COMMENTARY ON GEORGIAN INSURANCE LAW

Università degli Studi della Campania *Luigi Vanvitelli*

THE POLITICAL SCIENCE DEPARTMENT OF THE
UNIVERSITÀ DEGLI STUDI DELLA CAMPANIA
"LUIGI VANVITELLI"

THE FACULTY OF LAW OF
IVANE JAVAKHISHVILI TBILISI STATE UNIVERSITY

COMMENTARY ON GEORGIAN INSURANCE LAW

ANDREA BORRONI (GEN. ED.)

IN THREE VOLUMES

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COMMENTARY ON GEORGIAN INSURANCE LAW

Vol. I

Insurance

(Arts. 799-819)

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Favorite Style LLC
2022

UDC (უაკ) 349.3:36
C – 73

This publication was printed with the financial contribution of LEPL Insurance State Supervision Service of Georgia (ISSSG).

This volume was evaluated in accordance with the recognized criteria of anonymous peer-review.

This book is dedicated to the centennial celebration of the establishment of the Faculty of Law of Ivane Javakhishvili Tbilisi State University.

Borroni, Andrea (Gen. ed.)
Commentary on Georgian Insurance Law
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Tbilisi
2022
pp. 1-314
ISBN 978-9941-8-5032-5

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Foreword on Commentary on Georgian Insurance Law

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A chapter of a civil code devoted to the insurance contract raises two perspectives: the first related to the structure of the sources and the second to intrinsic preceptive content.

From the first perspective, a reference could be made to the trend towards endowing the insurance sector with its own code, as has occurred in France and Italy. Codes which, however, mainly address vertical relations between insurance companies and the supervisory authorities controlling them, with few incursions into horizontal relationships between insurers and insured parties, limited to the profile of the conformative powers attributed to the Authorities to curb the most widespread unfair or misleading clauses with which the policies in use are riddled. A restraint that is not always well managed, given that its effective operation would require a careful analysis of the content of the policies themselves. An analysis that does not appear to be within the reach of administrative authorities, without the power to intervene directly into the horizontal relationships that, moreover, are entrusted to the decisions of civil judges, while the exercise of administrative power are subject to those of the separate administrative jurisdiction. A historically determined oddity that prevents many European models from presenting themselves as worthy of imitation.

From the second perspective, the task of civil codes has always been to regulate purely horizontal relations between citizens; even though it is now established that, in relations between businesses (professionals) and consumers, it is a relationship tainted not so much by information dissymmetry as by the tendency of professionals to tailor contractual regulations that shift all future risks onto the contractual counterpart.

This tendency, which appears to be inherent in the hierarchical structure of the company (firm), is particularly obnoxious in the field of insurance contracts where the object of the contract is essentially the shifting of a risk from the insured's assets to those of the insurer.

This issue has traditionally been framed within the concept of "alea" for the simple reason that the structure of the contract contemplates the

possibility, intrinsic to the concept of risk, of obtaining a substantial indemnity against minimum premiums and, conversely, of paying substantial periodic premiums against zero indemnities.

Appropriately, therefore, the rules of the Georgian Civil Code under consideration here begin with a concretization of the topic of "alea", considering that the insurance contract nevertheless remains a commutative contract and therefore the payment of a premium, or its equivalent, cannot be for nothing.

It should be noted that these codified rules, which have been effectively described in the authors' Comments, do not appear particularly innovative with respect to the continental European tradition; rather, they constitute a careful consolidation of it.

In the processes of edification of a common European law, there is an increasing interest in the legislative choices that the various governments implement by unraveling the knots of the *jus controversum*, since this indicates a direction of policy of law that cannot be delegated to the jurisprudential formant considering that it lacks democratic investiture.

In this perspective, reading the following Comments is highly instructive.

Prologue on the Commentary

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A *Commentary on Georgian Insurance Law* (*Commentary*), edited by Andrea Borroni, is a two volume set on the history and evolution of Georgian Insurance law. To provide an analysis of the Georgian insurance law from comparative and normative perspectives. It provides a historical accounting of the evolution of insurance law across a number of legal systems. This book is essential reading for judges, scholars, legislators, and students interested in the topic. It is divided into four parts: General Provisions, Insurance Premiums, Life Insurance, and Accident Insurance. Although the book is mostly descriptive it also provides the basis for a normative inquiry. This is important since insurance law is currently in a transitional state (*de jure condendo*). The Georgian law of insurance continues to be built brick by brick.

General Provisions begins with Article 799's exploration of the concept of insurance and its meaning in law. Other articles deal with the issue of the insurer's duty to provide insurance, especially in cases of compulsory insurance, as well as the importance of the insurance certificate or policy, types of insurance, and the rights of insurance agents. General provisions also provide rules on otherwise perfunctory issues such as loss of insurance policy, time of commencement, and the effects of rising premiums. Articles 808-812 covers the important duty of the insured to provide relevant information to the insurance company especially when it involves undisclosed risks. The effects of the insured providing incorrect information (or non-disclosing material information), termination of the policy due to failing to communicate correct information are discussed. Two additional obligations of the insured reviewed are the obligations to give notice of increased risk and notifying about an insured event.

Part II deals with the narrower area of insurances premiums found in Articles 815-819. Again, the focus is on the duties of the insured to pay insurance premiums on time or face termination of the insurance policy. Parts III and IV review two types of insurance contracts—life and accident insurance. Part III on life insurance examines the issues of repudiation and termination of insurance policies, as well as the transfer of the rights of the beneficiary. In the area of transfer, Part III discusses the legal preclusion of certain third-parties from benefiting from the insurance and excludes the payout of benefits in the case of suicide, as well as other grounds for releasing the insurer from paying benefits or damages. Finally, Articles 851-853 provide the parameters for the substitution of policies, deduction for termination of the insurance contract, and the effects of forced execution. Part IV on accident insurance consists of five articles with specific rules in the areas of effects of injury, intentional acts, duty to give notice of accident, and cases where there is no right to make a claim for insurance recovery.

The *Commentary* due to the evolving nature of insurance in the digital age will likely need new editions. One issue not discussed is found in other parts of law, either general contract law or delict. In contract, the insurer has a duty of good faith to pay claims in a diligent and expeditious manner. Failure or undue delay in paying claims is an act of bad faith and may, under some national laws, provide a cause of action in delict. The other issue that will need to be discussed in future editions is the insurer's duty to defend. As is often the case, disputes will arise over the legitimacy of a claim for recovery, such as whether the event causing an injury is within the scope of the insurance policy. In order to protect the insured party, some countries recognize a broad duty to defend the insured in litigation or arbitration. As long as the claim or cause of action is plausibly within the scope of the insurance policy, the insurance company must pay the legal costs of the insured-defendant. These costs remain with the insurance company even when it is later determined that the relevant event was not covered by the policy.

The concept of insurance is always in a state of flux. Four reasons for the fluidity of insurance products will be mentioned here. First, developments in the real world create types of risks not previously considered. When new risks occur the insurance industry inevitably develops insur-

ance products to cover such risks. Second, the oscillating debate over the role of government law and regulations. Does the evolution of new types of insurance require new regulations? When should the government intervene and make insurance coverage compulsory?[1] Third, the long-term scholarly debate of the role of insurance companies relative to the insured. Is their role limited to providing protection in the form of paying out damages (accident) or a stipulated amount (life insurance), or should they be required to be proactive in the area of loss prevention? It should be noted that the role of protection can also be seen as protection from failure of regulation. That is, the regulation of insurance is narrower than the protections provided by insurance products. This may be due to the inevitable lag between novel real world developments and subsequent regulation. Fourth, the most recent issue in the insurance industry revolves around the impact of new technologies, which is discussed in the next paragraph.

Traditional insurance law has yet to recognize the use of telematics, in which insurers are able to monitor the conduct of their policyholders in real time and charge them for coverage accordingly. A type of pro rata insurance, which new technology makes possible, will initially impact auto insurance. Driving data and the premium charge will be based on data analytics derived from the use of smartphones and imbedded technologies (apps). This is the future of auto insurance and this is why the *Commentary* will need to be updated and its historical analysis brought forward to the future of insurance. This updating will be internal and external to the insurance industry—internal in the characteristics of insurance policies and the calculations of premiums, and external in the need for new types of regulation.

The strength of this Commentary is exhibited in its first provision (Article 799), which will be discussed here. Article 799, written by Andrea Borroni, discusses the general concept of insurance. This historical review is both interesting and vital to understanding the modern law of

1 For example, there have been proposals to «mandate the purchase of insurance or otherwise intervene in insurance markets to address a broad range of modern social ills, including police misconduct, gun violence, cyberattacks, and harms caused by artificial intelligence». K. Abraham & D. Schwarcz, *The Limits of Regulation of Insurance*, IND. L. J., forthcoming. See generally, K. Abraham & D. Schwarcz, *Insurance Law and Regulation*, 7th ed., Foundation Press, 2020.

insurance in Georgia. Borroni discusses the concept and essence of insurance as a specific species of contract. Article 799 notes that there is no universally accepted definition of insurance. Nonetheless, the unique characteristics of insurance contracts distinguishes them from other types of contracts. Essentially, the definition of insurance is we know it when we see it! Thus, the history and evolution of insurance is one of distinguishing it from other types of transactions and contracts. For example, one of the earliest issues to be confronted was distinguishing insurance from wagering transactions. In early history, some types of insurance were rejected as a form of gambling. There is a lengthy discussion of the distinction of insurance as an enforceable aleatory contract compared to an illegal wagering contract.

Borroni notes that the distinctiveness of insurance law includes that insurance policies are aleatory contracts in which the insurer's obligation to pay is only triggered with the occurrence of specified events, covered under the insurance policy, that result in harm to the insured. Wagering involves the artificial creation of risk, followed by unilateral enrichment, while insurance contracts involve the transfer of risk from insured to insurer in exchange for the payment of consideration (premiums). The transfer of risk only has legal significance if the insured has an insurable interest to be protected. The other unique characteristic of insurance is the socialization of risk. The insurance company acts as a conduit for the distribution of losses by the insurer among a large class of similar insured parties. It collects premiums into a pool of funds that is used to pay a small set of insured parties that suffer catastrophic loss. The one concept not discussed is the device of reinsurance in which a smaller insurance company pays a part of the premium over to a larger insurance company to cover catastrophic events (earthquakes, floods, and so forth) where a large group of insureds are harmed, and the immediate insurer's pool of funds is not enough to cover all claims.

Article 799 like most of the topics in the *Commentary* pull from a variety of historical and contemporary sources. In explaining the concept of insurance, Article 799 discusses American insurance law, as well as German and Italian. It also discusses Roman law's distinction between aleatory and commutative contracts. This distinction was incorporated in the *Code Napoleon*, but later extinguished in the Italian Civil Code, while

the German Civil Code did not adopt the language of an aleatory contract. Following the historical review of insurance, Article 799 undertakes a comparative analysis of the common law (United Kingdom and United States), traditional civil law country of Italy, East Asian laws of Japan and China, mixed jurisdiction law of South Africa, and the Scandinavian legal system.

The historical and comparative study provided in this book allows the reader to obtain a general understanding of insurance law, and, at the same time, gives a more granular analysis of the commonalities and idiosyncrasies across legal traditions and countries. I recommend the *Commentary on Georgian Insurance Law* to anyone new to the field of insurance law, whether student, scholar, or lawyer.

Preface

Prof. Stefan Perner
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Despite its overwhelming importance in practice, Insurance Law is regarded as a kind of an outlier in many legal systems. Few legal curricula incorporate the subject into their lists of mandatory courses and even scholars with expertise in Commercial Law often prefer to specialize in the field of Banking or Securities rather than Insurance Law.

Georgia is a particularly pleasing exception: Whereas in many other countries Insurance Contract Codes were enacted, the Georgian Civil Code includes a whole chapter on Insurance (Chapter Twenty, Artt. 799 – 859). The importance of the integration of Insurance Law into the main body of Georgian Private Law is twofold. *First*, it is a visible sign of the importance of this branch of the Law. *Second* and no less important, it reminds the applicant of the roots of Insurance Contract Law. If no special provisions apply, general rules of Contract Law have to be observed.

The importance of Insurance Law within the Georgian legal system is reflected by the Commentary on Georgian Insurance Law at hand (edited by Prof. *Andrea Borroni*). The book does not only give an excellent insight into Georgian Insurance Law by the leading experts in the field. The authors also include numerous comparative remarks into their deliberations. The decision to write this volume in English will of course lead to a high level of attention also in other jurisdictions.

The present Commentary on Georgian Insurance Law, therefore, not only serves as an indispensable source for everyone dealing with Georgian Insurance Law. It also enriches the discourse on Insurance Law and its interplay with Private and Supervisory Law as a whole.

Premise

Prof. Andrea Signorino Barbat
Professor – Insurance Academic Director
University of Montevideo
General Secretary - AIDA World
Association Internationale de Droit des Assurances

The authors of this collective work have asked me to write this preface, which is an honour but also a great responsibility, since the object of the book is not related to regulations of the Oriental Republic of Uruguay, my country of birth and primary residence, but is a commentary on foreign insurance regulations, included in the Civil Code of Georgia, No 786- IIs, in force since July 1997, with subsequent amending and complementary laws, including in the field of insurance. The latest amendments to the Code were made on 15 July 2020 and the dates of the latest amendments to the insurance regulations are 28 June 2017 and 20 December 2019.

Insurance law is my specialization and the reason for my efforts, as well as the focus of my academic work and teaching. Thanks to this subject, I have the pleasure of receiving these kinds of invitations from esteemed colleagues and professors who share, worldwide, the same passion for private law, in particular for insurance law.

For this important academic opportunity, I would like to first thank General Editor Andrea Borroni, and I extend my thanks to all the co-authors of this valuable work, in order of their participation in the book: Paolo Tortorano, Clara Mariconda, Elena Signorini, Mariam Tsiskadze, Ciro G. Corvese, Santa Nitti, Lydia Velliscig, Daniela Micu, Raul Felix Hodos, Ignazio Castellucci, Natalia Motsonelidze, Andrea Russo, Marco Seghesio, Giovanna Carugno, Maria Beatrice Pagani, Giorgi Amiranashvili, Andrea Cotillo, Fabio Zambardino, Maryna Vahabava, Fabio Coppola, Gian Maria Cotillo, Lorena Di Gaetano, Alexandra Manfredino, Elena Martina Paone, Maria Beatrice Pagani, Sabrina Darbali.

The book that I am pleased to preface is entitled "Commentary on Georgian Insurance Law", but it is much more than a commentary on

the current legislation of insurance contracts in Georgia, as it provides a wealth of comparative law in the various articles analyzed by each author.

Thus, an extremely didactic comparison is made of Georgian legislation with that of the United Kingdom and the Common law in general, with the Scandinavian legal system, with the far East legal systems, Japan and China, with South Africa, with the European system in general, Austria, Bulgaria, France, Germany, Italy, Spain, Switzerland, Russia, and even Australia. In addition, the Principles of European Insurance Contract Law (PEICL) are examined in several commentaries, which constitute a notable advance in the always intricate effort to unify the principles and elements of insurance contracts at a regional and international level.

This important work is, in brief, a commentary on the insurance provisions of Book Three "Law of Obligations" of the Civil Code of Georgia. The Code is the main act of the civil legislation of Georgia and regulates property, family and personal relations of private nature. It consists of six Books: Book One - General Provisions of the Civil Code, Book Two - Law of Things, Book Three - Law of Obligations, Book Four - Law of Intellectual Property, Book Five - Family Law, and Book Six - Law of Succession. The Code repealed, among other rules, articles 32-54 of the Law of Georgia on Insurance of May 1997, through article 33 thereof which states "Articles 32-54 of this Law shall be declared invalid upon the entry into force of a new Civil Code of Georgia".

In Book Three, Special Part, Section One, Contract Law, Part Two, Chapter Twenty, we find the provisions on Insurance, which is precisely what the book we preface comments on in two Volumes.

Thus, in Volume One, the authors deal with the general provisions applicable to insurance contracts.

It is well known that the insurance contract is a complex contract, the cause (insurable interest) and object (risk) of which are regulated in a similar way at international level, as so do the obligations between the parties, coverage and eventual indemnity - in damage insurance - and benefit - in life insurance - on the part of the insurer, and payment of the premium, in full, on the part of the contracting party or insured. The reason behind this is that the insurance contract is a contract with

universal technical foundations that underlie its legal elements and make it a very special, multidisciplinary and cross-border contract.

Herein lies one of the great academic riches of insurance: that its study and teaching can be shared beyond the borders of one's own country.

The book in question is an example of this.

To give just a few examples, the conceptualisation of insurance provided by article 799 is not far from the current conceptions which, rather than a definition of insurance, are closer to its description with an operational and functional approach, where damage insurance, governed by the principle of indemnity, is clearly differentiated from personal insurance, where a sum insured or other benefits are promised to be paid by the insurer. This is in return for payment of the premium by the insured and within the terms of the contract.

However, it is noteworthy that article 799 seems to adhere to the modern tripartite classification of insurance - based on the type of benefit promised by the insurer - into indemnity insurance, sum insurance and benefit insurance. This replaces the classic bipartite classification into damage insurance and personal insurance, according to the risks covered. The article also emphasises the aleatory element present in the contract.

Georgian legislation discussed also deals with the normative prevalence that the doctrine in insurance law deals with, focusing, in recent times, on how to reconcile the application of consumer protection law with insurance law. Article 801 deals with this prevalence with respect to the application to compulsory insurance which has its own legislation: "The law may provide for compulsory insurance to which the rules of this Chapter shall apply unless they contradict compulsory insurance legislation". Controversially, the same article refers to reinsurance, the regulation of which is left to the respective law, a contract which is far from being a compulsory contract, which has a different object from that of insurance and is classically governed by the principle of autonomy of will at its highest expression.

Other shared aspect of this law with modern insurance legislations, including the latest laws in Latin America such as those of Peru, Chile and Uruguay -the last special insurance law in force in Latin America-,

is the description and requirement of minimum content that the policy must have, as provided by article 802.

Another examples are the types of policies (art. 803) which classically can be issued to a bearer as blank-endorsed or to order, or the need to define a time of commencement and a time of termination of the term of the contract.

Then, the legislation deals with the effects of the obligations and burdens of the parties, especially the burden of information (arts. 808 and 809) on the risk of the insured, establishing the right of termination of the insurer in the event of omission of information relevant to the assumption of the risk. This implies overcoming the absolute and relative nullities which are concepts set aside by modern trends in doctrine who seek, above everything, subsistence of the contract.

In any case, it should be noted that modern legislation, such as the Peruvian legislation of 2012, distinguishes between fraudulent and non-fraudulent misrepresentation or false declaration, the latter not causing the termination or nullity of the contract but the recomposition of the contractual balance by adjusting the premium or the insured capital. In Georgian law, the insurer can terminate the contract in the event of failure to provide the information defined in the corresponding chapter, with one-month's notice (art. 811).

However, in accordance with modern legislative trends, the annotated legislation relates the claim to the misrepresentation or false declaration, demanding its influence on the occurrence of the risk (art. 812): "If the insurer terminates the insurance contract after the occurrence of an insured event, it shall not be released from its duty if the circumstance with respect to which the duty to give notice was breached had no influence on the occurrence of the insured event and on performance of the insurer's duty".

It also refers to the Obligation to give notice of increased risk (art. 813), although it should be noted that, in this respect, it does distinguish between when there is intent and when there is no intent to increase the risk on the part of the insured, but ultimately always giving the insurer the possibility of termination, with or without notice. It then refers to the Obligation of notifying about an insured event (art. 814) and the Obligation to pay insurance premiums in a traditional approach.

With regard to Volume 2 of the prefaced work, the authors dwell on the branches of insurance, i.e. Damage Insurance (arts 820 - 843), Life Insurance (arts 844 - 853) and Accident Insurance (arts 854-858).

At this point we must highlight aspects such as the nullity of double insurance concluded to receive illicit income, "any contract concluded for this purpose shall be considered null and void", the duty to comply with the instructions of the insurer and to avoid or reduce the damage as far as possible, the obligation to notify the alienation of the insured goods.

Also noteworthy is the case of insurance of damage caused by war or other force majeure in which the insurer is liable for damage caused by war or other force majeure only if a special agreement so provides.

In relation to life insurance, it is worth highlighting the regulation of the insurance contract taken out for the benefit of another person, where written consent of this person, or their legal representative, is required. Therefore, it is not sufficient to prove the insurable interest of the contracting party in the life of the third party.

And very interesting is article 850 that regulates the case of suicide, where it is provided that the insurer will be held harmless from any loss or liability if the person whose life was insured commits suicide and the heir of the policyholder can claim the return of the insurance premiums paid. It should be noted that the rule does not clarify that suicide must be voluntary or conscious, nor does it establish time limits with no coverage, as is usual in other legislation regulating suicide.

With regard to personal accidents, it is striking that article 858 states that the policyholder has no right of recourse against the person who is liable for the damage. This cannot be interpreted literally as it would mean disregarding a right of the insured, unless the insured had already received the benefit, in order to avoid enrichment at the cost of the insurance. If the purpose were to prohibit subrogation because it is considered to be an insurance of persons, where the majority doctrine considers subrogation inapplicable because the principle of indemnity does not apply, it should have referred to the insurer instead of the policyholder.

Finally, it should be noted that Georgian insurance legislation does not clearly state in its provisions that it is mandatory or public policy as

modern insurance legislation does. However, the policy clauses cannot violate the essential principles laid down in the law in such a way as to distort the insurance contract, all of which is applicable to the legislation under discussion.

In short, the book I have the honour to preface is not only didactic, but also a must-read not only for Georgian insurance lawyers, but also for all colleagues who wish to have a broad comparative law overview of the core issues covered by the insurance regulations contained in the Georgian Civil Code.

I am grateful once again for the opportunity to preface this important book and congratulate once again all the co-authors for their magnificent contribution to the academia and insurance law.

Introduction to the Commentary on insurance law: the way of Georgia towards the European Union

Prof. Andrea Borroni
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In the first place, I would like to thank the Faculty of Law of the Iv. Javakhishvili Tbilisi State University and the "Jean Monnet" Department of Political Science of the Vanvitelli University of Campania for having granted me the honour of coordinating such an ambitious project, and, respectively, Prof. Tamar Zarandia, the Dean of the Faculty of Law, and Prof. G. M. Piccinelli, under whose directorship the project started and Prof. Francesco D'Ippolito the current Director of the "Jean Monnet" Department of Political Science, for having enthusiastically endorsed such a worthful undertaking.

Secondly, I owe special gratitude to all authors for their commitment and expertise, and to their Academic Institutions that have contributed to the successful accomplishment of the present Commentary.

Furthermore, I tribute a heartfelt thanks to Prof. Giorgi Amiranashvili for his helpfulness, even during the most delicate stages, demonstrating a great deal of perseverance and patience. Besides, I want to express my gratitude to the Publisher Favorite Style LLC for having taken up this project, envisaging the possibility to further enhance and foster the research in the domain of legal science.

Additionally, I would like to thank dr. Fabio Zambardino for his help during the editing phases of the work.

The chance which I have been given to coordinate the Commentary on Georgian Insurance Law has been, at the same time, a great deal of satisfaction but also, plainly, a great burden of responsibility.

In the first place, it is a great honor owing to my relationship with the Georgian nation, a Country which has always welcomed me with great friendship and, academically, awarded me a full professorship since 2018 (first, at the International Black Sea University and, now, at the New Vision University in Tbilisi) as well as to publish in the main Georgian national academic Law Reviews. A Country, therefore, with which I am willing to further strengthen my personal bond by engaging in various

new projects, and that such as, for instance, the enlargement of the academic staff of my Georgian University with Italian Professors dealing with comparative law.

Secondly, it is a great pleasure for I have had the opportunity to involve friends and colleagues and young scholars, whose significant expertise has allowed to successfully accomplish such a high-value task.

Finally, it has been a demanding test owing to the aspiring nature of the project itself, above all for a comparatist. In fact, it is well-known that every codification process has been anticipated by a comparative analysis, and, in some cases, the enactment of a new legislation has been combined with the issue of the related commentary, and that the legal reforms follow the same ballet, above all in domain of the law that is for its very nature technical and entailed social and political implications as well.

Besides, the extent of the task we had committed to accomplish was huge, because it represented the first project on Georgia's insurance law, and, as no previous work had ever addressed this issue before, and reliable sources were hard to find.

Given these short premises, it has been inevitable that the elective method which could better ensure the fulfillment of such a work was a comparative one, based on the assumption that legal data of a third State can be properly analyzed even by a foreign jurist. In fact, as eminently stressed by the Trento Thesis authors, though a foreign jurist cannot easily access legal information and data of a different legal system, his interpretation thereof would not be undermined by the 'coherency presumption' of the system, which, instead would affect a domestic jurist. In other words, a foreign jurist's analysis offers an external perspective on domestic matters.

Moreover, a comparative approach permits, among the other tasks, to offer an oversee of the key legal systems by highlighting their likenesses and dissimilarities, so as to provide a wider knowledge of global models to the prospective Georgian legislator, and, at the same time, to constitute a solid foundation for the Country's future legal developments and case law windfall.

Following this structure, authors have been asked to comply with a defined model of drafting the comments, based on three essential steps: i) the study of their own legal system, so as to outline how a definite fact pattern is regulated thereunder, ii) the report of how one – or more - of

the most representative legal systems worldwide rule on a given factual perspective or case, and iii) on the basis of their comparison, the observation on the Georgian system, addressing, first of all, its fortes, assets, and faults and/or limitations.

The publication is divided into two parts: in the first one, we can read the surveys of the tenured professors that kindly accepted this challenge; in the second one, the readers can enjoy the considerations of the newborn scholars who faced this task with highly valuable commitment.

It ends up emerging that despite the contrasts, nuances, different historical development, their theoretical foundations and their institutional keystones it often occurs that the diverse legal systems formulate similar solutions to tackle common problems even when an investigator looks at those aspects of different systems that perform similar functions and from the point of view of the functionalist approach, the comparative analyst should endeavor to explore the issue without applying any legal category, notion or reasoning deriving from his own legal system.

The project sees the light in a peculiar geopolitical and historical moment.

It is quite known that since its independence, Georgia aspired to be part of the European Union and it is evident in the Georgian Constitution, in the support of the people of Georgia (83% of Georgians approve joining the EU) and across the political spectrum.

This sentiment has been the driver for a number of key reforms founded on European values and standards: in this track the Commentary on the Georgian Labour code I have the opportunity to edit is perfectly situated, as well as the opinion on Georgia's efforts in implementing its obligations under the Association Agreement (AA) and Deep and Comprehensive Free Trade Area (DCFTA).

The Opinion of the European Commission delivered this June 2022 assesses Georgia's application on the basis of its capacity to meet the criteria set by the European Council in Copenhagen in 1993, as well as in Madrid in 1995 along with the impact of Georgia's accession on the EU policy areas at a later stage.

Setting aside the political requirements, as regards the economic measures, Georgia has accomplished a good level of macroeconomic stability with a record of sound economic policy and a positive business environment.

In order to improve the functioning of its economic framework, further reforms are required to ensure long-term inclusive development and external attractiveness. Even it has not been clearly said, the approximation of the Insurance market rules could be included in this request.

Given the good results in terms of reaching the acquis communitaire in several fields for the implementation of the Association Agreement, on 3 March 2022, Georgia presented its application for membership of the European Union.

On 7 March 2022, the Council of the European Union requested the Commission to submit its opinion on this application.

On the 17th of June the European Commission stressed out a number of reforms that they are expected to be implemented, 12 for Georgia, before the Country is agreed to be given candidate status. The Commission recommended that Georgia be granted candidate status, once the following priorities will have been addressed:

- address the issue of political polarisation, through ensuring cooperation across political parties in the spirit of the April 19 agreement;
- guarantee the full functioning of all state institutions, strengthening their independent and effective accountability as well as their democratic oversight functions;
- further improve the electoral framework, addressing all shortcomings identified by OSCE/ODIHR and the Council of Europe/ Venice Commission in these processes;
- adopt and implement a transparent and effective judicial reform strategy and action plan post-2021 based on a broad, inclusive and cross-party consultation process;
- ensure a judiciary that is fully and truly independent, accountable and impartial along the entire judicial institutional chain, also to safeguard the separation of powers;
- notably ensure the proper functioning and integrity of all judicial and prosecutorial institutions, in particular the Supreme Court and address any shortcomings identified including the nomination of judges at all levels and of the Prosecutor-General;

- undertake a thorough reform of the High Council of Justice and appoint the High Council's remaining members. All these measures need to be fully in line with European standards and the recommendations of the Venice Commission;
- strengthen the independence of its Anti-Corruption Agency bringing together all key anti-corruption functions, in particular to rigorously address high-level corruption cases;
- equip the new Special Investigative Service and Personal Data Protection Service with resources commensurate to their mandates and ensure their institutional independence;
- implement the commitment to "de-oligarchisation" by eliminating the excessive influence of vested interests in economic, political, and public life;
- strengthen the fight against organised crime based on detailed threat assessments, notably by ensuring rigorous investigations, prosecutions and a credible track record of prosecutions and convictions;
- guarantee accountability and oversight of law enforcement agencies;
- undertake stronger efforts to guarantee a free, professional, pluralistic and independent media environment, notably by ensuring that criminal procedures brought against media owners fulfil the highest legal standards, and by launching impartial, effective and timely investigations in cases of threats against the safety of journalists and other media professionals;
- move swiftly to strengthen the protection of human rights of vulnerable groups, including by bringing perpetrators and instigators of violence to justice more effectively;
- notably consolidate efforts to enhance gender equality and fight violence against women;
- ensure the involvement of civil society in decision-making processes at all levels;

– adopt legislation so that Georgian courts proactively take into account European Court of Human Rights judgments in their deliberations;

– ensure that an independent person is given preference in the process of nominating a new Public Defender (Ombudsperson) and that this process is conducted in a transparent manner; ensure the Office's effective institutional independence.

The Commission will monitor Georgia's progress to address these priorities and report on them by the end of 2022.

Among the required work of approximation (the 35 categories) and the Copenhagen indexes, some steps to advance in acquis are highlightened. Insurance law reforms could answer to some of them (or single aspects of them) ranging from the Free movement of goods, Competition policy, Financial services, to above all Transport policy and Enterprise and industrial policy until the Consumer and health protection.

Insurance law is of pivotal importance for today's Georgia, as a country preparing to become a part of the EU, due to the high development of this framework in other first-world countries of the EU regarding the safety of the means of circulation, the guarantees provided to weaker parties, and s a way to soften the risk in economic and financial transactions.

To sum up, over the last two decades, Georgia has pursued impressive reforms targeted at improving its economic governance and business climate, whose environment has been deeply liberalised since the mid-2000s.

To ensure a resilient business environment, more needs to be done to strengthen the legal framework and enforcement procedures, and step up the enforcement of contracts. Among them the insurance contracts play a vital role in the economy.

The spirit is high like the hopes for a future more concrete integration that passes also through the Gordian knot of the insurance law reform: the baton is now passed to the Georgian jurists (being them judges, rulers, professors, or lawyers) for their comments on this work and the future concrete implementation of the rules.

Institutional greetings

Assoc. Prof. Dr. Tamar Zarandia
Dean of the Faculty of Law
of Ivane Javakhishvili Tbilisi State University,
PhD in Law, Associate Professor

I am glad that the present work is published with the institutional cooperation and co-organization between the Political Science Department of the Università degli studi della Campania Luigi Vanvitelli and the Faculty of Law of Ivane Javakhishvili Tbilisi State University. It offers an article-by-article and comparative legal commentary on the norms regulating insurance, given in the twentieth chapter of the Civil Code of Georgia.

It should be noted that this publication is the second product of the fruitful cooperation between the above-mentioned partner universities. In particular, in 2014, the Commentary on the Labour Code of Georgia was initially published in English and presented to the public in Rome at the Italian Parliament, and later it was translated into Georgian and its presentation was organized at Tbilisi State University.

It is noteworthy that this commentary, based on comparative methodology, despite the reforms concerning the Labour Code of Georgia implemented in the following years, took a worthy place not only by becoming an accessible source for foreign persons interested in Georgian law but also by becoming a reference book for Georgian scholars and practitioners working in the field of labour law. I am deeply convinced that this commentary will share the success of its predecessor and will contribute to the development of Georgian insurance law.

I would like to express my sincere gratitude to all the people whose great efforts have laid the foundations and implemented the mentioned project. A special thanks goes to the author of the idea of these projects, an employee of the Department of Internationalization and Scientific Research at our faculty, Assoc. Prof. Dr. Giorgi Amiranashvili, and the General Editor of both commentaries, a great fan of Georgia and Georgian law, our respected Italian Colleague, Prof. Dr. Andrea Borroni. I am grateful to all the authors of the commentary who have so enthusiasti-

cally and completely unselfishly produced a work of impressive scope and valuable content. I am also pleased by the fact that our faculty members, Prof. Dr. Mariam Tsiskadze, Assoc. Prof. Dr. Natalia Motsonelidze, and Assoc. Prof. Dr. Giorgi Amiranashvili, are represented among the authors.

Successful implementation of such a large-scale initiative is impossible without the support of partner organizations. In this regard, I would like to express my gratitude to the LEPL Insurance State Supervision Service of Georgia (ISSSG), which expressed great interest in the mentioned project and significantly contributed to its realization.

Finally, it should be noted that the project leadership had already decided to start working on the Georgian translation of the present commentary, which is not an easy task. I wish them success and hope that these publications will be of great help to both researchers and practicing lawyers and will become an integral part of the university curriculum.

Institutional greetings

Dr. Giorgi Amiranashvili
PhD in Law, Visiting Lecturer, Senior Specialist
at the Department of Internationalization and Scientific Research,
Member of the Contemporary Private Law Institute
of the Faculty of Law of Ivane Javakhishvili Tbilisi State University

I am glad that, within the framework of close and long-term cooperation between the Faculty of Law of Ivane Javakhishvili Tbilisi State University and the Political Science Department of the Università degli studi della Campania Luigi Vanvitelli, an article-by-article and comparative legal commentary on the regulatory norms of insurance contracts contained in the Civil Code of Georgia is being published.

The initiation and implementation of the idea were preceded by a similar project completed a few years ago, which was executed by the initiative of the same partner organizations and was dedicated to an article-by-article comparative legal commentary of the Labour Code of Georgia.

I will never forget that extraordinary day in 2015 when this book was presented in Rome at the Italian Parliament. This was followed by long and time-consuming work on the Georgian translation of the commentary, which was completed by its publication and the presentation at Tbilisi State University in 2016.

Insurance law has been taught at Tbilisi State University for many years. I also had the honour to teach this subject to students for about five semesters and, at the same time, to be involved in research activities in the field of insurance law. For this opportunity, I thank my dear teacher and senior colleague, Prof. Dr. Mariam Tsiskadze. I am glad that I also received the opportunity to be a co-author of this commentary with my respected Georgian and Italian colleagues.

I would like to take this opportunity to thank the General Editor of the book, my dear friend and colleague, Prof. Dr. Andrea Borroni, for long-term and productive cooperation. I thank each of the authors for their selfless contributions.

I express my sincere gratitude to my home university and faculty, and I am especially thankful to Assoc. Prof. Dr. Tamar Zarandia, Prof. Dr. Irma Kharshiladze and Prof. Dr. Irakli Burduli, for their encouragement and invaluable support of any such idea or initiative.

Last but not least, I would like to extend my appreciation to the LEPL Insurance State Supervision Service of Georgia (ISSSG) and its leadership, especially Ms. Nino Niavadze, for their significant contribution to support this project.

Finally, I hope that this commentary will share the fortune of its predecessor and become an interesting and useful source for both Georgian and foreign scholars and practitioners working in the field of insurance. I also believe that this book will become an integral part of the university curriculum in the direction of teaching comparative law. And, of course, I will look forward to our other similar initiatives and endeavours in the near future.

Editorial notes

Davit Onoprishvili
Chairman of Insurance State Supervision Service of Georgia
Nino Niavadze
Head of Legal Department
at Insurance State Supervision Service of Georgia

The history of insurance originates in the distant past, when the first signs of civilization and statehood appeared, and develops in its wake. Insurance continues to evolve, both with the diversity of insurance relationships, as well as with the constant refinement of its regulatory legislation and the introduction of best practices.

The economic development of Georgia actively promoted the reform of the insurance system, which contributed to the establishment of insurance organizations and insurance brokers, the rapid development of the industry, and the consideration of norms regulating insurance relations in the Civil Code of Georgia. The process of development of insurance relations in Georgia and its legal regulation covers the years 1990-1997 - the period after gaining state independence.

Since Georgia belongs to the category of countries with a transformational economy, it is important to know the international standards that are considered the best practices in the field of insurance.

For the Insurance State Supervision Service of Georgia, as the body responsible for the implementation of the state policy in the field of insurance, it is of the utmost importance to analyze the regulatory legislation of the field and identify gaps to refine them and bring them closer to the best international practices. The service constantly works in this direction, issues special regulatory normative acts, and initiates legislative changes. Also, for the service, as for the member of the management committee of the national strategy of financial education in the country, it is important that the comments on the legislation in the field of insurance are available to all interested individuals.

We are sure that the present comments, a thorough analysis and comparison of the existing legislation in the field of insurance with the legislation of advanced countries in the same field will become an important source for interested people in insurance issues and will contribute to bet-

ter informing the public about insurance relations and would help their implementation in practice. We believe that these comments will become a desk book not only for researchers of this field, but also for practicing lawyers and judges reviewing insurance disputes.

It is a big honor for the Insurance State Supervision Service of Georgia to participate and contribute to the publication of this book.

I – GENERAL PROVISIONS

Article 799 - Concept

1. Under an insurance contract the insurer shall be obligated to compensate the insured for the damages resulting from the occurrence of an insured event, subject to the terms of the contract. If insurance involves a firm fixed insured sum, the insurer shall be obligated to pay the insurance amount or perform any other promised action.

2. The policyholder shall pay the insurance contribution (premium).

3. A derivative shall not be an insurance contract. Relations arising from derivatives shall be regulated under the Law of Georgia on Financial Collaterals, Mutual Setoffs and Derivatives.

Andrea Borroni

1. Introduction

Article 799 of the Georgian Civil Code (hereinafter, also GCC) deals with the concept of the Insurance contract. The letter of the law does not provide the definition, in an Aristotelian way, but it provides more a functional/operational description of what is supposed to be the structure of the parties' performance.

Indeed, the Article makes something more by introducing the case in which the autonomy of the parties pre-determined the sum due to the insurer if a specific event takes place.

Therefore, the policyholder shall pay the insurance the premium, the insurer will compensate the insured if some events covered by the agreement happens.

The structure so described is the one of an aleatory contract: an agreement that is connected with an event that is not under someone's control, that may or may not happen, and of which the result is uncertain. It is a common understanding that the most common type of aleatory contract is an insurance policy, in which an insurance company must make payment only after a fortuitous event occurs.

Article 799 of the GCC falls within this schema.

2. Definition

In general terms, an insurance contract is commonly defined as a bargain under which the insured agrees to pay a specified contribution, and, in exchange, the insurer agrees to indemnify the insured against losses[1] that are within the terms of the policy, but that arise from events which are unknown and contingent when the policy is issued.[2]

Thus, an insurance contract is aleatory in character, since the insurer's obligation to perform is dependent on the random or chance occurrence of a fortuitous event,[3] and the underwriter of the risk is not supposed to perform its promise to pay unless the insured against casualty arises. The insurer's payment is conditional on a contingency that may or may not occur, and the insured's promise to pay the premium is completely independent of the insurer's performance of its conditional promise.[4]

The numerous types of insurance, as well as their legal characteristics, «make every attempt to provide a precise and simple definition of the insurance contract very complex and difficult. Therefore, there is not a universal definition of the insurance contract»[5].

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1 *Hahn v. Oregon Physicians Service*, 689 F.2d 840 (9th Cir. 1982) (the court said: «The insurance contract involves a contractual relationship which exists when an insurer, for consideration, agrees to reimburse an insured for loss caused by designated contingencies»).

2 *U.S. v. Tilleraas*, 709 F.2d 1088, 12 Ed. Law Rep. 24, 73 A.L.R. Fed. 295 (6th Cir. 1983) (noting also that if the contingency never occurs, the insurer, having been paid a premium, benefits).

3 *Panizzi v. State Farm Mut. Auto. Ins. Co.*, 386 F.2d 600 (3d Cir. 1967).

4 *Jackson Nat. Life Ins. Co. v. Receconi*, 1992-NMSC-019, 113 N.M. 403, 827 P.2d 118 (1992).

5 T. Dimov, *Definition of Insurance Contract: De Lege Lata - De Lege Ferenda*, BALKAN SOC. SCI. REV., 2018, *cit.*, p. 26.

The legal theory defines two categories of the insurance contract: compensation and prestation theory. The first one «outlines the aspect of remuneration in the insurance contract regarding both the property and the personal line of business. The latter defines the insurance contract as an equal obligation which imposes reciprocal prestation upon parties»[6].

However, both theories are based on the same understanding of the insurance contract as being a contract which provides compensation. Although, this trait of the contract refers only to property insurances.

3. Aleatory contract: the difference between Insurance and gambling

Insurance contract is an aleatory contract.

In common law, an aleatory contract can be seen as a contract whose value to either or both of the parties depends on chance or future events, or where the monetary values of the parties' performance are unequal.

These contracts are of two kinds.

1. When one of the parties exposes himself to lose something which will be a profit to the other, in consideration of a sum of money which the latter pays for the risk. Such is the contract of insurance; the insurer takes all the risk of the sea, and the assured pays a premium to the former for the risk which he runs[7].
   An insurance policy is an aleatory contract because the insurer's obligation to pay a loss depends on uncertain events, while the insured must pay a fixed premium during the policy period[8].
   An aleatory contract between an insured and an insurer, who agrees to indemnify the insured for loss caused by specified events[9].
2. In the second kind, each runs a risk which is the consideration of the engagement of the other; for example, when a person buys an

6 *Ibid*.

7 J. M. Limbaugh, *Life insurance as security for a debt and the applicability of the rule against wager contracts*, in *Missouri Law Review*, 1999, p. 693.

8 In England a contract of life assurance in the absence of an insurable interest of the assured in the life insured has been considered to be a wagering contract and has been made void by the Life Assurance Act, 1774. Marine policies without insurable interest has been made void by the Marine Insurance Act, 1906. It is believed that the Life Assurance Act, 1774 applies also to all other policies. In respect to insurance on goods, it is submitted that the Gaming Act, 1845 will strike down any policy, which is really a wager.

9 *Moran, Galloway & Co v Uziella* (1905) 2 KB 533.

annuity, he runs the risk of losing the consideration, in case of his death soon after, but he may live so as to receive three times the amount of the price he paid for it[10].

An insurance contract is not a wager. This statement is valid for all kinds of insurance.

The insurance contract is aleatory depending on an uncertain event but it is not considered a wager because it does not transfers an existing risk[11].

In fact, if there is no risk to transfer it is not an insurance contract but a wager not enforceable.

It is said that the insured has no insurable interest.

This means that: «[t]he insured has no such interest if the occurrence of the event that the insurance contract covers would cause the insured no loss of any kind»[12].

Thus, one who has no protectable interest in the insured object is not allowed to gamble on the possibility of its destruction for reason of public policy.

Also, in common law there is something similar to the Italian *alea normale*. Indeed, the risks involved in a social or economic activity are included in the usual path of the business. These risks are transferable throughout insurance contracts.

This is theoretical-logical structure that distinguishes the wagering contract from an insurance contract. Indeed, also in the insurance contract is possible to see the elements of a wager. In the case of a theft insurance, the policyholder bets on the fact that his car will be stolen and the insurer on the opposite event: if the car will be stolen the policyholder wins the bet (the irony of the destiny) and will receive the payment of the coverage; on the other side, the winner would be the insurer that received the fees as a stake.

The uncertainty is seen in the American system as the way to distinguish wager and insurance.

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10 D. Farnsworth, *Moral Hazard in Health Insurance: Are Consumer-Directed Plans the Answer?*, in *Annals Health L.*, 2006, pp. 317-320.

11 A. L. Corbin, *Corbin on Contracts. A Comprehensive Treatise on The Rules of Contract Law*, in *The Yale Journal*, 1950, p. 86.

12 *Ibid*. These are the cases of insurance policy on the life of another party (not connected by any relationship) or fire insurance policy on the house of another.

On one side a new risk is created through a bargain and there is no exchange of performances[13].

The consideration of an insurance contract is the transfer of an existing risk. If there is no insurable interest to transfer the contract is not insurance.

With the coming of the civil codes, the wagering contracts are more and more drown near to the category of the aleatory contracts.

In the *code Napoleon* appears clear the distinction between the commutative and aleatory contracts. These contracts stopped to be an under category of the onerous contracts[14].

The French code has two different definitions of aleatory contract.

The Article 1104 says: «[i]l est commutatif lorsque chacune des parties s'engage à donner ou à faire une chose qui est regardée comme l'*équivalent de ce qu*'on lui donne, ou de ce qu'on fait pour elle. Lorsque l'*équivalent consiste dans la chance de gain ou de perte pour chacune des parties, d*'après un évènement incertain, le contrat est aléatoire».

While the Article 1964 speaks again of aleatory contract: *«[l]e contrat aléatoire est une convention réciproque dont les effets, quant aux avantages et aux pertes, soit pour toutes les parties, soit pour l*'une ou plusieurs d'entre elles, dépendent d'un événement incertain. Tels sont: le contrat d'assurance; le prêt à grosse aventure; le jeu et le pari; le contrat de rente viagère. Les deux premiers sont régis par les lois maritimes».

This Article is, then, followed by the discipline of the gaming and wagering contracts and of the life annuity[15].

The distinction was explained by the doctrine considering the Article 1104 related only to the non-commercial contracts while the Article 1964 refers also to the commercial ones (in fact, for example, the insur-

13 A. L. Corbin, *Corbin on Contracts. A Comprehensive Treatise on The Rules of Contract Law*, *cit*., p. 479.

14 For the doctrinal analysis see C. Demolombe, *Cours de code Napoleon*, Vol. XXIV, A. Durand & L. Hachette, Paris, 1868, p. 25.

15 Article 1964: *Chapitre 1er. - Du jeu et du pari.*

Article 1965: *La loi n'accorde aucune action pour une dette du jeu ou pour le paiement d'un pari.*

Article 1966: *Les jeux propres à exercer au fait des armes, les courses à pied ou à cheval, les courses de chariot, le jeu de paume et autres jeux de même nature, qui tiennent à l'adresse et à l'exercice du corps, sont exceptés de la disposition précédente. Néanmoins le tribunal peut rejeter la demande, quand la somme lui paraît excessive.*

Article 1967: *Dans aucun cas, le perdant ne peut répéter ce qu'il a volontairement payé, à moins qu'il n'y ait eu, de la part du gagnant, dol, supercherie ou escroquerie.*

ance contract was disciplined in the commerce code of the 1807 by the Article 322 ss.)[16].

The definition of the Article 1964, created considering more the economic effects that the party will receive instead of looking to the structure of the contract as the Article 1104 does, had more success.

The Italian codes before the unification follow the schema of the *code Napoleon* and especially of the Article 1964.

The ABGB of 1811 provided expressly the discipline for the gratuitous aleatory contract. The Article 1267 ABGB says: «[t]he first Italian civil code of the 1865 erased the distinction between the aleatory and commutative contracts». In fact, the Article 1102 says: «[i]n Germany the category of the aleatory contracts had bad luck; in fact, the majority of the pandectist was against the classification, so the codification of the BGB does not speak of it»[17].

The aleatory contract is a contract in which there is uncertainty on the reciprocal performances of the parties.

To these contracts is not applicable the discipline of the rescission and of the termination of the contract.

The uncertainty of the performances refers to the juridical effects that affect the parties with regard to the *an* and the *quantum*.

To be aleatory the *alea* has to be essential to the contract; in other terms, the reason that prompts parties to bind themselves consists in the expectation of an advantage.

It is not aleatory the contract in which there a *normal alea*, *id est* a risk that was reasonably foreseeable in every bargain by each person of ordinary diligence.

The actual Italian legal system foresees and presupposes the aleatory contract, but the civil code gives no definition and no discipline.

The Article 1472 states that a contract can have as object future things, and it is null if the thing does not come in existence[18].

16 M. Troplong, *Dei contratti aleatori, In commenti sul prestito, deposito, sequestro e contratti aleatori*, trad. It., Antologia legale, Naples, 1879, p. 419 ff; G. R. Pothier, *Trattato del giuoco*, in *Opere contenenti i trattati di diritto francese*, trad. It., II ed., t. II, Livorno, 1841, p. 297; G. Boudry-Lacantinerie, *Delle Obbligazioni*, in *Trattato teorico pratico di diritto civile*, directed by G. Boudry-Lacantinerie, trad. It., Milan, s.d., pp. 17-18.

17 B. Windsheid, *Diritto delle Pandette*, trad. It. a cura di C. Fadda & P.E. Bensa, vol. II, Turin, 1904, p. 258, footnote 2.

18 See, *ex multis*, P. Perlingeri, *I negozi sui beni futuri*, Naples, 1962.

This is the transplant of the Roman *emptio spei* in the Italian legal system.

The Article 1472 codifies two autonomous hypotheses of sale of future things: the *emptio spei* and the *emptio rei speratae*.

The former one is an aleatory the latter a commutative sale[19].

It is easy to distinguish between the case in which a buyer will pay a lump sum in exchange for the fish that will be caught instead of the fish that may be caught.

Another aleatory contract is the "*rendita*" (derived from the Latin *reddere*) or annuity, i.d., a series of fixed-amount payments paid at regular intervals over the period of the annuity.

The *rendita* can be *perpetua* or *vitalizia*[20].

The *rendita perpetua* a party has the right to ask the other (and to the descendants of the latter) a sum of money in change of the transfer of an immovable or of a capital. The debtor of the sum can free himself by paying a sum based on the capitalization of the annuity and the interest (the so-called *riscatto* of the Article 1866).

The *rendita vitalizia* is an aleatory contract by all means. In fact, the contract has the term of the life of a party. The transfer of the immovable can be obtained with an uncertain amount of money or annuity.

The insurance is a contract in which the insured pays a sum of money, the *premium*, to the insurer that obliged himself to prevent the risk of an event (the life of a person, a fire, a car accident etc.).

The cause of the contract is the transfer of an existing risk[21].

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19 The concept of *emptio spei* is known also in the French doctrine (see M. Domat, *Les Loix Civiles dans leur ordre naturel*, Paris, 1777, p. 167) and in the German one (see L. Enneccerus, *Recht der schuldverhaltnisse*, J. C. B. Mohr, *Tubingen*, vol. II, 1958, par 101, p. 395 and *passim* F. Gluck, *Commentario alle pandette tradotto e arricchito da copiose note e confronti col Codice Civile del Regno d'Italia*, Libro XI, titolo V, *De aleatoribus*, Milan, 1903).

20 A. Lener, *Il rapporto di rendita perpetua*, Milan, 1967.

21 About the insurance contract the peculiarity of the Louisiana legal system is pointed out in famous case. *DiGerolamo v. Liberty Mut. Ins. Co.*, 364 So. 2d 939 (La. 1978) The court discussed the requirement of an insurable interest when liability insurance was at issue, in the context of a policy issued to a father on a car bought and owned by his son, who had purchased the car a week before reaching majority. «While we are disposed to find that in Louisiana there is no requirement of insurable interest with respect to liability insurance […] Nonetheless, as we have mentioned hereinabove we find it unnecessary to resolve at this time this question of whether in Louisiana a policyholder's insurable interest is required as it pertains to liability insurance on an automobile. Even if there were to be a requirement of an insurable interest for automobile liability insurance, in terms of possible (prospective) liability there is surely such an interest present in this case».

For the peculiar aspect of the distinction with a wager, so, although the insurer's obligation to pay is determined by the fate, a contract of insurance is different from a gambling contract[22], since the insured will have undergone a loss and the parties have merely disposed to allocate the loss[23].

Moreover, one purpose of insurance is to socialize risk, to spread it across a large group, whereas an indemnity agreement is designed simply to shift a risk from one party to another, thereby justifying the different rules; moreover, the main purpose of the agreement containing the indemnity provision was not to spread risk at all, but rather to transfer a portfolio of loans; finally, unlike an insurance contract, the instant contract was not an adhesion contract, and therefore application of the insurance rule was inappropriate[24].

For wager, characterized by the artificial creation of the risk and by a final unilateral enrichment, a corresponding advantage is immediately created, with a patrimonial awarding whose value is given by the probability of the event. Yet, it does not satisfy in itself the contractual interest (as in insurance), but it has an instrumental function. The final interest will realize only for one of the contractors. The occurrence of the event converts an iniquity aleatory position into right and obligation and discharges the other one. In insurance the position would be different. The interest of the parties also realizes with the non-existence of the service of the insurer. Indeed, insurance function finds the way to realization in the structure of the relation. In the same sense is possible to say that the insurance contract tends to avoid the misfortunes while the wagering contract tends to raise the inequality that come from the misfortune.

The difference between the insurance and the wagering contract is that in the former one party does not sustain a risk while in the latter both parties carry the risk[25].

This is theoretical-logical structure that distinguishes the wagering contract from an insurance contract. Indeed, also in the insurance contract is possible to see the elements of a wager. In the case of a theft insurance,

22 S. Williston, *Williston on Contract*, *1861-1963. Treatise on the law of contracts*, chapter 49:1.

23 *Castleberry v. Goldome Credit Corp*., 418 F.3d 1267 (11th Cir. 2005).

24 *Ibid*.

25 G. R. Pothier, *Trattato del contratto di assicurazione*, in *Opere contenti I trattati di diritto francese*, trad. It., II ed., t. II, Livorno, 1841, p. 97.

the policyholder bets on the fact that his car will be stolen and the insurer on the opposite event: if the car will be stolen the policyholder wins the bet (the irony of the destiny) and will receive the payment of the coverage; on the other side, the winner would be the insurer that received the fees as a stake. The creation of a risk for a gratuitous benefit, so, the consideration of the wagering contract while the insurance contract transfers an existing risk[26].

The uncertainty is seen in the American system as the way to distinguish wager and insurance. On one side a new risk is created through a bargain and there is no exchange of performances[27]. The consideration of an insurance contract is the transfer of an existing risk. If there is no insurable interest to transfer the contract is not insurance[28].

Furthermore, unlike a gambling contract, "the winner does not take all"; the company gets in premiums from all of its insureds, it is true, but it has to pay death or property loss claims to those suffering losses among its total body of insureds. Moreover, the bargain is not one-sided or unfair[29].

Therefore, «[t]he unconditional and periodically recurring duty of the insured to pay a relatively small premium to keep the policy in effect balances the conditional promise of the insurer to pay a much larger amount, but only if and when a loss occurs»[30]. In other words, an insurer expects that losses will occur, and they may be predicted actuarially; the cost of these expected losses is then spread through the market by charging a premium, the amount of which is based on the insurer's evaluation of the risks and likely losses within that market[31].

26 See A. Borroni, *I contratti di scommessa: osservazioni di diritto comparato*, in G. Mazzei & J. Espartero Casado, *Problematiche giuridiche e ruolo sociale dello sport - Problemática jurídica y papel social del deporte*, Naples, 2014.

27 A. L. Corbin, *Corbin on contract*, St. Paul Minnesota, with other re-editions since 1962, p. 479 ff. See also, S. Williston, *A treatise on the law of contracts*, 4th ed., Rochester, 2003, 540 ff.

28 A. Borroni, *I contratti di scommessa: osservazioni di diritto comparato*, cit.

29 *Castleberry v. Goldome Credit Corp*., 418 F.3d 1267 (11th Cir. 2005).

30 S. Williston, *Williston on Contract*, *1861-1963. Treatise on the law of contracts*, chapter 49:1, *cit*.

31 *Castleberry v. Goldome Credit Corp*., 418 F.3d 1267 (11th Cir. 2005); *Washington Physicians Service Ass'n v. Gregoire*, 147 F.3d 1039 (9th Cir. 1998), as amended on denial of reh'g and reh'g en banc, (Aug. 24, 1998) (the court, quoting *Group Life & Health Ins. Co. v. Royal Drug Co*., 440 U.S. 205, 99 S. Ct. 1067, 59 L. Ed. 2d 261 (1979), said «[t]he primary elements of an insurance contract are the spreading and underwriting of a policyholder's risk»).

Accordingly, the features by which a contract of insurance is distinguished from other types of contracts may be said to be: (1) the insured's possession of an insurable interest, or an interest in the insured property or insured life, capable of being valued in money; (2) the possibility, or the reasonable belief on the part of both parties, that the insured will suffer loss through damage to or destruction of its insurable interest by the happening of the casualty or death insured against; (3) the insurer's legal assumption of this risk of loss in a fixed or determinable amount; (4) the collection, in advance or at periodic intervals in installments from the insured and all others within the insured's class, of a ratable contribution known as a premium, as consideration for the insurer's assumption of risk; and (5) the distribution of losses by the insurer among that large class of similar insureds by charges to the insurance fund built up through the systematic collection of premiums paid by the members of the insured class[32].

4. Historical overview

The insurance contract, considered in its early form, was derived from maritime law which was a part of the General Law Merchant[33].

32 Cf.: *Mobile Airport Authority v. HealthSTRATEGIES, Inc.*, 886 So. 2d 773 (Ala. 2004) (in affirming summary judgment in favor of the insurer, the court said: «[t]he trial court determined that an oral contract existed between the appellees and [the insured,] MAA. An oral contract for insurance may exist, so long as the 'essential terms' of the contract are agreed upon. The 'essential terms' of an insurance contract are (1) the rate of premium, (2) the duration of the policy, (3) the nature of the risk, (4) a description of the property or person or interest to be insured and its location, and (5) the amount of insurance. … The appellees assert that all of those essential elements were contained in the application and in a … letter sent by [a managing underwriter] to [a third party administrator]. Acceptance of MAA's application for stop-loss insurance was clear from [the insurer's] receipt of premiums; from the assignment of a policy number to MAA; and from the letters sent …, which used terms such as 'coverage,' 'mid-contract,' and 'cancellation' when describing the relationship with MAA».). Cf.: *Harris v. Albrecht*, 2004 UT 13, 86 P.3d 728 (Utah 2004) (the elements essential to an insurance contract include the subject matter to be covered, the risk insured against, the amount of indemnity, the duration of coverage and the premium).

33 W. R. Vance, *Handbook on the Law of Insurance*, 3rd ed. by B. M. Anderson, St. Paul, Minn. West Publishing Co., 1951, p. 7.

The Italian cities «in the early middle ages and the Lombard merchants who came to London in the thirteenth century were the first to put the insurance contract in its legal form»[34].

In the United States, the insurance contract was introduced by the English common law in most of the States[35].

Historically, the first life insurance contract dates back to 1536 in London along with an ocean-going marine insurance contract[36].

It can be assumed that other insurance contracts, much earlier date, were known whether written or oral. It was not until 1574 «that the first significant step was undertaken towards the formation of some authoritative body in London to deal with all cases of disputes between the two parties to the insurance contracts»[37].

For many years, and until 1774, when the English act was passed, gamblers in England have issued legitimate insurance contracts[38].

An early form of contract definition, used for maritime insurance in Europe as early as 1590, is contained within a French guide on maritime laws known as "*Guidon de la Mer*" whose author is unknown[39]. In his definition of the maritime insurance contract, the author stated that it was «a contract between two parties under which compensation is promised for damages incurred in the transport of goods by sea, one party, the insured, undertaking to be responsible for the indemnity»[40].

This is deemed as the first definition of an insurance contract and is still used in most textbooks. There is abundant evidence that the

34 S. A. Salama, *Explanation of the Aleatory Aspect of the Insurance Contract with Reference to Risk*

Theory, in *The Journal of Insurance Issues and Practices*, 1979, *cit*., p. 62.

35 *Ibid*.

36 See, on this point, T. O'Donnell, *History of Life Insurance In Its Formative Years*, Chicago: American Conservation Company, 1936, p. 177; E. Wright, *The Bible of Life Insurance*, Chicago, The American Conservation Company, 1932, p. 17.

37 S. A. Salama, *Explanation of the Aleatory Aspect of the Insurance Contract with Reference to Risk*

Theory, *cit*., p. 64.

38 *Ibiid*.

39 F. Martin, *The History of Lloyd's and of Marine Insurance in Great Britain*, New York, 1971, p. 41.

40 S. A. Salama, *Explanation of the Aleatory Aspect of the Insurance Contract with Reference to Risk*

Theory, *cit*., p. 64.

principles herein were practiced at the end of the seventeenth century in Europe and England[41].

5. Common law[42]

5.1 United Kingdom

The law provides no exhaustive definition of a contract of insurance. Nor, because of the dynamic nature of insurance business, is it ever likely to do so. However, the courts have provided useful guidance in the form of descriptions of contracts of insurance. These state that the ultimate tests

41 *Ibid*. The 16th and 17th centuries saw the establishment of special courts and insurance codes. Before that era, insurance business and insurance contracts were banned in many European countries, as were any betting contracts. Before that era, «insurance business and insurance contracts were outlawed in many European countries, and likewise any wager contract». *Ibid*. The first statute relating to marine insurance and its contracts in England «was passed in 1601. The gambling principle was acceptable in insurance contract according to that law. With the era of licensing insurance corporations to practice marine, life and fire insurance in the 1720s in England, many insurance acts were passed to regulate and supervise that pecu- liar kind of business». *Ibid*. Almost all these codes legalized the insurance contract as it had been practiced, assuming it to be a special kind of wager. Those acts were more concerned with the financial strength of insurers on the one hand, and the amount of money they had to pay to finance the government to pay off its debts on the other. It was not until «the end of the eighteenth century that the Lloyd's of London with its very well developed "Register Book of Shipping", and the insurance corporations with their keen com- petition attracted a large number of risks which helped to shift insurance from gambling to a business based on a loss averaging. However, when the royal assent was given to an act for incorporating the members of the Lloyd's of London or for other insurance corporations, the parliament did not define or classify the insurance contract». *Ibid*.

42 With regard to Australia, for a considerable period insurance law followed closely the English model. An insurance policy is a legal contract between an insurance company and a customer, and places strict obligations on both parties. In 1984 a substantial reform was made to Australian insurance law by two pieces of legislation: the Insurance Contracts Acr and the Insurance Act. Conceptually, a contract of insurance has been described as «a contract upon speculation». See *Carter v Boehm* (1766) 3 Burr 1905; 97 ER 1162, p. 1909 (Burr), 1164 (ER); *Re Commonwealth Homes & Investment Co Ltd* [1943] SASR 211 p. 231. An insurance policy is a contract comprising a promise by an insurer to indemnify, pay or provide a benefit «to a policyowner, if that policyowner suffers loss defined under the policy, in return for the consideration of the payment by the policyowner of, or the policyowner's promise to pay, an amount of money, called the 'premium', to the insurer». I. Enright *et al.*, *General insurance*, Background Paper 14, Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry, 2014, *cit.*, p. 9.

of any contract are its individual terms and conditions and the context of the particular contract[43].

Generally, there is no code of insurance law in England; rather, there is a «patchwork of rules emanating from judicial decision, from statute, and from Codes of Practice drafted and administrated by the insurance industry»[44].

There is no statutory definition of an insurance contract in the UK.

For the purposes of both contract law and regulation, a description of an insurance contract which is typically employed is the one adopted by Channell J in *Prudential v Commissioners of Inland Revenue*, namely a contract whereby one party (the insurer) promises in return for a money consideration (the premium) to pay the other party (the insured) a sum of money or to provide him with a corresponding benefit upon the occurrence of one or more specified events. There are several products which lie on the margins of this description, several which are discussed in the Perimeter Guidance of the Financial Conduct and Prudential Regulation Authorities (PERG), together with references to the relevant case-law.

In the specific area of the maritime law, the Marine Insurance Act 1906, Section 1 states that «[a] contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in a manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure». The Consumer Insurance (Disclosure and Representations) Act 2012, Section 1 defines a consumer insurance contract as «a contract of insurance between an individual who enters into the contract wholly or mainly for purposes unrelated to their trade, business or profession» and a person who carries on the business of insurance[45].

43 See, generally, M. Song, *Insurance contract law reform in England*, in *Insurance law in China*, J. Hjalmarsson & D. Huang, Routledge, 2015, p. 274 ff; P. Merkin, *England*, in M. Fontaine (ed.), *Insurance contract law*, International Association for Insurance Law, 1990, p. 83 ff.

44 P. Merkin, *England*, *cit*., p. 83.

45 It is sometimes more relevant to consider what is a regulated contract of insurance, whether within the mandatory scheme for regulation of insurance under EU Directive (the minimum mandatory framework) or under wider protections permitted and afforded in the national law of Member States: see *e.g.* the recent decision of the UK Supreme Court in *Re Digital Satellite Warranty Cover* [2013] 1 WLR 605. Some forms of Credit Default Swap appear functionally identical to insurance, but are not treated as insurance (and are not regulated as such) There is also an important distinction drawn in European law between insurance and reinsurance: see *e.g. Universal General Insurance Co v Group Josi Reinsurance Co SA* (Case C-412/98) which has been acknowledged in England: *Agnew v Lansforsakringsbolgagens AB* [2001] 1 AC 223 HL.

Indeed, the regime of English insurance law derives largely from early marine insurance, which represents the oldest form of insurance known to the common law jurisdiction[46].

Much of English insurance law represents basically the law of contracts and torts applied to insurance situations. In fact, the rules related to the formation of contract, the construction of contract terms, the measurement of loss, the subrogation, and so far, derive from standard principles of English law[47].

The most relevant aspects of English insurance law are that the rules are applicable only to insurance contracts.

The common feature of the «English regulatory structure is that it is primarily concerned with regulating insurers rather than the policies which they issue»[48].

On February 12, 2015 the UK Parliament passed the Insurance Act 2015 which introduce the most significant changes to English insurance law for at least 100 years and arguably the most significant changes ever.

The Insurance Act 2015 retains some provisions of the Marine Insurance Act 1906, codifies some of the developments that have occurred since 1906 and provides new legal concepts.

The key provisions are the introduction of the new duty to make a fair presentation, the provision on warranties and similar terms risk mitigation clauses, and insurers' remedies for fraud[49].

The Insurance Act 2015 is a default scheme for business and non-consumer insureds. However, «as it is based on best practice and was widely supported by the market, it is unlikely that insurers will wish to contract out of it on a regular basis. It may however be appropriate to do so if the risk insured is very specific or complex»[50].

In addition, the new regime provided by the reform may be probably not appropriate for many reinsurance contracts. If the insurer wishes to

46 M. Song, *Insurance contract law reform in England*, p. 274. The business of marine insurance «was firmly developed in England by as early as the sixteenth century. Given this development of the insurance market over a considerable period of time, substantial numbers of cases have inevitably accumulated and eventually established a set of systematic principles under English law». *Ibid*.

47 P. Merkin, *England*, p. 85.

48 *Ibid*. such regulation of policy terms as does exist is for the benefit of third parties and not assured themselves.

49 D. Hertzell, *Reforms to UK insurance law: overview of key changes*, Thomson Reuters Practical Law, 2016. Available at https://uk.practicallaw.thomsonreuters.com. Last visited January 5, 2022.

50 *Ibid*.

contract on different terms and a term is disadvantageous to the insured, the insurer must: (i) take sufficient steps to bring the term to the insured's attention; (ii) ensure that the term is clear and unambiguous[51].

5.2 USA

In the United States, in connection with what constitutes a contract of insurance, although it has been said that whether a particular contract constitutes a contract of insurance is generally a question of the intention of the parties[52], insurance contracts may exist under circumstances in which the parties never understood or intended that their agreement would constitute a form of insurance[53].

Conceptually, an insurance contract in USA is defined as a «contract in which one party agrees to indemnify another against a predefined category of risks in exchange for a premium»[54]

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51 *Ibid*.

52 *North Dakota Ins. Guar. Ass'n v. Agway, Inc.*, 462 N.W.2d 142 (N.D. 1990) (in an action by a guaranty association, under a statutory mandate to provide resources when an insurer becomes insolvent and there is a claim for which the insolvent insurer was obligated to provide coverage, for a declaratory judgment that it need not defend a tortfeasor who was insured by an insolvent company because, under the statute, the association is not required to provide coverage if there is other available insurance to cover the loss or if the claim is one for subrogation, the court rejected the tort claimant's contention that payments it had received from an insurance company that was its wholly owned subsidiary were not insurance proceeds but were actually payments under a self-insurance plan, and thus held that the guaranty association was not required to defend, stating: «There is ample evidentiary support for the trial court's finding that [insured] and [its captive insurer] intended to enter into a contract of insurance. The conduct of the parties, both before and after occurrence of these losses, was indicative of a typical insurance transaction. At the inception of the transaction, [insurer] issued a standard insurance binder, and then issued a policy which has all of the indicia of a standard insurance policy. This policy lists [insured] as the 'insured,' specifies payment of 'premiums,' and provides dates of coverage, policy limits, deductibles, loss payable, coverage, and exclusions. It also includes provisions governing subrogation, notice of loss, and proof of loss. These documents support the trial court's finding that this was insurance. The parties' conduct also was wholly consistent with an insurance contract. [Insurer] sent [insured] an invoice for 'Premium' due on the policy. … After the collapse of the grain bins, [insured] submitted proofs of loss to [insurer]. These proofs of loss … state that '[a]t time of loss, by the above indicated policy of insurance you insured [insured]».

53 *Physicians' Defense Co v. Cooper*, 188 F. 832 (C.C.N.D. Cal. 1911), aff'd, 199 F. 576 (C.C.A. 9th Cir. 1912).

54 For the definition, see *Legal Information Institute*, Cornell Law School. Available at https://www.law.cornell.edu/wex/insurance. Last visited January 25, 2022.

Depending on the contract, the insurer may promise to financially protect the insured from the loss, damage, or liability stemming from some event. An insurance contract will almost always limit the amount of monetary protection possible.

An insurance policy is a contract[55] or agreement[56] that is essentially like all other contracts,[57] albeit with special features. Because insurance policies are contracts, they are governed by general principles of contract law, except to the extent that applicable statutes or administrative

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55 *Pitcher v. Principal Mut. Life Ins. Co.*, 93 F.3d 407 (7th Cir. 1996) (the court said: «[w]e note that an insurance policy is a written contract that memorializes an agreement or 'meeting of the minds' between the insurer … and the insured. … In exchange for the payment of premiums by [the insured], [the insurer] agreed to cover certain medical expenses …, subject to the terms and conditions of the contract (including the pre-existing condition clause)»); *Horning Wire Corp. v. Home Indem. Co*., 8 F.3d 587 (7th Cir. 1993); *TNT Speed & Sport Center, Inc. v. American States Ins. Co*., 114 F.3d 731 (8th Cir. 1997); *Stewart v. Morosa Bros. Transp. Co*., 611 F.2d 778 (9th Cir. 1980); *Travelers Ins. Co. v. Morrow*, 645 F.2d 41 (10th Cir. 1981) (affirming a jury verdict in favor of the insurer, the court said: «[i]n the field of insurance, the contract between the insurance company and the insured is known as an insurance policy. Policies are generally prepared by insurance companies and ambiguities or uncertainties are strictly construed against the company. This rule is particularly applicable to airflight policies acquired at airports because of the conditions under which they are sold. … Generally, however, parties are bound by the policy provisions under the law of contracts. The failure of an insured to read the policy does not relieve him from its provisions»); *Wright v. Director, Federal Emergency Management Agency*, 913 F.2d 1566 (11th Cir. 1990).

56 *Smith v. Matthews*, 611 So. 2d 1377 (La. 1993) (the court used the terms "agreement" and "contract" interchangeably, and said: «[a]n insurance policy is an agreement between the parties and should be interpreted by using ordinary contract principles. If the language in an insurance contract is clear and unambiguous, the agreement must be enforced as written. … However, any ambiguous provisions in an insurance contract must be construed in favor of coverage to the insured and against the insurer who issued the policy».)

Auto-Owners Ins. Co. v. Harrington, 455 Mich. 377, 565 N.W.2d 839 (1997) (using the terms "agreement," "contract" and "policy" as synonymous, the court said: «[r]esolution of the matter before us turns on our interpretation and application of the insurance contract and, specifically, on our interpretation of the 'expected or intended' language in the intentional-act exclusion at issue. An insurance policy is an agreement between parties that a court interprets 'much the same as any other contract' to best effectuate the intent of the parties and the clear, unambiguous language of the policy. … To do so, the court looks to the contract as a whole and gives meaning to all its terms».)

57 *Prestige Cas. Co. v. Michigan Mut. Ins. Co*., 99 F.3d 1340, 1996 FED App. 0347P (6th Cir. 1996).

regulations provide to the contrary or otherwise in contravention of a state's public policy[58].

Thus, the essential elements of a contract, including mutual assent between the insurer and the insured, as well as consideration for the promises of the parties, must be present.[59]

Like other contracts, insurance policies will generally be enforced according to their terms[60], with the respective rights and obligations of the parties determined by the insurance contract's terms[61].

Thus, the parties may contract for any lawful coverage, and insurers, no less than other contracting parties, may limit the risks they agree to cover and the liability they assume, or may impose restrictions and conditions on their obligations under the policies they issue as long as these are not inconsistent with public policy, statute, or regulation[62].

6. Scandinavian legal systems

The first Danish law on insurance contracts dates to the end of 17th century, when concluding an insurance contract was becoming a common feature[63].

The most important provision is the Danish Insurance Contracts Act (1930), which is a result of Nordic cooperation[64]. In particular, the most of the Act's provisions are aimed at protecting insureds against the dominant position of insurers. In order to afford such protection, «many

58 *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 10 Cal. Rptr. 2d 538, 833 P.2d 545 (1992) (the court said: "While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply.").

59 *Allstate Ins. Co. v. McKenzie*, 246 F.2d 151 (5th Cir. 1957).

60 *Canal Ins. Co. v. Ashmore*, 126 F.3d 1083 (8th Cir. 1997).

61 *Farmers Alliance Mut. Ins. Co. v. Bakke*, 619 F.2d 885 (10th Cir. 1980) (to the effect that an insurer's obligation is contractual and is determined by the policy's terms).

62 *Farmers Alliance Mut. Ins. Co. v. Bakke*, 619 F.2d 885 (10th Cir. 1980) (in determining public policy as it applies to exclusions under an insurance policy, the question is whether the exclusion conflicts with the express language of the insurance statutes or the legislative intent underlying them).

63 P. Lyngsø, *Denmark*, in M. Fontaine (ed.), *Insurance contract law*, International Association for Insurance Law, 1990, p. 63. The first Danish insurance company, which was interested exclusively in marine insurance, was founded in 1726.

64 *Ibid*. In fact, «the corresponding parliamentary Acts in Finland, Norway and Sweden essentially have the same contents as the Danish Act».

of the provisions are phrased so that deviation to the detriment of the insured is not allowed»[65].

The Danish Insurance Contracts Act provides rules for the relationship between the insurer and the policyholder. However, «[e]ven though the Act does not apply to reinsurance companies, it is applied by analogy together with general contract law. The Danish Insurance Mediation Act implements the EU Directive on Insurance Distribution (Directive 2006/97 on Insurance Distribution recast) and regulates insurance brokers and others distributing insurance commercially»[66].

Regarding Sweden, it must be underlined that there is no definition of insurance contract in Swedish national law. In addition, there is no specific form for insurance contracts[67].

The most important piece of legislation on insurance contracts in Sweden is the Swedish Insurance Contracts Act, which primarily regulates the relationship between insurer, policyholder and insured[68].

This Act applies to all categories of insurance contracts with the exception of reinsurance contracts[69].

The law is applicable to consumers' insurance, business insurance and insurance of a person (such as life, accident and sickness insurance). It applies to both individual and group insurance and to collectively agreed insurance[70].

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65 *Ibid*.

66 P. Schmith, *Denmark*, in *Insurance & Reinsurance*, Chambers Global Practice Guide, 2020, p. 3.

67 P. Lindmark & C. M. Roos, *Sweden*, in M. Fontaine (ed.), *Insurance contract law*, International Association for Insurance Law, 1990, p. 263 ff.

68 *Ibid*. Contracts, in fact, maybe «agreed upon in writing or orally, e.g. on the telephone and a contract is binding when the insurer has received acceptance». *Ibid*.

69 *Ibid*. However, the ICA distinguishes between various types of insurance policies, which are regulated differently; non-life consumer insurance, personal insurance, corporate insurance, group non-life insurance, group personal insurance, collective agreement-based non-life insurance and collective agreement-based personal insurance.

70 *Ibid*. In general, the law is mandatory, which means that any insurance clauses less favourable for the consumer than those set forth in the Act will not be applicable. A freedom of contract applies primarily to business insurance.

Under the Finnish civil law insurance contract in the field of voluntary insurance is based on an agreement/contract between the insurance company and the policyholder. After the conclusion of the insurance contract the insurance company is to transfer the insurance policy to the policy holder[71].

In the Finnish Insurance Contract Act (543/1994), there is no definition of an insurance contract[72]. The Act provides that (i) insurance of the person refers to insurance policies issued to insure natural persons; (ii) non-life insurance refers to insurance policies which indemnify the insured against losses arising from property damage, losses sustained under liability for damages, and other financial losses[73].

The writing of insurance contracts in Norway is regulated by the Norwegian Insurance Contract Act which sets out rights and duties for both the insurer and the insured.

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71 H. Honka, *Finland*, in M. Fontaine (ed.), *Insurance contract law*, International Association for Insurance Law, 1990, p. 116 ff. The insurance policy document should contain the most relevant points of the insurance contract and terms of the policy and all other requirements stipulated in the Finnish Insurance Contract Act. An insurance contract is considered valid through an offer-response mechanism under the Finnish civil law.

72 *Ibid*. However, despite the absence of a definition in law, insurance activity is defined by practitioners and legal literature as having the following characteristics: (i) the risk must be uncertain (not inevitable); (ii) the risk must involve potential economic damage (therefore meaning that the insurable interest can be expressed in terms of money); (iii) there must be a correspondence between the risk and the premium; (iv) the risk must be divided between a large number of policyholders; (v) the insurer and the policyholder must be separate entities.

73 *Ibid*. However, despite the absence of a definition in law, insurance activity is defined by practitioners and legal literature as having the following characteristics: (i) the risk must be uncertain (not inevitable); (ii) the risk must involve potential economic damage (therefore meaning that the insurable interest can be expressed in terms of money); (iii) there must be a correspondence between the risk and the premium; (iv) the risk must be divided between a large number of policyholders; (v) the insurer and the policyholder must be separate entities.

7. Far East Legal systems[74]

7.1 Japan

Insurance business in Japan is regulated under the Insurance Business Act (IBA)[75], whereby the Financial Services Agency (FSA) takes the main role as the insurance regulator[76].

Under the IBA, the Japanese Prime Minister (PM), who has the authority to supervise the entities or persons that conduct insurance business and related business in Japan, delegates most of his or her authority (excluding certain important powers such as granting or canceling insurance business licences) to the Commissioner of the FSA. The Commissioner further delegates a part of his or her authority to the directors of the Local Finance Bureau of the Ministry of Finance (LFB)[77].

There are two regulatory regimes that exist for insurance under Japanese law: the Insurance Act, that governs insurance contracts, and the IBA, which addresses the regulation of insurance business operators[78].

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74 In South Korea, in brief, an insurance product is defined as a contract that provides the payment of money and other benefits to the insured on the occurrence of a contingency for the purpose of guaranteeing risk, and in exchange for consideration. S. Kyu Yang, *South Korea*, in M. Fontaine (ed.), *Insurance contract law*, International Association for Insurance Law, 1990, p. 181 ff.

All contracts of insurance and reinsurance are regulated. The primary law regulating insurance and reinsurance contracts is the Insurance Business Law (IBL). Certain insurance products are regulated by special laws. For example, *takaful* (that is, a sharia-compliant method of providing insurance) does not exist in South Korea but there are co-operatives or mutuals similar to *takaful*. The co-operatives or mutuals established under a special law are not regulated as insurance. See, generally, J. Ahn *et al.*, *Insurance and reinsurance in South Korea: overview*, Thomson Reuters, 2021.

Reinsurance is treated as a category of non-life insurance and is defined as a contract through which an insurer transfers to another insurer all or part of the liabilities it bears under an insurance contract it has underwritten. *Ibid*.

75 *Insurance Business Act*, Act No. 105 of June 7, 1995. Available at https://www.fsa.go.jp/common/law/ins01.pdf. Last visited January 28, 2022.

76 K. Yoshikawa, *Japan*, in M. Fontaine (ed.), *Insurance contract law*, International Association for Insurance Law, 1990, p. 139 ff.

77 *Ibid*.

78 S. Ochiai, S. Takahashi, R. Takeda, *Japan: the insurance concept in the Insurance Act and the Insurance Business Act*, Research handbook on international insurance law and regulation, p. 747 ff.

Conceptually, the 'insurance contract' under the Insurance Act is significant in that it defines the applicability of the Act to contractual insurance arrangements. In respect of the IBA, «'insurance', rather than 'insurance contract', is the concept used in determining the application of the insurance supervision and regulatory regime»[79].

The Insurance Act defines an 'insurance contract' as «a contract, irrespective of whether it is named as an insurance contract, mutual aid contract or otherwise, under which one party promises to give a property benefit (limited to a money payment in the case of a life insurance contract or accident and/or disease insurance contract; each an 'Insurance Benefit') on the condition that one of the events specified in the contract occurs, and the opposite party promises to pay an insurance premium (including a mutual aid contribution) as being commensurate with the possibility of occurrence of the prescribed events»[80].

Specifically, Japanese insurance law takes a prescriptive approach to insurance contract arrangements and at the heart of the regime a substantial number of unilaterally mandatory clauses are required under the provisions of the law[81].

79 *Ibid*. These two concepts, particularly, «have different purposes and the insurance concept under the former Act does not necessarily coincide with that under the latter Act (that is to say, there is a conceptual relativity due to the differences in the legislative purposes). For this reason, although it may be meaningful to consider how the two concepts overlap in meaning and in practical application, it is the authors' position that they should be independently defined». *Ibid*.

80 Article 2, item 1 of the Insurance Act. Note that «when a contract does not fall within the definition of an insurance contract, the contract itself is construed as being effective but the Insurance Act does not apply directly to it; however, it is the author's view that in such a case there is a possibility that a contract which has many features similar to the insurance concept described herein should be subject to the regulations under the Insurance Act mutatis mutandis». S. Ochiai, S. Takahashi, R. Takeda, *Japan: the insurance concept in the Insurance Act and the Insurance Business Act*, *cit*., p. 752.

81 K. Yoshikawa, *Japan*, *cit*., p. 141.

The term 'unilaterally mandatory clause' «means a contractual clause that is required by law and any contractual stipulation that is inconsistent with that clause and is unfavorable to any of the policyholder, insured or insurance claim recipient (each a 'Policyholder' and collectively, the 'Policyholders') will be unenforceable»[82].

Life insurers and non-life insurers are both regulated by the Insurance Business Act. Reinsurers are regulated in the same way as nonlife insurers. Engaging in the underwriting of life insurance and non-life insurance entails obtaining from the regulatory authorities a life insurance business license and a non-life insurance business license, respectively. Companies may not run both businesses concurrently[83].

7.2 China

Chinese legislation dates back to October 1, 2009[84].

In the first Article of the said law it is clearly stated that this «[l]aw is formulated for the purposes of regulating insurance activities, protecting the legal rights and interests of the parties involved, strengthening supervision and administration over the insurance industry, safeguarding social and economic order and public interests, and promoting sound development of insurance operations». And that «[f]or the purposes of this Law, "insurance" refers to commercial insurance whereby a policy holder, in accordance with the contract, pays insurance premiums to the insurer, and the insurer bears an obligation to pay the policy holder indemnities against property loss caused by the occurrence of a contingent event as agreed upon in the contract, or pay insurance benefits when the insured dies, is injured or disabled, suffers illness or

82 S. Ochiai, S. Takahashi, R. Takeda, *Japan: the insurance concept in the Insurance Act and the Insurance Business Act*, *cit*., p. 752-753. Thus, «the Insurance Act explicitly provides that any provision of an insurance contract that is less favorable to the Policyholders than is provided for by the unilaterally mandatory clauses shall be unenforceable and the court will accordingly give effect to the contract as if the missing unilaterally mandatory clause had been included». *Ibid*.

83 K. Yoshikawa, *Japan*, *cit*., pp. 141-142.

84 Order of the President of the People's Republic of China No. 11, The Insurance Law of the People's Republic of China, revised and adopted at the 7th Meeting of the Standing Committee of the Eleventh National People's Congress of the People's Republic of China on February 28, 2009, is hereby promulgated and shall go into effect as of October 1, 2009.

reaches the age limit, time limit or any other condition agreed upon in the contract». (Article 2)

Pursuant to the law, an insurance contract is defined as an agreement in which an applicant and an insurer set out their respective rights and obligations under the insurance policy. The term applicant refers to the party that concludes the insurance contract with the insurer and who must pay the premium in accordance with the contract. The term insurer refers to the insurance company that concludes the insurance contract with the applicant and that is liable for paying insurance indemnities in accordance with the contract[85].

The Law insurance divides contracts into two classes, namely personal insurance contracts and property insurance contracts[86].

An insurance contract is formed when an insurance applicant applies for insurance and the insurer accepts the application. The insurer then issues to the insurance applicant an insurance policy or any other insurance certificate in a timely manner[87].

The insurance applicant and the insurer may agree upon other particulars related to insurance in the insurance contract.

In concluding an insurance contract, the applicant has a duty of honest disclosure when the insurer enquires about the subject insured or relevant circumstances concerning the insured. The insurer «shall have the right to rescind the insurance contract if the applicant intentionally or with gross negligence fails to perform his or her duty of honest disclosure, to the extent that the failure materially affects the insurer's

85 Chapter II, named "Insurance Contracts", Section 1, General Provisions, the article 10. An insurance contract «is an agreement whereby the rights and obligations pertaining to insurance are specified and agreed by the policy holder and the insurer and a policy holder is a party who enters into an insurance contract with an insurer and is obligated to pay premiums under the insurance contract. An insurer means an insurance company which enters into an insurance contract with a policy holder and is obligated to pay indemnity or insurance benefits under the insurance contract». In addition, in «making insurance contracts, applicants and insurers shall follow the principles of fairness, mutual benefits, unanimity through negotiation and voluntariness, and may not harm the interests of the social public. With the exception of those that must be insured as provided by laws and administrative regulations, insurance companies and other units may not force others entering into insurance contracts». Article 11.

86 M. Song & Y Yang, *Introduction to Chinese insurance law*, in J. Hjalmarsson & D. Huang, *Insurance law in China*, 2015, Routledge, pp. 13-14.

87 *Ibid*.

decision on whether to provide the insurance or whether to increase the premium rate»[88].

It is important to note that, however, if an insurer enters into an insurance contract with an applicant knowing that the latter has failed to disclose a material fact, the insurer is not entitled to rescind the contract, and if an insured incident occurs, the insurer shall bear the insurance liability[89].

Considering those clauses in the insurance contract, that exempt the insurer from liability, the insurer must give the applicant all the required warning about those clauses in the insurance application form, the insurance policy or any other insurance certificate, and expressly explain the contents of those clauses to the applicant in writing or orally[90].

8. South Africa

In South African law, there is no insurance contract law as such. The principles that govern the insurance contracts are the same which are applicable to all contracts. Those principles are based upon Roman-Dutch law, but have been influenced also by English law[91].

88 Z. Hao *et al.*, *The Insurance and Reinsurance Law Review: China*, in *The Law Reviews*, 2021. Available at https://thelawreviews.co.uk/title/the-insurance-and-reinsurance-law-review/china. Last visited February 2, 2022. Invoking the right of rescission reverses any insurance liability that was assumed for insured incidents that occurred prior to the rescission of the contract, entitling the insurer to those benefits that had already been paid out. However, «there is one minor distinction to be made between failing to disclose material facts as a result of gross negligence versus intentionally failing to disclose. If an applicant fails in the duty to disclose out of gross negligence, and this affects the insurer's pricing or provision of the policy, the insurer shall, with respect to the incidents occurring prior to the rescission of the contract, bear no insurance liability, but shall return the paid premiums». In addition, in the cases in which «an applicant intentionally fails to disclose a fact, however, the applicant is not entitled to a refund of the policy premium in the event of its rescission».

89 *Ibid*.

90 *Ibid*. If the insurer fails to give a warning or explicit explanation thereof, «those exemption clauses shall not be effective. Notably, the PRC Civil Code, which came into effect on 1 January 2021, brings about some changes regarding the validity of standard clauses. Article 496 of the PRC Civil Code provides that apart from standard terms that exempt or reduce the insurer's liability, other standard terms that the insurer provided to the applicant but failed to conclude in line with its duty of utmost good faith and that carry a significant interest for the other party will also not be effective».

91 M. F. B. Reinecke & J. P. Van Niekerk, *South Africa*, in M. Fontaine (ed.), *Insurance contract law*, International Association for Insurance Law, 1990, p. 162.

An insurance contract «is a reciprocal contract between an insurer and an insured in terms of which the insurer undertakes to pay the insured an amount of money or its equivalent, in exchange for payment of a monetary premium, should the risk, borne by the insurer on behalf of the insured, materialise by the happening of an event in which the insured has an interest»[92].

The South African law of insurance is primarily regulated by Roman-Dutch common law and authority for this can be found in *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality 1985 1 SA 419 (A)*. However, due to the way that the South African legal system developed English law has influenced the development of our law of insurance. For example, the doctrine of subrogation has been adopted into our law from English law[93].

There are a number of statutes which are relevant to insurance. The most important are the Long-term Insurance Act 52 of 1998 and the Short-term Insurance Act 53 of 1998. Although these Acts are mainly of an administrative nature in that they regulate and control the insurance industry, they also contain provisions which apply to the insurance contract and provide a measure of protection to consumers[94].

The law, in particular, recognizes two types of insurance contracts, which are the indemnity insurance and the non-indemnity insurance. The basic- difference between these two types of insurance contracts is that with indemnity insurance the number of damages claimed is directly proportional to the loss suffered or the amount of the insurance where it is less than the loss suffered. On the contrary, in the case of non-indemnity insurance, the loss suffered and the amount paid by the insurer are not proportionate[95].

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92 J. C. Nagel *et al*., *Business Law*, in *Commercial Law*, 2 ed, Butterworths: Durban, 2000, *cit.*, p. 196.

93 M. F. B. Reinecke & J. P. Van Niekerk, *South Africa*, *cit*., p. 162 ff.

94 *Ibid*.

95 J. C. Nagel *et al*., *Business Law*, in *Commercial Law*, *cit.*, pp. 196-197. Specifically, in indemnity insurance the insurer undertakes to make good the damage the insured suffers through the occurrence of the event insured against. The amount that the insured can receive from the insurer cannot exceed the actual amount of damages incurred. In non-indemnity insurance the insurer undertakes to pay the insured or the beneficiary a fixed sum of money if the event insured against takes place.

Regarding the conclusion of a contract, the general requirements are consensus, contractual capacity, legality, physical possibility and formalities.

In addition, the parties must reach an agreement on the essentialia (essential elements) of the insurance contract[96].

These essentialia are the insurable interest, the risk which is passed to the insurer, the cover which is provided, the premium which is payable by the insured and the term for which the insurance is valid[97].

9. Italy

The birth of insurance, which replaces archaic forms of negotiation representing the first embryonic figures of risk negotiation[98], is commonly traced back to the fourteenth century, an era in which trafficking becomes more and more intense and risky and one realizes that risk, like any other legally relevant asset, can itself be the object of exchanges, business and profit. It is then the birth of insurance companies that professionally deal with taking risks which determines the stabilization of increasingly elaborate negotiation models which, progressively, leave the sector of uncertainties connected to the possible damages deriving from economic activities to also embrace types of non-professional risks, belonging to subjects unrelated to the production of goods or services and reconnected to normal life events, whether they are positive or negative[99].

In this sense, it is not necessary to consider that the "risk" deduced within an insurance contract necessarily concerns a life event that is certainly negative but may have as its object all those future eventualities

96 M. F. B. Reinecke & J. P. Van Niekerk, *South Africa*, *cit*., p. 163.

97 *Ibid*.

98 Think of the *fenus nauticum* from the Roman era. Think, again, of the more embryonic forms of mutual aid with which the damage suffered by a member of the same was shared within a certain community. On this point, see G. Di Giandomenico, *La qualificazione giuridica del contratto di assicurazione*, G. Di Giandomenico & D. Riccio, *I Contratti speciali. I contratti aleatori*, in *Tratt. dir. priv. Bessone*, Turin, 2005, pp. 49-52; see also M. Rossetti, *Il diritto delle assicurazioni*, Padova, 2011, pp. 1-40.

99 C. Vivante, *Trattato di diritto commerciale*, IV, Milan, 1916, p. 418 ff; V. Porri, *Lo sviluppo delle imprese assicuratrici in Italia nei rami elementari*, en Aa. Vv., *Lo sviluppo e il regime delle assicurazioni in Italia*, Turin, 1928, p. 70.

which, placing the policyholder in front of a new reality, they require him to change his habits[100].

The insurance contract, in Italy, is mainly regulated by Articles 1882–1932 of the Italian Civil Code along with the Legislative Decree 209 of 7 September 2005 (the Code of Private Insurance Companies) and the regulations of the Italian Insurance Supervisory Authority (IVASS)[101].

100 G. Berti De Marinis, *La disciplina del contratto assicurazione in Italia: Profili di attualità*, in *Actualidad Jurídica Iberoamericana*, 2016, pp. 178-179. Think, for example, of the life insurance contract for the case of survival which obliges the insurance company to pay a capital or an annuity in the event that the insured survives to a certain date. The future event is, in this case, the survival of the individual which, despite being a desirable eventuality and anything but negative, however, exposes the policyholder to new challenges (old age, diseases related to aging, lower income resulting from the cessation of work, the greater availability of free time, etc.) which make it appropriate to download this "risk" on a third party. *Ibid*.

101 The first complete "modern" regulation of insurance contracts can be found, in fact, in the Commercial Code of 1865 which, in Articles 466 ff. regulated this negotiating figure while still taking it into consideration under the exclusive profile of non-life insurance, calibrating it, moreover, on the issues relating to the risks inherent in maritime trade which, at that time, represented the main means of distributing goods. See, for an overview of the Italian doctrine, M. Rossetti, *Il diritto delle assicurazioni*, vol. I, *L'impresa di assicurazione. Il contratto di assicurazione in generale*, Padova, 2011; G. Alpa, (a cura di), *Le assicurazioni private*, in *Giur. sist. civ. comm. Bigiavi*, Turin, 2006; G. Volpe Putzolu, *L'assicurazione*, in *Trattato Rescigno*, Turin, 1985; G. Fanelli, *Le assicurazioni*, in *Trattato Cicu-Messineo*, Milan, 1973; A. Donati, *Trattato del diritto delle assicurazioni private*, II e III, Milan, 1954 and 1956; A. Antonucci, *L'assicurazione fra impresa e contratto*, Bari, 1994; G. Bavetta, voce *Impresa di assicurazione*, in *Enc. del dir*., XX, Milan, 1970, p. 624 ff; E. Bottiglieri, voce *Impresa di assicurazione*, in *Dig. disc. priv., sez. comm*., VII, Torino, UTET, 1992, pp. 155 ff; L. Buttaro, voce *Assicurazioni in generale*, in *Enc. del dir.,* III, Milan, 1958, p. 427 ff; R. A. Capotosti, voce *Assicurazioni private e imprese assicurative (Diritto comunitario*), in *Noviss. dig. it.,* Appendice, Turin, 1980, pp. 506 ff; a. Donati, *Trattato di diritto delle assicurazioni private*, I, Milan, 1952.; A. Donati & G. Volpe Putzolu, *Manuale di diritto delle assicurazioni private*, 8ª ed., Milan, 2006; G. Fanelli, voce *Assicurazione*, II *Assicurazione contro i danni*, in *Enc giur*., III, Rome, 1988; F. Garri, voce *Impresa di assicurazione*, II (Diritto amministrativo), in Enc. giur., XVI, Rome, 1988; N. Gasperoni, voce *Assicurazion*e, III, *Assicurazione sulla vita*, in *Enc. giur*., III, Rome, 1988; C. Giannattasio, voce *Impresa di assicurazione* (Parte generale), in *Noviss. dig. it*., *Appendice*, Turin, 1983, pp. 29 ff; A. La Torre, *Diritto delle assicurazioni*, I, *La disciplina giuridica dell'attività assicurativa*, Milan, 1987; G. Leone & C. De Gasperis, *Le assicurazioni private nella giurisprudenza*, in *Raccolta sistematica di giurisprudenza* commentata diretta da M. Rotondi, Padova, 1975; L. Mossa, *Sistema del contratto di assicurazione nel libro delle obbligazioni del codice civile*, in *Assicurazioni*, 1942, I, pp. 185 ff; L. Mossa, *Impresa e contratto di assicurazione nelle vicendevoli relazioni*, in *Assicurazioni*, 1953, I, pp. 141 ff; V. Salandra, *Dell'assicurazione*, in *Commentario del codice civile* a cura di A. Scialoja e G. Branca, Libro IV, Delle obbligazioni (artt. 1861-1932), 3ª ed., Bologna-Roma, 1966, sub artt. 1882 ff, pp. 172 ff; G. Volpe Putzolu, *L'assicurazione*, in *Trattato di diritto privato* diretto da P. Rescigno, XIII, Turin, 1985, pp. 55 ff; G. Volpe Putzolu, *Le assicurazioni. Produzione e distribuzione* (problemi giuridici), Bologna, 1992; G. Volpe Putzolu, *L'evoluzione della legislazione in materia di assicurazioni*, in S. Amorosino, L. Desiderio (a cura di), *Il nuovo codice delle assicurazioni, commento sistematico*, Milan, 2006, p. 3; P. Corrias*, Il contratto di assicurazione: profili funzionali e strutturali*, Naples, 2016.

The regulatory evolution relating to the insurance contract has led it to place itself in the context of civil laws which, at present, support a general discipline of this form of negotiation abstractly referable to both non-life and life insurance (Articles 1882 - 1903), sections specifically dedicated to the regulation of non-life policies (Articles 1904 - 1918) and life insurance (Articles 1919 - 1927)[102].

The life and non-life insurance sectors are respectively regulated under Articles 1882[103] and following and Articles 1917[104] and following of the Civil Code even if the parties can modify the policy's clauses by means of their contractual autonomy, even if, since the insurers are deemed to be in a stronger position than the insured, the insurance companies are

102 G. Berti De Marinis, *La disciplina del contratto assicurazione in Italia: Profili di attualità*, *cit*., p. 181.

103 Article 1882 provides definitions for an insurance contract against damages and also life insurance contracts.

104 Article 1917 provides the definition for civil liability insurance contracts, under which an insurer is paid a premium to hold the insured harmless, where the insured must pay a third party for a liability covered under the policy. In particular «[i]n liability insurance the insurer is bound to indemnify the insured for the damages which the latter must pay to a third party as a result of the events occurred during the period of insurance and depending on the liability provided by the contract». On 6 May 2016 ruling 9140, the united sections of the Italian Supreme Court of Cassation issued a long-awaited judgment on the validity and enforceability of claims-made clauses in liability insurance. The judgment is of particular relevance in the area of Professional Indemnity, where insurance was made mandatory for professional activities in 2013. The legitimacy of the claims-made clause has been a frequent topic of discussion in the last 20 years, mainly because the Italian Civil Code provides for a liability insurance system clearly based on the occurrence principle. See A. Borroni, *Clausola claims made: circolazione parziale di un modello nella responsabilità civile italiana*, in *Ianus, Diritto e Finanza*, Rivista di Studi Giuridici, 2014, pp. 121-147; see also N. Spadafora & D. Scarpa, *Clausola claims made e disciplina del consumo (commento a margine della sentenza Cass. 6 maggio 2016, n. 9140)*, in dirittobancario.it, 2016. In short, «claims-made means, for the insurance industry, avoidance of the 'long tail'. That is why, in the Italian market, it is nowadays quite impossible to find any offer of occurrence-based professional liability policies. More uncertain are the effective benefits for the insured of claims-made coverage. Very often, commentators who are in favour of this second policy model remark that the claims-made policy provides insured parties with immediate coverage for all past, present and future claims-made during the policy period; insurance need not have been in place when the wrongful act or damage occurred». F. Delfini, *Claims-Made Insurance Policies in Italy: The Domestic Story and Suggestions from the UK, Canada and Australia*, in *The Italian Law journal*, *cit*., 2018, pp. 118-119.

subject to some limitations relating to the approval of specific clauses, information to be disclosed[105].

What stands out to the interpreter's attention is, despite the subsequent breakdown into insurance branches, the unitary definition of an insurance contract which art. 1882 of the Italian Civil Code[106] qualifies as the contract by which the insurer, upon payment of a premium, undertakes to reclaim the insured, within the agreed limits, for the damage caused to it by an accident, or to pay a capital or an annuity upon the occurrence of an event pertaining to human life[107]. A unity of the definition that is reflected on the equally inseparable link between the insurance contract and the insurance business such that the former cannot possibly be read separately from the overall operation carried out by the insurer and aimed at neutralizing the risk[108].

The *ratio legis* of Article 1882 is based on the following mechanism: the policyholder transfers the economic risk (the hazard) of a given event to the insurer, who is able to bear this risk because the calculation of probabilities allows him to divide among others insured the risk itself and also to obtain an economic advantage. Thus, against the payment

105 A. Borroni, *Clausola claims made: circolazione parziale di un modello nella responsabilità civile italiana*, cit., p. 121 ff.

106 On this poin, *inter alia*, L. Buttaro, *Assicurazione in generale*, *cit*.; *Id*, *Assicurazione sulla vita*, in Aa. Vv., *Enciclopedia del diritto*, Milan, 1958, pp. 611 ss.; T. Ascarelli, *Sul concetto unitario del contratto di assicurazione*, *cit*., pp. 408 ss. S. Landini, *Art. 1882*, in Aa. Vv., *Dei singoli contratti*, D. Valentino, Turin, 2011, p. 39, which, while highlighting the existing differences between life insurance and non-life insurance, states that even taking into account the evolution of life insurance, it seems difficult to deny unity, from a causal point of view to the phenomenon of insurance considered as well as in life insurance there is in any case the assumption of a demographic risk by the insurer.

107 F. Peccenini, *Dell'assicurazione*, in *Comm. cod. civ. Scialoja e Branca*, Bologna-Rome, 2011, pp. 1-13.

108 G. Berti De Marinis, *La disciplina del contratto assicurazione in Italia: Profili di attualità*, *cit*., 181. See also C. F. Giampaolino, *Le assicurazioni*, Turin, 2011, p. 169. The author states that the insurance contract is stipulated only in connection with the insurance business. On this level, the relationship is in fact considered not individually, but in connection with the overall operation carried out by the insurer through the use of a particular technical procedure based on the application of the calculation of probabilities.

of a modest sum, the insured is entitled, if that risk materializes, to a large indemnity[109].

What emerges from the provisions of the code that, in general, deal with insurance contracts is, therefore, the image of a causally unitary random case – albeit divided into life insurance and non-life insurance – through which the policyholder pays a premium to acquire the security of canceling or reducing an uncertain future risk[110].

10. The Derivative contract is not an insurance contract

The last amendments to the Civil code introduced a third comma: «[a] derivative shall not be an insurance contract. Relations arising from derivatives shall be regulated under the Law of Georgia on Financial Collaterals, Mutual Setoffs and Derivatives».

The specification is not surprising, and it is only answering to systematic needs: it conveys information to the reader on where to find

109 A. Bracciodieta, *Il contratto di assicurazione (Disposizioni generali)*, in *Cod. civ. Commentario Schlesinger*, Milan, 2012, pp. 23-25. Art. 165 d.lgs. 209 7/9/2005 (rule of coordination between Civil Code and Code of Private Insurance): The Civil Code still applies for insurance contracts [where not derogated by the Code of Private Insurances].

See Art. 1882 Civil Code: Insurance is the contract with which an insurer (in exchange of the payment of a certain premium) obliged himself: 1) to pay an indemnity to the insured equivalent to the damage caused by an accident; 2) to pay an income or a capital if a life-related event occurs.

It is considered to be an "upon payment" and synallagmatic contract: in fact, this assumption has to be clarified. Insurance is considered by a large part of the doctrine to be a synallagmatic contract even if it is at the same time an aleatory contract, we can also say that it has a synallagmatic element with reference to the genetic moment where the insurer assumes the duty to cover and even if the insured event will never occur.

There is no legal definition of an insurance contract in the Insurance Code, neither in France. However, it commonly refers to an agreement where one party (the insurer), agrees to provide coverage to another party (the insured), on the occurrence of a specified event that is beyond the control of either party, in exchange for receiving payment of premiums from the policyholder.

Insurance contracts are not regulated per se, in the sense that prudential supervision applies to entities and not to contracts. For instance, there is no pre-approval of contract terms, nor does the ACP systematically check terms and conditions for compliance. Nevertheless, all insurance contracts are subject to a wide variety of rules to be found in the Insurance Code, as well as in other codes or statutory provisions. There is also extensive case law applying to insurance contracts.

As a general rule, the most regulated contracts are consumer insurance contracts, with an exceptionally protective set of rules applying to unit-linked life assurance contracts.

110 A. Bracciodieta, *Il contratto di assicurazione (Disposizioni generali)*, *cit.*, pp. 23-25.

the discipline related to the derivatives. The same taxonomic approach is taken both in civil and in common law.

A particular contract containing a kind of risk in whose undertaking someone noticed a sort of bet, is that regarding the fluctuation of Stock Exchange values[111].

The growth of this contract typology is linked to the growth in financial markets of the so-called fixed-term contracts[112], in which share dealing contracts[113], with mere speculative aims[114], go along with the stipulation for which, at the expiry date, it is possible to proceed to the liquidation of the differences between the price agreed upon and the real one in the fixed day for the execution[115].

Some transactions effected in the stock exchange have an evident chancy side that makes them similar in some respects to the institution

111 A preliminary insight of the subject should considered L. Bianchi D'Espinosa, *I contratti di borsa. Il riporto*, TRATT. DIR. CIV. COMM., directed by A. Cicu & M. Messineo, XXXV, 2, Milano 1969, pp. 398-401; R. Corrado, *I contratti di borsa*, Trattato di diritto civile italiano, diretto da Vassalli, VII, 2, Torino, 1960, p. 210 ss.; F. Messineo, *Gli affari differenziali impropri*, RIV. DIR. COMM., 1930, p. 677 and of the same Author "*Contratto derivato*", ENC. DIR., X, Milano, 1962, p. 80; F. Carnelutti, *Nullità della vendita di cambi allo scoperto*, RIV. DIR. COMM. 1923, II, p. 493; M. Rotondi, *Contratti a termine e differenziali sui cambi*, RIV. DIR. COMM., 1925, II, p. 195 and *Studi di diritto commerciale e di diritto generale delle obbligazioni*, Padova, 1961; *Contratti a termine e differenziali sui cambi*, p. 235 ss., *Contratti differenziali su divise estere*, p. 255 ss., *contratti differenziali e contratti a termine nelle borse valori*, p. 269 ss.; A. Weiller, "*Borsa valori*", NOV. DIG. IT., II, 1938, pp. 495 e 514. In the specific field of gambling B. Inzitari, *Swap (contratto di*), CONTR. IMPR., 1988, p. 601.

112 It is an agreement for which the parties *ab initio* are obliged to pay the margin between the two prices. The specific characteristic of this agreement seems to consist in the precise will of the parties not to request nor effect, at the fixed date, the issue of the instruments, but to regulate the relation with the plain payment of the differences.

113 M. Rotondi, *Contratti differenziali e contratti a termine*, *cit.,* p. 285, observes that these are contract of sale.

114 *Ibid*. The author reports an enlightening rule of the Court of Cassation according to which «the law does not establish any citeria to distinguish fixed-term contracts from differential ones, for their distinction depends on the contractors' will, whose object is, in the former, the issue and purchase of the relevant titles, and in the latter, the speculation on the differences». Court of Cassation May 31st 1924, Pres. Tempestini, Drafter Scalfaro, (Banca Rosenberg c. Curiel). Later the same author maintains at page 246 of the same paper, that the differentiation between fixed-term and differential contract is impossible or insignificant and their distinction is exclusively based on parties' will, but from the economic point of view they reach equivalent results. Such contracts however must be considered licit and fully valid (the Author also adds that this is the French Jurisprudence setting out), *Ibid*.

115 R. Corrado, *I contratti di borsa*, *cit.*, p. 202.

of wager more than to an insurance. This explains the arising of the traditional question whether the legal system totally protects these transactions or subjects them to the discipline of article 1933 of the Italian Civil code.

Swap contract is the most significant case for which the exception of game, and therefore indirectly, natural obligations discipline, was appealed to[116].

Everybody knows that this anglicism is used to identify a variegated typology of contracts which, according to the reference parameters, differ between interest and currency swaps[117].

This category of transactions is a purely academic invention. The Italian civil code does not mention Stock Exchange dealings, nor the so-called speculations on Stock Exchange: yet we can derive their regulation from the civil code, for some aspects (for contango contract, for example) as well as from a series of specific measures[118].

Theoretically, making profits and losses depend on the Stock Exchange quotations of a title is not different from staking on any ordinary event, which can quite represent the object of a bet.

Jurisprudence, called to give its opinion on the validity of *swap* agreements, set as diriment the merely speculative aim[119]: therefore, «the contract we are considering does not impartially and concretely correspond to a cause that justifies full protection of credit reasons, it has rather to qualify itself as hypothesis of "wager", and cannot be operated ex art. 1933 of the Civil Code. In truth, parties submitted to the risk of interest rate fluctuations not because they needed to cover

116 B. Inzitari, *Il contratto di swap, i contratti del commercio, dell'industria e del mercato finanziario*, Treaty directed by F. Galgano, 3, Torino, 1995, p. 2445; M. Irrera, *Swaps*, DIG. DISC. PRIV. SEZ. COMM., Torino, 1998, p. 314; M. A. Ciocia, *L'obbligazione naturale- evoluzione normativa e prassi giurisprudenziale*, Milano, 2000, pp. 70-72.

117 "Domestic currency swap" contract is the agreement with which two parties mutually bind to pay, on the conventionally fixed expiry date, a sum of money in the domestic currency equal to the difference between the value (expressed in lire) of a sum in foreign currency, at the time of the contract conclusion, and the value of the same amount in foreign currency, on the predetermined expiry. Court of Turin, 11/12/1998 and Court of Milan, 2/20/1997.

118 M. Paradiso, *I contratti di gioco e scommessa*, Milano, 2003, p. 84.

119 With two *ordinanze*: Trib. Milano, 24 novembre 1993 and 26 maggio 1994 commented in BANCA BORSA, 1995, II, 80, with analysis of A. Perrone, *Contratti di swap con finalità speculative ed eccezione di gioco,* BANCA BORSA, 1995, p. 82.

for the actual business risks, but only to connect the competence of a property advantage (profit) to chance (that is just to the risk of the interests course)».

Nevertheless, this decision, as the Tribunal goes on, does not contrast with doctrine trend, in favour of recognizing full protection to swap contract, bearing in mind that there's no exclusion of the configuration of those swap contracts with – unlike the one under investigation- a function of certainty and economic guarantee, because linked with real binding relations[120].

Now, it is quite possible that parties do not have the aim of the real issue of titles, everything concluding with the payment of the difference as compensation, but, when two fixed-term contracts with the same expiry date are drawn up, that does not bring the transaction case outside the sphere of the stock exchange contract totally protected by the law.

The next jurisprudence[121], on the contrary, derived the lawfulness of swap contract from precise legislative indexes: from art. 1, paragraph 2, law 1/1991 which gave the name of securities to fixed-term contracts on financial instruments, and from article 23 of the same law which explicitly excluded the enforceability of article 1933 of the Civil Code to such contracts.

In the end, the legislator operated a real recognition with the legislative decree 58/1998.[122] Such decree, regulating investment services as an activity with financial instruments as its object, counts among them *swamps* (but *futures* and *options* as well)[123] also when they are

120 The Court in this way creates the dichotomy between the speculative swap, therefore invalid, and coverage swap, supported by the Courts. Trib. Milano, 26/05/1994. Juris data UTET.

121 Court of Appeal Milan, January 26th 1999, commented in "I contratti", 2000, 255, with Ferrario's comment, "Domestic currency swap" *a fini speculativi e scommessa.* The Court of Appeal, though, still admits that gamble exception ex art. 1933 of the Civil Code can be raised in case the mere speculative nature of the agreement is the unique aim both parties tend to with the conclusion of the contract, seen the ontological assimilability with the category of wager.

But formerly: «Swap contract does not have the characters of gamble and wager, and so the discipline is inapplicable for the same provided for, also when it has a merely speculative aim or however when it disregards the existence of a link between the finance operation and an underlying relation». Tribunal of Milan, 2/20/1997.

122 G. Cottino, *La legge Draghi e le società quotate in borsa*, Torino, 1999, p. 423.

123 Article 1, comma 2 decree-law 58/1998; also the article 1, comma 2, decree-law 415/1996 must be considered.

executed through the payment of differentials in cash; moreover, it excludes within an investment service, the enforcement of article 1933 of the Civil Code to derive financial instruments[124].

There is still to analyze the hypothesis that a contract of this kind is realized by two subjects, none of them being a bank or an investments business.

In this case as well, the main doctrine--seeing in article 23 of Legislative Decree 58/98 the execution of a general principle--considers the contract binding between the parties.

In England, the discipline of the swap contract is included in the Article 63 of the Financial Service Act of 1986[125].

In Louisiana, in the field of the derivative financial contract, the case law detected that a contract entitling seller to difference between contract and market price at time and place for delivery, if not accepted, was not mere gambling contract[126]. A presumption of an intent to make a gaming contract under the guise of a sale of stock for future delivery does not arise from the mere fact that the seller did not at the time own the stock[127].

If, under the guise of contract of sale, real intent of both parties is merely to speculate on rise or fall of prices and property is not to be delivered, but at time fixed for delivery one party is to pay difference between contract price and market price, transaction is invalid as "wager"[128].

A sale of cotton on "seller's call", whereby seller reserved the right to fix the price as of any future date, was not invalid as a gambling transaction[129].

Where agreement for "on call" sale of cotton, provided for immediate delivery and for fixing price according to market value on New York

124 Article 23, paragraph 5: «[w]ithin investment services, article 1933 of the civil code is not applied to derived financial instruments still less to those similar individualized to the senses of article 18, paragraph 5, letter a)». Also compare with art.18, paragraph 4 of the legislative decree n. 415/1996.

125 Cf.: *Weddle, Beck & Co v Hackett* (1929) 1 KB 321, (1928) All Eng 539 (rule in England, where intent of parties is to effect real purchase or sale, is that intention is conclusive).

126 *Washburn Crosby Co. v. Riccobono*, Sup.1926, 162 La. 698, 111 So. 65.

127 *Clews v. Jamieson*, U.S.Ill.1901, 21 S.Ct. 845, 182 U.S. 461, 45 L.Ed. 1183.

128 *Baucum & Kimball v. Garrett Mercantile Co*., Sup.1937, 188 La. 728, 178 So. 256.

129 *Manget Bros. Co. v. Page*, App.1938, 183 So. 139.

Cotton Exchange as of future date, that advances be made to seller by buyer using as basis there for quotation for cotton of similar grade on New York Exchange as of future date agreed on, less broker's commission and margin for buyer's protection, contract did not entail any element of "bet" or "wager" nor "gaming", notwithstanding on conclusion of such sale market value of cotton might be higher or lower than advance quotation as of date of contract[130]. In absence of contrary constitutional or statutory provision, a contract for sale of commodity to be delivered at future day is valid, if parties intend that goods are to be delivered by seller and that price is to be paid by buyer[131], and contracts of sale that do not contemplate the actual bona fide delivery of the property by the seller, nor the payment by the buyer, but are intended to be settled by paying the difference in price at some future time, are gambling contracts[132].

11. Conclusion

Even if the insurance contracts are well known in the legal domain, a definition normally is not included in the statutory texts. It is only the scholarly writings (and sometimes the jurisprudence of the courts) that provide a theoretical understanding the institution. Codes and regulations, most of the time, merely describe the reciprocal performances of the parties. This is true for the Western legal tradition and for the other legal families under this brief survey.

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130 *Baucum & Kimball v. Garrett Mercantile Co*., Sup.1937, 188 La. 728, 178 So. 256.

131 If the parties intend in fact to buy or sell actual cotton, to be delivered at a future time agreed upon by them, it is not a gambling transaction, although they exercise the option of settling the difference in price rather than make delivery; but if the original purpose be not to deliver cotton, but to use the form of a contract for a genuine sale as a method of merely speculating in the fluctuations of the market price, the contract is void, although there be an option of veritable sale and delivery. It is a question of fact for the jury to determine the intention. *Kirkpatrick v. Adams*, 1884, 20 F. 287.

132 *In re Succession of Condon*, App.1881, 1 McGloin, 351. and the rules and regulations adopted by the New Orleans Cotton Exchange in the settlement and substitution of contracts for the future delivery of cotton, when not used to promote a gambling transaction, are valid and legal, and are binding upon all persons familiar with such rules and regulations, or chargeable with knowledge thereof, when they employ members of said exchange to buy or sell on the floor of said exchange cotton for future delivery, and who in good faith so buy and sell in accordance with the said rules and regulations. *Lehman v. Feld*, 1889, 37 F. 852.

The Georgian Civil Code is not an exception. Article 799 of the Civil code of Georgia limits itself in determining the performances of the parties, states a mandatory duty to execute what is written in the contract, only leaving the parties free to foresee what kind of counter-performance offer to the other. The insurance could be asked to pay a sum of money or provide specific performances. That is allowed worldwide. In an ultraliberal contest like the Georgian one, the role of the public policy and the filling gaps function of the courts will play a fundamental role in concretely drafting the living law of the insurance contract.

Article 800 - Obligation to enter into an insurance contract

A person who publicly offers to conclude an insurance contract shall enter into the contract unless there is a valid reason for refusal.

Paolo Tortorano

Summary: 1. Introduction. 2. The Italian discipline. 2.1. The legal obligation to contract. 2.2. The obligation to contract in insurance law. 3. The German discipline. 4. The British Common law. 5. The Georgian discipline.

1. Introduction

With the regulation provided in the Article 800, the legislator intends to protect the interests of the parties of the insurance contract. In this sense, in particular, the main purpose of the above-mentioned protection is, on the one hand, the insurer as a consumer and, on the other hand, the insurer as an entrepreneur.

Considering as stated, the obligation to contract, specifically, «is the duty to conclude a contract with a person who is in need of the subject matter hereof – despite the contrary will of one of the parties»[1].

The Article 800 refers to the cases in which, instead of the obligation to stipulate an insurance contract, the insurer refuses to enter into it.

In particular, if the insurance company has a dominant position in the market, the insurer is prohibited from refusing to enter into a contract with the "insurer" in this field of activity or to offer him unequal contract terms unreasonably[2].

The Article in comment states clearly that a person who publicly offers to conclude an insurance contract cannot refuse to enter in the contract unless there is an important reason to do it.

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1 V. Klappstein, *The Obligation to Contract in British Law*, J. GOV. & REGUL., vol. 3, 2014, *cit*., 50.

2 See, on this point, K. Iremashvili, *Online Commentary on the Civil Code*, available at https://gccc.tsu.ge/. Last processed on March 16, 2016. Due to the unequal terms of the contract, it should be noted that this problem is particularly acute in the contracts with the customer. In general, inequality of the parties in determining the terms of the contract is a natural consequence of the development of social and economic processes. It is relevant in both service and other contracts. The insurance contract is no exception in this regard.

Given these premises, in the follow paragraphs it will be provided a brief comparative recognition of the Civil law– *i.e.* Italian and German law – and the Common law discipline, in order to underline some of the key elements of foreign laws; then, in the last part of the comment, it will be analyzed the Georgian discipline, with the purpose to highlight the strength and weakness of the Article in comment.

2. The Italian discipline

Before analyzing the obligation to contract in the insurance sector, it must be highlighted the general concept of compulsory insurance as provided by the Italian legislator.

Specifically, the legal obligation to contract is the obligation that has its source of the law, it is therefore different from the negotiation obligation that has its source in a negotiating commitment of the subject.

2.1 The legal obligation to contract

The legal obligation to contract occurs in any case in which a rule of law forces a subject, usually carrying out an entrepreneurial activity, regardless of his will, to enter into a certain contract. In this hypothesis, therefore, it is evident that the legislator intended to impose a limit on the principle of contractual autonomy depriving, in this way, the obligated subject of the choice about "if" to contract and "with whom" to contract[3].

The figure of the obligation to contract[4] has always played a role of considerable importance in the context of contract law and, more gener-

3 F. Camilletti, *Alcune considerazioni sull'obbligo a contrarre e sulla trascrizione del contratto preliminare*, RIV. NOT., 2004, 1121. See also C. M. Bianca, *Diritto civile*, vol. III, *Il contratto*, Milan, 1993, 204. The author affirms that the legal obligation represents an authoritarian limitation of contractual freedom. The admissibility of such a limitation must then be assessed on the different level of the constitutional protection of the subject's freedom. The solution of our legal system is in the sense that contractual freedom, basically expressed by the freedom of economic initiative, can be limited by reason of the superior interest of social utility. *Ibid*.

4 See, *ex multis*, P. L. Carbone, *Il contratto del monopolista. Contributo in chiave comparata alla teoria del contratto nell'era delle "conoscenze"*, in *Pubblicazioni del Dipartimento di scienze giuridiche*, Università degli studi di Sassari, vol. XXIV, 2011; V. Ricciuto, *Gli obblighi a contrarre*, in *I contratti in generale, Trattato dei contratti, I*, P. Rescigno E. Gabrielli, 2nd ed., Milan, 2006, 391 ff; C. Osti, *Nuovi obblighi a contrarre*, Torino, 2004; L. Nivarra, *La disciplina della concorrenza. Il monopolio*, in *Il codice civile. Commentario*, P. Schlesinger, Milan, 1992.

ally, in the entire system of private law. Its open contrast with the fundamental principle of private autonomy and, in particular, with its corollary of freedom to negotiate, on the basis of which – pursuant to art. 1322 c.c. – each individual, albeit within the limits established by the legal system, must certainly consider himself free to decide to conclude a contract, as well as to identify the content of the same, allows you to set the relationship between private autonomy and the obligation to contract within the terms of the rule-exception[5].

In brief, it is possible to affirm that fall within the scope of application of the obligation to contract all those cases in which one or more subjects are incumbent – by virtue of a constraint assumed on the basis of a previous contractual commitment, or consequently to an imposition contained in a specific rule of law – the obligation to conclude a specific contract, in most cases without any possibility of choosing either the counterparty or the content of the agreement[6].

Therefore, within the single category of the obligation to contract all those hypotheses in which a subject is legally obliged to put in place a contractual obligation can be included. This regardless of the circumstance that this obligation derives directly from the law (in this case we speak of a legal obligation to contract, as well as an obligation to contract pursuant to law), or it depends on the will of the subject, as happens - for example - when the latter assumes upon himself the obligation to contract through the stipulation of a previous contract[7].

In any case, a common feature of both types mentioned above lies in the fact that the stipulation of the contract, as fulfillment of the obligation to contract, in any case represents a due act, certainly not the result of the free determination of the parties[8].

It is important, in addition, to underline that the limitation does not so much concern contractual freedom, since the content of the contract remains, at least in certain limits, which can always be determined by the

5 A. De Martini, *Obbligo a contrarre*, in *Novissimo dig. it.*, XI, Turin, 1965, 694.

6 V. Ricciuto, *Gli obblighi a contrarre*, 391 ff.

7 A paradigmatic case of the obligation indicated last is the institution of the preliminary contract, which represents perhaps the most important hypothesis of the conventional obligation to contract (otherwise called the contractual obligation to contract, or the voluntary obligation to contract, as well as the obligation to contract *ex contractu*). S. Maiorca, *Obbligo a contrarre e contratto "imposto"*, in *Il contratto: profili della disciplina generale – lezioni di diritto privato*, 2nd ed., Turin, 1996, 212.

8 V. Ricciuto, *Gli obblighi a contrarre*, 391 ff.

parties; however, rather the freedom to contract, that is, the freedom explicitly characterized by the right to stipulate or not stipulate and to stipulate with whomever you want, by virtue of the principle that no one can be forced to contract since the contract is the fruit of a voluntary act, the essential requirement of which is spontaneity[9].

In this context, the *ratio* of the rule that justifies this limitation must be found in the need to protect a general interest, allowing all the associates to be able to access certain services managed on an exclusive basis (for example, as in the case of the legal monopoly), or to protect the community by ensuring compensation to those who have suffered unjust damage in a given activity, which in the absence of an obligation to contract could remain unsatisfied (this is obviously the function of the compulsory insurance imposed on the owner of motor vehicles)[10].

From a subjective point of view, it is important to underline the way in which the legal obligation to contract is always unilateral, unlike the conventional one, as it is charged only to the operator of the service needed while, on the contrary, the user remains free to conclude the contract or not[11].

However, what is stated above does not conflict with the principle of contractual autonomy. On the contrary it harmonizes with it; in fact, even if bound, the subject is still called upon to express his / her consent with regard to the formation/conclusion of the contract[12].

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9 As it was correctly highlighted in F. Messineo, *Il contratto in genere*, TRATT. DIR. CIV. COMM., A. Cicu & F. Messineo (directed by), Milan, 1973, 46. The author affirms that the freedom to contract is, on the one hand, the freedom to stipulate or not stipulate: the contract cannot be abstracted, because it is a fact of will and there is no will if it is not spontaneous. On the other hand, which is a second aspect of the first, freedom to contract is the possibility of choosing the counterpart and, therefore, of being able to refuse the conclusion of the contract with a party that you do not like. Otherwise, there would be the so-called compulsory or necessary contract.

10 F. Camilletti, *Alcune considerazioni sull'obbligo a contrarre e sulla trascrizione del contratto preliminare*, *cit*., 1121-1122.

11 *Ibid*. See also, compliant on the one-sidedness of the legal obligation to contract, L. Montesano, *Obbligazione e azione da contratto preliminare*, RIV. TRIM. DIR. PROC. CIV., 1970, 1173 ff; C. M. Bianca, *Diritto civile*, *cit*., 205; F. Messineo, *Il contratto in genere*, *cit*., 525.

12 C. M. Bianca, *Diritto civile*, *cit*., 205. The Italian doctrine, in particular, outlines the legal obligation to contract as a unitary figure, in which it contains heterogeneous hypotheses that may depend on substantial needs of various kinds, assessed in the legislative context.

Given the premises, the two best known cases contained in the Italian civil code are (i) the obligation to contract in the event of a monopoly, provided for by art 2597 of the Italian Civil Code and (ii) that of accepting transport requests, introduced by Article 1679 of the Italian Civil Code, while others are found in the special regulations such as, for example, the compulsory insurance provided for boats and motor vehicles contained in Article 132 of the Insurance Code (already provided for by Law 990 of 24 December 1969).

In this case, the protected interest is the interest of third parties unrelated to the contractual relationship: the interest of which each individual is the bearer to always be compensated for the damage that may derive from the use of mechanical means by others or from the management of highly dangerous plants by others, even if the injurers assets are not sufficient to compensate him[13].

Moreover, the obligation to contract under conditions predetermined by the administrative authority was thus transformed, *stricto sensu*, into an obligation to make an offer to the public. In particular, the obligation to insure those who request it in accordance with the offer formulated no longer differs, then, from what is imposed, according to the general rules on contracts (Article 1336 of the Civil Code), on each author of an offer to the public[14].

13 F. Camilletti, *Alcune considerazioni sull'obbligo a contrarre e sulla trascrizione del contratto preliminare*, *cit*., 1121-1122.

14 G. Gabrielli, *Le "disposizioni in materia di R.C. auto" del dicembre 2002: elusione dell'obbligo di contrarre da parte delle imprese assicuratrici ed elusione del principio di libertà tariffaria da parte del legislatore italiano*, DIR. ECONOMIA ASSICUR., 2004, 77-78. Ancient experiences attest to how easy it is to confuse the legal obligation to contract - which presupposes the heteronomous determination of the content of the contracts, implemented if only by relationem, through the imposition of respect for equal treatment between all the counterparties of the obligee or at least between those belonging to the individual categories in which such counterparties have been rationally distinguished - and a constraint deriving from an offer to the public whose contents are, on the other hand, freely determined by the author. It is only necessary to clarify - but this is irrelevant for the purpose of the discussion here proposed - that the obligation of the insurers has as its object, unlike that of the managers of public businesses, the formulation of an invitation to offer rather than a real proposal. contractual, subject to acceptance; this depends on the fact that the content of the individual contracts is affected by circumstances which it is the responsibility of the individual user to specify, in accordance, moreover, with the indications resulting from the invitation itself. *Ibid*.

2.2 The obligation to contract in insurance law

With specific regard to the insurance law, this principle is explicitly affirmed by the Code of private insurance (promulgated with the legislative decree no. 209/2005), in Title X, entitled "Compulsory insurance for motor vehicles and boats", in Article 132 – "obligation to contract".

In particular, the Article above-mentioned establishes, in the paragraph 1, that insurance companies are required to accept, according to the policy conditions and the tariffs that are obliged to establish in advance for any risk deriving from the circulation of motor vehicles and boats, the proposals for the compulsory insurance that is presented to them, without prejudice to the necessary verification of the correctness of the data resulting from the risk certificate, as well as the identity of the contracting party and the holder of the vehicle, if a different person[15].

Therefore, the only discretion that the insurance companies may have lies in the possibility of carrying out a check on certificates and means to see if everything is in order[16].

Art. 132, paragraph 1, of the private insurance code, therefore, obliges insurance companies to accept, according to the conditions and rates previously published, any risk deriving from the circulation of vehicles and boats.

Moreover, the insurance companies are obliged to insure anyone who comes with the intention of entering into a third-party liability contract (only the motor liability insurance is the subject of the obligation) according to the rates in force at the time of the stipulation request, while maintaining the freedom to verify the correctness and truthfulness of the data provided by the customer in order to avoid any scams[17].

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15 See the article 132, paragraph 1, of the Italian Code of private insurance. See, on this point, V. Sangiovanni, *I contratti di assicurazione fra codice civile e codice delle assicurazioni*, ASSICURAZIONI, no, 1, 2011, 110-111.

16 V. Ogliari & A. Costa, *Riflessioni sull'obbligo a contrarre la polizza r.c. auto nel nuovo Codice delle Assicurazioni private*, DIR. ECONOMIA ASSICUR., 2006, 483-484. In fact, by imposing on the undertaking the obligation to accept insurance proposals, a selection of risks that would not be admissible in a mandatory regime is avoided, as this selection, in favor of the company that implemented it, would necessarily translate into an anti-selection to charge to other companies. Moreover, the same would be induced to activate similar mechanisms, thus creating a situation of impossibility of access to compulsory insurance for certain categories of risks. *Ibid*.

17 P. M. Putti, *La riforma della Rc auto*, RESP. CIV. PREV., 2003, 230 ff.

Furthermore, the companies are required – or better, obliged – to accept the proposals for the compulsory insurance of motor vehicles and boats that are presented to them. The aforementioned obligation, therefore, is in contrast with the cardinal principle of our legal system: private autonomy and the consequential freedom to contract, understood in terms of both consent and the determination of the conditions of the contract[18].

With the obligation to contract in the liability insurance field, it is possible to verify a clear derogation from the aforementioned principle, as the law is interfered with in the context of the freedom of negotiation of individuals, through prescribing the mandatory consent for insurance companies for the purpose of concluding a contract[19].

3. The German discipline

In the German legal framework, the term *Versicherungspflicht* (insurance obligation) is predominantly used *stricto sensu* to indicate an obligation imposed to a specific person by the law.

This limited use may derive by the fact that the section 113 of the German Insurance Contract Law (hereinafter referred to as VVG) defines explicitly the term *Pflichtversicherung* (*i.e.* compulsory insurance) as a liability insurance, for the conclusion of which there is a legal or other obligation legal provisions[20].

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18 *Ibid*. However, the obligation to accept the proposals made by customers is subject to verifying the correctness of the data in the risk certificate and the identity of the contractor and the holder of the vehicle, if different. In fact, the law allows insurers to access databases (Public Vehicle Registry, National Vehicle Archive and Claims Database) in order to check the truthfulness of the information provided by the customer and in case of non-correspondence, refuse the stipulation policy.

19 M. Roma, *Codice delle Assicurazioni. Novità e prospettive in tema di tutela dell'assicurato-consumatore*, DIR. ECONOMIA ASSICURAZ., 2007, 109 ff. The additional obligation under Article 132 of the Italian Insurance Code in addition to accepting requests from customers, it is the responsibility of the Companies to establish in advance the rates for any risk deriving from the circulation of motor vehicles and boats. In other words, the Insurance Companies will not be able to limit their offer to cover only certain risk categories. In this way, the Legislator has prevented the companies in question from being able to circumvent the imposition of the obligation to contract and deprive those subjects carrying higher risks of the possibility of taking out policies. P. M. Putti, *La riforma della Rc auto*, *cit*., 230 ff.

20 See Section 113, *Versicherungsvertragsrecht* (German Insurance Contract Act).

Given the premise, while sections 113 *et seq.* VVG may be directly applied only to compulsory insurances which are liability insurances, therefore this does not mean that a *Pflichtversicherung* cannot be another type of insurance[21].

In a broader sense, moreover, *Versicherungspflicht* can also mean the contractual obligation to seek insurance coverage[22].

The above-mentioned provisions, however, do not establish the obligation to take out insurance but, more generally, they provide a framework and determine, *inter alia*, the minimum content of the coverage whenever this obligation is imposed by a legal provision[23].

Aside from that, there is no consistent regulatory regime of liability insurance, either at the federal or state law level that may justify the reasons for which they were established or in relation to the different standards of liability or the different types of damages[24].

In this regard, compulsory liability insurance is provided for claims arising from or relating to the possession of vehicles, animals, or weapons, the exercise of (potentially) dangerous activities, or a specific professional firm[25].

Hence, the purpose of this insurance is to protect, along the lines of the Italian's one, third parties from damage resulting from injury to life and limbs, property and/or damages for pure economic loss. There is no general rule that, in cases where there is strict liability, liability insurance has been introduced[26].

4. The British Common law

In Common law, freedom of contract is the dominant ideology of contract law. Parties should be as free as possible to make agreements on their own terms without any interference[27].

21 M. Zimmerling & A. Pfeiffelmann, *Germany*, INS. DISP. L. REV., 2021. See, also, M. Eichhorst, *Germany*, in *The Insurance and Reinsurance Law Review*, P. Rogan (ed.), *The Law Reviews*, 2020, 210-226.

22 M. Zimmerling & A. Pfeiffelmann, *Germany*, *cit*.

23 See, on this point, R. Koch, *Compulsory Liability Insurance in Germany*, in A. Fenyves, C. Kissling, S. Perner, D. Rubin (eds), *Compulsory Liability Insurance from a European Perspective*, TORT & INS. L., 2016.

24 *Ibid*.

25 *Ibid*.

26 M. Zimmerling & A. Pfeiffelmann, *Germany*, *cit*. See, also, M. Eichhorst, *Germany*, in *The Insurance and Reinsurance Law Review*, *cit*., 210-226.

27 E. Younkins, *Freedom of contract & sanctity of contract are the dominant ideologies*, in *The Lawyers and Jurists*, 2020. Available at https://www.lawyersnjurists.com/article. Last visited September 22, 2021.

Thus, the obligation to contract is neither an entirely private law phenomenon nor a contract law phenomenon, nor is it found only in public law. Indeed, it is configured as intertwined in those areas of law[28].

Because of this interrelation, the legal consequences have "unusual" aspects; in fact, one person is allowed to completely leave the freedom to contract by forcing another to enter into a contract that she never wanted to enter in the first place[29].

This also leads to a reduction in the exclusivity of the owner. To ensure that such a legal construct does not entirely infuse the legal system, it must have certain boundaries.

With the purpose to analyze the obligation to contract in Common law – specifically, in British Common law – there are two main criteria: the analysis of the two branches of law, private and public law, and their development over time.

The obligation to contract represents a legal duty that justifies the conclusion of a contract. A contract is «a promise or set of promises which the law will enforce»[30]. Putting both together the obligation to contract seems to be contradicting the principle of private autonomy, especially property and freedom to contract[31].

With specific regard to the analysis of the obligation to take out a contract in the insurance field, the author refers to the comment of the Article 801.

5. The Georgian discipline

In the Georgian legal framework, at a doctrinal level, insurance, in its essence, should not be considered just as a means of satisfying subsistence needs. As a matter of fact, the essence of insurance services aims at ensuring peace of mind for the insurer.

In particular, this goes beyond the scope of subsistence needs and this is considered a matter of some kind of user comfort.

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28 V. Klappstein, *The obligation to contract in British law*, J. GOV. & REGUL., vol. 3, 2014, 50.

29 *Ibid*.

30 F. Pollock & P. H. Winfield, *Pollock's Principles of Contract*, London, 1950, *cit*., 1.

31 V. Klappstein, *The obligation to contract in British law*, *cit*., 51. As these are important principles, «based on the general idea of human freedom, it can only be allowed in exceptional cases. However, it secures the freedom of contract and property as well, scilicet the one of the consumer, as he is enabled to contract». *Ibid*.

Given the premise, studying the information provided by the insurer represents one of the most important steps in the process of insurance business. In fact, when evaluating an application filled out by an insurer, insurance companies are guided by internal and external resources[32].

Given the specificities of insurance services, in many cases, the refusal to enter into a contract can be considered legitimate. In particular, the insurer is guided by certain criteria in the decision-making process and in determining its value[33].

Specifically, these criteria, on the one hand, are determined by the standards set in the insurance practice and, on the other hand, by the policy developed within the insurance company itself[34].

In addition, the refusal of the insurer to enter into a contract includes the imposition of a high insurance premium due to the increased risk, which, in turn, may mean the rejection of the contract for the insurer.

Whether the probability of taking the risk is high, the insurer is entitled not to take such risk at all or to impose a correspondingly high premium for such a carrying.

In these cases, the premium should not be unreasonably high to legitimize the refusal. Determining the premium compliance with the severity of the risk is a difficult task. The insurer, as an entrepreneur, is free to set the prices of insurance services for a particular type of insurance product[35].

In addition to the reasonableness of the refusal, it is no less important for the insurer to declare it within a reasonable time. It is conditioned by the necessity of protecting the interests of the mentioned insurer. In fact,

32 See, on this point, K. Iremashvili, *Online Commentary on the Civil Code*, *cit*.

33 *Ibid*.

34 *Ibid*. For example, some companies charge a correspondingly high premium for high-risk policies, while some companies do not consider it appropriate to issue such policies at all. Therefore, determining the legitimacy of an insurer's refusal is a difficult task. In such a case, the judge must take into account a number of circumstances when guided by the criterion of substantial grounds for refusal established by the 800. It should be noted that such a decision by a judge is, in some respects, an interference with the policy of the insurance company. Such an argument should not be unreasonable, as the judge does not have the competence on the basis of which the insurance company's underwriting service makes a separate decision. *Ibid*.

35 I. Nozadze, *Duty to Inform as a Specificity of Demonstration of Good Faith Principle in Voluntary and Compulsory Insurance*, Ivane Javakhishvili Tbilisi State University Faculty of Law, Journal of Law, 2017, 130-131.

before receiving an answer from the insurer, the object of insurance is at risk: there is no guarantee of damages[36].

Furthermore, if the insurer creates a legitimate expectation for the insured to enter into a contract and the insured incurs certain costs based on this, then the insurer will be charged a pre-contractual charge. In this sense, in terms of legal consequences, if the insured refusal is deemed to have been declared unfounded, the insurer shall exercise the right to impose an obligation on the insurer to enter into a contract under Article 800 as a special norm[37].

Finally, the insurer, in order to prove the effective obligation of the insured to enter into the insurance contract, must prove the illegitimacy of the refusal declared by the insured[38].

Therefore, in terms of legal consequences, if the insurer's refusal is deemed to have been declared unfounded, the insurer shall exercise the right to impose an obligation on the insurer to enter into a contract under Article 800 as a special norm.

36 K. Iremashvili, *Online Commentary on the Civil Code*, *cit*. The principle of good faith obliges the insurer to take more care of the interest of the insurers and not to put him in a difficult situation of late refusal to enter into a contract.

37 *Ibid*.

38 *Ibid*. In view of the above arguments, it is difficult to prove the unfairness of a particular decision made by the insurer as a result of the risk assessment, and ultimately, the assessment of the insurer's refusal is the prerogative of the court. Therefore, determining the legitimacy of an insurer's refusal is a difficult task. In such a case, the judge must take into account a number of circumstances when guided by the criterion of substantial grounds for refusal established by the 800. It should be noted that such a decision by a judge is, in some respects, an interference in the policy of the insurance company. Such an argument should not be unreasonable, as the judge does not have the competence on the basis of which the insurance company's underwriting service makes a separate decision.

Article 801 – Compulsory insurance

The law may provide for compulsory insurance to which the rules of this Chapter shall apply unless they contradict compulsory insurance legislation. Matters relating to reinsurance shall be regulated according to the procedure set down by law.

Paolo Tortorano

Summary: 1. Introduction. 2. The Italian discipline. 3. The German discipline. 4. The British Common law. 5. The Georgian discipline.

1. Introduction

The Article 801 of the Georgian civil code refers to the cases in which the law may provide for compulsory insurance.

As a matter of fact, the request for insurance can be voluntary, but, in some particular cases, it can also arise as a result of insurance obligations expressly created by public authorities.

In this sense, the authorities may seek, for political reasons, to protect the interests of consumers, businesses or third parties by requiring to certain categories of persons to take out insurance against specific risks. This kind of insurance, specifically, is called compulsory insurance[1].

The purpose of compulsory insurance contract «is the promotion of the development of stable and regulated civic relationship»[2].

In particular, «[t]he number and type of compulsory insurance requirements differ substantially from country to country»[3].

Compulsory insurance, also called mandatory insurance, represents the regulation of governments or authorities «that requires individuals and/or organizations to buy a minimum level of the relevant insurance cover-

1 European Commission, *Final Report of the Commission Expert Group on European Insurance Contract Law*, Directorate General for Justice, 2014, 34. Legal provisions establishing the duty to insure will often detail the mandatory content and extent of coverage prescribed. The most common examples of compulsory insurance include liability risks, particularly with regard to motor vehicles, aviation, ships and some independent professions.

2 I. Nozadze, *Duty to Inform as a Specificity of Demonstration of Good Faith Principle in Voluntary and Compulsory Insurance*, Ivane Javakhishvili Tbilisi State University Faculty of Law, Journal of Law, 2017, *cit*., 133.

3 *Ibid*.

age, such as mandatory bank deposit insurance and mandatory universal health insurance»[4].

In this context, the purposes of implementing a compulsory insurance are different. For example, one of these is to better protect the citizens of a Country – just think, for example, about the car insurance.

A further objective is linked to the protection of third parties. In fact, most compulsory insurance related to civil liability, such as compulsory professional indemnity and car liability insurance, serve this purpose.

Again, insurance forecasting can be helpful in helping solve the problem of insurance market failure[5].

Finally, a latter purpose that can be highlighted is to establish public trust in the relevant industry[6].

Considering as stated above, therefore, compulsory insurance represents a type of insurance that an individual or a company is legally required to purchase. Such insurance may be considered fundamental for individuals and businesses who wish to engage in certain financially risky activities, such as driving a car or conducting a business with employees.

Typically, «rules on compulsory insurance extend beyond a duty to take out insurance as such, but also establish requirements for an insured sum, specific elements of the cover, the availability and effect of exclusion clauses, deductibles, etc»[7].

In addition, compulsory insurance should protect accident victims from the costs of recovering from an accident caused by someone else, such as another driver or employer[8].

4 B. Y. Chen, *The Review and Analysis of Compulsory Insurance*, in *Asian Pacific Risk and Insurance Association*, 2012, *cit*., 6. See also, M. Fras, *Compulsory Insurance Contract in Private International Law*, EUR. INS. L. REV., 2021, 23 ff.

5 *Ibid*. On this point, «[t]here is no need to implement compulsory insurance if there is a necessary and sufficient private insurance market to cover the relevant risk. However, due to the adverse selection or moral hazard or social risk, the private insurance market fails. Then, there is a potential need for the government to implement such compulsory insurance. Compulsory natural disaster insurance and environment pollution insurance are for this purpose».

6 *Ibid*.

7 European Commission, *Final Report of the Commission Expert Group on European Insurance Contract Law*, *cit*., 33.

8 On this point, «the legal nature of a compulsory insurance contract should be verified on the example of classic theories of delimitation between public and private laws. In view of the theory of interests, compulsory insurance explicitly protects the public interest. Unlike voluntary insurance contract the scope of interests covered by compulsory insurance is broader». I. Nozadze, *Duty to Inform as a Specificity of Demonstration of Good Faith Principle in Voluntary and Compulsory Insurance*, *cit*., 132.

Considering the introductive remarks, with the purpose to analyze the strengths and weakness of the Georgian discipline, in the following paragraphs it will be provided a comparison with the Civil law – with specific regard to the Italian and German law – and the Common law discipline aiming to underline some of the key elements of foreign laws.

2. The Italian discipline

By analyzing the Italian legal framework, if in voluntary insurance – meaning those in which the policyholder freely chooses whether to conclude or not and, if so, under what conditions – the whole regulatory system focuses on the protection of the weak policyholder[9] by requiring the distributor of the insurance product to assess the adequacy of the same to the protection needs expressed by the customer[10], within those market segments in which the conclusion of a contract is required in order to see the protection needs of third parties rather than of the insured person protected and not compromised the legal system to assume a decisive role in order to provide for the specific characteristics that such insurance contracts must possess[11].

There is a considerable variety of what constitutes compulsory – or better, compulsory insurance. In particular, the insurance obligation can be established by law or by regulations relating to the exercise of a profession / activity. It can be established by the legislator, by state bodies or, otherwise, by professional associations or other self-governing bodies.

9 See, on these points, G. Cavazzoni, L. Di Nella, L. Mezzasoma, F., Rizzo, *La tutela del consumatore assicurato fra codice civile e legislazione speciale*, ESI, Naples, 2012.

10 F. Moliterni, *Art. 120*, in Aa. Vv., *Il codice delle assicurazioni private*, (F. Capriglione), II, Cedam, Padova, 2007, 167 ff; M. R. Arena, *Adeguatezza dell'offerta assicurativa nei rami danni*, DIR. ECON. ASS., 2007, 433 ff; G. Volpe Putzolu, *La valutazione dell'adeguatezza del contratto di assicurazione offerto*, in Aa. Vv., *La responsabilità civile nell'intermediazione assicurativa*, Giuffré, Milan, 2011, 31 ff; F. Panetti, *Conflitto di interessi e adeguatezza del prodotto nella disciplina degli intermediari assicurativi: il problema dei rimedi*, DIR. ECON. ASS., 2011, 462-469; U. Natoli, *Il contratto «adeguato». La prestazione del cliente nei servizi di credito, investimento e assicurazione*, Milan, 2012, 173 ff.

11 G. Berti De Marinis, *The discipline of the insurance contract in Italy: the new problems*, in *Actualidad Jurídica Iberoamericana*, IDIBE, 2016, 184.

Sometimes the obligation may be considered as a part of a code of conduct which, while not strictly binding, creates a standard of good practice whose violation can be sanctioned by disciplinary or other measures[12].

In this scenario, the decision to stipulate an insurance contract is not always the result of a free choice of citizens but, in some cases, it becomes a real legal obligation. On this point, in fact, a number of special laws impose compulsory insurance to be undertaken with private insurance companies.

At other times, the private insured must instead take out an insurance contract with a public insurer, such as the National Institute for the Insurance of Accidents at Work or take out a mutual insurance contract with a private insurer through a public contracting entity[13].

Finally, an obligation to take out an insurance contract can be found in some national collective labour contracts stipulated between the trade unions, representing the employees, and the Industrial Association, representing all their members who will adopt the negotiated national collective labour contracts for the specific industry[14].

Compulsory insurance, in this context, has very often represented the instrument aimed at balancing the interests of risk "producers" with the rights of any potential victims of this activity and with their need not to see their legitimate compensation expectations frustrated[15].

This aspect has been preserved to the point of being characterized, in these cases, by its own social function, expressly recognized from doctrine and jurisprudence and such as to make prevail, *ex lege*, elements of a

12 European Commission, *Final Report of the Commission Expert Group on European Insurance Contract Law*, *cit*., 75-76. In particular, «[w]here a professional self-governing body prescribes liability insurance, the stipulation of liability coverage is usually required for those registered with or subject to the professional self-governing body. Depending on the country in question non-performance of the duty to insure may result in the prohibition to exercise the profession. These differences are connected to the characteristics of the various markets, to the particular features of national legal systems of the Member States and to the needs of their citizens». *Ibid*.

13 A. P. Giorgetti, *Italy*, in *The Insurance and Reinsurance Law Review*, P. Rogan (ed.), *The Law Reviews*, 2020, 296 ff.

14 *Ibid*.

15 L. Bugiolacchi, *Le strutture sanitarie e l'assicurazione per la r.c. verso terzi: natura e funzione dell'assicurazione obbligatoria nella legge n. 24/2017 (legge «Gelli/Bianco»)*, RESP. CIV. PREV., 2017, 1033-1034. Moreover included in a social context of increasing sensitivity towards the injured which, as is well known, has highlighted the "compensatory" function of the institution of civil liability.

publicist nature on the pact regime containing the settlement of interests between the insured and the insurer, to the benefit of the injured third party, the true "beneficiary" of the compulsory insurance mechanism, as clearly testified by the now proven experience of compulsory liability insurance auto and by the law developed on this thrust[16].

Given these premises, regarding to the compulsory insurances existing in Italy, the coverage of related risk should be certainly possible even without compulsoriness, thus even if the insurance was facultative and probably without changing the insurance premium[17].

All the insurances not imposed by the State or by another public body with legislative power have to be considered facultative[18].

The Italian insurance code, on the subject of compulsory insurance, specifically deals with motor vehicle liability insurance.

More specifically, the Article 132 of the Italian Code of private insurance, in taking up the content of Article 11 of Law no. 690, imposes some fundamental rules of conduct for companies.

In particular, the legislator, in introducing such an obligation on companies, has mainly had regard to the consumer, who has the right not to be unjustly discriminated against in accessing the third-party insurance product for his vehicle prepared by the company, although obviously in the tariff difference according to the insured risk based on technical-actuarial criteria[19].

The legal obligation to contract is therefore not in contradiction with negotiating autonomy: as a matter of fact, the company remains free to identify the content of the contract and to apply the premium, albeit within the scope of tariffs determined *ex ante* by the same company according to its own technical bases, sufficiently broad and extensive[20].

16 The literature on the role and function of compulsory insurance systems, in their interaction with third party liability rules, generally based, in such cases, on channeling the responsibility towards the person carrying out the "risky" activities is very vast. On this point, see generally M. Comporti, *Considerazioni introduttive e generali*, in *Responsabilità civile e assicurazione obbligatoria*, Milan, 1998, 15 ss; G. Volpe-Putzolu, *voce Assicurazione obbligatoria*, in *Enc. giur. Treccani*, III, Rome, 1988, 2.

17 Only regarding to the most important catastrophic risks, in particular the risks of the natural calamities, we should say, maybe, that the universal mutuality caused by the compulsory insurance, should make easier, on the technical plan, the coverage.

18 A. P. Giorgetti, *Italy*, *cit*., 296 ff.

19 F. Martini & M. Rodolfi, *Esercizio dell'Assicurazione*, in A. Candian & G. Carriero (eds.), *Codice delle Assicurazioni Private*, ESI, Naples, 2014, 543-580.

20 *Ibid*.

Thus, the obligation to contract is instrumental in achieving the social purpose underlying the mandatory nature of car liability insurance: that of preventing the victims of accidents related to the circulation of vehicles and boats from being deprived of compensation protection[21].

Moreover, the mandatory protection may be extended to the damages caused to third parties by the insured vehicle, while, on the contrary, it does not cover the damages suffered by the latter or by its driver (who may in any case add specific guarantees dedicated to this).

As for the reinsurance situation, otherwise, the reinsurer has basically the same approach both to the compulsory insurance and to not compulsory one, and the same is for the insurer[22].

Both the operators, in fact, consider above all the technical aspect of the coverages (kind of risk, mutuality, statistical series, etc)[23].

However, there is no legislative definition of reinsurance contract, even though reinsurance is regulated both in the Italian Civil Code (Articles 1928-1931 c.c.) and in the Insurance Code (Articles 57-67). The Insurance Code dictates the definition of reinsurance business: it consists in the acceptance of risks transferred by an insurance company or another reinsurance company (Article 57, paragraph 1, of the Italian Civil Code)[24].

3. The German discipline

Posing the attention on the compulsory insurance in the German legal landscape, it is regulated by section 113 of the VVG (*Versicherungsvertragsrecht* – the German Insurance Act).

In particular, the above-mentioned law provides, in the first paragraph, that «[l]iability insurance which a policyholder is obligated by legal provision to take out (compulsory insurance) must be concluded with an insurance company authorised to do business in Germany»[25].

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21 *Ibid*.

22 A. P. Giorgetti, *Italy*, in *The Insurance and Reinsurance Law Review*, *cit*., 296 ff.

23 *Ibid*.

24 V. Sangiovanni, *I contratti di assicurazione fra codice civile e codice delle assicurazioni*, *cit.*, 109.

25 Section 113, paragraph 1, *Versicherungsvertragsrecht* (German Insurance Contract Act).

In this sense, the legislator has stated that some liability insurances are based on a voluntary basis while, on the contrary, others fall within the category of compulsory insurance.

In this sense, the most typical case is that in which the legislator has considered it particularly important to ensure the risk of damage to third parties caused by the behavior of another party. On this point, the most obvious example of mandatory liability insurance is that of third-party vehicle insurance, from which the other mandatory insurance is derived[26].

In fact, according to section 113 (1) of the Insurance Contract Act, liability insurance must be taken out with an insurance company licensed to carry out business in Germany, which is required by law (compulsory insurance).

Furthermore, the obligation to take out compulsory liability insurance does not have to derive from a law in the formal sense; a law in a material sense, *i.e.* a national or EU regulation, would also suffice. Insofar as the matter to be regulated falls within the jurisdiction of a federal state, the corresponding obligation may also derive from a state law[27].

Moreover, the following paragraphs provide that (i) the insurer shall confirm in writing to the policyholder, quoting the sum insured, that he is obligated to take out the compulsory insurance in accordance with a legal provision, to which reference must be made; (ii) the provisions of this Division shall also apply insofar as the contract of insurance grants cover in excess of the prescribed minimum requirements[28].

In this sense, it is important to specify that, in order to avoid the possibilities of splitting of the insurance contract, the entire insurance relationship is subject to the mandatory insurance discipline and not just that part that meets the minimum mandatory requirements[29].

This rule applies in particular to cases where an insured sum has been agreed which exceeds the minimum sum insured, the group of co-in-

26 M. Zimmerling & A. Pfeiffelmann, *Germany*, INS. DISP. L. REV., 2021. See, also, M. Eichhorst, *Germany*, in *The Insurance and Reinsurance Law Review*, P. Rogan (ed.), *The Law Reviews*, 2020, 210-226.

27 C. Armbrüster, *Il diritto dei contratti di assicurazione in Germania dopo la riforma del 2008*, in *Diritto e Fiscalità dell'Assicurazione*, 2013, 454 ff.

28 M. Zimmerling & A. Pfeiffelmann, *Germany*, *cit*.

29 C. ArmbrüSter, *Il diritto dei contratti di assicurazione in Germania dopo la riforma del 2008*, *cit*., 454-455.

sured is expanded beyond the mandatory requirements or the scope of insurance coverage is extended[30].

In addition, the limitation of the obligation of the insurer not providing any service to the policyholder to the minimum insured sum established in section 117 (3) VVG-E does not constitute an exception to this rule, but rather confirms the principle of the uniform contract relationship[31].

Furthermore, according to the provisions of the German law on compulsory insurance, it is aimed at guaranteeing subsistence funds for the company and protection against various life injuries and represents the «special implication of the Social State principle»[32].

In particular, as stated above implies the obligation of the legislator to define compulsory insurance in specific insurance systems, including: (i) health insurance for the protection of the population from cases of illness; (ii) accident insurance, which covers the risks associated with the work process in the industrial company; (iii) pension insurance, which includes social assistance and insurance components; (iv) unemployment insurance; (v) insurance related to the need for treatment in the event of illness[33].

Finally, in the mandatory protections it may be verified a question of protecting the insurer from risks that are not insurable and that do not give him the opportunity with regard to the main contract to prove his need[34].

In this regard, in particular, the underlying principle of social insurance creates a specific mechanism to improve the distribution of individual risk[35].

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30 M. Zimmerling & A. Pfeiffelmann, *Germany*, *cit*.

31 *Ibid*.

32 T. Zaalishvili, *Principle of Social State, Its Elements and the Human Right to Dignity – the Basis for Ensuring the Subsistence Minimum*, Ivane Javakhishvili Tbilisi State University Faculty of Law, Journal of Law, no. 1, 2012, *cit*., 255.

33 M. Zimmerling & A. Pfeiffelmann, *Germany*, *cit*.

34 C. ArmbrüSter, *Il diritto dei contratti di assicurazione in Germania dopo la riforma del 2008*, *cit*., 454. However, this last consideration is contrary at the level of legal policy to the limitation provided by art. 6, paragraph 2, c. 3 of the VVG to compulsory insurance.

35 *Ibid*. In this sense, «[f]or the implementation of social insurance principle the system of organizational unities was created and developed with the relevant distribution of risks. Each participant of the system must be protected in case of insured risk-taking place. The participant must not find itself alone against the negative results related to the risks».

Therefore, operationally, the compulsory insurance in Germany offers coverage to those who, due to specific conditions – *i.e.* poor economic conditions or incapacity – cannot manage their own lives independently.

4. The British Common law

In the United Kingdom, the type of insurances that are legally compulsory for everyone are the motor insurance and the employer's liability[36].

In the first case, it is provided that all drivers are required by law (under the *Road Traffic Act* of 1930) to have in force an insurance policy to cover their liability for bodily injury to or damage to third party property which arises from the use of a motor vehicle. Today, this law is defined by the *Road Traffic Act 1988*[37].

Compulsory automobile insurance means that all those operating a motor vehicle must purchase insurance[38].

The law, specifically, states that motorists are insured against liability for injury to others (including passengers) and for damage to other people's property, resulting from the use of a vehicle on a public road or in other public places[39].

Third party insurance is the bare minimum drivers need to have to circulate on public roads. It has been compulsory since it was introduced with the Road Traffic Act 1930.

However, third party only covers the other party's damage and injuries in cases of accident in which the policyholder has the fault[40].

However, the insurer is under an obligation to indemnify those specified under the policy as in respect of any liability owed to them, but

36 T. Hardy, *Mandatory insurance-legal and economic myths and realities*, British Insurance Law Association, London, 2010, 2-3.

37 A. Cohen & R. Dehejia, *The Effect of Automobile Insurance and Accident Liability Laws on Traffic Fatalities*, J. L. & ECONOMICS, 2004, 361. Revised to comply with European Directives and developments and more recently the *Road Safety Act* 2006 has inter alia introduced measures designed to assist with the enforcement of compulsory motor insurance.

38 *Ibid*. In particular, the authors stress that «[g]iven the bounded nature of assets that individuals commonly have, it is often rational for them to elect not to purchase insurance if they are free to do so». *Ibid*.

39 *Ibid*.

40 *Ibid*.

without any cause of action being conferred directly upon injured third parties. Such obligation does not preclude insurers from being able to repudiate liability to a policyholder for voidable grounds such as a material non-disclosure or misrepresentation[41].

The second case, instead, provides that employers Liability Insurance is required by law (under the *Compulsory Insurance Act* 1969).

The policy of the Act is straightforward. Indeed, «[i]t seeks to remedy a situation whereby people can be injured in the course of their employment, can be awarded compensation by the courts against their employer and yet not receive that compensation, because the employer does not have the necessary resources»[42]. To this end, it provides an obligation on employers to insure against the possibility of incurring such liability, «something responsible businessmen normally do as a matter of prudence to put it no higher»[43].

The extent of this obligation is prescribed in sections 1-3 of the Act. In particular, Section 1 (1) provides that every employer carrying on business in Great Britain must insure under approved policies with authorized insurers against liability for bodily injury or disease arising out of and in the course of employment in Great Britain in that business[44].

With specific regard to the case of reinsurance, in the UK the reinsurance of classes of compulsory insurance does not involve any specific

41 T. Hardy, *Mandatory insurance-legal and economic myths and realities*, *cit*., 21. As stated, «motor policies must be issued by authorised insurers to meet the requirements of the compulsory third party liability legislation, but may additionally cover a vehicle against comprehensive, including first-party, risks». *Ibid*.

42 D. Watkins; *H.C. Deb.*, Vol. 786 col. 1807, 1969. The scheme adopted is modelled on the earlier Road Traffic legislation in that the employer is required to take out a liability insurance policy, the terms of which are subject to statutory control, covering potential liabilities to employees, but does so in a more confined way: it is confined to personal injuries, subject to a financial cap, without any fallback by way of uninsured employers and involves far less statutory control.

43 R. C. Simpson, *Employers' Liability (Compulsory Insurance) Act 1969*, THE MODERN L. REV., 1972, *cit.*, 65. See also, B. Barrett, *Is the Employers' Liability (Compulsory Insurance) Act 1969 Fit for Purpose*, INDUTRIAL L. J., 2016, 503-524.

44 *Ibid*. On this point, the law states that «[n]ationalised industries, local authorities and police authorities are excluded from this obligation 7 on the grounds that they have sufficient resources to meet any such liability. It was contemplated that regulations would be made to exempt other employers whose

financial position was similarly secure if an acceptable formula could be found demonstrating this, but this has yet to be done». *Ibid*.

statutory obligations being imposed upon private reinsurers who must simply comply with rules governing the writing of reinsurance business more generally[45].

