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NEED TO IMPROVE SERBIAN INSURANCE REGULATORY FRAMEWORK BY ADOPTING INSURANCE CONTRACT LAW

SCIENTIFIC PAPER

Abstract

The author tries to answer whether the insurance contract is to be regulated under the Draft Civil Code of Serbia. Relying upon the result of a comparative legal analysis, the author advocates to the adoption of the Insurance Contract Law as one of the most important regulations in the process of harmonization of the Serbian law with that of the European Union. The adoption of a sectorial, special regulation is justified by a few arguments, of which the author highlights the bulkiness of insurance contracts, the peculiarities of the insurance contract compared to the rest of the contract law, the need for adopting an incentive regulatory framework for insurance clients and dynamics of the subject matter. Such a step does not exclude the regulation of insurance contracts under the provisions of the Civil Law. On the contrary, the author advocates for this, but recommends that the legislative technique and the scope of the matter need to be adapted to the twenty-first century and the nature of this significant contract. Namely, the Draft Civil Code needs to achieve two goals: lay the foundations for a new insurance regulatory framework under the Serbian law and strengthen the legal protection of more vulnerable contracting party. This is achievable through imperative and semi-imperative norms, whereas the issues governed by optional norms should remain the subject of a special insurance contract law. The norms of the Civil Code of Serbia should be general and systemic, and, as such, a necessary but not sufficient regulator of the 21st century insurance legal relations. Such norms will be amended, elaborated and particularized under

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the Insurance Contract Law. The author concludes by a general proposal as to which issues should be governed by this sectorial regulation.

Key words: *Insurance Contract Law, Draft Civil Code, Insurance Contract, consumer protection, sectorial approach*

1. Civil Code versus Insurance Contract Law: Prior Theoretical Considerations

Bearing in mind the bulkiness of the 21st century insurance contracts and the peculiarities of the subject matter of the insurance contract law, which cannot be observed separately from consumer protection, the question arises whether this contract is to be regulated by the civil code, and, if so, to what extent should it be standardized.

A comparative legal analysis leads us to believe that the insurance contract should be regulated under a *lex specialis*. As an example, we can mention two first-class legal systems: German and French. The best example of the insurance contract legislative technique is the 2007 German Insurance Contract Law (German: Versicherungsvertragsgezetz), which started to apply in 2008 and the 1989 French Insurance Code (Fran: Code des assurances). The current German Law replaced the 1908 Insurance Contract Law, which had been valid for a full hundred years[2]. Semi-obligatory norms included in the 1908 German Law were such an *invention* of the legislator at the beginning of the twentieth century that modern legislators have failed to find an appropriate institute to replace them. This speaks of the adaptability of these norms to the matter of insurance and the beneficial effects of their implementation.

The 1989 French Insurance Law, comprising, along with its amendments, the positive law of France, does not substantially amend the 1930 Code, the most important provisions of which are still in force. In the time of laws and legal regulations boost, in general, this possibility is curious if we have in mind how very sensitive and important the matter is for consumer protection The answer is simple: the 1930 Code was a step ahead of its time. The largest number of standards is formulated to ensure and protect the contractual balance between the insurer and the insured. As an example, we will mention the norm regarding the excluded damages clause. According to this norm, these clauses are null and void if they are not edited in a clear and limited manner and printed in an obvious way. There was no similar norm under the general contract law. Only half a century later, the Consumer Code introduced a norm that clauses of contracts proposed by an expert to consumers or

[2] This first-class law was translated into Serbian: Slavko Đorđević, Darko Samardžić, *German insurance contract law with the translation of the law* (VVG), IRZ, Belgrade 2014, 97-194.

non-experts should be redacted and presented in a comprehensive and clear way. Thus, the "old" insurance contract law represented a complete system of protection of the insured as a weaker party.[3]

The same approach exists in highly developed legal systems of Scandinavian countries. Since the adoption of the 1980 Consumer Insurance Act, Sweden has become the leader of consumer-related insurance legislation. Other Scandinavian countries also have separate insurance contract law: Finland since 1994, Denmark since 1930 (last amendment in 2014) and Norway since 1989. Great Britain, whose law has until recently been mentioned as an example of consumer-hostile legal system, has adopted a number of regulations, which clearly show the intention to provide consumer protection comparable with member states such as Germany, France etc. The best example is Consumer Insurance / Disclosure and Representations Act, which came into force on April 1, 2013.[4]

On the other hand, not all former socialist states, which were among the last admitted to the European Union, have adopted a special contract law dedicated to insurance matter. The best example is Croatia.

