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FORM OF INSURANCE CONTRACT

ORIGINAL SCIENTIFIC PAPER

Abstract

In Serbian positive law, an insurance contract is a formal legal transaction: for it to be valid, it must be concluded in the form prescribed by law. There are a few exceptions to this rule. This paper first addresses general issues related to the contract form, including the concept of form, the nature of formal contracts, the various manifestations of form, the concept of mandatory or constitutive form, and what are the legal consequences of non-compliance with it, what is the principle of form parallelism, and what is the purpose of form in modern society. The second part of the paper focuses on the legal form of the insurance contract under the law of the Republic of Serbia. It first examines the fundamental case of the legally prescribed constitutive form of the insurance contract, followed by an examination of a specific legal provision that allows the contracting parties to agree upon a real form for the contract.

Keywords: insurance contract, constitutive form, written form, real form.

I GENERAL ASPECTS OF CONTRACT FORM

1. What is the form of a contract?

The form of a legal transaction refers to the manner in which a legally relevant intention is expressed. It is a pre-determined, external, and visible way of expressing

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the content of the intention of the parties engaged in legal transactions, a means by which the intent of the party engaging in the legal transaction is materialized.

The form of a legal transaction always exists. Every contract, by its nature, must have some form. The question is whether the form of the contract is predetermined, or whether there is a requirement for the will to be expressed in a specific form in order for it to produce the intended legal effect.

When engaging in legal transactions, the parties are generally free to choose the form in which they will express their will. This stems from **the principle of autonomy of will**: legal entities are generally free, within the limits of mandatory regulations, public order, and good customs, to regulate their relations according to their own preferences, which includes the freedom to choose the manner of expressing that will.

When the form of a contract is neither prescribed nor specifically agreed upon, each contracting party may express its will in any form it chooses. Thus, a written offer can be accepted orally, and vice versa, an oral offer can be accepted in writing. An offer made via email can be accepted orally, during a telephone conversation, or in writing, by regular mail or courier.

2. Formal and Informal Contracts

A contract is considered **formal** if it has a prescribed or agreed-upon constitutive form, meaning that for its valid conclusion, the mutual assent of the contracting parties must be expressed in a specific form.[2] This requirement may be established by a general norm (law) or by a particular norm (agreement between the contracting parties). In our legal system, for example, the legal constitutive form is required for contracts such as the sale, exchange, and donation of real estate, sale with instalment payments, construction, loan agreements, license agreements, commercial agency agreements, and hospitality allotment contracts. **The insurance contract** is also considered a formal contract under our law.

If neither general nor specific legal provisions prescribe a mandatory form, the contract is considered **informal**. It is important to understand that an informal contract is not a contract without form: a contract must have a form, even if it is informal. When it is said that a contract is informal, it does not mean that it lacks any form, but that each party is free to choose the form in which it will express its will.

[2] Exceptionally, the requirement of form may apply only to one party's declaration of intent, while the other party remains free to express its intent in any form of their choosing. Such a contract is **unilaterally formal**. A typical example is a contract of suretyship (guarantee), where the surety is bound only if the declaration of suretyship is made in writing, while the creditor may consent in any form. This requirement is stipulated in Article 998 of the Law of Obligations (ZOO), *Službeni glasnik SFRJ,* No. 29/1978, 39/1985, 45/1989, and 57/1989; *Službeni glasnik SRJ,* No. 31/1993; *Službeni glasnik SCG,* No. 1/2003; and *Službeni glasnik RS,* No. 18/2020.

Informal contracts are often referred to in legal literature as consensual contracts, and the terms consensual and informal are often used synonymously.[3] Informal contracts are generally said to be concluded consensually, i.e. through the mere agreement of the declared wills (*solo consensu*), and the principle of consensualism refers to the fundamentally guaranteed freedom of the contracting parties to choose the form of the contract they enter into.[4]

3. What are the types of form?

The legal thought in our country during the second half of the 20th century was marked by the division of forms into oral and written forms, as well as real form and the form of a public document. The form of a public document refers to a written form in which a public authority has, in some way, participated in its creation.[5]

However, with the development of new technologies and the introduction of public notary services into our legal system, a different classification of legal transaction forms was proposed in the 21st century:[6] (a) electronic form has been singled out as a separate category; (b) instead of the form of a public document, a broader category of qualified written form has been adopted, which encompasses the form of a public document, but also other cases where, in addition to the content of the transaction and the handwritten signature, additional formalities are required. In other words, the participation of public authority holders in drafting the legal document about a legal transaction is classified among the ways in which a standard written form can be supplemented or specially qualified. This form is also the most stringent and reliable.[7]

To summarize: In terms of the manner of expressing will, the form in our contemporary law can be divided into **oral, written, real**, and **electronic**; the written form is further divided into regular (handwritten signed document) and qualified; and the qualified written form is further categorized into publicly notarized

[3] Slobodan Perović, *Obligaciono pravo,* Službeni list SFRJ, Belgrade, 1990, 182, 195.

[4] Some authors believe that consensual contracts are not the opposite of formal contracts, but rather of real contracts. This perspective is based on their prior assertion that the delivery of an object in real contracts is not a form or mode of expressing intent, but rather a mandatory supplement to the orally achieved agreement. Jakov Radišić, *Obligaciono pravo. Opšti deo,* 7th edition, Nomos, Belgrade, 2004, 123–124.

[5] S. Perović (1990), 342; Živomir Đorđević, Vladan Stanković, *Law of Obligations*, Naučna knjiga, Belgrade 1987, 246.

[6] Pierre Engel, *Traité des obligations en droit suisse*, Stämpfli, Berne 1997, p. 248 (qualifizierte Schriftform, forme écrite qualifiée). In our case: Dejan Đurđević, *Javnobeležnička delatnost*, Dosije, Belgrade 2014, 25–27.

[7] Bogišić held that: What is established before public authority is the strictest and clearest. Article 1023 of the General Property Code for the Principality of Montenegro (OIZ) of 1888.

(legalized) documents, publicly certified (solemnized) documents, and publicly drafted documents.[8]

3.1. Oral Form

The oral form of a legal transaction is the expression of one's own legally relevant will through **speech**, i.e. stating its content. Oral communication involves two parties: the productive (speaking) and the receptive (listening and understanding). Unlike writing and reading, which can be separated over time, speaking and listening naturally occur simultaneously: listening cannot be postponed. In order for the listener to hear what is being said, the participants in the oral communication must be in the same place at the same time. This is analogous to a telephone conversation.

A legal transaction is made **in oral form** when a legal entity verbally expresses the content of its will to achieve a legal effect. When expressed in oral form, the will materializes immediately and is perceivable to those present, but it does not leave a permanent record that would allow for the reproduction of what was said. Therefore, the primary drawback of the oral form is the difficulty in proving the existence and content of the statement, i.e. what was said and exactly what was conveyed. This drawback is traditionally overcome by securing witnesses.

The oral form of a bilateral legal transaction implies that the mutual will of the contracting parties is verbally articulated, meaning that the content of their agreement is expressed through oral statements. The oral form of a contract **is generally allowed**, unless otherwise prescribed or when the contracting parties agree in advance that their contract will only be valid if concluded in another form. Contemporary lawmakers never prescribe the mandatory oral form of a contract. A contract can be concluded orally whenever no other form is prescribed or agreed upon.

It should be noted that the terms **oral and informal are not synonymous**. Contracts concluded orally can still be strictly formal. An example of this is verbal contracts from Roman law, such as *dotis dictio* (a unilateral formal promise of a dowry), *iusiurandum liberti* (an oath of a freedman), *praediatura* (a procedural suretyship that later changed its purpose), and *stipulatio* (an abstract unilateral binding legal transaction through which various property obligations were assumed).[9]

[8] D. Đurđević, 23–27. This classification is based on the form's appearance, meaning the visible characteristics of the form. It does not reveal whether a specific form is prescribed by law or agreed upon and what its legal significance is, or what the legal consequences of its non-compliance might be. For instance, the written form of a contract can be statutory or contractual, and in terms of its legal significance, it could be a condition for the validity of that contract or merely proof of its oral conclusion.

[9] See: Miroslav Milošević, *Rimsko pravo*, Nomos, Belgrade 2005, 320; Paul du Plessis, *Borkowski's Textbook on Roman Law*, O.U.P., Oxford, 2005, 290; Martin Hogg, *Promises and Contract Law*, C.U.P., Cambridge, 2011, 110.

3.2. Real Form

The real form of a legal transaction is the expression of a legally relevant will through **the act of delivering an object**. The delivery of an object is a special form of materializing the will of the party to cause a specific legal effect. Contracts concluded in real form are called real contracts. For a real contract to be considered formal, it is necessary for the real form to be prescribed or agreed upon as a condition for its validity.

To conclude a consensual contract, it is sufficient for the contracting parties to reach an agreement on the content of their contract, that is, to form a mutual will regarding its legal effect. The mutual will can be expressed orally, in writing, or electronically, and if the contracting parties agree to the delivery of a specific object, that delivery can only be an act of fulfilling an obligation from the consensual contract.

In contrast, a real contract is not considered concluded until one contracting party delivers the object to the other party that the contract concerns. The delivery of the object is, in terms of its legal effect, **the act of concluding a real contract**.