Therefore, the «[r]einsurers may freely decide the terms upon which they underwrite or withdraw from such classes of business. The stance adopted by private reinsurers at any one time does however have a major bearing upon the feasibility of the provision of compulsory insurance by direct insurers»[46].

5. The Georgian discipline

The Article 801 establishes the rule of the legal regulation of compulsory insurance. In addition, the Article also refers to the legislative discipline of reinsurance relationships.

On this point, the first and second sentences of 801 envisage two substantially different institutions, making it difficult to define the norm in a unitary context.

At the same time, in the absence of the second sentence of 801, reinsurance relationships will be governed by the Georgia Insurance Act. From the point of view of legislative regulation, it would be desirable for the reinsurance rule to be formulated in a separate Article and in terms of content, since the reinsurance contract is in its essence a complex legal structure and requires detailed regulation[47].

As a matter of fact, there is a difference between compulsory and voluntary insurance. Voluntary insurance and compulsory insurance differ in this respect. First, it arises on the basis of the autonomy of the will of the parties and is regulated by the civil code. The second neglects the au-

45 T. Hardy, *Mandatory insurance-legal and economic myths and realities*, *cit*., 28.

46 *Ibid*.

47 See, on this point, K. Iremashvili, *Online Commentary on the Civil Code*, available at https://gccc.tsu.ge/. Last processed March 16, 2016. On this point, the risk allocation rule represents an element of paramount importance in order to determine the substantive terms of a reinsurance contract. In this regard, insurance practice is familiar with the different mechanisms of risk and premium distribution. Distinguish between optional and automatic reinsurance. The first is a relatively complex and impractical mechanism in that it requires the reinsurer to provide detailed information about each risk to the reinsurer. As a result, the reinsurer is entitled to refuse to take any risk from the offer. Automatic reinsurance contracts are long-term and do not require a separate risk check by the reinsurer.

tonomy of the will of the parties and is subject to regulation under public law[48].

The insurance regulations provided for by the civil code are mainly aimed at regulating voluntary insurance. However, it is possible to extend their validity also to compulsory insurance in the cases in which the legislation on compulsory insurance does not prohibit this possibility.

At the same time, the law provides for the obligation to insure the objects provided for by law for certain categories of legal persons. Moreover, the obligation to take out an insurance contract may also derive from an imposition relating to certain persons by a rule of private law[49].

In addition, the Law of Georgia on Insurance defines compulsory insurance as a form of insurance in which the object, types and rules of implementation of the insurance are determined by the relevant law on compulsory insurance.

The law protects the interests of the insured; specifically, in cases when the insurer has not entered into a contract or such a contract has been concluded for the insured under worse conditions than provided by law, the insured has the right to claim insurance compensation in the event of an insured event[50].

With reference to the second part of the Article 801 (*i.e.* reinsurance), it protects the interests of both the insurer and the insurer and ultimately contributes to the development of the insurance market.

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48 I. Nozadze, *Duty to Inform as a Specificity of Demonstration of Good Faith Principle in Voluntary and Compulsory Insurance*, *cit*., 138. Unlike voluntary insurance, in fact, compulsory insurance «promotes the development of stable and regulated civic relationship. In fact, this decision demonstrated the purposes and importance of influence of a compulsory insurance contract on civic relationship». *Ibid*.

49 *Ibid*. In life insurance, for example, «contract concluded in the form of a compulsory insurance, it does not depend on the consent of potential insured whether or not the insurance policy will be purposed for his/her life. Respectively, neither the insurer has the duty to request his/her consent. The law directly provides, that his/her life should be insured on a compulsory basis, who should be the insurer and who should be the beneficiary of insurance payment (after occurrence of an insured event)».

50 See, on this point, K. Iremashvili, *Online Commentary on the Civil Code*, *cit*. In compulsory insurance, for example, «the insurer will not be able to enjoy the right to break contract if policyholder does not pay the insurance premium. Payment of the premiums should be claimed through judicial procedure. Non-payment of the premium will not exempt the insurer from the indemnification of occurred damages». I. Nozadze, *Duty to Inform as a Specificity of Demonstration of Good Faith Principle in Voluntary and Compulsory Insurance*, *cit*., 141.

In particular, the Law of Georgia on Insurance defines reinsurance as an operation in which the insurer, on the basis of the reinsurance contract and taking into account the peculiarities of each such contract, carries out the insurance risk and related losses in whole or in part to the reinsurance company[51].

The content of the reinsurance contract is significantly determined by the content of the insurance contract. The definition of a reinsurance contract is based on the presumption that if the reinsurance contract does not provide otherwise, its terms apply to the terms and conditions of the insurance contract to the insurer[52].

On this point, it may be observed that the insurer itself is not a party to the reinsurance contract and usually does not have a contractual claim against the reinsurer. However, in interpreting a reinsurance contract, the court may grant such a request to the insurer if it considers that the reinsurance contract is a transaction in favor of a third party[53].

51 See, on this point, K. Iremashvili, *Online Commentary on the Civil Code*, *cit*. The insurer, regardless of the reinsurance contract, is liable to the insurer within the framework of all the obligations under the insurance contract «[d]espite reinsurance, the insurer undertakes to pay the full insurance premium to the insured». Law on Insurance, Article 13.

52 *Ibid*.

53 In practice, to make an example, it can be a problem to determine the insurer's liability in the event of an insurer going bankrupt. It would be unreasonable to release the insurer from liability for damages in the event of the insurer's bankruptcy. By such logic, reinsurers could also be considered to be the addressees of an unjust enrichment claim.

Article 802 - Insurance certificate (policy)

1. The insurer shall be obligated to deliver to the insured a signed document relating to the insurance contract (insurance certificate - policy).

2. The insurance policy shall include:

a) the identities of the parties to the contract and their domiciles (place of residence or legal address)

b) the object of the insurance and the name of the insured person

c) the definition of the insurance risk

d) the commencement and duration of the insurance

e) the amount of insurance

f) the amount of the insurance premium and the place and time of its payment

3. If the object of the insurance is the life of a person, then additional data shall be required on the conditions of calculating the profit of the insurer and on the conditions of distribution of the profit.

Clara Mariconda

Summary: 1. The insurance contract. Characteristics and discipline. 2. The insurance policy-essential elements. 3. The insurance contract in European countries. 4. Concluding considerations.

1. The insurance contract. Characteristics and discipline

Human life, the goods owned and those in respect of which it boasts the ownership as owners are daily subject to the risk of deterioration, destruction, subtraction damage. Subject, therefore, to a possible prejudice that of course also has repercussions above all on the economic sphere.

To avoid the *de quo* risk, the legislator has identified in the insurance contract the instrumentation suitable to protect the holder[1].

This is the contract under which one goes to seek protection for the occurrence of a future and uncertain event from which a certain prejudice could derive for the person or for the patrimony.

1 M. Rossetti, *Il diritto delle Assicurazioni. L'impresa di assicurazione. Il contratto di assicurazione in generale,* Padova, 2011.

The insurance contract, ex art. 1882 c.c., is «the contract with whom the insurer, towards the payment of a premium undertakes to claim the insured, within the agreed limits of the damage now produced by an accident, to pay a capital or an annuity upper the occurrence of an event related to human life».

Depending on the risk protected the insurance contract falls within the life business or in damages branch. Insurance companies can carry out their activities for one or both classes.

The insurance contract is a random contract or is a contract under which a party assumes the risk of hypothetical event towards the provision of a fixed counter performance. The latter takes the name of premium, or the payment of a certain sum identified in the same contract.

The event has nothing to do with the will of the parties but is consequential to a future and uncertain pack.

For example, in the compulsory non – life insurance for any motor vehicle if in circulation, ex Article 122 of the Insurance Code.

The insurance company undertakes to reclaim the insured for the damage caused and gives a claim. The insured, for this part, with the stipulation of the insurance contract transforms the risk into an expense[2].

The insurance service is merely possible because, it is conditional on the occurrence of a fact. in the absence of it has no reason to be.

The insurance contract re-enters in the type of typical contracts because specifically regulated by the legislator.

It is a consensual contract, that is concluded with the express consent of the parties involved, unless they establish that the contract is concluded at the time of payment of the premium.

It is a contract with mandatory effects where both parties are required to fulfill a certain obligation and to pay and onerous services being ordered to pay a price.

It is a contract after adhesion since the conditions are preliminary identified by the insure and of duration as it lasts for a certain period[3].

In fact, the contract must be specifically identified the beginning and the duration of the insurance.

2 A. Polotti di Zumaglia, *Le assicurazioni contro i danni alla persona*, in *Teoria e pratica del diritto,* Milano, 2019.

3 G. Racugno, P. Corrias, *Prestazioni di facere e contratto di assicurazione*, in *Quaderni di giurisprudenza commerciale*, Milano, 2013.

The insurance coverage can be provided for a limited time, in which the final term, no right can be asserted even if the event occurs since.

It is a contact, so the essential elements, according to the previsions of Article 1325 of the Civil Code, are the cause, the object, agreement of the parties and the form.

As regards the cause of the contract, it is in the transfer of the risk from the insured to the insurer. In this regard, it should be clarified that it is not the risk of being transferred in a legal sense when the economic consequences deriving from its occurrence.

The insurance company, in fact, if risk occurs, it is required to pay a compensation to the insured in the case of damage insurance, an annuity or a capital in the case of life insurance[4].

The object lies in the correspondence between the premium and the risk insurance. The premium consists in the piece paid by the policy holder, by virtue of his obligation. It is the result of the sum of the so-called pure premium and the loads, therefore casts and taxes[5].

The pure premium is the basic cost provided for insurance coverage and it's commensurate with the event of the risk assumed by the insurance marketing.

To determine the pure premium is considered the expected value of the commitments undertaken by the insurance company towards the insured. Expected because they are random, as it is not certain that the insured event can then manifest itself.

As regards the loads, that is the ancillary costs due by the policy holder (purchase, administration, commercial costs, collection charges) they must be specifically declared in the pre-contractual documentation within c.d. informative note.

The premium, unless it concerns a contract with a duration of less than 12 months, must be determined for certain period is paid in a single payment or periodically.

The payment of the premium is generally paid periodically at predetermined intervals, once a year, for example as happens in non – life insurance. In this case we speak about the recurring premium, to be paid

4 V. Ferrari, *I contratti di assicurazione contro i danni e sulla vita*, in *Trattato in diritto civile nel Consiglio Nazionale del notariato*, Napoli, 2011.

5 G. Alpa, P. Gaggero, A. Franchi (a cura di), *Codice delle Assicurazioni*, Milano, 2016.

at the beginning of each insurance period. It can also be paid in a single solution at the time of the stipulation of the contract by configuring the figure of single premium.

In any case, it is essential that is specified within the contract the date provided for the payment of the same.

The payment of the first annuity is mandatory, pursuant to Article 1882 c.c. The subsequent ones can be suspended in accordance with Article 1924 c.c.

If indicated within the insurance contract to the occurrence of certain premium conditions can, a request, be redeemed or reduced, providing the possibility of penalization on the capital of the insured. Also, in this case it must be declared in the pre-contractual stage, within the information note.

If the conditions to obtaining the redemption or reduction of the premium are not met, the contract is extinguished, and the sums already paid remain acquired by the insurance company.

If the taxpayer does not provide for the fulfillment of this service and therefore if the premium is not paid the contractual guarantees are suspended, the accident is not compensable, remains the obligation to pay the premium.

Specifying, in the event that it is an insurance for damages the coverage is suspended until the insured does not provide for the payment of the single premium of the first installment with the exemption of the insurers from the execution of their own performance. If these are the installments after the first period, there is a grace period of 15 days, after which the coverage is suspended.

The insurer within 6 months of the default, can act to obtain the payment of unpaid premiums.

The contract is terminated by right, unless the insured does not provide for the payment of the sums due, premiums and expenses, thus reactivating the insurance policy in this way[6].

As regards the life insurance, where the default concerns the first installment or the single premium, the insurer will have the right to act within six months to see their credit satisfied.

If, on the other hand, it is the premiums subsequent to the first, the contract after the grace period of twenty days, is terminated by right.

6 N. Di Paola, *Il contratto di assicurazione. Questioni processuali*, Milano, 2011.

The insurer cannot claim any other payment, but he retains those already paid, unless the right for the insured to redeem and reduce the policy has matured.

In some cases, it is also provided for above premium when the health conditions of the insured, or when the professional, sporting activities involve the man-exceeding of the level of risk envisaged.

In these cases, the insurance undertaking has the right to claim premium increases.

The insured is therefore required, first of all, to pay the premium in addition to additional charges explicitly provided by the legislator[7].

In Article 1913 c.c., the obligation to notify is provided, for which the insured, within 3 days of the verification of the accident, must notify the insurance company.

The insurance company for its part required to notify the victim of all the rights that are recognized and to provide him or her with a questionnaire to be completed so as to obtain a profit description of what happened.

As far as the assessment of bodily damage is concerned, it is made on the basis of only documents, in the event that it is damage to the feet in the most serious cases it becomes necessary the medical expertise.

The insurance, required to liquidate the damage suffered, must propose the offer of liquidation within three months of the claim for compensation.

If the responsibility for the accident within the term of 90 days is not yet clearly defined, there is a deadline of 18 months to comply with the fare cast, not later than that.

If it is not provided within the mentioned time limits it is also required to pay legal interest increased by 2 paints. Accepted the offer, it must be liquidated within 45 days.

The right to compensation for damage is prescribed in 10 years for bodily, damages 5 for those patrimonial.

In Article 1914 of the C.C. it is established that the insured must in place conduct to avoid the accident or reduce the consequences.

By aching in man-compliance with the *de quibus* charges, he loses the right to compensation, if he is operated in a malicious way, a reduction of compensation if conditioned by fault.

7 M. Irrera (a cura di), *Lineamenti di diritto assicurativo*, Bologna, 2019.

The Article 1982 of the C.C. specifies that the insured must precisely describe the risk from which he intends to protect himself, without omitting any information and avoiding inaccuracies[8].

If the information kept hidden would have led the insurer not to conclude the contract or to apply different conditions. If kept silent and with intent or gross negligence, the insurer has the right to challenge the contract to obtain its cancellation and to withhold premiums paid up to that time.

It must also not provide for any compensation if the accident should occur.

If the inaccuracy looks at them were contractual clauses not affecting the entire contract, only these are voidable. The insurer can still exercise their right of withdrawal.

If the prejudicial event occurs in the interval of time that goes from the knowledge of the defect to the effectiveness of the withdrawal, the compensation is due in a manner of all.

It is calculated in proportion to the difference between the premium expected and what it would have been, if known the additional conditions.

Also, on the insurer weigh different obligations.

First, it must act in compliance with the principle of transparency, providing clear and exhaustive information with respect to the product offered.

He is also required to pay compensation for the occurrence of the event for which the insurance contract was stipulated.

Before proceeding with the stipulation of the contract, the legislator has ordered a pre-contractual negotiation, which differs depending on whether it is life insurance or non-life insurance.

As regard to the non-life branch, IVASS, in implementation of the provisions of the EU directive number 97 of 2016 to ensure clarity and simplification of information, has introduced the I.P.I.D, acronym of Insurance Product Information Document, an information document standardized and pre contractual in which the main characteristics of the contract are specified.

8 M. Faccioli, *Dichiarazioni inesatte e reticenti dell'assicurato e tutela dell'assicuratore*, in *La responsabilità civile*, Torino, 2005, p. 32.

These are identified by virtue of schema, consisting of a series of questions and answers clarifying the differences between the products offered[9].

Useful is analyzing the risk.

The insurance risk consists in the possibility of suffering a prejudice, caused by a future and uncertain event over which the parties have no control.

It depends on the frequency, or another possibility that the event occurs and the proposed consequences that could derive from it.

It takes the name of accident in the event that it is an insurance for damage, of event in the case of life insurance[10]

The Article 1895 c.c. responds that the contract is no valid for lack of cause, in the event that the risk is inexistent[11].

The rule must also be applied to putative risk, that is the risk which does not actually exist at all, however it is considered to exist by the parties[12].

If during the contractual relationship, the risk ceases to exist the contract is dissolved, pursuant to the Article 1896 c.c. The insurer if retain the right to obtain payment in full all the premium accrued while the communication of the cessation of the risk.

If, on the other hand, the risk ceases even before the contract has begun to produce effects, cannot be demanded the payment of the premium, but only the reimbursement of expenses.

If the intensity changes, the contract must be adjusted to the change, pursuant the Article 1895-1898 c.c.

The reduction in the probability that the event will occur, in order to give the insured person, the right to benefit from the premium reduction, must be stable, significant, lasting. In this case the insurer has the possibility to withdraw from the contract.

On the other hand, if the probability that the event occurred increases, it must be unpredictable and unforeseen and must make survey at a time after the conclusion of the contract.

9 L. Farenga, *Manuale di diritto delle assicurazioni private,* Torino, 2019.

10 G. Rebuffi, G. Rebuffi, A. Rebuffi, *Analisi dei sinistri e perizie assicurative*, Roma, 2015.

11 M. Rossetti, *Il diritto delle assicurazioni,* Padova, 2011.

12 A. Procida, *La responsabilità civile. Contratto e torto,* Torino, 2014.

It must be the consequence of an extrinsic and new fact compared to what was the risk situation originally envisaged by the parties[13].

As regard to the aggravation of the risk, it should also be referred to the hypotheses of bankruptcy of the insured, with respect to which it is established that the contract is not extinguished, but also determines, also in this case the right of withdrawal for the insurer.

The risk must be specifically identified by the parties.

The insurance policy in fact cannot cover any exposure more can all the damages that have occurred be compensated.

According to the provisions of Article 1900 c.c., the parties must identify the content of insurance benefit and limits of the insured person's right, according to specific criteria of temporal order, spatial, causal order.

Causal order, in the sense that the insurer is not required to compensate the damage in the cases, in which it derives from willful misconduct of the interest party or even gross negligence.

He is obliged, instead, to fulfill his service to exercise, in cases in which although deriving from an action, malicious of the interested of human solidarity, or for the protection of common interests also to the insurer person, in a state of necessity, or in the hypothesis of legitimate defense[14].

The insurer has no obligation to pay compensation in the further event that the fact was determined by intrinsic defect on the thing not reported, unless the parties have otherwise agreed.

It is also exonerated in cases where the damage derives from unforeseeable events, such as wars, seismic movements and in the case of suicide of the insured, within 2 years from the conclusion of the life insurance contract, pursuant to Article 1927c.c.

Provision to which it is possible to derogate whit the inclusion of a special clause in the contracts, as required by ISVAP regulation number 40 of 2012[15].

13 The insured, having verified the fact that determines the increase, or the reduction of the risk, must promptly notify the insurer who, within 30 days of reporting the fact, has the right of withdrawal. If the insured does not do so, he will lose his right to compensation or will receive it only in part, to a reduced extent, in proportion to the different premium that the insurer would have requested if he had been aware of the greater exposure to risk.

14 L. Farenga, *Codice delle Assicurazioni*, in *I codici commentati con la giurisprudenza*, Piacenza, 2021.

15 F. Salandra, *Dell'assicurazione,* in A. Scialoja, M. Branca (a cura di), *Commentario del cod. civ*., Bologna - Roma, 1960, pag. 393; P. Baridon e M. Gagliardi, *Dell'assicurazione sulla vita. Commento sub art. 1927*, in P. Schlensiger (a cura di), *Il Codice Civile*, Milano, 2013, pag. 162.

As regards the death caused by catastrophic events, according to the provisions of the regulation, it can be specifically provided by the parties within the contract.

Therefore, certain categories of risks cannot be subject to insurance coverage and, if included in the contract, the agreements in this sense are null and void due to contrary to the law[16].

First of all, as we have seen, the claims caused by an intentional action by the insured are not eligible for compensation, pursuant to Article 1900 c.c.

Furthermore, the price of redemption in the event of kidnapping pursuant the Article 12 of the insurance code, is not compensable.

Article 3, para. 59 of Law number 244 of 24 December 2007 provides that the «risks deriving from the performance of institutional tasks entrusted to public officials insured by the public authority and concerning liability for damages are not insurable caused to the State».

We come to the event that can be compensated in the life insurance cause of death.

The I.S.V.A.P. regulation the tracing to what is already provided by the Civil Code regarding the insurer contract, establishes that the risk of death must be covered with respect to any cause, except for the hypotheses in which it is a consequence of the willful misconduct of the policyholder, of the insured, or of the beneficiaries.

The legislator in the Code also states that the parties have the possibility to guarantee insurance coverage also to the event caused by grass negligence of the policyholder, of the insured and of the beneficiaries[17].

On the other hand, in the I.S.V.A.P. regulation, the gross negligence isn't mentioned, providing, as the only cause excluding the compensation, willful misconduct.

As far as the form is concerned, it is a free form contract, although according to the provisions of Article 1888 c.c. for evidentiary purposes it seems necessary the written form.

2. The insurance policy-essential elements

The insurance contract consists of two documents, the insurance certificate and insurance policy.

16 M. Gagliardi, *Atipicità dell'assicurazione per prassi assicurativa e copertura dei nuovi rischi,* in *Gli Strumenti della precauzione: nuovi rischi, assicurazione e responsabilità,* Milano, 2006.

17 M. Franzoni (a cura di), *Diritto delle Assicurazioni*, Bologna, 2016.

The insurer is required to issue to the insured at the time of signing the contract, first of all the insurance policy, within which the essential elements are specified, as well as the general conditions of the contract[18].

Article 1888 c.c. establishes that the policy, signed by both parties has its object the general conditions of the contract and usually also the personalized ones, that is linked to the needs of the specific customer.

In this case we speak of additional clauses and particular clauses.

Among the first, it should be mentioned, for example, the possibility of arranging temporary insurance coverage, under which the contract takes effect from the moment of the proposal, even before acceptance.

Once acceptance has taken place, the definitive contract then takes effect, replacing the provisional one in full.

In the Article 1889 c.c. the recorder it has also provided that the insurance policy can be named to the bearer, to the order.

In the last two cases the assignment of the credit to the insurer performs a purely evidential function and does not become a credit title. The insurer can address to the bearer of the policy the same exceptions, that can be proposed to the previous holder.

It is also necessary the existence of certain conditions so that the insurance contract has reason to exist. First of all, a large number of subjects exposed to that specific type of risk is necessary.

The damage that could result must be heavy enough to justify the recourse of the insurance. The premium must consist of an accessible sum and the risk must be perceptible and measurable[19].

About the causes of termination of the insurance contract, it first expires at the time of the predetermined final term or if the exposure to risk ceases.

In subscription insurance and multi-year contracts is no longer applicable, the parties have the right to withdraw at any time by giving adequate notice of 60 days.

The contract is dissolved in the event of no-payment of the premium and in all other cases in which the insurer, by express legislative provision, matures the right to withdraw.

As mentioned above, the insurance policies are divided into non-life and life branches.

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18 P. Corrias, *Il Contratto di Assicurazione. Profili funzionali e strutturali*, in *Scienze assicurative*, Napoli, 2016.

19 A. Donati, G. V. Putzolu, *Manuale di Diritto delle Assicurazioni*, Milano, 2019.

In the latter case the insurance contract must contain further elements, capable of identifying the insurer's profit, the conditions for the distribution[20].

The life insurance is the policy by which the insurer assumes the obligation to provide for the payment of a capital or an annuity upon the occurrence of an event concerning human life, death, invalidity survival at the time of expiry of the contract.

The risk can be evaluated by means of the c.d. mortality tables, an instrumentation designed to verify the mortality rate is survival for single generations in a specific demographic area.

We speak, in this case, of demographic risk, which implies a certain deviation in the effective duration of the single person's life, compared to the statistically measured average life expectancy of the population to which he belongs.

It may be risk of premature death or longevity.

In the first case, the insurer required to transfer immediate resources to the family members of the deceased to his legitimate heirs, or the beneficiaries, if specifically identified in the contract.

In the second case, on the other hand, the insurer must provide for the payment to the insured of the resources useful to cope with old age.

Insurance contracts in this sense are profitable. Not only for families, but also for companies, to protect themselves from any consequential prejudices to the death of a certain company person.

He is the so-called key man, and he is difficult to replace for load and skills. In the insurance contract must be specified the contractual parties, the date of the figurative points, places of residence or legal address.

The parties involved are necessarily the insurer, more generally the insurance company, on the one hand, the real insured is the one who must protect himself from the verification of the risk on the other.

Then there are the policyholder and the beneficiary, who may or may not coincide with the person of the insured.

The insured is the person to whom the event refers, or whose interest has gone to protect with the stipulation of the contract.

It may be a natural person or a legal person, except for the cases in which the risk relates to an event relating to human life.

20 L. Farenga, *Manuale di Diritto delle Assicurazioni private*, Torino, 2019.

In fact, in life, accident and sickness policies, the insured can only be a natural person[21].

The contractor is the natural or legal person who concludes the contract and fulfils the payment of the agreed premium.

If it does not coincide with the person of the insured, he is not the holder of the rights granted by the contract itself.

The beneficiary is the natural or legal person with the right to obtain the insurance benefit upon the occurrence of a certain event contractually identified.

The Civil Code in the Article 1290 specifies that the person of the beneficiary can be identified within the contract or otherwise with a subsequent declaration, also testamentary.

In the same way the revocation of the beneficiary can take place at anytime, unless the policy holder has declared in writing that he can waive the power of revocation.

If irrevocability does not take effect if the beneficiary has attempted to live the life of the insured person[22].

For the contract stipulated to be valid, it is also necessary the interest of the insured[23].

Otherwise, the contract is void pursuant the Article 1904 c.c.

The interest must be current, must exist from the moment of commencement of the insurance coverage. It must also exist at the time when the event occurs.

The interest of the insured cannot be guaranteed for a figure higher than the real value of the asset.

There would be, on the other hand, an unjustified an undue enrichment of the insured.

We came, at this point, to the phase that precedes the stipulation of the contract itself, the pre-contractual phase.

The intermediary must deliver to the potential policyholder an information file containing, the summary, the information note, the insurance conditions, the glossary, and the proposal form. The insurance proposal must contain the essential elements of the contract, such as therefore the parties, the risk, the premium, the maximum chosen[24].

21 M. Irrera (a cura di), *Lineamenti di diritto assicurativo*, Bologna, 2019.

22 M. Franzoni (a cura di), *Diritto delle Assicurazioni*, Bologna, 2016.

23 P. Rescigno, *Appunti sulle clausole generali*, in *Riv. dir. comm.*, 1998, p.65.

24 N. Di Paola, *Il contratto di assicurazione. Questioni Processuali*, Milano, 2011.

The proposal is made by the insured to the insurer who then accepts or not. The insurance contract is perfected at the time when the proposal meets the citation and may undergo changes over time that must be indicated in writing on the appendices. Is the insurer to provide in this sense, the policy holder to sign it.

The Court of Cassation[25] , with reference to information obligations, affirms the principle for which the insurer of intermediaries' promoters are primarily obliged to guarantee consumers, clear, comprehensive and complete information.

There are also required to proposition of those policies useful for the claims of the insured. Otherwise, theirs is a negligent conduct, pursuant the Article 1176 c.c.

It is what is established by the same legislator in Articles 1175, 1337, 1375 c.c. and in the Article 183 of the Private Insurance Code, where it is clearly indicated that in the offer and execution of the insurance contract companies must act with diligence and transparency.

It must also be refrained from assuming any conduct that may be injurious to the insured.

The customer today is more aware and prepared thanks to the new technological methodologies that also have contributed to making the offer of the insurance market more usable.

Today, in fact, the customers can consult the online offers, they can have opinions and information shared by users on social networks, forum.

3. The insurance contract in European countries

The insurance contract governs the position of consumers with different offices and nationalities. It therefore enjoys a certain transnational vocation[26].

With the aim of introducing a coherent and unitary discipline on the subject of European insurance contractual relationships, the PEICL, Principles of European Insurance Contract Law, were published in August 2009[27].

25 Corte di Cassazione, sent. n. 8412 del 24 aprile 2015.

26 O. Clarizia, *Indennizzo diretto e prestazione assicurativa*, Napoli, 2009.

27 C. Armbruster, *The Principles of European Insurance Common Law*, in *Dir. econ. ass.*, 2010, p.18.

These rules are set out in the articulation of the Draft Common Frame of Reference, intended to standardize the regulatory framework in the member countries.

They are divided into four parts, the first has as its object common provisions; the second part concerns insurance coverage; the third ruler with regard to fixed insurance amounts; the last contains the special provisions.

The rules are dictated in compliance with the principles of loyalty and good faith, to which both contractual parties are required during the negotiations and in the execution of the contract.

Article 2: 101, Applicant's Pre-contractual Information Duty, for example, provides for the information obligation for the policyholder, who is required to provide all useful information for signing the contract and for a correct risk assessment. If he does not do so, he legitimizes the insurer to request termination of the contract.

From a comparative point of view, it is necessary to analyze, albeit briefly, the insurance system provided by other European countries, such as Germany, France, England (although no longer a member of the EU), especially as regards the compensation of the harm.

In Germany, as in Italy, the compensable damage is that caused by negligent conduct and therefore determined by negligence, imprudence, inexperience.

In par. 249, paragraph 1 of the *Burgerlisches Gesetzbuch*[28], that is the German Civil Code, it is established that the person who is required to compensate for the damage must restore the existing condition before the occurrence of the event.

In paragraph 2 it is established that the creditor, rather than requesting the reparation of the damage, can demand payment of the corresponding monetary sum.

The burden of proof, in claims for damages, rests on the person making the request, who is required to demonstrate the damage suffered and the causal link between the conduct of the counterparty and the event that occurred.

A study of the French legal system is also interesting, as insurance law in France is characterized by multiple statutes, differently provided for in specific contractual cases.

28 W. Fachredaktion, *BGB –Bürgerliches Gesetzbuch. Mit den Nebengesetzen zum Verbraucherschutz, Mietrecht und Familienrecht* , Ratisbona, 2021.

Life insurance, damage insurance and the insurance contract put in place for the exercise of the construction business are provided for.

The legislator took care to dictate specific regimes for each sector, by virtue of special laws. Let's see some of them.

The law of 9 April 1898 dictates the discipline for damages suffered in the exercise of work. The victim is not required to prove the fault of the employer, as this is a special form of strict liability.

The *Kouchner Law*, also known as the *Anti-Perruche Law*, n. 2001-303 of March 4, 2002, introduces special provisions about compensation for serious damage, the compensation of which falls on ONIAM, the guarantee fund.

Law no. 389 of 19 May 1998, about liability for defective products, establishes that the burden of proof lies with the manufacturer. The manufacturer must prove that the asset was built in strict compliance with the best standards required for that specific work activity.

The regulation of road accidents is provided for by the *Loi Badinter*, law of 5 July 1985, according to which.

Anyone who causes a traffic accident by means of a motor vehicle, whether it is moving or even in a state of positioning, is required to compensate the victim. The obligation does not exist if the event is caused by the person requesting compensation.

The IRCA agreement establishes that the parties involved must notify their insurance company of the event within five days of the event. They are required to report any useful information, including the presence of witnesses, the intervention of the authorities, the presence of wounded[29].

Claims arising from malicious acts are not eligible, except, however, for those of employees or persons for whom the Insured must answer, nor are claims caused by fraudulent acts refundable.

The French Court of Cassation confirms that the damage must not be compensated in the event of willful misconduct or gross negligence. However, this principle does not apply to children under the age of 16, to people over seventy, to 80% of disabled people[30].

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29 D. Sirignano, *Incidente stradale in Francia: risarcimento dei danni corporali subiti*, 12 settembre 2020, https://avvocatosirignano.com/incidente-stradale-in-francia-risarcimento-dei-danni-corporali-subiti/.

30 Pradel X., *Europa: il risarcimento del danno alla persona in Francia*, in RIDARE, 16 novembre 2015, https://ridare.it/articoli/focus/europa-il-risarcimento-del-danno-alla-persona-francia.

With regard to unfair competition, the Cour de cassation states that: «les faits de concurrence déloyale générateurs d'un trouble commercial impliquent nécessairement l'existence d'un prejudice»[31].

Jurisprudence and doctrine agree that there are two compensable damages, the *dommages corporels*, the *dommages materiels*.

The former refers to damage to the physical or mental integrity of the person.

The damage must be assessed immediately, but also in a permanent dimension, verifying potential irreparable damage.

The compensable victims are not only the direct ones, but also the indirect ones, such as the relatives of road victims.

In the case of moral damages, we speak of *dommages moraux*, whose compensation, according to the jurisprudential rulings, must be admitted. In fact, there is no duplication with the other types of damages that can be compensated.

Dommages materiels, on the other hand, are pecuniary damage, consisting, therefore, in economic losses, or in a loss of earnings.

The cd. *Nomenclathure Dintilac*, of July 2005, classifies 29 types of compensable damages, including pecuniary, non-pecuniary, temporary, permanent damages[32].

With regard to the compensable damage, the *Projet de réforme de la responsabilité*, proposed in March 2017, distinguishes the *dommage* from the *préjudice.* The civil liability of the agent arises only if an actual damage is caused.

Art. 1240 of the French civil code provides that civil liability arises if a *dommage* is caused and no mention is made to the *préjudice*. The French Court of Cassation, regarding the *dommage*, reports that it must be certain, personnel, direct[33].

31 Cour de Cassation, Chambre Commerciale, 9 gennaio 2019, n. 17-18.350, in *courdecassation.fr*.

32 Les Avocates, *Nomenclature Dintilhac*, in *Conseil National Des Barreaux*, p.1, https://www.avocat.fr/sites/default/files/NOMENCLATURE%20DINTILHAC.pdf «*La nomenclature Dintilhac Fixe des principes pour l'évaluation de la réparation résultant d'infraction seyant causé des dommages corporels à une victime. Elle fix ed vingt postes pour les victimes directes et sept postes pour les victimes indirectes. La nomenclature n'a pas de force obligatoire, elle est simplement indicative et un instrument pour les praticiens. Elle n'est pas non plus exhaustive, c'est-à-dire que le juge pourront décider d'indemniser un poste qui ne figure pas dans la nomenclature».*

33 C. Von Bar, *The Notion of Damage*, in A.S. Hartkamp, M.W. Hesselink, E.H. Hondius, C. Mak e C. Edgar du Perron (a cura di), *Towards a European Civil Code*, 4a ed., Wolters Kluwer, Alphen aanden Rijn, 2011, p. 387 ss.

In France, differently from what happens in Italy, the liberalization of the market is envisaged and, therefore, the insured can decide to withdraw from his insurance contract, should he find another more profitable proposal, at any time, even before the expiry of the contract.

Finally, we come to the English legal system.

In the English legal system, the insurance sector is regulated above all on the basis of jurisprudential rulings, based on case law.

To date, despite the various rulings, there is no unambiguous definition of insurance[34].

In August 2016, the Insurance Act 2015, IA, which appears to have been the most important insurance reform in England since 1906, came into effect when the Marine Insurance Act was enacted[35].

The main points of the reform are the provision of an obligation of correct information to ensure the knowledge of the risk, the knowledge, the verification of the causal link between the event contested by the insured and the damage.

In this way, the position of the insurance companies is protected, which are called upon to pay their own performance only in the cases in which the link actually exists.

As regards the first of the aforementioned points, the insured bears the so-called duty of fair representation, being required to provide the insurer, in the pre-contractual stage, with all useful information for the formation of the contract and risk assessment.

Before the reform, in the event of non-compliance with the obligation *de quo*, to breach, the contract was subject to retroactive cancellation.

The Insurance Act provides that cancellation must be considered as only one of the remedies available. The appropriate remedy must be commensurate with the type of violation, verifying, for example, whether the insured acted with willful misconduct or gross negligence.

As regards the second point of the reform, the sect. 11, the legislator establishes that the damage must not be compensated if there is no connection with the conduct put in place by the insured person[36].

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34 Sentenza della Corte di Giustizia dell'Unione Europea, (Sesta Sezione), 17 gennaio 2019, C-74/18, *A Ltd con l'intervento del Veronsaajien oikeudenvalvontayksikkö.*

35 ANIA, *L'Insurance-Act è entrato in vigore nel Regno Unito*, in *Panorama Assicurativo*, 2015,https://www.panoramassicurativo.ania.it/articoli/66959.

36 E. De Simone, *L'affascinante storia dell'assicurazione. Manifesti, libri, targhe, polizze,* Milano, 2016.

Finally, as regards the information obligations imposed on the insurer, the provisions dictated on the subject by the English legislator seem similar to what is provided for in our legal system.

The credit must certainly be attributed to the Community legislator, concerned with imposing on the Member States the promulgation of provisions to ensure compliance with the principle of transparency in contractual relations.

The insurer, as a strong policyholder, is required to provide clear and comprehensive information to its counterpart in the pre-contractual phase.

The insured, because he is a weak contractor, must be guaranteed effective knowledge and awareness of the contractual regulation.

4. Concluding considerations

The insurance sector, also from a regulatory point of view, seems to enjoy a certain uniformity and convergence between the various countries of the Union, due to the transnational nature of the economic operation underlying the contract, as well as to the Europeanization process aimed at by the Community legislator.

Community law in the insurance field is concerned with guaranteeing the weak party of the contract, the policyholder, «not because he is a consumer, but because he is a customer»[37].

The information asymmetry must be overcome and therefore the obligations specifically dictated on the subject must be respected, right from the pre-contractual stage.

In this way, the negotiation imbalance typical of the relationship between policyholders and insurers can be corrected.

The goal is also to promote the liberalization of the insurance market (as in France), the freedom of establishment and the provision of services.

The parties, both guaranteed and protected by law, must have the ability to conclude cross-border contracts, in the respectful observance of contractual fairness and transparency.

In this direction, comparative law, the aim of which is to promote community harmonization in the regulatory field, becomes the instru-

37 V. Roppo, *Regolazione del mercato e interessi di riferimento: dalla protezione del consumatore alla protezione del cliente*, in *Riv. dir. priv*., 2010, p. 25.

ment for promoting compatible solutions at the European level[38]. In fact, «[t]he matter of the insurance contract, both due to its origin to the *i*, as has always been known, it constituted a sort of special or corporative law of a transnational nature, either because of the ever-greater similarities in contractual matters existing in European law»[39].

38 A. Wijffels, *Le droite comparé ala recherche d'un novuel interface entre ordres juridiques*, in *Rev. int. dir. comp*., 2008, p. 228.

39 S. Nitti, *Duty of disclosure nel contratto di assicurazione. Analisi comparata tra sistema italiano e sistema inglese,* in *Dir. econ. ass.*, 2010, p. 527 ss.

Article 803 - Types of insurance policies

If the insurance policy is issued to a bearer as blank endorsed or to order, the insurer may assert against the holder of the policy all the claims that he/she has against the original policyholder. This rules shall not apply if the holder of the insurance policy notifies the insurer of the transfer of insurance rights to him/her and the insurer does not immediately assert his/her claims.

Clara Mariconda

Summary: 1. Different types of insurance policies. 2. The insurance policy and the insurance certificate. 3. Insurance policies in European law. 4. Conclusive considerations.

1. Different types of insurance policies

The insurance policies can cover a multiple variety of events. They are distinguished, in the first, in man –life and life insurance contracts. Life policies are rather varied branches.

They differ in terms of method of disbursement of the capital annuity compensation. The *quantum* in some cases is expressly linked to the performance of stock indices, shares of funds, whose trend is a direct consequence of the trend of the financial market. They are therefore categorized in traditional life policies, those of a demographic nature. Life policies of financial matrix, life policies traditional, life policies of a social security nature.

As regards the first, the risk in the case is the so-called demographic risk. It is necessary to carry out on assessment of the difference between the actual duration of life of a single subject, compared to those that are the average life expectancy of the population statistically detected.

It may be a risk of premature death or longevity. In the first case the insurer is required to transfer immediate resources to the family members of the deceased to his legitimate heirs and beneficiaries.

If specifically identified in the contract and second case. In the second case, the insurer provides for the payment to the insured of the resources useful to cope with old age[1].

1 A. Polotti di Zumaglia, *Le assicurazioni contro i danni alla persona*, Milano, 2019.

As regard to financial policies, they were born from the need to insure against certain events of economic matrices, such as monetary devaluation.

The insured if the life event expected within the contract occurs incorporates a capital annuity. The latter is commensurate with the performance of a certain stock index, or the financial values considered. They are born to cope with the c.d. investment risk, also known as risk of results of investments, of premiums paid against the operation of the life business.

The investment risk has no reason to exist if the life insurance policy is a transaction with predetermined and specified corresponding services. Already «at the time of conclusion of the contract assumed importance only a technical level»[2].

The investment risk occurs precisely because of the predetermination of the contractual obligations and therefore of the premium due by the insured and as regards the insurer's performance the determination of the sum assured.

This situation entails the inability of insurance companies to dissolve to their own benefit being the risk really weighs on.

Given the reversal of the economic cycle[3], the premiums initially paid are devolved to the c.d. mathematical reserves.

For the merge companies and the need to invest the resources obtained to be able to support the obligations assumed through the insurance contract. The return of investments must necessarily coincide with the technical rate which should therefore be carefully estimated.

The problems exposed and the needs of the constantly evolving market determine the proposition by insurance companies of types of insurance products focused on financial minds.

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2 P. Volpe Putzolu, *Le assicurazioni. Produzione e distribuzione*, Bologna, 1992, p.169.

3 La gestione delle imprese di assicurazione è caratterizzata principalmente dall'inversione del ciclo economico. Difatti, differentemente dalle altre forme di impresa, l'assicurazione anzitutto riscuote dagli assicurati i ricavi, ovverosia i premi per poi sostenere in seguito ed eventualmente i relativi costi, dei quali l'ammontare è incerto al momento della stipula del contratto. Motivo per il quale l'impresa assicurativa deve necessariamente accantonare risorse, dunque i premi di competenza dei futuri esercizi, in sede di bilancio e nel rispetto delle norme civilistiche; l'accantonamento avviene provvedendo alla costituzione delle c.d. riserve tecniche, le quali saranno poi investite così da garantire un rendimento adeguato. Per una completa analisi della gestione delle imprese di assicurazione si vd. A. Cappiello, *Economia e gestione delle imprese assicurative*, Milano, 2008.

Starting from the first half of the nineteenth are stipulated the first policies indexed by means of the opposition of the c.d. clauses gold course and gold value.

In Article 1277, para. 1. c.c. it is established that «the pecuniary debts are extinguished with money having legal tender in the State at the time of payment and for its nominal value consequently». The debtor gets free of the assumed obligation by providing for the payment of the nominal value of the predetermined sum without holding the debt with the possible variation of the real purchasing power.

The creditor could be seriously clauses by means of which to anchor the debt to the value of specific assets like gold.

Around 1970 in Italy, with the aim of ensuring stability to the value of the currency, the policy, ever time, data and inflationary winds devolving the currency[4], are introduced the first policies revalued by means of these. It is established that the service must be «parameterized to the result of special management of the mainly government bonds purchased against the mathematical reserves»[5].

It makes the premiums paid. The insured amount varies in proportion to the trend of the results achieved by means of separate management with profit by the policy holders.

In this way the value of the benefit due by the insurance is protected against possible monetary devolution and can only increase[6]. The financial risk, therefore, remains in the hands of the insurer, alone acquires considerable relevance, and use especially for life insurance contracts since these are long-term contracts and for social security purposes[7].

We speak about Index Linked policies if linked stock indices. Unit Linked policies, if they concern the value of units of a collective invest-

4 Negli anni '70 del secolo scorso con il cd. shock petrolifero del 1973 ha avuto inizio un periodo di crisi economica globale. Anche l'Italia, essendo importatrice di materie prime, dato il significativo aumento del prezzo del petrolio, subisce una riduzione del proprio approvvigionamento. Inoltre, la produzione comincia a rallentare, segue la svalutazione della moneta così dare impulso alle esportazioni dei prodotti finiti. La svalutazione monetaria finisce per incidere negativamente quanto sulle esportazioni, quanto nel mercato interno. Il tasso d'inflazione, pari al 5% nel 1972 si alza solo due anni dopo, nel '74 al 19%.

5 A. Corinti, G. Cucinotta, *Le polizze Index e Unit Linked in Italia*, in *Quaderni di ricerca ISVAP*, n. 5, 1999.

6 H. Schmidt, *Inflazione e assicurazione*, in *Assicurazioni,* 1983, I, pp. 280 ss, spec. 289.

7 A. Longo, *Assicurazione vita e inflazione*, in *Assicurazioni,* INA, Roma, 1974, I, pp. 531 ss, spec. p. 537.

ment fund of savings, or of an internal fund coming to the last of the categories such as that of traditional life insurance of a social security nature. This is a form of pension of the second pillar supplementary to the national public debt.

For the national public debt, the structures of the first pillar called to ensure the payment of the compulsory pension have encountered limits in the resources available.

For this reason, a binary system is established by virtue of which the mandatory public pension is integrated by the private. It is implemented by means of pension funds, associative bodies managed by insurance companies, securities firm, banks, asset management companies.

As regards then now life branch, these are policies aimed at protecting the insured from future and uncertain events that could cause damage to individual assets or to the assets in full to one's own person and to one's own earnings.

Already being this brief premise, it is possible to deduce that the man life branch is much wider and more varied because we have risk considered.

First, it is essential to distinguish the guarantees of direct risk from those of civil liability.

In the first case the insured goes to directly protect himself his own property against a certain event. In the second, the insurer assumes the obligation to hold the insured in harmless, against any damage caused by them involuntarily to third parties.

The branch of civil liability is in turn divided into two categories. The civil liability car and the civil liability different[8].

The C.d.S., traffic laws, provides that for all motor vehicles, including also trailers and trolley vehicles circulating or even parked on public roads must be compulsorily subscribed to insurance coverage.

This becomes useful and necessary for compensation for damages possibly caused to things or people. The obligation is less only when the vehicle is then demolished and deleted from the PAR (Public Automobile Register).

Fall into the category of CVT "land vehicle bodies", or that set of insurance coverage, it is also arranged for motor vehicles but inherent in other cases of events, such as theft and fire, also for natural disasters[9].

8 M. Bona, *Risarcimento del danno, procedure di liquidazione e azione diretta nel codice delle assicurazioni: prime riflessioni critiche*, in *Resp. civ. prev*., 2005, p. 1193.

9 L. Prati, *Le criticità del nuovo danno ambientale: il Confuso approccio del codice dell'ambiente,* in *Danno e responsabilità*, 2006, pp. 1049 ss.

With the kasko guarantee compensation for damages is also due if the accident involved only the insured and not also the third parties.

As regards the second category, the different civil liability includes various types of coverage, such as the R.C. of the entrepreneur who protects himself with respect to his own obligations towards his employees.

The R.C. product is, instead, that insurance coverage for damages related to the exercise of the production activity, and therefore manufacturing defects of packaging[10], while with the R.C. professional, by virtue of which freelancer goes to protect himself from any damage caused in the exercise of his professional activity.

Interesting the R.C. family for damages related to the normal life of households and credit insurance, that are a coverage that goes to protect the creditor from any default of his debtor.

What is clear from when referred is that in the policies of the man life branch the risk is greater than that foreseeable for life insurance policies.

While in fact in the latter the risk is calculated based on tables actuarial, in the hypothesis of insurance for damage depends on random events.

While in fact in the latter the risk is calculated because of actuarial tables, in the hypothesis of insurance for damages depends on random events.

The premium is defined by virtue of empirical criteria being calculated since the comparison between the insured value and the probability of verification of the accident. The damages branch also covers personal injury, even those caused by an illness, in this case we can speak about health insurance[11].

The insurance case in point intervenes in the hypothesis of alteration of the normal health status of the insured, from which follows the impossibility of receiving income. This prevented the execution of the work activity and met medical expenses.

In this regard, the long-term insurance cited intended to cover certain necessary interventions provided by public or private structures, if the insured person is not self-sufficient. Therefore, able to independently carry out the elementary activities of human life.

10 G. Stella, *La responsabilità del produttore per danno da prodotto difettoso nel nuovo codice del consumo*, in *Responsabilità civile e previdenza*, 2006.

11 L. Gremigni Francini, *Responsabilità sanitaria e tutela della persona*, in *Danno e responsabilità*, 2005, 11, p. 1049.

With the law transposing the Community directive number 79/267/CEE the law n. 742 of 22 October 1986 life insurance is divided into insurance on the duration of human life and nuptial insurance and birth.

Insurance is also provided for health insurance[12] and capitalization operations[13], in addition to the management operations of collective funds.

It seems evident that the subdivision this placed is much wider than what is established in Article 1882 c.c. Chapter 5 and 6 in addition, they have no connection with the event related to human life, provided for by the legislature of the Civil Code.

Chapter III instead has as its object the CD linked policies by arranging the economic connection with an internal investment fund external to the insurance company.

What characterizes the Linked policies is the partial or total transfer of the investment risk and «the risk of the results of the investment of premiums paid compared to the operations of life branches»[14].

The policies of this type have in fact a strong financial component. The sum due to the insured at the time of verification of the event or at the end of the contract is commensurate with the value of the fund of the stock index or of those values taken as a reference within the contract.

In the insurance market, policies without minimum guarantee are provided, by means of which the figure is estimate by virtue of the mere value of the reference index and partially guaranteed capital contracts.

Can also be stipulated contracts with guaranteed capital, for which also when the reference index is negative, to the insured must be returned part of the capital.

Third hypothesis is that of guaranteed capital contracts, for which the insured or in the case of a negative fluctuation of the index is entitled to the repayment of the entire amount invested.

If it is a minimum return policy, to the insured is returned the capital invested increased by a fixed interest rate.

About unit linked policies, the insured person's service, therefore, the premium paid by them, is invested in a mutual fund.

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12 Art. 1, numero 1, lettera d), della direttiva CEE n. 79/267 del 5 marzo 1979.

13 Articolo 33 del Testo Unico delle leggi sull'esercizio delle assicurazioni private, approvato con decreto del Presidente della Repubblica 13 febbraio1959, n. 449.

14 P. Volpe Putzolu, *L'evoluzione delle assicurazioni sulla vita: problemi giuridici*, I, in *Assicurazioni*, 1997, p. 24.

The value of sum invested varies in relation to the same fund[15].

The fund may be constituted by insurance companies belonging to the same group. It may also be a securities investment fund external to the insurance company. It further division concerns the fund within the company that must be divided, into investment funds with a minimum performance guarantee.

In this case it is provided for the stipulation of policies linked with a minimum financial guarantee consisting of a return or in the preservation of the capital invested. In the internal investment funds that do not provide for the guarantee of minimum performance[16].

In European countries including the Italian market, indexed policies obtain wide consensus and diffusion given that they allow to obtain a more interesting return, than that conceivable with the traditional life insurance policy and respect for bank deposits. We must think that in our country in the two-year period 1996-1998, the premiums relating to index and linked policies have gone from 529,4 to 5913 billion lire.

A contribution in this sense is certainly also attributable to the banks that over the years have assisted and collaborated with insurance companies, thus expanding their range of products that can be used by customers.

Insurance companies have benefited from the commercial and banking network and had access to information on the customer's financial profile owned by banks[17].

Index Linked policies, that are policies indexed to shares or to additional securities market values, that are introduced with the third Community directive de qua it is transposed into our system with the number 174 of 17 March 1995. It can be summarized the Community legislation of life insurance supporting the consolidated text of 1959 and number 63 of 1925 which, although dated, remains in force.

It is necessary to make a systematic reorganization to the discipline which is provided by means of number 209 of 7 September 2005 the Code

15 C. Cimarelli, *Unit-linked: polizze vita a valenza finanziaria,* in Insurancetrade.it, 24 settembre 2021, https://www.insurancetrade.it/insurance/contenuti/osservatori/11847/unit-linked-polizze-vita-a-valenza-finanziaria.

16 G. Alpa, *I prodotti assicurativi finanziari*, in S. Amorosino, L. Desiderio (a cura di), *Il nuovo codice delle assicurazioni,* Milano, 2006, pp. 77 ss.

17 C. Cotterelli, *La raccolta del risparmio tra banche ed assicurazioni: la nuova disciplina*, in *Banca, impr., soc.*, 2006, I, pp. 29 ss, spec p. 29-30.

of Private Insurance. The new code provides a definition of Linked policies by establishing that these are those contracts «whose main services are directly linked to the value of units of collective investment undertaking or internal funds at indices or at other reference values»[18].

With regard to life insurance policies, in Article 2 of the Insurance Code, the legislator provides to classify them in insurance on the duration of human life in nuptiality and birth insurance.

In insurance referred to the branches I and II, whose main benefits are directly linked to the value of units of undertakings for collective investment of savings internal funds or to index other reference values.

Illness insurance and insurance against risk of man-self-sufficiency must be guaranteed by means of long-term contracts, that cannot be terminated due, for the risk of serious disability due to illness, or accident, or longevity.

Capitalization operations, the management operations of collective funds provide for the prevision of benefits. In the event of death, in the event of cessation a reduction of work activity.

With the law number 303 of 2006 in Article 1 letter w of legislative n. 58 of 24 February 1998 consolidated Law of Finance, the legislator introduced the financial product issued by insured companies. It corresponds to the linked policies Chapter III and the capitalization contracts, in the branch V of Article 2 para. 1 of the Private Insurance Code.

With regard to the capitalization contract Article 179 of the Private Insurance Code provides that: «the capitalization is the contract by which the insurance undertaking, undertakes without a human life with the agreement to pay sums determined after a predetermined period. In consideration of a unique a periodic premiums that is made in cash a through other activities».

Differently the provisions of the Civil Code in Article 1882, Article 179 of the C.d.S. provides that the capitalization has no correction with the facts relating to human life. Nevertheless, falls within the category of insurance policies.

These because it becomes necessary to guarantee protection even after a risk of investment[19].

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18 L. Farenga, *Manuale delle Assicurazioni Private*, Torino, 2019.

19 P. Volpe, *Profili del contratto di capitalizzazione*, in *Dir. banc. merc. fin*., 1990, I, pp. 158 ss, spec. p. 163.

Distinctive features of this type of contract, from which the social security nature emerges[20], are first the minimum duration of 5 years and the provision and the possibility of ransom after 2 years from the stipulation.

The insured customer, since he has the policy, knows when he will receive what he should and the deadline is the amount that will not undergo any changes, even if they are placed in the contract clauses of participation in profits or revaluation.

The insurance policy, as mentioned, can cover a plurality of risks, also these related to the transport sector and can be of various types.

It can be a single policies or firm policies or contracts for which the coverage for a single risk, or for a consignment of goods and determined.

2. The insurance policy and the insurance certificate

The insurance contract consists of two documents, the policy, and the insurance certificate.

Article 1888 c.c. establishes the form required for the policy to which it must be signed by both parties. It contains as well as the general conditions of the contract, personalized conditions known as additional and the one's object of free bargaining between the parties.

As far as the additional conditions are concerned, these may, for example have as their object the provisional coverage under which the contract becomes effective from the moments of the proposal and until acceptance it is a sort of provisional contract.

The aim of protecting the security even in that sentence in which generally with no coverage it is then replaced in full by the final one.

The insurance contract must contain as essential elements the date of issue, the deadline, the identification of the contractual parties, the amount insured, and the risks covered[21].

The second document is the insurance certificate on the declaration by the insurance contract.

Both documents can be named to the order or to the bearer.

Article 1889 c.c., para. 1, establishes in fact that the policy can be named to the order a to the bearer. However, it is not a credit title, because

20 G. M. Corrias, *I contratti di assicurazione sulla vita*, in S. Amorosino, L. Desiderio (a cura di), *Il nuovo codice delle assicurazioni,* Milano, 2006, pp. 353 ss, spec. p. 355.

21 F. Santoboni, *Manuale di gestione assicurativa. Aspetti regolamentari, di governance e operativi*, Padova, 2018.

the rights that they represent are justified in the legal relationship from which they arise and are not separated from the same.

The insurance policy constitutes a credit title in its own pursuant to Article 2002 c.c. and the circulation of the same is carried out in the same way as the circulation of debt securities takes place. As much, as provided for in the Article 2008 c.c. circulates by turn of issued to the bearer, ex Article 2003 c.c.[22]

The provision of the policy to the order a to the bearer attributes to the holder the right to obtain the satisfaction of the credit transferred. According to the discipline dictated for credit securities the insurance contract in the case of alienation of the insured asset is transferred with termination of the policy.

As provided for in Article 1918 para. 5 c.c. So, in the case of a bearer policy on to the order with the policy is also transferred the credit to the insurer, ex Article 1260-1267.

The insurer may address to the bearer of the policy to the same exceptions that can be proposed to previous holders.

However, if the holder of the policy has communicated to the insurance company that he has taken over the contract and the letter does not immediately exercise its rights, it loses the possibility of doing.

So before proceeding and it seems appropriate to specify that securities are bearers, when the mere possession of the same confers active and passive legitimacy to the possessor. The securities are instead in order if it has been indicated on the transferred document the series of holders who followed one another. Only in this case who holds it enjoys legitimacy.

The modification of the possessor must in fact be formalized on the title by means of the endorsement. With the endorsement the first owner declares to the debtor and to the third parties to transfer their credit, the fulfillment of which must be performed in the hands of the new owner.

On bills of exchange and checks, the signature affixed to the back of the document from the legitimate holder corresponds to the turn.

In the event that the list of holders results not only from the document, but also from a register, that is kept by the one who puts the title, the letter takes the name of nominative. In these hypotheses we speak of doubleheader.

22 F. Galgano, *I titoli di credito*, Padova, 2009.

The legislator has provided three different ways to follow the double header.

In the first case the previous holder turns the title and requires the annotation in the register.

In the second case the holder asks the issuer for the title to make it payable to the buyer or to put a new one in his own name.

In the third case it is the buyer and holder of the title to request the issuer the header to if proving to have purchased it legitimately.

In the two second cases it is the *transfer* referred to Article 2022 c.c.

The first case is regulated in Article 2023 c.c. where the legislator recognizes the endorser of a nominative title to be able to require the issuer to make the annotation of the turn in his favor in the register. In this way, acquires the active cartulary legitimacy.

Coming to the insurance policy, the Article 1889 c.c. says that if it «is to the order on the bearer its transfer imports, the transfer of the credit debt to the insurer with the effects of the assignment. However, the insurer is released if without intent or gross negligence he fulfills the benefit to words the turner or the holder of the policy, even if he is not the insured. In case of loss, theft or destruction of the policy to the order, apply the provisions relating to the amortization of securities to the order».

In the old code no mention is made with respect to the duration of the insurance contract and at the time when it takes effect.

With Article 1899, therefore, the legislator provides for the resolution of two problems.

First of all, it provides that the moment in which the contract becomes effective must be established, in order to avoid doubts for those claims that occurred at the same time, or at the time immediately following the conclusion of the contract. In addition, it provides that man-life insurance contracts must have a fixed duration that can be waived in favor of the insured.

In order to avoid excessively long constraints for the insured, are also established limits for the tacit extension. In fact, generally the insured inadvertently leaves to run the time for the cancellation and undergoes the tacit renewal[23].

For what the dies a quo can be fixed starting from 24 hours after the conclusion of the contract, reason for which it must be specified on the day of conclusion of this rule.

23 M. Franzoni (a cura di), *Diritto delle assicurazioni*, Bologna, 2016.

This rule however can be derogable. In fact, a specific clause can be affixed that provides for a different starting time, for example from 12 hours after the conclusions. The purchase of the effectiveness can also be anticipated at the time of signing the policy or at the payment of the premium.

The exposure of the risk may also be subordinated if this arises later than the stipulation of the insurance contract[24].

As regards the *dies a quem* or the day of expiry of the contract. Generally, at least that does not intervene in advance and causes extinguishers. The relation coincides with the 24 hours following the last predetermined day within the contract itself.

Also, in this case the parties have the possibility to provide for a different one, in derogation from the general discipline.

The legislator for contracts in general except for the lease pursuant to Article 1573 c.c., does not provide for any duration limit for the relation established.

As for as life insurance is concerned, unless it is temporary, the time limit coincides with the duration of human life.

As regards the damage branch to avoid long-winded constraints for the parties. A limit set by law is equal to 10 years.

With six months forewarning each of the parties can exercise the contractual withdrawal[25].

The power of withdrawal recognized by law cannot be subject of derogations.

The code also grants the tacit extensions which cannot however exceed 2 years. The parties can decide to derogate from the extension by affixing a special exclusion clause within the contract itself a deciding to shorten the term.

3. Insurance policies in European law

The legal order of the European Union integrates our reality with that of the Member States. Community law contributes to determining the operating context for the countries belonging to the Union, with the aim of achieving uniformity and symmetry in the different legal systems.

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24 M. Irrera (a cura di), *Lineamenti di diritto assicurativo*, Bologna, 2019.

25 L. Farenga, *Codice delle Assicurazioni*, in *I Codici commentati con la giurisprudenza*, Padova, 2021.

In the fried of insurance there are many relevant directives as the insurance policies, whose nature is transnational, concern, in fact any legal system. Just to name a few.

The Community Directive number 79/267/CEE lays the foundations for the coordination of the different legislation existing in European countries. In the field of insurance with the aim of ensuring implementation of the principle of freedom of establishment provided by the Treaty of Rome.

The Community Directive number 92/96/CEE provides for the establishment of the European single market for insurance. It's useful to examine first the policies that can be re-evaluated.

The latter originate in the United States around the fifths of the last century. When products called "variable annuity contract"[26] are offered.

They are equivalent to life insurance, contract in the case of survival.

For is the subdivision of the premiums in which a part is intended for separate management the step court through which the seams are invested in shares of the securities market.

The obligation of the insurer is therefore commensurate in part results of management.

In England we talk about the c.d. linked long term policies, that given the significant financial component, are included among the investment insurance by the Financial Services Act of 1986.

The «contracts of insurance on human life where the benefits are wholly a partly to be determined by reference to the value of, or the in came from, property of any description a by reference to fluctuations in, or in an index of the value of the property of any description»[27].

It follows that the change in the value of those indexed assets specifically identified to the change in the asset owned by the insurance company.

The last hypothesis is the one from which the unit linked policies are then obtained.

In this type of policies, the payment of the premium becomes necessary not only for the mere insurance coverage, but also for the subscription of a share of a mutual fund of investments. The fund does not necessarily have to be internal to the insurance company.

26 M. Miola, *Il risparmio assicurativo*, Napoli, 1988, pp.7 ss.

27 Definizione data dall'*Insurance Companies Act* del 1982.

Coming to the insurance policies generally understood, it is necessary to report the German case that in matter seems to be rich and varied.

The German insurance system develops, in fact, in multiple terms.

Privathatftpflichtversicherung, is that the insurance coverage provided for the damages caused in the performance of daily activity.

In Germany is provided that everyone is responsible for the damages caused to third parties. For this reason, the personal liability insurance acquires relevance, *Haftpflichtversicherung.*

It must be mentioned the health insurance, *Krankenkversicherungk,* that stands out in the mutual fund. With reference to that provided by a public structure is the one privately stipulated since January 2009. The inhabitants of the country must compulsorily provide for the stipulation of a health insurance policy.

There are various types, the *Rechtsschutzversicherung*r is the insurance coverage concerning legal expenses. The stipulation is recognized to natural persons and others. Both these are legal and is intended to cover all costs of a possible trial.

The *Tierhalterhaftpflichversicherung* is the insurance policy concerning any damage caused by your pet.

The *Private Rentenversicherung,* is an insurance policy similar to the pension completely provided for by the Italian legal system. It is, in fact, a private pension insurance, stipulated to guarantee a supplementary income compared to the mandatory public one[28].

With the *Lebensversicherung* refers to life insurance like the Italian one. It involves the payment of an allowance to the family members of the insured, in case of death. It provides instead the payment of any annuity if you have survived a certain predetermined age[29].

As for as indexed insurance is concerned, according to the latest date, the number of contracts stipulated in this sense, in the last year, has been decreasing with a 7% equally articulated. It is the insurance system in France citing some of them as *securité sociale, la mutuelle, l'assurance de responsabilité civile y assurance habitation*.

28 A. Donati, G. Volpe Putzolu, *Manuale di diritto delle Assicurazioni*, Milano, 2019.

29 M. Predota, *Prämienkalkulation in der Lebensversicherung. Übungsbuch mit Musterlösungen*, Berlino, 2013.

La *securité sociale* is divided into five branches, sickness, old age and retirement accident at work, occupational disease and accident. It's mandatory.

La *mutuelle* is a supplementary insurance. The social insurance covers for example only two thirds of medical expenses. For this reason, it becomes profitable for citizens to stipulate additional policies to better protect themselves.

The *assurance de responsabilité civile* is an insurance coverage for damages caused to third parties.

The *assurance habitation* protects the insured from potentially and verifiable damage in their home (fire, theft, and leaks).

With regard to life insurance according to the analysis report published by the ACPR prudential supervisory authority the number of this type of policies is always increasing.

It is estimated an asset managed for inhabitant is equal to Euro 24.000,00, the highest value recorded in the European continent after Denmark[30].

Life insurance, in fact, is the main savings tool for families.

4. Conclusive considerations

At the end of our examination, we can certainly say that insurance sector represents a rather varied branch with primarily compensatory functions. But the other supplementary welfare and social security colors life insurance policies are, in fact, a form of savings.

If indexed they are a real investment from the analytical look used. It appears that the in-depth matter is regulated in a homogeneous way in the various member countries also and above all.

Through the contribution of the Community legislator intervened on multiple occasions to ensure uniformity asymmetry in the various systems.

Fundamental the intervention of the third Community here come to this and has introduced the regime of freedom to provide services. Today any insurance company having its registered office in a member country can have prior authorization to carry on its activity.

30 ACPR, *Autorité de controle prudentiel et de resolution banque de france*, *Studi e ricerche*,https://acpr.banque-france.fr/page-sommaire/etudes-et-recherche

In any other country of European Unity does not need in the case of moving, its headquarters of distancing itself in the second country.

Community citizens can conclude insurance contracts with insurance companies from a Member State. Other than their own year in this way.

Greater choice with respect to the range of services offered. In this direction the third directive therefore creates a fertile ground for the establishment of a true and single European market in the field of insurance. A real legislature uniformity in a sector of such importance can help for the purposes of a unitary regulation that can cope in the best way with the different existing requests.

Article 804 - Effects of losing an insurance policy

1. If under a contract the insurer must perform his/her duty only after the insurance policy has been presented but the policy is lost or destroyed, the policyholder may claim performance only if the insurance policy has been declared void under special proceedings.

2. If the insurance policy is lost or destroyed, the insured may demand a copy from the insurer. The expenses of issuing the copy shall be borne by the policyholder.

Elena Signorini

Summary: 1. Analysis of the article. 2. Comparative analysis: Italy. 3. Cross-border analysis: the case of France; Switzerland and Spain. 4. Final considerations.

1. Analysis of the article

Article 804 of Law No. 786 of 26th June 1997 (Civil Code of Georgia) belongs to Chapter XX, dedicated to Insurance, Section First, General Provisions. The Article is dedicated to the effects of the loss of an insurance policy.

The first paragraph of Article 804 specifies the evidential value of the policy: the insurer must fulfil the obligations arising from the contract entered into only after the insurance policy has been submitted to him. The rule specifies that if the document has been lost or destroyed, the policyholder may only demand fulfilment by the insurer when the policy has been declared void in the context of a special proceedings.

In the second paragraph the rule deals with the issue of the preparation of a copy of the insurance contract where it has been lost or destroyed. In this respect, the Georgian Code requires the policyholder to ask the insurer for a copy of the contract which has been lost. The rule stipulates that in such cases the costs of issuing a copy of the contract shall be borne by the insured person.

It seems appropriate to frame the present rule in the context of reference and therefore recall two other rules that seem closely related to the one under consideration. The first rule is Art. 802 in the matter of Insurance Certificate. The rule requires the delivery of the signed document relating to the insurance contract. It follows, therefore, that the form en-

visaged for the conclusion of this contract is the written form, with regard to which, however, the Georgian Code does not rule by opting for a general principle of freedom of forms. As is well known, however, the written form can have value both for constitutive purposes and for evidential purposes. In the silence of the norm (art. 804), that does not express the obligation to draw up the contract of insurance in written form (not even for evidentiary purposes as we will see for Italy) must be recalled art. 802 where it requires the insurer to deliver to the insured the signed document relating to the insurance contract (insurance certificate - policy).

It follows from that combination that the general rule of the Georgian Code contracts, which is art. 328. This rule provides that «if a specific form has been prescribed by law for the validity of a contract, or if the parties have determined such a form for the contract, then the contract shall enter into force only if it meets the requirements of the form»[1].

In the present case with regard to the insurance contract, the legislator has not expressly imposed the obligation to write the contract, but you can deduce this obligation implicitly by reading the provisions of art. 802, as regards the constituent value of the written form satisfied with the delivery of a document that must contain the elements and information indicated in the second and third paragraphs of the Article. To this must be added art. 804 from which it can be deduced the evidential value to be attributed to the written form with which the contract must have been formalized. In the absence of an explicit provision, which expressly prescribes the obligation of the written form for the contract of insurance, could be applied, for the purposes of the protection of the will of the parties and for the purpose of preserving the effects of the contract, also the second paragraph of art. 328 of the Georgian Code where it prescribes that «[i]f the parties have agreed on a written form, the contract may be concluded by drawing up one document signed by the parties. A telegraph notice, telecopy or exchange of letters shall also be sufficient for observance of the form»[2].

The combined provisions of the rules show a strong desire to protect and preserve the content of the agreement reached between the parties, this is in view of the fact that this type of contract is unbalanced

1 https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/90468/118660/F999089720/GEO90468%20Geo.pdf

2 https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/90468/118660/F999089720/GEO90468%20Geo.pdf

in favour of the insurance company and the form ensures greater information protection, regarding the terms of the contract, to the weak party.

In the light of the foregoing, the scope of Art. 804 is intended to regulate the effects arising from the loss of the insurance policy. In particular, the provision conditions the fulfilment of the obligation assumed by the insurer upon delivery of the document containing the contract concluded between the parties. The rule regulates the specific case in which the policy is no longer in the availability of the policyholder, this circumstance that must be analyzed together with the provision referred to in art. 803 where it provides that insurance policies may be issued in the bearer mode. In the case provided for by art. 804, in the event that the initial requirement of the rule, which binds the performance to the presentation of the document of legitimacy, the legislator, wanting to protect the rights of the weak party of the contract (insured), requires that compliance can only be achieved by a declaration of invalidity which has been made in the course of a special proceedings, to which it does not expressly refer.

The second paragraph also provides for the possibility for the insured person to obtain a copy of the document of which he has lost the availability, a copy that will be issued, if required, at his own expense.

2. Comparative analysis: Italy

From an initial comparison between art. 804 of the Georgian Code and the system that the Italian Civil Code dedicates to insurance emerge a series of issues related to the conclusion of the insurance contract; to the drafting of the contract in written form for the purpose of its proof; the obligation of the insurer to issue to the policyholder «the insurance policy or other document subscribed by him» (art. 1888 cc); the hypotheses related to the destruction, loss or theft of the policy to the order (art. 1889, para. 3, c.c.; art. 2016 cc); the depreciation proceedings which could be assimilated to the declaration proceedings referred to in art. 804, para. 1, of the Georgian code.

Analyzing the rules belonging to the Italian Civil Code of 1942, it should be noted that these requirements are contained in Book IV of the Obligations, Title III of the individual contracts, in Chapter XX (similar

to the Georgian code), bearing "*Dell'assicurazione*", Section One, General Provisions[3]. It is a system that develops from Articles 1882 until art. 1932.

The themes of the first paragraph of Article 804 of the Georgian Code are contained in Article 1888 cc., about the proof of contract and with regard to which it is worth recalling art. 2725 cc., referred to the documents for which written proof or written form is required. Art. 1888 c.c. is structured in three paragraphs: the first reads that «the insurance contract must be proved in writing»; the second prescribes that «the insurer is obliged to issue to the policyholder the insurance policy or other document signed by him»; and the third provides that «the insurer shall, at the request and expense of the policyholder, issue duplicates or copies of the policy, but in that case he may require the presentation or return of the original».

The topics related to the second paragraph of art. 804 of the Georgian Code are contained in Article 1889 cc. , containing Policies to the order or to the bearer, in particular the third paragraph of this provision where it is stated that, «in the event of loss, theft or destruction of the policy to the order, the provisions relating to the depreciation of the securities to the order apply» (art. 2016 cc). With regard to the probative function of the contract, referred to in the first paragraph of art. 804 of the Georgian Code, it should be noted that the Italian doctrine is agreed on the principle of the informal nature of the insurance contract for which the written form is required for evidential purposes[4].

This option was not found in the Italian Code of Commerce of 1882 where it was provided that «the insurance policy must be done in writing»[5]. It seems of fundamental importance to accept the evidentiary

3 On the theme G. Cian, A. Trabucchi, *Dell'assicurazione*, in *Comm. Breve c.c.*, Padova, 2020, 2035 ff; M. Irrera, *Lineamenti di diritto assicurativo*, Torino, 2019, 109 ff; F. Peccenini, *Assicurazione*, in *Comm. c.c. Scialoja Branca*, Bologna-Roma, 2011, 39 ff; F. Santi, *Artt. 1882 – 1986, Assicurazione – Giuoco e scommessa – Fideiussione – Transazione – Cessione dei beni*, in P. Cendon, *Comm. c.c.,* 2010, 105 ff; M. Rossetti, *Le assicurazioni*, in *Le fonti del diritto italiano,* Milano, 2019, 73 ff; A. Donati, *Trattato del diritto delle assicurazioni private*, Milano, I, 1952, II, 2, 1954, III, 1956.

4 On topic: A. Bracciodieta, *Il contratto di assicurazione. Disposizioni generali, Artt. 1882-1903,* in *Il Codice civile,* Commentario diretto da SCHLESINGER, (continuato da F.D. Busnelli) Milano, 2012, 79 ff; A. De Gregorio, G. Fanelli, A. Latorre, *Diritto delle assicurazioni*, Vol. II, Milano, 1987, 54 ff.

5 On topic already C. Vivante, *Trattato di diritto commerciale*, Torino, 1905, IV, 383.

approach attributed to the document in the code of 1942[6]: the written document that contains the insurance contract, the cd. policy, must be assigned the function of proof of the insurance contract (art. 1888, para. 1), a circumstance that is confirmed with the obligation that falls on the insurer to give to the policyholder (insured) «the insurance policy or other document signed by him (art. 1888 second paragraph)». In addition to an evidentiary function, the ratio contained in art. 1888 cc is also to allow synallagma to take place between parties according to good faith[7].

From what outlined the contract under consideration is a consensual and non-formal contract, as the written document is required by art. 1888 cc *ad probationem* only[8]. This implies that if the policy were missing (this is a hypothesis that can hardly be verified) the contract, or rather its content, could not be proved for witnesses or presumptions, unless it can be shown that the document has been lost without fault of the contractor, this hypothesis provided for by art. 2725 cc. and therefore there is a risk that the document would remain ineffective, in the absence of a confession from the other party, or in the absence of other documents (such as the insurance certificate) that the parties exchange or are underwritten by the insurer. The document as we see plays a decisive role.

The choice made by the Italian legislature must also be noted from a temporal point of view since the close consecution between the two statements referred to in the first and second paragraphs of art. 1888, highlights that necessarily the issue of the document can only be contextual or follow the conclusion of the corresponding contract[9] (paragraph first art. 1888). It follows that the obligation to deliver to the contracting party of the document (paragraph according to art. 1888 and art. 166 Private Insurance Code referred to in Legislative Decree 7th September 2005, n. 209)[10] must necessarily follow what previously stipulated and conclud-

6 A. Gambino, *Assicurazione. I) Contratto di assicurazione, profili generali*, in *Enc. Giur*., Roma, 1988, III, 12.

7 Trib. Biella, 17 febbraio 1999, in Resp. Civ. Prev., 2001, 481.

8 Cass. Civ. Sez. III, 22 marzo 2007, n. 6960, in *Guida al Diritto*, 2007, 9; Cass. Sez. Civ. III, 18 febbraio 2000, n. 1875, in *Assicurazioni*, 2000, II, 2, 140, in *Massimario giurisprudenza civile*, 2000, 402.

9 M. R. Ciancio, *La conclusione del contratto*, in *Le assicurazioni private*, a cura di G. Alpa, Torino, 2006, 894 ff.

10 I. Della Vedova, *artt. 165-169, D.lgs. 7 settembre 2005, n. 209* (Codice delle assicurazioni private), in De Cristofaro Zaccaria, *Comm. Breve al Diritto dei consumatori*, (fondato da G. Cian e A. Trabucchi), Padova, II ed., 2013, 1955 ff.

ed, and the delivery allows the document to give the actual proof both of the conclusion of the contract and of its object satisfying the obligations of clarity and completeness[11] of the information referred to in art. 166 of the Private Insurance Code[12]. The Insurance Code has introduced rules which affect in particular the quality of the information provided by the insurer to the policyholder and the policyholder. Although the above-mentioned rule did not introduce a written requirement ad substantiam for insurance contracts, art. 166 must be read in conjunction with the art. 1888 of the Italian civil code, obtaining the effect of reinforcing the burden of proof on insurance companies, which must prove in writing that they have made provision for a particular agreement and that they have made provision for it clear and exhaustive agreement.

The policy is therefore the document that incorporates the proposal and acceptance in which the essential elements of the insurance contract converge (according to the general rule of art. 1325 cc.). Practice shows that there are rare cases where the principle of written form for evidentiary purposes is carried out with documents other than the policy[13].

Again, with regard to the burden of proof, it should be noted that if the insured has lost without fault the document that provided the proof, this may be given by texts on the point, pursuant to the combined provisions of art. 2725 and 2724 No. 3 cc.[14]. The jurisprudence is not in agreement in admitting the witness proof with reference to contracts for which the written test is prescribed ad probationem. According to one part of the jurisprudence it must be admitted by not considering such a limitation[15]; other part of the jurisprudence has considered that the uni-

11 The art. 166 of the Private Insurance Code mentions in the first paragraph that «[t]he contract and any other document delivered by the undertaking to the contractor must be drawn up in a clear and exhaustive manner». L. Farenga, *Sub. Art. 166*, in *Il codice delle assicurazioni private*, Comm. a cura di F. Capriglione, II, 2, Padova, 2007, 183 ff.

12 On topic: E. Ferrante, *Sub artt. 165-169*, in *Commentario al codice delle assicurazioni*, a cura di M. Bin, Padova, 2006, 493 ff.

13 De Gregorio, Fanelli, La Torre, *Il contratto di assicurazione*, cit. 53 ff.

14 In the matter of insurance policy and burden of proof, Trib. Milano, Sez. VI, 20.02.2020, in https://www.lanuovaproceduracivile.com/wp-content/uploads/2020/04/milano20.pdf; Proof of delivery by insurer to insured person is admissible; the document containing the declaration of intention to terminate the contract, without prejudice to the fact that the insurance contract requires the written form "ad probationem", App. Bari, 18/06/2007, in www.laleggepertutti.it

15 Corte Cass., 21 marzo 2013, n. 7122, in Assicurazioni, 2013.

ty of the discipline obtainable from the art. 2725 and 2729 cc. excludes the existence of a different procedural regime as regards the finding of inadmissibility of witness evidence with regard to contracts for which the written form has been provided for *ad probationem* or *ad substantiam*, so that when by law or by the will of the parties the written form *ad probationem* is provided for a certain contract, the witness evidence referring implicitly or explicitly to the existence of the contract is to be considered inadmissible, unless it is intended to demonstrate that the document has been wrongfully lost (Art. 2724. No. 3 in conjunction with Art. 2725 c.1)[16]. The burden of the written form *ad probationem* therefore leads to certain limitations in the use of certain means of proof: as said the contract in question cannot be proved between the parties for witnesses, except where the document is lost without fault by the contracting party and not where there is a principle of written proof (art. 2724 n.1 cc). From what has now been outlined, the document plays a fundamental role with regard to the production of the effects of the insurance guarantee, both to third parties and to the policyholder.

Otherwise, in the relations with the policyholder (the insured person) must be applied art. 1888 c.c. already cited that states that the policyholder will have to produce the policy or other replacement document issued and undersigned by the insurer[17] to obtain the benefit.

The special attention paid by the legislator to the value of the written form of the insurance contract meets the need to protect the policyholder against possible misunderstandings, induced or spontaneous, in which the same could fall due to the particular technicality of matter[18]. The traditional practice of the written conclusion of the insurance contract also meets the need for certainty of the extent of the covered risk: As we have seen, this practice has been reflected in the legislative provision[19] which

16 In the matter of written contracts "ad probationem": limits of admissibility of the testimonial test, Cass. civ. Sez. Unite, Sent., (ud. 07-07-2020) 05-08-2020, n. 16723, in https://www.avvocatocassazionista.it/contenuto; F. Santi, *Artt. 1882 – 1986, Assicurazione – Giuoco e scommessa – Fideiussione – Transazione – Cessione dei beni*, cit., 119 ff.

17 Cass. Civ. Sez. III, 10 giugno 2005, n. 12322, in https://www.asaps.it/16737; Cass. Civ. sez. III, 29 maggio 2001, n. 7278, in https://www.avvocato.it/codice-civile-libro-quarto-titolo-iii-capo-xx-sezione-i-art1899; Cass. Civ. Sez. I, 8 luglio 1985, n. 4077, in F. Bertolini, P. Savarro, Codice di procedura commentato, 2018.

18 E. Ferrante, *sub. Artt. 165-169*, cit.; L. Farenga, in *Il codice delle assicurazioni private*, Comm. a cura di F. Capriglione, II, 2, Padova, 2007, 4 ff.

19 A. D. Candian, *Forma e assicurazione*, Milano, 1988.

gives the policy an essential evidentiary function by requiring the written act to *substantiam*[20].

The evidentiary affair may mislead the interpreter: in order to clarify the position adopted by the Italian legislator it should be specified that the documentary evidence refers to the content of the contract, not to the fact of its conclusion, this circumstance that could be proven by any means of evidence in order to obtain the document[21]. The insurance contract must be considered valid and effective regardless of the existence of a written form. This element can be conventionally elevated by the parties to element of validity: this is allowed in the Italian system by art. 1352 cc, which requires the will to be expressed in written form by both parties[22]. With regard to the proof of the existence of the contract, the jurisprudence excludes that it is possible to prove between the parties the existence of the insurance contract both for presumptions and for witness evidence with only one exception, the hypothesis that the contractor has without fault lost the document[23].

The system developed by the legislator provides a whole series of formal technical caution predictions that have been designed to rebalance the position of the parties within the contract. To this purpose, the provision that the insurer must deliver the documentation to the policyholder, who is thus made more aware of the contents and limitations of the contract, is aimed at making more available to the policyholder, expressing a more conscious and free consensus. This obligation also complies with the principle of good faith in the performance of the contract referred to in art. 1375 cc. and is not derogable, because any contrary agreement would make it difficult to exercise the rights of the insured by violating the provisions of art. 2698 cc. where it prescribes the nullity of the pacts with which the burden of proof is reversed or modified, in the case of rights not available to the parties or where the reversal or modification

20 With reference to the written form conventionally required ad substantiam ex art. 1352 cc. Trib. Roma 11 marzo 1964, in *Temi rom*., 1965, 91; Trib. Milano 18 febbraio 1946, in *Assicurazioni*, 1947, II, 22, XV.

21 G. Scalfi, *Assicurazione (contratto di*), in D. Comm, I, 333 ss.; A.D. Candian, Forma e assicurazione, cit. 91.

22 V. Salandra, *Dell'assicurazione*, cit. 214; G. Scalfi, *Assicurazione (contratto di*) cit. 354.

23 The case law on proof of insurance contracts has varied since the 1950s. Cass. 8 gennaio 1951, n. 30, in Assicurazioni, 1951, II, 2, 48; con riguardo alla prova per testimoni Cass. 7 agosto 1964, n. 2258, in Assicurazioni, 1964, II, 64, XLVIII.

has the effect of making it excessively difficult for one of the parties to exercise the right[24].

The first paragraph of art. 804 of the Georgian Code therefore recalls the evidentiary scope of the contractual document that must be presented in order to obtain the fulfillment by the insurer. However, the first paragraph of the rule provides for the case where the contractor is not in a position to produce the document in order to claim the benefit, in which case the rule requires, in cases of loss or destruction of the document, the possibility of requiring fulfilment only after the policy has been declared void in the context of a special proceedings.

The subject is somewhat controversial because it incorporates in the same provision (art. 804 Georgian code), consisting of two paragraphs, hypotheses that are governed instead in different rules in the Italian code (art. 1888 and 1889 cc.).

As for the issue of copies or duplicates of the policy (ex art. 1888, third paragraph, Cod. civ. Italian) art. 804 of the Georgian code in its second paragraph provides that in the event of loss or destruction of the insurance policy, the insured person may request a copy from the insurer, stating that the costs of issuing the copy must be charged to the insured person.

Art. 1888 to the second and third paragraphs generally provides that the insurer must issue to the policyholder the insurance policy (second paragraph) or a copy of this (third paragraph). The purpose of issuing the copy is to ensure that the insured person has a secure means of proof[25]: imposing the issue of the document, including copying, will restore a balance affected by the unilateral formation of the document[26]. It follows that the requirement of the release of the document could only be assigned to the party holding the monopoly of its formation. This is particularly important in cases where, despite the completion of the contract, the insurer has failed to deliver the policy or has performed it late. Such circumstance may give rise to the compensation of the damage suffered because of the missed or not timely delivery: this may be the case where the effectiveness of the insurance was subordinated to the

24 On the conventional reversal of the burden of proof, https://www.brocardi.it/codice-civile/libro-sesto/titolo-ii/capo-i/art2698.html

25 About it G. Castellano, S. Scarlatella, *Le assicurazioni private*, Torino, 1981, 169.

26 A.D. Candian, *Forma e assicurazione*, cit., 78.

delivery of the policy and in cases where a claim has occurred before the delivery[27].

The Georgian norm incorporates in art. 804 what the Italian code separately regulates as already mentioned in art. 1888 third paragraph on the issue of copies and duplicates, and in art. 1889 third paragraph, in the matter of loss theft or destruction of the policy.

With regard to the first aspect, it is worth highlighting the analogy between the Georgian rule and the provision contained in the third paragraph of art. 1888 c.c.: here the Italian norm prescribes that the insurer is obliged to issue to the policyholder, if from this request, copy or duplicate of the policy, after reimbursement of expenses incurred. The forecast shall be supplemented by the clarification that the insurer may request the presentation or return of the policy in due time. This claim was deemed to be well-founded with regard to policies to the order or to the bearer. Such policies circulating could expose the insurer to the risk of paying the indemnity twice: in order to remedy this danger the legislator provided that the insurer could demand the return of the original.

The eventuality outlined above does not take place in the case of registered policies for which it seems not allowed to make the issue of a duplicate conditional on the return or presentation of the original[28]. It is considered that this provision should, in any event, be given a general value which does not relate to the present case, which clearly presupposes that the title is not available to the contractor. This question could indeed be remedied by lodging the complaint of loss or the initiation of the depreciation proceedings pursuant to art. 2016 cc.

It should be noted, however, that it would be contrary to good faith to act for the return of the original in case, due to the particular nature of the insurance relationship, it is necessary to subscribe also a duplicate in addition to the original. Inevitably, it should be pointed out that if the duplicate was required to replace the lost document, the insurer could not require the presentation or the return of the duplicate[29].

As stated above, art. 804 also includes in its text a second issue which is aimed at regulating cases in which the policy is lost, stolen or destroyed.

27 L. Buttaro, *Assicurazione (contratto di),* in *Enc. Dir*., III, Milano, 1958, 481.

28 On topic A. Bracciodieta, *Il contratto di assicurazione. Disposizioni generali, Artt. 1882-1903,* cit., 87.

29 F. Peccenini, *Assicurazione*, cit., 43.

Or rather, art. 804 of the second paragraph prescribes that «[i]f the insurance policy is lost or destroyed, the insured may demand a copy from the insurer. The expenses of issuing the copy shall be borne by the policyholder».

Since the matter of the issue of the copy has already been analyzed, being contained in art. 1888 of cc. in the third paragraph, it should be noted that a request for a copy of the insurance policy may be made at the expense of the insured person.

These circumstances are specified by the Georgian legislator in the second paragraph of art. 804 where there is talk of loss or destruction of the policy.

The issue is regulated by the Italian legislator in art. 1889 to the third paragraph where the loss and destruction is also contemplated the hypothesis of theft. The rule now referred to is generally dedicated to the two categories of policies, the bearer and the order (depending on the different mode of transfer)[30] provided for by the Italian system. The provision of these clauses means that the policy fulfils together with its essential probative function, also a circulatory function[31]. With regard to the second of these categories the Italian legislator expressly prescribes that in cases of loss, theft or destruction of the policy to the order, should be applied the provisions about the proceedings of depreciation of titles to order[32].

It should be pointed out immediately that the insurance policy at the order or at the bearer[33], despite some doubts in the interpretation of the doctrine, is not to be considered a title of credit but an improper title of

30 The credit certificates are distinguished, according to the method of transfer between bearer securities, which are transferred by simple delivery of the security. In such cases, the holder of the security is entitled to receive the benefit indicated in the security, an example being the banknotes; in titles to the order, which are transferred through endorsement and finally there are the registered titles which are in the name of a specific person, which are transferred by double entry of the name of the new beneficiary on the licence or certificate or on the register of the issuing institution. In http://www.enciclopedia-juridica.com/it/d/polizza/polizza/polizza.htm

31 M. Rossetti, *Il diritto delle assicurazioni*, Vol. I, Padova, 2011, 732.

32 For bearer policies, in the absence of specific references, it seems that the applicability of articles. 2006 and 2007 cc should be excluded. In doctrine on point L. Buttaro, *Assicurazioni (contratto di*), cit., 477; contra V. Salandra, *Dell'assicurazione*, in *Commentario c.c. a cura di Scialoja Branca, sub. Art. 1882*, Bologna-Roma, 1966, 226; A. Donati, *Trattato delle assicurazioni private,* cit. II, 2, 335.

33 http://www.enciclopedia-juridica.com/it/d/polizza/polizza.htm

legitimacy[34] (an improper title) in favour of the debtor[35], clarifying that the transfer of such documents only involves the transfer of the claim to the insurer with the effects of the transfer[36]. This qualification of the insurance contract presents a weak point represented by the second paragraph and the third paragraph of art. 1889 cc. Those provisions in fact derogate from art. 2002 c.c. which regulates documents of legitimacy and improper securities, providing that the insurer debtor of the service is released if without malice or gross negligence fulfils the service in favour of the endorser or bearer of the policy even if it is not the insured, also recalling the rules on depreciation (v. infra).

The policy in fact does not give its holder, which is securely legitimated, a literal and autonomous right to credit: this is because the transfer of the right takes place with the effects as said of the assignment[37], even if service to the transferred debtor is not required. In the present case, therefore, active entitlement is lacking, which is the prerogative of the debt securities ex. Art. 1992, c. 1, cc.[38]. The policy on the order or on the bearer does not incorporate the right to compensation, this right remains linked to its assumption that it is represented by the ownership of the interest insured.

The policy does not transfer the insurance contract but only the right to the corresponding indemnity: this means that the new holder of the policy can be the recipient of all the exceptions, which could be opposed to the original insured, on the basis of the insurance contract (e.g. aggravation of risk, cancellation, default ...).

A similar provision does not exist in the Georgian Code which refers to such circumstances in general already in the first paragraph of art. 804 focusing on the problems that arise in the event that «... the policy is lost or destroyed, (prescribing that) the policyholder may claim performance only if the insurance policy has been declared void under a special proceedings».

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34 M. Irrera, *Lineamenti di diritto assicurativo*, cit., 112 ff.

35 S. Amorosino, L. Desiderio, G. Alpa, A.M. Ambroselli, N. Banchelli, E. Bellizzi, I*l nuovo codice delle assicurazioni: commento sistematico*, Giuffrè, 2006.

36 www.brocardi.it, art. 1888 cc; L. Buttaro, *Assicurazione (contratto di),* cit., 477 ff.

37 In the sense of the opposability to the bearer of any exception relating to the original contract derived from it, M. Irrera, *Lineamenti di diritto assicurativo*, cit., 113 ff.

38 On topic widely A. De Gregorio, G. Fanelli, A. Latorre, *Diritto delle assicurazioni*, cit., 82 ff.

It is therefore necessary to understand whether the provisions relating to the depreciation of the securities to the order allow the same result to be achieved in order to obtain the fulfilment of the policy that, according to Georgian law, must pursuant to art. 804, arising from the declaration of invalidity in the context of a special proceedings.

It must therefore be understood whether Italian depreciation can be attributed the same effects as art. 804 attributes the special proceedings for determining the invalidity of the insurance policy. Both cases are designed to ensure that the insurer fulfils its obligation.

The special proceedings referred to in art. 804 is not specified. With regard to the Italian law, it is necessary to specify that the depreciation proceedings to be applied to the policy in the event of destruction, loss or theft is governed by art. 2016 cc whose last paragraph specifies how, despite the denunciation of one of the events indicated to the insurer debtor, he is released if he pays to the assignee creditor before being notified of the relative decree of depreciation issued by the President of the Tribunal. The second paragraph of art. 1889 requires the insurer to be released from his obligation where, without malice or gross negligence, he fulfils the service in respect of the person who has issued the insurance, even if he is not the insured person[39].

This hypothesis (liberation) is not explicitly contemplated in the Georgian rule and is not identifiable when the insurer has received information from its policy-holder that one of the scenarios governed by the third paragraph has been put into effect, having regard to the effect of transferring that means of transfer of the policy[40]. In the Georgian system the release is subject to the declaration of nullity of the document.

Analyzing the scheme wanted by the Italian legislator it should be noted the particular attention paid by the legislator to the prevention of disputes[41] that could arise at the occurrence of the three events provided for by the combined provisions of art. 1888 and 1889 cc. providing for the release of the policyholder only «if without intent or gross negligence»

39 www.brocardi.it art. 1889 cc.

40 On topic L. Buttaro, *Assicurazione (contratto di*), cit., 477.

41 The jurisprudence of legitimacy is agreed in recalling the discipline of art. 1424 of the Italian Civil Code in the matter of conservation of contracts. On the point Cass. Civ. Sez. III, 11 ottobre 2006, n. 21737 in R. Giovagnoli, C. Ravera, *I contratti di assicurazione: percorsi giurisprudenziali*, Milano, 2011, 213 ff.

he «fulfils in although he is not the holder of the right [1189, 1836, 1889, 2006; 46 l. camb.]».

On the other hand, the Georgian law allows the insured to obtain the benefit, despite the failure to present the policy to the insurer (condition to which the Georgian code binds the fulfilment by the insurer) only in cases of loss or destruction of the policy, but there has been a declaration of invalidity of the policy by initiating a special proceeding.

There is no doubt that the forecast recalls the depreciation proceedings that can be activated pursuant to art. 2016 cc of the Italian code on the initiative of the holder in the case of subtraction, loss or destruction of the title.

The proceedings shall be admissible if an appeal is lodged with the President of the Court of First Instance of the place where the licence or certificate is payable, and that proceedings shall entail the establishment of the holder's right to payment and shall end with the authorisation to pay the licence or certificate after 30 days from the date of publication in the G.U.

Between the special proceedings referred to in art. 804 and that of depreciation there is therefore an important fil rouge although with some differences: while the first involves the declaration of nullity of the policy, a policy in circulation but not in the availability of the policyholder, in order to enable the insurer to comply with the requirement, in accordance with the amortisation proceedings, it is placed at the disposal of the legitimate holder of the security who, being in one of the three cases of unavailability provided for by the law (loss, destruction and theft), has lost possession of it and is intended to rebuild the position of legitimacy of the contractor.

The depreciation proceedings provided for by the Italian system is a proceedings of voluntary jurisdiction that is the responsibility of the holder of credit certificates aimed at obtaining the judicial declaration of ineffectiveness of the securities to the order and names lost, destroyed or stolen, and not of nullity as in the Georgian code. By virtue of this proceedings, a person who has obtained depreciation may demand payment by lodging a declaration of legal proceedings and, if the licence or certificate has not expired, may obtain from the issuer a duplicate of the licence or certificate of which he has lost access.

The nature of a simple document legitimizing the policy has also led part of the doctrine to exclude that the payment made after the report of

theft or loss free the insurer, contrary to the provisions of art. 2016 last paragraph c.c.[42].

The question is complex and implies the coordinated application of Articles 2016 cc (general discipline) and 1889, second paragraph, cc. under which that insurer may be deemed to have been released if he fulfils his obligations after the contractor's complaint, but before the notification of the decree closing the depreciation proceedings. The issue recalls the diligence of the insurer in fulfilling his obligation, this theme does not emerge explicitly from art. 804 in comment, although both rules present a particular preventive approach to conflicts aimed at protecting the weak party of the contract.

3. Cross-border analysis: the case of France; Switzerland and Spain

After analysing the Italian system, the comparative analysis of foreign legislation in the field of insurance presents a series of difficulties both definitional, arising from the different definitions of insurance law that vary from country to country; is linked to the application contexts as well as to the objective as well as subjective profile of the insurance phenomenon. The comparison of the institution would also require a historical analysis of the phenomenon in order to understand its operational implications that are different depending on the reference context. In general it can be highlighted as in countries with a Romanistic (or civil law) legal tradition, namely those belonging to central Mediterranean Europe, the institution has been heavily influenced in the insurance contract legislation by that imprint. For some countries (France, Spain, Belgium, etc.) the influence deriving from the principles contained in the Napoléon Code was fundamental. In other countries such as Germany, Austria, Switzerland, Denmark etc. The inspiration for the development of the pandette's system was decisive, marking a line of continuity with some institutions of Old German law. The countries belonging to this geographical area refer the insurance contract to typical contracts, marked by specific obligations on the parties, creating a system that leaves little operational scope for the free determination of the parties.

The systems of civil law are opposed to those of common law. This second category includes countries belonging to the British Common-

42 On topic A. De Gregorio, G. Fanelli, A. Latorre, *Diritto delle assicurazioni*, cit., 84 ff.

wealth as well as countries of the United States of America. These are systems in which the value of jurisprudential rulings which reflect the common modes of behaviour and the common feeling of the social community is given a fundamental role. These countries are characterised by regulatory systems which are more flexible to the wishes of the parties, reflecting changes in social customs and jurisprudence.

In France, the insurance legislation is contained in the Code des assurances[43] related to Decree No. 76-666 of 16th July 1976 and the implementing regulations no. 76-667 promulgated on the same day[44]. The French legislator regulates the insurance contract in Book I, by art. L100 to L.195-1: these norms belong to the civil part of the discipline that occupies the titles I, II and III of Book I on Le contrat. In particular, in Book I, Title I is dedicated to the rules common to non-life insurance and personal insurance (art. 11-1 to L 114-3) and Chapter II is dedicated to the conclusion and proof of the insurance contract - Form and transmission of policies (Arts. L 112-1 to L 112-11).

The methods of conclusion of the contract are contained in art. L112-2, second paragraph, from which it emerges the desire to inform the contractor of the contractual conditions (by delivery of a draft contract and supporting documents or an information note ...) also recalling the rules to protect the Code de la consommation[45] (which can be applied in the event of a dispute). Similarly to what has been said for the Italian system also in the French system there is a particular attention to the prevention of conflict, in art. L112-2 emerges the reference to the mediation proceedings, known as alternative dispute resolution proceedings[46].

Art. 112-3, first paragraph, prescribes the written form for the drafting of the contract that must be done in French, with simple characters.

French law in art. 112-10 deals with the discipline of the insurance relationship as well as the issue of withdrawal and waiver by the insured. In the French system, the question of the fulfilment of the obligation of the insurer in the event of loss of the insurance contract is not addressed. It

43 Code des Assurances, Dalloz 2001.

44 *Code des assurances*, in www.legifrance.gouv.fr

45 For a vision of rules to protect consumers https://noticias.juridicas.com/base_datos/Privado/r1-cc.l4t12.html.

46 The provisions of Title V of Book I of the Consumer Code have been incorporated into Title I of Book VI of the New Consumer Code. The rule was amended by L. 2019.486 of 22nd May 2019 - art. 206 (V), https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000038496102/.

may be assumed that the French legislature did not explicitly regulate these aspects, considering it sufficient in such cases to recall the general discipline on contracts in addition to that of the Consumer Code. In this regard it should be noted as in art. L 112-2-1 to the eighth paragraph specifies that «information on contractual obligations communicated at the pre-contractual stage must be in conformity with the law applicable to the contract».

In this regard, art. 112-2 has been amended by Ordinance No. 2018-361 of 16th May 2018 that further specifies the information obligations incumbent on the insurer which is to deliver, prior to the conclusion of the contract, or a copy of the draft contract with attached information, or an information brochure describing precisely which guarantees are covered and everything else is not included in the contract in order to protect the policyholder.

In Switzerland, insurance regulations are contained in the regulatory framework established by the original law dated 2nd April 1908[47] (Law on the LCA insurance contract), which entered into force on 1st January 1910 and is still in force today, and by the Federal Act supplementing the Swiss Civil Code of 30th March 1911[48], Book V, Law of Obligations[49].

This system was partly revised by the ordinances of 1st March 1966 on the repeal of restrictions on contractual freedom for insurance contracts[50]; 1st May 1966 and 23rd December 1966, as well as in the federal laws of 25th June 1972 and 23rd June 1978.

These rules are very old but still constitute the reference plant that stands out for the information burdens on the parties aimed at making them aware of the contract and the essential content of the contract that they are about to conclude (Art. 3, Federal Law of 1908). The Swiss legislator does not specify how the contract is to be drafted: he devotes much space to the subject of the proposal and to the information charges that fall on the parties. The formal aspect is filled, in part, by art. 1 of the Federal Law supplementing the Swiss Civil Code[51], which specifies that

47 https://www.fedlex.admin.ch/eli/cc/24/719_735_717/it.

48 https://wipolex.wipo.int/en/text/581102.

49 *Legge federale sul contratto di assicurazione del 2 aprile 1908*, in www.admin.ch.

50 https://www.fedlex.admin.ch/eli/cc/1966/476_495_495/it.

51 *Legge federale di complemento del codice civile svizzero (libro quinto: diritto delle obbligazioni) del 30 marzo 1911*, in www.admin.ch; *Codice civile svizzero del 10 dicembre 1907*, in www.admin.ch.

«the contract is not perfect unless the contractors have expressed their mutual will in agreement. This will can be expressed or tacit». There is therefore an indirect reference to the form of the contract, which reinforces the belief that it should be drawn up in writing (as confirmation of this Art. 14 of the Federal Law on the right of revocation and on the possibility of making additions, make corrections to the policy if it does not coincide with the agreed agreements).

The Swiss legislator is silent about the obligations to fulfil in cases of loss or destruction or theft of the document containing the insurance contract. Nevertheless, a proceedings is regulated in art. 13 called Amortization. This proceedings recall the depreciation proceedings provided for by the Italian legislature, and by analogy is similar to the special proceedings referred to in art. 804. In the Swiss case the second paragraph of art. 13 stipulates that «the provisions of the Federal Code of Obligations of 14th June 1881 on the amortisation of bearer bonds apply by analogy to the amortisation of policies, with the variant that the term of production must be one year at most».

About Spain, the matter is regulated in the Real Decreto of 24th July 1889[52], in the law n. 50 of 8th October 1980 De contrato de seguro, in Real Decreto n. 1 of 16th November 2007[53] with which the legislation on consumer protection has been reworked. To this system are added other complementary laws.

The Spanish system protects the contractual autonomy of the parties and with regard to the explicit insurance contract in art. 5 of Law no. 50 states the obligation to use the written form for the drafting or amendments and additions to be made to the contract. This discipline also provides for the delivery of the document by the insurer to the insured, thus satisfying the more general information requirements of the weaker party as already provided for in other legislation. It is precisely on this profile that art. 8 also of L. 50 which identifies the elements that the contract must necessarily contain for its effectiveness. Similarly to other legal systems, Spain also distinguishes between policies on the order or on the bearer (art. 9 L. 50 cit.). Chapter V, of Book IV, De la prueba de

52 https://noticias.juridicas.com/base_datos/Privado/r1-cc.l4t12.html.

53 *Ley 50/1980, de 8 de octubre, de Contrato de seguro*, in www.boe.es.

las obligaciones, of the Real Decreto of 1889, which has been the subject of additions and amendments as a result of Law No. 1 of January 7th, 2000 de Enjuiciamiento Civil[54].

4. Final considerations

The analysis of the provision in question and the comparison made shows the legislator's intention to protect the reasons of the parties to the contract by reinforcing the information asymmetry that distinguishes the contract in question[55]. To this end, it draws up a system in which the document plays a decisive role in identifying the person entitled to claim the service and at the same time serves to protect the insurer where he finds himself fulfilling in relation to an uninsured person. It is hoped that the system will clarify the substantive value as well as evidence of the written act and that will be further enhanced, strengthening the protection of the policyholder pending the special proceedings, as it does for the depreciation proceedings in Italy. In this way a better deflation of the litigation of which the matter is rich could be realized.

54 www.boe.es.

55 M. De Poli, *Asimmetrie informative e rapporti contrattuali*, Milano, 2002, 407 ff.

Article 805 – Rights of insurance agents

1. If an insurance agent (representative) is entitled to enter into an insurance contract, he/she may also amend the terms of the contract, prolong the contract or dissolve it.

2. An insurance agent brokering an insurance contract may enter into such contract.

Mariam Tsiskadze

Summary: 1. The Role of the Insurance Agent and Broker in Civil Turnover. 2. Scope of Authority of the Insurance Agent. 2.1. Content of the Activity of the Insurance Agent. 2.2. The Role of the Insurance Agent in Issuing a Bank Guarantee by the Insurer. 3. Scope of Authority of the Insurance Broker.

1. The Role of the Insurance Agent and Broker in Civil Turnover

The insurance agent and the insurance broker are the persons performing the insurance activity. According to Article 2 (b) of the Law on Insurance, insurance activity is the activity of the insurer, which is related to the conclusion and implementation of insurance and reinsurance contracts. According to the content of this norm, they assist the insurance company in concluding insurance and reinsurance contracts, on the one hand, as its representative, through the insurance agent, and on the other hand, in finding the persons wishing to conclude insurance and reinsurance contracts, through the insurance broker[1].

In insurance relations, the parties to the insurance contract are distinguished – the policyholder and the insurer, the participating entities – the third party insured during the insurance contract in favor of a third party; as well as the beneficiary named by the policyholder or insured. The

1 The legal status and basic rights and obligations of the insurance agent and insurance broker are defined in detail in Article 12 of the Law of Georgia on Insurance; the conditions for ensuring the financial soundness of an insurance broker are provided for in Article 16 of the same law; both the person wishing to conclude the insurance contract and the policyholder are protected from proper non-fulfillment of the obligations of the insurance agent and the insurance broker by the legal norms strengthened by Article 20 of the same law. And the terms and conditions for maintaining the register of insurance brokers are defined in Article 21 of the same law.

insurance agent and the broker are not the subjects of the insurance legal relationship, their legal status is defined, on the one hand, by Article 805 of the Civil Code, on the other hand, by Article 2 (g) & (h) and Article 12 of the Law on Insurance.

It should be noted that the insurance agent and the broker do not represent the persons in the labour contract with the insurer, their employees[2].

The opinion expressed in the Georgian legal literature is to be shared that for the purposes of separation from the employee of the insurance agent the court should pay attention to such circumstances as: existence of the constituent elements of the subordination, the name of the contract and its practical application, the content of the will expressed by the parties in the contract, the elements of the definition of labour law relationship strengthened by the law, etc[3].

It is noteworthy that Article 12 (8) of the Law on Insurance requires that the relationship between the insurance agent and the insurance broker and the insurer/policyholder/reinsurance company be determined by the contract concluded between them. In particular, a contract of mandate is concluded between the insurance agent and the insurer; therefore, the relationship between them should be regulated by Articles 709-722 of the Civil Code (a contract of mandate); while the insurance broker is in a contractual relationship with the insurer, the relationship between which is regulated by Articles 744-748 of the Civil Code; that is why the insurance agent and the insurance broker cannot be considered as participants in the insurance relationship.

According to the opinion expressed in the legal literature, the legal relationship between the insurance agent and the insurer belongs to a number of fiduciary relations, which places the agent in the process of protecting the interests of the insurer. A special relationship based on special

2 M. Wandt, *Versicherungsrecht*, 6. Auflage 2016, s. 168. K. Iremashvili, *Article 805*, *in Online Commentary of the Civil Code*, https://gccc.tsu.ge/, 15.03.2016 (in Georgian).

3 Z. Shvelidze, *Characteristics of Legal Status of Employee According to the Labor Code of Georgia*, in V. Zaalishvili (Ed.), *Employment Law (Collection of Articles) I*, 'Meridiani' Publishers, Tbilisi, 2011, pp. 90, 99, 109, 133, as cited in: K. Iremashvili, *Article 805*, *in Online Commentary of the Civil Code*, https://gccc.tsu.ge/, 15.03.2016 (in Georgian).

trust is considered fiduciary, which imposes an obligation of one party to the contract to take special care of the interests of the other[4].

2. Scope of Authority of the Insurance Agent

2.1 Content of the Activity of the Insurance Agent

Carrying out insurance activities of an insurer through an insurance agent means that they enter into an insurance or reinsurance contract on their behalf, change its terms or extend the term of the contract through an agent outside the office of the insurance company or its branch.

The insurance agent serves only the insurer and not the policyholder.

It is convenient to conclude an insurance contract through an insurance agent, especially in the regions and villages of Georgia, because the policyholder can enter into such an agreement through an insurance agent, pay the insurance premium, change the terms of the contract and extend its validity without leaving home. At this time, in addition to the special norms provided for in Articles 799-858 of the Civil Code, which regulate the insurance contract, Article 336 of the Civil Code on doorstep contract shall also be applied.

Article 805 (1) of the Civil Code states that if the insurance agent (representative) is authorized to enter into an insurance contract, they can also change the terms of the contract, extend its validity or terminate it. This legal norm does not indicate who can be the insurance agent. However, according to Article 2 (g) of the Law on Insurance, the insurance agent is a natural or legal person acting on the instructions and in the name of the insurer within the scope of authority granted to them by the insurer. Thus, the insurance agent can be any legally capable natural or legal person (both entrepreneurial and non-entrepreneurial), they do not need any special permit (license) or registration for such activity.

Thus, it is clear from the content of the above-mentioned insurance legislation that regulates the activities of the insurance agent that they exercise representation on behalf of the insurer; therefore, in addition to the legal norms of the above-mentioned insurance content, the legal norms reinforced by Articles 709-722 of a contract of mandate should be used to regulate the relationship between the insurer and the insurance agent;

4 B. A. Garner (Ed.), *Black's Law Dictionary*, 8th Edition, 2004, p. 658, as cited in: K. Iremashvili, *Article 805*, *in Online Commentary of the Civil Code*, https://gccc.tsu.ge/, 15.03.2016 (in Georgian).

the subject of the contract concluded between the insurer and the insurance agent and all other essential conditions, e.g. the internal private legal relationship between them should also be defined in the relevant Articles 709-722 of a contract of mandate.

It should be noted that in addition to a contract of mandate in relation to the insurance agent, the insurer is also obliged to take into account the requirements of Articles 103-114 of the Civil Code (agency in transactions), because it is important for the persons wishing to conclude an insurance contract, the power of attorney issued by the insurer, which must specify in detail the term of representation, the rights and obligations of the insurance agent with third parties, i.e. in relation to persons wishing to conclude an insurance contract.

Although the norms of the insurance contract do not directly indicate this, the view expressed in the Georgian legal literature is to be shared that the insurance agent should exercise the rights granted to them under Article 805 (1) in parallel with close consultation with the insurer[5].

If an insurance contract is concluded through an insurance agent, then not only the obligations under the insurance contract, but also the obligations under Articles 103-104 of the Civil Code should apply to the insurer during the period of validity of such an agreement and after the occurrence of the insured event.

For example, the insurance agent had a representative authority from the insurer from 1 January 2021 to 1 January 2025, and they had the right to receive an insurance premium, as well as the right to extend the term of the contract; Vano, who lives in the village of Zemo Kedi in Dedoplistskaro, insured his 500-foot vineyard and 2 tonnes of acceptable grapes from hail on 15 June 2021 for one year until 15 June 2022 through an insurance agent; the insurance agent handed Vano one copy of the power of attorney issued by the insurance company. One year later, on 15 June 2022, Vano again renewed his insurance contract with the same insurer under the same terms and conditions until 15 June 2023, and also paid the insurance premium to the insurance agent. At the end of August 2022, heavy hail destroyed 80 percent of Vano grape harvest, Vano applied to the insurer to compensate the damage caused by the accident in accordance with the terms of the insurance contract, but the insurer refused to

5 K. Iremashvili, *Article 805*, *in Online Commentary of the Civil Code*, https://gccc.tsu.ge/, 15.03.2016 (in Georgian).

pay Vano's insurance premiums because on 15 June 2022, the insurance contract with Vano was no longer extended; with this insurance agent, the insurer withdrew from the contract of mandate as yet of 20 November 2021 due to the agent's breach of the obligations under the contract of mandate; the insurance agent did not transfer the June-July 2022 insurance premium transferred by Vano to the insurer either. In this case, the legality of the insurer's refusal to pay insurance premiums to Vano should be examined under Article 108 of the Civil Code, according to which, «[t]hird persons shall be notified of alterations in or revocation of authority. If this requirement is not fulfilled, such alterations and revocation of authority shall not be valid with respect to third parties, except when the parties knew or should have known about it when making the transaction». According to the content of this norm, if the insurer fails to confirm that they notified Vano of the termination of the representation authority to the insurance agent on 20 November 2021, then they are obliged to compensate Vano for the damage in accordance with the terms of the insurance contract.

It is also interesting to consider Article 114 of the Civil Code in determining the content of the powers of the insurance agent. For example, if the insurance agent insures the property registered in their ownership in the same insurance company as an insurance agent after concluding the contract of mandate with the insurer, or even the property owned by their spouse, which they acquired after the marriage registered during the period of cohabitation, then the question arises, should such insurance contracts be unconditionally annulled as contracts concluded by the insurance agent with itself? To answer this question, we must first refer to Article 114 (1), according to which, «[u]nless otherwise provided by the consent an agent may not make a transaction on behalf of the principal and with himself/herself, either in his own name or as an agent of a third party, except when the transaction already exists for the performance of certain obligations». Based on all of the above, if the insurer, in the power of attorney issued in the name of the insurance agent, also granted them the authority to insure their own property, *i.e.* insure the property of oneself or the spouses together on behalf of the insurer, then such an insurance contract will not be void and it will definitely be considered valid.

An interesting opinion is expressed in the Georgian legal literature that if there is an abuse of representative power by the agent, the validi-

ty of the contract will depend on the consent of the person represented (see Article 111 (1) of the Civil Code)[6].

2.2 The Role of the Insurance Agent in Issuing a Bank Guarantee by the Insurer

According to Article 879 of the Civil Code of Georgia, an insurance company has the right to issue a bank guarantee. When the insurer guarantees the principal to the beneficiary, then its activities go beyond the scope of insurance and move more to the field of banking services. It is true that the current legislation of Georgia does not directly indicate, but the insurance agent can also represent the insurer when concluding a bank guarantee agreement.

In one of the civil cases, it was indicated that the insurance company had a contract with an insurance agent that required the latter to find individuals who needed bank guarantees. The insurance agent brought the persons wishing to obtain a bank guarantee to the insurance company, who in turn entered into a contract with the insurance company and paid the amount in accordance with the contract. This insurance company later went bankrupt and customer relations as well as money transfers to beneficiaries under a bank guarantee could no longer be blamed on the insurer. Nevertheless, the insurer filed a lawsuit against the insurance agent in the court and demanded the return of the remuneration transferred to them in the amount of GEL 17,844.

By the decision of the Collegium of Civil Cases of Tbilisi City Court of 18 June 2012, the claim of the plaintiff's insurance company against the respodent's insurance agent was upheld. The insurance agent appealed the decision of the court of first instance. By the decision of the Chamber for Civil Cases of Tbilisi Court of Appeals on 29 November 2012, the appeal of the insurance agent was upheld, a new decision was made to change the decision of the Collegium of Civil Cases of Tbilisi City Court of 18 June 2012, which rejected the claim of the insurance company. The appeals chamber referred to clause 2.3.6 of the contract of 1 March 2010 between the insurance company and the insurance agent, according to which, the insurer had to pay to the insurance agent a remuneration in the amount of 20% of the accrued income received through them; this agreement did not

6 K. Iremashvili, *Article 805*, *in Online Commentary of the Civil Code*, https://gccc.tsu.ge/, 15.03.2016 (in Georgian).

contain any stipulation that the insurance agent should be reimbursed after the expiration of the bank guarantee. It was established from the case file that the insurance agent fulfilled the obligation duly, in good faith, and at the time and place determined, stipulated in the contract of 1 March 2010. Evidence to the contrary was not presented in the case. The decision of the appeals chamber was appealed by the insurance company, which requested its annulment and leave the decision of the court of first instance unchanged. In the cassation appeal, the insurer indicated that due to the revocation of the license, as the validity of the bank guarantee was terminated, the insurance agent was obliged to return the insurance premiums, due to which the agent had to return the remuneration (commission). The cassator explained that they were obliged to pay interest to the agent for the amount the company had received as a bonus, accordingly, the insurance agent was obliged to return 20% of this premium, otherwise, it would be unfair to oblige the insurance company to return 100% of the premium received, of which 20% was received by the agent and 80% by the company.

According to the decision of the Chamber of Civil Cases of the Supreme Court of Georgia of 19 September 2013, the cassation appeal of the insurance company remained unresolved due to inadmissibility[7].

3. Scope of Authority of the Insurance Broker

The main function of an insurance broker is to assist the insurer in finding the persons wishing to enter into an insurance contract, *i.e.* they carry out intermediary activities.

According to the opinion expressed in the legal literature, the activity of the insurance broker is to connect the future parties of the contract, *i.e.* the insurer and the policyholder[8]. Therefore, unlike an insurance agent, an insurance broker can serve both the insurer and the policyholder.

It is true that the norms governing the insurance contract of the Civil Code do not offer the direct term of an insurance broker, but the content of Article 805 (2) directly refers to and defines the authority of the insurance broker.

Unlike an insurance agent, according to the Law on Insurance, no person has the right to carry out the activities of an insurance broker,

7 Judgment of the Chamber of Civil Cases of the Supreme Court of Georgia of 19 September 2013, Case No. 233-225-2013.

8 M. Wandt, *Versicherungsrecht*, 6. Auflage 2016, s. 183.

because according to Article 2 (h) of this law, an insurance broker can be – a natural or legal person established in accordance with the legislation of Georgia, registered with a Legal Entity of Public Law – the Insurance State Supervision Service of Georgia (the Service), and independently carrying out brokerage activity in the field of insurance, as a type of its entrepreneurial activity.

Thus, an insurance broker can only be a natural person who is registered as an individual entrepreneur in the tax authority and who is also registered as an insurance broker by the LEPL Insurance State Supervision Service; they can also be an entrepreneurial legal entity, which is also required only to register with the LEPL Insurance State Supervision Service and not for a license. The terms and conditions for registration of an insurance broker are regulated by the order of the head of the LEPL Insurance State Supervision Service.

Since the activity of an insurance broker is considered to be an entrepreneurial activity by law, they are not in a labour relationship with the insurer[9].

If the insurance broker, in addition to finding a person wishing to conclude an insurance contract, also concludes an insurance contract with that person on behalf of the insurer, then they also perform the functions of an insurance agent. It is explicitly stated in Article 805 (2) of the Civil Code that the insurance agent who acts as an intermediary in concluding the insurance contract has the right to enter into such a contract. But it should also be taken into account that any insurance agent cannot exercise the powers of an insurance broker unless they are registered as an insurance broker; and any insurance broker can carry out the activities of an insurance agent.

The content of Article 805 of the Civil Code and the Articles of the Law on Insurance directly indicates that the relationship between the insurance company and the insurance broker should be regulated by a brokerage contract, in particular Articles 744-748 (general provisions on brokerage) of the Civil Code.

Therefore, when concluding a contract with an insurance broker, the insurance company must take into account the terms of the contract provided for in Articles 744-748.

9 Article 2 (h) of the Law of Georgia on Insurance. M. Wandt, *Versicherungsrecht*, 6. Auflage 2016, s. 168.

Article 806 – Time of commencement of insurance

1. The insurance shall commence at 24:00 on the day the contract is entered into and shall end at 24:00 on the last day of the contract period.

2. If the insurance contract is made for a period of more than five years, either party may terminate the contract three months after giving a notice of termination.

Ciro G. Corvese

Summary: 1. Preliminary notes: scope and limits of the Article 806. 2. A comparative point of view: the Italian law and Spanish law. 2.1. The comparison with Italian law. 2.2. The comparison with Spanish law. 3. The Georgian law. 3.1 Introductive notes. 3.2. The first paragraph of the Article 806. 3.3. The second paragraph of the Article 806.

1. Preliminary notes: scope and limits of the Article 806.

The Article 806 of the Georgian Civil Law is divided in two paragraphs: the first paragraph provides that: «1. The insurance shall commence at 24:00 on the day the contract is entered into and shall end at 24:00 on the last day of the contract period»; the second provides that: «2. If the insurance contract is made for a period of more than five years, either party may terminate the contract three months after giving a notice of termination».

We might say that the scope of this Article is to issue rule concerning the "duration" (or, properly, "time of commencement") of the contract: in the first paragraph we have the general rule about the duration of the insurance contract and in the second one, we find the specific rule regarding the termination of the contract when the duration is fixed more than five years.

If we agree with this interpretation, the Article 806 of the Georgian Civil Code leaves unresolved a whole series of questions also probably for the synthetic form used by the legislator; thus, for example, what about the time of commencement? Does "time of the commencement of insurance" mean the commencement of the contract or the commencement of the effects of the contract? May we apply this rule to all insurance contracts? Is it possible to extend the term of duration? What happens in the event of an extension of the term? And more other questions.

2. A comparative point of view.

To properly interpretate Article 806 of the Georgian Civil Code we think it is relevant to see two similar rules provided by the Italian Civil Code, the Article 1899 whose heading is "*Durata dell'assicurazione*", and by the Spanish Insurance Contract Law, the Article 22 whose heading "*Duración del contrato*".

2.1 The comparison with the Italian law.

The general rules governing insurance contracts are contained in Chapter XX (Articles 1882 to 1932) of Title III of Book IV of the Italian Civil Code, to which is added the special law of Legislative Decree No. 209 of 9 September 2005 (hereinafter Italian Private Insurance Code)[1].

1 See M. Rossetti, *Il diritto delle assicurazioni*, vol. I, *L'impresa di assicurazione. Il contratto di assicurazione in generale*, Padova, 2011; G. Alpa, (a cura di), *Le assicurazioni private*, in Giur. sist. civ. comm. Bigiavi, Torino, 2006; G. Volpe Putzolu, *L'assicurazione*, in Trattato Rescigno, 13, Torino, 1985; G. Fanelli, *Le assicurazioni*, in Trattato Cicu-Messineo, Milano, 1973; A. Donati, *Trattato del diritto delle assicurazioni private*, II e III, Milano, 1954 e 1956; A. Antonucci, *L'assicurazione fra impresa e contratto*, Bari, Cacucci, 1994; G. Bavetta, voce *Impresa di assicurazione*, in *Enc. del dir*., XX, Milano, Giuffrè, 1970, pp. 624 ff; E. Bottiglieri, voce *Impresa di assicurazione*, in *Dig. disc. priv., sez. comm*., VII, Torino, UTET, 1992, pp. 155 ff; L. Buttaro, voce *Assicurazioni sulla vita*, in *Enc. del dir.,* III, Milano, Giuffrè, 1958, pp. 608 ff; L. Buttaro, voce *Assicurazioni contro i danni*, in *Enc. del dir.*, III, Milano, Giuffrè, 1958, pp. 493 ff; L. Buttaro, voce *Assicurazioni in generale*, in *Enc. del dir.,* III, Milano, Giuffrè, 1958, pp. 427 ff; R. Capotosti, voce *Assicurazioni private e imprese assicurative (Diritto comunitario*), in *Noviss. dig. it.,* Appendice, Torino, UTET, 1980, pp. 506 ff; A. Donati, *Trattato di diritto delle assicurazioni private*, I, Milano, Giuffrè, 1952.; A. Donati e G. Volpe Putzolu, *Manuale di diritto delle assicurazioni private*, 8ª ed., Milano, Giuffrè, 2006; G. Fanelli, voce *Assicurazione*, II *Assicurazione contro i danni*, in *Enc giur*., III, Roma, 1988; F. Garri, voce *Impresa di assicurazione*, II (Diritto amministrativo), in Enc. giur., XVI, Roma, 1988; N. Gasperoni, voce *Assicurazione*, III, *Assicurazione sulla vita*, in *Enc. giur*., III, Roma, 1988; C. Giannattasio, voce *Impresa di assicurazione* (Parte generale), in *Noviss. dig. it*., *Appendice*, Torino, UTET, 1983, pp. 29 ff; A. La Torre, *Diritto delle assicurazioni*, I, *La disciplina giuridica dell'attività assicurativa*, Milano, Giuffrè, 1987; G. Leone e C. De Gasperis, *Le assicurazioni private nella giurisprudenza*, in *Raccolta sistematica di giurisprudenza commentata* diretta da M. Rotondi, Padova, Cedam, 1975; L. Mossa, *Sistema del contratto di assicurazione nel libro delle obbligazioni del codice civile*, in *Assicurazioni*, 1942, I, pp. 185 ff; L. Mossa, *Impresa e contratto di assicurazione nelle vicendevoli relazioni*, in *Assicurazioni*, 1953, I, pp. 141 ff; V. Salandra, *Dell'assicurazione*, in *Commentario del codice civile* a cura di A. Scialoja e G. Branca, Libro IV, Delle obbligazioni (artt. 1861-1932), 3ª ed., Bologna-Roma, Nicola Zanichelli editore - Società editrice del Foro Italiano, 1966, sub artt. 1882 ff, pp. 172 ff; G. Volpe Putzolu G., *L'assicurazione*, in *Trattato di diritto privato* diretto da P. Rescigno, XIII, Torino, UTET, 1985, pp. 55 ff; G. Volpe Putzolu, *Le assicurazioni. Produzione e distribuzione* (problemi giuridici), Bologna, Il Mulino, 1992; G. Volpe Putzolu, *L'evoluzione della legislazione in materia di assicurazioni*, in S. Amorosino, L. Desiderio (a cura di), *Il nuovo codice delle assicurazioni, commento sistematico*, Giuffrè, Milano, 2006, p. 3; P. Corrias, *Il contratto di assicurazione: profili funzionali e strutturali*, Napoli, Edizioni scientifiche italiane, 2016.

Insurance is that contract under which the insurer, to pay a premium, undertakes to claim the insured person within the agreed limits of the damage caused by an accident or to pay a capital or an annuity at the occurrence of a fact relating to human life (Article 1882 of Italian Civil Code)[2]. From the code definition it is possible to find two types of insurance:

a. non-life insurance, the discipline of which is dictated by Articles 1904 Italian Civil Code and ff. as well as by the private insurance code referred to in Legislative Decree No. 209 of 2005;

b. life insurance, to which Articles 1919 and .c refer, and, again, the private insurance code.

Based on the Article 1899 Italian Civil Code[3]:

1. the insurance shall take effect from 24:00 on the day the contract is entered into [1326] to 24:00 on the last day of the contract period;

2. the insurer may, as an alternative to annual cover, propose multi-year cover in return for a reduction in the premium compared to that provided for the same coverage as the annual contract;

3. if the contract exceeds five years, the insurer may, after five years, withdraw from the contract with sixty days' notice and with effect from the end of the year during which the right of withdrawal was exercised;

4. the contract may be tacitly extended once or several times, but each tacit extension may not last more than two years;

2 For the different definition of insurance contracts in Europe see https://ec.europa.eu/info/sites/default/files/definition_of_insurance_contract_en.pdf. Last visited January 19, 2022.

3 See A. Antonucci, *Commento sub art. 1899*, in *Breviaria*, 2013, p. 45 ff; *Id*, *L'assicurazione fra impresa e contratto*, Bari, 2000; A. Donati, G. Volpe Putzolu, *Manuale di diritto delle assicurazioni private*, 8ª ed., Milano, Giuffrè, 2006, p. 147 ff. and specifically for life insurance contracts, p. 196 ff.

5. the rules of this Article shall not apply to life assurance [1919 ff.][4].

In relation to the duration of the insurance contracts, the doctrine distinguishes:

a. "formal duration", which begins at the time of conclusion of the contract and continues until the occurrence of a cause (legal or conventional) of dissolution and

4 The Article 8, named "Duration and Termination of the Contract", of Greek Insurance Contract Law provides that: «1) If the insurance contract is of finite duration, it shall be terminated following the lapse of the term specified, unless it has been agreed that it can be renewed by implication. Such extension may not be agreed for a period of more than one year.

2) If the contract is of indefinite duration ("continuous policy"), the contract shall be terminated by means of notice at the end of the insurance period. The time limit set for the exercise of the right of termination may be neither less than one month, nor more than three months.

3) For non-life insurance contracts with a cover period in excess of one year and insurance of persons, the policyholder shall be entitled to rescind the contract within fourteen days from the date when the policy was delivered. The time limit shall not commence if the policyholder has not been informed by the insurer of his right in this regard, which must be confirmed by means of a document. If the insurer fails to inform the policyholder of his right to rescind, it shall lapse two months following the payment of the first premium. The right to rescind does not apply to non-life insurance where cover is provided immediately, on the particular request of the policyholder. The period set for the exercise of the right to rescind shall be suspended for the period during which the policyholder is entitled to raise an objection pursuant to Article 2 paragraph 6 of this Law.

4) The insurance contract shall be terminated by means of a notice, in accordance with the provisions of Articles 3 and 4, Article 5 paragraph 1, Articles 6 and 12 of this Law, as well as those set out in paragraph 2 of this Article. The policyholder shall also be entitled to terminate the contract by means of a notice in the event that the insurer is declared insolvent, or if the insurer is deprived of the free disposal of part or of all its assets. The insurer shall be entitled to terminate the contract by means of a notice if the policyholder is declared insolvent or if the policyholder's business becomes subject to compulsory administration.

5) The insurance policy may also provide for other reasons for termination of the insurance contract. If the insurer maintains the right to terminate the contract after the insured event has occurred, the policyholder shall have a corresponding right. Without prejudice to Article 3 paragraph 7, Article 4 paragraph 4 and Article 12 of this Law, the termination, whenever initiated by the insurer, shall not come into effect until the lapse of thirty days from the date on which such notice of termination was communicated to the policyholder.

6) "Insurance term" shall mean a period of one year, unless the computation of premiums has been made for a shorter period of time, in which case the term shall be construed accordingly».

b. a "substantial duration" concerning the effectiveness of the contract in relation to the provision of guarantee by the insurer and starts, according to the rule in comment, from 24 hours on the day on which the contract is concluded until 24 hours on the last scheduled day[5].

It also refers to "technical duration" about the duration of the insured's obligation to pay the premium in relation to which the amount of the premium is proportionate. Case-law agrees to distinguish the duration of the contract from its effectiveness, which is subject to payment of the premium, unless the parties agree otherwise[6]; parties of the contract may provide for an anticipation of the effects even before the time indicated in the rule[7].

The first paragraph of the Article 1899 of the Italian Civile Code provides that the insurer may, as an alternative to an annual contract, propose multi-year insurance cover; in this case, however, the premium must be cheaper than that provided, for the same coverage, by the annual policy. In that case, therefore where the insurance company and the customer enter into a multi-year agreement with a reduced premium compared to that due for an annual shop, the right of withdrawal for the insured person - with notice of sixty days and with effect from the end of the year during which it was exercised - is provided only if the contract is more than five years and the five-year period has elapsed.

5 Regarding the last paragraph of the Article 1899 of the Italian Civil Code, see M. Rossetti, *Il diritto delle assicurazioni*, vol. I, *L'impresa di assicurazione. Il contratto di assicurazione in generale*, Padova, 2011, p. 1023 ff. dove l'autore distingue correttamente Il periodo di assicurazione dal periodo per il quale è stata pagata la rata di premio e, infine, la durata del contratto; A. Donati, *Trattato di diritto delle assicurazioni private*, II, Milano, 1952, p. 340; G. Scalfi, voce *Assicurazione (contratto di),* in *Digesto IV, Discipline privatistiche,* sezione Commerciale, I, Torino, 1987, p. 33 ff, part. p. 356; F. Peccenini, *Assicurazione*, in *Commentario del Codice Civile Scialoja-Branca*, a cura di Francesco Galgano, Bologna-Roma, 2011, p. 83 ff, part. 84.

The Italian Supreme Court, sez. III, 10-06-2005, n. 12305, established the provision of Article 1899 c.c. (under which the insurance took effect from 24 hours on the day of the conclusion of the contract), since it does not involve a general and binding interest, it does not exclude a written agreement anticipating the contractual effects; in fact, the power of the insurance agent to conclude a contract covers the possibility of specifying the time of the agreement (Italian Supreme Court, Judgment No 11142 of 1994) and the proof of that derogation must be given in writing, without the possibility of recourse to testimonies or to presumptions.

6 See Italian Supreme Court, Judgment No 1855 of 1982.

7 Italian Supreme Court, Judgment No 11142 of 1994.

The second paragraph of Article 1899 of the Italian Civil Code provides that the contract may be the subject of tacit extensions, the duration of which may not in any case exceed two years. Only it is permissible a shorter duration, being a possible clause to the contrary replaced *ex lege*; it does not matter the conclusion of a new contract, but it is a continuation of the precedent of which all conditions remain unchanged[8]. For the tacit renewal of the contract, an express clause is required which must be specifically approved in writing.

Case-law has also ruled on this point several occasions[9]. The tacit extension provided for in the contract can be avoided by cancellation, the term and form of which are often laid down in the policies; this term according to the doctrine is essential and given the receptive nature of the cancellation it concerns its receipt by the insured person.

The Italian Supreme Court, which according to an initial consolidated orientation, had stated that in order to prevent the tacit renewal of the contract it is necessary that the cancellation reaches the addressee within the established period[10] then stated that the ambiguous clause as to whether or not the cancellation was receptive, in order to assess its timeliness, must be interpreted by reference to the criteria laid down in Articles 1366 and 137 of the Italian Civil Code, i.e., in the sense most favourable to the statement; the dispatch of the registered letter[11].

In the case of an express extension, the time limits for the tacit extension shall not apply. The period of six months shall run not from the communication but from receipt by the addressee.

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8 About this profile, see Italian Supreme Court, sez. III, 28-07-2005, n. 15797, according to which in contracts of duration (in this case, an administration contract), if the parties agree that, in the event of non-termination, the relationship lasts over time for the period predetermined by them (so-called "pactum renovandi"), the renewal is the effect of the contractual clause and the relationship continues, under the conditions initially established, as a result of the original contractual will; if, on the other hand, the aforementioned clause is missing, but nevertheless the parties, after the deadline, manifest for conclusive facts the will to continue the relationship, this continues by tacit agreement, according to the general principle, codified in Article 1597, 1677, 1899 c.c. of the Italian Civil Code, so that, in the absence of an express contrary agreement, contracts of duration, if not cancelled in right time, are tacitly renewed for the time provided for in the contract itself or by the uses, or for an indefinite period, and the new relationship is governed by the same clauses contained in the original convention, except those excluded from the express will of the parties or the law , either because of incompatibility or because of exhaustion of their function.

9 Italian Supreme Court, Judgment No 6145 of 1978.

10 Italian Supreme Court, Judgment No 2817 of 1971.

11 Italian Supreme Court, Judgment No3353 of 1985.

The third paragraph of Article 1899 of the Italian Civil Code excludes the applicability of the provision to life assurances in the strict sense. These cannot include so-called health insurance which guarantees in the event of accidents or illnesses within the limits of the costs incurred for medical treatment and which are therefore also governed by the rule of this[12].

Given that, to understand better the Italian rule, we have to remember the legislative evolution of the Article 1899 of the Italian Civil Code, putting particular attention to two important modifications intervened in 2007 and 2009.

With regard to the duration of insurance policies and the related right of withdrawal, we have to remind that Article 1899, paragraph 1, second period, of the Italian Civil Code, as last amended by Article 21, Law 23 July 2009, n. 99[13], provides that «[t]he insurer, as an alternative to an annual coverage, may propose coverage of multi-year duration against a reduction in the premium compared to that provided for the same coverage by the annual contract. In this case, if the contract exceeds five years, the insured person, after five years, may withdraw from the contract with sixty days' notice and with effect from the end of the year during which the right of withdrawal was exercised».

On February 1, 2007 the so-called "Bersani Decree" came into force, intervening on the rule in question, introducing the right for the insured person to withdraw annually from policies «without charge and with sixty days' notice». On January 31, 2007, No. 7, Article 5, paragraph 4 of the Text published in the Official Journal stated: «In paragraph 1 of Article 1899 of the Italian Civil Code, the second period shall be replaced by the following»: «In the case of a multi-year period, the insured person may withdraw annually from the contract without charge and with sixty days' notice»[14].

During the conversion into law of the "Bersani Decree", however, some changes were made with which a period was added to the rule described above, which below is fully reported: «Art. 1899 c.c., paragraph

12 Italian Supreme Court, Judgment No 9689 of 1992.

13 See *Italian Official Journal*, 31.07.2009, n. 176.

14 F. Peccenini, *Assicurazione*, in *Commentario del Codice Civile Scialoja-Branca*, a cura di Francesco Galgano, Bologna-Roma, 2011, 83 ff, spec. 85 f.; P. Marano, *La concorrenza tra intermediari assicurativi: prospettive di regolazione europea e interventi di liberalizzazione nazionali*, in P. Marano P., M. Siri (a cura di), *La regolazione assicurativa dal Codice ai provvedimenti attuativi*, Giappichelli, Torino, 2008, 231 ff, spec. 258 ff.

1, the second period is replaced by the following: In the case of a multi-year duration, the insured person may withdraw annually from the contract without charge and with sixty days' notice. These provisions shall enter into force for contracts concluded from the date of entry into force of the Law converting this Decree. For contracts concluded before the date of entry into force of the Law converting this Decree, the option referred to in the first period may be exercised provided that the insurance contract has been in force for at least three years».

Therefore, by the law of conversion, the legislature intended to make the right of withdrawal, for all multiannual contracts concluded before the entry into force of the conversion law, subject to the condition of the existence of the insurance contract for at least three years, at the time of the exercise of the right of withdrawal by the insured person.

As regards the effectiveness of the reform, we may consider an important case discussed by the Italian Supreme Court[15] where the insurance contract had only been in place for two years, but since the withdrawal was exercised about 15 days before the entry into force of the conversion law and, by providing for that law for contracts concluded before Law of conversion n. 40 of 2007, for which the withdrawal had already taken place pursuant to Decree No. 7/07, the Court considered that the legislature had implicitly admitted the validity of the withdrawal thus put in place.

Indeed, the Italian Supreme Court, after retracing the long-awaited question concerning the intertemporal effectiveness of the rules contained in the Decree (and amended or abolished by the conversion law referred to in the next paragraph), has identified three withdrawal hypotheses:

(a) contracts concluded before Law No. 40 of 2007, and for which the withdrawal of the insured person had already taken place pursuant to D.L. n. 7/07:

– for such contracts, the legislature has not formally ordered, implicitly admitting the validity of the withdrawal;

(b) contracts concluded before L. n. 40 of 2007, and still in force:

– for these contracts, the legislature has granted the right of withdrawal to the insured person with the limit of the three-year period from the conclusion of the contract;

15 Italian Supreme Court, Sez. III, 10-05-2016, n. 9386.

(c) contracts concluded after L. No 40 of 2007, for which:

– there is full right of withdrawal of the insured person, with only the obligation to give 60 days' notice.

The second important reform of the Article 1899 of the Italian Civil Code was introduced in 2009 by the 23 July 2009, n. 99[16] that modified the original second sentence of the first paragraph of the above-mentioned Article, providing that the insured person may withdraw with sixty days' notice and with effect from the end of the current year, in the only event that the contract exceeds five years and the five-year period has elapsed.

As a result of the 2009 reform of the Article 1899 of the Italian Civil Code, companies may propose an insurance contract lasting more than one year, but they will have to grant a discount on the rate («[t]he insurer, as an alternative to annual coverage, may propose multi-year coverage against a reduction in the premium compared to that provided for the same coverage under the annual contract»). In case law, it was considered that if the company does not apply or not express the discount on the tariff, the contractor may withdraw to any year, without prejudice to the 60-day notice.

Finally, from the point of view of the objective scope of application of the rule, we must remember that Article 1899 Italian Civil Code does not apply:

1. to life insurance policies as expressly provided for by Article 1899, paragraph 3, of the Italian Civil Code;
2. to motor vehicle liability insurance policies, as required by Article 170-*bis* of the Italian Private Insurance Code[17] according to which

16 *Italian Official Gazette*, 31.07.2009, n. 176, S.O. 136.

17 The Article 170-*bis*, named Duration of the contract, of Italian Private Insurance Code, provides that:

«1. The compulsory insurance contract for civil liability deriving from the circulation of motor vehicles and boats has an annual duration or, at the request of the insured, for a year plus fraction, it automatically terminates on its natural expiry and cannot be tacitly renewed, notwithstanding Article 1899, first and second paragraphs of the Italian Civil Code. The insurance company is required to notify the policyholder of the expiration of the contract with at least thirty days› notice and to keep the guarantee provided under the previous insurance contract operational, no later than the fifteenth day following the expiration of the contract, up to the effect of the new policy.

1-bis. The termination referred to in paragraph 1 also applies to insurance for ancillary risks to the main risk of civil liability deriving from the circulation of vehicles, if the same contract, or another contract stipulated at the same time, simultaneously guarantees both the main risk and the ancillary risks (Paragraph inserted by the Article 1, paragraph 25, of law no. 124 of 4 August 2017)».

the contract relating to these policies has an annual duration or, at the request of the insured, of a year plus fraction, automatically terminates on its natural expiry and cannot be tacitly renewed, notwithstanding the Article 1899, first and second paragraphs of the Italian Civil Code. The insurance company is required to notify the policyholder of the expiration of the contract with at least thirty days' notice and to keep the guarantee provided under the previous insurance contract operational, no later than the fifteenth day following the expiry of the contract, until the new one policy becomes effective.

According to paragraph 1-*bis* of the abovementioned Article 170-bis, the termination referred to in paragraph 1 also applies to insurance of ancillary risks to the main risk of civil liability deriving from the circulation of vehicles, if the same contract, or another contract stipulated at the same time, simultaneously guarantees both the main risk and the ancillary risks[18].

18 See Italian Supreme Court, sez. III, 29-05-2001, n. 7278. As far as compulsory liability insurance arising from the movement of vehicles is concerned, and with regard to the dispute which the insured person promotes for the assessment of the cancellation at the natural expiry of the contract, in order to avoid its tacit extension referred to in Article 1899, 2nd paragraph, c.c., proof of such termination can also be provided with reference to the existence of timely and unequivocal tacit manifestations of will, highlighting a contrary intention to the continuation of the relationship, considering that, on the dissolution of the relationship by fact, the subjection of the insurance contract to the written form "*ad probationem*" (unlike in cases of written form required "*ad substantiam*") is not an obstacle, and also that the form of the registered letter sent with six months' notice for the exercise of the right of withdrawal is provided for in the aforementioned rule with the sole reference to contracts lasting more than ten years; in order for the validity and effectiveness of the tacit cancellation to be legitimately preached, it is necessary, moreover, for it to intervene before the expiry of the final period of the contract, and for it to take the result in facts which are entirely incompatible with the desire to make use of the tacit extension of the contract itself, since the assessment of the suitability of those facts to manifest in an unequivoid manner the will of the dejection referred to the court on the substance of the contract , with uncensorable appreciation in the area of legitimacy if properly justified.

2.2 The comparison with the Spanish law.

Based on Article 22 of the Spanish Insurance Contract Law[19]:

1. The duration of the contract shall be determined in the policy, which may not set a period of more than ten years. However, it may be established that it is extended once or several times for a period not exceeding one year at a time.
2. The parties may object to the extension of the contract by written notification to the other party, made at least one month in advance of the conclusion of the current insurance period, if the person opposed to the extension is the insured and two months when the insurer is.
3. The insurer shall inform the insured person, at least two months before the end of the current period, of any change in the insurance contract.
4. The conditions and terms of opposition to the extension of each party or its non-opposability shall be highlighted in the policy.
5. The provisions of the preceding paragraphs shall not apply as soon as they are incompatible with the rules on life assurance.

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19 In the original language the Article 22 of the Spanish Insurance Contract Law provides that «1. La duración del contrato será determinada en la póliza, la cual no podrá fijar un plazo superior a diez años. Sin embargo, podrá establecerse que se prorrogue una o más veces por un período no superior a un año cada vez.

2. Las partes pueden oponerse a la prórroga del contrato mediante una notificación escrita a la otra parte, efectuada con un plazo de, al menos, un mes de anticipación a la conclusión del período del seguro en curso cuando quien se oponga a la prórroga sea el tomador, y de dos meses cuando sea el asegurador.

3. El asegurador deberá comunicar al tomador, al menos con dos meses de antelación a la conclusión del período en curso, cualquier modificación del contrato de seguro.

4. Las condiciones y plazos de la oposición a la prórroga de cada parte, o su inoponibilidad, deberán destacarse en la póliza.

5. Lo dispuesto en los apartados precedentes no será de aplicación en cuanto sea incompatible con la regulación del seguro sobre la vida».

See F. Sanchez Calero, *Comment to the Article 22 of Spanish Insurance Contract Law, in Comentarios a la Ley 50/1980, de 8 de octubre, y sus modificaciones*. Editorial Aranzadi, Navarra, 2005, p. 535 ff; M. Calonje Conde, *El marco temporal del contrato de seguro*, *in Revista cuatrimestral de las Facultades de Derecho y Ciencias Económicas y Empresariales,* nº 71, mayo-agosto 2007, p. 221 ff, spec. p. 223 ff.

As regards the duration of the insurance contract[20], we must distinguish between the formal duration of the insurance contract and the duration of its effects, which do not have to coincide[21].

This may be due to:

1. a grace period has been agreed (initial period of validity of the contract during which some or all of the contingencies provided for in the contract are not covered);
2. the effects of the coverage shift in time, which usually occurs in certain civil liability insurance contracts, in which although the causative event occurs within the period of the policy, the manifestation of its effects takes place once the contract has been completed.

An inverse case is that of some accumulative accident policies arising from a commitment by collective agreement, where although the causative event had occurred prior to the beginning of the period of validity of the contract, it will be covered if during that period the situation of disability is declared due to part of the UVMI – *Unidad de Valoración Médica de Incapacidades*).

Although the contract can be concluded for a specific and single term, it is usual for it to be concluded for a period, usually one year, always less

20 The determination of the duration of the contract is an element of essential importance in it, since it will allow to know the moment in which the obligations incumbent on the parties and that derive from the contract and, therefore, the moment to from which the risk is covered. In turn, the setting of the moment in which the effects of the insurance end, will serve to determine when the premiums are due (in the event that these were periodic), as well as the termination of the contract and, consequently, of the coverage of the insured risk by the insurance company (See M. Calonje Conde, *El marco temporal del contrato de seguro*, *in Revista cuatrimestral de las Facultades de Derecho y Ciencias Económicas y Empresariales,* nº 71, mayo-agosto 2007, p. 222).

21 The Spanish Insurance Contract Law, when referring in its Article 8.8 to the duration of the contract, refers to its material duration, that is, the period of time during which the risk coverage insured by the insurance company will be maintained. Thus, depending on the type of insurance, the determination of the material duration of the contract may be established exactly, as will happen in those cases in which we find ourselves before a fixed-term insurance in which the parties have expressed in the policy, a period of time during which the insurance will be valid, or, in other insurances, the duration will not be specifically determined as it depends on certain circumstances, such as the duration of exposure to the risk of the insured interest (See M. Calonje Conde, *El marco temporal del contrato de seguro*, *in Revista cuatrimestral de las Facultades de Derecho y Ciencias Económicas y Empresariales,* nº 71, mayo-agosto 2007, p. 223).

than ten, but subject to periodic renewal periods, normally for extendable years. Each period of insurance thus configured is indivisible for the purposes of the premium, although the fraction thereof may be agreed.

This is established in Article 22, paragraph 1 of the Spanish Insurance Contract Law, n. 50/1980, 8 October 1980 and subsequent modifications[22]: «The duration of the contract will be determined in the policy, which may not set a term of more than ten years. However, it may be established that it be extended one or more times for a period not exceeding one year each time»[23].

An exception to the limitation of the maximum term of ten years is found in relation to life insurance. If we put the attention on Article 22, paragraph 3 of the Spanish Insurance Contract Law, according to it «[t]he provisions of the preceding paragraphs shall not apply insofar as it is incompatible with the life insurance regulation», we may find that situation in different life insurance: savings, which are usually made to coincide with the 60 or 65 years of the insured, regardless of the age of the insured at the time of hiring and the so-called "*wida entera*", whose duration is limited only by the death of the insured person.

When the duration is established in "extendable years", the renewal occurs based on the so-called "tacit extension", unless one of the parties opposes it as established in Article 22, paragraph 2: «[t]he parties may

22 For an exhaustive comment on the quoted Article 22, see F. Sanchez Calero, *Comentarios a la Ley 50/1980, de 8 de octubre, y sus modificaciones*. Editorial Aranzadi, Navarra, 2005, p. 535 ff.

23 According Mónica Calonje Conde, as regards to the duration that the extension must have, as indicated in Article 22, it must always be carried out for periods not exceeding one year. This implies that in the event that the parties had agreed in the contract that the same, once its term has been reached, will be extended for periods of two years, this extension would not be valid or, if applicable, it would be considered that the extension is for annual periods, being able for any of the parties oppose each of them. To the contrary, the setting of this limitation will mean that the parties may agree that the contract be extended for a period of less than one year, it not being usual in practice for the contract to be extended for periods shorter than that period of time.

On the other hand, regarding the way in which the extension terms that could have been established in the contract must be computed, since nothing is foreseen in this regard in the Spanish Insurance Contract Law, nor in any other regulation of the private insurance, we must refer to the rules contained in Article 5, paragraph 1 of the Spanish Civil Code, so that in the event that the extension is made for an annual period, it must be computed from date to date, or in the event that the term whether by days, the day from which such period is computed shall be excluded (M. Calonje Conde, *El marco temporal del contrato de seguro*, *in Revista cuatrimestral de las Facultades de Derecho y Ciencias Económicas y Empresariales,* nº 71, mayo-agosto 2007, p. 223).

oppose the extension of the contract by means of a written notification to the other party, made two months in advance of the conclusion of the current insurance period»[24].

The effects of the insurance contract cease when the contractual relationship between the parties is terminated. This may be due to:

– the deadline set for its duration has elapsed, in cases in which the extension has not been foreseen: a trip, a show, the construction of a property. Attention to certain Civil Liability policies;

– one of the parties has opposed the extension or by mutual agreement between both, resulting in the termination of the contract;

– disappearance of the risk or the insured object;

– non-payment of the non-initial or unique premium without the insurer having claimed payment in the six months following its expiration.

3. The Georgian law

3.1 Introductive notes.

The Article 806 of the Georgian Civil Code entitled "Time of commencement of insurance" provides:

first, the insurance shall commence at 24:00 on the day the contract is entered into and shall end at 24:00 on the last day of the contract period;

second, if the insurance contract is made for a period of more than five years, either party may terminate the contract three months after giving a notice of termination[25].

At the beginning of this comment, we have considered some questions that the Article 806 of the Georgian Civil Code remains unsolved; so, for

24 About this poiunt see M. Calonje Conde, *El marco temporal del contrato de seguro*, *in Revista cuatrimestral de las Facultades de Derecho y Ciencias Económicas y Empresariales,* nº 71, mayo-agosto 2007, p. 227 ff.

25 We have to remember that in the preview Law of Georgia "On Insurance", there was a specific rule regarding the "Validity of the insurance contract", we refer to the Article 35according to which «1. The insurance contract shall be valid from the date of payment of the insurance premium or from the date of payment of the first insurance premium in the event of deferred payment, unless the legislation or contract provides otherwise.

2. The validity of the insurance contract shall cease when the first insurance accident occurs from the date of full payment of the insurance premium, unless the contract or legislation provides otherwise.

3. The insurance territory is the same as the territory of Georgia, unless the nature of the object of the insurance or contract provides it differently».

instance, what about the time of commencement? Is the commencement of the contract or the commencement of the effects of the contract? May we apply this rule to all insurance contracts? Is it possible to extend the term of duration? What happens in the event of an extension of the term? And more other questions.

First, we have to note that, considering the corresponding rules provided by Italian and Spanish laws, the Article 806 of the Georgian Civil Code does not provide the extension of the time of the contract and we say more, if we do not fall into error, that the case of the extension of the duration is not provided for in any other article relating to the insurance contract and it is provided only for certain types of contract regulated by the Georgian Civil Code.

Before entering in the comment of the specific rules of the Article 806 of the Georgian Civil Code, we must put the attention on the objective limit of the rule.

From an objective point of view, we shall observe that the Article 806 of the Georgian Civil Code is apparently applied to all insurance contracts, given that:

the abovementioned Article lacks a specific rule relating to the exclusion of life insurance contracts;

and the Article 806 of the Georgina Civil Code is inserted in the part named "General provisions".

As regards the life insurance contracts, it is possible to presume that the specific rule in comment does not apply to them by virtue of the consideration that in case of life insurance contract the termination is regulated by death and that contract has by their nature indefinite duration; therefore, the rule relating to the duration referred to in the second paragraph of the Article 806 cannot be applied to them.

We do not have the same conclusion when the life insurance contract is concluded for the life of the insured because in this case the contract has a duration and it is not possible to apply the Article 806 of the Georgian Civil Code but the Article 846 of the Georgian Civil Code, named "Termination of the contract where insurance premium is paid periodically", which provides «If the insurance premium is paid periodically, the insurer may terminate the insurance contract at any time but only at the end of the current insurance period»[26].

26 See *infra* M. B. Pagani, *Comment* to the Article 846 in this book.

Besides, derivative contracts do not fall within the scope of application of the law not even by virtue of the provisions of art. 799 which provides at paragraph 3 «A derivative shall not be an insurance contract. Relations arising from derivatives shall be regulated under the Law of Georgia on Financial Collaterals, Mutual Setoffs and Derivatives. This article and Articles 800-858 of this Code shall not apply to relations arising from the said law»[27]. We might add that also "insurance financial products", as, for instance, unit-linked policies or index-linked policies are excluded from the application of the Article 806 of the Georgian Civil Law[28].

27 This rule has become effective from 14 January 2020. See above A. Borroni, *Comment* to the Article 799 in this book.

28 See for Italian doctrine the bibliography on financial products issued by insurance companies is vast; among the many and more recent contributions, cfr. E. Sabatelli, *I prodotti misti assicurativi e finanziari*, in A. Patroni Griffi & M. Ricolfi (a cura di), *Banche ed assicurazioni fra cooperazione e concorrenza*, Milano, 1997, 107 ss.; P. Corrias, *I contratti di assicurazione sulla vita e di capitalizzazione*, in Amorosino, Desiderio (a cura di), *Il nuovo codice delle assicurazioni*, Milano, 2006, 145 ss; V. Buonocore, R. Costi, G. Volpe Putzolu, G. Morbidelli, A. Gambino, F. D'angelo, P. Marano, M. Siri, P. Castellano (a cura di), *I prodotti finanziari bancari ed assicurativi - In ricordo di Gaetano Castellano*, Milano, 2008 ed ivi i lavori di G. Volpe Putzolu, *La distribuzione dei prodotti finanziari emessi dalle imprese di assicurazione,* in *I prodotti finanziari bancari e assicurativi*, cit., 35; D. Galletti, *La cross selling di prodotti bancari ed assicurativi dopo le recenti riforme dei mercati finanziari*, in *Banca impr. società*, 2007, 365; A. Gambino, *La responsabilità e le azioni privatistiche nella distribuzione dei prodotti finanziari di matrice assicurativa e bancaria*, in *Assicurazioni*, 2007, I, 195; V. Romagnoli, *Controllo e regole di collocamento dei prodotti assicurativi a carattere finanziario*, in *Nuova giur. civ. comm.*, 2007, II, 90 ss.; R. Costi, *I prodotti finanziari emessi dalle banche e dalle imprese di assicurazione*, in *I prodotti finanziari bancari ed assicurativi*, cit., 11 ss.; L. Di Brina, *La disciplina dei prodotti finanziari emessi da banche e da imprese di assicurazione*, in L. De Angelis, N. Rondinone (a cura di), *La tutela del risparmio nella riforma dell'ordinamento finanziario*, Torino, 2008, 363 ss.; A. Longo, *La distribuzione di prodotti assicurativi: una regolamentazione ancora* in itinere, in A. Antonucci, M. T. Paracampo (a cura di), *La distribuzione di prodotti finanziari bancari e assicurativi*, 2008, 153 ss.; A. Perrone, *Distribuzione di prodotti finanziari emessi da banche e da imprese di assicurazione*, in F. S. Martorano (a cura di), *Disciplina dei mercati finanziari e tutela del risparmio*, Milano, 2008, 257 ss.; L. Salamone, *Disposizioni regolamentari in materia di offerta al pubblico di sottoscrizione e di vendita di prodotti finanziari emessi da imprese di assicurazione*, in *Disciplina dei mercati finanziari e tutela del risparmio*, cit., 167 ss.; M. Miola, *L'offerta fuori sede di prodotti finanziari assicurativi alla luce delle riforme del mercato finanziario: verso l'epilogo di una lunga contesa?*, in *Studi per Franco Di Sabato*, Napoli, 2009, I, 467 ss.; L. Salanitro, *Prodotti finanziari assicurativi collegati ad obbligazioni Lehman Brothers*, in questa *Rivista*, 2009, I, 491; M. Sampognaro, M. Siri, *I prospetti di offerta dei prodotti finanziari-assicurativi*, in P. Marano, M. P. Siri (a cura di), *La regolazione assicurativa*, Torino, 2009, 89 ss.; P. Gobio Casali, *Prodotti assicurativi finanziari: disciplina normativa, qualificazione giuridica e tutela informativa del risparmiatore*, in *Giust. civ.*, 2010, II,

If we compare the Article 806 with the Article 1899 of Italian Civil Code and the Articles 22-23 of the Spanish Insurance Contract Law the differences are very evident and in particular many questions remain about the discipline to be applied on certain aspects.

3.2 The first paragraph of the Article 806

The first paragraph of the Article 806 of the Georgian Civil Code provides: «The insurance shall commence at 24:00 on the day the contract is entered into and shall end at 24:00 on the last day of the contract period».

To comment correctly that rule, it is necessary to answer two preliminary questions:

1. First, what does "the contract is entered into" mean? and
2. second, what is the meaning of "the insurance shall commence".

To answer the first question – what "the contract is entered into" means –we have to put the attention on the Article 327 of Georgia Civil Code (Chapter Two - Entering into a Contract) – Agreement on the essential terms of a contract.

301; L. Bugiolacchi, *I prodotti «finanziari assicurativi»: considerazioni in tema di qualificazione giuridica e disciplina applicabile*, in *Resp. civ.,* 2011, 876; G. Gobbo, *Commento* sub *art. 25-bis*, in F. Vella (a cura di), *Commentario T.U.F. Decreto legislativo 24 febbraio 1998, n. 58 e successive modificazioni*, Torino, 2012, I, 302 ss.; G. Martina, *I prodotti finanziari emessi dalle imprese di assicurazione e i prodotti previdenziali di terzo pilastro*, in V. Santoro (a cura di), *La crisi dei mercati finanziari: analisi e prospettive*, Milano, 2012, 485 ss; A. Portolano, *Commento* sub *art. 25*-bis, in M. Fratini, G. Gasparri (a cura di), *Il Testo unico della finanza*, Torino, 2012, I, 447 ss.; M. Siri, *I prodotti finanziari assicurativi*, Roma, 2013; F. Bruno & E. Franza, *Prodotti finanziari emessi dalle imprese di assicurazione e poteri della* Consob *in tema di vigilanza e trasparenza*, in *Assicurazioni*, 2014, I, 3 ss.; L. Zitiello (a cura di), *I prodotti finanziari assicurativi*, Milano, 2014; Piras, *Le polizze variabili nell'ordinamento giuridico italiano*, Milano, 2011; G. Volpe Putzolu, *Le polizze linked tra norme comunitarie, t.u.f. e codice civile*, in *Assicurazioni*, 2012, 399 ss.; M. Frigessi di Rattalma, *La qualificazione delle polizze linked nel diritto dell'Unione europea*, in *Assicurazioni*, 2013, 3 ss.; A. Sciarrone Alibrandi, *Prodotti "misti" e norme sulla tutela del cliente*, in *Liber amicorum Pietro Abbadessa*, Torino, 2014, III, 2437; F. Capriglione, *Polizze « unit linked »*: prodotti assicurativi con finalità di investimento, in *Nuova giur. civ. comm*., 2014, 426 ss.; P. Corrias, *Sulla natura assicurativa oppure finanziaria delle polizze linked: la riproposizione di un tema*, in questa *Rivista*, 2015, II, 457-462; A. C. Nazzaro, *La causa delle polizze unit e index linked*, in *Dir. merc. ass. fin*., 2016, 57 ss.; A. Albanese, *Assicurazione sulla vita e protezione patrimoniale*, in *Contr. e impr*., 2016, 1422 ss.; P. Corrias, *La natura delle polizze linked tra previdenza, risparmio e investimento*, in *Principi, regole, interpretazione. Contratti e obbligazioni, famiglie e successioni. Scritti in onore di G. Furgiuele*, Mantova, 2017, II, 491 ss.

Based on this Article:

«1. A contract shall be considered entered into if the parties have agreed on all of its essential terms in the form provided for such agreement. 2. Essential terms of a contract shall be those on which an agreement is to be reached at the request of one of the parties, or those considered essential by law. 3. A contract may give rise to the obligation to conclude a future contract. The form stipulated for the contract shall apply to the preliminary contract as well».

