

COMPARATIVE ANALYSIS OF THE INSURANCE CONTRACT RULES AND REGULATIONS FROM THE VIEW OF THE PROVISIONS STIPULATED IN THE NEW CIVIL CODE

OANA RĂVAȘ, MIRELA MONEA, ADRIAN DAVID *

ABSTRACT: *The insurance contract is an important factor of the present economic life. It has been regulated until now by many laws, in order to establish certain rules to govern this important area, such as the insurance market, which is continuously changing. The new Romanian Civil Code regulates this subject for the first time, including many rules, which currently were regulated only by laws.*

KEY WORDS: *insurance; contract; civil code; regulation; law; risk; indemnity; payment; agreement; subrogation.*

JEL CLASSIFICATION: *K10; K12.*

The Civil Code is a reflection of a social system. Rules contained respond to specific needs and at the same time, tend to meet the dynamics of social life. Thus, it is a modeller of human relations, granting principles to the individual in relationship with himself and other individuals, in respect to which he can conduct its life in all its aspects - spiritual, material, biological and, especially, social.

The principles governing relations between people are in their essence the same. Therefore, a civil code provides, par excellence, constant law principles, around which any type of society is structured, regardless of time and space.

However, the profound changes of the Romanian society and the European and contemporary realities require the protection of new socio-moral, cultural, economic and scientific-technical values, the fundamental rule of civil law having to respond, equally, to requirements arising from commitments made by Romania during the

* *Assist. Prof., Ph.D. Student, University of Petroșani, Romania,*

oana_dumitrescu13@yahoo.com

Lecturer, Ph.D., University of Petroșani, Romania, moneamirela@gmail.com

Assist. Prof., Ph.D. Student, University of Petroșani, Romania, adriandavid23@yahoo.com

process of European integration and the new status of our country, as EU member state.

Over one hundred pages of the new Civil Code are devoted to various special contracts, not just the contracts are special (because of express regulation in the Code) but as well the way in which the legislator treats and adapts them to modern economic and social conditions - a more gentle expression to illustrate that these conditions have changed significantly since the entry into force of the old Civil Code.

In the Romanian Civil Code, from 1864, still in force, the definition of insurance contract underwent successive improvements. Thus, in accordance with the regulation adopted in 1930, "through the insurance contract, the insurance company undertakes to take a risk on itself in exchange of a premium."

According to rules laid down in 1971 (State Council Decree no. 471/1971 on state insurance), by insurance contract, the insured party is obliged to pay a premium to the State Insurance Administration. The State Insurance Administration takes on itself the risk of a certain even occurrence, undertaking, when a certain risk arises, to pay the insured party or third party, called beneficiary, an indemnity, respectively the reparation or the insured amount, within the limits agreed.

At present moment, by removing the state monopoly in insurance, insurance contracts can be concluded by all insurance companies incorporated under Romanian legislation in the field (Law no. 136/1995 on insurance and reinsurance in Romania, Law no. 32/2000 on the insurance companies and insurance supervision).

According to Law 136/1995, the insurance contract is "the contract by which the insured party undertakes to pay to the insurer a premium and the insurer undertakes, when a certain risk arises, to pay to the insured party or to the beneficiary the reparation or the insured amount, hereinafter called the indemnity, within the convened limits and delay."

The insurance contract is concluded between the insurer and the insured party, for voluntary insurance, which provides the obligation of the insured party to pay a premium and the obligation of the latter to take upon itself the risk of an event, paying the indemnity provided for in this case, to the insured party or beneficiary. The contract also includes other liabilities of the insurer and the insured party:

- As some authors consider, the insurance contract has two functions:
- Introduces the risk into a mutuality, in the sense that, although remains individual, the risk is merged into a whole, in symbiosis with other admitted risk;
 - Establishes an individual link, by agreement, between the insurance company and risk bearer

Professor George Bistriceanu believes that, "the insurance is a system of economic and social relations, an objectively necessary process of economic and social development, emanating from the action of the objective economic law, which consists of jointly creating, by the population and undertakings threatened by certain risks, of a fund, from which are compensated damages and satisfied other probable, unpredictable financial and economic requirements".

Description of insurance in legal terms:

- the law is the legal form for regulating insurance;

- in legal terms, the insurance contract is an aleatory contract, with strictly bilateral character;

The legislative framework consists of:

- Law no.36/29.12.1995 o insurance and reinsurance in Romania
- Law no.32/10.04.2000 on the insurance companies and insurance supervision

The insurance contract (regulated by Law no.136/1995) – a legal act, by which the insured party undertakes to pay to the insurance company a premium, and the insurance company undertakes, when a certain risk arises, to pay to the beneficiary, who can be the insured party or a third party, an indemnity, within the convened limits.