Of course, the contracting parties must agree on what the delivery of the object means in legal terms. Therefore, a real contract cannot exist unless there is a mutual agreement between the contracting parties to enter into a relationship of a specific content. However, they must express this agreement through the delivery and acceptance of the object to which the contract pertains. One party delivers the object, and the other party accepts it, all with the intention of concluding the contract, and at that moment, with that act, the real contract is concluded.

3.3. Written Form

The written form ensures the permanent materialization of the content of a legal transaction. In the broadest sense, it is a signed text of a declaration on a document. The written form of a legal transaction consists of at least two elements: (a) **the text of the declaration of intent** by the legal entity engaging in the legal transaction, written either electronically or mechanically, or by hand, and (b) **the handwritten signature of that entity.** The text of the declaration and the handwritten signature are always placed on a physical medium, most often paper, which is called the document and serves as a permanent record of the content of the legal transaction. A contracting party who cannot write will affix a handmark on the document (a signature by mark), certified by two witnesses or by a court or other public authority. The written form of a legal transaction allows for delayed direct insight into the content of someone's legally relevant will. Unlike the oral form, where speaking and listening cannot be separated, the written form enables delayed reading of what has been written, i.e. the separation of the productive and receptive phases in verbal communication.

There is a rebuttable legal presumption of the completeness of a written document regarding a legal transaction. When a contract is concluded in a specific form, either by law or by the will of the parties, it is presumed that only what is written in that document applies between the parties. However, valid are also (a) simultaneous oral agreements regarding secondary matters not mentioned in the formal contract, provided they do not contradict its content or undermine the purpose of the prescribed form, and (b) simultaneous oral agreements that reduce or ease the obligations of one or both parties, if the special form is prescribed solely for the benefit of the contracting parties.

3.4. Types of Written Form

There are two types of written forms for legal transactions: standard and qualified.

The standard written form is a document that is signed by hand, on which the content of the legal transaction is written either by electronic or mechanical means, or by hand. The elements of the standard written form of a contract are the text of the contract, i.e. the written expression of the content of the contract that the parties have agreed upon, and their handwritten signatures. The text of the contract may be written, typed, or printed by one of the contracting parties or by a third party. It is customary for the legal document to be dated.

The law explicitly stipulates that the requirement for a written form is fulfilled when the parties exchange letters, or when they agree upon any means that allows the content and the author of the statement to be determined with certainty. For instance, the legislator mentioned teletypes, which were in use when the Law of Obligations (ZOO) was adopted. Teletypes are electric typewriters that could communicate via a closed, controlled teleprinter network, similar to landline telephony. As is well known, they are no longer in use. Nowadays, a permanent electronic record of a contract concluded orally can be ensured through the exchange of emails, or it can be stored on various media such as DVDs, CD-ROMs, memory cards, and computer hard drives. Such a record serves as simple proof of an orally concluded contract. For example, a warranty card is a document of guarantee, and the guarantee is a declaration of will in which the manufacturer guarantees or promises the proper functioning of a product for a specific period, starting from the moment the product is handed over to the buyer. The merchant is obliged to provide the consumer with the warranty card in written or electronic form, or on another permanent data storage medium, as simple proof of the warranty. Failure to provide such proof is subject to a misdemeanour penalty, but the declaration of warranty itself will not be invalidated due to this; it still obligates the merchant even when given orally.

When the written form of a contract is prescribed by law, a permanent electronic record of the text of the contract can replace the prescribed written form only

if this record allows the identity of the contracting parties to be determined with certainty. The handwritten signature, as an element of the written form, ensures that the contract was concluded by the person identified as a contracting party in the contract document. Therefore, the standard written form can only be replaced by a means that provides the same guarantees, i.e. performs the function of authentication. For example, the electronic form is a modern means that can replace the standard written form of a contract. It must contain the appropriate electronic signatures of the contracting parties, which serve as an adequate substitute for their handwritten signatures.

It is not uncommon for the law to prescribe that a merchant is obliged to inform the consumer about certain matters during the pre-contractual phase or during the contractual relationship. The legislator usually requires that the merchant provides **certain notifications on a permanent data storage medium** and prescribes civil and criminal penalties for the merchant who fails to fulfil this obligation in the prescribed manner. A permanent data storage medium is defined as any instrument that allows data to be stored for later access or reproduction in an unchanged form, such as paper, email, CD-ROM, DVD, memory card, and hard disk drives.[10]

A permanent data storage medium is not a form of a legal transaction, but a physical object on which the content of a legal transaction, notification, or a simple note can be recorded. This can be done by (a) writing on paper or another material such as wood or clay, from which the text can be read directly, (b) embossing on objects such as punched cards, CD-ROMs, and DVDs, from which the text is read mechanically by a computer and cannot be changed, or (c) as an electronic document, for example, on a memory card, from which it can be read using a computer and is subject to changes.

A record is, therefore, a written or electronic document, while the data storage medium is the medium that allows the storage, reading, and reproduction of what has been recorded. For example, before concluding an insurance contract and throughout the duration of the contractual relationship, the insurer is obliged to notify the policyholder about many matters, in writing or on another permanent data storage medium, that ensures the data can be stored, accessed, and reproduced unchanged.[11] Also, a merchant is obligated to notify the consumer on a permanent data storage medium that they can exercise their right to withdraw from a contract concluded remotely or outside the business premises of the merchant, by electronic means.[12]

However, it should be noted that in these cases, we are not talking about a legal form of the contract but rather **the legal form of required notifications**.

[10] Article 5 paragraph 1 point 44 of the Zakon o zaštiti potrošača - ZZP (Consumer Protection Act), *Službeni glasnik RS,* No. 88/2021.

[11] Articles 82–84 of the Zakon o osiguranju – ZO (Law on Insurance), *Službeni glasnik RS,* No. 139/2014 and 44/2021.

[12] Article 27 of the ZZP.

One contracting party is obliged to notify the other party about something before, at the time of, or throughout the duration of the contractual relationship, and to do so in a way that allows the provided data to be stored, accessed again, and printed, or otherwise reproduced, as long as necessary, given the purpose and nature of the contract. **The burden of proving** that the notification was made in the prescribed form falls on the party who is obligated to provide the notification.

The notification can be made, for example, on paper without a handwritten signature, which is sent by mail or handed over to the recipient in person, and in some cases, it may be posted in the merchant's premises so that a potential co-contractor can read it and take it with them. Additionally, the notification can be made in the form of an electronic document without an electronic signature, which is sent by email, handed to the recipient on a memory card, or in some cases posted online, so that others can save or print it.

A qualified written form includes everything that the standard written form entails, meaning the content of the legal transaction and the handwritten signatures of the parties involved on a physical object (document), but it requires something more, which further qualifies this form and makes it stricter than the standard written form. This supplement is called **additional formalities**. For example, sometimes it is required that the person undertaking a specific legal transaction writes the text of the legal transaction by hand on the document (holographic will) or acknowledges the document in the presence of witnesses as their legal transaction (allographic will). The additional formality sometimes consists of a public authority participating in the conclusion of the contract by certifying (legalizing) the signatures of the contracting parties, or confirming (solemnizing) their private document of the legal transaction, or preparing a public document in the appropriate procedure for the contracting parties. For example, before public notaries were introduced in our legal system, contracts that could transfer property rights to real estate, such as sale, gift, and exchange, were concluded in the form of a publicly certified (legalized) document. The signatures of the parties on these contracts had to be certified by a court. Contracts for lifelong support and contracts for the transfer and division of property during the lifetime were concluded in the form of a publicly confirmed (solemnized) document.

In our positive law, the most important qualified written forms are those in which the additional formality involves **the participation of a public notary**.[13] This includes publicly certified documents, publicly confirmed documents, and publicly drafted documents.

The form of a **publicly notarized document** is a qualified written form that includes (a) the standard written form and (b) a signature authentication clause

[13] D. Đurđević, 25–27.

(legalization clause). By certifying the signature, the notary public confirms that the submitter of the document, whose identity has been previously verified, has signed the document in their presence, or that they have already acknowledged the signature on the document as their own. The notary public is not responsible for the content of the submitted document nor are they obliged to determine whether the submitter has the right to sign the document. Thus, only **the legalization clause** makes the document a public document, meaning that only it has full probative force. As for everything else, a publicly notarized document is nothing more than a private (non-public) document, which is subject to evaluation by the free judicial discretion.[14]

The form of a **publicly confirmed** private (non-public) document is a qualified written form that includes (a) the standard written form and (b) a solemnization clause (confirmation clause). Public confirmation is done by placing a solemnization clause on the document of the legal transaction. With this clause, the notary public confirms that the document was read to the parties in their presence, that the parties declared that the document faithfully and completely reflects their will, and that they have signed it by hand.