For the second question, we may say that the time of commencement is the time from which the contract produces its effects; therefore, the rule refers to both the formal duration and the substantial duration. The formal duration which begins at the time of conclusion of the contract ("the contract is entered into") and continues until the occurrence of a cause (legal or conventional) of dissolution and the substantial duration concerning the effectiveness of the contract in relation to the provision of guarantee by the insurer and starts, according to the rule in comment, from 24 hours on the day on which the contract is concluded until 24 hours on the last day of the contract period.

3.3 The second paragraph of the Article 806.

The second paragraph of the Article 806 of the Georgia Civil Code provides that «if the insurance contract is made for a period of more than five years, either party may terminate the contract three months after giving a notice of termination».

We must first resolve some preliminary issues, including clarifying what is meant by "period of time".

According to the Article 123, named "End of a period of time" of the Georgian Civil Code, «1. a period of time specified by days shall end on the expiry of the last day of the period. 2. A period of time specified by weeks, by months or by a duration of time comprising more than one month – year, half-year, quarter – ends on the expiry of the day of the last week or of the last month which corresponds to the day on which the event or the point of time occurs. 3. If a period of time specified by months lacks a specific day on which the period is due to expire, then the period ends on the expiry of the last day of that month».

The rule introduces a specific hypothesis of termination, that is to say: if the insurance contract is concluded for a period of more than five

years, either party may terminate the contract three months after giving a notice of termination. It is possible to apply this rule only if the insurance contract has a determined period and therefore it does not apply to life insurance contract for the death of the insured.

In addition to this hypothesis of termination of the contract, the Georgian Civil Code knows other situations for which the contract can be terminated.

Before considering these situations, we have to remember that in the preview Law of Georgia "On Insurance", there was a specific rule regarding the termination of insurance contract, we refer to the Article 44 according to which «1. In addition to instances specified under the Civil Code, an insurance contract will also terminate, if:

a. the contractor's term has expired;

b. the insurer has complied with the liabilities assumed under contract towards the policyholder in full;

c. the insurance object's existence has ceased;

d. the insurant, who is not the policyholder, has died, unless he was replaced;

e. the policyholder has failed to pay the full insurance premium or the next insurance premium in due time, unless the contract provides otherwise;

f. the policyholder has alienated the object of insurance because the insurer refused the policyholder's replacement, while the contract or legislation does not provide otherwise;

g. the insurance contract has been recognized as void by court;

h. the insurer has gone bankrupt.

2. The insurance contract may be terminated before time at request of the policyholder or the insurer if provided for in the contract.

3. The parties shall notify each other about their intent to terminate the insurance contract before time in advance of 30 days at least, unless the contract provides otherwise.

4. In the case of termination of the insurance contract before time at request of the policyholder, the insurer shall return to the

policyholder the paid-in insurance premiums, less the overhead expenses already born by the insurer. If the termination of the insurance contract results from violation of the insurance contract provisions, the insurer shall return the paid-in insurance premium in full.

5. In the case of termination of the insurance contract before time at request of the insurer, the insurer shall be obliged to return to the policyholder the paid-in insurance premiums born him in full, less the expenses born. If the policyholder's demand for terminating the insurance contract is stipulated by the insurer's violation of the insurance contract, the insurer's violation of the insurance contract, the insurer shall return the insurance premiums of the corresponding remaining insurance time, less the expenses born».

This Article has been declared invalid by the Article 33 of the new Law of Georgia "on insurance" and it has been replaced from 5 new Articles of the Georgian Civil Code: Article 810 - Termination of insurance contracts by reason of failure to communicate information[29], Article 811 - Period for termination of contracts by reason of failure to communicate information [30], Article 812 - Termination of a contract after the occurrence of insured events[31]. As regards life insurance contract, we have the Article 846 - Termination of the contract where insurance premium is paid periodically[32] and the Article 852 - Deductions upon termination of the contract[33].

Therefore, the rule of the second paragraph of the Article 806 of the Georgian Civil Code, being a derogation rule, it represents a specific rule, it applies only if the insurance contract, as previously specified[34], is made for a period of more than five years.

29 See *infra* L. Velliscig, *Comment* of Article 810.
30 See *infra* L. Velliscig, *Comment* of Article 811.
31 See *infra* E. Signorini, *Comment* of Article 812.
32 See *infra* M. B. Pagani, *Comment* of Article 846.
33 See *infra* F. Coppola, *Comment* of Article 852.
34 See above par. 3.1.

Article 807 - Effects of increasing the insurance premium

If the insurer increases the insurance premium, the insured may terminate the contract one month after giving a notice of termination. This right shall not arise if the insurance premium is increased slightly.

Ciro G. Corvese

Summary: 1. Preliminary notes: scope and limits of the Article 807. 2. The first sentence of the Article 807. 3. The second sentence of the Article 807.

1. Preliminary notes: scope and limits of the Article 807.

The Article 807 of the Georgian Civil Code introduces two rules:

a. in the first sentence of the Article we have the general rule providing that «If the insurer increases the insurance premium, the insured may terminate the contract one month after giving a notice of termination»;

b. in the second sentence of the Article we find a special rule derogating the general rule, that is to say the right to terminate the contract after the increasing of the insurance premium can not be exercised by the insured person if the increasing is "slight".

We must immediately carry out some preliminary observations.

1. The rule has no correspondents in the Italian legal system and in any other European system.
2. The rule does not refer to a specific insurance contract and is found among the general provisions;
3. The rule is not linked to a possible increase in risk as envisaged by the following art. 813 which is a special rule with respect to art. 807.
4. When is it possible to increase the premium? At the end of the period?
5. If the insured person exercises the right of withdrawal, what about the subsequent effects?

6. What does it happen if the event for which the insurance policy was signed occurs before the deadlines for the communication and for the effectiveness of the withdrawal have elapsed?

7. What does slightly mean? What is it parameterized to?

Before trying to answer these questions, we may suppose that the rule in comment has the object of satisfying two interests, the interest of the insurer and the interest of the insured: the interest of the insurer to increase the premium in circumstances where it is not possible or if it is not convenient to modify the contract; the interest of the insured who, not wanting to pay the premium increase, can exercise the right of withdrawal.

2. The first sentence of the Article 807.

The first part of the Article in comment aims to satisfy the interest of the insurer providing that «If the insurer increases the insurance premium, the insured may terminate the contract one month after giving a notice of termination»[1].

According to Legashvili, «maintaining a contract without the increase of premium may place insurance company at a disadvantaged situation and it may not feasible for it to maintain contractual relation for the amount of insurance premium and insurance services to be provided may be disproportionate. Perhaps that is why it is not required to adapt a contract to changed circumstances and is granted the right to dissolve a contract. At the same time, insignificant increase of insurance contribution does not entitle an insured entity to dissolve a contract early. The entitlement to dissolution a contract emerges based on significant increase of insurance contribution»[2].

It is important to note the rule in comment does not link the increasing of premium to a correspondent increasing of the risk because

1 On the variation of the premium in the Italian legal system, see M. Rossetti, *Il diritto delle assicurazioni*, vol. I, *L'impresa di assicurazione. Il contratto di assicurazione in generale*, Padova, 2011, p. 1003 ff; A. Antonucci, *Commento sub art. 1898*, in *Breviaria*, 2013, p. 43 ff.

2 D. Legashvili, *The Impact of Changed Circumstances on Contractual Relations*, in *Journal of Law*, №2, 2013, p. 67 ff, spec. p. 99-100. For the Author, "Thus, change of circumstance during the insurance relations – increase of contractual contribution does not give rise to the outcome stipulated under Article 398 of the Civil Code of Georgia and entitles a party to dissolve a contract".

for this particular case the Article 813 of the Georgian Civil code – named "Obligation to give notice of increased risk" – applies and according to that «1. The policyholder shall immediately notify the insurer of an increased risk arising after the contract was concluded if it would have a material influence on the conclusion of the contract. 2. Where so provided in the first paragraph of this article, the insurer may terminate the contract one month after giving a notice of termination or demand a corresponding increase in the insurance premium. If the insured intentionally causes the increased risk, the insurer may terminate the contract without observing the notice period»[3].

According to Legashvili «increase of insurance contribution may be due to internal (e.g., losses) as well external factors (e.g., increase of the prices on medicines) of an insurance company. While the increase of prices may, in turn, be due to such circumstances which occurrence could not have reasonably be assumed at the time of conclusion of a contract»[4].

Given that, we cannot fail to consider that the Article can provide the insurer with the possibility of increasing the premium as an opportunity to push the insured to terminate the contract unless the variation of the premium is slight.

The other question is: when the insurer may increase the premium? We may suppose that it is possible at the renewal of the contract or at the end of the premium payment period because, even if nothing is said in the Article in comment, the insurer is obliged to give immediate notice of the increase in the premium and this can happen in the two moments that we have indicated above.

As regards the effects deriving from the exercise of the right of withdrawal by the insured, the Article offers no solution, we may suppose that the insurer is entitled to receive the premiums relating to the insurance period in progress at the time the declaration of withdrawal is communicated[5].

Last question: What does it happen if the event for which the insurance policy was signed occurs before the deadlines for the communication and for the effectiveness of the withdrawal (one month) have elapsed?

3 See above R. Hodos, *Comment* to Article 813.

4 D. Legashvili, *The Impact of Changed Circumstances on Contractual Relations,* in *Journal of Law*, №2, 2013, p. 100, note 23.

5 See Article 1898, paragraph 4 of the Italian Civil Code.

Also for this question, no answer is from the Article in comment and we may say more, there is no answer for that question also in the important Article 813 of the Georgian Civil Code where the increasing of premium is strictly linked to the increasing of risk[6].

We may suppose that if the claim occurs before the deadlines for the communication and for the effectiveness of the withdrawal have elapsed, the insurer is obliged to pay without considering the increasing of the premium proposed.

3. The second sentence of the Article 807.

In the second sentence of the Article in comment we find a special rule derogating the general rule present in the first sentence, the right to terminate the contract after the increasing of the insurance premium cannot be exercised by the insured person if the increasing is "slight".

Although we can agree with whoever wrote that «it has to be established on a case-by-case basis based on the circumstances of the case as to what is considered as significant increase of insurance contribution»[7], we cannot fail to consider that, without any doubt the Article will be harbinger of numerous jurisprudential decisions necessary to clarify the meaning of "slightly".

6 As regards the question posed in the text, the last paragraph of the Article 1898 of the Italian Civil Code provides that: "If the claim occurs before the deadlines for the communication and for the effectiveness of the withdrawal have elapsed, the insurer is not liable if the worsening of the risk is such that he would not have allowed the insurance if the new state of affairs existed at the time of the contract; otherwise, the amount due is reduced, taking into account the relationship between the premium established in the contract and that which would have been fixed if the greater risk had existed at the time of the contract itself".

7 D. Legashvili, *The Impact of Changed Circumstances on Contractual Relations*, in *Journal of Law*, №2, 2013, p. 100.

Article 808 - Obligation to communicate information

1. When entering into a contract, the insured shall inform the insurer of all circumstances known to him/her that are material to the occurrence of the danger or event covered by the insurance. The circumstances that can influence the insurer's decision to repudiate the contract or enter into it on modified terms shall be deemed to be material.

2. Any circumstance, about which the insurer clearly and unequivocally inquires of the insured, shall also be deemed as material.

3. If contrary to the rules under the first paragraph of this article the insurer is not informed of a material circumstance, then the insurer may repudiate the contract. The same shall hold true if the insured intentionally avoids informing the insurer of a material circumstance.

4. The contract may not be terminated if the insurer knew of the concealed circumstances or if the insured was not responsible for the failure to communicate them.

Article 809 - Effects of communicating incorrect information

1. The insurer may also repudiate the contract if the notice of material circumstances includes incorrect data.

2. The contract may not be repudiated if the insurer knew of the inaccuracy of the data or if the insured was not responsible for communicating the incorrect data. The insurer may terminate the contract within one month after the communication of such data.

Santa Nitti

Summary 1. Foreword. 2. Duty of disclosure. 3. Comparative profiles: The Italian model. 4. The English model: Essence of Uberrimae Fidei. Duty of disclosure and Misrepresentation. 4.1 Consumer contract and duty of disclosure. 4.2 Duty of disclosure in commercial contract. 4.3. Fair presentation under the Insurance Act 2015. 4.4 Possibility of concluding the contract outside the framework of the law. 5. The solutions proposed in the Principles of European Insurance Contract Law (PEICL). 6. The Georgian legislator's choices.

1. Foreword

The provisions in question deal with a crucial issue of insurance contract law, namely the insured's duty to provide information on the risk since the pre-contractual stage, and the related legal consequences in the event of breach of this duty.

It should be immediately clarified that the considerations that follow are intended to provide an overview on the different solutions for the duty of disclosure present in the Western Legal Tradition, therefore the considerations on the Georgia rules here commented are made on the same assumption, namely the identification of the operational model chosen by the Georgian legislator.

It follows that, the effects (or possible effects) of the rules in Georgian domestic law will not be taken into consideration. This is strictly, because the analysis has been carried out on the English translation of the rules. Therefore, the difficulty in catching the exact scope of the rules in the Georgian legal system is rooted in the well-known problems of legal translation, and in particular in the difficulty not so much of the untranslatability of legal terms but of legal concepts, especially those concepts that are characteristic of some legal systems but not of others[1].

1 For example, consider the use in the first three paragraphs of Art. 808 of the term repudiate the contract, while in the fourth and last paragraph the term terminates the contract is used (the same with reference to Art. 809 which deals with incorrect information). Now repudiation and termination in English law are different concepts and have different effects on the contract. The problems connected with the translation of legal concepts are well known, so much so that the drafters of the Principles of European Insurance Law (PEICL), in the notes to the principles, made it clear that they were using the English language but avoided using terms which could directly lead back to legal institutions of common law. Therefore, in the absence of a clarification or glossary of terminology in the translation of the code under comment, it is not possible to state with certainty what the effect of repudiation and termination is. On the subject of the problems of language and law, please refer to the more extensive and in-depth considerations of S. Ferreri, L. A. Di Matteo *Terminology Matters: Dangers of Superficial Transplantation,* 2019, 37 B.U. Int'l L.J. 35; B. Pozzo, "*Chapter 2: The Myth of Equivalence in Legal Translation"*, in *Translating the DCFR and Drafting the CESL: A Pragmatic Perspective*, edited by B. Pasa and L. Morra, Berlin, Boston: Otto Schmidt/De Gruyter european law publishers, 2014, pp. 29-46; S. Ferreri, *Law, Language and Translation in Multilingual Contexts*, King's Law Journal, 2014 ,25:2, 271-286J;. Husa, *Understanding Legal Languages - Linguistic Concerns of the Comparative Lawyer* (January 1, 2012). The original version of this paper is published in *The Role of Legal Translation in Legal Harmonization* J. Baaij (ed.) Kluwer Law International 2012 pp.161-181. , Available at SSRN: https://ssrn.com/abstract=2326910; B. Pozzo, (ed.) *Ordinary language and legal language,* Giuffrè 2005; R. Sacco, l. Castellani (ed), *Le multiples langues du droit européen uniforme*, l'Harmattan Italia 1999; R. Sacco "*Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II),* in The American Journal of Comparative Law, vol. 39, no. 1, 1991, pp. 1–34. Indeed, the problems associated with legal translation are also well known to Georgian scholars, see on this point the considerations made by Lado Chanturia in the introduction to the 2001 English translation of the Georgian Civil Code, available at http://jafbase.fr/docEstEurope/Georgie/code_civil.pdf.

From a systematic point of view, the first remark is that the insurance contract rules have been retained within the Civil Code[2] despite having been innovated and an insurance law was enacted in 2019. The choice is not irrelevant, in fact, it is well known how, in the insurance field, the aspects of the regulation of the contract are strictly connected to the business activity, and perhaps, from a viewpoint of greater coherence and systematicity, it would have been possible to think of a sectorial codification which would enclose the discipline of the business, of the contract and of the distribution, so as to have a single source, certainly more easily coordinated and accessible. Sectoral codification, in fact, has the merit of achieving regulatory simplification, reducing the (sometimes) exorbitant number of rules of a given legal system and remedying their frequent contradictory nature, their (relatively) low quality and their excessive burdens on citizens and businesses. On the other hand, the current meaning of the concept of simplification has evolved considerably over the years, through the progressive abandonment of the instrument of individual delegation regulations in favour of a more ambitious work of reducing the number of rules and, in general, of consolidating and codifying the remaining ones[3].

The concept of codification itself has evolved from that of the 19th century, and is now focused on the reorganization of specific sectors rather than of regulatory macro-systems.

From the point of view of the *ratio legis,* the rules on disclosure play a central role precisely because of the nature of insurance and the social role it plays in the market. Insurance is an activity aimed at satisfying human needs and providing the economic means to deal with risks understood as economically adverse events. It is no exaggeration to say that there are very few aspects of human life today in which insurance activity is completely unrelated. Insurance is pervasive in today's society precisely because the technique of coping with risks by transferring them to the

2 The first edition of the code dates back to 1997 then amended with the latest reforms in 2019 and entered into force in 2020.

3 The issue was also the subject of much debate in Italy at the time of the enactment of the Private Insurance Code (legislative decree no. 209/2005), when the drafters decided not to incorporate the provisions of the Civil Code into the Insurance Code, see A.D. Candian, *Il nuovo codice delle assicurazioni e la disciplina civilistica del contratto di assicurazione: tendenze e resistenze*, Contr. impr., 2006, p. 1289-1313; A. Gambino, *Note critiche sulla bozza del codice delle assicurazioni private*, Giur. comm., I, 2004.

insurer has now become commonplace, sometimes even made compulsory by the legislator (motor liability, professional liability, etc.). It goes without saying that the human condition is subject to a multiplicity of risks: risks to the person, illnesses, accidents, death, financial collapse, and this allows individuals, but more generally companies or private bodies, families, businesses, public bodies, from the smallest to the state, to protect themselves against risks, understood as unfavorable events capable of determining financial consequences. It is therefore clear that it has two fundamental functions: asset protection and welfare, whether it is intended to provide economic means for retirement or is intended merely as savings[4].

If we look at insurance from the point of view of the economic operation and, therefore, from the point of view of the business activity, we can see that it consists in: transferring the individual risk to another subject which is the insurance company (a company that does precisely this by trade, taking on third party risks); and in transforming the so-called individual risk into a collective risk (the collective risk is the essence of the insurance company activity and here we begin to speak of the communion of risks and insurance mutuality).

In fact, insurance is used to distribute the risk among a number of subjects exposed to the same type of risk. Through the so-called probability calculation it is possible to establish how many times that type of risk will occur in a given period within the community[5]. In order to ensure that these requirements can be met and that profits can be generated, the insurance company relies on the inversion of the production cycle, i.e. the insurance company first collects the premiums before the event or claim under the contract occurs, and then only after the event connected with the insured risk has occurred will the company be required to pay its benefits, compensation or capital. The insurance company must obviously be able to determine beforehand the cost of the service that it will have to provide in favor of the insured and therefore this must be done by forming a mass of risks, the number and homogeneity of which are such as to

4 A. H.Willett, *The Economic Theory of Risk and Insurance*, Philadelphia: University of Pennsylvania Press, 2016; K. S. Abraham, *Efficiency and Fairness in Insurance Risk Classification*. *Virginia Law Review* 71, 3, 1985, pp. 403–51.

5 See A. Donati & G. Volpe Putzolu, Manuale di diritto delle assicurazioni, Milano, Giuffrè, 11 ed 2016, p. 3; P. Liedtke, *What's Insurance to a Modern Economy*? *Geneva Pap Risk Insur Issues Pract* 32, 2007, pp. 211–221.

allow the compensation between the premiums paid by the persons exposed to the risk and the sums necessary to pay the services promised by the insurer. If this economic mechanism is therefore borne in mind, it is possible to understand the central role that risk declarations have always played in the formation of the contract but ultimately in the insurer's choice of whether or not to take on a given risk and this because erroneous assessments on the assumption of a risk not only affect, obviously, the individual contract but also the mass of risks to which the flawed contract accedes, precisely because of mutuality[6].

2. Duty of disclosure

The duty of disclosure, as noted above, is certainly one of the most important elements of the insurance contract and is present in every jurisdiction regardless of the classification of legal systems. The majority of jurisdictions[7] place a duty on the insured to provide the insurer with a true and fair view of the risk when applying for cover from the insurers. Rather, the differences between the various jurisdictions lie in the scope of this duty and the remedies. The aspects on which the laws often differ or offer different answers relate, for example, to whether the duty to inform is discharged by answering explicit questions honestly, or whether there is a spontaneous duty to inform; whether the information relates only to the nature of the risk or extends to the person of the insured (moral hazard); what is the role of insurance intermediaries.

Although the discipline of the duty of disclosure historically arose and developed as a duty of the insured, it is equally true that today it

6 The importance of risk statements, on the other hand, plays a key role throughout the insurance industry, including in reinsurance. For more on this topic, refer to D. Cerini, *Duties and remedies in the Principles of International Commercial Contracts (PICC) and the Principles of Reinsurance Contract Law (PRICL). Notes for a comparison,* in Uniform Law Review, 2020, Vol 25, Issue 1, March 2020, pp. 21–44.

7 See among others J. Zhen, *Remedies for Breach of the Pre-Contract Duty of Disclosure in Chinese Insurance Law,* in *Connecticut Insurance Law Journal*, Conn. Ins. L.J., 2016-2; T. Falkanger, H. J. Bull, L. Brautaset, *Scandinavian Maritime Law*, 3rd ed., Universitetsforlaget, Oslo, 2011; H. Thanasegaran, *Good Faith in Insurance and Takaful Contracts in Malaysia*, Springer 2016, see in particular Chapter 2 *Pre-contractual Duty of Disclosure and Misrepresentation;* M. van Rossum, *The Duty of Disclosure: Tendencies in French Law, Dutch Law and English Law; Criterions, Differences and Similarities between the Legal Systems,* MJ 3 2000; for an overview of European countries see J. Basedow, J. Birds, M. Clarcke, H. Cousy, H. Heiss, L.D. Loacker (edit) *Principle of European Insurance Contract Law (PEICL),* 2nd Expanded Edition, 2016, Otto Schmidt.

refers more generally to the role of information in the formation of the insurance contract. There are well-known studies aimed at demonstrating how information can play a decisive role in the elimination of so-called information asymmetries[8] and, therefore, ultimately become an instrument capable of guaranteeing the information balance within the contractual synergies with the ultimate aim of reducing the transaction costs that an "unwanted" contract entail[9]. In other words, by means of a conscious use of information, the aim is to ensure that the contracting parties reach the conclusion of the contract not only fully aware but above all fully satisfied[10].

A historical excursus on the origins of this duty shows that the relevance of reticence in the insurance[11] contract was essentially based on the very nature of the insurance contract, requiring, therefore, the protection of the position of the insurer, considered "weak" as it is exposed to the risk of deception committed against it by the reticence of the insured. What matters is not the aleatory nature of the contract, but, on the contrary, its commutative nature[12], since aleatory implies that both contracting parties are deprived of information as to the concrete subject matter of the contract, and although aware of their situation of ignorance the contracting parties decide to contract equally.

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8 The topic of information asymmetry is explored among others by G.J. Stigler, *The Economics of Information,* in The Journal of Pol.Econ., 1961, pag. 213; G. Akerlof, *The Market for Lemons.Quality Uncertainty and the Market Mechanism*, 84 Quarterly-Journal of Economics 1970, p. 489.

9 According to a survey of British consumers conducted by the Office of Fair Trading (OFT) and published in February 2011, consumers rarely read contracts in full before entering into them. Thus the study shows that they are usually unaware of some clauses they are agreeing to and, even when they are aware of them, they often end up making errors of interpretation that ultimately result in mistakes or misrepresentations. OFT1312 (February 2011): Consumer Contracts Market Study, available at http://www.oft.gov.uk/shared_oft/market-studies/consumercontracts/oft1312.pdf, p 17.

10 See K. Kukoc, *Information Disclosure in a Competitive Insurance Market - The Government Role*, The Geneva Papers on Risk and Insurance, 1998, 23, 87, pp. 224-246.

11 In the Italian legal system, for instance, the first rule was contained in article 429 of the 1882 Commercial Code. This article was considered one of the cornerstones of the legal discipline of insurance in A. Salandra, *Comm. Cod. Civ.*, sub artt. 1861- 1932, Scialoja-Branca, p. 234.

12 See G. Scalfi, *Corrispettività e alea nei contratti*, Milano, 1960, which clarifies the point. See also S. A Salama, *Explanation of the Aleatory Aspect of the Insurance Contract with Reference to Risk Theory*. The Journal of Insurance Issues and Practices, 1979, 3(1), 61–76.

Commutativity implies the opposite situation. The obligation imposed on the insured to provide the information necessary for the insurer to assess the risk is a regulatory provision aimed at shifting the center of gravity of the insurance contract from the pole of pure chance, as in the case of a bet, to the pole of commutativity by assimilating the risk to a (negative) asset that the insured transfers to the insurer. Originally, if we consider the first rule codified in Italian law, the legal consequence provided for by the article in question was therefore the nullity of the contract, without the good or bad faith of the insured being relevant. The omissive behaviour was closely linked to the figures of fraud and error as vices affecting the formation of consent[13]. Article 429 of the Italian Commercial Code, for example, imposed the sanction of nullity for any false or erroneous statement or reticence on circumstances known to the insured party, even if not affecting the claim event, but nevertheless such that the insurer would not have concluded the contract or would have concluded it under different conditions[14].

The rule, on the basis of an imbalance between the parties, led to a different protection of the parties and provided the person who is normally considered today to be the strong contractor in the insurance contract, the insurer, with an important privilege: the nullity of the contract.

The doctrine has always seen two basic reasons for sanctioning reticent declarations. The first can be identified in the desire to ensure a situation of equality between the parties as regards knowledge of the risk; the second is based on the complexity of establishing malicious intent, on the insured, where it exists. Therefore the insurer would have the right to defend itself by having recourse to the exception of fraudulent intent[15].

13 *See* G. Visintini, *La reticenza nella formazione dei contratti*, Padova 1972, 39.

14 G. B. Gallus, *The duty of utmost good faith: sviluppi della giurisprudenza anglosassone e breve analisi comparativa*, *Il dir. trasp.*, 1996, 393.

15 For a first reconstruction in this sense in the Italian legal system A. Baldasseroni, *Delle assicurazioni marittime,* Florence, 1801

3. Comparative profiles: The Italian model

The Italian codification of 1942, which unified the two subjects of Civil and Commercial law into a single legislative text, in regulating the insurance contract, obviously incorporated the regulations of commercial origin on reticent declarations in articles 1892-1893[16]. This was for the obvious technical reason, already highlighted, whereby the two provisions contain a protection for insurers, protected precisely because they are considered to be more exposed, compared to other categories of contracting parties, in relation to the principles of good faith and fairness. Articles 1892 and 1893 of the Italian Civil Code contain the provision of a sanction for breach of the duty to provide pre-contractual information on the risk, the function of which is precisely to allow the insurer to know and assess the risk that is the subject of the contract[17]. This regulation is based on the assumption that the information is in the possession of the policyholder and if the policyholder does not provide the relevant information correctly, it becomes difficult for the insurer to identify the risk. Therefore, the insurer is at the mercy of the policyholder without which it is unable to acquire the necessary and useful information to "calibrate" its own performance according to the risk exposed and described by the counterparty and to determine the proper premium. Moreover, the two provisions convey two regimes of discipline and related sanctions on the basis of the different subjective element (fraud or negligence) with which such statements are made.

In particular, Article 1892 of the Italian Civil Code governs the insured party's obligation to provide truthful pre-contractual declarations for the purpose of determining the real insured risk; the declarations of the insured party therefore become fundamental, because only the policyholder is able to know the factual circumstances underlying the risk assessment[18]. The provision therefore imposes on the policyholder an

16 Article 1892 of the Italian Civil Code: sanctions inaccurate statements and reticence on the part of the contracting party "with malice or gross negligence" Article 1893 of the Civil Code: sanctions those "without malice or gross negligence". For an overview of Italian model see D. Cerini, *Insurance Law in Italy,* 2019, Wolters Kluers.

17 A. Gambino, voce Assicurazione, (*contratto di assicurazione:profili genrali)*, *Enc. giur.* 1988, 1.

18 In fact, the cooperation of the policyholder is necessary to obtain the information and for this reason the insurance contract was considered by the repealed code to be an *uberrimae bonae fidei* contract, *i.e.* requiring the utmost good faith on the part of the insured.

obligation to provide information which, if breached by inaccurate or reticent declarations made with malice or gross negligence, provides for the sanction of cancellation of the contract and the related action is subject to a time limit of three months, starting from the time when the insurer became aware of the inaccuracy of the declaration or the reticence[19].

The insured party is in fact burdened with a more stringent duty of information than that imposed on policyholders in ordinary contract negotiations[20]. The aforementioned articles provide for the different hypotheses of inaccurate and reticent declarations by the insured in the event of fraud or gross negligence on the part of the policyholder, with the consequent cancellation of the contract, and in the event that, in the absence of fraud or gross negligence, the insurer has the right to withdraw from the contract.

The legal basis of the protection offered in this type of contract is identified in the violation of pre-contractual good faith, as a breach of the obligation to provide information, by that part of the doctrine which disputes the framing of the protection of article 1892 of the Civil Code in

19 On the topic of incorrect declarations and misrepresentations in the insurance contract in the Italian legal system, see among others V. Sangiovanni, *Dichiarazioni inesatte, reticenze e annullamento del contratto di assicurazione*, in Assicurazioni, 2011, 2, 280 ss.; A. Antonucci, *Commento all'art. 1892 c.c.*, in *Commentario breve al diritto delle assicurazioni*, a cura di G. Volpe Putzolu, Padova, 2010, 29 ss.; M. Bellardini, *Commento agli artt. 1892 e 1893 c.c.*, in Codice civile, a cura di P. Rescigno, II vol., 8a ed., Milano, 2010, 3617 ss.; V. Ferrari, *Commento agli artt. 1892 e 1893 c.c.*, in *Codice civile annotato con la dottrina e la giurisprudenza*, a cura di G. Perlingieri, Napoli, 2010, IV libro, II tomo, 2245 ss.; S. Nitti, *Duty of disclosure nel contratto di assicurazione. Analisi comparata tra sistema italiano e sistema inglese*, in Dir. econ. assic., 2010, 527 ss.; R. Calvo, *Reticenze e assicurazione del sindaco d'istituto bancario*, in Dir. econ. assic., 2010, 771 ss.; M. Gagliardi, *Il contratto di assicurazione – spunti di atipicità ed evoluzione del tipo,* Giappichelli, Torino, 2009, F. Parola, *Dichiarazioni false o reticenti dell'assicurato e annullamento o recesso dal contratto di assicurazione*, in Obbl. contr., 2008, 133 ss.; L. Bugiolacchi, *Dichiarazioni inesatte e reticenti: obblighi informativi dell'assicurato e correttezza dell'assicuratore* in Resp. civ. prev., 2006, 659 ss.; C. Cavaliere, *Le dichiarazioni inesatte e reticenti nel contratto di assicurazione: il quadro italiano (con radici inglesi)*, in Contr. impr./Eur., 2004, 315 ss.; A. Cea, *Questionario anamnestico, dichiarazioni inesatte e reticenze dell'assicurato*, in Nuova giur. civ. comm., 2002, 251 ss.; C. Menichino, *Reticenze ed informazioni precontrattuali nel contratto di assicurazione*, in Contratti, 2001, 872 ss.; A. Boglione, "*Non disclosure" e "misrepresentation"* in assicurazione e riassicurazione, in Dir. mar., 2000, 33 ss.; R. Dies, *Ancora in tema di annullamento o recesso dal contratto di assicurazione per dichiarazioni inesatte o reticenze del contraente (artt. 1892 e 1893 c.c.)*, in Resp. civ. prev., 1998, 1540 ss.

20 A. Boglione, *Non-disclosure and misrepresentation in insurance and reinsurance, cit.,* 33.

the typical scheme of annulment[21]. According to these authors, the fact that the insurer retains the right to premiums as provided for in the third paragraph of article 1892 of the Civil Code would be contrary to the retroactive effect of cancellation and therefore the discipline should be more appropriately framed within the framework of termination for non-fulfilment. In this way, there would also be a clear breach of the insured party's obligation to inform the other party of the circumstances indicated in Article 1892 of the Civil Code and the breach of this obligation would allow the insurer to challenge the contract[22].

This discipline of reticence in the insurance contract is consistent with the breach of a genuine duty of information which the law places on only one party.

In fact, some criticism has been made of this thesis, since it has been observed that «when the legislature used the term annulment in this provision (Art. 1892 of the Civil Code) it did so with full awareness by contrasting it with the term withdrawal which appears in Art. 1893 of the Civil Code»[23].

The supporters of this second thesis observe that the discipline links the invalidity of the contract to the presence of a defect of will on the part of the insurer, misled as a result of inaccurate or reticent declarations by the insured[24]. According to the content of these provisions, the annulment, connected to the ascertainment of fraud or gross negligence on the part of the insured, is a remedy based on a rule of invalidity and not a reaction to the non-performance of an obligation. The attribution to the insurer of the premiums collected is provided for, in their opinion, by Article 1892 of the Civil Code to penalise, in a lump sum and legally predetermined measure, the deliberate or grossly negligent breach of the insured's obligation to provide information and is not intended to restore a contractual balance that has been altered[25]. This is demonstrated by

21 G. Mancini, *Il recesso unilaterale e i rapporti di lavoro,* I, Milan, 1962, 96; A. Fusaro, *Ancora in tema di assicurazioni fideiussorie: questioni di interpretazione della volontà contrattuale e di contratti sull'autonomia privata, Giust. civ.*, 1985, I, 2849. Jurisprudence has interpreted the content of article 1892 of the Civil Code as a real obligation of information placed by the regulation on the insurer. In this sense, Court of Cassation, 15 April 1987, no. 3743 *Arch. Civ.*, 1987, 986 and Tribunal of Bologna, 6 April 1983, *Arch. Civ.*, 1983, 875.

22 G. Mancini, *Il recesso unilaterale e i rapporti di lavoro, cit.*, p. 110

23 G. Visentini, *La reticenza nella formazione dei contratti,* Padova, 1972, p. 108., 83

24 *Ibid*; G. Trabucchi, *Errore* (dir. civ.), *Nss. D. I.,* VI,.670.

25 F. Benatti, *Culpa in contrahendo*, in *Contratto e Impresa,* 1987, 106

the fact that the same protection of the insurer is not provided for by the subsequent Article 1893 of the Italian Civil Code, *i.e.* which contemplates the hypothesis in which there is no malice or gross negligence in the declaration and therefore the criterion of imputation of liability is not considered. In fact, this rule governs inaccurate statements and reticence without deliberate misconduct or gross negligence; the breach of the duty to make such statements entails less serious legal consequences than those envisaged by Article 1892 of the Civil Code: the insurer is given the choice between the right to withdraw from the contract or to continue the contractual relationship.

The doctrine, which identifies the basis of the preceding article in the breach of a duty to inform, reaches the same result for this second case[26].

This thesis, however, has received some criticism from other authors according to whom the remedy provided by this article cannot be considered as a reaction against the violation of good faith *in contrahendo*[27] . In fact, the protection provided by the article is not intended to sanction the unfair behaviour of the insured, but to safeguard the position of the insurer, who is granted the possibility of determining unilaterally the termination of the relationship[28].

The system of protection would therefore be aimed at removing an agreement irregularly concluded due to an error on the part of the insurer, without any sanctioning intention; that is to say, it is designed to remedy an imbalance between the corresponding performances that would not have arisen if the insurer had been placed in a position at the pre-contractual stage to assess all the data precisely.

In order to be relevant under Art. 1892 of the Civil Code, the circumstance incorrectly declared or concealed must have influenced the assessment of the risk; on the other hand, reticence about circumstances that the insurer already knew is not considered relevant[29].

It should be said that the Italian legal system does not apply the model of the so-called guided declaration followed by other legal systems (*i.e.* the French one), which would have the effect of limiting the extent of the

26 *Ibid*; G. Mancini, *Il recesso unilaterale e i rapporti di lavoro, cit.,* 114

27 G. Grisi, *L'obbligo precontrattuale di informazione*, Napoli, 1990, 260.

28 *Ibid*.

29 The Supreme Court has also expressed this view, ex multis Cassazione civile sez. III, 15/09/2021, n.24907; Cassazione civile sez. III, 05/10/2018, n.24563; Cassazione civile sez. III, 19/12/2008, n.29894; Cassazione civile sez. III, 06/06/2014, n.12831.

duty of declaration on the charge of the insured. In fact, the combined application of Article 1892–3 CC builds a system where the insured has to know what a prudent insurer would like to know about the risk and consequently has to specify every element relevant for the evaluation of the risk. This rule has in principle the aim of reducing the so-called imbalance of knowledge between the parties, but everyone can understand how many practical problems it creates, especially when applied to the consumer who may not know which elements should be declared to the insured at the time of the conclusion of the contract. As a consequence, the national courts have tried to limit the extent of the duty of disclosure by applying a reversal in the burden of the proof on the charge of the insurer. They provide that when the prospective insured is required to complete a questionnaire prepared by the insurer, it is the responsibility of the insurer to prove that the elements not required in the questionnaire are relevant for the evaluation of the risk and the non-disclosure by the insured consequent to the insurance contract[30]. The latter approach is the one adopted by the Georgian legislator in Article 808(2), which expressly states that in the presence of questionnaires or, more generally, questions posed by the insurer to the insured, these are to be considered material.

Both in Art. 1892 of the Civil Code - where fraud and gross negligence are present - and in Art. 1893 of the Civil Code - where the conduct is omissive but not fraudulent or grossly negligent - reticent conduct may jeopardise the contractual balance agreed upon by the parties and alter the terms of the contract.

The possibility of termination granted unilaterally to the insurer denotes an intention to privilege this party, regardless of the fault of the other party, who remains protected by the ordinary remedies.

It should be noted that the special protection provided for the insurer is at odds with today's reality, where the imbalance between the parties as considered in the commercial code of 1882 and the civil code of 1942 is no longer present; in the past, the weak position of the insurers was protected compared to that of the insured. Insurers, as mentioned above, were considered to be defenseless in respect of the statements made by the insured, as they had no possibility of verifying the content and accuracy of such information. Hence the greater protection granted to them exclusively. In the present day, however, the role of the insurance company has

30 See D. Cerini, *Insurance Law in Italy, cit*.

certainly changed to the extent that some have put forward the idea that in reality the insurer is no longer the weak party in need of protection, but stands in the contractual relationship as a strong party, so that even Articles 1892 and 1893 of the Civil Code, issued to protect the insurance company, appear to be "devoid of rational justification"[31]; the most important current need is to protect the insured, the true weak party. The insurer's duty to co-operate should replace the insured's duty to inform as provided for in articles 1892 and 1893 of the Civil Code[32]. If, from the point of view of the protection of the insured intended as a consumer, and therefore as a weak contracting party, this approach can be shared, it does not seem appropriate to call into question the provisions of the code in question.

The protection of the policyholder/consumer is certainly not foreign to the Community legislator who, with various provisions, has conveyed the so-called obligation of transparency which could take the form of the duty, for the strong policyholder, to provide the counterparty with information in the pre-contractual phase by means of the contractual text and the annexes thereto[33], so as to allow the insured party to have effective knowledge of the contractual regulations. While one cannot but agree with the thrust and implementation of complete transparency on the part of insurance companies, it should however be stressed that the ratio of these provisions should not be confused with, or in any case assimilated to, that of Articles 1892-1893 of the Italian Civil Code. In fact, the rationale of the provisions of the code is aimed at protecting the insurer, who assesses the risk on the basis of the policyholder's declarations and com-

31 M. Bin, *Informazione e contratto di assicurazione*, *Riv. trim. dir. proc. civ.*, 1993, 732.

32 While this statement may be justified in general terms or in an overall assessment of the contractual relationship, it cannot go so far as to "undermine" the purpose and function of the articles in question. From this point of view, in fact, the position of the insurer has not changed, the exact determination of the risk is still entrusted to the declarations of the insured/contractor, there being no other way for the insurer to obtain or even only verify what is represented to it by the insured, and this does not change either in a model in which the criterion of voluntary information of the policyholder is adopted or in a model in which the information that is relevant is only that which is the subject of a specific request made by the insurer, as will be explained below.

33 C. Menichino, *Reticenze ed informazioni precontrattuali nel contratto di assicurazione*, *cit.*, p. 879; G. Alpa, *La trasparenza del contratto nei settori bancario, finanziario e assicurativo*, *Giur. it*., 1992, IV,411; De Nova, *Informazione e contratto:il regolamento contrattuale*, *Riv. trim. dir. proc. civ.*, 1993, 705.

mensures the premium to be paid to the insured party[34]; the provisions on transparency and information to be provided to the insured party are part of the general framework of consumer protection that has been developing for some time now, thanks above all to the action of the European Community, and their function is to guarantee and ensure a free and informed choice on the part of the insured party.

The regulatory framework that imposes on the insurer a general duty of contractual transparency can be identified either in the regulatory provisions that implement the EU directives imposing an information obligation on the client[35], or more generally, as some authors have argued, by applying to these parties the general principles of fairness and good faith in negotiations set forth in Articles 1337 and 1338 of the Civil Code[36].

On the basis of this approach, it follows that from the principle of good faith laid down in Article 1337 of the Civil Code it is possible to identify a duty of cooperation incumbent on the insurer, who must guide the client by providing him with the correct frame of reference, in order to «reduce the scope for indeterminacy of the circumstances in which he has an interest»[37].

It should be noted that, although the doctrine has emphasised the need to protect the insured and the jurisprudence is moving in the same direction, the exceptionality of the degree of protection and privilege guaranteed to the insurer with respect to the common law is ineliminable in the current legislation[38]. An equal regulation of contractual transparen-

34 In this sense, the underlying public policy *rationale of the* rules is clear in the sense that they are also intended to ensure the solvency of the company which, through the underlying actuarial calculation, procures the necessary reserves to meet its liabilities.

35 D. Legislative Decree no. 175 of 17 March 1995 implementing Directive 92/49/EEC on direct insurance other than life assurance; Legislative Decree no. 174 of 17 March 1995 implementing Directive 92/96/EEC on life assurance. Legislative Decree no. 174 of 17 March 1995 implementing Directive 92/96/EEC on life assurance. These provisions provide a special discipline of the insurance contract, aimed at protecting the insured considered as a weak contractor. Again with a view to protecting the insured party, the actions taken by the Supervisory Body (ISVAP) should also be considered, in particular Circular 474/D of 2003 and Circular 551/D of 2005 on adverse.

36 In favor of the second solution, see G. Visentini, *La reticenza nel contratto di assicurazione*, *cit*; see Court of Cassation 20 November 1990, no. 11206, *Giur. it*., 1990, 382.

37 Cass. 20 November 1990, no. 11206, *Giust. civ. Mass. 1990, 11; and Giur. it.,* 1991, I, 1, 1029.

38 M. Bin, *Informazione e contratto di assicurazione*, *cit*., p. 731

cy in insurance matters would imply, in fact, that if on the one hand the insured person has the duty to cooperate with the insurer in gathering the information necessary to correctly assess the risk, on the other hand the insurer must behave with equal loyalty and correctness in helping the insured person to know all those circumstances which, if known, could induce him/her not to enter into the contract, or to enter into it under different conditions[39]. This is the reason why it has been effectively said that in the general regulation of contracts the bases for the construction of a meaningful obligation to inform the insurer about the contents of the contract should be identified, in line with the trends in contractual information and transparency[40].

In this respect, an analysis of the insured's position shows that he is a rather special kind of consumer.

In fact, he shares the qualification of consumer since insurance is traditionally conveyed through standard contracts and, therefore, is part of mass contracting. It differs from the latter in that the insured participates in the actuarial technical process, which determines his inclusion in the so-called mutuality circuit, typical of the insurance phenomenon.

It must be said that this need for a rebalancing of the contractual positions in the insurance relationship has been acknowledged and adopted by the European legislator and obviously by the domestic legislator following the implementation of the so-called third generation Directives, without forgetting all the discipline of the Supervisory Authority through the issue of circulars whose specific *rationes* have been to regulate in detail the contents of the contractual conditions as well as the pre-contractual information set which aimed at "guaranteeing" the insured party, awareness of the characteristics of the product he is about to subscribe to, as

39 *Ibid.*

40 In this sense, it cannot but be considered that the evolution of the insurance sector and of the techniques for selling insurance products require greater control. However, it cannot be ignored that the insurer's duty to provide greater "transparency" and information to the insured cannot be seen as a corresponding obligation with respect to the insured's duties under Articles 1892-1893, since the underlying rationale of the two disciplines is different. The protection provided by the civil code to the insurer is undoubtedly of a public nature as it aims to guarantee the exact identification of the risk covered by the contract and this inevitably has an impact on the technical reserves and, therefore, on the financial stability of the company. The insured party's right to be informed and put in a position to know exactly what insurance product is being offered is certainly worthy of protection but falls within the general duty of good faith.

well as the limitations and, more generally, the rights and duties deriving from the contract.

This European trend towards transparency as a means of protecting the insured, which has already been underway for some years, is fully recognized in the Insurance Code[41]. Through this instrument, in fact, the Italian legislator has intended, with a view to delegation, to provide a reorganization of the insurance regulations, and has provided for an entire Title (XIII) on "Transparency of operations and protection of the insured", aimed precisely at fully implementing the Community principles[42].

The common opinion is that a discipline should be created that is as equal as possible in the relations between the two parties, and in this sense the need to be able to apply the law of contracts to the insurance contract has been highlighted. In reality, the movement witnessed in the 20th century cannot be summarized only in a progressive shift of information duties from the insured (as it was in the 19th century) to the insurer. In fact, we are dealing with information obligations that have different objects. When reference is made to the duties of information incumbent on the insured, reference is made to duties of information pertaining to the risk and hence to the subject matter of the contract itself. When reference is made to the information obligations incumbent on the insurer, reference is made to information pertaining to the coverage of the risk. The shift of attention from the first to the second subject is justified not only by the general polarization of the discourse of jurists towards the obligations of the entrepreneur addressing the market to obtain informed consent, but also in the light of phenomena specific to the insurance market. Among these phenomena, the widespread use of questionnaires prepared by insurers to elicit appropriate information from the insured is significant. As long as the description of the risk remained a general obligation of the insured, any omission of data could be considered, at least potentially, relevant. The widespread use of questionnaires has changed this to some extent, at least in the interpretation given to them by case law[43].

On the other hand, the ever-increasing lexical and structural complexity of contractual texts and the parallel phenomenon of their non-reading

41 Legislative Decree No 209 of 7 September 2005.

42 These rules should then be read in conjunction with the regulations issued by ISVAP, with Regulation No. 40 of 2018 on insurance mediation.

43 On the value of the questionnaire as a direct or merely evidential element, see L. Velliscig, Comment on articles 810-811 in this commentary.

by the adherent has placed the issue of information on the cover offered at the center of attention. In a perfect world, the identification of insurance cover would be a classic non-problem because insurance cover coincides with the content of the insurance contract, as repeated by the endless jurisprudence that has constantly rejected attempts to frame limits to insurance cover as clauses limiting liability, in the real world the identification of insurance cover, or rather the identification of the risk transferred, is often a very complicated matter.

Jurisprudence usually invokes the principle of good faith[44], but in reality it would be sufficient to refer to the consolidated rule of *interpretatio contra stipulatorem to* overturn any ambiguity in the contractual text to the disadvantage of the predisposer. Unless this rule is understood with regard to the decoding of the contractual text by the average insured party and not by the expert and also taking into account the context in which the contractual text is inserted[45]. Both hermeneutical operations are, however, little adopted by the jurisprudence and this complicates things considerably.

4. The English model: Essence of Uberrimae Fidei. Duty of disclosure and Misrepresentation

There is no doubt that the duty of disclosure is a principle peculiar to the insurance contract[46], in fact under the principles of the law of contract we do not find a general duty of disclosure and this is because of the application of the principle of *caveat emptor* on the basis of which the seller is not obliged to disclose all the defects of the goods to the buyer, but the buyer is the one who has the obligation to inspect the goods he intends to buy. The difference, it is argued, is that the insurance contract is a contract qualified as a *contract uberrimae fidei* or in Anglo-Saxon terminology utmost good faith. As a first approximation it can be stated that this principle governs the entire genetic and executive phase of the insurance contract.

The rule underlying the principle, and common to any contract or branch of insurance law, is that the insured is obliged, at the time of the

44 See. A. Monti, *Buona fede e assicurazione,* Milan 2002

45 *Ibid*.

46 For a survey of the sources of the insurance contract see M. Clarcke, *The Law of Insurance Contract,* fourth ed. LLP 2002, 1 J. Birds, *Modern Insurance Law*, Sweet & Maxwell 1997 1 f.; for a more detailed historical survey of the insurance contract see W.S. Holdsworth, *The early history of the contract of insurance*, 17 Col. L.R. 85, 1917.

proposal or before the contract is concluded, to disclose to the insurer all material information that to some extent may affect the insurer's appreciation of the nature, limits and extent of the risk under the contract. Breach of the duty to inform is sometimes referred to by the term concealment as in early English insurance literature or as is the case in American case law even today, but considering that in English law the duty to inform may be breached even in the absence of deliberate misconduct or intent, the present study will refer exclusively to the case of non-disclosure. Also in England it is inevitable to consider the duty of disclosure as part and parcel of the more general duty of good faith. Historically, but also nowadays, the duty of disclosure finds its rationale in the fact that the insurer has the advantage of possessing the necessary information. The theorisation of the duty of disclosure as an application of the more general principle of *uberrima fidei is* due to Lord Mansfield and his opinion in Carter v Bohem[47]. The importance of Mansfield's statements lies in the recognition that non-disclosure is relevant even where there is no fraudulent intent, and consequently the application of the courts since Carter v Boehm has led to the establishment of a particularly onerous burden on the insurer whereby he has a duty, when preparing a proposal, to disclose all material circumstances, This is based on the assumption that, at least at this stage of the contract, the insurer depends on (and must rely on) the insured's representations in assessing and calculating both the risk and the premium. Although it is generally agreed that the principle originated with

47 As is well known, Lord Mansfield stated in his judgment that «Insurance is a contract of speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist. .... Although the suppression should happen through mistake, without any fraudulent intention, yet still underwriter is deceived and the policy is void; because the risque run is really different from the risque understood and intended to be run at the time of the agreement ..... Good faith forbids either party, by concealing what he privately knows to draw the other into a bargain from his ignorance of the fact, and his believing the contrary». R.A. Hasson *The doctrine of uberrima fides evaluation in Insurance law a critical evaluation,* The Modern Law Review 1969, 32, 615-637, the Author, through a critical reading of the Carter v Bohem judgment, shows that Lord Mansfield's opinion was not in the sense of attributing an absolute duty of disclosure to the insured, and that the insurer is certainly not the passive party but must take steps to obtain the relevant information he needs or which is relevant to him. In other words, the insured's duty was to be limited only to private information, i.e. that which only he knows.

Lord Mansfield, some authors have pointed out that Lord Mansfield's words may have been interpreted more broadly, by merely extrapolating the concept from the general context in which it was said. In fact, Lord Mansfield had in mind only that private information which only the insurer can know. Section 17 of the Marine Insurance Act (UK) 1906 states that «A contract of marine insurance is a contract based on utmost good faith, and if utmost good faith is not observed by either party, the contract may be avoided by the other party». From the analysis of the case law and the wording of sec. 17 of the MIA, it is clear that the duty of disclosure was theorised from the outset as a bilateral duty and, therefore, to be considered binding not only on the insured but also on the insurer. However, if this is true as a theoretical statement of the principle, case law analysis shows that in reality the duty of disclosure, as an insurer's obligation, was not particularly relevant, at least until *Banque Financier Delacite SA v. West Gate Insurance Co. Ltd*. This precedent is particularly relevant because the court at first instance had tried to impose such a duty on the insurer, even awarding damages for the breach. The Court of Appeal, while upholding the existence of such a duty on the insurer, nevertheless held that the only remedy granted in the event of a breach of the duty of disclosure was the cancellation of the contract.

The duty of disclosure[48] briefly described above, which for more than 200 years has been regulated on the basis of the principle of utmost good faith and the related elaboration made by the jurisprudence, has been questioned in the last decade as has its ability to guarantee the proper formation of the contract. There have been many studies and proposals for legislative reforms, especially in view of a certain discrepancy between

48 See R. A. Husson, *The Doctrine of Uberrima Fides in Insurance Law - A critical evaluation,* MLR 1969, 615; J. Lowry P. Rawlings., *Insurance law: Doctrine and Principle,* Hart. Publishing 2005, 79; S. Park, *The Duty of Disclosure in Insurance Contract Law*, Dartmouth Publ. Comp. Ltd., 1996; J. Birds, & N. J. Hirds, *Misrepresentation and Non-Disclosure in Insurance Law. Identical Twins or Separate Issues?* The Modern Law Review, 1996 59(2), 285–296; A. A. Tarr & J.-A. Tarr, *The Insured's Non-Disclosure in the Formation of Insurance Contracts: A Comparative Perspective*, The International and Comparative Law Quarterly, 50(3), 577–612. R. Merkin, *Marine Insurance Legislation*, 3rd ed., LLP, 2005; R. Merkin & J. Steele, *Insurance and the Law of Obligations*, Oxford University Press, 2013; R. Merkin, Ö. Gürses, *The Insurance Act 2015: Rebalancing the Interests of Insurer and Assured*. The Modern Law Review, 2015, 78(6), 1004–1027; McGee, *The Modern Law of Insurance*, 4th ed., LexisNexis, 2018; J. Birds, *Insurance Law in the United Kingdom*, 4th ed., Wolters Kluwer, 2018; *MacGillivray on Insurance Law*, 14th ed., Sweet&Maxwell, 2018; *Colinvaux's Law of Insurance*, Sweet&Maxwell, 12th 2019.

the rule codified and applied by the courts and what was happening in industry practice[49]. In fact, the English insurers themselves have posed the problem of the inadequacy of the discipline and have adopted rules and practices that aim to better protect the policyholder-consumer, through the publication of codes of practice, then taken as a model by the Law Commission to propose a legislative amendment. The various proposals have since become concrete and today the rules distinguish between insurance contracts with consumers and commercial contracts governed by two different Acts: the Consumer Insurance (Disclosure and Representations) Act (CIDRA) 2012 and the Insurance Act 2015. The latter retains certain provisions of the Marine Insurance Act 1906, codifies some of the developments since 1906 and introduces new legal concepts. The key provisions are the introduction of the new duty to provide fair representation, the introduction of warranty provisions and risk mitigation clauses, and the provision of remedies granted to insurers in the event of fraud. In addition, under the Insurance Act 2015, the concept of disclosure (just as was the case in the rest of Europe as a result of the various directives) is also viewed and regulated from the perspective of the transparency imposed on the insurer, who if it wishes to enter into a contract on different terms and a clause is "disadvantageous" to the insured, the insurer must comply with the transparency provisions and take sufficient steps to bring the clause to the attention of the insured, as well as ensuring that the clause is clear and unambiguous. But perhaps the most significant novelty of the legislative changes lies in the distinction not only in concept but also in law between insurance contracts concluded with consumers and contracts concluded with professionals.

4.1 Consumer contract and duty of disclosure

The Insurance (Disclosure and Representation) Act 2012 (from now on CIDRA) which came into force in April 2013 applies to consumer insurance and aims to regulate the consequences if a consumer provides

49 See Law Reform Committee, Fifth Report, Conditions and Exceptions in Insurance Policies Cmnd 62 (1957); Law Commission, Insurance Law: Non-Disclosure and Breach of Warranty Cmnd 8064 (1980); J. Birds, *Insurance Law Reform; The Consumer Case for a Review of Insurance Law* (London, NCC, 1997); Report of the Sub-Committee of the British Insurance Law Association, Insurance Contract Law Reform: Recommendations to the Law Commission (London: Centre for Financial Regulation Studies London Guildhall University 2002).

incorrect information to his insurer[50]. Consumer Insurance contracts are defined as insurance purchased by individuals for purposes wholly or mainly unrelated to their trade, business or profession. At the same time CIDRA applies to individual insurance contracts as well as to group insurance even when the policyholder is, for example, the employer, as the new law considers insured persons and beneficiaries as the intended end users of the protection rules. The consumer definition deliberately follows the general approach of European law, while the definition of insurance is left to common law[51]. According to doctrines, CIDRA has contributed substantially to the concept of transparency in insurance law in various ways[52]. There is no doubt that one of the most significant changes has been the cancellation of the duty of the consumer to voluntarily provide information, as provided for in the Marine Insurance Act of 1906 and then interpreted by the Courts[53]. Therefore, today the insurer when contracting with a consumer must ask appropriate questions and the consumer must answer honestly and carefully. This does not imply that the insured person is totally discharged, since the Act does in fact lay down a general duty to behave honestly and carefully when giving answers and to adopt a prudent attitude in order to avoid making false or incorrect statements. The new principle also applies when a policy is varied or renewed. In assessing the behavior of the policyholder or insured who discloses the risk, an objective assessment is adopted, namely ref-

50 See J. Lowry & P. Rawlings, *That wicked rule, that evil doctrine . . .": Reforming the Law on Disclosure in Insurance Contracts*, in *The Modern Law Review*, *75*(6), 2012, 1099–1122; P. Jaffe, *Reform of the Insurance Law of England and Wales-Separate Laws for the Different Needs of Businesses and Consumers,* Tul. L. Rev., 2012, 87, p. 1075 For more on the reform of duty of disclosure in consumer contract see J.A. Tarr, *Disclosure and concealment in consumer insurance contracts*. Routledge-Cavendish, 2013; P. J. Tyldesley, *Consumer insurance law: disclosure, representations and the basis of the contract clauses*. Bloomsbury Professional, 2013; L. D. Loacker, *Informed Insurance Choice?: The Insurer's Pre-contractual Information Duties in General Consumer Insurance*. Edward Elgar Publishing, 2015.

51 In relation to avoid a definition see *Department of Trade and Industry v St Christophers' Motorists Association* [1974] Loyd's Rep 17, 18 e *Medical Defence Union v Department of Trade* [1980] Ch 82.

52 See K. Noussia, *Transparency in the Insurance Contract Law of England,* in *Transparency in Insurance Contract Law*, pp. 573-590, Springer, Cham, 2019 (ed P. Marano, K, Noussia). The author provides a detailed analysis of the duty of disclosure reform in the English model.

53 It should be noted that this was the tendency in the English legal system and what was done by the Financial Ombudsman Service (FOS).

erence is made to the criterion of reasonable consumer behavior, while also taking into account other circumstances such as the sales channel and the type of insurance product.

The provision of a single duty to take reasonable care not to make misrepresentations to the insurer laid down for consumers is in fact a general trend in the insurance discipline as Section 14 of the Insurance Act of 2015 demonstrates. Where the consumer makes misrepresentations anyway, the discipline distinguishes between three types of misrepresentation: reasonable, imprudent and deliberate or reckless. The remedy for the insurer that if it had known the correct information, it would not have concluded the contract or would have concluded it on different terms is only available if the misrepresentations are deliberate or reckless, i.e. if they are 'qualifying misrepresentations' as defined by CIDRA. Conversely, no remedy is available if the consumer's misrepresentation was reasonable. For the purpose of assessing the statement as deliberate or imprudent, the burden of proof is on the insurer, who must prove on the one hand the consumer's intention to provide the false or misleading statement, or the lack of diligence in not assessing whether the information was correct, and on the other hand also the awareness that the information was relevant to the insurer. The change of perspective with respect to the previous rule, which was decidedly in favour of the consumer assessed as a weak contractual party, is immediately evident. In order to "lighten" the burden of proof on the insurer, CIDRA provides for two presumptions: the first that the consumer has the knowledge of a reasonable consumer, the second that if the insurer makes a clear statement, it is presumed that the matter is relevant. The remedies are also graduated and if the misrepresentation is fraudulent (i.e. made with intent or recklessly), the insurer may cancel the policy and generally retain the premium. If the misrepresentation is merely imprudent, the insurer's remedy depends on what it would have done had adequate information been provided. If the insurer would have rejected the risk altogether, it is possible to avoid the policy and reject any claim, but the insurer would have to return the premium. If the insurer would have issued the policy with different conditions, e.g. different limits or exclusions, then those conditions apply from the outset. If, on the other hand, the insurer would simply have concluded the contract anyway but with a higher premium, then any compensation in the event of a claim will be reduced proportionally to the premium surcharge that was not

paid. Even if the new rules are summarised, it is easy enough to understand the change they represent compared to the rules of the Marine Insurance Act of 1906, which provided for a single remedy, in this case the cancellation of the contract without any assessment of the type of misrepresentation or the impact it could have on the contract or rather on the insurer's assessment of the risk. Wanting to assess the impact of the new regulation, it is pointed out that research conducted by the Chartered Insurance Institute and corroborated by discussions with the FOS indicates that consumer disputes involving issues of misrepresentation have become rarer. With a change that may appear trivial (replacing the consumer's obligation to voluntarily provide relevant facts with an obligation to take care not to make false statements), CIDRA has actually significantly improved the consumer's position in relation to the duty of information and remedies for breach of this duty, promoting transparency while preserving the rights of the insured consumer [54]

4.2 Duty of disclosure in commercial contract

As already seen above in the Marine Insurance Act 1906, Section 17, which is based, with some modifications, on Lord Mansfield's judgment in Carter v. Boehm, states that a contract of marine insurance is a contract of utmost good faith and if either party fails to demonstrate good faith, then the policy may be cancelled. This is followed by sections 18, 19 and 20 which deal respectively with the information that is due from the insured, the information that is conveyed by the insured's agent and the consequences in case of misrepresentation by the insured. With regard to the analysis of the legislative changes, it is noted that the section of the Insurance Act 2015 repeals the concluding sentence of section 17 of the 1906 Act and with it all the common law rule that developed from it, but the first sentence of the section "A contract of marine insurance is a contract based on the utmost good faith" remained intact.

Thus, before and after the 2015 Act, maritime (and non-maritime) insurance contracts are contracts based on utmost good faith. The 2015 Act, by renaming the pre-contractual duties as the duty of 'proper presentation of risk' and retaining the first sentence of Article 17 of MIA 1906, clarified that the duty of utmost good faith in Article 17 of MIA 1906

54 K. Noussia, *Transparency* quoted p. 581

is not limited to the duty of proper presentation of risk[55] . The choice means that good faith remains as an interpretative criterion.

The Insurance Act 2015 repealed Sections 18-20 of the MIA 1906, but retained and thus recodified some of the principles already established by these sections. More specifically, the 2015 Act codified some of the common law principles developed since the enactment of MIA 1906 and also made clarifications to certain issues such as 'knowledge of the insurer' and 'knowledge of the insured' in relation to the proper presentation of risk. Important changes were introduced regarding the remedy for breach of the pre-contractual fair presentation of risk.

4.3 Fair presentation under the Insurance Act 2015

The Insurance Act 2015[56], section 21(2), repeals sections 18-20 of the Marine Insurance Act 1906, removes the utmost good faith in the context of the pre-contractual duties of the insured and replaces it with the concept of "fair presentation" (section 3)[57]. In this regard it is noted that the

55 In fact, it was debated in the context of the MIA 1906 whether Article 17, i.e. the duty of utmost good faith, was comprehensively illustrated by Articles 18-20 of the MIA 1906.

56 For more detailed analysis of the Insurance Act 2015 please see, B. Foat, *Leveling the Playing Field-The Modernisation of Insurance Law in the United Kingdom*, Int'l. In-House Counsel J., 2014;8 p.1; A. M. Costabel, The UK Insurance Act 2015: A Restatement of Marine Insurance Law, *Thomas L. Rev.,* 2015, 27 133; O. Gurses, and R. Merkin, *Insurance contracts after the Insurance Act 2015,* Law Quarterly Review, 2016, 132, no. 3, 445-469; O. Gurses, and R. Merkin, *Insurance contracts after the Insurance Act 2015,* Law Quarterly Review 2016,132, no. 3, pp. 445-469; M. Clarke and B. Soyer, *The insurance act 2015: A new regime for commercial and marine insurance law*. Informa law from Routledge, 2016.

57 There has already been the first judgement applying the new rule of fair representation: Berkshire Assets (West London) Limited v AXA Insurance UK plc [2021] EWHC 2689 (Comm) High Court of Justice Queen's BenchDivision Commercial Court. An interesting point of this case is that the judge concluded that the Act does not alter the law on materiality as developed by the courts before the Act came into force. The judge states that the materiality of a particular fact is a question of fact and is to be determined by the circumstances of each case. Materiality is to be tested at the time of placement of the insurance and not by reference to subsequent events. Facts raising doubts as to the risk are sufficient to be material. It is not necessary for the facts to be shown, with hindsight, to have actually affected the risk. The overall effect of the 'prudent insurer' test is that whether there has been a fair presentation of the risk remains to be assessed principally from the perspective of an insurer. A circumstance does not have to be decisive for the hypothetical prudent insurer in determining whether to take the risk or on what terms; it merely needs to constitute something a prudent insurer would take into account when reaching a decision.

concept of fair presentation is not new but already present, albeit in obiter dicta, in case law precedents and regarded by the Law Commissions as a more appropriate representation of the duty.

The duty requires the insured to disclose all relevant circumstances that the insured knows or ought to know; failing that, to provide sufficient information for a prudent insurer to understand that it needs to make further enquiries; to provide such information in a reasonably clear and accessible manner; and to ensure that any material statement of fact is materially correct and that any material statement of expectation or belief is made in good faith[58] . While the picture does not appear to have changed much, one aspect that is certainly relevant and which presents itself as an innovation in the disclosure system is that the information may be considered sufficient and, therefore, the obligation discharged if the statements made "provide the insurer with sufficient information for a prudent insurer to understand that it must make further enquiries in order to disclose such relevant circumstances". This provision shows the change of perspective of the English legislator and the realization of the fundamental role that knowledge (understood in the bilateral sense of insured and insurer) plays in the regulation of the disclosure obligation.

In the event of a breach of the duty of fair presentation, the insurer has various potential remedies as also provided in consumer contracts. If the breach is characterized by willfulness or recklessness, the insurer may cancel the contract completely; however, if the breach is not willful or reckless, consideration must be given to what the insurer would have done had the obligation not been breached.

Although on paper the range of remedies seems fairer and, above all, aimed at maintaining the insurance contract where possible, it is equally true that determining what the insurer's behavior would have been in different circumstances is not easy to prove[59] .

In fact, the concept of materiality as enunciated by the courts, remains also in the new regime and can be summarized as follows: the materiality of a particular fact is a question of fact and must be determined by the

58 See on this point Insurance Act 2015 Explanatory Notes at legislation.gov.uk

59 The criterion of the prudent insurer is that of the previous legal regime. Reference is made to the Marine Insurance Act 1906, s 18(2); and the Marine Insurance Act 1908, s 18(2). For further clarification, see State Insurance v McHale [1992] 2 NZLR 399 (CA). See also Lambert v Co-operative Insurance Society Ltd [1975] 2 Lloyd's Rep 485 at 487, which held that the test of s 18(1) applies to all forms of insurance; and Mayne Nickless Ltd v Pegler, supra at 29, at 239.

circumstances of each case; materiality must be verified at the time of the placement of the insurance and not by reference to subsequent events; facts that raise doubts about the risk are sufficient to be material. It is not necessary to prove, with hindsight, that the facts actually affected the risk; the overall effect of the "prudent insurer" test is that the fair presentation of the risk must be evaluated primarily from the perspective of the insurer; a circumstance need not be decisive for the hypothetical prudent insurer in determining whether to assume the risk or on what terms; it must simply constitute a factor that a prudent insurer would take into account in making a decision[60] .

4.4 Possibility of concluding the contract outside the framework of the law

Under the Insurance Act 2015, parties should be free to contract outside the provisions of the Act, as provided in section 16(2), subject to the transparency safeguards in section 17 and that the policyholder is informed of the disadvantages.

This prediction implies that the rules of the Insurance Act 2015 are designed as a 'default regime' for commercial insurance. The prediction is not surprising given that in English law, as in many other civil law and common law jurisdictions, party autonomy is at the heart of commercial law. In common law countries, however, there is more flexibility, so much so that many changes have been precisely inspired by market practice and this competitive advantage would have been nullified by the introduction of mandatory rules. But there are also other reasons: the first certainly technical, commercial risks often involve a much greater variety of unusual risks than those covered by consumer insurance, making the use of customised clauses to control risk essential from a risk management perspective. The second is that in commercial contracts the bargaining position of the parties is more balanced, which makes the protection of the policyholder-insured less compelling. The third is that even if one were to consider more knowledge on the part of the insurers, it is well known that in the commercial sphere the in-

60 See Berkshire Assets (West London) Limited v AXA Insurance UK plc [2021] EWHC 2689 (Comm)High Court of Justice Queen's Bench Division Commercial Court.

surance contract is almost always brokered by professionals who can bargain on equal terms with insurers.

Corporate insurers, however, cannot exclude the Insurance Act simply by including a clause in a policy stating that the changes in the new law do not apply. Instead, insurers will have to identify each individual change that they do not intend to apply. They will therefore have to highlight and specify each opt-out in the policy. In fact, a mandatory provision is that any clause in an insurance contract whereby the insured guarantees the truthfulness of all pre-contractual statements will be removed.

5. The solutions proposed in the Principles of European Insurance Contract Law (PEICL)

As is well known, the unification of the rules on insurance contracts has always been considered necessary by a large part of the doctrine, which, despite unsuccessful attempts and resistance, has never stopped calling for it, as well as trying to make it operational. The same result has been shared by the Group of Experts in insurance set by rhe EU Commission in 2012, as it is well explained on the final report 2013. The same path has been followed with reference to reinsurance where an equal need for harmonized rules have been formulated by scholars and most of all by practitioners[61].

If one looks for the concrete results of the work carried out by the "Restatement of European Insurance Contract Law" group, it can be found in the so called Principles of European Insurance Law (PEICL)

61 In 2016, scholars from several EU and non-EU States began work on *model* or *optional* law for reinsurance contracts: the 'Principles of Reinsurance Contract Law' (PRICL). Since then, the project has been jointly supported by legal practitioners, and insurance and reinsurance companies. The basic goal of the working group has been to elaborate a set of rules to be used *globally* as an optional law instrument for reinsurance transactions. For a broader view on the goals and aims shared by the project group see H. Heiss, *From contract certainty to legal certainty for reinsurance transactions: the Principles of Reinsurance Contract Law (PRICL)'*, in *Scandinavian Studies in Law*, vol. 64, 2018, pp. 92–114, especially at § III. On the idea of optional laws and restatements to be used in commercial contracts, see M. Fontaine, *Les principes pour les contracts commerciaux internationaux élaborés par UNIDROIT*, in *Revue de droit international et de droit comparé*, 1991, p. 25 ff; M. J. Bonell, *An international restatement of contract law. The UNIDROIT Principles of International Commercial Contracts*, III ed., 2005, p. 9 ff.

containing the general rules of the insurance contract for all types of insurance, including indemnities and fixed sum insurance, should be seen in this light. A first edition was drafted in 2009 and the second updated in 2016.

Going straight to the heart of the discipline of the duty of disclosure, the PEICL contemplates the need, in the context of the pre-contractual phase of the insurance contract, for an obligation to act in a transparent manner and to make the insurance relationship clear and comprehensible, both by imposing obligations on the insurers and by regulating the information duties of the policyholder. From the point of view that is of strict interest here, i.e. the duties of the policyholder, the obligation is laid down for the applicant to provide the necessary information so that the insurer can properly assess the risk and decide whether or not to accept an application for insurance.

Article 2:101 of the PEICL introduces the information obligation at the pre-contractual stage, for the applicant to inform the insurer of the circumstances of which he is or should be aware, and which are the subject of clear and precise questions posed by the insurer. Although the obligation is expressly imposed on the applicant, it is in fact partially transferred to the insurer. Indeed, the PEICL limits the scope of the information that the applicant is obliged to disclose to the information that the insurer requests. In this respect, the drafters of the principles noted that the different legal models could be grouped into two broad categories: models with the imposition of a general duty of spontaneous disclosure (e.g. Italy, Croatia, Austria) and others (e.g. France, Poland, the Netherlands, Turkey) where the duty of information is instead conveyed by questionnaires prepared by the insurer. The PEICL have opted for the latter model as they believe that the questionnaire method is more appropriate and efficient as it is usually easier for insurers than for applicants to define what information is relevant to the risk. Furthermore, in more general terms, the drafters considered that the provision of questionnaires improves the transparency of the insurer's business as the questions asked by the insurer reveal what information is needed to assess the risk. Finally, it is worth mentioning that, similarly to the insurer's pre-contractual information duties, the PEICL also distinguishes between the applicant's pre-contractual information duties

in life and non-life insurance contracts, which correspond to each other (see Article 17:201)[62].

6. The Georgian legislator's choices

The comparison with the Italian and English models shows how both, albeit in different ways, started from the imposition of a general duty to disclose on the insured party in accordance with the principles developed in the context of the *lex mercatoria*. The comparative analysis shows that in the times that are closest to us, this construction of the duty to disclose has been the subject of criticism and has posed a number of interpretative problems in practice, which can be summarized in a single basic element: the need to offer greater protection to the subject considered weak, *i.e.* the insured. In the English model, these problems have led to a legislative reform with the main aim of making the matter organic and systematic both by innovating, specifying, and limiting the duty to inform borne by the insured and by identifying two distinct disciplines for contracts with consumers and commercial contracts. The rules of the Georgian law here commented seem to lay in the middle of the models examined. In fact, the insurer is given the possibility of cancelling the contract when the insured intentionally or even negligently fails to disclose information relevant to the description of the risk to be insured. However, the duty to inform is not imposed in a general and absolute manner since it refers only to relevant information (material). It has been seen that the identification of what is to be considered relevant is not always easy from the point of view of both the insured and the judges. And even in the light of the legislator's intention to circumscribe the duty by indicating that the information that may influence the insurer to insure or to insure under different conditions is relevant,

62 For more on the Principle; H. Heiss, *The Common Frame of Reference of Insurance Contract Law*, in *European Journal of Commercial Contract Law*, 2009; D. Cerini, *Diritto del contratto di assicurazione e diritto europeo: i Principles of European Insurance Contract Law (peicl)*, in *Dir. economia assicur*. (dal 2012 Dir. e Fiscalita' assicur.) 2008; J. Basedow, *Verso una disciplina europea del contratto di assicurazione, ragioni, struttura e metodo*, in *Danno e resp.*, 2006; M. Clarke, H. Heiss, *Towards a European Insurance Contract Law? Recent Developments in Brussels*, in *Journal of Business Law*, 2006; D. Cerini, *Nuovo parere del Comitato economico e sociale europeo (doc. Cese 1626/2004): quale via per un contratto di assicurazione europeo?*, in *Dir. economia assicur*. (dal 2012 Dir. e Fiscalita' assicur, 2005.

just as relevant will be the information provided in response to the insurer's specific answers, the fact remains that in the event of disputes it will be necessary to reconstruct the formation of the consent and necessarily resort to the identification of the behavior of a prudent insurer, or refer to market practices. This reconstruction, indeed, has shown its limitations, at least in the English system. Another critical aspect relates to what was mentioned in the introduction, regarding the choice to regulate the insurance contract within the civil code, which does not deal with the regulation of the insurance company and insurance intermediaries, which leads to the belief that a complete picture of the effectiveness of the rules in question can only be had with the necessary connection with the specific rules of the sector.

Furthermore, from the perspective of the consequences on the contract when a material circumstance has been voluntarily concealed or omitted (with or without fault), the rules provide for a single remedy in the form of the voidance of the contract; therefore, there is no provision for a graduation of the sanction on the basis of the effect that the omission had on the insurer's choice to accept the risk. Presumably the choice has been dictated by the circumstance that the articles in question regulate only the effects of the failure to provide relevant information, but the latter, although relevant, does not necessarily imply that the insurer would certainly not have entered into the contract, even in the face of relevant information the insurer might still have wanted to conclude the contract albeit under different conditions (a higher premium, a maximum cap, a higher deductible etc). Although it is presumed that the insurer is allowed, by virtue of contractual autonomy, to maintain the contract, the gap in the law puts the insured at a disadvantage.

In this regard, the provision of the fourth paragraph of Article 808, according to which cancellation is not permitted where the insured is not responsible for the erroneous or false information or where the insurer knew of the information, is inadequate, since such a provision leaves it to the courts to assess the subjective status of the policyholder-insured.

Lastly, the regulation should provide for a greater balance between the positions of the policyholder-insured and the insurer. It is true that the Georgian Civil Code embraces the notion of good faith[63], and that

63 See the observations of K. Iremashvili, *Transparency in the Insurance Contract Law of Georgia*, in *Transparency in Insurance contract*, quoted p. 377

this notion serves as a general clause applicable in every area, thus also for insurance contracts. But it is equally true, and comparative studies prove it, that good faith alone is not enough to guarantee the protection of the insured and above all to reduce the information asymmetries that connote the insurance market. It would be important to envisage, in addition to the duty of disclosure on the part of the insured, which serves to assess the risk, the duty of disclosure on the part of the insurer in the latter case in order to make the policyholder-insured aware of the contract he is about to enter into.

Article 810 - Termination of insurance contracts by reason of failure to communicate information

If the insured was required to respond to written queries about the circumstances of a danger, the insurer may terminate the contract for the failure to communicate the circumstances, which, though not inquired about, were intentionally withheld by the policyholder.

Lydia Velliscig

1. Introduction

These Comments to the English translation[1] of the rules contained in Book Three (Law of Obligations), Special Part, Chapter Twenty of the Georgian Civil Code, devoted to insurance, provide the opportunity to analyse the issue of the presentation of risk from a comparative perspective. It should be noted that it is not possible to infer from the black letter of these rules, and especially Arts. 810-811, how these rules are integrated in the Georgian insurance and contract law, nor how they have been interpreted in the case law. The purpose of these Comments is therefore to provide a framework for a comparative analysis of the topic, with the aim of highlighting the specific features of these Georgian rules. As it is well known, translations make it possible to overcome language barriers and understand the meaning of the norms[2]. At

1 This English version is available at the following link: http://www.matsne.gov.ge.

2 Comparative law has long dealt with the issues of legal translation. Among others, see B. Pozzo, *Harmonisation of European Contract Law and the Need of Creating a Common Terminology*, in *European Review of Private Law*, 2003, 6, at 754 and B. Pasa, L. Morra (eds.), *Translating the DCFR and Drafting the CESL. A Pragmatic Perspective*, Munich, Sellier European Law Publishers, 2014 (also available at: http://ssrn.com/abstract=2627546), in particular the following papers: B. Pozzo, *The Myth of Equivalence in Legal Translation*, 29-46; M. Bajčić, *Towards a Terminological Approach to Translating European Contract Law*, 125-146; E. Ioriatti Ferrari, *Found in Translation: National Concepts and EU Legal Terminology*, 223-246.

the same time, they make it difficult to identify the corresponding legal concepts[3]. Indeed, a quick glance at the provisions reveals some lexical inconsistencies.

A first example concerns the term used to identify the remedy provided to the insurer in case of failure to disclose or misrepresentation. Art. 810 expressly refers to *termination*, while Arts. 808 and 809 use the term *termination* and *repudiation*. In the context of these rules, this terminological choice seems to suggest that termination and repudiation are deemed as equivalent[4].

Another example concerns the use of the term *insured* or *policyholder*. Art. 808 appears to impose on the insured the duty to present any risks, while Art. 810 also mentions the policyholder[5]. When insured and policyholder are not the same, the issue can be quite complex[6].

Finally, Art. 810 expressly refers to the circumstances of a *danger*. However, the term *risk* may be more suitable within the context of the rule.

Since legal terminology entails precise legal effects, it is preferable to limit these Comments to comparative considerations.

Against this background, the rule described in Art. 810 of the Georgian Civil Code relates to the broad topic of the pre-contractual information that the insured has to provide in the insurance proposal form in order to fairly and accurately describe facts and circumstances related

3 On legal transplants in general, see M. Graziadei, *Legal Transplants and the Frontiers of Legal Knowledge*, in *Theoretical Inquiries at Law*, Vol. 10, Number 2, 2009, 693 ff. See also U Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, in *Int'l Rev. L. & Econ*., 1994, Vol. 14, Issue 1, 3-19; M. Graziadei, *Comparative Law as the Study of Transplants and Receptions*, in M. Reimann, R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, 2007, 441-473.

4 In any case, it is not clear what kind of legal remedy is available to the insurer.

5 Art. 810 of the Georgian Civil Code, in the English translation, seems to use the terms *insured* and *policyholder* as having the same meaning, thus identifying those who seek insurance coverage.

6 For the purposes of this Comment, it is assumed that the policyholder is also the insured. This terminological choice seems to be consistent with the terminology adopted in Art. 808 of the Georgian Civil Code which appears to attribute this duty to the insured. In this regard, it should be noted that the English Statutes apply the term *assured* or *insured*, the French Civil Code the term *assuré*, and thus insured. The Italian Civil Code, on the other hand, uses the term *contraente*, and therefore policyholder, and also the drafters of the PEICL have opted to use the terms *applicant* and *policyholder*.

to the risk to be underwritten[7]. More specifically, it concerns the remedy available to the insurer in the event of non-disclosure or misrepresentation[8]. The duty to provide information affecting the risk relates to elements that may influence the insurer's assessment of the risk being insured[9]. These elements are the so-called "material facts or circumstances", that insurers deem relevant to risks classification and their decision whether to conclude the insurance contract, including the terms or conditions of the same[10].

The description of the risk, which is largely based on statements made by the insured, is a core element of insurance contract law. Both the identification of the risk to be underwritten and the subject matter of the insurance contract are strictly connected to the accurate presentation to the insurer of all circumstances of the risk. This correlation is due to the fact that certain characteristics of the risk could affect the probability of occurrence of the loss and its extent. Hence the insurer must be able to correctly identify the type of risk for underwriting purposes and to calculate the correct premium to charge. Therefore, legal systems govern cases of inaccurate statements by the insured at the time of entering into an insurance contract.

All European countries impose specific disclosure duties when it comes to insurance contracts[11]. In the Georgian system, insurance

7 For a general overview, see K. Iremashvili, *Transparency in the Insurance Contract Law of Georgia,* in P. Marano, K. Noussia (eds.), *Transparency in Insurance Contract Law*, Springer, 2019, at 379 ff.

8 According to the legal terminology in the English common law, the term *disclosure* means the insured's duty to volunteer information, while *misrepresentation* refers to the insured's duty to accurately answer the insurer's questions. For further information on the difference between these two terms, see J. Lowry, *Pre-contractual information duties: the insured's pre-contractual duty of disclosure - convergence across the jurisdictional divide*, in J. Burling, K. Lazarus (eds.), *Research Handbook on International Insurance Law and Regulation*, Edward Elgar Publishing, Inc., 2011, at 56.

9 This duty of providing information related to the risk applies before the conclusion or the renewal of a contract. Accordingly, if circumstances change between the proposal and the conclusion, the insured is required to communicate any changes to the insurer.

10 Material facts are relevant facts such as to have an influence on the insurer's underwriting decision. For further details, see S. Nitti, *sub Art. 808-809*, in this Commentary.

11 See J. Basedow, J. Birds, M.A. Clarke, H. Cousy, H. Heiss, L.D. Loacker (eds.), *Principles of European Insurance Contract Law (PEICL)*, 2nd ed., Otto Schmidt, 2016, *sub* art. 2:101, N1, at 106.

contracts are regulated under Book Three (Law of Obligations), Special Part, Chapter Twenty of its Civil Code and disclosure obligations are specifically established under Articles 808 ff. This group of rules sets out the so-called *obligation to communicate information*, as well as the legal consequences of its violation.

In particular, Art. 810 refers to the case where the insurer makes a written query as to circumstances that may affect the assessment of the risk and the policyholder has intentionally concealed certain elements of the risk. Art. 810 establishes that the insurer may terminate the contract, even if the withheld information relates to circumstances not expressly included in a specific written question raised by the insurer.

2. Pre-contractual information duties and risk assessment: an overview

To frame this rule within the context of the legal discipline governing insurance contracts in general and pre-contractual statements in particular, it is necessary to address some peculiarities of the insurance activity which, as is well known, is based on principles such as mutuality, risk spreading and insurability of risks. According to these principles, the insurer makes technical and actuarial calculations in order to classify risks and determine the relevant premium[12].

In sum, the modern insurance technique is based on a complex economic operation aimed at distributing the cost of the losses related to future and uncertain events across members of the same pool. More broadly, the insurer redistributes underwritten risks among the participants of the risk pool, ensuring risk spreading (i.e., the mutualisation of risk). In practice, a single risk is transferred to the insurer and then mutualised by redistributing it among insureds belonging to the same class of expected loss. The class is identified by the homogeneity of the underwritten risks

12 The literature on this topic is extensive. For an overview, see, for example, J. Lowry, P. Rawlings, R. Merkin, *Insurance law: doctrines and principles*, 3rd ed., Bloomsbury, 2011; J. Birds, *Modern Insurance Law*, 11th ed., Sweet & Maxwell, 2019; K.S. Abraham, D. Schwarcz, *Insurance Law and Regulation. Cases and Materials*, 7th ed., Foundation Press, 2020; T. Baker, K.D. Logue, C. Saiman, *Insurance Law and Policy. Cases and Materials*, 5th ed., Wolters Kluwer, 2021. In Italian legal doctrine, see, e.g., G. Volpe Putzolu, *Le assicurazioni. Produzione e distribuzione: problemi giuridici*, Bologna, Il Mulino, 1992 e C.F. Giampaolino, *Le assicurazioni. L'impresa - I contratti,* Torino, Giappichelli, 2013.

and the premium relies on probabilistic elements relating to all underwritten risks of the same type.

For this risk redistribution mechanism to be financially and technically successful, there must be a certain mass and homogeneity of underwritten risks. The risk spreading activity is based on a probability calculation, which determines how many times a risk will occur within the members of the risk pool over a period of time. The greater the number of exposure units, the more accurate the prediction about the actual occurrence of the risk[13]. This calculation allows the insurer to predict quite accurately the cost of adverse events and to distribute the loss in advance among individual members of the same pool, fixing the premium. At the same time, however, the risks to be underwritten must be homogeneous (i.e., having similar values). By grouping risks with similar values, the insurer can identify the average value of losses and determine the amount of the premium.

This complex mechanism, which depicts how the insurance activity operates, is based on the insurer's ability to accurately identify the risk and, consequently, to make accurate predictions about the occurrence of future events and the costs to bear. Therefore, the correct classification of risk and setting of an adequate premium depends on the insurer's ability to collect information related to facts and circumstances pertaining such risk. If the information collected is accurate, the insurer can decide whether and under which terms or conditions to conclude the contract. However, since information regarding the characteristics of the risk is within the knowledge of the prospective insured, the insurer's risk assessment is largely based on information provided by the former.

At the same time, given the difficulty for the insurer to verify the information provided by the prospective insured and the impact of non-disclosure and misrepresentation on the proper functioning of the

13 This is the so-called Bernoulli's Law of Large Numbers according to which the greater the number of observations made, the greater the probability that the future frequency of a risk will be close to the frequency observed in the past for the same event. It follows that it is possible to make a prediction of the future occurrence of insured risks and thus determine the amount of the premium (J. Bernoulli, *Ars Conjectandi*, Basel, 1713). On the distinction between risk and uncertainty, see A.H. Willett, *The Economic Theory of Risk and Insurance*, Columbia Studies, XIV, No. 2, 1901.

insurance mechanism[14], legal systems correct this information asymmetry by introducing a specific protection for insurers. Legal systems belonging to the so-called Western Legal Tradition[15] impose on the insured a general duty to disclose material facts relating to the risk to be underwritten and not to misrepresent circumstances that might influence an insurer's judgement in determining whether and under which terms to accept the risk. When relevant facts or circumstances are either not disclosed or misrepresented by the insured, the insurer is entitled to specific legal remedies, aimed at maintaining the stability of the insurance activity and, ultimately, of the insurance market.

This approach is historically influenced by the origins of insurance which, rooted in marine insurance, functioned to spread maritime risks connected with long-distance seaborne trades. More specifically, given the impracticability of physically inspecting ships and cargo being transported, as well as the lack of rapid means of communication, the insurer calculated risk based on the statements provided by the insured. Indeed, shipowners and merchants were in a better position to know the characteristics of the risk to be underwritten than the insurer, and insurance was only just developing as a professional practice[16].

Nowadays, the insurance market has expanded beyond maritime risks. Indeed, demand for mass risks coverage has increased and it is increasingly common for the insured to be a consumer who adheres to the insurance contract instead of negotiating it. The evolution of the insurance market and the combined effect of all these factors have cast a new light on the issue of information asymmetry between the insurer

14 Asymmetry of information between the insured and the insurer can give rise to the so-called adverse selection. Generally, see: G.A. Akerlof, *The Market for "Lemons". Quality Uncertainty and the Market Mechanism*, in *Quart. Journ. of Econ*., 1970, at 488 ff; C. Wilson, *Adverse Selection*, in *The New Palgrave. A Dictionary of Economics*, Palgrave Macmillan, 1987, at 32 ff; G. Dionne, N. Doherty, *Adverse Selection in Insurance Markets: A Selective Survey*, in G. Dionne (ed.), *Contributions to Insurance Economics*, Springer, Boston-Dordrecht-London, 1992, at 97 ff.

15 A. Gambaro, *Western Legal Tradition*, in P. Newman (ed.), *The New Palgrave Dictionary of Economics and The Law*, Palgrave Macmillan, 1998, at 686.

16 For an extensive analysis, see R. Merkin, *Marine Insurance: A Legal History*, Vol. I&II, Edward Elgar Publishing, 2021. See also F.E. De Roover, *Early Examples of Marine Insurance*, in *The Journal of Economic History*, Vol. 5, Issue 2, 1945, 172-200; A. Donati, *Trattato del diritto delle assicurazioni private*, vol. I, Milano, Giuffrè, 1952, at 53 ff.

and the insured. On one side, insurers usually have detailed knowledge of risks; on the other side, it has become clear that insureds are often unaware of the relevant circumstances for proper risk identification[17].

Hence, insurers have adopted the practice of collecting information through questionnaires (usually attached to the insurance proposal form) that the insured must complete by answering each question fairly and accurately. The purpose of the questionnaire is to identify the elements of the risk to be underwritten so that the insurer may properly classify and assess that risk, as well as determine the adequate premium.

However, the use of the questionnaire has raised the question whether answering questions posed by the insurer fulfils the insured's duty to accurately present the risk. The issue concerns material facts or circumstances known to the insured which are not included in the insurer's questionnaire, as well as the legal relevance of failure to disclose such information. This is the specific issue addressed by Art. 810.

Before analysing the Georgian approach, it seems appropriate to discuss the different disclosure models implemented by other legal systems whereby the insured is required to provide relevant information to the insurer before concluding the insurance contract. Specifically, this concise comparative analysis will consider the experience of the English legal system and the different approach to the same issue developed by the French legal system. The Italian legal system will also be briefly mentioned, since it has long been debated whether the failure to request information in the questionnaire provided by the insurer releases the insured from its obligation to inform the insurer of other known circumstances. Finally, the analysis of the rules codified in the Principles of European Insurance Contract Law (PEICL) will also be discussed, as these Principles are based on extensive comparative studies.

3. The duty of disclosure in the UK

The English legal system has traditionally required the insured to voluntarily disclose, prior to the conclusion of the contract[18], all informa-

17 This change of perspective has also raised the complex issue of transparency in insurance contract law. For more, see S. Nitti, *sub Art. 808-809*, in this Commentary. See also P. Marano, K. Noussia (eds.), *Transparency in Insurance Contract Law*, Springer, 2019.

18 See, e.g., J. Lowry, P. Rawlings, *Insurance Law. Doctrine and Principles*, 2nd ed., Hart Publishing, 2005, at 106; *MacGillivray on Insurance Law*, 14th ed., Sweet&Maxwell, 2018, 478-479.

tion that may influence the insurer's decision and of which the insured was aware at the time of contract[19]. In this perspective, the duty of disclosure applied regardless of any enquiry made by the insurer, since the entire burden of describing relevant facts and circumstances relating to the risk to be underwritten fell on the insured.

This specific duty, which is peculiar to insurance contract law[20], has been codified by the Marine Insurance Act 1906[21] (hereinafter the "1906 Act")[22]. According to the wording of section 17, insurance was a contract based upon the utmost good faith, the breach of which entitled the

19 For a comprehensive introduction to the topic, see, e.g.: S. Park, *The Duty of Disclosure in Insurance Contract Law*, Dartmouth Publ. Comp. Ltd., 1996; J. Lowry, P. Rawlings, *Insurance Law. Doctrine and Principles*, *cit.*; R. Merkin, *Marine Insurance Legislation*, 3rd ed., LLP, 2005; R. Merkin, J. Steele, *Insurance and the Law of Obligations*, Oxford University Press, 2013; McGee, *The Modern Law of Insurance*, 4th ed., LexisNexis, 2018; J. Birds, *Insurance Law in the United Kingdom*, *cit.*; *MacGillivray on Insurance Law*, *cit.*; *Colinvaux's Law of Insurance*, Sweet&Maxwell, 12th, 2019.

20 See, e.g., J. Lowry, P. Rawlings, *Insurance Law. Doctrine and Principles*, *cit.*, 77-78.

21 The Statute (and thus the duty) applies to both marine and non-marine insurance. See *Lindenau v Desborough* (1928) 8 B. & C. 586; *Lambert v Co-operative Insurance Society* [1975] 2 Lloyd's Rep 485; *Pan Atlantic Insurance Co. Ltd. v Pine Top Insurance Co Ltd* [1994] 2 Lloyd's Rep. 427 and *Assicurazioni Generali Spa v Arab Insurance Group* [2003] Lloyd's Rep IR 131.

22 The origins of the duty of disclosure can be traced back to the case of *Carter v Boehm* (1766) 3 Burr 1905 and the opinion of Lord Mansfield, who famously stated that: "Insurance is a contract based upon speculation. The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only; the underwriter trusts to his representation and proceeds upon the confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact, and his believing the contrary". On this subject, see R. Hasson, *The Doctrine of* Uberrima Fides *in Insurance Law. A Critical Evaluation*, (1969) 32 *MLR* 615; H.N. Bennett, *Mapping the Doctrine of Utmost Good Faith in Insurance Law*, [1999] LMCLQ 165; T.J. Schoenbaum, *Key divergences between English and American law of marine insurance: a comparative study*, Cornell Maritime Press, 1999; J. Lowry, *Pre-contractual information duties: the insured's pre-contractual duty of disclosure - convergence across the jurisdictional divide*, *cit.*, at 57 ff.

non-breaching party to avoid the contract[23]. The subsequent sections enforced the principle of good faith through two pre-contractual disclosure duties of the insured. Namely, section 18 set out a duty of disclosure and section 20 established a duty of not to misrepresent[24].

More precisely, section 18(1) required the disclosure of «every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him»[25], before the contract was concluded. According to section 18(2), «[e]very circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk».

The insured was required to disclose all information material to the risk, and thus any facts or circumstances which could influence a prudent insurer's judgement[26] in deciding whether, and for what premium, to accept such risk[27].

This interpretation of both the duty of disclosure and the notion of materiality of facts has also been supported by the *Pan Atlantic* decision[28], in which the court held that a circumstance was material if the prudent insurer would regard it as such, regardless of whether its disclosure would have had any influence on the decision to conclude the contract or its terms[29]. How-

23 Under the 1906 Act as originally enacted, section 17 reads: "A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party".

24 J. Birds, N.J. Hird, *Misrepresentation and Non-disclosure in Insurance Law - Identical Twins or Separate Issues*, in *Modern Law Review,* 1996, at 285; M. Clarke, *Rescission: Inducements and Good Faith*, in CLJ, 2004, at 286.

25 Consumers must thus disclose only material facts known to them. See, e.g., *Joel v Law Union and Crown Insurance* [1908] 2 KB 863; *Economides v Commercial Union Assurance Co plc*, [1997] 3 All ER 636, 647, Simon Brown LJ. On the topic of insured's knowledge, see, e.g., J. Lowry, P. Rawlings, *Insurance Law. Doctrine and Principles*, *cit*., 93-99; J. Birds, *Insurance Law in the United Kingdom*, *cit*., 2018, 80-82; *MacGillivray on Insurance Law*, *cit*., 472-475.

26 The reference is not to the assessment of a specific insurer. See, e.g., J. Lowry, P. Rawlings, *Insurance law. Doctrines and Principles*, *cit*., at 82; *MacGillivray on Insurance Law*, *cit*., at 490 ff.

27 See J. Lowry, *Pre-contractual information duties: the insured's pre-contractual duty of disclosure - convergence across the jurisdictional divide*, *cit*., at 63 and 67.

28 *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co* [1995] 1 AC 501, 528, Lord Mustill.

29 According to this leading case, it is sufficient for the insurer that it would have wanted to be aware of the fact or the circumstance in making the underwriting decision for these facts and circumstances to be deemed as material. See, e.g., J. Birds, *Insurance Law in the United Kingdom*, *cit*., at 80. For more on this topic, see S. Nitti, *sub Art. 808-809*, in this Commentary.

ever, as if to mitigate the onus of this duty, the same court added a subjective requirement (the so-called "inducement requirement"): the insurer's right to avoid the policy depended on its ability to prove that the facts affected its decision as to acceptance of the risk, the premium, or the contract terms[30]. In other words, that the non-disclosure induced the insurer to enter into that contract[31].

In sum, the insured was obliged to disclose any information that was of a certain relevance for the prudent insurer, regardless of any specific enquiry[32], and not to mislead the insurer by misrepresentation[33]. This meant that it was not sufficient to fairly and accurately answer the insurer's questions, since the insured had to disclose all material facts and circumstances, even those which were not specifically addressed by the insurer[34].

According to the 1906 Act as originally enacted, the insurer was entitled to avoid the contract if the insured either failed to disclose material facts or misrepresented them[35]. Hence, the contract was deemed as if it had never been concluded, regardless of the insured's state of mind or the relevance of the breach. Furthermore, since the insurance contract was

30 See *St Paul Fire & Marine Insurance Co (UK) Ltd v. McDonell Dowell Constructors Ltd* [1995] 2 Lloyd's Rep. 116; *Assicurazioni Generali SpA v Arab Insurance Group* [2003] 1 W.L.R. 577. In the latter case, the court concluded that the misrepresentation or non-disclosure must have had a causal effect on the insurer's consent to contract, even if not exclusively. Proof of inducement is on the insurer. See also J. Birds, *Insurance Law in the United Kingdom*, *cit*., at 80; *MacGillivray on Insurance Law*, *cit.*, at 481 ff; J. Lowry, *Pre-contractual information duties: the insured's pre-contractual duty of disclosure - convergence across the jurisdictional divide*, *cit*., at 66.

31 Even if not the sole reason, the non-disclosure was an effective cause of the insurer entering into the contract. In these terms J. Birds, *Insurance Law in the United Kingdom*, *cit*., at 80.

32 See *Glicksman v. Lancashire & General Assurance Society* [1927] AC 139 and *Schoolman v. Hall* [1951] 1 Lloyd's Rep. 139.

33 Regarding misrepresentation, section 20(1) provided that every material representation made by the insured «must be true. If it be untrue the insurer may avoid the contract». The following section 20(2) provided that a representation was material if it «would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk». Therefore, the insured had the duty not to mislead the insurer by misrepresentation of facts or circumstances which were of relevance to a prudent insurer.

34 See J. Birds, *Insurance Law in the United Kingdom*, *cit*., at 79. See also M.A. Clarke, *Policies and Perceptions of Insurance Law in the Twenty-first Century*, Oxford University Press, 2005, at 112.

35 See the 1906 Act, section 20(6). On the use of the term avoidance or termination, see McGee, *The Modern Law of Insurance*, *cit*., at 65.

void from the beginning, the insurer had to return the premium (except in case of fraud[36]) and could refuse to pay any past and future claim. The insured, on the other hand, lost coverage and had to reimburse the insurer for any claims already paid[37].

Moreover, the contract was avoidable at the discretion of the insurer. If the insured disputed the insurer's decision, avoidance had to be confirmed by the court and the insurer had to meet the burden of proof[38].

The remedy was very harsh for the insured. Indeed, it completely deprived the insured of insurance coverage, even in the case of insured's mistake or forgetfulness[39]. Considering also that a breach of duty is often revealed at the time of a claim, the traditional English approach seemed inadequate for the modern insurance market in which the insured could have poor knowledge of how the contract is regulated by law and what facts and circumstances are material. This inadequacy was even more evident when, especially in mass risks, it is the insurer who poses the questions since the insured may believe that only facts and circumstances being asked for are relevant[40].

36 In case of fraudulent disclosure or misrepresentation, the contract was avoidable and the insurer could retain the premium. See the 1906 Act, section 84 (3)(a).

37 *MacGillivray on Insurance Law*, *cit*., at 484 ff.

38 *MacGillivray on Insurance Law*, *cit*., at 480 ff.

39 *MacGillivray on Insurance Law*, *cit*., at 475.

40 According to section 18(3), there were only four cases in which the insured was not obliged to disclose material information. These were: circumstances that the insurer knew or should know; circumstances which it was superfluous to disclose by reason of any express or implied warranty; circumstances that decreased the risk; or circumstances in which the insurer waived its right to information. As concerns circumstances the disclosure of which was waived by the insurer (for more, see e.g. R. Merkin, J. Steele, *Insurance and the Law of Obligations*, *cit*., at 53), in the following cases it may be held that the insurer had released the insured from its disclosure obligation: when the insured had provided information that should have reasonably prompted the insurer to inquire further as to whether other material had been omitted; the insurer had asked specific questions and declined to ask other related questions; the proposal form was designed in such a way as to lead the insured to believe that only information directly solicited was material; the insured gave partial answers and the insurer did not inquire further (see, e.g., M.A. Clarke, *Policies and Perceptions of Insurance Law in the Twenty-first Century*, *cit*., at 112-113; J. Lowry, P. Rawlings, *Insurance Law. Doctrine and Principles*, *cit*., 104-106; J. Birds, *Insurance Law in the United Kingdom*, *cit*., at 79; *MacGillivray on Insurance Law*, *cit*., 518-521). In all these scenarios, case law has progressively broadened the scope of the waiver of the right of information, to protect the insured in situations where the insurer had behaved in such a way as to create a situation of ambiguity. Although the duty to disclose all material facts has traditionally constituted the core of the English insurance law, the practice of providing questionnaires - combined with the reaction by the courts and by the Financial Ombudsman Service to protect the insured - has inevitably prompted insurers to take more rigorous measures in formulating the questions (see, e.g., R. Merkin, J. Steele, *Insurance and the Law of Obligations*, *cit.*, at 53; *Colinvaux's Law of Insurance*, *cit.*, at 414).

The English traditional system based on spontaneous disclosure has been recently revised. One of the driving factors was precisely the growing awareness that the insured (and especially when the insured is also a consumer) does not possess the technical and legal knowledge to understand how insurance activity operates or which facts or circumstances may be relevant for a prudent insurer.

The evolutionary process[41] has had two main legislative outcomes: the Consumer Insurance (Disclosure and Representations) Act 2012 (hereinafter the "2012 Act"), with regard to consumer insurance contracts, and the Insurance Act 2015 (hereinafter the "2015 Act") as regards to business insurance.

The 2012 Act applies when an individual enters into an insurance contract «wholly or mainly for purposes unrelated to the individual's trade, business or profession»[42]. The 2012 Act has significantly modified the previous regulatory framework, including the extent of the insured's pre-contractual duties and the remedies available to the insurer[43].

Specifically, for consumer insurance contracts, the 2012 Act has replaced the duties envisaged by the 1906 Act (i.e., to volunteer information and accurately represent facts) with the single duty to take reasonable care to avoid misrepresentation. According to the 2012 Act, section 2(2), a consumer has the pre-contractual duty only to take reasonable care not to make misrepresentations to the insurer.

The new framework requires the insured to answer the insurer's questions with reasonable care. The consumer is no longer required to disclose material facts; rather, the consumer has a duty not to misrepresent.

41 The model has been gradually redesigned. For an in-depth look at the step-by-step process, see R. Merkin, Ö. Gürses, *The Insurance Act 2015: Rebalancing the Interests of Insurer and Assured*, in MLR, Vol. 78, Issue 6, 2015, 1004-1027; J. Lowry, P. Rawlings, *'That wicked rule, that evil doctrine…': Reforming the Law on Disclosure in Insurance Contracts*, in MLR, Vol. 75, Issue 6, 2012, 1099-1122; J. Birds, *Insurance Law in the United Kingdom*, *cit*., 82-83; *Colinvaux's Law of Insurance*, *cit*., 325-327.

42 It applies to contracts concluded or renewed after 6 April 2013.

43 For an in-depth analysis of the 2012 Act, see *MacGillivray on Insurance Law*, *cit*., ch. 19. See also K. Noussia, *Transparency in the Insurance Contract Law of England*, in P. Marano, K. Noussia (eds.), *Transparency in Insurance Contract Law*, *cit*., at 579 ff.

This means that the insured has a duty to answer questions fairly and accurately[44] and the insurer can only rely on the information provided following explicit questions[45].

According to the 2012 Act, section 3(3), the standard of care required is that of a "reasonable consumer"[46], and compliance with this benchmark must be measured «in the light of all relevant circumstances». To offer guidance, section 3 provides some examples of circumstances that must nevertheless be taken into account in determining whether a breach of duty has occurred[47], including the clarity and specificity of the insurer's questions. Hence, how the insurer asks questions is relevant to the determination of the breach of duty.

According to the 2012 Act, section 4(1)(2), an insurer has a remedy against a consumer where there has been a "qualifying misrepresentation"[48] and the insurer proves that, had it not been for the misrepresentation, it would not have entered into the contract at all or would not have agreed on the same terms. Therefore, the insurer invoking a remedy must

44 According to section 5(2)(b), there is no longer any mention of the so-called prudent insurer. See, e.g., *Colinvaux's Law of Insurance*, *cit*., at 332.

45 J. Lowry, P. Rawlings, *'That wicked rule, that evil doctrine…': Reforming the Law on Disclosure in Insurance Contracts*, *cit.*, at 1110.

46 It is to be presumed that the consumer has the knowledge of a reasonable consumer but, according to the 2012 Act, section 3(4), if the insurer is, or ought to be, aware of any particular characteristics or circumstances of the actual consumer, those are to be taken into account. According to the 2012 Act, section 3(5), if the consumer makes a misrepresentation dishonestly there is always breach of the duty and such misrepresentation is regarded as made without reasonable care.

47 Specifically, the following are mentioned: (a) the type of policy in question and its target market; (b) any relevant explanatory material or publicity produced or authorized by the insurer; (c) how clear and how specific the insurer's questions were; (d) on renewal or variation, how clearly the insurer communicated the importance of answering questions or the possible consequences of failure to answer; and (e) whether or not an agent was acting for the consumer. In addition, account must be taken of any particular characteristics or circumstances of the actual consumer that the insurer knows or ought to know.

48 According to the 2012 Act, section 4(1)(2), the insurer has a remedy against a consumer for a qualifying misrepresentation only if the consumer made the misrepresentation in breach of the duty to take reasonable care not to make a misrepresentation and the insurer shows that, but for the misrepresentation, it would not have entered into the contract at all, or not on those specific terms.

prove that it relied on the misrepresentation of the insured in its determination to contract[49].

According to the new regime, a qualifying misrepresentation can be either deliberate or reckless, and careless[50].

In case of deliberate or reckless misrepresentation[51], Schedule 1 provides that the insurer may avoid the contract, reject any claim, and retain the premium, except when such would be unfair to the consumer[52].

In the case of careless misrepresentation, the insurer is entitled to remedies proportionate to what it would have done had the insured not breached[53]. In cases where the insurer would not have entered into the contract at all, the insurer may avoid the contract and reject any claim, but it must return the premium. However, if the misrepresentation only affected the terms under which the contract would have been concluded, the contract is treated as if it was entered on those terms from the beginning. Hence, if the insurer would have concluded the contract at a higher premium, the insurer may proportionately reduce the claims payout; if the insurer would have entered into the contract on different terms, then the insurer is entitled to rely upon the modified terms. Alternatively, the insurer may terminate the contract. According to the 2012 Act, Schedule 1, para 9(7), if either party terminates the contract, the insurer must re-

49 See, e.g., J. Birds, *Insurance Law in the United Kingdom*, *cit*., at 84; R. Merkin, J. Steele, *Insurance and the Law of Obligations*, *cit*., at 54. See also the report provided by A. Green, answering the questionnaire on disclosure duties for the World Congress of International Insurance Law Association (AIDA) 2018 and available on the AIDA website.

50 According to section 5(2), the misrepresentation is deliberate or reckless if the consumer knew, or did not care, that it was untrue or misleading and knew, or did not care, that the matter to which the misrepresentation related was relevant to the insurer. According to section 5(3), the misrepresentation is careless if not made reasonably in accordance with section 2. For more on this topic, see, e.g., see Y. Quiang Han, *Pre-contractual Duties in the UK Insurance Law after 2015: Old (or New?) Wine in New Bottles?*, in Y. Qiang Han, G. Pynt (eds.), *Carter v Boehm and Pre-Contractual Duties in Insurance Law. A Global Perspective after 250 Years*, Hart Publishing, 2018, at 153 ff.

51 According to the 2012 Act, section 5(4), the insurer has to show that a misrepresentation was deliberate or reckless. However, it is supported by two statutory presumptions under section 5(5): the consumer is presumed to have the knowledge of a reasonable consumer and to know that something about which the insurer asked a clear and specific question was relevant to the insurer.

52 2012 Act, Schedule 1, para 2.

53 2012 Act, Schedule 1, paras 3 ff.

fund any premium paid for the terminated cover in respect of the balance of the contract term[54].

If the misrepresentation is reasonable, the insurer has no remedy[55].

Making the insurer responsible for the risk description with inquiries playing a primary role in the risk assessment process, implies a significant shift from the duty to volunteer information to the duty to answer questions. As such, under this new regulatory framework, queries by the insurer are relevant, the consumer is required to answer the questions, and the remedies are designed to better balance the parties' positions. Any other material fact that is known to the insured is irrelevant and is not required to be disclosed.

The subsequent Insurance Act 2015 introduced changes to the law applicable to non-consumer insurance contracts. That is, contracts that do not fall within the definition and scope of the 2012 Act[56].

Formally, the 2015 Act amended the 1906 Act. Section 14 amended 1906 Act, section 17, which currently reads: «A contract of marine insurance is a contract based upon the utmost good faith»[57]. Additionally, section 21(2) repeals sections 18-20 of the 1906 Act, replacing the duty of disclosure and the duty of not misrepresenting with the single duty of fair presentation of the risk[58].

Substantially, according to the 2015 Act, section 3, before entering into an insurance contract, insureds are required to disclose every material circumstance which they know, or ought to know, that would influence the insurer's judgement in deciding whether to underwrite the risk and on what terms[59]. In other words, the duty of fair presentation implies

54 For an in-depth analysis, see *MacGillivray on Insurance Law*, *cit*., at 577 ff; *Colinvaux's Law of Insurance*, *cit*., at 332 ff.

55 See, e.g., J. Birds, *Insurance Law in the United Kingdom*, *cit*., at 84.

56 It applies to contracts concluded or renewed after 12 August 2016. See J. Lowry, P. Rawlings, *'That wicked rule, that evil doctrine…': Reforming the Law on Disclosure in Insurance Contracts*, *cit*., at 1121.

57 According to the Insurance Act 2015 Explanatory Notes, §116, "good faith will remain an interpretative principle, with section 17 of the 1906 Act and the common law continuing to provide that insurance contracts are contracts of good faith".

58 For an in-depth analysis of the 2015 Act, see *MacGillivray on Insurance Law*, *cit*., ch. 20.

59 According to section 3(5), it is reiterated that, in the absence of enquiry, it is not required to the insured to disclose a circumstance if it diminishes the risk, the insurer knows it, the insurer ought to know it, the insurer is presumed to know it, or it is something as to which the insurer waives information.

that the insured is required to disclose not only all information, facts, and circumstances which are both known to the insured and material to the risk[60] but also any information that the insured ought to know, including information that would have been revealed by a "reasonable search"[61]. However, the new Statute adds that the insured may give the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries about potentially material circumstances.

Hence, the duty of fair presentation does not differ substantially from the traditional duty of disclosure; they both require the insured to disclose material facts or information. The innovative aspect of the duty of fair presentation lies in its potential to mitigate the burden of the broad disclosure requirement by requiring the insurer to probe further when the information provided by the insured should have prompted the insurer to follow up with additional questions to reveal other material circumstances. In such cases, even if the insured has failed to disclose a material fact, the duty of fair presentation is deemed to be met. Even in case of non-consumer contracts, when it comes to selecting material facts, this adjustment leads to a shift of the burden from the insured to the insurer[62].

Such easing of the disclosure burden of the insured is accompanied by a gradation of the remedies, which are proportionate to the breach of the duty of fair representation, overcoming the previous regime under the 1906 Act whereby the insurer could avoid the contract in any event.

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60 2015 Act, section 7 provides three examples of material circumstances: special or unusual facts relating to the risk; any particular concerns which led the assured to seek insurance cover for the risk; and anything which those concerned with the class of insurance and field of activity in question would generally understand as being something that should be dealt with in a fair presentation of risks of the type in question.

61 *MacGillivray on Insurance Law*, *cit*., at 596 ff; *Colinvaux's Law of Insurance*, *cit*., at 344 ff. What an insured knows or ought to know is defined by 2015 Act, section 4.

62 See Insurance Bill Explanatory note. The duty of fair representation, §14: "The Bill updates and replaces the existing duty on non-consumer policyholders to disclose risk information to insurers before entering into an insurance contract. It redefines its boundaries under the banner of the "duty of fair presentation", requiring policyholders to undertake a reasonable search of information available to them, and defining what a policyholder knows or ought to know. The Bill also requires insurers to play a more active role, asking questions in some circumstances. Importantly, the Bill introduces a new system of proportionate remedies where the duty has been breached. This replaces the existing single remedy of avoidance of the contract, except where the policyholder has breached the duty deliberately or recklessly".

Under section 8 and Schedule 1, if the breach is a "qualifying breach"[63], then avoidance remains available where the insurers can prove that the qualifying breach was deliberate or reckless. In this case, the insurer is entitled to avoid the contract, reject any claim and retain the premium[64].

Similar to what is provided under the 2012 Act, the new framework envisages a range of outcomes where the qualifying breach was neither deliberate nor reckless (i.e., it was negligent or innocent).

If the insurer can prove it would not have concluded the contract had a fair presentation of the risk been made, the insurer can still avoid the contract and refuse any claim, but it must return the premium[65]. If the insurer would have concluded the contract on different terms, then those different terms will be held to apply, and the claim will be adjusted accordingly[66]. Finally, if the insurer would have entered into the contract but charged a higher premium, the amount paid on a claim may be reduced proportionately[67].

In sum, the insured must make a fair presentation of the risk to the insurer before the contract is concluded. This may be done either by disclosing every material circumstance which the insured knows or ought to know, or by making a disclosure that gives the insurer sufficient information to put a prudent insurer on notice of the need to make further enquiries[68].

With specific reference to the use of questionnaires in the proposal, it seems that the description of the risk is still a general duty of the insured and therefore any omission of information can be considered potentially relevant with regard to the duty of fair presentation. As all material circumstances should be disclosed to the insurer regardless of a specific

63 According to the 2015 Act, section 8(1), the insurer has a remedy against the insured for a breach of the duty of fair presentation only if the insurer shows that, but for the breach, it would not have entered into the insurance contract at all, or not on those specific terms.

64 2015 Act, Schedule 1, para 2.

65 2015 Act, Schedule 1, para 4.

66 2015 Act, Schedule 1, paras 3-6.

67 J. Birds, *Insurance Law in the United Kingdom*, 4th ed., Wolters Kluwer, 2018, at 86.

68 According to section 3(3)(b), the disclosure must be made in a manner that would be reasonably clear and accessible to a prudent insurer, making a correct representation of facts, so that it would be easily understood by a prudent insurer. Then, according to section 3(3)(c), material representations of fact must be substantially correct and material representations of expectation or belief must be made in good faith.

request by the insurer, the duty to make a fair presentation is not limited by answering only those questions raised by the insurer. Hence, the fact that specific questions have been asked for does not necessarily relieve the insured from the duty to disclose any other material fact.

However, the insurer should pay particular attention to the wording and the structure of the questionnaire, as this duty is mitigated by the fact that disclosure of every material circumstance is not required where the insured gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing other material circumstances. Furthermore, the insured must not be made to believe that the insurer is not interested in receiving information about some fact or circumstances[69].

4. The role of questionnaires in the French system

Also in the French legal system the presentation of risk was based traditionally on the duty to disclose information at the insured's initiative, as the insured was required to provide a full description of any relevant circumstance related to the risk to be underwritten[70].

The previous version of Art. L113-2[71] of the French Insurance Code stated that insureds were obliged to disclose accurately, before the contract was concluded, all circumstances known to them which were relevant for the insurer's assessment of the risk to be underwritten[72].

As in the English system, in the French system this approach has been justified mainly because of the issues arising from the information asymmetry between insurer and insured, given that the insured had better knowledge of the characteristics related to the risk to be underwritten, and thus of the circumstances that may affect the occurrences of the insured event[73]. For this reason, insureds had the duty to provide an ac-

69 Section 3(5) of the 2015 Act reaffirms the waiver of information principle.

70 The so-called *déclarations spontanée*.

71 Art. L113-2 French Insurance Code (previous version): "*L'assuré est obligé: […]; 2° De déclarer exactement lors de la conclusion du contrat toutes les circonstances connues de lui qui sont de nature à faire apprécier par l'assureur les risques qu'il prend à sa charge*".

72 See, e.g., B. Beignier, *Droit des assurance*, 2 éd., LGDJ, 2015, at 217 ff.

73 See J. Kullmann, *Le relations entre assureur et assure en droit français*, in *La protection de la partie faible dans les relations contractuelles, Comparaisons franco-belges*, LGDJ, 1996, 349-388.

curate description of the risk, regardless of any questions posed by the insurer[74]. Although questionnaires to collect relevant information were often used in practice, the French Court of Cassation confirmed that the questionnaire's purpose was only to draw the insured's attention to some material facts and circumstances of the risk[75].

Ahead of other legal systems, France had to face criticisms for the fact that, in modern insurance and specifically in mass risks insurance, the insured was not always able to select which circumstances of the risk were relevant for a correct assessment of the risk. Consequently, over the last thirty years, the French model has changed its approach from a system of spontaneous declarations to an opposite system based on the insured's duty to answer the insurer's questions[76].

Specifically, Art. 10 of Law No. 89-1014 of 31 December 1989 modified the rules related to description of the risk such that it is now the insurer who has the duty to guide the insured in order to disclose any material element relevant to the assessment of the risk[77]. Therefore, before the conclusion of the contract, the insured must truthfully and accurately answer questions raised by the insurer. As a result of this new system, the insured's failure to describe any fact or circumstance not mentioned in a question is irrelevant[78].

74 The roots of the insured's precontractual informational duty lie in the principle of good faith. For more, see See S. Leroy, *Pre-contractual Duties under the French Insurance Law*, in Y. Qiang Han, G. Pynt (eds.), *Carter v Boehm and Pre-Contractual Duties in Insurance Law. A Global Perspective after 250 Years*, *cit*., at 230-233.

75 Court of Cassation, Civ., 1st Chamber, 3 December 1974, n° 73-12.610.

76 However, it should be noted that this system of spontaneous declaration continues to apply in marine insurance. See Art. L172-2 of the French Insurance Code.

77 The so-called *declaration guidée*. See, e.g., Y. Lambert-Faivre, L. Leveneur, *Droit des assurances*, Dalloz, 14 éd, 2017, at 281.

78 For an overview on this topic, see H. Groutel, *Le contrat d'assurance*, 2 éd. Dalloz, 1997, 77-87; H. Groutel, *Droit des assurances*, Dalloz, Mémento, 12 éd., 2011; M. Chagny, L. Perdrix, *Droit des Assurances*, 2 éd. LGDJ, 2013, 145-154; J. Bigot (dir.), *Traité de droit des assurances*, t. 3, *Le contrat d'assurance*, 2 éd., LGDJ, 2014, 593-681; B. Beignier, *Droit des assurances*, *cit*., 215-270; Y. Lambert-Faivre, L. Leveneur, *Droit des assurances*, *cit*., 277-302.

Under the current version of Art. L113-2 of the French Insurance Code[79], at the time of the conclusion of the contract[80], the insured must truthfully and accurately answer questions raised by the insurer on circumstances that enable the insurer to assess the risks to be underwritten[81]. Hence, the perimeter of the insured's obligation is delimited by the questions raised by the insurer[82]. The insured is not obliged to spontaneously provide statements on circumstances about which the insurer has not asked questions[83]. The insured may still provide the insurer with additional information, even if not required, in which case the insured is obliged to give true information[84].

Typically, the insurer provides the insured with a questionnaire and, according to the so-called "closed questions" model[85], the insured only has the duty to truthfully and accurately answer precise questions. The questionnaire allows the insured to describe the risk by following the path outlined by the insurer. This means that, if a question is not asked, any reticence or omission of information is considered irrelevant[86].

It should be noted that Art. L113-2 of the French Insurance Code does not appear to require the insurer to provide a written question-

79 Art. L113-2 French Insurance Code (current version): "*L'assuré est obligé: […]; 2° De répondre exactement aux questions posées par l'assureur, notamment dans le formulaire de déclaration du risque par lequel l'assureur l'interroge lors de la conclusion du contrat, sur les circonstances qui sont de nature à faire apprécier par l'assureur les risques qu'il prend en charge*". An English translation of part of the French Insurance Code is available on the website of the International Insurance Law Association at: http://www.aida.org.uk/pdf/French%20Insurance%20Code%202004.pdf.

80 This obligation of the insured to describe the risk by providing answers to the insurer lasts until the formal conclusion of the contract, so that the insured, even after answering the questions, is obliged to disclose to the insurer any new circumstances that may aggravate the risk or give rise to new ones, since they may affect the assessment of the risk. See, e.g., Court of Cassation, Civ., 2nd Chamber, 24 November 2011, n° 10-27119.

81 It should be noted that, in the previous version, the reference was to material circumstances known to the insured. In the current version, the reference is only to material circumstances. On this point, see H. Groutel, *Le contrat d'assurance*, *cit*., 81-82; J. Kullmann, *La declaration de risqué*, in J. Bigot (dir.), *Traité de droit des assurances*, *cit.*, at 599 ff; *Lamy Assurances*, Wolters Kluwers, 2017, §299.

82 See M. Chagny, L. Perdrix, *Droit des Assurances*, *cit*., at 147.

83 See, e.g., Court of Cassation, 3 July 2014, n° 13-1870, in RCA 2014.352, with comment of Groutel. See also B. Beignier, *Droit des assurances*, *cit*., at 229.

84 B. Beignier, *ibidem*, at 222-223; see also, e.g., Court of Cassation, 4 February 2016, n° 15-13.850.

85 The *questionnaire fermé*.

86 See S. Leroy, *Pre-contractual Duties under the French Insurance Law*, *cit*., at 235.

naire[87]. However, if the insurer chooses to collect information by means of a written questionnaire, then the questionnaire must contain precise questions[88]. According to Art. 112-3(4) of the French Insurance Code, where the insurer has asked questions in writing to the insured before the conclusion of the contract, the insurer may not rely on the fact that a general question has been answered imprecisely[89]. If a questionnaire includes unclear questions, the questionnaire is deemed to be incomplete and the insurer cannot take advantage of the fact that a general question was inaccurately answered[90].

As regards proof, the insurer must prove that, had the insured correctly answered the questions[91], the insurer would not have entered into the contract at all or would have done so but under different terms[92]. The reason lies in having influenced the identification of the risk and having prevented the insurer from correctly assessing the same[93].

Articles L113-8 and L113-9 govern the legal consequences of the breach of the duty to accurately answer the insurer's questions[94]. Specifically, the French Insurance Code distinguishes between cases in which the disclosure duty was breached with or without fault[95].

87 On this point, opinions are divergent across case law and legal doctrine. For more, see B. Beignier, *Droit des assurances*, *cit.*, at 220-221. It is easier for the insurer to satisfy the burden of proof by providing a written questionnaire.

88 See, e.g., Court of Cassation, Civ., 2nd Chamber, 29 June 2017, n° 16-18.975.

89 See, e.g., Court of Cassation, Civ., 2nd Chamber, 8 March 2018, n° 17-11767, in RGDA 2018.245, with the comment of Asselain.

90 For more, see B. Beignier, *Droit des assurances*, *cit*., at 229-230.

91 It should be noted that a debate has developed in the French case law concerning the so-called pre-drafted statements which are prepared by the insurer in order to express in writing data that the insured is supposed to have provided to the insurer as a result of questions. These pre-drafted statements end with a standard formulation in which the insured signs a statement that the information contained therein is accurate. For a detailed analysis of this topic, see S. Leroy, *Pre-contractual Duties under the French Insurance Law*, *cit*., at 240-246. See also B. Beignier, *Droit des assurances*, *cit*., at 224-228; J. Kullmann, *La declaration de risqué*, *cit.*, at 614 ff; *Lamy Assurances*, *cit.*, §335; M.-O. Barbaud, *La prevue de la fausse declaration d'assurance*, in *RCA*, 2016, Etude 9.

92 On this point, see J. Kullmann, *La declaration de risqué*, *cit*., at 609 ff.

93 Thus, their relevance is independent from the occurrence of a claim. See, e.g., *Lamy Assurances*, *cit*., §309 and CA Metz, 1st civ., 11 June 2019, n° 18-00814.

94 The insurer may waive its right to remedies, either implicitly by unambiguous conduct (see, e.g., Court of Cassation, Civ., 2nd chamber, 3 October 2019, n° 18-19916) or explicitly, for example by including in the contract a so-called "incontestability clause" under which the insurer waives in advance its right to remedies in case of inaccuracies if the breach of the duty to disclosure is without fault. See, e.g., Y. Lambert-Faivre, L. Leveneur, *Droit des assurances*, *cit*., at 301.

95 See, e.g., M. Chagny, L. Perdrix, *Droit des Assurances*, *cit*., 149-154 and Y. Lambert-Faivre, L. Leveneur, *Droit des assurances*, *cit.*, 290-298.

According to Art. L113-8, the contract is null and void[96] when the insured has intentionally omitted or misrepresented circumstances that influenced the identification of the risk. Avoidance has retrospective effects: the insurer may reject any claims, demand repayment of the compensation already made, retain collected premiums and obtain payment of the premium due[97].

The insurer must seize the court and prove the subjective element (i.e., the insured's intent), as mere inaccuracy does not automatically constitute proof of intentional failure to disclose or misrepresent[98]. The insurer must also demonstrate that questions were posed and prove their accuracy. The judge will assess the existence of the subjective element and will consider any ambiguity in relation to the formulation of the questions in favor of the insured[99].

Omissions and misrepresentation may be unintentional and in good faith. In these cases, Art. L113-9 of the French Insurance Code provides several remedies, further distinguishing between whether the mistake is revealed before or after the claim. In any case, avoidance of the contract is excluded.

If the misrepresentation or omission is revealed prior to a claim, the insurer may terminate (*résilier*) the contract ten days after notifying the insured by registered letter. The insurer refunds the part of the premium already paid for the remaining contract period. However, the insurer may also offer to maintain the contract subject to the payment of an increased amount of premium (which the insured may refuse). If the insured refuses to pay the increased premium, the contract is terminated.

On the other hand, if the misrepresentation or omission is discovered after a claim has occurred, the claims payout is reduced in relation to the premium that the insured should have paid[100]. The insurer may request the contract be terminated[101].

96 The remedy is *nullité*. For more on these topics, see S. Leroy, *Pre-contractual Duties under the French Insurance Law*, *cit*., at 236 ff. and the report provided by J. Kullmann, answering the questionnaire on disclosure duties for the World Congress of International Insurance Law Association (AIDA) 2018 and available on the AIDA website.

97 See B. Beignier, *Droit des assurances*, *cit.*, at 259 ff and Y. Lambert-Faivre, L. Leveneur, *Droit des assurances*, *cit*., at 295.

98 Assuming good faith, according to Art. L2274 of the French Civil Code.

99 Y. Lambert-Faivre, L. Leveneur, *Droit des assurances*, *cit*., at 292; *Lamy Assurances*, *cit*., §398.

100 The so-called "*règle proportionelle de prime*". It should be noted that this rule applies even if the misrepresentation or omission had no influence on the occurrence of the claim, because the misrepresentation or the omission have had an influence on the insurer's consent and it is the technical balance that must be restored. See Y. Lambert-Faivre, L. Leveneur, *Droit des assurances*, *cit.*, at 297.

101 *Ibidem*, at 298: the insurer may choose the *résiliation*.

5. Remedies for the breach of disclosure obligations in the Italian system

The Italian legal system addresses the issue of the presentation of risk by regulating remedies. The Italian Civil Code contains two specific provisions, Art. 1892 and Art. 1893, which govern the consequences in case of breach of duty to provide pre-contractual information[102]. These provisions apply where the information provided by the insured[103], before the conclusion of the contract and in relation to circumstances that are material to the risk to be underwritten, is inaccurate or incomplete[104]. The Italian Civil Code distinguishes between cases where the insured has act-

102 On this topic, see D. Cerini, *Insurance Law in Italy*, 2nd ed., Wolters Kluwer, 2019, ch. 10.

103 The rule literally refers to the policyholder. On the terminological choice applied in this Comment, see above §1 and footnote n. 6.

104 The topic has been extensively investigated. In Italian legal doctrine, see, e.g.: G. Tedeschi, *"Misrepresentation" e "non disclosure" nel diritto assicurativo italiano*, in *Riv. dir. civ*., 1958, I, 479 ff; G. Visintini, *La reticenza nel contratto di assicurazione*, in *Riv. dir. civ*., 1971, 423-458; M. Bin, *Informazione e contratto di assicurazione*, in *Riv. trim. dir. proc. civ*., 1993, 727-737; G.B. Gallus, *Il* duty of utmost good faith: *sviluppi della giurisprudenza anglosassone e breve analisi comparativa*, in *Dir. trasp*., 1996, 393; R. Dies, *Ancora in tema di annullamento o recesso dal contratto di assicurazione per dichiarazioni inesatte o reticenze del contraente (artt. 1892 e 1893 c.c.)*, in *Resp. civ. prev.*, 1998, 6, 1540-1549; A. Boglione, *"Non disclosure" e "misrepresentation" in assicurazione e riassicurazione*, in *Il dir. maritt*., 2000, 1, 33-63; C. Menichino, *Reticenze ed informazioni precontrattuali nel contratto di assicurazione*, in *I Contratti*, 2001, 10, 872-881; A. Cea, *Questionario anamnestico, dichiarazioni inesatte e reticenze dell'assicurato*, in *Nuova giur. civ. comm*., 2002, at 251 ff; C. Cavaliere, *Le dichiarazioni inesatte e reticenti nel contratto di assicurazione: il quadro italiano (con radici inglesi)*, in *Contr. impr. Europa*, 2004, 1, 315-360; L. Bugiolacchi, *Dichiarazioni inesatte e reticenti: obblighi informativi dell'assicurato e correttezza dell'assicuratore*, in *Resp. civ. prev*., 2006, 659-676; F. Parola, *Dichiarazioni false o reticenti dell'assicurato e annullamento o recesso del contratto di assicurazione*, in *Obblig. contr*., 2008, at 133 ff; L. Bugiolacchi, Disclosure *dell'assicurato e cooperazione dell'assicuratore nella determinazione dell'informazione rilevante*, in *Resp. civ. prev*., 2009, 7-8, 1598-1615; F. Ceserani, *Rappresentazione del rischio, asimmetria informativa ed uberrima fides: diritto italiano e diritto inglese a confronto*, in *Diritto ed economia dell'assicurazione*, 2009, 1, 151-229; S. Nitti, Duty of disclosure *nel contratto di assicurazione. Analisi comparata tra sistema italiano e sistema inglese*, in *Diritto ed economia dell'assicurazione*, 2010, 3, 527-603; S. Landini, *Reticenze dell'assicurato e annullabilità del contratto*, in *Resp. civ. prev.*, 2011, 3, 629-636; V. Sangiovanni, *Dichiarazioni inesatte, reticenze e annullamento del contratto di assicurazione*, in *Assicurazioni*, 2011, 2, 275-298; V. De Lorenzi, *Contratto di assicurazione e dichiarazioni inesatte e reticenti sul rischio dell'assicurato*, in *Assicurazioni*, 2014, 2, 195-219.

ed with fraud or gross negligence (Art. 1892)[105] and those where there is no fraud or gross negligence (Art. 1893)[106].

In case of fraud or gross negligence, the insurer is entitled to seek in court the remedy provided for by Art. 1892 of the Civil Code (that is the annulment of the contract) when the insurer would not have concluded the contract (at all or under the same terms) had it not been for the insured's inaccurate statements or omissions. Inaccurate or reticent statements must be material in the sense of having affected the insurer's decision[107]. This means that, had the insurer been aware of the fact[108], the

105 Art. 1892 (Misrepresentations or fraudulent or grossly negligent failure to disclose). 1. If the contracting party, fraudulently or through gross negligence, misrepresents or fails to disclose circumstances which, if known to the insurer, would have caused him to withhold his consent to the contract, or to withhold his consent on the same conditions, the insurer can annul the contract. 2. The insurer forfeits his right to attack the contract if, within three months from the day on which he had knowledge of the falsity of the representation or of failure to disclose, he fails to notify the contracting party of his intention to attack the contract. 3. The insurer is entitled to the premiums covering the period of insurance running at the time when he petitioned for annulment of the contract, and in all cases to the premiums agreed upon the for the first year. If the accident occurs before the expiration of the period indicated in the preceding paragraph, the insurer is not bound to pay the amount of the insurance. 4. If the insurance concerns more than one person or thing, the contract is valid with respect to such persons or such things as are not affected by the misrepresentation or the failure to disclose.

This translation is provided in *The Italian Civil Code*, translated by M. Beltramo, G.E. Longo, J.H. Merryman, Dobbs Ferry, N.Y., Oceana Publications, 1969.

106 Art. 1893 (False representation or withholding of information without fraud or gross negligence). 1. If the contracting party has acted without fraud or gross negligence, misrepresentations or failure to disclose are not grounds for annulment of the contract, but the insurer can withdraw from the contract by means of a declaration to be made to the insured within three months from the day on which the insurer had knowledge of the falsity of the misrepresentation or of the failure to disclose. 2. If the accident occurs before the insurer has knowledge of the falsity of the representation or of the failure to disclose, or before he has notified the insured of his intention to withdraw from the contract, the amount due by him is reduced in proportion to the difference between the premium agreed upon and the premium which would have applied if the true situation had been known.

This translation is provided in *The Italian Civil Code*, translated by M. Beltramo, G.E. Longo, J.H. Merryman, Dobbs Ferry, N.Y., Oceana Publications, 1969.

107 The benchmark for assessing materiality is that of a prudent insurer.

108 This check is required even when the contract proposal is accompanied by a questionnaire specifying that any information requested is to be deemed as material. See *infra* footnote n. 116.

insurer would not have concluded the contract at all or would have done so but on different terms[109].

Hence, the insurer is entitled to request the annulment of the contract only if it proves that, had it been aware of the circumstances, it would have made a different decision concerning the contract. The insurer must also prove that the insured knew or should have known of such circumstances and that either deliberately or with gross negligence concealed them from the insurer[110]. Based on these elements, the judge will decide on the insurer's request for annulment of the contract[111].

According to Art. 1892 of the Civil Code, the insurer is entitled to the premium covering the period of insurance in effect at the time of the request for annulment and, in any case, to the premium agreed for the first year. If the claim occurs before the expiry of that period, the insurer is not obliged to pay any claim. The rationale behind this provision is to penalize the insured who has made inaccurate or reticent statements, and favour the insurer who has concluded the contract on terms not consistent with the underwritten risk.

On the other hand, under Art. 1893 of the Civil Code, if the insured has acted without fraud or gross negligence, inaccurate statements or omissions entitles the insurer to unilaterally terminate the contract by notifying the insured of such termination within three months from the day on which the insurer became aware of the inaccuracy of the state-

109 Among others, see Court of Cassation, 17 December 2004, n. 23504; Court of Cassation, 19 January 2001, n. 784; Court of Cassation, 12 May 1999, n. 4682.

110 If the insurer's decision has not been affected, even in case of inaccuracy of the statement or reticence, the contract cannot be annulled. See, e.g., Court of Cassation, 25 May 1994, n. 5115. For a quick overview of remedies in contract law in the Italian legal system, see M.S. Cenini, R.E. Cerchia, *Cases and Materials on Italian Private Law*, Milano, Giuffrè, 2016, 84-93.

111 According to the case law, three conditions should be simultaneously verified: the insured's presentation of the risk is inaccurate or reticent; the misrepresentation or the failure to disclose has been made with fraud or gross negligence; the reticence or inaccuracy has been decisive in the formation of the insurer's consent to conclude the contract. For some time now, case law has been consistent on this point. See, e.g., Court of Cassation, 1994, n. 5115 and Court of Cassation, 29 March 2006, n. 7245. See also, e.g., Court of Cassation, 21 July 2006, n. 16769; Court of Cassation, 30 November 2011, n. 25582; Court of Cassation, 31 July 2015, n. 16284; Court of Cassation, 5 October 2018, n.24563. In this latter decision, the Italian Supreme Court reaffirmed that trial judges must consider, in the overall assessment, the presence of the questionnaire and the insured's behaviour in completing the answers.

ment or the reticence. If the claim occurs before the insurer becomes aware of the inaccuracy of the statement or the reticence, or before the term of notification expires, the amount shall be reduced in proportion to the difference between the agreed premium and the premium that would have been applied if the true circumstances had been known.

According to the discipline set out in the Civil Code[112], the Italian system has opted for the duty of spontaneous disclosure model. The insured is required to make an accurate description of the risk, identifying all the relevant facts and circumstances for assessing the risk. Therefore, completing a questionnaire is not sufficient to fulfil the duty of disclosure.

However, from the perspective of the law in action[113], the framework becomes more complex. Since the insured may not be able to select which elements of the risk are relevant, national courts have attempted to ease the duty of disclosure by intervening on the burden of proof[114]. According to case law, if the insurer has raised specific questions about the circumstances of the risk by means of a questionnaire, the insurer's failure to include certain aspects in the questions implies that such information is presumed to be irrelevant to the insurer's decision and the insured cannot be held to have been reticent[115]. The insurer must prove that facts and circumstances not included in the questions are material to the assessment of the risk and that the reticence has affected the con-

112 Pursuant to Art. 1932 of the Civil Code, the discipline set out in Articles 1892 and 1893 of the Italian Civil Code is mandatory unless the modification is more favourable to the insured. On this point, see B. Farsaci, *Spunti di riflessione sulla tutela codicistica dell'assicurato-contraente debole, con particolare riferimento all'applicazione dell'art. 1932 c.c.,* in *Ass.*, 2004, at 115. Art. 1932 (Mandatory rules) reads: "1. The provisions of Articles 1887, 1892, 1893, 1894, 1897, 1898, 1899, second paragraph, 1901, 1903, second paragraph, 1914, second paragraph, 1915, second paragraph, 1917, third and fourth paragraphs, and 1926 cannot be varied, except in ways which are more favorable to the insured. 2. The corresponding provisions of the law are substituted for clauses which deviate in ways which are less favorable to the insured". This translation is provided in *The Italian Civil Code*, translated by M. Beltramo, G.E. Longo, J.H. Merryman, Dobbs Ferry, N.Y., Oceana Publications, 1969.

113 For a classic introduction to this topic, see R. Pound, *Law in Books and Law in Action*, in *Am. L. Rev*., 1910, vol. 44, Issue 1, at 12.

114 For a brief overview on this topic, see D. Cerini, *Insurance Law in Italy*, *cit*., at 89.

115 See, e.g., Court of Cassation, 4 March 2003, n. 3165 and Court of Cassation, 24 November 2003, n. 17840.

tract[116]. In other words, the questionnaire does not relieve the insured of the duty to disclose, but it does allow for a reversal of the burden of proof on the insurer as to the relevance of the omitted circumstances[117].

Case law has also required the insurer to provide a clear picture of circumstances it intends to know, so as to adequately reduce uncertainty about material facts. Consequently, if the insurer formulates ambiguous questions[118], any doubts as to the relevance of the material circumstances should fall on the insurer[119]. Therefore, questions included in a questionnaire should not be general, incomplete or poorly formulated[120]. Thus, the insured's discretion on how to answer generic questions should be circumscribed and ambiguities avoided[121].

Despite the adjustments introduced by case law, the Italian system remains rooted in the duty of spontaneous disclosure. A rule such as that provided by the Georgian Civil Code would certainly be helpful in preventing misunderstandings about the scope of the duty of disclosure, since the issue about the relevance of non-disclosure of material circumstances not included in the questionnaire has not been completely settled.

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116 It should be noted that, according to the prevailing case law, inclusion of some circumstances in a questionnaire does not automatically make those circumstances material to the representation of the risk, since it is necessary that those circumstances exercise a concrete influence on the assessment of the risk. For this reason, the insurer must prove that inaccurate or reticent statements are material, since the fact that such circumstances are contained in the questionnaire is not sufficient to prove their relevance. See, e.g., Court of Cassation, 4 April 1991, n. 3501; Court of Cassation, 12 October 1998, n. 10086; Court of Cassation, 12 May 1999, n. 4682; Court of Cassation, 19 January 2001, n. 784. In its decision of the 4th of August 2017, n. 19520, the Court of Cassation confirmed that the inaccurate representation of the risk must have an influence on the insurer's consent, but not on the claim that occurred subsequently. See also Court of Cassation, 11 June 2010, n. 14069 and Court of Cassation, 31 July 2015, n. 16284.

117 See D. Cerini, *Insurance Law in Italy*, *cit*., at 89.

118 On the topic of ambiguities in insurance contract language, see A. Monti, *Buona fede e assicurazione*, Giuffrè, Milano, 2002, at 20 ff.

119 See Court of Cassation, 20 November 1990, n. 11206. See, e.g., also Court of Cassation, 5 October 2018, n. 24563. On this topic, see L. Bugiolacchi, *Disclosure dell'assicurato e cooperazione dell'assicuratore nella determinazione dell'informazione rilevante, cit.,* 1598-1615.

120 Among judgements on merits, see, e.g., Trib. Torino, 17 giugno 1995; Trib. Caltanissetta, 21 March 2016, n. 155. See also Trib. Torino, 17 May 2019, n. 2365, in which the judge affirmed that intention and gross negligence, required by Article 1892 of the Italian Civil Code, are not met where the insurer does not prepare an appropriate and specific questionnaire to make the insureds aware of the consequences of their statements.

121 See again, e.g., Court of Cassation, 17 November 2018, n. 24563.

6. Rules adopted by the PEICL

Although this brief overview on how some legal systems in Europe deal with the issue of pre-contractual disclosures made by the insured is not exhaustive, it helps to identify the two main models (i.e., the questionnaire model and spontaneous pre-contractual disclosure) used to present risk[122]. It follows, then, that these two models may give rise to other variants, which contribute to the complexity of the European framework and make it far from being harmonised[123]. These more or less marked differences between national regulations contribute to erecting barriers within the European single market[124] and require insurers to adapt their products to the legal requirements of national markets, with an overall increase in costs[125].

Despite being based on contractual models designed through a process that is technical and that makes them universal, insurance policies are in any event negotiated on a national basis. Indeed, it is precisely this

122 For a broader overview, see, e.g., J. Basedow, J. Birds, M.A. Clarke, H. Cousy, H. Heiss, L.D. Loacker (eds.), *Principles of European Insurance Contract Law (PEICL)*, (PEICL 2016), 2nd ed. (Otto Schmidt, 2016), at 106-108. For brief notes, see M. Ostrowska, *Transparency in the Insurance Contract Law: A Comparative Analysis between the Principles of European Contract Law (PEICL) and Selected European Legal Regimes*, in P. Marano, K. Noussia (eds.), *Transparency in Insurance Contract Law*, *cit*., 287-288.

123 See, e.g., J. Kullmann, *La déclaration de risque*, in J. Bigot (dir.), *Traité de droit des assurances*, T. 3, *Le contrat d'assurance*, 2e éd., LGDJ, 2014, at 596.

124 Although the UK is no longer part of the EU following Brexit, it seems appropriate to include the English model in these discussions, at least for the purpose of these Comments. For a quick read on Brexit and insurance, see R. Merkin, *Brexit and insurance*, in *Diritto del mercato assicurativo e finanziario*, 2017, 217-228.

125 The European Commission set up an Expert Group on European Insurance Contract Law in 2013, which presented the results of its work in 2014 (cfr. *Final Report of the Commission Expert Group on European Insurance Contract Law,* 24 January 2014, at https://ec.europa.eu/info/sites/default/files/final_report_en.pdf). With regard to pre-contractual duties of disclosure, the Expert Group highlighted that disclosure rules, remedies and the use of questionnaires vary at the national level. This leads to increased costs because insurance companies must adapt their products to national rules and to take into account the evolution of case law at national level regarding the interpretation of the duties (see the Report at 43-44). See also see H. Heiss, U. Mönnich, *Pre-contractual Duties in European Insurance Contract Law*, in Y. Qiang Han, G. Pynt (eds.), *Carter v Boehm and Pre-Contractual Duties in Insurance Law. A Global Perspective after 250 Years*, *cit*., at 382.

feature of the insurance market that suggests the need to harmonise insurance contract regulations[126].

At the EU level, the work of the Restatement of European Insurance Contract Law group - which published a proposal for a general framework for insurance contracts as a model law, the so-called Principles of European Insurance Contract Law (PEICL), first in 2009 and again in 2016[127] - should be framed in this context. These Principles have been drafted as an Optional Instrument of European Insurance Contract Law, codifying a set of rules that parties to an insurance contract could have chosen to govern their contract[128]. Accompanied by Comments and Notes and based on an extensive comparative analysis of several national insurance contract laws, these model rules represent the outcome of research and studies of different contract rules, reflecting each time the most appropriate solution in the light of the developments that insurance law has experienced in the domestic legal systems[129].

126 It is well known that national regulation fragments the European market, preventing the emergence of a single internal market. Since the 1970s, the process of edification of the European insurance market focused on freedom of establishment and freedom to provide services, on the establishment of the home country control principle, up to the latest solvency regulation within the European Union. Indeed, a fragmented market in which there is a lack of uniform rules on capital adequacy requirements, on supervisory principles and policies, and on corporate governance gives rise to distortive effects. In this regard see, in the Italian legal doctrine, A. Candian, *Il diritto delle assicurazioni e la misurazione dei rischi dell'impresa assicurativa: l'esempio di* Solvency II, in M. Graziadei, M. Serio (eds.), *Regolare la complessità. Giornate di studio in onore di Antonio Gambaro. Atti del 5° Congresso nazionale SIRD (Trapani, 24-25 giugno 2016)*, Torino, Giappichelli, 2018, 93-100. Among others, for a comprehensive picture on the European insurance industry, see A. Cappiello, *European insurance industry. Regulation, Risk Management, and Internal Control*, Palgrave Macmillan, 2020.

127 J. Basedow, J. Birds, M.A. Clarke, H. Cousy, H. Heiss, L.D. Loacker (eds.), *Principles of European Insurance Contract Law (PEICL 2016)*, *cit*. For further information about the research project, see specifically H. Heiss, *Introduction*, *ibid*.

128 Art. 1:102 PEICL (Optional Application) reads: "The PEICL shall apply when the parties, notwithstanding any limitations of choice of law under private international law, have agreed that their contract shall be governed by them. Subject to Article 1:103, the PEICL shall apply as a whole and no exclusion of particular provisions shall be allowed". For further information, see H. Heiss, *The principles of European insurance contract law: an optional instrument?,* 2010 available at: http://www.europarl.europa.eu/document/activities/cont/201004/20100430ATT73919/20100430ATT73919EN.pdf. last access 30 July 2021), at 7.

129 For further details, see H. Heiss, M. Clarke, M. Lakhan, *Europe: towards an harmonised European insurance contract law - the PEICL*, in J. Burling, K. Lazarus (eds.), *Research Handbook on International Insurance Law and Regulation, cit*., ch. 23.

Specifically, rules governing the so-called "Applicant's pre-contractual duty" are contained in Articles 2:101-2:106[130].

Art. 2:101(1) introduces a general rule requiring the insured[131] to disclose circumstances material to the risk before the contract is concluded[132], thereby transposing the common rule within all legal systems. However, the rule considers the practice of insurers of using questionnaires to collect relevant information, adding that material circumstances should be subject of questions raised by the insurer. Therefore, the duty to provide information is limited to the duty to provide correct answers, and is further limited to circumstances of which the insured is or ought to be aware[133]. Questions must be clear and precise and, according to Art. 1:203[134], the interpretation more favourable to the insured shall prevail if a question is poorly worded[135].

The disclosure duty is therefore limited to statements made in response to questions posed by the insurer about circumstances that the insurer has requested, opting for the so-called "questionnaire model". The PEICL thus depart from the traditional model of voluntary pre-contractual disclosure, which is based on the insured's duty to disclose all the circumstances which might be relevant to the insurer's decision to enter into the contract.

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130 For a detailed analysis on the duty of disclosure in the PEICL, see H. Heiss, U. Mönnich, *Pre-contractual Duties in European Insurance Contract Law*, *cit*., 381-410. See also M. Ostrowska, *Transparency in the Insurance Contract Law: A Comparative Analysis Between the Principles of European Insurance Contract Law (PEICL) and Selected European Legal Regimes,* in P. Marano, K. Noussia (eds.), *Transparency in Insurance Contract Law*, *cit*., at 279-292.

131 The rule literally refers to the applicant. For more, see above §1 and footnote n. 6.

132 Art. 2:101 PEICL, C2 at 104.

133 Art. 2:101 PEICL, C4 at 105.

134 The reference is generally made to any document or information. Art. 1:203 (Language and Interpretation of Documents) reads: "(1) All documents provided by the insurer shall be plain and intelligible and in the language in which the contract is negotiated. (2) When there is doubt about the meaning of the wording of any document or information provided by the insurer, the interpretation most favourable to the policyholder, insured or beneficiary, as appropriate, shall prevail".

135 Furthermore, according to Art. 2:103(a), the PEICL do not envisage remedies when a question is unanswered or the answer is obviously incomplete or incorrect and the insurer has concluded the contract without further investigations. In such a case, it is deemed reasonable that the circumstances are not material with respect to the decision or whether to conclude the contract at all or on which terms. On this point, see Art. 2:101 PEICL, C1 at 113.

Art. 2:102 governs the legal consequences for failure to disclose information when the insured provides incomplete or inaccurate answers and the insurer concludes a contract which it either would not have entered into at all or not on the same terms.

If the insured breaches the duty of disclosure with fault, the insurer may either terminate the contract or propose a modification of its terms, including the premium. In the latter case, the insured can accept the modified terms and thereby maintain the insurance contract, or can reject the variation proposed. In case of rejection, the insurer may choose to terminate the contract. According to Art. 2:102(3), if the insured breaches the duty of disclosure without fault, the insurer has the right to terminate the contract only if the knowledge of the circumstances to be disclosed would have led to the contract not being concluded at all[136].

Under Art. 2:102(4), termination of the contract shall take effect one month after the written notice has been received by the insured, while variation shall take effect in accordance with the agreement of the parties[137]. Both termination and modification of the contract have prospective effects as these remedies relate to future claims[138].

In case of breach of duty of disclosure with negligence, further clarification must be made. Art. 2:102(5) sets out that, when an element of the undisclosed risk causes an insured event before termination or variation takes effect, the insurer is released from any obligation if it would not have concluded the contract at all had it known the true circumstances. However, compensation is proportionately reduced when the insurer would have charged a higher premium. If the insurer would have concluded the contract on different terms, the insurer's obligation to perform will be regulated by these modified terms[139].

136 This implies that, where the insured is not at fault for the breach of duty, the insurer is obliged to pay compensation even if the incorrect or incomplete disclosure of material circumstances has caused the event. See Art. 2:102(5) PEICL, C6 at 110.

137 See Art. 2:102 PEICL, C2 and C4 at 109.

138 See Art. 2:102 PEICL, C2 and C3 at 109.

139 Art. 2:103 identifies other cases in which the insurer has no remedy for the breach of duty of disclosure. The exceptions to the duty of disclosure are as follows: the insured does not answer a question or the answer is obviously incomplete or incorrect and the insurer has concluded the contract anyway; the insurer asks questions about facts or circumstances which would not be material to a reasonable insurer's decision to conclude the contract at all or on the agreed terms; the insurer had allowed the insured to believe that a certain circumstance did not have to be disclosed; lastly, information about which the insurer was or should have been aware.

Finally, in case of fraudulent breach, Art. 2:104 establishes that the insurer is entitled to avoid the contract as an alternative to the remedies provided for in Art. 2:102. Specifically, Art. 2:104 states that the insurer is entitled to avoid the contract *ab initio* (depriving the insured of the insurance coverage from the beginning and retaining the premium), if the insurer proves that was induced to conclude the contract by the insured's fraudulent conduct. In such case, the remedy has retroactive effect.

The application of a gradation of remedies is consistent with the choice made by those national legal systems that have recently reviewed their regulations. This is also the approach that best reflects the changes in the relationship between insurer and insured in the modern insurance market. The combination of these articles governing the duty of disclosure illustrates the intention of the drafters of the PEICL to attribute the role in selecting material elements of the risk with clear, precise and understandable questions to insurers. This approach allows the insurer to reach a proper decision about the risk to be underwritten and calculating the correct premium. Although the insured may disclose information which has not been explicitly requested, there is no spontaneous disclosure duty[140].

7. Final remarks and some suggestions

The analysis of the three different national systems and the PEICL's model rules reveals different ways of approaching the issue of the presentation of the risk. In the English system, the duty to correctly represent the risk is still imposed on the insured for business insurance contracts, even though the duty is mitigated compared to the traditional approach, while the consumer insured has only the duty to answer questions raised by the insurer. In the French system, the questionnaire is essential to identify whether a fact or circumstance is material. Accordingly, the insurer must draft the questionnaire as completely and accurately as possible, and the insured must only answer the questions asked by the insurer. Finally, in the Italian system, when the insurer asks questions, it is presumed that anything not expressly requested by the insurer is not material. However, if the insurer proves materiality, then the omission becomes relevant and

140 Insureds are not prohibited from disclosing additional relevant circumstances about which the insurer has not made an enquiry. However, according to Art. 2:105 PEICL, the insured is subject to the same sanctions as for the breach of the duty of disclosure introduced by Art. 2:101.

the insurer may unilaterally terminate the contract even where the failure to disclose is made by the insured without fraud or fault. The PEICL have adhered to the questionnaire model and the presentation of the risk relies on queries posed by the insurer[141].

In addition to what is established in case of incorrect answers governed by Art. 809, Art. 810 of the Georgian Civil Code provides that, where the description of facts or circumstances which might be relevant to the insurer's decision to conclude the contract is guided by a written questionnaire, the insurer is entitled to terminate the contract where no specific questions on relevant circumstances of the risk to be underwritten have been raised and the insured has intentionally concealed these latter.

The legislator recognizes that there may be other circumstances known to the insured that could have an actual influence on the insurer's decision on whether to underwrite the risk, beyond those already included in the questionnaire[142]. In such circumstance, duty of spontaneous disclosure applies. If the insured intentionally fails to disclose such additional circumstances to the insurer, the insured is in breach of its duty of disclosure and the insurer may terminate the contract.

141 It should be noted that, in 2008, Germany extensively reformed the Insurance Contract Act of 1908 (*Versicherungsvertragsgesetz* - VVG), by which the Georgian insurance contract law has largely been influenced (see, e.g., K. Iremashvili, *Transparency in the Insurance Contract Law of Georgia, cit.*, at 375 ff. An English version of the VVG is available at: https://www.gesetze-im-internet.de/englisch_vvg/. On the reform of 2008, see, e.g., S. Landini, *Il nuovo codice del contratto di assicurazione tedesco. Primi orientamenti*, in *Danno resp.*, 2009, at 1115 ff.). The new VVG 2008 has introduced a modified approach to disclosure duties. According to sec. 19 para 1 VGG, the policyholder shall disclose to the insurer all circumstances which are material to the insurer's decision to conclude the contract with the agreed content and which the insurer has requested in writing, before the contract is concluded. If the policyholder breaches the duty not to misrepresent, the VVG 2008 introduces a gradation of remedies, according to sections 19, paras 3-5, 21 and 22 (for a detailed analysis of disclosure duties in German insurance contract law, see M. Wandt, K. Bork, *Pre-contractual Duties under the German Insurance Law*, in Y. Qiang Han, G. Pynt (eds.), *Carter v Boehm and Pre-Contractual Duties in Insurance Law. A Global Perspective after 250 Years*, *cit.*, 261-292).

142 Under the provisions of Art. 808(2) (which reads: «[a]ny circumstance, about which the insurer clearly and unequivocally inquires of the insured, shall also be deemed as material»), there is a presumption of materiality with respect to the circumstances specifically asked for by the insurer. This presumption of materiality should imply that the insurer is exempted from proving that such circumstance has effectively been decisive for the insurer's consent. In this way, the Georgian legislator seems to overcome some of the problems of interpretation that, for example, have arisen in the Italian legal system, where the trial judge has to decide, on a case-by-case basis, whether the inclusion in the questionnaire of a question relating to a particular circumstance makes that circumstance relevant to the representation of risk (see above §5).

By regulating those cases in which the insured voluntarily conceals relevant information from the insurer, this statutory choice enables to avoid situations of uncertainty that may also compromise the proper functioning of the insurance activity. Therefore, the insured must be aware of both the information and its materiality.

This rule is worthy of analysis because it attributes legal relevancy to the cases in which the insured deliberately conceals facts or circumstances that she or he knows to be material to the insurer's decision to enter into the contract, regardless of the questions raised by the insurer.

From a comparative perspective, this rule would not apply under the French system, since the insured only has the duty to truthfully and accurately answer precise questions. In the English system, according to the 2015 Act with reference to business contracts, the fact that specific questions have been asked for does not necessarily relieve the insured from the duty to disclose any other material fact. But the insurer is entitled to remedies in case of the insured's failure to disclose also where the breach of the duty is negligent or innocent[143].

The Georgian legislator therefore recognizes the importance of the failure to disclose additional material circumstances about which the insurer has not prepared written queries and it makes legally relevant the case where the insured intentionally interferes with the correct representation of the risk with the intent to deceive the insurer.

The rule does not govern further aspects which would have made this "duty to communicate information" a more complete and self-standing discipline. The burden of proof is not regulated, even if it is possible to assume that it rests on the insurer. It is also not mentioned what happens if the insured disputes the insurer's decision, although it is possible that a court has to accept or reject the termination's effectiveness. Furthermore, as already mentioned, the rule does not govern the effects of termination. This implies a coordination between these insurance contract rules and the general concepts of Georgian contract law, also considering the contribution of each formant[144].

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143 «[F]or business insurance there will remain a remedy for an innocent non-disclosure or misrepresentation»: J. Birds, *Modern Insurance Law*, *cit*., 86.

144 See R. Sacco, *Legal Formants. A Dynamic Approach to Comparative Law (Installment I of II)*, in *Am J. Comp. L*., vol. 39, Issue 1, 1991, 1-34; R. Sacco, *Legal Formants. A Dynamic Approach to Comparative Law (Installment II of II)*, in *Am J. Comp. L*., Vol. 39, Issue 2, 343-402. For a general overview of the Georgian insurance contract law, see K. Iremashvili, *Transparency in the Insurance Contract Law of Georgia*, *cit*., at 375 ff.

Article 811 - Period for termination of contracts by reason of failure to communicate information

1. The insurer may terminate the contract within one month after the failure to communicate the information defined under this Chapter. The period shall commence from the moment the insurer became aware of the breach of the duty to give notice.

2. The insured shall be notified of termination of the contract.

Lydia Velliscig

Summary: 1. Time limits and formalities. 2. Features of termination. 3. Conclusions.

1. Time limits and formalities

Located at the end of the rules devoted to regulating the so-called pre-contractual "duty to communicate information" by the insured, Art. 811 establishes a time limit and certain formalities with which the insurer must comply when exercising its right to terminate the contract in case of failure to disclose information, as defined in Book Three, Special Part, Chapter Twenty devoted to Insurance[1].

The insurer may exercise the right of termination from the moment it becomes aware of the breach of the duty of "communicate information"[2]. It would have been appropriate to also consider the opportunity to add that the time limit for notice may also commence from the moment when the insurer should have known of the breach of duty[3].

1 It must be reiterated that this Comment refers to the English translation of Art. 811 of the Georgian Civil Code and its purpose is to provide some comparative remarks, without offering an assessment of how this rule is framed in Georgian insurance law (for more on this aspect, see *sub Art. 810* in this Commentary, §1). This English version is available at the following link: http://www.matsne.gov.ge.

2 According to the English version of Art. 808 of the Georgian Civil Code, the duty to provide information on which the insurer relies seems to fall on the insured. For an overview on the topic of the presentation of the risk, see the general report on disclosure duties prepared by P. Sharon for the World Congress of the International Insurance Law Association (AIDA) 2018 and available on the AIDA website.

3 See, e.g., Art. 2:102(1) PEICL.

The insurer has one month to notify the insured of its intention to terminate the contract. It should be noted that this time limit, provided for in the case of failure to communicate information, is aligned with the time limit provided for communicating incorrect information by Art. 809, para. 2.

The remedy seems to be that of termination *by notice.* Despite there is no indication on how the notice must be given, it can be assumed that the notice of termination must make it unambiguously clear that the contract is to be terminated. The rule does not seem to require an express acceptance by the insured.

2. Features of termination

According to the English translation of Arts. 808-811 of the Georgian Civil Code, *termination* seems to be the remedy available to the insurer for breach of the duty to provide material information by the insured. The legislator also mentions *repudiation* in Arts. 808-809, but it seems that these two terms are used interchangeably. Thus, termination/repudiation refers to an election of the insurer to terminate an insurance contract for failure to communicate material information by the insured. The insurer can terminate the contract by its own unilateral act, notifying the insured of its intention to exercise its statutory right.