By adopting, the Law 32/10.04.2000 the following objectives were targeted:

- harmonizing the Romanian legislation with the Community legislation;
- creating the supervision framework regarding the solvency of the insurance companies;
- establishing certain internationally recognized standards in the field of insurances;
- The Insurance Supervisory Commission, the administrative authority which regulates the insurance activity, shall supervise the compliance with law provisions;

The principles underlying insurance contract:

- the principle of indemnity - the insurance contract does not compensate an amount exceeding the losses incurred by the insured party;
- the principle of insurable interest - a person has an insurable interest if the occurrence of an insured event could cause a financial loss or injury to that person;
- the principle of subrogation - applicable when the insurer is bound by the insurance policy to compensate a damage caused by negligence of a third person (substitution, in a legal relationship of a person or thing)

Another principle underlying insurance is the principle of mutuality, in which each insured contributes with a sum of money, called premium, to create the insurance fund, of which the insurer covers damages incurred by the insured.

The insurance transfers the risks and losses of a person to an insurance company offering financial security. Risk transfer through distribution was determined in antiquity by ancient seafarers and carriers of goods by sea, by dividing goods on several ships as a way of protection.

The New Civil Code will regulate, among other things, the main aspects pertaining to insurance contracts. Consequently, most of the provisions under Law no. 136/1995 in this matter will be repealed as from 1 October 2011 (although Law 136/1995 will still regulate, in principle, the compulsory civil liability insurance for damages resulting from car accidents).The New Civil Code regulates insurance contracts in general, as well as various types of insurance, such as insurance of goods, insurance of persons, civil liability insurance, credit and guarantees insurance, financial loss insurance. Some of the main changes made to insurance contracts under the New Civil Code are briefly presented below:

Insurance methods developed simultaneously with existing protection needs at a given moment, for people and their businesses. Thus, businesspersons agreed to use

insurance to reduce risks that may arise in commercial transactions and those related to heritage protection.

The legal approach is common and justified, as insurance has to take the shape of a legal form in order to become efficient, and this form is the first noticeable. Such a form is awarded by “the contract,” which is the “law of parties” and the law itself, emanating from the legislature. Insurance contract and the law on insurance activity, as a source of rights and obligations in terms of security, complement each other.

The insurance expresses mainly a financial protection for the losses incurred by natural or legal persons due to various risks.

Mutual agreement will be the first basic principle that allows a contract to be concluded between the insured and insurer, by means of which the insured benefits of protection for the risks undertaken by the insurer. The insurer through the insurance contract undertakes to pay the indemnification in case one of the risks undertaken arises.

The insurance contract is valid if series of conditions are met:

a. *The parties have the capacity to contract.* Any person may contract, unless declared incompetent by law. The problem is related to the existence of legal competence in natural or legal person. Legal persons obtain legal competence once incorporating and having chosen their management bodies. Legal persons have legal competence at the age of 18 years and are not interdicted. Referring to personal insurance, the minimum age required to conclude the insurance is usually 16 years, except certain accident insurance, where the insured must have at least 14 years, if achieves income from own work.

b. *The existence of consent of the parties.* Consent is valid if it was not given by error, obtained by violence or by fraud. For example, a case of error occurs when concluding an insurance contract as a condition of granting a loan by a bank. If the bank refuses the loan, the insurance contract is cancelled, because of the error of the person which contracted. Also, if the consent of one of the parties is obtained by violence, a situation which occurs rarely in insurances, the contract is considered null. It is considered fraud when one of the parties uses cunning means to determine the other party to contract, so that it is obvious that in the absence of this practice, the other party would not have contracted; in this case, the contract is cancelled.

c. *The existence of a specified or ascertainable object of the insurance contract.* The object of the insurance is specific to each insurance sector: goods, persons, and civil liability. In damage insurance, besides the actual goods, other goods may be covered by the insurance, which although are not destroyed or damaged, are subject to decrease or failure, representing a loss for the insured. Thus, when insuring transported goods, the insurance may cover the earning foreseen, and that would have been obtained if the goods had not been destroyed or damaged; also the insurance may include the loss of income due to the disuse of the property, which is partially or totally destroyed.

d. *The cause of the contract must be lawful and moral.* An insurance contract is valid if it was concluded without breaking the law or the good morals. Therefore, the smuggling activity cannot be insured and insurance contracts shall not be concluded for goods obtained through malfeasance.