Therefore, in developed insurance industries, the insurance contract law has always been governed by special laws, which created a unique and complete system of regulation of legal (contractual) insurance relationships. Modern insurance law aims to protect the consumer of insurance services, but does not give up traditional principles that also protect the Insurer and the insurance industry.[5]

As far as Serbian law is concerned, historical reasons certainly require the "appropriation" of the insurance contract subject matter and its regulation under the future civil code. In the process of the succession of the subject matter of the Law on Contracts and Torts, everything that has been regulated under this law in the past 40 years should be regulated, in principle, in a modern way, under the Civil Code. Draft Law on Contracts and Torts also supports this principle. However, it is our belief that if we are already "appropriating" this extremely important matter for the future law, this should be done in a way that leaves us the possibility of a faster adoption of the *lex specialis* regulations. Therefore, generally, the insurance contract should be regulated under a Civil Code of Serbia, by adopting the attainments of the European Union law.

However, the Commission for drafting the Civil Code of Serbia (hereinafter: the Commission) already faces serious doubts about this issue, since the insurance contract law is the least harmonized part of the EU's insurance law. While harmonization

[3] Jérôme Bonnard, *Droit des assurance*, 4 Édition, LexisNexis, Paris 2012, 21.

[4] Giesela Rühl, "Common Law, Civil Law and the Single European Market for Insurances", *International and Comparative Law Quarterly*, Vol. 56, 2007, 2.

[5] Herman Cousy, National Report – Belgium", Insurance Contract Law between Business Law and Consumer Protection, Helmut Heiss (ed.), Dike, Zurich 2012, 86.

has been achieved in the status and supervision law, the insurance contract law remains within the "projects" supported by the EU but not implemented in the member states to an extent as to speak of a possible improvement compared to the period at the beginning of harmonization. Since this has already been written about, we just wish to remind of the cause of this "backlog" in harmonization of the insurance contract law of the EU. *For consumer (small) risks, an imperative insurance law regime applies*. Regulations governing consumer insurance are mostly imperative, with some so-called semi-obligatory norms comprised in particular laws[6]. Obviously, it was difficult for EU member states to harmonize their regulations in the field dominated by imperative norms. The question, therefore, arises which legal system the Commission needs to follow. We believe that a lot of attention should be dedicated to the issue of prior research and collection of adequate comparative materials and to the engagement of experts best acquainted with the insurance law.

By acknowledging differences between member states' laws and perceiving the same as an obstacle, we are convinced that the Commission could benefit from the principles of the European Insurance Contract Law (hereinafter: the Principles). The Principles are a kind of *codification* of the European Insurance Contract Law, which seeks to additionally spur the harmonization of the EU insurance contract law. The Principles are contained in a general reference framework and should serve as a model law for European legislators.[7] They are conceived as an *optional instrument*, since they allow the policyholder (insured) and the insurer to choose to apply them instead of the national law, i.e. the imperative provisions thereof.[8] This creates the additional conditions for the proper functioning of the domestic insurance market of the European Union and provides the European citizens with access to foreign insurance services. [9] Nevertheless, the very fact that the Principles are not widely accepted in the member states indicates a problem that should be considered by every legal system having decided to implement the Principles. Namely, the Principles are, in many aspects, the result of a compromise between the diametrically

[6] Egon Lorenz, "Grundlagen des Versicherungsvertragsrechts", Roland Michael Beckmann, Annemarie Matusche-Beckmann (hrsg.), *Versicherungsrechts-Handbuch*, Verlag C. H. Beck München 2009, 5.

[7] Egon Lorenz, 15; Ioannis Rokas, "Principles of European Insurance Contract Law (PEICL) as a settled and balanced system of policyholder protection", *European Insurance Law Review*, 1/2013, 37-41.