The breach of the duty to communicate material information seems to give rise to the right of the insurer to terminate the contract even if the breach is innocent or negligent[4]. Even in the case governed by Art. 810, termination is still the available remedy if the insured intentionally conceals material circumstances from the insurer.

Actually, according to the black letter of these provisions, it is not clear what effects termination/repudiation will produce[5]. It could be assumed that failure to disclose implies that this form of termination/

4 For more on disclosure duties in Georgian insurance contract law, see S. Nitti, *sub Art. 808-809*, in this Commentary.

5 The English translation of these provisions appears to be based on the available international terminology rather than on the English legal terminology.

repudiation may have some retroactive effects[6], but it is not possible to infer this indication from the textual analysis of the English translation of Arts. 808-811 of the Georgian Civil Code[7].

Traditionally, the choice of most legal systems to grant the insurer a right to avoid the contract *ab initio* (thereby releasing the insurer of its contractual obligations) in case of breach of disclosure duties was strictly connected with the underwriting process – which involves making appropriate financial provisions against claims that will occur in an uncertain future. If the insured fails to disclose relevant information or

6 It should be noted that termination set out under Art. 2:102 PEICL regards the future, as supported by the Comments (see J. Basedow, J. Birds, M.A. Clarke, H. Cousy, H. Heiss, L.D. Loacker (eds.), *Principles of European Insurance Contract Law (PEICL)*, 2nd ed., Otto Schmidt, 2016, at 109, C2) which highlight that termination does not have a retroactive effect, also in accordance with the provisions of the Principles of European Contract Law (Art. 9:305(1) PECL reads: "Termination of the contract releases both parties from their obligation to effect and to receive future performance, but, subject to Articles 9:306 to 9:308, does not affect the rights and liabilities that have accrued up to the time of termination". See also M. Fontaine, *An Academic View*, in J. Basedow et al. (eds.), *Principles of European Insurance Contract Law (PEICL)*, cited above, at 35-36. On the relationship between PECL and PEICL, see, e.g., H. Heiss, U. Mönnich, *Pre-contractual Duties in European Insurance Contract Law*, in Y. Qiang Han, G. Pynt (eds.), *Carter v Boehm and Pre-Contractual Duties in Insurance Law. A Global Perspective after 250 Years*, Hart Publishing, 2018, at 385). In the English system, according to Schedule 1 para 9(8) of the 2012 Act, termination of the contract has effect for the future and thus does not affect the treatment of any claim arising under the contract in the period before termination (see McGee, *The Modern Law of Insurance*, Sweet&Maxwell, 14th ed., 2018, at 5.10: "Termination does not affect any claim arising pre-termination (the remedy is termination, not avoidance)").

7 As it is well known, legal translation has long been a focus of attention in comparative law studies due to the difficulties involved in identifying the meaning of a legal term or concept in a specific legal system and in rendering and translating it into another language. For a more in-depth discussion, see, e.g., B. Pozzo (ed.), *Ordinary language and legal language*, Milano, Giuffrè, 2005; V. Grosswald Curran, *Comparative Law and Language*, in M. Reimann, R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, Oxford 2006, at 675 ff; B. Pozzo, V. Jacometti, *Multilingualism and the Harmonisation of European Law*, Kluwer Law International, 2006; B. Pozzo, *Comparative Law and Language*, in M. Bussani, U. Mattei (eds.), *The Cambridge Companion To Comparative Law*, Cambridge, 2012, 88-114; B. Pozzo, *Comparative Law and the New Frontiers of Legal Translation*, in S. Šarčević (ed.), *Language and Culture in the EU Law. Multidisciplinary Perspectives*, Routledge, 2016, 73-90; S. Ferreri, L.A. Di Matteo, *Terminology Matters: Dangers of Superficial Transplantation*, 2019, vol. 37, B.U. Int'l L.J., 35-88. See also S. Ferreri, *Loyal to Different Exclusive Masters: Language Consistency at the National and Supranational Level*, in *Statute Law Rev.*, 37(2), 2016, 172-181 and G. Ajani, M. Ebers (eds.), *Uniform Terminology for European Private Law*, Baden Baden, 2005.

makes misrepresentations, the insurer may fail to accurately price risks, thus undermining the proper functioning of the insurance system[8].

This type of approach is generally outdated. Instead, the law tends to favour a different approach that poses greater attention to proportionate remedies according to the insured's state of mind and whether the insurer would have in any case entered into that contract, albeit under different terms and conditions. Indeed, the legal systems that have recently reformed insurance contract law have introduced a gradation of remedies. When the insured is not at fault and the breach is not significant, it is possible to identify a trend in favor of preserving the contract rather than terminating or avoiding it, which would ultimately penalize insureds.

The English system provides one example. Traditionally, according to the Marine Insurance Act of 1906[9], avoidance was the only remedy available to the insurer in the event of a breach of the duty of disclosure[10]. The contract was avoidable at the election of the insurer, which had to unequivocally inform the insured by a formal notice that it would have

8 For more on the underwriting process, see: K.S. Abraham, *Distributing Risk: Insurance, Legal Theory, and Public Policy*, Yale University Press, 1986; R.H. Jerry, II, D.R. Richmond, *Understanding Insurance Law*, 3rd ed., Newark, 2002; K.S. Abraham, *Insurance law and regulation: cases and materials*, 5th ed., Foundation Press, 2010, at 3 ff; R.E. Keeton, A.I. Widiss, J.M. Fischer, *Insurance Law: A guide to Fundamental Principles, Legal Doctrine, and Commercial Practices*, 2nd ed., West Academic Publishing, 2016; R.H. Jerry II, D. Richmond, *Understanding Insurance Law*, 6th ed., Carolina Academic Press, 2018. On the origins of insurance contract, see W.S. Holdsworth, *The early history of the contract of insurance*, in *Columbia Law Rev.*, 17(2), 1917, 85-113. See also M. Clarke, *An introduction to insurance contract law*, in J. Burling, K. Lazarus (eds.), *Research Handbook on International Insurance Law and Regulation,* Edward Elgar Publishing, 2012, ch. 1; H. Cousy, *Insurance Law*, in J.M. Smits (ed.), *Elgar Encyclopedia of Comparative Law*, Edward Elgar Publishing, 2nd ed., 2012, ch. 34; R. Merkin, J. Steele, *Insurance and the Law of Obligations*, *cit*., 17-35.

9 The Marine Act is a codifying statute. See J. Lowry, *Utmost Good Faith*, in R. Merkin (ed.), *Insurance Law: An Introduction*, Ruthledge, 2007. The original formulation of the duty of disclosure can be traced in *Carter v Boehm* (1766) 3 Burr 1905 and in the famous opinion of Lord Mansfield. The literature is abundant on this topic: see, e.g., P. Matthews, *Uberrima Fides in Modern Insurance Law*, in F.D. Rose (ed.), *New Foundations for Insurance Law, Current Legal Problems,* London, Stevens and Sons, 1987; H. Bennett, *Mapping the Doctrine of Utmost Good Faith in Insurance Law*, LMCLQ 165, 1999. See also M.A. Clarke, *Policies and Perceptions of Insurance Law in the Twenty-First Century*, Clarendon Law Series, 2005, at 98 ff; R. Merkin, *Marine insurance legislation*, London - Singapore, LLP, 3rd ed., 2005, at 16 ff; *MacGillivray on Insurance Law*, Sweet&Maxwell, 14th ed., 2018, ch. 17; *Colinvaux's Law of Insurance*, Sweet&Maxwell, 12th, 2019, ch. 6.

10 1906 Act, section 17.

exercised the right of avoidance within a reasonable period of time. The avoidance took effect from the moment it was communicated to the insured. In case the right of avoidance was disputed, it had to be confirmed by the court and the insurer had to satisfy the burden of proof. The insurance contract became void from the beginning, meaning the insurer had to return the premium (except in case of fraud), and could refuse to pay any past and future claims, as avoidance of the contract releases both parties from their obligations[11].

In 2012 and 2015, the English legal system implemented a major review of the duty of disclosure in an attempt to make English insurance contract law more consistent with the new trends for greater protection of insureds[12], especially consumers. One of the main innovations introduced by these reforms has been plurality of remedies granted to the insurer[13].

In the Consumer Insurance (Disclosure and Representation) Act 2012, Schedule 1 para 2 provides that, in case of deliberate or reckless qualifying[14] misrepresentation, the insurer may avoid the contract, reject

11 1906 Act, section 84(3)(a). For an overview, see M.A. Clarke, *Policies and Perceptions of Insurance Law in the Twenty-First Century*, Oxford University Press, 2005, at 116 ff; J. Lowry, P. Rawlings, *Insurance Law. Doctrine and Principles*, 2nd ed., Hart Publishing, 2005, at 82 ff; J. Lowry, *Pre-contractual information duties: the insured's pre-contractual duty of disclosure - convergence across the jurisdictional divide*, in J. Burling, K. Lazarus (eds.), *Research Handbook on International Insurance Law and Regulation*, Edward Elgar Publishing, Inc., 2011, at 74 ff; J. Birds, *Insurance Law in the United Kingdom*, 4th ed., Wolters Kluwer, 2018, 78-82; *MacGillivray on Insurance Law*, *cit*., at 485.

12 M.A. Clarke, *Policies and Perceptions of Insurance Law in the Twenty-First Century*, *cit*., at 104. See also J. Birds, *The Reform of Insurance Law*, in *Journal of Business Law*, 1982, 449-459.

13 On these reforms, see R. Merkin, J. Lowry, *Reconstructing Insurance Law: The Law Commissions' Consultation Paper*, in *Modern Law Rev.*, 71(1), 2008, 95-113; Y. Qiang Han, *Pre-contractual Duties in the UK Insurance Law after 2015: Old (or New?) Wine in New Bottles?*, in Y. Qiang Han, G. Pynt (eds.), *Carter v Boehm and Pre-Contractual Duties in Insurance Law. A Global Perspective after 250 Years*, *cit.*, 143-169. See also the report provided by A. Greene, answering the questionnaire on disclosure duties for the World Congress of the International Insurance Law Association (AIDA) 2018, available on the AIDA website; K. Noussia, *Transparency in the Insurance Contract Law of England*, in P. Marano, K. Noussia (eds.), *Transparency in Insurance Contract Law*, Springer, 2019, at 579 ff; *MacGillivray on Insurance Law*, *cit.*, chs. 19-20; *Colinvaux's Law of Insurance*, *cit*., ch. 7.

14 According to the 2012 Act, section 4(1)(2), the insurer has a remedy against a consumer for a breach of the duty to take reasonable care not to make a misrepresentation only if the insurer shows that, but for the misrepresentation, it would not have entered into the contract at all, or not on those specific terms.

any claim, and retain the premium unless such would be unfair to the insured[15]. Schedule 1 para 3 ff. further provides that, in case of careless qualifying misrepresentation, the insurer is entitled to modify the terms of the contract or to make a proportionate reduction in the claims payout, or to terminate the contract by giving reasonable notice to the insured[16]. In turn, the insured may terminate the contract by giving reasonable notice to the insurer[17]. If either party terminates the contract, the insurer must refund any premiums paid for the remaining contract period[18]. The insurer is entitled to avoid the contract, refuse all claims, and return the premium only if it would not have entered into the contract at all[19].

As regards business insurance contracts, the Insurance Act 2015 also adopts a proportionate approach to regulate remedies and limit the use of avoidance as the automatic consequence of the breach. In case of deliberate or reckless qualifying[20] breach, the insurer may avoid the contract, refuse all claims, and retain the premium[21]. In case the breach was neither deliberate nor reckless, if the insurer can prove it would not have entered into the contract at all had a fair presentation of the risk been made, it can still avoid the contract and refuse any claims, but it must return the premium[22]. If the insurer would have entered into the contract but on different terms, then those different terms will be held to apply, as if the contract included those terms from the beginning and the claim will be adjusted accordingly[23]. Finally, if the insurer would

15 2012 Act, section 5(2)(a)(b).

16 2012 Act, Schedule 1, para 9(4).

17 2012 Act, Schedule 1, para 9(6).

18 2012 Act, Schedule 1, para 9(7).

19 2012 Act, Schedule 1, para 5. If the misrepresentation is innocent, the insurer has no remedy. See R. Merkin-Ö. Gürses, *The Insurance Act 2015: Rebalancing the Interests of Insurer and Assured*, in *Modern Law Rev.*, 78(6), 2015, at 1014. For more on the 2012 Act, see J. Lowry-P. Rawlings, *'That wicked rule, that evil doctrine...': reforming the law on disclosure in insurance contracts*, in *Modern Law Rev*., 75(6), 2012, 1099-1122; *MacGillivray on Insurance Law*, *cit*., ch. 19; *Colinvaux's Law of Insurance*, *cit*., ch. 7; McGee, *The Modern Law of Insurance*, *cit*., ch. 5.

20 According to 2015 Act, section 8(1), the insurer has a remedy against the insured for a breach of the duty of fair presentation only if the insurer shows that, but for the breach, it would not have entered into the insurance contract at all, or not on those specific terms.

21 2015 Act, Schedule 1, para 2.

22 2015 Act, Schedule 1, para 4.

23 2015 Act, Schedule 1, paras 3-5.

have entered into the contract but would have charged a higher premium, the amount paid on a claim may be reduced proportionately[24].

An analysis of the model rules in the Principles of European Insurance Contract Law[25] also suggests that it is desirable to differentiate the remedies according to the insured's state of mind and to how the insurer would have reacted if it had known all the circumstances of the risk[26].

According to Art. 2:102(1), the insurer may choose to terminate the contract or to propose a reasonable modification of the contract. The insurer has one month from when it became aware or should become aware of the breach to give written notice of its decision. This notice must contain either the notice of termination of contract or the proposal to amend the contract, as well as the legal consequences of its decision. Under Art. 2:102(4), termination will take effect one month after receipt by the insured of the insurer's written declaration. On the other hand, the effect of the variation is subject to an agreement by both parties. However, Art. 2:102(2) states that the insured can reject the proposed variation within one month of receipt of the notice. In such cases, the insurer is entitled to terminate within one month of receipt of the written notice of the insured's rejection. The insured may either accept or reject the proposed

24 2015 Act, Schedule 1, para 6. See, e.g., J. Birds, *Insurance Law in the United Kingdom*, *cit*., at 86. For an overview see R. Merkin, Ö. Gürses, *The Insurance Act 2015: Rebalancing the Interests of Insurer and Assured*, *cit*., 1004-1027. See also see *MacGillivray on Insurance Law*, *cit*., ch. 20; *Colinvaux's Law of Insurance*, *cit.*, ch. 7; McGee, *The Modern Law of Insurance*, *cit*., ch. 5.

25 The PEICL are a kind of restatement of insurance contract law in the European Union. They are divided into principles, definitions and model rules, the latter being the result of extensive comparative studies of individual national laws. For further details, see, J. Basedow et al. (eds.), *Principles of European Insurance Contract Law (PEICL)*, cited above in footnote n. 6. See also H. Heiss, M. Clarke, M. Lakhan, *Europe: towards a harmonised European insurance contract law - the PEICL*, in J. Burling, K. Lazarus (eds.), *Research Handbook on International Insurance Law and Regulation, cit*., ch. 23. For some accounts on the single market in insurance, see T.H. Ellis, *European Integration and Insurance. (Creating a Common Insurance Market)*, London, Witherby and Co., 1990; T. H. Ellis, *The Single European Market and Insurance Law and Practice*, London, Witherby and Co., 1994; A. McGee, *The Single Market in Insurance. Breaking Down the Barriers*, Ashgate, Dartmouth, 1998.

26 It should be noted that also the German Insurance Contract Law 2008, besides introducing the insured's duty not to misrepresent (and thus limiting the disclosure duty to the duty to answer questions asked by the insurer in writing), introduced a gradation of remedies depending on different degrees of fault. See *infra* footnote n. 37.

variation, and the variation of contract takes effect on acceptance or one month after receipt of the variation proposal[27].

Pursuant to Art. 2:102(3), if the insured has committed an innocent breach, the insurer may exercise its termination right only if it proves that it would not have concluded the contract.

In case of fraudulent conduct, the insurer may seek the general remedies set out in Art. 2:102, or the specific remedy provided by Art. 2:104. The latter provides that the insurer is entitled to avoid the contract from the beginning and to retain the premium due, if it proves that the fraudulent conduct induced it to conclude the contract. In this case, the insurer must give the insured written notice, within two months of becoming aware of the fraudulent conduct[28].

The French Insurance Code[29] also introduces a gradation of remedies[30]. Under Art. L113-8, in the event of intentional omissions or false statements, the insurer may invoke the remedy of avoidance (*nullité*)[31], along with its retrospective effects. The insurer retains the premium paid and is entitled to all premiums due. The insurer must seize the court and the trial judge decides whether the insurer provides sufficient evidence for the contract to be declared null and void. When omissions and false statements are unintentional and in good faith, Art.

27 See also J. Basedow et al. (eds.), *Principles of European Insurance Contract Law (PEICL)*, cited above in footnote n. 6, at 109, C3.

28 For an in-depth analysis on the duty of disclosure in the PEICL, see H. Heiss, U. Mönnich, *Pre-contractual Duties in European Insurance Contract Law*, *cit.,* 381-410. See also M. Ostrowska, *Transparency in the Insurance Contract Law: A Comparative Analysis Between the Principles of European Insurance Contract Law (PEICL) and Selected European Legal Regimes,* in P. Marano, K. Noussia (eds.), *Transparency in Insurance Contract Law*, *cit.*, 279-292.

29 An English translation of part of the French Insurance Code is available on the website of the International Insurance Law Association at: http://www.aida.org.uk/pdf/French%20Insurance%20Code%202004.pdf.

30 For a more detailed discussion, see S. Leroy, *Pre-contractual Duties under the French Insurance Law*, in Y. Qiang Han, G. Pynt (eds.), *Carter v Boehm and Pre-Contractual Duties in Insurance Law. A Global Perspective after 250 Years*, *cit.*, at 229-260 and the report provided by J. Kullmann, answering the questionnaire on disclosure duties for the World Congress of International Insurance Law Association (AIDA) 2018 and available on the AIDA website.

31 On difficulties of translating legal concepts into another language, see the example provided by M. Fontaine, *Les programmes européens PHARE et TACIS. Mémoires de frustrations*, in *Liber amicorum Jean-Luc Fagnart*, Anthémis-Bruylant, 2008, at 963.

L113-9(1-2) of the French Insurance Code allows the insurer to terminate (*résilier*) the contract ten days after notifying the insured by registered letter, refunding the part of the premium paid for the period during which the insurance no longer applies. In such case, avoidance (*nullité*) of the contract is excluded.

Even the Italian system distinguishes between annulment and unilateral termination, despite relying on the Civil Code which dates to 1942. According to Art. 1892 of the Italian Civil Code, in case of statements made with fraud or gross negligence, the insurer has three months from the day on which it became aware of the inaccuracy of the statement or reticence to inform the insured of its intent to seek the annulment of the contract in court. On the other hand, Art. 1893 provides that if the insured is not at fault, the insurer has three months to inform the insured in an unequivocal manner of its intention to withdraw from the contract and the time limit starts running from the day the insurer became aware of the inaccuracy of the statement or reticence[32].

32 For an introduction to this topic in the Italian system, see D. Cerini, *Insurance Law in Italy*, 2nd ed., Wolters Kluwer, 2019, ch. 10. For an overview of invalidity of contracts and its consequences in the Italian legal system, see M.S. Cenini, R.E. Cerchia, *Cases and Materials on Italian Private Law*, Milano, Giuffrè, 2016, 84-93 and G. Iudica, P. Zatti, *Language and Rules of Italian Private Law. A brief Textbook*, 5th ed., Cedam, 2020, 135-140. See also *The Italian Civil Code*, translated by M. Beltramo, G.E. Longo, J.H. Merryman, Dobbs Ferry, N.Y., Oceana Publications, 1969. In Italian legal doctrine, see also, e.g.: A. Donati, *Trattato delle assicurazioni private*, vol. II, Milano, Giuffrè, 1954, at 308; L. Buttaro, *Assicurazione (contratto)*, in *Enc. Dir*., III, Milano, Giuffré, 1958, 483-488; N. Gasperoni, *Le assicurazioni*, Milano, Vallardi, 1966, at 70; V. Salandra, *Dell'assicurazione*, in A. Scialoja, G. Branca (eds.), *Comm. Cod. Civ*., 3rd ed., Bologna-Roma, Zanichelli, 1966, at 209; G. Scalfi, *Assicurazione (contratto di assicurazione)*, in *Digesto, sez. comm*., I, Torino, 1987, at 355; G. Volpe Putzolu, *L'assicurazione*, in P. Rescigno (ed.), *Tratt. Dir. Priv*., XIII, Torino, 1985, at 74; A. Gambino, *Contratto di assicurazione*, *Profili generali*, in *Enc. giur*., III, Roma, 1988, at 10; A. La Torre (ed.), *Le assicurazioni*, Milano, Giuffrè, 2007, 82-101; V. De Lorenzi, *Contratto di assicurazione. Disciplina giuridica e analisi economica*, Padova, Cedam, 2008, at 57; A. Antonucci, *Commento all'art. 1892 c.c*., in G. Volpe Putzolu (ed.), *Commentario breve al diritto delle assicurazioni*, Padova, 2010, at 29; M. Rossetti, *Il diritto delle assicurazioni*, Vol. I, Padova, Cedam, 2011, 863 ff; S. Landini, *Assicurazioni*, in V. Roppo (ed.), *Trattato dei contratti*, vol. V, Milano, Giuffré, 2014, at 455.

3. Conclusions

These rules, included in the Georgian Civil Code and governing the presentation of the risk and the remedy in case of the breach of the so-called "duty to communicate information", are quite succinct and do not provide a complete picture of the discipline of termination as regards insurance contracts. A comparison between these rules with comparable norms of other legal systems prompts various questions that appear to remain unanswered.

From a comparative perspective, Art. 811 seems to indicate that the legislator has chosen to introduce termination of contract *by notice* as a remedy, which is characterised by a simple procedure and that does not require a court ruling, as any judicial review shall take place afterwards in disputed cases. It therefore seems to adopt the approach of the Anglo-German model of resolution *by notice*[33], a choice that seems to be generally preferred also in European soft law projects[34]. This model of termination provides an immediate remedy with no initial court scrutiny. This model of termination differs from that of termination *ope judicis*, which is traditionally associated with the French-Italian tradition[35]. According to the latter, a contract may be terminated by decision of the court[36].

Assuming that the use of the English terms *termination* and *repudiation* are equivalent in their effects to the corresponding Georgian categories, it is imperative to coordinate these few notes on termination/repudiation relating to insurance contracts as well as the rules on Georgian general contract law, the outcomes of case law, and opinions developed by legal doctrine, in order to provide a more comprehensive and clear framework.

33 E.g. 2012 Act, Schedule 1, para 9(4)(b); §19(3) VVG.

34 E.g. III. - 3:507 DCFR; Art. 9:303 PECL; Art. 2:102(1) PEICL.

35 E.g. Art. 1178 French Civil Code; Art. 1453 Italian Civil Code.

36 For an overview of termination in comparative law, see: H. Kötz, *European Contract Law*, 2nd ed., Oxford University Press, 2017; M. Smith, *Contract Law. A Comparative Introduction*, 2nd ed., Edward Edgar, 2017; H. Beale, B. Fauvarque-Cosson, J. Rutgers, S. Vogenauer, *Cases, Materials and Text on Contract Law*, 3rd ed., Bloomsbury, 2019. See also J. Bell, S. Boyron, S. Whittaker, *Principles of French Law*, 2nd ed., Oxford University Press, 2008, at 357 ff.

Coordination is especially desirable, since the Chapter on insurance contracts is contained in the Georgian Civil Code[37]. It follows that the sector-specific rules (such as those regulating insurance contracts) should be interpreted in a manner consistent with the major topics of general contract law[38].

37 It should be noted that, because the legislator did not establish a comprehensive body of insurance law containing private law and market law, insurance matters must be settled by applying either the Georgian Civil Code or sectoral laws. This approach is also adopted in other legal systems. For instance, German law distinguishes between insurance contracts, regulated under the Insurance Contract Act (*Versicherungsvertragsgesetz* (VVG), recently reviewed in 2008. An English version of the VVG is available at: https://www.gesetze-im-internet.de/englisch_vvg/), and insurance undertakings and supervision, which are governed by the Insurance Supervision Act (*Versicherungsaufsichtsgesetz* (VAG). For a general overview of insurance law in Germany, see R. Koch, *Insurance Law in Germany*, Wolters Kluwer, 2018. For a more extensive analysis of the duty of disclosure in German insurance contract law, see also J. Lowry, *Pre-contractual information duties: the insured's pre-contractual duty of disclosure - convergence across the jurisdictional divide*, *cit.*, 59-60, 91; M. Wandt, K. Bork, *Pre-contractual Duties under the German Insurance Law*, in Y. Qiang Han, G. Pynt (eds.), *Carter v Boehm and Pre-Contractual Duties in Insurance Law. A Global Perspective after 250 Years*, *cit*., 261-292; M. Wandt, K. Bork, *Disclosure duties in German insurance contract law*, in *ZVersWiss* 109, 2020, 81-103, https://doi.org/10.1007/s12297-020-00462-0). In the Italian system, insurance contracts are regulated by the Civil Code, insurance activity and distribution are governed by the Code of Private Insurance (legislative decree No. 209 of 7 September 2005. Much debate has arisen over the choice not to include the regulation of insurance contracts in the Insurance Code: see A.D. Candian, *Il nuovo codice delle assicurazioni e la disciplina civilistica del contratto di assicurazione: tendenze e resistenze*, in *Contr. impr*., 2006, 4/5, 1289-1313 and A. Gambino, *Note critiche sulla bozza del codice delle assicurazioni private*, in *Giur. comm*., 2004, I, at 1035 ff.). Other legislators have opted for adopting sectoral codes providing a complete framework of insurance law in a single source. In particular, the French Insurance Code is a unitary text of rules designed to govern insurance law, from contracts to insurance activities (for a general overview of the sources of insurance law in France, see H. Groutel, *Droit des assurances*, 14e éd., Dalloz, 2018, at 11 ff. For a more complete analysis of the presentation of risk in French insurance law, see e.g. M. Chagny, L. Perdrix, *Droit des assurances*, 2e éd, LGDJ, 2013, at 145 ff; J. Kullmann, *La déclaration de risque*, in J. Bigot (dir.), *Traité de droit des assurances*, T. 3, *Le contrat d'assurance*, 2e éd., LGDJ, 2014, ch. 2; B. Beignier, *Droit des assurances*, 2e éd, LGDJ, 2015, at 215 ff; Y. Lambert-Faivre, L. Leveneur, *Droit des assurances*, 14e éd., Dalloz Precis, 2017, ch. 1 *Le risque*; J. Kullmann (dir.), *Le Lamy assurances*, Wolters Kluwer, 2021, ch. 2 *Déclaration du risque*).

38 For further details, see K. Iremashvili, *Transparency in the Insurance Contract Law of Georgia,* in P. Marano, K. Noussia (eds.), *Transparency in Insurance Contract Law*, Springer, 2019, at 375 ff. and G. Rusiashvili, *Place of Georgian Civil Law in European Legal Family*, in *Journal of Law*, Ivane Javakhishvili Tbilisi State University Faculty of Law, 2015, vol. 15, issue 1, 97-106.

Article 812 - Termination of a contract after the occurrence of insured events

If the insurer terminates the insurance contract after the occurrence of an insured event, it shall not be released from its duty if the circumstance with respect to which the duty to give notice was breached had no influence on the occurrence of the insured event and on performance of the insurer's duty.

Elena Signorini

Summary: 1. Analysis of the article. 2. Comparative analysis: Italy. 3. Cross-border analysis: the case of France, Switzerland and Spain. 4. Final considerations.

1. Analysis of the article

Article 812 of Law No. 786 of 26th June 1997 (Civil Code of Georgia) belongs to Chapter XX, dedicated to Insurance, Section First, General Provisions. The Article provides rules for the termination of the contract after the insured event has occurred.

In particular, the provision specifies that the insurer who terminates the contract, after verification of the event, is not exempt from its obligation (to compensation) where there has been a failure by the policyholder to comply with the disclosure obligations, provided that the circumstances not disclosed had no influence on the occurrence of the event. The obligations of communication to which the policyholder is bound, and which have been breached as specified in art. 812, are governed by Articles 808 et seq., of the Georgian Code. These rules lay down specific obligations to make the policyholder aware of the situation in which the policyholder is (insured) and to allow the conclusion of the contract and the quantification of an appropriate premium. These rules should also be analysed together with the provision of art. 813 in the matter of increased risk.

Art. 812 therefore implies an extensive analysis of the insurance contract to which the Georgian code has dedicated many rules to specify the obligations of disclosure of information on the part of the insured (Art. 808), the effects of incorrect communications (Art. 809), the termination of the insurance contract in case of intentional omission of information (art. 810), the terms for termination of the contract arising from such vio-

lations (art. 811), also considering the particular case in which the insured event has already occurred (art. 812). The code dedicates a specific norm, art. 813, to the case of aggravation of the risks, this circumstance must be immediately communicated by the insured to the insurer because the quantification of the risk is a fundamental element, both for the conclusion of the contract and for the definition of the premium.

Always in the matter of communication obligations provided for by the policyholder, art. 814 which stipulates the obligation to disclose the insurance of the occurrence of the insured event, a communication fundamental to the fulfilment by the insurer of the contract.

The discipline contemplated in Chapter XX must also be analysed together with the general provisions contained in Book III of the Georgian Civil Code and in particular art. 318 on the subject of Obligation to disclose information. The rule provides that the right to receive information may be contained, as in the insurance contract, in a specific obligation.

Art. 318 highlights the role that information has in the contract: it plays a significant role, both for the conclusion and for the definition of the content of the contract, determining the obligations of both parties. The rule also requires that the costs of communication be borne by the recipient of such communications: the ratio can be sought in the will to avoid that a person can escape the fulfilment of the informative obligations because of the costs that this operation could involve. Always in topic a dutiful reference goes to the general norms on the essential terms of the contract recalling in particular the modalities of manifestation of the will. This area is governed by art. 327 (agreements on the essential terms of a contract) which provides in the first paragraph that a contract shall be deemed to have been concluded if the parties have agreed all its essential elements in the form provided for in that agreement. The second paragraph specifies that the «essential terms of a contract shall be those on which an agreement is to be reached at the request of one of the parties, or those considered essential by law». On the matter of insurance certificate, Article 802 provides that the policy must contain a number of elements including the definition of risk art. 802, paragraph 2, c)). This definition is inevitably affected by the representation of reality offered by the policyholder.

In the present case, the role played by information in identifying the obligations of the parties and their respective compliance with them should also be highlighted. Applying the general rule of art. 327 to the

specific case of the insurance referred to in art. 812 it appears that the contract, in the event of a serious breach of the information obligation, is flawed and as such the agreement to which the contract refers must be understood not to have been reached with the consequent release of the parties from the obligations that the contract should have contained. The Georgian Code also attaches great importance to the way in which the will of the parties is perfected by providing that in the event of inaccurate information (Art. 809) the insurer may "repudiate" the contract.

Given this overview, the special attention that the Georgian legislator in art. 812 gives the protection of the weak party of the contract by providing that, where the communication is incorrect or not carried out (art. 808, paragraph 1, 2 on material information) has no influence on the occurrence of the insured event, that circumstance does not relieve the insurer from the obligations arising from the contract when the insured event has occurred and even if the insurer intends to terminate the contract.

2. Comparative analysis: Italy

From an initial comparison between art. 812 of the Georgian Code and the system that the Italian Civil Code dedicates to insurance emerge a series of issues related to the conclusion of the insurance contract; to the will as an essential element for the conclusion of the contract; the extent of the information that the policyholder must provide to the insurer, with particular reference to cases of aggravation of risk; finally, the Article deals with the issue of the withdrawal of the insurer. Analysing the rules belonging to the Italian Civil Code of 1942, it should be noted that these requirements are contained in Book IV of the Obligations, Title III of the individual contracts, in Chapter XX (similar to the Georgian code), bearing "Dell'assicurazione", Section One, General Provisions[1]. It is a system that develops from Articles 1882 until art. 1932. With regard to the issues contained in art. 812 of the Georgian Code, the

1 On the theme G. Cian, A. Trabucchi, *Dell'assicurazione*, in *Comm. Breve c.c.*, Padova, 2020, 2035 ff; M. Irrera, *Lineamenti di diritto assicurativo*, Torino, 2019, 109 ff; F. Peccenini, *Assicurazione*, in *Comm. c.c. Scialoja Branca*, Bologna-Roma, 2011, 39 ff; F. Santi, *Artt. 1882 – 1986, Assicurazione – Giuoco e scommessa – Fideiussione – Transazione – Cessione dei beni*, in P. Cendon, *Comm. c.c.,* 2010, 105 ff; M. Rossetti, *Le assicurazioni*, in *Le fonti del diritto italiano,* Milano, 2019, 73 ff; A. Donati, *Trattato del diritto delle assicurazioni private*, Milano, I, 1952, II, 2, 1954, III, 1956.

Italian discipline that is important and to which we must refer is specifically contained in Articles 1892 cc. (Inaccurate statements and reservations with intent or gross negligence) and art. 1898 cc. (Aggravation of risk)[2]. Closely related are art. 1893 (Inaccurate statements and reservations without intent or gross negligence); art. 1896 (Termination of risk during insurance) and art. 1897 (Decrease of risk). This is a set of rules in which particular emphasis is given to the way in which the will of the parties is formed in the run-up to the conclusion of the insurance contract. The issue is delicate because where the insurer is not properly informed by the insured, the contract would be flawed and therefore could be cancelled, as prescribed by Italian law, ex art. 1427 cc. and following. It is therefore essential to understand the scope of the foreign rule the analysis of the general regulation on the defects of consent (art. 1427 ff. Cc.) in order to understand the consequences of the termination of the contract[3].

It should still be specified as the Italian code of commerce of 1882 to art. 432 ordered the insurer to be released from his obligations when the risk was changed or aggravated by "the fact of the insured". That clarification made it clear that, where such a new state of affairs existed at the time of the conclusion of the contract, the insurer would not have allowed it, or would have concluded it under different terms. In the 1882 Code, the release of the insurer resulting in the termination of the contract was therefore determined by the possibility of the relevant change to be chargeable to the policyholder, while what was not attributable to him remained the responsibility of the insurer itself. This approach, which put the communication of the risk change, which had to be attributable to the fact of the insured person, connected to the good faith and diligence of the insured person, was not pursued in the 1942 Code. In view of the obvious need to broaden the range of changes that policyholders may be subject to and in order to preserve the balance of benefits within the policy, the Civil Code has taken a different view, aimed at safeguarding the interest of the company in preserving the original balance of services, emphasising the aggravation which has been

2 According to the prevailing doctrine, the scope of art. 1898 cc. Is limited to non-life insurance, as for life insurance must be applied art. 1926 cc. On topic A. De Gregorio, G. Fanelli, A. Latorre, *Diritto delle assicurazioni*, Vol. II, Milano, 1987, 102 ff; in senso contrario A. Donati, *Trattato del diritto delle assicurazioni private,* cit. 1954, 399.

3 L. Gringeri, *Dei rimedi diretti allo scioglimento del contratto d'assicurazione*, in AA.VV., Recesso e risoluzione nei contratti, a cura di G. De Nova, Milano, 1994, 908.

achieved and ascertained, by imposing on the policyholder a burden of communication (which recalls the "own fact" of art. 432 of the Commercial Code) and by giving companies the power to adapt the premium to the new reality of risk, under penalty of termination of the contract. The setting of the Code is clearly in favour of insurers and at the expense of policyholders: in order to redress the balance of the situation, the legislator laid down Article 6 of the Code of 1898 those rules that can not be waived except in favour (in melius) of the latter (insured persons) pursuant to art. 1932 cc. (mandatory rules).

The reference to the origin of the institution appears decisive since it is necessary to assess whether the omission of information referred to in art. 812, also extended to information obligations governed by art. 808 until 814 of the Georgian code, a correspondence could be find in the forecasts of the Italian code.

In particular, it is necessary to understand the real importance of the obligation to communicate to the insurer the actual state of the art in order to reach the conclusion of a contract that corresponds to reality in compliance with that loyalty, fairness and good faith (art. 1175 cc.) which must distinguish the behaviour of the parties, both before the conclusion of the contract and after it (art.1375 cc.)[4]. Part of the doctrine considers the insured a real obligation to communicate[5], other part identifies it as a burden[6].

In the insurance field, the importance of the issue emerges from the general notion contained in art. 1882 cc. where it specifies that «the insurance is the contract under which the insurer, in return for payment of a premium, undertakes to pay back to the insured, within the agreed limits, the damage caused to him by an accident, or to pay a capital or an annuity upon the occurrence of an event pertaining to human life». The rule already highlights at first reading the importance attached to the definition of risk, which is the essential element of the insurance contract that operates in two ways, both from the structural point of view and from the functional one[7]. In view also of the nature of the insurance contract, the

4 With regard to the obligation – burden to communicate, A. La Torre, *Le assicurazioni*, Milano, 2007, 118.

5 A. Gambino, *Assicurazione (contratto di assicurazione, profili generali*), in Enciclopedia Giuridica Treccani, 1988, II, 4.4.1.

6 L. Buttaro, *Assicurazione (in generale*), in Enciclopedia del Diritto, 1958, III, 405.

7 F. Peccenini, *Assicurazione*, Bologna, 2011, 10 ff.

doctrine in the various attempts of elaboration of a unitary concept has reached to identify the characters of the contract of insurance framing it in some of the general contractual categories previewed from the Italian system. By referring to these categories, the contract in question is defined as a synallagmatic contract or a contract for consideration[8], as a aleatory contract[9], of duration[10] or for continuous and bilateral execution[11].

The text of Art. 812 shows the importance of the communications that the insured person must provide to the insurer.

Similarly in the Italian system, the legislator stresses the obligations imposed by the law on the policyholder by highlighting the obligation to state exactly the circumstances influencing the risk assessment (Art. 1892, 1893 cc.), or their aggravation (Art. 1898 cc.) to give prompt notice of the accident (art. 1913 cc.), or to do everything possible to reduce the damage (art. 1914 cc.). By comparing the rules, it is clear that both legislators intend to avoid an information imbalance between the parties in implementation of the more general principle of fairness and good faith in the performance of the contract (Art. 1375 cc.). A corresponding of this approach is also found in the Georgian code which, with regard to the insurance contract, requires since art. 808 until art. 814 a plurality of circumstances that the policyholder must communicate to the insurer by providing for the "repudiation" of the contract in case of breach of those obligations (ex. art 809). The repudiation is a similar case to the annulment as governed by art. 1892 cc. of the Italian Code, in cases where the statements made by the insured person are inaccurate or reticent, with intent or gross negligence.

Art. 1892 and 1983 have a common matrix represented by the recognition of inaccurate or reticent statements. Within the Italian law, however, there is an important watershed represented by the detectability in the behaviour of intent or gross negligence: in this case the contract can be annulled pursuant to art. 1892 cc. In addition to this case, the Italian Code provides for a lighter case characterized by statements not connot-

8 F. Peccennini, *Assicurazione*, cit. 5 ff.

9 A. Gambino, *Assicurazione. I) Contratto di assicurazione, profili generali,* in *Enc. Giur.,* Roma, 1988, III, 7; Scalfi, *Assicurazione (contratto di*), in *Digesto Comm*, I, 178 ff; A. De Gregorio, G. Fanelli, A. Latorre, *Diritto delle assicurazioni*, cit. 14 ff. In giurisprudenza Cass. Civ. 7 giugno 1991, n. 6452, in *Foro It. Mass*. 1991.

10 L. Buttaro, *Assicurazione* (contratto di), in *Enc. Dir*., III, Milano, 1958, 459.

11 F. Santoro Passarelli, *Dottrine generali del diritto civile italiano*, Napoli, 2012, 238.

ed by intent or gross negligence (a case not explicitly contemplated in the Georgian Code) (art. 1893 cc.), in which case the insurer can withdraw from the contract pursuant ex art. 1893 cc.

In both cases, however, the insurer must declare that he intends to avail of these forms of protection within three months since the discovery of the inaccuracy or reticence. He falls from the right to appeal provided for by art. 1892 in the first paragraph, if within three months of the day on which he became aware of the inaccuracies of the statements or reservations, he does not declare to the contracting party that he wishes to exercise the appeal.

In the same way, art. 1893 prescribes in case of inaccurate statements without malice or gross negligence that the contract cannot be cancelled (as in the case of art. 1892 cit.) but that the insurer may withdraw by means of a declaration to be made to the insured person within three months of the day on which he became aware of the inaccuracy of the information or of the reticence. The specific discipline contained in articles 1892 and 1893 cc. recalls the general principles of invalidity of the contract due to a lack of consent. In the present case, the aim pursued by the legislator is to penalize the failure of the contractor to comply with a precise declaration burden laid down for him. The structure developed by the legislator in this case is articulated, as said, unlike the general discipline providing on the one hand the annulment (art. 1892 cc.) and on the other the withdrawal (art. 1893 cc).

A similar provision can be found in the Georgian Code in Articles 809 second paragraph and 810, which link the withdrawal of the insurer to effective liability on the part of the insured person who has deliberately omitted or denied certain circumstances which, if known, would have led the insurer either not to conclude the contract, or to conclude it under different terms (higher premium). The Italian jurisprudence speaks of decisive[12] or significant[13] aggravation in the first case if known to the insurer, the latter would not have concluded the contract; in the second his knowledge would have led to the conclusion of the contract under different terms.

However, the question which is the subject of this provision should be broadened, since the insurance contract may be a contract of duration

12 Cass. Civ. 10 aprile 1987, n. 3564, in Assicurazioni, 1988, II, 23; Mass. Giust. Civ., 1987, 4.

13 Cass. Sez. Civ. III, 18 gennaio 2000, n. 500, in Mass. Giust. Civ., 2000, 81; Diritto & Giustizia, 2000, 3, 55.

and, in the course of its development, a change in the initial terms, and in particular one of the aspects on which both legislators have focused is precisely the hypothesis of increased risk.

The subject was the subject of many doctrinal interventions divided between those who demanded that the aggravation should result from a fact subsequent to the conclusion of the contract, a fact that had to be unexpected and unpredictable and unknown, and those who have not accepted the classification of normal or abnormal risk. On this point, the doctrine has pointed out that the interpreter must only determine whether a certain risk falls within the insured risk, and where it falls, whether it was due to an increase in original risk or not[14].

According to Italian case law, the aggravation must result from a new fact, compared to the situation of risk insured and not from the normal evolution of the state existing at the time of the conclusion of the insurance contract[15]; it must be a lasting situation and not a transitory one, with a certain degree of stability[16]. The aggravation must be such as to alter the balance between the risk itself and the premium above the normal contractual alea[17].

The circumstance analysed finds in art. 1898 c.c. the internal discipline, discipline that corresponds to art. 812 and art. 813 of the Georgian Code. Let us not forget that art. 1898 finds its justification precisely in the need for correspondence between the risk and the premium paid: this approach derives from the satisfaction of the technical principles that inspire the insurance to neutralize individual risks. This requirement also emerges during the execution of the contract and is met with the discipline provided in case of increased risk: according to the system provided by the legislator where such a circumstance occurs will operate a structure that includes the option of withdrawal of the insurer, the loss or reduction of compensation[18].

The case-law also shows that the rule does not require a rigid and absolute immobility of the factual situation existing at the time of the

14 A. La Torre, *Le assicurazion*i, cit., 115. On topic is critical the jurisprudence, F. Santi, *Artt. 1882 – 1986, Assicurazione – Giuoco e scommessa – Fideiussione – Transazione – Cessione dei beni*, in P. Cendon, *Comm. c.c.*, cit, 300 ff.

15 M. Rossetti, *Caratteri generali del contratto di assicurazione*, in G. Alpa, (a cura di), *Le assicurazioni private*, Torino, 2006, 1072.

16 La Torre, *Le assicurazioni*, cit. 114.

17 Cass. 4 maggio 1977, n. 1678, in *Archivio giuridico circolazione e sinistri stradali,* 1977, 581.

18 Cass. Sez. Civ. III, 4 settembre 2003, n. 12880, in *Giur. It.,* 204, 1857.

conclusion of the contract. Not every subsequent change in circumstances must be communicated to the insurer, but only that change which may affect the seriousness and intensity of the insurance risk by altering the balance between risk and premium. It must also be a new situation, neither predictable nor predictable and characterized by a certain permanence (episodic and transitory changes are in fact not significant)[19].

With regard to Italian law, the norm prescribes the first paragraph of art. 1898 cc. a general obligation to give immediate notice of changes which may lead to an increase in risk[20]: in the second paragraph this provision is enriched with the formal and temporal arrangements for the exercise of the right of withdrawal by the insurer. To this system is added the provision of the third paragraph of art. 1898 in which the legislator prescribes two scenarios of withdrawal: one with immediate effect, when the aggravation is such that the insurer would not have allowed the insurance; the other with effect after fifteen days, if the increase in risk is such that a higher premium would have been required for insurance. With regard to the effects of the withdrawal declaration, they therefore occur at different times depending on the extent of the risk increase.

The Georgian system of art. 812 is not so specific and punctual regarding the withdrawal methods. However, it should be noted that the relevant provision governs the specific case in which the insurer, after the occurrence of the event, withdraws from the contract. Where that is the case, the insurer shall in any event be required to fulfil the obligations arising from the contract only if the circumstance in respect of which the obligation to provide information has been breached, did not have any influence on the occurrence of the insured event and on the performance of the indemnity obligation[21] by the insurer.

The Italian jurisprudence, on the subject, has specified in the case in which the policy contains a clausula with the faculty of withdrawal of the insurer after every accident, that the case does not have to be analysed according to what art. 1898 cc. but according to Art. 1373 cc[22].

19 Cass. Civ. 10 aprile 1987, n. 3563, in *Assicurazioni*, 1988, II, 23.

20 Cass. Sez. Civ. III, 21 aprile 2006, n. 9371, in *Mass. Giust. Civ*., 2006, 12.

21 F. Amici, *Focus giurisprudenziale, Gros plan sur la jurisprudence, Case-law Focus, Suicidio, negozio giuridico e processo di formazione del volere. Considerazioni teorico pratiche sui riflessi dell'intenzionalità suicidaria nel diritto dei contratti*, in *Rivista di Criminologia, Vittimologia e Sicurezza*, 2020, XIV, 2 – 3, 96 ff.

22 Cass. Sez. I, 28 ottobre 1980, n. 5779, in Mass. Giust. Civ., 1980, 10.

The Article cited is the one dedicated to unilateral withdrawal and the first and second paragraph provides that «[i]f one of the parties is granted the right to withdraw from the contract, this right can be exercised until the contract has had a principle of execution. In contracts with continuous or periodic performance [1467], this option may also be exercised later, but the withdrawal has no effect for services already performed or in progress».

Both paragraphs indicated could be applied in the specific case even if, accepting the thesis that recognizes the insurance contract as a contract of duration, it is considered necessary to apply to the present case the second paragraph according to which a party must be allowed to break the constraint, as no mandatory constraint can last indefinitely. In this case, however, the services performed are without prejudice to the fact that each of them is autonomous[23].

The question is delicate because the withdrawal governed by art. 1898 is a withdrawal that finds its source in the law. The rules governing it are exceptional and are not susceptible to analogue application outside the cases provided for by the law: the case law has therefore indicated that this discipline cannot apply to the case of the conventional withdrawal referred to in art. 1373 cc.[24].

On this point, the case law intervened for clarification purposes: the judges of the Supreme Court have ordered that «in the matter of non-life insurance, the policy clause that provides for the right of withdrawal of the insurer after every claim, integrates a hypothesis of conventional recess, according to the provision of art. 1373 cc. , to which the deadline set by art. 1898 cc is not applicable. , for the different case of the legal recess as a result of the increased risk»[25].

This consideration is evident if is analysed the aim of art. 1898 cc. that does not extend to the case in which the policy clause provides for the right of the insurer to be repatriated after each claim, a case that as stated must be regulated ex art. 1373 cc.

Should a situation similar to that contained in art. 812 of the Georgian Code occur, it is worth recalling art. 1892, third paragraph. This provision

23 F. Santi, *Artt. 1882 – 1986, Assicurazione – Giuoco e scommessa – Fideiussione – Transazione – Cessione dei beni,* in P. Cendon, Comm. c.c., cit., 298 ff.

24 Cass. 28 ottobre 1980, n. 5779, in *Assicurazioni*, 1981, II, 2, 6; Cass. 22 luglio 1971, n. 2417, in *Assicurazioni,* 1972, II, 2, 5.

25 Cass. Civ. Sez. I, 28 ottobre 1980, n. 5779, in *Mass. Giust. Civ*., 1980, 10.

provides for the insurer to be released from his obligation if the obligation to provide information has not been correctly fulfilled (at the time of conclusion of the contract and no subsequent amendments have been notified) and where the accident should occur before the three-month period has elapsed from the day on which the insurance company became aware of the inaccuracy or reticence.

The ratio of the rule is to prevent the insurer who has not demonstrated the intention to withdraw in the three months, although having learned of the real state of risk, continues to earn premiums, and then refuse compensation after the accident[26].

This is not the case where the policyholder's behaviour is not marked by intent or gross negligence, in such cases, where the event occurs, before the insurer becomes aware of the inaccuracy of the statement or of the reticence, or before he has declared that he is withdrawing from the contract, the sum due by the insurer may be reduced (art. 1893, paragraph 2 cc.) in proportion to the difference between the agreed premium and that which would have been applied if the true state of affairs had been known[27].

Part of the doctrine has, however, made clear that, for the hypothesis in which the insurer, if he had been aware of the inaccuracy, would not have in any way stipulated the contract, the same is freed from the payment of compensation in analogous application of art. 1892 paragraph third cc.[28].

With regard to the obligations of the parties, it should be noted that, while the Italian civil code seems to consider only the policyholder inclined to provide inaccurate information or prone to reticence (damaging the insurance that requires information not otherwise available), on the other hand should be reported as art. 166 of the Private Insurance Code contained in D.Lgs. n. 209 of 7 September 2005 shows that the insurer is also obliged to the clare loqui, to speak clearly, giving rise to an informative reciprocity necessary for the representation of the true state of things. The discipline is affected by the implications deriving from art. 166 and 183 of the Private Insurance Code, where they impose on insur-

26 M. Rossetti, A*rt. 1892, Le assicurazioni*, Milano, 2019, 106 ff.

27 A. Gambino, *Assicurazione. I) Contratto di assicurazione, profili generali*, cit. 11; M. Rossetti, art. 1893, *Le assicurazioni,* Milano, 2019, 123 ff.

28 M. Rossetti, art. 1893, *Le assicurazioni*, cit. 126 ff.

ers the duty of loyalty, clarity and diligence towards policyholders, in addition to the duty to ensure that policyholders are always adequately informed[29] by meeting the need for maximum information cooperation on both sides[30].

However, there is a clear difference between the two sources: while the Civil Code regulates the fate of the contract in case of cancellation or withdrawal, art. 166 is silent about struments and techniques of protection. This leads to a reflection on whether the general rules referred to in Articles 1337 (negotiation and pre-contractual liability) and 1338 cc can be applied. (knowledge of invalidity clauses), 1439 (wilful intent) and 1440 (wilful accident) and /or in Articles 1428 (relevance of error) of the Civil Code[31].

3. Cross-border analysis: the case of France, Switzerland and Spain.

The comparative analysis of art. 812 of the Georgian Code continues with other normative contexts: in particular the reflections are addressed to the case of France, Switzerland and Spain.

An initial comparison of insurance legislation already reveals a number of difficulties: these are problems of a definitional nature, arising from the different qualifications in insurance law which vary from country to country; these difficulties are compounded by problems arising from the different operational contexts of the case. For a better understanding of the legal arrangement it is also essential to make a small historical premise of the phenomenon, this allows a better understanding of the operational implications that vary from context to context depending on whether they are countries belonging to the Romanistic (or civil law) legal tradition or those of common law.

The former, belonging to central Mediterranean Europe, are affected by the influence that this approach has had in the legislation on insurance contracts. This impression is evident in some systems such as France

29 A. Bracciodieta, *Il contratto di assicurazione. Disposizioni generali, Artt. 1882-1903,* in Il Codice civile, Commentario diretto da SCHLESINGER, (continuato da F.D. Busnelli) Milano, 2012, 168 ff.

30 I. Della Vedova, *Criteri di redazione,* in *Comm. Breve al diritto dei consumatori, Codice del consumo e legislazione complementare*, (a cura di) G. De Cristofaro, A. Zaccaria, Padova, 2013, 1961 ff.

31 M. Irrera, *Lineamenti di diritto assicurativo*, Bologna, 2019, 123.

and Spain, strongly influenced by the principles of the Napoléon Code. Unlike other countries such as Germany, Austria, Switzerland and Denmark, the imprint is different: for these countries, the inspiration deriving from the development of pandette's system has been fundamental and has drawn a line of continuity with some institutions of Old German law. The countries belonging to this geographical area refer the insurance contract as typical contracts, marked by specific obligations on the parties, creating a system that leaves little operational scope for the free determination of the parties. With regard to the common law countries, they are more flexible to the will of the parties and are strongly affected by the value of the jurisprudential rulings that reflect the common modes of conduct, the common feeling of the social community and the changes in social customs and jurisprudence.

France regulates the contract in question in the Code des Assurance contained in Decree No. 76-666 of 16th July 1976[32]; to this text are added the provisions contained in the implementing regulations no. 76-667 promulgated on the same day. The discipline of the insurance contract is contained in Book I, articles L100 to L195-1. It is a set of predictions related to the civil part of the discipline that occupies Titles I, II and III of Book I, on "*Le contrat*".

The common rules on insurance against damage and personal insurance are contained in Book I, Title I of which contains articles L 111-1 to L 114-3. Chapter II is dedicated to the conclusion and proof of the insurance contract (Articles L 112-1 to L 112-11). The obligations of the parties (insurer and insured) are regulated in Chapter III of Title I, of the French Code, in Articles L 113-1 to L 113-17.

It is a complex system that regulates the modalities of conclusion of the contract (art. L112-2, second paragraph), paying particular attention to the information phase of the policyholder who must be made aware of the contractual terms (by delivery of a draft contract, a proposal and supporting documents or an information note ...). The special protection of the insured is implemented also recalling the rules of the Code de la consommation (which can be applied in case of dispute).

The informative aspect and the attention aimed at filling the information imbalance that distinguishes this contract was also the subject of an

32 *Code des assurances*, www.legifrance.gouv.fr.

Ordinance, No. 361 of 16 May 2018. The reformed text amended art. 112-2 of the Code providing for further information obligations on the part of the insurer, which is obliged to deliver, before the conclusion of the contract, or a copy of the draft contract with attached information, or an information brochure describing precisely which guarantees are covered and everything else is not included in the contract in order to protect the policyholder.

A more precise discipline dedicated to the subject and the obligations of the parties can be found in Chapter III, of Title I, cited. A specific reference goes in the first place to art. L. 113-2 that in regulating the obligations of the policyholder at No. 1 of the first paragraph specifies that the policyholder must answer exactly the questions that the insurer asks him at the time of the conclusion of the contract. For the sake of completeness, No. 3 of the above-mentioned provision provides for the obligation of the insured person to inform the insurer of any new circumstances which may aggravate or create new risks within 15 days of becoming aware of them. This rule expressly refers to the danger that such inaccurate declarations will frustrate the information provided under No. 2 of the article. Articles L 113-4, L 113-8, L 113-9 and L 113-10 should also be mentioned[33].

All the above rules give rise to a systematic system to regulate aggravation cases (L 113-4), focusing on cases of reluctance or false declaration by the policyholder (L 113-8) and of all the variables that may affect the discipline of the events that may unbalance the already tenuous balance from which this contract is distinguished (L 113-8, L 113-9 and L 113-10).

The Code dedicates Article L 113-4 to the hypothesis of the aggravation of the risk that occurred during the contract. In this case, the French Code, similarly to the Italian Code, also draws attention to the role that a higher risk would have played when the contract were concluded, if it had been known by the insurance.

The rule specifies that if the new circumstance had been declared at the time of the conclusion of the contract or renewal, the insurer would not have concluded or would have concluded it with a higher premium. In these cases is recognized to the insurer the possibility to withdraw from the contract or to propose a new amount for the premium.

The rule regulates the two hypotheses separately. With regard to withdrawal, the rule specifies that this may take effect only ten days af-

33 Code des assurances, in www.legifrance.gouv.fr.

ter notification and the insurer must reimburse the insured the part of the premium or contribution related to the period during which the risk is not incurred (Article L 113-4, second paragraph). With regard to the second hypothesis, the rule provides that if the policy holder does not comply with the insurer's proposal or refuses the new revised premium amount, within 30 days of the proposal, the insurer may withdraw from the contract at the end of that period, provided, however, that the policyholder has been informed of this option, which must have been communicated by inserting it with visible characters in the proposal referred to in Article L 112-2, paragraph 2 - 6 and 7. In particular, the seventh paragraph of Article L 112-2 refers to the proposal to amend the contract but specifies that this proposal is considered accepted if the insurer does not refuse it within ten days of its arrival. The sixth paragraph specifies that the insurance proposal does not constitute a binding document either for the policyholder or for the insurer: only the policy or the accompanying note binds the parties by containing the reciprocal commitments.

The third paragraph provides that, however, the insurer may no longer take advantage of the aggravation of risks when, after being informed in any way, has given the consent to the maintenance of the contract, continuing to perceive the premiums or paying compensation after a claim.

The rule also governs the hypothesis of risk reduction during the contract (Article L 113-4, fourth paragraph). In this case, the insured person is entitled to a reduction in the premium and where the insurer does not consent, the rule gives the insured person the right to withdraw from the contract.

The fifth paragraph reiterates the importance of the knowledge of the contractual terms: to this end it specifies that the insurer must remind the policyholder of the provisions of Article L 113-4 both in terms of aggravation and risk reduction. The last paragraph of the Article then defines its scope, stating that these provisions do not apply, neither to life insurance, nor to health insurance when the health status of the policyholder is changed.

The information aspect is also regulated in Article L 113-8 of the Code des assurances. The law deals with the case of reluctance and false statements made intentionally by the policyholder.

Where such cases occur, the rule provides that irrespective of the ordinary causes of invalidity, and without prejudice to the cases referred to in Article L 132-26 concerning error, the insurance contract shall be con-

sidered void. The rule provides for this irremediable consequence where reluctance (in the Italian system we speak of reticence) or false declaration has changed the subject matter of the accident or has reduced the opinion of the insurer, even if the risk omitted or misrepresented by the policyholder did not affect the claim.

It follows that in this case, contrary to what is prescribed by the Georgian code, the reluctant or false statements are given a very important role by attributing to them the ability to render the contract null and void even if they have had no influence on the verification of the claim.

Also in the matter of omissions or inaccurate statements should be noted Article L 113-9, first paragraph, which excludes the nullity of the contract in the event that the bad faith has not been established. However, the rule provides that, if established before the accident, the insurer has the right or to maintain the contract by increasing the premium (which must be accepted by the insured) or to withdraw from the contract, ten days after the communication sent to the insured person by registered letter. The third paragraph of the Article also provides that where the omission or inaccuracy of the communication is recognised after the accident has been verified, in such a case, the compensation shall be reduced in proportion to the rate of the premiums paid in relation to that which would have been due if the risks had been fully and accurately reported. In order to meet the need for clarity and legal certainty, the provisions on termination of the contract should be laid down in the policy (Article L 113-12).

Another country that is analysed in this rapid comparison is the Swiss Confederation. In Switzerland there is a regulatory framework established by the Federal Law of 2 April 1908[34] (Law on the LCA insurance contract)[35], which entered into force on 1st January 1910 and by the Federal Law supplementing the Swiss Civil Code of 30th March 1911[36], Book V, Law of Obligations. This is a system which has been partly revised by the ordinances of 1st March 1966 on the abolition of restrictions on freedom of contract for insurance contract[37]s; 1st May 1966 and 23 December 1966, as well as the federal laws of 25th June 1972 and 23rd June 1978. Although these rules are very old, they have produced a system which is

34 https://www.fedlex.admin.ch/eli/cc/24/719_735_717/it.

35 *Legge federale sul contratto di assicurazione del 2 aprile 1908*, in www.admin.ch.

36 https://wipolex.wipo.int/en/text/581102.

37 https://www.fedlex.admin.ch/eli/cc/1966/476_495_495/it.

still a current reference point for the information burdens which it places on the parties to make them aware of the contract and its essential content (Art. 3, Federal Law of 1908)[38].

Entering into the merits of the comparison with art. 812 of the Georgian code should be noted as the comparison implies the recall of a substantial number of rules contained in the Swiss system. With regard to the Federal Insurance Contract Act of 1908, three sets of rules should be mentioned: the first, dedicated to the information burdens for the parties, is composed of Articles 6 on the subject of reticence and their consequences (in general), 7 dedicated to the collective insurance contract and 8 on the subject of the validity of the contract despite the reticence.

The Swiss legislator in art. 6, part "In general", recognizes the insurer the right to withdraw from the contract in the event that, «who was required to make the statement» stated inaccurately or withheld an important fact that he knew or should know and on which he was asked in writing. The rule regulates in the third paragraph the consequences of the withdrawal operated: by resorting to the circumstances referred to in the third paragraph, first part, the insurer is released from the obligation to provide its services. The insurer's obligation shall also be extinguished in respect of damage already incurred, if the fact that has been the subject of the reticence has affected the occurrence or extent of the damage.

In addition to this hypothesis, the legislator also regulates the case in which the insurer has already provided the service referred to in the insurance contract: by resorting to the circumstances outlined above he is entitled to the refund of what has been given.

The withdrawal cases are limited in the ones provided for by art. 8: this rule specifies how, although there was a reticence pursuant ex art. 6, the insurer cannot withdraw in the six cases specified by the rule. These are specific hypotheses from which emerges an active role of the insurer who, for example, had helped to provoke reticence (Art. 8, paragraph 1, n. 2) or knew or had to know the unspoken fact or had to know exactly the fact incorrectly stated (art. 8, paragraph 1, n. 3, 4). The insurer still cannot withdraw (always pursuant to art. 8) in the event that the unspoken or incorrectly declared fact has ceased to exist before the accident occurred

38 *Legge federale di complemento del codice civile svizzero (libro quinto: diritto delle obbligazioni) del 30 marzo 1911*, in www.admin.ch; *Codice civile svizzero del 10 dicembre 1907*, in www.admin.ch.

(art. 8, paragraph 1, n. 1) or when the insurer has waived the right to withdraw from the contract (Art. 8, first paragraph, No. 5); or even if the person required to make the declaration has not answered the question that was asked and the insurer despite this has concluded the contract (art. 8, paragraph 1, n. 6).

From the system outlined emerges the great importance of the formation of the will of the parts of the Swiss system: the norm specifies in the final part that «this provision does not apply to the case in which, just other communications of the obligor to the declaration, the question must be considered as if he had received a reply in a certain sense and that reply appears as a reticence above a relevant fact that the party responsible for the declaration knew or had to know» (art. 8, paragraph 1, n. 6).

The second set of rules (Articles 28 to 32) is dedicated to increasing risk and releasing the insurer. This group is made up of Articles 28, concerning the aggravation of risk by the contracting party, 29, concerning the reservation of special agreements, 30, concerning the aggravation of risk without the participation of the contracting party, 31 on the subject of aggravation of risk in the collective insurance contract and 32 on aggravation without consequences.

The system set up by the Swiss legislature distinguishes between cases in which the aggravation is the consequence of a conduct held by the policyholder during the insurance (art. 28, paragraph 1) from those that occur without the participation of the policyholder (art. 30). In the first case, the insurer is freed from the obligations assumed by the contract. With regard to the first hypothesis, art. 28 requires that the aggravation of the risk is essential, that is to say that it results from the modification of a fact relevant to the appreciation of the risk (art. 4) as determined by the parties when concluding the contract. The contract may in fact provide whether and to what extent and under what terms the contractor must communicate any aggravation to the insurer (art. 28, third paragraph).

Precisely with regard to the autonomy of the parties, art. 29 regulates the reserve of special covenants by providing that the provisions of art. 28 do not modify any agreements with which the contracting party has assumed obligations aimed at containing the risk or preventing its aggravation (art. 29 first paragraph). The legislator in the second paragraph of the Article then intervenes to protect the weak party of the contract by providing that the insurer may not invoke the clause that frees him from the contract if the stipulation fails to meet the obligations, assumed pur-

suant to art. 29 of the first paragraph, where such failure has not contributed to the verification of the accident and to the possible extension of the benefits payable to the insurer.

Complete this second group art. 30 dedicated to the hypothesis of aggravation not dependent of the policyholder. In the event that the essential aggravation has not contributed to the conclusion of the consequences referred to in art. 28, that is to say, the release of the insurer for the future of the contract, shall take place only when the policyholder has failed to declare the aggravation to the insurer in writing and as soon as it becomes known.

The second paragraph of the provision also requires that if the policyholder has properly fulfilled the obligations assumed and if the insurer has reserved the right to withdraw from the contract because of the essential aggravation of the risk, the insurer's liability is extinguished fourteen days after notification to the policyholder of his intention to terminate the contract.

The third set of rules consists of Articles 43 on the communication of the insurer and 44 on the communication of the policyholder or the person entitled. Both rules are devoted to the way in which the parties must communicate to which they are bound.

Finally, it is worth recalling art. 12 of the general insurance provisions according to the 2018 LCA Insurance Contract Act regarding communications.

All the texts examined refer in several parts to the importance of respecting diligence in the execution of the contract: The expression of such diligence is the fulfilment of the information and communication obligations incumbent on the parties who are required to make known the changes that may have occurred to the situation existing at the time of the conclusion of the contract. In case of omission art. 12 cited states that the policyholder will have to pay retroactively any difference in premium if he fails to comply with the information requirement concerning changes in the personal conditions determining the calculation of the premium.

The last country to be compared is Spain.

The Spanish system regulates the insurance contract in the Real Decreto of 24th July 1889, in the Law n. 50 of 8th October 1980 containing De contrato de seguro, in Real Decreto n. 1 of 16th November 2007 with which the legislation on consumer protection has been reworked. The plant also includes additional laws. Chapter V, of Book IV, De la prueba

de las obligaciones, of the Real Decreto of 1889, which has been the subject of additions and amendments as a result of Law No. 1 of January 7, 2000 de Enjuiciamiento Civil[39].

The case in question must be traced back to the provisions of Law n. 50 of 1980[40] and in particular art. 10 concerning statements to be made by the insured person to the insurer prior to the conclusion of the contract. The second paragraph of the Article regulates the cases of withdrawal in case of inaccurate declarations providing for the time arrangements for the exercise of that right.

The Spanish system, by analogy with the Italian and French systems, requires that in the event of the accident being verified before the insurer has indicated its intention to withdraw from the contract, the compensation is reduced in proportion to the difference between the agreed premium and the premium that would have been applied if the actual level of risk had been disclosed (art. 10, paragraph 3). It should be noted, however, that in case of malice or gross negligence of the insured the insurer will be exempt from payment of the due (as provided for example by art. 28 of the Federal Law on the insurance contract of 1908 in Switzerland).

Spanish law also specifies an obligation for the policyholder or for the insured to inform the insurer as soon as possible of the alteration of the factors and circumstances declared in the questionnaire completed at the time of the conclusion of the contract (art. 11, paragraph 1).

The overview is completed by a series of rules that punctually regulate a series of variants that may occur during the life of the contract: only by way of example is cited art. 12 which gives the insurer the possibility of proposing an amendment to the contract within two months of the day on which the aggravation was declared.

4. Final considerations

The analysis of the rule in question, of the rules related to it and the comparison carried out shows a common concern of the legislator to preserve, by imposing a series of behaviours due to the parties, the smooth conduct of the contract, avoiding that it can be translated into an unequal instrument, potentially to the detriment of both parties.

39 *Real Decreto Legislativo* n. 1/2007, de 16 de noviembre, or el que se aprueba el texto refundido de la Ley general para la defensa de los consumidores y usuarios y otras leyes complementarias, in www.boe.es.

40 *Ley 50/1980, de 8 de octubre, de Contrato de seguro*, in www.boe.es.

The approach chosen by the legislator of the countries considered places a unitary attention to the ratio that is at the base of this contract, trying to avoid, as in the specific case of art. 812 in question, that there may be an advantage to the detriment of the policyholder where the insurer, by exploiting an omission of the policyholder, which is de facto irrelevant in the occurrence of the event, tries to free himself from the obligations assumed in the contract, although they have received the corresponding premiums.

At the same time, the general rules protect the insurer from the possible improper conduct of the policyholder who, by omitting or providing incorrect information, seeks to secure a higher indemnity by paying a lower premium. The issue is a delicate one and the balance even more so in a contract in which there is in fact an imbalance between the parties to which the legislator must remedy.

Article 813 - Obligation to give notice of increased risk

1. The policyholder shall immediately notify the insurer of an increased risk arising after the contract was concluded if it would have a material influence on the conclusion of the contract.

2. Where so provided in the first paragraph of this article, the insurer may terminate the contract one month after giving a notice of termination or demand a corresponding increase in the insurance premium. If the insured intentionally causes the increased risk, the insurer may terminate the contract without observing the notice period.

Article 814 - Obligation of notifying about an insured event

1. Upon becoming aware of the occurrence of an insured event, the policyholder shall notify the insurer.

2. After the occurrence of the insured event, the insurer may demand any kind of information from the insured necessary to determine the extent of the insured event or of the liability.

3. The insurer may not resort to an agreement under which it is released from liability in the event of the policy holder's failure of notification, but if such failure of notification does not materially prejudice the insurer's interests.

4. The insurer shall perform its duty after having ascertained the insured accident and the extent of compensation.

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Summary: 1. Obligation to give notice of increased risk (art. 813 of Civil Code of Georgia). 2. Obligation of notifying about an insured event (art. 814 of Civil Code of Georgia).

1. Obligation to give notice of increased risk (art. 813 of Civil Code of Georgia)

Among the insured´s obligations is the obligation to properly notify the insurer on the occurrence of the insured event after the conclusion of the contract. The contract´s performance in good faith also includes the obligation to notify the contractual partner of important changes to

the conditions underlying the conclusion of the contract. Moreover, this obligation is subsequent to both parties´ obligation to inform each other, which has existed since the pre-contractual stage.

The risk is the key element of the insurance contract. In recent doctrine, it is defined as the possibility or probability that a future event, sometimes uncertain only about the time of its occurrence, will occur.[1] However, it should be added that an impossible event removes the risk of insured event´ occurrence, which would lead to the nullity of the insurance contract, given that the risk insurance and coverage of damages are the proximate cause that the insured has in mind to conclude the policy.

After concluding the contract, the policyholder must refrain from creating conditions that lead to an increased risk. The event artificially increased by the policyholder represents a change of the contractual conditions, made unilaterally by him. Even if we are in the realm of random contracts, obviously the risk being their key element, the increase of its occurrence probability cannot be made as a result of the policyholder's own manoeuvres, but only by the appearance of external, natural, technical events or by the intervention of third parties which are not under his control. The policyholder's act, premeditated or not, which has led to the change of risk degree, implicitly leads, as we have shown before, to the change of the contractual conditions. The insured risk produced intentionally by the policyholder himself constitutes a reason to exclude the insured risk. Consequently, the policyholder´s act leads to the insurer´s exemption from paying the indemnity.

The aggravation of risk can also occur in the absence of the policyholder´s deed, guilty or not. Even in this case, the insurer must be informed about the change in circumstances that have led to an increase in the probability of insured risk´ occurrence. The conclusion of the insurance contract took into account certain circumstances, and a significant change in them would put the insurer in a situation that it did not assume at that time. The Constitutional Court of Romania has ruled[2] that the

1 M. Rossetti, *Il diritto delle assicurazioni*, I, Padova, 2011, 751, apud *Le Assicurazioni. L'assicurazione nei codici. Le assicurazioni obbligatorie. La distribuzione assicurativa, IV Edizione, (*a cura di) A. La Torre, Milano, 2019, p. 17.

2 Constitutional Court of Romania, 25th of October 2016, n. 623, decision regarding the exception of unconstitutionality of the provisions of art. 1 para. (3), art. 3, art. 4, art. 5 para. (2), art. 68, especially art. 8 para. (1), (3) and (5), art. 10 and of art. 11 of Law no. 77/2016 on the payment of real estate in order to settle the obligations assumed through loans, as well as the law as a whole, published in Official Journal of Romania, Part I, n. 53 of 18.01.2017.

analysis of the contract would have to take into account both the risk assumed by the parties voluntarily and the additional risk, that the parties could not take into account because of third and unforeseen elements at the time of the agreement of wills. According to the same ruling, the unpredictability would only cover "added risk", such that the parties would have two options: a) either to renegotiate the contract´ adaptation in view of the new reality; b) or to decide the termination of the agreement. Even if the Court's analysis relates to credit agreements, the *alea* element is present from the perspective of the interest rate' and exchange rate' value for foreign currency loans, and *mutatis mutandis* this is also applicable in the case of insurance contracts.

Even if the risk is neither the cause nor the object of the insurance contract, it contributes to the definition of both the insurance contract's cause and its object. Regarding the cause, the insured concludes the contract motivated by the future coverage of the damages caused by a future and uncertain event. As for the object, the insurer is the one who requests a sum of money to pay the damages caused by a risk of occurrence of a future and uncertain event, obligation calculated at the time of concluding the agreement. Therefore, the subsequent modification of the assumed obligation´ conditions represents a contractual modification that may lead to an increase in the value of potential damages, implicitly to the payment by the insurer of additional amounts that were not assumed at the time of concluding the contract.

In various European countries, the situation of increased risk after the contract´s conclusion has been regulated by imposing on the insured the obligation to notify the insurer of the new circumstances, so that the latter can choose between maintaining the contract, even modified, or terminating it.

According to those established in art. 813 para. (1) of the Civil Code of Georgia[3], the policyholder must immediately notify the insurer of the insured risk´ aggravation that has occurred after signing the insurance contract, if this factor would have a material influence on the contract´s conclusion. In addition to this legal text, art. 813 para. (2) of the Civil Code of Georgia establishes in favor of the insurer two alternative situations: a) either the termination of the contract with the prior notification of the policyholder at least one month in advance; b) or the insurance

3 The Civil Code of Georgia is available at the following link: https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/90468/118660/F999089720/GEO90468%20Geo.pdf.

premium´ corresponding increase. If the insured risk increases due to the insured person´ intentional act, the insurer may choose to terminate the contract without first going through the procedure of informing the policyholder.

From the way these legal texts are rendered, it can be observed that the insurance contract´ further execution or, as the case may be, its termination due to the insured risk´ aggravation remains at the discretion of the insurer, who can apply either of the two alternatives depending on the situation resulting from the agreement´ execution. In other words, if, for example, the agreement´ further execution is no longer of interest to the insurer because of the insured risk´ aggravation that has a material influence on the contract, the insurer may proceed from the beginning to unilaterally terminate the contract according to art. 813 para. (2) lit. a) thesis I of the Civil Code, not being obliged to justify in any way his decision towards the insured person or to take into account a possible option of the policyholder to continue the contract´ execution, with the insurance premium´ proper increase. This statement is reflected by the provisions of art. 813 para. (2) lit. a) Thesis I, in which the Georgian legislature provides that the insurer has as its first option the contract´ termination and only as the second option its maintenance with the insurance premium´ corresponding increase. The fact that the insurer can choose the unilateral termination of the insurance contract gives him a position of superiority over the insured persons, although the insurer, as a professional in the field, has access to specialized solutions, information and knowledge, acces which a policyholder normally does not have. The existing disequilibrium between the rights and obligations of the parties to the contract and which is also reflected in para. (1) of art. 813 from the Civil Code results from the fact that this Article does not define essential notions in outlining the policyholder´ obligation to inform the insured risk´ increase, which highlights the inequality between the insurer, on one hand, and the policyholder, on the other hand.

Thus, the art. 813 para. (1) does not show the way in which the policyholder must notify the insurer of the insured risk´ increase, nor the concrete terms in which the policyholder must fulfill this obligation. In this respect, the term "immediate" is too vague to be able to establish, objectively, what is the time frame that the legislator considers to be reasonable in order to be fulfilled by the insured his obligation to give notice. In the absence of express provisions in this regard, we can appreciate that

the policyholder will inform the insurer in writing, in a way that ensures both the proof of notification´ transmission by the insured and the proof of actual receipt by the insurer of the notification. It is necessary for the insurer to be informed within a reasonable time, without any unjustified delays on the part of the insured caused by his guilty conduct. Also, art. 813 para. (1) does not provide clear criteria for determining the material influence of the insured risk´ increase after the agreement´ conclusion, nor does it make reference to other legal provisions that may apply in this situation.

Taking into account all the above, a fair option in case of insurance contract´ unilateral termination by the insurer, under the conditions of art. 813 of the Civil Code, would be only the one in which the insured person intentionally causes the insured risk´ increase, this situation being regulated by Civil Code´ art. 813 para. (2) lit. a) Thesis II. In the situation mentioned in art. 813 para. (2) lit. a) Thesis I of the Civil Code, it is preferable for the insurer to choose, in a first phase, to maintain the contract, with the insurance premium´ corresponding increase. This aspect is also supported by the opinion of two Georgian authors[4], according to whom a contracting party may invoke, under the provisions of the Georgian Civil Code, the financial cost as justification for the request of amending the contract, but may not use this aspect in order to claim the impossibility of the inssurance contract´ performance and in order to terminate the agreement.

If the insured does not agree to the contract´ modification under the conditions proposed by the insurer, and following the new contractual clauses´ negotiation, the parties would not reach an agreement on these clauses´ content, the insurer may initiate the procedure of unilateral termination, under the terms of art. 813 para. (2) of the Georgian Civil Code, motivated by the fact that it has become too onerous for the insurer. Prior fulfillment of a complete and transparent procedure for informing the insured about the need to amend the contractual clauses, as well as negotiating with the insured the contractual clauses´ adaptation to the new socio-economic reality for the insurer means to eliminate the risk that the insured would prove before the court that the insurance contract´ unilateral termination is an unjustified measure.

4 O. Kipshidze, s. Mebonia, *Implications and possible legal consequences of the Coronavirus pandemic on commercial contracts in Georgia*, available at: https://www.dentons.com/en/insights/articles/2020/april/3/implications-and-possible-legal-consequences-of-the-coronavirus-pandemic.

We consider that these conclusions respect the principle of equality between the contracting parties, a principle whose legislative importance is recognized by its mention at the beginning of the Georgian Civil Code. Thus, according to art. 1 of the Civil Code, this normative act regulates the relations of a private nature based on the persons´ equality. The effective application of this principle in the legal relations between the insured and the insurer, by increasing the insured´ level of information offered by the insurer, is a viable solution for blurring inequalities between the parties of the insurance contract, because through knowledge and information, the insured, as a "layman", may reach the level of knowledge and training that the insurer, as a professional, has in the field of insurance[5]. This conclusion applies not only to Georgian insurance law but also to the rules of Romanian law applicable in this field.

In Romanian law, the insured´ obligation to inform the insured risk´ increase is regulated by the Civil Code´ art. 2203 para. (2)[6]. According to this legal text, the insured is obliged to notify the insurer in writing of any change that occurres during the contract´performance and that concerns an essential circumstance of the insured risk. This obligation also belongs to the insurance contractor who has become aware of the change.

From the analysis of art. 2203 of the Civil Code, results three important aspects, from the perspective of the Romanian legislator, in establishing the insured or the insurance contractor´ obligation to inform: a) this obligation is double: it exists both at the conclusion of the contract [art. 2203 para. (1) of the Civil Code], as well as during the execution of the contract [art. 2203 para. (2) of the Civil Code]. b) the circumstances which the insured or the insurance contractor must declare to the insurer and which give rise to the above-mentioned sanctions must be essential to the assessment of the risk. c) the essential circumstances mentioned above must be known to the insured person / the insurance contractor. In other words, the insured or the insurance contractor cannot defend themselves that they have not known certain essential circumstances, if these situation have had to be known or could have been known with the least effort that a diligent person could make. Therefore, the insured or the in-

5 E. M. Minea, *Considerații privind încheierea contractelor de asigurare*, Juridical Current Review n. 3-4 (18-19), Tîrgu Mureș, 2004, 7-8, article available at: http://revcurentjur.ro/old/arhiva/attachments_200434/recjurid043_49F.pdf.

6 Civil Code, republished (r1) in Official Journal of Romania, Part I, n. 505 of 15.07.2011, with subsequent amendments.

surance contractor may be relieved of the obligation to state the essential circumstances relating to the risk only if those circumstances could not, objectively, have been known to even the most diligent person.[7].

In this regard, in national case law[8] it is emphasized that in the assessment of the insured's conduct regarding the fulfillment of the obligation to inform the insurer on the insured risk´ essential elements, the specialized bodies´ documents or findings on the insured risk´ conditions (e.g. high risk of flood or landslide is declared by the authorities in a specific area) are less relevant than the findings/knowledge held by the insured person himself regarding this situation.

In the interpretation of art. 2203 para. (2) of the Romanian Civil Code, the doctrine[9] mentions that neither the Civil Code nor the special legislation in the field of insurance (e.g. Law n. 132/2017[10], Law n. 236/2018[11]), do not establish the effective form that the insured person / the insurance contractor´ statements must take, especially as regards the questions which these persons are obliged to answer. In practice, the techniques accepted in this regard can be of various types, provided that they help to form a complete opinion on the risks to be contracted[12].

Based on the same art. 2203 of the Civil Code, the national judicial practice[13] shows that the insured´ good faith during the contract´ execution in the conditions of insured risk´ aggravation is an essential requirement in order to demand the insurer to pay the indemnities in case the insured risk would occur. In this regard, the court points out that by signing the insurance contract the insurer acceptes to take a significant risk based on

7 M. Afrăsinei, *Interpretation of art. 2203 of Civil Code*, in D M. Gavriş, M. Eftimie, et al., *Noul Cod civil - comentarii, doctrină, jurisprudenţă. Volume III*, Bucharest, 2012, 584.

8 Suceava Court of Appeal, 11 September 2014, n. 6831, in V. Nemeş, G. Fierbinţeanu, *Dreptul contractelor civile şi comerciale. Teorie, jurisprudenţă, modele,* Bucharest, 2020, 678.

9 A. Dutu, *Consideraţii privind reglementarea contractului de asigurare în Codul civil român*, Pandectele Române Review n. 2/2015, available at: https://sintact.ro/.

10 Law n. 132/2017 on the compulsory insurance against civil liability for the damage to third parties caused by vehicle and tram accidents, published in the Official Journal of Romania, Part I, n. 431 of 12.06.2017.

11 Law n. 236/2018 on the distribution of insurance, published in the Official Journal of Romania, Part I, n. 853 of 08.10.2018.

12 A. Dutu, *Consideraţii privind reglementarea contractului de asigurare în Codul civil român, cit.*

13 Iaşi Court of Appeal, 3 October 2017, n. 618, judgment available at: http://portal.just.ro/45/Lists/Jurisprudenta/DispForm.aspx?ID=1093.

the information he utilizes to determine the insurance amount, without being able to verify the information provided by the insured, so that the good faith of both parties in the insurance contract´ conclusion and execution is presumed. Therefore, in the court´s opinion, the violation of the legal trust presumed by art. 2203 of the Civil Code, due to the bad faith of the insured in providing this information, is severely sanctioned, in the present case, by refusing to pay the compensation. Based on these legal arguments, the court has rejected the insured's request to oblige the insurer to pay the compensation claimed by the insured as a result of the insured risk´ occurrence. In motivating this solution, the court has pointed out that the insured´ obligation to provide complete information about the insured risk was not limited to the answers given in the questionnaire completed in the pre-contractual period, because according to art. 2203 para. (1) of the Civil Code the insured person has the obligation to declare, in addition to the answers to the insurer's questions, any information or circumstances that he knows and that are also essential for the risk assessment. Moreover, because good faith is a basic principle in the matter of insurance, par. (2) in art. 2203 of the Civil Code stipulates that the insured must make full statements, even when during the performance of the contract the circumstances regarding the risk (e.g. *aggravation of the risk*) have changed.

The importance of the insured´ good faith from the Romanian legislator´ perspective also results from the analysis of art. 2204 of the Civil Code. The first paragraph of art. 2204 regulates the sanction of the contract´ nullity applicable in situations where the inaccuracy / reluctance´ statements are obviously made in bad faith, and the second paragraph stipulates the legal consequences applicable if the insurer insured cannot prove the bad faith. In interpreting this article, national case law[14] states that the contract´ nullity operates when the following conditions are cumulatively met: 1) the insured has given, at the time of concluding the contract, an inaccurate statement or has not given the required information ("reluctance"); 2) the inaccurate statement or reluctance was made by the insured in bad faith; 3) the inaccurate statement or reluctance was made by the insured regarding the circumstances which, had they been known by the insurer, would have determined the insurer not to give his consent at all or to give it in different circumstances.

14 Focşani Municipal Court, 15 april 2021, n. 2973, judgment available at: https://sintact.ro/.

However, the provisions of art. 2203 - art. 2204 of the Romanian Civil Code do not refer to the direct link that exists between the good faith of the insured, as a consumer within the meaning of the provisions of art. 2 point 2 of the Government Ordinance no. 21/1992[15] and of the art. 2 point 1 of Government Emergency Ordinance n. 34/2014[16], during negotiation and execution of the insurance contract and good faith of the insurer in the same situation, given the professional quality of the latter[17], as well as his obligation to financial prudence. In this situation, the fulfillment in good faith by the insured of the obligation to inform the insurer depends, to a large extent, on the fulfillment by the insurer of the obligation to inform the insured correctly and completely, therefore implicitly in the insurer´ good faith. In this case, the insured cannot be blamed for failing to inform the insurer of any deficiencies in the documentation required by the insurer in assessing the insured risk and establishing the essential circumstances, as long as this omission was caused by the insurer because of the generic manner he drew up the standard forms which he communicated to the insured for completion and signing.

As long as the insurer is the one who drafts the standard clauses in the insurance contract and in the standard forms that are required for signing the contract and, subsequently, for its execution, the insurer, as a professional, meaning a person with specialized knowledge in the field of insurance, knows best what is the "required documentation" in the overall risk assessment[18], so inclusively in defining the essential nature of

15 Government Ordinance n. 21/1992 on consumer protection, published in the Official Journal of Romania, Part I, n. 212 of 28.08.1992, republished in the Official Journal of Romania, Part I, n. 75 of 23.03.1994 and in Official Journal of Romania, Part I, n. 208 of 28.03.2007, with subsequent amendments brought by Law n. 363/2007, Government Emergency Ordinance n. 174/2008, Government Emergency Ordinance n. 71/2011, Government Emergency Ordinance n. 34/2014, Government Ordinance n. 37/2015, Law n. 51/2016, Law n. 203/2018 and Law n. 222/2020.

16 Government Emergency Ordinance n. 34/2014 on consumer rights in contracts concluded with professionals, as well as for amending and supplementing normative acts, in the negotiation and development of the insurance contract and good faith of the insurer in the same situation, published in the Official Journal of Romania, Part I, n. 427 of 11.06.2014, with subsequent amendments brought by Government Ordinance n. 2/2018, Law n. 109/2019, Government Emergency Ordinance n. 70/2020, Government Emergency Ordinance n. 174/2020, Law n. 131/2021 and Government Emergency Ordinance n. 140/2021.

17 See art. 2 para. (2) of Government Emergency Ordinance n. 34/2014.

18 In this regard, see V. Nemeș, *Dreptul asigurărilor. Ediția a cincea*, Bucharest, 2021, 190 - 191.

the circumstances regarding the insured risk, which the insured or the insurance contractor must declare to the insurer, regardless of the moment of their occurrence (before signing the contract or during its execution).

Therefore, in determining how the insured has fulfilled in good faith the obligation to inform the insurer correctly and completely about the essential circumstances of the insured risk both at the time of signing the contract and during its execution, an important step is represented by the way in which the insurer has fulfilled its obligation to draft the contractual clauses and other formalities necessary in signing and executing the contract, in an intelligible, concise and transparent way, using a clear and simple language. The insurer´s failure to comply with this obligation may not constitute a ground for its rejection of a claim made by the insured, as long as, in accordance with the principles of law, no one can plead his own fault in support of his interests (*nemo auditur propriam turpitudinem allegans*).

For the same reasons, national courts should consider, in solving any claims of insured persons, as consumers, for their compensation by insurers, not only the manner in which those insured persons have fulfilled their obligation to inform insurers, under the provisions of art. 2203 and of art. 2204 of the Civil Code, but also the way in which the insurers have complied with their own obligation to inform the insured, even if at present art. 2203 and art. 2204 of the Romanian Civil Code does not contain express provisions in this regard. Thus, in pronouncing a solution in a case similar to the one described above, national courts should take into account, *inter alia*, the principle of protection of the disadvantaged party, in which case it is the insured, as a consumer within the meaning of the Government Ordinance n. 21/1992 and the Government Emergency Ordinance n. 34/2014.

At EU level, the principle of vulnerable and disadvantaged person[19] is recognized from a legislative point of view by the provisions of art.

19 (1) Court of Justice of the European Union (Third Chamber), Judgment of the Court of 17 September 2009, case C-347/08, *Vorarlberger Gebietskrankenkasse vs WGV-Schwäbische Allgemeine Versicherungs AG*, pct. 44, available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=84084&pageIndex=0&doclang=ro&mode=lst&dir=&occ=first&part=1&cid=1176247.

(2) Court of Justice of the European Union (Second Chamber), Judgment of the Court of 12 May 2005, case C-112/03, *Société financière et industrielle du Peloux vs Axa Belgium and others,* point 29, available at: https://curia.europa.eu/juris/showPdf.jsf?text=&docid=59309&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7288555.

10 - art. 12 of Regulation (EU) no. 1215/2012 of the European Parliament and of the Council[20]. Art. 10, art. 11 and art. 12 of the Regulation establish the rules of jurisdiction in the field of insurance applicable in the EU Member States, which are different from the jurisdiction rules in contractual and delictual liability. These provisions of Regulation (EU) no. 1215/2012 have the role to protect the rights and interests of the party which is economically disadvantaged and is less experienced from a legal point of view compared to the insurer[21], meaning it grants the disadvantaged person the benefit of rules of jurisdiction which are more favorable to his / her interests than the general rules. In applying this principle, the Court of Justice of the European Union[22] notes that, in matters relating to workers and consumers, insurance action is characterized by a certain imbalance between the parties, which European Union law and the laws of the Member States of the European Union are obliged to fix.

This principle of European law is applied by the current insurance legislation applicable from Germany, following the reform from 2008 regarding the legal rules applicable to the rights and obligations of the insured and the insurer as parts of the insurance contract. Thus, on January 1, 2008, the Insurance Contract Act 2008 came into force[23], with the aim to modernize German insurance law and to provide the insured with a higher level of protection in the legal relations with the insurer. Unlike the previous regulation, which took into account the *all-or-nothing* principle in determining the insured's liability and the indemnity that would be

20 Regulation (EU) n. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, published in Official Journal of the European Union n. L 351/1 of 20.12.2012.

21 In this regard, see I. REBECA, *Drept internațional privat european*, Bucharest, 2019, 361.

22 (1) Court of Justice of the European Union (Eight Chamber), Judgment of the Court of 13 July 2017, case C-368/16, *Assens Havn vs Navigators Management (UK) Limited*, point 30, available at: https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:62016CJ0368.

(2) Court of Justice of the European Union (First Chamber), Judgment of the Court of 26 May 2005, case C-77/04, *GIE Réunion européenne și alții vs Société pyrénéenne de transit d'automobiles (Soptrans),* point 22, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62004CJ0077&from=RO.

23 Insurance Contract Act of 23 November 2007 (Federal Law Gazette I p. 2631), as last amended by Article 2 of the Act of 10 July 2020 (Federal Law Gazette I p. 1653), available at: https://www.gesetze-im-internet.de/englisch_vvg/englisch_vvg.html#p0160.

due to him in case of insured risk, Insurance Contract Act 2008 has introduced the system of proportional reduction of the payable indemnity.[24]

Section 19 (1) of the Insurance Contract Act 2008 provides that, before concluding the contract, the insured has the obligation to inform the insurer about the risk factors that the insured is aware of and which are relevant in the insurer's decision to conclude the contract in the established form.

Also, after the conclusion of the contract, the insurer has no right to increase the insured risk or to allow the risk` increase without the insurer` consent, according to the provisions of section 23 (1) of the Insurance Contract Act 2008. In addition to this legal text, section 23 (2) and (3) provide for two situations, which differ according to the insured` role in increasing the insured risk after signing the insurance contract:

a. section 23 (2): *if, after the conclusion of the contract, the insured acknowledges that he has aggravated or has allowed an aggravation of the insured risk without the consent of the insurer, he must disclose the aggravation of the insured risk to the insurer without undue delay.*

b. section 23 (3): *in the event that, after the conclusion of the contract, an aggravation of the risk insured occurs notwithstanding his intention, he must disclose the aggravation to the insurer without undue delay as soon as he has learned thereof.*

If the insured risk increases during the contract, the insurer may choose between one of the following situations:

a. *Either the termination of the contract*, a measure that the insurer must adopt within one month from the date of taking note of the insured risk` increase. If within this period the insurer does not notify the insured of the contract` termination or if the state of affairs that existed prior to the insured risk` increase is restored, the insurer is deprived of the right to invoke the contract` termination [section 24 (1), (2) and (3) of Insurance Contract Act 2008].

24 According to this principle, the insurance indemnity due to the insured is reduced in proportion to the degree of guilt attributed to him, which implicitly leads to the limitation of the insurer's ability to escape liability. Regarding this point of view, see H. Heiss, *Proportionality in the new German Insurance Contract Act 2008*, 106, available at: http://www.erasmuslawreview.nl/tijdschrift/ELR/2012/2/ELR_2210-2671_2012_005_002_003.pdf.

b. *Or the maintenance of the insurance contract*. In this case, the insurer has the option to choose again: either he demands the insured to pay an increased insurance premium proportionally to the insured risk` increase, or the insurer refuses to pay the higher risk indemnity [section 25 (1) thesis I of Insurance Contract Act 2008].

Subsequently, Section 25 (1), thesis I, of the Insurance Contract Act 2008 expressly provides that it is preferable that the insurer chooses to maintain the insurance contract and not to terminate it. This aspect is mentioned neither in art. 813 of the Georgia Civil Code nor in art. 2203 - art. 2204 of the Romanian Civil Code.

According to the Section 25 (1), thesis I, of the Insurance Contract Act 2008, the implementation of this option by the insurer is not conditioned in any way by the fulfillment of the insured's obligation to inform the insurer about the increase of the insured risk. Moreover, none of the Insurance Contract Act 2008 provisions which we have cited above stipulates the legal consequences applicable if the insured fails to fulfill his obligation to inform the insurer in the event of an insured risk` increase. For this reason, the specialized doctrine[25] emphasizes that a common practice when concluding an insurance contract is that the general terms and conditions contain, *inter alia*, the obligations of the insured to inform the insurer of an insured risk` increase, and the contract itself stipulates the legal consequences applicable to the insured in case of non-fulfillment of these information obligations.

In French law, the Insurance Code provides at art. L. 113-2 points 2) and 3) the fact that the insured` obligations include among others:

a. The obligation to answer exactly the questions asked by the insurer, in particular in the risk declaration form which is completed before signing the contract, regarding the circumstances that are likely to make the insurer assess the risks he takes [art. L. 113-2 point 2) of Insurance Code].

b. The obligation to declare, during the performance of the contract, the occurrence of new circumstances which determine either

25 M. Zimmerling, A. Pfeiffelmann, *The Insurance Disputes Law Review: Germany*, available at: https://thelawreviews.co.uk/title/the-insurance-disputes-law-review/germany#footnote-105.

the increase of the risk or the creation of a new risk. If this legal text becomes applicable, the answers given by the insured to the insurer's questions under the conditions mentioned in art. L. 113-2 pt. 2) become inaccurate or obsolete [art. L. 113-2 point 3) thesis I of Insurance Code]. Within a maximum of 15 days from the date of becoming aware of the occurrence of new circumstances that have at least one of the consequences mentioned above, the insured has the obligation to inform the insurer about the incidence of the provisions of art. L. 113-2 pct. 3) thesis I. The insurer's notification must be made in writing, regardless of the support. Thus, according to the French legislature, the insured informs the insurer by sending a registered letter, which can be on paper or an electronic letter, 100% dematerialized [art. L. 113-2 point 3) thesis II of Insurance Code]. According to the French legislature, the registered electronic letter has the same legal effects as the paper letter, which can be replaced by the registered electronic letter, as long as certain conditions are complied with by the legal texts in force governing them[26].

The obligation of the insured to inform the insurer under the conditions of art. L. 113-2 point 3) of the Insurance Code applies in the case of most insurance contracts that are concluded on the basis of this normative act. As an exception, in the case of life insurance and health insurance, the rule provided by art. L. 113-2 pt. 3) Thesis II does not apply.

From the overall analysis of art. L. 113-2 point 3) it results that the insured must, on his own initiative, declare the new aggravating circumstances or, as the case may be, the appearance of the new risks. Therefore, it is necessary for the insured to have information regarding the definition of the two notions, "aggravating circumstances" and "new risk", as well as to be aware of the obligation incumbent on him under art. L. 113-2 point 3). Thus, the insurer should be informed only of the circumstances that cause the risk to change significantly. Otherwise, the contract could be modified too easily, which would violate the principle of contractual security. Thus, the fact that a correct initial answer becomes incorrect due to a new circumstance does

26 See November 2021 Practical Guide to the Recommended Electronic Letter, a guide prepared by the French Ministry of Economy, Finance and Reform and available at: https://www.entreprises.gouv.fr/files/files/secteurs-d-activite/services/services-postaux/lettre-recommandee-electronique-guide-pratique.pdf.

not necessarily indicate a increased risk, as long as that circumstance is not essential in the uniform interpretation and application of the contract.

In case of non-fulfillment of the information obligation according to art. L. 113-2 point 3), the insured is sanctioned in compliance with art. L. 113-8 and with art. L. 113-9 of the Insurance Code[27], in one of the ways mentioned below:

a. Nullity of the contract in case of reluctance or a false statement given by the insured intentionally [art. L. 113-8 point 1) of the Insurance Code];

b. Maintaining the contract and increasing the premium accepted by the insured [art. L. 113-9 point 2) thesis I of the Insurance Code];

c. Unilateral termination of the contract at the initiative of the insurer, with the consequence of reimbursing to the insured the part of the insurance premium that has been paid for the period in which the contract is no longer in force [art. L. 113-9 point 2) thesis II of the Insurance Code].

Under Italian law, primary insurance legislation is represented by:

a. Civil Code[28] which regulates in Title XX (About Insurance), art. 1882 - art. 1932, the main rules applicable to the insurance contract and to the obligations arising from the signing of this type of agreement.

b. Private Insurance Code[29], establishing the applicable legal framework for insurance and reinsurance activities, as well as the insurance mediation procedure[30]. According to art. 165 of the

27 A. Astegiano-La Rizza, *La déclaration des risques en cours de contrat: entre nouvelles précisions jurisprudentielles et incertitudes récurrentes*, available at: https://bjda.fr/les-dossiers/dossier-1/la-declaration-des-risques-en-cours-de-contrat/. See also the article *Insurance law and regulation in France*, available at: https://cms.law/en/int/expert-guides/cms-expert-guide-to-insurance/france.

28 Approved by Royal Decree n. 262 of 16 March 1942 and published in the Official Journal General Series n. 79 of 4 April 1942, Civil Code is available at: https://www.gazzettaufficiale.it/dettaglio/codici/codiceCivile.

29 Approved by Legislative Decree n. 209 of 7 September 2005, the Private Insurance Code entered into force on 1 January 2006, being available at: https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2005-09-07;209.

30 M. Cerretti, A. Scafidi, M. Modica, *Insurance and reinsurance in Italy: overview*, available at: https://uk.practicallaw.thomsonreuters.com/4-501-3463?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a525875.

Private Insurance Code, the provisions of the Civil Code apply in the case of insurance and reinsurance contracts, if they do not contravene the provisions of the Private Insurance Code.

Regarding the obligation of the insured person to notify the increase of the insured risk, this is provided by art. 1898 of the Civil Code. This legal text stipulates the obligation of the insured to notify the insurer immediately about the changes that result in aggravation of the risk, a situation which if it had existed or if it had been known by the insurer at the time of concluding the contract would have determined him not to agree to sign the contract or, in the case of signing the contract, to ask the insured to pay a higher premium [art. 1898 para. (1)]. The insurer may withdraw from the contract, provided that he notifies the insured in writing within one month from the date on which he got aware of the increased risk [art. 1898 para. (2)]. The insurer's option to withdraw from the insurance contract takes effect on different dates, depending on the legal consequences of the increased insured risk: a) the withdrawal of the insurer becomes immediately applicable in the event that the risk increase is so great that the insurer would not have allowed the conclusion of the insurance contract; b) the withdrawal of the insurer becomes applicable after fifteen days, if the risk increase would lead to a higher premium, in the event of maintaining the insurance contract [art. 1898 para. (3)]. The insurer is entitled to the premiums due by the insured at the time of communication of the withdrawal declaration [art. 1898 para. (4)]. If the insured event occurs before the expiry of the time limits for the communication and the effectiveness of the termination, the insurer is not liable if the risk has increased so much that the insurer would not have allowed the insurance contract to be concluded in the event that the new facts have existed at this time; otherwise, the amount owed by the insurer shall be reduced, taking into account the ratio between the premium set out in the contract and the premium which would have been fixed if the higher risk had existed at the time the contract was signed [art. 1898 para. (5)].

In the interpretation of art. 1898 of the Civil Code, the Italian doctrine[31] notes that these legal provisions apply only in the case of general insurance because in the case of life insurance the increase of the insured

31 G. SCALFI, *Assicurazione (contratto di)*, D. COM., I, Torino, 1987, 361, apud *Le Assicurazioni. L'assicurazione nei codici. Le assicurazioni obbligatorie. La distribuzione assicurativa, IV Edizione, (*a cura di) A. LA TORRE, *cit.,* 141.

risk is regulated by art. 1926 of the Civil Code. A contrary opinion results from the jurisprudence of the Italian courts, according to which the provisions of art. 1898 of the Civil Code also applies to life insurance [32].

The main legal effects of the provisions of art. 1898 of the Civil Code are as follows:

a. The insured person's obligation to communicate the increase of the insured risk to the insurer;

b. The possibility for the insurer to choose between two alternatives: b.1. to continue to perform his obligations under this contract, with the same value of the premium; b.2. or to terminate the contract.

In the situation provided in sub-point b.1., it can be seen that unlike German law [section 25 (1) thesis I of Insurance Contract Act 2008] şi French Law [art. L. 113-9 point 2) thesis I Insurance Code], art. 1898 of the Italian Civil Code does not provide for the possibility for the insurer, in the event of maintaining the insurance contract, to require the insured to pay a higher premium, calculated proportionally to the increase of the insured risk.

The insured person is obliged to *immediately* notify the insurer of the risk increase. In this respect, the Italian doctrine[33] distinguishes between two hypotheses:

a. If the increase in the insured risk is caused by an act of the insured, then the insurer is informed immediately;

b. If the insured risk has increased as a result of a third party's act or due to force majeure, then the insured person must notify the insurer as soon as he has become aware of the increase in the insured risk.

Since art. 1898 of the Civil Code does not provide other details regarding the term in which the obligation stipulated by para. (1) must be

32 Supreme Court of Cassation, Civil division, 9 July 1966, n. 1812, Assicurazioni 1967, II, 2, 11, in *Le Assicurazioni. L'assicurazione nei codici. Le assicurazioni obbligatorie. La distribuzione assicurativa, IV Edizione, (*a cura di) A. LA TORRE, *cit.,* 141.

33 A. Donati, *Tratato del diritto delle assicurazioni*, vol. II, Milano, 1954, 405, apud *Le Assicurazioni. L'assicurazione nei codici. Le assicurazioni obbligatorie. La distribuzione assicurativa, IV Edizione, (*a cura di) A. La Torre, *cit.,* 146.

fulfilled, the insured person is obliged to inform the insurer within a reasonable time, without undue delay caused by the insured.

Also, art. 1898 para. (1) of the Civil Code does not regulate the manner in which the insured is obliged to inform the insurer in order to apply this legal text. Therefore, the insured person can inform the insurer about the increase of the insured risk in any way, and the proof of fulfillment of this obligation can be obtained by any means of proof[34].

In applying the provisions of art. 1898 of the Civil Code, the jurisprudence of the Italian supreme court[35] states that the insured has the obligation to notify the increase of the insured risk if the following requirements are cumulatively fulfilled:

a. The possibility of verifying the event mentioned by the insurance contract increases.

b. The new factual situation presents novelty characteristics, meaning that the new situation was not foreseen and was not foreseeable by the contracting parties at the time of the contract conclusion.

c. The new situation has characteristics of permanence, e.g. stability. Thus, in determining the increase of the insured risk, episodic and transitory changes of the risk are irrelevant.

In applying these general rules resulting from the interpretation of art. 1898 of the Italian Civil Code, Supreme Court of Cassation[36] also notes that in the case of compulsory civil liability insurance contracts for motor vehicles, the aggravation of the risk within the meaning of art. 1898, takes place only if the insured property is subject to permanent, special, exceptional and unpredictable dangers. Also, even if the insured event (e.g., an accident) occurs due to abnormal traffic of the vehicle, the insurer cannot refuse to pay the indemnity due to the insured unless this risk is expressly

34 L. Buttaro, *Assicurazione (contrato di),* ED, Milano, 1958, 489, apud *Le Assicurazioni. L'assicurazione nei codici. Le assicurazioni obbligatorie. La distribuzione assicurativa, IV Edizione, (*a cura di) A A. La Torre, *cit.,* 146.

35 Supreme Court of Cassation, III civil division, 18 January 2000, n. 500, judgment available at: https://www.laleggepertutti.it/codice-civile/art-1898-codice-civile-aggravamento-del-rischio.

36 Supreme Court of Cassation, III civil division, 14 March 1996, n. 2115, judgment available at: https://www.laleggepertutti.it/codice-civile/art-1898-codice-civile-aggravamento-del-rischio.

removed from the general conditions of the insurance policy. Additionally, the Italian Supreme Court denies the existence of an abnormal risk and aggravation of injury in situations such as:

a. The occurrence of an accident caused by a vehicle without effective brakes[37];

b. An accident caused by a vehicle equipped with considerably worn tires[38];

c. The situation of an accident caused by the voluntary or accidental opening of a door during the movement of the vehicle[39].

Following the analysis of the legal provisions governing the obligation of the insured to notify the increased risk in Georgia, Romania, Germany, France and Italy, it can be seen that there are significant differences in the approach to this matter by the laws of the five countries mentioned above. Given that each state has its own socio-economic reality, which must be regulated by the legislation in force, we cannot claim that the laws applicable in Georgia or Romania take over by *copy-paste* method the normative acts from Germany, France or Italy.

From our point of view, an important and achievable aspect in the case of the legislation of the first two countries (Georgia, Romania) is the balancing of the legal provisions governing, on the one hand, the obligations of the insured and, on the other hand, the obligations of the insurer, so that a possible legal action concerning the conclusion, execution and termination of an insurance contract would have as parties to the dispute persons with "equal arms". In this regard, it is preferable to amend the legal provisions of the Georgian Civil Code and the Romanian Civil Code which apply to the obligation of the insured to notify the increased risk in a way that encourages the insurer to take at least the following essential measures:

37 Supreme Court of Cassation, 28 July 1967, n. 2015, Supreme Court of Cassation, 4 May 1977, n. 1678, in *Le Assicurazioni. L'assicurazione nei codici. Le assicurazioni obbligatorie. La distribuzione assicurativa, IV Edizione, (*a cura di) A. LA TORRE, *cit.,* 143.

38 Supreme Court of Cassation, 9 July 1968, n. 2377, in *Le Assicurazioni. L'assicurazione nei codici. Le assicurazioni obbligatorie. La distribuzione assicurativa, IV Edizione, (*a cura di) A. LA TORRE, *cit.,* 143.

39 Supreme Court of Cassation, 7 May 1969, n. 1555, in *Le Assicurazioni. L'assicurazione nei codici. Le assicurazioni obbligatorie. La distribuzione assicurativa, IV Edizione, (*a cura di) A. LA TORRE, *cit.,* 143.

a. Prior to the signing of the contract and throughout its execution, the insurer shall ensure the insured person` information in a clear, concise and transparent language, which is accessible to any individual without specialized studies in the field of insurance.

b. In case of a breach of the insured person' obligation to notify the increased risk, the insurer should choose first the insurance contract`s modification (with the proportional increase of the premium) and only secondly the contract`s termination (if the insured person does not agree with the premium` increase in the manner proposed by the insurer).

2. Obligation of notifying about an insured event (art. 814 of Civil Code of Georgia)

The parties` obligation to inform each other resulting from the insurance contract` execution implies, as far as the insured is concerned, not only his obligation to inform the insurer about the insured risk` increase, but also the obligation to inform the insured event. After acknowledging the occurrence of the insured risk, the insurer opens a claims file, in the settlement of which he must establish the level of damage, the existence of a possible liability of the insured in producing the insured risk, as well as the amount of compensation to which the insured is entitled. The mere fact that the insured has not notified the insurer of the insured risk` occurrence cannot be a valid reason for the insurer to refuse to pay the indemnities due to the insured, as long as the insurer does not prove that there are incidents and other legal or factual reasons to justify his refusal.

According to art. 814 para. (1) – para. (3) of Civil Code of Georgia, after becoming aware of the occurrence of the insured event, the policyholder has the obligation to inform the insurer about this fact [para. (1)]. In order to determine the extent of the insured event / of the liability, the insurer may request from the policyholder any information required [para. (2)]. Failure by the policyholder to comply with the obligation to inform the insurer of the insured event` occurrence may not automatically lead to the insurer's release from liability, provided that such failure of the insured does not cause material damage to the insurer [para. (3)]. The insurer has the obligation to perform its duty after having ascertained the insured accident and the extent of compensation [para. (4)].

From the above mentioned aspects it results that art. 814 para. (1) does not provide for a term within which the insured has the obligation to inform the insured about the insured event` occurrence, but neither does it prohibit in any way the establishment of this term in the insurance contract. Also, from a *per a contrario* interpretation of the provisions of art. 814 para. (3) it results that the insurer may request the insured to sign an agreement by which the insurer is exonerated from liability following the insured event` occurrence, only if the following conditions are cumulatively met: a) the insured has not notified the insurer of the insured event; b) the non-fulfillment of this legal obligation by the insured determined some material damages in the detriment of the insurer.

The obligation to communicate the occurrence of the insured risk is also regulated by the common Romanian law. According to art. 2207 para. (1) - para. (2) of the Civil Code, the insured person is obliged to communicate to the insurer the occurrence of the insured risk, within the term provided by the insurance contract [para. (1)]. Otherwise, the insurer may refuse to pay the indemnity if, for this reason, the insurer has not been able to establish the cause of the insured event and the extent of the damage [para. (2)].

A common aspect resulting from art. 814 para. (1) of the Georgian Civil Code and art. 2207 para. (1) of the Civil Code is represented by the fact that both normative acts leave to the parties of the insurance contract the possibility to establish the term in which the insured must fulfill his obligation to notify the insured event` occurrence, but not the obligation of notifying itself.

Regarding the term of fulfillment by the insured of this information obligation, in practice the insurance contracts establish a term as short as possible (generally a few days), this duration being variable depending on the characteristics of each type of insurance contract. The contractual clauses that establish the term for informing the occurrence of the insured event are not usually negotiated with the insured, this term being generally imposed by the insurer.

If the insured does not fulfill his obligation to inform within the term established by the contract, the insurer may refuse to pay him the insurance indemnity. This conclusion is found in the motivation of a judgment

of the High Court of Cassation and Justice of Romania (H.C.C.J.)[40] in which Romania's supreme court dismisses the insured's claim to oblige the insurer to pay the indemnity under the insurance contract concluded between the parties regarding the risk of non-payment of leasing installments to the leasing contracts. By this decision, H.C.C.J. notes that the plaintiff (the insured) has not fulfilled his obligation to communicate to the insurer the occurrence of the insured risk within the term provided in the insurance contract, which has led to the impossibility for the defendant (insurer) to determine the cause of the event and the extent of the damage.

The importance of the notification by the insured of the insured event` occurrence within the term established by the insurance contract results from another decision[41] of the supreme court, by which H.C.C.J. notes the following:

a) The announcement of the insured event was made in due time and in compliance with the insurance contract` conditions;

b) The insurer` refusal to pay the insurance indemnity cannot be justified by the fact that it was unable to determine the causes of the event or the extent of the damage because the defendant (insured) could not present an on-site investigation report or another act showing that the police conducted this investigation.

The fulfillment of the legal obligation to inform the insurer within the term established by the contractual provisions represented, for the Romanian courts that had solved this case, one of the main arguments for admitting the insured's request to oblige the insurer to pay the insured goods` equivalent value.

In the absence of an express contractual provision regarding the term, the insured has the obligation to inform the insurer about the occurrence of the insured event within a reasonable time, which in case of litigation is determined by the judge in relation to concrete elements, which are specific to each dispute. In assessing how the insured has fulfilled within

40 HCCJ, commercial division, 4 October 2007, n. 2962, judgment available at: https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=83390#highlight=##.

41 HCCJ, II civil division, 27 september 2005, n. 4273, judgment available at: https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=29849#highlight=##.

a reasonable time the obligation to inform the insurer about the insured risk` occurrence, the court is required to take into account the profession of the insured person, his/her level of training, the conditions of occurrence of the insured event, including the place and period in which it occurred[42], etc.

In the recent practice of the Georgian courts[43], it is emphasized that the two-year delay of an insured in notifying the insurer of additional liability in respect of potential third-party damages does not automatically preclude the coverage of the damage under the policy. However, in the court's view, it is important for an insurance policy to contain express provisions, which clearly state that the timely notification of the insured event` occurrence is an essential condition for the payment of the compensation[44].

Regarding the content of the notification, art. 814 para. (2) of the Georgian Civil Code gives the insurer the possibility to request from the insured any type of information necessary to determine the extent of the insured event or of the liability. The provisions of art. 814 of the Georgian Civil Code do not show how the insured fulfills the obligation to inform the insurer about the insured risk.

On the other hand, in Romanian law art. 2207 para. (1) of the Civil Code does not indicate a solution regarding the content of the notification or regarding the way of fulfilling this obligation, reason for which the common law rules regarding the execution of the obligations apply. Obviously, if the parties have agreed through the insurance contract the content of the notification and the way of informing the insurer about the insured risk` occurrence, the insured has the obligation to comply with the contractual provisions, given that art. 361 para. (2) of the Georgian Civil Code, as well as art. 14 para. (1) and art. 1350 para. (1) of the Romanian Civil Code stipulate that any person must fulfill his civil obligations in good faith.

42 V. Nemeş, G. Fierbinţeanu, *Dreptul contractelor civile şi comerciale. Teorie, jurisprudenţă, modele, cit.,* 687-688.

43 Court of Appeals of Georgia, *Plantation Pipe Line Company v. Stonewall Insurance Company*, 20 November 2015, n. A15A1359, judgment available at: https://caselaw.findlaw.com/ga-court-of-appeals/1719197.html.

44 C. Bateman, *Court of Appeals Clarifies Georgia Law Regarding Insurance Policy Notice Provisions*, available at: https://www.fmglaw.com/insurance/court-of-appeals-clarifies-georgia-law-regarding-insurance-policy-notice-provisions/.

If the insurance contract does not contain provisions to regulate the content of the notification and the manner of its execution, difficulties may arise in resolving these issues.

Regarding the content of the information, an opinion[45] states that the information obligation involves not only notifying the insurer of the occurrence of the insured event, but also providing with the information the insured has in connection with the conditions of the insured event` occurrence, with the nature and extent of the damage, as well as the communication of other useful data to the insurer in the preparation of the claim file.

According to other opinion[46], if the insurance contract does not mention the documents and information that the insured must communicate to the insurer together with the notification of the insured event` occurrence, the information provided by the insured in this case shall be brief. Thus, in this opinion, to which we agree, the obligation to inform can be summarized only in the insured event` occurrence, not in the communication of additional data or documents. In arguing this opinion, we take into account the fact that the insurer, as a professional, is the one who drafts the essential clauses of the insurance contract. In this sense, the power of the insured person to negociate is very limited, as in most cases he only has the possibility to accept or not to sign the contract in compliance with the clauses previously established by the insurer. Therefore, the insurer has the possibility to request from the insured, in the procedure prior to signing the contract, the data and documents that the insured should communicate to the insurer together with the notification of insured event` occurrence. The absence of express clauses in the insurance contract, to which is added the lack of a legal obligation to provide certain data or documents after the production of the insured risk, has as a legal consequence the absence of a basis (legal or contractual) in order to oblige the insured to provide the insurer with information or additional documents about the occurrence of the insured event.

45 In this sens, see M. Afrăsinei, *Interpretation of the art. 2207 of Civil Code*, in D. M. Gavriş, M. Eftimie, et al., *Noul Cod civil - comentarii, doctrină, jurisprudenţă. Volume III*, *cit.,* 591.

46 V. Nemeş, G. Fierbinţeanu, *Dreptul contractelor civile şi comerciale. Teorie, jurisprudenţă, modele, cit.,* 689.

These findings are also based on the opinion of the court[47] according to which the fulfillment by the insured of the obligation to inform the insurer regarding the insured event` occurrence entitles him to receive the insurance indemnity from the insurer. In motivating this solution, the court emphasizes that: «insurers must show good faith in their legal relations with insured persons, and the clauses inserted in the agreement must not turn the insurance policy into a simple document that does not provide protection according to the purpose for which it has been concluded».

Regarding the way of fulfilling the insured` obligation to inform, the fact that neither art. 814 of the Georgian Civil Code, nor art. 2207 of the Romanian Civil Code contain any provision regarding these aspects, it entitles us to state that the obligation to inform the insurer about the occurrence of the insured event can be performed in compliance with the requirements from the insurance contract, and, in their absence, by any means of communication, regardless of support. In the latter case, the information procedure may take place in any of the following methods: a) in writing or orally; b) on paper or by electronic means; c) by sending the notification by post or fax. In conclusion, with regard to the insured` obligation to notify the insurer about the occurance of the insured risk, it is important that the obligation is fulfilled, and not the way it is fulfilled[48].

In support of these conclusions, we also take into account the arguments retained by a national court in the application of art. 2207 of the Romanian Civil Code. In motivating the decision[49], the court mentions that the insured cannot be exempted from the obligation to pay the compensation due by invoking the fact that there is no written notice of the insured risk` occurrence, as long as art. 2207 of the Civil Code does not refer to any written communication that the insured should make.

Also, from the perspective of the provisions of art. 814 of the Georgian Civil Code and of art. 2207 of the Romanian Civil Code, the person in charge of the information obligation is the insured, as part of the insurance contract. However, unless otherwise specified in the legal texts

47 Constanța County Court, II civil division, 11 November 2014, n. 352, judgment available at the website: http://rolii.ro/hotarari/589ae79fe4900948260015d9.

48 V. NEMEȘ, *Dreptul asigurărilor. Ediția a cincea*, *cit.,* 199.

49 Bucharest Municipal Court, Division VI civil, 23 March 2016, n. 1018, judgment available at the website: http://rolii.ro/hotarari/587e6edde490096c27001473.

mentioned above, the occurrence of the insured event may be notified, as appropriate, by other interested parties, such as the beneficiary of the insurance, a proxy of the insured, the spouse / the child of the insured, or the person who, together with the insured, stays in the building which is the object of the insurance contract[50], etc.

In case of non-execution of the obligation to inform about the occurrence of the insured case, the question of the legal consequences of this non-execution is raised.

Art. 814 of the Georgian Civil Code does not provide for a sanction applicable in case of non-fulfillment by the insured of the information obligation provided by par. (1) nor does it make reference to any other legal text that may apply in the event of non-compliance with this obligation. From the *per a contrario* interpretation of this article, in particular of the provisions of par. (4), it results that the non-fulfillment by the insured of the obligation to inform the insurer about the occurrence of the risk cannot represent a legal ground for the insurer to refuse the payment of the indemnity. According to art. 814 para. (4) of the Georgian Civil Code, this payment is made on the basis of the insurer's findings regarding the occurrence of the accident and after the insurer has established the extent of the compensation.

Instead, according to art. 2207 para. (2) of the Romanian Civil Code, in case of non-fulfillment of this information obligation, the insurer may refuse to pay the indemnity, if for this reason he could not determine the cause of the insured event and the extent of the damage. The analysis of this legal text shows the following aspects:

a. Failure by the insured to comply with the obligation to provide information shall have as result the insurer`possibility to refuse to pay the indemnity.

b. The insurer's refusal to pay the indemnity is legal if two cumulative requirements are met:

   b.1 Due to the non-fulfillment by the insured of the information obligation under the conditions provided by par. (1) the insurer could not determine the cause of the insured event.

50 I. Macovei, C. Macovei, *Dreptul contractelor de asigurare*, Bucharest, 2020, 214.

b.2 For the same reason as in the situation mentioned in point b.1. the insurer was unable to determine the extent of the damage.

If at least one of the two requirements referred to in *point b.1.* and *point b.2.* is not fulfilled, the sanction of refusal to pay the indemnity is not applicable.

However, in practice it is almost impossible for an insurer to successfully claim before a court the thorough nature of the refusal to pay compensation under art. 2207 para. (2) of the Romanian Civil Code, as long as he, as a professional, has, at least in theory, the human, logistical and financial means and resources necessary to establish the cause of the insured event and the extent of the damage[51].

The obligation of the insured to notify the occurrence of the insured event is regulated in **German law** by section 30 (1) thesis I of the Insurance Contract Act 2008. According to this legal text, after becoming aware of the occurrence of the risk the insured must fulfill his obligation to inform the insurer without undue delay. The second thesis of Section 30 (1) provides that where a third party is entitled to the insurance benefit, the third party is also required to notify the insurer. In the latter case, the legislature does not in any way regulate the period within which the third party is required to notify the insurer of his claims for compensation.

In addition to the provisions of section 30 (1), section 31 (1) provides that the insurer may require the insured to provide all necessary information to determine how the insured event occurs or the extent of the insurer's liability. The insurer may also require proof of the occurrence of the insured risk, in so far as the insured can reasonably be required to have such evidence.

It should be noted that sections 30 (1) and 31 (1) of the Insurance Contract Act 2008 also do not contain provisions on how the insured notifies the occurrence of the insured case. In these conditions, we consider that the aspects we have previously invoked in the interpretation of the provisions of art. 814 of the Georgian Civil Code and of art. 2207 of the Romanian Civil Code can be applied. Briefly, we mention that the obligation to inform the insurer about the occurrence of the insured event can be fulfilled in compliance with the clauses of the insurance contract, and, in their absence, by any means of communication.

51 V. Nemeș, *Dreptul asigurărilor. Ediția a cincea*, *cit.,* 204.

In French law, the Insurance Code provides in art. L. 113-2 pt. 4) the fact that the insured is obliged, among other things, to notify the insurer, as soon as he becomes aware of it and at the latest within the term established by the contract (period which may not be less than five working days), in respect of any claim likely to involve the insurer's guarantee.

Although the Article indicated above does not make an express reference regarding the occurrence of the insured event, we consider that this falls under the incidence of art. L. 113-2 pt. 4), because the production of the risk that is the object of the insurance is likely to involve the insurer's guarantee, *ie* his obligation to pay the insurance indemnity.

According to art. L. 113-2 point 4) of the Insurance Code, the insured has the obligation to notify the insurer as soon as he becomes aware of the occurrence of the insured event. Also, from the content of this legal text results the possibility for the parties to establish through the insurance contract the term for communicating the occurrence of the insured risk, with the mention that the term indicated in the contract cannot be less than the one expressly provided by art. L. 113-2 pt. 4).

In Italian law, the obligation of the insured to notify the occurrence of the insured risk is regulated by art. 1913 of the Civil Code, as follows: the insured is obliged to communicate the occurrence of the insured risk to the insurer or to the agent empowered to sign the insurance contract. The deadline for fulfilling this obligation is three days from the occurrence of the event or, as the case may be, from the date on which the insured became aware of this aspect. This information procedure is not necessary if the insurer or the agent empowered to conclude the contract intervenes within the aforementioned period in the operations of ascertaining the insured event [para. (1)]. A special situation applies to animal death insurance; in this case, the procedure for notifying the insurer or, as the case may be, the agent empowered to conclude the contract must be carried out within 24 hours, in the absence of other agreement between the parties to the insurance contract [para. (2)].

The legal provisions mentioned above are supplemented by the art. 1915 of the Civil Code, which regulates the sanctions applicable to the insured in case of non-fulfillment of the obligation to report the occurrence of the insured risk. According to the Italian legislator, these sanctions differ depending on the degree of guilt of the insured in the non-fulfillment of the obligation provided by art. 1913 of the Civil Code:

a. The insured who does not *intentionally* fulfill his obligation to notify has no longer the right to benefit from the indemnity' payment that would have been due to him based on the insurance contract [art. 1915 para. (1)].

b. If the insured fails to fulfill this obligation because of *his negligence*, the insurer has the right to reduce the indemnity to which the insured would be entitled for the damage suffered by the latter [art. 1915 para. (2)].

From the corroborated interpretation of the provisions of art. 1913 and of art.1915 of the Italian Civil Code, there are several aspects:

1. The occurrence of the insured event can be communicated either to the insurer or to the agent empowered to sign the insurance contract, depending on the insured person's option.
2. The information regarding the occurrence of the event covered by the insurance contract can be made by the insured in any way, and the fulfillment of this obligation can be proved by the insured by any means of proof.
3. Failure to fulfill the obligation to inform under the conditions provided in art. 1913 cannot automatically determine the loss by the insured of the right to benefit from compensations for the damage suffered as a result of the occurrence of the insured event. In this regard, the doctrine[52] emphasizes that non-compliance with the obligation to report the insured event does not have negative consequences for the insured when this is determined by causes not attributable to the insured and, in particular, by unforeseeable circumstances and force majeure. The case-law of the Italian courts also states the following aspects:

a. On the one hand, the non-compliance by the insured with the obligation to report the occurrence of the insured event, according to the terms of the insurance contract, does not in itself constitute an argument for the loss of the insured's right to compensation. For this purpose, it is necessary to determine whether the respective

52 N. Gasperoni, *Assicurazione contro i danni*, NNDI, I, 1147 (1958), apud *Le Assicurazioni. L'assicurazione nei codici. Le assicurazioni obbligatorie. La distribuzione assicurativa, IV Edizione, (*a cura di) A. La Torre, *cit.,* 270.

breach of the insured's obligation is intentional or culpable, provided that, in the second case, the right to compensation does not cease, but it is reduced under the conditions provided by art. 1915 para. (2) of the Civil Code.

b. On the other hand, in order for the insured to no longer receive the compensation due after the insured event, it is sufficient for the insured to be aware of the legal obligation to inform the insurer and for the non-compliance with this obligation to be a direct consequence of the insured's conscious will[53].

c. This decision of the court is legally correct, considering that in this case the insured has not fulfilled his obligation in good faith, contrary to the provisions of art. 1375 of the Civil Code.

Following a cumulative analysis of the aspects shown above, we can conclude that the notification by the insured of the occurrence of the insured event is a way of fulfilling the insurance contract in good faith. For the same reason, the insurer who has learned of the occurrence of the event by means other than its notification by the insured, has the obligation to pay the compensation due to the insured, even if the latter has not fulfilled its obligation to inform.

We consider that the fulfillment by the insured of the obligations of notifying the insurer regarding the increased risk and the occurrence of the insured event depends not only on the good faith of the insured in the negotiation and execution of the contract, but also on the conduct of the insurer throughout this procedure. For a good application of the principles of law governing the proportionality between the rights and obligations of a consumer and a professional who have the same contractual basis, each national legislation has the role of guaranteeing, through clear, unitary and complete legal provisions, equality of arms between the insured and the insurer in the exercise of their rights and the fulfillment of their obligations.

53 Supreme Court of Cassation, III civil division, 28 July 2014, n. 17088, judgment available at: https://www.laleggepertutti.it/codice-civile/art-1915-codice-civile-inadempimento-dellobbligo-di-avviso-o-di-salvataggio.

II – INSURANCE PREMIUMS

Article 815 - Obligation to pay insurance premiums

1. The policyholder shall be obligated to pay the insurance premium only after obtaining the insurance document.

2. If interest in the insurance is lost, the insurer may demand that part of the insurance premium that corresponds to the duration of the risk assumed. The insurer may demand corresponding compensation for the services.

Article 816 - First insurance premium

Until the first or one-time insurance premium is paid, the insurer shall be free from liability.

Ignazio Castellucci

Summary: 1. Introduction. 2. The multi-step insurance contractual process: validity, provability, enforceability of an insurance contract. 3. Language, documents, and the "physical exchange" element. 4. The Georgian insurance contractual process. 5. Loss of insured interest: premium and costs.

1. Introduction

1.1 Articles 815 and 816 of the Civil Code are here analised in a single, comprehensive comment, covering Article 815 paragraph 1, and Article 816 – dealing with the enforceability of an insurance contract, with respect to the issuance of a contractual document and payment of premium. A comment on Article 815 paragraph 2 will follow.

These provisions could prima facie be seen as representing the purely administrative dimension of insurance contract; in fact, they reflect its core economic and legal mechanics.

Each individual insurance contract is a tiny fragment of a much larger picture, made possible by, and at the same time being instrumental to, that big picture, and to the associate calculus. Insurance is a promise of super-human resources being made available, with the associated peace of mind, *vis-à-vis* the possibility of suffering large-impact life's or business' events – in exchange for a relatively small, bearable human effort.

The ability to keep such a promise requires that a high number of small human efforts are actually made, exactly as calculated and contractually prescribed; written insurance policies, certain terms, and a stable flow of premium payments are, thus, absolutely needed: loose formation/validity/enforceability rules and lack of precision in contractual terms would make the cost of proper management of contracts, and legal costs, soar to untenable levels; the existence of large numbers of ongoing contracts with unpaid premiums would shake a delicate overall equilibrium reached through calculus.

The very nature of insurance, thus, warrants balancing two different sets of interests and principles: on the one hand, the general need of the economy and general principles of contract law, to make contracts quickly executed and enforceable, with minimum formal requirements – to seek and buy an insurance cover on-the-go, to support a last-minute business opportunity, to enable the conclusion of a contract over the telephone, etc. On the other hand, the also general interest in enhancing certainty and ease of proof of relations, interests insured, contractual terms, collection of premium payments, shall be protected for the healthy functioning and development of the insurance industry.

Contemporary consumer protection considerations introduce a wide array of additional requirements for the formation of a valid and enforceable insurance contract.

1.2. Georgian law of insurance is consistent with the European civil law tradition. Most notably, with the German one, to which Georgian legal system is much indebted, particularly on insurance law[1]: Georgian rules are often compact versions of the more complex rules of the German *Versicherungsvertragsgesetz* (VVG), a piece of legislation first enacted in 1908, and reformed several times subsequently – lastly, in 2017.

1 K. Iremashvili, *Transparency in the Insurance Contract Law of Georgia*, in P. Marano, K. Noussia (eds.), *Transparency in Insurance Contract law*, AIDE Europe Research Series on Insurance and Regulation 2, Springer, 2019, p. 375 ff.

Georgian rules often maintain the core notion of their German sources of inspiration, while simplifying them. The more detailed rules of the VVG which have been excluded from the simpler, "core" Georgian ones may, however, still be used as persuasive elaboration of Georgian rules, when not contradicted by a specific local rule or circumstance – with a view to preserving the underlying delicate balance associated with the provisions of any complex legislative instrument.

The German experience enshrined in the VVG provides solutions which are the result of a century-long legislation, case-law, scholarship, and practice. They are also compatible with the EU normative frame and instruments, like *Solvency II* – a compatibility which also seems to corresponds to the general interests and aims of the Georgian growing insurance industry, and of Georgian economy at large.

While giving the Georgian local specificities the utmost attention, the general legal frame and mechanisms hailing from its German sources of inspiration should, thus, be preserved, as careless changes may produce unwelcome shockwaves through the system.

The norms on insurance in the Italian Civil Code of 1942 represent a further legislative development of the German model of insurance law, a few decades after the first German *Versicherungsvertragsgesetz* (VVG) of 1908; they may also be used effectively as comparative tools to interpret the Georgian Civil Code in this matter.

French law, as representing the other main civil law model, Swiss and Luxembourg laws, as being related to important insurance hubs within the European civil law jurisdictions, English, Russian, and other laws, will also be considered, when appropriate, to better understand the general economic picture and the dynamics of the industry.

2. The multi-step insurance contractual process: validity, provability, enforceability of an insurance contract.

2.1 In the lack of any specific provision on formation and validity of insurance contracts in Chapter twenty of the Georgian Civil Code, general principles of contract law shall apply – a simple exchange of consents, as per Articles 69, paragraph 1, and 327, paragraph 1, of the Civil Code, will produce an insurance contract which "shall commence at 24:00 on the day the contract is entered into", according to Article 806 of the Civil Code.

The specific normative significance brought by Articles 815 paragraph 1, and 816, is, thus, that of providing a specific mechanism for the full enforceability and practical functionality of the insurance cover: reading those rules in a reverse order makes clear that no insurer shall be liable for indemnification, before receiving the payment of (the initial) premium; and that, on the other hand, no insured will have to pay the premium before receiving a contract-related signed document from the insurer, as provided by Article 802 – furnishing which is, in turn, the initial insurer's obligation, directly hailing from the contract.

Concluding a valid insurance contract is thus only one step in a process, in an operational and economic sense: ordinarily, a continuum is required, bundling together a valid contract, one (or more) contractual document(s), a payment of premium – to have, respectively, a valid, provable, fully enforceable set of obligations.

It has to be noted that in most legal systems the relation between an insured and an insurer develops through a similar multi-step process: details may vary, from one legal system to another, but more or less invariably the full enjoyment of parties' rights, and the fulfillment of their reasonable expectations hailing from a valid insurance contract is subject to some requirement additional to the bare matching of wills.

This multi-step process hails from practices historically developed under different legal traditions, affecting the ways insurance contracts are negotiated and formed nowadays. Understanding those developments, in a historic and comparative legal approach is necessary to fully grasp the deep normative meaning of the provisions examined here.

2.2 Historically, the interests to be insured were proposed in writing by risk bearers, normally through a broker, to pools of underwriters – as in the Lloyd's model – or to insurance companies, which would accept the proposal by underwriting it, or by signing a paper slip, a cover or runner across it[2], and later formalise an insurance document specifying the details of insured party, risk and amount insured, premium, and other contractual terms. The risk bearer would then accept the proposed terms,

2 M. Clarke, *English Insurance Contract Law*, Bookboon, 2016, pp. 6-27; P. Masci, *The History of Insurance: Risk, Uncertainty and Entrepreneurship*, J. WASH. CHINA STUDIES, Spring 2011, Vol.5, no.3, p. 31 ff.

and a contract would be concluded by the exchange of wills, but in practice requiring the actual payment of premium to produce its full set of legal effects, including effectiveness of cover.

At a subsequent stage, insurers' general policies would be made publicly accessible, to be adhered to by risk bearers: underwriters would accept adhesion, by handing a signed document reproducing their general policy or a certificate; the insured thus becoming a "policyholder", having to pay the relevant premium to activate the purchased cover.

With the expansion of the demand for insurance services, and the development of vast networks of (quasi-)third parties – brokers and agents –involved in the conclusion of insurance contracts, the more or less individual contracts of the origins were replicated in large numbers, to be concluded through standardised formation protocols. Persons, families, businesses and entities of all sorts now submit their insurance needs through a written questionnaire, on a form provided by the insurer, which in most jurisdiction is still framed as a proposal or order from the risk-bearer. Consumer protection regimes in most jurisdictions nowadays mandate that general terms and conditions are clear, previously and clearly understood, and specifically accepted in writing.

Meanwhile, contemporary sophisticated insurance markets feature the presence of large, or global, insurance brokers, matching the parties of insurance contracts, through multi-step processes including researching available policies, collecting needs and data from risk bearers, eventually funneling the latter's standing orders or proposals, to selected insurers, and receiving their acceptances, to be conveyed back to would-be policyholders.

These processes are all variations of the basic offer-and-acceptance paradigm – sometimes preceded by an invitation to offer a cover (from the risk bearer, or an insurance broker, providing information on the relevant risk, followed by an insurer's proposal), or, switching the parties' roles and actions, with insurers publicising their insurance policies and receiving a standing proposals from would-be policyholders – which shall in most case, as an additional requirement, receive adequate and understandable information on the contracts' contents, in consideration

of consumers' protection regimes – as provided by, e.g., by German[3], Italian[4], Swiss[5], French[6], Luxembourg[7], Greek[8] laws.

According to Article 800 of the Georgian Civil Code, insurers' publicised policies should be considered as public offers, thus binding insurers upon adhesion/acceptance of the insured subject "unless there is a valid reason for refusal".

The general formulation of Article 800[9] makes it possible, also for a risk bearer, to publicly and bindingly offer to conclude a contract; which, while seeming odd in routine client-insurer relations, could apply to insurance cover purchases through brokers, and in electronic trading places. Would-be policyholders willing to avoid being bound by the terms of their initial request for a cover should, thus, make their intention clear, when making recourse to brokering services – in case of electronic platforms, consistently with their nature and mode of operation, this might not always be an available option.

2.3 In many practical instances the formation of an insurance relation is simplified, by the contextual exchange of a payment (of premium) with one or more signed documents (*e.g.* a signed certificate of insurance including a dated quittance for payment of premium, and a reference to the attached insurer's policy with general terms and conditions).

3 VVG, Article 5; after 2008, policy terms and conditions have to be furnished, together with adequate advice, to the insured person before making his proposal, or application, as per Articles 6 and 7. See E. M. Braje, *Germany*, in *The Law Reviews – The Insurance and Reinsurance Law Review*, Section II, *Making the Contract*, available at https://thelawreviews.co.uk/title/the-insurance-and-reinsurance-law-review/germany. Last visited May 11, 2022.

German law, however, also features a reversed pattern of formation, *e.g.* in relation to the conclusion of a contract with detailed terms provided in writing after a verbal conclusion of contract e.g. by telephone; or upon renewal of a standing contract with modified terms, in which case the mechanisms are framed as a proposals made by the insurer, accepted by the insured (VVG, Articles. 5 and 7).

4 Italian Civil Code, Articles 1887 – 1888, and Article 166 of the Code of Private Insurance.

5 Swiss Federal Law on Insurance of 1908 (last amended in 2020), Articles 1 and 3.

6 French Insurance Code, last modified 2018, Articles L112-2, L112-2-1, L112-3.

7 Luxembourg Insurance Law of 1997, Article 9, Section 1.

8 Greek Insurance Law no. 2496 of 1997, Art. 2.

9 "A person who publicly offers to conclude an insurance contract shall enter into the contract unless there is a valid reason for refusal."

Modern economy and technology made it possible to consolidate all those steps in shorter, one-shot, quasi-instantaneous transactional processes, including through vending machines issuing insurance policies/certificates[10], or through computer-based smart protocols – providing non-fungible electronic files upon payment, representing an insurance policy, its terms and conditions, its certificate, and characterised by intrinsic, automated enforceability of the related cover[11].

However, the sheer diversity of practical situations and interests, in relation to which an insurance contract is concluded, still warrants the discrete regulation of each of the mentioned segments in the contracting process, to provide flexibility of action and responses to market's and individual clients' needs.

Contract-formation mechanisms which are flexible enough permit the quick conclusion of valid contracts verbally, *e.g.* by telephone, which are also immediately effective when associated to the payment of the related premium – followed by the transmission of the contractual documents[12], or associated to the release of provisional cover letters while the final, complete document is being produced, and sometimes instead of it[13]. Flexible formation mechanisms also allow complex, multi-party, brokered negotiations through a variety of means of communication, to satisfy the needs of the most sophisticated actors.

Obviously, a more complex process implies a higher number of errors, and a higher number of declarations exchanged (whether verbal or in writing) implies higher chances of their not being perfectly aligned[14]

10 See, for instance, Section 3107 of the New York Consolidated Laws, on the sale of insurance policies through vending machines located in railways stations, airports, etc., since the early 20th century. Travel policies were also sold by vending machines in Milano, Italy, by Assicurazioni Generali, at the end of the 19th century.

11 A. Borselli, *Smart Contracts in Insurance: A Law and Futurology Perspective*, in P. Marano, K. Noussia (eds.), *InsurTech: A Legal and regulatory View*, AIDA Europe Research Series on Insurance Law and Regulation 1, 2020, 101-125. Available at https://doi.org/10.1007/978-3-030-27386-6_5. Last visited May 11, 2022.

12 As in the German VVG, Art.6 Section (2).

13 VVG, Articles 49-52; Greek Insurance Law of 1997, Articles 1 Section 3), and 2 Section 2); Swiss Federal Insurance Law, Art. 9 Sections 3 and 4.

14 Amongst North American popular information websites, see International Risk Management Institute (IRMI), 2022, *Avoiding Common Insurance Certificate*, Expert Commentary, at https://www.irmi.com/articles/expert-commentary/avoiding-common-insurance-certificate-errors-in-contracting-services. Last visited May 11, 2022.

– with ensuing operational uncertainties, and costs. A balance is sought after by all legal systems, between flexibility and certainty.

2.4 A EU Expert Group on Insurance Law was formed in 2013 by EU Commission Decision of 17 January 2013[15], to assess the state of the art in EU member states legislation, «to carry out an analysis in order to assist the Commission in examining whether differences in contract laws pose an obstacle to cross-border trade in insurance products»[16]. Its final Report of 2014 includes a focus[17] on the issues of formation, form, validity, enforceability of the insurance contract, highlighting how EU legal systems deal with this matter, producing a variety of solutions.

Most European insurance laws tend to indicate the sufficiency of consent, for validity of the insurance contract[18] while requiring a document which shall be furnished by the insurer - with variable details, in writing or in "a form capable of proving the text" of the contractual terms and conditions[19] - not for validity, but only to prove the existence and contents of the contract[20].

The delivery of such written document(s) is characterized as an obligation of the insurer in most legal systems, including the Georgian one[21].

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15 The Expert Group included some 20 experts hailing from a dozen of European jurisdictions, led by German Professor Jürgen Basedow.

16 Commission decision, Art. 2(1). EU Expert Group on Insurance Law, *Final Report of the Commission Expert Group on European Insurance Contract Law*, 2014, *Introduction*, p. 9. Also see J. Basedow, *Towards a European Insurance Contract law? The Commission Expert Group, its Antecedents and Consequences*, Max Planck Institute for Comparative and International Private Law, Research Paper Series 15, 2018.

17 EU Expert Group, Report 2014, pp. 44-45.

18 BGB, Section 145 and ff. ones; the English MIA of 1906, Art. 21, the French Insurance Code, Art. L112-3, and the Luxembourg Insurance Law of 1997 Article 9, Section 3, also make express references to the fact that the agreement may be proved by a slip, or cover note, before a policy or a full contractual document is produced.

19 Swiss Federal Insurance Law of 1908, Art. 3, Section 1.

20 See Art. 1888 of the Italian C.C.; France Insurance Code, Article L112-3; Swiss Federal Insurance Law, Art. 11; Luxembourg Insurance Law, Article 16, Section 1; Greek Insurance Law no. 2496 of 1997, Article 2, Section 1), English MIA of 1906, Art. 22.

21 Georgian C.C., Article 815 paragraph 1; VVG, Art. 4 provides the insurer shall issue a policy or other signed document to the insured; Art. 1888 of the Italian Civil Code; Luxembourg Insurance Law, Article 16, Section 3; Article 1 Section 2) of the Greek Insurance Law of 1997; Art. 7:932 of the Dutch Civil Code.

A different rule can be found in the English *Marine Insurance Act* (MIA, 1906), having become paradigmatic for all types of insurance relations in England[22], as well as in a number of English-related jurisdictions, like South Africa[23] and an important maritime hub such as Singapore[24]: the issuance of a policy document is conditioned to the previous payment of premium[25] – this being a diverging rule with respect to the corresponding rule of general insurance at common law[26]. With its strictness on the insured party, the mentioned rule of the English MIA of 1906 – a product of the Victorian era, aimed at protecting and fostering the then soaring English insurance industry – provides more certainty in insurance relations, as probably mandated by the variety and global dispersion, even back then, of English insurers' clients.

Quite differently from the rule in the English MIA, most civil law ones, including Georgian Articles 815 and 816, make it possible to have a signed insurance "document" (policy or certificate) issued with no actual cover being active, until the initial, or one-time, premium is paid – meaning that an extra 'hard' evidentiary element is needed, namely proof of payment of the premium, to give effect to the insurance cover from the date and time payment is made.

It has to be highlighted how the German VVG permits a specific optional contractual provision to be included in the contract, making the commencement of the insurance cover dependent on the actual payment of premium[27], subject to this condition being separately communicated in writing or written conspicuously in the policy.

3. Language, documents, and the "physical exchange" element

3.1 One of the consequences of the mentioned evolution of the insurance contractual process, is a certain degree of blurring of its original several steps, and of the related (current and) legal language: the contract eventually becoming quite often identified, in practice and in common

22 H. Bennett, *The Marine Insurance Act 1906: Reflections on a Centenary*, in SINGAPORE ACADEMY OF LAW JOURNAL, 2006, 669-692.

23 S. Huneberg, *English Insurance Law Reforms: Lessons for South Africa*, in *Obiter*, Vol. 40, Issue 1, Jul. 2019.

24 H. Bennett, *The Marine Insurance Act 1906*, cit., pp. 669-692.

25 English MIA of 1906 Art. 52.

26 H. Bennett, *The Marine Insurance Act 1906*, cit., pp. 677-678.

27 VVG, Article 51.

parlance, with a (signed) "policy" – which, in turn, is often identified by a printout of contractual terms and an attached receipt of payment of premium.

A wide vocabulary has been used, historically and presently, in various jurisdictions, to indicate different documents or steps in insurance contract formation: proposal, order, offer, acceptance, underwriting, binder, slip, runner, rider, provisional cover, cover note, frontispiece, contract, policy, document, terms and conditions, certificate, etc.

The original differences in the meaning of those words are getting fuzzier, or lost altogether, as they are increasingly used interchangeably: as in Articles 802 and 815 of the Georgian Civil Code for the terms "certificate", "policy" and "insurance document"; or as in the Georgian Insurance Law of 2 May 1997, which provided in its Article 33 that an insurance contract should be concluded in writing, through typical documents including the formation and/or exchange of a drafted contract, or standard policy terms, or certificates, or any other product documenting the parties' consent.

Also, the Italian civil code, art. 1888 of which provides that the insurer shall furnish to the insured subject «the insurance policy or another document signed by him», and the Greek law of 1997 identifies the contract with a signed policy document[28]. In art. 940 of the Civil Code of the Russian Federation of 1992, «a signed policy document or certificate issued by the insurer» amounts to «a contract in written form», when documents are accepted by the insured[29].

3.2 Upon conclusion of an insurance contract, a document including all contractual terms and conditions is normally issued to the policyholder: a written document may not be necessary to validly conclude a contract in most legal systems, but the insured person certainly needs one, for prompt reference, as well as to prove and enforce his insurance rights, if needed.

Insurance certificates, issued and signed by the insurers, stating in short, the main terms of the insurance contract, shall also be furnished to the policyholder, for the purpose of being shown to third parties. An insurance contract certainly represents one of the most typically third-party-oriented contractual phenomena in modern economy: damaged third parties, beneficiaries, heirs of life-insured persons, designees and

28 Greek Insurance Law of 1997, Article 2, Section 1).

29 Russian Civil Code, Art. 940.

bearers in order or bearer transferable policies, re-insurers, co-insurers, other insurers, regulatory authorities: all bear specific interests in this large and most sophisticated economic game – which would be impossible to protect, or almost so, without detailed contractual documents.

While most European insurance laws indicate the sufficiency of consent for the validity of the insurance contract, requiring a written document only for proving it[30], in some legal systems an insurance contract has to be executed in writing for its validity (e.g. in Russia[31], Bulgaria[32]), compacting "consent" and "document" into one single element – loosing some operational flexibility in favour of simplicity/certainty of process and, perhaps, of stricter general public control over the industry.

The solution provided in the Georgian Civil Code, adopted in November 1997, provided thus a major change of approach with respect to the previous rule provided by Article 33 of the Georgian Insurance Law of 2 May 1997, transitionally providing that "An insurance contract shall be concluded in writing", the latter norm being inspired in post-Soviet legal models and in Article 940 of the Russian Civil Code of 1995, according to a set list of typical forms; with the actual payment of premium being – like in Art. 957.1 of the Russian Civil Code – characterised, ivi as per Article 35 of the Georgian Insurance Law of 1997 as an additional requirement of validity.

3.3 Western society and culture have a complex relation with written documents, serving a large number of daily life purposes: a document in writing can be a most coveted asset, for a lawyer, a bureaucrat, or a man in the street, as being a source of authority, or of validity of a transaction, or a way to prove them, or to escape some sort of liability.

Sometimes, the "document" being itself (a part of) an expected benefit or performance (e.g a Certificate or Diploma); or a mean to be able to fully enjoy it (like a product leaflet, or an owner's manual, or the conditions and terms of a contract to be consulted/enforced); sometimes containing

30 See below, Paragraph 10.

31 Russian law provides a simple, clear-cut rule of mandatory written form – including electronically – for the validity of the insurance contract, in art. 940 of the Civil Code of the Russian Federation of 1992; the same article reveals that a signed policy document or certificate issued by the insurer amounts to written form, when documents are accepted by the insured subject: the implication seems clear, that the only really needed document is the one issued by the insurer, whereas the insured subject's acceptance may be inferred, circumstantially – typically, by payment of premium.

32 Article 184 Section (1) of the Bulgarian Insurance Code.

credentials, or even being a physical key to (prove title to) enforce one's rights, including vis-à-vis third parties. More often than realised, the relation of humans with documents may include a ritual or fetish element, theoretically beyond any legal relevance, but in practice able sometimes to affect the law in action[33].

The almost-necessary formal dimension of the insurance contract, and the associated party and third-party reliance on documents, makes an insurance "document" – especially, but not only, certificates or transferable policies – akin, in some respect, to commercial negotiable instruments, and sharing some of their characteristics – starting from a thick element of reliance on their documentary essence, and on the face of the document and its stated terms, whatever its originating parties might have agreed.

Possession and display of the "original" document of an insurance contract, or of a duplicate or copy issued by the insurer, is necessary in many jurisdictions and in many instances, to enforce contractual rights[34]. Procedures for cases of loss of the policy document are often similar to those applicable to commercial instruments such as cheques or bills of exchange.[35] Even the rules, a bit old-fashioned perhaps, but present in all legal systems[36], on costs chargeable to issue copies and duplicates, *e.g.* in case of loss of the original document, reveal the importance attached to those documents, and their associated documentary quality, and significant production costs, before the computer era.

3.4 Another frequent feature of insurance law and practice in addition to the exchange of the parties' wills, and to contractual documents, is a "physical exchange" element: following an insurers' acceptance, an insurance contract may still not have any effect, until a final payment

33 A. Good, *'The benefit of Doubt' in British Asylum Claims and International Cricket*, in D. Berti, A. Good, G. Tarabout (eds.), *Of Doubt and Proof: Ritual and Legal Practices of Judgment*, Juris Diversitas Series, Routledge, 2015, pp. 119-139; Z. White, *In Doubt: Documents as Fetishes in the Danish Asylum System*, in D. Berti, A. Good, G. Tarabout (eds.), *Of Doubt and Proof: Ritual and Legal Practices of Judgment*, Juris Diversitas Series, Routledge, 2015, pp. 141-161.

34 Georgian C.C., Article 804; VVG Article 3; Italian C.C., Articles 1888, 1889.

35 Georgian Civil Code, art. 804; VVG, Articles 3 Section (3), and 4; It. c.c., 1889.1 and 1889.3. Swiss Federal Insurance Law, Art. 13.

36 See Article 804 of the Georgian Civil Code; VVG Article 3, Section (5); Italian C.C., Article 1888.

of the relevant premium triggers the effectiveness of cover. The actual payment of premium is, in many legal systems, a condition precedent for the coming into existence and/or to the full operationality of the insurance cover[37].

In English marine insurance law, the actual payment of premium is also a condition precedent for the insurer to provide the insurance documents[38].

This "physical" element is apparently in contradiction with modern tenets of contract law on the sufficiency of consent, and seems to have a remote ancestor, and a similar economic rationale, in Roman law "real" contracts – those formed with the actual delivery of a thing, or of an amount of money: restitutory obligations on one side are only generated with the actual delivery of consideration from the other side[39].

Those contracts had initially been developed in contexts of family or friendship relations; they later became – with the inclusion of additional stipulations, terms and conditions, like those on payable interests, and others – common instruments for economic and financial transactions[40], including insurance-type arrangements: *mutuum* (loan), *depositum* (deposit), *commodatum* (bailment), *fides* or *fiducia* (trust) *pegnum* (pledge), *pecunia traiecticia* or *fenus nauticum* (bottomry – an early combination of a marine insurance and a loan arrangement)[41] – most of which are still operational nowadays in civil law jurisdictions.

37 See, e.g., the Italian C.C., Art. 1901, providing that coverage is "suspended" until payment of the first installment of the agreed premium has occurred; Greek Insurance Law, Art. 6 Sections 1) and 2). In art. 957 Section 1 of the Russian C. C. the initial payment of premium is presented as a condition for the concluded contract to enter into force, according to art. 957.1 (the heading of this article reads 'beginning of validity'). The German VVG, on the other hand, only provides in art. 51 for a possibility to make the cover dependent on payment, by providing it in a separate agreement or in a conspicuously written note in the policy.

38 Marine Insurance Act (1906), art. 22. H. Bennett, *The Marine Insurance Act 1906*, cit., pp. 677-678.

39 B. Frier, *A Casebook on the Roman Law of Contracts*, OUP, 2021, Chapter III, *Contracts Created through Delivery*; R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Clarendon, OUP, 1996, p. 153 ff.

40 A. Watson, *The Evolution of Law: The Roman System of Contracts*, School of Law, University of Georgia, Scholarly Works, 1984. Available at https://digitalcommons.law.uga.edu/fac_artchop/496, at 6-7. Last visited May 11, 2022.

41 R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, *cit*., pp. 181-185.

Despite adding stipulations and additional consensual pacts to the basic "real" scheme, and the developing of a tension towards more informal dealings and consensual contracts[42], it has always been impossible for the Romans to dispose of the core "real" element, in main financial transactions of the time, of the transfer of a physical element; their rationale seems to have been a solid "I-am-not-obliged-to-give-back-anything-before-I-actually-receive-it" kind of approach. Consensual contracts never became a general category until the Middle Ages.[43]

3.5 It is interesting, thus, to note the tension of Roman law, trying to shift from early ritual or physical forms of conclusion to the later relevance of a bare exchange of promises, with respect to the opposite tension, in modern and contemporary insurance contract laws and practices, all pursuing – departing from the general purely voluntary vision of contract – an identifiable operational "real" dimension.

Resources shall actually be pooled to make insurance mechanism work reliably; mere consent in internal relations between the insurer and the insured does not satisfy the industry's needs. A "physical" transfer of money, *i.e.* payment of premium ("in cash", as per Greek Law on Insurance of 1997, Art. 6 Section 1), is a condition for the cover to become active, irrespective of contractual documents having been issued, subject perhaps to a short grace period[44].

English MIA 1906 goes one step further: the "physical exchange" element is bilateral, as documents are only issued after payment – ready to be accepted worldwide as proof that the related cover is active.

The "real" mechanisms of insurance aims at protecting the reliability of individual insurance covers, as enshrined in appropriate documents; and the overall solidity of the insurance system, reducing the risk of a lack of actual resources to face the insured risks; thus, protecting the underlying calculus and its expected results.

The same can be said with respects to the function of specific clauses protecting the insurer's interest in collecting premium upon renewal, also

42 A. Watson, *The Evolution of Law: The Roman System of Contracts*, *cit.*, p. 8 ff.

43 R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, *cit*., pp. 532-545.

44 Two weeks, in Georgian law (Article 817 of the C.C.), in German VVG (Articles 10, 33 Section (1), 37 and 38, in Swiss Federal Insurance Law, Art. 29; fifteen days in Italian law (Article 1901 of the Italian C.C.).

designed to protect reliability, punctuality and smoothness of premium flows[45].

3.6 To sum up, concluding an insurance contract is a complex transactional and legal phenomenon, beyond contract law theories and dogmatics.

The majority of insurance law legislations, despite hailing from diverse traditions, reach in the event similar results making written form overtly or covertly "necessary" – whether a matter of formal validity of contract, or just for proving the contract, or as an ancillary but primary duty of the insurer; and as a physical key to exercise insurance rights.

Legal formants[46], economic practice, historic-comparative analyses suggest that, under most laws, contractual rights hailing from a valid insurance contract are only fully and conveniently enforceable, subject to the availability of its written text.

Additionally, an insurance cover only operates when the related premium has actually been paid (or is not too much overdue, in some cases) – the latter element being perhaps a very resilient feature of early Roman law surviving in the Current Era, protecting the financial solidity of the mechanism, possibly not sufficiently/efficiently protected by enlightened visions on the legal effect of human pure will and consent.

These mechanisms provide certainty, in different ways, satisfying the different needs of the various actors in the industry. The various patterns of the contracting processes, devised in the various legal traditions and in practice, may thus compare to an inverted river delta, with several watercourses upstream eventually flowing into a single estuary: in practice, validity of contract, or its general *inter partes* enforceability may not be the (only) crucial issue, vis-à-vis the paramount relevance of certainty, associated with a written piece of evidence of the contract and

45 See Articles 817 and 818 of the Georgian Civil Code. Also see Article 37 of the German VVG, Art. 1901 of the Italian Civil Code, all providing that coverage is suspended until payment of the first installment of the agreed premium has occurred, before being terminated, if delay continues beyond a specified additional term, also at every subsequent deadline or installment – unless of course the insurer brings a judicial action to collect the overdue payment.

46 R. Sacco, *Legal Formants: a Dynamic Approach to Comparative Law* (Installment I of Ii), AM. J. COMP. L., Vol. 39, no. 1, 1991, pp. 1-34; R. Sacco, *Legal Formants: a Dynamic Approach to Comparative Law* (Installment II of Ii), AM. J. COMP. L., Vol. 39, no. 2, 1991, pp. 343-401.

its terms; and activation of the purchased cover, associated with (proof of) actual payment of premium.

An informal, textless, primeval type of insurance, based on a "pure validity" model could be relevant perhaps – with variable features according to different legal systems – for mostly non-commercial contracts, which in present-day reality could only be considered as very atypical forms of insurance, bordering the area of personal deals like life-long payments, betting, guarantees, and other arrangements normally involving persons being significantly and personally related. Or that of intermediate cases between those and "regular" insurance, like mutual insurance, fraternal benefit societies, etc.

4. The Georgian insurance contractual process.

4.1. Georgian insurance law, particularly Articles 806, 815 paragraph 1 and 816 of the Civil Code, clearly design a three-step contractual process: contract concluded, documents issued, premium paid – to have a contract which is valid, provable, fully enforceable.

A purely consensual commercial insurance contract may give rise to obligations on the insurer, to issue and deliver the agreed insurance document (*e.g.* when a named insurance product has been purchased over the telephone), and to activate the related cover if the premium has already been paid – or if it becomes necessary in the initial grace period provided for by Article 817 paragraph 1. However, keeping in mind that an exceedingly relaxed attitude towards punctual payment of premium, even for renewals, may specifically be sanctioned by Articles 817 paragraph 2, and 818.

A contractual liability of the insurer would hail from his failure to document the validly concluded contract, and to activate the relevant paid-for insurance cover – should the insured be able to prove the agreement, and the payment of premium.

4.2 The delivery of the insurance signed "document", under Georgian law, as a condition for the insured's obligation to pay the relevant premium[47], has to be analysed: cover would not be activated before premium is paid[48]; in turn, premium may not be payable before the signed

47 Article 815 paragraph 1, C.C.

48 Articles 816, Georgian C.C.

document is delivered to the policyholder. The rule is similar to the German one provided by Article 33, Section (1), of the VVG.

The Georgian Civil Code solution provided, thus, a significant change with respect to the previous rule provided by Article 33 of the Georgian Insurance Law of 2 May 1997, transitionally providing that «[a]n insurance contract shall be concluded in writing», according to a set list of typical forms; with an additional requirement of validity being the actual payment of premium, as per Article 35 of the same Insurance Law.

Article 816 is designed to protect the insured's interest to actually receive a policy document: the risk bearer may still decide to pay the premium immediately, to activate the cover and request the document later.

Questions would probably arise from cases of insured events occurring before payment of premium is made, due to the failure or delay of the insurer to provide the policyholder with the signed insurance: the latter had a right to suspend the payment of the premium, but who should bear the insured risk in the meanwhile?

Considering the validly concluded contract, the insurer's initial obligation to provide the document hailing from it, and the general principle of good faith enshrined in Article 8, paragraph 3 of the Civil Code, which infiltrates the Georgian legal system[49] – re-balancing the insurance contract's parties' mutual obligations, despite a drafting of Civil Code rules, and the related case law, much inclined to highlight policyholders' duties, producing inequality[50] – it seems reasonable in such a case, to conclude that the risk should be borne by the insurer, thus being obliged to give effect to the cover if so needed – subject to the payment of premium, or to deducting its amount from the indemnification paid.

Besides, it would be entirely unreasonable to permit the insurer to be released from an unwelcome contract by simply not issuing documents, with the consequence of not receiving premium payments and thus not having to activate the insurance cover: when the contract is validly concluded, it is the insured's right to wait until receiving the documents

49 Supreme Court of Georgia, the Section of Civil Law Disputes, October 9, 2013, case #as-1708-1602-2012; and October 20, 2014, case #as-698-668-2014.