A novelty brought by the New Civil Code is that it expressly provides that misrepresentation or nondisclosure made in bad faith by the insured or the insurance contractor, of circumstances that would be decisive for the insurer in assuming the risks covered, shall trigger nullity of the insurance contract. In such a case, the insurer will be entitled to withhold the insurance premiums already received, and require the payment of the premiums due up to the time when the causes of nullity are known. The New Civil Code also lays down regulations for situations when it cannot be established whether misrepresentation or nondisclosure was made in bad faith, in which case the insurance contract will not be invalidated.

The new Civil Code provides the new regulation of the insurance contract, which regulates “Credit insurances and guarantees and insurances for financial losses,” stipulated at Article 2221-2222.

Credit insurances and guarantees may be intended to cover the risks of general insolvency, export credit, instalment sales, mortgage, agricultural credit, direct or indirect guarantees, as well as other risks alike, according to rules adopted by the state, which, under the law, supervises the activity in the field of insurances.

If a direct insurance contract for credits and guarantees covers the risk that a borrower of the insured does not pay a loan that was granted, the insurer cannot condition the payment of the insurance indemnity according to the initiation of the procedure for claiming the reparation of the damages by the insured, against that borrower, including by enforcement of judgment.

Unless otherwise agreed by the insurance contract, the indemnity for the insurance against financial losses must cover the actual damage and loss of earnings, including to and overheads as well as those arising directly or indirectly from the occurrence of the risk insured.

A new rule provides that the insurer may not assign the insurance contract without the written approval of the insured. This rule shall not apply to assignment of portfolios between insurers made according to special regulations.

Furthermore, the new legal text is institutionalized and the notion of “premium reserves,” covered so far only by methodological rules for the application of the insurance law. Thus, Article 2234 provides that in insurances for which premium reserves were established, the insured party could cease the payment of premiums, with the right to maintain the contract in an amount reduced or terminate it, requesting the reimbursement of the reserve established, according to the insurance contract. Any other payment, regardless of the form under which it is performed by the insurer, different from the insurance indemnity, or the amount representing the reimbursement of the reserve, under paragraph (1) cannot be made earlier than six months from the date of concluding the insurance contract.

Article 2169 brings a change of perspective towards the Commercial Law, in that it defines money as a fructuous, meaning that if it is borrow it brings interest; so far, only in commercial law money was regarded as a fructuous good. Hence, a significant but old difference between civil and commercial aspect of the money is vanished. Therewith, the concept of credit facility emerged, which appears to have similarities (probably intentional) with the manner in which operate credit cards and bank line of credits.

Insofar as insurance of goods is concerned, the New Civil Code sets forth that, if not otherwise agreed between the parties, the transfer of ownership of the insured asset shall not trigger the termination of the insurance contract, which will continue to produce effects in respect of the insurer and the acquirer of the asset (under Law no. 136/1995, the sale of an insured asset triggers the termination of the insurance contract if the parties have not otherwise agreed).

Insofar as insurance of persons is concerned, where a risk insurance coverage is taken for an individual, other than the one who signs the insurance contract, such insurance will only be valid if the individual in question has expressed approval in writing.

The idea of legal subrogation of the insurer, in case the event insured under Article 2210 arises, is a good concept, since insurance companies normally have a much higher financial power than the insured, making it possible for a more efficient recovery of the damage produced by the responsible person.

Chapter XVI, "Insurance contract", brings together the life-income contract and the contract of maintenance for life, the latter finding and legislative consecration after a long period in which it was governed by the rules of general obligations and innovations resulted from the practice of Courts.

With respect to personal insurance, Article 2230 indicates the beneficiary of the indemnity, stating the insured's legatees (in case of his death). Because the text fails to qualify legatees (in the sense of legal or testamentary), we assume that the indemnity may be paid only after it becomes clear who will inherit and who not, that is, after all the legal legatees have expressed their hereditary option and legacies were reduced. Although logically, this approximation may become unjust and problematic if there are differences of opinion between potential legatees about the quality of legatee- such processes can last quite long.

Under the applicable legal provisions, if an insurance contract is concluded by another person than the insured one, no consent by the insured is required. It should be noted that under Law no. 71/2011 for the implementation of Law no. 287 of 17 July 2009 on the Civil Code, insurance contracts concluded prior to the enactment of the new code shall continue to be governed by the law in effect at the date of their conclusion. In light of this provision, the New Civil Code will have an impact in particular on the insurance contracts entered into as of 1 October 2011. In this respect, a revision of the general terms and of the standard insurance contracts would be advisable.