When confirming a document of a legal transaction, the notary public is obliged to explain the meaning of the transaction to the parties, to point out its consequences, to verify whether the legal transaction is permissible, i.e. not contrary to mandatory regulations, public order, or good customs. Furthermore, the notary public must verify whether the parties have the legal and business capacity required to undertake the legal transaction, and whether they are authorized to undertake it, as well as check if the representative or attorney of the contracting party is legally capable and authorized to declare the will on their behalf. For all these reasons, a **complete publicly confirmed document**, not just its solemnization clause, has the status of a public document and full probative force.[15]

The form of a **publicly drawn up** document is the strictest qualified written form of a legal transaction, which includes the greatest number of additional qualifying formalities. A public authority or another holder of public powers participates

[14] Currently, in our law, public forms of notarized documents include, for example, declarations of inheritance, contracts for the establishment of a company, and contracts for the transfer of shares in a limited liability company. Moreover, any legal transaction can be made in the form of a notarized document, except when the law stipulates that such transactions must be concluded in a stricter form, such as a publicly confirmed or publicly composed document.

[15] Currently, in our law, publicly confirmed (solemnized) documents include, for example: (a) contracts based on which ownership rights to real estate are acquired, such as sale, exchange, and donation; (b) mortgage agreements and pledges (if they do not contain an explicit statement by the obligated party that direct enforcement can be carried out upon the due date of the obligation); (c) contracts establishing real or personal servitudes; (d) contracts by which spouses or future spouses arrange their property relations concerning existing or future property (marriage contracts). Other contracts can also be made in the form of notarized documents if the parties so agree, except for contracts that must be concluded in a stricter form of a publicly composed document as prescribed by law.

in the drafting of the public document, and when it is drawn up by a notary public, it is also referred to as a notarial record. Such a document is prepared by the notary public in a special non-contentious procedure, based on the statement of the person undertaking the legal transaction, and when it concerns a contract, on the statement of the contracting parties. Like a solemnized document, **the entire notarial record has the status of a public document** – the entire document, not just some part of it. When drafting a contract document, the notary public is required to verify the identity of the contracting parties, inform the parties about the content of the contract they are entering into, and educate them about its legal consequences. The notarial record has the same evidentiary value as if it were drawn up in court or before another state authority. Moreover, under conditions defined by law, a notarial record may have the power of an enforceable document. In general, a notarial record is an enforceable document if it establishes a specific obligation to perform an act that the parties can agree upon and contains an explicit statement by the debtor that, based on this document, enforcement can be directly carried out.[16]

3.5. Electronic Form

The development of digital technologies has made it possible for the content of contracts in modern legal transactions to be expressed in the form of an electronic document. Since the emergence of writing, the content of a contract could be recorded on paper or some other physical medium. In addition, today the content of a contract can also be recorded as a digital file, which is suitable for electronic storage, processing, and transmission.

A digital record of the content of a legal transaction represents an electronic document that has (a) an internal representation, i.e. the technical-programming aspect that is machine-readable and generally not of interest to the contracting parties, and (b) an external, visual representation of the content of the contract, for which we need a computer to read it.

It is important to recall that the written form of a contract implies a document regarding the legal transaction, which contains the text of the contract and the handwritten signatures of the contracting parties. Therefore, the written form of a contract is not just the printed content on a physical medium; it also requires

[16] Article 85 of the Zakon o javnom beležništvu - ZJB (Public Notaries Act), *Službeni glasnik RS,* No. 31/2011, 85/2012, 19/2013, 55/2014 (other law), 93/2014 (other law), 121/2014, 6/2015, and 106/2015. Additionally, based on a notarial record, immediate registration in the public register can be executed if the record contains a statement in which the debtor explicitly agrees to it. The legal form of a notarial record in our jurisdiction includes contracts regarding the disposal of real estate by legally incompetent persons; agreements on statutory maintenance; mortgage contracts and pledge statements (if they contain an explicit statement by the obligated party that enforcement can be carried out directly upon the due date of the obligation, either judicially or extrajudicially). Moreover, the contracting parties can agree that their contract will produce legal effects only if it is concluded in the form of a notarial record.

the contracting parties to hand-sign the document, thus identifying themselves and recognizing the text of the contract as their own. The same can be said for contracts concluded in electronic form.

The electronic form of a contract includes (a) the electronic document, i.e. the digital record of the contract's content, and (b) the electronic signatures of the contracting parties, which identify them and accept the text of the contract as their own. An electronic signature, like a handwritten signature, must be made by a natural person. When a legal entity concludes a contract, the electronic signature of the individual authorized to represent that legal entity in concluding the contract is used.

There are three types of electronic signatures: standard, advanced, and qualified.

A standard electronic signature is a set of data in electronic form that is attached and logically linked to other (signed) electronic data, so that the electronic signature confirms the integrity of the electronic data and the identity of the signatory. Thus, it is a set of electronic data that together confirms the content of the electronic document and the identity of the person who signed the document. **An advanced electronic signature** is more reliable than the standard one because it more reliably confirms the integrity of the signed data and the identity of the signatory. The signatory is the only one who controls the use of their advanced electronic signature. Any subsequent modification of the signed data can be detected, and the signed data cannot be secretly altered. Therefore, an advanced electronic signature allows for a more reliable identification of the signatory and the detection of any subsequent changes to the signed document. The advanced signature cannot be copied from the electronic document to be reused; the signed document cannot be modified without leaving an electronic trace.

A qualified electronic signature is a special type of advanced electronic signature, equipped with a qualified certificate issued by an accredited certification authority.[17] A qualified electronic signature is legally equated with a handwritten signature. It is the most reliable electronic signature: it ensures that the electronic data have not been changed after being signed, and that the document was signed by the person whose signature it is, namely, the one authorized to use that signature to identify themselves and recognize the electronic document as their own.

The Law of Obligations (ZOO) does not mention the electronic form of a contract directly, but it does provide that the requirement for a written form is met if the parties agree on another medium that allows the content and the declarant to be determined with certainty. Recently, it has been stipulated that a qualified

[17] Currently, certification authorities include the Serbian Post, the Chamber of Commerce of Serbia, the Ministry of Internal Affairs, the Ministry of Defence, and others.

electronic signature has the same legal effect as a handwritten signature. Furthermore, a qualified electronic signature can replace the certification (legalization) of a handwritten signature if specifically prescribed by law.[18]

Thus, the following options are available to the parties in our legal system. First, **when the law does not prescribe a specific form**, the parties can conclude the contract in electronic form using a standard, advanced, or qualified electronic signature. In fact, the contract can even be concluded through a simple exchange of emails. The parties are also free to ensure simple proof of an orally concluded contract in electronic form. Second, **when the law prescribes that a contract must be concluded in writing**, the parties can replace the prescribed form only with an electronic form that is equipped with their qualified electronic signatures, because only such signatures are legally equated with handwritten signatures. Neither the standard nor the advanced electronic signature is sufficient to meet the legal requirement that a specific contract be concluded in written form. Third, **when the law specifies that a contract must be in the form of a publicly certified document** (legalization of signatures), the prescribed form can be replaced by an electronic form containing qualified electronic signatures of the parties only if such a replacement is specifically allowed by law. Fourth, when the law requires that a contract be concluded in the form of a solemnized document or a public notarial record, the prescribed form cannot be replaced by an electronic form, even one containing qualified electronic signatures.

The final issue to mention, for a complete understanding of this relatively new legal framework, concerns the relationship between the original and copies of an electronic document. An electronic document can either be originally created in electronic form or it can result from the digitization (e.g. scanning) of a document that was not originally electronic. Furthermore, an electronic document can be printed into a physical form or duplicated electronically. In all these scenarios, it is necessary to determine what is considered the original and what is considered a copy, as well as what is required for a copy to be legally or functionally equivalent to an original.

(a) An electronic document that was originally created in electronic form is considered the original. (b) Any other electronic document that has the identical digital record is also considered the original. (c) By printing the external form of the electronic document, i.e. its visual representation, a copy of the document can be made on paper. This copy can be certified by a notary public. By certifying the copy, the notary public confirms that the copy of the document is identical to the original document. The notary public can certify that the printed copy matches the original electronic document if the printing of that copy was done under their supervision.

[18] Article 50 of the Zakon o elektronskom dokumentu, elektronskoj identifikaciji i uslugama od poverenja u elektronskom poslovanju, (Law on Electronic Documents, Electronic Identification and Trust Services in Electronic Business) *Službeni glasnik RS*, No. 94/2017 and 52/2021.

Before certifying the printed copy of the electronic document, the notary public must verify that a qualified electronic signature was used. The certification clause must specify that it is a printed copy of the electronic document. (d) An electronic document can also be created by digitizing an original non-electronic document, for example, by scanning pages of paper on which the contract text is written. Such an electronic document is considered a copy of the original non-electronic document. The notary public can certify this copy by confirming that the electronic copy is identical to the original document. It is required that the original document be digitized in the presence of the notary public. The notary public then adds their qualified electronic seal to the digitized copy, confirming its identity with the original non-electronic document.[19]

4. What is the purpose of form?

In modern law, the basic principle is the freedom to choose the form of one's own declarations of will. Participants in legal transactions are free to choose the form in which they will express their will. Legal acts generally produce the intended legal effects regardless of the form in which they are made. The principle of autonomy of will has permeated all civil codifications from the 19th century to the present. It implies the freedom to contract, which also includes the free choice of the form of contracts and other legal transactions. This **principle of the free choice of form** in legal transactions is now referred to as consensualism and is understood as a contrast to the formalism that characterized ancient legal systems. Consensualism stems from the freedom to contract and signifies that all ways in which legally relevant will can be expressed are equally valid. The free choice of form in which one's will is expressed aligns with the practical needs of rapid and widespread trade in goods and services.