[8] Jürgen Basedow, "The Case for a European Insurance Contract Code", *Journal of Business Law*, 2001, 569-586; Colin Croly, Robert Merkin, "Doubts About Insurance Codes", *Journal of Business Law*, 2001, 587-604; Helmut Heiss, "Europäischer Versicherungsvertrag", *VersicherungsRecht*, 2005, 1-4; Malcolm Clarke, Helmut Heiss, "Towards a European Insurance Contract Law? Recent Developments in Brussles", *Journal of Business Law*, 2006, 600-607; Giesela Rühl, "Common Law, Civil Law and The Single European Market for Insurances", *International and Comparative Law Quarterly*, Vol. 56, 2007, 879-910; Andreas Th. Müller, "Vers un droit européen du contrat d'assurance - Le "Projet Group Restatement of European Insurance Contract Law", *Revue Européennne Du Droit Privé*, 2007, 59-101.

[9] Bearing in mind the number of European citizens who emigrate or temporarily live in another country, the idea is to enable the creation of insurance products at the European level.

opposed solutions under the EU member states' insurance laws. As such, they often contain norms that sound like a "foreign object" from the perspective of the applicable law of any other member state. Therefore, our belief is that the provisions from the Principles should not be accepted *telle quelle*, without previous considering the capacity of their inclusion into the Serbian law and socio-economic environment.

Therefore, whatever foreign source we use as a model, it is crucial to avoid the copy-paste approach. We are against the simple acceptance of foreign solutions, without first considering the possibility of their implementation into the Serbian insurance reality. Regardless whether we have a good or modern solution under a German or French law (which can definitely serve as a model for writing a funded law), the question is whether we could expect the identical effects of its implementation.

Therefore, starting from the assumption that the insurance contract should be regulated under the Draft Civil Code, we should clarify the legislative technique to be adopted. *We are convinced that the insurance contract in the twenty first century cannot be regulated by the codification of the civil law in the same way as at the early nineteenth century*. After all, in the most representative legal systems - French and German - the subject matter of the insurance contract remained beyond codification. The speed of legal transactions and the introduction of new ways of concluding contracts in the Internet era are just some of the reasons why insurance contract should be regulated in a general manner, without the need to regulate in detail the issues that arise in daily life of the insurance contract.

According to our opinion, the Draft Civil Code should lay the foundation for a new insurance regulatory framework in Serbia and strengthen the legal protection of the weaker party of the insurance contracts. This should be done through the obligatory and semi-obligatory norms, whereas the issues that could be regulated under the optional norms should be left to the special insurance contract law. *The norms of the Civil Code should be general and systemic and as such a necessary but insufficient regulator of the insurance legal relationship in the twenty-first century. They will be supplemented by the Insurance Contract Law.* In order to understand the relationship between the above-mentioned regulations, one should recall the notorious distinction between superseded, compliant and special legal regulations. The relationship between the future civil code of Serbia and the insurance contract law cannot be subject to any of the mentioned categorizations. Although the insurance contract law will be special, in as much as it refers to a certain part of the contractual substance, it will not depart from the subject and principles of the Civil Code. Therefore, it is not precise enough to qualify it as *lex specialis*. The latter should supplement and concretize the basics of the insurance contract regime set out in the civil code. The author believes it is not wrong to say that the insurance contract law will represent a kind of sectorial *lex specialis*.

2. Reasons for Necessity of Adopting Insurance Law

An insurance contract deserves a sectorial approach for at least several reasons. The first is the *bulkiness of insurance contract*. The number of insurance contracts increases from one year to another, not only in the area of compulsory insurance. Today, almost every citizen maintains a form of an insurance contract. Motor vehicle third party liability insurance contracts are concluded by all users and owners of motor vehicles. A person whose profession involves giving advice and opinion carries a special professional risk that is best controlled through liability insurance. Therefore, many types of professional liability insurance are compulsory. Individuals, whose standard of living allows maintaining the life insurance cover, supplemented by an accident or voluntary health riders. The benefits provided by a life insurance package and/or a mode of non-life package include a combination of savings and care for own health or protection against the unforeseen events. All together, the insurance contract becomes one of the most important contracts of modern time. *We are committed to ensuring that the insurance contract regulations reflect the significance of this contract type,* which can best be achieved by adopting a special law.