50 K. Iremashvili, *Transparency in the Insurance Contract Law of Georgia*, *cit*., p. 369 ff.

before paying the premium, as per Article 815, paragraph 1, of the Civil Code; a contract lingering due to a lack of payment may still be activated by payment – the lack of delivery of the insurance document having the effect of preventing the insurer from requesting payment according to Articles 817, paragraph 1, or 818, paragraph 1, of the Civil Code.

On the other side, even after ordinarily receiving the signed certificate or policy, the insured may enjoy a grace period before paying the relevant premium, as per Article 817 C.C.[51] – to the extent of being able to decide not to pay at all, and be released from the concluded contract, or to pay only if the insured event occurs within the mentioned grace period: each party may actually abuse these provisions to some extent, to the detriment of the other,[52] and both enjoy, in principle, some related flexibility.

4.3. The rule of Article 815 paragraph 1, establishing that payment is not due before a signed document is received by the policyholder, seems to reveal a modicum of mistrust of the law, with respect to the ability of the Georgian insurance industry[53] to provide a policy document immediately and in all cases, thus leaving policyholders some flexibility *vis-à-vis* payment of premium. On the other side, payment of price is still regulated in Article 816 as a condition precedent to the activation of the insurance cover – departing from the more liberal German model, making this conditionality an option, to be expressly and conspicuously provided in the policy[54] – and Georgian insurance law and practice, in general, still

51 A rule similar to that of the German VVG, Articles 33 and 37, and to that of the Swiss Federal Insurance Law, Art. 20. The German rule is more lenient, compared to the Georgian and the Swiss ones, as it also allows to consider benevolently cases of no-fault delay of the insured to pay the overdue premium within the requested 14-day term from the insurer's request.

52 K. Iremashvili, *Transparency in the Insurance Contract Law of Georgia, cit.*, pp. 383-384 highlight how the insurer may abuse the provisions of Articles 817 and 818 by using or not using, in bad faith, his right to send a notice requiring overdue payments, citing in support the Supreme Court of Georgia, Section of Civil Law Disputes, October 9, 2013, case # as-1708-1602-2012; Appellate Court of Tbilisi, the Section of Civil Law Disputes, November 21, 2012, case # 2b/3080-12; Supreme Court of Georgia, the Section of Civil Law Disputes, February 21, 2013, case # as-85-81-2013.

53 This could actually be a provision in the Civil Code re-balancing the insurance contract's parties' respective positions, generally unbalanced in favour of the insurer, as discussed in K. Iremashvili, *Transparency in the Insurance Contract Law of Georgia*, *cit*., pp. 369-371.

54 VVG, Article 51.

seem to include a significant amount of inequality in insurer-policyholder relations[55].

These norms reveal the introduction of variations, with respect to the general German model, aimed at better protecting the parties' interests, expectations and mistrust vis-à-vis each other, which might be bound, on the other hand, to produce thorny issues. The mentioned mechanism reveal, perhaps, some underlying frictions in the Georgian economic environment, and/or the difficulties of getting past a post-Soviet model of insurance relations – featuring a simple compact of consent, written form and payment for validity of the insurance relations, as per Articles 33 and 35 of the Georgian Insurance Law of 1997 – towards a more sophisticated Western European one.

In the Georgian developing economic, legal and financial environment, it has probably been considered appropriate to leave to scholars and courts the further developments needed to regulate those issues, during the process in which Georgian insurance market, public, administrative supervision and regulation reach their maturity.

5. Loss of insured interest: premium and costs.

5.1 Article 815 paragraph 2 is based on another fundamental feature of the insurance contract: that of requiring the actual existence of an insurable risk. A contract insuring a non-existing risk would be null and void under any, or most, legal systems; if the insured interest and/or risk vanish after the conclusion of contract, so does the contract.

The Georgian rule in Article 815 paragraph 2 makes a direct connection between the loss of interest and the "corresponding" reduction/reimbursement of premium[56].

In simple words, the insured subject is not taking the risk of an early disappearance of the insured risk, when paying the premium; in a perhaps more refined remark, the policyholder is not counter-insuring the insurer for the stipulated amount of premium paid, to be paid even in case of loss of the insured interest – such an arrangement would possibly have several reasons for being against public policy (e.g. for the lack of qualification

55 K. Iremashvili, *Transparency in the Insurance Contract Law of Georgia*, *cit*., pp. 369-371.

56 Also see the German VVG, Article 39, Section (1); Swiss Federal Insurance Law, Article 24; Italian C.C., Articles 1895, 1896.

and capacity, let alone awareness, of the insured subject to assess and take charge of the risk). Premium may not be considered, thus, as including a counter-premium, for a second-degree counter-insurance, so to speak, to stabilise and guarantee its initial amount.

Premium shall in such a situation be re-calculated in relation to the exact moment, which may need to be proved, when the interest has been reduced or lost. This is the solution also found in the German VVG and in the Swiss Insurance Law[57], consistently with Article 815 paragraph 2 of the Georgian Civil Code.

A different solution can be found in the Italian Civil Code, identifying the relevant moment for premium reduction/reimbursement with that of notification to the insurer, of the insured interest having being lost, also providing that in long-term relations reduced premium will only be applicable from the contract renewal following said notification[58]. These stabilising provisions, and the associated simplification in managing and proving elements of related situations, however, do not seem to be supported by the Georgian Article 815 paragraph 2 – the latter being consistent, instead, with the German and Swiss mentioned approach.

5.2. A question hailing from Article 815 paragraph 2 relates to compensation due to the insurer for expenses incurred in connection with the ceased (part of the) insured interest: which costs are recoverable? What compensations, for which services, are included in the initial premium paid by the policyholder?

German VVG clarifies that costs may be reimbursed to the insurer only in some cases of termination of contract[59], whereas costs remain included in the (reduced) premium in case of partial loss of the insured interest, thus not being refundable[60]. In Italy as well, costs are only recovered if risk vanishes before the policy becomes effective[61], otherwise being considered as included in the (reduced) premium for the relevant period.

From both rules – which seem to be entirely replicable in interpreting Article 815 paragraph 2 of the Georgian Civil Code – it is possible to infer

57 VVG, Article 39, Section (1); Swiss Federal Insurance Law, Article 24.
58 Italian C.C., Article 1896 Section 1.
59 VVG, Article 39.
60 VVG, Article 41.
61 Italian C.C., Article 1896 Section 2.

that costs ordinarily related to insurance services and contracts (research, personnel, administration, documentation, etc.) are all fully included in the premium, however reduced; and that they may only be compensated per se when the insured interest is entirely lost, and the related premium is entirely reimbursed or discharged.

Different, specific costs, for different specific services may still be reimbursed, if not being part of the ordinary management of the insurance contract – *e.g.* re-issuing or extra copies of policies or certificates, courier or mailing costs, etc. This reading has a parallel rule in Article 804 of the Georgian Civil Code, burdening policyholders with the costs of issuing copies of the policy in case the original is lost.

Article 817 – Late payment of insurance premium

1. If an insurance premium is not paid on time, the insurer may specify a two-week payment term in writing, and shall indicate the consequences of the failure to pay within the specified term.

2. If the insured event occurs after the expiry of such term and by that time the policyholder has delayed the payment of the premium or interests, the insurer shall be released from liability.

Mariam Tsiskadze

Summary: 1. Prerequisite for the Application of Article 817. 2. The Right of the Insurer to Set an Additional Two-Week Period for the Payment of the Insurance Premium to the Policyholder. 3. Consequences of Non-Payment of Interest Imposed Due to Non-Payment of Insurance Premium by the Policyholder. 4. The Right of the Policyholder to Reimburse the Insurance Compensation. 5. Duty of the Policyholder Due to the Failure of the Two-Week Notice Period. 6. The Right of the Insurer to Reimburse the Insurance Premium by the Policyholder After the Expiration of the Contract. 7. Whether the Insurance is Suspended Within the Notice Period Specified by the Insurer. 8. Terms and Conditions of Compensation for Damage Caused by the Insurer to the Policyholder Due to Non-Payment of Insurance Compensation.

1. Prerequisite for the Application of Article 817

Article 817 applies when the policyholder has paid the first insurance premium and has not paid the next second or subsequent insurance premium. And if the parties agree on the distribution of the lump sum premium payment and the policyholder does not pay part of the premium within the stipulated time, then Article 816 and not Article 817 should be applied. Article 817 should therefore not apply to the lump sum payment of a lump sum insurance premium in whole or in part unless the parties to the insurance contract have agreed otherwise.

The opinion expressed in the Georgian legal literature that Article 817 regulates the cases when the policyholder violates the rule of payment of the first or one-time premium should not be shared[1].

1 K. Iremashvili, *Article 817*, *in Online Commentary of the Civil Code*, https://gccc.tsu.ge/, 15.03.2016 (in Georgian).

According to the opinion expressed in the German legal literature, if the first premium or one-time premium is not paid on time, § 37 of the German Insurance Contract Act[2], and if the next premium is not paid on time, § 38 of the German Insurance Contract Act applies, which also provides for the release of the insurer from the performance of the obligation and the right of the insurer to withdraw from the contract[3].

Not the first but the next premium in case of breach of the obligation to pay the premiums is more strongly protected, because by paying the first premium they have proved their reliability and thus has already gained insurance[4].

2. The Right of the Insurer to Set an Additional Two-Week Period for the Payment of the Insurance Premium to the Policyholder

If the second or subsequent payment of the periodic insurance premium is not paid by the policyholder, the insurer has the right to set a two-week payment period in writing in accordance with Article 817 (1), with an indication of the consequences following the expiration of the period.[5] In case of breach of payment time, the insurer must set a period of at least two weeks in writing for the policyholder, and this must be done not in accordance with § 286 of the German Insurance Contract Act, but in a qualified form (qualified reminder to pay the debt). The insurer must name the overdue amounts of premiums, interest and expenses one by one. In the case of a joint contract, the amounts must be stated separately (§ 38 I 2 of the German Insurance Contract Act).

In addition, the insurer must indicate to the insurer all possible legal consequences which, in accordance with § 38 II and III of the German Insurance Contract Act, may arise in case of non-payment[6].

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2 M. Wandt, *Versicherungsrecht*, 6. Auflage 2016, s. 223.

3 M. Wandt, *Versicherungsrecht*, 6. Auflage 2016, s. 225.

4 M. Wandt, *Versicherungsrecht*, 6. Auflage 2016, s. 222.

5 In case of non-payment of the insurance premium within the agreed period, the insurer is obliged to inform the policyholder within a reasonable time of the expected results. The existence of such a standard of conduct of the insurer is conditioned precisely by the conduct in good faith of the subjects of private law (Article 8 (3) of the Civil Code). Judgment of the Chamber of Civil Cases of the Supreme Court of Georgia of 03 April 2015, Case No. ას-1308-1246-2014.

6 M. Wandt, *Versicherungsrecht*, 6. Auflage 2016, s. 225.

After the expiration of the mentioned two-week notice period, the insurer is still not able to withdraw from the insurance contract, as the contract has not been terminated after the expiration of this period[7].

Thus, this term is not the term provided for the fulfillment of the obligation before the withdrawal from the contract specified in the first sentence of Article 405 (1). It is noteworthy that even after the expiration of this two-week period, the insurance contract continues, about which the second part of the same article offers a certain clause, according to which if after the expiration of the term the insured event arises and by this time the term of payment of premium or interest is exceeded by the policyholder, then the insurer is relieved of their duties.

3. Consequences of Non-Payment of Interest Imposed Due to Non-Payment of Insurance Premium by the Policyholder

The percentage payable by the policyholder provided for in the second part of this article shall mean the amount of the penalty (fine, surcharge) provided for them by the insurance contract due to non-payment of the insurance premium (i.e. non-fulfillment of a monetary obligation). It is true that Article 817 (2) does not offer any special clause, but the payment of interest in the form of a penalty should be requested by the insurer to the policyholder only if the parties have specifically agreed in writing in the insurance contract[8].

An interesting and shareable opinion is expressed in the Georgian legal literature that «... in case of non-payment of the premium, the insurer uses the right to impose interest. Correspondingly, according to the wording provided in 817 II, the precondition of the insurer's refusal and

7 In Georgian legal literature and legislation, the terms termination of contract and withdrawal (refusal) are often equated with each other, which is incorrect. It should be noted that the grounds for termination of the contract are not a breach of contract, but a loss of interest in the contract. Violation of the contractual obligation is the non-payment of the insurance premium by the policyholder, in which case the correct legal term is withdrawal from the contract (rejection of the contract) taking into account the content of the first sentence of Article 405 (1) of the Civil Code. Maintaining this terminological accuracy is very important, because the theory of contract law offers different grounds for termination and withdrawal of the contract, as well as different terms and conditions of termination and refusal (withdrawal), although sometimes they have similar consequences.

8 An imperative requirement of Article 418 (2) of the Civil Code is that the agreement for a penalty requires a written form.

the violation of the interest payment term are also considered. The interpretation of the above rule may give rise to differing views in court practice. In such a case, the judge must also take into account the interest of the policyholder as well. For example, if the policyholder paid the insurance premium as a result of the warning but did not pay the interest, the use of 817 II on the basis of a literal explanation would put the policyholder in a difficult and unfair situation. Therefore, the court must take into account the interest of the policyholder and resolve such dispute in the light of the factual circumstances of each case»[9].

4. The Right of the Policyholder to Reimburse the Insurance Compensation

It is true that Article 817 stipulates the duration of the additional term given to the insurer in case of non-payment of the premium, as well as the form of such notice and the legal consequence that after the expiration of this two-week period the insurer has the right to refuse to reimburse the insurance compensation, but this article does not explicitly state whether an insured event arises within this two-week period of notice, whether it should be reimbursed by the insurer. According to the content of both parts of Article 817, the insurer at this time is obliged to reimburse the policyholder for the insurance compensation, even if the policyholder has not paid the premium, because the insurance compensation will not be reimbursed only after the expiration of this two-week period. However, it should be noted here that if the insurer set a two-week period for the payment of the insurance premium to the policyholder, sent a written notice of this, but in this notice the insurer did not indicate the consequences of the expiration of this period (i.e. that the insured event after the expiration of this period will not be reimbursed), then the policyholder has the right to at least claim the reimbursement of the insurance compensation.

5. Duty of the Policyholder Due to the Failure of the Two-Week Notice Period

Since an insured event occurred within the two-week period specified in Article 817 (1) is subject to reimbursement, the policyholder shall be obliged to reimburse the insurer for the period of service for the duration of risk.

9 K. Iremashvili, *Article 817*, *in Online Commentary of the Civil Code*, https://gccc.tsu.ge/, 15.03.2016 (in Georgian).

In case of voluntary non-payment of this amount to the insurer, regardless of the exercise of the right granted by the insurer under Article 818, they have the right to file a lawsuit against the policyholder and request payment of insurance premium payable to them for a period of two weeks; in case of satisfaction of the mentioned lawsuit, in the event of voluntary non-execution of the court decision that has entered into legal force, enforcement will be carried out from the property of the policyholder.

6. The Right of the Insurer to Reimburse the Insurance Premium by the Policyholder After the Expiration of the Contract

Neither Article 817 of the Civil Code nor any other provision offers a direct answer as to if the insurer does not set an additional term for the policyholder to fulfil the obligation neither in writing nor orally at all due to non-payment of the insurance premium for the second and subsequent periods, also does not warn them of the consequences provided for in Articles 817-818, and after the expiration of the term of the insurance contract, they file a direct lawsuit against such policyholder for reimbursement of the unpaid premium for the entire insurance period (not about damages, which will be discussed below), should the court uphold such a claim?

Based on the systematic analysis of the legal norms regulating the insurance contract provided for in the Civil Code, the unified judicial practice of Georgia has considered such claims of insurance companies well-grounded and satisfied them.

In one of the civil cases, the court rightly did not shared the policyholder's objection alleging that their non-payment of the insurance premium was to be regarded as a loss of interest in the insurance contract, and they exercised their right to terminate the contract under Article 815 (2). In this case, the reference of the court is to be shared that the policyholder must first inform the insurer about the loss of insurance interest in the insurance contract and the termination of such contract must be observed and follow the rules and terms of termination of the contract.

The courts also rightly did not shared the motive of the insure's objection, since they had not paid the insurance premium in full during the term of the contract, the insurance company seemed to them to be exempt from the obligation to pay the insurance compensation. In civil

cases of a similar category, the courts have quite rightly indicated that the insurer is exempt from the obligation to reimburse the insurance compensation before the policyholder only if they enjoy the right conferred by Article 817 and the additional time limit set by them for the payment of the insurance premium expires in vain; but if the insurer has not set an additional term for the payment of the premium to the policyholder, then during the term of the contract they were obliged to fulfill the terms of such a contract before the policyholder, and the policyholder, in turn, was obliged to pay the insurance premium in accordance with the risk borne by the insurer before the expiration of such contract[10].

It is noteworthy that in a similar category of civil cases some courts later ruled differently. In particular, the focus was initially on the fact that the policyholder did not pay the next insurance premium on time, however, despite the non-payment of the insurance premium, the insurer did not warn the policyholder in writing about the expected consequences. The Court clarified in the present case that Articles 817-818 of the Civil Code are not binding, but the principle of good faith obliges the insurer to exercise the right conferred on it lawfully and in case of non-payment of the insurance premium, warn the policyholder about the termination of the contract, do not wait for the expiration of the contract and then demand reimbursement of the insurance premium[11]. Such reasoning of the courts should not be shared, as the insurer's failure to exercise the right of notice provided to the policyholder under Article 817 does not constitute a violation of the fundamental principles of equality and good faith in private law, as well as encroachment on the interests of the policyholder as a relatively weak party compared to the insurer as a strong entrepreneurial entity; whereas, as mentioned above, in the present case, during the term of the insurance contract, the insurer's obligation to pay the indemnity (i.e. payment of the insurance compensation) to the policyholder as a result of the insured event is valid at this time and is not

10 Judgment of the Chamber of Civil Cases of the Supreme Court of Georgia of 27 June 2011, Case No. ას-719-674-2010; Judgment of the Chamber of Civil Cases of the Supreme Court of Georgia of 09 October 2013, Case No. ას-1708-1602-2012; Judgment of the Chamber of Civil Cases of the Supreme Court of Georgia of 16 March 2015, Case No. ას-896-858-2014; Judgment of the Chamber of Civil Cases of the Supreme Court of Georgia of 16 March 2015, Case No. ას-896-858-2014.

11 Judgment of the Chamber of Civil Cases of the Supreme Court of Georgia of 21 February 2013, Case No. ას-85-81-2013; Judgment of the Chamber of Civil Cases of the Supreme Court of Georgia of 10 February 2015, Case No. ას-841-799-2013.

terminated, and the policyholder must pay a premium for the risk service borne by the insurer.

7. Whether the Insurance is Suspended Within the Notice Period Specified by the Insurer

In the insurance contract practice in recent years, there have been frequent cases when the insurer and the policyholder indicate as one of the essential conditions that according to a specific clause of the contract, in case of non-payment of the premium (and its overdue payment in installments) by the policyholder, the insurance is suspended. Suspended insurance is automatically canceled (terminated) if the policyholder does not repay the debt within a month. Moreover, the parties agree that the event (damage) occurred during the suspension period is not subject to insurance compensation. It should be noted that after such an agreement, if the policyholder breaches their obligation to pay the next insurance premium, the insurer no longer considers it necessary to exercise the right conferred by Article 817, without giving additional time for payment of the insurance premium and without written notice, the insurer directly refuses to reimburse the insurance compensation with reference to the above essential condition, which should be considered as incorrect contractual practice.

In one of the civil cases, the court correctly pointed out that in order to assess the agreed condition for the suspension of the contractual obligations of insurance, the norms provided for in Articles 799 and 817 of the Civil Code should be analyzed together. Based on the principles of the lawful and good faith exercise of civil rights recognized by civil legislation, the court found it lawful that the condition agreed upon by the parties to the termination of the contract was contrary to the principles established by civil legislation. In the event of such a dispute, the said agreement of the parties shall not prevail, as it contradicts the requirements of the law, in particular Article 817 of the Civil Code, especially the requirement of the second part of this article, which does not nullify the insurer's obligation to the policyholder to reimburse the insurance compensation without complying with the requirements of the first part of this article and leaves it in force[12].

12 Judgment of the Chamber of Civil Cases of the Supreme Court of Georgia of 08 February 2019, Case No. ას-433-433-2018.

8. Terms and Conditions of Compensation for Damage Caused by the Insurer to the Policyholder Due to Non-Payment of Insurance Compensation

In case of non-payment of the second or subsequent insurance premium by the policyholder, the insurer sometimes files a lawsuit against such policyholder and seeks compensation for the damage caused by the breach of the insurance premium in the amount of unpaid premium.

In one of the civil cases, the Cassation Chamber explained that «… in case the insurer requests compensation for the damage caused due to the breach of the obligation to pay the insurance premium by the policyholder, examining the merits of such a claim depends on the existence of several conditions, including: a legal norm should be found that is appropriate to the case under consideration; after establishing the legal basis of the claim, it should be checked whether the facts indicated by the plaintiff correspond to the abstract elements (composition) of the applicable norm… First of all, it is necessary to find out the content of the damage and the existence of the necessary objective criteria for its compensation under Article 394 (1), Articles 403 and 411 of the Civil Code, so that the satisfaction of the claim does not result in unjustified enrichment of the victim. In the present case, as it is clear from the grounds of the submitted claim, the plaintiff directly related the amount of damages to the full (unpaid) amount of the insurance premium, while established demand for non-payment of insurance premium under the contract by the contracting party/policyholder, moreover, they could not refer to the evidence that would unequivocally prove the amount of damages determined by the plaintiff… As the plaintiff failed to provide any evidence of the existence of damage as one of the main grounds for liability for damage, which is a qualifying mark for the application of Article 411 of the Civil Code, therefore, according to the general principle, in the dispute of the category under consideration, the plaintiff bears the burden of both stating the facts and proving them. Consequently, in the present case, the plaintiff had to indicate and prove that the defendant's action was unlawful, this action caused damage, there is a causal link between the defendant's action and the damage caused, as well as what the amount of damage is. According to the case file, the fact of damage caused in the form of unacceptable income to the plaintiff

is not confirmed, which excludes the preconditions for satisfying the claim and, consequently, the appeal». The above reasoning and explanation of the Cassation Chamber should be shared to verify the validity of the insurer's claim for such damages[13].

Thus, the merits of the satisfaction of the secondary claim for damages caused by the insurer to the policyholder due to non-payment of the insurance compensation cannot be verified solely on the basis of Article 799 (2), Article 815 (1), as well as Articles 817-818 of the Civil Code.

13 Judgment of the Chamber of Civil Cases of the Supreme Court of Georgia of 03 April 2015, Case No. ას-1308-1246-2014.

Article 818 –Termination of the contract due to late payment of the insurance premium

If the insured does not file the insurance premium on time, the insurer may notify the insured one month prior about the termination of the contract and terminate it after the expiration of this period if it does not yield any results.

Natalia Motsonelidze

Summary: 1. The definition and legal nature of the norm: A. Definition; B. Legal nature. 2. Aim of the norm. 3. Time and form of utilization of the norm. 4. Untimely payment and setting the deadline: A. Untimely payment; B. Setting the deadline. 5. Cancelation of the notice of the contract termination. 6. Practical indication and legal result.

1. The definition and legal nature of the norm

A. Definition

The obligation of the insured to pay a premium arises with the conclusion of the insurance contract. The obligation of the insured to pay the insurance premium is of economic importance[1]. It is a basic legal instrument for collecting insurance premiums that is commensurate with the insurer's commitment to take insurance risk.

B. Legal nature

The obligation to pay a premium is the insured's basic synallagmatic responsibility[2]. Corresponding to it is the insurer's obligation to indemnify the insurance loss in case of the insurance accident[3].

Articles 817-818 regulate the issue of overdue payment of the next insurance premium. The next insurance premium is the payment required by the insurance contract, which is not the first or one-time. The latter is regulated by Article 816 of the Georgian Civil Code. The first/one-

1 A. Bruns, *Privatversicherungsrecht*, München, 2015, §15, Rn. 2.

2 P. Schimikowski, *Abschluss des Versicherungsvertrags nach neuem Recht*, r+s 2006, Rn. 146.

3 A. Bruns, *Privatversicherungsrecht*, München, 2015, §15, Rn. 3.

time and the next insurance premium have a different meaning in the insurance relationship.[4] In Article 816 of the Civil Code, the legislator indicates that the insurer is free from obligation until the payment of the first or one-time insurance premium. Which indicates that it is the beginning of the material obligation of the insurer. The legislator is strict in the case of violation of obligation provided in Article 816 of the Georgian Civil Code and does not entitle the insured to claim a compensation. Unlike Article 816 of the Civil Code, the legislature is relatively mild in cases when the next insurance premium is overdue. Article 817 of the Georgian Civil Code requires the insurer to set a two-week period for the insured, based on the good faith.[5] At the same time, in case of failure to fulfill the obligation within the aforementioned period, Article 818 of the Georgian Civil Code grants the insured one additional month to fulfill the obligations.

It should be noted that the German legislator has a similar approach to that of the Georgian legislator on the issue of non-payment of the first or one-time and the next premium. According to the German legal doctrine, the relatively strict approach of the legislator in case of non-payment of the first or one-time premium is conditioned by the fact that before paying the first or one-time premium the parties, in the given case, the insurer, do not know how real is the insured's will to uphold contractual responsibilities. It is precisely the payment of the premium that reveals the insured's desire to be involved in the insurance relationship. As for the next insurance premium, by this time the parties are already in a contractual relationship. This relationship may even be several years old. Since in all contractual relationships the purpose of the legislature is to enforce the contract, the parties to the insurance relationship are given the opportunity to try and remain in the contractual relationship and fulfill their obligations in good faith. That is the reason why, after the two-week period provided by Article 817 of the Georgian Civil Code, Article 818 of the Civil Code still gives the insurer an additional one month to fulfill the obligation.

4 The first insurance premium is the first amount due after the conclusion of the contract. For more details, see Ch. Karczewski, in: W. Rüffer, D. Halbach, P. Schimikowski, *Versicherungsvertragsgesetz*, 4. Aufl. 2020, §37, Rn. 3.

5 See Commentary on Article 818 of GCC.

2. Aim of the norm

Article 818 regulates the overdue payment of the next insurance premium by the insured and the rule of termination of the insurance contract during the untimely payment of the premium.[6] The purpose of this provision is to grant a certain protection guarantee to the existing insurance contract.[7] It, as a special norm, replaces the regulation of Article 405 of the Georgian Civil Code in the insurance relationship, which imposes an additional term in case of breach of obligation. The Civil Code is a code oriented towards fulfilling contractual responsibilities.[8] Accordingly, it seeks to give the debtor an additional chance to meet the obligation. Therefore, before the termination of the contract, a creditor must give a debtor a chance to fulfil the obligations, and granting an additional time is a reflection of that. While the creditor requests fulfilment of obligations he also should set a time limit for that.[9] Article 818 of the Georgian Civil Code serves precisely this purpose.

3. Time and form of utilization of the norm

The insurer may determine the period envisaged by Article 818 of the Georgian Civil Code and subsequently terminate the contract only after it has fulfilled the procedures established by Article 817 of the Georgian Civil Code. In particular, according to Article 817 of the Georgian Civil Code, if the insured does not pay the insurance premium on time (meaning the next premium), then the insurer can set a two-week payment period in writing, while also indicating the consequences upon the expiration date. Only after the end of the two-week period, the insurer can utilize the provision established by Article 818 of the Georgian Civil Code. It should be noted that Article 818 of the Georgian Civil Code, in contrast to Article 817, does not specify the form of the warning for insured. Nor does Article 405 of the Georgian Civil Code provide a special form. However, practice shows that it is advisable to impose an additional period in writing, easing the burden of proof for the creditor in the event of a dispute. If the additional term does not yield results, the creditor may

6 Decision of the Tbilisi Court of Appeals, case №2B/5993-15, 27.05.2016.

7 F. Stahl, in: D. Looschelders, P. Pohlmann, *VVG - Kommentar,* 2. Aufl., 2011, §38, Rn. 1.

8 B. Zoidze, Reception of European Private Law in Georgia, 2005, p. 301.

9 G. Vashakidze, *Commentary on the Civil Code of Georgia, Book III, General Part of the Law of Obligations*, 2019, p. 405.

terminate the contract. However, this is its right and not obligation. The insurer can remain in the contractual relationship and still demand fulfilment of obligations.

4. Untimely payment and setting the deadline

A. Untimely payment

A prerequisite for the insurer to set a time period for the insured is the overdue payment of the premium by the insured. In such a case, it is not just the fulfilment that is crucial, but the proper fulfilment, that is meeting the obligations in due time.[10]

B. Setting the deadline

If the insured does not pay the insurance premium on time, the insurer can warn him about the termination of the insurance contract and terminate the contract after the expiration of the term.

An insurer may determine a time limit authorized by the law for the payment of the next insurance premium directly upon the end of period set out for fulfilling the obligation. If the time to meet obligation has not yet expired, the party cannot terminate the contract. Therefore, an additional term can be set only after the date has expired.[11]

Georgian legislation, unlike European legislation, including the German one,[12] does not normally indicate the obligation of an insurer to warn an insured about the overdue payment of the premium and indicates «... the insurer can ... warn». This, of course, allows the various interpretation of the norm. Moreover, the legislature does not specify what form of warning the insurer should choose, oral or in writing, what the warning should contain, and so on.

The Court of Appeals of Georgia clarifies the above-mentioned legislative record based on the principle of good faith and states in its decision: «The Civil Code obliges the subjects of private law to act in good faith. According to Article 8 section 3 of the Civil Code, the parties to a legal relationship are obliged to exercise their rights and duties in good faith».

10 Ch. Karczewski, in: W. Rüffer, D. Halbach, P. Schimikowski, *Versicherungsvertragsgesetz*, 4. Aufl. 2020, §38, Rn. 2.

11 G. Vashakidze, *Commentary on the Civil Code of Georgia, Book III, General Part of the Law of Obligations*, 2019, p. 405.

12 Deutsche Versicherungsvertragsgesetz, §38, Abs. 1.

Moreover, a legislator clarifies that the norm is not obligatory, however, the insurer's right to warn the insured is understood in the context of good faith and legality, and instructs the insurer to «warn the insured about the termination of contract in case of failure to pay the insurance premium and do not wait for the date of contract to expire»[13]. In its later decisions, the Court once again underscores its commitment to good faith, stating that «Article 818 is not binding, but the principle of good faith obliges the insurer to exercise its right lawfully and warn insured about the termination of the contract in case of non-payment, and do not wait for the term to expire and only after request appropriate reimbursement»[14]. Articles 817-818 are the norms establishing the rights rather than obligations. Accordingly, the insurer can itself decide whether to use them in case of non-compliance to the contractual obligations by the insured. In the latter case, the insurer still bears the same responsibilities that would have been valid in the event of timely payment of the premium by the insured. Therefore, the insurer, as an entrepreneur, can decide for himself whether to exercise the right conferred by Article 818 of the Georgian Civil Code. The same opinion is also developed by the court in its 2016 decision, which indicates that Article 818 of the Georgian Civil Code is a legal norm establishing the rights and it does not oblige the insurer to apply the measure specified there.[15]

Similarly, according to the Supreme Court, the stipulation of Article 818 of the Georgian Civil Code on the termination of the contract due to overdue payment of the premium is a legal norm establishing the rights and it cannot be elevated to the level of obligation.[16] However, this stipulation should not be perceived as a means for arbitrariness. The legislature explicitly determines that it depends on the will of the insurer whether or not to use the given opportunity to issue a warning. However, based on the principle of good faith, even in case of non-exercise of the right of warning, the legislator requests the insurer to remain in a contractual relationship and imposes on it an obligation to fulfill the contract, which is a sort of civil law sanction.

13 For more details, see decision of the Tbilisi Court of Appeals, case №2B/3080-12, 21.11.2012.

14 For more details, see decision of the Supreme Court of Georgia, case №AS-841-799-2013, 10.02.2015.

15 Decision of the Supreme Court of Georgia, case №AS-802-769-2016, 19.10.2016.

16 Decision of the Supreme Court of Georgia, case №AS-1708-1602-2012, 9.10.2013.

5. Cancelation of the notice of the contract termination

The insurer's notice of termination shall be nullified if the insured pays the next insurance premium within the period of one month established by Article 818 of the Georgian Civil Code. This, in turn, allows the parties to continue the insurance relationship.

6. Practical indication and legal result

So as to consider the warning of the insurer stipulated in Article 818 of the Georgian Civil Code as a legitimate warning, it is recommended that in order to determine the exact period/time for the fulfilment of obligation, the insurer must indicate the exact amount/volume of the obligation to be met, and furthermore provide the insured with accurate information on the expected results and make sure that the information has reached the recipient.

After the expiration of the period set out through the relevant notice, the insurer may automatically terminate the insurance contract.

Article 819 – Termination of the payment of insurance premium

The Insured may terminate the payment of insurance premium if, after the conclusion of the contract, it becomes clear that the economic situation of the Insurer has deteriorated to an extent that there is a real risk of defaulting on the contractual obligations in case of the insurance accident.

Natalia Motsonelidze

Summary: 1. Aim of the norm. 2. Function of the norm. 3. Occasions to use the norm. 4. The realization of termination of insurance premium payment: A. Objective precondition; B. Subjective prerequisite. 5. Judicial consequences.

1. Aim of the norm

Article 819 of the Georgian Civil Code stipulates the preconditions under which the insured has the right to refuse to fulfill its main obligation in the insurance relationship, that is to pay the insurance premium and terminate it. Article 819 of the Georgian Cri Civil Code a legal norm that protects the interests of the insured.

2. Function of the norm

Article 819 of the Georgian Civil Code is a special norm that allows the insured to stop paying the insurance premium under the insurance contract due to the deterioration of the insurer's economic situation. The norm regulates a domain of special relationship. Article 819 of the Georgian Civil Code reflects the principle of «no compliance without reciprocal fulfilment». According to this principle, the contract party must be insulated from fulfilling such obligations that does not yield corresponding benefits. The right granted to the insured to refuse to fulfill the obligation protects him from the risk of meeting the commitments beforehand.[1] The function of Article 819 of the Georgian Civil Code is a measure to ensure the fulfillment of an obligation. Namely, granting the insured the right by the legislator to delay the fulfilment, which is reflected in suspending payment of the

1 D. Medicus, R. Stürner, in: H. Prütting, G. Wegen, G. Weinreich, *BGB Kommentar*, 8. Auflage, Luchterhand Verlag, 2013, §320, Rn. 1.

insurance premium by the insured, protects him from such commitments that would not yield the reciprocal performance due to the deterioration of the insurer's economic situation. In addition, by granting the right to terminate the payment of the premium, legislator insulates the insured from the expected harm that may occur if the insurer will not be able to meet the contractual obligations in the event of an insurance accident.

3. Occasions to use the norm

According to the general rule, which is set by part 2 of Article 799 of the Georgian Civil Code, the insured is obliged to pay the insurance fee (premium). According to Article 2 (a) of the Law of Georgia on Insurance, the insurance relationship is established precisely after the payment of the insurance premium. Payment of the insurance premium is based on the insurer's obligation to indemnify the damage caused by the insurance accident. The contribution paid by the insured forms the monetary funds that ensure the protection of personal and property interests of individuals and legal entities in certain circumstances.[2] The insurer has the right to demand the payment of the premium, while the obligation to pay falls on the insured. However, the insurance contract is not limited to the liability of the insured only. It is of a synallagmatic nature, which translates into the mutual commitments by the parties. If in one case the insurer is entitled to claim the premium i.e., a creditor,[3] and the insured is a debtor, in the second case, for example, in the event of an insurance accident, the insured is the one who is entitled to receive the reimbursement, which makes him a creditor, while the insurer is the debtor. Therefore, the contracting parties in the insurance relationship fulfill a mutual obligation with the motive of receiving a reciprocal benefit. Consequently, the non-fulfillment of a contractual obligation by one party entitles the other to refuse the respective reciprocal performance. For example, in case of non-payment of the premium by the insured, legislator gives the insurer an opportunity to use the right granted by Articles 816-818 of the Georgian Civil Code, that is to relieve from the responsibility to meet its commitments[4] and terminate the insurance contract.[5] For its part, Article 819 of the Georgian Civil Code, in

2 Law of Georgia on Insurance, Article 2(a).

3 D. Looschelders, P. Pohlmann, *Versicherungsvertragsgesetz Kommentar,* 2. Auflage, 2011, §33, Rn. 2.

4 See K. Iremashvili, *Online Commentary of the Civil Code, Article 816.*

5 See K. Iremashvili, *Online Commentary of the Civil Code, Article 817-818.*

case of deterioration of the economic situation of the insurer, threatening fulfillment of its obligations, gives the insured the right to stop paying the premium. In the case of the norm under consideration, the insured is a creditor and the insurer is a debtor. Therefore, Article 819 of the Georgian Civil Code deals with the fulfillment of commitments and similar reciprocal action. In other words, the Article takes up disputed liabilities that arise from a mutual commitment and are of a synallagmatic nature.

4. The realization of termination of insurance premium payment

A. Objective precondition

Before concluding each contract, the parties try to be prudent and choose the terms of the contract carefully. However, if the counterparty itself is not reliable, only the correct selection of the terms of the contract cannot guarantee the proper performance. And in the reliability, especially in a type of relationship such as insurance, financial guarantees from the parties play a crucial role. Since, the insurer's interest in the insurance relationship is to receive compensation (premium) for the borne risk, while the insured's interest is to receive appropriate compensation in the event of an insurance accident, the financial soundness of both parties is a necessary prerequisite for this relationship. Therefore, the deterioration of economic situation of either party has a negative impact on the performance of contract.

In general, it can be said that unlike other contractual relationships, the parties to the insurance relationship, especially the insured, are more protected from the aforementioned risk. This is due to the financial guarantees required for the insurer by the law. In particular, capital, insurance reserves, and the reinsurance system.[6] In addition, the corresponding amount of cash of the insurer's minimum capital has to be continuously placed in a banking institution licensed in Georgia at all stages of the insurance activity.[7] The oversight over the implementation of the aforementioned is carried out by the LEPL State Insurance Supervision Service of Georgia.[8] Although the above measures provides some financial sta-

6 Law of Georgia on Insurance, Article 13.

7 Law of Georgia on Insurance, Article 13.

8 Resolution №102 of the Government of Georgia of May 2, 2013 on the "Establishment of the LEPL State Insurance Supervision Service of Georgia and the Supervisory Board Attached to it."

bility for the insurer, it is not an absolute guarantee. That is why the legislator through Article 819 of the Georgian Civil Code gives the insured an additional leverage for protection in the form of stopping insurance premium payments.

The right to stop payment of the insurance premium is a non-standard right to terminate the contract, which arises for the insured if certain preconditions set out by the law occur. These prerequisites are:

1. Deterioration of the economic situation of the insurer to the extent
2. that endangers the fulfillment of the contractual obligation by the insurer.

Through this stipulation, the legislature indicates that not all kind of deterioration in the economic situation of the insurer entitle the insurer to stop paying the premium. The cumulative presence of both of the above preconditions is essential. Moreover, the deterioration must be so substantial as to pose a real threat to the proper fulfillment of the contractual obligation in future.[9] Therefore, any significant deterioration of the insurer's economic situation must be assessed individually, taking into account all available factors.

B. Subjective prerequisite

Article 819 of the Georgian Civil Code stipulates: «The insured has the right to stop paying insurance premium if after the conclusion of the contract the economic situation of the insurer has deteriorated». The given norm allows dual interpretation. In one case, it may mean granting the aforementioned right to the insured only after the conclusion of contract the economic situation of the insurer is deteriorated. In the second case, the norm applies even if the economic condition of the insurer deteriorates before the conclusion of the contract, but will become known to the insured after the conclusion of the contract. In order to find out what the legislator meant to include in a particular norm, it is appropriate to investigate the purpose of the norm itself. Article 819 of the Georgian Civil Code stipulates that its purpose is to protect the insured against the danger of the insurer's non-compliance with the contractual obligations. This risk will inevitably arise if the insurer no longer has a solid financial base. Therefore, in order to achieve the goal set by the legislator, while in-

9 K. Iremashvili, *Online Commentary of the Civil Code, Article 819.*

terpreting the norm one should focus not on the period of a conclusion of contract, but on the time insured receives the information on the financial condition of the insurer. Accordingly, the right to terminate the payment of the premium must arise at any time when the insured becomes aware of a substantial deterioration in the insurer's economic situation.

5. Judicial consequences

The insurance premium is an essential element of the insurance relationship. Precisely its payment creates a basis for the insurer to bear the insurance risk. Accordingly, the termination of payment by the insured, within the framework of the law, implies suspension of the basis that motivates activities of the insurer. By stopping the payment of premium, the insured shows the willingness to terminate the contractual relationship with the insurer due to the worsening economic situation.

THE POLITICAL SCIENCE DEPARTMENT
OF THE UNIVERSITÀ DEGLI STUDI DELLA CAMPANIA
"LUIGI VANVITELLI"

THE FACULTY OF LAW OF
IVANE JAVAKHISHVILI TBILISI STATE UNIVERSITY

A. Borroni (Gen. ed.)

COMMENTARY ON GEORGIAN INSURANCE LAW

Vol. II

Insurance against damages

(Arts. 820-843)

ANDREA RUSSO

Favorite Style LLC

2022

UDC (უაკ) 349.3:36
C – 73

This publication was printed with the financial contribution of LEPL Insurance State Supervision Service of Georgia (ISSSG).

This volume was evaluated in accordance with the recognized criteria of anonymous peer-review.

This book is dedicated to the centennial celebration of the establishment of the Faculty of Law of Ivane Javakhishvili Tbilisi State University.

Borroni, Andrea (Gen. ed.)
Commentary on Georgian Insurance Law
Copyright: Favorite Style LLC
Tbilisi
2022
pp. 323-608
ISBN 978-9941-8-5032-5

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Chapter I

INTRODUCTION

Insurance contracts are a vital element of risk pooling and determine the risks covered, the premiums charged and the value of the insurance cover. Although insurance contracts are governed by the usual laws of contract, in practice they have some important features of that fundamentally impact the relationship between the insured and the insurer.

Insurance is the contract by which the insurer, in return for payment of a premium, assumes to reimburse the insured, within agreed limits, for the loss caused by a claim, or to pay a lump sum or annuity upon the occurrence of an event pertaining to human life[1].

Generally, in the different legal systems, the operation of the insurance contract is based on the following mechanism: the insured transfers the economic risk (the *alea*) of a given event to the insurer, who is able to bear that risk because the calculation of probabilities allows him to divide the *alea* itself among the other insured and also to obtain an economic benefit.

Thus, for the payment of a modest sum the insured is entitled, if that risk materializes, to a large indemnity.

1 See article 1882 of the Italian Civil code. On this point, the comments of F. Peccenini, *Commentario del Codice Civile. Assicurazione Art.1882-1932*, in *Commentario del Codice Civile Scialoja-Branca*, F. Dagnino (a cura di), 2011, pp. 1-13.

Chapter II

THE INSURANCE CONTRACT IN COMPARATIVE PERSPECTIVE

1. General notion of insurance contract

The insurance contract[2] is, by its very nature, a negotiating model with a strong transnational vocation intended to regulate, by means of insurance guarantee mechanisms, relations between contracting parties having different locations and nationalities[3].

The process of Europeanization of private law has strongly affected the physiognomy of insurance contracts, helping to redraw their regulatory boundaries. The evolution that has affected insurance contracts[4] can be explained both in light of the need to meet the demands of modern contracting and in the desire to bring the regulation of insurance contracts[5] closer to the current socio-economic context[6].

The same dividing line that traditionally separates the common law model[7] from the civil law model seems to be taking on increasingly blurred contours in the regulation of insurance contracts[8].

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2 On this topic, see O. Clarizia, *Indennizzo diretto e prestazione assicurativa*, Naples, 2009.

3 M. P. Mantovani, *Il contratto di assicurazione nel diritto europeo*, in *Annali della Facoltà Giuridica dell'Università di Camerino*, n. 2, 2013, p. 6.

4 L. Desiderio, *La riforma della disciplina del contratto assicurativo nel progetto di Codice delle assicurazioni*, DIR. ECON. ASS., 2011, p. 605 ff.

5 *Ibid*.

6 There is extensive doctrinal production on mediation and conciliation in insurance contracts. Above all P. Negri & C. Stolfi, *La mediazione finalizzata alla conciliazione delle controversie civili e commerciali. Riflessi del nuovo istituto nell'ambito del settore assicurativo*, DIR. ECON. ASS., 2011, p. 907 ff; F. Maniori, *Mediazione e assicurazione: cogliere le opportunità*, DIR. ECON. ASS., 2011, p. 993 ff; M.C. Pagni & G. Bonivento, *La mediazione: esempi di successo nel settore assicurativo e riassicurativo*, DIR. ECON. ASS., 2011, p. 983 ff; F. Cuomo Ulloa, *La mediazione nel processo civile riformato*, Bologna, 2011, p. 54 ff.

7 M. Bussani, *Faut-il se passer du common law (européen)? Réflexions sur un code civil continental dans le droit mondialisé*, REV. INT. DR. COMP., 2010, p. 7 ff, spec. p. 14.

8 *Ibid*. The author observes, with regard to the differences between the two legal systems «[c]es dernières sont cependant mieux connues des comparatistes et des praticiens du droit du commerce international que de toute autre figure juridique». *Ibid*.

Common law and civil law are obviously not two natural facts, but not even two historical facts: they are, on the contrary, two classifications that Western jurists have given[9].

The existence of distinct dogmatic categories between these two legal systems should not, however, lead one to consider these legal models as excessively distant; the progressive rapprochement between these systems can be grasped precisely in the process of harmonization promoted by European private law[10].

The contrast, which can be traced to the division between codified and jurisprudential law has, therefore, gradually assumed more nuanced contours[11].

The same way of understanding the relationship between civil law and common law in terms no longer only of opposition, but also of distinc-

9 A. Gambaro, *Common law e civil law: evoluzione e metodi di confronto*, in *Due iceberg a confronto: le derive di common law e civil law*, RIV. TRIM, 2009, p. 7 ff.

10 F. Zenati-Castaing, *La proposition de refonte du livre II du code civil*, REV. TRIM. DR. CIV., 2009, p. 211 ff, spec. 243, where, about the relationship between common law and civil law, the author states that «[r]emonter plus en arrière, à la recherche du droit romain préromaniste, c'est, contre toute attente, le moyen de jeter un pont sur la Manche, car si la common law est totalement étrangère au droit romain du Moyen-âge, elle est curieusement très proche, dans son architecture et ses concepts, de la logique romaine originelle». On this point, see also F. Carpi, *Introduzione*, in *Due iceberg a confronto: le derive di common law e civil law*, RIV. TRIM, 2009, p. 2, stating that with the prospects of harmonization and modern procedural reforms, the distinctions between the old categories are breaking down. Common law judges are becoming more active and interventionist; interest in oral argument is increasing in civil law countries.

11 A. Gambaro, *Common law e civil law: evoluzione e metodi di confronto*, cit., p. 12, according to which pitting common law systems against civil law systems solely on the basis that the former grant jurisprudential law the role and status of a source of law makes no sense. There is too much data that does not square with such an assumption. The law of obligations and contracts has been more jurisprudential law than codictic law in Germany, so much so that the Schuldrecht reform of 2002 was a restatement of jurisprudence as well as an accommodation of law of EU origin; civil liability is a sector entrusted to jurisprudential law in France and Italy, to the point that in the latter country jurisprudence allows itself to repeal, or otherwise rewrite *funditus* a cardinal rule of the codictic system such as 2059 because it is no longer aligned with the evolution of jurisprudential law. On the same point V. Varano, *Civil law e common law: comparazione e cultura*, in *Due iceberg a confronto: le derive di common law e civil law*, RIV. TRIM., 2009, p. 41. There is now a widespread tendency among comparatists, not only Italian, to blur the sharp contrast between civil law and common law.

tion inclusive fosters the fading of an incompatibility that traditionally traced back to antagonistic cultures[12].

Civil law and common law legal systems respond to culturally characterized and oriented ways of conceiving and practicing law[13], although it appears increasingly evident that the European framework envisions a different scenario, where the civil law / common law dichotomy is destined, at the legal level, to give way in favor of a legal knowledge – which nowadays cannot fail to become - increasingly dialectical and problematic, in the sense of being oriented toward themes and problems underlying all legal experience[14].

Indeed, the difference between civil law systems may be greater than that existing between French law and English law or German law and English law[15].

The same expression common law, which is traditionally contrasted with the law continental, reinforces the idea that a state structure that wants to embody in some way the idea of unity needs a common law: common law precisely[16].

Always one of the chosen grounds of legal comparison is between the civil law model and common law[17]. In this perspective, the contribution of comparative law[18] is decisive, both to overcome rigid conceptual sche-

12 L. Moccia, *Comparazione giuridica, diritto e giurista europeo: un punto di vista globale*, RIV. TRIM., 2011, p. 773. The author notes how the civil law-common law contraposition itself ceases to be only and above all the dividing line between geographically located or placeable antagonistic cultures, to be internalized as a dialectical component of all legal experience, within which - that is - both the civil law soul and the common law soul live.

13 *Ibid*.

14 *Ibid*.

15 R. Zimmermann, *Le droit comparé et l'européanisation du droit privé*, REV. TR. DR. CIV., 2007, p. 467 ff.

16 In this sense, C. Castronovo, *L'utopia della codificazione europea e l'oscura realpolitik di Bruxelles dal DCFR alla proposta di regolamento di un diritto comune europeo della vendita*, EUR. DIR. PRIV., 2011, p. 837 ff.

17 G. Gorla, *Diritto comparato*, in *Enc. dir*., Milan, 1964, p. 928 ff.

18 B. Fauvarque-Cosson, *Deux siècles d'évolution du droit compare*, REV. INT. DR. COMP., 2011, p. 527 ff, spec. 538, «qu'il s'agisse de la formation du droit européen ou International, la comparaison des droits nationaux demeure indispensabile. […] Dans cet environnement juridique complexe, le comparatiste découvre les ineractions et superpositions des souces de droit; il tâche de les rdonner et, parfois, entreprend d'unifier le droit afin de mettre fin à certains conflits de lois, au moins dans une region donnée». See also A. Von Bogdandy, *Le sfide della scienza giuridica nello spazio giuridico europeo*, DIR. UN. EUR., 2012, p. 225 ff.

matisms between legal areas, as well as to foster that process of Europeanization of private law that is much discussed[19].

Thus, comparative law represents the tool for giving meaning, a direction to European private law, freeing it from excessive institutional technicality, in order to promote an interaction between national legal models and the European model[20].

In the field of insurance contracts, the contribution of comparative law is particularly useful[21], functioning as a tool that can raise awareness of the regulatory framework adopted in different legal models[22], in order to facilitate the development of solutions that might have a high degree of compatibility at the European level[23].

2. The French model

In France, insurance law is characterized by a plurality of statutes, each corresponding to a different type of contract[24]. These statutes are not only the same in France, but also in the rest of the world. They range from property and casualty insurance contracts to life insurance, to construction insurance, for which there is the assurance *dommages-ouvrage*,

19 On this point, «[l]'idée que l'européanisation du droit privé dépend de façon décisive d'une européanisation de la formation des juristes dans les différentes universités à travers l'Europe est aujourd'hui largement acceptée». R. Zimmermann, *Le droit comparé et l'européanisation du droit privé*, cit., p. 457.

20 A. Wijffels, *Le droit comparé à la recherche d'un nouvel interface entre ordres juridiques*, REV. INT. DR. COMP., 2008, p. 228 ff; A. Mansouri, *Approche méthodoligique et fonctionelle du droit comparé*, REV. DR. INT. DR. COMP., 2006, p. 173 ff.

ss. B. JALUZOT, Méthodologie du droit compare. Bilan et prospective, in Rev. int. dr. comp., 2005, p. 29 ss.

21 R. Sacco, *Codificazione, ricodificazione, decodificazione*, DIG. DISC. PRIV., SEZ. CIV., AGG., Turin, 2010, p. 319 ff. On this aspect O. Sandrock, *Significato e metodo del diritto civile comparato*, trans. it. by R. Favale, Naples, 2009, p. 45 ff; P. Lerner, *A proposito dell'armonizzazione, del diritto comparato e delle loro connessioni*, RIV. TRIM., 2005, p. 489 ff.

22 R. Sacco, *La diversità nel diritto (a proposito dei problemi di unificazione)*, p. I., *Diversità, variazione e diritto*, RIV. DIR. CIV., 2000, I, p. 15 ff. Of paramount importance in this view is the link that is established between law and language, which already noted H. Capitant, *Vocabulaire juridique*, Paris, 1930, p. 7 ff. «La langue juridique est la première enveloppe du droit, qu'il faut nécessairement traverser pour aborder l'étude de son contenu». S. Chatillon, *Droit et langue*, REV. INT. DR. COMP., 2002, p. 687 f.

23 M. Bussani, *Diritto privato europeo*, ENC. DIR., *Annali*, II, 2, Milan, 2008, p. 420.

24 See generally H. Groutel, F. Leduc, P. Pierr, M. Asselain, *Traité du contrat d'assurance terrestre*, Paris, 2008.

which provides, before the construction work is carried out, for the conclusion of an insurance contract[25].

Fundamental, in tracing the reconstructive framework of the insurance contract in the French model, is a consideration of the contribution of case law in the area of the insurance contract, particularly in the area of insured risk and liability for willful misconduct.

On the declaration of risk, the *Cour de cassation* has held that there is a liability of the insurer in the case of the production in court of the questionnaire containing untrue information about the nature or extent of the insured risk[26], except in the case of a declaration made by the insured, exclusively on his or her own initiative, before the conclusion of the contract[27].

The content of the declaration directly affects the determination of the insured risk. From this perspective, it is particularly important, for the purpose of assessing the conduct of the insured, to ascertain whether he or she acted in good or bad faith, with obvious repercussions on the enforcement level. The insured is under an obligation to inform the insurer, an obligation that directly affects the construction of the content of the contract, particularly properly and fully with reference to the determination of the insured risk and constitutes a direct explication of the more general duty of good faith in contractual matters (art. 1134, paragraph 3, Civil Code). The accentuation of information obligations

25 For an in-depth H. Groutel, *Droit des assurances terrestres*, REC. DALLOZ, 2011, p. 1926 ff.

26 In this perspective, Cass. 15 February 2007, n. 05-20.865, in DALLOZ, 2007, p. 1635, with note of D. Noguéro.

27 Cass. 19 February 2009, n. 07-21655, in DALLOZ, 2009, p. 2788, with note of C. Mézen. The concrete case on which the 2007 *Cour de cassation* ruling was based concerned a portfolio management company that, when taking out professional liability insurance, had failed to declare that disciplinary action had been brought before the Securities and Exchange Commission against the same company. The Court of Appeals had declared the contract null and void, on the basis that it had failed to find that the insurer had placed a clause requiring the insured to declare the inspection procedure. The Court of Appeals on remand, following the annulment of the judgment by the Supreme Court, upheld the cassation court's *decisum*, in ruling No. 09-14876 of June 3, 2010. The insurer argued that there was a defect of consent, assuming willful conduct on the part of the insured, invoking the operation of the provision of Article 1116 civil code, in that the insurer had, voluntarily, failed to inform the insured of the changes that had occurred at the professional level.

in insurance contracts affects both the pre-contractual and contractual phases[28].

Jurisprudence, for about thirty years, has held that the insurer cannot claim nullity of the contract if it is aware of the false statement made by the insured[29]. It follows that the insurer cannot plead the nullity of the insurance contract, pursuant to Article 113-8 *Code des assurances*, in the event that its agent is aware of the false statement made by the insured.

In addition, the *Code des assurances* provides, in Article 112-4, that policy clauses stipulating nullity, forfeiture or exclusion are invalid if they are not adequately highlighted. It seems clear that, in this area, a problem arises both in terms of identifying the clause in terms of its recognizability and in terms of controlling its content, in order to ascertain its validity and protect the insured policyholder, a *partie faible* in the negotiated relationship.

What emerges from the jurisprudential profiles investigated is the power granted, in France, to the judge, who is not only called upon to interpret the *regula iuris* but, in tracing the rule back to the concrete case, realizes, through hermeneutic activity, an evolutionary function of the legal discipline[30].

In the circulation of legal models, a fundamental role is played, then, properly by the creative input of judges, which fosters a mechanism for the circulation of ideas[31].

28 M. P. Mantovani, *La vendita dei beni di consumo*, Naples, 2009, p. 229.

29 Cass. 31 March 1981, n. 79-15707, in DALLOZ, 1982, p. 97 with note of C. J. Berr & H. Groutel.

30 For the past few years, there has been a significant strand of jurisprudence that, precisely in the area of professional liability insurance, deems it necessary to handle the occurrence of contingencies related to damages that, inevitably, may occur even after a period of time. In this sense see: Cass. September 22, 2005, No. 04-17232, in DALLOZ, 2006, p. 1784, with note by H. Groutel.

31 See G. F. Ferrari & A. Gambaro, *Le Corti nazionali ed il diritto comparato. Una premessa, in Corti nazionali e comparazione giuridica*, a cura di G. F. Ferrari & A. Gambaro, *Collana Cinquanta anni della Corte Costituzionale*, Naples, 2006, VIII.

3. The English model

If looking at the common law model and, in particular, English law, it is possible to see significant parallels with the Italian model[32] regarding information obligations in the insurance contract[33].

Information pertains to the cultural and experiential background of the subject and is of particular importance in the insurance sector[34].

In the body of legislation of the Private Insurance Code (Legislative Decree No. 209 of September 7, 2005), both insurance products[35] and the

32 F. Galgano & F. Marrella, *Diritto e prassi del commercio internazionale*, TRATT. DIR. COMM E DIR. PUBB. ECON., diretto da F. Galgano, Padua, 2010, p. 632. The authors point out how the causal balance of the contract can, from the outset, be altered by inaccurate statements or reticence on the part of the insured, which mislead the insurer about the extent of the risk assumed and, therefore, the relationship between this and the amount of the premium. Here the code protects the insurer with rules more explicit than the common law principles on the cancellation of the contract for error (art. 1428 It. Civ. Code) or for malice (1439 It. Civ. Code): if the insured had acted with malice or gross negligence, the insurer may, within three months of discovering the inaccuracy of the di- clarification or reticence, request the cancellation of the contract (art. 1892 It. Civ. Code); if, on the other hand, the insured had acted without willful misconduct or gross negligence, the insurer may, within the same period, withdraw from the contract, and for the claim, which may have occurred before the discovery, compensation less than that contractually provided for and adjusted to the true state of things is due (art. 1893 It. Civ. Code).

33 S. Nitti, *Duty of disclosure nel contratto di assicurazione. Analisi comparata tra sistema italiano e sistema inglese*, DIR. ECON. ASS., 2010, p. 527 ff. The subject of the insurance contract, either because of its origin to be traced back to the *lex mercatoria*, as has always been known, constituted a kind of special or corporate law with a transnational character, or because of the ever-increasing similarities in contractual matters existing in European law, shows a common background to the various national laws.

34 V. Meli, *L'applicazione della disciplina delle pratiche commerciali scorrette nel «macro settore credito e assicurazioni»*, BANCA BORSA, 2011, p. 334 ff, spec. 342. With regard to the sectors and activities carried out by the Antitrust Authority there is the macro-sector of credit and insurance, and with regard to measures relating to the insurance sectors, the parameter of the average consumer plays a key role, a hypothetical figure to be reconstructed on the basis of general social and cultural factors, disregarding any connection with the – possible – concrete case, and that, in essence it is irrelevant whether in the cases concretely brought to the Authority's attention the practice has or has not had the effect of distorting the behavior of the consumers actually involved

35 C. G. Corvese, *La pubblicità dei prodotti assicurativi: un tentativo di ricostruzione della disciplina*, RESP. CIV. PREV., 2010, p. 2130 ff.

regulation of insurance product advertising are regulated[36]. These provisions are designed to eliminate the information asymmetries that characterize the relationship between the insured and the insurance company, imbalances that arise precisely from the different degree and intensity of knowledge[37].

In this sense, some of the provisions introduced in the Insurance Code that have incorporated the trend, manifested at the European level, aimed at ensuring effective protection of transparency and correct information in the contractual sphere, appear fundamental[38].

In particular, the issue of missing or inaccurate information assumes importance from the standpoint of the conduct of the insured who has provided the insurer with inaccurate communications or has failed to communicate relevant circumstances to it[39].

Thus, the insured's liability arises when the insured has not properly fulfilled its obligation to provide information, which is particularly

36 S. Nitti, *Duty of disclosure nel contratto di assicurazione. Analisi comparata tra sistema italiano e sistema inglese*, cit., p. 534. The author states that the regulation gives Isvap the task of issuing detailed rules on the content and outline of the information note, with the possibility of implementing, for life insurance and only for this sector, the information standard set by the legislature. In particular, the legislature empowers Isvap to set by regulation the additional information, in addition to that listed above, that is necessary for full understanding of the essential characteristics of the contract, and in particular that which concerns costs and risks and conflict of interest transactions.

37 C. G. Corvese, *La pubblicità dei prodotti assicurativi: un tentativo di ricostruzione della disciplina*, cit., p. 2132. The goal of overcoming information asymmetries in the insurance relationship, is common to all the rules found in Title XIII of the Private Insurance Code, thus not only to advertising but also to conduct obligations (Art. 183), disclosure obligations (Art. 185) and interpellation (Art. 186), but, with the introduction of rules on advertising, including advertising related to insurance products, the legislature has taken on board the instances coming from the less benevolent theories towards advertising by trying to achieve a specific objective: that of preventing the advertising message from being incorrect i.e., containing lies and being, therefore, misleading, and this is corroborated by the circumstance that at the time of the dissemination of the advertising message [. ...] one does not know the person to whom the message is directed and therefore it would be difficult to understand even the level of information asymmetries so as to provide all the information that can equalize the level of knowledge between company and insured.

38 S. Nitti, *Duty of disclosure nel contratto di assicurazione. Analisi comparata tra sistema italiano e sistema inglese*, cit., p. 538.

39 *Ibid*.

pronounced when there are significant information and knowledge asymmetries between the parties[40].

The insured is, therefore, saddled with a broader information burden than that which invests the policyholders at the negotiation stage, since he or she is required to for- ward to the insurer, in a logic of cooperation and collaboration, all the information deemed necessary to define the terms and conditions of the contract[41].

In the English legal system, the insurance contract draws its regulation from the jurisprudential formant, based on case law. English insurance contract law is still considered part of the common law.

Despite the long jurisprudential tradition in insurance matters and the enactment of industry-regulating statutes, an unambiguous definition of insurance law is lacking in English law[42].

In the English model, the affairs of the insurance contract have a quite particular foundation, requiring judges to read each external source in light of the framework of rules handed down. This is probably one of the most interesting aspects from the perspective of adapting the law to the novelties and factors affecting the insurance world[43].

Although we have not yet reached the enactment of an organic reform of insurance contract law, the subject is a source of heated debate not only among scholars and the categories of economic operators involved, but also at the institutional level, and in the English legal system there is a growing need to develop a system of rules aimed at regulating insurance contracts[44].

The spread of insurance contracts is gradually becoming established in the business world, where the circulation of wealth and the flow of

40 V. Roppo, *Il contratto*, Milan, 1977, p. 169. Duties of information come into play first: particularly marked when there are information asymmetries between the parties. The party who knows (or should know) data relevant to the evaluation of the contract, and knows (or should know) that counterparty instead ignores them, has a duty to inform the other party. However, it is important to reasonably delimit this duty, because any reticence between the parties is unlawful.

41 S. Nitti, *Duty of disclosure nel contratto di assicurazione. Analisi comparata tra sistema italiano e sistema inglese*, cit., p. 537.

42 J. Birds & N. J. Hird, *Birds'Modern Insurance Law*, 6 ed., London, 2004, p. 1 ff.

43 M. Gagliardi, *Il contratto di assicurazione. Spunti di atipicità ed evoluzione del tipo*, Turin, 2009, p. 55 ff.

44 *Ibid*.

large amounts of capital has imposed, in order to guarantee security for commercial traffic, the creation of standard conditions applicable to this category of contracts. While the absence of regulation ensures greater freedom in the regulation of insurance contracts, with obvious benefits to policyholders in terms of both coverage offered and costs, it does not appear to be in line with emerging trends at the European level[45].

In this perspective, the importance assigned to the duty to disclose (Duty to disclose) is significant; in particular, in the Principles of European Contract Law, the duty to inform becomes a cardinal principle in contractual matters, applicable both at the negotiation stage and after the conclusion of the contract[46].

There is a growing trend toward the contractualization of duties of information, in this regard particularly significant is Article 6:101 of the Principles of European Contract Law, which provides that a statement made by one party before or at the time of the conclusion of the contract is a source of contractual obligation, if the other party so understood it[47].

Contract law draws here a strong element of originality, overcoming the old dichotomy between pre-contractual and contractual liability[48].

Although the *acquis communautaire* has not, at present, transposed a general duty to inform except in the specific areas of consumer protection contracts and in the field of financial products, it seems, however, to have reached a significant milestone regarding the use of the general principle of good faith and fairness which, in place of the usual duty of

45 S. Nitti, *Duty of disclosure nel contratto di assicurazione. Analisi comparata tra sistema italiano e sistema inglese*, cit., p. 539. Until December 2001, insurance legislation (particularly the Companies Act 1974 and 1982) did not include a definition of insurance or insurance contract. In particular, the Regulated activities Orders 2001 contains numerous references to the insurance contract.

46 C. Castronovo & S. Mazzamuto, *Manuale di diritto privato europeo*, vol. II, Milan, 2007, p. 391 ff, spec. 448.

47 *Ibid*. The authors underline that outside of an express regulatory provision, and when the cause of the contract and/or the nature of the service does not require it (consumer contracts, provision of financial services), we do not feel that European law has now embarked on the path of a collaborative and solidaristic conception of the contract, such that a general duty to disclose is considered part of the *acquis Communautaire*.

48 R. Alessi, *Diritto europeo dei contratti e regole dello scambio*, EUR. DIR. PRIV., 2000, p. 978.

not to conceal, imposes the more pregnant duty (of positive content) not to turn to the detriment of the other party one's informational advantage[49].

4. The Italian model

The insurance contract is one of the typical contracts under Italian law, regulated in Articles 1882-1932 Civil Code. However, in addition to those of the civil code, the insurance code[50] also dictates some provisions on insurance contracts: Title XII of the Private Insurance Code is dedicated to the rules on insurance contracts (Art. 165-181 Ins. Code)[51].

The problem of the concurrence of these provisions does not arise for contracts prior to January 1, 2006, the date on which the Insurance Code came into force (Art. 355, para. 1 of the Insurance Code): for contracts already concluded on that date, the earlier rules remain in force (Art. 354, para. 7 of the Insurance Code)[52].

In contrast, for insurance contracts concluded on or after January 1, 2006, there are two bodies of law: the Insurance Code, as a special law, and the Civil Code, as a general law[53].

In Italy, in accordance with the principle adopted by the Art. 1882 c.c., it is provided – as with other contracts – a definition of the insurance contract. But, as with other legislation, it limits itself to a dualistic description hinging on the two basic subtypes (insurance against damages,

49 C. Castronovo & S. Mazzamuto, *Manuale di diritto privato europeo*, cit., p. 451.

50 On the introduction in the Italian legal system of the Insurance Code, see A. Gambino, *Note critiche sulla bozza del codice delle assicurazioni private*, GIUR. COMM., 2004, I, 1035 ff; G. Volpe Putzolu, *Il parere del Consiglio di Stato sullo schema di codice delle assicurazioni*, GIORN. DIR. AMM., 2005, p. 881 ff.

51 Title XII of the Code of Insurance is divided into six chapters: chapter I (general provisions), chapter II (compulsory insurance of liability arising out of the use of motor vehicles and watercraft), chapter III (legal protection and assistance insurance), chapter IV (life insurance), chapter V (capitalization) and chapter VI (applicable law). In this regard see G. Volpe Putzolu, *Le disposizioni relative ai contratti*, GIORN. DIR. AMM., 2005, p. 1255 ff.

52 V. Sangiovanni, *I contratti di assicurazione fra codice civile e codice delle assicurazioni*, ASSICURAZIONI, 2011, pp. 107-108.

53 *Ibid*.

insurance on life), renouncing to pose a unitary concept which, given its difficulty, it abandons to doctrine[54].

What stands out to the attention of the interpreter is, notwithstanding the subsequent division into insurance branches, the unitary definition of the insurance contract[55] that art. 1882 Civil Code qualifies as the contract by which the insurer, against payment of a premium, undertakes to compensate the insured, within the agreed limits, for the damage caused to it by an accident, or to pay a capital sum or an annuity upon the occurrence of an event pertaining to human life[56].

A unity of definition that is reflected in the equally inseparable connection between the insurance contract and the insurance business such that the former can in no way be read in isolation from the overall operation put in place by the insurer and aimed at neutralizing the risk[57].

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54 The origin and development of insurance contracts have been object of several historical analysis. Above all, see N. Gasperoni, *Assicurazione (in generale)*, in Aa. Vv., *Nuovo digesto*, Turin, 1957, p. 354 ff; A. Donati, *Trattato del diritto delle assicurazioni private*, Milan, 1952, p. 53 ff; G. Cassandro, *Assicurazioni (storia)*, in aa. Vv., *Enciclopedia del diritto*, Milan, 1958, p. 420 ff; G. Scalfi, *Assicurazione (Contratto di)*, in Aa. Vv., *Digesto delle discipline privatistiche*, Sezione commerciale, Turin, 1987, p. 333 ff.

55 On this point, *ex multis*, L. Buttaro, *Assicurazione in generale*, in Aa. Vv., *Enciclopedia del diritto*, Milan, 1958, p. 345 ff; L. Buttaro, *Assicurazione sulla vita*, in Aa. Vv.: *Enciclopedia del diritto*, Milan, 1958, p. 611 ff; T. Ascarelli, *Sul concetto unitario del contratto di assicurazione*, in *Saggi giuridici*, Milan, 1949, p. 408 ff. More recently, S. Landini, *Art. 1882*, in Aa. Vv, *Dei singoli contratti* (a cura di D. Valentino), Turin, 2011, p. 39, which, while pointing out the differences existing between life insurance and non-life insurance states that even taking into account the evolution of life insurance, it seems difficult, however, to deny unity, from the causal point of view, to the phenomenon of insurance considering how even in life insurance there is still the assumption of a demographic risk by the insurer. Compare, also, G. Fanelli, *Le assicurazioni*, in *Trattato di diritto civile e commerciale Cicu e Messineo*, Milan, 1973, p. 467 ff.

56 For a deep analysis F. Peccenini, *Commentario del Codice Civile. Assicurazione Art.1882-1932*, cit., pp. 1-13.

57 On this matter C. F. Giampaolino, *Le assicurazioni*, Turin, 2011, p. 169. The author points out that the insurance contract is entered into only in connection with the business of insurance. On this level, the relationship is in fact considered not individually, but in connection with the overall operation carried out by the insurer through the use of a particular technical procedure based on the application of the calculation of probabilities.

What emerges from the codified provisions that, in general, deal with insurance contracts is, therefore, the image of a causally unified aleatory case - albeit articulated in insurance belonging to the life branch and insurance falling within the non-life branch - through which the insured pays a premium to purchase the security of cancelling or reducing a future and uncertain risk[58].

However, it should be pointed out that from the regulatory point of view, the regulation of the insurance contract now seems to be crystallized in the codified provisions, as no organic interventions aimed at actualizing insurance law on the purely negotiating level have been found.

Considering the premises, the main element of the insurance contract – as for all the types of contracts – is the cause.

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58 A. Bracciodieta, *Il contratto di assicurazione (Disposizioni generali)*, in *Cod. civ. Commentario Schlesinger*, Milan, 2012, pp. 23-25. The only moment of possible rupture of this stasis was found in the first draft of the 2003 Private Insurance Code which provided – in addition to the reorganization of the provisions relating to the insurance company, insurance supervision and insurance brokerage – for the expunction of the provisions contained in the Civil Code relating to the insurance contract in order to transpose them into the new regulatory text. The basic idea of the 2003 legislature was, therefore, to create a complete body of law in which to trace the entire regulation of the insurance phenomenon in terms of both market and more markedly private regulations. This code was to replace all previous provisions that, outside the Civil Code, dealt mainly with the regulation of the insurance company. It should be recalled, in fact, the first legislation on the point dates back to Royal Decree No. 29 April 1923, núm. 966 converted by l. April 17, 1925, núm. 473 (on which see A. Asquini, *Diritto pubblico e diritto privato nell'ordinamento delle assicurazioni*, in A. Asquini, *Scritti giuridici*, Padua, 1936, pp. 119 ff) later replaced by the Consolidated Text of Private Insurance (Presidential Decree February 13, 1959, núm. 49). On such earlier legislation, see G. Cottino, *Insurance between past and present*, in Aa. Vv, *L'assicurazione, l'impresa e il contratto*, Padua, 2001, p. 7. However, this attempt, mainly due to criticism from a part of the doctrine16, foundered, leading to the enactment of Legislative Decree No. 209 of September 7, 2005 (the so-called private insurance code), which contains almost exclusively the regulation of the insurance market (capital, structural, governance requirements) and intermediation. On these points, A. Gambino, *Note critiche sulla bozza del codice delle assicurazioni private*, cit., 2004, I, p. 1035 ff; M. Bin, *Artt. 1 e 2*, *Commentario al codice delle assicurazioni* (coord. da M. Bin), Padua, 2006, p. 12 ff; A. D. Candian, *Il nuovo codice delle assicurazioni e la disciplina civilistica del contratto di assicurazione: tendenze e "resistenze"*, CONTR. IMPR., 2006, pp. 1289-1313; P. Corrias, *La disciplina del contratto di assicurazione tra codice civile, codice delle assicurazioni e codice del consumo*, RESP. CIV. PREV., 2007, pp. 1749-1774.

The oldest doctrine is that of the indemnity function. Insurance arises with an indemnity function, that is, with an indemnity function; and the development of life insurance in the modern sense shatters this concept[59].

The indemnity theory has the wrong – this is also true for property and casualty insurance – of attributing to the contract a cause (damages) that it would demand only upon the occurrence of the loss: so that whenever the loss does not occur, the contract would be without cause[60].

59 It is not worth deleting, as has been attempted, life insurance from the territory of insurance, because the life of trades and all laws qualify it as such. Death does not always cause damage (think was of the economically passive insured) ; survival almost never causes it (economically active insured) ; in insurance for the benefit of third parties or in that of the life of a third party, no economic or even only moral interest of the beneficiary or the policyholder in the life of the insured is required; finally, even when the insured event presents itself net concrete case as really damaging, the insurer's benefit has for its object a sum or annuity predetermined in the contract and not already commensurate with the damage suffered. About this theory, above all, G. Partesotti, *La polizza stimata*, Padua 1967, p. 88; G. Fanelli, *La "summa divisio" delle assicurazioni private: riflessioni su di un vecchio problema*, FORO IT., 1962. In jurisprudence, SS. UU. Cass., sez. un., 9 May 2016, n. 9140, in Corr. Giur., 2017, with note of R. Calvo, *Clausole claims made fra meritevolezza e abuso secondo le Sezioni Unite*, pp 4-5. The author states that while non-life insurance performs an indemnity function to protect assets, human life insurance meets needs of an eminently welfare nature. This does not detract from the fact that non-life insurance also qualifies *lato sensu* as an act of provision against the risk of economic loss as a result of the accident. *Ibid*.

60 P. Corrias, *Previdenza, risparmio ed investimento nei contratti di assicurazione sulla vita*, RESP. DIR. CIV., 2009, p. 89 ff, in part. p. 90-95; B. Farsaci, *Le teoriche sul contratto di assicurazione*, ASSICURAZ., 2007, p. 84. A more frequently accepted theory today is the one that attributes to insurance the function of placing wealth at a person's disposal in the event of the occurrence of a need-provoking event, that is, more briefly, to satisfy a contingent need. Although broader in scope than the previous theory, this theory does not, first of all, escape the objection already made to the indemnity theory, that since the contract performs its function only upon the occurrence of the need-provoking event, all the time the event does not occur the contract would be without cause. On the other hand, even when it does occur, the event does not always cause a need, even if set on an objective basis claim. Especially in life insurance, death and survival do not always cause a need. Nor is it valid in such a case to speak of concrete need in non-life insurance or abstract need in life insurance: abstract need, as already typical damage, is a vain play on words. See, on this point, M. Rossetti, *Il diritto delle assicurazioni, I, L'impresa di assicurazione. Il contratto di assicurazione in generale*, Padua, 2011. Other theories disregard the cause of the store but do not reach appreciable results. Thus, it is not worth noting that the concept is imposed on an exchange between the performance of the premium by the policyholder and the performance (some add conditional) of the insurer in consideration, and that this exchange is characteristic of many contracts: in all bilateral contracts one party makes a performance in consideration and proportion of a counter-performance; and in some contracts, in front of a pure obligation stands a conditional obligation (game).

A more recent theory, recognizing that there is not always harm or need, ascribes to insurance the function of allowing a certain patrimonial purpose-preservation of the status quo, or increase (hoped-for profit insurance)-that without the occurrence of a certain event affecting individual elements of the estate or the entire estate (property insurance), or the organizer of the estate (life insurance), would have been realized, is realized with certainty, whether or not the event occurs[61].

Furthermore, it is to be noted that this theory, while it may not pub include all species of insurance, does include all other contracts and there are many (conditional contracts, collateral contracts, surety) aimed at fulfilling the same generic function.

Others say that the characteristic of insurance is the assumption and bearing of risk on the part of the insurer but, apart from the fact that there are other contracts on risk, this does not solve, but rather raises the problem. If by risk is meant the possibility of an event provoking need damaging event, we are in full indemnity theory; if it is meant possibility of an event provoking need we are in full contingent need theory, etc[62].

The insurance relationship is usually a synallagmatic or bilateral relationship. Since nothing precludes that a synallagma may exist between the assumption of a pure obligation and the insurance of an obligation subordinated to an event *incertus quando* or even *incertus an*, the promise of the policyholder and the promise subordinated to a term or necessary precondition *incertus an* of the insurer are in a synallagmatic relationship in the technical sense[63].

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61 A. Bracciodieta, *Il contratto di assicurazione (Disposizioni generali)*, cit., p. 26; G. Cottino, *Insurance between past and present*, cit., p. 7; A. Gambino, *Note critiche sulla bozza del codice delle assicurazioni private*, cit., p. 1035 ff. However, this theory, if it can apply to non-life insurance, can no longer apply to many forms of life insurance (in fixed term insurance ; in temporary life insurance ; in survival insurance ; in insurance on the life of a third party or for the benefit of a third party, when there is a lack of interest of the policyholder or beneficiary on the life of the third party) and in other personal insurance in which, the indemnity being established as a lump sum, the insurance pub allows the achievement of a purpose (increase in assets), which is not said that without it loss would have occurred.

62 For an analysis of this specific feature of an insurance contract, see D. De Strobel & V. Ogliari, *L'assicurazione di responsabilità civile e il nuovo codice delle assicurazioni private*, in *Teoria e pratica del diritto*, Milan, 2008, p. 26 ff.

63 On this point, A. Gambino, *La neutralizzazione dei rischi nella struttura e nella funzione giuridica unitaria del contratto di assicurazione*, RIV. DIR. COMM., 1985, p. 209 ff.

All the rules proper to bilateral contracts therefore apply to the relationship[64].

4.1. The criteria for drafting insurance contracts under Italian law

Article 166, para. 1, of the Insurance Code, first of all, notes that the contractual relationship of insurance is between "the insurance company" of insurance, on the one hand, and "the policyholder", on the other.

The figure of the enterprise is defined by the Insurance Code. The Insurance Code borrows the system of definitions from EU experience.

In European law, regulations must apply in all member countries. In order to ensure uniform application in all states, it is necessary to dictate – already at the community level – a definition of terms that are used in legislative texts. In recent years, this regulatory technique has also made its way into the Italian legal system, especially in the case of legislation transposing EU law. And indeed, even the Insurance Code opens with a long list of definitions. The definition of interest here is that of company, by which is meant the licensed insurance or reinsurance company (Art. 1(s), Insurance Code)[65].

64 *Ibid*. Of course, with regard to *exceptio inadimpleti contractus* and termination for non-performance, since they presuppose non-performance, the policyholder can avail himself of them against the insurer only when the latter is in default, after the expiration of the term on which the maturity of the debt depends, or after the occurrence of the presupposition on which the arising and expiration of the obligation depends. In other cases of termination, on the other hand, the policyholder will be able to avail himself of the right to terminate the contract even though the insurance case has not occurred, when a prerequisite for termination is not default, but the fear of default.

However, the insurance relationship is not always, or is only, synallagmatic. Sometimes, in fact, the two considerations are in a conditional relationship: the insurer promises (in term or subject to the occurrence of a presupposition *incertus an*) his performance, because the policyholder has made his performance (one performance *in obligatione*; the other *in condicione*): this happens when the insurance is single premium and its effectiveness is made dependent on the payment of said premium. At other times, finally, the relationship between the two considerations is partly conditional, partly synallagmatic: this happens when the premium is periodic, but the effectiveness of the contract is made dependent on the payment of the first premium installment: in that case between the first premium installment and the insurer's promise the relationship is conditional; between the promise of subsequent installments and the insurer's promise the relationship is synallagmatic.

65 V. Sangiovanni, *I contratti di assicurazione fra codice civile e codice delle assicurazioni*, pp. 113-114.

In contrast, a definition of policyholder is not provided by the Insurance Code. However, this expression is to be understood as the person who concludes the insurance contract. In this regard, it should be noted that the legislator is not referring only to the figure of the consumer, but to any policyholder of an insurance contract (and such a policyholder may well be a person who does not qualify as a consumer).

In this respect, Art. 166, para. 1, of the Insurance Code expands the preceptive meaning of Art. 35, para. 1, of the Consumer Code, which stipulates that – in consumer contracts – clauses must always be drafted in a clear and comprehensible manner. While the rule in the Consumer Code has a scope limited to consumers, the rule in the Insurance Code has a scope not limited to consumers. The extension of the rule of clarity to all insurance contracts (not only those concluded by consumers) is justified by the fact that the subject of insurance is characterized by a high level of technicality: the understanding of insurance mechanisms is not easy even for those who, although professional, operate in a sector other than insurance[66].

With reference to the subject matter regulated by article 166, para. 1, of the Insurance Code, the provision refers primarily to contract. However, the provision also mentions any other document. This is intended to essentially ensure that every communication from the company and addressed to the policyholder has the characteristics of clarity and comprehensiveness.

The contract is accompanied by the general terms and conditions of the policy, which-although normally presented as a separate text-are an integral part of it[67].

66 *Ibid*.

67 With reference to the general conditions of insurance contract see M. Bin, *Condizioni generali di contratto e rapporti assicurativi*, GIUR. COMM., 1994, p. 798 ff. Prominent among the other documents that must be given to the policyholder is the information note. Although this document receives a special regulation in Art. 185 of the Insurance Code, the legislator limits itself to indicating its content. This provision should then be supplemented with Art. 166, para. 1, of the Insurance Code, which explains how the information is to be provided: demanding clarity and comprehensiveness of the information note as well.

Moreover, it can be inferred from the provision, however implicitly, that the duty of clarity and comprehensiveness remains throughout the relationship between the parties: both at the pre-contractual stage and once the contract has been concluded[68].

After all, the delivery of the written text of the draft contract occurs, by necessity, before the same text is signed and, therefore, at a pre-contractual stage. The purpose of the provision is precisely to enable the contractor to assess in advance the content of the clauses proposed by the company[69].

The preceptive content of Article 166, para. 1, of the Insurance Code is to stipulate that the contract must be clear and comprehensive.

Clear means that the contract must be easily understandable to an average reader and cannot give rise to significant interpretive doubts.

In this regard, it is interesting to note how the terminology used by Art. 35, para. 1, of the Consumer Code is slightly different: there the double term of clauses drafted in a clear and comprehensible manner is used. However, that the two expressions should be regarded as synonymous, or rather: clarity is nothing but a means by which comprehensibility is achieved[70].

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68 For an in-depth analysis on this point, see E. Ferrante, *Commento agli artt. 165-169*, in Aa.Vv., *Commentario al codice delle assicurazioni*, a cura di M. Bin, Padua, 2006, p. 492 ff.

69 V. Sangiovanni, *I contratti di assicurazione fra codice civile e codice delle assicurazioni*, pp. 114-115.

70 *Ibid*. It follows that the requirement of clarity should be interpreted as the possibility of easy comprehension. The ability to comprehend obviously depends on the recipient of the communication. Considering that every insurance company tends to conclude contracts with a very large number of parties, the ability of policyholders to understand varies greatly from case to case. The goal of the legislature is not to ensure that any recipient understands all contractual clauses, but to ensure that an "average" recipient is able to understand them. In this respect, it can be considered that the requirement of clarity means that technical matters (including in the economic-legal sense) peculiar to insurance matters must be set out in the contract in such a way that they are reasonably understandable even by a person who is not a professional in the field. L. Farenga, *Commento all'art. 165*, in Aa.Vv., *Il codice delle assicurazioni private*, diretto da F. Capriglione, vol. 2, Padua, 2007, p. 50. See also I. Della Vedova, *Commento all'art. 165 cod. ass*., in Aa.Vv., *Commentario breve al diritto dei consumatori*, a cura di G. De Cristofaro & A. Zaccaria, Padua, 2010, p. 1628 ff; G. Volpe Putzolu, *Commento all'art. 165*, in Aa.Vv., *Commentario breve al diritto delle assicurazioni*, a cura di G. Volpe Putzolu, Padua, 2010, p. 621 ff.

Exhaustive means that the contract must cover all relevant aspects. Wanting to make a comparison with consumer regulations, it must be noted that the requirement of exhaustiveness is not provided for in Article 35, para. 1, of the Consumer Code, which merely – as pointed out above – refers to clarity and comprehensibility. An exhaustive contract is not necessarily the best situation for the contractor, in the sense that it risks being excessively long. A long contract text disincentivizes careful reading by those who did not prepare it: there is a risk that the contractor will sign without having a clear understanding of all the effects involved[71].

Article 166, para. 1, of the Insurance Code must therefore be interpreted to mean that the contract must be comprehensive, yes, but only with reference to those aspects that assume reasonable relevance in the case at hand. Therefore, not every possible circumstance should be regulated, but any eventuality that may have a perceptible influence on the interests of the parties should be regulated. The requirement of clarity and the requirement of comprehensiveness cannot conflict. And this result can be achieved only by considering comprehensiveness not in absolute terms (which, moreover, are very difficult to achieve), but as referring to the main elements of the contract[72].

In the event that the contract (or its clauses) is deemed unclear and incomplete, the problem arises of identifying the proper remedy available to the contractor. The question is by no means simple precisely because of the silence of the legislature (making a joke, one could say that the legislature, which requires contracts to be exhaustive, is not itself exhaustive). Moreover, this is not the only case in which a piece of legislative text requires a subject to behave in a certain way, but fails to provide what should happen if the precept is violated. Disorientations in case law on identifying the correct remedy in the face of violations of the rules of conduct of intermediaries' financial intermediaries are well known to all[73].

71 V. Sangiovanni, *I contratti di assicurazione fra codice civile e codice delle assicurazioni*, pp. 115-116.

72 *Ibid*.

73 The most striking case of a legal provision without simultaneous provision of a sanction for the hypothesis of its noncompliance is probably that of the rules of conduct of financial intermediaries. The absence of the express provision of a civil sanction for their violation has led to the emergence of conflicting jurisprudence. In this regard, the Court of Cassation in United Sections had to intervene, with two famous rulings: Cass.,

In trying to identify a range of possible remedies in favor of the contractor, one can draw inspiration precisely from the solutions arrived at by the jurisprudence of legitimacy regarding the liability of financial intermediaries.

In this regard, the fundamental distinction concerns the moment in which the breaches are put in place: if such breaches take place before the conclusion of the contract, there may be compensation for damages or cancellation of the contract; if they are placed after the conclusion of the contract, there may be damages or termination of the contract[74].

In the case of insurance contracts, the policyholder's contentions will be raised (and enforced in court) only once the contract has been signed. Nevertheless, the remedies that can be brought by the policyholder should be those pertaining to the "pre-contractual" stage: compensation for damages on the basis of the combined provisions of articles 1337 and 1218 of the Civil Code as well as a claim for annulment of the contract on the grounds of error or, possibly, malice[75].

On the other hand, it seems to me more difficult to be able to invoke contractual remedies, since the insurance company's misconduct (failure

December 19, 2007, nos. 26724 and 26725, BANCA, BORSA, 2009, II, p. 133 ff, with note by A. Bove; CONTRATTI, 2008, p. 221 ff, with note by V. Sangiovanni; CORR. GIUR., 2008, p. 223 ff, with note by V. Mariconda; DANNO RESP., 2008, p. 525 ff, with notes by V. Roppo & F. Bonaccorsi; DIR. BANC. MERC. FIN., 2008, p. 691 ff, with note by F. Mazzini; DIR. GIUR., 2008, 407 ff, with note by A. Russo; GIUR. COMM., 2008, II, p. 604 ff, with note by F. Bruno &. A. Rozzi; GIUST. CIV., 2008, I, 2775 ff, with note by T. Febbrajo; RIV. DIR. COMM., 2008, II, 155 ff, with note by A. Calisai; SOCIETÀ, 2008, 449 ff, with note by V. Scognamiglio. The principle of law enunciated by the Supreme Court is that the violation of the duties of customer information and proper execution of transactions that the law places on parties authorized to provide financial investment services may give rise to pre-contractual liability, with a consequent obligation to pay damages, where such violations occur at the stage preceding or coinciding with the stipulation of the brokerage contract intended to regulate the subsequent relationship between the parties; it may instead give rise to contractual liability, and possibly lead to the termination of the aforementioned contract, where violations are involved concerning investment transactions or disinvestment made in the execution of the brokerage contract financial intermediation contract in question. In no case, in the absence of regulatory provision to that effect, however, the violation of the aforementioned duties of conduct may result in the nullity of the brokerage contract, or of the individual subsequent negotiation acts, pursuant to of Article 1418, para. 1, Civil Code.

74 V. Sangiovanni, *I contratti di assicurazione fra codice civile e codice delle assicurazioni*, p. 116.

75 *Ibid*.

to draft clearly and comprehensively) pertains to the negotiation stage and not to the contract execution stage[76].

The last aspect that deserves to be analyzed regards the effect deriving in cases in which an insurer preparing an unclear and/or non-exhaustive insurance contract. In essence, he deceives the policyholder, inducing him to enter into a contract that – otherwise – he would not have concluded or would have concluded on different terms; hence, the appropriate remedy appears to be to seek cancellation of the contract, either for mistake or – in the most serious cases – for malice[77].

In practice, it is more likely that cancellation can be sought for mistake, since the company's malice is generally difficult to prove.

76 *Ibid*.

77 In this sense E. Ferrante, *Commento agli artt. 165-169*, cit., p. 500, uses the suggestive expression "drafting malice" to refer to the behavior of the insurance company that prepares a contract that is intentionally unclear and not comprehensive.

Chapter III

RESPONSIBILITY IN INSURANCE AGAINST DAMAGES

Insurance against damages is a contract, referred to as an insurance policy, under which the insurer, in return for the payment of a premium, undertakes to indemnify the insured, within agreed limits, for the loss to the insured caused by a claim.

This type of insurance includes all policies that insure the policyholder against risks to which the property belonging to him (such as his car or house), or his assets, understood as a whole, and even his own person, are exposed.

Except for personal injury insurance, insurance against damages is based on the so-called indemnity principle.

It provides that the basis of the insurance contract is an interest (present or future) in compensation for the damage, on the part of the insured.

This interest must be present at the inception of the insurance and must continue until the damage occurs.

1. Responsibility and damage in civil law

One of the main aspects to consider in an insurance contract against damages is the responsibility of the parties.

As a matter of fact, the relationship between liability and damage is an extremely delicate subject whose development has marked some of the most important stages in the furrow of Western legal culture and, even today, represents a constantly evolving issue in the doctrinal, normative and, above all, jurisprudential spheres.

Indeed, the liability-damages pair has undergone, from Roman law to the present day, a transformation at times gradual and at times abrupt, in which stubborn resistance and sudden turns have alternated. A deferred-speed itinerary, then, which has radically altered the way they are understood in legal science as well as their ability to affect social reality, both when considering their definition and the delimitation of their scope and when examining their relationship. To sum up, while in the field of liability the growing relevance of non-contractual cases has been accompanied, characterized, and fostered by the definitive shift to a civil law di-

mension completely divorced from the criminal discipline, in the field of damage the shift of jurists' interest and sensitivity from the "thing" to the "person" has led to a significant increase in the types of non-patrimonial damage and the prerequisites for its recognition[78].

Analyzing in parallel the genealogy and metamorphosis of their paradigm allows us to observe two interesting phenomena: on the one hand, in fact, it is possible to glimpse a substantial uprooting of liability from the conduct of the subject and its increasingly objective assessment, aimed mainly at verifying the suitability of the subject's action to produce damages deserving of compensation; on the other hand, on the other hand, there is a clear shift of attention to the overall position of the injured party, through the weighing of all the elements inherent in the individual's life and through the ascertainment of any disabilities produced by the actions of others. In other words, the centrality of the person and the affirmation of a congeries of rights directly traceable to the person, sustained and increasingly guaranteed thanks to the strengthening of constitutional systems, have determined this conceptual divarication whereby, while the profile of liability tends inexorably to objectivize, the figure of damages tends, conversely, to subjectivize.

1.1. Historical development of the concept of damage in the civil law

The eighteenth and nineteenth centuries are characterized by a twofold assimilation of the theoretical results that naturalistic jurisprudential doctrine had achieved. Two models, as is well known, were established, the German and the French, which would direct the legal culture of continental Europe, crystallizing respectively in the *Code civil* of 1804 and in the BGB (*Bürgerliches Gesetzbuch*) of 1900, the alpha and omega of an era in which massive industrial development would lead to previously unknown problems and, consequently, to the need to adopt a renewed and different vision that would lead to new paradigms, both for liability and for damages[79].

78 Sharply distinguishing property damage and non-property damage is a very tricky operation, it is far from self-evident and is, in fact, even misleading in some cases. N. Jansen, *Danno patrimoniale e danno non patrimoniale nella tradizione di diritto comune*, in L. Vacca (a cura), *Il danno risarcibile*, Naples, 2011, p. 47.

79 F. D'URSO, *Responsabilità e danno. Tra modelli tradizionali e tendenze contemporanee*, ETICA & POLITICA, 2020, p. 258 ff.

In truth, with respect to the first profile, a subjectivist conception remains in both codes, formally based on the notion of culpa; but, with respect to the recognition of damage, peculiarities emerge that will allow, to the respective jurisprudences, to insinuate, following different strategies, the seed of objective responsibility, offering in this way the possibility of categorizing new types of compensation. While the Code, in fact, adopts a kind of "general clause" of damages that constitutes the indispensable picklock for the judges' novel action, the BGB addresses the same issue with a series of particular provisions that draw a more or less defined boundary, except for some specific and limited "open" figures that, in turn, trigger a similar evolutionary process, at least in the jurisdictional sphere[80].

The French model has its theoretical references in the systematic work of Jean Domat and that of Robert-Joseph Pothier. Domat, first and foremost, identifies three specific issues for analysis: the harmful conduct producing the harm, the nature of the harm, and the forms of compensation[81]. As far as conduct is concerned, he elaborates the following tripartition: crimes and misdemeanors, breach of contract, and other cases that do not fall under the first two categories[82]. It is precisely this last "negative" typology that opens a decisive opening for the elaboration of a model of extra-contractual liability based on the negligent conduct of the injurer. In relation to the nature of the damage, the French jurist identifies, instead, two classes: visible damages and invisible damages[83]. The latter would consist of losses from uncollected credit or unfulfilled sales; in them he almost begins to foreshadow that inseparable binomial - fundamental for later jurisprudence – of emergent damage and lost profit. In fact, with regard to forms of compensation, Domat adds interest to the liquidated damages, both for credits and for all other cases. Moreover, he considers the assessment of damages in an absolutely objective manner, denying any value to the *affectionis ratio*, and distinguishes own liability from liability for the acts of others, thus endorsing the hypothesis of strict liability[84].

80 *Ibid*.

81 J. Domat, *Les loix civiles dans leur ordre naturel*, II, in *Euvres complètes de J. Domat*, I, Paris 1835, p. 94 ff.

82 *Ibid*.

83 M. F. Cursi, *Danno e responsabilità extracontrattuale nella storia del diritto privato*, Naples, 2010, p. 198.

84 *Ibid*.

The latter dichotomy is refined by Pothier's extensive reconstruction. Indeed, by taking up the Romanistic separation between crimes and quasi-crimes, and thus between guilt and malice, he comes to reunify *iniuria* and *culpa* into a single concept[85]. This newfound identity is reabsorbed by the Code Napoléon although in its structuring, guilt becomes the necessary criterion for the legitimization of damages[86]. A fault which, by taking the form of failure to comply with an obligation, negligence and imprudence, reveals the French legislator's preference for an atypical model of liability, decidedly distant from the Romanistic one[87].

A combined reading of Articles 1382 and 1383 of the Code reveals, moreover, two absences: on the one hand, the assumption of unlawfulness-since it speaks generically of "damage" but does not define it as "unjust" – and, on the other, any reference to strict liability[88].

In short, the codified legislation, insofar as it is strongly linked to a markedly individualistic view, although it does not provide for any limitation on compensation for damage – considering it as an open case – attempts not to hinder or threaten, in any way, the business activity and, therefore, prevents the possibility that any damages can be imputed to it for liability not arising from voluntary or negligent conduct[89].

Emblematic in this regard is the timid regulation of Article 1384 (*responsabilité du fait des choses*) in the case of accidents with industrial machines and vehicles[90].

To this, then, should be added a further absence, namely the failure to provide for non-patrimonial damage. However, it is precisely the vagueness with which damage is defined that has allowed jurisprudence in sub-

85 R. J. Pothier, *Traité des obligations*, in M. Bugnet (a cura), *Euvres de Pothier*, II, Paris 1848, p. 57 ff.

86 V. Zeno-Zencovich, *La responsabilità civile*, in G. Alpa *et al.*, *Diritto privato comparato. Istituti e problemi*, Bari, 2012, pp. 340-341.

87 *Ibid*.

88 Article 1382 was replaced, in 2016, by Article 1240, the wording of which does not change, in substance, the institution: it, in fact, identifies a subjective criterion of imputation of liability and the applicable forms of remedy, but nothing adds to the qualification of the damage to be compensated. On the point A. Lasso, *Riparazione e punizione nella responsabilità civile*, Naples, 2018, p. 41.

89 F. D'URSO, *Responsabilità e danno. Tra modelli tradizionali e tendenze contemporanee*, ETICA & POLITICA, 2020, pp. 260-261.

90 V. Zeno-Zencovich, *La responsabilità civile*, cit., p. 342.

sequent years to find an implicit reference and thus the avenue for its possible and gradual recognition.

A process favored also by a last and not secondary element to be emphasized, namely the reversal of the burden of proof, which made the principle of the presumption of guilt as the cornerstone of procedural development on the subject of damage[91].

On this basis, as early as the mid-nineteenth century, while preserving in the abstract the existence of fault-based liability alone, judges began to award compensation to the worker where there was, quite presumptively, a connection between the damage suffered and a defect in the machinery used (or even a deficiency in the company's organizational system)[92].

The German model, on the other hand, develops along the ridge of the historical school and pandectics, which take a diametrically opposed approach with respect to the definition of damage, while converging in substance with respect to the notion of liability[93].

A dialectic, this one, the results of which will constitute the main theoretical reference for the 1900 BGB discipline, but not without surprises. On the subject of damages and liability, the historical school takes a decidedly conservative stance: both Savigny and Puchta recognize only the case of pecuniary damage, while Gustav Hugo extends, in addition to the injured party, compensation to relatives and those with an interest, despite not specifying criteria on the basis of which the attribution of the right is possible[94].

Pandettistics, on the other hand, in its attempt to actualize Roman sources, is surprisingly more open to the innovations proposed by natural law. In fact, while, on the one hand, through the acceptance of *Differenz-*

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91 *Ibid*.

92 An important pronouncement in this regard dates back to December 13, 1854, by the Imperial Court of Lyon. See on this point, F. Di Ciommo, *Evoluzione tecnologica e regole di responsabilità civile*, Naples, 2003, pp. 121-122; F. Degl'Innocenti, *Rischio d'impresa e responsabilità civile. La tutela dell'ambiente tra prevenzione riparazione dei danni*, Florence, 2013, p. 18.

93 M. F. Cursi, *Danno e responsabilità extracontrattuale nella storia del diritto privato*, cit., pp. 174 and 179.

94 F. K. v. Savigny, *Le obbligazioni* [1851], I, Torino 1912, trans. it., p. 9; G. F. Puchta, *Pandekten*, Leipzig 1877, p. 342; G. Hugo, *Lehrbuch des Naturrechts, in Id., Lehrbuch eines civilistischen Cursus*, II4, Berlin 1819, p. 481.

theorie[95] the quantification of aquilian compensation is linked to the patrimonial diminution determined by the harmful event, many of its exponents take an extremely open stance toward the non-patrimonial case[96].

In particular, Bernhard Windscheid, after an initial contrariety, comes to share with Rudolf von Jhering the principle that the interest of the injured party constitutes the only benchmark for legitimizing compensation[97].

On the other hand, as far as liability is concerned, both schools endorse a return to the Roman sources, setting aside the naturalistic jusnaturalist distinction between unlawfulness (*iniuria*) and culpability (*culpa*)[98].

In the BGB, in truth, we have only three provisions on extra-contractual liability, but all of them are very significant:

- § 823 defines damage from culpable injury and malicious injury, listing the set of protected goods: life, body, health, liberty, property, or different right; this very last reference constitutes an open formula that allows in theory, at the jurisprudential level, a progressive extension of the cases.
- § 826 also recognizes damages in cases of voluntary conduct against "good morals".
- § 829 provides for strict liability only in cases of harm procured by incapacitated persons.

95 The *Differenztheorie* was elaborated from Fridrich Mommsen in the second half of the nineteen century. F. Mommsen, *Beitrage zum Obligationenrecht, I, Zur Lehre vom dem Interesse*, Braunschweig 1855, pp. 3-150 and 213-231. It can be regarded as a development and overcoming of the principle of *id quod interest* of Romanistic tradition. F. Procchi, *Dall'"id quod interest' alla costruzione della cd. Differenzhypothese ad opera di Friedrich Mommsen*, in L. Garofalo (a cura), *Actio in rem e actio in personam. In ricordo di Mario Talamanca*, II, Padova 2011, pp. 481-550. Or as a Pandettist reformulation of Paul's passage that states « damnum et damnatio ab ademptione et quasi deminutione patrimonii dicta sunt». C. Castronovo, *Responsabilità civile europea*, in V. Scalisi (a cura), *Il ruolo della civilistica italiana nel processo di costruzione della nuova Europa*, Milan, 2007, p. 736.

96 F. D'URSO, *Responsabilità e danno. Tra modelli tradizionali e tendenze contemporanee*, ETICA & POLITICA, 2020, p. 258 ff.

97 B. Windscheid, *Diritto delle pandette* [1908], trans. it., Turin 1925, p. 764; R. v. Jhering, *Ein Rechtsgutachten, betreffend die Gäubahn*, in *Jherings Jahrbücher*, XVIII, 1889, p. 1 ff. On this point, also, M. F. Cursi, *Danno e responsabilità extracontrattuale nella storia del diritto privato*, cit., p. 179.

98 M. F. Cursi, *Danno e responsabilità extracontrattuale nella storia del diritto privato*, cit., p. 179.

In general, the discipline of the German Code has the following characteristics: it makes its own separation between *iniuria* and *culpa*; it protects absolute rights in a broad and general manner; it protects relative rights in a particular and lacunar manner; it recognizes non-pecuniary interests only in cases provided for by law; it oscillates between a preference toward *Generalklauseln* and respect for the *numerus clausus*[99].

Therefore, in it, too, it is possible to discern that tendency, already discerned in the Code, of preserving on the whole the liability-fault pair.

However, especially in the second part of the twentieth century, German jurisprudence, starting from an extensive reading of § 836 concerning the specific and residual matter of damages in case of building ruin, has elaborated the concept of *Verkehrspflicht*, which introduces a general principle of strict liability incumbent on those who, in the exercise of their activity, determine or allow to persist a dangerous situation that produces damage to third parties[100].

Yet another example, then, of how case law, in this area, moving from the remotest folds of a normative text, manages to elaborate a principle or *regula iuris* that radically alters the very way in which an established institution and its entire legal framework are understood[101].

1.2. The Italian law

The reception of the subject of liability and damages is articulated throughout the 19th and 20th centuries around the two civil codes with which the Italian legal system has been endowed over time, that of 1865 and the "unified" code of 1942.

The analysis of the process of legislative formation shows how in the Italian legal context there is the emergence of a "double soul"[102]: if, in fact, articles 1151 and 1152 of the Pisanelli code constitute a somewhat faithful transcription of articles 1382-1383 of the Napoleonic code, the '42 code, while maintaining the atypical structure and the general clause of French

99 *Ibid*. On the same point, also, V. Zeno-Zencovich, *La responsabilità civile*, cit., p. 375.

100 F. Di Ciommo, *Evoluzione tecnologica e regole di responsabilità civile*, cit., p. 131. For a deep analysis of the concept of *Verkehrspflicht*, see R. Wilhelmi, *Risikoschutz durch Privatrecht*, Tübingen 2009, p. 192 ff.

101 F. D'URSO, *Responsabilità e danno. Tra modelli tradizionali e tendenze contemporanee*, ETICA & POLITICA, 2020, pp. 261-262.

102 M. F. Cursi, *Danno e responsabilità extracontrattuale nella storia del diritto privato*, cit., pp. 211-214.

derivation, adds, to the definition of extra-contractual liability, the element of unlawfulness. This results in a shift of focus from the agent to the harmful event, exacerbated by the provision of strict liability, especially for corporations, which responds to a principle of social solidarity entirely absent, as seen, in the radically individualist and liberal nineteenth-century codifications[103].

A much-debated issue, moreover, concerns the function, or congeries of functions, attributable to strict liability in our legal system. Even until a few years ago, jurisprudence admitted the existence of exclusively restorative purposes: a clear opening to a multifunctional dimension of extra-contractual liability occurred only in 2015[104].

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103 *Ibid*. For a general overview of the Italian doctrine, see A. Antonucci, *L'assicurazione fra impresa e contratto*, Bari, 1994; G. Bavetta, voce *Impresa di assicurazione*, in *Enc. del dir*., XX, Milan, 1970; E. Bottiglieri, voce *Impresa di assicurazione*, in *Dig. disc. priv., sez. comm*., VII, Turin, 1992; L. Buttaro, voce *Assicurazioni in generale*, in *Enc. del dir.,* III, Milan, 1958; R. A. Capotosti, voce *Assicurazioni private e imprese assicurative (Diritto comunitario*), in *Noviss. dig. it.,* Appendice, Turin, 1980; A. Donati, *Trattato di diritto delle assicurazioni private*, cit.; A. Donati & G. Volpe Putzolu, *Manuale di diritto delle assicurazioni private*, 8ª ed., Milan, 2006; G. Fanelli, voce *Assicurazione*, II *Assicurazione contro i danni*, in *Enc giur*., III, Rome, 1988; F. Garri, voce *Impresa di assicurazione*, II (Diritto amministrativo), in Enc. giur., XVI, Rome, 1988; N. Gasperoni, voce *Assicurazion*e, III, *Assicurazione sulla vita*, in *Enc. giur*., III, Rome, 1988; C. Giannattasio, voce *Impresa di assicurazione* (Parte generale), in *Noviss. dig. it*., *Appendice*, Turin, 1983; A. La Torre, *Diritto delle assicurazioni*, I, *La disciplina giuridica dell'attività assicurativa*, Milan, 1987; G. Leone & C. De Gasperis, *Le assicurazioni private nella giurisprudenza*, in *Raccolta sistematica di giurisprudenza* commentata diretta da M. Rotondi, Padova, 1975; L. Mossa, *Sistema del contratto di assicurazione nel libro delle obbligazioni del codice civile*, in *Assicurazioni*, 1942; L. Mossa, *Impresa e contratto di assicurazione nelle vicendevoli relazioni*, in *Assicurazioni*, 1953; V. Salandra, *Dell'assicurazione*, in *Commentario del codice civile* a cura di A. Scialoja e G. Branca, Libro IV, Delle obbligazioni (artt. 1861-1932), 3ª ed., Bologna-Roma, 1966; G. Volpe Putzolu, *L'assicurazione*, in *Trattato di diritto privato* diretto da P. Rescigno, XIII, Turin, 1985, pp. 55 ff; G. Volpe Putzolu, *Le assicurazioni. Produzione e distribuzione* (problemi giuridici), Bologna, 1992; G. Volpe Putzolu, *L'evoluzione della legislazione in materia di assicurazioni*, in S. Amorosino, L. Desiderio (a cura di), *Il nuovo codice delle assicurazioni, commento sistematico*, Milan, 2006; P. Corrias, *Il contratto di assicurazione: profili funzionali e strutturali*, Naples, 2016. G. Volpe Putzolu, *L'assicurazione*, in *Trattato Rescigno*, vol. 13, Turin, 1985; A. Bracciodieta, *Il contratto di assicurazione – disposizioni generali*, in *Il Codice Civile Commentario fondato e diretto da Pietro Schlesinger*, Milan, 2012.

104 See, Cass. Civ. 15.04.15, n. 7613.

Even in the modern doctrine it seems unquestionable that through it additional purposes can be pursued, such as deterrence, prevention or sanction of certain conduct and practices[105].

It is less peaceful, however, to admit the provision of a multiplicity of imputation criteria that favorable doctrine identifies not only fault but also risk and economic status[106].

More generally moving to the side of damages, even in Italy the connection between civil liability and risky activities has determined the need for adequate responses, on all levels: doctrinal, legislative, and jurisprudential[107].

Responses that have mainly been directed toward a gradual extension of the compensability of damages to new cases through the identification (or creation) of new figures and new institutions by civil jurisprudence.

In general, the relationship between liability and damages has been weakening and, symmetrically, the range and type of claims that can be made has grown. This has resulted in an increased focus on the position of the injured party and his or her interests as well as on the composite nature of damages[108].

If, in fact, in the nineteenth century the orientation of legislation and jurisprudence was not to hinder the growth of the capitalist system and, therefore, limit the field of civil compensation to a rigidly closed number of cases, the twentieth century witnessed a steady growth in the protections of the individual person[109].

A phenomenon that is juxtaposed with a parallel trend that represents, perhaps, one of the most interesting aspects in the development of the

105 P. G. Monateri, *La responsabilità civile*, in *Trattato di diritto civile: le fonti delle obbligazioni*, directed by R. Sacco, III, Turin, 1998, pp. 19-21.

106 On this position, one of the first authors, S. Rodotà, *Il problema della responsabilità civile*, Milan, 1964, p. 127 ff. *Ibid*. If fault, to be true, does not raise particular objections, with respect to risk, it would be embodied in those cases of strict liability expressly contemplated in Articles 2049 (liability of masters and principals), 2050 (liability for the exercise of dangerous activities), 2051 (damage caused by things in custody), 2052 damage caused by animals). M. F. Cursi, *Danno e responsabilità extracontrattuale nella storia del diritto privato*, cit., pp. 241-242. In addition, with regard to economic condition, it is in the devices of Articles 2047 (damage caused by the incapacitated person) and 2048 (liability of parents, guardians, tutors and masters of art), i.e., in the so-called cases of liability for the acts of others, that it would find specific application. *Ibid*.

107 P. G. Monateri, *La responsabilità civile*, cit., pp. 19-21.

108 V. Zeno-Zencovich, *La responsabilità civile*, cit., p. 336.

109 F. Marinelli, *Scienza e storia del diritto civile*, Rome-Bari, 2009, p. 214.

relationship between liability and damages, namely, the progressive separation that, with contractual (e.g., insurance) or non-contractual (e.g., accident insurance) remedies, has produced, over the years, a real "allocation" of damages to another subject entity[110].

In the presence of such radical changes, it is, moreover, possible to observe in the watermark the features of a further paradigmatic turning point, namely the emergence of that dialectic between Code and Constitution which, especially in continental European legal systems, has characterized a rebalancing between principles and rules, and consequently between *iudex* and *lex*, with fundamental implications in the field of private individual rights[111].

Remaining, then, in the narrow field of civil law discipline, a first important innovation was the gradual extension of Aquilan liability to new situations[112].

A turning point that Italian jurisprudence made by applying the discipline of Art. 2043 first, starting with a historic judgment in 1971, to relative subjective rights[113], and then, in the last decade of the last century, also to the protection of legitimate interests[114].

110 V. Zeno-Zencovich, *La responsabilità civile*, cit., p. 336.

111 F. Marinelli, *Scienza e storia del diritto civile*, Rome-Bari, 2009, p. 216. The most relevant contribution, which has influenced subsequent studies and research, is undoubtedly the extensive essay on accident liability G. Calabresi, *Costo degli incidenti e responsabilità civile. Analisi economico-giuridica*, Milan, 1975, as well as G. Calabresi, *Optimal Deterrence and Accidents*, YALE L. J., 1975, pp. 656-671. The starting point of the study was the assumption that one of the purposes of tort liability is the need to minimize social costs. Therefore, Calabresi, in identifying more effective tools and strategies, going beyond the simple logic of *cuius commoda eius et incommoda*, elaborates a true theory of civil liability that is based on two cornerstones: first, the imputation of damage is conceived in such a way as to produce more efficient results from an economic point of view; second, in order to achieve this objective, it is necessary to provide incentives to induce behavior that is deemed more correct. In essence, the idea emerges, through reference to the notion of strict liability, that the party on whom the obligation to compensate should fall is the one who can best equip itself with a thorough cost-benefit analysis. For a more comprehensive reconstruction, see also, F. Di Ciommo, *Evoluzione tecnologica e regole di responsabilità civile*, cit., pp. 143-145. Elsewhere, especially in North American legal culture, the contribution of the economic analysis of law has shifted the perspective of civil liability from "fault" to "risk", and thus from the purely subjective dimension of conduct to the predominantly objective dimension of the activities performed and damages generated. F. Marinelli, *Scienza e storia del diritto civile*, cit., p. 215.

112 F. Marinelli, *Scienza e storia del diritto civile*, cit., p. 215.

113 As Castronovo further observes, the idea of aquilian protection limited to subjective rights represents the corollary of the very idea of subjective right, the meaning of which is to constitute an am-bit of protection outside of which, conversely, protection is consistent there is none. C. Castronovo, *Sentieri di responsabilità civile europea*, EUR. DIR. PRIV., 2008, p. 340.

114 Cass. Civ. S.U. 22 July 1999, n. 500. See also F. Marinelli, *Scienza e storia del diritto civile*, cit., p. 216.

A solution that proved to be effective thanks to the reference to the general clause of "unjust damage", the use of which has allowed this two-fold and fundamental expansion over time[115].

If, therefore, on the subject of patrimonial damage, a laborious but extremely broad dilation of the positions guaranteed by the possibility of compensation has taken place, a different discourse must be made with regard to the non-patrimonial case[116].

The more avowedly peremptory character of Article 2059, in fact, has resulted in a tendentially more restrictive reading that has led, part of the doctrine, to the attempt to introduce and recognize new types of damage not provided for in the regulations of the code[117].

115 P. Perlingieri, *Manuale di diritto civile*, Naples, 2014, p. 901.

116 *Ibid*.

117 With this rule, the compensability of non-pecuniary damage, that is, damage that has no repercussion on material wealth, was excluded in principle. By the act of others, the reputation of a professional may be impaired, resulting in the diversion of clients from him, the dignity of a girl may be impaired, and thus removed from her proper place: these are, these, cases of pecuniary damage, however defined indirectly, and their compensability has never been doubted, the unlawful act of the agent having repercussion on the patrimony. Part of the doctrine argued strenuously for the non-compensability of pure moral damage, on the assumption that from the idea of damage is inseparable that of lasting effect, that there is no moral legal patrimony, that the intangibility and inviolability of the human personality is not in itself a civil and private right, but a right whose protection is provided only by public criminal law, that the evaluation of moral damage would not be possible. See G. Cricenti, *Il danno non patrimoniale*, Padova, 2006. Vainly we argued that the assumption that from the idea of damage is inseparable, a permanent painful effect is not acceptable, the greater or lesser duration being elements that adhere to the quantity of the damage; that if patrimony is a complex of goods, an individual state of the person can also be a good, that the tranquility of psychic life constitutes a good, and the pathema is disruption; that if there is a right to the moral inviolability of the person protected by the criminal law, a fortiori a protection must come from the civil law; that if money and pain are not comparable terms, nevertheless if it is considered that money is the common denominator of all goods, for the comparison it is a matter of difficulty, not impossibility. Resistance to the acceptance of such criteria has always been great on the part of some writers, and to them jurisprudence has been decidedly opposed, affirming the inapplicability of Article 1151 of the Civil Code of 1865. On the contrary, recently it has even been written that to compensate means to restore to pristine condition, which would not be possible in the matter of non-pecuniary damage, a concept that cannot be accepted if one considers that even when it comes to material goods, restitution to pristine condition is very often not possible, and no one disputes that in these cases the injured party is entitled to compensation, that is, a sum that compensates for the loss and provides him with the possibility of making up for the deprivation he has suffered by other means. It has also been noted that since money can serve to procure those moderate pleasures that temper the pain of the offense suffered, a certain equivalence must also be found. On this point, P. G. Monateri, *Il pregiudizio esistenziale come voce del danno non patrimoniale*, RESP. CIV. PREV., 2009, p. 56; A. Procida Mirabelli Di Lauro, *Il danno non patrimoniale secondo le Sezioni Unite. Un "de profundis" per il danno esistenziale*, DANNO E RESP., 2009, p. 32; R. Pardolesi & R. Simone, *Danno esistenziale (e sistema fragile): "die hard"*, FORO IT., 2009, p. 122 ff.

The shift, in fact, of gaze from the figure of the damaging party to that of the injured party has, in a sense, shifted the focus from the conduct of the former to the effects objectively produced in the sphere of the latter.

Put differently, the growth of the profile of strict liability has been matched by an increasing expansion of the dimension of damage and, therefore, by the proliferation of its possible and alleged types, all of which can be traced back to the broader concept of personal injury[118].

A phenomenon that has certainly been nurtured and encouraged by the interpretive extension of the reference to the law, to which Art. 2059 makes express and basic reference, meaning by it the Constitution itself and, therefore, the entire array of rights enshrined therein[119].

It is, therefore, within this framework that the introduction of other figures such as biological and existential damage must be understood in our system, alongside moral damage – a category traditionally associated with the case of non-pecuniary damage[120].

Biological damage first received full recognition in the jurisprudence of the Supreme Court, and then also found a place in other legislative sources, raising, however, not a few perplexities[121].

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118 S. Patti, *Il risarcimento del danno e il concetto di prevenzione*, in L. Vacca (a cura), *Il danno risarcibile*, Naples, 2011, p. 21. The author affirms that the certification of the new damage figures served, first and foremost, to take into account every aspect of the injured party's subjective injury.

119 F. Marinelli, *Scienza e storia del diritto civile*, cit., pp. 217-218.

120 Moral damage, in the words of the Supreme Court itself, constitutes the unjust disturbance of the injured party's state of mind, or even in the mood or state of transient distress generated by the wrongful. On this point Cass. Civ. 17 July 2002, n. 10393.

121 As Busnelli reconstructs, the dialogue between jurisprudence and legislation has gone through two phases and has always developed in a problematic manner: if, in fact, until 2000 the legislature did not give any follow-up to the successive interventions of the judges that recognized and clearly fixed the terminus of biological damage, starting with legislative decree 38/2000 on work accidents and then with l. 57/2001 on road traffic, its formula began to appear in the normative texts as well. The problem stemming from this changed attitude of the legislature lies in the fact that biological damage is not defined and regulated by an organic law (which, in the texts cited, was at least preannounced, as opposed to subsequent legislation, starting with the 2005 "Insurance Code", which will no longer mention it) but through an incidental inclusion in specific sectoral disciplines: this prevents the possibility that this figure of damage can be correctly configured, in general terms, as a component of the more general 'non-personal property damage,' that is, as it has been framed both by the cassation (Cass. Civ. 31.05.03, nos. 8827 and 8828) and by the Constitutional Court (C. Cost. 11.07.03, no. 233); on the point F. D. Busnelli, *Il danno alla persona: un dialogo incompiuto tra giudici e legislatori*, in L. Vacca (a cura), *Il danno risarcibile*, Naples, 2011, pp. 285-287.

Existential damage, on the other hand, although identified, defined, and admitted in the rulings of the Supreme Court, has not been considered by it as an autonomous case of damage, nor has it been reflected in any normative discipline[122].

On the contrary, in the last decade, we can note the succession of a series of pronouncements that have traced a constant and decisive jurisprudential orientation aimed, in essence, at achieving a *reductio ad unum* of non-patrimonial damage, within the framework of which the possible identification and existence of the subcategories of moral damage, biological damage and existential damage contribute to quantitatively determine the overall amount of the compensation claim[123].

In general, one cannot fail to ascertain this recurrent drive to broaden the scope of compensable damages, especially in the non-patrimonial dimension, through the identification of new and specific protectable situations[124].

A process that has as its protagonist the work of the judge, of the interpreter-applicator, of that institutional body that, with greater sensitivity and immediacy than the legislature, can grasp in the concrete case the advance of new needs, new interests and, above all, the transformations of society, as much in the material dynamics as in the value perspectives that emerge and assert themselves in it with greater force and greater urgency[125].

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122 F. Marinelli, *Scienza e storia del diritto civile*, cit., pp. 218-219; F. D. Busnelli, *Il danno alla persona: un dialogo incompiuto tra giudici e legislatori*, cit., p. 288.

123 In this sense see Cass. Civ. S.U. 11.11.08, No. 26972-5; Cass. Jan. 15, No. 687/2014. In a very recent judgment, moreover, the Court ruled that, with regard to the criteria for the liquidation of non-patrimonial damages, the judge must consider two aspects, namely the injury of the moral sphere and that of the dynamic relational sphere. Therefore, while within the scope of the former falls the evaluation of moral damage, within the scope of the latter flow biological damage and existential damage, whose joint attribution would, however, constitute a duplication of compensation, given the belonging of both items to the area protected by the same constitutional norm, namely Article 32 (Cass. Civ. August 20, 2018, no. 20795).

124 In truth, a special case is constituted by the so-called "loss of chance", i.e., the failure to obtain an advantage resulting from the unjust and harmful conduct of others. Granted that it pacifically constitutes an autonomous form of pecuniary damage, in France it has been the subject of a debate, doctrinal and jurisprudential, about the possibility that it could configure, where it referred to a «*perde de chance de guérison ou de suivre*», a new case of non-pecuniary damage. On the point, D. Mazeaud, *La 'perde de chance'*, in L. Vacca (a cura), *Il danno risarcibile*, Naples, 2011, pp. 233-248.

125 A. Gambaro, *Le funzioni smarrite della responsabilità civile*, in L. Vacca (a cura), *Il danno risarcibile*, Naples, 2011, p. 318.

A process that, precisely because it moves from jurisprudential activity and casuistry, cannot but be, however, characterized by resistance and rethinking, by inconsistencies and ambiguities, by the possibility of precipitous leaps forward and the risk of dangerous short circuits[126].

1.3. The common law systems

If turning, then, the view to the systems across the Channel and overseas, it is possible to observe a significantly different formation and evolution of the institutions.

In England, the Germanist tradition is bound up with the casuistic principle that characterizes as known the very structure of common law: if, in a first stage, there are restrictions on the forms of actions, in a second stage we arrive at the definition of torts that will specifically regulate cases of strict liability and the terms of compensation for damages.

Specifically, the action of trespass, of older origin, which is criminal in nature and concerns injuries directly inflicted by the offender, is joined in the fourteenth century by the action of trespass on the cases, which is civil in nature and provides for a form of compensation even for acts not directly performed by the offender[127].

Differently, while the first form of procedural remedy has as its object an intentional tort, where a presumption of voluntariness exists, the second type of court action is available for torts arising from unintentional conduct, and from it the concept of tort of negligence would later develop[128].

This form of liability, in the seventeenth and eighteenth centuries, will be attributed exclusively to activities of public importance with respect to which a special duty of care was recognized; however, in the nineteenth century, with the intensification of the industrialization process, it will find application in much wider[129].

126 *Ibid*. In this sense, it is correct to argue, following Gambaro's reasoning, that tort law is an eminently jurisprudential area of law, either because of its weak normative structure or because its fundamental rules are not read in codes, or in legislative texts, but rather are dictated by jurisprudence according to the style proper to each tradition. *Ibid*.

127 *Ibid*.

128 The entire original common law tort liability, Comandé carefully explains, is characterized by the intentionality of conduct; and its principal action, the trespass, is characterized by the voluntariness and physicality (*vi et armis*) of the conduct and the injury re-attributable to it. G. Comandè, *Le linee di confine tra danno patrimoniale e non patrimoniale nella evoluzione del modello di common law*, in L. Vacca (a cura), *Il danno risarcibile*, Naples, 2011, p. 271.

129 V. Zeno-Zencovich, *La responsabilità civile*, cit., p. 346.

In general, the imputability of tort of negligence was based on five factors: the existence of the duty of case (i.e., the duty of care), the violation of the duty, the existence of the damage caused, the causal link between injury and damage, and the non-existence of justifying causes or liability of the injured party that would determine any contributory negligence[130].

Among them, however, it is the definition of the duty of case that is the fundamental element, the pivot around which the entire discipline of civil liability revolves: thanks to it, in fact, the center of judicial ascertainment becomes the injured party, with respect to whom the tendency of jurisprudence is to narrow the areas of liability[131].

Unlike continental systems in which, either through typical forms or through an atypical structure, the main point is represented by the configuration of the protected situation-and thus the central position is that of the injured party – in British common law the hinge always remains the existence of a duty of care. [132].

An obligation that, together with its possible violation, is not identified through recourse to general principles, but is rather derived from a broad casuistry that allows, from time to time, the judge to delineate the standard of case: while rejecting, in fact, any hypothesis of statutory negligence, the search for the standard must nevertheless be based on objective elements that refer to the imago of the reasonable man, a very faithful transposition of the *bonus pater familias* of the Roman tradition[133].

Finally, two further aspects should be recalled: first, that the law of damages applies to both contractual and extra-contractual liability, thus leading to less complexity regarding the qualification of liability, but also to the attribution of excessive discretion in the hands of the judge with regard to the identification of foreseeability, which is indispensable for proving the existence and congruity of the damage[134].

130 *Ibid*.

131 F. Di Ciommo, *Evoluzione tecnologica e regole di responsabilità civile*, cit., pp. 124-125.

132 In English law, resistance to the assertion of objective liability hypotheses was particularly strong, even though, in Britain itself, the fallout from the industrial revolution was, as early as around the mid-nineteenth century, significant. F. Di Ciommo, *Evoluzione tecnologica e regole di responsabilità civile*, cit., p. 125.

133 V. Zeno-Zencovich, *La responsabilità civile*, cit., pp. 348-349.

134 *Ibid*. The most stringent issue, however, on the subject of duty of case, is represented, as Comandè notes, by the wide discretion put back into the hands of the judge regarding the very sensitive issues, such as the assessment of the foreseeability of the effects produced by the damaging. G. Comandè, *Le linee di confine tra danno patrimoniale e non patrimoniale nella evoluzione del modello di common law*, cit., p. 277.

In the United States, on the other hand, liability law broadly traces the British common law framework, but differs from it in some key elements. In essence, tort of negligence presents a broader articulation: on the one hand, the burden of proof falls on the injured party except for cases in which the principle of *res ipsa loquitur* exists[135]; on the other hand, judicial activity, at the stage of verifying the duty of care, is characterized by a broader recourse to legislative sources and does not focus predominantly on casuistry alone[136].

Overall, with respect to the qualification of damages, what on the whole col- pers is the fact that in the common law the distinction between pecuniary loss and non-pecuniary loss, that is, between pecuniary and non-pecuniary damages, is not a central element either in doctrinal elaboration or in judicial practice[137].

Much more relevant, however, are the concrete identification of cases of compensable damages. Therefore, another conceptual dichotomy appears more significant, namely that between pure economic loss and non-economic loss[138].

The former, in fact, is compensable only if the violation of a private interest and the intentionality of the conduct (which must take the form of an act against morality or against public policy) subsist[139].

The latter, conversely, having overcome the rigid dictates of the unconsciousness doctrine that prevented any form of compensation, has found increasingly easier and more frequent recognition[140].

Reason why it is correct to observe that in the dynamics of the common law that full enfranchisement of compensation, patrimonial and non-patrimonial, from the materiality of damage has been accomplished[141].

135 V. Zeno-Zencovich, *La responsabilità civile*, cit., p. 352.

136 *Ibid*.

137 As Castronovo well explains, in common law the question of the qualification of damages is originally absent because the typicality of torts that characterizes these systems makes a question about the characteristics of damages in general meaningless. C. Castronovo, *Sentieri di responsabilità civile europea*, cit., p. 337. Therefore, it can be concluded that in the matter of damage we pass from the pure and simple patrimonial loss that can be said to be characteristic of common law but also of French law, to legal systems such as the German and the Italian, in which damage becomes relevant through a process of juridicization that brings it closer and closer to a normative conception in its primitive meaning. *Ibid*. On the point as well see G. Comandè, *Le linee di confine tra danno patrimoniale e non patrimoniale nella evoluzione del modello di common law*, cit., p. 273.

138 Traditionally, Comandé writes in summary, non-economic harm is that harm that cannot be measured in terms of money. G. Comandè, *Le linee di confine tra danno patrimoniale e non patrimoniale nella evoluzione del modello di common law*, cit., p. 270.

139 *Ibid*.

140 *Ibid*.

141 *Ibid*.

1.4. The punitive damages case

A final aspect to be recorded concerns the fact that, with the affirmation of a completely autonomous civil liability completely purged of the last remnants of criminal law, the function of damages in its punitive prerogative has been greatly reduced – if not almost completely emptied, particularly in continental legal culture.

This rigid marking does not, in fact, find a correlative counterpart in common law sources, within which punitive damages are absolutely provided for and scrupulously regulated.

This very subject, by virtue of the recent interest of jurists and courts in European civil law systems, deserves a final reflection.

The figure of punitive damages is present in English common law as early as the 13th century, in the *Statute of Gloucester* of 1278 in which treble damages for waste are contemplated[142].

But it is in the eighteenth century that, under the label of exemplary damage coined in *Wilkes v. Wood*, a dual function, both satisfactory and punitive, is recognized in damages for a series of more significant cases[143].

142 C. Costantini, *Per una genealogia dei punitive damages: Dislocazioni sistemo logiche e funzioni della responsabilità civile*, in D. Barbierato (a cura), *Il risarcimento del danno e le sue "funzioni"*, Naples, 2012, p. 289.

143 It was with the twin rulings *Huncle v. Money* and *Wilkes v. Wood* that the retributive and punitive redressability of damages inflicted maliciously and intentionally was affirmed for the first time limited to a closed decalogue of torts i.e. for the hypotheses of assault, battery, malicious prosecution, false inprisonment and trespass. At a time when the boundary between criminal and civil law was still uncertain and blurred, punitve damages took on more markedly deterrent and sanctioning contours with English Courts imposing penalties of double and triple the amount of damage caused. A unifying feature of all the pronouncements is the recurrence of conduct connoted by the traits of malice, a term in which all subjective states from intent to fault with foresight converge.

Soon the success of such comminations favored their spread overseas, where the institution of the popular jury, the so-called American rule and the so-called *quota lite* pact favored comminations in terms of a true tort lottery. While punitive damages were rampant in the U.S. without effective control, it was otherwise the case in England where the House of Lords, had long attempted to circumscribe their application to certain cases. Primarily in the face of oppressive, arbitrary or unconstitutional acts carried out by the public administration and consisting of an abuse of power or the violation of the citizen's fundamental rights; secondly in all cases in which the damaging party succeeds in deriving a profit greater than the damage caused; the third category is that, finally, in which punitive damages are expressly provided for by a legal provision. To have the consecration of such a principle by the U.S. Supreme Court, however, we will have to wait for the pronouncement *State Farm Mutual Automobile Insurance Co. v. Inez Preece Campbell* in 2013, when it was first ascertained that the amount of punitive damages must in any case be proportionate to the severity of the conduct of the injurer and no more than ten times the amount of actual damages. See G. Calabresi, *The complexity of torts – The case of punitive damages*, in M. S. Madden (ed.), *Exploring tort law*, Cambridge University Press, 2005, p. 333 ff.

Then, in the next century, a more complete systematization takes place and the permissible cases are framed in a taxing manner: the arbitrary, oppressive and unconstitutional actions of public officials; profit in excess of damage; and additional specific regulatory provisions[144].

In this regard, the leading case-law is *Rooks v. Barnard*[145], which later case law, while confirming its absolute legitimacy, will tend to interpret in a particularly restrictive way[146].

In the United States, the earliest traces date back to the eighteenth century and, here too, a first systematization occurs only in the nineteenth century. It should not, moreover, be forgotten that, precisely at this historical stage, in both the United Kingdom and the United States, the industrial revolution gives rise to economic interests that are not automatically linked to the protection of property and, therefore, are difficult to vindicate in the courts through the traditional remedies provided by the civil system[147].

In American jurisprudence, however, an opposite attitude from the Anglo-Saxon one is asserted, i.e., the use of punitive damages for a growing and heterogeneous number of situations is extended, sometimes excessively[148].

144 C. Costantini, *Per una genealogia dei punitive damages: Dislocazioni sistemo logiche e funzioni della responsabilità civile*, cit., pp. 289-290.

145 Douglas Rookes was a draughtsman, employed by British Overseas Airways Corporation (BOAC). He resigned from his union, the Association of Engineering and Shipbuilding Draughtsman (AESD), after a disagreement. BOAC and AESD had a closed shop agreement, and AESD threatened a strike unless Rookes resigned also from his job or was fired. BOAC suspended Rookes and, after some months, dismissed him with one week's salary in lieu of proper notice. Rookes sued the union officials, including Mr. Barnard, the branch chairman. Rookes said that he was the victim of a tortious intimidation that had used unlawful means to induce BOAC to terminate his contract. The strike was alleged to be the unlawful means. At first instance, before Sachs J, the action succeeded. This was overturned in the Court of Appeal. The House of Lords reversed the court of appeal, finding in favour of Rookes and against the union.

146 C. Costantini, *Per una genealogia dei punitive damages: Dislocazioni sistemo logiche e funzioni della responsabilità civile*, cit., pp. 291-293.

147 In other words, as Comandé again notes, the attention of jurists is brought to situations that are not directly attributable to person, to land, or to things, i.e., the three occasions in which the trepass was originally actionable. G. Comandè, *Le linee di confine tra danno patrimoniale e non patrimoniale nella evoluzione del modello di common law*, cit., p. 273.

148 The greater fortune of the institution in North American lands, Costantini observes, compared to the archetypal English declinations, would seem to reside in the special consideration of the subjective element of the tort as well as in the importance attributed to it in the procedural. C. Costantini, *Per una genealogia dei punitive damages: Dislocazioni sistemo logiche e funzioni della responsabilità civile*, cit., pp. 294-295. See fon an in-depth analysis of the North American law F. Benatti, *Danni punitivi e "class action" nel diritto nordamericano*, AN. GIUR. ECON., 2008, pp. 231-244; P. G. Monateri, *L'analisi economica dei danni punitivi e le Sezioni Unite*, FORO IT., 2007, p. 2648 ff; U. Mattei, *Common law. Il diritto angloamericano*, Turin, 1992. Be allowed, a reference to A. Russo, *Inadempimento e clausola penale tra civil law e common law*, Naples, 2012, pp. 176-181.

Hence, the intervention of the Supreme Court, which has drastically circumscribed the scope of application, invoking some fundamental constitutional guarantees: the Fifth Amendment in deference to the ne bis in idem principle, the Eighth and Fourteenth against the excessive fines clause, and in respect of the cornerstones of due process of law[149].

The "constitutionalization" of punitive damages has, however, met with very strong resistance from various and opposing sides.

Surprisingly, albeit for very different reasons, there has been heavy criticism both from jurists with an ultraconservative outlook, such as Antonin Scalia – who rejected the possibility of limitations, at the federal court level, to the definition of civil litigation – and from more progressive spirits, such as Guido Calabresi, who, pushing for a transformation of the practice of punitive damages into a form of social compensation, identifies the different profiles around which such a transition can concretely take place[150].

In European civil law systems, punitive damages struggle to gain admissibility and recognition.

Focusing only on the Italian context, we can observe that, while contrasting positions emerge in the doctrine, the Supreme Court at first considered any form of punitive damages contrary to public order, even denying the possibility of receiving foreign judgments that contemplated and quantified them, later it admitted, in the abstract, their compatibility with the Italian system, subject, however, to a legislative intermediation,

149 *Ibid*.

150 Antonin Scalia was, in 1996, dissenting judge in *BMW vs. Gore*, the first case in which the Supreme Court declared punitive damages unconstitutional in violation of the due process clause principle. He put it this way, «I set forth my view that a state trial procedure that commits the decision whether to impose punitive damages, and the amount, to the discretion of the jury, subject to some judicial review for 'reasonableness', furnishes a defendant with all the process that is 'due'». See *BMW of North America, Inc. v. Gore*, 517 U.S. [1996], p. 598). By Calabresi see G. Calabresi, *The complexity of torts – The case of punitive damages*, cit., pp. 333-351, now also in *The Civil Law Between Law and Rules*, II, Liber amicorum for Francesco D. Busnelli, Milan, 2008, pp. 327-347. In this paper, the American jurist considers punitive damages to be of primary importance because it is able to fulfill the following needs: to use the civil plaintiff's action as a public prosecution for antitrust, to sum up in a determinated case all damages produced of the same species and magnitude also to other subjects, to settle cases that have tragic choices as their object, to constitute a general compensation instrument extendible also to cases not yet recognized or typified, and to perform an eminently punitive function. For a concise reading of the two views see F. D. Busnelli, *Il danno alla persona: un dialogo incompiuto tra giudici e legislatori*, cit., pp. 290-292; for a critique of Calabresi's position see C. Castronovo, *Sentieri di responsabilità civile europea*, cit., pp. 374-375.

thus attributing to them an exceptional character with respect to the general case inferable from Article 2043[151].

Again, the reference to the law is, according to some scholars, inclusive of the constitutional dictate and, therefore, this would lead to the possibility of recognition and legitimacy of punitive damages in cases where they turn out to be aimed at the protection of constitutionally guaranteed rights[152].

In general, although the discussion on punitive damages is inevitably intertwined with the issue of the polyfunctionality of aquilian liability[153], an obstacle that is difficult to cross is the fact that their use results, at the same time, in a disproportion between the damage received and the liquidated damage with respect to co-claimants generating, in practice, an unjust enrichment that probably satisfies the sanctioning purposes with respect to the injured party, but does not provide any benefit or relief with respect to the other injured parties.

A hybrid solution capable, perhaps, of balancing all the positions in the field has been elaborated, in France, in the 2017 *Projet de réformede la responsabilité civile*, within which the figure of the *amende civile* is introduced[154].

This, proportionate to the seriousness of the fault, the contributory capacity of the damaging party, and the profit made, would apply to anyone who causes harm to others through intentionally lucrative behavior; however, it should not be conferred on private individuals, but rather on a *fonds d'indemnisation en lieuavec la nature du dommage subi* or, alternatively, for the benefit of the *trésor public*[155].

151 Cass. Civ. S.U. 5 luglio 2017, n. 16601.

152 On this perspective, A. Malomo, *Responsabilità civile e funzione punitiva*, Naples, 2017, pp. 121-123; A. Lasso, *Riparazione e punizione nella responsabilità civile*, cit., 268.

153 M. Grondona, *La responsabilità civile tra libertà individuale e responsabilità sociale. Contri-buto al dibattito sui risarcimenti punitivi*, Naples, 2017, p. 111.

154 In the last version of the Art. 1266-1 it is stated that «en matière extracontractuelle, lorsque l'auteur du dommage a délibérément commis une faute en vue d'obtenir un gain ou une économie [faute lucrative], le juge peut le condamner […] au paiement d'une amende civile». On this point, see J. Prorok, *L'amende civile dans la réforme de la responsabilité civile. Regard critique sur la consécration d'une fonction punitive générale*, REV. TRIM. DROIT. CIV., 2018, p. 327 ff.

155 A. Lasso, *Riparazione e punizione nella responsabilità civile*, cit., p. 44.

1.5. The *compensatio lucri cum damno*

In principle, damages are given in two ways. As the effect of an obligation that arose to realize a planned transfer of wealth between the parties, implementing a translative function, within the scope of which, however, takes on an increasing importance, recognized by the jurisprudence of legitimacy alluding to the category of so-called protection contracts - the circumstance that the performance is functional to the objective of holding harmless the legal sphere of its contractual interlocutor. That is, as the effect of an obligation established by interference conflicts that arose outside of pre-existing constraints, aimed at restoring the allocation of resources that existed before the conflict[156].

In Italy, the civil-law coordinates that govern the relationship between compensation for damages and property attributions that in dependence of the event underlying the compensable loss can contribute to guaranteeing the welfare of the injured party, are largely entrusted to the interpretation of a rule that the Italian civil law scholar has learned to problematize by referring to the Latin expression *compensatio lucri cum damno*[157].

The rule descending from this interpretation leads to the exclusion that the concept of damage can be compressed, in order to consider, in subtraction in the calculation of the compensable, patrimonial attributions that appear to be justified by a "title" other than the compensatory one.

This well-established interpretation has, however, been the subject of an articulated critical rethinking in the context of an orientation that has

156 On this systemic view, which offers reason for the underlying logic to which the displacement of what is said to be harm in society responds, justifying the displacement of wealth that is linked to and enabled by this notion, very clearly M. Barcellona, *Trattato della responsabilità civile*, Milanofiori Assago, 2011, p. 7 e ff.

157 For the most recent contributions on the subject of *compensatio lucri cum damno*, see E. Bellisario, *Il problema della compensatio lucri cum damno*, Milan, 2018; G. Scarchillo, *La natura polifunzionale della responsabilità civile: dai punitive damages ai risarcimenti punitivi. Origini, evoluzioni giurisprudenziali e prospettive di diritto comparato*, CONTR. IMPR., I, 2018, p. 289 ff; P. Gallo, *Compensatio lucri cum damno e benefici collaterali parte prima: la compensatio lucri cum damno e le sue trasformazioni*, RIV. DIR. CIV., 2018, p. 851 ff; R. Pardolesi & P. Santoro, *Sul nuovo corso della "compensatio"*, DANNO RESP., 2018, p. 427 ff; M. Franzoni, *La compensatio lucri cum damno nel III millennio*, DANNO RESP., 2019, p. 5 ff; G. Mattarella, *Compensatio lucri cum damno e tipicità dei danni punitivi: una prospettiva critica*, NUOVA GIUR. CIV., 2019, p. 583 ff.

recently emerged within the jurisprudence of legitimacy, leading to the emergence of a contrast (and in the course of the discussion the reasons for these quotation marks will be explained) that at first was unsuccessfully submitted to the United Sections of the Supreme Court, but on which decisive (and to some extent, temporarily definitive) developments are expected shortly by the highest courts of civil and administrative jurisdiction[158].

In Germany, in the aftermath of the promulgation of the BGB, when the normative meaning associated with the Latin formula had been precomposed in the wording of § 249 BGB, initiating the rich jurisprudential parabola that would be known by the *Vorteilsausgleichung* in the last century of the last millennium.

The history of *Vorteile* (advantages) in the evolution of the compensability of damages administered by German tort law is a story as always well organized into Fallgruppen3, which usually finds way of being surveyed in the periodic updates of the commentaries to the Civil Code[159].

In doctrine and jurisprudence, in the factual kaleidoscopic that characterizes the spectrum of jurisprudential applications of the rule, certain fixed points are shared.

Vorteilsausgleichung is, in fact, generally kept distinct from the mere technique of quantifying damages, not least because the very precise phrasing of § 249 BGB helps to bring into focus that the advantage most often is characterized as a separate circumstance, which certainly relates to the damage, but which strictly speaking cannot be considered a

158 It all originates with Sect. Un. civ., Apr. 10, 2002, No. 5119, RESP. CIV. PREV., 2002, p. 687, in which it resolutely takes a stand on the debated causal structure of the accidental misfortune insurance contract (Art. 1916 Civil Code). By Cass. civ., June 11, 2014, No. 13233, FORO IT., 2014, I, 2064, this contractual subtype of insurance is subjected to the indemnity principle, declaring the need to defalcate from the damage compensable by the injured party, the insurance indemnity that the injured party has earned as a result of his choice to insure.

159 The more authoritative German doctrine on the point, C. Grüneberg, *Vorbem vor § 249*, in O. Palandt, *BGB*, München, 2015, par. 67 ff; J. Ekkenga & T. Kuntz, *Zum § 249*, in H. T. Soergel, *Bürgerliches Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, vol. 3/2, Stuttgart, 2014, par. 279 ff; U. Magnus, *Vorbemerkung zu §§ 249-255*, in *Nomos Kommentar zum BGB*, vol. 2/1, Baden-Baden, 2012, par. 116 ff; G. Schiemann, *§ 249*, in J. Von Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, Berlin, 2004, par. 132 ff; D. Medicus & S. Lorenz, *Schuldrecht I. Allgemeiner Teil*, München, 2012, par. 646 ff.

constituent part of the notion of damage that is the subject of the obligation to compensate[160].

But what is most important, especially for practical purposes, is the consensus that exists (in doctrine as well as in jurisprudence) around the idea that causation alone is not sufficient to explain and (especially to) put into practice the effects of this institution[161].

Since the postwar period, the jurisprudence of the *Bundesgerichtshof*, moved by a renewed sensibility, inspired by the new values of the federal republican constitution, has fully realized that the causal perspective is not enough, and that the relevance of benefits demands to be ascertained in the light of an additional criterion, which allows for the enhancement of explicitly the interests at stake in the solution of the problem, with the possibility of establishing, when necessary, a balancing between these interests: how much to say that «[m]aßgeblich ist eine wertende Betrachtung, nicht eine rein kausale Sicht»; decisive is a consideration legal of the problem, not a mere causal view[162].

There is always room – as most recently reiterated by the BGH, admitting that a partial reimbursement of the price resulting from an excessive flight delay could be cumulated with the compensation provided for in Article 12 of Reg. (EC) No. 261/2004 – for an analytical assessment that, on the basis of good faith, guides to justice the balance of the interests of the conflicting parties on the claim to defalcate the benefit from the damage[163].

160 H. Lange & G. Schiemann, *Schadensersatz*, Tübingen, 2003, § 9 I.2.

161 For the explicit consideration of the purpose of advantage, promoted through the prism of good faith K. Cantzler, *Die Vorteilsausgleichung bei Schadensersatzanspruch*, in *Archiv für die zivilistische Praxis*, 156, 1957, 29, spec. 51 ff.

162 See BGH, 15 dicembre 1988, in NJW, 1989, 2117.

163 BGH, 30 settembre 2014, in NJW, 2015, 553: «Die Rechtsprechung hat daher die Anrechnung eines Vorteils davon abhängig gemacht, ob sie im Einzelfall nach Sinn und Zweck des Schadensersatzrechts unter Berücksichtigung der gesamten Interessenlage der Beteiligten nach Treu und Glauben dem Geschädigten zugemutet werden kann. Dieses wertende Merkmal ist für die Frage, ob ein Vorteil anzurechnen ist oder dem Schädiger zugute kommen soll, das entscheidende Kriterium». Good faith sanctions a judgment of undeservingness in the allocation of benefit, to which the operation of *Vorteilsausgleichung* follows: «[d]er Vorteilsausgleich beruht auf dem Gedanken von Treu und Glauben (242 BGB) und erfordert eine wertende Betrachtung (BGHZ 173, 83 = NJW 2007, 2695 Rn. 18 mwn). Für die Kl. wäre es ein unverdienter Vorteil, wenn sie die ohnehin vorgesehenen Sanierungsarbeiten teilweise auf Kosten der Bekl. durchführen könnte». In these terms, eloquent on the relevance of good faith in assessing the suitability of the benefit to be deflated by damages, BGH, April 4, 2014, in NJW, 2015, 468.

This critical awareness finds voice in the courts' emphasis on several analytical criteria that offer a sure guide in resolving the problem posed by *Vorteilsausgleichung* on a case-by-case basis.

The first of these is the requirement of congruence between harm and benefit. The two elements must, in fact, reveal an *innerer Zusammenhang*[164], that is, they must present themselves to the interpreter of the problem in such a way as to form on the level of legal (and not merely accounting) assessment a single unit of computation (*Rechnungseinheit*)[165].

Not unlike in Italy, in Spain – where the offset began to circulate in the discourses woven by Iberian civilians around Article 1106 of the *codigo civil*, in the wake of the well-known conceptualizations developed by German authors – generally speaking the doctrine recognizes the *compensación de beneficios* when the benefits are a direct consequence of the harmful event and have the same cause[166].

However, the requirement of *finalidad* takes shape in the idea of not allowing the deductibility of the benefit from the harm when the benefit is expression of *prestaciones que recompensan*, as opposed to what happens when the benefit identifies *prestaciones que compensan*[167].

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164 The jurisprudential fortune known by this formula is due to the elaboration proposed by W. Thiele, *Gedanken Zur Vorteilsausgleichung, in Archiv für die zivilistische Praxis*, 167, 1967, 191, spec. 193 ff and 201 ff.

165 In this evaluative formula converge elements aimed at ascertaining whether it is fair and reasonable to consider that the benefit in question can be deducted from the damage.

166 L. Diez-Picazo, *Derecho de daños*, Madrid, 1999, p. 320 ff; M. Yzquierdo Tolsada, *Sistema de Responsabilidad Civil Contractual y Extracontractual*, Madrid, 2001, p. 498 ff.

167 As stated by M. Medina Crespo, *La compensatión del beneficio obtenido a partir del daño padecido. Aplicatión del principio «compensatio lucri cum damno» en el Derecho de daños*, Barcelona, 2015, p. 212, «[…] a los efectos de efectuar la computación reductora de las ventajas conseguidas, hay que dilucidar si las ayudas estatales proporcionadas sirven para reparar mezcladamente perjuicios de una y otra índole, con desconocimiento del principio institucional de la vertebración perjudicial; y hay que verificar si esas ayudaos corresponden a recompensas que non compensan y que, por definición, no puede ser objeto de computación reductora». For the analysis of case law that provided for the nature of reward, with the effect of excluding clcd in the case of pensions provided for by Decree 1211/1972, of April 13, 1972, bearing «Texto Refundido de Ley de Derechos Pasivos del Personal Militar y Asimilado de las Fuerzas Armadas, Guardia Civil y Policía Armada», M. Medina Crespo, *La compensatión del beneficio obtenido a partir del daño padecido. Aplicatión del principio «compensatio lucri cum damno» en el Derecho de daños*,, cit., pp. 214-24.

Not surprisingly, the underlying problem of compensato lucri cum danmo in English common law is not approached by moving from the formalization of a principle to be tested in various solutions but is resolved in various solutions from the outcomes of which it is painstakingly possible to extrapolate the fixed points of an argumentative ground of comparison.

In this area, the guiding idea of full compensation[168], in the personal injury law takes note of its ontological restorative limits and of the fairy-tale dimension that hovers in those who really think that it is up to the judge to discover the exact penny figure that every compensation affair, at the end of its fulfillment, will reveal to be precise measure of the «not one more, not one less» of the case. And it repositions itself to the more realistic goal of procuring the injured party «a fair, reasonable and just compensation»[169].

This idea has had to confront the possibility that the damaging event sets in motion transfers of wealth intended to fulfill this function for reasons other than those that obligate the tortfeasor to replenish the wealth lost by the injured party.

In the dialectic of the English courts, the problem of coordinating with the harm the benefits that, resulting from the harmful event, enter the injured party's estate, has been resolved by showing concern for a synthesis of justice, reasonableness, and sensitivity in terms of policy[170], close behind which have been intensely political visions that, however, the Lords have been careful never to make explicit.

The idea that the cause of the transfer of wealth, underlying the benefit, is traceable to the sacrifice of the party who avails himself of this

168 Accepted – not without bothering to insert the phrase «so far as money can do it» - as a principle of the law of contract since the famous missed lease on which reasoned Baron Parke, in *Robinson v. Harman* (1848) 154 ER 363, 365, the rule of reparation integral transmuted on the stage of the protection afforded to property by torts in Lord Blackburn's prose in *Livingstone v. Rawyards Coal co*. (1880) 5 App. Cas, 25, 29.

169 In *Rowley v. London and North Western Ry. Co.* (1873) LR 8 Exch. 221, 231.

170 As noted in a judgment noted above, in *Parry v. Cleaver*, cited above, p. 13, Lord Reid did not hesitate to summarize the idea, remarking, «[t]he common law has treated this matter as one depending on justice, reasonableness and public policy».

benefit when it comes to determining the compensable damage, evoked to maintain the full entitlement of the benefit to the injured party[171], has thus been subjected to critical remarks unable to find a limit in the force of a superordinate normative value, to which to refer the solidarity embodied in the community of tax-payers[172].

171 In this sense, a «convincing policy reason for the non-deductibility of insurance payments is thus that the victim has 'paid for' the benefits which he now receives, whether through the payment of insurance premiums or occupational pension contributions, or simply through past service for his employer. At the very least, then, the benefit should not go to the tortfesor (or his insurer) in the form of a reduced damage award». S. Deakin, B. Markesinis, A. Johnston, *Tort Law7* Oxford-New York, 2013, p. 809.

172 It is, after all, a "political" reinterpretation of this idea of justice that resulted in *Hodgson v. Trapp* [1988] UKHL 9, the House of Lords, in the elegant prose of Lord Bridge of Harwich, asserted that, as a general rule, when it comes to establishing damages having a purely economic nature that followed a tort, as the result of the loss of a gain that the injured party would have earned, had he not been victimized by the tort, it is reasonable to start from the idea that such benefits should be defalcated from the claim for economic damages promoted by the injured party, except to observe that the rule cannot be justified when the injured party receives an indemnity consequent upon insurance coverage for which he has paid the premium (solution anciently adopted in *Bradburn v. Great Western Railway Co*., 1864, L.R. 10 Ex. 1, where the idea of deducting the premium of the beneficiary of an accident policy from the computation of the compensation due from the responsible party was unabashedly portrayed as «the most unreasonable thing in the world»), or sums donated to him out of a spirit of benevolence and sympathy by third parties sensitive to his state of need (as sanctioned in *Redpath v. Belfast and County Down Railway*, 1947, N.I. 147. Lord Bridge, however, went so far as to reconsider the conviction that had led Lord Reid (in *Parry v. Cleaver*, cit.), to doubt that, in the absence of an explicit provision on the point identified by the legislative instrument governing the disbursement, the various measures of the English welfare state had been conceived by Parliament by accommodating the idea that community resources allocated through the benefit might end up translating into a benefit for the perpetrator of the wrongdoing. The metaphor – which Lord Reid had indirectly instituted in his 1969 opinion – of a state acting as a private benefactor, with the need to test on a case-by-case basis whether, from the overall interpretation of the statutory text conferring the benefit such beneficence could be confirmed, by the late 1980s it seemed to Lord Bridge to have become unpersuasive: «[i]n these cases is not so much one of statutory construction as of public policy. If we have regard to the realities, awards of damages for personal injuries are met from the insurance premiums payable by motorists, employers, occupiers of property, professional men and others. Statutory benefits payable to those in need by reason of impecuniosity or disability are met by the taxpayer. In this context to ask whether the taxpayer, as the "benevolent donor", intends to benefit "the wrongdoer" as represented by the insurer who meets the claim at the expense of the appropriate class of policy holders, seems to me entirely artificial». In this sense, *Hodgson v. Trapp*, cit.

No doubt, in any case, that the insurance compensation due to the injured party as a result of accident insurance for which the latter has paid the premiums can never be subject to defalcation in quantifying the damages owed by those who must be civilly liable for the injury[173].

The *dicta* of the common law courts have certainly had their weight in the casuistic-argumentative definition of the general problem on which we reason, but it is a fact that the deductibility of benefits granted to the victim of an accident by the English welfare state, when the accident is attributable to the tortfeasor, is, now more than ever, entrusted to the exceedingly punctilious care of the legislature[174].

In US common law, the underlying problem of Latinism has been able to gain the authoritative stage of the Supreme Court since the mid-nineteenth century, when, after the sinking of a schooner by a steamer in the waters of a lake in New York State, the question was whether the shipowner of the vessel responsible for the accident could paralyze the action for damages brought against him by the owners of the schooner, relying on the circumstance that they had already been indemnified by their own insurer[175].

In rejecting the responsible shipowner's defense, the Supreme Court adhered to a (then still fresh) precedent of the English Court of Admiralty[176], and emphasized that the contract between the injured party and its

173 R. Lewis, *Deducting collateral benefits from damages: principle and policy*, LEG. STUD., 1998, p. 26 ff.

174 It may be significant to note how only in recent times has the English scholarship taken steps, first to explicitly denounce (A. Burrows, *The Relationship Between Common Law and Statute in the Law of Obligations*, L.Q.R., 2012, p. 232), and then to recover (see in contributions collected in T. T. Arvin & J. Steele, *Tort Law and Legislature. Common Law, Statute and Dynamics of Legal Change*, Oxford, 2013) the delay in realizing at a systematic level the decisive influence that statute law has manifested since the postwar period on the dynamic evolution of the common law of torts. Conversely, English social security law identifies a recognized paradigm of legal complexity, the subject of no less complex academic analyses, which in recent times have accompanied the realization of the idea that the thicket of provisions and benefits guaranteed to English citizens should be cleared, as happened in 2013 with the introduction of the system of so-called «universal credit», in which various subsystems of British welfare found reorganization. On the topic, N. Harris, *Law in a Complex State: Complexity in the Law & Structure of Welfare*, Oxford, 2013.

175 *The Propeller Monticello v. Mollison*, 58 U.S. 152 (1854).

176 *Yates v. Whyte* (1838) 4 Bingham New Cases 272.

insurer could not manifest any limiting effect on the former's full subjection to the injured party's claim for compensation[177].

Perhaps the so-called US "collateral source rule" (csr) owes its fortunes, from a historical perspective, to the fact that it was authoritatively enunciated in a circumstance that presented a different scenario from that typical of an era in which, as a rule, damages recoverable by U.S. courts were not quantified under circumstances that would result in a compensatory "bonanza" for the injured party[178].

The fact remains that the rule, although revisionist criticisms had not failed to arise at its direction when things had by then definitely changed, found a way to crystallize in Section 920 A(2) of the 1964 *Second Restatement of Torts*, and in very stark terms «[p]ayments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable»[179].

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177 On this perspective, Justice Grier in *The Propeller Monticello v. Mollison*, 58 U.S. 156 (1854) «[t]he defense set up in the answer, that the libellants have received satisfaction from the insurers, cannot avail the respondent. The contract with the insurer is in the nature of a wager between third parties, with which the trespasser has no concern. The insurer does not stand in the relation of a joint trespasser, so that satisfaction accepted from him shall be a release of others. This is a doctrine well established at common law and received in courts of admiralty». *Ivi*, p. 57.

178 Thus, alluding to the fact that in the 19th century the full manifestation of the phenomenon of insurance and social security were yet to come, the incipit of the famous essay that in the US scholarship still identifies as the doctrinal landmark in the reflection on the problem, J. G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, CAL. L. REV., 1966, p. 1478, who years later gave the Italian literature a fascinating *vaticinium* that had hitherto remained unpublished, J. G. Fleming, *C'è un futuro per i torts?*, (transl. it., C. Rossello & R. Pardolesi), RIV. CRIT. DIR. PRIV., 1984, p. 271 ff, on whose rate of fulfillment, thirty years later, it is for all to form an opinion. On Fleming's legacy, F. Werro, *Tort Law at the Beginning of the New Millennium. A Tribute to John G. Fleming's Legacy*, AM. J. COMP. L., 2001, p. 147 ff.

179 It should be kept in mind that the well-known argument of overcompensation, which would be induced in Italy by preventing the *compensatio lucri cum damno* from operating and in the US by applying the collateral source rule, at least in the U.S. system is radically discolored, having in mind the general rule that oversees the bearing of costs related to access to justice, with the well-known contingent-fee mechanism. The aptitude for offsetting costs in many cases, and in any case the circumstance that often what the judge places on of the losing party does not fully cover the amount of costs incurred by those who have prevailed at trial, might lead one to recover the meaning of this finding in our system as well.

In the Second Restatement of Contracts, however, the vigor of csr has been predicated in less stark terms, opening itself to a casuistic test of the purpose of the benefit «[t]he collateral source rule is less compelling in the case of a breach of contract than in the case of a tort [...] For example, the effect of the receipt of unemployment benefits by a discharged employee will turn on legislative policy rather than on the [general rule limiting damages to his actual loss in the value of the expected bargain]»[180].

180 J. G. Fleming, *The Collateral Source Rule and Contract Damages*, CALIF. L. REV., 1983, pp. 79-85. According to the author, the application of this parameter in US jurisprudence has more often than not meant allowing the courts to give room in the casuistic solution (traceable to the choice of admitting, or not, the defalcation in the presence of cases involving the injured party's receipt of unemployment benefits, or cases involving the payment of the benefit induced by the operation of an insurance contract) to considerations in which the assessment of the seriousness of the creditor's default came into play, or consideration of the purpose of the unemployment benefit (directed at subsidizing the aggrieved debtor in the case, and not at rewarding the unfaithful debtor), or the perverse incentive induced by the choice of partially relieving the debtor of the consequences of his default, or the circumstance that, even where the benefit payer and the debtor defaulter concretely coincide, the worker is entitled to receive the benefit upon face of the finding that in the specific case the benefit has cause in the contract of employment and thus accedes, in the specific case, to a retributive nature or – again – to the idea that the disapplication of the rule followed by subrogation entails transactional costs destined to render the endorsed economic transaction useless, making it desirable, rather, to let those sums benefit the creditor.