Without form, there is no transaction. The legally relevant will must be expressed, manifested, and made perceivable to others in order to produce legal effect. A legal transaction is not a hidden, unspoken, internal will, but a declared will. This necessity to express will, to materialize it, means that every legal transaction, by its nature, must have some form. Form is a necessity because the will must be manifested, must take shape, in order to have legal effect. Therefore, the purpose of form is not to refer to the function of the form in general, but rather the function

[19] In the margin: An electronic signature can only be held by a natural person, whereas an electronic seal can be held by a legal entity or an authorized body within a legal entity. Similar to a signature, an electronic seal can be standard, advanced, or qualified. When a public authority issues an act in the form of an electronic document, the qualified electronic seal of that authority or the qualified electronic signature of an authorized person within that authority replaces the institution's seal and the handwritten signature of the authorized person. A qualified electronic seal carries a legal presumption of data integrity and the authenticity of its origin.

of a specific form that is mandatory for a particular legal transaction. The question is not why a contract has a form, but rather why the free choice of form is restricted by law and what purpose the form, which is mandatory for certain contracts, serves.

French theory has stated that consensualism is suitable for strong, mature, and honest contracting parties. On one hand, consensualism is simple, speeds up transactions, and benefits the economy. On the other hand, it opens the possibility for hasty and thoughtless commitments, leaves third parties without reliable proof of the existence and content of others' contracts, and makes it easier for contracting parties to disagree on whether they are actually bound by a contract or not.[20]

This means that mandatory form has some drawbacks. It slows down transactions, creates additional costs for the contracting parties, and sometimes leads them to the mistaken conclusion that mere compliance with a prescribed form guarantees the validity of the undertaken legal act. This last drawback particularly affects the form of public signature certification. The requirement for form can also benefit an unscrupulous party who, by pointing out formal deficiencies in the contract, actually wants to circumvent the obligation they had willingly accepted.[21]

What is the purpose of form in legal transactions under modern law? It is clear that today form does not have a sacred role; it is no longer believed that obligations arise from rituals or verbal formulas. Formalism, in principle, does not meet the conditions of free trade. The prescribed form of a legal transaction slows down legal traffic and creates costs. However, in certain areas of business, such as **banking and insurance**, the form of legal transactions is still very important. So, what is the current function of form, and what purpose does it serve?

First, forms that ensure a permanent record of the content of a contract allow the contracting parties and third interested third parties to later review the agreement and verify that the contract was concluded and what it pertains to. This is particularly important in long-term contractual relationships and when ownership, or other real rights are transferred based on a contract. Thus, the form of a contract serves a **proof function**, for example, in the case of a dispute about the existence or content of a contract, or when the parties need to inform third parties about their contractual relationship, or when one of them needs to show the basis of their acquisition, and so on.

A private document regarding a contract, created in a simple written form or in electronic form, serves as standard evidence of the conclusion and content of the contract and is subject to the judge's discretion. In contrast, public documents regarding legal transactions, i.e. qualified written forms in which a public authority

[20] Phillippe Malaurie, Laurent Aynes, Phillippe Stoffel-Munck, *Droit des obligations*, L.G.D.J., Paris, 2017, 305–306.

[21] Hugh Beale *et al., Cases, Materials and Text on Contract Law,* Hart Publishing, Oxford, 2019, 396.

(primarily a notary public) participates, have full probative value, meaning that they prove the truthfulness of what is confirmed or determined within them. However, there is a gradual scale in this regard. (a) When a contract is concluded in the form of a publicly certified document, only the legalization clause has the characteristic of a public document. In the case of a dispute about who signed a particular document, the court must assume that the document was signed by the person identified as the signatory in the certification clause. As for everything else, the publicly certified document is nothing more than a private document subject to free judicial evaluation. (b) When a contract is concluded in the form of a solemnized document or a notarial record, the entire document about the legal transaction has the characteristic of a public document and full probative value — not just some part of it.

Second, certain forms of contracts ensure that the contracting parties are better informed about the content, significance, and legal consequences of the contract they are entering into, protecting them from rash and hasty commitments, or accepting risks they do not understand. This **protective function** is especially important for forms that require the involvement of a public authority, such as a notary public, in drafting the legal document to warn the parties about certain aspects or refuse to draft a document for an invalid transaction. For example, the notary public is obliged by law to warn the parties if their declarations are unclear, incomprehensible, or ambiguous, or to refuse to draw up a document for a void transaction. The notary public must decline to create a document if they find that the will of the parties is not serious or free, or if the contract they wish to conclude is contrary to mandatory regulations, public order, or good morals. Furthermore, the notary public drafts the document based on the statements of the contracting parties, and helps ensure that their mutual will is clearly expressed and legally valid.

Third, some forms provide guarantees that the legal transaction was undertaken by the person identified in the legal document, and that the text of the document reflects the content of the expressed will. This is known as the **authentication function of the form**, and it is particularly emphasized in notarial forms. The notary public verifies the identity of the contracting parties, their representatives, and other participants in the procedure, minimizing the possibility of forgery and subsequent manipulation of the document's content.[22]

Finally, it is undeniable that strict formalism slows down legal transactions. The requirement of form mandates that the parties pause and fulfil everything necessary to express their will in the exact form requested. This creates additional costs, consumes time, and generally increases the expense of the transaction. However, the strictest forms — those ensuring that a legal document has the effect of an executive instrument — can, in the long run, speed up legal transactions by **effectively shortening the time needed for the enforcement** of contractual claims.

[22] D. Đurđević, 28–30.

5. When is Form Mandatory?

The essential form of a contract may be prescribed by law or agreed upon by the parties. If the form is legally required, the parties may only make it **more stringent** by mutual agreement; they cannot make the legal form easier or exclude it through mutual agreement. The form prescribed as a condition for the validity of a contract may be replaced by a more stringent form, that is, a form that includes everything prescribed by the legal form, with the addition of further formalities. The law may also provide for **competition among essential forms**, meaning that it may prescribe multiple forms, meaning that one form is sufficient for the valid conclusion of the contract.

When the form is **agreed upon**, but not prescribed by law, the execution of the contract without complying with this form should be understood as a waiver by the contracting parties of the agreement about the form that they had previously concluded.[23] However, when a constitutive form of the contract is prescribed by law, and not agreed upon by the parties, the contract does not produce the intended legal effect if it is not concluded in that form. Absolute nullity is the civil law sanction for non-compliance with the constitutive form.

Nevertheless, unlike contracts that are null due to other reasons, a contract that is null due to the lack of the prescribed form can be validated through execution.[24]

The process of validation (convalidation) through execution occurs by exception, when the cumulative conditions prescribed by law are met. (a) The first condition is that a **written form is prescribed** for the conclusion of the contract.[25] (b) The second condition is that the parties **have executed their contractual obligations** in full or in substantial part. (c) Third, a contract cannot be validated through execution if such execution would contradict the **purpose of the form**, or if validation in such a way would obviously undermine the goal for which the form was prescribed.

For example, it is not permitted to validate a contract by execution if it lacks the form prescribed for the protection of public interest. However, such validation is allowed when the contract has been executed, and the form that was not complied with at the time of conclusion was intended to warn the parties about the complexity of the legal transaction and to reduce the risk of disputes regarding its existence and content. Execution, for instance, can validate a construction contract or a contract

[23] For example, if the parties agreed to tighten the statutory written form by notarizing their signatures but later conclude the contract in the standard legally prescribed written form, it should be considered that they have implicitly waived the agreed-upon stricter form.

[24] Aticle 73 of the ZOO.

[25] As mentioned earlier, a written form may be simple or qualified. A contract lacking the required form may be validated through performance only if this aligns with the purpose of the prescribed form. Typically, only contracts requiring a simple written form can be validated through performance, as validation by performance is generally incompatible with the objectives of qualified written forms.

for partition, but it is not permitted to validate in this way a contract on the basis of which a property right is acquired on immovable property. Insurance contracts should be classified among those contracts that can be validated by execution.

6. What is Parallelism of Forms?

The term parallelism of forms refers to the **interconnection between the forms of two legal transactions**. It is not presumed merely because certain transactions are related; rather, it must be specifically prescribed or provided by law or agreed upon in a contract, within the general limits of the freedom to contract. If parallelism of forms is not specifically foreseen, the form required for one transaction applies only to that transaction, and not to other transactions that arise in connection with it. For example, the law stipulates that an agreement on a contractual penalty must be in the legal form of the contract from which the secured obligation originates; offers and acceptances must be made in the form prescribed for the contract; consent to the assignment of a contract is valid only if given in the form prescribed by law for the assigned contract; a preliminary agreement produces legal effects only if concluded in the form prescribed by law as a condition for the validity of the main contract;[26] a contract for which a notarial form is prescribed can only be terminated, amended, or supplemented by mutual agreement in the same form.[27]

The form prescribed by law for a particular contract is generally required also for the power of attorney and the consent of a third party to conclude that contract. However, when the form for a contract requires a public notarized document or notarial record, it is sufficient for the signature of the principal on the power of attorney, or the signature of the third party on the consent or approval for the conclusion of the contract to be notarized (legalized).[28]

II SPECIFICITIES OF THE INSURANCE CONTRACT FORM IN THE SYSTEM OF THE LAW OF OBLIGATIONS

1. Insurance Activity and Legal Transactions of the Insurer

The insurance activity is the **business activity of the insurer**, classified as a specially regulated, specialized business activity, similar to banking or leasing activities. The National Bank of Serbia supervises the performance of insurance activities.[29]

[26] Articles 271 and 38, Article 145(3), and Article 45(2) of the ZOO.
[27] Article 82(3) of the ZJB.
[28] Article 90(2) and Article 29(2) of the ZOO.
[29] Article 13 of the ZO, *Službeni glasnik RS,* No. 139/2014 and 44/2021.