Another reason of our commitment to sectorial approach is *specificity*. The insurance contract has always differed from the rest of the contract law, in many ways. Starting from the aleatory character, through the technique of concluding the contract on access, to highlighting its consumer character, in recent times. In fact, the obligations law and the insurance contract law differ by their starting point. While the obligations law starts from the *assumption of equity* of the parties, the insurance contract law is based on an opposite assumption. [10] It regulates the position and relationship of fundamentally unequal parties. The insurance contract law "knows" that the policyholder, insured, beneficiary or the damaged party are not in a position to negotiate the content of the contract, that the contract is imposed, etc. [11] The initial difference entails a different method of regulation. Under the obligations law, the contractual equilibrium is assumed while under the insurance contract law it must be protected by various instruments. [12] The conceptual difference between the

[10] *The legal equality of the contracting parties, which is a presumption in the law of obligatins, does not mean the real equality of the participants in market relations.* When the contract is concluded between the contractors of unequal economic, legal and professional power, it is difficult to maintain this assumption. Also: Silvija Petrić, "The concept of unfair contractual provisions with a special emphasis on consumer contracts", *Unfair contractual provisions, European standards and Croatian implementation,* Vesna Tomljenić, Silvija Petrić, Emilija Mišćenič (office), Faculty of Law, University of Rijeka, Rijeka 2013 , 15.

[11] The so-called *new paradigm of freedom of contracting* corresponds to changed business conditions. The development of industry, technology, the need to secure faster business transactions has led to the *depersonalization of contractual relationships* and the concentration of great power in the hands of those who deal with the provision of services or the sale of goods.

[12] They significantly limit the autonomy of the will of the parties as one of the basic principles of the law of obligations...

obligations law and the insurance contract law is also in the legislative technique. The autonomy of the will, as the starting point of the obligations law, is actualized through the optional norms. There is a completely different situation in the field of insurance contract law. It is dominated by the obligatory and semi-obligatory norms. *The protection under the obligatory and semi-obligatory regulations is also granted by the fact that the insurance services consumer cannot renounce the protection, nor can such protection be limited in any other way*.[13] Therefore, this contract deserves to be separated from the rest of the obligations law and is regulated in detail by a special regulation.

The third reason is the *consumers' ignorance and the need to facilitate acquaintance with the regulatory framework*. It is often difficult for a consumer in a need to call upon a protective rule and orient in the sea of various regulations - often governing the same matter - and determine which regulation applies to his case! Such an environment is in no way favourable for consumers of financial services, and in particular for the insured persons. What is the current situation in Serbia? The insurance contract law is contained in the Law on Contracts and Torts, but particular issues of the obligatory legal nature are regulated under the Insurance Law. The best example is the pre-contractual and contractual obligation to notify. All insurance service providers are obliged to provide the policyholder with legally required information before conclusion of the insurance contract and during its validity. This obligation, of extreme importance for consumer protection, was specified under the by-law of the National Bank of Serbia.[14] Moreover, forms of incorrect consumer practice are regulated under the Consumer Protection Act and the Trade Act, while ethical standards are regulated under the Code of Business Ethics and sanctioned by the practice of the Court of Honour of the Serbian Chamber of Commerce. If a consumer intends to get to know well Serbian regulatory insurance framework and locate the core points of potential protection, he will need at least an average legal knowledge. It is clear that such a thing cannot be expected from an average consumer. If the intention were to satisfy the consumers, they would definitely be better off to rely on insurance contract law, which systematically regulates all issues of importance for their protection. This would, to a certain extent, also contribute to the education of insurance service consumers. Moreover, the adoption of a separate insurance contract law would greatly facilitate the work of judges, who are facing the increasing insurance disputes, and boost the chances of creating a uniform case law.

[13] Emilia Čikara, *Gegenwert und Zukunft der Verbraucherkreditverträge in der EU und in Kroatien, Die Umsetzung der Richtlinie 87/102/EWG und der Richtlinie 2008/48/EG in das deutsche, österreichishe und kroatische Verbraucherkreditrecht*, LIT Verlag, Wein 2010, 45.

[14] It is the Decision on the manner of protection of the rights and interests of the users of insurance services, *Official Gazette of RS,* No. 55/2015.