Although their systems of contract law are still highly disparate, the States of the European Union have yet to create a uniform system of general contract law. Efforts have been made in that direction. These are reflected in the Principles of European Contract Law, the basic rules of European contract law that were formulated by the Commission on European Contract Law. In their present version, these rules relate to the conclusion of contracts, the authority of agents, substantive validity, interpretation, content, breach of contract and the rights of parties affected by a breach of contract. The work that is still being undertaken relates to rules governing majorities of creditors and debtors, the assignment of claims, the assumption of debts, set-offs, the right to charge compound interest and the statute of limitations.

On closer inspection, however, the situation with regard to the sources of the law governing legal contracts in the Member States is actually highly complex. Although the national legal systems concur in so far as they apply the general provisions of the law of contracts to insurance contracts, these provisions are often overridden in many respects by special laws on insurance contracts, laws which contain numerous preemptory and semi-preemptory rules. The only countries without such special legislation – apart from a few narrowly defined exceptions – are the United Kingdom and Ireland, where the courts try to solve the particular problems of insurance contracts with the instruments of the general law of contracts.

The parties to an insurance contract will normally have been free to decide whether to conclude the contract at all and whether to conclude it with a particular partner. The principle of freedom to contract is not, of course, absolute. In the Member States, for example, there are various numbers of compulsory insurance schemes. In the case of third-party motor insurance, indeed, the obligation to insure is even laid down in Community law. Compulsory insurance does not necessarily imply that insurers are compelled to contract with every applicant. In a competitively organised insurance market, however, there is every reason to assume that all those who are subject to compulsory insurance will find an insurance company that is willing to cover their respective risks, though not always on the same terms and conditions.

There are main differences between the Member States' legal systems in the domain of insurance contracts, differences which have undoubted implications for the marketing of policies in the European single market and which are a huge obstacle to the cross-border provision of services.

ACKNOWLEDGEMENT

„Cercetări realizate în cadrul proiectului POSDRU/ CPP107/DMI1.5/S/76851 cofinanțat din Fondul Social European prin Programul Operațional Sectorial Dezvoltarea Resurselor Umane 2007-2013”

REFERENCES:

- [1]. **Achim, M.L.** (2008) *Asigurarile de bunuri și persoane în economia cunoașterii*, Editura Economica, București
- [2]. **Cătana, R.N.** (2008) *Dreptul asigurărilor. Reglementarea activității de asigurare. Teoria generală a contractelor de asigurare*, Editura Sfera Juridică, Cluj-Napoca ,
- [3]. **Krause, T.; Bean, D.; Connor, R.; Harrison, C.** (1990) *Insurance information systems*, American Institute for CPCU, Malvern, Pennsylvania
- [4]. **Nemeș, V.** (2009) *Contractul de asigurare de bunuri*, editura Hamangiu, București
- [5]. **Negru, T.** (2011) *Practica asigurărilor comerciale*, Editura Wolterskluwer, București
- [6]. **Randall, E.D.** (1987) *Issues in insurance*, American Institute for CPCU, Malvern, Pennsylvania
- [7]. **Scott, D.L.** (1994) *The guide to buying insurance - How to secure the coverage you need at an affordable price*, The Globe Pequot Press, Old Saybrook, Connecticut
- [8]. **Sferdian, I.** (2009) *Dreptul asigurărilor*, ediția a II-a, Editura CH Beck, București
- [9]. **Zevnik, R.** (2004) *The complete book of insurance*, Sphinx Publishing, USA

- [10]. Legea nr. 287/2009, privind Noul cod civil, publicată în Monitorul Oficial nr. 511/24.07.2009
- [11]. Legea nr.32/2000 privind societățile de asigurare și supravegherea asigurărilor, publicată în Monitorul Oficial nr. 148 din 10.04.2000, Legea 403/2004 privind modificarea și completarea legii 32/2000, OUG nr. 201 privind modificarea și completarea legii 32/2000, publicată în Monitorul Oficial nr. 1191 din 29.12.2005
- [12]. Legea nr. 136/1995 privind asigurările și reasigurările în România, include modificările aduse de - O.G. nr. 27/1997- Legea nr. 172/2004 O.U.G. nr. 61/2005- Legea nr. 283/2005- Legea nr. 113/2006- Legea nr. 172/2006- Legea nr. 180/2007- Legea nr. 304/2007 publicata in Monitorul Oficial nr. 784 din 19.11.2007.
- [13]. www.rbd.doimgbuisness.ro
- [14]. www.musat.ro
- [15]. www.kpmg.com
- [16]. www.europarl.europa.eu/workingpapers, Jurgen Basedow, Hamburg - "The law governing insurance contract"

Reproduced with permission of copyright owner. Further reproduction prohibited without permission.