Thus, the insurance activity is a specially regulated economic activity, or as it is often referred to in modern terms, an *industry*, which has its own rules, internal logic, and economic laws. The primary purpose of this activity is to provide protection against the risks to which insured property or insured persons is exposed. Protection is provided retroactively, meaning when the insured risk materializes, by providing compensation for the damage incurred or paying a predetermined sum. Moreover, the insurance activity may have a supplementary, quite limited preventive function: the business activity of the insurer also includes taking specific measures to prevent or eliminate risks threatening the insured property or persons. However, the insurance institution is **primarily reactive**: the main function of insurance is reparation, meaning the repair, removal, or at least reduction of the consequences of an insured event that has already occurred, either in the property or personal sphere of the insured party.[30]

Instead of bearing their own risks, the insured person, by paying the premium, joins a **risk community**, thereby socializing their own insured risk, i.e. sharing it with other members of the community and agreeing that they, too, will share their insured risks with them. All members of the community are exposed to the same danger, and knowing that the danger will actually affect only some of them, they decide to share the risk by paying premiums from which compensation or the insured sum will be paid to those whose risks materialize.[31]

The institution of insurance has ancient origins.[32] However, the modern insurance contract is a contemporary legal transaction, which is much more complex and distant from its historical roots. Knowledge of the history of insurance is not necessary to comprehend the modern institution. Nevertheless, the long history of insurance attests to the existence of an ancient need to socialize the risk of damage, i.e. to share the risk of property loss. Every participant in legal transactions is exposed to this risk.

In performing its business activity, insurers conclude or undertake **various legal transactions**, among which the most important are insurance contracts, but reinsurance transactions, as well as brokerage and agency activities in insurance, are also significant.

Broadly speaking, the legal transactions undertaken by insurers can be (a) unilateral (such as general business conditions or an offer to conclude an insurance contract) or (b) bilateral (for example, an insurance contract). (c) In addition, some authors emphasize the existence of joint transactions. For a joint legal transaction

[30] See: Nataša Petrović Tomić, *Pravo osiguranja: Sistem*, Službeni glasnik RS, Belgrade 2019, 43–44 and *passim*. (on various aspects of insurance activity); Predrag Šulejić, *Pravo osiguranja*, Faculty of Law, University of Belgrade (PFBG) and Dosije, Belgrade 1997, 26–28 (on the preventive function of insurance).

[31] N. Petrović Tomić, 72 *et seq*.

[32] P. Šulejić (1997), 32 *et seq*.

to arise, the will must be expressed by two or more persons, but not mutually (each with respect to the others), but jointly (on the same side).[33] In the insurance industry, this could, for example, refer to decisions made by the collective body within an insurance company.

2. The Insurance Contract: Definition and Legal Characteristics

The insurance contract is one of the numerous legal transactions that insurers conclude or undertake in the course of their business activities.[34]

In terms of its legal characteristics, the insurance contract falls under the category of nominate, bilateral (synallagmatic), onerous, long-term, and aleatory[35] bilateral legal binding transactions.[36]

When the insurance contract is categorized as a binding legal transaction, it means that its purpose is achieved by the fulfilment of mutual obligations that arise from the contract.[37] Therefore, the insurance contract is best defined by the obligations that emerge from it. In this contract, one party (the policyholder) undertakes to pay a specified monetary amount as the insurance premium and, potentially, to fulfil other obligations (such as taking the preventive measures stipulated by the contract), while the other party (the insurer) commits, in return, to compensate for the damage in case the insured event occurs. This compensation may involve (a) paying the damages in property insurance, (b) paying the agreed sum (insured amount) in personal insurance, or (c) taking another action (for instance, compensating for the insured damage in kind or defending the insured from unjustified claims – in liability insurance).

Insurance contracts are typically concluded using an adhesion technique, meaning they belong to the category of contracts of adhesion. The fundamental characteristic of contracts of adhesion is that one party (a) prepares the content of the future contract in advance, and (b) excludes the possibility of negotiating that

[33] Vladimir V. Vodinelić, *Građansko pravo. Uvod u građansko pravo i Opšti deo građanskog prava*, Pravni fakultet Univerziteta Union i Službeni glasnik, Belgrade 2017, 450

[34] For more on the insurance contract, see: N. Petrović Tomić, Ivica Jankovec, *Privredno pravo*, Službeni glasnik RS, Belgrade, 1999, 563 et seq.

[35] Aleatoricism is a legal characteristic of the insurance contract itself, not of the insurer's business activity; the insurer's business activity is not aleatory. See: M. Vasiljević (2012), 179; P. Šulejić (1997), 165 (each individual insurance contract is aleatory: it cannot be annulled due to excessive damage, and the policyholder cannot demand a refund of premiums if the insured event does not occur. However, the insurer concludes a large number of contracts, thereby eliminating its economic risk, so it can be said that the insurer's business activity is not excessively risky).

[36] For these and other classifications of contracts, see: M. Karanikić Mirić (2024), 173 *et seq*.

[37] In contrast, dispositional legal transactions—such as debt forgiveness, novation, or assignment of claims—do not create obligations but achieve their purpose immediately upon conclusion.

content. In the case of insurance contracts, the insurer occupies this position. The party adhering to the contract does not participate in the formation of its content but agrees to the terms set by the other party. Their freedom of negotiation is limited to the decision of whether to conclude or not to conclude the contract. This position is held by the policyholder.

The insurance contract is considered to be a contract of mutual trust (*uberrimae fidei*). This means that it obliges the contracting parties to act toward each other in accordance with the highest standards of good faith and fairness, particularly regarding the mutual duty of informing each other about circumstances that are significant to their contractual relationship.[38]

The insurance contract cannot be classified as a contract concluded based on identity (*intuitu personae*). First, the identity of the insurer is not crucial, as they operate according to the law and the general terms, and when the insured event occurs, it is not of particular importance to the policyholder whether the specific insurer pays the compensation or the insured sum; what matters is that the amount is paid. Second, the insurance contract is usually not tied to the identity of the policyholder either. However, the identity of the insured party may be relevant when assessing certain risks, and in this limited sense, it can be said that the insurance contract is concluded with regard to *intuitu personae*. In general, the insurer does not care who pays the premium. However, when covering risks that affect an individual's personal sphere, the insurer does pay close attention to who the insured is, what they do, how they live, and their overall health status, etc.[39] Finally, in addition to being nominate, bilateral, onerous, aleatory, and long-term, as part of binding transactions and typically concluded by adhesion, the insurance contract is, in our system, fundamentally formal. General questions regarding the form of contracts were addressed in the first part of this paper, and the remainder of the paper is dedicated to the form of the insurance contract.

3. The Form of the Insurance Contract in the ZOO System

3.1. Legal Significance of the Insurance Policy or Other Document Concerning the Contract

Under our positive law, contracts are generally concluded in a free form: when the form of a contract is neither prescribed nor specifically agreed upon, each party may declare its will to conclude the contract in the form it chooses.[40]

However, the Law of Obligations (ZOO) contains a specific rule regarding the form of the insurance contract, which applies to both property insurance and personal

[38] P. Šulejić (1997), 170.

[39] In some cases, the insured risk is directly tied to the insured person's characteristics—whether the insured event occurs depends on their attentiveness or behaviour. This is typical for liability insurance.

[40] A more detailed discussion on this can be found in the first part of this article.

insurance. According to this rule, the insurance contract requires a constitutive written form: it is considered concluded when the parties sign the insurance policy or cover note.[41] Therefore, for the insurance contract to be concluded in accordance with the provisions of the ZOO, it is necessary to create an appropriate written document for the contract (the insurance policy or cover note), which, in terms of its legal significance, is not merely evidence that the contract has been concluded, but a legal condition for its valid conclusion.[42]

It should be noted that some types of insurance are explicitly excluded from this regime: the ZOO rules concerning the insurance contract do not apply to marine insurance, reinsurance, and insurance of receivables.[43] These types of insurance are not excluded from the entire ZOO but only from those provisions of the ZOO that specifically regulate insurance. In other words, for the excluded contracts, the general provisions of the ZOO regarding contracts apply (including the rule regarding the free choice of form), but the specific provisions of the ZOO regarding the insurance contract, including the special rule on constitutive form, do not apply.

In our law, it is now undisputed that the insurance contract is regularly formal. However, this was not always the case[44]: (a) After World War II, under the influence of some pre-war legal rules, courts initially considered that the insurance contract had to be concluded in writing. (b) Later, they adopted a different view, in line with the legal theory and practice developed under the general conditions of many insurers, which held that an insurance contract was concluded as soon as the parties reached an agreement on its content, with the insurance policy or another document serving only as proof of the contract's conclusion and not a condition for its validity.[45] (c) The more recent judicial practice was codified: since 1967, the law has required insurers to issue an insurance policy or another document confirming

[41] Article 901, paragraph 1 of the ZOO. Naturally, the document may be signed by the parties personally or through their representatives.