The fourth reason is *dynamics of the subject matter*, *which is constantly developing*. As regards the method of standardizing insurance services consumer protection, we already mentioned that a special law is a matter of first choice in comparative law. Such law is usually conceived as a supplement to the civil code, i.e. the Law on Contracts and Torts. This legislative policy satisfies the need for frequent amendments to the insurance services consumer protection regulations, caused by permanent legislative activity at the EU level. [15] In addition*, the legislative technique for writing directives differs greatly from the technique of writing a law on contracts and torts*. Too long sentences and articles comprising multiple views can hardly be transferred into a future civil code, which traditionally features precise and concise rules.[16] Finally, the contents divergence of the norms that include various directives additionally prevents the governing of obligation of legal protection of insurance services consumers by the civil code. Civil codes have always been conceived as permanent and only exceptionally complementary and/or replaceable legal monumental facility. Therefore, it is not necessary to burden them with live, dynamic and specific regulations which govern the insurance industry. On the other hand, the civil code cannot give up insurance as a constituent element of civil history. In this regard, the jurisprudence of the insurance contract law can be considered as an upgrade of the existing legal order.

The fifth argument in favour of the sectorial regulation is the existence (for a few decades, now) *of special regulations governing contractual issues of different modes of transportation*. Regulated by special laws referring to particular transportation branches, the transportation contract is the best example in this regard. The basic provisions on such contract are included in the Law on Contracts and Torts, which was not an obstacle to the adoption of special regulations. We can find an analogy in case of transport insurance. Historically, in all countries, the transport insurance has always been separated and regulated under a special law, adopted significantly before the laws codifying consumer goods subject matter. This is the case in Serbian law, as well, since the Law on Contracts and Torts applies neither to marine insurance nor to insurance to which the rules of marine insurance apply. In this regard, there is no doubt that the Civil Code *rationae materiae* should not apply to all transport

[15] Consumer law is under development! Europe is far from defining the consumer acquis, which would be a coherent and complete entity. In this respect, legislative activity aimed at implementing the European standards of consumer protection is designated, under the Croatian law, as "legislative hysteria" or "legislative stampede". Thus, the pace of legislative activities and the speed of change of the recently adopted solutions are vividly illustrated. See: Marko Baretić, "Consumer protection in the Republic of Croatia after joining the European Union - did we implement a consumer protection system by the implementation of European law?", Strengthening Consumer Protection in Serbia, Liber Amicorum Svetisla Tabaroši, Thierry Bourgoignie, Tatjana Jovanić (ed.) , Faculty of Law, University of Belgrade, Belgrade 2013, 66.

[16] Marko Baretić, 80.

insurance. This should be clearly expressed. Therefore, in the positive law there are examples of the split contract regulations.

We emphasize that countries like Serbia, having faced a legal protection vacuum regarding consumer protection in general and, in particular, protection of the insurance services consumers, have an even more difficult task. As soon as possible and prior to joining the EU, Serbia should fully harmonize its regulations with the European achievements in the field of consumer protection. This is an extremely difficult task, especially considering that in only a decade we should include into the Serbian law what has been included in the laws of the EU member states for decades.[17]

3. Character of Norms – Derogation from Legislative Technique of Obligations Law

The legislative technique of the Draft was taken from the Law of Contracts and Torts (ZOO), which is quite expected. Protection of the Insured, as a weaker party, requires a highest number of imperative norms, while the number of optional ones is significantly smaller than in other contracts. In fact, we believe that the text of a systemic law, such as the Civil Code, should not be "burdened" with unnecessary content. Optional norms are an example of that part of the insurance contract regulation that should be left to the insurance contract law. In addition to many imperative and a few optional norms, there are the so-called, semi-obligatory norms regulating the insurance. The Law on Contracts and Torts provides that derogation from other provisions, unless prohibited by this or any other law, be permitted only if undoubtedly in the interest of the Insured. This provision has enormous importance, because thanks to it, the freedom of contracting in the field of the so-called inland insurance has not been abolished altogether. Precisely the existence of semi-obligatory norms allows the insurance contract be an expression of freedom of contracting, instead of the legal projection of the alleged rights and obligations of the co-parties. In line with such a character of semi-obligatory norms, *consumers cannot waive the rights they acquire under the law itself. In addition, contractual clauses are invalid if they amend the protective provisions to the detriment of the consumer. However, it is not possible to derogate from the legal provisions in such a way as to disrupt the public order in the field of insurance, nor can the deviations be at the detriment of the Insurer.*

Finally, in order to promote the rights of a country with still underdeveloped insurance market and awareness of people of the usefulness of this institute, we suggest that German approach be considered. The German "patent" is very good.