Chapter IV

INSURANCE AGAINST DAMAGES

1. Monetary liability for damages (art. 820)

Liability insurance policies generally provide that the insurer will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which the insurance applies.

In Italy, Art. 1917 c.c. provides that the insurer is obliged to indemnify the insured for whatever the insured, because of the fact occurring during the time of insurance, has to pay to a third party, in connection with the liability deduced in the contract. The insurer is entitled, upon notice to the insured, to pay directly to the injured third party the indemnity due and is obliged to make direct payment if the insured so requests.

Expenses incurred in resisting the action of the injured party against the insured shall be borne by the insurer to the extent of one-fourth of the sum insured. However, in the event that a sum greater than the insured sum is owed to the injured party, court costs shall be shared between the insurer and the insured in proportion to their respective interests. The insured, sued by the injured party, may sue the insurer[181].

As envisaged by the Italian legal system, therefore, the insurer's right to indemnify the insured for whatever the latter may have to pay to third parties for damages caused, as a result of an event expressly deductible in the contract and occurring within the time frame of the insurance coverage[182].

Liability insurance should be included within the scope of property insurance, since its primary objective is to avert a depletion of the insured's assets, as a result of an action for damages brought by a third party. As the object of the contract, therefore, it will be appropriate to consider the risk, qualified as the adverse effect of the claim whose effects reverberate on the insured's assets[183].

The traditional approach, established by insurance practice, takes the name of loss occurrence. According to this approach, the operability of

181 As provided by the art. 1932 of the Italian civil code.

182 A. Borroni, *Clausola Claims Made: Circolazione Parziale Di Un Modello Nella Responsabilita' Civile Italiana*, in *Ianus, Diritto e Finanza, Rivista di Studi Giuridici*, No. 10/2014, p. 125.

183 *Ibid.*

the guarantee is limited to events that occur during the policy term, regardless of the date of the claim and the reporting of the loss[184]; in other

184 In this sense, the French legal system, in the *Code des Assurances*, Article L 124 -1, states that «[d]ans les assurances de responsabilité, l'assureur n'est tenuque si, à la suite du fait dommage able prévu au contrat, une réclamation amiable ou judiciaire est faite à l'assurè par le tierslésé».

Current and very intense is the doctrinal debate concerning the interpretation of the meaning to be assigned to the term "claim". Since it is a particularly articulated phenomenon, at least four different interpretative nuances are noted; it, in fact: i) can be identified with the damaging fact; ii) can coincide with the claim for compensation for damage; iii) can be reflected in the identifying case of the judicial recognition of the right to compensation; and iv) can be manifested through the payment of the same. The recognition operation encounters greater difficulties when referring to the so-called "protected professions", as the consequences generated by the damage may be particularly distant from the fact producing the accident itself. See, on this point, A. Durante, *L'assicurazione di responsabilità civile*, Milan, 1964, 260; A. Donati & G. Volpe Putzolu, *Manuale di diritto delle assicurazioni private*, cit., p. 173 ff. For example, for L. Farenga, *Diritto delle assicurazioni private*, Turin, 2006, p. 184 the claim is nothing more than the concretization of the risk for which the policy was stipulated and should be identified not so much at the moment in which the fact occurred but, rather, at the moment of the claim by the injured third party. Also along the same lines is G. Volpe Potzolu, *The "claims made" clause: risk and loss in liability insurance*, ASSICURAZIONI, 2010, I, P. 6; and L. Bugiolacchi, *I mobili confini del tipo assicurativo: considerazioni in tema di assicurazione della r.c. con clausola claims made contributo approvato dai refere claims made*, RESP. CIV. PREV., 2012, fasc. 3, which considers it legitimate to speak of a claim only at the stage when the actual claim for compensation takes place since Article 2952 Civil Code, c. 3. makes the statute of limitations of the insured's rights for liability insurance run from the moment when the third party has claimed compensation from him. This, as argued by, A. Boglione, *Le clausole loss occurrence e claims made nell'assicurazione di responsabilità civile (R.C.)*, ASSICURAZIONI, 2009, p. 474, derives from the fact that the risk of liability cannot exist before the formulation of a claim by the injured party since any conduct is potentially injurious but its offensiveness, and therefore its relevance in insurance terms, arises when it is perceived as such by the injured party and contested by the damaging party. A different thesis is, on the other hand, the one held by A. D. Candian, *Responsabilità civile e assicurazione*, Milan, 1993, p. 292, according to whom the concept of a claim must not be seen in the claim (since it remains a fact extraneous to the claim) but at the moment in which the tortious conduct is transformed into damage. It affirms, in fact, if the insured risk is the normal risk of liability insurance, that is, the risk that due to the occurrence of a fact for which the insured is to be held civilly liable, the obligation to compensate for the damage and/or repair arises on his part, the claim also cannot fail to involve the occurrence of the fact that is the source of liability, precisely because the claim is the implementation of the insured risk. A final position can be found in the study by A. Polotti Di Zumaglia, *Coperture presso diversi assicuratori,* in *Diritto ed Economia dell'Assicurazione* (dal 2012 Dir. e Fiscalità assicur.), 2013, 1 ff. where it is stated that the notion of claim highlighted by Art. 1917 Civil Code therefore refers to the fact of the insured or rather to his behavior from which his liability originates without any reference to the moment of manifestation of the damage or to the moment in which the relative compensation is then claimed.

The jurisprudential formant, on the other hand, does not deviate from an older pronouncement that in fact does not seem to completely clarify the hermeneutical doubts just highlighted. Judgment 71/1941, in fact, speaks of a claim as any event which does not relate to the life of the insured or of a third person, expressly indicated in the policy, and which is productive of a diminution or a failure to increase the assets of the insured. G. Cian & A. Trabucchi, *Commentario breve al Codice Civile. Complemento giurisprudenziale*, Padua, 2012, p. 2389.

words, the insured right to the guarantee, pursuant to Article 1917 c. 1 of the Civil Code, also applies even at a stage after the expiration of the contractual relationship[185].

In British law, a promise to indemnify is simply a promise to hold the indemnified person harmless from a specified loss or expense. On this basis, no debt can arise before the loss is suffered or expense is incurred; however, once the loss is suffered or expense is incurred, the indemnitor is in breach of contract for failing to hold the indemnified person harmless from the relevant loss or expense[186].

The insurer's primary obligation is to pay damages for breach of duty to prevent the loss from occurring, but not to pay valid claims. Accordingly, a claim for damages caused by the insurer's unreasonable rejection of a valid claim for insurance payment is unrecoverable because there is no cause of action for delay in paying damages[187].

This makes the contract of indemnity insurance an exception to the usual rules of contract law, under which, when a party breaches a contract, the injured party may seek compensation for damages suffered, provided that the plaintiff proves that actual economic loss occurred; that the loss was foreseeable at the time of the contract; and that it proves that reasonable measures were taken to mitigate that loss[188].

The article 820 of the Georgian civil code states that «in cases of insured damage, the insurer shall pay the damages in money»; it is, generally, in line with the provision of the other Countries – or legal systems – analyzed in so far.

The article in comment contains wording characteristic of the mandatory rule, according to which the insurer must compensate the damage with money when insuring property.

185 A. Borroni, *Clausola Claims Made: Circolazione Parziale Di Un Modello Nella Responsabilita' Civile Italiana*, cit., pp. 125-126.

186 See J. Zhen, *The insurer's primary obligation to pay valid claims in a timely manner*, J. BUS. L., 2015, p. 4.

187 See, generally, M. Song, *Insurance contract law reform in England*, in *Insurance law in China*, J. Hjalmarsson & D. Huang, Routledge, 2015, p. 274 ff; P. Merkin, *England*, in M. Fontaine (ed.), *Insurance contract law*, International Association for Insurance Law, 1990, p. 83 ff.

188 See J. Zhen, *The insurer's primary obligation to pay valid claims in a timely manner*, cit., pp. 4-5.

Specifically, if the rule is considered imperative, the parties will be limited in determining the form of compensation. It should be noted that in both Georgian and international insurance practice, the non-monetary form of damages is also used in property insurance. Strictly speaking, the true intent of the legislature should not be to limit the form of compensation in property insurance. With such a provision, the law would significantly hinder the possibility of using flexible settlements tailored to the interests of economically efficient parties. Therefore, Article 820 should be interpreted broadly, and the established practice in the insurance industry of nonmonetary fulfillment of the payment obligation in property insurance should not be considered a violation of the provision[189].

189 K. Iremashvili, *Art. 820*, in *Online Commentary on the Civil Code*, available at https://gccc.tsu.ge/. Last visited July 26, 2022. The author, then, considers another aspect. In international insurance practice is familiar with the so-called agreement of the parties, "repair or replace", which provides for the possibility of repairing the damaged object or replacing it with a new one. Specifically, in property insurance, the parties may agree that the insurer will repair or replace the damaged object for compensation. The disputes that arise in these cases are mainly related to two issues. The first concerns the insured's right to choose whether to repair or replace the damaged object. The second concerns the quality and character of the repair of the damaged object.

In the first case, the content of the contract is decisive. The insured's right to choose between repair and replacement of the damaged object must be clearly and unambiguously stated in the insurance policy. The insurer will use the absence of such a condition in the contract to its advantage, which may lead to an undesirable result for the insured for the following reasons.

The second problem, which is no less urgent, is related to the quality of the repair of damaged goods. In particular, it is problematic when the insurer uses parts of relatively low quality and price to repair the insured object and not, for example, branded parts used in the production of an automobile.

In the case of property insurance, the agreement on non-monetary compensation for damage often contains a reservation on the transfer of ownership of the insured object to the insurer.

2. Extent of liability for damages and insurance comparison (artt. 821-822)

The insurer shall pay the damages only to the extent of the insured amount.

Art. 1909 of the Italian c.c. provides that insurance for a sum in excess of the actual value of the insured thing is invalid if there has been malice on the part of the insured; the insurer, if in good faith, is entitled to the premiums for the current insurance period[190].

If there has been no malice on the part of the policyholder, the contract is effective up to the actual value of the insured thing, and the policyholder is entitled to obtain for the future a proportional reduction in the premium[191].

From the insurable value, whatever the time of its reference, the sum insured should be distinguished[192].

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190 P. Corrias, *Giulio Partesotti e il diritto delle assicurazioni*, BANCA BORSA, 2018, p. 3 ff. This problem has led the doctrine to repeatedly question the value to be placed on the estimate and to express, in the context of the debate that has arisen on the point, two opposing views. For a deep analysis of the problem, see G. Scalfi, *I contratti di assicurazione. L'assicurazione danni*, Turin, 1991, 203 ff. The former, on the assumption of the substantive value of the appraisal statement, goes so far as to uphold the intangibility of the appraisal agreed upon by the parties and, therefore, to sanction the prevalence of the parties' will-which would seem, precisely, to derive from the power, expressly granted by law, to agree on the value of the property-over the indemnity principle (at least with regard to the inapplicability of Article 1909 of the Civil Code). Advocate of this thesis G. Volpe Putzolu, *L'assicurazione privata contro gli infortuni (nella teoria del contratto di assicurazione)*, Milan, 1968, p. 180 ff. In the opposite sense, believing that the agreement on the value of the property can be recognized only as a procedural value of reversal of the burden of proof, it is held that the statement is susceptible to be disregarded, if the party concerned succeeds in demonstrating that the actual value is different from that resulting from the estimate. G. Fanelli, *Le assicurazioni*, in *Trattato di diritto civile e commerciale Cicu e Messineo*, cit., p. 181 ff. However much the author avoids ascribing his approach to the "proceduralist" theses, in fact, he notes that the overestimate in relation to the damage that actually occurred can be challenged even regardless of the particular circumstances that led to it (error, etc.).

191 D. Semeghini, *Assicurazione cumulative e principio indennitario*, BANCA BORSA, 2012, pp. 643-644. See also L. Buttaro, *Diminuzione del rischio e diminuzione del valore delle cose assicurate*, RIV. DIR. COMM., 1955, II, p. 248, footnote 13.

192 See generally, for a deep analysis of the differences between these two concepts F. Piraino, *Critica della causa al servizio dell'adeguatezza in concreto del contratto. il caso dell'assicurazione della responsabilità civile con copertura claims made*, EUR. DIR. PRIV., 2019, 1052-1053. Also, G. Fanelli, *Le assicurazioni*, cit., p. 235 ff.

The former under the strict indemnity principle represents the maximum legal limit (total damage) to the insurer's obligation; the latter represents, on the other hand, within the limits of the former, the maximum conventional limit[193].

It may be that an insurable value cannot be determined (so in liability insurance) or that no sum insured is fixed. In the first case the insurer's obligation will be established on the basis of the loss within the limits of the sum insured. In the second case it will be established on the basis of the loss with no limit other than that of the loss[194].

When, as is almost always the case, there is an insurable value and an insured sum is set, an arithmetic relationship is established between the one and the other[195].

193 G. Partesotti, *La polizza stimata*, Milan, 1967. The problem of the effectiveness of the appraisal and, more generally, of the parties' agreements on the insurable value, cannot be fully addressed and resolved unless the scope and extent of the indemnity principle, i.e., the limits within which private autonomy can reach in determining the insurable value, is first brought into focus. *Ivi*, p. 8. The author goes on to state how any claim to pronounce on the point [i.e., on the value that can be accorded to an agreement of the parties on insurable value] presupposes, in fact, an inquiry capable of fixing in general lines the actual meaning of the indemnity principle, in order to determine the limits of private autonomy in relation to this principle. P. Corrias, *Giulio Partesotti e il diritto delle assicurazioni*, cit., p. 2, footnote 12.

194 G. Partesotti, *La polizza stimata*, cit., p. 31 ff. The author asserts, however, that compensation for common damages, i.e., regulated in the context of civil liability, and insurance damages, which are the prerequisite for the company's indemnity provision, do not constitute two separate institutions, but should, instead, be considered in a unified perspective. On the same point, G. Volpe Putzolu, *L'assicurazione privata contro gli infortuni (nella teoria del contratto di assicurazione)*, cit., p. 12 ff.

195 P. Corrias, *Giulio Partesotti e il diritto delle assicurazioni*, cit., pp. 6-7. This arithmetic relationship gives rise to three hypotheses: (i) sum insured and insurable value coincide: in which case there is full insurance. In the event of a loss, the insurer is obliged to indemnify it in full; (ii) the sum insured is less than the insurable value : in which case there is partial insurance or underinsurance. Agri effects of underinsurance, the relationship must be established between the sum insured and the insurable value at the time of the loss (thus express. art. 1907), since underinsurance has no relevance until the time of loss. Underinsurance is sometimes due to external factors (increase in insurable value, originally coinciding with the sum insured) or to the free will of the insured (high purpose of saving on the premium); sometimes, on the other hand, it is made compulsory by the policy for the purpose of removing in the insured any wish to cause a claim and inducing him to greater diligence by obliging him to bear a part of the risk. In such a case it is forbidden-usually under penalty of forfeiture-to insure with others the part of the risk that must remain with the insured himself; (iii) the sum insured is greater than the insurable value: in such a case there is insurance for a sum exceeding the value or overinsurance. Since overinsurance implies an unnecessary payment of excess premium, it is useful to avoid or eliminate it at any time. In determining whether or not there is overinsurance, the ratio of sum insured to insurable value at any time applies, not only at the time of the loss.

There are, then, some cases in which the value of the insured property is less than the stipulated premium. Such a case is called overinsurance, which is a violation of the indemnity principle and an incitement to malicious or grossly negligent claims. All legislation, as well as the policies themselves, have therefore fought it, often bitterly and by draconian means[196].

Over-insurance can be described as having excess insurance coverage/policies that covers the same risk or having insurance cover in excess (more than) of the value of the possible loss that the insured can experience. Over-insurance occurs when an individual or a business has insurance cover in excess of the value of the risk(s) covered/insured[197].

Since insurable value refers not only to the intrinsic value of the thing (*quoad maxime*) but more precisely to the interest which the insured has in it and which is of different magnitude according to the type of legal relationship between the subject and the thing itself (ownership, usufruct, collateral, etc.), there is overinsurance even if the excess concerns not the value of the thing itself, but the quality of the interest entitling the in-

196 According to the most authoritative doctrine, the phenomenon of overinsurance is, at the same time, useless and dangerous. A. Donati, *Trattato del diritto delle assicurazioni private*, cit., p. 260. Useless because, given the prohibition posed by the indemnity principle (see sub art. 1905, para. 1, and art. 1908, para. 1), the higher premium that the insured comes to pay can never credit him with compensation in excess of the actual loss. G. Fanelli, *Le assicurazioni*, Milan, 1973, p. 11. Dangerous because the excess of coverage may induce him to cause the loss or to hold otherwise a demeanor of interested negligence in protecting the property. *Ibid*.

See, to delve deeper to the concept of overinsurance G. Miotto, *«Coassicurazione indiretta», obbligo di avviso e frodi assicurative*, RESP. CIV. PREV., 2014, p. 944 ff; A. De Bernardinis, *L'assicurazione facoltativa contro gli infortuni, l'art. 1910 c.c. e la disciplina dei contratti comunitaria*, RESP. CIV. PREV., 2000, p. 388 ff; M. Irrera, *L'assicurazione: l'impresa e il contratto*, in *Tratt. dir. comm*., diretto da G. Cottino, Padua, 2011, p. 253 ff. In accordance with the most established tradition, already accepted by the old code, the Italian law distinguishes two hypotheses: (i) in case of malicious intent on the part of the policyholder (insuring on behalf of others of the insured), the insurance is null and void. To constitute malice, full awareness on the part of the insured of the existence of the declared value and the intention to profit will suffice. If the insurer has concluded the insurance for greater comma in good faith, that is, believing the value declared by the insured. the latter is obligated to him for all past premiums, and thus if already paid cannot repeat them, and for the premium for the current insurance period; (ii) if there is no fraud in the above sense, on the part of the policyholder (in insurance on behalf of others, of the insured) the principle *utile per inutile non vitiatur* applies the insurance is valid and effective up to the actual value, ineffective for the excess. The policyholder is entitled ex nuovo to a reduction in the premium in proportion to the reduction in the sum insured.

197 G. Miotto, *«Coassicurazione indiretta», obbligo di avviso e frodi assicurative*, cit., p. 944 ff; A. De Bernardinis, *L'assicurazione facoltativa contro gli infortuni, l'art. 1910 c.c. e la disciplina dei contratti comunitaria*, cit., p. 388 ff; M. Irrera, *L'assicurazione: l'impresa e il contratto*, cit., p. 253 ff.

sured, as in the case where the mortgage creditor insures for the original amount of the debt and it has been partially discharged[198].

It must be stressed that in the Italian law overinsurance, precisely because it refers to the "value of things", cannot take place in the branch of civil liability, where the damage is not assessable *a priori*, unless this concerns the preservation of "determinate things": in which case over-insurance may take place, as in any other form of insurance against the incurrence of a debt in which there is a prior determination of the insurable interest[199].

198 L. Buttaro, *Assicurazione in generale*, cit., p. 505 ff. Where, on the other hand, the insured declares an interest in the thing other than the true one (e.g., the usufructuary who qualifies as an owner), the discipline relating to misrepresentation applies then the rules relating to misrepresentation of risk set forth in Art. 1892-1893. Unlike underinsurance, then, which becomes relevant only at the time of the claim, overinsurance is relevant throughout the duration of the relationship and can therefore be ascertained, for the purposes of Article 1909, at any time.

199 *Ibid*. It is important to distinguish two cases: willful overinsurance and non-willful overinsurance. The willful hypothesis is the one provided in the 1st paragraph of the art. 1909of the Italian civil code, which states that the insurance is not valid if there has been willful misconduct on the part of the insured," that is, when he knowingly declares a value higher than true in order to try to make a profit in the event of a claim, without, however, the need for deception (as referred to in Art. 1439 of the Civil Code). Proof of malice is the responsibility of the person who alleges it (insurer), but it may result from the very exaggeration of the sum insured in relation to the insurable value due to the excessive and unjustified disproportion (V. Salandra, *Dell'assicurazione*, cit., p. 323 ff; G. Scalfi, *I contratti di assicurazione. L'assicurazione danni*, cit., p. 197; in jurisprudence, see Trib. Monza, March 10, 2003, DE ASS, 2003, p. 499, with note by L. Letta, *Soprassicurazione dolosa di cose: annullabilità o nullità? Art. 1892 or 1909 c.c.?*): the hypothesis normally assumes that the insured proposes not to make it appear, at the time of the claim, the true value of the things insured, not being otherwise able to take advantage from his malice (A. De Gregorio & G. Fanelli, *Il contratto di assicurazione*, Testo riveduto integrato e annotato da A. La Torre, Milan, 1987, p. 128). The mandatory nature of the rule, linked to an (indemnification) principle of public order, excludes that it is a matter of simple annulment, as might be suggested by the suppose the reference to intent; instead, it is a matter of nullity, albeit relative (in that it can be invoked only by the insurer), and therefore neither validable nor subject to a statute of limitations. G. Scalfi, *I contratti di assicurazione. L'assicurazione danni*, cit., p. 197, where consistent citations.

The non-willful hypothesis is provided for in the 2nd paragraph of Art. under consideration, occurs when the insurance for an excess sum does not depend on malice by the policyholder, but from an error of assessment committed in good faith or from a supervening decrease in value of the insured thing. In such a case the contract takes effect up to the actual value of the thing insured, *i.e.* it is maintained in force to the extent compatible with the indemnity principle in application of the *maxim utile per inutile non vitiatur*. It therefore gives rise to a reduction of the contract: either, at the request of the insurer, generally upon the occurrence of the claim or, at the request of the insured, at any time during the course of the relationship (V. Salandra, *Dell'assicurazione*, cit., p. 324, who sees in this case a case of nullity partial lack of object; A. Donati, *Trattato del diritto delle assicurazioni private*, cit., p. 263 speaks of invalidity for the excess; G. Scalfi, *I contratti di assicurazione. L'assicurazione danni*, cit., p. 199, specifies that it is a null clause replaced by right by mandatory rule, ex art. 1419, 2nd paragraph, limiting the excess sum to the maximum insurable value, *i.e.*, reducing the overinsurance to full insurance).

In the German law, Section 74 of the Insurance Contract Act (*Versicherungsvertragsgesetz*, VVG) states that «if the sum insured considerably exceeds the value of the insured interest (insurable value), each contracting party may request that the sum insured be reduced with immediate effect in order to eliminate the overinsurance, thereby also reducing the premium proportionally. […] If the policyholder concludes the contract with the intention of gaining an illegal pecuniary benefit on account of the overinsurance, the contract shall be void; the insurer shall be entitled to the premium up until such time as he learned of the circumstances establishing nullity»[200].

Reading the article 822 of the Georgian Civil code it emerges that the *ratio legis* is the same as the German VVG. In fact, the two dispositions are very similar.

The issue of article 822, however, is manifested by two independent legal problems. The first is related to the goal of preventing overinsurance and is essentially part of the rules governing the amount of insurance. The second determines the legal consequences of entering into a contract with unlawful intent.

Finally, the purpose of the rule contained in Article 822 is the fair determination of insurance compensation and the establishment of good faith contractual relations between the parties.

However, the proper systematic placement of the rules requires that: 822 I be dealt with under the 821 regulation, and 822 II, depending on its importance, be reflected in the property insurance framework alongside other mechanisms for preventing unjust enrichment[201].

The rule established in article 822, para. 1, is important for two main reasons. First, the rule reinforces one of the basic principles of property insurance, which is expressed in the determination of insurance indemnity within the sum insured[202].

200 Section 74, Insurance Contrct Act (*Versicherungsvertragsgesetz*, VVG).

201 K. Iremashvili, *Art. 822*, in *Online Commentary on the Civil Code*, available at https://gccc.tsu.ge/. Last visited July 26, 2022.

202 *Ibid*. In this sense, the rule must be interpreted in conjunction with Articles 821 and 823. In interpreting Article 822 I, it is important to consider the legal result established by Article 826. Specifically, if the parties do not implement the reduction in the amount of insurance provided for in Article 822 I, according to Article 826, the insurer's liability is calculated on the basis of the loss suffered. Accordingly, the existence of a difference between the sum insured and the economic value of the insured property will not entitle the policyholder to receive compensation in excess of the loss suffered.

In addition, Article 822 is important because it indirectly reads the insured's obligation to notify the insurer of circumstances arising during the insurance period. The possibility of such reasoning arises from a broad interpretation of Article 813[203].

Then, the paragraph 2 of the article 822 defines the grounds for invalidity of the insurance contract in case of bad faith of the policyholder. It is worth noting that even in the absence of such arrangement, the transaction concluded by the policyholder for the purpose of obtaining illegal income is invalid based on the general grounds of invalidity stipulated by the Georgian civil code[204].

According to article 822, para. 2, the contributions paid to the insurer before the invalidity of the contract remain with him. In it, the legislator should mean the insurer. With such an arrangement, the Georgian discipline shares the most common practice of returning insurance premiums. From this point of view, this norm is similar to the principle in practice in

203 See D. Micu & R. F. Hodos, *Artt. 813-814*, in this Commentary. During the insurance period, it is possible to reduce the economic value of the insured object (see the commentary to Article 826). In such a case, the parties have the right to change the terms of the contract and reduce both the amount of insurance and the insurance premium. In Article 822 I, the legislature uses the wording-in that insurer and policyholder, in order to avoid excessive insurance, may request a reduction in the amount of insurance and the insurance premium. In this case, the policyholder's interest is expressed by the insurance premium, while the insurer's interest is expressed by the reduction of the insurance amount. K. Iremashvili, *Art. 822*, cit. It should be kept in mind that the decrease in the economic value of the insured property is a type of information that has a direct impact on the formation of the insurer's will. According to this logic, it is reasonable to define 822 I in connection with 813, under which the insured will be obliged to notify the insurer of the reduction in the economic value of the insured property. By itself, in Article 813, the legislature establishes the obligation to notify the insurer of the aggravation of risk. The Code does not separately regulate the obligation to notify the insurer of new circumstances arising during the insurance period. Therefore, Article 813 must be interpreted broadly to include all types of information discovered during the insurance period that are of critical importance to the insurer. In this example, such information is provided by the reduction in the economic value of the insured item. The imposition of such an obligation on the insured is justified by the principle of good faith. *Ibid*.

204 Art. 822, para. 2, is interesting in that in it the legislator regulates the problematic issue of the return of paid premiums (see, regarding the return of paid premiums, A. Borroni, *Art. 799*, in this Commentary). In the international doctrine of insurance, the positions related to the return of paid premiums are mixed. In most cases, the return of the insurance premium is considered inappropriate, since the premium is considered earned from the moment the insurer assumes the risk. However, in individual cases, the return of the premium may be considered justified due to the policyholder's bona fide expectation of the validity of the contract.

the international insurance doctrine. However, it is necessary to take into account the reservation provided by the norm – if he was not aware of its invalidity at the time of signing the contract[205].

Article 821 of the Georgian Civil Code, states that the «insurer shall pay the damages only to the extent of the insured amount».

Determining the economic value of the insured property can be complicated in certain cases. For example, US courts consider it irrational to determine the exact economic value of the property in the process of destruction[206].

It is important that the economic value of the insured property at the time of occurrence of the insured event is taken into account when determining the insurance compensation.

In British common law, with regard to extent of liability for damages, the sum which the assured can recover in respect of a loss on a policy by which he is insured, in the case of an unvalued policy to the full extent of the insurable value, or, in the case of a valued policy to the full extent of the value fixed by the policy is called the measure of indemnity[207].

Where there is a loss recoverable under the policy, the insurer, or each insurer if there be more than one, is liable for such proportion of the measure of indemnity as the amount of his subscription bears to the value fixed by the policy in the case of a valued policy, or to the insurable value in the case of an unvalued policy[208].

The sum insured is usually determined according to the economic value of the property. Respectively, if the economic value of the property changes during the validity period of the insurance contract, it should be reflected in the insurance amount as well. From this point of view, the

205 K. Iremashvili, *Art. 822*, cit. With such reasoning, the good faith of the insurer is given importance. In particular, the principle of retention of paid premiums may be violated if the insurer had information about the policyholder's unlawful intent at the stage of concluding the contract. Accordingly, the Georgian legislator associates the preservation of paid premiums with the good faith of the insurer, thereby trying to achieve the prevention of unjust enrichment of the insurer himself.

206 R. H. Jerry & D. Richmond, *Understanding Insurance Law*, cit., 649.

207 See, generally, M. Song, *Insurance contract law reform in England*, cit., p. 274 ff; P. Merkin, *England*, cit., p. 83 ff.

208 P. Merkin, *England*, cit., p. 83 ff. See also M. V. Pauly, *Overinsurance and Public Provision of Insurance: The Roles of Moral Hazard and Adverse Selection*, QUART. J. L. ECON.. 1974, pp. 44-62.

Civil Code establishes the rules for regulating both excessive insurance (see 822 I) and reduced (incomplete) insurance (see 827 I)[209].

Specifically, this article performs the same controlling function as the cases analyzed above; however, unlike the Italian regulation, for example, it does not present any distinction in relation to whether it is valid in cases where there has been malice on the part of the insured.

For the rest, in the same way as the relevant Italian regulations, if there has been no malice on the part of the policyholder, the contract is effective up to the actual value of the thing insured.

3. Peculiarities of property insurance (art. 823)

In the Italian discipline, establishing the value of an asset (art. 1908, paragraph 2, Civil Code) is a central problem. In this regard, the so-called estimation clause, i.e., to the covenant by which the parties provided for estimating the value of the asset, plays a key role[210].

If that estimate turns out to be manifestly excessive, in that the value of the insured property is agreed upon in an amount that later turns out to be significantly higher than the actual value, there is, in fact, a problem of violation of the indemnity principle and, in particular, of the rule prohibiting the above-mentioned over-insurance.

Part of the doctrine has proposed that the rule that the legislature introduced through Article 1909, paragraph 2, of the Italian c.c. for over-insurance be extended to the policy estimated to be manifestly excess[211].

By virtue of this rule, as is well known, insurance for a sum exceeding the actual value of the thing insured, in the event that the parties are not aware of this excess[212], is effective up to the amount of said value, and the policyholder is entitled to obtain, for the future, a proportional reduction in the premium. Even if agreed to a different extent, therefore, the company's performance will be brought back within the limits of the loss suffered and for the future, in the case of multi-year insurance, a lower premium will be due from the policyholder[213].

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209 K. Iremashvili, *Art. 821*, in *Online Commentary on the Civil Code*, available at https://gccc.tsu.ge/. Last visited July 26, 2022.

210 P. Corrias, *Giulio Partesotti e il diritto delle assicurazioni*, cit., pp. 5-6.

211 On this point, above all, G. Partesotti, *La polizza stimata*, cit.

212 In the case of awareness of the parties, in fact, the insurance is invalid under Article 1909, paragraph 1 of the Italian c.c..

213 G. Partesotti, *La polizza stimata*, cit., p. 70 ff.

It is important to note that in this hypothesis, the legislature provides for an external intervention in the content of the contract, allowing the parties to demand its adjustment to the indemnity rule[214].

Therefore, it is possible to attribute substantive value to the estimate to the extent that the negotiated instrument allows the full implementation of the cause of compensation. Up to this point, the principles are safe and the demands of reality are adequately met[215].

Conversely, if the estimate, as manifestly excessive, results in a deviation from the cause of the contract, the court must always be able to reduce the excessive estimate by a modifying substitution of the bargaining activity, because compliance with the cause of compensation in damage insurance is imposed by reasons of public policy and is therefore inalienable[216].

214 P. Corrias, *Giulio Partesotti e il diritto delle assicurazioni*, cit., pp. 5-6. This conformative intervention – similar to that found in the case of reduction of the manifestly excessive penalty under Article 1384 of the Civil Code – is apt to operate, in addition to the just-described hypothesis expressly provided for by law, in all cases in which the agreed performance is higher than the real value of the insured property. On this point, see again G. Partesotti, *La polizza stimata*, cit., p. 87 ff.

215 G. Partesotti, *La polizza stimata*, cit., p. 91.

216 *Ibid*. The author, however, does not entirely rule out the possibility that absolute effectiveness can be recognized in the appraisal. This is possible when the contracting parties, instead of proceeding directly-that is, on the basis of a mere agreement between them-to establish the value of the property, have the appraisal preceded by a proper appraisal that guarantees the veracity of the valuation and that the parties agree to accept. In this hypothesis, in fact – which can be traced back to the case of arbitrage (art. 1349 Civil Code) – the impartial position of the appraiser, commissioned by both parties, and his qualification as an expert constitute a sufficient guarantee of the veracity of the appraisal. It cannot be ruled out, however, that the determination of the expert-arbitrator may also prove to be unfair and erroneous within the meaning of Article 1349(1) of the Civil Code. If this happens, however, the estimate-having, as noted, absolute effectiveness-will be appealable according to general principles, and the judge may substitute his own determination for that of the appraiser. P. Corrias, *Giulio Partesotti e il diritto delle assicurazioni*, cit., pp. 6-7. It is true that the latter hypothesis ends with a determination by the judge, which, in practice, may coincide with the conforming intervention that occurs in the case of a direct estimate by the contractors. However, Partesotti resolutely points out that these are distinctly different cases when the judge reduces the exaggerated estimate stipulated directly between the parties, it is only required that a (relevant, essential) divergence between the estimated value and the amount of the damage actually suffered results. The judge thus makes the reduction by comparing the two values: that is to say, he/she exclusively syndicates the result of the estimation operation carried out by the parties, in light of the principle that the insured cannot be entitled to anything more than compensation, albeit liquidated on a lump-sum basis, as was said at the time. On the other hand, the position of the judge who syndicates the determination of the third party, assumed by the parties as the basis of their agreement in the measure of the indemnity, is different. In this hypothesis, the possibility of identifying in the intervention of the expert and impartial third party a sufficient guarantee of the veracity of the valuation, means that the judge must substitute his determination for that formally attributable to the contracting parties, only insofar as he detects a flaw in the estimation procedure. G. Partesotti, *La polizza stimata*, cit., p. 144.

It deserves to be mentioned, however, how there is a subsisting difference between the actual estimate (Art. 1908, para. 3, Civil Code) and the simple declaration of value – or even "provisional" assessment of the insured thing (Art. 1908, para. 2, Civil Code). While the former has a negotiating character, in that it fixes with binding effect, with the limitations explained above[217], the indemnifiable value, the second constitutes a declaration of science by which the parties represent or attest the initial insurable value[218].

In this sense, although on the theoretical level the difference is clear, it is less easy in practice to determine whether the individual, often ambiguous statement in the documentation expresses an estimate or a statement of value.

It is believed, in this regard, that a specific acceptance of the insurable value may lean toward the former alternative and a generic acceptance may, on the other hand, lead to the latter.

In all cases, reiterating what has already been argued elsewhere, the doctrine rules out the need for the written form *ad substantiam* for the estimate and argues, instead, that the technical means adopted by the law for the purpose of the immediate determination of the meaning of the declaration, is that of a specific written acceptance of the estimate clause, that is, an acceptance distinct from the general acceptance placed at the foot of the contractual document[219].

It would seem, therefore, that a specific written declaration distinct from the contract is sufficient but not the solemn form.

It is noted, first of all, that Paragraph 2 of Article 1908 of the Civil Code, in addition to not requiring solemn form, does not even introduce a hypothesis of written form *ad probationem* since the estimation clause is already subject to the limit of testimonial evidence and by presumptions by virtue of the general rule, enshrined in Paragraph 1 of Article 1888 of the Civil Code[220].

At this point, part of the doctrine[221] argues that, contrary to what is commonly believed, the *summa divisio* between *forma ad substantiam*

217 P. Corrias, *Giulio Partesotti e il diritto delle assicurazioni*, cit., pp. 9-10.

218 G. Partesotti, *La polizza stimata*, cit., p. 158.

219 *Ibid*.

220 *Ibid*.

221 On this point, *ex multis*, A. Genovese, *Le forme integrative e le società irregolari*, RIV. TRIM. DIR. PROC. CIV., 1948, p. 119 ff; A. Genovese, *Le forme volontarie nella teoria dei contratt*i, Padua, 1949.

and *forma ad probationem*, does not exhaust the categories of the negotiation form. Indeed, the very case under consideration, namely the estimate accepted in writing between the parties, would constitute the expression of a third model, such as the "supplementary" form and, within this, it would be, even more precisely, an "interpretative" form[222].

In other words, being aware that the documentation of the estimate or declaration of value is often expressed in an unclear manner, the law intervenes by dictating the model to be followed in the documentation – that is, precisely, the written acceptance of the parties – and binding the judge in the attribution of the meaning to be given to the deed. The in-depth excursus on form is concluded by dwelling on the importance to be given to the declaration of value of the insured things (art. 1908, paragraph 3, Civil Code).

The doctrine is, in fact, opposed to completely devaluing this declaration and holds that it is distinguished on an evidentiary level from other "non-estimated" declarations insofar as it can be invoked by the insured or the insurer as evidence of the insurable value; more precisely, as a declaration of science expressing a simple presumption of the value of the insured things at the time of the conclusion of the contract[223].

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222 P. Corrias, *Giulio Partesotti e il diritto delle assicurazioni*, cit., pp. 10-11. It would operate at the interpretive moment of the declaration by overcoming its ambiguity according to the following technique. A given declaration (where precisely documented in writing), is evaluated by the law in a certain sense, chosen from among two or more meanings that it would in itself be possible to attribute to it. In other words, the rule of law operates directly on the ambiguity of the statement by resolving it, by a technical procedure approximating the well-known one alluded to when speaking of legally typified statements.

223 G. Partesotti, *La polizza stimata*, cit., p. 158. A conscious scrutiny of these original and articulate interpretative proposals of the author, which often imply a profound revisiting of well-established general categories on the subject of form, proof and interpretation of the contract, is certainly not permitted here. However, it is worth noting that, beyond the sharing in the merits of his thought, such thoughtful convictions contain insights of great importance and, above all, testify to the constant and indefatigable effort to re-examine the questions that remain open in an exquisitely systematic key, with the aim of identifying and proposing concrete solutions only after having well screened on a technical-legal level - one would say, resorting to a word that is perhaps, wrongly, no longer current, dogmatic – their compatibility with the general principles of the system. Recently, on the recurring question of the method V. Calderai, *L'eclissi in una luce diversa. Note sullo statuto epistemologico dei concetti giuridici nell'epoca del diritto post-nazionale*, RIV. DIR. CIV., 2016, p. 1620 ff, spec. 1634 ff.

The Georgian civil code in the article 823 states that «the value of a property shall be deemed to be the amount of the property insurance, unless otherwise determined by the circumstances of the case». It is noteworthy that in Italy does not exist a specific rule similar to the Georgian one; the merit of this provision is precisely that it establishes, through a specific rule, what the limits are to the value of the insurable property.

According to the norm, the value of the property will be considered as the insurance amount, unless otherwise provided by the circumstances of the case[224].

In insurance practice, the insurance amount is determined as a result of the economic value of the object of insurance (see the comment on Article 821). The norm does not have an imperative character, and the reservation provided in it provides the possibility of deviating from the rule. In particular, it is possible for the insurance amount to be determined by the amount less than the value of the object of insurance[225].

In addition, the definition of the reservation provided in Article 823 should be based on the principle of compensation (see the comment on Article 820). In particular, if the insurance amount exceeds the economic value of the insured object, the policyholder should not receive compensation in excess of the incurred loss. Such an opinion is read in the norm provided for in Article 826[226].

4. Insurance of lost benefit (art. 824)

Very often in practice it happens that, when a claim occurs, the insured neglects to fulfill some of the obligations that the law and the insurance contract place on him.

Among the duties imposed on the insured, the best known is certainly the obligation to report the claim governed by Article 1913 of the Italian Civil Code, which must be formalized to the insurer, or to the agent authorized to conclude the contract, within three days from the moment the

224 K. Iremashvili, *Art. 823*, in *Online Commentary on the Civil Code*, available at https://gccc.tsu.ge/. Last visited July 26, 2022. The author states that, from a systematic point of view, it would be desirable to form the norms provided in 823 and 821 into one article.

225 *Ibid*.

226 *Ibid*. Eventually, the practical purpose of the norm provided for in Article 823 is expressed by the fact, that if the parties did not determine the amount of the insurance amount in the contract, the economic value of the property will be considered as such.

event occurs or from when the insured becomes aware of it, and whose purpose is to enable the company to take the necessary steps in a timely manner to protect its own interests and those of the insured[227].

Such initiatives include the insurer's right to appoint attorneys or experts to ascertain the causes of the damage and its amount, as well as to seek an amicable solution between the parties or to implement actions aimed at eliminating or limiting the damage.

In this last respect, the duty of rescue provided for in Article 1914 of the Civil Code, which consists of the insured's duty to do everything possible to avoid or diminish the damage, is particularly important[228]. This duty, however, is very often neglected by the one who has contracted insurance coverage, mainly due to the belief that he or she will not be personally liable for any disbursement, since, in the presence of the company, he or she will be indemnified or held harmless by it in the face of the injured third party's claims for compensation[229].

The obligation to rescue comes, in the first place, to the fore at the occurrence of the loss, a moment at which precisely the insured is immediately in a position to perceive and attempt to curb the injury[230].

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227 M. Mazzola, *La clausola claims made and reported: a proposito di alcune criticità nel trapianto giuridico*, RIV. ASS., fasc. 3, 2021.

228 P. Corrias, *Giulio Partesotti e il diritto delle assicurazioni*, cit., pp. 2-3. This duty can be considered to be placed to protect a general interest, because it achieves the result of decreasing claims or at least preventing the propagation of harmful consequences. This avoids a decrease in national wealth and the dangers inherent in the damaging fact that may arise even in people's lives. G. Partesotti, *La polizza stimata*, cit., p. 85.

229 For an in-depth analysis of this duty of rescue see P. Corrias, *Sinistro, danno e rischio nell'assicurazione della responsabilità civile (Commento a Cass. civ., 19 gennaio 2018, n. 1465 (Ord. interl.)*, RESP. CIV. PREV., 2018, p. 905. The cooperation of the insured is crucial in several respects to enable the insurer, who will be called upon to pay the indemnity, to avoid or diminish the damage and consequently also the eventual payout, since the company, which has remained until the opening of the claim extraneous to the fact that is the subject of the insurance affair, does not hold the necessary tools and information, which instead are available to the insured or at any rate within its sphere of action. The latter has, in fact, knowledge of the course of events, holds any documentation related to the case, as well as the correspondence that has taken place with the complainant, and above all is the one who is able to intervene in the immediacy of the event to limit or eliminate the damage.

230 *Ibid*. Just think, for example, of two adjoining properties and the occurrence of a water leak from the pipes of one of the two dwellings affecting the adjoining one: in such a case, where the owner of the first dwelling unit remedies the cause of the damage, for example by stopping the water leakage, he will be able to limit or eliminate the injury to the detriment of the other dwelling affected by the spill).

However, this obligation, although perhaps less obvious, is no less significant at a later stage, when the damage has already occurred and, above all, on a legal level, attempts to circumscribe its consequences[231].

In such cases, it is not uncommon for the insured to object or otherwise resist in the face of a settlement, especially when litigation is already underway and they are defending themselves with their own trusted legal counsel, as there may be a belief for the insured that the absence of their own liability will be affirmed either in the intent to save on the insurance deductible, or in any case in the presumption that, in the worst case scenario, it will be the company called upon to indemnify the claim.

Such conduct constitutes a breach of the insured's obligation to rescue, as it precludes the insurer from limiting the loss[232].

To protect the position of the insurer, who would otherwise be left "at the mercy" of the insured's determinations, the law, specifically Article 1915 of the Civil Code, allows companies to plead breach of the duty to rescue and thus prevent a greater outlay where, to return to the above example, there has been carelessness on the part of the insured with respect to the opportunity for a settlement agreement[233].

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231 *Ibid*. Consider the hypothesis in which the company deems it convenient to reach a conciliatory solution with the injured party, making a certain disbursement that saves in terms of expenses and costs and does not expose the insurance company to the hazards of the judgment.

232 R. Santagata, *Polizze assicurative parametriche (o index-based) e principio indennitario*, in *Orizzonti del Diritto Commerciale*, Roma, 2022, p. 36. The important role that contractual autonomy can play in enhancing the binding nature of the rescue obligation should not be overlooked. In particular, it is certainly indisputable that it is impossible to provide for forfeiture clauses of the right to indemnity even in the case of culpable violations, precluding the provision of Article 1932 of the Civil Code, which provides for the automatic substitution (by the corresponding provisions of law under Article 1339 of the Civil Code) of conventional provisions that establish more unfavorable conditions for the insured on the subject of (warning and) rescue obligations. For an overview of these clauses see G. Scalfi, *I contratti di assicurazione. L'assicurazione danni*, cit., p. 207 ff, where the clarification that a "simple" deductible means the provision that excludes from compensation damages below a certain amount; the "absolute" deductible, on the other hand, allows the insurer to make a deduction from the indemnity due to the insured. On the same point, also C. F. Giampaolino, *Le assicurazioni*, cit., p. 348 ff, which highlights the positive effect of deductibles on the stability of the technical-insurance process of risk neutralization.

On the other hand, nor is it disputable, that even in parametric policies it is possible to include negotiated provisions aimed at involving the insured in the management of the risk, urging its interest in preventing the loss and taking all necessary measures to reduce the potential damage.

233 P. Corrias, *Sinistro, danno e rischio nell'assicurazione della responsabilità civile (Commento a Cass. civ., 19 gennaio 2018, n. 1465 (Ord. interl.)*, cit., pp. 905-906.

The same remedy can be invoked if the beneficiary of the policy fails to cooperate in other respects, and thus fails, for example, to provide the elements and documents necessary for the company to prepare an adequate defense on the merits, whether judicial or in the pre-litigation phase[234].

It is interesting to note that the safeguarding of the general interests underlying the rescue charge, although not substantially dissimilar to the demands garrisoned by the indemnification principle[235] has certainly less poignancy than the latter, as attested to: in the Italian legal system, by the failure to include the obligation to rescue among the rules declared mandatory by Art. 1932 of the Code[236]; at the comparative level, by its absence in legal systems traditionally close to the Italian, such as French law[237].

The Georgian article in comment states that insurance shall apply to the benefits lost due to the occurrence of an insured event, if so provided for in the agreement.

In fact, article 824 regulates the insurance of unearned benefits. According to the norm, the insurance also applies to unearned benefits caused by an insured event, if this is stipulated by the agreement[238].

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234 *Ibid*. Under this last profile, it should be pointed out that the insurance company is always extraneous to the facts deduced by the injured party and/or the damaging party, therefore it only learns about them through the files and information provided by such parties, so that without the help of the insured it is not alone able to effectively counter the claims of the claimant. In such cases, if the insured sets itself up with its own defense counsel at trial, it is its responsibility to prepare adequate defenses in order to avoid, or at least limit, any damages, since its conviction would inevitably affect the insurer's obligation to indemnify. The same is also true in the pre-litigation phase, where information from the insured appears all the more indispensable for the purpose of assessing and settling the claim. *Ergo*, where the insured fails to take action by cooperating with the company, the Code allows for the protection of Art. 1915 of the Civil Code in favor of the insurer, which would otherwise remain exposed to the risk without the possibility of defending itself on the merits, as it lacks the necessary information and tools that are instead available to the insured.

235 For the exact identification of the basis of the rescue obligation, it is still essential to read the page of G. Partesotti, *La polizza stimata*, cit., p. 85.

236 See A. De Gregorio & G. Fanelli, *Il contratto di assicurazione*, cit, p. 137.

237 For an analysis of this point, see Y. Lambert Faivre & L. Leveneur, *Droit des assurance*, Paris, 2011, p. 378.

238 Article 824 is similar to article 831 in reference to the need for agreement, which considers force majeure insurance to be permissible only in case of agreement of the parties (see comment on Article 831).

According to the norm, income is considered unacceptable, which the person did not receive and which he would have received if the obligation had been properly fulfilled. In the case of insurance, the damage is caused not by non-fulfilment of the obligation, but also by realization of insurance risk[239].

5. Insurance of unity of things (art. 825)

The article 825 states that «[i]f a unity of things is insured, the insurance shall apply to all the things in it».

The norm is provided to regulate the insurance of a combination of things. Specifically, the article in comment considers permissible to insure not only one specific item, but also several items (combination of items) at the same time[240].

In this case, the insurance amount is determined according to the economic value of the set of items. In the event of damage, the insurance compensation is determined according to the damaged (destroyed) item(s) and their economic value[241].

From a comparative point of view, it is important to note that this provision does not find similar norms either in the Italian discipline or in other legal experiences.

In Italy the same result can be achieved on a private basis since it is not prohibited by public policy to draft a contractual text into which this

239 K. Iremashvili, *Art. 824*, in *Online Commentary on the Civil Code*, available at https://gccc.tsu.ge/. Last visited July 26, 2022. According to the author, an example of unearned benefit insurance in insurance practice is crop insurance.

The agreement on the insurance of unacceptable benefits requires the parties to describe the insurance risk and its realization (insurance event) in detail. Like other types of insurance, the insurance amount and the criteria for determining the insurance compensation should be determined. In this case, it may be convenient for the parties to agree on a fixed amount. Certain difficulties may be associated with determining the exact amount of damages in the case of unearned benefits insurance. This is of crucial importance in determining the insurance compensation. The best mechanism for dispute prevention is the unequivocal and comprehensive formulation of the terms of the contract. *Ibid*.

240 K. Iremashvili, *Art. 824*, in *Online Commentary on the Civil Code*, available at https://gccc.tsu.ge/. Last visited July 26, 2022. According to the athor, an example of a set of things is the so-called family property, office equipment, etc.

241 *Ibid*. For example, according to the insurance contract, the object of insurance was defined as office equipment. As a result of the insurance accident, only the furniture was damaged. In such case, the insurance compensation is issued only for the damage caused by damage to the furniture.

kind of provision can be translated. In other words, the parties can decide to insure individual goods (e.g., antiques, art goods, etc.) and insure them either as a universality of goods, as a group of goods or as individual identified goods and as such insurable *uti singuli*.

6. Amount of insurance compensation (art. 826)

The Georgian article in comment states that «[t]he insurer shall not be obligated to pay the policyholder any sum in excess of the extent of the damage even if the insured amount exceeds the insured value at the moment when the insured event occurs».

The corresponding discipline in the Italian law is contained in the article 1905 of the civil code. It affirms that the insurer is obliged to compensate, in the manner and to the extent established in the contract, the loss suffered by the insured as a result of the loss; the insurer, in addition, is liable for the profit hoped for only if it has expressly obligated itself.

Although the verb "to compensate" is used in art. 1905, it does not refer to compensation in the technical sense since the obligation is not connected to any liability, but to the fulfillment of a contract[242].

Therefore, the doctrine does not consider transferable to the subject matter the principles governing compensation in the proper sense[243] – for example to the causal link between damaging fact and damage, considering compensable only the damage that affects the insured thing directly and in its materiality, thus excluding the so-called loss of profit or loss of earnings, such as, for example, the damages of the inactivity of a company resulting from the fire of the premises in which it is placed[244].

In any case, the limit set by the indemnity principle, according to which where there is no damage there can be no insurance, remains firm[245] and, therefore, the indemnity can never exceed the actual damage without transforming the compensation into enrichment[246].

242 Cass. Civ., July 9, 1963 no. 2210, GC 1963, 2439.

243 *Ex multis*, F. Moliterni, *Sub art. 1904*, in G. Volpe Putzolu (ed.), *Commentario breve al diritto delle assicurazioni*, Padua, 2010, p. 65.

244 See A. De Gregorio & G. Fanelli, *Il contratto di assicurazione*, cit., p. 122 ff.

245 G. Fanelli, *Le assicurazioni*, cit., pp. 76 ff, 91, 190 ff, 230 ff; R. Calvo, *Il contratto di assicurazione. Fattispecie ed effetti*, TR. RESP. CIV., directed by Franzoni, Milan, 2012, p. 117 ff.

246 F. Santi, *Il contratto di assicurazione*, Rome, 1965, p. 304 ff.

In other words, the damage will be indemnifiable if it is in an adequate causal relationship with the accident that produced it[247] and the amount of compensation to which the insurer is bound will be marked by the damage suffered by the insured as a consequence of the accident, having to exclude, both the loss of profit resulting from the accident and the damage not caused by the accident directly to the insured thing[248]: the function of insurance against damages is seen, in fact, in reinstating the injury of the interest within the limits of this, so that the interest in that the injury does not occur must always prevail, since an interest in that it does occur cannot be admitted[249].

And it is in this sense that the indemnity principle fulfills a public policy function[250], being closely interpenetrated in the cause of the contract of insurance against damage[251] as it is coessential to the economic-social function of insurance against damage[252]; this is clear from the legislative definition itself[253] as well as by the article under consideration and other norms of the section[254], and is accepted by legal systems legal systems of all countries[255].

The rule under analysis, requires the insurer to pay damages to the insured in the manner and within the limits stipulated in the contract.

The contractually stipulated ways and limits, reflecting the relationship between the insurer's obligation and the insured's interest, reveal the synallagmatic nature of the insurance contract and justify the correspondence between the amount of the premium owed by the insured and the

247 A. De Gregorio & G. Fanelli, *Il contratto di assicurazione*, cit., p. 122.

248 *Ibid*.

249 G. Fanelli, *Le assicurazioni*, cit., p. 78.

250 V. Salandra, *Delle obbligazioni, artt. 1861-1932*, COM. S.B., Bologna-Rome, 1966, p. 304 ff.

251 M. Rossetti, *Il diritto delle assicurazioni, II, Le assicurazioni contro i danni*, Padua, 2012, p. 4 ff.

252 A. De Gregorio & G. Fanelli, *Il contratto di assicurazione*, cit., p. 109 ff (see both the text and the footnotes).

253 See Art. 1882 c.c., para. 1.

254 See Artt. 1904, 1908 para. 1, 1909, 1910 para. 3.

255 A. La Torre, *Scritti di diritto assicurativo*, Milan, 1979, p. 46. For significant feedback case law, the following maxim is quoted: the amount of compensation payable by the insurer can never exceed the amount of the loss suffered by the insured since insurance, being protected by law exclusively as a means of preserving assets, must never become a source of enrichment nor constitute an incentive to facilitate the occurrence of events which, by causing a destruction of wealth, are harmful to the public economy. G. Ballarini, *Sub art. 24*, in *Le Assicurazioni*, A. La Torre (a cura di), Milan, 2014, p. 191.

content of the insurer's obligation. In this sense, it is precisely the determination of the policy premium that assumes decisive value for the purpose of identifying the type and maximum limit of the insured risk, so that the synallagmatic balance can be deemed to be concretely respected between the mutual benefits[256].

With regard to the ways of compensating for the damage, these traditionally consist of, in the disbursement of a sum of money corresponding to the damage suffered (on a par with of compensation for equivalent), or, for certain particular branches of insurance, also in benefits in kind, (such as with reference to the legal assistance) in greater compliance with the indemnity principle and the satisfaction direct satisfaction of the insured's interest and the direct removal of the damage (on a par with compensation in specific form)[257].

The specification of the contractually stipulated limits within which the insurer is obliged to indemnify damages allows the parties to contractually determine the subject matter of the contract and the extent of the insured risk, defining the scope through specific limiting clauses. In this regard, however, a distinction must be made between clauses limiting the subject matter of the contract and clauses limiting the insurer's liability[258]: the former, aimed at specifying the guaranteed risk, pertain to the determination of the content and limits of the insurance guarantee; the latter, directed at limiting the consequences of fault and default or excluding the guaranteed risk, given their vexatious nature, must be specifically signed by the insured, under Article 1341 of the Civil Code[259].

In the German law, this principle is expressed in Section 74 of VVG, which provides, in the first paragraph, that in the cases in which the sum insured considerably exceeds the value of the insured interest (insurable value), each contracting party may request that the sum insured be re-

256 G. Ballarini, *Sub art. 24*, cit., pp. 191-192.

257 A. Donati & G. Volpe Putzolu, *Manuale di diritto delle assicurazioni private*, cit., p. 65.

258 G. Ballarini, *Sub art. 24*, cit., p. 192.

259 Cass. Civ., April 7, 2010, no. 8235, GC 2011, I, 199, with note by M. Rossetti; concurringly, Cass. Civ., January 11, 2007, no. 395. In this regard, the Supreme Court specified that clauses that make the operation of the insurance guarantee conditional on the adoption by the by the insured of security measures in defense of the protected asset, do not realize a limitation of the insurer's liability, but rather, identify and delimit the object of the contract and the insurer's risk.

duced with immediate effect in order to eliminate the overinsurance, thereby also reducing the premium proportionally[260].

The second paragraph, moreover, states that if the policyholder concludes the contract with the intention of gaining an illegal pecuniary benefit on account of the overinsurance, the contract shall be void; the insurer shall be entitled to the premium up until such time as he learned of the circumstances establishing nullity[261].

In addition, it is provided also in the VVG that the insurable value may be determined by agreeing on a certain amount (agreed value). The agreed value shall also be deemed to be the value of the insured interest upon occurrence of the insured event, unless it considerably exceeds the actual insurable value at that point in time. If the sum insured is less than the agreed value, the insurer shall only be liable to compensate the loss in the proportion that the insurable value bears to the agreed value, even if the agreed value is considerably overstated[262].

The purpose of the article 826 of the Georgian civil code refers to the main principle of property insurance — the indemnity principle[263].

According to this norm the insurer is not obliged to pay an amount greater than the incurred loss in the form of compensation, if the insured amount exceeds the insured value at the time of the occurrence of the insured event. In this way the legislator clearly expresses the goal of preventing unjust enrichment in property insurance[264].

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260 See, on this point, M. Zimmerling & A. Pfeiffelmann, *Germany*, INS. DISP. L. REV., 2021; T. R. Berry-Stolzle & P. Born, *The Effect of Regulation on Insurance Pricing: The Case of Germany*, J. RISK & INS., Vol. 79, No. 1, 2012, 129-164; M. Wandt & K. Bork, *Disclosure duties in German insurance contract law*, in *Zeitschrift für die gesamte Versicherungswissenschaft*, 2020, 81-103.

261 See, for an in-depth analysis of the Section 74 VVG S. Perner, W. Schnepp, A. Staudinger *et al*., *Band 3 §§ 74-99 VVG*, *Volume 3: §§ 74–99 Insurance Contract Act*, 2020.

262 Section 76 VVG, "Agreed value".

263 The interpretation of the norm requires its consideration in relation to 820, 823 and 821.

264 K. Iremashvili, *Art. 826*, in *Online Commentary on the Civil Code*, available at https://gccc.tsu.ge/. Last visited July 25, 2022. The economic value of the property is variable. It may decrease as a result of wear and tear, also with the occurrence of an unforeseen event with insurance coverage, market conditions, or other factors. For cases of reduction in the economic value of the property, the legislator establishes a mechanism for the prevention of excessive insurance (see comment on Article 822 I). However, even in case of non-fulfillment of the requirement stated in Article 822 I, the liability of the insurer cannot exceed the amount of the damage incurred. Such content is read according to the norm established in Article 826. *Ibid*.

It is important to analyze the arrangement of the words of this article, because the term "even" is stated in the norm. It is worth considering the mentioned, because in the property insurance regulation norms, the Code nowhere directly states the prohibition of compensation in the amount greater than the actual damage.

However, Article 826 is the only article in property insurance regulatory norms, in which the legislator directly states this prohibition. In conclusion, the statement specified in the norm allows the judge to interpret it broadly[265].

It is interesting to note that the art. 826 of the Georgian civil code refers also to the cases in which the insured amount exceeds the insured value at the moment when the insured event occurs. In the Italian case, in the paragraph of art. 1905 the doctrine sees an application of the rule that damage in the insurance sense is that concerning the thing in its materiality and notes how this rule is derogated from by the last paragraph of Article 1908, which in the insurance of products of the soil includes fruits not yet ripened at the time of the loss[266].

Because of the indemnity principle, the compensation owed by the insurer does not normally include the hoped-for profit, being exclusively aimed at covering the emerging damage[267]. In doctrine there is a tendency to consider, in fact, coinciding the concept of hoped-for profit with that of lost profit[268].

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265 *Ibid*. The influence of the compensation principle can be seen during the analysis of the separate norms (article 827 III provides a similar reference).

266 A. De Gregorio & G. Fanelli, *Il contratto di assicurazione*, cit., p. 124.

267 F. Moliterni, *Sub art. 1904*, p. 69.

268 A. De Gregorio & G. Fanelli, *Il contratto di assicurazione*, cit., p. 123. For an earlier contrary thesis see A. Gambino, *Le assicurazioni del profitto sperato o della perdita del beneficio: valore a nuovo, valore forfettario e il principio indennitario*, ASSICURAZIONI, 1966, I, p. 72. By "hoped-for profit" is meant, in fact, the well-founded expectation of those economic utilities which, without the loss, the insured would have attained with reasonable certainty (G. Fanelli, *Le assicurazioni*, cit., p. 158), such as, for example, the rents that the owner comes to lose (lost profit) as a result of the destruction or damage of the property already rented. But insurance coverage, in such cases, can operate only if it is expressly agreed upon by means of a supplementary guarantee (A. Donati & G. Volpe Putzolu, *Manuale di diritto delle assicurazioni private*, cit., p. 166); however, apart from the ass. of "soil products" (see. sub art. 1908, para. 3), Legislative Decree No. 175 of 1995 (on non-life ass.), which contemplates the line of business pecuniary losses of various kinds, offers the possibility of an independent guarantee for certain cases of hoped-for profit, such as loss of profits and insufficiency of income (G. Scalfi, *Assicurazione (Contratto di)*, cit., p. 202).

7. Underinsurance or partial insurance; double insurance (art. 827) and its invalidity (art. 828)

Article 827 of the Georgian civil code refers both to the case in which the insured mount is less than the insured value at the moment when the insured event occurs (underinsurance or partial insurance) and the case in which the person who has insured the same interest concurrently with several insurers.

In the first case, the law provides that the insurer shall pay the damages according to the ratio of the insured amount to the insured value. In the second case, the insured shall immediately notify each insurer about it. The notice shall indicate the identity of all the insurers and the amount of insurance.

According to Article 1907 of the Italian civil code, if an asset is assured for less than its actual value, the insurance company will reimburse in proportion to the insured value. Therefore, underinsurance occurs when the amount you decide to insure is less than the actual value of the property on which the insurance coverage acts.

Underinsurance is defined as when the value of the insured property or the amount paid to cover any claims (insured value) is less than the actual value of the property at the time when a damaging event occurs to the same property. In the case of underinsurance, in fact, the so-called proportional rule applies, unless otherwise agreed by the parties.

It is necessary to start from the hypothesis in which the insured intends to supplement only partial insurance coverage. As is well known, underinsurance is usually taken out, to use the icastic terminology of economic analysis, in order to contain the problem of so-called moral hazard, *i.e.* the possibility that the insured, enjoying the coverage of the risk, loses all interest in taking action, as far as it may depend on him, to avoid or diminish the damage[269].

In German law the case of underinsurance is regulated by the Section 75 VVG which provides that, if the sum insured is considerably less than the insurable value upon the occurrence of the insured event, the

269 D. Semeghini, *Assicurazione cumulativa e principio indennitario*, cit., 2012, pp. 645-646. In Italian doctrine the emphasis is quite common, although one almost never encounters explicit references to the categories of economic analysis [reference is sometimes made to the so-called subjective risk: see for example G. Partesotti, *La polizza stimata*, cit., p. 68; T. Ascarelli, *Sul concetto unitario del contratto di assicurazione*, in *Studi in tema di contratti*, Milan, 1952, p. 356 ff.

insurer shall only be liable in the proportion that the sum insured bears to this value.

The law provides that the insurer has an obligation to inform the policyholder of the risk of underinsurance and the importance of replacement values to the sum insured[270].

However, there is a tendency to strictly require objective cause and the insurer's ability to recognize it[271].

It should also be noted that there must always be an opportunity to review existing insurance coverage, i.e., general advice need not be provided[272].

In relation to the double – or cumulative, also known in practice as indirect co-insurance – insurance the Italian law at art. 1910 c.c. presupposes a plurality of insurances, taken out with different insurers (thus not with only one), jointly operative[273] and having identity of content as to the following elements: a) the object (e.g., the same house); b) the risk, which must be the same (e.g., fire); c) the duration in time (i.e., contemporary, not successive); d) the interest (concerning, e.g., the property and not the usufruct or the creditor's mortgage guarantee)[274].

Multiple insurances come to cumulate, being intended to function simultaneously and not one subordinate to the other, as is the case with subsidiary insurances, that is, when one of them is operative only if the

270 *OLG Karlsruhe*, VersR 2013, pp. 885 ff.

271 Cf. *BGH*, VersR 2014, pp. 861 ff. (p. 862); *OLG Karlsruhe*, VersR 2013, pp. 885 ff. (p. 886); *OLG Saarbrücken*, VersR 2011, pp. 1556 ff. (regarding the old VVG).

272 M. Wandt & K. Bork, *Disclosure duties in German insurance contract law*, German national report. World congress of the International Insurance Law Association (AIDA), 2018.

273 *Ex multis*, F. Moliterni, *Sub art. 1910*, in G. Volpe Putzolu (ed.), *Commentario breve al diritto delle assicurazioni*, Padua, 2010, p. 80.

274 M. Rossetti, *Il diritto delle assicurazioni, II, Le assicurazioni contro i danni*, cit., p. 53 ff. The concurrence of these elements, which the 1st paragraph summarizes in the formula for the same risk ... the insured, implies the referability of the various insurances to one and the same person: whether it is the insured himself who has taken them out or others for him (V. Salandra, *Dell'assicurazione*, cit., p. 328, who also notes that the law speaks of insurances that are contracted and not already that the insured has contracted). It does not seem that some judgments were of this opinion, which, in the past, had excluded the applicability of Article 1910 when, having concluded the insurance on behalf of others or on behalf of whom it is due, the insured (not a policyholder) also takes out another one for the same risk. But later case law has affirmed that Article 1910 applies as much if the insurances were taken out by the same insured person as by different persons and only after it is established that the beneficiary of them is the same person (G. Ballarini, *Sub art. 29*, cit., pp. 212-213), reiterating that, for the purposes of Article 1910, only the identity of the insured and not also that of the policyholder counts.

first does not operate, because it is conditional on the invalidity of the latter or the insolvency of the insurer[275].

Also distinct is the hypothesis of supplementary insurances, also known as "second-risk" insurances, concerning the case in which the effectiveness of an insurance is limited to the part of the loss that exceeds the amount covered by the others[276].

The freedom to insure the same risk with different insurers does not, in principle, find an obstacle in the law because multiple insurance can be a source of lawful advantages: both for the insured, who will be able to count on a broader front of debtors in the event of a claim; and for the insurers, who will see the size of their respective benefits diminished.

But this freedom finds a limit in the bulwark of the indemnity principle[277]: in fact, it, even more than in single overinsurance – where the policyholder bears a higher premium for the excess of the insured value – is exposed to the danger of being circumvented precisely in multiple insurance[278], where the policyholder pays several premiums for the same risk.

This costly excess of coverage may well be provoked by the intent to profit, in the event of a claim, from a hoped-for or attempted multiplicity of compensations for the same damage: an intent that the multi-insured can realize all the more easily (as compared to over-insurance with a single company) since he is entitled to apply distinctly to several insurers, who may even ignore each other[279].

Hence the real possibility that he, by cumulating the various indemnities, will come to receive a total amount higher than the actual loss. And it is precisely against such a hypothesis, which is far from theoretical, that the discipline dictated by Art. 1910, the purpose of which is precisely that of preventing that danger by making each insurer aware of the insurance taken out with others: this by means of an "information alert" system for which the law makes the same (and only) insured party responsible: the regulatory imposition of the burden on the insured to give notice of all insurances to each

275 V. Salandra, *Dell'assicurazione*, cit., p. 326 ff, where *reprise d'assurance* is spoken of, for the case in which the insured, doubting the solvency of the first insurer, cedes to the next the rights deriving to him from the first contract

276 A. Donati & G. Volpe Putzolu, *Manuale di diritto delle assicurazioni private*, cit., p. 155; A. Sotgia, *Assicurazione plurima, coassicurazione, doppia assicurazione*, ASSICURAZIONI, 1953, I, p. 29.

277 Cass. Civ., April 10, 2002 no. 5119.

278 V. Salandra, *Dell'assicurazione*, cit., p. 326; G. Scalfi, *Assicurazione (Contratto di)*, cit., p. 208.

279 G. Ballarini, *Sub art. 29*, cit., pp. 213-214.

insurer, and by providing for the exemption of insurers from payment of indemnity in the case of willful failure to give notice, is aimed primarily at preventing the insured from pursuing profit by achieving undue enrichment[280].

This complex information system, intended to be reflected in the various legal positions involved, is first of all garrisoned by the serious sanction that the 2nd paragraph imposes on the insured person if he wilfully fails to give the notice provided for in the previous paragraph, since in that case the insurers are not obliged to pay the indemnity: it is not bound, therefore, by none of them, not even the first (with respect to which the omission was not had been willful), nor must they return the premiums legitimately collected[281].

The insured's maliciousness, which consists in conduct preordained for the purpose of obtaining compensation greater than the damage actually suffered, is to be proved, but will be easily inferable from the claim for indemnity he made to all insurers without having given them notice of the other insurers[282].

Outside of these hypotheses, and thus in the physiology of the relationships to which it gives rise multiple insurance, the rule is that the multiple insured may claim from each insurer for the indemnity due according to the respective contract, but with the limitation arising by the indemnity principle, namely, provided that the total sums collected do not exceed the amount of the damage[283].

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280 *Ibid*.

281 V. Salandra, *Dell'assicurazione*, cit., p. 329; G. Scalfi, *Assicurazione (Contratto di)*, cit., p. 209, recalling Art. 1909, para. 1.

282 V. Salandra, *Dell'assicurazione*, cit., p. 329. The insured's forfeiture of the right to indemnity depends on the willful omission of the duty to warn; but it may also depend on the non-willful omission, if this is expressly provided for by the policy.

283 G. Ballarini, *Sub art. 29*, cit., pp. 214-215. This means that, in order to obtain the indemnity to which he is entitled, the insured: a) is entitled to apply indifferently to any of his insurers – with a choice that among other things puts him safe from the insolvency or disputes of any of them – by asserting the right arising from the relevant contract, as if it were the only one he (or for him) entered into; b) he may thereby obtain the whole, that is, the sum corresponding to the damage suffered, and then he will have nothing else to claim from the remaining insurers; (c) to whom, otherwise, he may apply for the remainder, according to their respective contracts, until the amount of indemnifiable loss is completed, but within the limit of the value insurable (art. 1909), i.e., not more than the amount of the loss. V. Salandra, *Dell'assicurazione*, cit., p. 330; G. Scalfi, *Assicurazione (Contratto di)*, cit., p. 209. See also Cass. Civ., October 14, 1988 no. 5596, according to which, if one of the insurers is in compulsory liquidation, the insured who wishes to obtain from the others their share of the indemnity has the burden of insinuating himself into the liquidation proceedings, otherwise lacking proof of the partial or total inability to obtain payment from the first insurer.

It may therefore be the case that, having been compensated for the entire loss by one of the insurers, the remainder would be unjustly relieved of their contractual obligation, if the equalization of the various legal were not provided by the 4th paragraph: under which the insurer who has paid has a right of recourse against the others for the proportional apportionment by reason of the indemnities due according to their respective contracts[284].

Then, the Italian discipline provides for a similar type of insurance, the so-called co-insurance (art. 1911 Italian c.c.).

Apart from the subjective plurality of insurers, which is the datum present in both multiple insurance and co-insurance, otherwise the two phenomena (the former of which is centered on the exclusive interest of the insured, while the latter is more visible from the perspective of insurance technique: see par. above), are clearly differentiated. Multiple or cumulative insurance moves from the unilateral initiative of the (multiple) insured, tends to aim at a surplus of coverage, and takes the form of a multiplicity of insurance contracts (for the same risk) taken out, separately from each other, with insurers who most often ignore each other (except for the duties of notice to which the insured is bound: see sub-article 1910). On the contrary, co-insurance moves from joint initiatives, it aims not to multiply but to balance the coverage of the risk within the same

284 G. Ballarini, *Sub art. 29*, cit., p. 214. This right of recourse is analogous, though not quite the same, to that which accrues to the joint and several debtor under Article 1299 of the Civil Code (Cass. Civ., September 19, 1997 no. 9554, CG 1998); it tends to avoid unjust enrichment of one or more insurers to the detriment of those among them who have paid the full amount or at least to a greater extent in relation to the others (for whom it excludes the qualification of jointly and severally liable. G. Scalfi, *Assicurazione (Contratto di)*, cit., p. 209 ff, where other doctrinal references); and it is the means, precisely, of re-establishing among the various insurers the proportional division mentioned in the 4th paragraph.

In this regard, recourse between insurers who, with independent contracts, have covered the same risk, constitutes an autonomous right arising from the payment of the indemnity, so that it is from that moment that the statute of limitations (two years, pursuant to Article 2952 of the Civil Code) of the right in question begins, and not from the occurrence of the risk deduced in the contract. M. Rossetti, *Il diritto delle assicurazioni*, cit, p. 60. Moreover, if one of the insurers, on the basis of his contract, considers the guarantee inoperative, it is clear that he, just as he could have opposed such an exception to his insured (if defendant by him), so can he oppose it to the other insurers if by them defendant in recourse. G. Ballarini, *Sub art. 29*, cit., p. 215.

insurance and this is taken out (no matter if by means of a single document) with a group of insurers who, after agreement among themselves, share it by determined quotas on the basis of an agreement. And it is precisely on this agreement, placed in the context of an objectively unitary negotiating structure, that the characterizing feature of co-insurance and the most obvious (but not the only) difference from multiple insurance is usually seen[285].

Risk sharing by agreement between insurers is enforceable against the insured only if the insured is aware of it[286].

Article 1911 does not have the nature of a mandatory rule and, since it is dictated in the interest of insurers, there is nothing to exclude that they, renouncing favor legis, establish an obligation jointly and severally rather than in proportion to their respective shares: however, this is a highly improbable eventuality which, if it does not even lead to degrading the case in multiple insurance (ex art. 1910), would in any case give rise to an anomalous or at least atypical hypothesis of co-insurance, which in itself excludes solidarity[287].

Co-insurance is not excluded by the fact that the policy was signed by only one of the insurers since the written form is required (Art. 1888 Civil Code) not *ad substantiam* but *ad probationem*, so it can also result aliunde and from writings other than from the policy[288].

On the dual premise that the written form is provided for only *ad probationem* and that co-insurance postulates a plurality of (co-)insurers, case law has repeatedly addressed the issue of the individual insurer who enters

285 G. Ballarini, *Sub art. 29*, cit., p. 220. Thus in doctrine, *ex multis*, A. Donati, *Trattato del diritto delle assicurazioni private*, cit., p. 267 ff; A. De Gregorio & G. Fanelli, *Il contratto di assicurazione*, cit., p. 133 ff; G. Fanelli, *Le assicurazioni*, cit., p. 200 ff; A. Donati & G. Volpe Putzolu, *Manuale di diritto delle assicurazioni private*, cit., p. 151; N. Gasperoni, *Assicurazione (in generale)*, cit., p. 103.

286 Cass. Civ., June 9, 2003 n. 9199, DG 2003, 34, with note of Sangiorgio.

287 A. La Torre, *Scritti di diritto assicurativo*, cit., p. 326 ff; A. Sotgia, *Assicurazione plurima, coassicurazione, doppia assicurazione*, cit., p. 130 ff.

288 Cass.Civ., August 23, 1985 n. 4500; Cass. Civ., January 26, 1988 n. 661; Cass. Civ., April 2, 2001 n. 4799, RCP 2001, 1211, with note of S. Pizzotti, *La responsabilità del conduttore-assicurato e la responsabilità del coassicuratore delegatario, in caso di incendio della cosa locata*.

into the contract declaring that he is acting in co-insurance with others, not stipulants, but allegedly represented by him as *falsus procurator*[289].

Under the German law, anyone who insures the same interest against the same risk with several insurers shall be obligated to inform each insurer about the other insurances without undue delay. In his communication he shall name the other insurers and the sum insured. If the profit lost in respect of the same interest is insured with one insurer but other loss is insured with another insurer, subsection (1) shall apply *mutatis mutandis*[290].

If one interest is insured against the same risk with several insurers and the sums insured exceed the insurable value or for other reasons the sum of damages which would have to be paid by the insurer if the other insurance did not exist exceeds the total loss (multiple insurance), the insurers are liable as joint and several debtors in such a manner that each insurer must pay the sum in accordance with his contract, but the policyholder cannot demand more than the total amount of the loss[291].

As regards the insurers, they shall be liable to pay in proportion to the amounts for which they are liable in accordance with each respective contract. If foreign law is applicable to one of the insurances, the insurer to whom foreign law applies may only assert a claim for compensation against the other insurer if he himself is liable to pay compensation under the relevant law[292].

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289 G. Ballarini, *Sub art. 29*, cit., p. 221. The problem, examined from various angles, has found the following solutions: a) the "ratification" of the co-insurance contract, entered into by the insurer who has declared that he also acts in the name and on behalf of others, without being provided with a power of attorney, is possible, but must result (albeit on the basis of *facta concludentia*) from written acts coming from the insurers falsely represented; (b) the lack of representation on the part of the underwriter does not exclude the latter's obligation to pay the indemnity in proportion to his share (Art. 1911), without prejudice to his liability to the insured under Art. 1398 Civil Code; c) in fact, the lack of power of attorney or subsequent ratification is not sufficient to transform the obligation of the (self-styled) co-insurer from partial to joint and several, but he can be called upon by the insured to answer; (d) moreover, the underwriting by only one insurer is not a decisive element in excluding the existence of co-insurance, nor can an intention to that effect certainly be ruled out (so as to deem the insurance of the risk by only one company) due to the lack of power of attorney and subsequent ratification since this, in itself, entails the different legal effect of the liability of the *falsus procurator*, pursuant to Article 1398 of the Civil Code.

290 Section 77 VVG, "Several insurers".

291 Section 78 VVG, "Liability in the case of multiple insurance", para. 1.

292 Section 78 VVG, "Liability in the case of multiple insurance", para. 2.

If the policyholder has taken out multiple insurance with the intention of thereby gaining an illegal pecuniary benefit, each contract made with that intention shall be void; the insurer shall be entitled to the insurance premium up until such time as he learned of the circumstances establishing the nullity[293].

Under British common law, the courts tend to approve the forfeiture clause requiring the insured to notify the insurer of double insurance during the policy period, with the penalty of forfeiture or cancellation of the policy if there is no notification[294].

In the United States, courts generally agree with insurers that purchasing additional insurance for insured property without the permission of the insurer that already insured it increases the likelihood that such property may be intentionally destroyed, especially when the property is overinsured, in order to recover proceeds[295].

Insurance policy writers have devised an "escape clause" with the aim of eliminating all liability under the insurance policy when the insured has purchased additional insurance policies without the permission of the first insurer[296].

In Georgian law, article 827 c.c. expresses two independent legal problems. The first one is related to the method of determining insurance compensation in case of underinsurance (partial) insurance. The second

293 Section 78 VVG, "Liability in the case of multiple insurance", para. 3.

294 *E.g. Steadfast Ins. Co. Ltd. v. F& B Trading Co. pty. Ltd.* (1972), 46 A.L.J.R. 10. On this perspective J. Birds, *Modern Insurance Law*, 7th ed., London, 2007, pp. 135-136.

295 See on this point R. E. Keeton & A. I. Widiss, *Insurance Law*, West Publishing Company, 1988, pp. 269-270.

296 *Ibid*. Escape clauses in property insurance policies are often accepted. See e.g. *O'Leary v. Merchants' & Bankers Mutual Ins. Co.*, 66 N.W. 175 at 176 (Iowa 1898) holding that «an insurance company has the right to write in the contract the escape clause as that its liability consequent upon a change in the contract, shall be in writing». *Zimmerman v. Insurance Co.*, 42 N.W. 462 (Iowa 1889); *Kirkman v. Insurance Co*., 57 N.W. 952 (Iowa 1894); *Hankins v. Insurance Co.*, 35 N.W. 34 (Wis. 1887) «[w]hen the assured has accepted a policy containing a clause prohibiting the waiver of any of its provisions [including the excape clause] by the local agent, he is bound by such inhibition, and that any subsequently attempted waiver, merely by virtue of such agency, is a nullity». *Cleaver v. Trader's Insurance Co*., 32 N.W. 660 at 663 (Mich. 1887) «[t]he holder of the policy is estopped, by accepting the policy, from setting up or relying upon powers in the agent in opposition to limitations and restrictions in the policy».

one establishes the legal consequences of double insurance and the scope of the insurers' obligation[297].

According to the article 823, the insurance amount is determined according to the economic value of the insured object. This implies that the insurance amount can be less than the economic value of the insured object. The civil code recognizes such a case as under/partial insurance and establishes a special rule for determining the insurance compensation. In particular, according to Article 827, para. 1, if the insurance amount is less than the economic value (insurance value) of the insured object, the insurance compensation is determined according to the ratio between the insurance amount and the insurance value[298].

With reference to the case of double insurance, the paragraph 2 of the norm in comment provides that the insurance of the same interest with several insurers does not create the possibility of the occurrence of the risk that the legislator tries to prevent through this norm. For double insurance it is essential that an interest must be insured from the same risk with several insurers.

In the same way the Italian discipline, article 827, para. 2, establishes the obligation of the policyholder to provide information in case of double insurance. According to the norm, if a person decides to insure the same interest with several insurers, he is obliged to inform each insurer[299].

It is important to note that the Italian framework does not contain any rules regarding the invalidity of multiple insurance (or co-insurance), unlike the Georgian discipline, which expressly provides for it in Article 828, which states that «if the policyholder concludes double insurance to

297 K. Iremashvili, *Art. 827*, in *Online Commentary on the Civil Code*, available at https://gccc.tsu.ge/. Last visited July 25, 2022. Article 827 is provided for the fair determination of insurance compensation and the establishment of bona fide contractual relations between the parties. The correct systematic placement of norms requires that: 827 I be arranged together with the norms regulating the insurance amount, and 827 II and III, should be reflected next to the mechanisms for the prevention of unjust enrichment in property insurance. *Ibid*.

298 *Ibid*. In addition, it is important that the specific situation stated in the norm — the relationship between the insurance amount and the insured value — should be present at the time of the occurrence of the insured event.

299 *Ibid*. This type of information belongs to essential information and its important for the insurer to know it. This norm also defines the content of the insurer's notification and indicates that the policyholder must notify the insurer what are the identities of the other insurer(s) and the insured amount for each policy.

receive illegal income, then each contract concluded for this purpose shall be deemed to be void».

As a matter of fact, article 828 of Georgian civil code determines the legal consequences of the double insurance contract (contracts) concluded for the purpose of receiving illegal income. Prevention of unjust enrichment in property insurance is achieved in various ways. In fact, the goal of preventing unjust enrichment is read into every article regulating property insurance. In some cases, the legislator directly indicates the nullity of the contract as a legal consequence and thus forces the parties to act in good faith[300].

8. The fault of the policyholder upon occurrence of the insured event (art. 829)

Article 829 reinforces the fundamental principle of insurance. The mentioned principle is known as the insurable interest in the insurance doctrine and obliges the policyholder to take care of the object of insurance[301].

The purpose of the norm is to establish *bona fide* contractual relations between the insurer and the insured and to protect public order. Due to its importance, the place of the norm, from a systemic point of view, is among the general provisions regulating insurance[302].

In the Italian law, similarly, the insurer is not obligated for claims caused by the willful misconduct or gross negligence of the policyholder, the insured, or the beneficiary, unless otherwise agreed in cases of gross negligence[303].

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300 *Ibid*. In the Georgian law the burden of proof in such cases rests with the insurer, who must prove the existence of the policyholder's unlawful profit with respect to one or all of the contracts. Fulfillment of the mentioned in practice, may be related to certain difficulties.

301 See A. Borroni, *Art. 799*, in this Commentary.

302 K. Iremashvili, *Art. 829*, in *Online Commentary on the Civil Code*, available at https://gccc.tsu.ge/. Last visited July 27, 2022. Norms similar to article 829 are established for other types of insurance. In particular, article 842 — in liability insurance, articles 849-850 — in life insurance, article 856 — in accident insurance. In Article 829, the insurable interest is a prerequisite for the claim for compensation. The norm in question is interesting from the point of view that, unlike the cited norms, it introduces the concept of gross negligence into the concept of insurable interest.

303 In the case of malicious intent, on the other hand, a covenant to the contrary is not allowed so the insurer can always be held liable.

The insurer is obligated for loss caused by the willful misconduct or gross negligence of persons for whose acts the insured is liable[304].

He is also obligated, notwithstanding any agreement to the contrary, for claims resulting from acts of the policyholder, the insured, or the beneficiary, performed out of a duty of human solidarity (2 Const.) or in the protection of the interests common to the insurer (1914 para. 3)[305].

The rule allows, however, for the parties to regulate the effects of gross negligence differently: the insurer, in fact, is not obligated unless otherwise agreed.

In principle, therefore, if the event deduced in the contract was caused by the person who had an interest in the insurance coverage, and if the claim was the consequence of willful or grossly negligent conduct, the insurer is not obliged to indemnify the loss.

The reason for this must be found in the legislator's desire to discourage those grossly negligent behaviors which, by manifesting an absolute disinterest in preventing the loss from occurring, affect the community of interest (in the loss not occurring) that, at least up to the time of the loss, must unite in the contract the aforementioned parties and the insurer[306].

In the mind of Paragraph 2 of Article 1900 of the Civil Code, the insurer may not refuse to perform if the claim was caused by the willful misconduct or gross negligence of the persons for whose acts the insured is liable.

According to a certain doctrinal orientation, between insurer and insured there must be a common interest in preventing the claim from occurring; in this perspective should therefore be read the regulatory provision that excludes the insurer's obligation when the event was caused by the intentional or gross negligence of certain persons, namely, the policyholder - the insured - the beneficiary, and likewise

304 For example, in the case of a claim caused by an incapacitated person (2047 Civil Code) or in the case of the liability of parents, guardians, tutors or masters of art (2048 Civil Code).

305 Consider, for example, the case where the person acts by causing a claim to avoid greater loss to the insurer.

306 A. Bracciodieta, *Il contratto di assicurazione (Disposizioni generali)*, cit., p. 183.

it would be explained why a similar limitation does not operate if the damaging event is attributable to a person for whose actions the insured is responsible[307] since in such cases the perpetrator would not have a contrary interest in the occurrence of the accident and therefore his conduct would not be in any way different from that of the third party who with malice or gross negligence has caused injury to the insured and therefore obliges the insurer to intervene to eliminate the prejudicial consequences[308].

The third paragraph of Article 1900 of the Civil Code provides that the insurer is always obliged to indemnify the loss when the loss is the consequence of acts of the policyholder, the insured and the beneficiary performed out of a duty of human solidarity or in order to protect interests common to the insurer[309].

If liability is insured, i.e., if the insurer has obligated itself to hold the insured harmless for what the insured, as a result of an event that occurred during the effective period of the contract, has to pay to a third party, the insured has the right to be indemnified in the case of fault (including gross negligence) but not if the damage resulted from his own willful act[310].

307 And, therefore, first and foremost the employee but also the incapacitated person, the minor, the pupil/apprentice, the servant/clerk, the auxiliary and - as clarified recently Cass. Civ, sec. III, sent., January 27, 2015 no. 1430 - the third party when contractually bound to the insured, such as the renter of a vehicle with respect to the owner who has insured the risk of theft.

308 G. Fanelli, *Le assicurazioni*, cit., p. 78 ff.

309 "Human solidarity" is to be understood as that act which, while not the subject of a legal duty, constitutes fulfillment of a moral duty, dictated by the rules of civil coexistence generally shared in a given community and at a given historical moment. M. Rossetti, in *Le Assicurazioni*, a cura di A. La Torre, Milan, 2007, p. 133. On the other hand, the protection of common interests occurs when the insured takes steps to limit the damaging consequences of a previous loss or to fulfill the obligation of rescue expressly contemplated in Article 1914 of the Civil Code. In the mind of the latter provision, in fact, the insured is entitled to reimbursement of expenses incurred for the purpose of avoiding or diminishing the damage, and the insurer is also liable for material damage suffered by the insured property as a result of the means used by the insured for the purpose of containing the damage, unless it proves the reckless use of said means. And in both cases, a contrary covenant is not permitted, which, if provided for, would be radically null and void because it is contrary to a mandatory rule.

310 G. Fanelli, *Le assicurazioni*, cit., p. 78 ff.

So much is expressly provided in Article 1917 paragraph 1 of the Civil Code, and this different treatment of "fault" has its explanation in the special purpose of liability insurance[311].

Finally, it should be pointed out that, in the absence of specification, the degree of intensity of fault will be irrelevant because the insurer will always be obliged to hold the insured harmless, even for an act committed with gross negligence.

It must be pointed out that the exclusion of the insurer's obligation in the event of a claim caused by a direct party to the contract (policyholder, insured, beneficiary) depends, according to some, on the failure of the latter to comply with a duty, not to cause the claim and consequently on the defect of a prerequisite to the insurer's right to benefit[312].

Rather, it makes it necessary to specify when a cause of loss is covered and when it is not: that is, when the insurer is or is not obliged, with the caveat that, given the principles which we shall now indicate, there will always remain the *quaestio facti* of determining when one or the other case has occurred and in the case of competition of causes, to which of them the loss is actually to be attributed[313].

Also similarly, in German law, the Section 81 VVG (Causing the insured event) states that the insurer shall not be obligated to effect payment if the policyholder intentionally causes the insured event (para. 1). If the policyholder causes the insured event by gross negligence, the insurer shall be entitled to reduce the benefits payable commensurate with the severity of the fault of the policyholder (para. 2).

The problem addresses the burden of proof concerning the fault of the policyholder. In cases of a breach of contractual duty, it is a general

311 In fact, unlike insurance against damages, where the insured's interest consists in the compensation of the damage suffered by a specific asset of his as a result of an accident, in that for civil liability said interest consists in protecting himself against the risk of negative alteration of his own assets taken as a whole and exposed to unlimited liability for any culpable conduct, even serious, with its reinstatement through the payment by the insurer, of a sum of money equal to the disbursement due by the insured, within the framework mostly of a ceiling called the maximum amount. See on this point Cass. Civ, sec. I, Sent., July 17, 1993 No. 7971.

312 According to others, however, it is a risk (*rectius*: an uninsured cause of loss). The problem has little practical importance, since according to either theory the consequence is always the same: the insurer is not obliged to its performance.

313 For the theory of causality see the article 1895 of the Italia civil code.

principle of German law that the debtor must prove that he acted without fault[314].

The Insurance Contract Act 2008 follows the same principle and «presumes the policyholder to have acted with gross negligence when breaching a contractual duty (except for cases of causation of loss, which are not considered a breach of duty)»[315].

However, the amount by which the insurance money will be reduced depends not only on the existence (or rather, the presumption) of gross negligence as such, but on its degree. Therefore, there is a debate as to whether the burden of proof for a particular degree of gross negligence lies with the insurer or with the policyholder[316].

Following the same *ratio* of Italian and German discipline, article 829 releases the insurer from liability in case the policyholder causes the insured event by intent or gross negligence.

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314 H. Heiss, *Proportionality in the new German Insurance Contract Act 2008*, ERASMUS L. REV., 2012, pp. 109-110.

315 *Ibid*.

316 *Ibid*. Overall, it seems that most commentators accept the view that a particular degree of gross negligence must be proven by the insurer. Within this debate, some commentators have proposed that the presumed gross negligence of a policyholder will entitle an insurer to reduce the insurance money by 50%. See in this sense, J. Felsch, *Neuregelung von Obliegenheiten und Gefahrerhöhung*, in Recht und Schaden, 2007, p. 493 ff; M. Nugel, *Das neue VVG – Quotenbildung bei der Leistungskürzung wegen grober Fahrlässigkeit*, in *Monatsschrift für Deutsches Rec*ht, 2007, p. 26 ff; J. Grote & C. Schneider, *VVG 2008: Das neue Versicherungsvertragsrecht, Auswirkungen für gewerbliche Versicherungen*, Betriebs-Berater, 2007, p. 2695 ff; U. Weidner & H. Schuster, *Quotelung von Entschädigungsleistungen bei grober Fahrlässigkeit des VN in der Sachversicherung nach neuem VVG*, Recht und Schaden, 2007, p. 364 ff; H. Baumann, *Quotenregelung contra Alles-oder-Nichts-Prinzip im Versicherungsfall – Überlegungen zur Reform des § 61 VVG*, in Recht und Schaden, 2005, p. 9 ff *de lege ferenda* to § 81 (at least 50 % reduction); T. Langheid, *Die Reform des Versicherungsvertragsgesetzes*, in *Neue Juristische Wochenschrift*, 2007, p. 3669 ff; critical on this point, M. Nugel, 2008, above n. 36, p. 1321; R. Rixecker, *Quotelung bei Obliegenheitsverletzung: Alles, Nichts oder die Hälfte*, in *Zeitschrift für die gesamte Versicherungswissenschaft*, 2009, p. 6; D. Looschelders, *Quotelung bei Obliegenheitsverletzungen: Alles, Nichts oder die Hälfte'* in *Zeitschrift für die gesamte Versicherungswissenschaft*, 2009, p. 28 ff. If an insurer wants to increase the reduction, he must prove a degree of gross negligence beyond 50%. In turn, if a policyholder wants to avoid a 50% reduction, he must prove a degree of negligence below 50%. The vast majority of all commentators reject this proposal, because it would seriously infringe upon the flexibility of the rule, the attainment of which was, after all, the major aim of the legislature.

In Georgian judicial practice, there are interesting explanations about gross negligence. It should be noted that gross negligence under the concept of insurable interest tightens the requirement of prudence towards the policyholder[317].

In considering examples of gross negligence under article 829, a Supreme Court decision for an automobile insurance dispute is interesting. In this case, the claimant requested compensation for the damage caused by the theft of the insured vehicle. The insurance company explained in its statement that the policyholder violated the terms of the insurance contract and contributed to the insurance accident with gross negligence[318].

In addition, article 829 indicates intent and gross negligence. When analyzing the factual circumstances of a particular case, it may become controversial to determine the degree of negligence[319].

However, it is problematic to assess the degree of infringement and to match it with gross negligence under article 829.

In terms of legal consequences, the insurer is freed from compensation obligations. In this regard, article 829 is an additional prerequisite for realizing the policyholder's claim[320].

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317 K. Iremashvili, *Art. 829*, cit.

318 Judgment of the Supreme Court of Georgia dated December 23, 2008 No. AS-681-902-2008. From the factual circumstances of the case, it was clear that the car was owned by an unauthorized person (a washerman), who parked the car in front of the car wash at 9 o'clock in the morning on the day of the insurance accident and hung the key on the wall. The driver who arrived at 11 o'clock did not find the car and the key on the spot. The city court shared the defendant's reasoning that the insured event was caused by the policyholder's negligent act. According to the court's opinion, the authorized driver of the insured car violated the attention requirements and by handing over the keys to another person, he significantly increased the risk of an insured accident.

319 K. Iremashvili, *Art. 829*, cit. For example, the Supreme Court of Georgia in one of its rulings, referring to the decision of the Federal Supreme Court of Germany, explains that: gross negligence occurs when in certain situations and circumstances a person is expected to show good faith, which is clear to everyone, and in such a case the person does not show good faith on an unusually large scale, not foresees and violates it. Unlike ordinary negligence, gross negligence represents an unforgivable mistake even from a subjective point of view.

320 *Ibid*. See, also, for an in-depth analysis A. Borroni, *Art. 799*, in this Commentary.

9. Duty to fulfil the insurer's instructions (art. 830)

Article 830 establishes the obligation of the policyholder to comply with the instructions of the insurer. Based on the content of the norm, its usage is equally relevant when agreeing on both property and other types of insurance[321].

By transferring the risk to the insurer, the policyholder relieves the burden it would have carried in the absence of insurance. However, policyholder still has the obligation to take care of the insured objects, which is expressed by the legislator's imposition of the obligation to cooperate with the insurer.

830 I defines the essence of the policyholder's obligation. In particular, according to the norm, upon the occurrence of an insured event, the policyholder is obliged to prevent or reduce the damage as much as possible and to comply with the instructions of the insurer. By imposing such an obligation, the legislator makes policyholder to act in good faith. The existence of insurance should not reduce the policyholder's interest in the insured object.

The policyholder must act with the same care and prudence towards the insured object as he would have acted in the absence of insurance[322].

However, article 830 does not determine the legal consequences of breaching the policyholder's obligation. Logically, the violation of the obligation established in the first paragraph may release the insurer from the obligation to indemnify.

The results of embodying the instructions given to the policyholder are at the insurer's risk. Such an opinion is read in the second paragraph of the article in comment, which obliges the insurer to reimburse the expenses that have been incurred by its instructions. In this way the insurer

321 K. Iremashvili, *Art. 831*, in *Online Commentary on the Civil Code*, available at https://gccc.tsu.ge/. Last visited August 2, 2022. The article in comment should be interpreted together with the norms governing the obligation to provide information. In particular, the statement provided in Art. 830 falls under the logical definition of Art. 814. See D. Micu & R. F. Hodos, *Artt. 813-814*, in this Commentary.

322 *Ibid*. For example, if a fire breaks out in front of the policyholder in a house which he owns, there is no justification for any inaction on his part on the ground that the house is insured and he will still receive compensation. By imposing the obligation to prevent damage and reduce it, the norm forces the policyholder to consider the interests of the insurer. In the given example, the damage caused by the policyholder's timely response will be significantly less than the damage caused by the complete destruction of the house.

in some respects resembles the owner of the property, as it takes care of the property in an attempt to prevent or reduce the loss. The insurer must bear the expenses even if their expenditure was ineffective in preventing or reducing the damage[323].

From a comparative perspective, it is important to note that this provision does not find similar norms either in the Italian discipline or in other legal experiences.

The same result – *e.g.* in Italian discipline – can be achieved on a private basis since it is not prohibited by public policy to draft a contractual text into which this kind of provision can be translated.

10. Insurance against damages caused by war or other force majeure (art. 831)

Liability insurance cannot cover merely accidental facts, *i.e.*, due to fortuitous events or force majeure, from which no liability arises, but, by its very name, it necessarily implies that the damaging fact, for which the insurance is taken out, must be culpable, covering, with the sole exception of malicious acts, every risk arising from that liability, even if dependent on gross or very gross negligence, and having to exclude, in the absence of express clauses delimiting the risk, that some faults are excluded from the insurance guarantee.

Under Italian law, according to art. 1912 c.c.[324], those damages which, although insured and (if otherwise caused) indemnifiable, nevertheless exclude the insurer's obligation if they are caused by some particular events are not included in normal insurance coverage: called exceptional because they are sporadic and irregular in frequency; catastrophic because of the severity and spread of their destructive effects.

323 *Ibid*. The author also states that during the dispute, importance should be given to the assertion of the parties about the possibility of preventing or reducing the damage. In addition, the judge must take into account the scope of the obligation established by the legislator for the policyholder. The term "as far as possible" should be interpreted variously for a different policyholder. In particular, the judge must assess how much the policyholder had an objective opportunity to prevent or reduce the damage under the given circumstances.

324 Art. 1912 of the Italian civil code states that unless otherwise agreed, the insurer shall not be obligated for damage caused by earth tremors, war, by insurrection or popular riots.

So that, under the first profile, they escape statistical observation and the calculation of probabilities, which are the criteria on which insurance technology is based; under the second profile, then, they produce damage of such intensity and extension as to surpass ordinary compensation capacities. It is from this twofold reason that the rule under consideration derives, which exempts the insurer for damage caused by telluric movement, war, insurrection, or popular uprising, but makes subject to agreement to the contrary, since these are risks which, if normally uninsured, are nevertheless insurable[325].

This means that, without the need for a special contractual clause, such events are understood by law to be excluded from the guarantee (legal delimitation legal delimitation of risk), provided that in causal connection with the damage; but with special clause, expressly covering them, they are insured. As for the scope of Article 1912, which is a rule included in the section on non-life insurance, life insurance remains excluded from it, while it is doubtful whether it includes that against accidents[326].

In identifying such events, the first problem that arises is whether their listing, contained in Article 1912, is exhaustive or illustrative[327].

The prevailing opinion in the doctrine is in the first sense[328], but some author has not failed to appeal to the justificatory basis of the rule to consider this enumeration not strictly taxative[329].

The contrast is perhaps mitigated by considering that the events indicated by the law, although in a closed number and therefore not

325 G. Ballarini, *Sub art. 31*, in *Le Assicurazioni*, A. La Torre (a cura di), Milan, 2014, p. 224. See also, on this point, L. Buttaro, *Assicurazione in generale*, cit., p. 510; G. Castellano, *L'assicurazione e gli atti di violenza contro una comunità che colpiscono persone o beni*, ASSICURAZIONI, 1974, p. 451 ff; G. Castellano & S. Scarlatella, *Le assicurazioni private*, Turin, 1981, p. 338 ff; A. Donati, *Trattato del diritto delle assicurazioni private*, cit., p. 158 ff and 251 ff.

326 G. Ballarini, *Sub art. 31*, cit., pp. 224-225.

327 E. Inchingolo, *Assicurazione dei rischi catastrofali, I, Le assicurazioni delle calamità naturali, in I nuovi contratti nella prassi civile e commerciale*, a cura di P. Cendon, Turin, 2004, p. 289 ff.

328 A. Donati, *Trattato del diritto delle assicurazioni private*, cit., p. 159; G. Fanelli, *Le assicurazioni*, cit., p. 11; G. Scalfi, *Assicurazione (Contratto di)*, cit., p. 228.

329 V. Salandra, *Dell'assicurazione*, cit., p. 333.

dilatable, may nevertheless be given a more or less broad but not improper meaning[330].

Another important problem that arises with the rule under consideration, as in any hypothesis of causal delimitation of risk (whether legal or conventional), is, first of all, that of establishing whether and when the damage that forms the subject of the insurance coverage (the fire, theft, accident of navigation, etc.) can be said to be determined, i.e., caused, by the excluded event (earthquake, war, etc.). The question does not arise whenever this event is the direct and exclusive cause (e.g., house collapsing due to earthquake tremor; ship sinking under aerial bombardment); nor, inversely, in the case of mere occasionality between the event and the damage subsequently occurring (such as theft in a closed apartment located in an earthquake-affected locality). Instead, it arises when the excluded risk, although not the immediate cause of the loss, nevertheless created

330 G. Ballarini, *Sub art. 31*, cit., p. 225. Thus, the expression telluric movements is linguistically suitable to include, in addition to earthquake, volcanic eruption and any other violent phenomenon of the earth, but it is very doubtful that it can extend to perturbations of the air (such as cyclone) without having to resort to analogy (deemed instead admissible by the minority thesis). The concept, then, of war, which strictly speaking presupposes a formal declaration, may well be understood in the more general sense of armed conflict, de jure or de facto, even within a state or against partisan forces (V. Salandra, *Dell'assicurazione*, cit., p. 333; G. Scalfi, *Assicurazione (Contratto di)*, cit., p. 228; A. Donati, *Trattato del diritto delle assicurazioni private*, cit., p. 7) as has been decided in jurisprudence (Cass Civ., January 19,1950 no. 157, GI 1950, I, 1, 181 and ASS 1950, II, 3, with note by Spolidoro; Cass. Civ., October 6, 1952 no. 2904, FI 1952 I, 1339; in doctrine see N. Balestra, *Le assicurazioni marittime dei rischi di guerra*, Milan, 1991, p. 12 ff, 23 ff, 69 ff.) but an attack aimed at creating social alarm certainly does not fall under this concept. An isolated act of terrorism or sabotage cannot fall under the concept of insurrection, which implies an armed popular uprising, of a certain extent, against the constituted powers; nor under that of popular tumult, which evokes the idea of uprising when it, even if not directed against the constituted authority, is such as to disturb public order and hinder or even prevent police intervention (V. Salandra, *Dell'assicurazione*, cit., p. 333, who recalls the numerous controversies to which, at the time gave rise – in force art. 434 c. comm. – the "fascist punitive expeditions"; G. Scalfi, *Assicurazione (Contratto di)*, cit., p. 228; A. Donati, *Trattato del diritto delle assicurazioni private*, cit., p. 7); with specific reference to the risk of terrorism, see E. Inchingolo, *Assicurazione dei rischi catastrofali, I, Le assicurazioni delle calamità naturali, in I nuovi contratti nella prassi civile e commerciale*, cit., p. 306 ff.

the situation that made it fatal, as in the case of fire caused by the rupture of gas pipes in turn caused by the earthquake[331].

The problem is generally resolved on the basis of the theory of adequate causation, according to the data of common experience, in the sense that, in the coexistence of several causes, the one in itself alone adequate to produce the accident prevails[332].

As for the burden of proof regarding causation and thus the existence of the excluded risk, it is borne by the insurer, since it is an "impeding fact" and not constitutive of the insurance guarantee[333].

In USA it is provided a war exclusion clause or hostile acts exclusion. This is a common clause in insurance policies which excludes damage arising from a warlike act between sovereign or quasi-sovereign entities[334].

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331 This is the historical example recalled by V. Salandra, *Dell'assicurazione*, cit., p. 335, referring to the huge earthquake disaster that destroyed the city of Messina in 1908, and noting how in that case the necessary cause must be found in the earthquake, for which the insurance guarantee is not operative). It must not, however, be a cause remote, as in the case – often mentioned by the authors and not without corroboration in jurisprudence – of the stormy ship hitting a rock, perhaps avoidable without the switching off of the lighthouse ordered for reasons of war: it, precisely, remains a remote antecedent to the accident of navigation (V. Salandra, *Dell'assicurazione*, cit., p. 335; N. Balestra, *Le assicurazioni marittime dei rischi di guerra*, cit., p. 61 ff.

332 L. Buttaro, *Assicurazione in generale*, cit., p. 510; A. De Gregorio & G. Fanelli, *Il contratto di assicurazione*, cit., p. 120 ff; S. Ferrarini, *Le assicurazioni marittime*, Milan, 1991, p. 165 ff. Jurisprudence has applied this theory in a maritime insurance case, including damages from war risks (loss of perishable goods due to delay in transportation, in turn resulting from the closure of the Suez Canal), enunciating the following maxim: when faced with a causal series prolonged over time, the factor that is by itself capable of producing the event, to the point of absorbing the value of those that constitute its evolution, undoubtedly assumes the role of cause of the event itself (Cass. Civ., March 24, 1976 no. 1041, according to which the delay – contractually excluded from the insurance guarantee insurance – was the immediate causal antecedent of the loss of the load, whereby which it, whether or not it depended on war facts, integrated the only relevant cause of the loss itself. The judgment can be read in DM 1977, 186, with note by G. Alpa, *Institute war clauses and rules of legal causation*).

333 G. Ballarini, *Sub art. 31*, cit., p. 226.

334 See S. Massmann, *War Risk Exclusion Legal History Outlined*, PROP. CASUALITY, 2001, p. 40 ff; M. Menapace, *Losses from Malware May Not Be Covered Due to Your Policy's Hostile Acts Exclusion*, NAT'L L. REV., 2019.

Insurance companies typically will not cover damages caused by war because such an event could cause damage that would be likely to bankrupt them if they had to cover it[335].

Companies and individuals faced with a significant risk of war, such as companies located in politically unstable countries, may be able to purchase a separate war risk insurance policy.

In the US, the Terrorism Risk Insurance Act provides a "backstop" for insurance claims related to acts of terrorism[336].

Based on the provisions of Article 831 of the Georgian Civil Code, the insured has the option of insuring damages caused by force majeure. With this provision, the legislature establishes an exception to the general rule of civil law on force majeure, allowing individuals under private law to receive compensation for damages caused by force majeure[337].

One of the main elements of this provision, it is necessary for the parties to the contract to specifically write down the insurer's obligation. In the event that there is no express written agreement, damages caused by force majeure are not compensated[338].

In terms of resolving disputes in these cases, the court must determine both the events occurred and the nexus, if any, between them.

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335 *Ibid*.

336 The Act created a federal "backstop" for insurance claims related to acts of terrorism. The Act «provides for a transparent system of shared public and private compensation for insured losses resulting from acts of terrorism». The Act was originally set to expire on December 31, 2005, was extended for two years in December 2005, and was extended again on December 26, 2007. The Terrorism Risk Insurance Program Reauthorization Act expired on December 31, 2014.

337 K. Iremashvili, *Art. 831*, in *Online Commentary on the Civil Code*, available at https://gccc.tsu.ge/. Last visited July 25, 2022. Irresistible force is expressed in the classic forms of insurance cases. However, there is a significant difference in the degree and extent of damage caused by other types of risks. One of the striking examples of the realization of catastrophic risks is the terrorist attack in the United States of America on September 11, 2001. *Ibid*.

338 *Ibid*. In practical terms of insurance coverage and exclusions, it is important to write the conditions unambiguously and in detail. In many cases, force majeure occurs in the form of natural events. In these cases, it is particularly important to determine the causal relationship.

Causation is also an important use of the right standard in determination[339].

The Georgian norm, given the analysis proposed so far, can be considered to be completely coincident with the Italian regulation.

11. Claim for damages asserted against a third party (art. 832)

The principle of subrogation, among other principles established in property insurance similarly, is based on the doctrine of compensation. Restoring the status quo and making a profit to prohibit acceptance, the content of subrogation is also determined[340].

Damage by transferring the claim against the claimant to the insurer double compensation by the policyholder is excluded. Accordingly,

339 See A. Borroni, *Art. 799*, in this commentary. In terms of separating one from the other, the so-called Bruener's (The Bruener "last direct cause" Rule) and Franklin's (The Franklin Rule) rules, the need for use arises because of the causes of the insured event in times of plenty, as is often the case with force majeure. Referring to Brunner's rule, the parties agree on the purpose that caused the loss by assigning decisive importance to the cause. In the example discussed, application of Brunner's rule precluded the policyholder's satisfaction of the claim because the ultimate cause of the damage-the flood-was not covered by the insurance coverage. Franklin's rule under conditions of multiplicity of causes and competition allows the court a broad interpretation. As a result, the court considers the bona fide expectations of the parties in a single chain of causes, assigning decisive significance to a specific cause. From a practical point of view, the use of Brunner's rule is more convenient because, by referring to the last cause, the parties are excluded from the need for the judge's intervention. As a result, damages are compensated quickly, and court costs are saved. However, in the case of a non-party contractor (adhesion contract), as mentioned above, critics of the decision emphasize the interest of protecting the weaker party through court intervention and, in the interest of the contractor, require an explanation. On this point, K. Iremashvili, *Art. 831*, cit. See also, L. B. Squires, *Recent Development: Autopsy of a Plain English Insurance Contract: Can Plain English Survive Proximate Cause?*, WASH. L. REV., 1983, p. 570 ff.

340 K. Cannar, *Essential Cases in Insurance Law*, cit., p. 9. It has to be mentioned that «subrogation as well as cession and regress are the independent theoretical constructions of the civil law. However, their characteristics are so similar that it is often difficult to separate them. In order to make the essence of subrogation clear, it is essential to separate it from the above mentioned concepts of the law. Above mentioned separation has theoretical as well as practical importance. In particular, the concepts differ from each other with the legal basis of their genesis, as well as in terms of their legal outcomes. The above determine different nature of rights and obligations of parties to the relationship». N. Motsonelidze, *Separation of Subrogation from Regress and Cession*, in *Journal of Law*, Ivane Javakhishvili Tbilisi State University, 2014, no. 1, p. 129.

subrogation in the insurance relationship is primarily groundless it is a means of preventing of enrichment[341].

To implement this goal, the principle of subrogation of the contract imposes equal restrictions on the parties. In particular, on the one hand, it will policyholder claims for damages against third parties are prohibited. And, on the other hand, the insurer is limited by the fact that it is only the policyholder after compensation of damages in favor that can set demand and that too within the limits of what he paid. Therefore, making a profit from this point of view, the insurer is also prohibited[342].

Subrogation protects the interest of the policyholder because the insurer against him compensates for the standing damage. The said policyholder shall spend as much time as well as the difficulty of the relationship between the policyholder and the person causing the damage is connected[343].

On the other hand, subrogation also protects the interest of the insurer, to compensate for its expenses. The insurance company receives additional income and insurance It allows accumulating reserves[344].

Finally, the insurance company will make a claim for the injured party by submission, not only protection of the interests of the parties is achieved, but also restoring justice to the guilty subject of responsibility through imposition[345].

In Italian law, the article 1916 states that the insurer who paid the indemnity shall be subrogated, up to the amount of the indemnity, to the rights of the insured against liable third parties[346].

Except in the case of fraud, subrogation does not take place if the damage is caused by the insured's children (affiliates), ascendants, other

341 K. Iremashvili, *Art. 832*, in *Online Commentary on the Civil Code*, available at https://gccc.tsu.ge/. Last visited July 28, 2022.

342 *Ibid*.

343 N. Niavadze, *Subrogation and recourse in insurance law, previous judicial analysis*, Tbilisi, 2012, p. 24.

344 *Ibid*.

345 K. Iremashvili, *Art. 832*, cit.

346 The Constitutional Court, in its judgment of July 18, 1991, No. 356, declared the constitutional unlawfulness of the rule insofar as it allows the insurer to avail itself, in the exercise of the right of subrogation against the liable third party, also of the sums owed by the latter to the insured as compensation for biological damage.

relatives or relatives-in-law of the insured who are permanently cohabiting with him or her, or servants.

The insured shall be liable to the insurer for the prejudice to the right of subrogation.

The provisions of this article shall also apply to insurance against accidents at work and accidental misfortunes.

Article 1916 of the Civil Code provides for and regulates the subrogation action of the insurer which, having paid the indemnity in favor of the insured, has the right to substitute itself in the rights of the latter against third parties responsible for the damage[347].

In order to fully understand the nature of this institution, it appears of preliminary relevance to identify the rationale that prompted the legislator to regulate and provide for such an action in favor of the Insurer in order to better understand its practical feedback and its role as an indispensable "corrective" within the triangular relationship insured / insurer / damage liability[348].

Should we stop at such a first and premature result, manifestly unfair would be the consequences produced by the occurrence of a claim covered by an insurance policy: the insured/injured person being able to claim both compensation and insurance indemnity would find himself in a far more favorable economic position than his status quo ante, eventually di-

347 V. Salandra, *Dell'assicurazione*, cit., p. 333 ff; G. Scalfi, *Assicurazione (Contratto di)*, cit., p. 228 ff; A. Donati, *Trattato del diritto delle assicurazioni private*, cit., p. 7 ff. From this perspective, it was held that this institution was to be considered an expression of the indemnity principle, which characterizes property and casualty insurance, and which, as is well known, does not allow the insured to obtain from the insurance company (or companies) with which he or she has agreed to cover the risk a sum greater than the damage actually suffered; or it obeyed the need to reduce the costs of the insurance operation on the assumption that the possibility for the company to recover at least part of the indemnities paid to the insured could induce it to reduce premiums; or it was an expression of the desire to affirm the principle of liability, preventing the perpetrator of the damage from being exempt from the penalty of compensation. P. Corrias, *Diritto di surrogazione dell'assicuratore e vincolo di solidarietà*, BANCA BORSA, 2022, pp. 2-3.

348 In fact, following the commission of an unlawful act to the detriment of an insured person, two distinct and simultaneous relevant legal situations arise: the insured's right *vis-à-vis* the insurer to obtain indemnity as provided for in the policy text and, likewise, that of the insured *vis-à-vis* the person responsible for the damage to obtain the relevant compensation for the damage caused to him/her.

storting the very function of the insurance contract, which would take on contours proper to other contractual schemes, such as that of the bet[349].

The admissibility of such an accumulation would, in other words, produce the paradoxical result of transforming the damaging event into a desired or at least desirable event for the insured in spite of the well-known indemnity principle on which, as is well known, the contract of insurance against damages is based.

It is precisely to avert such paradoxical consequences that the legislature provided for and introduced the institute of insurance subrogation.

Article 1916 of the Civil Code makes it possible to safeguard the indemnity principle on which insurance against damages rests by preventing the Insured from receiving a double settlement – the indemnity from the insurer and the compensation for the damage from the responsible party – and at the same time prevents the damaging party from taking unfair advantage of the circumstance that the victim of the tort, insured under a damages policy, having received the indemnity may abandon any action against him[350].

The "translative" moment of the right to damages against the damaging party turns out to be for some part of the doctrine[351] the actual pay-

349 See on this point C. A. Funajoli, *Giuco e scommessa*, N.SSO DIG. IT., VII, 1961; F. Gazzoni, *Manuale di diritto privato*, Naples, 2006. A bet can be defined as that agreement between two (but often more than one) parties that has as its object the promise to pay a sum of money, to perform a certain service or the direct making of a wager whose attribution depends on the outcome of a game or the occurrence of any act or fact that may qualify as (even only subjectively) uncertain.

350 Jurisprudence almost unanimously sees in this institution an instance of succession in title to the claim of the insured who has benefited from the indemnity: that is, the insurer, which has paid a certain indemnity by virtue of its obligation under the policy, succeeds to the rights of the percipient – and within the limits of the indemnity paid – to the person responsible for the damage.

351 See A. Donati, *Trattato del diritto delle assicurazioni private*, cit., p. 475; Indeed, more recently the same author has changed his opinion by adhering to the opposite thesis: A. Donati & G. Volpe Putzolu, *Manuale di diritto delle assicurazioni private*, cit., p. 162, supported by practically unanimous jurisprudence: Cass. February 22, 1988 n. 1848, GIUR. IT., 1989, I, 1, 526, with note by Russo, *Sulla surrogazione dell'assicuratore*; Cass. Februaary 18, 1980 n. 1179; Cass. May 05, 1978 n. 2137; Cass. June 07, 1977 n. 2341, RESP. CIV. PREV., 1977, 789; Cass. May 28, 1977 n. 2195 ARCH. CIV., 1977, 891; Cass. April 04, 1962 n.688, ASSICURAZIONI, 1963, II, 2, 12.

ment of the insurance indemnity, while for others[352] the acquisition of the right by the insurer would follow from its express manifestation of will, the so-called *denuntiatio*.

The right acquired by the insurer is to be considered exactly the same as that already held by the insured, and to the former all the exceptions that the liable party could have opposed to the latter are consequently enforceable[353].

On the other hand, the companies involved in the lawsuit frequently yearn to invoke the aforementioned jurisprudential orientation in order to legitimize their claim to see the possible liability of the damaging third party ascertained with regard to the facts for which they are suing before the possible ascertainment of their own indemnity obligation towards the insured[354].

352 Cass. July 19, 2004 n. 13342. This approach based on the traceability of insurance subrogation to the sphere of legal subrogation and, therefore, of the particular succession in the right of claim accrued by the insured against the liable third party, is in tune with the modern view of solidarity in a functional key, which considers it as an effect, that is, a mode of being of the extinguishing effect of multi-subjective obligations, such that the fulfillment of one extinguishes the whole. In this sense M. Orlandi, *Sulla rinuncia alla solidarietà*, RIV. TRIM. DIR. E PROC. CIV., 2019, p. 1101 ff. Underlying this idea is the belief that the necessary and sufficient element for the mechanism of solidarity to operate is the occurrence of the "equivalence" of the performances, that is, the suitability of each of them to realize the same creditor interest: if two or more performances, although deriving from different titles (*id est*: not presenting the *eadem causa obbligandi*), turn out to be concretely capable of pursuing such a result, the bond of solidarity must be deemed to exist between the obligatory relationships of which they constitute the object. P. Corrias, *Diritto di surrogazione dell'assicuratore e vincolo di solidarietà*, cit., pp. 6-7. This dynamic can be found plastically in the insurance field, where, since the insurer's indemnity benefit and the indemnity benefit of the party responsible for the accident both prove to be capable of realizing the insured party's interest in the restoration of its assets objectively diminished by the contemplated damaging event, the functional connection of solidarity must be found between them, even though the obligations of which they are the object have quite different titles. *Ibid*.

353 If the prerequisite for the exercise of subrogation pursuant to article 1916 of the Civil Code is the payment of indemnity in favor of the injured insured party, it should be pointed out that, from a procedural point of view, jurisprudence recognizes the insurer's right to sue the liable third party even before the actual payment of benefits to the insured party and the contextual *denuntiatio* and in order to obtain, evidently with a view to judicial economy, a sentence sentencing the insurer to reimbursement of any indemnity that it may be obliged to pay.

354 If, however, we keep in mind the considerations made above about the nature of the subrogation action under Article 1916 of the Civil Code, we understand that the horizons that can be envisaged are actually other.

According to the most recent jurisprudence, in fact, the subrogation of the injured party must necessarily be promoted directly by the injured party / insured party at the time of his or her own constitution in order to avoid the forfeiture to which the same would inexorably incur ex art. 167 c.p.c., resulting then in the exercise of this faculty precluded de relato also to his or her insurers[355].

Acknowledging this position, recent jurisprudence on the merits has declared, in accordance with the above reasoning, the exclusion of the parties called in suit by the insurers – and held by them to be responsible for the damages that occurred – since such a call in suit could only be promoted by the insured party, the latter not exercising it was now forfeited pursuant to article 167 c.p.c. and therefore the Insurance Companies, taking over the rights of the insured pursuant to art. 1916 c.c., find themselves to be holders of a right in reality now already extinguished due to its failure to be timely exercised by the Insured.

However, it deserves to be emphasized that, precisely article 1916 of the Civil Code introduces a different discipline by placing the entire burden of the debt on the injured party. This is done, precisely, by allowing the insurer to recover from the latter the full value of the indemnity it has paid to the insured-damaged party, by means of an action of subrogation analogous to that provided for in the field of surety by Art. 1949 Civil Code, where, as is well known, the guarantor who has paid is fully subrogated to the rights that the creditor had against the debtor. Ultimately, the insurance discipline manifests this marked peculiarity: a case that on the substantive level appears to be one of solidarity in the common interest is considered, on the normative level, to be one of unequal solidarity[356].

355 In fact, the Supreme Court had already had occasion to clarify that the subrogation of the insurer in the rights of the insured against the responsible party, pursuant to Article 1916 Civil Code, entails the derivative acquisition of such rights in the same state, with the same content and with the same limits in which they were due to the insured, the said insurer coming to take over the identical substantive and procedural position of the injured parties towards the third party author of the harmful event. See Cass. Civ. III sez. June 4, 2007 n.12939.

356 P. Corrias, *Diritto di surrogazione dell'assicuratore e vincolo di solidarietà*, cit., pp. 6-7. What are the reasons for this choice are unknown and, in any case, it is not for the interpreter – who must merely take note of it – to investigate in that direction. It can only be hypothesized that it is an expression of the capacity for influence possessed by insurance companies in the period of codification (in this sense G. Partesotti, *Recensione ad Angelo Bracciodieta (La divisibilità del premio di assicurazione*, Naples, 1973, pp. XII-165), RIV. DIR. CIV., 1974, p. 382 ff) which led to a favor that characterized other significant provisions introduced by the legislator in '42, among which at least those providing for the so-called indivisibility of the premium should be mentioned. P. Corrias, *Dissesto dell'assicuratore e tutela contrattuale dell'assicurato*, Milan, 2001, p. 194 ff.

In conclusion, the Italian legislator includes insurance subrogation within the scope of insurance against damages, specifying, however, that it applies also to insurance against accidents at work and accidental misfortunes. Hence two implicit but sure indications: (i) the institution is not compatible with life insurance; (ii) the institution is not limited to insurance against property damage but also refers to insurance against personal injury, such as insurance against accidents and accidental misfortunes[357].

The basis of the indications is quite clear.

Beginning with life insurance, it should be recalled that, when it comes to survival insurance, the company's benefit – whether it consists of a lump sum or, as is usually the case, an annuity – has the function of having a solidaristic-pension character, of enabling the beneficiary, upon reaching a given age, to meet the economic needs that are likely to arise at that stage of life. These are, therefore, welfare interests of a "pension" nature or, as it has recently been pointed out[358], of a welfare-solidaristic nature; that is, analogous to those which the compulsory social security system aims to satisfy, sometimes without fully succeeding[359].

These are interests quite different from those which aim to realize the compensation for non-pecuniary personal damages, owed to the insured by the responsible party, when the former is damaged by conduct attributable to the latter: although subtracted from the logic of purely economic calculation and therefore from the principle of full reparation (at least in the sense that this principle assumes in matters of pecuniary damage)[360], in fact, non-pecuniary damage must also be recognized as having at least a partially compensatory function[361] and, in any case, still restorative for

357 P. Corrias, *Diritto di surrogazione dell'assicuratore e vincolo di solidarietà*, cit., pp. 9-10.

358 Cass. civ, April 8, 2021, n. 9380.

359 P. Corrias, *Contratto di capitalizzazione e attività assicurativa*, Milan, 2011, p. 83 ff; P. Corrias, *Le assicurazioni sulla vita*, in *Trattato Cicu-Messineo*, Milan, 2021, p. 51 ff. With regard to the pension function realized by the life insurance contract, see the fundamental Cass., sez. un., March 31, 2008, n. 8271, RESP. CIV. PREV., 2008, p. 1282 ff.

360 In this sense, C. Salvi, *Le funzioni della responsabilità civile e il volto italiano dei danni punitivi*, FORO IT., 2018, p. 2504 ff; C. Salvi, *La responsabilità civiile*, in *Trattato Iudica-Zatti*, Milan, 2019, p. 18 ff, spec. P. 27 ff.

361 E. Navarretta, *Il contenuto del danno non patrimoniale e il problema della liquidazione*, in *Il danno non patrimoniale (Principi, regole e tabelle per la liquidazione) a cura di Navarretta*, Milan, 2010, p. 88 ff. The author appropriately distinguishes, in the context of the composite structure of property damage, the solidaristic-compensatory function assumed by biological damage – susceptible to being "monetized" with sufficiently certain criteria by medico-legal science through the measurement of psycho-physical pathology with the parameters of temporary or permanent disability – from the solidaristic-satisfactory one to be recognized to the other items of non-asset damage.

the injured party[362]. For this reason, there is no doubt that the performance of the company and that of the liable third party can cumulate and, therefore, there is no room for subrogation[363].

Accident insurance, not unlike life insurance, realizes a social security purpose, in that it protects an interest of a personal nature, such as health, and not merely property as is the case in most property or asset insurance[364]. This is despite the fact that Article 1916, paragraph 4 of the Civil Code, as we have seen, has expressly provided for subrogation.

It is necessary, therefore, to dwell briefly on the reasons for this choice, which may not appear immediate.

It should be premised that the various interests considered to be of a social security nature, although having as a characterizing element the reference to personal values traceable, in substance, to the category of the so-called "social rights"[365], do not always present the same characteristics, but can also differ profoundly from each other. Specifically, one thing is the interest of a solidaristic-assistance-social security nature in defending one's acquired standard of living in the face of events, such as survival at a given age (*id est*, longevity) or the death of a relative, which could call it into question, and another is to obtain relief of a pecuniary nature to deal with the condition in which one finds oneself because of the impairment of health resulting from accidental injury or misfortune. These are, we repeat, interests that, although both pertaining to the sphere of the person and, as such, not reducible to the strictly patrimonial level and, therefore, definable as "social security", differ profoundly[366].

Well, it can be seen that while the first interest, in the maintenance of an adequate standard of living, as has just been attempted to demonstrate, differs markedly from that to the satisfaction of which the compensa-

362 This is the approach followed by the prevailing jurisprudence and recently well illustrated and reiterated by Cass. civ, September 28, 2018, no. 23469, RESP. CIV. PREV., 2019, p. 503 ff, with extensive note by C. Scognamiglio, *La giurisprudenza della Corte di Cassazione in materia di risarcimento del danno non patrimoniale tra continuità e innovazione*, p. 508 ff, spec. p. 512 ff, who emphasizes the decision's contribution to the construction of a statute of non-pecuniary damage with regard to the requirements of its unity and all-inclusiveness, in the context of the realization of both satisfactory purposes, with regard to the victim's sense of justice, and sanctioning of the tort. This is consistent with the aforementioned multifunctional function of liability.

363 P. Corrias, *Diritto di surrogazione dell'assicuratore e vincolo di solidarietà*, cit., p. 10.

364 P. Corrias, *Le assicurazioni*, cit., p. 72 ff.

365 *Ibid*.

366 P. Corrias, *Diritto di surrogazione dell'assicuratore e vincolo di solidarietà*, cit., p. 11.

tion for non-pecuniary damage to the person aims (possibly owed by a responsible third party), the second, to the pecuniary compensation that allows one to better cope with the impairment to health, on the other hand, coincides almost completely with that ensured by the compensatory remedy. Hence, in the former hypothesis, the cumulability of the company's and the liable third party's benefits with the consequent exclusion of subrogation and, in the latter, the non-cumulability and the related power of subrogation[367].

Focusing, in these terms, on the composite nature of interests within the same function that we have referred to as generically social security, allows, in our opinion, also to correctly set up the last question evoked in the beginning and pertaining, as will be recalled, to the applicability of subrogation to fatal accident insurance and other *lato sensu* social security relationships that provide for the payment of benefits in the event of the death of the insured[368].

When the risk insured under accident insurance also covers the event of death, the beneficiary of the death benefit will evidently be a person other than the insured. So the interest in the insurance benefit of which the third-party-beneficiary is the bearer, does not concern the compensation or reparation of a personal injury – which, on the other hand, the injured insured could possibly benefit from in the event that the event does not turn out to be fatal – but the protection of the standard of living in the face of the disappearance of the injured relative, not unlike what happens in common death insurance when this is determined by a cause other than the accident (such as illness or suicide)[369].

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367 The non-cumulative nature of the insurance benefits of the social security institution and compensatory benefits of the third-party injured party, in the case of a nonfatal injury caused to the insured by the latter, has recently been sanctioned by the aforementioned twin rulings of 2018 (Cass., sec. un., May 22, 2018, nos. 12565, 12566, 12567, p. 1897 ff); in this direction, subsequently, Cass., Nov. 5, 2020, no. 24633, ASICURAZIONI, 2021, 125; Cass., July 5, 2019, no. 18050; Cass., June 11, 2014, no. 13233, cit., 2062; however, it should be recalled that this approach has not always been shared, as an orientation in favor of the cumulation of the two benefits had to be found: Cass., Aug. 30, 2016, No. 17407; Cass., Sept. 30, 2014, No. 20548.

368 P. Corrias, *Diritto di surrogazione dell'assicuratore e vincolo di solidarietà*, cit., p. 11.

369 In this sense, see, Cass., sez. un., April 10, 2002, no. 5119, p. 117 ff, according to which in the case in which the guarantee is also assumed for the fatal accident a risk that is typical of life insurance is taken into consideration: the insured risk, although linked to a specific cause (the accident), is, in fact, still constituted by death, and that is, by an event pertaining to human life, and not to the person, such as the disabling accident. Approach recently confirmed by Cass., Apr. 8, 2021, no. 9380; in an adhesive sense, also, Trib. Crotone, Sept. 9, 2020, DE JURE, 2021.

Compensation for damages possibly owed by the person responsible for the fatal accident to the surviving relative, who is also the holder of the insurance benefit, thus realizes the interest in repairing the psycho-physical integrity resulting from the loss of the relative quite different from the solidaristic type of interest implemented by the insurance contract. For this reason, it is plausible to reach the conclusive consideration that insurance and compensation benefits are cumulative and, therefore, no subrogation is conceivable[370].

In Common Law jurisdictions, in the context of insurance/reinsurance, the right of subrogation entitles an insurer/reinsurer, having paid/indemnified the loss to the insured, to "step into the shoes"[371] and bring an action in the (re)insured's name, against any third party who was responsible for causing the loss[372].

The insurer acquires the right to use the insured's name to proceed against any third party liable for the loss and to claim from the insured any sums received by way of compensation from that third party[373].

If a party is insured against an insured risk, and that risk eventuates and causes loss, the insurer will make good to the insured party the loss suffered as a result of the occurrence of the event, the risk of which was an insured risk[374].

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370 P. Corrias, *Diritto di surrogazione dell'assicuratore e vincolo di solidarietà*, cit., p. 11.

371 R. E. Keeton & A. I. Widiss, *Insurance Law*, cit., p. 220.

372 D. Rosenberg, *Deregulating Insurance Subrogation: Towards an Ex Ante Market in Tort Claims*, Harvard Law School Public Law, Research Paper No. 043, 2002, p. 307 ff.

373 J. Greenblatt, *Insurance and Subrogation: When the Pie Isn't Big Enough, Who Eats Last?*, U. CHI. L. REV., 1997, p. 1337 ff. Several policy considerations underlie the doctrine of subrogation. First, subrogation has its genesis in the principle of indemnity. Although an insured is entitled to indemnity from an insurer pursuant to coverage provided under a policy of insurance, the insured is entitled only to be made whole, not more than whole. Subrogation principles normally prevent an insured from obtaining one recovery from the insurer under its contractual obligations and a second recovery from the tortfeasor under general tort principles. Additionally, subrogation rights enable the insurer to recover payments made to the insured, who theoretically should have been made whole through those payments. Finally, subrogation advances an important policy rationale underlying the tort system by forcing a wrongdoer who has caused a loss to bear the burden of reimbursing the insurer for indemnity payments made to its insured as a result of the wrongdoer's acts and omissions. This rationale has been termed the moralistic basis of tort law as it has developed in our system.

374 *Ibid*. However, the insurer is entitled to bring a subrogated claim, that is a claim in the name of the insured party, against any other party legally responsible for the event. The existence of the insurance does not relieve the wrongdoer (or the other party legally responsible for the event) of any liability it would otherwise have, absent the existence of the insurance policy, to make recompense for having caused that event. See also R. Hasson, *Subrogation in insurance law – a critical evaluation*, OXFORD J. LEGAL STUD., 1985.

Modern legal principles have divided subrogation into two basic categories reflecting how the right of subrogation arises. Legal subrogation, also known as equitable subrogation, arises when an insurer fulfills its obligations to an insured pursuant to the contract of insurance and, in fact, that obligation should have been paid by another, i.e., the tortfeasor[375].

Subrogation, like other aspects of the legal relationship between an insured and insurer, is influenced by a number of different legal sources in the United States. First and foremost, the contract of insurance between the insurer and insured sets forth the basic obligations and duties between them by specifically enumerating the obligations of the respective parties. To a lesser extent, custom and usage also play a role in filling in many of the gaps in the express contract language of a policy[376].

Increasingly, however, the relationship between the insured and insurer is being influenced by administrative, judicial, and legislative forces in the United States through the enactment and implementation of "Unfair Claim Settlement Practices" legislation and regulations, and the recognition by courts that an insurance contract creates a fiduciary relationship between the insured and insurer[377].

In Georgian law, article 832 is a legal form of giving up the request. As mentioned it is known as subrogation in insurance law. Norm deter-

375 This right arises in the absence of contractual language granting a right of subrogation. Conventional subrogation, also known as contractual subrogation, arises by virtue of contract or agreement. Conventional subrogation arises when an insurance policy specifically grants a right of subrogation to the insurer. In this regard, insurance policies routinely include a provision entitling the insurer, on paying a loss, to be subrogated to the insured's right of action against any person whose act or omission caused the loss or who is legally responsible to the insured for the loss caused by the wrongdoer. See J. Parker, *The Common Fun Doctrine: Coming of Age in the Law of Insurance Subrogation*, IND. L. REV., 1998. Conventional subrogation also may arise when the insured specifically assigns its claim to the insurer by way of a subrogation receipt.

376 R. E. Keeton & A. I. Widiss, *Insurance Law*, cit., p. 220.

377 *Ibid*. This is known as the implied covenant of good faith and fair dealing in every insurance contract. When a fiduciary relationship exists, the insurer must "strike a proper balance" between acting in its own best interests and protecting the interests of its insured. As a result of that relationship, the parties (primarily the insurer) are required to act in good faith in the performance of their express and implied obligations under the insurance contract.

mines the insurer's ability to indemnify in case of damages satisfy the self-interest of the injured person's request at the expense of the right[378].

At the time of subrogation, with the same obligation – legal in the relationship, the place of one person (policyholder) is taken by another (insurer). Replacement of the creditor in the legal relationship of damage insurance the introduction of the principle, according to the court's explanation, may serve from the unjust enrichment of both the insured and the third party to avoid[379].

Article 832, para. 1, for exercising the right of subrogation by the insurer certain prerequisites are established. In particular, the insurer's damages initially, should be reimbursed in favor of the policyholder. According to the article in comment, the claim is transferred to the insurer if it indemnifies the policyholder harm. Accordingly, the insurer is granted the right to demand from the third party as a result of damages. In addition, the insurer has the right, third to demand from a person the fulfillment of the amount that he has insured beneficially implemented. Otherwise, the insurer will stand the problem of unjust enrichment[380].

It should be noted that the second condition is not directly established in the norm under consideration. However, it derives from the doctrine of subrogation and serves to prevent unjust enrichment of the insurer, as well as the interests of public order protection as well. Hypothetically, with the second premise in the absence of established demand, it is possible to do it yourself the insurer has the motivation to intentionally damage the insured object[381].

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378 Judgment of the Supreme Court of Georgia of September 5, 2012, # AS-581-549-2011. The Court of Cassation points out that according to the mentioned norm the possibility is taken into account when the insurer is transferred to the right to demand that the policyholder is responsible for the damage such a transfer of the right of claim against a person is known as "subrogation" as a principle.

379 Judgment of the Supreme Court of Georgia dated February 17, 2012, # AS-663-624-2011.

380 *Yorkshire Insurance Co. Ltd v. Nisbet Shipping Co.Ltd*., 1961. For example, in international insurance in one of the cases known to the practice, for the person causing the damage in the process of filing the request, the pound sterling was devalued as a result, the difference between the amount paid and received by the insurer amounted to 55,000 pounds sterling. In International Insurance Doctrine according to the established rule, the excess belongs to the policyholder

381 K. Iremashvili, *Art. 832*, cit. For the doctrine of insurable interest see A. Borroni, *Art. 799*, in this Commentary and article 820, in this volume.

An important provision is given in article 832 para. 2. According to the norm, if the policyholder waives his or her claim against the third party on the right to secure the claim, then the insurer is released from the obligation to compensate for the amount of damage as much as he or could to receive compensation for his expenses related to the exercise of the right or regarding filing a request[382].

It is important to note that some authors stress the prohibition of the use of subrogation established by article 832, para 2. According to the norm, if the policyholder's right to compensation for damages concerns the family members living with him, then the transfer of the right is excluded when a family member caused the damage intentionally[383].

In addition, it should be noted that article 829 only indicates gross negligence. For a member of the policyholder's family inadmissibility of the right to demand when intentionally causing damage is explained by the lack of obligation to pay. By such logic, the intention of damage to the insured object by a member of the policyholder's family the injury equates to such action by the policyholder and, in terms of legal effect, from the insurer's obligation to indemnify leads to release[384].

Accordingly, if there is no compensation obligation, on its face, will not be a prerequisite for subrogation and will be excluded transfer of the right to demand[385].

12. Alienation of insured property (artt. 833-835)

Articles 833-835 deserve a unique dissertation considering that they treat the alienation of insured property, its effects (art. 833), the obligation to notify the alienation to the insurer (art. 834) and the termination of contract after the alienation.

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382 *Ibid*.

383 Legal in the literature, there is an opinion of a technical flaw in the norm regarding existence. In particular, according to this opinion, article 832 is omitted in the paragraph 2 the word – not and the norm should be formulated as follows: when a family member the damage was not caused intentionally. M. Tsiskadze, *Commentary on the Civil Code, Art. 832*, Book IV, Volume II, 2001, p. 15 ff. The mentioned opinion has a logical explanation: the legislator of the insurer based on damage caused by a family member's negligence policyholder uses the right of subrogation without justification considers.

384 K. Iremashvili, *Art. 832*, cit.

385 *Ibid*. In both interpretations, the legislator makes the policyholder liable to the insured object he calls for special attention and mentions obligations including persons in the sphere of influence of the policyholder.

The Italian civil code contains this discipline in the article 1918, which states that the alienation of the insured property is not cause for termination of the insurance contract[386].

The insured, who fails to notify the insurer of the alienation and the purchaser of the existence of the insurance contract, remains obligated to pay premiums falling due after the date of alienation.

The rights and obligations of the insured shall pass to the purchaser, if the purchaser, having been notified of the existence of the insurance contract, does not, within ten days from the due date of the first premium following the alienation, declare to the insurer, by registered letter, that he does not intend to take over the contract. In this case, the insurer shall be entitled to the premiums for the current insurance period.

The insurer may, within ten days from the day on which it received notice of the alienation, terminate the contract by giving fifteen days' notice, which may also be given by registered letter.

If a policy has been issued to order or to bearer, no notice of the alienation shall be given to the insurer, and so the latter as well as the purchaser may not withdraw from the contract.

Article 1918 of the Civil Code regulates a peculiar, partially automatic succession mechanism, which in the event of transfer of the *res assicuratae*, whether for a consideration or free of charge, extends insurance coverage to the purchaser of the goods. In fact, if the "things" are transferred from the original insured to a third party, the risk of damage on them incipiently will also pass to the purchaser and with it the interest in its compensation under Article 1904 of the Civil Code, which characterizes the indemnity function[387].

Since the insurance covers the asset, the alienation of the asset also naturally results in the transfer of the former. This shift is intended to facilitate

386 In fact, the choice of the legislature is in the direction of the simultaneous transfer of the insurance contract as well, according to a mechanism of silent consent.

387 Vast is the literature on the norm inspired by the formula of J. L. M. De Casaregis, *Discursus legales de commercio*, Venice, 1740, IV, n. 1 according to whom «risicum seu interesse assecurari» represents the «principale fundamentum assecurationis [...] sine quo non potest subsistere assecuratio». See *ex multis*, A. Donati, *L'interesse nel contratto di assicurazione*, ASSICURAZIONI, 1950, I, p. 313 ff; A. Donati, *Trattato del diritto delle assicurazioni private*, cit., p. 205 ff; L. Buttaro, *L'interesse nell'assicurazione*, Milan, 1954, p. 7 ff; N. Gasperoni, *Le assicurazioni*, in *Trattato di diritto civile*, diretto da Grosso e Santoro-Passarelli, Milan, 1966, p. 96 ff; G. Castellano & S. Scarlatella, *Le assicurazioni private*, in *Giurisprudenza sistematica di diritto civile e commerciale*, diretta da Bigiavi, Turin, 1981, p. 312 ff; G. Volpe Putzolu, *Assicurazione contro i danni*, D. DISC. PRIV., sez. comm., I, Turin, 1987, p. 401 ff.

the purchaser in that it allows him to keep the contract without the need for a new contract. However, since both parties are faced with a new contractor, that they may not like, both are entitled to rescind. Moreover, the discipline does not apply to order or bearer policies since in that case the circulation of the right occurs because of the circulation of the security[388].

As already illustrated, according to concepts now established in doctrine, property and casualty insurance is a contract of a compulsory and *intuitus personae* nature, and not already a real one, and is concerned with a subjective interest and not with an objective interest. Strict consequence of these principles would be that as soon as by the alienation of the insured property the insured interest meta holder, insurance contract should be extinguished[389].

388 See F. Mancuso, *Sui rapporti tra l'«alienazione di cose assicurate» (art. 1918 c.c.) e il principio di successione nei contratti nel trasferimento d'azienda (art. 2558 c.c.),* GIUST. CIV., 2013, p. 2734 ff, note at the judgement Cass. Civ. , December 7, 2005, n.27011, sez. III.

389 Art. 439 old code, valid for all property and casualty insurance, not excluding marine insurance, and which sounded, in the event of alienation of the insured property, the rights and obligations do not pass to the purchaser, unless it is agreed otherwise, was in essence merely sanctioning legislatively this logical consequence of the principles. A. Donati, *L'interesse nel contratto di assicurazione*, cit., p. 313 ff. The strict application of the principle now affirmed, and sanctioned, unless otherwise agreed, by the old code, produced, however, serious drawbacks : for the insurer, who saw d insurance relationship terminate d indeed time ; for the alienating insured, who by policy premium was often obliged to pay a part of the unexpired premium as compensation for the early termination ; for the purchaser of the insured things, finally, who remained uncovered from the day of his purchase to the time of the conclusion of a new insurance contract. *Ibid*.

In practice, therefore, the need quite opposite to cold dogmatic principles was manifested. Under the impetus of this necessity take on circulatory function, numerous institutions: assignment of the policy, policy to order or to bearer, insurance on behalf of whom it is due, different institutions that in different ways implement the circulation of insurance. G. Castellano & S. Scarlatella, *Le assicurazioni private*, in *Giurisprudenza sistematica di diritto civile e commerciale*, cit., p. 312 ff.

While insurance for the account of the person entitled implements it by assigning the right to compensation for the loss directly to the holder of the interest at the time of the loss, the assignment of the insurance contract implemented the transmission of the relationship, thus constituting the conventional derogation to Article 439 provided by it. This assignment must be considered to consist of an assignment of the eventual claim against the insurer andwhen the relationship was not unilateral, that is, when all the premium had not already been paid and the insured was the same policyholder (on whom the obligation to pay the premium in the ass. on behalf of others rests)-of an assumption, as the case may be cumulative or privative of the premium debt. The assignment was often made obligatory, under penalty of payment of all or part of the residual premium for the insured, by policy covenants that could be traced to a pactum de *contrahendo cum tertio*. *Ibid*.

Finally, policies to order or to bearer, not constituting, except in exceptional cases, true securities, but merely documents of legitimation, silenced in either case the circulation of insurance by simplifying the transmission of the document. A. Donati, *L'interesse nel contratto di assicurazione*, cit., p. 313 ff.

The provision of Article 1918 constitutes the legatee (ex lege) basis of a transmission in the technical sense of the insurance relationship.

The alienation of interest and thus the transfer of the insurance relationship occurs with the transfer of ownership. This thesis is supported (1) by the text of Article 1918 itself, which refers to the alienation of the insured property; (2) by the fact that the insured interest is thus well determined; and (3) by the fact that it is the only moment that can really be ascertained.

The alienation of the insured things at the time indicated above - produces the following effects: on the insured (and, in insurance for the account of others, also on the policyholder) is the double burden of notifying the insurer of the alienation; the purchaser of the existence of the insurance contract[390].

Notice is here, as in other fields, a statement of science. Since no time limit is set, the burden of notice must be observed immediately.

There is no burden of notice to the insurer when the insurance policy is issued to order or to bearer: in such a case the policy is issued with a view to the probable circulation of the insured things, so that the insurer already can expect such circulation. On the other hand, since in such a case the insurer has no power to terminate the contract, the usefulness of the notice is lost[391].

It is possible, therefore, to hold that by effect and at the time of alienation the insurance relationship passes to the purchaser, but that the purchaser has the power to withdraw within a certain period of time.

From the moment of alienation, the right to the insurer's indemnity benefit passes to the purchaser. Since this is a derivative right, the insurer

390 See Art. 1918, para. 1, Italian c.c.

391 See F. Mancuso, *Sui rapporti tra l'«alienazione di cose assicurate» (art. 1918 c.c.) e il principio di successione nei contratti nel trasferimento d'azienda (art. 2558 c.c.),* cit., pp. 2378-2739. Failure to observe the burden of notice to the insurer or the purchaser or both imports as a penalty that the insured remains obligated to pay premiums that fall due after the date of transfer of the insured property. Since the insurance relationship transfers de jure even if the duty of notice is not observed, it must be held that this sanctioning rule must be interpreted to mean that: (i) as long as the relationship operates *de jure* in the hands of the purchaser, the purchaser is liable for the premium because he benefits from the insurance, but the alienator is jointly and severally liable because the failure to give notice keeps the purchaser unknown and does not make it possible for the insurer to cancel the contract ; (ii) when aliunde, or by late notice, purchaser and insurer become aware, the former of the insurance, the latter of the alienation, the purpose of the charge is, albeit belatedly, achieved and thus the purchaser alone will remain *ex nunc* obligated for the premium if the insurance continues, or the alienator only for the current premium, if the insurance ceases.

will be able to assert against the purchaser all defenses enforceable against the alienator, under the contract, minus therefore those extra-insurance defenses that are personal to him (*e.g.*, set-off for a claim under another contract). Thus, breaches of obligations and burdens, fraudulently concluded overinsurances and double insurances, prior assignments of rights by the alienator, etc., are enforceable against the purchaser; in addition, terms in progress against the alienator continue to run against the purchaser[392].

As anticipated in the preceding pages, both the insurer and the buyer have the option to withdraw from the ceded contract.

The law provides for *de jure* transfer of the relationship because it normally represents an advantage for the buyer and the insurer. But sometimes there may be no such advantage, and the insurer or the buyer may have reasons for not taking advantage of the transfer: *e.g.*, the buyer because he does not want to insure himself or because he wants to insure himself elsewhere, or because he is already insured (e.g., under a subscription contract); the insurer, on the other hand, because he has no confidence in the buyer's solvency or sound management of the risk, or because he sees the new situation as aggravating the risk anyway[393].

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392 See *ex multis*, A. Donati, *L'interesse nel contratto di assicurazione*, cit., p. 313 ff; A. Donati, *Trattato del diritto delle assicurazioni private*, cit., p. 205 ff; L. Buttaro, *L'interesse nell'assicurazione*, cit., p. 7 ff; N. Gasperoni, *Le assicurazioni*, in *Trattato di diritto civile*, cit., p. 96 ff; G. Castellano & S. Scarlatella, *Le assicurazioni private*, in *Giurisprudenza sistematica di diritto civile e commerciale*, cit., p. 312 ff; G. Volpe Putzolu, *Assicurazione contro i danni*, cit., p. 401 ff. Accoding to the reported doctrine, when the relationship between insurer and alienating insured is bilateral, the obligation to pay the premium also passes to the purchaser. In such a case (subject to adjustments in the internal relations between the alienator and the purchaser) the purchaser is obliged to pay the first installment of premium due after the installment of premium to the payment of which the alienator is obliged – current at the time of alienation. The relationship is no longer bilateral, and thus the obligation to pay the premium not burdening the alienator cannot be passed on to the purchaser when: (i) the premium was paid in full; (ii) the insurance was for the account of a third party, so that the obligation of the premium rested on the policyholder and not on the alienating insured.

393 The law thus grants both the buyer and the insurer a unilateral power of withdrawal under Article 1373. It does not, however, grant it to either one or the other in the case where the policy was issued to order or to bearer, because in that case, the legitimizing function of the document in the circulation of insured things, especially its position in the play of documentary sales, well known to the insurer when he issued the policy and to the purchaser when he knew of the existence of the insurance, would be frustrated by the withdrawal powers.

(a) The insurer must exercise under penalty of forfeiture the power of withdrawal within ten days from the date (dies a quo non computatur in termine) on which it received (from the insured or aliunde) notice of the alienation. The declaration of intent to withdraw must be made in writing and served (by bailiff or at least by registered letter). The declaration of withdrawal shall take effect after fifteen days.

(b) The purchaser may exercise under penalty of forfeiture the power of withdrawal within ten days from the date after the due date of the first premium installment following the alienation, and the date on which he received (from the insured or aliunde) notice of the existence of the insurance.

This is again a genuine declaration of withdrawal and must also be made in writing and notified at least by registered letter. The declaration has immediate effect. In this case the buyer is obliged to pay the insurer the premiums for the current insurance period[394].

In Germany, if the policyholder sells the insured object, the policyholder shall assign to the buyer the rights and obligations resulting throughout the period of his ownership. The seller and the buyer shall be liable as joint and several debtors for the premium payable during the current period of insurance at such time as the seller assigns the rights to the buyer.

The insurer must not accept the assignment against him until he has learned thereof[395].

In addition, regarding the termination of contract after the sale, the insurer shall be entitled to terminate the insurance agreement *vis-à-vis* the buyer of an insured object subject to a notice period of one month. The right to terminate the contract shall lapse if it is not exercised within a period of one month of the insurer learning of the sale.

The buyer shall be entitled to terminate the insurance agreement with immediate effect or to the end of the current period of insurance. The right to terminate the contract shall lapse if it is not exercised within one month of the purchase, in the case of a lack of the buyer's knowledge of the existence of an insurance within one month after he learns thereof.

If the insurance agreement is terminated in accordance with the provisions enunciated in the previous two paragraphs, the seller shall be obligated to pay the premium; the buyer shall not be liable to pay the premium[396].

The seller or the buyer must disclose the sale to the insurer without undue delay. Where disclosure has not been made, the insurer shall not be obligated to effect payment if the insured event occurs later than one month after the time when the insurer should have received the disclosure, and the insurer would not have made the contract with the buyer which existed with the seller[397].

394 See F. Mancuso, *Sui rapporti tra l'«alienazione di cose assicurate» (art. 1918 c.c.) e il principio di successione nei contratti nel trasferimento d'azienda (art. 2558 c.c.),* cit., pp. 2735-2736.

395 See Section 95 VVG, *Sale of the insured object*.

396 See Section 96 VVG, *Termination of the contract after a sale*.

397 See Section 97 VVG, *Disclosure of the sale*. Notwithstanding subsection (1), second sentence, the insurer shall be obligated to effect payment if he knew of the sale at such time as he should have received the disclosure, or if at the time of the occurrence of the insured event the time limit for the insurer to terminate the contract had expired and he did not terminate the contract.

In common law there is no provision similar to what analyzed insofar.

However, it is provided a so-called "alienation clauses" – not only referred to insurance law – which enables a lender to request the repayment of a mortgage in full if the collateral property or asset used for the mortgage is sold or transferred to a third party. An alienation clause triggers a due and payable effect in the course of a collateral being sold or transferred[398].

Usually, an alienation clause is a provision that is included in a trust deed or mortgage, this clause comes into effect when the ownership of the property changes.

Alienation clauses are also included in insurance contracts whether it is a residential and commercial property insurance contract.

An alienation clause has a different meaning in the context of an insurance contract as against that of a mortgage contract. In insurance contracts, alienation clauses relieve a policyholder from paying insurance on a property if the property is sold or transferred. This means that the new owner of home needs to purchase a new insurance on the home[399].

The Georgian article 833 c.c. determines the legal consequences of alienation of insured property. In particular, according to the norm, as a result of the alienation of the insured property, the rights and obligations of the policyholder are transferred to the purchaser. To the purchaser and the insurer, the continuation of the contractual relationship between the legislature certain relates to prerequisites[400].

The conclusion of the insurance contract does not limit the policyholder in exercising the rights of the owner. Alienation of the property of the policyholder is one of the manifestations of the autonomy of the will. Therefore, he decides himself the legal fate of his property during the insurance period. From a practical point of view, the existence of insurance when alienating property should reflect positively on the buyer's

398 C. Sparks, *Reforming Insurance Contract Law. Issues Paper 7: The Insured's Post-Contract Duty of Good Faith*, The Law Commission and The Scottish Law Commission, 2010, 9. See also J. P. Lowry, *Redrawing the parameters of good faith in insurance contracts*, in C. O'Cinneide & J. Holder, *Current Legal Problems*, 2007, 338 ff.

399 *Ibid*.

400 K. Iremashvili, *Art. 833,* in *Online Commentary on the Civil Code*, available at https://gccc.tsu.ge/. Last visited July 29, 2022. The mentioned prerequisites are given in article 834. Therefore Art. 833 should be interpreted in connection with the article 834. Legislative regulation from the point of view, it would be preferable to provide for article 833 and 834 norms should be presented as one article.

interest, as opposed to, for example, the alienation of legally encumbered property[401].

It is important that the buyer is informed of the existence of insurance in a timely manner. Such a requirement does not apply directly to the insured property in the text of norms regulating alienation. However, the imposition of such an obligation on the insurer follows the principle of good faith in civil legal relations by existence[402].

Analyzing the norm, there is a strict indication of the time for fulfilling the notification obligation. Despite the strictness, the indication of said obligation the possibility of free interpretation on immediate performance leaves in such a case, compliance with the requirements of the norm should be checked every time on the example of a specific case. However, in the end, from the goal of the norm, the resulting term shall be immediately in favor of the insurer explain.

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401 *Ibid*. However, with such admission, the buyer may not want to continue the insurance. The autonomy of the buyer's will is expressed by the fact that he receives an independent decision on a continuation of insurance. In the buyer's decision, various factors can play a role. Namely: specific insurance the business reputation of the company, the amount of the premium, the insurance coverage the volume, the principle of determining the insurance compensation, etc.

402 K. Iremashvili, *Art. 834,* in *Online Commentary on the Civil Code*, available at https://gccc.tsu.ge/. Last visited July 29, 2022. As a matter of fact, article 834 prescribes notification to the insurer about the alienation of property obligation and determines the legal consequences of its violation. When defining the norm, it is important to define the message of the addressee of the obligation, the time of notification, and the notification of legal consequences of breach of obligation.

When determining the addressee of the notification obligation, it should be noted that the norm uses the wording — the insurer must be notified as a result of the literal interpretation, it will not apply only to the policyholder. In addition, regarding the violation of the notification obligation in the norm under consideration in determining the legal result, the wording is used — if the acquirer or transferor did not notify the insurer when defining the norm it is important to note that the alienation of property for the insurer the notification is an obligation of the transferor. Indeed, alienation of the insured property upon termination of the insurance contract does not constitute a basis, but as far as it is decided by the policyholder's contractual relationship with the insurer, he is obliged to the mentioned to inform the insurer about it. Such obligation derives from article 813 from the broad definition, according to which the policyholder is obliged to not only increase the risk but also during the insurance period notification of any changes to the insurer obligation. From a practical point of view, the notification obligation determination of the addressee becomes relevant when the message insurer will waive damages due to breach of obligation on compensation. The principle of good faith obliges the transferor, to consider the buyer's interest in the insurance contract with care and not to hinder the insurer's fulfilling the obligation to pay damages in favor. *Ibid*.

Violation of the notification obligation releases the insurer from damages from the obligation to pay. It is important to reserve insurance regarding the time of occurrence of the accident. In particular, the insurer is exempted from the obligation to pay if the insured event occurred within two weeks than from the moment when the notification is received by the insurer. An additional prerequisite for the obligation to pay damages the purpose of establishing a two-week deadline is to protect the insurer's interest serves with such an arrangement, the legislator allows the transferor must fulfill the notification obligation and the mentioned two the risk of occurrence of an insured event within a week is borne by the insurer[403].

In addition, article 835 regulates insurance as a result of the alienation of insured property the rule of termination of the contract. The contract can be terminated by the insurer as well as by the purchaser.

Change of the counterparty in the contractual relationship for the insurer is an important factor that can be found. When insuring property the change of the counterparty is usually not represented by the insurer the necessary prerequisite for the formation of the will to cancel the contract. If a new policyholder is not acceptable to the insurer for its business due to reputation, financial situation, or other circumstances, interest should not include termination of insurance[404].

Nevertheless, in individual cases the insurer may terminate the contract is considered more reasonable and termination of insurance to make a decision. For the insurer to cancel the contract, the legislator has defined

403 See Decision of Tbilisi Court of Appeal No. 2b/78-12 of March 29, 2012. When explaining the norm in Article 834, it is important that one of the defendants in the case of the merger of two companies, based on article 834, a property he equated it with alienation and refused on the mentioned grounds indemnification of damage caused by insurance accident. Mentioned the appellate court developed and did not share the discussion on the circumstance of the plaintiff's argument that since there was no alienation of real estate, there was no real estate for the insurer as a result of the merger of the enterprise obligation to notify about a change of ownership. In particular article 833 of the Civil Code defines the insured property as the consequences of alienation, and article 834 — to the notification obligation in case of alienation of the insured property. The Court of Appeal explains that the court is not bound by the literal interpretation of the law. When defining the norm, it is important to ensure the equality of persons and unreasonable limitation of the powers of one of the party's inadmissibility. In a specific case, article 833 should be interpreted in such a way that succession of rights is allowed in the insurance relationship. Based on the above, article 834 imposes for the insurer obligation to notify about a successor.

404 K. Iremashvili, *Art. 835,* in *Online Commentary on the Civil Code*, available at https://gccc.tsu.ge/. Last visited July 29, 2022.

a period of one month. In case of breach of a deadline, the insurer is prohibited from using the right to terminate the contract under article 835, para. 1, on the basis provided[405].

According to the norm, the buyer should terminate the contract only immediately or at the end of the current insurance period. Along with the wording, article 835, para. 2, provides for the right of cancellation the same one-month cancellation period that applies to the insurer. In particular, the right of the buyer is invalidated if the buyer one month after the purchase will not take advantage of the mentioned right provided for in article basis. It should be noted that the above provisions it is contradictory: on the one hand, the norm is stricter towards the buyer the requirement imposes and indicates only immediately or insurance on disruption in the current period. On the other hand, it gives the buyer the right to exercise the said right within a month[406].

12.1. Obligation to pay insurance premium

First of all, in the face of non-payment of the insurance premium, it is customary that the insurer will provide a reminder in an amicable manner requesting compliance with the payment of the premium. In fact, nonpayment results in the insurer having a claim against the policyholder, and if even in the face of such a reminder the insured fails to make the due payment, then it will be up to the insurer to decide whether or not to take action to enforce recovery of the claim.

In Italian law, the article that deals with this issue is 1901 c.c. which states that failure to pay the premium or the first installment of the premium entails suspension until twenty-four hours of the day on which the policyholder pays what is due, and, if, on the other hand, the policyholder

405 *Ibid*. The desire to break the contract, from an objective point of view, therefore, may occur more to the buyer, because he agreeing to the terms of the agreement made unilaterally in fact has to. For making the mentioned decision, it is important that the buyer should have complete information about the insurance of the purchased property. Interesting for the buyer along with the terms of the contract there will be information received by the alienator with the insurance facility. The buyer's motivation for terminating the contract is different it can be due to a factor. These include, for example, experience contracting or relying on a particular insurer's lack, non-agreement with the essential terms of the contract, etc.