[42] As stated by the court: "As a general rule, the conclusion of a contract does not require any specific form (Article 67, paragraph 1 of the ZOO); oral consent of the contracting parties suffices. However, Article 901, paragraph 1 of the ZOO prescribes that an insurance contract is concluded when the policyholder and the insurer sign the corresponding written document. Therefore, the insurance contract must be concluded in written form, and if it does not meet this requirement, it has no legal effect (Article 70, paragraph 1 of the ZOO) and does not enjoy judicial protection." Decision of the Higher Commercial Court, Pž. 8934/97 of January 28, 1998, ParagrafLex. Also: "An insurance contract is concluded when the parties sign the policy, so a policyholder who returned the signed policy to the insurer could not, by that act, implicitly reject the offer to conclude the contract (since the contract had already been concluded), nor could they terminate the contract in that way." Judgment of the Commercial Appellate Court, Pž. 4358/2011(2) of January 5, 2012, ParagrafLex.

[43] Article 899 of the ZOO.

[44] For more on this history, see: P. Šulejić, 165 *et seq*.

[45] When it is said that a policy is **mere proof**, this means (a) that the policy is not a requirement for the valid conclusion of the contract and (b) that the existence and content of the contract can be proven by other means, not just the policy.

the concluded contract.[46] This means that the insurance policy or another written document concerning the contract served only as mere proof that the contract had been concluded, while the contract itself could be concluded in any form, including orally. (d) Despite the fact that the insurance contract was newly defined by law as informal, Konstantinović proposed in 1969 in his Draft that the insurance policy should not merely be proof of the contract's conclusion but its mandatory form.[47] (e) The Yugoslav legislator accepted this proposal in 1978: under the ZOO system, the general rule is that the insurance contract is not concluded until the parties sign the insurance policy or the cover note.[48]

3.2. The Policy as the Legal Constitutive Form of the Insurance Contract

In order for property insurance or personal insurance to be concluded in accordance with the provisions of the ZOO, it is necessary for the contracting parties to sign the insurance policy.[49] Despite all the criticisms that may be directed at this legal solution and possible alternative interpretations of the existing legal provision, the legal significance of the policy is undisputed for our courts: the policy is understood in our jurisdiction as the **constitutive form of the insurance contract**.[50]

The prescribed written form of the insurance contract is typically achieved by using the insurer's form or template, which explicitly states it is stated that it is an insurance policy. However, the legal requirement for form should be considered met whenever the essential content of the insurance contract is recorded on any durable medium with the handwritten signatures of the contracting parties. This document may be titled as a policy, or left untitled, or even incorrectly titled (*falsa nominatio non nocet*), but it must certainly contain the minimum elements of the policy as prescribed in Article 902 of the ZOO.[51]

[46] Article 64, paragraph 2 of the Basic Law on Insurance and Insurance Organizations, *Službeni glasnik SFRJ,* No. 7/1967.

[47] Article 879, paragraph 1 of the Draft. See: Mihailo Konstantinović, *Obligacije i ugovori. Skica za zakonik o obligacijama i ugovorima*, Službeni glasnik SFRJ, Belgrade 1996, 292.

[48] There are some exceptions to this rule, which will be discussed later.

[49] Article 901, Paragraph 1 of the ZOO.

[50] N. Petrović Tomić, 317. From judicial practice: By signing the insurance policy, the contract is concluded, and the obligation to pay the premium arises. Decision of the Commercial Appellate Court, Pž. 12837/2010 of September 1, 2011, ParagrafLex. Also: By signing a policy for a multi-year insurance period, a legally valid contractual relationship is constituted for the entire insurance period. It is irrelevant that the insured later refused to sign a separate policy for a shorter period within the agreed duration of the insurance. Decision of the Supreme Court of Serbia, Prev. 323/2007 of September 13, 2007, ParagrafLex. Even: The fact that the insured agreed to conclude a contract with the insurer for combined casco motor vehicle insurance does not mean that the contract is concluded until both parties sign the insurance policy, especially since the insurer's special conditions prescribe that the contract is concluded by signing the policy. Judgment of the Commercial Appellate Court, Pž. 11031/2010 of July 20, 2011.

[51] The subsequent issuance of a policy on the insurer's standard form would then have the legal significance of mere proof of a contract that has already been concluded. Conversely, the last court ruling cited in the previous footnote takes a different stance.

The insurance policy is a document concerning the contract that is created in a **standard written form**[52]. The minimum content of the insurance policy is prescribed by law:[53] the policy must include the contracting parties, the insured object or insured person, the risk covered by the insurance, the duration of the insurance and coverage period, the insured sum or indication that the insurance is unlimited; the premium[54] or contribution (in the case of mutual insurance), and the date of issuance of the policy. The text of the insurance policy may be written, typed, or printed by one of the contracting parties or a third party, but it is usually drafted by the insurer itself. In any case, the insurance contract is considered concluded only when the policy is signed by both contracting parties.[55]

The law prescribes that the general terms under which the contract is concluded bind the party agreeing to them only if they were known to the party or should have been known at the time of conclusion.[56] This rule is further tightened for insurance contracts: not only must the policyholder be informed of the insurance terms, but this must also be stated in the policy. Specifically, the insurance policy must contain a statement confirming that the insurer has fulfilled two legal obligations: (a) to inform the policyholder that the insurance terms are an integral part of the contract, and (b) to provide the policyholder with the text of those terms, unless they are printed directly on the policy itself. This applies to both the general and specific insurance terms under which the specific insurer operates. In the case of a discrepancy between any provision of the insurance terms and any provision of the policy, the policy prevails according to the law. If there is a discrepancy between printed and handwritten provisions of the policy (if such exist), the handwritten provision prevails.[57]

Therefore, the general and special insurance terms are integrated or incorporated into the contract by a statement on the insurance policy confirming that the policyholder has been informed about them and that the text of these terms has been provided to them, if they are not printed on the policy itself. In other words, the insurance contract encompasses the insurance policy and the incorporated general and special terms of insurance that are valid at the time of conclusion, provided that the insurer has informed the other party that these terms are an integral part

[52] More on standard written form is discussed in the first part of this article.

[53] Article 902, Paragraph 1 of the ZOO.

[54] From case law: The premium is the price of insurance and therefore constitutes an essential element of the insurance contract. If the premium cannot be precisely determined based on the information stated in the policy, the insurance contract is invalid. It is not sufficient for the policy to merely state "applicable tariff" instead of specifying the premium amount. Judgment of the Higher Commercial Court in Belgrade, Pž. No. 1976/01 of June 20, 2001, ParagrafLex.

[55] Therefore, in our legal system, the policy is generally authoritative when its content differs from the insurance offer or from what the parties agreed upon during negotiations. The situation is different when the insurance contract is informal. P. Šulejić (1997), 195 *et seq*. See Article 71 ZOO.

[56] Article 142, Paragraph 3 of the ZOO.

[57] Article 902, Paragraphs 3–5 of the ZOO.

of the contract, delivered their text (if not printed on the policy), and confirmed all of this in the policy.

The law prescribes the minimum content of the insurance policy, i.e. the elements the policy must contain. However, the parties are free to include other elements in the policy, that is, they can agree on matters that the legislator does not require. For example, the policy may contain an agreement on the local jurisdiction of the court.[58] In addition to signing the same document, the contracting parties may also **exchange policies**, meaning that each party may receive the policy signed by the other contracting party. This possibility is explicitly provided by law.[59] It is based on the idea that the party holding the document signed by the other contracting party can always add their own signature, thus making it complete.

Moreover, the law specifically permits the replacement of the legally required written form with another method that ensures the content and the issuer of the declaration can be clearly identified[60]. This means that the written form of the insurance policy can be replaced by an electronic form equipped with **qualified electronic signatures** from the contracting parties, as only such electronic signatures are legally equated with handwritten signatures.[61] Neither a standard nor an advanced electronic signature is sufficient to meet the legal requirement for the policy to be in written form.[62]

Exceptionally, an individual classified qualifies as a consumer of financial services (which includes insurance) may conclude a distance contract valued up to 600,000 dinars without using their qualified electronic signature, provided that the authentication function required by the law for that contract is secured in another legally prescribed manner (using at least two elements to confirm the user's identity or by using an electronic identification scheme with a high level of reliability).[63] This is a special legal rule aimed at protecting consumers who enter into financial service contracts using remote communication means. It allows for the authentication function of the handwritten signature or qualified electronic signature of the consumer (not the service provider) to be realized by using some **other form of electronic identification** that ensures a high level of trust in the consumer's identity, thereby effectively preventing abuse or false representation.

[58] Decision of the Higher Court in Čačak, Gž. 1594/2021 of March 10, 2022, ParagrafLex.

[59] Article 72, Paragraph 4 of the ZOO.

[60] *Ibidem*.