[17] About the problems that accompany this process: Marko Baretić, 72-73.

Namely, the German law traditionally includes unilaterally binding norms. However, unlike Serbian, the German law includes a criterion for a clear interpretation of the character of legal norms. The obligatory norms that cannot be derogated are clearly separated at the end of each section, and other norms may be derogated but not at the detriment of the Insured. Therefore, if a norm is not explicitly defined as obligatory under any particular law, it is considered semi-obligatory. In addition, the derogation criterion which is not at the detriment of the Insured, potentially creates fewer problematic situations in practice than the criterion "in the undoubted interest of the insured" from Serbian law.

4. To What Extent to Regulate Insurance Contract by Provisions of Civil Code

The subject matter of the insurance contract can still be governed by the civil code, provided two needs are satisfied. *The first is the need to lay the foundation for the future of insurance services consumer protection and generally, the insurance institute based on modern achievements.* We think that further development of the insurance market can benefit from regulating the insurance contract by the civil law codification, including the achievements of the insurance contract law. By that, we primarily think of the norms and principles, without encroaching upon specific legal issues, which may not be governed by systemic regulations such as the Civil Code. *Another interest to be taken into account when designing an insurance contract section is its dynamics and continuous development.* The insurance contract is a typical consumer contract, which will become bulky in times to come in Serbia, as well. In addition, in the Internet era, on the one hand, and the impact of EU law, on the other hand, it is realistic to expect relatively more frequent amendments to the regulations governing contractual issues than up to now. In order to satisfy this need and allow for the further development of the insurance contract law, the authors of the Civil Code should abandon the detailed regulation of individual legal issues and focus on norms and principles. Only the civil code conceived in such a way can survive in the twenty-first century. The general benchmark for the Commission should be the character of norms. Namely, everything that is regulated under the optional norms should remain outside the future code. Regarding imperative and semi-imperative norms, such a matter should be included in the civil code only in general traits.

As for us, we consider that some issues absolutely do not belong to the civil code. These are provisions on contracts between absent persons, provisions on the right to withdraw from the contract, provisions for development of liability insurance, etc.

5. Conclusion

The adoption of the Civil Code of Serbia in the twenty-first century makes sense only if, when drafting its wording, the changed circumstances and needs of modern legal transactions are taken into account. In particular, when it comes to the insurance contract, it is not possible to adopt fully the matter of the Law of Contracts and Torts. Since, at the time of the adoption of this Law, it was not possible to talk about the later adoption of the Insurance Contract Law, on the one hand, and that the insurance contract was not influenced by European regulations as much as it is today, on the other hand, it was acceptable to regulate insurance in detail under the mentioned regulation. *If a modern and incentive regulatory insurance framework is to be provided, this should be done by dividing the substance of the insurance contract law into the civil code and the insurance contract law. The Civil Code of Serbia should lay the foundations of a modern insurance institute and the insurance services consumer protection using the legislative technique of imperative and semi-imperative norms. The Insurance Contract Law should regulate all other issues of contract jurisprudence, divided into general and special parts*. Our belief is that the actual future Serbian Insurance Contract Law should, in the main part, contain provisions relating to all lines of insurance, which regulate all issues from the moment of conclusion until the termination of the insurance contract (contractual obligation, insurance with return effect, policy, inception and termination of insurance, period of coverage, etc.). A special section should be devoted to specific rules governing casualty insurance, in particular the insurance of property and liability insurance. The major drawback of Serbian regulatory framework lies in the liability insurance regulations, effected pursuant to the insurance terms and conditions. This insurance should be dedicated a separate chapter, which would be divided into a section containing general provisions and a section that regulates compulsory insurance in primary lines. As far as the personal insurance is concerned, in addition to life insurance - which is regulated under the Law on Contracts and Torts - it is necessary to regulate the accident insurance and health insurance, under special chapters. By inspecting the scope of the matter that should be regulated under the *lex specialis*, it becomes clear that a systemic regulation such as the Civil Code cannot pretend to govern this matter.

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