406 *Ibid*. It is important that if the buyer was not aware of the insurance, the one month for terminating the contract is counted from the moment when the buyer learned about the insurance. A legislator with such an arrangement protects the interest of the buyer.

on the agreed due dates does not pay the subsequent premiums, the insurance is suspended from twenty-four hours of the fifteenth day after the due date.

Up to this point, the principle adopted by the legislator is clear, whereby, if the premium or the first installment is not paid, one will not enjoy the insurance coverage, which will begin to produce its effects only from the twenty-four hours of the day on which the payment is made; while, if the premiums subsequent to the first one are not paid, the insurance coverage will remain suspended from the twenty-four hours of the fifteenth day after the due date[407].

While the Commercial Code of 1882 did not dictate any specific rules in relation to the fulfillment of such an obligation, leaving it to the development of practice to determine *ad hoc* contractual regulations[408] the current code has expressly regulated the hypotheses of default and non-performance of the insured, essentially stipulating that if the insured fails to pay the premium stipulated in the contract, the insurance remains suspended[409].

Article 1901 of the Civil Code, however, establishes a further principle that has been the subject of interpretation and study, which determines the termination *ope legis* of the insurance contract where, in the face of non-payment of the premium or the first installment of premium or subsequent premiums, the insurer does not act to collect the same within six months from the day on which the premium or installment of premium is due. In such a case, the insurer is entitled only to payment of the premium

407 P. Corrias, *Alea e corrispettività nel contratto di assicurazione (indivisibilità del premio e sopravvenienza)*, BANCA BORSA, 2015, pp. 317-318.

408 See above all V. Salandra, *Dell'assicurazione*, cit., p. 292.

409 M. Mazzola, *Tacita proroga e inadempimento dell'assicurato: alcune osservazioni*, RESP. CIV. PREV., 2018, p. 964, footnote 20. This is a specific application of the exception "*inademplenti non est adimplendum*": therefore, it cannot be opposed by the insurer when it is contrary to good faith (Art. 1460, paragraph 2, Civil Code). It is worth mentioning that, as stated in Sec. Un. civ, February 28, 2007, No. 4631, in insurance contracts with a premium adjustment clause, the insured's failure to comply with the obligation to periodically notify the insurer of changes in the data relevant to the premium supplement does not entail the immediate suspension of the guarantee, but can justify such an effect, as well as the termination of the contract, only on the basis of the general principles on the importance of non-performance and good faith in the execution of the contract, since it is a civil obligation different from those indicated in Art. 1901 Civil Code; among others, adhesively, Cass. civ, December 19, 2013, no. 28472.

for the current insurance period and reimbursement of expenses (except for life insurance)[410].

On the other hand, analyzing the first sentence of the third paragraph of article 1901 of the Civil Code, this provides that a prolonged inertia of the insurer in the face of the default of the policyholder determines a termination *ope legis* of the contract, thus causing all contractual effects to cease and releasing the parties from the fulfillment of the obligations assumed. In fact, the rationale of the rule is to prevent the insurer who has remained inactive for a long time in taking care of the collection of the premium from keeping alive a relationship from which he derives an exclusive benefit as a result of the persistence of the insured's obligation, after the lapse of the grace period, to pay the premium for the entire insurance period despite the cessation of the risk[411].

According to a substantial part of the doctrine, the provision in the aforementioned paragraph – along with several others topologically contiguous to it (including: articles 1892, paragraph 3, 1896, paragraph 1, 1909, paragraph 1, Civil Code) – would be a direct corollary of the principle of the so-called "indivisibility of the premium"[412], by virtue of which the insurer is entitled to acquire the agreed premium for a given period

410 M. Irrera, *L'assicurazione: l'impresa e il contratto*, cit., p. 206 ff.

411 According to the prevailing doctrine, the current period would consist of the period of time that would have been covered by the insurance guarantee if the unpaid premium or premium installment had been paid, so that if the contract is terminated as of right and the annual premium was divided into six-monthly installments, the insured would have to pay only the installment inherent in the period in which the termination occurred, and not the entire premium stipulated in the policy. Among others, in this sense, G. Partesotti, *Recensione ad Angelo Bracciodieta (La divisibilità del premio di assicurazione)*, cit., p. 380; P. Corrias, *Il contratto di assicurazione: profili funzionali e strutturali*, cit., p. 113. The authors find the positive hook, in order to support this interpretation, in article 1901, paragraphs 1 and 2, of the Civil Code, which provides for the division into installments and links the suspension of insurance coverage alternately to the expiration of the annual premium, or, when provided for, to that of the individual installments. This interpretation, in jurisprudence, has been accepted by Cass. civ., October 18, 2010, No. 23264. According to A. Bracciodieta, *Il principio di divisibilità del premio*, Naples, 1973, p. 82 ss, on the other hand, the current period could only mean that during which (and up to which) the insurer has actually provided the guarantee.

412 For a concise survey of the various opinions that have matured in doctrine regarding the basis of the principle L. Ballerini, *Risoluzione del contratto di assicurazione ex art. 1901, 3° co., c.c. e diritto dell'assicuratore al pagamento del premio relativo al "periodo assicurativo in corso"*, RESP. CIV., 2012, p. 908 ff.

of time – so-called insurance period – despite the fact that the insurance guarantee is provided for only part of it, or not at all[413].

The principle, which certainly introduces an exception to the rules on correspondence, would stand to highlight the normative emergence of the technical requirements underlying the insurance transaction[414]: given that the insurer, in calculating the (pure) premium, takes into account the number of risks assumed and thus the total amount of premiums it will collect, the failure of even a single premium could alter the basis of the calculation and make the premiums collected insufficient to cover the claims that, hypothetically, might occur[415].

In Germany, Section 33 of VVG states that the policyholder must pay a single premium or, where payment of recurrent premiums has been agreed, must pay the first premium without delay 14 days after receipt of the insurance policy. If the insurer previously collected the premium, the policyholder shall not be obligated to transfer the premium until requested to do so in writing by the insurer[416].

If the single premium or the first premium is not paid on time, the insurer is entitled to terminate the contract, unless the policyholder is not responsible for the non-payment. The insurer is not obliged to pay when the insured event occurs before the payment of the premium, unless the policyholder is not responsible for the non-payment[417].

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413 The definition of G. Partesotti, *Recensione ad Angelo Bracciodieta (La divisibilità del premio di assicurazione)*, cit., p. 378, Indivisibility of the premium means the infeasibility of the agreed premium for a specific period of time – so-called insurance period – with the consequence that the insurer is allocated the entire premium corresponding to the insurance period even when the guarantee, or by other formula the bearing of the risk, is provided for only part of the period, or even not provided at all.

414 P. Corrias, *Incidenza dell'impresa e conformazione del contratto di assicurazione*, GIUST. CIV., 2017, p. 518 ff. Related to the classic topic of the impact of the organizational and actuarial profile of the enterprise on the insurance contract, see also O. Clarizia, *Contratto di assicurazione, impresa, mercato: dialoghi tra passato (l'impresa requisito del contratto) e presente (nullità di protezione ed eteroregolamentazione)*, RASS. DIR. CIV., 2017, p. 1211 ff.

415 F. Denozza, *Contratto e impresa nell'assicurazione a premio*, Milan, 1978, p. 73.

416 Section 33 VVG, *Due date*.

417 However, the insurer has to inform the policyholder of the legal consequence of non-payment of the premium in writing in a separate communication or by means of a conspicuous note in the insurance policy. Section 37 VVG, *Delayed payment of first insurance premium*.

In UK, the requirements for payment of a premium are made on a contractual basis. It is not necessary for premium actually to be paid – the contract may provide that the consideration is agreement to pay[418].

Generally, requirements for payment of premium will be governed by the terms of the contract of insurance[419].

An insurance contract may contain a premium warranty under which the insured warrants that premiums will be paid at given times. Such a provision will be given effect by the court as a warranty and default will bring the insurer's liability under the policy to an end, although the insured remains liable for the premium[420].

Even without an express warranty an insurer may be able to repudiate a contract of insurance where there has been a failure to pay premium on the due date[421].

In Georgian law, in case of termination of insurance as a result of the alienation of the insured property the obligation to pay the insurance premium rests with the transferor. In particular, if the insurance contract is canceled according to article 835, the alienator is obliged to pay the insurance premium.

The premium also determines the amount and indicates that the alienator does not have to pay more than what they should have paid during the insurance period and will terminate the contract including the moment. It is logical that the legislator insurance the buyer, who has no interest in the contract, is released from the premium from payment obligations[422].

418 J. Birds, *Birds' Modern Insurance Law*, London, 2022, p. 191 ff.

419 *Ibid*.

420 See *J. A. Chapman & Co Limited v Kadirga Denizcilik Ve Ticaret* [1998] Lloyd's rep IR 377.

421 See *Figre Limited v Mander* [1999] Lloyd's Rep IR 193.

422 For an in-depth analysis of the Georgian discipline on this topic, I. Castellucci, *Artt. 815-816*, in this Commentary.

Chapter V

INSURANCE FOR THE BENEFIT OF ANOTHER PERSON

One of the criteria for classifying insurance is to determine to whom the insurance is payable. From this point of view, the legal literature distinguishes between insurance contracts taken out for the benefit of the first party (first-party-insurance) and third parties (third-party-insurance).

According to U.S. insurance doctrine, all insurance other than liability insurance is first-party insurance[423].

In Italy, insurance in favor of a third party is valid. The designation of the beneficiary may be made in the insurance contract, or by subsequent written declaration communicated to the insurer, or by will; it is effective even if the beneficiary is determined only generically. Equivalent to designation is the allocation of the sum insured made in the will in favor of a specific person.

As a result of the designation, the third party acquires its own right to the benefits of insurance.

Under this bargaining scheme, the policyholder undertakes to pay premiums during his lifetime, against a commitment by the insurer to pay the sum insured – once the insured event, *i.e.*, death, has occurred – to the person designated as beneficiary by the insured, always subject, except in some cases, to the possibility of the latter revoking the designation[424].

From this, albeit concise, definition, it is possible to derive the most relevant functional features of the case under analysis, which also makes it possible to understand, already at this point of the discussion, the importance of this declination of life insurance in modern succession phenomena. It is, in fact, no coincidence that life insurance in favor of a third party has been a particularly fertile ground of theoretical elaboration relating to the already mentioned distinction between acts of last will, *inter*

423 K. Iremashvili, *Art. 836*, in *Online Commentary on the Civil Code*, available at https://gccc.tsu.ge/. Last visited July 21, 2022.

424 C. Petta, *Assicurazione sulla vita a favore di terzo e assetti successori tra interferenze disciplinari e opportunità applicative*, DIR. FAM. PER., 2022, pp. 839-840.

vivos transactions, dispositions of property upon death and *trans mortem* attributions[425].

It is noted, first of all, the general ascribability of the insurance considered, in the broader general scheme of the contract in favor of third parties of articles 1411 ff. c.c.[426]. This assumption, which finds the almost unanimous favor of interpreters[427] (also in the light of the evolution of

425 This differentiation has been made for the first time by G. Giampiccolo, *Il contenuto atipico del testamento*, *contributo ad una teoria dell'atto di ultima volontà*, Naples, 1954, whose studies have influenced all subsequent doctrinal elaboration. The a. moves precisely from the discussion of the life insurance contract in favor of a third party, dwelling on the discipline of Articles 1412 and 1920 Civil Code.

426 Doctrine has traditionally related third-party life insurance to the general scheme of the third-party contract. *Inter alia*, see A. Pacchioni, *I contratti a favore di terzi*, Milan, 1933, p. 294 ff; M. Stolfi, *L'assicurazione sulla vita a favore di terzi*, Milan, 1947, p. 49 ff; A. Donati, *Teoria indennitaria nelle assicurazioni e contratto a favore di terzi*, RIV. DIR. COMM., 1954, p. 1 ff; A. Donati, *Trattato del diritto assicurazioni private*, cit., p. 592 ff; A. Mora, *l beneficiario dell'assicurazione sulla vita a favore di terzi*, RESP. CIV. PREV., 1988, p. 332 ff; A. La Torre, *L'assicurazione nella storia delle idee*, Milan, 2000, p. 273 ff; V. Ferrari, *I contratti di assicurazione contro i danni e sulla vita*, Naples, 2011, p. 441 ff; R. Calvo, *Il contratto di assicurazione*, cit., p. 168 ff; D. Pirilli, *La designazione (e la revoca) del beneficiario nell'assicurazione sulla vita tra contratto e successione*, RESP. CIV. PREV., 2019, p. 1246 ff. In a partially dissenting sense, see, C. Manenti, *Il contratto di assicurazione sulla vita con designazione di un terzo beneficiario*, RIV. DIR. CIV, 1909, p. 589 ff; G. Volpe Putzolu, *Assicurazione sulla vita, dispositioni a causa di morte e atti di liberalità, in Studi in memoria di Gino Gorla*, III, Milan, 1994, p. 2100 ff; L. Buttaro, voce *Assicurazione sulla vita*, cit., p. 608 ff, who, while valuing the favor tertii typical of life insurance policies, deny, however, the overlap between the two disciplines. It has been said, in particular, that it is incongruous to qualify as a contract in favor of a third party a contract, which by its nature, can only benefit a third party, just as it is incongruous to apply in a subsidiary way the discipline of articles 1411 ff. to a case of negotiation in which the destination of the performance to a third party is inherent in the stipulation. On the configurability of the contract in favor of a third party as a *trans mortem* transaction compatible with the prohibition of agreements as to succession, see, for all, the precise analysis offered by V. Barba, *I patti successorî e il divieto di disposizione della delazione*, Milan, 2015, p. 110 ff, also for complete references to the doctrine. Finally, more generally, on the scheme of the third-party contract see, for all, M. Franzoni, *Degli effetti del contratto: efficacia del contratto e recesso unilaterale (artt. 1372-1373)*, in *Il codice civile. Commentario*, directed by P. Schlesinger, I, Milan, 1988, p. 183; M. Franzoni, *Il contratto e i terzi*, in E. Gabrielli (ed.), *I contratti in generale*, II, 2nd ed., in *Tratt. contr. Rescigno*, Turin, 2006, p. 1239 ff; T. O. Scozzafava, voce *Contratto a favore di terzi*, ENC. GIUR., VIII, Rome, 1988, p. 3 ff.

427 *Ex multis*, L. Buttaro, *voce Assicurazione sulla vita*, cit., p. 648 ff; N. Gasperoni, *voce Assicurazione: assicurazione sulla vita a favore di terzi*, cit., p. 12 ff; P. Corrias, *L'assicurazione sulla propria morte*, cit., p. 723 ff.

the discipline with respect to the codification previously in force[428]), is functional for understanding the essential characteristics of the operation, although it should be clarified as of now that the insurance transaction under analysis presents very significant special features[429] which do not allow its full ascribability to the mentioned general scheme[430].

1. Contract for the benefit of a third party. A general comparative overview

The issue of stipulation in favor of third parties has always appeared to be one of the profiles of greater distance between different legal traditions, particularly between common law and civil law families.

As is well known, the rule of "privity of contract"[431], according to which a contract produces effects only between the parties, did not allow English law to recognize the validity of a contract for the benefit

428 In the former codification, in fact, the principle of general invalidity of contracts in favor of third parties was affirmed, except in cases expressly provided for by law, such as those in articles 1128, 1130 c.c. 1865 and 453 c. comm. 1882. In particular, for Art. 1128 c.c. 1865, stipulation in favor of third parties was possible only in the case where it constituted a condition of stipulation in one's own favor or of a donation made by others, it being evident that the life insurance contract did not fall under any of those cases. C. Petta, *Assicurazione sulla vita a favore di terzo e assetti successori tra interferenze disciplinari e opportunità applicative*, cit., p. 840, footnote 25. As a result, the insured's purpose of benefiting another person could be realized only indirectly, namely, the indemnity became part of the estate and was attributed to the third party as a legacy or share of the estate, but in this way the result to which the insured was aiming ran the risk of being well often frustrated by the claims of the tax authorities, creditors, and the other heirs of the insured. L. Buttaro, *voce Assicurazione sulla vita*, cit., p. 648 ff.

429 Otherwise, the general rules dictated by articles 1411 ff. c.c. apply to the case under consideration insofar as they are not derogated from the special rules provided for life insurance in articles 1920 ff. c.c. On this point see, for all, F. Peccenini, *Commentario del Codice Civile. Assicurazione Art.1882-1932*, cit., pp. 1-13.

430 C. Petta, *Assicurazione sulla vita a favore di terzo e assetti successori tra interferenze disciplinari e opportunità applicative*, cit., p. 840.

431 The doctrinal production on the rule of privity of contract is widest. It is reported the most relevant: P. S. Atiyah, *An introduction to the law of contract*, Oxford, 1995, p. 265 ff; J. N. Adams R. Brownsword, *Key issues in contract*, London, 1995, p. 152 ff; G. H. Treitel, *The law of contract*, London, 1985, 6 ed., p. 454 ff; F. Toriello, *Gli effetti del contratto a favore di terzi nell'esperienza inglese*, CONTR. IMPR. EUR., 2000, I, p. 80 ff; G. H. Treitel, *Third Parties*, in *Chitty on Contracts*, London, 1999, 28 ed., I, p. 959 ff; H. Collins, *The Law of Contract*, London, 1993, 2 ed., p. 285 ff; R. Merkin, *Privity of Contract: The Impact of the Contracts (Right of Third Parties) Act 1999*, London-Hong Kong, 2000; V. V. Palmer, *The Paths To Privity: A History of Third Party Beneficiary Contracts at English Law*, San Francisco, 1992.

of a third party, which, by contrast, is generally recognized in civil law countries.

The doctrine of privity of contract is a common law principle which provides that a contract cannot confer rights or impose obligations upon any person who is not a party to the contract.

The premise is that only parties to contracts should be able to sue to enforce their rights or claim damages as such. However, the doctrine has proven problematic because of its implications for contracts made for the benefit of third parties who are unable to enforce the obligations of the contracting parties[432].

The historical factors that contributed to the development, in England, of the rule of contractual relativity remain in many ways obscure. The ultimate establishment of the privity of contract constitutes the outcome of a long process, not fueled solely by endogenous factors. A decisive role was played by the spread in England, around the beginning of the 19th century, of the Continental theory of freedom of the will[433].

The translation of Pothier's works[434] constituted the main vehicle for the dissemination of this theory, which identified the agreement between the parties as the climax of the contractual affair. In deference to the principle *solus consensus obligat*, the parties were free to achieve, through the agreement resulting from the meeting of proposal and acceptance, the arrangement of interests most in keeping with their will[435].

Continental theory presented common law jurists with a different conception of the contract than the national one, traditionally based on the elements of consideration, promise and breach of promise. The consensual principle, valuing the agreement between the parties, led to a definition of contract conceived not as an exchange of promises, but as an agreement[436].

In England, the will theory received a hostile reception especially from those jurists who considered the new ideas, coming from the continent,

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432 L. Vagni, *Il contratto a favore di terzi nella comparazione «common law – civil law»: dallo «ius comune» al diritto privato europeo*, RIV. TRIM. DIR. PROC. CIV., 2005, pp. 1205-1206.

433 V. V. Palmer, *The Paths To Privity: A History of Third Party Beneficiary Contracts at English Law*, cit., p. 175 ff.

434 The first English translation of Pothier's treatise on obligations comes from 1806 by Sir Williams David Evans.

435 L. Vagni, *Il contratto a favore di terzi nella comparazione «common law – civil law»: dallo «ius comune» al diritto privato europeo*, cit., pp. 1205-1206.

436 L. Moccia, voce *Contract*, ENC. GIUR., 1988, p. 20 ff.

incompatible with the traditional conception of contract. The staunchest opposition to the Continental theory came mainly from utilitarians[437].

The latter held that the acceptance of the theory of the will would reduce consideration, and with it the concept of bargain, to marginal requirements of the contract, in order to give greater prominence to the proposed acceptance of the contracting parties[438].

According to the utilitarians, the legal system bound the promisor to his promise in order to satisfy the reliance the promisee had placed on performance. These jurists, therefore, proposed the acceptance of the theory of reliance, rather than the principle *sofiis consensus obligat*: first, because it was more responsive to the reality of the facts, but above all because it was more compatible with consideration[439].

The recognition of the privity of contract rule, by the common law courts, must be analyzed with reference to this context.

The will theory appeared to be abstractly compatible with the validity of the contract in favor of third parties. Contractors well could enter into a contract for the benefit of a third party if their will had so expressed itself[440].

On the basis of the above considerations, however, it can be assumed that English jurists were reluctant to give such wide latitude to the freedom of the contractors, fearing the elimination of consideration as a prerequisite for the validity of the contract. If the contract for the benefit of the third party was valid and effective on the basis of the consent of the parties alone, then the third party, in order to receive protection in the common law courts, no longer had to prove the existence of valid consideration underlying the contract, but only that the parties had manifested a willingness to beneficiary[441].

437 See, for an in-depth analysis on this point, P. S. Atiyah, *Promises, Morals and Law*, Oxford, 1981, p. 55 ff.

438 L. Vagni, *Il contratto a favore di terzi nella comparazione «common law – civil law»: dallo «ius comune» al diritto privato europeo*, cit., p. 1206. The author states how it is understandable, therefore, the resistance of these jurists to a theory, which threatened to undermine the entire contractual framework hitherto accepted by common law courts.

439 V. V. Palmer, *The Paths To Privity: A History of Third Party Beneficiary Contracts at English Law*, cit., p. 184 ff.

440 L. Vagni, *Il contratto a favore di terzi nella comparazione «common law – civil law»: dallo «ius comune» al diritto privato europeo*, cit., pp. 1206-1207.

441 V. V. Palmer, *The Paths To Privity: A History of Third Party Beneficiary Contracts at English Law*, cit., p. 185. The author also points out that English jurists feared that third-party beneficiary protection, by implementing the parties' liability, would end up resulting in a restriction of their freedom. Protection of the third-party beneficiary would have restricted the parties' freedom to establish and modify their relationships.

The difficulties of cross-channel jurists in accepting a theory that ill accorded with their way of thinking probably found a solution in Pothier's reading of the Treatise of Obligations[442]. The French author, while accepting the principle *solus consensus obligat*, denied validity to a contract for the benefit of a third party, arguing that effects descend from a contract only between the parties. The third party could not demand the ademption of the performance because the promisor had no interest, assessable patrimonially, in benefiting him[443].

Nineteenth-century English jurists saw in this thesis an affinity with the rule of consideration, under which the third-party beneficiary, if he wished to take action for performance of the contract, had to show that the sacrifice suffered by the promisor was for the sole purpose of benefiting him.

It is not intended in this way to argue that privity of contract was borrowed from civil law through Pothier's thought, but more simply that while English procedural rules provided fertile ground for the emergence of a strict principle of contractual relativity[444], it was probably civil law graft that enabled the identification of a privity of contract rule to reinforce consideration[445].

Probably precisely because a regime of the third-party contract was not fixed by Roman law, which indeed, as we have seen, did not generally admit its validity in deference to the rule that *alteri stipulari nemo potest*, the disciplines provided for in contemporary legislations often have elements of divergence between them[446].

However, they all presuppose the agreement of the contracting parties (usually identified as the stipulator/promisor and promisor), which,

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442 R. J. Pothier, *Trattato delle obbligazioni*, in *I trattati del diritto privato francese*, a cura di D. Seniore, ed. italiana, I, 1, art. V, p. 75 ff.

443 *Ibid*.

444 V. V. Palmer, *The Paths To Privity: A History of Third Party Beneficiary Contracts at English Law*, cit., p. 189 ff. The author explains that covenant action. which originally presupposed the presence of a deed, was granted during the 19th century even in cases where the agreement did not comply with the formalities of the deed signed. The increased use of analogy and the focus on substantive fact were among the causes of this result.

445 L. Vagni, *Il contratto a favore di terzi nella comparazione «common law – civil law»: dallo «ius comune» al diritto privato europeo*, cit., p. 1207.

446 F. Mattioli, *Il contratto a favore di terzo. Spunti per una comparazione diacronica dal diritto romano al «Draft Common Frame of Reference»*, RIV. DIR. ROM., 2010, p. 7.

insofar as it is aimed at conferring on the third party the right to a performance as an element of the synallagma, constitutes the characterizing element of the negotiated agreement in favor of the latter[447].

The acquisition of the right in the hands of the third party is in fact mostly considered a direct consequence of the stipulation in the main Civil Law systems: the rule that applies, unless otherwise agreed[448] or unless in any case the nature or purpose of the contract indicates otherwise[449], is that of the direct and immediate recognition to the third party extraneous to the contract of the right to demand its performance[450].

In this regard, however, it should be noted that in some jurisdictions the acquisition of the right and the consequent right of the third party to

447 In this sense, explicit references to the agreement or the intention of the parties are found in § 881 [2] of the ABGB (Austrian civil code) and in Art. 112 [2] of the Swiss Code of Obligations, respectively.

448 Cfr. Art. 1411 [2] of the Italian Civil Code.

449 Cfr. in this regard § 881 [2] of the ABGB. as well as § 328 [2] of the BGB. More precisely, ABGB, § 881 (2), as reformed by the 1916 *Teilnovelle*, states that the direct acquisition of the right by the beneficiary (as well as the time at which it may become due), may result from the agreement, the nature and purpose of the contract (and thus explicitly or implicitly) and that in any case, in case of doubt, the right is to be considered directly acquired to the third party. Previously, § 328 (2) of the BGB, (on the BGB. rules in general, regarding the determination of the time when the right of the third party arises and the time when the provision in his favor becomes irrevocable, see P. Gallo, voce *Contratto a favore di terzo in diritto comparato*, DIG. DISC. PRIV., Sez. Civile, vol. IV, Turin, 1989, p. 252 ff) had stipulated that it should be inferred from the circumstances, and particularly from the purpose of the contract, whether the third party should acquire the right and whether this right arises immediately or only in connection with the occurrence of certain prerequisites (on this point see also the interpretative provisions contained in §§ 329-330 respectively with regard to the assumption of performance and in the case of, among others, life insurance or annuity contracts: see in this regard K. Larenz, *Lehrbuch des Schuldrechts, I, Allgemeiner Teil 12*, München, 1979, p. 203 ff). As mentioned in a similar sense the intention of the parties or the custom refers to Art. 112 (2) of the Swiss Code of Obligations, in connection with the possibility of the third party to demand performance directly.

450 F. Mattioli, *Il contratto a favore di terzo. Spunti per una comparazione diacronica dal diritto romano al «Draft Common Frame of Reference»*, cit., pp. 7-8. This is also the orientation of French doctrine and jurisprudence: see on this point P. Malaurie, L. Aynès, P. Stoffel-Munck, *Les obligations*, Paris, 2003, p. 394 and footnote 35. In similar terms is pronounced, among the most recently drafted codifications, Article 430 (1) of the Code of the Russian Federative Republic. Equally is the case in the equally recent *Code civil du Québec*, Art. 1444, para. 1. What is noted, however, does not normally rule out the stipulator/promisor retaining the right to require the promisor to perform the promise: thus explicitly § 335 del BGB., § 881 (1) ABGB., and also Art. 112 (1) of the Swiss Code of Obligations, Art. 444 (2) of the *Código civil Português* and the Art. 6.256 of the *Nederlands Burgerlijk Wetboek*.

demand its performance turn out to be rather conditional on the latter's acceptance: this is specifically the case with Art. 1257, para. 2, of the Spanish Civil Code, as well as in particular Art. 6.253, para. 1 of the Dutch BW, the latter code in which among other things it is consistently stated (cf. Art. 6.254, para. 1) that the third party's acceptance constitutes him a party to the contract concluded in his favor[451].

As a rule, on the other hand, acceptance by the third party (which as a rule may be explicit or even made by *facta concludentia*) has rather the simple effect of rendering irrevocable (and unmodifiable) the contract entered into in his favor, a circumstance that is affirmed in explicit terms, to limit ourselves here to just a few examples, by Art. 1121, para. 2, of the French Civil Code[452], by Art. 112, para. 3, of the Swiss Code of Obligations, as well as by Art. 1411, para. 2, of the Italian Civil Code[453].

Given these premises, in civil law systems the agreement between promisor and promisor can as a rule have as its object any performance,

451 As is evident, this solution finds – one would say not by chance – its direct historical referent in the Grotian construction, which we know was already adopted by the Prussian Landrecht (I, 5, § 75; for the overcoming of the approach present in the Prussian Code, which occurred, after a long doctrinal debate, by the German doctrine of the 19th century, see in particular B. Windscheid, *Lehrbuch des Pandektenrechts*, II8, Frankfurt am Main, 1900, p. 281 ff, transl. it. – *Diritto delle Pandette* – II, 1 [cur. C. Fadda & P. E. Bensa], Turin, 1904, p. 232 ff). On this aspect and the necessity of acceptance in the Prussian, Bavarian and Saxon codifications see most recently R. Zimmermann, *Lo ius commune e i Principi di diritto europeo dei contratti: rivisitazione moderna di un'antica idea*, CONTR. IMPR., 2009, p. 119. As to the solution still accepted by the Dutch legislature see C. E. Du Perron, *Art. 6:110: Stipulation in Favour of Third Party*, in *The Principles of European Contract Law and Dutch Law. A Commentary,* ed. D. Busch, E. H. Hondius, H. J. van Kooten, H. N. Schelhaas, W. M. Schrama, The Hague, 2002, pp. 283-284. Otherwise, the third party does not become a party in the case of those jurisdictions that recognize him the acquisition of the right on the mere basis of the agreement made between promisor and promisee: see, for example, for French law, P. Malaurie, L. Aynès, P. Stoffel-Munck, *Les obligations*, cit., p. 388. The same happens in Italian law: on this point see, for example, Cass. Civ., August 9, 1996, no. 7398 and in doctrine above all C. M. Bianca, *Diritto civile*, III 2, Milan, 2000, p. 569 ff.

452 In the same sense see now also Art. 1171, para 1, of the 2005 *Avant-projet de réforme du droit des obligations* and Art. 143 of the 2008 *Projet de réforme du droit des contrats*.

453 F. Mattioli, *Il contratto a favore di terzo. Spunti per una comparazione diacronica dal diritto romano al «Draft Common Frame of Reference»*, cit., p. 9. Notably, among those mentioned, the Italian code is the only one to explicitly refer not only to irrevocability, but also to immodifiability.

and it is not normally considered necessary that the identity of the third party be determined at the time the contract is concluded[454].

Although advantageous to the third party, the promised performance cannot, however, be imposed on him; for this reason, the third party is recognized as having the right to refuse it. Explicit in this sense is the disposition of Art. 1411, para. 3, of the Italian Civil Code, which provides that in such a case the performance shall remain for the benefit of the stipulant unless it results otherwise from the will of the parties or from the nature of the contract[455].

Specifically, in French law, the Napoleonic Code expressly provides that contracts are effective only between the contracting parties, and cannot benefit third parties unrelated to the agreement[456].

The prohibition is absolute and contemplates a single exception, provided for in the event that the benefit to the third-party beneficiary is the subject of a condition or *modus* affixed to the contract. This discipline faithfully traces the theory developed by Pothier on the subject[457].

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454 *Ibid*. In some jurisdictions, on the other hand, it is required for the stipulation to be valid that the stipulator has an interest in it. The presence of this requirement, which is certainly a historical reminiscence of what is stated in Roman sources and in particular in an Ulpian passage («[…] inventae sunt enim huiusmodi obligationes ad hoc, ut unusquisque sibi adquirat quod sua interest […]») is, for example, implied in the two cases in which the third-party contract was originally allowed under Art. 1121, para. 1, of the *Code civil*, while it is still explicitly required in the Italian Civil Code, (Art. 1411, para. 1).

455 This is the case also considered by Art. 6.255 of the Dutch BW, which explicitly provides for the possibility of the stipulant designating himself or another third party, the designation being deemed to have been made for himself in the event that the stipulant has not designated others within the time period congruently established by the promisor.

456 M. Dassio, *L'esperienza francese*, in *Effetti del contratto net confronti dei terzi*, a cura di G. Alpa & D. Fusaro, Milan, 2000, p. 95.

457 L. Vagni, *Il contratto a favore di terzi nella comparazione «common law – civil law»: dallo «ius comune» al diritto privato europeo*, cit., pp. 1214-1215. The author, in fact, recovering the solution of Roman law, argued that only what concerned the personal interest of the stipulant (promissory) could be the subject of the contract. Performance in favor of a third party, therefore, was exceptionally valid when it constituted a modus or condition affixed to the stipulation: in such cases, the promisor's non-performance entailed prejudice to the promisor. In the first case, the sacrifice suffered by the u1man, by reason of the promise, was quantifiable in the amount of money (or other good) lent to the other party to benefit the third party. The same was true if the failure to perform towards the third party was the condition, upon the occurrence of which, the promisor was obligated to lend money or other benefit to the promisor. In such a case, the promisor was bound to his promise because by default he would frustrate a personal expectation, quantifiable in money, of the promisor. *Ibid*.

The provisions of the code civil on1 contract in favor of third parties have remained unchanged over time, but the current system recognizes general validity to the institution. The overcoming of the principle *alteri stipulari nemo potest* occurred through jurisprudence[458].

Almost a century after the Napoleonic Code, the BGB recognized the validity of the contract in favor of third parties[459].

As a result of the contract, the third party directly acquired the right to demand performance from the promisor. The production of effects *vis-à-vis* the third party was left to the will of the contracting parties, in adherence to the thought that understood the contractual relationship to be governed entirely by voluntarism[460].

The will of private parties, which constituted the source of binding effect of the act of autonomy, could well be expressed in a sense favorable to the third party[461].

Third-party stipulations have been the focus of heated disputes among German jurists. The divergence of orientations on the theme has not totally subsided even since the enactment of the Code. Among the various routes taken by the doctrine to justify the validity of stipulations in favor of third parties, the issue of the promisor's interest reappears as an essential requirement for the validity of these covenants[462].

This orientation, however, is not widely shared: some authors attribute relevance only to the promisor's pecuniary interest, while others

458 M. Dassio, *L'esperienza francese*, cit., p. 95.

459 A. Somma, *L'esperienza tedesca*, in *Effetti del contratto net confronti dei terzi*, a cura di G. Alpa & D. Fusaro, Milan, 2000, p. 107 ff.

460 M. Zimmermann, *The law of obligations*, Cape Town, 1990, p. 45.

461 L. Vagni, *Il contratto a favore di terzi nella comparazione «common law – civil law»: dallo «ius comune» al diritto privato europeo*, cit., p. 1217. The contract for the benefit of a third party was similarly justified in the earlier draft of the Civil Code for the German Empire of 1888, which stated in § 412, if in a contract a performance is proposed by one of the contracting parties for the benefit of a third party, the third party acquires from this immediately the right to demand from the promisor the performance, provided that it appears from the content of the contract that this acquisition was intended. The draft recognized *pactum in favorem tertii* as a general legal institution, with the effect of the immediate acquisition of the right by the third party. The validity and effectiveness of the contract in favor of a third party was independent of the presence of an interest of the promisor in the performance of the performance to the third party.

German law thus completely subverted the rule *alteri stipulari nemo potest*, but deviated from the path traced by the glossators, who had operated on the requirement of the promisor's interest to derogate from the Roman prohibition.

462 *Ibid*.

completely deny any importance of the requirement[463]. The German system seems to opt for the latter orientation, although contrary opinions are not lacking in the doctrine[464].

In Italy, the contract under consideration is only capable of producing favorable effects in the legal sphere of the third party[465]; this is evident from the phrase "in favor", which indicates that only legal situations of advantage can be attributed to the third party.

In addition, the parties who enter into a contract in favor of a third party want the third party to acquire a right, and not only an advantage[466]. It is precisely the attribution of a right in favor of the third-party beneficiary that distinguishes it from the contract with performance to the third party, where the agreement only determines the arising of the

463 M. Zimmermann, *The law of obligations*, Cape Town, 1990, p. 45.

464 See on this point, L. V. Moscarini, *I negozi a favore di terzo,* Milan, 1970, p. 100 ff. The author states that The silence of § 328 BGB with regard to the interest of the stipulator is equally explained by the consideration that the introduction of the general figure of the contract for the benefit of third parties proper, with direct external effect, takes place, in the BGB, in the same single notation (§528) in which other figures are likewise contemplated, albeit in foreshortening and at least partly implicitly, namely that of the contract for the benefit of third parties with only internal effect and that of the contract for the benefit of third parties "with adhesion". Now given that with respect to these two different figures the specific problem of interest had no reason to be posed, it is precisely the concomitant provision of these two figures, alongside that of the contract for the benefit of third parties in the proper sense, that prohibited the express provision of the interest of the stipulant; without, of course, preventing the interpreter from deriving from the system the need for the same element of causal justification.

Interesting, also, is what was argued by O. Palandt, *Bürgerliches Gesetzbuch*, München, 1985, § 528, 1, b, who states «War der VertrSchl ein Akt der Fürsorge für den Dr od ist aus sonst Grden ausschließl im Interesse des Dr. Kontrahiert worden, kann idR ein Rerwerb bejaht w. Eine entspr Vermutg besteht aber nicht».

465 On this theme cf. A. Fusaro, *Il contratto a favore di terzi*, in *Trattato del contratto*, diretto da V. Roppo, Milan, 2006, Vol. III, p. 175 ff; according to V. Roppo, *Istituzioni di diritto privato*, Bologna, 2008, p. 390, there is a contract in favor of a third party only when the contract directly touches the legal sphere of the third party, giving him a real subjective right towards the promisor. On this subject see also A. Palazzo, *Contratto a favore di terzo e per persona da nominare*, RIV. DIR. CIV., 1991, II, p. 177; G. A. M. Trimarchi, *Il contratto a favore di terzo*, NOTARIATO, 2000, p. 576; G. Gandolfi, *Il contratto a favore di terzi nel "codice europeo dei contratti"*, RIV. TRIM. DIR. PROC. CIV., 2003, p. 993; G. Lo Schiavo & A Marrese, *Il contratto a favore di terzi*, Milan, 2003; S. Nardi, *Sul contratto a favore di terzi*, in *Studium iuris*, 2009, p. 134 ff.

466 In this sense R Sacco, *Il contratto*, in *Trattato di dir. civ.*, diretto da R. Sacco, Turin, 1993, p. 206.

promisor's obligation to the stipulant to perform the performance to the third party[467].

The cause of the contract for the benefit of a third party is that of the contract (typical or atypical) concluded by the contractual parties, to which is attached an ancillary clause that attributes the performance of the promisor to the beneficiary. Therefore, its cause is not autonomous: in fact, the stipulation in favor of the third party tends to assume the characteristics of an accessory determination, which does not distort the contract to which it accedes by transforming it into a different contract[468]. It follows that the form of the third-party contract is that which may be prescribed for the type of contract chosen by the promisor and the stipulator.

A contract for the benefit of third parties, pursuant to Art.1411, para. 1, of the Civil Code, is valid if the stipulant has an interest in it: according to the prevailing orientation, the stipulant's interest may be either of a patrimonial or non-patrimonial nature (including moral or affective) and in any case it must be an interest worthy of protection[469].

It should be added that the defect or unlawfulness of the stipulant's interest renders only the clause in favor of the third party void but does not render the contract in which it is contained invalid (subject to the application of partial nullity under article 1419 of the Civil Code).

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467 According to a guideline of the jurisprudence of legitimacy in order for a contract for the benefit of a third party to be configured, it is not sufficient that the third party receives an indirect economic benefit from the contract intervened between other parties, but it is necessary that the latter directly intended to attribute it to him, in the sense that the parties themselves, in their capacity as contracting parties, foresaw and intended a performance for the benefit of the third party extraneous to the contract, as an element of the synallagma. In other words, it is necessary that the parties intended to attribute to the third-party beneficiary a direct economic benefit, through a contract validly and fully operative between the contracting parties and capable of producing both obligatory effects and real effects in the hands of the third party beneficiary. See on this point A. Palazzo, *Atti gratuiti e donazioni*, in *Trattato di dir. civ*., diretto da R. Sacco, Turin, 2000, p. 326 ff; F. Angeloni, *Contratto a favore di terzi*, in *Commentario del cod. civ. Scialoja-Branca*, a cura di F. Galgano, *sub artt. 1411-1413*, Bologna, 2004, p. 99 ff.

468 Cf. M. Franzoni, *Il contratto e i terzi*, in *I contratti in generale*, a cura di E. Gabrielli, Turin, 1999, p. 1083; according to a further orientation (M. Sesta, *Interesse, causa e motivi nella stipulazione a favore di terzo*, in *Studi in memoria di G. Gorla*, Milan, 1994, p. 2073) the contractual relationship between the promisor and the stipulator must be supported by an independent justifying cause for the promisor's obligation to arise.

469 F. Angeloni, *Contratto a favore di terzi*, cit., p. 35.

The second paragraph of this article states that unless otherwise agreed, the third party acquires the right against the promisor as a result of the stipulation. This, however, may be revoked or modified by the stipulator, as long as the third party has not declared, even in comparison with the promisor, that he wishes to take advantage of it. It follows from the rule that the production of the acquisitive effect takes place directly against the third party, who has the right to demand performance from the promisor[470].

The third-party beneficiary's declaration of willingness to profit from the contract has only the function of making the performance in his favor irrevocable and unchangeable. Such a declaration constitutes a unilateral legal transaction put in place in the exercise of a subjective potestative right that makes the clause in favor of the third party definitively effective. According to one doctrine, the declaration of willingness to profit from the stipulation consummates the very power of the third party's refusal, determining its extinction[471].

Conversely, the third party's refusal, as well as the revocation of the stipulator, determine the ineffectiveness of the clause in favor of the third party. Revocation – a unilateral legal transaction, brought about by the stipulant in the exercise of a subjective potestative right – like modification, is grounded in the need to protect the stipulant's private autonomy. Following the revocation of the stipulation or the third party's refusal to take advantage of it, the benefit originally intended for the third-party beneficiary – such as a right of credit, a right *in rem*, or other subjective legal situation originally attributed to the third-party – is attributed to the stipulant (Art. 1411, para. 3, Civil Code)[472]. However, the provision is without prejudice to a different regulation of the consequences of revocation or refusal resulting from the will of the parties or the nature of the contract.

In Italian law the aspect that most distinguishes the stipulation in favor of the third party, as described by the 1942 code, is the interest of the stipulant. The legislator's emphasis on this element has prompted numerous authors to question the meaning of the term and, in particular, the role that the interest of the stipulant plays in the structure referred to in Article 1411 of the Civil Code.

470 In this sense, V. Roppo, *Istituzioni di diritto privato*, cit., p. 390, notes that the possible accession of the third party – a recettivistic act addressed to both the stipulator and the promisor – does not serve to realize the acquisition of the right, but serves to make it final.

471 M. Franzoni, *Il contratto e i terzi*, cit., p. 1087.

472 On this argument, V. Martino, *Negozi "trans mortem", formalismo negoziale e revoca del beneficio nel contratto a favore di terzo*, RIV. DIR. CIV., 2002, II, p. 441.

In spite of the variety of opinions expressed, it seems that the debate can be summarized on two clearly delineated positions: on one side are the supporters of the theory that we would call "causalistic" of the interest, intent on sustaining, in one direction or another, its incidence on the cause of the attribution to the third party[473]; on the other are those who maintain that the interest is worth (only) qualifying the stipulant's position, thus allowing the justification of the outward shifting of an effect of the contract.

It seems clear, beyond the impact of the interest on the mechanism of attribution to the third party, that it is necessary, before any reconstruction, to define its precise content[474].

In fact, there is debate as to whether it is possible to superimpose this requirement on the creditor's interest, indicated by Article 1174 of the Civil Code as the parameter to which the content of the performance that is the object of the obligation should be related[475].

On closer inspection, the problems posed by such a reconstruction are such as not to suggest such an equalization to the interpreter, if only because the figure of the stipulant is more complex and does not result sic et simpliciter coincident with that of the creditor in the context of the obligatory relationship.

473 See *ex multis* L. V. Moscarini, *Il contratto a favore di terzi*, *sub art. 1411 cod. civ.*, in *Commentario Schlesinger*, Milan, 2012, p. 104. The author states that resurfaces the need to identify the cause of the attribution made by the instrument of the third-party transaction, to which need should precisely be referred, directly and simply, the rule that provides as a necessary requirement of the stipulation in favor of third parties the interest of the stipulator. Therefore, it can be said that the contract under consideration immediately gives rise to an autonomous right of the third party actionable against the promisor, who becomes his debtor and can oppose to the third party the exceptions based on the contract from which the third party derives his right, but not those based on other relationships between the promisor and the stipulator (Art. 1413 c.c.). This provision concerning the relationship between promisor and third-party beneficiary carries an implicit waiver of the promisor's personal exceptions to the stipulant.

474 In fact, the doctrine's oscillations on this specific issue are significant. See, for example, F. Girino, *Studi in tema di stipulazione a favore di terzi*, Milan, 1965, p. 47, who argues for a causal autonomy of the stipulation in favor of the third party with respect to the contract without a clause The contract in favor of a third party does not have an autonomous cause with respect to the main contract: on closer inspection, the insertion in the contractual content of the clause aimed at diverting the negotiation effects in favor of the third party has only the function of identifying the subject who will be responsible for the performance and is absolutely incapable of altering the typical cause of the contract in which it is inserted (cf. O. T. Scozzafava, *Contratto a favore di terzi*, ENC. GIUR., IX vol., Roma, 1988, p. 2).

475 The less recent doctrine and the "*Guardasigilli* Report" itself (No. 664) identified the interest of the stipulant with the creditor's interest in performance, referred to in Art. 1174 (see for evidence of the impossibility of considering that the interest in question is that under Art. 1174 of the Civil Code. U. Majello, *L'interesse dello stipulante nel contratto a favore di terzo*, Naples, 1962, p. 240; see also M. Giorgianni, *L'obbligazione*, Milan, 1951, p. 63.

This is because the stipulant, as the inescapable point of reference of the interest in question, assumes a position, qualified by that interest, not vis-à-vis the promisor, who represents his natural counterpart in the sphere of the obligatory relationship, but of the third party.

In other words: if the interest under Article 1411 of the Civil Code coincided with the interest of Article 1174 of the Civil Code, it would have to recur in the stipulant as a creditor in the obligatory relationship. The law, on the other hand, does not identify or require the interest of the stipulant as an element incident to the promisor-stipulant relationship, but holds that it is preparatory to the attribution of the right to the third party[476].

This first observation, which might seem obvious only if one looks at the literal datum emerging from the provision in question, takes on a precise meaning in view of the framing of the case.

It allows, in other words, to grasp the differential note of Article 1411 of the Civil Code with respect to other contractual systems centered on the creditor-debtor relationship, shifting the axis of reasoning outside the contractual relationship, in the relationship with the third party.

On the other hand, it would not even seem possible to solve the aforementioned problem – of the framing of the stipulant's interest – by qualifying him, simply, as a "creditor" of the performance, as he is entitled to demand performance from the promisor[477].

476 In this sense, undoubtedly, it is possible to agree with the Author who has dealt more comprehensively with the problem when he points out that the interest referred to in Article 1411 refers to an economic result other than performance but rather to a legal situation particularly qualified by the fact that it is a contractual situation. U. Majello, *L'interesse dello stipulante nel contratto a favore di terzo*, cit., p. 12.

477 Consider that currently prevailing in doctrine is the admissibility in the hands of the stipulant of the action aimed at demanding performance from the promisor. It is currently argued that, as a result of "acceptance", the third party acquires an autonomous right to performance against the promisor and can enforce it directly against the same (cf. Cass. no. 7622/1994; Cass. no. 8531/1992). Part of the doctrine, in this regard, holds that the third party's action for performance is concurrent with that of the promisor. On this point M. Bianca, *Diritto civile*, cit., p. 539.

Other doctrine, on the other hand, affirms that the stipulant does not have standing to act for performance but can only assert the actions based on the contract (annulment, rescission, termination), intervene in the *ad adiuvandum* judgment, in favor of the third party plaintiff and oppose to the promisor, outside that judgment, the *exceptio inadimplenti contractus* (U. Majello, *Contratto a favore del terzo*, in *Digesto civ*., Turin, 1988, p. 247).

It is also problematic to establish whether the third party can act in order to obtain the termination of the contract in the cases provided for by law (Art. 1453 ff.). One part of the doctrine (L. V. Moscarini, *Il contratto a favore di terzi*, *sub art. 1411 cod. civ.*, cit., p. 202) takes the opposite view, holding that the action for termination, as a contractual action, can be brought only by those who are parties to the contract; another part of the doctrine (O.T. Scozzafava, *Contratto a favore di terzi*, cit, p. 7), on the contrary, seems inclined to recognize complete legal protection for the third party.

In this way, in fact, there would be a logical inversion, consisting of first attributing to the stipulant the power to demand performance from the promisor and then, as a result, qualifying him as a creditor.

Likewise, the reconstruction of those who hold that the interest of the stipulant is that of the "attribution of the right to the third party" does not appear entirely convincing. Again, the contribution of this definition to the resolution of the practical problems posed by the stipulation in favor of the third party seems modest[478].

Indeed, ruling out the possibility that the legislature considered the interest of the stipulant to be merely a creditor's interest, it is compelling to conclude that this element represents a peculiar aspect of the stipulation in favor of the third party.

However, while agreeing with this assumption, it does not seem possible to qualify this interest by pointing out that it constitutes "the interest in the attribution to the third party"; instead, it would be more correct to identify its relevance with respect to the mechanism of Article 1411 et seq. of the Civil Code[479].

2. Concluding an insurance contract for the benefit of another person (art. 836)

In the case of insurance taken out for the benefit of the first party, the loss is borne directly by the insured and, consequently, compensation is made to the insured. This is, for example, property insurance. In the insurance contract concluded in favor of the third party, the third party's interest is defined as the object of protection. We speak of liability insurance when a third party suffers a direct loss. Damage to the insured is considered to arise indirectly[480].

478 U. Majello, *Contratto a favore del terzo*, cit., p. 247 ff.

479 However, it is clear the intent kept in mind by the author who dealt with the hypothesis: to qualify the interest as an interest in the attribution of the right to the third party, serves Majello to emphasize how the problem has peculiar traits and how it is not possible to speak tout court of creditor interest.

480 K. Iremashvili, *Art. 836*, cit. Life insurance, in which the life of the insured is defined as the object of insurance, belongs to the contract made in favor of the first policyholder. In this case, it is true that the insured does not receive the insurance indemnity, but the direct loss occurs against him, because his life is lost. Health insurance is also a first-party insurance contract. In this case, the insured suffers direct damage in the form of deterioration of health conditions. It should be noted that in the case of health insurance, as a rule, the insurer pays the insurance compensation (cost of medical services) directly to the medical service provider. However, the purpose of the health insurance contract is not to reimburse the medical service provider for the cost of medical treatment, but to protect the interests of the insured. Reimbursement to the medical service provider is a kind of prerequisite to satisfy the interests of the insured and is governed by a separate agreement concluded between the insurer and the medical service provider.

The main criterion of the above classification is expressed in the identification of the affected person. Accordingly, if the direct loss is borne by the insured, the first person is insured, while if the direct loss is borne by a third party, the third person is insured[481].

In third-party insurance, it is important that the parties contract in favor of the third party's interests and not vice versa. Third-party insurance creates a danger of increased moral hazard. Consequently, taking into account the insured subject matter, the doctrine of insurable interest gains special importance in third-party insurance[482].

In insurance practice, there are examples where life insurance, at first glance, contains signs of third-party insurance, but in reality, can be harmful to third parties[483].

In theory, property insurance can be used for the benefit of a third party. However, from a practical point of view, the problem of insurable interest arises in such cases. For example, if a person decides to insure property owned by someone else and designates himself as the beneficiary, due to the presence of high moral hazard, the insurer's interest in such a contract will be minimal. On the other hand, if in the same example a person designates the insured as a beneficiary, the moral hazard will not increase with this

481 *Ibid*. An important example of a transaction concluded for the benefit of a third party in modern insurance practice is insurance related to an employment contract. In the case of life insurance, the policyholder is the employer, the insured is the employee, and the spouse or other family members of the insured are the beneficiaries. In the case of health insurance, the employer is the policyholder and the employee is the insured. An example of third-party insurance is a separate state-implemented program in health insurance. In this case, the state is the policyholder and individuals representing a specific social group are defined as the insured.

As an example of third-party insurance, reinsurance can also be considered. In such cases, it is crucial to determine the recipient of direct losses. In particular, it is controversial who suffers the direct damage: the insured or the reinsurer. In a sense, both entities are harmed. The insured's damage is the material result of the realization of the risk defined by the insurance contract. The reinsurer's harm is expressed by the obligation to issue an insurance indemnity. In this logic, as in some of the examples discussed above, direct losses are borne by the insured. Consequently, the purpose of the reinsurance contract is to protect the interests of the insured. However, this position is controversial. Insurance doctrine is dominated by the view that the direct objective of reinsurance is expressed in ensuring the financial stability of the insurer. By this reasoning, the protection of the insurer's interest is shifted to the foreground.

482 See on this perspective A. Borroni, *Art. 799*, in this Commentary.

483 An important example is derived from the US jurisprudence, *Liberty National Life Insurance Co. v. Weldon*. In this case, the Alabama Supreme Court held that three life insurance companies were liable in a wrongful death action for failing to exercise reasonable diligence in issuing life insurance policies to a person who had no insurance interest. See on this point E. H. Dimitriou, *Liability of Insurer for Wrongful Death-Failure to Determine Policyholder's Interest*, DICKINSON L. REV., 1959, p. 172.

transaction. However, in this case, considering the importance of the legal interest in the composition of the insurance interest, the insured's lack of a property right creates a problem[484].

The Italian discipline on the matter is contained in the article 1891 c.c.[485].

484 K. Iremashvili, *Art. 836*, cit.

485 The institution of insurance on behalf of one's own is provided for in article 1891 of the Civil Code, which regulates this figure and that of insurance on behalf of others by dictating a unified regulation. A. Donati, *Evoluzione storica. Funzione giuridica dell'assicurazione per conto di chi spetta*, RIV. DIR. NAV., 1936, p. 174 ff. In relation to the applicability to the life insurance industry, several opinions have been proposed: G. Fanelli, *Le assicurazioni*, cit., p. 424 ff, deeming the principle of interest in damages applicable (which legitimizes only the insured party to obtain compensation for damages) asserts that the discipline dictated by article 1891 Civil Code concerns only the contract of insurance of damages; while A. Donati, *Teoria indennitaria nelle assicurazioni e contratto a favore di terzo*, cit., p. 3 ff, holding the indemnification theory applicable, affirms the opposite nonrestrictive view. See also D. Barbierato, *Irrevocabilità della designazione del beneficiario nell'assicurazione vita stipulata per conto altrui e diritto di riscatto*, RESP. CIV. PREV., 1993, p. 719 ff; A. Trabucchi, *Istituzioni di diritto civile*, Padua, 1998, p. 794 ff.

It has been noted in doctrine (*inter alia*, G. Castellano, *Assicurazione per conto altrui, contratto a favore di terzo e sostituzione*, RIV. DIR. CIV., 1963, p. 559 ff; M. Stella Richter, *Osservazioni in tema di assicurazione per conto di chi spetta*, GIUR. COMM., 1988, p. 853 ff; M. C. Capponi, *Il contratto di assicurazione per conto di chi spetta*, GIUST. CIV., 1990, p. 160 ff; U. Bellini, *Assicurazione per conto altrui o per conto di chi spetta*, in *Nuova rassegna di giurisprudenza sul Codice Civile*, diretta da C. Ruperto & V. Sgroi, Milan, 1994, p. 3843 ff; R. De Michel, *Assicurazione contro i danni a favore del terzo*, GIUR. IT., 1995, p. 61 ff; E. Rosafio, *Sull'assicurazione per conto di chi spetta, con particolare riferimento alla titolarità dell'interesse assicurato*, DIR. TRASP., 1996, p. 213 ff) that while both figures provided for in the aforementioned article 1891 of the Civil Code are attributed identical legal effects, their economic function is, however, different. A. Guidetti, *L'assicurazione per conto di chi spetta*, RESP. CIV. PREV., fasc. 6, 2001, p. 1134 ff. In fact, the proper function of the on behalf of whom it is due clause would be to be found in the possibility of automatic and unconditional transfer of the insurance guarantee from one subject to another, as a result of the simple transfer of the property subject to insurance, and with it of the ownership of the interest in compensation for the damage (the so-called "circulatory function". A. Donati & G. Volpe Putzolu, *Manuale di diritto delle assicurazioni private*, cit., p. 141 ff, underline that the institution that most fully realizes the objective of the circulation of insurance collateral at the same time as the circulation of the insured interest is insurance on behalf of the entitled. The insurance policy is not, as a rule, a document intended for circulation, but merely an evidentiary document. The policy may, however, be issued with a clause to order or to bearer, and in this case its transfer involves the transfer of the claim against the insurer with the effects of assignment. The insurer, however, is discharged if, without willful misconduct or gross negligence, it performs against the endorser or bearer of the policy, even if the latter is not the insured).

Through such a mechanism, what has been called the "ambulatory nature of the right to compensation" (R. Ippolito, *La funzione circolatoria dell'interesse per conto*, ASSICURAZIONI, 1987, p. 38 ff) would be realized, by virtue of which the transfer of the right to the insurance benefit is automatic, freed from the completion of the formalities to which it is normally subject in cases of change of the holder of the guaranteed interest.

Despite the fact that the institution is placed within the general provisions devoted to the insurance contract (Sec. I, Chapter XX, Civil Code), the imposition of the necessary coincidence between the figures of the insured, *i.e.*, the person exposed to the risk, and the beneficiary, as the recipient of any indemnity (*ex* art. 1891, paragraph 2, Civil Code, the rights deriving from the contract are due to the insured), would lead one to believe that this scheme is exclusively suited to insurance against harmful events, governed – as is well known – by the indemnity principle[486].

On the other hand, in life guarantees, the right to the insurance benefit can be attributed by the policyholder to another person already through the designation of a beneficiary, stipulating coverage in favor of a third party (art. 1920 Civil Code).

However, albeit scanty case law that has spread on the point has without any uncertainty whatsoever held that this contractual figure does, on the other hand, also find application in the context of life cover.

And it is precisely in reference to the jurisprudential *datum* that the topicality of the question can be appreciated: a recent pronouncement of the Supreme Court, recalling these precedents, confirmed, albeit by way of mere obiter dictum, that when the beneficiary of the right to insurance benefits coincides with the third party on whose life the insurance is stipulated (the insured, or the so-called bearer of the risk[487], there would be a case governed by Article 1891 of the Civil Code, so that, for the validity of the contract, the requirement of the latter's written consent would not be necessary (under Article 1919, paragraph 2, Civil Code)[488].

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486 The discipline dedicated to the contract of insurance against damages is studded with provisions informed by this principle (articles 1905, 1908, 1909, 1910 Civil Code), by virtue of which the company's performance is subject to the occurrence of any harmful consequences deduced in the guarantee, as well as, except in cases of prior and lump-sum assessment of compensation, parameterized, *in quantum*, to the actual extent of the damage suffered. It follows, evidently, that a split is not allowed between the figure of the beneficiary and that of the insured, who can only be the subject concretely exposed to the insured risk (art. 1904 Civil Code): for these remarks, be allowed to refer to M. Mazzola, *Sul concetto di interesse nel contratto di assicurazione: inquadramento teorico e profili applicativi*, RIV. DIR. CIV., 2019, p. 1200 ff.

487 As G. Fanelli, *Le assicurazioni*, cit., p. 420 states, the qualification of insured, in life insurance, is not valid to designate the person who holds the interest in compensation for the damage (art. 1904 Civil Code), but rather the person (whether or not coinciding with the person to whom the quality of policyholder or recipient of the insured lump sum or annuity is due) whose death or survival determines the insurer's benefit or, in any case, affects it.

488 Cass. Civ., February 18, 2018, n. 3707.

Such an argumentative solution, even though it is ultrasound in the overall economy of the decision, by envisaging the discussed configurability of insurance on behalf of others in the sphere of life guarantees, revives the question under consideration, which gives rise to consequences of no small moment on the operational level as well[489].

Around the systematic framing of insurance on behalf of others (or on behalf of whom it is due[490]) has not matured, at present, an unequivocal orientation, neither in doctrine nor in jurisprudence.

According to a first guideline, this would be a case essentially framed in the scheme of the contract for the benefit of third parties, according to the model in article 1411 ff. c.c., within the limits of compatibility, from time to time to be evaluated, with the statute of the insurance contract[491].

Other orientation, however, departs from this reconstruction, highlighting the marked differences, at once structural and functional, between the two institutions.

Indeed - it is pointed out - the third-party contract is an instrument by which a person, the stipulant, acting on the basis of his own interest, intends to attribute to another person, who becomes neither a substantial nor a formal party to the contract, his own right to claim the performance due from the promisor[492].

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489 M. Mazzola, *Polizze vita e assicurazione «per conto altrui»*, RESP. CIV. PREV., 2019, pp. 2135-2136.

490 Although both in insurance on behalf of others and in that on behalf of whom it is due, there is a dissociation between policyholder and insured, in the first hypothesis the insured is identified from the time the contract is concluded, while in the second hypothesis the interest concerns an asset subject to circulation, so that there will be as many potential holders for as many transfers as that asset will undergo; consolidating, finally, in the head of the one who will be the holder at the time of the eventual occurrence of the insured risk. A. Bracciodieta, *sub art. 1891*, *Il contratto di assicurazione. Disposizioni generali (artt. 1882-1903)*, cit., p. 113 ff.

491 About this thesis see, *inter alia*, A. Donati, *Trattato del diritto assicurazioni private*, cit., p. 4; A. Fiorentino, *L'assicurazione contro i danni*, Naples, 1949, p. 42 ff; A. De Gregorio, *I soggetti del contratto di assicurazione*, in A. De Gregorio & G. Fanelli, *Il contratto di assicurazione*, cit., p. 30 ff; D. Purcaro, *L'assicurazione per conto altrui*, Milan, 1996, p. 25 ff; R. Calvo, *Il contratto di assicurazione. Fattispecie ed effetti*, Milan, 2011, p. 44 ff. In jurisprudence, *ex multis*, Cass. civ., May 25, 1995, n. 5747, MASS. FORO IT., 1995; Cass civ., August 29, 1997, n. 7769, MASS. FORO IT., 1998; Cass. civ., June 5, 2007, n. 13058, DANNO RESP., 2008, p. 479 ff.

492 A. La Torre, *Un chiarimento sull'assicurazione altrui (art. 1891 c.c.)*, GIUST. CIV., 2002, p. 905 ff; in the same perspective, also M. Bianca, *Il contratto*, Milan, 1991, p. 570 ff.

On the other hand, insurance for account concretizes a hypothesis of management of other people's interests: to be deducted as a guarantee by the policyholder is a risk incumbent on the legal-patrimonial sphere of another person, who, therefore, although formally extraneous to the contract, is certainly not a third party in the structure of the insurance relationship[493].

It is no coincidence that the rule set forth in Article 1891 of the Civil Code does not impose any inquiry as to the recurrence of an interest of the policyholder in the contract (article 1411, paragraph 1, Civil Code), and does not admit the possibility of revocation of the benefit conferred on the third party (article 1411, paragraph 2, Civil Code). At the same time, the insured – as precisely the subject actually exposed to the danger of damage – is burdened with a conspicuous series of burdens and obligations from which the mere beneficiary of a stipulation concluded in his favor is, by contrast, immune[494]: among these, that of making the insurer aware of any inaccurate or reticent statements made by the policyholder in the pre-contractual phase (art. 1894 civil code), of informing about the possible aggravation of the risk (art. 1898 civil code), of warning in case of a claim and providing, as far as possible, for rescue (arts. 1913 and 1914 civil code), as well as of reporting the existence of other insurances (art. 1910 civil code)[495].

And again, materializing in an activity aimed at procuring a useful result for the insured, there is provision for the reimbursement in favor of the policyholder of the premiums paid by the latter and of the expenses

493 G. Ferri, *L'assicurazione per conto altrui nella teoria dei contratti*, ASSICURAZIONI, 1942, p. 375 ff. On the same point, G. Fanelli, *Le assicurazioni*, cit., p. 417 ff; A. La Torre, *Un chiarimento sull'assicurazione altrui (art. 1891 c.c.)*, cit., p. 901 ff; D. Pirilli, *La designazione (e la revoca) del beneficiario nell'assicurazione sulla vita tra contratto e successione*, cit., p. 82 ff.

494 As observed by M. Masi, *L'assicurazione per conto di chi spetta e il contratto a favore di terzo*, RIV. DIR. COMM., 2004, p. 1191, the production of contractual obligations on the part of the insured is a sufficient element to deny the status of third party to the insured and to exclude the insured's extraneousness to the contractual relationship arising from the insurance contract.

495 D. Pirilli, *La designazione (e la revoca) del beneficiario nell'assicurazione sulla vita tra contratto e successione*, cit., p. 40. For a full examination of the burdens and obligations placed on the insured, favored by coverage on behalf of others, see D. Purcaro, *L'assicurazione per conto altrui*, cit., p. 237 ff.

of the contract, with the corresponding privilege over any indemnity paid by the insurer (Art. 1891, paragraph 4, Civil Code)[496].

Consider, however, that the literal tenor of article 1891, paragraph 2, declining the differential trait between insurance on behalf of and that for the benefit of a third party (Article 1920 Civil Code), provides – as mentioned – that the rights arising from the contract belong exclusively to the insured: the figure of insurance on behalf of others can only effectively find citizenship, therefore, only in those cases in which the beneficiary of the insurance benefit is the same bearer of the risk, or another person designated by him[497].

From this point of view, it does not seem correct to exclude that the case in point cannot find use in all contracts of life insurance on the life of others, case of death: if the right to the payment of the capital (or of the annuity) is reserved to the insured, this means that he/she can also dispose of it *vis-à-vis* third parties (heirs or otherwise), who consequently acquire iure proprio the legitimacy to collect the sum insured[498].

Irrelevant is the fact that the eventual liquidation of the sum insured inevitably arrives, in this case, in the hands of a subject distinct from the one subjected to the risk: as mentioned above, in the life insurance class the requirement of interest in compensation is lacking. On the contrary ownership of the insurance is certainly not lost, but on the contrary is

496 As highlighted by G. Fanelli, *Le assicurazioni*, cit., p. 443, the right to reimbursement of premiums and expenses, which is ex lege to the policyholder, is a dependent variable of the content of the pre-existing internal relationship, if any, that induced the policyholder to insure the interest of others.

497 On this point, Cass. civ., May 13, 1977, n. 1883, p. 210.

498 According to M. Rossetti, *Il diritto delle assicurazioni, II, Le assicurazioni contro i danni*, cit., p. 848, if the designation of the third party in life insurance in case of death is defective, this would be a case of insurance in favor of the policyholder himself, whose right to the benefit would be transferred iure hereditaria to the latter's heirs. The thesis, however, clashes with the fact that the acquisitive event of the right to the payment of the lump sum (or annuity), in life insurance in the case of death, is linked to the death of the *de cuius*, which is an event that determines the loss of the latter's legal capacity, and therefore the possibility that he or she will ever become the holder of the claim against the insurer. Correctly observes, in this regard, G. Volpe Putzolu, *Assicurazione sulla vita, dispositioni a causa di morte e atti di liberalità, in Studi in memoria di Gino Gorla*, cit., p. 2105, that it would be excluded that death insurance constitutes an example of a contract in favor of third parties, considering that it is a case of negotiation in which the destination of the performance to a third party is inherent in the stipulation, so that the contract must be considered stipulated in favor of the heirs, who consequently acquire the right *iure proprio*.

confirmed if, as a fatal consequence of death, the benefit will be acquired by the person who succeeds the insured mortis causa or was designated by him[499].

Otherwise, if the policyholder, stipulating in his own interest, reserves the benefit of life insurance on the life of others to himself, or to another person distinct from the insured, the discipline will be that of article 1919 ff. of the Civil Code[500].

The provision of Article 1891 of the Civil Code, which on the one hand provides for the assumption on the part of the policyholder of the obligations arising from the stipulation and on the other hand, in deference to the indemnity principle, does not allow him to assert the rights due to the insured except as a "substitute" for the latter, induces some further consideration that moves in the furrow of evaluating the implications connected with the application of the discipline[501].

The relationship that binds policyholder and insured remains absolutely distinct both from that which binds policyholder and insurer and from those which binds insured and insurer.

While, therefore, this relationship is not relevant for insurance purposes, it is very often the basis for the diligence of the policyholder for account in procuring security against loss. In other words, the contractor for account often finds himself in the position of holding the property owned by others and has an indirect interest in the preservation of the same; an interest that prompts him, in the prospect of being able to avoid liability for damage even though caused in the course of his business, to take out the insurance policy[502].

The German law regulates these cases in the Division 4 of the VVG (*Versicherung für fremde Rechnung* – Insurance for the account of a third party) in which it is provided, similarly to the Italian case, that the policyholder may make the contract of insurance in his own name for the account of another with or without naming the insured third party[503].

499 Cass. civ., May 13, 1977, n. 1883, p. 210.

500 M. Mazzola, *Polizze vita e assicurazione «per conto altrui»*, cit., pp. 2140-2141.

501 D. Pirilli, *La designazione (e la revoca) del beneficiario nell'assicurazione sulla vita tra contratto e successione*, cit., p. 40.

502 *Ibid*.

503 Section 43, para. 1, VVG, *Definitions*.

If the contract of insurance is made for another, it is assumed in cases of doubt, even if the third party is named, that the policyholder is not acting as his agent but in his own name for the account of a third party[504].

In addition, if the circumstances do not indicate that the contract of insurance is to be concluded for another, it is deemed to have been made for the policyholder's own account.

The insurance for the account of a third party implies that a policy holder insures the concern of a third party (the insured) in his own name. It is not required to name the insured in order to conclude an insurance for the account of a third party[505].

The insurance for the account of a third party grants insurance cover for persons who incur the financial risk of the damage or loss based risk taking rules or the possession situation. Those persons are often obliged to conclude an insurance for the account of a third party[506].

Regarding the legal implications of a third-party insurance contract, the German law makes a distinction – which will be analyzed in the next paragraph – between the external relationship (of the policyholder and the insured to the insurer) and the internal relationship (between the policyholder and the insured).

Similarly, Georgian law provides that the policyholder may enter into an insurance contract with the insurer in his own name for the benefit of another person. Such a person need not be named.

According to the rule, the policyholder may enter into an insurance contract with the insurer in the name and on behalf of another person. Accordingly, the rule considers it permissible to refer to the policyholder as a party to the contract and to a third person as the insured/beneficiary[507].

It is noteworthy the provision in article 836, para. 2, which states that the name of the third person is not mandatory. With this

504 Section 43, para. 2, VVG, *Definitions*.

505 Section 44, para. 1, VVG, *Rights of the insured person*.

506 C. Becker, *Characteristics of the insurance for the account of a third party*, Wilhelm Rechtsanwälte, Düsseldorf, 2011, pp. 1-2.

507 K. Iremashvili, *Art. 836*, cit. The legal consequences of such an agreement are defined in Articles 837 and 838.

arrangement, the insurance rule is similar to the rules established in articles 349-351 of the Civil Code[508].

3. Rights arising from insurance for the benefit of another person (artt. 837-838)

In Italy, the provision of article 1891 of the Civil Code on the one hand enshrines in the head of the policyholder the obligations arising from the contract and on the other hand does not allow him to enforce the rights arising from the same except with the express consent of the insured[509].

Despite the fact that the legal system recognizes that a given subject, although not the owner of a legal-subjective situation that rests on the property, can take out insurance against damages having as its object the

508 *Ibid*. However, it should be kept in mind that in individual cases the insurance rule also recognizes the reservation of a different content. See M. Seghesio, *Art. 844*, in this Commentary. In the case of third-party insurance, the dispute may involve work-related insurance. In one such case, a life and health insurance contract for judges was concluded between the Department of General Courts of the Supreme Judicial Council of Georgia and an insurance company. The insurance period was defined as June 1, 2008 to December 31, 2009. Based on the decision of the Supreme Judicial Council of Georgia on October 1, 2009, the insured was relieved of his duties as a judge due to the expiration of his term. The insured died on October 21, 2009. The deceased's wife sought payment of the insurance indemnity from the insurer. The city court did not comply with the claimant's request. The appellate court did not grant the request either, and the decision of the city court remained unchanged. K. Iremashvili, *Art. 836*, cit.

According to the explanation of the Court of Appeals, the insurance signed between the Department of General Courts of the Supreme Council of Justice and the insurance company was a contract entered into for the benefit of a third party. However, the court did not rule on the extent to which the insurer's refusal to indemnify due to the expiration of the court's authority was justified. *Ibid*.

The Court of Appeals found it established that the right to benefit from the insurance contract was linked to the position of the third-party insured judge. Accordingly, the court agreed with the argument that the termination of the judge's authority resulted in the termination of this right.

In turn, the estate indicated that the insurance contract was valid until December 31, 2009, and the insured died on October 21. Moreover, "for the stipulated time, he had no debts". According to the drafter, the judge's dismissal should not be considered a basis for termination of the contract if the insured continued to pay the insurance premium. According to the adjuster, if being a judge was a prerequisite for the extension of the contract, then this contract should not have been concluded with the insured until December 31, 2009, because the insured knew in advance that he would no longer be a judge 7 months before the contract expired. *Ibid.*

509 D. Pirilli, *La designazione (e la revoca) del beneficiario nell'assicurazione sulla vita tra contratto e successione*, cit., pp. 4-5.

coverage of risks, such as, for example, destruction or damage, nevertheless it cannot admit that insurance, from being a system for coping with risks, turns into a source of undue enrichment[510] for those who are not the owners of the interest of substance.

It seems useful to refer to the provisions of Article 1904 of the Civil Code in this regard[511].

The policyholder will indeed have an indirect interest in the preservation of the asset, linked, for example, to the possibility of being forced to pay damages in the event of an accident. Indeed, he could, especially in cases in which he carries out activities such as that of carrier, take out insurance covering his own civil liability[512], thereby resulting in his own insurance, but it is true that this observation does not allow for any perplexity regarding the (clear) distinction between these two cases, nor does it diminish the scope and value of acting on behalf in the context in question.

The position of the policyholder for account seems to be articulated along five lines: 1) the interest in taking out the policy; 2) the obligation to fulfill the obligations under the policy; 3) the obligation to inform the

510 This risk is avoided by ensuring that the indemnity principle is not violated and by identifying only the holder of the substantive interest as the creditor of the insurance benefit.

511 See the comment to the article 1904 c.c., E. Bottiglieri, *Dell'assicurazione contro i danni, Artt. 1904-1918*, Milan, 2010, p. 73 ff.

512 In the case referred to in Article 1917 of the Civil Code, unlike the case otherwise governed by Article 1891 of the Civil Code, the insured is the policyholder himself, who takes out a policy to cover the risk that damage may be caused to others by his activity; it is therefore an insurance of assets, disengaged, moreover, from reference to the value of a specific res. In fact, in this type of insurance there is usually a ceiling. This does not exclude, as also pointed out by case law, that a policy covering liability for account may be taken out. An example is policies taken out by parent companies in the case of temporary business associations. See on this point Cass. civ., sez. I, June 7, 2012, no. 9240. In this case liability insurance, taken out by the parent company of a temporary business association to cover the liability of the individual companies participating in the temporary business association on behalf of the latter, constitutes typical insurance on behalf of others. The rights arising from such a contract therefore accrue to the individual enterprises participating in the temporary business association, and not to the parent enterprise. With reference to the *dies a quo* of the statute of limitations, see Cass. civ., sez. III, July 13, 2011, no. 15376. On the subject of a contract of insurance of civil liability stipulated on behalf of others, the statute of limitations provided for by the third paragraph of art. 2952 Civil Code starts from the day on which the injured third party addresses the claim for compensation to the civil responsible party, insured pursuant to art. 1891 Civil Code.

insured that the policy has been taken out; 4) the right to obtain reimbursement of premiums paid to the insurer; and 5) the inability to enforce rights under the policy without the express consent of the insured[513].

1. t is clear that whoever finds himself in a condition of holding an asset owned by others, because, for example, he is called upon to carry out transport or storage activities, has an interest in the preservation of the asset, an interest, however, that is different and quite distinct from the interest of substance belonging to the owner, and otherwise identifiable in the need to cope with the negative consequences that the destruction or damage of the asset could produce in his legal sphere, *i.e.* a debt exposure. It is therefore clear that this interest is quite distinct from the interest in compensation for loss of property ownership that is otherwise found to be vested exclusively in the insured person[514].

2. The policyholder is obliged to pay premiums to the insurer, but is entitled to reimbursement from the insured. The legislature, moreover, has seen fit to bring this claim within the category of those secured by special lien[515].
   The need to burden the policyholder with the obligation to pay premiums stems from the insurance technique that is based on the reversal of the production cycle and the pooling of risks[516].

3. As for the policyholder's obligation to make the insured aware of the stipulation, the legislator is silent on the point. In the absence, therefore, of explicit indication, it is up to the interpreter to envisage a solution that, without betraying the *ratio legis*, moves in the logic of a reading of the norms inspired by the criterion of good faith.

513 D. Pirilli, *La designazione (e la revoca) del beneficiario nell'assicurazione sulla vita tra contratto e successione*, cit., p. 5.

514 *Ibid*.

515 Article 1891, para. 4, of the Civil Code provides that, for the reimbursement of premiums paid to the insurer and expenses of the contract, the policyholder shall have a special lien on the sums due to the insurer in the same degree as claims for conservation expenses.

516 In other words, the company collects premiums in advance and builds up adequate technical reserves to meet the (eventual) payment of claims as stipulated in articles 36 ff of the Insurance Code.

It is true that the legislator did not consider to burden the policyholder on behalf of specific information obligations, but it is also true that the structure of the case implies the extraneousness of the insured to the stipulation. He, not being a party to the contract well could be unaware of an activity that, performed by the policyholder for account, will produce its effects in his legal sphere, as the holder of the interest of substance.

He could therefore find himself in the condition, as an "unconscious insured", of not activating his rights under the contract, or of not activating them within the terms, short, of the statute of limitations, with the double consequence of relieving the insurer of the obligation to make the service due, even though he has forfeited the premiums, and of not being able himself to avail himself of the guarantee.

It is for these reasons that, thanks in part to the input provided on the point by case law, an obligation has been emerging on the part of the policyholder to inform the insured of the existence of the insurance from which he alone can take advantage[517].

4. With reference to the right to reimbursement of premiums, it should be noted that the policyholder on behalf acts in his own name but in the interest of the insured, who is the only person who can enforce the rights arising from the contract. It is therefore understandable that the policyholder has a claim against the insured for the reimbursement of premiums paid, a claim that is backed by special lien[518].

5. The inability of the policyholder to enforce rights under the contract without the express consent of the insured derives from the very essence of insurance for account. The policyholder is not the owner of the interest of substance; the system cannot allow-unless it violates the indemnity principle-a person to collect an insurance indemnity to compensate for an injury that has not affected his legal sphere. He may only turn to the insurer if he has obtained the "express" consent of the insured. This is a provision that should not come as a surprise and is consistent with the

517 Cass. civ., April 1, 2003, GIUST. CIV., 2003, with note of A. La Torre.

518 D. Pirilli, *La designazione (e la revoca) del beneficiario nell'assicurazione sulla vita tra contratto e successione*, cit., pp. 5-6.

system insofar as it does not allow one to take advantage of claims that affect other people's legal spheres[519].

The position of the insured is perfectly consistent with the insurance discipline insofar as it anchors the right to obtain indemnity to the objective requirement of interest[520].

Insured can therefore be none other than the person on whose legal sphere the risk falls and, in the context of insurance against damage, can only be the owner of the legal situation that rests on the property and from whose injury derives the right to compensation for the damage, a situation which, although normally proprietary, can otherwise be identified in the ownership of other real rights or rights of guarantee[521].

It might be objected that in the hypothesis of insurance on behalf of whom it is due, it could well be the case that the policyholder will later come to coincide with the insured; but in that case the insurance indemnity will accrue to him not as a party to the contract but as a party to the relationship, not as the policyholder but as the holder of the interest of substance, as the holder of a legal situation that comes to rest on the property. Therefore, it is not possible to glimpse any derogation from the system in the case *de qua*[522].

Taking the normative datum as a starting point, it should then be noted how Article 1891, paragraph 1, of the Civil Code stipulates that the policyholder must fulfill the obligations arising from the contract except those that must by their nature be fulfilled by the insured.

Among the obligations specifically incumbent on the insured is certainly that of informing the insurer of any aggravation of risk (Art. 1898 Civil Code), as well as of warning in the event of a claim (Art. 1913 Civil Code) and, again, of attempting to rescue (Art. 1914 Civil

519 *Ibid*.

520 Interest understood as the relationship, susceptible to economic evaluation between a subject and an asset. In this sense A. Donati, *Trattato di diritto delle assicurazioni private*, cit., p. 194.

521 See A. Antonucci, in *Commentario breve al diritto delle assicurazioni*, (a cura di) G. Volpe Putzolu, *Commentario breve al diritto delle assicurazioni: Codice civile, codice della navigazione, codice delle assicurazioni*, Assago, 2013, p. 24.

522 D. Pirilli, *La designazione (e la revoca) del beneficiario nell'assicurazione sulla vita tra contratto e successione*, cit., p. 6.

Code)[523], or of reporting the existence of other insurances, under Art. 1910 Civil Code[524].

It is, in fact, at the stage immediately preceding the stipulation that the insured provides the company with all the information the latter needs in order to adequately assess the risk and, consequently, calculate the relevant premium.

It may well happen, however, that during the life of the insurance relationship, these circumstances change leading to an aggravation of the risk itself. Hence the provision of article 1898 of the Civil Code[525].

Indeed, the obligation to give notice under article 1913 c.c.[526] would be provided to enable the insurer to ascertain the dynamics of the accident and verify its consequences in order to fulfill, if due, its indemnity benefit[527].

Article 1914 of the Civil Code[528] provides the insured with an obligation to do everything possible to avoid or to reduce the damage, an

523 Highlights the systematic connection that exists between Article 1913 of the Civil Code, which enshrines the insured party's obligation to give notice of the claim and, moreover, provides a very short deadline within which it must be fulfilled (three days), and Article 1914 of the Civil Code, which requires the insured party itself to do everything possible to avoid or lessen the damage, V. Ferrari, *I contratti di assicurazione contro i danni e sulla vita*, cit., p. 77. The notice in this logic would be functional in saving.

524 A general principle, the one enshrined in Article 1910 of the Civil Code, which obviously applies to all property and casualty insurance, since it cannot be allowed that the insured, by activating different insurance coverages, can take advantage of the claim by cumulating several insurance indemnities.

525 Circumstances could indeed lead to a decrease in the risk itself; in such a case the provisions of article 1897 of the Civil Code will apply.

526 On the configuration in terms of burden or obligation of notice, F. Moliterni, in *Commentario breve al diritto delle assicurazioni*, (a cura di) G. Volpe Putzolu, *Commentario breve al diritto delle assicurazioni: Codice civile, codice della navigazione, codice delle assicurazioni*, Assago, 2013, p. 97 ff.

527 On the legal nature of the notice of claim, D. Purcaro, *L'assicurazione per conto altrui*, cit., p. 264. The author considers this to be a declaration of knowledge of a recettivistic nature that must contain the factual elements essential to bring to the insurer's knowledge the extent of the claim and its circumstances. Some puzzlement is expressed regarding the reference to the claim as the time from which the obligation to give notice begins; see M. Rossetti, *Il diritto delle assicurazioni, I, L'impresa di assicurazione. Il contratto di assicurazione in generale*, cit., p. 48.

528 Indeed, the interest in rescue would be as much the insured's as the insurer's, and, more generally, it would be an interest in loss prevention. F. Moliterni, in *Commentario breve al diritto delle assicurazioni*, cit., p. 102. See also G. Coco, *Assicurazione r.c., obbligo di salvataggio e dovere di limitare il danno*, DANNO RESP., 2004, p. 740 ff.

obligation moreover enshrined to protect the interests of both parties to the relationship, insurer and insured[529].

On the one hand, in fact, the appropriate intervention to avoid or to reduce the consequences of the accident certainly benefits the company, which not surprisingly is obliged to bear the related expenses; on the other hand, it is clear that the insured should have every interest in avoiding the consequences of the accident as far as possible. Not to mention the more general interest in the preservation of the property[530].

With regard otherwise to the obligation to report the (possible) existence of other insurance coverage, referred to in article 1910 of the Civil Code[531], this is the corollary of a system that cannot allow insurance to turn into an instrument of enrichment and certainly cannot create a mechanism that induces the insured to have an interest in the destruction of a res of which he is normally the owner driven by the prospect of economic advantage.

Article 1894 of the Civil Code then provides, with regard to insurance for account, that if the insured has knowledge that inaccurate or reticent statements have been made, the rules of Articles 1892 and 1893 of the Civil Code shall apply.

The rationale of the rule is obvious: it is intended to prevent the insured from taking advantage of the policyholder's good faith by keeping silent about the inaccuracy of the statements made.

Behold, Article 1894 of the Civil Code, in this logic, ensures that the balance is maintained. Indeed, it should not be overlooked that the regime of inaccurate and reticent statements comes into being in order to prevent the insurer/insured relationship from being distorted, and,

529 Property insurance is based on the principle that insurer and insured would be "allies", in that they share an interest in avoiding the loss and limiting its prejudicial effects, according to R. Calvo, *Il contratto di assicurazione. Fattispecie ed effetti*, cit., p. 111.

530 D. Pirilli, *La designazione (e la revoca) del beneficiario nell'assicurazione sulla vita tra contratto e successione*, cit., pp. 6-7.

531 Jurisprudence, however, originally oriented in the direction of excluding the applicability of the provisions of Article 1910 Civil Code in the case of insurance on behalf of others, has since understandably changed its opinion. On the point I. Sabbatelli, in *Commentario breve al diritto delle assicurazioni*, (a cura di) G. Volpe Putzolu, *Commentario breve al diritto delle assicurazioni: Codice civile, codice della navigazione, codice delle assicurazioni*, Assago, 2013, p. 85 ff.

considering that the bearer of the risk is the one who must provide the company with all the information it needs in order to adequately assess the risk and calculate the premium, it must do so as correctly as possible[532].

Against these obligations, which cannot be fulfilled except by the insured, he assumes rights under the contract, chief among them the right to insurance indemnity in the event of a claim.

The desire to provide an answer to the need not to see the policyholder on behalf of a victim of (perhaps more apparent than real) substantial injustice but diligent in procuring adequate insurance coverage for others and unable to enforce rights under the contract without the express consent of the insured himself, has been articulately reflected in the interpretation of the Courts.

A recurring example is when the carrier, a contractor on behalf of, called upon to pay damages to the owner, sues to obtain insurance indemnity[533].

The almost unanimous denial by the courts in the absence of express consent of the insured is entirely consistent with the statutory provision. However, there has been no shortage of attempts to recognize the value of a consent that, although not manifestly expressed, could nevertheless be inferred from a tacit manifestation of will[534].

This issue calls for some reflection. Although our legal system allows the will to be expressed even implicitly – and, in this logic, there seems to be no difficulty in admitting that a formal power of attorney is not needed – nevertheless, care must be taken not to betray the rationale of the rule; to go beyond the normative dictate in this context would risk allowing someone who is not the owner of the interest to obtain the insurance indemnity, a solution that is not permissible if it violates the indemnity principle.

Although, indeed, as keenly observed, the case law that rejected the contractor's claim did so because it was faced with claims made on

532 D. Pirilli, *La designazione (e la revoca) del beneficiario nell'assicurazione sulla vita tra contratto e successione*, cit., pp. 5-6.

533 *Ibid*.

534 I. Riva, *Il contratto di assicurazione "per conto di chi spetta" nel settore del trasporto merci*, CONTR. IMPR., 2009, p. 1029 ff.

the basis not of implied consent, as such abstractly permissible, but presumed[535].

In another respect, an issue harbinger of interpretative difficulties has been that relating to the alleged operation, in the case at hand, of the institution of subrogation, as per Articles 1201 ff. of the Civil Code. In other words, the question has been raised whether the policyholder, who has compensated the insured on the basis of the rules governing their internal relations, can then be subrogated to the rights that the insured has against the insurer.

This is a solution accepted, albeit rarely, by case law, a solution that has registered some consensus in doctrine[536] and that is based on the assumption of the operation of the provision of article 1203, para. 3, of the Civil Code[537]. However, one cannot avoid, as also part of the doctrine has not failed to do[538], to express some perplexity on the point. Indeed, it is not considered to detect a hypothesis of solidarity that justifies a subrogation mechanism.

The policyholder is normally linked to the insured by a contractual relationship that is and remains absolutely distinct from that of insurance[539].

It is true, it might be objected, that both the policyholder and the insurer are obliged to compensate for the damage produced in the legal

535 Intervening on the two different positions taken in this regard by the jurisprudence of legitimacy, on the one hand inclined to recognize validity to an unequivocally manifested consent, even if not incorporated in a statement, and on the other inclined to exclude that consent can be manifested through conclusive conduct, he points out how in reality the Supreme Court has denied validity to presumed consent, not tacit, M. Rossetti, *Il diritto delle assicurazioni, I, L'impresa di assicurazione. Il contratto di assicurazione in generale*, cit., p. 709. The author states that it is worth pointing out, however, that despite the apparently divergent maxims, the contrast just mentioned can well be called only "formal". In fact, if attention is shifted from the maxims alone to the reasons for the judgments, one realizes that in all the cases in which the Court has denied the validity of tacit consent, for the purposes of article 1891, para. 2, of the Civil Code, in reality the plaintiff had claimed to base his legitimacy on a consent that was not "tacit" but only presumed.

536 D. Purcaro, *L'assicurazione per conto altrui*, cit., p. 309.

537 On the discipline of article 1203 of the Civil Code, see L. Casertano, in *Commentario al codice civile, Delle obbligazioni, art. 1173-1217*, diretto da E. Gabrielli, Turin, 2012, p. 677 ff.

538 I. Riva, *Il contratto di assicurazione "per conto di chi spetta" nel settore del trasporto merci*, cit., p. 1030.

539 D. Pirilli, *La designazione (e la revoca) del beneficiario nell'assicurazione sulla vita tra contratto e successione*, cit., p. 7.

sphere of the insured, but by reason of two different titles; the first by virtue of the arising of a contractual liability, the second by reason of the assumption of the risk. Nor do the two benefits necessarily coincide, since delimitations of risk may well be provided for in the policy. But it is certainly true that the insured cannot be allowed to be in a position to collect the insurance indemnity after the loss has been compensated to him by the policyholder.

Another, certainly less successful, attempt has been to frame account insurance within the framework of liability insurance in order to enable the policyholder, as the insured, to enforce his or her rights under the contract.

The differences between the two forms of insurance are obvious. Liability insurance covers the risk of property depletion in which the insured incurs when damage is caused to others by its own conduct; account insurance is property damage insurance in which the insured risk consists of the possibility that the property will be destroyed, damaged, etc. More debated and differently argued is the framing in the context of the third-party contract, which although has found a place in the interpretation of the Courts[540].

Indeed, at first, the united sections of the Supreme Court itself went so far as to affirm that the contract of insurance for account could be brought within the scope of the stipulation in favor of a third party under article 1411 of the Civil Code[541]. This solution allowed the policyholder, in the presence of the insured's refusal to make use of the guarantee, to obtain the benefit even in the absence of consent.

The attempt, while appreciable insofar as aimed at enabling the contractor for account, through the assimilation of the case under article 1891 c.c. with that under article 1411 c.c., to enforce rights under the contract, was, however, misleading[542].

And indeed, the unified sections of the Supreme Court, only two years later, have returned to the issue, taking a position that is in clear antithesis to the previous one, but which appears more consistent with the

540 Cass. civ., May 25,1995, n. 5747, FORO IT. REP., 1995. The decision assimilates insurance on behalf of others to contract for the benefit of a third party.

541 The reference is to Cass., sez. un., May 6, 2000, n. 295, DIR. GIUST., 2000, p. 58 ff.

542 D. Pirilli, *La designazione (e la revoca) del beneficiario nell'assicurazione sulla vita tra contratto e successione*, cit., p. 7-8.

structure of the case insofar as it excludes the assimilability to the contract in favor of a third party[543].

Although this is not the place to address the issue *funditus*, nevertheless we cannot fail to note the profound difference between acting on behalf of and acting for the benefit of, a difference that becomes even more significant in the context of property and casualty insurance[544].

But that the debate was destined not to be quenched is shown by the fact that the Supreme Court itself in 2007 returned to the issue, stating that the contract of insurance on behalf of others under article 1891 of the Civil Code constitutes a *sui generis* negotiated affair of a contract for the benefit of a third party[545].

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543 The reference is to Cass. civ., April 18, 2002 n. 5556, GIUST. CIV., 2002, I, p. 895 ff, with note of A. La Torre, *Un chiarimento sull'assicurazione per conto altrui (art. 1891 cod. civ.)*, DIR. GIUS., 2002, with note of Rossetti, CORRIERE GIUR., 2002, with note of Lamorgese. To the insurance for the account of one who is entitled, governed by article 1891 of the Civil Code, is not applicable, in view of its indemnity nature, article 1411, para. 3, Civil Code, which, on the subject of contracts for the benefit of third parties, legitimizes the policyholder to benefit from the benefit if the third party refuses to profit from it; it follows that, in the case where the insurance contract has been entered into by the carrier in favor of the owner of the things transported, it is to be excluded that the former can benefit from the indemnity even though the insured has not profited from the insurance, having preferred to seek compensation for the damage from the carrier. Nor can his "express consent" to the policyholder's exercising, in accordance with the provisions of paragraph 2 of the aforementioned article 1891, the rights arising from the policy be drawn from such conduct of the insured, since it only reveals the insured's refusal to avail himself of the insurance, but nothing expresses the policyholder's exercise of the rights arising from the insurance.

544 A. La Torre, *Un chiarimento sull'assicurazione per conto altrui*, cit., p. 899 ff; A. La Torre, *Cinquant'anni col diritto, vol. II, Diritto delle assicurazioni*, Milan, 2008, p. 353 ff, spec. 357 ff.

545 The reference is to Cass. civ., sez. III, June 5, 2007, n. 13058, MASS. GIUR. IT., 2007. Insurance on behalf of others or on behalf of the entitled governed by Art. 1891 of the Civil Code integrates a contract for the benefit of a third party or, even more specifically, a *sui generis* negotiating event of a contract for the benefit of a third party, so that both the rules proper to the institution pursuant to Art. 1411 ff of the Civil Code and those of the insurance contract apply to it insofar as they derogate from the general principles dictated by law for the contract for the benefit of a third party. It follows that the specific requirement of "interest" in insurance under article 1891 of the Civil Code is of twofold nature and different content, having to be evaluated, for the purposes of the validity of the contract, both with regard to the position of the insured-third party, in accordance with article 1904 of the Civil Code, as well as with reference to the position of the policyholder, pursuant to article 1411 of the Civil Code: under the first aspect, the insurance interest implies, an economic relationship between a subject and an asset exposed to risk in relation to a potentially damaging future event (having, for the effect, to result in a legally qualified subjective position and not a mere factual interest) while, in relation to the second aspect, the interest does not have to take on characters of juridicality, being able, resolving also in a subjective situation of mere fact, moral or image.

The fluctuating position of the Supreme Court highlights the importance of the issue and the peculiarities of insurance for account, a case which, by balancing the formal criterion of legitimacy (*e.g.*, possession of the policy) and the substantive criterion of ownership of the insured interest, contributes to keeping alive the debate in a field, that of insurance law, which constitutes an authentic laboratory of ideas, trends, conceptual and practical solutions, because it appears oriented to preserve its original features in adapting to the needs of modernity[546].

In German law, the third-party insurance contract is a contract modification for the benefit of a third party under articles 328 ff of the German Civil Code (BGB). The policyholder of the insurer is the policyholder and not the insured. This has the following consequences[547].

The policyholder is the sole debtor of the premium. The insurer must send the policyholder a reminder for unpaid insurance premiums. The policyholder is not liable for payment.

However, the insured may avoid termination of the insurance contract by the insurer as a result of the policyholder's late payment without being the premium debtor[548].

The policyholder is the recipient of the insurer's declarations of intent. If the insurer intends to dissolve the insurance contract, declare a rescission or withdrawal, this declaration must be received by the policyholder. Otherwise, the insurer's declaration remains without legal effect for formal reasons[549].

The same applies to declarations against the insurer concerning the continuation of the insurance contract. Cancellations, rescissions,

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546 See generally G. Alpa, *Introduzione*, in *Le assicurazioni private*, a cura di G. Alpa, Turin, 2006.

547 See generally M. Eichhorst, *Germany*, in *The Insurance and Reinsurance Law Review*, P. Rogan (ed.), *The Law Reviews*, 2020.

548 Under article 34 VVG, the policyholder can make payment of the premium arrears to the insurer. This payment satisfies the premium requirement. If the insurer refuses to accept the insured's payment, the right to payment remains against the policyholder. However, the insurer may not declare a termination justified because of late payment of the premium, since the policyholder has offered to pay. On this point, M. Zimmerling & A. Pfeiffelmann, *Germany*, cit.

549 For an in-depth analysis see R. Koch, *Compulsory Liability Insurance in Germany*, in A. Fenyves, C. Kissling, S. Perner, D. Rubin (eds), *Compulsory Liability Insurance from a European Perspective*, TORT & INS. L., 2016.

withdrawals, etc., can only be declared by the policyholder. The declarations by the policyholder have no legal effect[550].

The behavior of the policyholder and the insured can affect the claim. For example, their behavior may lead to the insurer's exemption from payment due to the breach of an obligation[551].

Pursuant to article 28, para. 2, VVG, insurance contracts may stipulate that the insurer may be fully or partially exonerated from payment of compensation in the event of breach of contractual obligations, depending on the level of default[552].

The policyholder has the right to dispose of the insurance benefit. This means that the policyholder, as a contractual party to the insurer, has the right to claim the insurance benefit.

In addition, the policyholder has the right to enforce its claim against the insurer in court. A claim by the policyholder against the insurer would remain unsuccessful due to lack of right to claim-except for the following exemptions[553].

On the other hand, the insured may dispose of the claim directly against the insurer if the policyholder agrees. If the policyholder agrees that the insured has the right to dispose of the claim, it usually transfers that right to the insured by assignment of the insurance claim[554].

Usually, the policyholders do not agree that the insured will collect the insurance benefit. This is due, among other things, to the fact that the possibility mentioned below of preferential satisfaction of the insured's claims is omitted if the insured is allowed to make the claim.

In addition, the insured could have a separate claim against the insurer if the policyholder refuses to enforce the insurance benefit. The insured's

550 *Ibid*.

551 C. Armbrüster, *Il diritto dei contratti di assicurazione in Germania dopo la riforma del 2008*, in *Diritto e Fiscalità dell'Assicurazione*, 2013, 454 ff.

552 *Ibid*. In the case of third-party insurance, according to sec. 47 VVG, not only the conduct of the policyholder, but also the conduct of the insured can damage the insurance claim and lead to the insurer's exemption from payment due to the breach of an obligation.

553 Only in exceptional cases does the insured have the right to claim directly against the insurer instead of the policyholder. The insured's right of recourse against the insurer exists if the insured is in possession of the insurance policy (see Art. 44, para. 2, VVG). In this case, the insured can disallow claims arising from the insurance contract without the approval of the policyholder and also assert them judicially (see M. Terbille, in *Münchner Anwaltshandbuch Versicherungsrecht*, 2nd edition, 2013, approx. para. 2 no. 259.

554 M. Terbille, in *Münchner Anwaltshandbuch Versicherungsrecht*, cit., approx. para. 2 no. 259.

refusal could result from the fact that the insurer's refusal to provide the insurance benefit is considered to be erroneously correct. In case of the insured's inaction, forfeiture, or limitation of the right to insurance benefit is imminent. This exceptional case approves the insurer's direct right to claim[555].

The external relationship with the insurer described above must be separated from the internal relationship between the policyholder and the insured.

The mutual rights and obligations of the policyholder and the insured relating to the insurance contract arise from the internal relationship[556].

Usually this internal relationship is based on a contractual obligation between the policyholder and the insured. This may be, for example, a service contract, a lease contract, an order, etc.

This contractual obligation determines who is entitled to insurance benefits in the internal relationship after the formal collection of the insurance benefit. If it is the insured, the policyholder – regardless of exceptions – transfers the insurance benefit to the insured[557].

Under the lease agreement, the lessee usually must claim payment from the lessor as the insured.

The lease agreement that obligates the tenant of a commercial space to take out insurance for the building often stipulates that the tenant, as the policyholder, must transfer the insurance benefits received for damage to the building to the building owner as the insured. The lease may contain the additional provision that the insured must use the insurance benefits to repair the damaged building[558].

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555 *Ibid*.

556 E. M. Braje, *Germany*, in *The Law Reviews – The Insurance and Reinsurance Law Review*, Section II, *Making the Contract*, available at https://thelawreviews.co.uk/title/the-insurance-and-reinsurance-law-review/germany. Last visited August 12, 2022.

557 *Ibid*. For example, leasing contracts regulate the internal relationship between lessee and lessor. The lessee, as the policyholder, must collect the insurance benefit from the comprehensive insurer in case of damage to the insured car. Under the internal relationship, the lessee has the right and obligation to claim the insurance benefit from the insurer and to enforce the claim in court if necessary.

558 *Ibid*. For example, leasing contracts regulate the internal relationship between lessee and lessor. The lessee, as the policyholder, must collect the insurance benefit from the comprehensive insurer in case of damage to the insured car. Under the internal relationship, the lessee has the right and obligation to claim the insurance benefit from the insurer and to enforce the claim in court if necessary.

These and similar contractual clauses often govern who is entitled to the insurance benefit in the internal relationship and how it is to be used.

If there is no contractual obligation between the policyholder and the insured or if the contract contains no information about the insurance benefit, the jurisdiction assumes an unwritten legal obligation between the policyholder and the insured[559]. This obligation determines the typical rights and obligations of the insurance benefit.

Under this contractual obligation, the policyholder has the right to dispose of the insurance benefit in trust. The policyholder is obligated to claim the insurance benefit from the insurer and to deliver the benefits received to the insured[560].

In addition, the policyholder is required to inform the insured about the content of the insurance contract and the amount of the insurance benefit received[561].

In addition, the policyholder is required to consider the interests of the insured in negotiations with the insurer. For example, the policyholder cannot waive the right to an insurance benefit without the consent of the insured.

The obligations of the insured arising from the unwritten obligation interpreted by the jurisdiction do not exist for all constellations. The policyholder is not always obligated to transfer the insurance benefit received to the insured. The policyholder is not obligated to transfer the insurance benefit to the insured per se and independently of its interest in the insured[562].

If the policyholder's behavior is considered to be in bad faith, this could counteract the redemption claim.

The policyholder can, among other things, offset the insured's claim against the claims to which it is entitled for the event that caused the insurance case[563]. If the policyholder seeks compensation from the insured, for example because the insured has culpably caused damage to the pol-

559 See Federal Court of Justice "BGH", NJW 1973, p. 1368 ff.

560 See C. Dageförde, in *Münchner Kommentar zum VVG*, 1st edition, 2010, on § 46 VVG no. 7.

561 *Ibid*.

562 E. M. Braje, *Germany*, in *The Law Reviews – The Insurance and Reinsurance Law Review*, cit.

563 See Federal Court of Justice VersR 73, p. 634 ff.

icyholder, the policyholder may declare a set-off against the insured's claim for redemption. In this case, the policyholder may, in the absence of the insured's need for protection, retain the insurance benefit.

In addition, the policyholder may object to the request for insurance benefits with the argument of preferential satisfaction under Art. 46 VVG. Under Article 46 VVG, the policyholder may preferentially satisfy its claims against the insured related to the insured object. If the policyholder had claims against the insured arising from this loss on his part, he may at first object to preferential satisfaction and refuse to transfer the insurance benefit to the insured with this argument.

Hence, third-party insurance corresponds to the economic reality whereby, due to contractual obligations, the party who has to enter into an insurance contract is often not the party injured by the insured event.

The separation between the formal right to the claim (policyholder) and the substantive ownership of the insurance claim (usually the insured) simplifies the regulation of the loss for the insurer. The insurer has the policyholder as a contractual partner with whom to discuss the claim and to whom to pay the insurance benefit with the effect of satisfying an obligation.

The separation of formal and substantive law allows the insurer to see whether it has claims that must be met in preference, before transferring the insurance benefit to the policyholder. The policyholder would not have this option if the insured had its own formal right of recourse against the insurer.

Unlike insurance for one's own account, it is disadvantageous to the policyholder that breaches of the policyholder's obligations can be attributed to the policyholder. In the case of own-account insurance, imputation of third-party conduct is possible only in exceptional cases (representative liability).

Article 837 of the Georgian Civil Code provides that if the insurance is for the benefit of another person, the rights under the contract belong to that person. Only the policyholder can apply for the insurance policy (para. 1). In addition, the insured may exercise his rights without agreement with the policyholder and apply to a court only if he is in possession of the insurance policy (para. 2).

The purpose of third-party insurance is to provide him with benefits. Logically, the insured should be able to realize his rights under the insur-

ance contract. According to Article 837 I, when insuring for the benefit of another person, the rights arising from this contract belong to that person. In these rights, the legislature should consider the possibility of receiving insurance compensation. This is expressed in different ways depending on the types of insurance[564].

It is important that the legislator associates the possession of an insurance certificate with the realization of rights under the third-party insurance contract. It is clear from reading the article under review that the insured may exercise his or her rights without an agreement with the policyholder and request their exercise in court only if he or she is in possession of the insurance certificate. With this mandatory provision, the legislature seeks to achieve a fair use of the right. The possession of an insurance certificate by a third party constitutes a presumption of the validity of his right. In the insurance certificate, the legislature must refer to the insurance policy, which at the same time allows for the identification of the insured. In case of a dispute, the decisive importance is given to the contract, which must be clearly separated from the policyholder and the insured[565].

In the event of a dispute, attention should be paid to the circumstances under which the insurance certificate left the possession of the insured. The use of the right provided for in article 837 is not permitted in the event that a third person obtains the insurance certificate against the will of the insured[566].

Article 838 of the Georgian Civil Code provides that the policyholder may exercise in his or her own name the rights due to the insured under the insurance contract. If the insurance policy is issued, the policyholder may receive compensation without the consent of the insured or transfer the right to the insured only if the policyholder holds the insurance policy.

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564 K. Iremashvili, *Art. 837*, in *Online Commentary on the Civil Code*, available at https://gccc.tsu.ge/. Last visited August 9, 2022. For example, in the case of property insurance, this may be the right to request repair or replacement of the damaged item; in the case of health insurance, the right to use medical services, etc.

565 *Ibid*. Only the policyholder has the right to request a certificate of insurance from the insurer. Article 837, para. 1, strictly indicates the above. Accordingly, the insurance certificate will be delivered to the policyholder by the insurer.

566 *Ibid*.

The insurer will pay the policyholder for the benefit of the insured person only if the policyholder proves that the insured person has consented to the insurance contract[567].

The rules governing third-party insurance in the Civil Code differ from each other depending on the rights they are intended to exercise. In this sense, article 837, as the title of the article indicates, is concerned with defining and regulating the rights of third parties. Article 838, depending on the title of the article, will deal with the rights of the insured. Logically, the rules established in these two articles are derived from each other. In particular, the proviso in article 837, para. 2, on the possession of the insurance certificate defines the person authorized to exercise the rights established by the agreement[568].

The third paragraph of this article contains an interesting provision on the consent of the insured. As a rule, when insuring in favor of another person, the consent of that person is not mandatory.

However, in practice, the existence of the third party's consent can be challenged. According to article 838, para. 3, this problem may arise when issuing an insurance claim. According to the provision, the burden of proof is on the insured. It is he who has to prove that the insured agreed to the insurance contract[569].

567 K. Iremashvili, *Art. 838*, in *Online Commentary on the Civil Code*, available at https://gccc.tsu.ge/. Last visited August 11, 2022.

568 *Ibid*. Article 838, para. 1, reiterates what was said in article 837, para 2. Specifically, if the insurance certificate is in the hands of the policyholder, the policyholder can enjoy the rights defined by the insurance contract in his or her own name. From this point of view, article 838, para. 2, which refers to the realization of the right to receive the insurance indemnity by the insurer, does not contain any new rules. Therefore, the above rules again emphasize that the signing of an insurance contract in favor of another person is not sufficient for the realization of the insured's rights; the real basis for this is only the transfer of the insurance certificate.

569 *Ibid.*

Chapter VI

CIVIL LIABILITY INSURANCE

1. Definition and scope of application (art. 839)

According to Italian regulations, in liability insurance, under Article 1917 of the Italian Civil Code, the guaranteed future and uncertain event is represented by the payment to be made by the insured, as a result of the fact that occurred during the time of insurance, to the third party who suffered the injury, in dependence of the liability deduced in the contract.

The Italian legislature, with Article 1917 of the Civil Code, wished to indicate what it considered to be the fundamental principles to be placed at the basis of the regulation of liability insurance, giving substance to a rule that today seems no longer to fit the needs of insurance companies[570].

- These principles can be identified among the following:
- the insured risk is the possibility of the harmful event from which the insured's liability arises, so that the loss occurs at the moment when the third party's act occurs;
- the insurer is obliged to indemnify the insured, i.e., to provide him with the means to satisfy the third party and not merely to reimburse the insured;
- liability for the insured's willful misconduct is not insurable;
- liability insurance is a contract for the benefit of the insured and not the injured third party571.

On the parameters outlined above was thus shaped Article 1917 of the Civil Code, which defines the contract of liability insurance by stipulating that the insurer is obligated to hold the insured harmless for whatever the insured has to pay to a third party as a result of a liability deduced in the contract and arising for an event that occurred during the life of the insurance relationship.

570 See D. De Strobel, *Le vicende del «claims made»*, DIR. ED EC. DELL'ASS., 2006, p. 531 ff.

571 In this sense, A. Donati, *Trattato di diritto delle assicurazioni private*, cit., p. 190.

This scheme, outlined in Article 1917 of the Civil Code, corresponds to what is commonly called in practice the loss occurrence contract.

For a complete analysis of the institution of liability insurance, Art. 1917 Civil Code has always been studied in conjunction with Art. 2952 Civil Code on statute of limitations in insurance matters[572].

Reading the two regulations in combination, two essential but distinct moments in the development of the insurance relationship emerge. In particular, it is possible to differentiate between a first stage in which the accident, *i.e.*, the damaging event from which the obligation to pay compensation originates, and a second stage in which the obligation to pay compensation arises.

Art. 1917[573] c.c. points out, in fact, that the moment in which the damaging event occurs is decisive for the effectiveness of the guarantee[574]; while the obligation to pay the indemnity incumbent on the insurer arises later as a result of a judicial or extrajudicial request, as specified in Article 2952, paragraph 3, Civil Code.

The rules, while complementing each other, evidently have a different object and a different rationale[575] and it does not seem plausible, as a minority part of the doctrine has held[576], to go so far as to confuse the two notions, attributing them equal meaning.

The same have different meanings and, therefore, one should not fall into the contradiction of confusing the moment in which the harmful fact engendering professional liability, that is, the accident, occurs with the moment in which the obligation to pay insurance compensation arises.

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572 Article 2952, para. 3, states that in liability insurance, the term of the right to obtain payment of indemnity shall run from the day on which the third party has demanded indemnity from the insured or brought an action against the insured.

573 Specifically, it is recalled that Article 1917 of the Civil Code provides that in liability insurance, the insurer is obliged to indemnify the insured for whatever the insured, as a result of the fact occurred during the time of insurance, has to pay to a third party, in connection with the liability deduced in the contract. Damages resulting from malicious acts are excluded.

574 A. Donati & G. Volpe Putzolu, *Manuale di diritto delle assicurazioni private*, cit., p. 163 ff.

575 Cass., March 15, 2005, n. 5624, DANNO RESP., 2005, p. 1071 ff. See in doctrine A. Donati & G. Volpe Putzolu, *Manuale di diritto delle assicurazioni private*, cit., p. 163 ff. D. De Strobel, *L'assicurazione di responsabilità civile*, Milan, 2004; M. Franzoni, (voce) *Responsabilità (assicurazione della)*, DIG. DISC. PRIV., Turin, 1996, p. 40 ff.

576 A. De Gregorio & G. Fanelli, *Il contratto di assicurazione*, cit., p. 162; R. Simone *Assicurazione Claims made, sinistro (latente) e dilatazione (temporale) della responsabilità civile*, DANNO RESP., 2005, p. 1079 ff.

In view of what has been stated so far, liability insurance, in the Italian legal system, should be included in the sphere of property insurance, given that its primary objective is to avert a depletion of the insured's assets, as a result of the compensation action brought by a third party. As the object of the contract, therefore, it will be appropriate to consider the risk, qualified as the adverse effect of the claim whose effects reverberate on the insured's assets[577].

In some circumstances, the typical models provided for in Article 1917 are gradually being replaced by new prototypes, such as, for example, claims made clauses[578].

The claims made clause was first formulated in the Common Law systems, and specifically in US practice; hence, starting in the 1980s, this contractual provision became a customary clause in insurance contracts pertaining to civil liability, particularly professional liability[579].

Subsequently, this practice circulated reaching civil law jurisdictions as well, and was transplanted, with the appropriate adaptations, to Ita-

577 A. Borroni, *Clausola Claims Made: Circolazione Parziale Di Un Modello Nella Responsabilita' Civile Italiana*, cit., p. 125.

578 On the origins of the claims made clause, F. Ceserani, *Origine e sviluppi della clausola claims made nei mercati internazionali*, DIR. EC. ASS., 2007, 799 ss. The reasons that insurance companies, starting in the mid-1980s, have been pushing loss occurrence formulas to claims made formulas are well highlighted in the doctrine. For example, C. Lanzani, *Clausole claims made legittime ma vessatorie*, DANNO RESP., 2005, p. 1084, argues that the whole insurance sector has, in fact, undergone a profound crisis due to the judicial recognition of completely new damage cases, such as damage from exposure to toxic substances such as asbestos or environmental and pollution damage.

579 G. Mastrogiorgio, *La giurisprudenza italiana e la clausola claims made*, RESP. CIV., 2009, p. 6 ff. For a more specific reconstruction of the operational rules of Anglo-Saxon systems, see W. I. B. Enright, *Professional Indemnity Insurance Law*, London, 1996, p. 3023 who states that «the insurer may offer to write the professional indemnity policy on an "occurrence" basis or an "a claims made" basis. An "occurrence basis" policy has its core a promise by the insurer to indemnify the insured for any loss, arising out of a defined event, occurrence circumstance or accident». He continues, then «the professional indemnity insurer will be unlikely to offer an "occurrence basis" policy, but it is likely that its offer will be a "claims made" policy. The core of this policy is promise by the insurer to the insured that it will indemnify for any claim that is made by a third party against the insurer within the duration of the policy, no matter, subject, to the provisions in relation to the time within which notice must be given, when the defined event affecting the third party occurred». As is clear, there is substantial identity, at least in principles, with the civil law system. A. Borroni, *Clausola Claims Made: Circolazione Parziale Di Un Modello Nella Responsabilita' Civile Italiana*, cit., p. 127.

ly as well. As can be seen from the literal tenor of Article 1917 of the Civil Code, under which the insurer is obliged to compensate in full for damages caused by the loss that occurred during the period of effectiveness of the contract or after the expiration of the guarantee[580], this clause represents a departure from the system originally typified by the Italian legislature in 1942.

In fact, the focus is placed not on the moment when a claim occurs, but rather on the moment when the injured third-party files a claim[581] against the insured[582]. Precisely because of the great versatility demonstrated by claims and their ability to monitor damages arising from events

580 G. Mastrogiorgio, *La giurisprudenza italiana e la clausola claims made*, cit., p. 2. See also, for a comparative overview, M. Franzoni, (voce) *Responsabilità (assicurazione della)*, cit., p. 401; E. F. Carbonetti, *La formazione ed il perfezionamento del contratto*, in R. Cavallo Borgia (a cura di), *Responsabilità ed assicurazione*, Milan, 2007, p. 82; R. Simone, *Assicurazione claims made, sinistro (latente) e dilatazione (temporale) della responsabilità civile*, DANNO RESP., 2005, p. 1079 ss.; D. De Strobel, *Le vicende del "claims made"*, cit., p. 531; A. D. Candian, *Responsabilità civile e assicurazione*, cit., p. 290 ff; C. Lanzani, *Clausole claims made legittime ma vessatorie*, cit., p. 1084 ff; L. Locatelli, *Clausole claims made e loss occurrence nella assicurazione della responsabilità civile*, RESP. CIV., 2005, p. 1030 ff.

581 On the identification of the claim with the time when the claim is filed, see I. Partenza, *L'assicurazione di responsabilità civile generale*, Milan, 2009, p. 175; N. De Luca, *L'attuazione del rapporto assicurativo*, in R. Cavallo Borgia (a cura di), *L'assicurazione di responsabilità civile. Trattato della responsabilità civile*, diretto da M. Franzoni, Milan, 2004, p. 166; P. Gabasio, *Modalità di validità della clausola in claims made: il pensiero dell'assicuratore*, in *Medicina e Diritto*, 2010, p. 44 ff.

582 As stated by L. Bugiolacchi, *I mobili confini del tipo assicurativo: considerazioni in tema di assicurazione della r.c. con clausola claims made contributo approvato dai refere claims made*, cit., There is no doubt, then, that the transition from the traditional models of liability insurance, so-called loss occurrence, to those structured according to the claims made model, occurred precisely as a result of the emergence of the new figures of damage. According to the reconstruction made therein, in fact, paragraph 1 of Article 1917 of the Civil Code (i) incorporates a notion of loss understood as a damaging fact, and (ii) identifies the event giving rise to the insurance obligation in the culpable conduct engaged in by the insured du- rantly during the period of effectiveness of the policy and producing damage to the third party.

In other words, the moment in which the insurer's indemnity obligation arises coincides with the occurrence of the insured's injurious conduct, without regard to the actual manifestation of the injurious consequences of that conduct or the moment in which the injured third party's claim for compensation is made; thus, in order for the insured to be covered, the insured's injurious conduct must occur during the time interval in which the policy is in force. A. Borroni, *Clausola Claims Made: Circolazione Parziale Di Un Modello Nella Responsabilita' Civile Italiana*, cit., pp. 127-128, footnote 14.

even going back in time, insurance companies have increasingly adopted this instrument[583].

By virtue of this clause, insurance coverage operates for those claims for which compensation is sought during the term of the contract, the moment in which the damaging event occurred not mattering[584].

We find, therefore, in the presence of a clause that, when provided for in the insurance contract, dilutes its effects, given that the object of the legal transaction itself, will no longer be identified with the guarantee of a risk (read as the negative repercussion of a damage-generating event), but with the claim for compensation[585].

Claims made clauses, given their atypical and derogatory nature of the system of protection provided by the Civil Code for the insured (tra

583 Differently, according to S. Monticelli, *La clausola "claims made" tra abuso del diritto ed immeritevolezza*, DANNO RESP., 2013, p. 3, the substantial advantage for insurance companies would reside in the fact that the claims made clause in tying coverage to the validity of the policy at the time the claim is reported, contributes decisively to customer loyalty, who will be inclined to renew the contract from year to year to avoid incurring dangerous "gaps in coverage" when switching from one policy to another. The author then goes on to say that this profile, although it affects issues of public economic order and has been adequately signaled by some doctrine, at least, to date, has not been taken into account at all by case law. On the same point, also M. Gazzara, *Contratto di assicurazione e tutela dell'aderente*, RESP. CIV. PREV., 2011, fasc. 2 states that this is a clause whose purpose is, on the one hand, to strictly limit in time the company's debt exposure, and on the other hand, to induce the insured to renew the policy from year to year and even after its termination, that is, until the risk of compensation claims is exhausted, and thus, for policies covering occupational risks, for the ten years needed for the purposes of the statute of limitations. As points out F. Ceserani, *Ancora nuvole di vaghezza intorno alla clausola claims made: alcune necessarie puntualizzazioni*, DIR. ECON. ASS., 2011, fasc. 2, it is, however, possible in some cases to provide for an extension of the guarantee, beyond the terms of the temporal validity of the contract, always making it conditional on the notification to the insurer of the claim for compensation, in this case occurring after the contract has expired, but referring to a tort debt arisen during its effectiveness.

584 A. Borroni, *Clausola Claims Made: Circolazione Parziale Di Un Modello Nella Responsabilita' Civile Italiana*, cit., p. 128.

585 See for an in-depht analysis P. Tortorano, *Il contratto di assicurazione e la clausola "claims made"*, in atti e contributi del simposio scientifico internazionale, *Justice, Cooperation, Peace. La cooperazione di giustizia per lo sviluppo e la pace nel mediterraneo, dedicati a Gaetano Liccardo nel suo ottantesimo compleanno*, Vol. I, Prospettive e modelli della cooperazione di giustizia nel Mediterraneo, Naples, 2010, p. 442 ff.

ditionally the weaker policyholder), must be subjected to vexatiousness scrutiny[586].

According to doctrine, the clauses provided in insurance contracts can be assimilated to the clauses contained in the general terms and conditions, while the screening regarding the vexatiousness of the claims made clause has seen the jurisprudential formant manifest sometimes non-uniform orientations[587]: at some times, jurisprudence has upheld its vexatiousness without distinction, insofar as it entails an undue limitation of liability[588]; at other times, jurisprudence has adopted a more analytical method.

To this approach belongs the distinction between pure and mixed claims made clauses[589].

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586 On this argument see S. Chierici, *Vessatorietà delle pattuizioni limitative del rischio assicurato e criterio della "determinazione del rischio garantito"*, CONTRATTI, 2013, p. 269. The interpretation that is given by the doctrine of the insurance contract as a representation of general terms and conditions, would lead to the consequence of ineffectiveness for the claims made clause if it is not approved in writing (and provided that the phenomenology of the claims made clause is, in the present case, framed in the category of unfair terms). For further discussion, see P. Gaggero, *Validità ed efficacia della assicurazione della responsabilità civile claims made*, CONTRATTO IMPR., 2013, p. 2 ff.

587 According to L. Bugiolacchi, *I mobili confini del tipo assicurativo: considerazioni in tema di assicurazione della r.c. con clausola claims made contributo approvato dai refere claims made*, cit., the co-presence of a multiplicity of interpretations is also an indication of the persistent movement between typicality and atypicality that has been recorded for some years now by jurisprudence and doctrine, which have been engaged in revisiting, often with enhancement of the central role of good faith, well-established approaches on the subject of insurance contract regulation and investigating the relationship between the new contractual models, delivered to us by practice or sectoral legislation, and the causal function of the contract encapsulated in Article 1882 of the Civil Code. On the use of good faith to achieve a balance between advantages and disadvantages see L. Delogu, *Le modificazioni convenzionali della responsabilità civile*, Padua, 2000, p. 17 ff; L. Cabella Pisu, *Le clausole di esonero da responsabilità*, Turin, 1988, p. 19.

588 A. Borroni, *Clausola Claims Made: Circolazione Parziale Di Un Modello Nella Responsabilita' Civile Italiana*, cit., pp. 128-129.

589 S. Monticelli, *La clausola "claims made" tra abuso del diritto ed immeritevolezza*, cit., p. 5. The author distinguishes the claims made clauses into two different types: claims made in a pure way and claims made in an impure way.

In the pure claims made clause[590] the insurance company indemnifies the insured against claims received during the term of the contract. In this case, the clause is not considered vexatious if the coverage ends when the statute of limitations for the injured third party's right to compensation accrues[591].

In the case of mixed claims made, vexatiousness is, on the other hand, justified by the fact that such a provision is included in a mixed system (in other words, in a context in which elements of a loss occurrence and act committed system are simultaneously present): for claims that occurred during the force of a claims made coverage, but manifested in their effects, only in the force of a loss occurrence system, the insured would be "uncovered" from insurance protection, even though he or she had not interrupted in time the underwriting of contracts to protect civil liability[592].

In such a case, in order not to deprive the insured of effective insurance coverage, the optimal solution seems to be one that deems such a

590 The species of claims clause is given a hybrid nature with retroactive coverage; hence, both the international insurance market and common law courts are used to call it retroactive period clause; Prior Acts Coverage. Moreover, it is classified by droit francaise as a regime *base réclamation avec reprise du passé inconnu*. A. Borroni, *Clausola Claims Made: Circolazione Parziale Di Un Modello Nella Responsabilita' Civile Italiana*, cit., p. 131. See A. Boglione, *Le clausole loss occurrence e claims made nell'assicurazione di responsabilità civile (R.C.)*, cit., p. 471, who follows the English doctrine of Clarke, who states that «[t]he interval of time between event and claim can vary considerably and this has led to hybrid policies».

591 It should be pointed out that a limitation of liability could occur even in the case of policies with ten-year retroactivity. It is, in fact, to consider (i) the possibility that the illicit remains long for a period longer than ten years, and (ii) that the ten-year pre-writing period would in any case begin from the moment, possibly later, when the injured party acquires full awareness of the wrongful nature of the injury suffered. In the absence of the protections provided by loss occurrence, as the experience of the U.S. insurance market has shown, there would be very serious economic burdens from the long duration of liability cases due also to the identification of the collateral actually affected by the loss event with gradual development over time. Conversely, there will be a reduction over time in the compensation awarded to victims given the decrease in coverage limits resulting from the inflationary phenomenon. A. Borroni, *Clausola Claims Made: Circolazione Parziale Di Un Modello Nella Responsabilita' Civile Italiana*, cit., p. 131, footnote 24.

592 In such cases, the treatment could be likened to that of a vexatious clause that is not specifically signed.

clause vexatious, so that it is brought back to the conditions of operation of a pure claims made clause[593].

This approach fits well with the solutions adopted in dealing with the traditional dichotomy between strong and weak parties to the contract and, therefore, with the protections put in place to safeguard the insured/consumer.

In the case, on the other hand, of a claims made clause inserted in contracts protecting liability actions signed between the insurance company and professionals (especially if qualified) uncertainties emerge about the approach to be taken. In other words, a new and additional element is introduced to screen the validity of the clause: the subjective characteristics of the parties[594].

In principle, so-called claims policies provide the insured with a greater extent of indemnity guarantee, as they provide retroactive protection against facts and damages prior to the date of contract conclusion.

In other words, the doctrine points out, that such a contract would grant the insured the advantage of taking out a policy even in a period after the occurrence of the damage-generating activity, as long as the insured is not aware of that damaging situation[595].

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593 In view of the highly atypical nature of the claims made clause and the possibility of its content being interpreted in various forms, for the purposes of an assessment of vexatiousness, it is not sufficient to ascertain a simple derogation from Article 1917, but rather it is necessary to ascertain, on the basis of the content of the same, whether or not the clause operates as a limitation of the insurer's liability. Thus, according to the Supreme Court's ruling, only those clauses that limit the consequences of fault or default or exclude the guaranteed risk must be considered to be limiting liability, whereas clauses that concern the content and limits of the insurance guarantee and, therefore, specify the guaranteed risk, pertain to the object of the contract. Cass. Civ. Sec. III, Judgment, June 26, 2012, no. 10619.

594 B. Tassone, *Clausole "claims made", professionisti e "terzo contratto"*, DANNO RESP., 2012, p. 717 ff.

595 On this point see C. Lanzani, *Clausole claims made legittime ma vessatorie*, cit., p. 1085 ff; P. Tortorano, *Il contratto di assicurazione e la clausola "claims made"*, cit., p. 447 ff.

Indeed, in all types of claims made, the insured is usually asked to declare the presence of previous claims or otherwise situations from which claims may arise[596].

596 A. Polotti Di Zumaglia, *Coperture presso diversi assicuratori*, cit., p. 3 ff. In the English legal system, through "English law and practice", the insurance contract is defined as a "utmost good faith" contract (the expression was coined by Lord Mansfield in *Carter vs. Boehm 1766* and later codified in the "Marine Insurance Act of 1906") *i.e.*, a legal relationship that requires utmost good faith. This duty applies to all stages of the insurance relationship and, with reference to the pre-contractual stage, is embodied in the obligation to inform the insurer of any circumstance relevant to the risk to be insured which is within his direct knowledge or which, by reason of his business, is presumed to be within his knowledge and the obligation not to represent untruthfully and fairly the circumstances relevant to the risk, the breach of which provides for the nullity of the contract. An exception to this regulation is provided only in cases where (i) the facts within the insured's knowledge are such that they simply result in a reduction of risk, (ii) the insurer has knowledge of these facts or is presumed to have the same; (iii) for facts known; or, finally, (iv) in of waiver (waiver) of the insurer to avail itself of this obligation of cooperation on the part of the insured. It is noteworthy that the jurisprudential approach is tempered by the Financial Ombudsman Service (FOS), which does not endorse the nullity of the contract in every case of violation and differentiates the sanction according to the psychological condition of the subjects by distinguishing them into deliberate (when the subject engages in deliberately deceptive behavior) reckless: (when the subject makes statements or omits circumstances with gross negligence); inadvertent: (when the subject makes statements or omits circumstances with slight negligence); innocent: (when the subject engages in completely innocent conduct). In the latter case, the FOS will reject any claim of innocence and the insurer must pay the indemnity in full. With reference, on the other hand, to the so-called warranties clauses, any waiver in insurance contract relationships will result in the termination of the contract with the consequent release of the insurer from all indemnity obligations from the date of their breach. Warranties, in fact, perform the function of delimiting the contractual risk through statements about past or present factual situations (affirmative warranties) or through promises of future conduct (promissory warranties) which, coming from the insured, are formally included in the policy as contractual covenants. The Australian and New Zealand rules provide otherwise. The former opts for greater protection of the insured through section 54 of the ICA which does not allow the insurer to challenge the indemnifiability of the claim for breach of warranty if it does not prove that it is the cause of the claim. It also prescribes a reduction in indemnity in proportion to the injury suffered if the breach of warranty only partially facilitated the damaging event. The second, on the other hand, prohibits insurers from using the basis of contract clauses in order to evade the obligation to indemnify when pre-contractually the misrepresentation bears no relation to the insured risk. In the USA, although there is federal insurance legislation, the Supreme Court has declared the role of state laws to be predominant. Canadian jurisprudence, for its part, has emphasized the insurer's right to resort to breach of warranty only when it is relevant in relation to the insured risk and when it aided the occurrence of the claim. F. Ceserani, *Rappresentazione del rischio, asimmetria informativa ed uberrima fides: diritto italiano e diritto inglese a confronto*, DIR. ECON. ASS. (dal 2012 DIR. FISCALITÀ ASSICUR.) Fasci-

Thus, in the event that the insured was aware of the damaging event or the possibility that the same might occur, one falls under the case provided for in Article 1892 of the Civil Code on the subject of misrepresentation and reticence[597].

In France, the claims made clause has been the subject of lively doctrinal debate since the 1980s, as well as numerous interventions by case law and, later, the legislator[598].

The earliest rulings had considered the claims made clause valid insofar as it did not conflict with public policy[599]. This orientation was already partially modified in later rulings, as the Supreme Court stated that such clauses, while valid, were not enforceable against the injured third party[600].

Later, however, the *Cour de Cassation* carried out a complete *revirement* of its positions: examining the validity of the clause through the instruments of the common law, and in particular through the cause of the contract, it affirmed that the claims made (or *clause de réclamation de la victime*) deprived of cause the insured's obligation to pay the premium and was, therefore, invalid[601].

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colo. I, 2009. In France, on the other hand, the issue is regulated by the *Loi sur le contrat d'assurance terrestre du 25 juin 1992, Art. 5. Obligation de déclaration* which states «[l]e preneur d'assurance a l'obligation de déclarer exactement, lors de la conclusion du contrat, toutes les circonstances connues de lui et qu'il doit raisonnablement considérer comme constituant pour l'assureur des éléments d'appreciation du risque. Tutefois, il ne doit pas déclarer à l'assureur les circonstances déjà connues de celui-ci ou que celui-ci devrait raisonnablement connaitre. Les données génétiques ne peuvent pas etre communiquèes. S'il n'est point répondu à certaines questions écrites de l'assureur et si ce dernier a néanmoins conclu le contrat, il ne peut, hormis le cas de fraude, se prévaloir ultérieurement de cette omission». Finally, in the US, although there is federal insurance legislation, the Supreme Court has declared the role of state laws to be prevalent.

597 A. Borroni, *Clausola Claims Made: Circolazione Parziale Di Un Modello Nella Responsabilita' Civile Italiana*, cit., p. 135.

598 See generally M. Chagny & L. Perdrix, *Droit des assurances*, Paris, 2014, p. 208 ff; Y. Lambert-Faivre & L. Leveneur, *Droit des assurances*, Paris, 2017, p. 507 ff; B. Beignier & S. Ben Hadj Yahia, *Droit des assurances*, Paris, 2015, p. 554 ff; J. Bonnard, *Droit des assurances*, Paris, 2016, 157 ff.

599 Cass. civ. 1re, November 29, 1978, Bull. Civ., I, n. 366.

600 Above all Cass. civ. 1re, January 22, 1985, Rev. Gén. Ass. Terr., 1985, p. 410 ff; Cass. civ. 3e, April 8, 1987. In doctrine Y. Lambert-Faivre & L. Leveneur, *Droit des assurances*, cit., pp. 511-512.

601 Y. Lambert-Faivre, *La durée de la garantie dans les assurances de responsabilité: fondement et portée de la nullité des clauses « réclamation de la victime »*, RECUEIL DALLOZ, 1993, p. 13 ff.

Based on the combined provisions of Article 1131 (as it stood before the reform[602]) and Art. L. 124-1 *Code des Assurances*, the Supreme Court affirmed that such a clause must be regarded as unwritten because the payment of premiums for the period between the commencement of the effectiveness of the insurance contract and its termination has as its necessary counterpart the guarantee of damages caused by an event occurring during that period, and the clause in the policy according to which the damage is guaranteed only if the victim's claim for compensation is made during the term of the contract, which is in any case necessary for the operation of liability insurance, deprives the insured of the benefit of insurance by reason of a fact not attributable to him and creates an illicit advantage as it is without cause in favor of the insurer alone, which in such a case would receive premiums without counter-performance[603].

It should be emphasized that, through the notion of the cause of the obligation proper to French law (and not of the cause of the contract)[604], it is easier to subject to the scrutiny of the causal judgment the clauses that significantly affect a party's obligation; in fact, this approach allows the obligations of the contracting parties to be analytically evaluated, and to intervene even on the individual clauses that modify the structure of the economic transaction[605].

The Italian Supreme Court overcame the possible problems arising from the unitary nature of the notion of cause, linked to the existence/absence of the same, by referring to the judgment of merits. In the analysis carried out, however, explicit recourse is made to the causal judgment:

602 The provisions of the civil code concerning contracts, bonds and evidence have been reformed in their entirety through the *ordonnance 10 février 2017, No. 2016-131*.

603 Cass. civ. 1re, December 19, 1990, (7 arrêts), Bull. Civ., I, n. 303.

604 Although the differences with the causal judgment, conceived in a unified manner, are not as decisive as they may initially appear, since in each case the judgment concerns the respective obligations of the parties, see M. Barcellona, Della causa, Padua, 2015, p. 41 ff.

605 This approach led a part of the doctrine to argue that the *Cour de Cassation* should verify the existence of the cause for each obligation and even for each individual clause of the contract: this debate developed, initially, about judgments that concerned the penalty clause. However, case law has rejected this hypothesis, stating that the cause must be assessed in relation to the contract as a whole: Cass. com., February 3, 1975, BULL CIV., IV, n. 32; Cass. com., July 4, 1972, BULL CIV., IV, n. 32; Cass. com., October 21, 1974, BULL CIV., IV, n. 255; Cass. com., May 12, 1976, BULL CIV., IV, n. 163; Cass. com., February 22, 1977, BULL CIV., IV, n. 58. In doctrine see J. Ghestin, G. Loiseau, Y. L. Serinet, *La Formation du contrat*, in *Traité de droit civil*, diretto da J. Ghestin, t. 2, Paris, 2013, p. 542 ff.

the claims made clause, in fact, significantly alters the exchange between the payment of the premium and the coverage of the risk and, therefore, affects the cause of the contract[606], since it significantly reduces the guarantee.

The position adopted by the *Cour de Cassation* is even more drastic than that of the United Sections, since it was affirmed that the clause must always and in any case be deemed to be unwritten, regardless of the specific contract, the concrete way in which the claims made clause was drafted, and the context in which the policy was made[607].

For this reason, too, this orientation has not been without criticism: it equates imbalance of performance with complete lack of cause[608], without assessing the extent of this imbalance in the concrete case. Indeed, as pointed out by the doctrine, the jurisprudence has not taken into account the fact that the premium is normally calculated in relation to the lesser extent of coverage[609].

In subsequent judgments, the *Cour de Cassation* confirmed its position, sanctioning a clause in a policy that, in order to circumvent the prohibition posed by case law, based the guarantee on the loss occurrence system, but limited coverage to claims made in the two years following the conclusion of the contract[610].

The same judgment of nullity for lack of cause also affected the clauses de garantie subséquente, which limits the guarantee to claims that occurred during the term of the policy and whose claim for compensation is made within the expiration of the policy or within a specified period of time[611].

This principle had initially found a partial exception only in relation to specific regulations of regulatory origin, which explicitly provided for the possibility of making coverage dependent on the time at which the

606 Although the cause still remains the same, consequently the atypicality does not extend to the entire contract. L. Locatelli, *Clausole claims made e loss occurrence nella assicurazione della responsabilità civile*, cit., p. 833 ff.

607 R. Fornasari, *In attesa delle sezioni unite: brevi note circa la disciplina della clausola claims made in Francia e Germania*, RESP. CIV. PREV., 2018, pp. 727-728.

608 *Ibid*. It should be noted that for the insurance contract there is no *lésion* case, which allows, in relation to specific contracts, to sanction the excessive imbalance of the parties' obligations.

609 J. Bigot, J. Kullmann, L. Mayaux, *Les assurances des dommages*, in *Traité de droit des assurances*, diretto da J. Bigot, Paris, 2017, p. 591 ff.

610 *Ibid*.

611 Y. Lambert-Faivre & L. Leveneur, *Droit des assurances*, cit., p. 511.

claim for compensation was made[612]: in fact, the French Supreme Court affirmed that, in such a case, it was the regulation itself that provided for an exception[613].

This orientation was, moreover, contradicted by the jurisprudence of the *Conseil d'État*[614], as well as by subsequent rulings of the *Cour de Cassation*[615], which excluded tout court the validity of *clauses de réclamation de la victime*[616].

Finally, also following the law regulating the matter[617], the French Supreme Court reaffirmed this principle (applicable if the policy is not subject to the new legislation[618], ruling that the payment of premiums for the period from the beginning of the coverage of the insurance contract to its termination, unless otherwise authorized by the law applicable to the case, has as its necessary counter-performance the guarantee of damages generated by an event that occurred during that period; any clause that aims to reduce the insurer's guarantee to a period of time shorter than the duration of the insured's liability generates an obligation without cause, therefore unlawful and to be considered as unwritten[619].

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612 This was the case, for example, with the liability of real estate agents, travel agents, accountants, and insurance contracts concluded by hemotransfusion centers. R. Fornasari, *In attesa delle sezioni unite: brevi note circa la disciplina della clausola claims made in Francia e Germania*, cit., p. 729.

613 Cass. civ. 1re, March 9, 1999, BULL. CIV., I, n. 82.

614 Conseil d'État, December 29, 2000, RECUEIL DALLOZ, 2001, p. 1265, with note by Y. Lambert-Faivre, REV. GÉN. DR. ASS., 2001, p. 97. On this sentence, also M. C. Delpoux, *Durée de la garantie dans les assurances de responsabilité civile réglementée: un nouveau cas d'insécurité juridique*, REV. GÉN. DR. ASS., 2001, p. 33 ff.

615 Cass. civ. 1re, June 2, 2004, n° 01-00574.

616 J. Bigot, J. Kullmann, L. Mayaux, *Les assurances des dommages*, cit., p. 603 ff.

617 R. Fornasari, *In attesa delle sezioni unite: brevi note circa la disciplina della clausola claims made in Francia e Germania*, cit., pp. 729-730.

618 Cass. civ. 3e, November 26, 2015, BULL. CIV., III, n. 1332; Cass. civ. 1re, April 12, 2005, Bull. Civ., I, n. 185; Cass. civ. 2e, February 17, 2005, BULL. CIV., II, n. 35. Related to the issues on succession of laws during the time and the applicable law, see M. Chagny & L. Perdrix, *Droit des assurances*, cit., p. 212 ff; J. Bigot, J. Kullmann, L. Mayaux, *Les assurances des dommages*, cit., p. 636 ff; in jurisprudence Cass. com., December 14, 2010, BULL. CIV., 2010, IV, n. 115; Cass. civ. 2e, June 25, 2009, BULL. CIV., 2009, II, n. 171.

619 R. Fornasari, *In attesa delle sezioni unite: brevi note circa la disciplina della clausola claims made in Francia e Germania*, cit., p. 730.

The legislator intervened on the issue, which instead partially allowed the validity of claims made clauses[620].

First, Law No. 2002-303 of March 4, 2002, permitted the introduction of such clauses in policies concerning medical liability[621]; later, Article 80 of Law No. 2003-706 of August 1, 2003 (*loi de sécurité financière*) regulated claims made in relation to all liability insurance contracts[622]. Currently, in liability insurance, the law provides that the parties may choose how to modulate the operation of coverage; however, this freedom is subject to well-defined limits[623].

Claims made clauses are, in general, considered valid[624]; however, they must cover both any damaging facts unknown to the insured prior to the conclusion of the policy (without any time limitation) [625] and provide for a posthumous guarantee of at least five years[626].

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620 J. Bigot, J. Kullmann, L. Mayaux, *Les assurances des dommages*, cit., p. 608 ff; M. Chagny & L. Perdrix, *Droit des assurances*, cit., p. 211 ff; B. Beignier & S. Ben Hadj Yahia, *Droit des assurances*, cit., p. 557 ff; Y. Lambert-Faivre & L. Leveneur, *Droit des assurances*, cit., p. 516 ff.

621 J. Bigot, J. Kullmann, L. Mayaux, *Les assurances des dommages*, cit., p. 608 ff.

622 L. Mayaux, *La durée de la garantie en assurances de responsabilité depuis la loi de sécurité financière du 1eraout 2003, les rayons et les ombres*, REC. GÉN. DROIT ASS., 2003, p. 647 ff. About the evolution of the discipline concerning the claims made clause see Aa.Vv., *La validité des clauses "de réclamation" dans les contrats d'assurances de responsabilité en droit français*, REV. LAMY DROIT CIV., 2005, p. 57 ff; G. Courtieu, *Assurance de responsabilité, durée de la garantie: la nouvelle donne*, RESP. CIV. ASS., 2003.

623 R. Fornasari, *In attesa delle sezioni unite: brevi note circa la disciplina della clausola claims made in Francia e Germania*, cit., pp. 730-731.

624 Art. L. 124-5, para. 1, *Code des assurances*, provides that «[l]a garantie est, selon le choix des parties, déclenchée soit par le fait dommageable, soit par la réclamation».

625 Art. L. 124-5, para. 3, *Code des assurances*, provides that «[l]a garantie déclenchée par le fait dommageable couvre l'assuré contre les conséquences pécuniaires des sinistres, dès lors que le fait dommageable survient entre la prise d'effet initiale de la garantie et sa date de résiliation ou d'expiration, quelle que soit la date des autres éléments constitutifs du sinister».

626 Art. L. 124-5, para. 4, *Code des assurances*, provides that «[l]a garantie déclenchée par la réclamation couvre l'assuré contre les conséquences pécuniaires des sinistres, dès lors que le fait dommageable est antérieur à la date de résiliation ou d'expiration de la garantie, et que la première réclamation est adressée à l'assuré ou à son assureur entre la prise d'effet initiale de la garantie et l'expiration d'un délai subséquent à sa date de résiliation ou d'expiration mentionné par le contrat, quelle que soit la date des autres éléments constitutifs des sinistres». Art. L. 124-5, para. 5, *Code des assurances*, states that «[l]e délai subséquent des garanties déclenchées par la réclamation ne peut être inférieur à cinq ans. Le plafond de la garantie déclenchée pendant le délai subséquent ne peut être inférieur à celui de la garantie déclenchée pendant l'année précédant la date de la résiliation du contrat. Un délai plus long et un niveau plus élevé de garantie subséquente peuvent être fixés dans les conditions définies par décret».

On the other hand, the posthumous guarantee for claims concerning losses that occurred during the term of the policy may not be less than ten years for certain specifically specified professions and activities (*e.g.*, for lawyers, notaries, insurers, court experts, and accountants) [627]. The posthumous guarantee must also be ten years for the last policy taken out by an individual before cessation of business or death[628].

Finally, Art. L. 124-5, paragraphs 6 and 7, Insurance Code[629], regulates the succession relationship between policies taken out with different insurers or a coverage system[630]; special provisions providing for different disciplines (such as, for example, Art. L. 241-1 Insurance Code) are not affected.

Consequently, this legislation, while contrasting with the jurisprudence of the Supreme Court, requires ways of structuring the *clause de réclamation* that guarantee the insured and, therefore, injured third parties, a broad period of coverage.

On the other hand, the prohibition to base the guarantee on the claims made system remains firm for policies to which this law does not apply (either because they predate its entry into force or because they do not concern the areas regulated therein). On the other hand, with regard to the insurance of the liability of natural persons outside their professional activity, the law imposes, by mandatory rule, that the guarantee depends on the moment when the harmful event occurs[631].

On the contrary, the German system does not provide for the cause as an essential element of the contract; consequently, the validity and effectiveness of the claims made clause has not been evaluated through cases

627 R. Fornasari, *In attesa delle sezioni unite: brevi note circa la disciplina della clausola claims made in Francia e Germania*, cit., p. 732.

628 *Ibid*.

629 Art. L. 124-5, para. 6, *Code des assurances*, provides that «[l]orsqu'un même sinistre est susceptible de mettre en jeu les garanties apportées par plusieurs contrats successifs, la garantie déclenchée par le fait dommageable ayant pris effet postérieurement à la prise d'effet de la loi n° 2003-706 du 1eraoût 2003 de sécurité financière est appelée en priorité, sans qu'il soit fait application des quatrième et cinquième alinéas de l'article L. 121-4». Art. L. 124-5, para. 7, *Code des assurances*, states that «[l]es dispositions du présent article ne s'appliquent pas aux garanties d'assurance pour lesquelles la loi dispose d'autres conditions d'application de la garantie dans le temps».

630 J. Bigot, J. Kullmann, L. Mayaux, *Les assurances des dommages*, cit., p. 632 ff.

631 R. Fornasari, *In attesa delle sezioni unite: brevi note circa la disciplina della clausola claims made in Francia e Germania*, cit., p. 732.

similar to those in the French and Italian systems. However, the validity of the said clause has also been debated in Germany because of the imbalance it generates between the parties' performances[632].

The matter is regulated by the VVG, which dates back to 1908 and was substantially reformed by a reform (*Gesetz zur Reform des Versicherungsvertragsrechts*) that came into force on January 1, 2008[633].

With this reform, numerous provisions were introduced to protect the insured, especially concerning information and contract adequacy obligations[634].

German legislation does not provide explicit limits to the possibility of structuring the insurance contract according to the claims-made system. Indeed, in principle, liability insurance can be based on the following models: *Schadensereignis Prinzip* (corresponding to the act committed model), *Manifestazions Prinzip* (loss occurrence), or *Anspruch* (claims made)[635].

This orientation has been endorsed by the *Bundesgerichtshof* (BGH, the German Supreme Court), which has stated that the VVG does not provide a definition of a claim that is unbreakable by the parties[636]. In principle, therefore, policyholders are free to determine the insurance model they prefer.

However, this does not mean that claims made should automatically be considered valid and effective; on the contrary, since it still entails a deviation from contractual practice and is a potentially abusive clause[637],

632 Although claims made are less common than in the French and Italian insurance markets L. Locatelli, *Polizze a regime claims made: quando il diverso ha difficoltà ad integrarsi*, DANNO RESP., 2017, p. 463, footnote 14; I. Carassale, *La clausola claims made nelle polizze di responsabilità civile professionale*, DANNO RESP., 2006, p. 605, footnote 27.

633 On this reform O. Meixner & R. Steinbeck, *Das neue Versicherungsvertragsrecht*, München, 2008; F. Baumann & H. L. Sandkühler, *Das neue Versicherungsvertragsgesetz*, Haufe, 2008; S. Landini, *Il nuovo diritto del contratto di assicurazione in Germania: una prima visione di insieme*, ASSICURAZIONI, 2007, p. 480 ff; S. Landini, *Il nuovo codice del contratto di assicurazione tedesco. Primi orientamenti*, DANNO RESP., 2009, p. 1115 ff; V. Cuocci, *La riforma della legge sul contratto di assicurazione in Germania: novità, problemi e prospettive*, DANNO RESP., 2008, pp. 706 ff; W. T. Schneider, *Nouveau code allemand des assurances: la renaissance d'un centenaire*, RECUEIL DALLOZ, 2007, p. 44 ff.

634 V. Cuocci, *La riforma della legge sul contratto di assicurazione in Germania: novità, problemi e prospettive*, cit., p.708 ff.

635 S. Landini, *The Worthiness of Claims Made Clauses in Liability Insurance Contracts*, in *The Italian Law Journal*, 2016, p. 514 ff.

636 BGH, March 26, 2014, IV ZR 422/12.

637 M. Eichhorst, *Germany*, cit., para. 3.

it is valid only if it corresponds to the needs of the insured and there are corresponding concessions made by the insurance company[638].

For example, the Munich Court of Appeal[639] analyzed the validity of a claims made clause included in a policy concerning the professional liability of directors and officers. The Court found this clause to be valid, although it deviated from the loss occurrence model, because in the case at hand the disadvantages of the claims made system were adequately balanced by the advantages granted to the insured; moreover, in the case at hand, the policy provided that the insured was covered even if the claim for compensation was communicated to the insurer within the year following the termination of the policy and that, in any case, claims based on events prior to the conclusion of the contract were also covered[640].

In contrast, a recent ruling by the Hamburg Court of Appeals[641] ruled that a claims-made clause that provided three years' posthumous coverage – however, not operative in the event of the insured's insolvency – was invalid.

In conclusion, in the German legal system the claims made system is not per se considered invalid; however, each policy is examined in relation to the concrete circumstances and the stipulations therein, in order to assess whether the disadvantages arising from such a clause are adequately counterbalanced by other stipulations[642].

The solution adopted, which defers the choice regarding the validity of the claims made to the assessment of the individual concrete case, allows decisions to be made that are most appropriate to the specific case; however, it also entails considerable uncertainty for practitioners[643].

638 R. Fornasari, *In attesa delle sezioni unite: brevi note circa la disciplina della clausola claims made in Francia e Germania*, cit., pp. 733-734.

639 OLG München, May 8, 2009, 25 U 5136/08.

640 R. Fornasari, *In attesa delle sezioni unite: brevi note circa la disciplina della clausola claims made in Francia e Germania*, cit., pp. 733-734.

641 OLG Hamburg, July 8, 2015, 11 U 313/13

642 S. Landini, *The Worthiness of Claims Made Clauses in Liability Insurance Contracts*, cit., p. 514 ff.

643 M. Eichhorst, *Germany*, cit., para. 3. Finally, it is mentioned that a wide debate has also developed in Belgian law regarding the validity of the claims made. In 1992 the legislature had banned in toto the possibility of providing for the claims made clause in land insurance contracts (Art. 78 *loi sur le contrat d'assurance terrestre*). In 1994, due to protests from insurance companies, the law was amended (new Art. 78): the prohibition of the claims made system was maintained, but several exceptions were provided for specific sectors. In any case, claims for which a claim is made within three years of the policy termination must be covered, if that risk is not covered by another insurer. See M. Fontaine, *Évolutions récentes du droit belge des assurances*, in *Mélanges en l'honneur du Professeur Jean Bigot*, coordinated by J. Kullmann, Paris, 2010, p. 130 ff.

The purpose of Article 839 of the Georgian Civil code is to release the policyholder from the obligations that he owes to the third party due to the liability arising during the insurance period. In liability insurance, the goal of protecting the interest of both the policyholder and the third party is achieved. In particular, the insurer is provided with satisfaction of the demand arising on the basis of the delict committed by him; and the third person – by compensation for the damage caused to his property, life or health[644].

It is important to determine the object of liability insurance to consider several circumstances. First of all, it should be noted that under responsibility, the legislator means civil responsibility and directly refers to it in article 839. According to the basic principles of insurance, the object of the contract must be legal. This excludes the possibility of other types of liability insurance[645].

Regulating norms of civil liability insurance which also applies to professional liability insurance, which represents an important segment of the developed insurance market. An essential element of liability insurance is the occurrence of damage as a result of the policyholder's actions. From a practical point of view, it is important that the liability insurance contract specifies the nature of the damage. For example, indicate that the object of the contract is liability for property damage caused by the policyholder's actions. By making such a reservation in the contract, the moral damage is immediately excluded from the insurance coverage[646].

It should be taken into account that liability insurance is considered as a transaction concluded in favor of a third party. In order to prove the mentioned opinion, the authors point to the infliction of direct damage to a third party (see the comment on Article 836). However, with this similarity, according to the position established in the legal literature, civil

644 M. Tsiskadze, *Commentary on the Civil Code, Art. 839*, Book IV, Volume II, 2001, p. 162 ff.

645 K. Iremashvili, *Art. 839*, in *Online Commentary on the Civil Code*, available at https://gccc.tsu.ge/. Last visited August 12, 2022. For example, criminal liability insurance would be considered immoral and harmful to public order.

646 *Ibid*. No less important is the existence of a causal connection between the act committed by the policyholder and the resulting outcome. It is desirable to specify the criterion for determining the causal connection in the contract (see A. Borroni, *Art. 799*, in this Commentary). For example, the contract should stipulate that the insurer will compensate the damage caused to the third party, which is a direct result of the action of the policyholder. In the case of liability insurance, the third party can be both a natural person and a legal entity. For example, in the case of professional liability insurance, the policyholder may harm the legal entity by providing improper legal services.

liability insurance is distinguished from third-party insurance. In particular, it is important that the beneficiary of civil liability insurance is a third party who has been harmed by the policyholder; here the insurance compensation is given only to the injured person. However, it is important that considering its specificity, unlike other types of insurance, it is impossible to determine the third party in advance[647].

In interpreting article 839, it is important to qualify the policyholder's action. In the action of the policyholder, the legislator should mean slight negligence. Compensation for damage caused by an intentional act is excluded in the case of liability insurance according to the norm provided for in article 842. The deliberate action of the legislator should be taken into account when the policyholder deliberately provokes the circumstances. The basis for such an explanation is provided by the analysis of other norms of similar content[648].

It is important to take into account the exception established for mandatory insurance in relation to damage caused by an intentional act of the policyholder. In particular, in the case of compulsory insurance, priority is given to the interest of the third party[649].

When determining the nature of liability insurance, it is important to specify the nature of the damage to the policyholder. From this point of view, the damage of the policyholder can be expressed both by the damage caused to the third party and by the demand made by the third party to the policyholder. According to the norm contained in article 839, the insurer is obliged to release the insured from the obligation he bears to a third party due to the liability arising during the insurance period.

Accordingly, according to the norm, the coverage of liability insurance applies to the action committed by the policyholder during the insurance period and the resulting damage. International insurance practice knows such cases when liability insurance coverage and, accordingly, compensation from the insurer extends to the claim made against the insured during the insurance period. From this point of view, it should not be out of place to take into account the classification of

647 M. Tsiskadze, *Commentary on the Civil Code, Art. 839*, cit., p. 162 ff.

648 K. Iremashvili, *Art. 839*, cit. As for gross negligence, it can be excluded from the content of article 839 by using article 829. Article 829 indicates gross negligence along with the intentional causing of damage as a basis for releasing the insurer from his obligations. Because of the purpose of Art. 839, the policyholder's action must include gross negligence.

649 *Ibid*.

liability insurance policies when interpreting the norm contained in article 839[650].

The peculiarity of liability insurance is expressed by the fact that the realization of the insurance risk is within the sphere of influence of the policyholder. If agreeing on other types of insurance, the accident caused by the influence of environmental factors is defined as an insured event, the damage is caused by the action of the policyholder himself in the case of liability insurance. From this point of view, the prohibition of intentionally caused damage gains a special weight in liability insurance, where the insurance risk falls within the sphere of influence of the policyholder[651].

In the legal literature, mixed views are shared about the effect of professional liability insurance on the motivation of the policyholder. For example, regarding the professional liability insurance of the doctor, the opinion is expressed that the liability insurance can significantly reduce the motivation of the doctor to perform the duty of care on the part of the patient. However, on the other hand, there is a logical argument to support the opposite opinion. In particular, liability insurance can, on the contrary, increase the motivation of the doctor to fulfill his obligations and prevent the insured event. It is considered that the payment of the premium reminds the doctor about his own responsibility. In this sense, it is important to use the so-called existence of bonus-malus mechanisms[652].

In order to specify the essence of the object of insurance, it is important to consider the classification criteria and purpose of liability insurance policies.

In international insurance practice, two types of insurance policies are distinguished: occurrence-based policy and claims-made policy. For such separation of policies, it is important to determine the scope of insurance coverage. In the first case, the occurrence of an insured event and damage is considered as a prerequisite for compensation. At such a time, it is most important that the result of the insured event defined by the policy, damage in the form of bodily or property damage, occurs during the insurance period. Accordingly, the insurer will indemnify in favor of the policyholder the damage caused to the third party (detected) during the insurance period. With the second type of policy, the decisive importance is given to the claim for damages against the insured during the insurance

650 *Ibid.*

651 *Ibid.*

652 K. Iremashvili, *Peculiarities of legal regulation of health insurance*, in *Journal of Law*, no. 2, 2011, p. 74.

period. Accordingly, in such a case, the submission of a claim by a third party to the policyholder is considered a prerequisite for compensation[653].

The wording provided in article 839 due to liability arising during the insurance period, in the case of a literal interpretation, is applicable to the content of the occurrence-based policy. However, the content of the norm given in article 841 should be taken into account, according to which the insurance coverage applies to judicial and non-judicial expenses as well. In this sense, the norm is similar to the claims-made policy[654].

When using an occurrence-based policy, the occurrence of the wrongful and culpable act of the policyholder is not essential. In such policies, the most important thing is the occurrence of damage because of the insured event during the insurance period. Basically, the insured event and the damage caused by it, as two independent events, are not separated by a period and occur at the same time[655].

Therefore, it is often noted that occurrence-based policies cover damage caused by an insured event during the insurance period. However, in insurance practice, there are cases when damage caused by an insured event occurs (appears) after a certain period of time has elapsed from the event that caused it.

In such a case, the difficulty of using the policy is expressed by the existence of a time gap between the insured event and the damage. Consequently, it becomes difficult to determine the exact time of both the occurrence of the insured event and the occurrence of the damage caused by it. The interest of the insurer requires that he's able to specify the stages of occurrence of the insured event and damage. Otherwise, it will limit the ability to determine the premium accurately and adequately. In the legal literature, the opinion is expressed that the funds accumulated by

653 K. Iremashvili, *Art. 839*, cit. In the US insurance market, occurrence-based policies are preferred, and claims-made policies are mainly used for high-risk or so-called long-tail exposure (in the above-mentioned type of cases, damage appears late) for cases, the classic example of which is professional liability insurance. Such division of liability insurance policies is not always of practical importance. For example, in the case of car owner's liability insurance, the type of policy will not matter if an insured event occurs, and a third party makes a claim for compensation during the insurance period. However, there are cases when such a division becomes of great practical importance.

654 Georgian legal literature shares the opinion that civil liability insurance applies to claims for damages. However, the said opinion does not specify the timing of the request. see N. Gvaramia, *Civil Liability Insurance Contract*, Tbilisi, 2002, p. 87.

655 K. Iremashvili, *Art. 839*, cit. For example, while driving a car, the driver hit a pedestrian, who was injured. In this case, both the insurance event and the damage to the third party occur at the same time.

this type of policies may be insufficient to fulfill the obligation of the insurance company to pay the insured[656].

Claims-made policies are primarily used in professional liability insurance. This type of policy covers the damage caused by a claim submitted to the policyholder by a third party during the insurance period. In this case, there is clearly a gap of time between the action of the insurer and the claim against him. Therefore, in contrast to the occurrence-based policy, in which such a time gap may not even exist, the stage of occurrence of the damage covered by the claims-made policy is sharply separated from the stage of the action of the insured. When using a claims-made policy, the insurer has the opportunity to accurately determine the amount of the premium[657].

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656 *Ibid*.

657 *Ibid*. It is important to note the retroactive date clause in claims-made policies. In particular, the policy must specify that the action of the policyholder, on the basis of which the third party made a claim, must be implemented after a specific date. It is worth noting that the US courts are skeptical of claims-made policies precisely because of the reservations about the retroactive date. For example, in one case the Court considered the claims-made policy to be an occurrence-based policy. Such a conclusion was supported by the court with the argument that the retroactive date in the given policy coincided with the effective date of the policy. In the court's opinion, in a different conclusion, the policy was interpreted to the detriment of the insured's interests because the interval between the retroactive date and the beginning of the insurance period was unreasonably narrow.

In claims-made policies, there must be a reasonable interval between the retroactive date and the date marking the beginning of the insurance period. In some cases, the US courts consider reservation on a retroactive date to be contrary to public order and the bona fide expectations of the policyholder.

On the other hand, US courts consider a proportional relationship between a narrow gap and a correspondingly reduced premium. Finally, the following is the good behavior of the insurer and the best way to protect the interests of the policyholder in the given case: a) Unanimous establishment of claims-made policy coverage conditions in writing and in the form of oral explanation for the policyholder; b) To offer alternative coverage to the policyholder in the form of an occurrence-based policy. In such conditions, the policyholder will be provided with the opportunity to make an informed (true will) and informed choice.