[61] Zakon o elektronskom dokumentu, elektronskoj identifikaciji i uslugama od poverenja u elektronskom poslovanju (Article 50 of the Law on Electronic Documents, Electronic Identification, and Trust Services in Electronic Business), *Službeni glasnik RS,* No. 94/2017 and 52/2021, and Article 3, Paragraph 2 of the Zakon o zaštiti korisnika finansijskih usluga kod ugovaranja na daljinu - ZZKFUD (Law on Consumer Protection in Distance Financial Services Contracts - ZZKFUD), *Službeni glasnik RS,* No. 44/2018.

[62] More on the electronic form is discussed in the first part of this article, where the legal obligations for the contracting parties to provide certain notifications on a durable medium are also explained.

[63] Article 3, Paragraph 3 of the ZZKFUD.

The insurance policy can be **temporarily replaced by a cover note**, which includes the essential components of the insurance contract. This possibility is also provided by law.[64] The cover note is issued either in writing or in an appropriate electronic form, containing only the most basic data about the agreed insurance. It is usually issued when the policyholder or the insurance contractor urgently requires proof of the concluded transaction, in cases like transport insurance, or when insuring a large property that requires prior inspection.[65] The contractual obligations between the parties arise as soon as both sign the cover note — the policyholder or insured is protected against risk, while the insurer acquires the right to the premium.

The cover note has a limited content and must later be replaced by an insurance policy containing all legally prescribed elements. Once the cover note is issued, a legal obligation arises to replace it with an insurance policy within a reasonable period, or within the period prescribed by the insurance terms or customary for that type of insurance. If a cover note is issued, **the contract is considered concluded**. The insurance policy issued later cannot have the legal significance of the constitutive form of the insurance contract; it can only serve as proof of the contract's existence and content.

According to general contract law, the insurer may set stricter requirements for the form or extend the mandatory content of the policy, to which the policyholder agrees by entering into the contract under stricter rules. The contracting parties cannot relax or exclude the legal form of the insurance policy, but they may **mutually agree to make the form stricter**. For instance, instead of the standard written form required by law (handwritten signature on the policy), the parties can agree that their signatures must be notarized for the contract to be considered concluded. Furthermore, the parties may expand the **minimum content of the policy**, meaning they can condition the conclusion of the contract on the inclusion of additional elements that are not legally required to be included in the policy.[66]

An insurance contract that has not been concluded in the prescribed constitutive form is subject to **validation by performance.**[67] The validation by performance occurs as an exception when the cumulative conditions foreseen by law are met, as discussed earlier. The first condition is that the contract's conclusion is prescribed by the ordinary (not qualified) written form.[68] This is because validation by performance is generally inconsistent with the objectives for which qualified written forms are required. The second condition is that the parties have performed their contractual

[64] Article 902, Paragraph 2 of the ZOO.
[65] P. Šulejić (1997), 197.
[66] The minimum content of the policy is prescribed in Article 902, Paragraphs 1 and 4 of the ZOO.
[67] Article 73 of the ZOO.
[68] Decision of the Higher Commercial Court, Pž. 5798/2008(2) of February 10, 2009, ParagrafLex (the provision of Article 73 ZOO cannot be applied if, in addition to the written form, the contract also requires notarization of signatures or the consent of a third party for its conclusion).

obligations either in full or in substantial part. Third, the contract cannot be validated by performance if such validation would contradict the purpose of the form, or if it would clearly defeat the goal for which the form was prescribed. The legal consequences of validating a contract through performance are that the party that has mostly performed their contractual obligation can be required to complete it, and neither party can demand the return of what has been performed under a contract that was invalid due to lack of form, but has since been validated by performance.

Finally, in special cases, when the insurance policy merely serves as proof of the contract, there is no point in considering the possibility of validating the insurance contract by performance (as envisaged in Article 73 of the ZOO). If the insurance policy is merely proof of the contract that is considered concluded as soon as the parties agree on its essential elements, then this contract cannot be null and void due to lack of form, and the question of validation through performance will not arise.

In comparative law, there is a prevailing view regarding the informal nature of insurance,[69] meaning that the policy usually serves as mere proof of the existence and content of the contract. This was the case in our country after the war, until the adoption of the ZOO. Our contemporary legal theory advocates returning to this solution, i.e. abandoning the mandatory legal form for the insurance contract.[70] However, until such a change is implemented, it seems that the domestic legislator's intention was for the insurance contract to have a constitutive standard written form within the framework of the ZOO, and its minimum content should be that prescribed for the policy in Article 902 of the ZOO.

(a) This means that the contract is considered concluded when both parties sign the insurance policy. (b) Furthermore, the insurance contract should be considered concluded when the contracting parties reach an agreement in standard written form on the minimum content prescribed for the policy and both parties sign it by hand, even if it is not on the standard form typically used to issue an insurance policy.[71] (c) Finally, the insurance contract should be considered concluded when it is made in electronic form containing qualified electronic signatures from both parties. In such a case, its minimum content is that which is prescribed by law for the policy.

3.3. The Insurance Policy as Mere Proof of a Concluded Contract

It has already been stated that the provisions of the ZOO regarding insurance contracts do not apply to marine insurance, insurance of claims, and reinsurance, which means that the ZOO provision regarding the formal nature of insurance does not apply to these contracts either. In these cases, the insurer is still obliged to issue

[69] N. Petrović Tomić, 295; P. Šulejić (1997), 166 *et seq*.

[70] N. Petrović Tomić, 296.

[71] This would constitute the conclusion of an insurance contract according to the general rules for (formal) contracts. See: N. Petrović Tomić, 322.

an insurance policy, but that policy is not a condition for the creation of the contract; instead, it serves as mere proof of a contract concluded in some other form.[72]

Moreover, even within the framework of the ZOO, there are exceptional **cases in which a contract is concluded without a policy**, where the policy cannot have the legal significance of a constitutive form, but only serves as proof of the existence and content of the contract. The insurer is still obligated to issue an insurance policy in these cases, but the policy does not represent an essential form of the insurance contract; rather, it serves **merely as proof of the fact that the contract has been concluded**.

3.3.1. Real Form of the Insurance Contract

It is commonly said that the earnest money (deposit) is the only real contract in our ZOO.[73] However, the ZOO specifically provides for a possibility where a real form of the contract can be agreed upon instead of the legally prescribed written form. Specifically, in its general terms of business (insurance terms), the insurer can specify cases where the contractual relationship from the insurance arises solely through the payment of the premium.[74] This is referred to as **insurance without a policy**.[75]

In such cases, the insurance contract has a **contractually agreed constitutive real form**. This form is (a) agreed upon, because it is not prescribed by law for a specific contract but is provided in the insurer's terms, which the other party accepts; (b) constitutive, because it represents one of the alternatively set conditions for the valid conclusion of the contract (the contract must be concluded either in the legally required written form or in the agreed-upon real form to produce legal effects); (c) real, because the contract is concluded by paying the insurance premium—the payment of a certain sum of money constitutes the act of concluding the contract.

The real form of the insurance contract is agreed upon when the insurer provides it in their terms, and the other party accepts it by paying the premium with the intention of entering into a contract under the insurer's terms. If this possibility

[72] The policy is considered here only from the perspective of the form of an insurance contract. In addition to serving as the constitutive form of a contract or as evidence, an insurance policy can also function as an identification document, a (qualified) debt instrument, or a security, which is beyond the scope of this paper. More on these other functions of the policy can be found in: P. Šulejić (1997), 191 *et seq*.

[73] Article 79, paragraph 1, ZOO. Additionally, pledge, deposit, and loan, according to classical understanding, are classified as real contracts. While these were real contracts in pre-war law, the ZOO now defines them as consensual contracts. The delivery of an item is not an act of concluding the contract but an act of fulfilling a contractual obligation that has already arisen from it.

[74] Article 903, ZOO.

[75] A common example is voluntary passenger accident insurance in public transport, which is concluded upon purchasing a transport ticket. N. Petrović Tomić, 302; M. Vasiljević, 182; Predrag Šulejić, "Član 903. Osiguranje bez polise", *Komentar Zakona o obligacionim odnosima* (ed. Slobodan Perović), Savremena administracija, Belgrade, 1995.

were not specifically prescribed by law, the parties would not be allowed to deviate from the legally prescribed constitutive written form of the insurance contract.

The insurer, in their terms, may stipulate that the contract is considered concluded when the other party pays the full premium or when part of it is paid. There is no legal obstacle to the insurer's terms providing, for example, that the premium is paid in instalments and that the contract is concluded by paying the first instalment.

When the insurance terms provide that the contract is concluded by paying the premium, the insurance contract is **not informal**:[76] it is not concluded in a free form, but rather in the agreed-upon constitutive real form. Even in this case, the insurer is still required to issue a policy upon request of the policyholder. However, the policy in this case does not have the legal significance of a constitutive form of the insurance contract, but rather serves only as mere proof of the existence and content of the contract concluded in the real form.

How does this case differ from validation by performance? (a) When the insurance contract is concluded in real form, the main contractual obligation of the insurer arises as soon as the policyholder pays the premium. This obligation is enforceable. This is because the contract is concluded by the act of paying the premium. (b) In contrast, validation by performance occurs only when a contract lacking the essential legal form is performed in full or to a substantial extent. This means that contractual obligations do not arise until they have been predominantly performed. Once the contract is performed, validation occurs, and neither party can demand the return of what they have already provided. However, until validation occurs, the policyholder cannot be required to pay the premium, nor can the insurer be required to pay the compensation or the insured sum, or do anything else specified in the contract if the insured event occurs. These obligations are not enforceable until validation occurs. Once validation has taken place, that is, when the parties have voluntarily performed their obligations in full or to a substantial extent—neither party has the right to claim restitution of what has already been given.[77]

In addition to the described case of **insurance without a policy**, which is explicitly named as such in the law (Article 903 of the ZOO), there are other situations in the ZOO framework where the policy cannot be anything other than proof that the contract has already been concluded in some other manner—not by the mutual signing of the policy.

[76] Ivica Jankovec, „Član 903. Osiguranje bez polise", *Komentar Zakona o obligacionim odnosima* (eds. Borislav Blagojević, Vrleta Krulj), Savremena administracija, Belgrade, 1983, 1938.

[77] Jankovec interprets this differently. According to him, paying the insurance premium under Article 903 of the ZOO actually constitutes validation by performance, as generally regulated in Article 73 of the ZOO. He argues that by paying the premium, the contract is already predominantly performed, since the insurer's main obligation depends on whether the insured event occurs. Therefore, he suggests that the insurer's performance should not be considered when assessing whether the conditions for contract validation by performance have been met. I. Jankovec (1983), 1938.

3.3.2. Unilateral Written Insurance Contract

It is explicitly stipulated by law in our system that a written offer made to the insurer for the conclusion of an insurance contract binds the offeror for a period of eight days from the day the offer is received by the insurer, unless a shorter period has been specified. If a medical examination is required, this period extends to thirty days. If the insurer does not reject the offer within that period, and the offer does not deviate from the terms under which the insurer provides the proposed insurance, the offer is considered accepted and the contract is concluded. In this case, the contract is considered concluded when the offer is received by the insurer.[78]

The insurance contract still retains the legally prescribed form required for its validity[79]. It is a **unilateral written formal contract.**[80] Thus, even in this case, the contract is not informal, but unilateral and written: the offer made by the policyholder must be in writing or an appropriate electronic form. A special legal rule stipulates that an insurance contract produces legal effects only if the policyholder has made the offer in writing, with the insurer accepting the offer by silence.

The content of the contract is determined by the offer made by the policyholder, which must fully comply with the insurer's terms and must be made in written form. General rules allow the written form of the offer to be replaced by an electronic form containing a qualified electronic signature. Once the period during which the offeror is bound by the offer expires, the written offer that is not rejected converts into a written insurance contract – it is considered that the insurer, by remaining silent, has accepted the offer, and the contract with that content is concluded when the offer is received by the insurer. In this case, the insurer is also obligated to issue the insurance policy, but the policy can only serve as mere proof of the contract that has already been concluded; it cannot be the constitutive form of the contract.

In legal terms, silence means refraining from any reaction, the absence of both speech and action, a completely passive stance. By its nature, an offer cannot be made by silence, as the offeror must propose the content of the future contract. This rule applies without exception. When it comes to acceptance, the basic rule is that silence does not mean acceptance of the offer. However, there are some exceptions to this rule:

First, participants in legal transactions can agree that in their future business relationship, the silence of the offeree will be understood as acceptance of the offer made to them. Of course, this cannot be agreed upon when the form of the legal transaction is imperatively prescribed by law, as is the case with insurance in the ZOO system. Second, silence may be deemed acceptance if it is required by

[78] Article 901, paragraphs 2–4, of the ZOO.

[79] In contrast (that the contract is informal): M. Vasiljević, 182.

[80] It has already been mentioned that a guarantee contract binds the guarantor only if the statement of guarantee has been made in writing. [Article 998, ZOO.] The creditor may agree to this in any form, which means that for the legislator, a guarantee contract is unilaterally formal (unilateral written).

business customs in a particular context. This is not applicable to contracts that are legally formal. Third, the ZOO regulates two situations in which, by exception, the silence of the offeree is taken as acceptance:[81] If the offeree has an ongoing business relationship with the offeror regarding the delivery of specific goods, it is considered that the offeree has accepted an offer relating to such goods if they do not reject it immediately or within the prescribed time. Similarly, if the offeree has an ongoing business relationship with the offeror regarding the performance of certain tasks, it is considered that they have accepted an offer relating to those tasks if they do not reject it immediately or within the prescribed time.[82] This does not apply to insurance. Fourth, the law may specifically stipulate that silence from the offeree means acceptance of the offer to conclude a specific nominated contract. This is precisely what the legislator has done for insurance contracts: **the insurer's silence on a written offer** made to them within the acceptance period and in accordance with the terms of insurance is deemed as acceptance, as explicitly provided by law. In this case, there is no requirement for an ongoing business relationship between the parties, but rather that (a) the offer was made in writing, (b) it was made by the insurance proposer, (c) it fully complied with the general terms, and (d) the silence lasted for eight days, or thirty days if a medical examination is required.

3.3.3. Deviation from the Legal Form in the Undeniable Interest of the Insured

The dispositive nature of legal provisions is one of the fundamental principles of our ZOO:[83] the parties can arrange their contractual relationship differently than prescribed by the law, unless a specific provision of the law or its purpose dictates otherwise. However, the rules of the ZOO regarding insurance contracts are **generally imperative**:[84] the parties can only deviate from these rules when they have explicit legal authorization[85] or when such a deviation is in the undeniable interest of the insured and is not explicitly prohibited.[86]

[81] Article 42, paragraphs 3 and 4, ZOO.

[82] However, if there is no permanent business relationship between the two parties, then the silence of the commission recipient who has received a certain commission is not qualified as acceptance of that commission but as careless conduct in the pre-contractual phase, thus serving as the basis for pre-contractual liability for the damage caused. Article 750, ZOO.

[83] Article 20 ZOO.

[84] Article 900 ZOO.

[85] Explicit authorization to contract differently than prescribed is contained in several articles of the ZOO: Article 930, Article 931, paragraph 1, Article 936, paragraph 1, Article 937, paragraph 1. These legal provisions are dispositive (non-mandatory) by exception.

[86] (a) For example, the insurer may request the annulment of the contract if the policyholder has intentionally made an inaccurate declaration or intentionally concealed a circumstance of such nature that the insurer would not have concluded the contract had they known the true state of affairs (Article 908, paragraph 1, ZOO). However, it can instead be agreed that the insurer has the right to demand an increase in the premium.

In domestic legal theory, the position has been presented that deviation from the legal form of an insurance contract can be justified by referring to Article 900, paragraph 2 of the ZOO, i.e. when such deviation is undoubtedly required by the interests of the insured. An example often cited is the case when the insured needs to immediately obtain coverage for a risk they are exposed to.[87]

However, the insured almost always has an obvious interest in obtaining coverage as soon as possible. This interest is protected by the rules regarding the conclusion of the contract by the silence of the insurer or by the payment of the premium. Additionally, an insurance contract that is null and void due to a lack of form can be validated through performance. Also, the law explicitly allows for the written form to be replaced by any form that ensures the content and the party making the statement can be clearly determined.[88] The insurance policy can, therefore, be made in an electronic form that contains qualified electronic signatures of the contracting parties. Outside of these situations, our courts require that the insurance contract be concluded by the handwritten signing of the policy (either in person or through a representative), if the rules of the ZOO apply to that contract.

Finally, the strict rules of the ZOO regarding the form of the insurance contract are not only prescribed for the protection of the interests of the insurance proposer or the insured but also in the interest of the insurer, so that their obligation does not arise before it is determined which risks are covered by the insurance, in a form that reduces the likelihood of disputes. Because of all of this, the possibility of deviating from the legal form of the insurance contract based on the provision of Article 900, paragraph 2 of the ZOO (in the undeniable interest of the insured) seems to be considered in our legal theory merely as one of the potential responses to the strict formalism of our legal solution, rather than as a *de lege lata*—an existing legally provided option.[89]

(b) If it is agreed that the premium is to be paid at the conclusion of the contract, the insurer's obligation to pay compensation or the amount specified in the contract arises by law the next day after the premium payment (Article 913, paragraph 1, ZOO). However, it can be agreed instead that the insurer's obligation becomes due earlier and that they bear the risk as soon as they inspect the item, not just the next day after the premium payment.
(c) If the increase in risk is such that the insurer would not have concluded the contract had such a state existed at the time of its conclusion, they may, by law, terminate the contract (Article 914, paragraph 3, ZOO). However, it can instead be agreed that the insurer has the right to demand an increase in the premium. For further examples, see: Predrag Šulejić, "Article 900. Deviation from the Provisions of this Chapter," in: Slobodan Perović (ed.), Commentary on the Law of Obligations, Savremena administracija, Belgrade 1995, 1469.

87 P. Šulejić (1997), 168 (the train departs immediately upon loading the shipment; the insured does not have time to go and sign the policy; their intention to insure the shipment is communicated by sending a telegram to the insurer).

88 Article 72, paragraph 4, ZOO.

89 Predrag Šulejić, „Član 901. Kad je ugovor zaključen", Komentar Zakona o obligacionim odnosima (ed. Slobodan Perović), Savremena administracija, Belgrade, 1995, 1471–1472

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