Non-uniform approaches exist regarding the date of fulfillment of the obligation to inform the insurer in claims-made policies. It is mainly considered that according to the mentioned type of policy, during the insurance period, it is necessary not only to make a claim of the third party to the policyholder, but also to inform the insurer. As a rule, the violation of the obligation to inform the insurer, the so-called on late notice, US courts are more lenient with occurrence-based policies when there is good cause. In case of claims-made policies

They show more rigor, as they consider them as an integral part of the content of the claims-made policy itself. However, there are court decisions in which the obligation to inform the insurer during the insurance period was considered against public order. In order to fulfill the said obligation by the policyholder in such a case, the policy defines an additional period of so-called reporting extension.

From a practical point of view, it is important that the exclusions of professional liability insurance clearly indicate that the insurer will not compensate for damages caused by the actions of the policyholder during the period of suspension of the policyholder's authority or after the termination of the authority. Policyholder in professional liability insurance final processing termination of authority shall be determined as grounds for termination of the policyholder.

Finally, liability insurance is loaded with elements of a fiduciary relationship. A fiduciary relationship is considered to be a relationship based on special trust, which obliges one party to the contract to take special care of the interests of the other. Traditionally, fiduciary relationships include relationships between lawyer and client, doctor and patient, etc. In such relationships, one party has a significant advantage over the other due to the possession of special knowledge or qualifications. That is why the fiduciary relationship requires special good faith in protecting the interests of the weaker party. Such relationships require a high degree of care for the interests of the represented person[658].

2. Claim for direct payment of damages (art. 840)

According to Article 1917 of the Italian Civil Code, third paragraph, the insured may request the insurer to pay directly to the third party, and the insurer is obliged to do so.

The insurer has the right, after notifying the insured, to pay directly to the third party. According to general principles for the insurer to be able to pay directly to the third party would require the consent of the insured already at the fact of the conclusion of the contract or subsequently,

658 *Ibid*. In the legal literature, the insurance contract is usually not classified as a fiduciary relationship. However, there are exceptional cases. In this regard, it is interesting to consider the opinion expressed about liability insurance. The courts of the United States of America, when interpreting the obligation of good faith in favor of the policyholder, expose the insurer to a breach of fiduciary obligation. In particular, in the case of liability insurance, when protecting the policyholder from the injured third party, the insurer should take into account the interest of the policyholder. In the process of negotiation, the insurer must agree only to such an offer, which will be the most favorable for the policyholder. Accordingly, the courts of the United States of America in such cases determine that the insurer's subordination of the policyholder's interest to its own interest constitutes a breach of the insurer's fiduciary duty

since the debtor cannot pay to a third party without the consent of the creditor[659].

Hence, in view of the function of liability insurance, the consent of the insured is replaced by the law, becoming indifferent whether the insured consents or not. However, this is an option and not an obligation of the insurer, so that the third party acquires no right to the insurer's benefit as a result of the contract.

Thus, the function of any liability insurance can be highlighted, which is not so much to reimburse the insured, in whole or in part, for the amount of compensation paid by the insured to the injured third party, but to provide the insured with the means to satisfy the third party or to satisfy the latter by the direct intervention of the insurer, thus preventing the insured's assets from being depleted even temporarily[660].

And this confirms the reason why liability insurance is classified among property insurance, as already mentioned generally[661].

In fact, while in property damage insurance the insured's interest consists in compensation for the damage suffered by a specific asset of his as a result of an accident, in liability insurance this interest consists in protecting himself against the risk of negative alteration of his assets taken as a whole and exposed to unlimited liability for any culpable behavior, even serious, with its reinstatement through the payment by the insurer

659 See in doctrine A. Donati & G. Volpe Putzolu, *Manuale di diritto delle assicurazioni private*, cit., p. 163 ff. D. De Strobel, *L'assicurazione di responsabilità civile*, cit.; M. Franzoni, (voce) *Responsabilità (assicurazione della)*, cit, p. 40 ff; E. F. Carbonetti, *La formazione ed il perfezionamento del contratto*, cit., p. 82; R. Simone, *Assicurazione claims made, sinistro (latente) e dilatazione (temporale) della responsabilità civile*, cit., p. 1079 ss.; D. De Strobel, *Le vicende del "claims made"*, cit., p. 531; A. D. Candian, *Responsabilità civile e assicurazione*, cit., p. 290 ff; C. Lanzani, *Clausole claims made legittime ma vessatorie*, cit., p. 1084 ff; L. Locatelli, *Clausole claims made e loss occurrence nella assicurazione della responsabilità civile*, cit., p. 1030 ff.

660 A. Borroni, *Clausola Claims Made: Circolazione Parziale Di Un Modello Nella Responsabilita' Civile Italiana*, cit., pp. 128-129. Since this type of insurance does not concern a specific thing, but the very preservation of the property for an amount that cannot usually be determined in advance, there can be no indication of an insured value within the meaning of article 1908 of the Civil Code, but only the indication of a sum that marks the maximum limit (it is therefore called the policy ceiling) of the indemnity that the insurer undertakes to pay, for a risk that, as we have seen, is necessarily delimited.

661 A. Polotti Di Zumaglia, *Risvolti assicurativi della responsabilità civile*, in *Collana Medico Giuridica*, 2003, pp. 4-5.

of a sum of money equal to the outlay due by the insured, within mostly a ceiling called the maximum limit[662].

In any case, the insurer's obligation to pay compensation following a claim, exists only against the insured and not against the injured party, unless the latter can take direct action against the insurer itself by virtue of a precise rule of law, as, for example, provided for in the matter of compulsory insurance of civil liability arising from the circulation of motor vehicles and watercraft. A direct relationship between the insurer and the injured party cannot therefore have as its object the obligation of guarantee, which is typical of the insurance contract, but may concern only the performance of the insurer's obligation by subsisting either when the insurer itself takes the initiative to perform directly in the hands of the injured party, or when the insured requests direct payment to the injured party[663].

According to article 840 of the Georgian c.c., in the claim for direct compensation of damages, the legislator implies the right of direct appeal to the insurer of the third party.

Third parties can learn about tort liability insurance in different ways. For example, the policyholder himself informs the victim about the insurance. At such time, the parties may agree on the submission of a claim to the insurer by a third party.

On the one hand, the victim will learn about the existence of insurance in another way. In such a case, with the regulation provided by article 840, the absence of the insurer's consent does not prevent a third party from making a claim for damages against the insurer[664].

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662 See in doctrine A. Donati & G. Volpe Putzolu, *Manuale di diritto delle assicurazioni private*, cit., p. 163 ff. D. De Strobel, *L'assicurazione di responsabilità civile*, cit.; M. Franzoni, (voce) *Responsabilità (assicurazione della)*, cit, p. 40 ff; E. F. Carbonetti, *La formazione ed il perfezionamento del contratto*, cit., p. 82; R. Simone, *Assicurazione claims made, sinistro (latente) e dilatazione (temporale) della responsabilità civile*, cit., p. 1079 ss.; D. De Strobel, *Le vicende del "claims made"*, cit., p. 531; A. D. Candian, *Responsabilità civile e assicurazione*, cit., p. 290 ff; C. Lanzani, *Clausole claims made legittime ma vessatorie*, cit., p. 1084 ff; L. Locatelli, *Clausole claims made e loss occurrence nella assicurazione della responsabilità civile*, cit., p. 1030 ff.

663 See Cass. Civ., January 8, 1999 n. 103, RESP. CIV. PREV. 1999, 683 with note of P. Sanna, *I mille volti della responsabilità medica: la responsabilità delle case di cura private*; also in ASSICURAZIONI, 1999, II, 2, 208 with note of C. Russo, *L'assicurazione di responsabilità civile del medico e delle case di cura*.

664 K. Iremashvili, *Art. 840*, in *Online Commentary on the Civil Code*, available at https://gccc.tsu.ge/. Last visited August 12, 2022.

On the other hand, the insurer has the right to clarify with the third party the identity of the insured and the information related to the insured event, as this is a prerequisite for compensation of damages from his side[665].

The purpose of liability insurance is to protect third parties. It is logical that the victim enjoys the right of direct appeal to the insurer. However, the interest of the insurer should also be considered. When explaining this norm, it is important to point out that its content includes the insurer's right to clarify the preconditions for reimbursement with the person submitting the request[666].

Article 840 clearly indicates the scope of the insurer's obligation. By such regulation, the legislator protects the interest of the insurer. Accordingly, in cases where the pending damage exceeds the amount of the insurance amount, the insurer is not obliged to fully compensate the damage[667].

3. Court and out-of-court expenses (art. 841)

According to the Italian discipline, the reimbursement of legal expenses, as an object of insurance benefits, is expressly taken into consideration both by article 1917, para. 3, of the Civil Code, in the context of liability insurance, and, in more general terms, by the legal protection insurance contract as defined by article 173 of the Private Insurance Code.

The distinction between the two figures now referred to can be considered, at least on a theoretical level, sufficiently clear[668].

Unlike in the case of legal protection (or judicial[669]) insurance, the reimbursement of litigation expenses faced by the insured under the third-party liability insurance contract (Art. 1917 Civil Code) is not the immediate object of the obligations under the insurance contract[670].

The insured risk is commonly identified as the risk of having to indemnify third parties for damages produced directly by one's own act

665 *Ibid*.

666 *Ibid*.

667 *Ibid*.

668 See B. Farsaci, *Sub artt. 173-174*, in *Le assicurazioni*, a cura di A. La Torre, Milan, 2014, p. 597 ff; B. Farsaci, *L'assicurazione di tutela legale e di assistenza*, Milan, 2008, p. 159 ff; M. Rossetti, *Il diritto delle assicurazioni*, cit., p. 557 ff.

669 A. Tina, *Il rimborso delle spese legali nel contratto di assicurazione*, GIUR. COMM., 2015, p. 685.

670 B. Farsaci, *L'assicurazione di tutela legale e di assistenza*, cit., p. 164 ff.

(articles 1218 and 2043 Civil Code) or indirectly by another's act for which the insured is liable (articles 1228 and 2049 Civil Code)[671].

Nonetheless, the indemnification of legal expenses incurred by the insured in connection with one's own civil liability (and with the related indemnity debt) can, however, be considered a supplement and a completion, albeit indirect, of the insurance coverage offered by the insurer[672], referable, depending on the legal nature recognized to the litigation expenses, to the provisions of article 1917, para. 3, Civil Code or to the benefits of the civil liability insurance contract itself[673].

In fact, the legal costs incurred, in different capacities, by the insured as a result of the compensation claims made by the injured third party are reimbursed by the insurer, either mediately, as part of the damage caused by the insured/damaging party to the injured third party[674] or, depending on the case and the accepted view, as included in the hypothesis contemplated by article 1917, para. 3[675].

Article 1917, para. 3, of the Civil Code states that expenses incurred in resisting the action of the injured party shall be borne by the insurer to the extent of one-fourth of the sum insured. However, in the event that a sum greater than the insured sum is owed to the injured party, court costs shall be apportioned between the insurer and the insured in proportion to their respective interests. As a preliminary matter, it is first necessary to

671 See, above all, G. Fanelli, voce *Assicurazione*, cit., p. 24 ff; E. Bottiglieri, *Dell'assicurazione contro i danni, Artt. 1904-1918*, cit., p. 267 ff; F. Peccenini, *Dell'assicurazione (art. 1882-1932)*, in *Commentario Scialoja-Branca*, Bologna-Rome, 2011, p. 174; M. Rossetti, *L'assicurazione della responsabilità civile*, in G. Alpa (a cura di), *Le assicurazioni private*, Turin, 2006, p. 1519 ff; R. Calvo, *Il contratto di assicurazione. Fattispecie ed effetti*, cit., p. 149.

672 B. Farsaci, *Sub artt. 173-174*, cit., p. 599.

673 A. Tina, *Il rimborso delle spese legali nel contratto di assicurazione*, cit., pp. 685-686.

674 *Ibid*. The payment of so-called losing costs, which the insured may be ordered to pay in favor of the victorious injured party, is commonly regarded as an accessory to the indemnity obligation, the indemnification of which falls to the insurer to the extent that it does not result in exceeding the liability policy limit, if any.

675 On this point, also H. Möller, *L'assicurazione di difesa legale nella sua posizione rispetto agli altri rami assicurativi*, ASSICURAZIONI, 1969, p. 237 ff. The author states that liability insurance performs legal protection functions only with respect to the exclusion or diminution of the primary insurance loss. While indirect (in the sense clarified above), insurance coverage of litigation expenses incurred by the insured can, therefore, also be considered to be included in the broader category of property insurance and, more specifically, expense insurance.

define the legal nature of the expenses incurred by the insured/damaged party in resisting[676] the claim of the injured third party and governed by Article 1917(3) of the Civil Code.

The qualification of expenses under Art. 1917, para. 3, Civil Code as rescue expenses – traceable, therefore, albeit with a partially different discipline, to the general figure provided by Art. 1914 Civil Code – may, in fact, affect, depending on the accepted thesis, the solution of some of the most delicate interpretative and, above all, applicative problems posed by the dictate of article 1917, para. 3, Civil Code and relating, in particular, to the definition of the proper functioning and scope of application of the two criteria for the allocation of the costs of resistance and the possible distinction, for the purposes of the applicable discipline, between the expenses incurred by the insured to resist the claim made by the injured party and the expenses, on the other hand, of succumbing possibly due to the injured party[677].

The problem – different and distinct from that posed, more generally, by the application of article 1914 of the Civil Code also to the contract of liability insurance[678] – sees the doctrine divided on opposing positions.

On the one hand, there tends to prevail the thesis that denies the ascribability of litigation expenses under Article 1917, paragraph 3, of the Civil Code to rescue expenses under Article 1914 of the Civil Code[679].

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676 A. Tina, *Il rimborso delle spese legali nel contratto di assicurazione*, cit., pp. 689-690.

677 *Ibid*.

678 This possibility is recognized both in doctrine (G. Castellano, *Recensione a Durante, L'assicurazione di responsabilità civile*, RIV. DIR. CIV., 1960, p. 554; F. Cigolini, *La responsabilità della circolazione stradale secondo la nuova legislazione*, Milan, 1963, p. 1059 ff; A. Durante, *L'assicurazione di responsabilità civile*, cit., p. 317 ff; on the contrary, however, D. De Strobel, *L'assicurazione di responsabilità civile*, cit., p. 271, according to whom article 1914 of the Civil Code is an institute characteristic of direct insurance of property damage so much so that the second paragraph states that the burden is placed on the insurer in proportion to the insured value) and in jurisprudence (Cass. Civ., June 14, 2007, n. 13958, ASSICURAZIONI, 2007, II, 2, p. 355; Cass. Civ., November 7, 1991, n. 11877, GIUST. CIV. MASS., 1991, p. 11).

679 F. Angeloni, *Contratto a favore di terzi*, cit., p. 567; D. De Strobel, *L'assicurazione di responsabilità civile*, cit., pp. 268 and 271 ff; A. Durante, *La proporzione delle spese di difesa in rapporto ai rispettivi interessi*, ASSICURAZIONI, 1961, p. 279; A. Durante, *Manuale per l'assicurazione di responsabilità civile*, Milan, 1962, p. 61; M. Franzoni, *Responsabilità civile (assicurazione della)*, DIGESTO COMM., 1996, p. 405; V. Vigorita, *Appunti in tema di aggravamento del rischio e di spese della lite*, ASSICURAZIONI, 1954, p. 3 ff; V. Vigorita, *Sul limite del rimborso delle spese di lite*, ASSICURAZIONI, 1958, p. 193 ff.

In this regard, it is pointed out that:

i. litigation expenses are aimed at rejecting or limiting the injured third party's claim to be compensated for a damage that, at least conceptually, is firm in its magnitude, while salvage expenses are incurred by the insurer in the activity aimed at avoiding or diminishing the damage resulting from the accident in its objective consistency;

ii. no obligation to resist the action of the injured party is placed on the insured, unlike the provisions of article 1914, para. 1, Civil Code while, conversely, the insurer has, on the contrary, the right to pay directly to the injured third party the compensation due (and is obliged to do so if requested by the insured, Art. 1917, second paragraph, Civil Code);

iii. in determining the insurance premium, the insurer takes into account the costs of litigation, while this is not the case for those of rescue, which are, moreover, carried out in the insurer's exclusive interest;

iv. the criterion of proportionality recalled by art. 1917, third paragraph (second part), Civil Code inspired by the principles proper to article 1914, second paragraph, of the Civil Code, remains subsidiary: if one had intended to make an application of article 1914 of the Civil Code, one would not see the reason for repeating in the particular rule the general criterion, instead of merely stating the exception made to the general rule. The reimbursement of litigation expenses under article 1917, third paragraph of the Civil Code is, therefore, assessed as an ancillary benefit to the indemnity owed by the insurer[680].

On the other hand, noting that the costs of resistance referred to in Article 1917 Civil Code have the same purpose as the costs of rescue, it is believed that – also in light of the historical genesis of the rule[681] – article 1917

680 Although not directly falling within the scope of the insured loss, legal (resistance) costs are an accessory to it, with the result that they are subject to a special discipline, binding to the detriment of the insured, which places them partly at the expense of the insurer, excluding that for that part they can be counted in the insured limit. F. Angeloni, *Contratto a favore di terzi*, cit., p. 567 ff. See also B. Farsaci, *Sub artt. 173-174*, cit., p. 599.

681 See, on this point, G. Auletta, *Le spese giudiziali nell'assicurazione della responsabilità civile*, ASSICURAZIONI, 1959, p. 174 ff.

Civil Code should be interpreted by placing it in relation to the more general principle contained, for the allocation of expenses in article 1914 c.c.[682].

More specifically, to the considerations of the prevailing doctrine referred to above, it has been effectively replied that:

i. in liability insurance, the insured loss is not the damage suffered by the injured party, but the insured's need to compensate the injured party, that is, the sum necessary to discharge the debt to the injured party[683]. Given that this amount does not depend solely on the extent of the damage done, but also on the (greater or lesser) skill in conducting negotiations and the trial, the insured's activity of resistance is therefore such that it can contribute to diminishing the damage and is therefore a salvage activity[684];

ii. it is irrelevant that the insured has no obligation to assume the costs of litigation, since this does not exclude that these costs have the same nature as salvage costs, but only implies that they may be subject to their own peculiar regime[685];

iii. for the purpose of determining the premium, it is necessary to take into account not the damage that would have occurred without the salvage operations, but the damage that occurs in spite of these operations and, moreover, the expenses of the operations themselves[686]; just as it does not seem accurate that salvage expenses in non-life insurance (Art. 1914 Civil Code) are

682 G. Auletta, *Condotta della vertenza nell'assicurazione della responsabilità civile ed oneri ad essa connessi*, ASSICURAZIONI, 1942, p. 136; cf. E. Bottiglieri, *Dell'assicurazione contro i danni, Artt. 1904-1918*, cit., 297 ff; L. Landini, *Le spese di lite nella assicurazione di responsabilità civile*, ARCH. GIUR. CIRC. SIN. STRAD., 1966, p. 386; I. Tucci, *Sulla interpretazione del patto di gestione della lite in relazione alle spese per resistere all'azione del terzo danneggiato*, ASSICURAZIONI, 1967, p. 137 ff.

683 See, on this point, G. Auletta, *Le spese giudiziali nell'assicurazione della responsabilità civile*, cit., p. 174 ff.

684 *Ibid*. On this point, also, G. Volpe Putzolu, *Le assicurazioni. Produzione e distribuzione* (problemi giuridici), cit., p. 75. The author states that in liability insurance, the activity of resisting the claims of the injured party has only the function of limiting the insured's debt, since the claim, understood as an event causing damage to property or persons, has already been finally consummated.

685 G. Cottino, *Assicurazione contro la responsabilità civile e spese di lite*, RIV. DIR. COMM., 1957, p. 154 ff.

686 G. Auletta, *Le spese giudiziali nell'assicurazione della responsabilità civile*, cit., p. 171 ff.

made in the exclusive interest of the insurer, as opposed to legal ones[687]. In addition to the general point that the insured capital might be less than the injury actually suffered, it does not seem tenable, as a matter of principle, that the insured has no interest in preserving his own thing[688], with the consequence that, in the case of partial insurance, the salvage expenses also benefit the insured, who participates in them in proportion to his interest, as established by the second rule of Art. 1917 Civil Code[689];

iv. the objection that the criterion of proportionality, peculiar to rescue expenses under Art. 1914, para. 2, Civil Code, provided for in the second part of article 1917, para. 3, c.c. would still remain subsidiary, turns out to be without any foundation if it is shown that the first rule contained in article 1917 c.c. also is based on that relationship between the bearing of the expense and the interest in the expense itself[690]. Even the failure of Art. 1917, para. 3, of the Civil Code to refer to the criterion of "recklessness" (Art. 1914, para. 2, last part, of the Civil Code) as a limitation on the reimbursement of expenses does not testify to the contrary. It was, in fact, observed that the limit now referred to is already contained in the rule of article 1914 and that, since the rule of article 1917 is a particular application of it, repetition was not necessary[691]. According to the supportable approach now under consideration, the qualification of the expenses referred to in article 1917, para. 3 of the Civil Code as rescue expenses would, therefore, imply the pre-existence of a regulation of expenses that article 1917 of the Civil Code, without derogating from its essential principles, would merely apply taking into account the particularities of the hypothesis. The allocation of expenses-and, consequently, their division between insurer and insured-should, therefore, follow the principle that expenses are to be borne by the person in whose interest they are made; a principle which the institution of salvage

687 G. Cottino, *Assicurazione contro la responsabilità civile e spese di lite*, cit., p. 155.

688 *Ibid.*

689 G. Auletta, *Le spese giudiziali nell'assicurazione della responsabilità civile*, cit., p. 173 ff.

690 *Ibid.*

691 G. Cottino, *Assicurazione contro la responsabilità civile e spese di lite*, cit., p. 154.

is inspired by (Art. 1914 Civil Code) and which art. 1917 Civil Code merely applies to the particularities of the case[692].

A further element of discussion in Italian doctrine concerns the criteria for the allocation of litigation costs between insurer and insured under article 1917, para. 3, of the Civil Code.

As mentioned, the choice between the two approaches is not without applicative consequences on the scope and operational scope of the criteria for the allocation of litigation costs under article 1917, para. 3, of the Civil Code, with reference, above all, to the limit of a quarter of the sum insured, provided for in the case where a sum not "exceeding the insured capital" is owed to the injured party[693].

Indeed, the proportional criterion does not raise particular doubts[694]. If the damage exceeds the maximum amount, from the total of the sum

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692 G. Auletta, *Le spese giudiziali nell'assicurazione della responsabilità civile*, cit., p. 169 ff. Regardless of which thesis is considered preferable – the criticisms raised by the prevailing doctrine against the qualification of expenses under article 1917, para. 3, of the Civil Code as rescue expenses do not seem, indeed, insuperable - as reported case law (see supra note 48) now tends to exclude the reconductibility of litigation expenses under article 1917, para. 3, of the Civil Code to rescue expenses under article 1914 of the Civil Code.

693 To tell the truth, one cannot exclude a priori the certainly not frequent hypothesis in which the insurance contract does not provide for any ceiling, or the one in which it provides for different ceilings for different hypotheses of claims. In the case of no ceiling, it has been observed that the term of comparison should be identified in the amount of compensation assessed by the judge, with the consequence that litigation costs would, in any case, be due within a quarter of the compensation awarded to the injured third party (G. Auletta, *Le spese giudiziali nell'assicurazione della responsabilità civile*, cit., p. 180; V. Vigorita, *Sul limite del rimborso delle spese di lite*, cit., p. 199 ff); or, alternatively, that only the insurer would have to bear the court costs without any limit, consistent with the lack of provision of a reference ceiling (C. Costantini, *La gestione della lite*, in *Responsabilità e assicurazione, a cura di Cavallo Borgia*, TRATT. RESP. CIV., diretto da M. Franzoni, Milan, 2007, p. 241 ff. If, on the other hand, the insurance contract provides for different ceilings, two further hypotheses would have to be distinguished: if the occurrence concerns only one of the categories of damage, the one-quarter relationship will be established with the ceiling for that category specifically provided for; if, on the other hand, the occurrence concerns several categories of damage and no overall ceiling is provided in the policy for that eventuality, the relationship must be established with respect to the ceilings respectively established for those categories of damage and must apply to the expenses incurred apportioned in proportional shares to the amounts liquidated. *Ibid*; but see also V. Vigorita, *Sul limite del rimborso delle spese di lite*, cit., p. 200, according to whom in such a case the ratio of the fourth should, instead, be established with the sum of the different ceilings involved).

694 Isolated remained the view of L. Lordi, *Istituzione di diritto commerciale*, Padua, 1943, p. 127 ff, that the quarter limit would operate in conjunction with the proportional rule, thus representing the upper limit to the reimbursement of litigation costs.

due to the injured party there shall be deducted the amount of the maximum amount, which shall be paid by the insurer, while the extra difference shall be paid by the insured; and the total of the court costs shall be divided into two parts, the first of which, which shall be paid by the insurer, shall stand to the other part, which shall be paid by the insured, in the same ratio, in which stands the sum insured to the difference between the sum due to the third party and the sum insured[695].

With reference, on the other hand, to the first part of article 1917, para. 3, of the Civil Code (*i.e.*, to the quarter limit), there is, first of all, the question of whether the quarter limit of the expenses to be borne by the insurer concerns only those which, when added to the amount of the loss to be paid, would possibly exceed the sum insured, or also those which would remain included in it[696].

On the one hand, it is believed that the insured may claim from the insurer reimbursement of litigation expenses incurred in his own defense up to the limit of the ceiling increased by a quarter[697], based on the con-

695 F. Angeloni, *Contratto a favore di terzi*, cit., p. 568. In this regard, it has, indeed, sometimes been observed that the allocation of costs according to the proportional criterion would operate when it is the amount claimed (not the amount ascertained) that is higher than the ceiling (A. Durante, *La proporzione delle spese di difesa in rapporto ai rispettivi interessi*, cit., p. 268 ff; A. Durante, *Manuale per l'assicurazione di responsabilità civile*, cit., p. 61 ff). Prevailing, however, is the contrary orientation, according to which the criterion of proportional allocation must be referred to the amount of damages that are ascertained (see C. Costantini, *La gestione della lite*, in *Responsabilità e assicurazione, a cura di Cavallo Borgia*, cit., p. 238 ff; A. Donati, *Trattato di diritto delle assicurazioni private*, cit., p. 405; V. Vigorita, *Sul limite del rimborso delle spese di lite*, cit., p. 199; G. Auletta, *Le spese giudiziali nell'assicurazione della responsabilità civile*, cit., p. 178; G. Castellano, *Recensione a Durante, L'assicurazione di responsabilità civile*, cit., p. 554; G. Castellano, *La ripartizione delle spese di lite fra l'assicuratore e l'assicurato*, GIUR. IT, 1962, p. 1397 ff. In particular, the latter poses the question of whether, in assessing the respective interest of the parties, if the ascertained damage, although higher than the ceiling, is lower than the injured party's claim, reference should be made to the difference between the ascertained damage and the ceiling or to the difference between the former and the sum claimed by the injured party, concluding for the former option). Jurisprudence, too, while referring in an isolated case to the sum demanded by the injured party (Cass., June 6, 1961, No. 1306, ASSICURAZIONI, 1961, p. 275 ff) has by now clarified that the proportional criterion operates only when the amount of damages awarded to the injured party is greater than the insured capital (Cass., July 25, 1981, No. 4810, GIUST. CIV. MASS., 1981; Cass., March 6, 1998, No. 2525, GIUST. CIV. MASS., 1998; Cass., Oct. 22, 1963, No. 2815).

696 V. Salandra, *Dell'assicurazione*, cit., p. 371 ff.

697 G. Auletta, *Le spese giudiziali nell'assicurazione della responsabilità civile*, cit., p. 183 ff. See also F. Cigolini, *La responsabilità della circolazione stradale*, Milan, 1954, p. 1060, footnote 113.

sideration that this solution would be preferable as it is more in line with the system outlined by article 1914 of the Civil Code, according to which rescue expenses are borne by the insurer since they are incurred in his interest[698].

On the other hand, on the contrary – excluding, according to the prevailing opinion, the ascribability of litigation expenses to salvage expenses under Article 1914 Civil Code – it is believed, on the other hand, that the quarter limit also operates not only in the case where the compensation due does not reach the insured capital[699], but also in the case where no

698 In these terms V. Salandra, *Dell'assicurazione*, cit., p. 371 ff. More specifically, the framing of the costs of litigation under article 1917, para. 3, of the Civil Code in the scheme provided by article 1914 of the Civil Code has led part of the doctrine, which has, however, remained isolated, to further reduce the scope of application of the fourth criterion. Based on the principle that expenses are to be borne by the one in whose interest they are made (G. Auletta, *Le spese giudiziali nell'assicurazione della responsabilità civile*, cit., p. 169), article 1917, third paragraph, of the Civil Code should be referred to the hypothesis in which the injured party asks for a higher figure than the ceiling, so that the judgment is carried out together in the interest of the insurer and the insured. In this case, the ceiling represents the insured value, but how is it possible to establish, as is required by the second paragraph of article 1914, the full value of the insured thing (which in our hypothesis is represented by the sum corresponding to the damage to be indemnified). In the case of condemnation to a sum greater than the ceiling, the value sought is given by this very sum; in the case of condemnation to a lesser sum, not knowing what would have been the extent of the damage (and therefore the value of the thing insured), if one had not defended oneself, that is, if one had not met the costs of the judgment, one resorts to an approximate criterion of apportionment, making the insurer bear the costs up to a quarter of the sum insured and the insured bear the further costs. (G. Auletta, *Condotta della vertenza nell'assicurazione della responsabilità civile ed oneri ad essa connessi*, cit., p. 136 ff; see also A. Durante, *La proporzione delle spese di difesa in rapporto ai rispettivi interessi*, cit., p. 279, according to which even then the defense is still in the interest of both parties). On the contrary, if the sum claimed by the injured party is less than the maximum amount, the judgment is in the exclusive interest of the insurer and therefore the costs must all be borne by him, without being able to resort to article 1917 of the Civil Code (G. Auletta, *Condotta della vertenza nell'assicurazione della responsabilità civile ed oneri ad essa connessi*, cit., p. 177 ff; see, indirectly, also F. D'Orazi Flavoni, *Il patto di gestione della lite e i diritti dell'assicurato nella assicurazione della responsabilità civile*, FORO IT., 1956, p. 1552 ff). Indeed, in such a case, the particular rule of article 1917, third paragraph, of the Civil Code would not apply, but the more general rule about rescue costs in general (article 1914 of the Civil Code). (G. Auletta, *Le spese giudiziali nell'assicurazione della responsabilità civile*, cit., p. 178).

699 F. Angeloni, *Contratto a favore di terzi*, cit., p. 568 ff; E. Bottiglieri, *Dell'assicurazione contro i danni, Artt. 1904-1918*, cit., p. 296 ff; C. Costantini, *La gestione della lite*, in *Responsabilità e assicurazione, a cura di Cavallo Borgia*, cit., p. 239 ff; D. De Strobel, *L'assicurazione di responsabilità civile*, cit., p. 268 ff; A. Donati, *Trattato di diritto delle assicurazioni private*, cit., p. 412 ff; V. Vigorita, *Sul limite del rimborso delle spese di lite*, cit., p. 198 ff.

compensation has been awarded to the injured party who brought the action against the insured[700].

The latter position raises, however, not a few perplexities, if one considers that the criticisms raised by the prevailing opinion to the qualification of expenses under article 1917, para. 3, Civil Code as rescue expenses do not seem entirely insuperable.

Thus defined the "quantitative" limits of the reimbursement of litigation expenses, without prejudice to the possibility for the insurance company to evade the obligation to reimburse the insured for the expenses incurred in resisting the action of the injured party, by making available to the latter the entire insured limit (*ex* Art. 1917, para. 2, civil code)[701],

700 A. Tina, *Il rimborso delle spese legali nel contratto di assicurazione*, cit., pp. 691-692.

701 If one considers that article 1917, second paragraph, of the Civil Code gives the insurer the power to pay directly to the injured third party, it must a fortiori be held that the insurer itself has the power to fulfill its obligations to the insured by making available to him the entire maximum amount (Cass., May 19, 1969, No. 1724, ASSICURAZIONI, 1970, II, 2, p. 98). It would not, therefore, be sufficient for this purpose to have a generic willingness on the part of the insurer to pay the costs of litigation (see App. Rome, May 24, 1954, ASSICURAZIONI, 1956, II, 2, p. 18; App. Milan, Nov. 29, 1955, (nt. 48); Trib. Florence, Nov. 7, 1963, ASSICURAZIONI, 1964, II, 2, p. 98). In similar terms also part of the doctrine: A. Angioni, *Assicurazione della responsabilità civile e spese di lite*, RIV. GIUR. SARDA, 1992, p. 362 ff; A. Fusaro, *L'assicurazione r.c.: l'offerta del massimale e il carico delle spese giudiziali*, ASSICURAZIONI, 1970, p. 100 ff; A. Polotti Di Zumaglia, *Coperture presso diversi assicuratori*, cit., p. 892. The conclusions reached on this point by the doctrine and, above all, by the jurisprudence would actually seem to confirm, albeit implicitly, the ascribability of the costs of resistance incurred by the insured to the rescue costs provided for in article 1914 of the Civil Code. In this regard, it was, in fact, noted that for one who qualifies court costs as rescue costs the reason for bearing the costs is in the membership of the interest for which the costs were made. One who, while declaring himself opposed to the trial, retains the possibility of taking advantage of a favorable judgment, thus allowing the trial to take place in his interest as well, cannot for that very reason escape the burden of costs. Consequently, in order to escape the burden of costs, it would be necessary to ensure that the trial does not take place in one's own interest, and for this to happen it is necessary that the one who does not want the trial should pay (or at least undertake to pay) to the other party that sum, which would be his or her responsibility if one paid to the injured party the sum he or she requires to waive the litigation (G. Auletta, *Le spese giudiziali nell'assicurazione della responsabilità civile*, cit., p. 181 ff; see also in jurisprudence App. Milan, Nov. 29, 1955, (footnote 48)). The insurance company's ability to pay the injured third party directly is, however, ruled out in the event of bankruptcy of the insured-damaging party: see Cass., August 28, 2000, no. 11228, GIUR. IT., 2001, p. 1423; App. Bologna, Nov. 15, 1997, DIR. MARITT., 1998, p. 1138; Trib. Ancona, Oct. 28, 1980, Resp. Civ. Prev., 1981, p. 254.

with reference, on the other hand, to the type of expenses susceptible to reimbursement under Art. 1917, para. 3, Civil Code ("qualitative" limits), the problem arises, in particular, of establishing whether (regardless of any negotiated "additions" to the insurance coverage) the reimbursement provided for by Art. 1917, para. 3, Civil Code can have as its object, in addition to the legal costs incurred by the insured to resist the legal action brought by the injured third party[702], also: i) the court costs due to the injured party pursuant to Art. 91 Civil Code, according to the principles

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702 In this regard, despite the position sometimes taken by part of the doctrine (see F. Angeloni, *Contratto a favore di terzi*, cit., p. 568; A. Durante, *La proporzione delle spese di difesa in rapporto ai rispettivi interessi*, cit., p. 311; C. Costantini, *La gestione della lite*, in *Responsabilità e assicurazione, a cura di Cavallo Borgia*, cit., p. 246 ff; D. De Strobel, *L'assicurazione di responsabilità civile*, cit., p. 262 ff; see spec. R. Mantovani, *In tema di gestione della lite da parte dell'assicuratore in sede penale*, ASSICURAZIONI, 1963, p. 140, who points out that the interest of the defendant (insured) to be acquitted in criminal proceedings would coincide with the interest of the insurer, since it is on the basis of the findings of the criminal judgment that the latter may or may not be called upon to compensate for the damage), it is the prevailing opinion that in any criminal trial the insurer's obligation to hold the insured harmless under Art. 1917, third paragraph, c.c. exists only if the injured party has joined the civil action (in this sense A. Formica, *Le spese di lite*, in G. Alpa (a cura di), *Le assicurazioni private*, GIUR. SIST. BIGIAVI, Turin, 2006, p. 1666; A. Fusaro, *L'assicurazione r.c.: l'offerta del massimale e il carico delle spese giudiziali*, cit., p. 102; N. Gasperoni, *voce Assicurazione: assicurazione sulla vita a favore di terzi*, cit., p. 1215; A. Polotti Di Zumaglia, *Coperture presso diversi assicuratori*, cit., p. 893; M. Rossetti, *L'assicurazione della responsabilità civile*, cit., p. 1582 ff. The insurer's obligation is limited by the timeliness of the injured third party's claim and the pursuit of a result useful to both parties, who are interested in rejecting it. Consequently, the insurer is not obliged to reimburse the costs of the criminal proceedings, which took place against the insured but without the establishment of a civil plaintiff of the injured party, and were settled by a declaratory dismissal of the crime due to amnesty, remaining, however, for the insurer – where the insurance contract provides not for an unconditional obligation to handle the insured's litigation, but merely the faculty to assess the appropriateness of its intervention for the handling of disputes in extrajudicial or judicial proceedings – liability for possible mala gestio where the failure to intervene configures the violation of an obligation of diligence. (Cass. S.U., January 15, 1985, No. 59, ARCH. GIUR. CIRC. SIN. STRAD., 1985, p. 725; App. Brescia, April 8, 1969, ASSICURAZIONI, 1969, p. 154; App. Brescia, October 21, 1959, ASSICURAZIONI, 1960, II, mass. no. 26; App. Trieste, December 23, 1952, ASSICURAZIONI, 1953, II, 2, p. 137; App. Milan, July 18, 1952, ASSICURAZIONI, 1954, II, 3; Trib. Bari, Dec. 2, 2008, in dejure; Trib. Turin, May 9, 1957, ASSICURAZIONI, 1958, II, 2, 152; Trib. Trieste, May 29, 1952, ASSICURAZIONI, 1953, II, 2, p. 137).

of succombency[703]; ii) the expenses incurred by the insured for the exercise of any counterclaims brought within the framework of the judgment instituted by the injured third party; iii) the expenses incurred for and in the extrajudicial phase.

According to part of the doctrine, the so-called costs of succumb on the functional level in nothing differ from other expenses, with the consequence that the inclusion also of the expenses due to the injured party in the fourth best corresponds to the nature of said expenses and to their qualification as rescue expense[704].

On this point, it appears, however, that the contrary view prevails and is well established, according to which the rescue costs due to the injured party are an integral part of the indemnity obligation and, therefore, to be borne by the insurer within the limits of the insured capital[705]. In accordance with the now constant jurisprudence[706], the expenses that the insured is ordered to reimburse the injured party pursuant to article 91 of the Civil Code must, therefore, be considered a component of the damage to be compensated and, therefore, an accessory of the insured's indem-

703 The operational relevance of the issue is well highlighted by G. Auletta, *Le spese giudiziali nell'assicurazione della responsabilità civile*, cit., p. 182 ff: in the hypothesis in which the ceiling is absorbed by the compensation, with the first thesis (imputation of the expenses of the injured party to the ceiling) the insured will have to bear the expenses due to the injured party even if the other expenses do not reach the quarter, while with the second thesis (imputation of the expenses of the injured party to the quarter) these expenses would also be borne by the insurer until the quarter is reached; if, on the other hand, the compensation is less than the ceiling, while the other expenses reach the quarter, with the first thesis the expenses due to the injured party would be borne by the insurer up to the limit of the ceiling, while with the second thesis they should be borne by the insured. *Ibid*.

704 *Ibid*.

705 See F. Angeloni, *Contratto a favore di terzi*, cit., p. 567 ff; A. Angioni, *Assicurazione della responsabilità civile e spese di lite*, cit., p. 363; E. Bottiglieri, *Dell'assicurazione contro i danni, Artt. 1904-1918*, cit., p. 298 ff; C. Costantini, *La gestione della lite*, in *Responsabilità e assicurazione, a cura di Cavallo Borgia*, cit., p. 247 ff; A. Durante, *La proporzione delle spese di difesa in rapporto ai rispettivi interessi*, cit., p. 309; A. Durante, *Un aspetto non trascurabile dell'attività del fondo di garanzia*, ASSICURAZIONI, 1979, p. 196 ff; A. Formica, *Le spese di lite*, cit., p. 666 ff; I. Partenza, *L'assicurazione di responsabilità civile generale*, cit., p. 77; V. D'Orsi, *Questioni varie in tema di assicurazione sulla responsabilità civile*, MON. TRIB., 1958, p. 733.

706 To the contrary, only a few isolated and long-standing pronouncements, mainly of merit, are noted, Cass., February 5, 1959, n. 344, GIUR. IT., 1959, I, 1, p. 640; App. Milano, February 21, 1958, ASSICURAZIONI, 1959, II, 2, p. 84; Trib. Milano, October 16, 1977, GIUR. IT., 1978, I, 2, p. 472.

nity obligation, which, within the limits of the agreed-upon maximum amount[707], is borne by the insurer[708].

Moreover, must be excluded from the coverage under article 1917, para. 3, also the expenses incurred by the insured for any counterclaims brought against the injured third party[709] (a circumstance, the latter, moreover, not dissimilar from that in which the insured has taken legal action on his own initiative and in his own exclusive interest, for the recovery of his own damages, and has been unsuccessful in the face of the counterclaim brought by the defendant, itself injured, whereby a distinction must be made between the expenses, which are not recoverable, incurred by the insured in the action for compensation of its own damages, and those, which are recoverable, incurred in resisting the adverse legal claim[710]).

More debated, on the other hand, is the extension of insurance coverage under article 1917, para. 3, Civil Code to extrajudicial expenses[711] incurred by the insured as well, although it tends, however, to prevail, as mentioned, the more restrictive interpretation that limits, also because of the literal tenor of the normative provision ("resisting") and the general context also invoked by article 1917, para. 4, Civil Code, reimbursement under article 1917, para. 3, Civil Code to judicial expenses only[712].

With reference to recoverable expenses for judicial and extrajudicial costs, a comparative survey can equally show important differences in the national legal solutions.

In the UK provisions on legal expenses are typically part of the standard terms in full indemnity insurance, for example an insurance on property covering the policyholder's liability as well.

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707 A. Tina, *Il rimborso delle spese legali nel contratto di assicurazione*, cit., pp. 692-693.

708 *Ibid*.

709 Cass., February 14, 2014, n. 3428, DEJURE. See also Trib. Cosenza, April 14, 1964, DIR. PRAT. ASS., 1964, p. 417; Pret. Naples, December 1, 1958, TEMI NAP., 1959, p. 206, cited by G. Castellano & S. Scarlatella, *Le assicurazioni private*, cit., p. 566 ff. See also B. Cerveau, *Assurance de protection juridique, un Répertoire de droit civil*, Paris, 2008, sec. 2, § 22.

710 G. Castellano, *Assicurazioni in generale*, RIV. DIR. CIV., 1961, p. 298 ff; L. Landini, *Le spese di lite nella assicurazione di responsabilità civile*, cit., p. 389 ff.

711 In this sense F. Angeloni, *Contratto a favore di terzi*, cit., p. 568 ff; A. Donati, *Trattato di diritto delle assicurazioni private*, cit., p. 410 (as long as they are closely related to the process); I. Tucci, *Sulla interpretazione del patto di gestione della lite in relazione alle spese per resistere all'azione del terzo danneggiato*, cit., p. 138 ff.

712 A. Tina, *Il rimborso delle spese legali nel contratto di assicurazione*, cit., p. 693.

Such policies often contain a clause whereby the insured is bound to take all necessary steps to avoid or mitigate the loss in the interest of the insurer. Where such a clause is included or implied in the liability insurance contract, the reimbursement of legal expenses forms part of the policyholder's claim against the liability of the insurer[713].

However, in the absence of a clear contract term, clauses on the extent of cover can be interpreted in different manners by judges in various States which may create obstacles. Moreover, courts in other jurisdictions may not agree that such a standard clause entitles an insured to conduct litigation at the expense of the insurer unless the insurer expressly agreed.

A question can arise whether there is a full indemnity or not which could also affect the application of such a clause.

In other countries, especially those with a civil law system, the law lays down minimum provisions for the indemnification of judicial and extrajudicial costs.

Under the German Insurance Contract Act, the insurer has to provide cover for necessary legal expenses as well; the law explicitly points out that the insurance sum agreed is not a cap for those costs.

In particular, according to the Section 83 VVG[714], the insurer shall reimburse the policyholder's expenses in accordance with section 82, para. 1 and 2[715], even if they remain unsuccessful, to the extent that the policyholder could deem them necessary based on the circumstances. Upon the request of the policyholder the insurer shall advance the amount of the necessary expenses.

In addition, if the insurer is entitled to reduce the benefits payable, he may also reduce the amount of the expenses reimbursed.

The third paragraph of Section 83, moreover, provides that expenses incurred by the policyholder on account of his following the insurer's in-

713 European Commission, *Final Report of the Commission Expert Group on European Insurance Contract Law*, EU Commission, Directorate General for Justice, 2014. Available at https://ec.europa.eu/info/sites/default/files/final_report_en.pdf. Last visited August 23, 2022.

714 Section 83 VVG, *Reimbursement of expenses*.

715 Section 82 VVG, *Loss avoidance and minimisation*. The first paragraph provides that the policyholder must, upon the occurrence of the insured event, ensure that the loss is avoided or minimised wherever possible. The second paragraph, moreover, states that the policyholder must follow the instructions of the insurer, where reasonable, and obtain instructions, circumstances permitting. If several insurers involved in the contract of insurance issue different instructions, the policyholder must act at his own proper discretion.

structions shall also be reimbursed to the extent that they exceed the sum insured, taken together with the other compensation[716].

In order to fully analyze the German discipline, also Section 101 VVG must be taken into consideration[717].

Specifically, the Section in comment provides that the insurance shall also cover the judicial and extra-judicial costs arising from claims asserted by a third party insofar as the circumstances necessitate the expenditure.

Further, the insurance covers expenses incurred on the instruction of the insurer by defence counsel in criminal proceedings initiated on the basis of an act which could result in the policyholder becoming liable *vis-à-vis* a third party. At the policyholder's request the insurer shall advance the costs.

If a sum insured has been determined, the insurer shall also reimburse the costs of a legal dispute conducted at his instigation and the costs for defence counsel in accordance with subsection 1, second sentence, insofar as they exceed the sum insured plus the insurer's expenses for indemnifying the policyholder. This shall also apply to interest payments which the policyholder owes the third party as a result of a delay in satisfying the third party occasioned by the insurer.

If the policyholder is released from the obligation of avoiding the execution of a judicial decision by furnishing security or a deposit, the insurer shall effect the payment of the security or deposit[718].

Considering the comparative analysis proposed insofar, the purpose of the Georgian article 841 is aimed at defining the scope of liability insurance coverage and refers to the reimbursement of judicial and non-judicial costs by the insurer in favor of the policyholder.

In fact, 841 also defines the object of liability insurance, as it specifies the content of the insured's damages[719].

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716 The fourth paragraph, finally, with reference to the case of livestock insurance, provides that the costs of feeding and keeping the livestock, as well as the costs of veterinary examinations and treatment are not classed as expenses to be reimbursed by the insurer in accordance with subsections (1) to (3).

717 Section 101 VVG, *Legal protection costs*.

718 This obligation shall only apply up to the amount of the sum insured; if the insurer is obligated in accordance with subsection (2) over and above that amount, the surplus amount shall be added to the sum insured. The insurer shall be released from the obligation under the first sentence if he acknowledges that the third party's claim vis-à-vis the policyholder is well-founded.

719 K. Iremashvili, *Art. 841*, in *Online Commentary on the Civil Code*, available at https://gccc.tsu.ge/. Last visited August 22, 2022.

As a result of causing damage to a third party, the policyholder acts as the addressee of the claim of the third party. The third party can exercise the right to compensation in different ways. Article 840 provides for the case when a third party submits a claim directly to the insurer. However, in insurance practice, there are frequent cases when a third party applies to the court to implement a claim for compensation. Article 841 regulates just such a case[720].

According to the norm, at the time of initiation of a claim proceeding by a third party against the policyholder, the obligation to pay is applied to the costs incurred to defend against the claim of the third party.

The legislator means judicial and non-judicial expenses in the mentioned expenses. Court expenses are expressed by the state fee, and non-judicial expenses –by the cost of the lawyer's services and others. In case of a broad interpretation of article 841, non-judicial costs should also include costs related to alternative dispute resolution[721].

In determining the scope of the insurer's obligation, the norm under consideration makes a significant reservation. In particular, according to article 841, such expenses must be incurred depending on the circumstances of the case. Such a necessity is expressed to the policyholder by setting a claim for compensation by a third party. It is by protecting the interest of the policyholder that liability insurance is similar to the fiduciary relationship model[722].

4. Releasing the insurer from liability (art. 842)

The insurer, as expressely provided by the article 842 of the Georgian Civil Code, is released from liability if the policyholder intentionally causes the circumstance that creates its liabilities to a third party.

Moving the analysis from the study of Italian regulations, in general, the insurer has the option of refusing to pay compensation in cases where the loss was caused by the policyholder, the insured or the beneficiary

720 *Ibid*.

721 *Ibid*. For example, a third party and the policyholder as disputing parties may be involved in the mediation process. In such a case, the policyholder's civil liability insurance should also cover the costs of the mediation process.

722 *Ibid*.

acting with malice or gross negligence – as provided from the article 1900 of the Italian Civil Code[723].

Generally, the insurer is not liable to indemnify the policyholder in the cases in which the insured event was caused by the person who had an interest in the insurance coverage or where the accident was the result of willful or grossly negligent conduct[724].

An analysis of article 1900 shows that the insurer is not obligated for claims caused by willful misconduct or gross negligence on the part of the policyholder, insured or beneficiary, unless otherwise agreed for cases of gross negligence[725].

The exclusion of the insurer's obligation in the event of a claim caused by a direct party to the contract (policyholder, insured, beneficiary) depends, according to some, on the failure of the latter to comply with a duty, not to cause the claim and consequently on the defect of a prerequisite to the insurer's right to benefit. According to others, however, it is a risk (*rectius*: an uninsured cause of loss). The problem has no practical consequences, since according to either theory the consequence is always the same: the insurer is not obliged to its performance[726].

723 G. Volpe Putzolu, *L'assicurazione*, cit., p. 71. For an analysis of the ratio of the law, see also A. La Torre, *Responsabilità ed autoresponsabilità nell'assicurazione*, in *Scritti di diritto assicurativo*, Milan, 1979, p. 421 ff.

724 *Ibid*. In particular, the rationale for this provision is to be found in the legislator's desire to discourage those grossly negligent behaviors that, by manifesting an absolute disinterest in avoiding the occurrence of the accident, affect the community of interests (until the accident occurs) that, at least up to the time of the accident, must unite the aforementioned parties and the insurer in the contract. A. Bracciodieta, *Il contratto di assicurazione (Disposizioni generali)*, cit., p. 183.

725 G. Volpe Putzolu, *L'assicurazione*, cit., p. 71.

726 *Ibid*. Rather, it makes it necessary to specify when a cause of loss is covered and when it is not: that is, when the insurer is or is not obligated, with the caveat that, given the principles we shall now indicate, there will always remain the quaestio facti of determining when one or the other case occurred and in the case of competition of causes, to which of them the loss is actually to be attributed. See, on this point, A. Donati, *Trattato del diritto delle assicurazioni private*, cit., p. 131 ff; G. Fanelli, *Le assicurazioni*, cit. p. 78 ff; G. Scalfi, *I contratti di assicurazione. L'assicurazione danni*, cit., p. 73 ff.

In the first paragraph, the Italian legislator explicitly excludes the guarantee if the event is caused with malice or gross negligence by an interested party (*i.e.*, the policyholder, insured or beneficiary)[727].

The second paragraph of Article 1900 states that the insurer is obligated for damages caused by the intentional or gross negligence of the persons for whom the insured is liable[728].

With reference to the seriousness of the insured's fault, the legislator has held that the conduct of the insured can be considered grossly negligent in any case in which it assumes decisive causal importance in relation to the occurrence of the guaranteed risk[729].

The last paragraph of article 1900 states that the insurer is also obligated, notwithstanding an agreement expressly providing to the contrary,

727 V. Salandra, *Dell'assicurazione*, cit., p. 280. According to the dominant doctrine, malice must be understood as consciousness and will of the prejudicial act; therefore, the agent must be aware of causing the harmful event. A. Donati, *Trattato del diritto delle assicurazioni private*, cit., p. 131 ff. Scholars also assert that there must be a common interest between the insurer and the insured to prevent the occurrence of the loss; it is in this light, therefore, that the legislative provision that excludes the insurer's obligation when the event was caused by the willful misconduct or gross negligence of some parties, namely the insurer, the insured or the beneficiary, should be read. G. Fanelli, *Le assicurazioni*, cit. p. 78 ff. Similarly, this would explain why a similar limitation does not apply if the damaging event is attributable to a person for whose actions the insured is liable, since in such cases the perpetrator would have no interest contrary to the occurrence of the loss and thus his or her conduct would not be in any way different from that of the third party who, with malice or gross negligence, caused damage to the insured and thus obliges the insurer to take action to eliminate the damaging consequences.

728 Since gross negligence is configured as an impediment, it implies that the burden of proof is on the insurer. On this point, the jurisprudence of the Court of Appeals of Rome, in the very recent ruling No. 159/2020, has established that, according to article 1900 of the Civil Code, the insurer is not obligated for claims caused by willful misconduct or gross negligence of the policyholder, the insured or the beneficiary, unless otherwise agreed for cases of gross negligence, and this is to avoid that the insurance guarantee creates the interest of the 'insured to cause the claim. Court of Appeal of Rome, Judgment No. 159/2020. The judgment upheld the first instance ruling in which the insured's claim that he had been a victim of theft and had consequently exercised his right to compensation was rejected.

729 A. Donati, *Trattato del diritto delle assicurazioni private*, *cit*., pp. 132-133. The legislator intended to analyze the degree of the insured's fault in consideration of the relevance of the conduct with respect to the production of the guaranteed event, recognizing, likewise, the existence of relevant fault within the meaning of the rule in question. In this case, whenever the insured's action or omission is considered a sufficient cause to bring about the event. On the contrary, scholars have held that conduct must still be assessed on a concrete basis, and specifically, in the case of differently culpable conduct there will be different cases, with different effects on the extent of compensation due to the insured. See, above all, P. Santoro, *Sulla colpa dell'assicurato in caso di furto*, in *Danno e Responsabilità*, vol. 12, Milan, 2007, p. 885 ff.

for claims arising out of acts of the policyholder, insured or beneficiary, which were committed out of a duty of human solidarity or to protect interests common to the insurer.

It is possible, therefore, to discern two exceptions to the exclusion from the insurance guarantee of voluntarily caused injuries, given the total absence in these cases of the purpose of profit[730].

Indeed, it is clear that the insurer is obligated, even in the presence of a covenant to the contrary, for claims caused as a result of acts of the policyholder, the insured or the beneficiary, performed in the performance of moral or social duties or in the protection of interests common to the insurer (*i.e.* in the case of the rescue of insured property under Art. 1914)[731].

Moreover, article 1917 of the Italian Civil Code provides that, in order to prevent the insured from carrying out the activity that is the subject of the contract without the necessary diligence, it is excluded the coverage for the risk arising from malicious conduct – Art. 1917, para. 1[732].

In the cases in which civil liability is insured – *e.g.*, where the insurer may be required to indemnify the insured for what it has to pay to a third party as a result of an event that occurred during the term of the contract – the insured is entitled to be indemnified in cases of negligence (including gross negligence) but not in cases where the damage arises from his or her own willful act[733].

Similarly, in Germany the Section 103 of the VVG states that the insurer shall not be obligated to effect payment if the policyholder has intentionally and unlawfully caused the loss suffered by the third party[734].

This legal dictate states that damage intentionally caused by the insured is not covered by the insurance contract; therefore, the insurer is

730 V. Salandra, *Dell'assicurazione*, *cit*., pp. 280-281. The application of the rule, as noted by some of the doctrine, is reserved exclusively for non-life insurance, except in cases of insurance contracted in the event of the death of a third party and for the benefit of another third party. G. Scalfi, *I contratti di assicurazione. L'assicurazione danni*, cit., p. 73 ff; V. Cuocci, *Il tormentato inquadramento dell'assicurazione per conto altrui nel contratto a favore di terzo*, DANNO RESP., 2008, p. 482 ff; A. La Torre, *La responsabilità di chi stipula un'assicurazione per conto altrui senza renderla nota all'assicurato*, GIUST. CIV., 2003.

731 G. Fanelli, *Assicurazione contro i danni*, *cit*., p. 24.

732 *Ibid*. However, the parties may extend the risk exclusion to cases of gross or very gross negligence. See, *ex multis*, on this point, G. Fanelli, *Assicurazione contro i danni*, cit., p. 24 ff; G. Scalfi, *I contratti di assicurazione. L'assicurazione danni*, cit., p. 73 ff; V. Salandra, *Dell'assicurazione*, cit., pp. 280-281.

733 G. Fanelli, *Assicurazione contro i danni*, cit., p. 24. This provision derives espressely from Art. 1917 paragraph 1 of the Italian Civil Code and this different treatment of "guilt" has its explanation in the special purpose of civil liability insurance

734 Section 103 VVG, *Causing the insured event*.

not obligated to provide benefits. In this regard, the provisions contained in Section 103 VVG are not an obligation but a subjective exclusion of risk.

In particular, in the case where the insured (or his representative) causes the insured event, the insurer may be deemed to be exempt from performance or at least have a limited obligation to provide benefits[735].

In the above case, the intentional breach of any contractual obligation of the insured – and, therefore, not only of the *ex ante* conditions of the insured event – gives the insurer the possibility of being released from its obligation to provide benefits[736].

Therefore, the releasing of the insurer from liability occurs only in the cases in which the insured has intentionally caused the event covered by the insurance[737].

The essential element for obtaining the insurer's exemption from liability under German law lies in the assumption that the insured's breach must be relevant to the occurrence of the insured event or to the extent of the insurer's liability. In fact, if the insured event would have occurred even without the breach of an obligation, the insurer remains fully liable[738].

On this point, therefore, to be fully exempt from liability, the insurer must prove the intentional breach of the obligation. Conversely,

735 See, on this point, M. Zimmerling & A. Pfeiffelmann, *Germany*, cit.; T. R. Berry-Stolzle & P. Born, *The Effect of Regulation on Insurance Pricing: The Case of Germany*, cit., pp. 129-164.

736 *Ibid*. In this regard, wilful misconduct is not only considered where the act of breach consists of a positive act, but can also be assumed in the implementation of liability in case of default. In fact, since conditional malice is sufficient to justify the insurer's freedom of performance, but the insurer is obliged to grant coverage in case of malice, it is necessary to distinguish between conditional and intentional malice. See, generally, C. Drave & F. Herdter, *Insurance Litigation in Germany*, Wilhelm Rechtsanwälte, 2016.

737 In civil liability insurance, if the insured has intentionally caused the damage suffered from the third. M. Wandt & K. Bork, *Disclosure duties in German insurance contract law*, Zeitschrift für die gesamte Versicherungswissenschaft, 2020, pp. 81-103. Furthermore, the insurer remains fully liable if the breach by the insured was only negligent (*i.e.* the simple negligence). C. Drave & F. Herdter, *Insurance Litigation in Germany*, *cit*.

738 C. Drave & F. Herdter, *Insurance Litigation in Germany*, *cit*., 5-6. The breach must have caused the loss or increased the extent of the loss. The insurer must notify the insured in writing of the possible consequences of a breach in order to be able to rely on the breach.

«the insured must prove that he acted merely negligently to achieve full indemnification»[739].

With reference to Common law systems, it is not expressly disciplined the case of releasing the insurer from liability for damages intentionally caused by the policyholder.

However, insurance contracts are generally based on mutual duties of "good faith", which may be applied both before and after the contract is formed[740].

With reference to the UK common law, Under Section 4[741] of the *Consumer Insurance Act*, the insurer has ability to access remedies only in the face of misrepresentations that exhibit specific characteristics. Misrepresentations that give rise to the remedies arranged for the insurer are called qualifying misrepresentations.

First, for a qualifying misrepresentation to exist, two conditions must be fulfilled: (a) the consumer must have provided a response in violation of the duty to take reasonable care; (b) the insurer must be able to prove that in the absence of that misrepresentation he would not have taken out the policy or would have done so on different contractual terms.

Notably, it is definitively clarified, also and finally in a legislative text, that the focus must be on the individual and specific insurer, and no longer, as provided in Section 20(2) of the *Marine Insurance Act*[742], on a hypothetical prudent underwriter: the insurer invoking a remedy in its favor must show that, in its determination to contract, it concretely relied on

739 *Ibid*.

740 See, generally, J. Lowry, *Whither the Duty of Good Faith in UK Insurance Contracts?*, CONN. INS. L. J., 2009, pp. 97-156; Y. K. Chowdhury, *In Terms of Utmost Good Faith, the Law of Insurance Imposes Strict Obligation on the Insured as Compared to the Insurer: A Literature Review*, 2007; C. Butcher, *Good faith in insurance law: a redundant concept?*, J. BUS. L., Issue 5, 2008, pp. 375-384.

741 Section 4, CIA, Qualifying misrepresentations: definition and remedies. «(1) An insurer has a remedy against a consumer for a misrepresentation made by the consumer before a consumer insurance contract was entered into or varied only if: (a) the consumer made the misrepresentation in breach of the duty set out in section 2(2), and (b) the insurer shows that without the misrepresentation, that insurer would not have entered into the contract (or agreed to the variation) at all, or would have done so only on different terms. (2) A misrepresentation for which the insurer has a remedy against the consumer is referred to in this Act as a "qualifying misrepresentation" […]».

742 Section 20(2) MIA states that «[a] representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk».

the insured's misrepresentation, regardless of the fact that a prudent underwriter would not, instead, have done so[743].

Thus, the element of inducement borrowed from the body of case law following *Pan Atlantic v. Pine Top*[744] is definitively enshrined, while that of materiality in the form of the prudent insurer test[745] is once and for all set aside.

In addition to the above conditions, a misrepresentation, to be qualifying, must necessarily be deliberate or reckless, or simply careless[746]. A misrepresentation is considered deliberate when the consumer is aware of its false and/or misleading character or does not care whether it is or not; is considered reckless when the consumer is aware of the relevance of the response with respect to the insurer – *i.e.*, it does not matter to him whether it is or not[747].

Careless (or mildly negligent) misrepresentation is defined by exclusion as that misrepresentation that is not deliberate or reckless[748]. Put another way, only those misrepresentations that are deliberate or culpable (either severely or mildly) integrate the violation of the reasonable care standard, while there may be cases of innocent misrepresentations in so far as they are reasonably made[749].

The burden of proof falls on the insurer, but the insurer is assisted by two statutory presumptions, which invoke the objectivity of the standard previously established: it must be presumed, in fact, until proven otherwise, that the consumer in question possesses knowledge of a reasonable consumer type; and that the consumer in question is able to recognize

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743 See for an in-depth analysis J. P. Lowry & P. Rawlings, *'That wicked rule, that evil doctrine…': Reforming the Law on Disclosure in Insurance Contracts*, MODERN. L. REV., 2012, p. 112.

744 Cf. *Consumer Insurance Law: Pre-contract Disclosure and Misrepresentation*, (Law Com no. 319) (Scot Law Com no. 219), § 6.7-6.9.

745 *Ibid*.

746 J. P. Lowry & P. Rawlings, *'That wicked rule, that evil doctrine…': Reforming the Law on Disclosure in Insurance Contracts*, cit., pp. 112-113.

747 R. Merkin, J. Hjalmarsson, A. Bugra, J. Lavelle, *Marine Insurance Legislation*, CRC Press, 2014, p. 41.

748 *Ibid*.

749 J. P. Lowry & P. Rawlings, *'That wicked rule, that evil doctrine…': Reforming the Law on Disclosure in Insurance Contracts*, cit., p. 113.

the relevance of the information requested by the insurer with clear and specific questions[750].

The classification of misrepresentations according to the subjective status of the consumer served for the introduction of the fundamental principle of proportionality, the absence of which had been lamented for years in the British legal system, unlike in other Western legal systems. *Schedule 1* of the *Consumer Insurance Act*, in fact, provides in favor of the insurer differentiated remedies according to the severity of the qualifying misrepresentation. If it was deliberate or grossly negligent in nature, the insurer may seek cancellation of the contract, refuse to pay compensation, and withhold premiums already paid (unless this would be unduly unfair to the insured)[751].

In the case, on the other hand, of careless misrepresentation, the insurer is entitled to access proportionate remedies in relation to what it would have done had the insured committed no breach[752].

If the insurer, knowing the true situation, would in no way have decided to take out the policy, he is entitled to demand its cancellation and deny all past and future claims, but is still obliged to return all premiums already paid by the insured[753].

If, on the other hand, the insurer would still have concluded the contract but by applying different conditions (excluding those related to the premium), the contract remains in force but the above conditions apply retroactively, as if they had taken effect ab initio. If the insurer would have simply charged a higher premium, then the indemnity must be paid but in a proportionately reduced amount[754].

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750 Section 5(4) CIA «[i]t is for the insurer to show that a qualifying misrepresentation was deliberate or reckless». Section 5(5) «[b]ut it is to be presumed, unless the contrary is shown – (a) that the consumer had the knowledge of a reasonable consumer, and (b) that the consumer knew that a matter about which the insurer asked a clear and specific question was relevant to the insurer».

751 Schedule 1, Part 1, Section 2, Deliberate or reckless misrepresentations: «[i]f a qualifying misrepresentation was deliberate or reckless, the insurer – (a) may avoid the contract and refuse all claims, and (b) need not return any of the premiums».

752 R. Merkin, J. Hjalmarsson, A. Bugra, J. Lavelle, *Marine Insurance Legislation*, cit., pp. 42-43.

753 *Ibid*.

754 J. P. Lowry & P. Rawlings, *'That wicked rule, that evil doctrine…': Reforming the Law on Disclosure in Insurance Contracts*, cit., p. 113.

Considering the comparative analysis reported insofar, the article 842 of the Georgian Civil Code is much similar to the civil law systems (Italy and Gemrany) considered.

Specifically, this article reinforces the principle of the prohibition of damages caused intentionally, which is the basis of the foundations of the doctrine of insurance[755].

By declaring it, the legislator calls on the parties to be honest and protects the interest of public order.

First of all, it should be noted that in the case of liability insurance, the insurance risk falls within the sphere of influence of the policyholder. With this in mind, the prohibition of intentional damage becomes particularly important in liability insurance[756].

It is important to note that article 842 has different wording from other norms. In particular, when referring to the form of causing damage by the policyholder, the legislator uses the term – the deliberate occurrence of the circumstances for which the policyholder is liable to a third party. It should be noted here that non-uniform terms are used in all norms that refer to the prohibition of compensation for damages caused intentionally[757].

From this point of view, also in the term given in article 842 – aware of the circumstance's provocation, intent and gross negligence must be combined. It would be wrong to exclude gross negligence from the grounds for exempting the insurer from liability[758].

Specifying the wrongdoing committed by the policyholder is important to the proper qualification of the action[759].

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755 See on this perspective A. Borroni, *Art. 799*, in this Commentary.

756 K. Iremashvili, *Art. 842*, in *Online Commentary on the Civil Code*, available at https://gccc.tsu.ge/. Last visited August 24, 2022.

757 *Ibid*. For example, article 829 directly indicates intent and gross negligence; article 844 uses the term – intentionally causing death by illegal action; article 856 provides for the case of intentionally causing an accident by illegal action. Terminological uniformity of the mentioned norms is important, as long as they confirm the same principle.

758 *Ibid*. Insurance practice knows cases when, for example, the policyholder drives a car while intoxicated. While providing medical assistance to the patient, the doctor is under the influence of a narcotic or psychotropic substance, etc.

759 *Ibid*. For example, when insuring a doctor's professional liability, in Georgian insurance practice, it is problematic to determine the essence of a medical error (mistake). According to the position established in the circle of medical experts, the term – mistake, with its etymological meaning, indicates an intentional action. The doctor's professional liability insurance cannot be applied to an intentional act. Consequently, the term medical error was introduced in Georgian insurance practice, *i.e.* Mistakes in medical judgments and actions arising from the specificity of the field of medicine. It is important to take into account the mentioned position, as the judge relies on the conclusions of medical experts in similar types of disputes.

The arrangement provided for in article 842, at first glance, calls into question the liability insurance as third party insurance, the goal. In particular, by assuming the insurer's release from liability, the third party's protection interest remains unfulfilled. However, in this case, the insurer's exemption from liability is justified by its interest in the contract. It would be unjustified, with the argument of protecting the interest of the third party, that the insurer would be obliged to pay compensation in all cases[760].

First of all, the autonomy of the will of the insurer implies the free determination of the terms of the contract by him. From a practical point of view, it is unlikely that an insurer would be interested in such a deal that would oblige it to pay for damages caused intentionally by the insured[761].

On the other hand, such a transaction is also ineffective from an economic point of view. This will lead to inefficient spending of the intelligence company's resources[762].

In addition, article 842 indirectly serves the interest of the third party dispute[763].

The issue is resolved differently in case of compulsory insurance. When the objective of protecting the third party is predominant – as it will be seen in the next paragraph.

760 *Ibid*.

761 *Ibid*.

762 *Ibid*.

763 *Ibid*. For example, in the case of professional liability insurance of the doctor, a certain part of the scientists believe that the existence of the insurance inhibits the motivation of the doctor to conscientiously fulfill his obligation to care for the patient. In fact, by denying compensation to a physician who causes harm intentionally or through gross negligence, ultimately, an incentive for good physician behavior and an improvement in medical quality is achieved.

5. Liability under compulsory insurance (art. 843)

If the insurer is completely or partially freed from the duty to the policyholder – as provided by the article 843 – his liability to the third party is valid in the cases provided by the law on compulsory insurance.

If the insurer meets the third party's claim, then the claim against the policyholder is transferred to the insurer.

The article in comment must be analyzed in accordance with the article 801 of the Georgian Civil Code[764]. In this sense, the purpose of compulsory insurance contract «is the promotion of the development of stable and regulated civic relationship»[765].

Compulsory insurance represents a type of insurance that an individual or a company is legally required to purchase. This type of insurance may be considered fundamental for individuals and businesses who wish to engage in certain financially risky activities, such as driving a car or conducting a business with employees[766].

The purpose of this norm is to protect third parties during compulsory insurance. In this sense, article 843 represents an exception to the principle recognized in the doctrine of insurance (as provided by article 842). In this case, the legislator gives priority to the interest of the third party and gives the insurer the opportunity to use the regressive claim.

In the case of compulsory insurance, the intentional action of the policyholder does not lead to limitation of compensation for damages to the injured third party. In such a case, the insurer indemnifies the existing damage in favor of the third party and subsequently demands compensation from the policyholder in the manner of recourse.

Under Italian regulations, as noted in the preceding paragraphs, former article 1917 of the Civil Code cannot be deduced as the object of insurance risk[767].

This position is made even more incisive by article 1900, in the light of which the insurance company is not only not obligated for claims caused

764 See P. Tortorano, *Art. 801*, in this Commentary.

765 I. Nozadze, *Duty to Inform as a Specificity of Demonstration of Good Faith Principle in Voluntary and Compulsory Insurance*, Ivane Javakhishvili Tbilisi State University Faculty of Law, Journal of Law, 2017, *cit*., p. 133.

766 P. Tortorano, *Art. 801*, in this Commentary.

767 On this regard, see generally M. Comporti, *Considerazioni introduttive e generali*, in *Responsabilità civile e assicurazione obbligatoria*, Milan, 1998, p. 15 ff; G. Volpe-Putzolu, *voce Assicurazione obbligatoria*, in *Enc. giur. Treccani*, III, Rome, 1988, p. 2 ff.

with malice but is even obligated for those caused with gross negligence - meaning by these terms that behavior of the agent that greatly deviates from the rules of diligence, prudence and expertise - by the policyholder, the insured or the beneficiary. In any case, while in the case of gross negligence a covenant to the contrary is permissible, in cases of malice this is never allowed and it is, therefore, always excluded that the insurance company can be held liable.

Notwithstanding the aforementioned articles of the Civil Code, the most accepted jurisprudence inclines towards the operability of insurance coverage even in the case of the insured's malicious intent, based on the consideration that the normative referent of article 122 of the Private Insurance Code – which defines the scope of operability of civil liability arising from road traffic – is expressly represented by article 2054 of the Civil Code and not by the aforementioned article 1900 of the Civil Code[768].

Fault should therefore be broadly understood in the inclusive sense of both the culpable profile, arising from imprudence, negligence and inexperience, and the malicious or intentionally injurious profile, subject always to the insurance company's recourse against the insured or driver[769].

768 Recalling article 2054 of the Civil Code, the insurance company is obliged to repair the accident caused even by malicious action since, for the purpose of recognizing the right to compensation for damages, it does not distinguish between malicious and culpable conduct. On this point, Cass. Pen., sec. I, November 18, 2009 n. 44165, with note of R. Plenteda, *R.C.A.: l'assicurazione opera anche in caso di investimento doloso del pedone*. Such an arrest was affirmed by the Court of Cassation, First Criminal Section, in Judgment No. 44165 of 2009 in which decision it can be read that on the subject of civil liability from road traffic, deems it necessary to give continuity to the principle already expressed in this Court according to which the rule in Law No. 90 of 1969, Article 1, and that in Article 18, same Law, for the exercise of protection by direct action, rules transfused in Legislative Decree September 7, 2005, No. 209, Articles 122 and 144 (Insurance Code) contain the reference not to article 1900 Civil Code (general rule on insurance) or article 1917 Civil Code (on civil liability insurance) but to Article 2054 Civil Code. which does not distinguish per se between negligent or intentional actions, so that it must be considered that both conducts must be understood to be included in the same protection, not having to interpret the tort in question as autonomous, but rather as a specification of the tort under article 2043 Civil Code even though qualified by the circulation of vehicles.

769 See in this perspective F. Martini & M. Rodolfi, *Esercizio dell'Assicurazione*, in A. Candian & G. Carriero (eds.), *Codice delle Assicurazioni Private*, ESI, Naples, 2014, pp. 543-580. The legislation in question, in other words, also in the light of the European Directives, configures a civil traffic liability not only as a contractual remedy of coverage of the insured party's risk, but also as a substantive and procedural instrument of compensation of the injured party in the light of the principle of solidarity towards the injured party or third party injured, with a tendency to remove obstacles for the full and timely compensation of damages even if caused by a risk not specifically assumed in the contract having in fact to consider preeminent the interest of the injured party to be compensated.

Therefore, if, in principle, those damages caused by malicious acts are excluded from the coverage of liability insurance, in the context of compulsory motor vehicle liability insurance this rule is waived since the insurer will still be liable for such damages to the injured party, albeit with a right of recourse against the insured[770].

This is not expressly stipulated in the law because article 122 of Legislative Decree No. 209/2005 (*Private Insurance Code*) merely states that trackless motor vehicles cannot be put on the road if they are not insured for third-party liability as provided for in article 2054 of the Civil Code.

So, the rule does not make it explicit at all whether the insurer must equally compensate for damages arising from the circulation of motor vehicles and which are attributable to the malicious act of the insured.

Jurisprudence, however, even before the enactment of the Insurance Code, had ruled that the insurer could not refuse to indemnify damages caused maliciously by the insured.

The Supreme Court had held, in fact, that Article 1 of Law No. 990/1969[771] did not distinguish between wilful and culpable acts, but rather – in defining the facts that should be covered by compulsory insurance – had merely referred to the liability provided for in article 2054 of the Civil Code, which not only does not explicitly exclude wilful acts but derives its content directly from article 2043 of the Civil Code, in the mind of which any wilful or negligent act that causes unjust damage obliges to compensation; from the systematic correlation of these norms, therefore, jurisprudence had inferred the principle according to which wilful acts are also included in compulsory insurance, without these effects being

770 L. Bugiolacchi, *Le strutture sanitarie e l'assicurazione per la r.c. verso terzi: natura e funzione dell'assicurazione obbligatoria nella legge n. 24/2017 (legge «Gelli/Bianco»)*, RESP. CIV. PREV., 2017, pp. 1033-1034.

771 See for an in-depth analysis, *ex multis*, A. De Cupis, *L'azione della vittima*, in *L'assicurazione dei veicoli a motore*, a cura di A. Genovese, Padua 1977, p. 95 ff; A. Donati, *La nuova legge italiana sull'assicurazione obbligatoria della responsabilità civile automobilistica e la Convenzione di Strasburgo*, ASSICURAZIONI, 1970, I, p. 30 ff; F. Jr. Ferrara, *L'assicurazione obbligatoria degli autoveicoli*, RIV. TRIM. DIR. PROC. CIV., 1974, p. 752 ff; G. Gentile, *Assicurazione obbligatoria della responsabilità civile degli autoveicoli e dei natanti*, Milan, 1971; I. Militerni & A. Vella, *L'assicurazione obbligatoria*, Naples, 1971, p. 160 ff; L. Stanghellini, *I diritti del danneggiato e le azioni di risarcimento nell'assicurazione obbligatoria della responsabilità civile*, Milan, 1990; G. Tarzia, *Aspetti processuali dell'assicurazione obbligatoria della responsabilità civile automobilistica*, RIV. DIR. PROC., 1973, p. 643 ff; C. Vocino, *Incognite processuali della legge 24 dicembre 1969, n. 990*, DIR. PRATICA ASS., 1971, p. 197 ff.

paralyzed by any different agreement which, as contrary to imperative norms, would not have been opposable to the injured party[772].

Since article 122 of Legislative Decree No. 209/2005 essentially transposed Art. 1 of L. no. 990/1969, the aforementioned principles are still current and have been reaffirmed by the most recent case law, which has in fact affirmed that on the subject of compulsory insurance of motor vehicles, the insurance guarantee also covers the damage maliciously caused by the driver against the injured third party, who, therefore, has the right to obtain from the insurer of the civil responsible party compensation for the damage, not finding application of the rule in article 1917 Civil Code – which does not constitute the typical paradigm of road traffic liability, found, on the contrary, in the laws of the RCA and European directives that affirm the principle of solidarity towards the injured party – without prejudice to the insurer's right to claim against the insured, for whom the contractual coverage does not operate[773].

In Germany, similarly, compulsory insurance is provided under Section 113 of the VVG, which provides that «[l]iability insurance which a policyholder is obligated by legal provision to take out (compulsory insurance) must be concluded with an insurance company authorised to do business in Germany. The insurer shall confirm in writing to the policyholder, quoting the sum insured, that he is obligated to take out the compulsory insurance in accordance with a legal provision, to which reference must be made. The provisions of this Division shall also apply insofar as the contract of insurance grants cover in excess of the prescribed minimum requirements»[774].

The insurer's liability cases, however, may be derived from the reading of Section 117 of the VVG.

As in the Italian case, where the insurer is released in whole or in part from liability to the policyholder, its liability to the third party remains[775].

Specifically, a circumstance that results in the non-existence or termination of the insurance contract takes effect against the third party only one

772 Cass. civ., sec. III, February 18, 1997, no. 1502.

773 Cass. civ, sec. III, August 3, 2017, no. 19368, which is also noteworthy for its references to the case law of the Supreme Court subsequent to ruling no. 1502 of 1997 cited above; finally, even more recently always in the same sense see Cass. civ., sec. III, March 6, 2018, no. 5180.

774 Section 113 VVG, *Compulsory insurance*.

775 M. Zimmerling & A. Pfeiffelmann, *Germany*, cit. See, also, M. Eichhorst, *Germany*, in *The Insurance and Reinsurance Law Review*, cit., pp. 210-226.

month after the insurer notifies the relevant agency of the circumstance. This applies even if the insurance contract terminates due to lapse of time. The time limit does not run until the insurance contract is terminated[776].

In the cases referred to in subsections 1 and 2, of Section 117 VVG, the insurer is liable only within the prescribed minimum sum insured and the risk assumed by him. On the contrary, the insurer remains not obligated to pay if the third party can be compensated by another insurer or social insurance institution[777].

In the event of the opening of insolvency proceedings against the insurer's assets, the insurance contract shall not terminate, notwithstanding Article 16, until one month after the insolvency administrator has notified the competent agency of this fact; until that time it shall remain effective against the insolvency estate. If no competent agency has been appointed to receive notification pursuant to the first sentence, the insurance contract shall terminate one month after the policyholder is notified of the opening of insolvency proceedings; the notification shall be in writing[778].

In the United Kingdom, differently, the type of insurances that are legally compulsory for everyone are the motor insurance and the employer's liability[779].

In the first case, it is provided that all drivers are required by law (under the *Road Traffic Act* of 1930) to have in force an insurance policy to cover their liability for bodily injury to or damage to third party property

776 The circumstance described in the first and second sentences may also be invoked against the third party if, prior to the time when the loss occurred, the relevant agency has received confirmation of a new insurance contract taken out on the basis of a relevant law. The provisions of this Division shall not apply if no competent agency has been appointed to receive notification under the first sentence. Section 113, para. 2, VVG, *Compulsory insurance*.

777 If the insurer's obligation to pay under subsections 1 and 2, of Section 117 VVG, coincides with an obligation to pay compensation on the basis of a culpable breach of official duty, the obligation to pay compensation under Section 839, para. 1, of the German Civil Code shall not be excluded in the relationship with the insurer on the ground that the preconditions for the insurer's liability are met. The first sentence does not apply if the public official is personally liable under Section 839 of the German Civil Code.

778 C. Armbrüster, *Il diritto dei contratti di assicurazione in Germania dopo la riforma del 2008*, DIR. FISC. ASS., 2013, p. 454 ff.

779 T. Hardy, *Mandatory insurance-legal and economic myths and realities*, British Insurance Law Association, London, 2010, pp. 2-3.

which arises from the use of a motor vehicle. Today, this law is defined by the *Road Traffic Act 1988*[780].

In accordance with the *Motor Vehicle Act*, third-party insurance or liability coverage is considered to be a statutory requirement. As the name suggests, the beneficiary of the policy is not the two parties involved in a contract.

To put it in simpler terms, the vehicle owner and the insurance companies are not the beneficiaries of this contract. The insured is not provided with any benefit. Rather, it helps in covering the legal liability owed by the insurer to the third party on account of the disability/death caused to the party by the insured's vehicle.

The second case provides that employers Liability Insurance is required by law (under the *Compulsory Insurance Act* 1969).

The policy of the Act is straightforward. Indeed, «[i]t seeks to remedy a situation whereby people can be injured in the course of their employment, can be awarded compensation by the courts against their employer and yet not receive that compensation, because the employer does not have the necessary resources»[781].

To this end, it provides an obligation on employers to insure against the possibility of incurring such liability, «something responsible businessmen normally do as a matter of prudence to put it no higher»[782].

The Georgian law is very similar to the "civilian" legal systems analyzed above. In fact, in article 843, para 1, the legislator uses the wording – if the insurer is completely or partially freed from the duty to the

780 A. Cohen & R. Dehejia, *The Effect of Automobile Insurance and Accident Liability Laws on Traffic Fatalities*, J. L. & ECONOMICS, 2004, p. 361. Revised to comply with European Directives and developments and more recently the *Road Safety Act* 2006 has inter alia introduced measures designed to assist with the enforcement of compulsory motor insurance. See, P. Tortorano, *Art. 801*, in this Commentary.

781 D. Watkins; *H.C. Deb.*, Vol. 786 col. 1807, 1969. The scheme adopted is «modelled on the earlier Road Traffic legislation in that the employer is required to take out a liability insurance policy, the terms of which are subject to statutory control, covering potential liabilities to employees, but does so in a more confined way: it is confined to personal injuries, subject to a financial cap, without any fallback by way of uninsured employers and involves far less statutory control». P. Tortorano, *Art. 801*, in this Commentary.

782 R. C. Simpson, *Employers' Liability (Compulsory Insurance) Act 1969*, MODERN L. REV., 1972, p. 65. See also, B. Barrett, *Is the Employers' Liability (Compulsory Insurance) Act 1969 Fit for Purpose*, INDUTRIAL L. J., 2016, pp. 503-524.

policyholder. Accordingly, the third party's interest is protected regardless of the extent of the insurer's liability to the policyholder[783].

The second paragraph of the article in comment refers to the use of recourse claims by the insurer. In particular, if the insurer meets the third party's claim, this claim against the insured is transferred to the insurer. Accordingly, the prerequisite for the use of the retroactive claim by the insurer is the satisfaction of the claim of the third party. Only then can the insurer use the recourse claim against the policyholder. With such a reservation, the legislator aims to prevent unjust enrichment of the insurer[784].

Regression should be distinguished from subrogation, which the legislator systematically regulates in the property insurance section. During subrogation, the creditor changes in the obligation-legal relationship and, accordingly, the right is transferred from one person to another (from the policyholder to the insurer). This time. At the time of regression, a new right arises[785].

At this point, the concrete obligation-legal relationship is completed and a new obligation arises[786].

783 K. Iremashvili, *Art. 843*, in *Online Commentary on the Civil Code*, available at https://gccc.tsu.ge/. Last visited August 24, 2022.

784 *Ibid*. In the case of motor vehicle liability insurance, the right of recourse is logically granted to the insurer in the event that the policyholder caused the damage intentionally. Otherwise, the use of such a claim by the insurer when causing damage within the scope of the insurance coverage would contradict the purpose of the liability insurance itself. This may be seen also in relation to the article 839 of the Georgian Civil Code.

785 N. Niavadze, *Subrogation and recourse in insurance law, comparative legal analysis*, cit., p. 28.

786 K. Iremashvili, *Art. 843*, cit.

Chapter VII

HEALTH INSURANCE

1. General comparative overview

The source of legal regulation of health insurance contract is represented by the Georgian Civil Code which on the one hand, «defines principles of contractual relationship and on the other hand, contains the separate set of regulatory norms for insurance contract. Articles 799 to 858 determine guiding principles for insurance contracts on a general level, as well as on examples of individual types of insurance»[787].

The Civil Code does not separately regulate health insurance contract. Accordingly, the latter is covered both by general principles of contract law, and rules determined by regulatory norms of insurance contract.

Parties of health insurance contract are the insurer, represented by the insurance company and the insured, represented by physical or legal entity. The insurer «presents the terms and conditions of health insurance contract to the consumer. The latter gets acquainted with them and makes a decision to enter or not to enter the contractual relationship. By declaring preparedness for the agreement, the parties express their will to get legally bound by the contract. The contract is made between the parties on a basis of two reciprocal wills»[788].

The transfer of health risk – in the sense of transforming an individual risk into a collective risk – is implemented by means of a "socially typical contract", which is widespread in the practice of the insurance market. After all, the consideration that, in the turn of time, the individual may face situations of need dictated by personal injury (accident) or alteration of physiological state (illness) is incontrovertible statistical observation[789].

The health insurance model is based on individuals signing up, of their own free will, for an insurance package that will shelter them from medical expenses. Once the premium is paid, the insured has peace of mind that the expenses he or she incurs to receive health care will be reimbursed by the insurance company.

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787 K. Iremashvili, *The characteristics of legal regulation of health insurance*, in *Journal of Law*, Ivane Javakhishvili Tbilisi State University, 2011, no. 2, p. 46.

788 *Ibid*.

789 F. Sartori, *Appunti sulle assicurazioni infortuni: funzione indennitaria e vantaggi compensativi*, GIUST. CIV., 2019, p. 814.

It is not necessarily the case that the latter will reimburse all the medical expenses actually incurred; in fact, individual policies may include restrictions of various kinds: they may provide deductibles, maximums, or forms of cost-sharing; certain categories of services may be excluded from reimbursement, just as limitations may be placed on the choice of doctor or facility at which to receive treatment. Theoretically, each individual citizen – based on his or her financial availability, health status, and risk appetite – can agree with his or her insurance company on a tailored policy[790].

Those who decide to take out health insurance can choose from a plurality of competing private insurers. The insurers may consist of for-profit insurance companies, or nonprofit entities and funds[791].

In the former case, the premium is likely to be risk rated, that is, calculated on the individual risk of the individual underwriter[792].

Nothing prohibits nonprofit insurance companies from also calculating premiums based on individual risk, but they often prefer "community-rated" or "group-rated" insurance premiums. Premiums are called group-rated when they are uniform for all workers belonging to the same company or occupational category. In contrast, premiums are called community-rated when they are the same for all residents in a given geographical area[793].

Regardless of how the premium is calculated, the insurance model is based on the principle of redistribution of risk (risk pooling) among policyholders[794]: the expenses of those who fall ill are also paid for through the premiums of those who remain healthy[795].

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790 F. Toth, *Non solo Bismarck contro Beveridge: sette modelli di sistema sanitario*, RIV. IT. POL. PUBBL., vol. 11, n. 2, 2016, pp. 281-283.

791 See, on this point, E. Mossialos & S. Thomson, *Voluntary health insurance in the European Union*, Copenhagen, 2004.

792 H. Rothgang, M. Cacace, S. Grimmeisen, C. Wendt, *The changing role of the state in healthcare systems*, EU. REV., vol. 13, suppl. n. 1, 2005, pp. 191-192. See also OECD, *Proposal for a taxonomy of health insurance*, Organisation for Economic Cooperation and Development, Paris, 2004.

793 On this perspective E. Mossialos & A. Dixon, *Funding health care: an introduction*, in E. Mossialos, A. Dixon, J. Figueras, J. Kutzin (eds.), *Funding health care: options for Europe*, Buckingham, 2002, pp. 1- 30.

794 See J. Kutzin, *A descriptive framework for country-level analysis of health care financing arrangements*, in *Health Policy*, 2001, pp. 171-204; P. Hussey & G. F. Anderson, A comparison of single – and multi-payer health insurance systems and options for reform, *Health Policy*, 2001, pp. 215-228.

795 This thesys is supported by N. Dirindin & P. Vineis, *Elementi di economia sanitaria*, Bologna, 2004.

Liability insurance potentially constitutes, as is well known, an instrument of enormous utility in pursuing and achieving the goals identified by the legislature when it defines limits and scopes of liability in certain professional or market sectors.

It is now an accepted principle-even by those who do not fully recognize themselves in the theories of the economic analysis of law-that through the rules governing the civil liability of certain subjects it is possible not only to achieve a balancing of conflicting interests, but also to guide behavior in terms of preventing or managing risks that are socially accepted because they are useful, but sources of liability when not properly assessed or managed by those who benefit from their introduction into society[796].

It should be clarified, *in limine*, that the insurance contracts that may be relevant in this context (*id est*, abstractly affected by digitization) as they can be traced within the unitary notion of "health insurance" are multiple[797]: (i) accident and/or illness insurance (so-called personal injury insurance), by which the insurer assumes the obligation to provide a sum of money – predetermined in a lump sum – in the event that the insured suffers a psychophysical injury and/or is affected by a morbid state that causes his or her death, permanent disability or temporary disability; (ii) medical or health expense insurance, which guarantees the mere reimbursement of expenses incurred by the insured to cope with the event affecting his or her health, provided they can be documented; (iii) the so-

796 On tort liability as a tool for implementing "deterrence" policies through the cost of claims G. Calabresi, *Optimal Deterrence and Accidents*, cit., p. 656 who states that the general prevention – or market method – makes use of two techniques to arrive at cost reduction. The first, and most obvious, is to encourage safer activities. Some of those who would in-take a relatively risky activity if its cost did not also reflect the cost of related accidents, prefer to target a safer activity if its cost also reflects the cost of related accidents instead. The second technique, perhaps the most important, that market control uses to affect the cost of claims is to encourage the reduction of the danger inherent in certain activities.

797 For an in-depth analysis of the rule of insurance companies in the health sector see S. Landini, *Il ruolo delle assicurazioni nella salute*, DIR. SAL., 2017, p. 88 ff; M. Gagliardi, *Salute e assicurazione: il diritto delle assicurazioni in campo sanitario*, RIV. IT. MED. LEGALE, 2015, p. 1321 ff. On the operation of insurance companies in the area of integrative health care and the different forms in which it takes place, see extensively E. Piras, *Fondi sanitari integrativi e società di mutuo soccorso: le nuove frontiere della sanità integrativa*, RESP. CIV. PREV., 2016, p. 1870 ff.

called Long Term Care (*breviter* LTC)[798] insurance, by which long-term care is guaranteed to the insured in case of non-self-sufficiency due to illness, accident or senescence[799].

All of the contractual cases mentioned – among which the most popular and discussed are undoubtedly the former – are united by the purpose of guaranteeing the insured against occurrences apt to procure him an impairment of psycho-physical integrity and, therefore, to compromise his health[800].

This type of insurance was understood, especially in the past, as health insurance and, in particular, was defined as that contract which covers the insured against the economic consequences arising from a state of illness that impairs the ability to attend to ordinary occupations, resulting in medical/pharmaceutical treatment, specialized analyses, hospitalization in nursing homes, surgery, nursing care or care of family members, loss of earnings during the infirmity[801].

Health insurance finds, like other branches of insurance, its origin in so-called "friend societies", mutual aid associations. In the beginning it had development in England, in the last century in the USA, later, after World War I, in Germany and more recently in France[802].

As for Italy, it had some hint of development in the 1930s but then virtually disappeared after the war, swamped by the rise of the various social insurances.

Only recently has this branch of insurance enjoyed exceptional development, unforeseeable considering the little interest shown by the insur-

798 L. Di Nella, *Le assicurazioni per il rischio di non autosufficienza. Modelli e tutele*, in G. Cavazzoni, L. Di Nella, L. Mezzasoma, F. Rizzo (a cura di), *La tutela del consumatore assicurato tra codice civile e legislazione speciale*, Naples, 2012, p. 217 ff; L. Gremigni Francini, *Assicurazioni sanitarie e prestazione diretta di assistenza: il caso delle polizze long term care*, in P. Corrias & G. Racugno, *Prestazioni di facere e contratto di assicurazione*, Milan, 2013, p. 39 ff; L. Gremigni Francini, *Tutela degli anziani ed assicurazioni per l'assistenza di lungo periodo alla luce dei diritti fondamentali*, in G. Comandè (a cura di), *Diritto privato europeo e diritti fondamentali (Saggi e ricerche)*, Turin, 2004, p. 213 ff; D. De Strobel, *Le assicurazioni per il rischio di non autosufficienza Long Term Care. I profili giuridici*, DIR. ECON. ASS., 2004, p. 147 ff.

799 A. Camedda, *La digitalizzazione del mercato assicurativo: il caso della Digital Health Insurance*, RIV. DIR. BANC., 2018, pp. 569-570.

800 P. Corrias, *Il contratto di assicurazione: profili funzionali e strutturali*, cit., p. 57.

801 See E. Bonvicini, *L'assicurazione facoltativa infortuni e malattie*, Milan, 1983.

802 G. Umani Ronchi & G. Bollino, *Alcune puntualizzazioni in tema di assicurazioni per il rimborso spese sanitarie*, RESP. CIV. PREV., 2000, pp. 521-522.

ance market and the extensive protection offered in this area, at least in theory, directly by the state[803].

In Italy, social health insurance had been managed, prior to the advent of the National Health System, by a plurality of public bodies generally endowed with institutional autonomy, with different names, but with a similar function, centered on ensuring the provision of health benefits to workers and their families in case of illness. These benefits included: direct assistance, with the administration of the necessary therapeutic prescriptions to the sick person; indirect assistance, by means of reimbursement of the treatment expenses borne by the assisted person, in the manner and in the measures established for that purpose; and sick pay (for workers), in the case of lost wages due to illness[804].

The risk, therefore, was very broad, encompassing any benefit-generating event, so much so that social insurance protection also covered purely subjective situations with the payment of benefits even for those who thought they were sick without being sick! Moreover, an understandable difference from private care, all individuals were assisted, regardless of their health status[805].

Thus, in 1978, with the establishment of the National Health System carried out by Law No. 833 of December 23, 1978, there was a shift to a single form of assistance for all citizens, centralized, managed by the state in collaboration with the regions and other local authorities, which, in their autonomy, must comply with the provisions of the national health plan, which, in turn, establishes the general guidelines and the modalities for carrying out the institutional activities of the National Health Service[806].

In fact, such harmony of purpose has been emphasized, to say the least. Suffice it to consider how the very backbone of all planning and organizing activity of the Health Services, the National Health Plan, has had a genesis that has not yet been adequately fulfilled. The entanglement and ambiguity of the functions for which it is intended lies in what it should be by its nature and what it is intended to be by its charisma, in

803 *Ibid*.

804 P. Corrias, *Il contratto di assicurazione: profili funzionali e strutturali*, cit., pp. 58-59.

805 G. Umani Ronchi & G. Bollino, *Alcune puntualizzazioni in tema di assicurazioni per il rimborso spese sanitarie*, cit., pp. 521-522.

806 Art. 53, Law No. 833 of 1978.

its peremptoriness but simultaneously in its legislative elusiveness, in the polymorphism of its perspective. In simplistic terms it is everything but also it's double and that is nothingness[807].

The ambitious program preconceived with the establishment of the National Health System constitutes in theory and in power a cutting-edge initiative among all civilized countries on the subject of public health protection, but it is equally true that on the proof of the facts it has proved utopian, there existing an obvious gap between a project endowed with such polyvolumetric functionality and the real public and health operational structures as well as the reduced economic availability of the state unable to control its own spending[808].

The health insurance policy is thus an insurance product that did not seem to have a place with the implementation of the National Health System precisely in view of the purposes of social security (downsized over time to a more feasible form of "social protection") in the management of the citizen's health protection in deference to the Constitutional dictate[809].

It is no coincidence that in the Constitution there is an explicit legitimization of private health protection when (Art. 46) it is stated verbatim that voluntary mutuality is free despite not being able to benefit from any contribution or financing by the State since the same rule states that mutual insurance companies freely established for the provision of services supplementary to the health care provided by the National Health System will not be able to benefit from any contribution or financing by public bodies, enterprises or companies[810].

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807 G. Bolino, *Sanità, sei anni di vita stentata*, in *Oggi e domani*, 1984, p. 5 ff.

808 G. Umani Ronchi & G. Bollino, *Alcune puntualizzazioni in tema di assicurazioni per il rimborso spese sanitarie*, cit., pp. 522-523.

809 See articles 32 and 38 of the Italian Constitution.

810 G. Umani Ronchi & G. Bollino, *Alcune puntualizzazioni in tema di assicurazioni per il rimborso spese sanitarie*, cit., p. 523. Indeed, as already pointed out by one of the author in another contribution (G. Umani Ronchi, *Le polizze integrative del sistema sanitario nazionale*, in *Jura Medica*, 1990, p. 69 ff), the legislator's ambitious plans have been matched by a general dissatisfaction with the services offered by public health care with its inadequate facilities, notorious bureaucratic difficulties, long waits for various examinations and hospitalizations, the introduction of onerous health care tickets, and more generally the overall expiration of the quality of health care services offered, sometimes bordering on the dignity of the sick. Not to mention, then, the public irritation and distrust engendered by the non-transparent politicization of the management of Local Health Units (and the current Health and Hospital Boards), the lack of expertise at the management level, and the squandering and misuse of the certainly not meager economic resources allocated to the health sector. Hence, private insurance has emerged over the

From a purely legal point of view, it should be emphasized that health insurance is an indemnity type of insurance (insurance against damages) which, however, finds its central element in a fact pertaining to human life (illness event) and therefore, as is the case with accident policies, we are faced with an "atypical" form of insurance that escapes the rigid dichotomous approach provided by the Civil Code[811].

Similar to accident insurance, it can be said that it is a form of insurance of persons against damages as also expressed by the Supreme Court[812].

In this regard, however, the same adjudicative body has subsequently held – aligning itself with the dictates of legal doctrine – that, similar to accident insurance, optional sickness insurance is part of a tertium genus of insurance subject to the general rules contained in Sect. I, Chapter XX, Civil Code and, by analogy, to the rules of Sects. II and III that are compatible with its structure and function[813].

In the context of health insurance, two different species of insurance protection are brought together under one name: that of reimbursement proper (reimbursement insurance) and the other of daily allowance (*per*

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years for the reimbursement of treatment expenses in the case of injury or illness, which, as they have evolved, are moving from being forms of supplement to the National Health System to true forms of substitution for public health care, including, for example, expenses for preventive and control clinical investigations or for the treatment and social recovery of states of alcoholism or drug addiction, or compensation for loss of profit due to temporary disability resulting not only from illness but also from maternity.

Private protection has ultimately found ample room for maneuver and considerable scope for expansion, supplementing – and in some cases replacing – the quantitative (and even more so the qualitative) activity provided by the National Health System, realizing the democratic principle of freedom of choice on the part of the citizen, without conflict with the state but, on the contrary, with mutual comfort and satisfaction. On this point G. Bernardini, *L'assicurazione privata contro le malattie, tipi di coperture e relativi contenuti*, in *Atti XI Convegno dell'Associazione Italiana di Medicina dell'Assicurazione Vita*, Bologna, 1985.

This is in accordance with the fact that, according to article 32 of the Constitution, the state is committed to safeguarding the right to health protection and not the right to health, that is, to implement social "protection" and not an impractical, utopian and unrealizable social "security". Thus, the state has the sole obligation to implement the proper safeguards for the health-prevention of disease and preservation of the state of health (or well-being of its citizens, guaranteeing free treatment and rehabilitation only for the indigent. H. Recine, *Prospettive future delle assicurazioni private nell'ambito della tutela della salute*, in *Jura Medica*, 1990, p. 107 ff.

811 G. Umani Ronchi & G. Bollino, *Alcune puntualizzazioni in tema di assicurazioni per il rimborso spese sanitarie*, cit., pp. 523-524.

812 Cass. civ., March 2, 1956, n. 628.

813 Cass. civ., June 21, 1971, n. 1941.

diem insurance). In fact, in this kind of insurance, the loss is represented by the expenses of treatment (loss of earnings) or loss of earnings (loss of profit) due to temporary cessation of work, caused by illness[814].

The interest in this insurance is given precisely by the insured's desire not to have to bear the health expenses made necessary by the onset of a state of illness. Thus, the purpose of this type of insurance comes to coincide with the protection of an indeterminate part of the insured's assets, unlike in accident insurance where the interest to be protected is represented by the individual's ability to work standardized on an abstract – but statistically precise and valuable for actuarial logic – prototype such as that of the average of all possible work activities[815].

An interesting peculiarity concerning health expense reimbursement insurance is that which concerns the determination of the amount of compensation payable by the insurer: in all property and casualty insurance, both the frequency of claims and their magnitude are completely removed from the determination of the insured. In health care reimbursement insurance, things are different. In fact, having taken out the policy and set the relevant maximum amount, upon the occurrence of the generating event, the insured may also invest the entire amount provided for in the contract, making use, for example, of a particular health facility rather than another, availing himself of the work of one surgeon rather than another. The expense is thus determined by subjectivity, a criterion unknown, indeed denied, in any other form of insurance[816].

To obviate this only partially determinable and predictable element, companies often include a clause in the policy whereby the insured can avail himself of any health care facility, as long as it is included in a special list of agreements between the same company and a set of health care facilities of known cost[817].

On the other hand, it is not believed that the criterion of free choice on the part of the insured, a typical and qualifying characteristic of this form of insurance, can validly be substituted for the criterion of circum-

814 G. Umani Ronchi & G. Bollino, *Alcune puntualizzazioni in tema di assicurazioni per il rimborso spese sanitarie*, cit., pp. 523-524.

815 *Ibid*. The assessment of interest is, however, more actual than lump-sum, since it is a contract that aims to reinstate the insured from economically unfavorable events, usually easily quantifiable, related to the onset of an illness.

816 *Ibid*.

817 P. Corrias, *Il contratto di assicurazione: profili funzionali e strutturali*, cit., p. 59 ff.

scribing the choice among health care garrisons whose cost is contained within precise limits, because doing so would most likely undermine the favorable expansion process of this type of insurance[818].

Considering as stated insofar, the Georgian law has been amended recently with the provision of the Chapter related to the Health Insurance – chapter of the Civil Code (Chapter Twenty), similar to damage insurance, life insurance and accident insurance.

It should be noted that from January 1, 2017, the services defined by the "State Program of Universal Health Protection" cannot be used by persons with private insurance. This caused some problems in receiving medical services. In practice, insurers refer to the rules governing damage insurance, which exclude their liability in certain cases.

According to Article 829 of the Civil Code of Georgia, the insurer shall be released from liability if the policyholder causes the event covered by the insurance by intent or gross negligence. Although this clause is defined in the property damage chapter, insurance companies often invoke this clause in health insurance cases. Also, they avoid defining in the contract insurance cases for gross negligence, especially when it comes to the purchase of insurance services by state agencies. Consequently, the citizen may be vulnerable, because the private insurance will not compensate it for such cases.

The existing problems show that, especially in cases where it concerns human life and health, it is necessary to define the relevant norms by legislation and to minimize the possibility of misuse of norms by insurers.

With the proposed changes, Subchapter III[1] will be added to the twentieth chapter of the Civil Code, which will regulate the relationship related to health insurance and determine the norms to be applied in relation to this relationship. This excludes the possibility of the insurer misapplying the law and compensating the insured for the relevant expenses under the terms stipulated in the contract.

The purpose of the draft law is to ensure the guarantees of the right to life and health of a person in the case of insurance relations by legal regulations and to solve the existing problems in practice.

With the draft law, such an important type of insurance as health insurance will be introduced and regulated in the Civil Code, and the fun-

818 G. Umani Ronchi & G. Bollino, *Alcune puntualizzazioni in tema di assicurazioni per il rimborso spese sanitarie*, cit., pp. 524-525.

damental issues regulating it will be defined. Also, the norms that can be used in connection with the health insurance contract are defined.

In the first article, 843[1] it is provided that «[u]nder a health insurance contract, an insurer shall reimburse for the treatment expenses connected with the deterioration of the health status or the health injury of an insured person, and other medical service expenses agreed upon under this contract in accordance with the procedure and conditions established by the same contract». The second paragraph adds that «[a] health insurance contract may be concluded by a policyholder in favour of an insured person». The scope and content of this article are determined within the scope of the given type of insurance. In the proposed formulation, health insurance covers both the costs of deterioration of its condition and injuries and other types of services. With such a broad formulation, the consumer's right to exercise the right to health care is defined and protected, to enjoy the unlimited possibilities defined by the law.

The establishment article 843[2], titled "assertion of a claim for damages against a third party", is justified both for one of the principles of insurance, the prevention of unjust enrichment, and for the implementation of the fundamental principles of civil legislation (taking into account the punitive purpose of tort law). A similar arrangement is recognized by the Civil Code under article 832. The possibility of using the right of subrogation in relation to life insurance is considered different (unjustified) by Georgian judicial practice. In order to avoid ambiguity in the case of health insurance as a type of personal insurance, the said right of the insurer in the health insurance section should be strengthened. In the case of health insurance, strengthening the possibility of using the insurer's right of subrogation at the legal level increases their motivation to work on health insurance products and increase their volume, which in turn serves to protect the interests of the consumer.

Finally, article 843[3] provides that only articles 820 and 821 of the Civil Code out of the damage insurance standards shall apply to health insurance. The purpose of the norm is to strictly define the scope of the norms regulating health insurance. It eliminates the wrongful and vicious practice of insurance companies to use the analogy of the law to property damage to deny compensation.

Considering as stated above, the definition of the extent of insurance coverage has particular importance in the process of agreement on the

conditions of health insurance contract. Insurance coverage denotes the list of medical services, expenses of which will be reimbursed by the insurance company. In addition, it implies exclusion clauses as well, *e.g.* «list of medical services that are not subject to compensation from the side of the insurer. Clear and precise wording of above-mentioned conditions by the insurer and their complete and adequate comprehension by the insured are equally important»[819].

In the settings of market economy and freedom of contract, insurance companies are not limited in their right, to establish the list of medical services, compensation for which is in their own interests.

Moreover, on an example of Georgian insurance practice, «most of the time, insurance companies themselves define medical institutions, where the insured is supposed to receive certain types of medical care. At a first glance, above-mentioned does not create a problem, since insurance company, as profit-oriented subject of private law, can determine itself the price and conditions for the product it sells. It is important for the consumer, to get carefully acquainted with the contents of the offered contract and make a decision on signing the contract only after thorough analysis of conditions of insurance coverage and exclusion clauses»[820].

The consumers are free in their choice. They become legally bound by contractual obligations only after signing the contract, which takes away their right to make claims regarding certain terms of the contract.

According to the agreement made between the insurer and the insured, «medical care expenses related with the health of the insured will be covered. Human health, in its turn, is complex and unpredictable category and the insurer is naturally interested in precise definition of its own responsibility»[821].

The insurer cannot take over obligation to cover expenses of any kind of medical care related to the health of the insured. In such case, ensuring financial planning and control of assets and expenses by the insurer would be impossible. Therefore, precise definition of insurable events is necessary.

819 K. Iremashvili, *The characteristics of legal regulation of health insurance*, cit., p. 48.

820 *Ibid*.

821 *Ibid*.

2. The personal injury insurance policy

The personal injury insurance contract, in particular, as a moment of explication of private insurance activity[822], has its origins in distant contexts and developed under the relentless drive of the processes of change in industry in United Kingdom, which is accompanied by the exponential growth of occupational injury risks and accidental misfortunes related to modern transportation and travel techniques[823].

The scheme, in its essential frame, traces the figure of personal accident insurance, *i.e.*, that policy which «provides a fixed compensation in the event of injury, disability or death caused solely by violent, accidental, external and visible events»[824].

Hence the subsequent establishment of the model, with epidemic effect, due to the complex of public policies that have gradually eroded, even in continental experiences, the figure of the welfare state, in its objective here limited to providing security to individuals and families in the presence of adverse events, such as disability and illness[825].

In Italian law, despite its long-standing application practice and increasing diffusion in the present, the personal injury insurance contract has not found a definitive place in insurance law. In this regard, it should be immediately pointed out that the legislative framework represents only one of the possible sides of the problem's emergence. Which does not at all come to diminish the importance of the issue, which winds around the

822 In fact, the reference is to accident insurance provided by private insurers and not, on the other hand, by public bodies, nor to compulsory private insurance – for one's own benefit or for the benefit of others – provided *ex lege* for the exercise of certain activities.

823 Certain importance can be attributed precisely to the mechanization of labor and the changes in transportation and travel techniques with the appearance of the steam engine. Which explains the emergence of premium accident insurance on an industrial scale precisely in the rail transportation sector. Primogeniture is attributed to the *British Railway Passengers Assurance Company* in 1848. For a historical reconstruction see, among others, H. J. Hastings, *The History and Development of Personal Accident and Sickness Insurance*, London, 1922; W. A. Dinsdale, *History of Accident Insurance in Great Britain*, London, 1954; B. Supple, *The Royal Exchange Assurance: A History of British Insurance (1720-1970)*, New York, 1970. Some notes, on the Italian front, in M. Franzoni, *Diritto delle assicurazioni*, Turin, 2016, p. 130 ff.

824 See generally E. R. Hardy Ivamy, *General Principles of Insurance Law*, London, 1966.

825 F. Sartori, *Appunti sulle assicurazioni infortuni: funzione indennitaria e vantaggi compensativi*, cit., pp. 813-814.

sparse discipline of Chapter Twentieth of Book Four of the Civil Code and the provisions – few in number for the importance of the phenomenon, there is no one who does not see - dedicated to the subject by the Private Insurance Code[826].

The first profile, which comes up, relates to the placement of the contract within the framework of the bipartition between non-life insurance and life insurance, according to the binary scheme of Article 1882 of the Civil Code. The framing is, therefore, in the furrow of the industry's operating territory and charges the company's obligation with different intensity. In fact, to recompense the insured, within the agreed limits, for the damage caused to it by a loss, or to pay a lump sum or annuity upon the occurrence of an event pertaining to human life[827].

On closer inspection, the common law rules do not provide decisive insights in the absence of an independent regulation of the type and a mere reference under Article 1916 of the Civil Code to the institution of subrogation also to insurance against accidents at work and accidental misfortunes. Without thereby clarifying whether the reference confirms or denies, by rule exception, the non-life insurance nature of the type under consideration. If accident and accidental misfortune insurance were non-life insurance, there would be no justification for the need for a redundant reference to the phenomenon of succession from the active side of the obligatory relationship. On the other hand, however, the extension to the contractual case of a provision with a patent indemnity function pushes in the direction of the opposite carrier[828].

Uncertainties and ambiguities that seem to drag on since the enactment of the 1942 Code. For the preliminary draft expressly included it in insurance on the vicissitudes of human life, only to favor a choice of reticence[829].

To sweep away any possible, hypothetical doubts in this regard, the sector legislator in the classifying exercise included in the "non-life class" accidents.

826 *Ibid*.

827 *Ibid*.

828 *Ibid*.

829 The reasons would be related to a precise ideological choice. That is, to encompass the value of the person, on the insurance side, in a conception of the damage (suffered by the insured as a result of the accident as article 1905 of the Civil Code states) clinging only to the logic of the individual's earning capacity. See U. Izzo, *La "giustizia" del beneficio. Fra responsabilità civile e welfare del danneggiato*, Naples, 2018, p. 226 ff.

In this sense, having overcome the idea of the intrinsic inestimability of personal injury, accident insurance comes to be characterized by its indemnity nature, insofar as it is functional to compensate for the unfavorable consequences of the harmful event. Nor does the notion of damage in article 1882 of the Civil Code seem to stand in the way of the envisaged view, since article 1908, para. 2, provides for the possible conventional, advance, lump-sum determination of the insured interest and its injury (so-called "estimated policy")[830].

Following these stimuli, starting in the 1960s, the jurisprudence of legitimacy initiates a "granular" process that – around the fundamental pivot of the mere "affinity" of accident insurance with life insurance – moves in the latitude of the disapplication *à la carte* of the relevant discipline. In moving down to the concrete, one disapplies article 1924 of the Civil Code in favor of article 1901 Civil Code, on the subject of non-payment of premium[831].

The regime of article 1926 Civil Code for changes in the insured's profession or activity is excluded[832]. Conversely, the regulation of the consequences of willful or negligent omission of the obligation to give notice under Article 1915 Civil Code (*i.e.*, loss or reduction of the right to indemnity) applies[833]. The insurer's debt is then considered to be of value and not currency on the assumption of the indemnity nature of the payment[834], and so on.

Such a procedure is thus functional in the pursuit of collective welfare. Fair and reasonable protection is ensured in the individual con-

830 G. Volpe Putzolu, *L'assicurazione privata contro gli infortuni (nella teoria del contratto di assicurazione)*, cit., p. 159. See also A. Gambogi, *"Cave a consequentiariis": la "identificazione" tra contratto di assicurazione privata contro gli infortuni e contratto di assicurazione sulla vita*, ASSICURAZIONI, 1969, p. 234 ff; N. Gasperoni, *Le assicurazioni*, cit., p. 155 ff; E. Bonvicini, *Assicurazione facoltativa infortuni e malattie*, cit., p. 285 ff. Other part of the doctrine holds, however, that accident insurance falls under a *tertium genus* contractual. Above all E. Pasanisi, *L'assicurazione infortuni nella disciplina legislativa del contratto di assicurazione*, ASSICURAZIONI, 1962, p. 361 ff.

831 *Inter alia*, Cass. civ., November 13, 1964, n. 2735, FORO IT., 1964, I, c. 1915; Cass. civ., Ocober 19, 1967, n. 2551, GIUST. CIV., I, 1968, p. 267 ff; Cass. civ., May 25 1971, n. 1526, FORO IT., I, c. 1892.

832 On this point, Cass. civ., November 27, 1979, n. 6205, ASSICURAZIONI, II, 1981, p. 106 ff, with note by M. Antinozzi.

833 Cass. civ., March 4, 1978, n. 1078, GIUST. CIV., I, 1978, p. 1314 ff.

834 See Cass. civ., May 3, 1986, n. 3017, Giust. Civ., I, 1986, p. 2831 ff; Cass. civ., January 26, 1988, n. 661, GIUST. CIV., Mass. 1988, p. 1 ff.

crete case, freeing itself from a conception of damage clinging only to the logic of the individual's earning capacity[835]. It contributes, from the perspective of deterrence, to ensuring effectiveness to the constitutional precept that recognizes the right to health as a fundamental right of the individual[836].

Comparative evidence also seems to confirm that the application of cumulation in the area of accidental misfortune actually depends on choices of fairness, reasonableness and public policy. In the famous English precedent *Bradburn v Great Western Railway Co. 1874* it is established that the victim of a railroad accident is entitled to damages from the railroad company without any deduction of the compensation received from the insurance company. The argument is technical and develops around the well-known collateral source rule[837]. But, on closer consideration, the Court does not hesitate to clarify that the conclusions meet the realistic goal of guaranteeing the injured party «a fair, reasonable and just compensation», since «the common law has treated this matter as one depending on justice, reasonableness and public policy».

Even leaving aside the jurisprudential formant, the English system has always treated the issue of "recoupment" as a "political", social protection issue. Thus, it is possible to read in the *Beveridge Plan*, named after the founding father of the welfare state, that «[a]n injured person should not have the same need met twice over. He should get benefit at once without prejudice to any alternative remedy, but if the remedy in fact proves to be

835 U. Izzo, *La «giustizia» del beneficio. Fra responsabilità civile e welfare del danneggiato*, cit., p. 226 ff.

836 F. Sartori, *Appunti sulle assicurazioni infortuni: funzione indennitaria e vantaggi compensativi*, cit., p. 829.

837 Verbatim, «[w]hat in a given case is, and what is not, "collateral"? Insurance affords the classic example of something which is treated in law as collateral. Where X is insured by Y against injury which comes to be wrongfully inflicted on him by Z, Z cannot set up in mitigation or extinction of his own liability X's right to be recouped by Y or the fact that X has been recouped by Y. Bradburn v Great Western Ry Co […]. There are special reasons for this. If the wrongdoer were entitled to set-off what the plaintiff was entitled to recoup or had recouped under his policy, he would, in effect, be depriving the plaintiff of all benefit from the premiums paid by the latter and appropriating that benefit to himself». The issue of the cumulation rule then came to be declined in light of the regular payment of insurance premiums as the counterpart of the indemnity payment. See, for example, *Hussain v New Taplow Paper Mills Ltd* [1988] AC 514; *Hodgson v Trapp* [1989] AC 807; *McCamley v Cammell Laird Shipbuilders Ltd* [1990] 1 All ER 854; *Page v Sheerness Steel PLC* [1996] PIQR Q26.

available, he should not in the end get more from the two sources together than he would have got from the one source alone»[838].

But it is a matter, the point is essential, of state benefits as it has been prescribed by successive legislative interventions over time. The *Social Security Recovery of Benefits Act* of 1997, as subsequently amended, thus introduces an elaborate mechanism for recoupment by the Secretary of State of those benefits obtained by the victim of an accidental misfortune: «[a] person who makes a compensation payment in any case is liable to pay to the Secretary of State an amount equal to the total amount of the recoverable benefits»[839].

To have the effect, the tortfeasor must reimburse the state for the sums incurred by the administration (the so-called specific damages[840]), in order to facilitate solidaristic interventions[841].

On the other side of the Atlantic, the basic approach does not change.

The principle of the collateral source rule-which originates from an 1854 New York Supreme Court precedent, *The Propeller Monticello v Mollison*[842] – is based on technical arguments, which preclude the operation of the "law of releases" in the relationship between insurer and injured party[843].

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838 F. Sartori, *Appunti sulle assicurazioni infortuni: funzione indennitaria e vantaggi compensativi*, cit., p. 829.

839 Section 6 (1). The text may be consulted at the website http://www.legislation.gov.uk/ukpga/1997/27/contents. Last visited September 1, 2022.

840 F. Sartori, *Appunti sulle assicurazioni infortuni: funzione indennitaria e vantaggi compensativi*, cit., pp. 829-830. The list of benefits subject to recoupment is limited in number and is the subject of meticulous and peremptory legislative listing, which contains, for example, work disability benefits, disability pensions, benefits related to incapacity status, income contributions, mobility allowances, welfare benefits, etc.

841 *Ibid*. It should also be noted that what is known as private first party insurance, which includes personal accident insurance, is excluded from this procedure, for which the rule of cumulation of insurance indemnity and damage compensation applies.

842 *The Propeller Monticello v Mollison*, 58 U.S. 156, p. 1854 ff. The case involved the sinking of a vessel and its cargo by a steamer in the waters of a lake in New York State. The shipowner, after receiving indemnity from his own insurance company, made a claim against the steamer's owner, who promptly objected to his release by operation of the law of releases.

843 The literature on this point is vast. See, above all, W. Schwartz, *The Collateral Source Rule*, B.U.L. REV., 1961, p. 348 ff; D. Fellman, *Note: Unreason in the Law of Damages: The Collateral Source Rule*, HARV. L. REV., 1964, p. 741 ff; J. W. Peckinpaugh Jr., *An Analysis of the Collateral Source Rule*, INS. COUNS. J., 1965, p. 32 ff; L. R. West, *The Collateral Source Rule Sans Subrogation: A Plaintiff's Windfall*, OKLA. L. REV., 1963, pp. 395-397; J. G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, cit., pp. 1478-1485; J. G. Fleming, *Collateral Source Rule and Contract Damages*, cit., 1983, p. 56 ff.

In rejecting the exception of the shipowner responsible for the loss, the Court states that «[c]ollateral source rule provides that full compensation can be recovered from the tortfeasor even if payment has already been furnished by a source collateral to the injury, since the collateral source is not a joint tortfeasor. The tortfeasor is not presumed to know, or bound to inquire, as to the relative equities of parties claiming the damages. He is bound to make satisfaction for the injury he has done».

The rule, which comes to be crystallized in the Restatement (Second) of Torts, Section 920A (1979) (55), has been the subject of vibrant criticism, which has led numerous state jurisdictions to modify its framework, by the introduction of numerous correctives that make it less strict and adaptable to the justice of the case. By way of example, evidence of "collateral benefit" is allowed to allow juries to award damages on an equitable basis; or the application of the collateral source rule is precluded where the beneficiary has subrogated and actually exercised a claim against the liable third party. Again, the case is significant, the collateral source rule is disapplied in areas where the conduct of the injurer is not to be suppressed, at least not with particular intensity, for reasons of general interest, as was the case in the context of medical liability[844].

2.1. A contract with unequal terms of bargaining power

A comprehensive analysis of the health insurance contract requires the analysis of those specifics that arise during the agreement on the terms of the contract. In particular, the unequal bargaining power of the parties at the time of the agreement should be emphasized.

Nowadays, people often have no freedom to negotiate on the terms of an agreement. The standardization of contracts in individual areas is associated with one party determining the contract terms, which takes away another party's right to change them. The above is somewhat contradictory to the idea of freedom of agreement[845].

844 F. Sartori, *Appunti sulle assicurazioni infortuni: funzione indennitaria e vantaggi compensativi*, cit., pp. 830-831.

845 The freedom of contract has not always been a legal principle. For many centuries, rights and obligations of a person were determined by his/her birth, family status, belonging to certain tribe and other signs. Legal relationships between people have changed after the basement of economy on labor distribution principle. Since then, people started to define their own personal status by entering individual contractual relationships. See K. Zweigert & H. Kötz, *Introduction to Comparative Law*, translated from the German by T. Weir, 3rd revised ed., Oxford, 1998, p. 325 ff.

In classic cases, contracts between the parties are concluded under equal bargaining power. bargaining power. Current insurance contracts practically exclude this possibility. The insured is free to choose among insurers and various insurance products, but after selecting a specific type of insurance, the right to negotiate on specific terms is limited. As a rule, the insurer presents the insured with a standard contract, prepared in advance for the insured to sign. Of course, the insurer is more experienced and well-trained in understanding the content of insurance terms than the "inexperienced" consumer[846].

Since the consumer is less experienced in the preparation of insurance contracts and interpreting their wording, there is a risk that the insurer will take advantage of the consumer's "inexperience" and that and will tailor the terms of the contract primarily to its own interests. Often important statements in the contract, such as exception clauses, are presented in such a way that the insured may not even notice them unless they pay special attention to them[847].

Freedom of contract is not an absolute category. Its existence is virtually ruled out in cases of economic and social inequality between the parties to the contract. In such cases, it is the stronger party who determines the content of the contract[848].

In the case of health insurance contract, the unequal bargaining power of the parties is often caused by the clear economic priority of one party, which practically imposes the terms of the contract on the other party. For example, due to high demand and low supply of labor, the applicant does not have the opportunity to negotiate. usually does not have the opportunity to negotiate the terms of the contract. The other party may blindly accept the terms of the contract for other reasons, such as: lack of experience, insufficient negotiating skills, or lack of special interests they would like to be considered in the terms of the contract[849].

However, it should be considered that consumers accept the proposed terms without negotiation not only because of the economic priority of the other party. Many times, due to constraints of time, financial resources, or other factors, it is more convenient for the consumer to accept the

846 K. Iremashvili, *The characteristics of legal regulation of health insurance*, cit., p. 53.

847 *Ibid.*

848 *Ibid.*

849 K. Zweigert & H. Kötz, *Introduction to Comparative Law*, cit., p. 331.

standard terms than to enter into negotiations and negotiate for better terms. For example, when a person parks a car in a garage or buys a computer, he or she usually accepts the proposed terms not because he or she is forced to do so, but because the inconvenience of the expense of negotiating or finding an alternative solution outweighs the benefits gained by accepting the proposal[850].

Laws adopted in most European countries since 1960 have been based on the idea of protecting the consumer, as the "weaker" party, from contract terms that were contract conditions tailored to unilateral interests. For a long period, protection from unfair contract terms was implemented only in the Federal Republic of Germany[851].

German courts developed guiding principles for evaluating the fairness of standard contract terms, distinguishing between various cases and certain types of contract terms. As a result, a German judicial law was developed that had no analogues at the time, mainly due to the German courts. In 1977, the General Terms and Conditions Law (AGBG) was adopted[852].

The judicial systems of Austria, Switzerland, France[853] and Italy[854] also consider the protection of the "weaker" party to the contract from unfavorable terms[855].

The issue of the fairness of standard contract terms is also relevant to the English and American legal systems. In this regard, it is worth mentioning the decision of the English Court of Appeal[856], which stated that the more unexpected and unfavorable the contractual condition may be to the party, the more clearly and accurately it must be worded. English courts have actively followed the "*contra proferentem*" principle[857]. In 1977, the Unfair Contract Terms Act was adopted.

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850 *Ibid*.

851 *Ibid*. During such hearings, courts mostly followed the *contra proferentem* principle, which meant that vague and ambiguous contract terms were interpreted for the benefit of the party that had not participated in their formulation. K. Iremashvili, *The characteristics of legal regulation of health insurance*, cit., pp. 54-55.

852 K. Iremashvili, *The characteristics of legal regulation of health insurance*, cit., p. 55.

853 K. Zweigert & H. Kötz, *Introduction to Comparative Law*, cit., p. 338.

854 *Ibid*.

855 K. Iremashvili, *The characteristics of legal regulation of health insurance*, cit., p. 55.

856 K. Zweigert & H. Kötz, *Introduction to Comparative Law*, cit., p. 343.

857 *Ibid*.

The problem of the adequacy of standard contract terms has also been examined by the EU contract law system. The EU Directive on *Unfair Terms in Consumer Contracts* was adopted on April 5, 1993[858].

This directive establishes a minimum threshold for the protection of consumer rights, which certainly does not limit the possibility for member states to expand the frames of protection. The directive covers only contracts in which one of the parties is the consumer (*i.e.*, a natural entity acting for purposes outside its professional, occupational or commercial interests). Consequently, the directive does not cover contracts between entrepreneurs[859].

According to this directive, the condition of the contract is null and void if it was not agreed upon between the parties and if it was formulated in advance by only one party and the consumer did not have the opportunity to change its content[860].

3. The new frontiers of the health insurance

In the wake of the massive digitization of the healthcare sector[861] and the current demographic, economic and social framework, this phenomenon – which is a specific manifestation of Insurtech and relates, in particular, to the areas of IoT and Big Data – seems destined for significant development[862].

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858 K. Iremashvili, *The characteristics of legal regulation of health insurance*, cit., p. 55. In addition to the French legal system, this restriction is not applied in the German, Austrian, Swedish and Dutch systems.

859 K. Zweigert & H. Kötz, *Introduction to Comparative Law*, cit., p. 344.

860 *Ibid*.

861 Digitization of healthcare is strongly advocated and promoted also by European institutions. On the topic, European Commission, *Comunicazione relativa alla trasformazione digitale della sanità e dell'assistenza nel mercato unico digitale, alla responsabilizzazione dei cittadini e alla creazione di una società più sana* [COM(2018)233 final], Bruxelles, 2018; European Commission, *State of Health in the EU: Companion report 2017*; European Commission, *Libro verde sulla sanità mobile ("mHealth")*, COM(2014)219 final, Bruxelles, 2014; European Commission, *Comunicazione relativa a sistemi sanitari efficaci, accessibili e resilienti* [COM(2014)215 final], Bruxelles, 2014.

862 A. Camedda, *La digitalizzazione del mercato assicurativo: il caso della Digital Health Insurance*, cit., p. 568.

The offer of modern insurance solutions, more adherent to the changed citizens health needs, could indeed emphasize the social function of health insurance[863] and its role within welfare systems as well as contribute to disease prevention and the promotion of healthier lifestyles by encouraging their adoption through premium discounts[864].

The "digital" offerings of insurance companies in the area of health are particularly focused on proposals that incentivize the use of electronic bracelets or other wearables (e.g., pedometers) for detecting and monitoring the physical activity of the insured (so-called activity trackers)[865].

The framework just outlined makes it possible to illustrate the opportunities offered by Digital Health Insurance to insurance companies, with particular regard to those suitable for affecting the activity of risk assessment and pricing, since this is a central aspect of the insurance operation[866].

To this end, it is barely worth mentioning that, as a rule, insurance companies are in a position of information gap with respect to the poli-

863 On the social function of private insurance see G. Cottino, *L'assicurazione tra passato e presente*, in M. Irrera, *L'assicurazione: l'impresa e il contratto*, in *Tratt. dir. comm., diretto da Cottino*, Padua, 2011, p. XX; F. Santoro Passarelli., *Funzioni delle assicurazioni private e delle assicurazioni sociali*, ASSICURAZIONI, 1962, p. 42, according to whom the favorable institutions and rules prepared by the legislature with regard to insurance would be an expression of the social utility inherent in the operation underlying it, albeit in its various formulations. In Jurisprudence, above all, Cass., SS. UU., December 30, 2011, n. 30174, Dir. Fisc. Ass., 2012, p. 667 ff.

864 A. Camedda, *La digitalizzazione del mercato assicurativo: il caso della Digital Health Insurance*, cit., p. 568.

865 The trend evoked affected, first and foremost, countries characterized by systems health care with a predominantly private component such as the United States of America. Here it is happening more and more frequently that employers, who are obliged to take out group health insurance contracts for their employees, are purchasing electronic bracelets to monitor the risk status of insured workers and, at the same time, obtain a premium discount. For an overview of the US health care system, C. Di Novi, *Selezione avversa e mercato assicurativo privato: un'analisi empirica su dati USA*, DIR. ECON. ASS., 2011, p. 945 ff; B. Carducci Agostini, *La riforma sanitaria americana: il difficile compromesso tra esigenze di universalità di cure, contenimento dei costi e mantenimento di un sistema sanitario di tipo privato*, DIR. FISC. ASS., 2013, p. 508 ff; M. Bassini & G. Romeo, *Il "Welfare" statunitense: lo spettro del "big government" e le tentazioni solidaristiche*, DIR. PUBB. COMPAR. EU., 2013, p. 1484 ff; N. Giannelli, *I sistemi sanitari di Stati Uniti, Germania, Regno Unito: mercato, redistribuzione e reciprocità*, AMMINISTRARE, 2016, p. 147 ff.

866 A. Camedda, *La digitalizzazione del mercato assicurativo: il caso della Digital Health Insurance*, cit., p. 577.

cyholder/insured party in relation to the status of the risk[867]. Indeed, they are not in a position to know all the risk characteristics of potential policyholders and therefore rely on the statements made by the latter at the pre-contractual stage[868].

In the specific case of health insurance, in a context of low digitization, the practice sees the company basing its risk assessment and premium determination on the information provided by the customer by filling out the health questionnaire submitted to him or her before the contract is signed[869].

Although intended to provide detailed information on the state of health and on any previous pathologies and/or hereditary nature of the insured, the health questionnaire does not, however, solve the problem of information asymmetry and the natural incompleteness of risk-related information; in fact, even the insured could be unaware of certain circumstances relevant to the assumption of the risk itself[870].

Given the difficulty – and even the impossibility – of verifying ex ante the characteristics of each risk, the insurance company seems, therefore,

867 The insurance market would be characterized by a bilateral information asymmetry, whereby the "supremacy" of the insurer in relation to information concerning rights and obligations under the contract would be matched by an inferior position of the insurer in relation to knowledge of the risk and its circumstances. As effectively observed by A. Donati, *Trattato del diritto delle assicurazioni private*, *cit*., p. 298 ff, the insured is a true manager of the risk, since he is the only person with knowledge of the circumstances capable of identifying and assessing it; prior ascertainment of these elements would be complicated and burdensome for the insurance company, often even impossible since these are events of the past or of a sensitive nature. On bilateral asymmetry in insurance, see also D. Pirilli, *La fase precontrattuale nell'assicurazione*, ASSICURAZIONI, 2013, pp. 418-421; F. Ceserani, *Rappresentazione del rischio, asimmetria informativa ed uberrima fides: diritto italiano e diritto inglese a confronto*, cit., p. 163, who points out that the circumstantial elements of the risk are known only to the insurer.

868 The information rendered by the insurer is, therefore, fundamental to the assessment and selection of risks, as they are instrumental to the physiological functioning of the insurance operation, based on the pooling of risks and the principle of mutuality, and to the correct calculation of the premiums charged to the insured. In this sense S. Nitti, *Duty of disclosure nel contratto di assicurazione. Analisi comparata tra sistema italiano e sistema inglese*, cit., p. 551 ff. Therefore, the obligation to describe the risk accurately and completely under articles 1892 and 1893 of the Civil Code falls on the insurer; however, the jurisprudential interpretation of these rules has led to the identification of a duty of cooperation on the part of the insurer, under which he must put the insured in a position to understand what the circumstances of the risk are relevant to his assumption.

869 A. Camedda, *La digitalizzazione del mercato assicurativo: il caso della Digital Health Insurance*, cit., pp. 578-579.

870 *Ibid*.

constantly exposed to the possibility that the customer may omit, even unintentionally, relevant information on the status of the risk to be insured.

A similar situation of information asymmetry in relation to the characteristics of the risk can be found in the phase following the conclusion of the contract. At this stage, in fact, the insurance company as a rule, is unable to observe and monitor the behavior of the insured, who may engage in conduct, even omissions, such as to increase their riskiness[871].

In such a scenario – which, according to economic theory, could trigger adverse selection or moral hazard phenomena[872] – the "digital turn" of health insurance could have disruptive effects. First, the availability of a multiplicity of previously inaccessible personal, health and behavioral data would facilitate more effective and timely risk assessment and profiling of customers at the pre-contractual stage, enabling companies to recognize each individual's risk profile and to parameterize the amount of premiums to it[873].

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871 *Ibid*.

872 The "adverse selection" refers to the phenomenon whereby the inability of the insurance company to recognize ex ante the degree of individual risk of the insureds and to parameterize the amount of premiums to it, results in the determination of a premium of identical amount for all insureds of the same class, which reflect their average riskiness. This would adversely affect the position of the less high risk bearers: the latter, in fact, faced with an "average premium" that is not advantageous to them - in that it is excessive compared to the low probability of the risk occurring for them – would be induced to forego insurance coverage or to take out less expensive insurance policies (*id est*, for which a lower premium is provided for a lower premium than the average one mentioned above) and not very convenient in terms of the benefits guaranteed. Conversely, those exposed to greater risks, attracted by the convenience of the "average premium", would take out insurance contracts that provide high coverage, benefiting from the phenomenon of cross-subsidy ("cross-subsidy"); precisely, those insured who are more exposed to risk, being required to pay a lower average premium than they would have had to pay if the premium had been commensurate with their actual individual riskiness, will be indirectly subsidized by the less risky individuals who nevertheless choose to take out insurance. Unlike adverse selection, which pertains to the risk-taking phase, so-called "moral hazard" represents a form of inefficiency in the insurance market resulting from the insurer's inability to observe the conduct engaged in by policyholders in the phase following the conclusion of contracts; it would be manifested when policyholders engage in activities and conduct that increase the likelihood that the event inferred to be at risk will occur. Ceserani, *Rappresentazione del rischio, asimmetria informativa ed uberrima fides: diritto italiano e diritto inglese a confronto*, cit., p. 162; C. Di Novi, *Selezione avversa e mercato assicurativo privato: un'analisi empirica su dati USA*, cit., p. 943 ff. Also, abouth these phenomena in the health insurance, see F. Barigozzi, *Assicurazione sanitaria*, RIV. POL. ECON., 2006, p. 217 ff.

873 A. Camedda, *La digitalizzazione del mercato assicurativo: il caso della Digital Health Insurance*, cit., pp. 579-580.

In addition, since devices coupled with new health policies allow for constant and continuous monitoring of individual clinical parameters, habits and lifestyles, the insurance company could assess and possibly "reclassify" the insured's risk profile – and, to effect, the relevant premium – even while the relationship is ongoing[874].

Hence the desirability of a significant reduction of the aforementioned information asymmetry both at the pre-assumption risk assessment stage and at the contract execution stage, to which is a corollary the possible neutralization of the phenomena of adverse selection and moral hazard mentioned above.

Despite the opportunities offered to businesses and consumers, the use of digital technology in the context of health insurance policies raises some issues that are worth noting.

If the main critical issues relate to the privacy and security of the personal and health data processed[875], which are now more than ever exposed to the threat of cyber crime, no less important are the limitations arising from Digital Health Insurance in relation to the possible use of said data for discriminatory purposes and the necessary protection of the right to individual self-determination[876].

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874 *Ibid*.

875 The European legislature has intervened on the point by reiterating that privacy and data security must govern the development and use of new technologies. In particular, noting the increase in personal data flows and the exchange, including cross-border exchange, of personal data resulting from technological development, the new Data Protection Regulation (2016/679/EU) ensures that data subjects have adequate control over their data and introduces appreciable accountability measures for companies involved in its processing. These include: the establishment of the new figure of the Data Protection Officer (DPO), who must be designated by the data controller and data processor whenever their main activities consist of processing operations which, by their nature, scope and/or purposes, require regular and systematic monitoring of data subjects on a large scale (Art. 37); the obligation of prior data protection impact assessment placed on the data controller where the processing itself - including as a result of the new technologies employed – presents a high risk to the rights and freedoms of natural persons and, in particular, involves a systematic and comprehensive assessment of personal aspects relating to natural persons based on automated processing, including profiling, and on which decisions are based that have legal effects or affect such natural persons in a similar significant way (Art. 35). For an initial commentary on the EU Regulation, see G. Finocchiaro, *Introduzione al Regolamento europeo sulla protezione dei dati*, NUOVE LEGGI CIV. COMM., 2017, p. 1 ff.

876 A. Camedda, *La digitalizzazione del mercato assicurativo: il caso della Digital Health Insurance*, cit., pp. 582-583.

Although the use of telematic devices, such as the aforementioned wearables, in the context of health insurance is generally described as a factor capable of extending access to insurance coverage even to previously excluded categories of individuals, there is widespread concern that insurance companies may use the data transmitted by the aforementioned devices in order to discriminate against individuals who are more exposed to risk[877].

In particular, it is believed that the personalization of premiums allowed by the analysis of such accurate data could expose the most "vulnerable" clients – for example, those suffering from chronic diseases or disabilities – to the demand for insurance premiums so high as to be unaffordable[878]; with the paradox that insurance contracts characterized by a marked social function, insofar as they are intended to cover health risks for which the state is no longer able to fully assume, would be economically unaffordable precisely for those individuals who, more than others, would have an interest in additional health coverage[879].

877 *Ibid*.

878 B. Keller, *Big Data and Insurance: Implications for Innovation, Competition and Privacy*, The Geneva Association, 2018, p. 33.

879 A. Camedda, *La digitalizzazione del mercato assicurativo: il caso della Digital Health Insurance*, cit., pp. 583-584.

Chapter VIII

BRIEF *DE JURE CONDENDO* CONSIDERATIONS

Insurance law springs from a plurality of formants or factors that live beyond the normative framework. Indeed, jurisprudence, doctrine, and practice represent phenomena that the jurist cannot ignore in the daily work of reconstructing the legal rule[880].

The moment of application represents, then, the instrument of concretization of law and contributes to the formation of living law.

In this sense, the formation of the effective insurance market in the context of legal economy creation requires settling methodological matters concerned with the determination of the significance and the role of insurance in a financial system of a Country, as well as development of a conception of its concrete functioning and enhancement.

Considering the peculiarities of the origin and development of the insurance system in Georgia, it should be noted that if in the conditions of a planned economy insurance was a State monopoly and was mainly limited to the framework of insurance of personalities, property of citizens and agricultural enterprises, then during the transition to a market economy it became possible to more fully take into account the risk intensity and probability of losses from emergency events and better meet the society's need for insurance protection[881].

In this context, the functionalist principle of considering the risk element and attempting to overcome or, at any rate, prevent it represents a point of commonality among different legal systems.

To this goal, the Georgian legislator's choice was to bring together a number of elements from different legal experiences, particularly from civil law systems.

The Georgian Civil Code makes a classification of insurance according to the object of insurance. In this respect, insurance against damages, life insurance and accident insurance are separated from each other in the Code and the rules governing non-life insurance include both property and liability insurance contracts for the benefit of another person[882].

880 R. Sacco, *Introduzione al diritto comparato*, 5a ed., Turin, 1992, p. 147 ff.

881 R. Pachulyya & J. Meshyya, *Questions Formation and Development Insurance system in Georgia*, in *Economic Theory & Law*, Kiev, 2015.

882 K. Iremashvili, *Art. 820*, cit.

Moreover, damage, as an element that defines the essence of the insurance contract, is included in all forms of insurance. Therefore, the term damage insurance may cause some ambiguities when interpreted separately from the standard[883].

The basic principles of property insurance based on the indemnity principle are set out in the rules governing property insurance in the Civil Code.

Georgian insurance law is clearly affected by the influence of civil law legal family systems, with particular reference to the German discipline.

The solution adopted by the Georgian legislator has elements of strength in the clarity of the wording of the legislator whose recourse to principles allow an easier application of the law to concrete cases; this does not enshrine abstractions of law but, rather, make it quite clear that the interpreter must proceed from time to time to carefully examine the concrete fact in light of the casuistic approach.

In this perspective, the reference to some of the provisions of the VVG represents one of the assets of Georgian insurance law insofar as it is capable of being dropped into cases that transcend German borders. In fact, VVG sets out the general rules for insurance contracts as well as the statutory provisions for specific insurance branches.

There is no shortage, however, of weaknesses in Georgia's insurance living law. One of the main problems, in this regard, is the slow pace of jurisprudential development, whose ruling are, indeed, latent.

A partial solution to this problem would potentially be to also take up the case law and the jurisprudence of the German courts, so as to know the *ratio decidendi* and encourage a more advanced practical application of the legal device, that is patently derived from the German legislation: a legal transplant of more than one element from the original system to the new one.

Considered as stated insofar, it should also be noted that, at present, Georgia has applied for membership status in the European Union. This represents a further moment of external solicitation to which Georgia will have to respond.

The process of European integration invites reflection on the role played by civil-law legal science, particularly in the drafting of a frame-

883 *Ibid*. Specifically, types of insurance have been distinguished into personal, property, and liability insurance. The establishment of insurance for the benefit of another person should be described in the general provisions on insurance (see, ahead, article 836).

work of principles for the regulation of private relationships. The development of a European private law follows the idea of Europe as an integration between States that, beyond a certain extent, cannot be realized without regulatory integration.

The genesis and development of a new way of understanding the contractual relationship is justified by the need to provide adequate protection for contracting parties who find themselves in conditions of contractual inequality, in regulatory, economic, and social terms.

More in detail, the approach should follow «a combination of basic political and social best practices accompanied by specific legal provisions, a sort of protocol [that it is possible to] define as Policies And/Or Law 1 – and is trying to make out of this the recipe for its success»[884].

Only a constant and fruitful debate among practitioners and the legal formants can ensure the pursuit of a high degree of harmonization, and meet the expectation of the European Union, on the one hand, and of the citizens of Georgia, on the other hand.

884 This type of approach has been increasingly employed in regulatory reforms. See, on this point, A. Borroni, *The impact of new coronavirus (COVID-19) on domestic violence and violence against women: the case of the Republic of Georgia*, submitted within the call: COVID-19 and the increase of domestic violence against women, 2020. Available at https://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/call_covid19.aspx. Last visited September 5, 2022.

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THE POLITICAL SCIENCE DEPARTMENT
OF THE UNIVERSITÀ DEGLI STUDI DELLA CAMPANIA
"LUIGI VANVITELLI"

THE FACULTY OF LAW OF
IVANE JAVAKHISHVILI TBILISI STATE UNIVERSITY

A. Borroni (Gen. ed.)

COMMENTARY ON GEORGIAN INSURANCE LAW

Vol. III

Life insurance

(Arts. 844-858)

MARCO SEGHESIO (Ed.)

Favorite Style LLC

2022

UDC (უაკ) 349.3:36
C – 73

This publication was printed with the financial contribution of LEPL Insurance State Supervision Service of Georgia (ISSSG).

This volume was evaluated in accordance with the recognized criteria of anonymous peer-review.

This book is dedicated to the centennial celebration of the establishment of the Faculty of Law of Ivane Javakhishvili Tbilisi State University.

Borroni, Andrea (Gen. ed.)
Commentary on Georgian Insurance Law
Copyright: Favorite Style LLC
Tbilisi
2022
pp. 617-789
ISBN 978-9941-8-5032-5

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Article 844 – Concept

1. Life insurance may cover the policyholder or another person.

2. If a life insurance contract is concluded for the benefit of another person, the written consent of such person or his/her legal representative shall be required.

Marco Seghesio

Summary: 1. Definition. 2. Purpose. 3. Parties. 4. Classifications. 5. Life insurance for the benefit of another person. 6. Inaccurate or reticent statements by the person whose life is insured.

1. Definition

Life insurance is a contract whereby an insurer undertakes, in return for a single or periodic premium, to pay a lump sum or an annuity on the occurrence of an event concerning human life – either upon the death of the insured person or upon his reaching an agreed-upon age – or at a fixed time[1].

1 Under article 1:201 of the Principles of European Insurance Contract Law "*life insurance*" is described as «an insurance in which the obligation of the insurer or the payment of premium depends upon an insured event that is defined exclusively by reference to the death or survival of the person at risk».

In this regard, Professor Banyár writes that «[t]he term "life"-insurance itself is partly correct, but partly euphemistic, since primarily those insurances are called life insurance, where the insured event is related to the death of the insured. This – given by the nature of the matter – can be exactly of two kinds: 1. the incurrence of death, 2. the non-incurrence of death. More precisely the possible life insurance events can be phrased as 1. death as an insured event, if the death of the insured happens during a pre-determined term, 2. living through a term as an insured event means that death doesn't happen during a certain pre-determined time-period. Consequently we get the two elemental insurances that are most important in many respects:1. term insurance (for death) and 2. pure endowment insurance (for living through)». J. Banyár, *Life insurance*, Budapesti Corvinus Egyetem, Budapest, 2021, pp. 93-94.

Similarly, in France three different categories of life insurance are recognised: insurance *en cas de vie*, *enc as de décès*, and *mixte*. Before the French Court of Cassation, sitting as a *Chambre mixte* and hearing four cases (namely judgments no. 224, 225, 226, 227, delivered on 23 November 2004) concerning the legal definition of life insurance contracts, Régis de Gouttes, at the time First Attorney-General to the Court of Cassation, clarified the differences between the various types of life insurance. In particular, he wrote, by entering into an insurance *en cas de vie*, or in the event of life, the insurer undertakes to pay the sum insured to the beneficiary in the event that the insured person is still alive after a given date, whereas by concluding an insurance *en cas de décès*, or if the insured person dies. An insurance *mixte*, on the other hand, is an insurance policy that combines an insurance *en cas de vie* and one *en cas de décès*, for the insurer undertakes to pay the sum insured either to the policyholder, if he is alive, or to his heirs, if he is dead; this is a type of 'alternative', and not cumulative, insurance, in that it combines two contradictory risks (death or survival), only one of which will occur (cf. Régis de Gouttes's conclusions, available at https://www.courdecassation.fr/jurisprudence_2/chambres_mixtes_2740/gouttes_premier_537.html. Last visited January 24, 2022).

On this topic, see also A. Donati, *Trattato del diritto delle assicurazioni private*, III, Milan, 1956, p. 569 and G. Fanelli, *Assicurazioni sulla vita*, in NN.D.I., I, 2, Turin, 1968, p. 1382.

In the case of an obligation to pay the sum insured at a fixed time, the obligation to pay the premium ceases if the insured person dies beforehand[2].

The insured event may relate to the life of the policyholder or of a third party. If the insured event relates to the life of a third party, in this author's opinion, for the insurance to be valid there ought to be an interest on the part of the policyholder in the continued existence of the third party, so as to prevent life insurance contracts from devolving into mere wagering contracts[3].

Life insurance is by its very nature an aleatory contract, since the payment of the agreed-upon sum is dependent on an uncertain event[4].

2 In this case, the uncertain event is whether, within the time limit, the death of the insured person will occur and, if so, when (A. Donati, *Trattato del diritto delle assicurazioni private*, p. 573)

3 On this aspect, Iremashvili writes that «[b]ased on the norm considered under the Georgian Civil Code (GCC) - 815 II, legislator regulates the cases of losing the interest towards the insurance contract. Interest existing towards the insurance contract (insurable interest) is not identical to the insurable interest known for the international insurance doctrine. Clear definition of above mentioned terms is key for the resolution of specific disputes. To some extent, insurable interest reflects the interest of insured towards the contract. Absence of such interest may cause annulation of contract according to the article 54 of GCC. However, analysis of insurable interest doctrine makes it possible to distinguish interest to the insurance contract from the interest towards the insurance object, as losing the first not always automatically implies losing of the other one» K. Iremashvili, *Insurable Interest Doctrine and Analysis of Its Critics*, in *Journal of Law*, n. 2, 2013, p. 59.

4 The insured event may be said to be *certus an, incertus quando*, when it is certain that it will occur, but it is uncertain when it will, or *incertus an, incertus quando*, when it is uncertain whether the event will occur and, if it does, when.

2. Purpose

The main purpose of life insurance is protection and, ultimately, peace of mind, by assuring that financial loss or hardship will be alleviated should the insured event occur. In fact, through this contract, it is possible to provide a financial benefit either to the dependants of an insured person, in the event of his premature death, thereby securing the family's financial security, or to the insured person himself, upon reaching the agreed-upon age, so as to supplement his income[5].

To achieve that function, the insurer agrees to take on a risk relating to human life, with the obligation to pay the sum insured in the event that the insured event occurs. That risk is, then, eliminated by the insurance company by homogenising all the individual risks assumed and by neutralising them through their distribution to all insured persons by means of premiums calculated on a technical actuarial basis.

However, life insurance can also be considered a form of investment[6].

5 In this regard, life insurance is different from other types of insurance, originally meant for «indemnifying businesses for loss of property. But this mechanism, other than a creditor insuring for the life of the debtor, would perhaps never have taken off for life insurance in a widespread manner. An average individual rarely perceives death as so imminent to provide for it and at the same time (if it is imminent, then it is never lucrative enough for a stranger to take the risk) it is never experienced by a person twice (other than observing tragic deaths amongst friends, family and neighbours) for him to prepare for his demise prior to his desired longevity. The secret to unlocking the potential of life insurance was discovered by Wallace and Webster in trying to provide for the widows and children of deceased ministers of the Church of Scotland. The provision for insurance had to be sold not just as providing a nest egg for the family in the event of a premature demise of the earning member, but also as a savings instrument which provides a lumpsum (maturity benefits) to the insured in the event he survives after having overseen his familial responsibilities.1 It not only incentivizes him to save but also by the mechanism of a fund in which such savings (premium) went in and from which payments (death benefits) were made in the event of sudden demise of the assured reduced the risk upon the insurer». A. Kumar Rai, *Suicide and Life Insurance: A Comparative Analysis of Judicial and Legislative Response*, in M. Pal Singh, N. Kumar, *The Indian Yearbook of Comparative Law 2018*, Singapore, Springer, 2019, p. 72.

6 In fact, «[v]ery few life insurance policies are pure insurance instruments that cover the risk of premature death by the policy holder. Most, instead, have an important savings component, that increases over time and is paid back irrespective of the death of the policyholder. This savings component is invested by the insurance company – but the policy holder is normally guaranteed a minimum return. In most countries, life insurance policies can (or could until a few years ago) also act as tax shelters (insurance premiums could be deducted from taxable income up to some limit). For these reasons, and also because of aggressive door-to-door marketing strategies, life-insurance policies are often purchased by individuals who are liable to income tax, have little prior knowledge of and confidence in financial markets. Life insurance policies are associated with high costs and commissions (that partly offset the value of tax exemptions) but turn out to be attractive to certain investors for specific reasons. For instance, they normally are not counted in the estate of a deceased, so they can be used as a device to increase testamentary freedom. Also, they cannot be seized by creditors in the case of bankruptcy, and this makes them potentially interesting to the self-employed. Pure life insurance policies are relatively common in association with the purchase of bulky items, such as a car or, more frequently, a dwelling, particularly if a loan or mortgage contract is involved. These arrangements are aimed at protecting the mortgage repayment against the risk of premature death of mortgagor and might be required by the borrower». D. Cavapozzi, E. Trevisan, G. Weber, *Life insurance investment and stock market participation in Europe*, in *Advances in Life Course Research*, Volume 18, Issue 1, March 2013, p. 91.

3. Parties

The parties to the contract are, on the one hand, the insurer and, on the other hand, the policyholder, the insured and the beneficiary.

The insurer is the person who, as a result of the contract and in exchange for the payment of premium, assumes the risk of the insured event occurring.

Policyholder is the person who enters into the contract and who bears the resulting obligations.

The insured person is the person whose death or survival gives rise to the insurer's obligation to pay the sum insured.

The beneficiary is the person to whom the sum insured will be paid.

4. Classifications

Life insurance can be classified in several ways on the basis of different criteria.

First of all, life insurances can be classified according to the nature of the risk and, consequently, of the event insured. In this respect, the parties may agree that the sum insured will be paid out in the event of the death of the insured or in the event that the insured person will still be alive on a certain date; but the parties may also agree that the insured event is alternatively the insured person's continued existence on a certain date or his death, whichever comes first.

It is also possible to classify life insurance on the basis of the persons on whose life the insurance is taken out; in this case, the distinction is between insurance on one's own life and insurance on the life of others. It is also possible to take out an insurance on the lives of two persons alternately, with the provision that the sum insured will be paid out on the death of the first insured person. In France, the *Code des assurances* also allows multiple people may take out reciprocal insurance on each other's lives by a single contract[7].

A further possible classification concerns the person in whose favour the insurance is taken out, differentiating between whether the insurance is for the benefit of the policyholder or of a third party.

7 Under article L132-1, paragraph 2, of the *Code des assurances*, "[p]*lusieurs personnes peuvent contracter une assurance réciproque sur la tête de chacune d'elles par un seul et même acte*".

Furthermore, it is possible to distinguish between fixed-term and whole-life insurance[8].

Other possible distinctions concern premium – whether it is paid regularly or as one lump sum – and the way the sum insured is paid out, as a lump sum or an annuity.

5. Life insurance for the benefit of another person

The second paragraph of this Article allows for an insurance contract to be concluded for the benefit of another person, but subjects its validity to the consent of the third party or his legal guardian[9].

Despite the lack of clarity of the rule, in my opinion, the obligation to obtain the written consent of the third party referred to in the second paragraph must be understood as meaning that, in all cases where insurance is taken out on the life of another person, the consent of the person whose life is insured must be required – which is a common requirement in the legislation of several countries[10]. On the subject, Article 17:101 of

8 In this regard, one interesting aspect is that «[t]he basic difference between term and permanent insurance is that with permanent insurance the initial premium is higher than the insurer's mortality and other costs, with the difference allocated to a cash value fund from which future charges will automatically be withdrawn when the current premium is no longer sufficient to cover them. The advantage of this arrangement, overlooked by many, is that cash values grow tax deferred as long as the policy remains in force. Therefore, the insurance costs are paid from untaxed earnings within the policy (i.e., pre-tax). The proof of this is that if a life insurance policy is surrendered, the gain (taxed as ordinary income) is determined after subtracting the premiums paid (which constitute the policyholder's basis) from the cash value. In effect, the cost of the insurance charges reduces or perhaps eliminates the taxable gain». R. P. Rojeck, *Wealth*, Chem, Palgrave Macmillan, 2019, p. 56.

9 Article 844 places no limit on the identity of the third party whose life is insured. In other jurisdictions, however, the legislature sometimes decides to set limits. For example, in France, under article L132-3 of the *Code des assurances*, «[i]t is forbidden for any person to take out insurance in the event of death of a minor under the age of twelve, of a person of full age under guardianship or a person placed in a psychiatric hospital», and in Spain, under article 83, paragraph 7, of the *Ley* 50/1980, *de Contrato de Seguro*, "[n]o insurance may be taken out in the event of death of a child under fourteen years of age or of a disabled person».

10 Section 150, paragraph 2, of the German *Versicherungsvertragsgesetz* states that «[w]here the life insurance is taken out against the death of another person and the agreed benefit exceeds normal funeral costs, the written agreement of the other person shall be necessary for the contract to be effective; this shall not apply in the case of collective life insurances in company pension schemes. If the other person has no legal capacity to act or only limited capacity to act, or if a custodian has been appointed and the policyholder is entitled to represent that person's interests, he may not represent the other person when giving his consent thereto» and the following paragraph adds that «[i]f one parent takes out the insurance for an under-age child, the child's consent shall only be required if in accordance with the contract the insurer is to be liable even in the event of the child dying before reaching the age of seven and the benefit agreed for this event exceeds normal funeral costs». Article 1919, paragraph 2, of the Italian Civil Code, more briefly states that «insurance contracted in the event of the death of a third party is not valid if the third party or his legal guardian have not given consent to the conclusion of the contract. consent must be proven in writing». Similarly, under article 83, paragraph 4, of the Spanish Ley 50/1980, «in the case of insurance in the event of death, if the persons of the policyholder and the insured are different, the consent of the latter, given in writing, is required, unless his interest in the existence of the insurance can be presumed otherwise» See also article L132-2 of the French *Code des assurances*.

the Principles of European Insurance Contract Law states that «[a]n insurance contract on the life of a person other than the policyholder shall be invalid, unless the informed consent of the person at risk is obtained in writing and evidenced by signature. Any substantial later change to the contract, including a change of the beneficiary, an increase in the sum insured and a change in the duration of the contract shall be without effect without such consent. The same applies to an assignment of or encumbrance on the insurance contract or the right to the insurance money»[11].

This interpretation serves the purpose of proving the policyholder's interest in the existence of the third party, as well as the purpose of protecting the third party's life by preventing the insurance from becoming an incentive to murder[12].

Therefore, it follows from a systematic reading of the provisions of this chapter that the contract may concern the life of the policyholder and designate a third party as beneficiary, or it may concern the life of the third party also designated as beneficiary, or, finally, it may concern the life of a third party and provide for an entirely different person as beneficiary[13].

The rule is also silent as to the moment when the third party is called upon to give consent. No doubt the assent declaration may be contained in the policy itself or in a separate document concluded before or at the same time as the conclusion of the contract. In the opinion of the au-

11 The "Principles of European Insurance Contract Law" were drafted by the Project Group on a "Restatement of European Insurance Contract Law", which was founded in September 1999. On the topic, see H. Heiss, "*The Principles of European Insurance Contract Law (PEICL) 2016*", in *European Journal of Commercial Contract Law*, 2016.

12 A. De Virgiliis, *Rilievi in tema di assicurazione sulla vita del terzo*, in RDC, 1963, II, p. 511; A. De Gregorio & A. Fanelli, *Il contratto di assicurazione*, Milano, 1987, 198; A. Fanelli, *Le assicurazioni*, in *Tratt. Cicu, Messineo*, XXXVI, 1, Milano, 1973, p. 1385; N. Gasperoni, *Le assicurazioni*, in *Tratt. Grosso, Santoro Passarelli*, Milan, 1966, p. 207; N. Gasperoni, *La rilevanza giuridica delle dichiarazioni inesatte e delle reticenze del terzo non contraente*, in *Assicurazioni private*, Padova, 1972, p. 798; G. Pericoli, *Consenso e interesse nell'assicurazione sulla vita del terzo*, in RDC, 1976, I, p. 368; V. Salandra, *Dell'assicurazione*, in *Comm. Scialoja, Branca*, sub artt. 1861-1932, Bologna-Roma, 1966, p. 390; G. Volpe Putzolu, *L'assicurazione privata contro gli infortuni nella teoria del contratto di assicurazione*, Milan, 1968, p. 131

13 In Italy, the courts do not consider the consent of the third party, whose life is insured, necessary, provided he – or his heirs or a person designated by him – is the beneficiary of the contract, since, in that case, the need to protect his life, which inspires the rule, is not present (Cass., Sez. III, Sent., 26/06/1973, 1846, and Cass. civ. Sez. III, Sent., 15/02/2018, n. 3707).

On the basis of this principle, for instance, the Court of Cassation has ruled that the life insurance taken out by an employer on the life of one of his employees, for the benefit of the heirs of the latter, is valid and enforceable regardless of the consent of the employee (Cass., Sez. I, Sent., 10/06/1977, n. 2393).

thor, in the light of the silence of the law, the third party should also be allowed to give consent at a later time, thereby "preserving" the contract in question.

6. Inaccurate or reticent statements by the person whose life is insured

A further question, in the case of insurance contracted on the life of a third party, concerns the consequences of inaccurate or reticent statements by the person whose life is insured. In fact, the wording of Articles 808[14], 809[15], 810[16], makes it clear that the insured person – and not the policyholder – is required to provide all relevant information about himself. If these obligations are breached, the insurer may repudiate the contract, unless the insurer was aware of the relevant circumstances or the insured person was not responsible for the failure to communicate such information.

The legislative choice to impose these obligations on the insured person is certainly appropriate, since that is the person who can most easily and certainly provide the insurer with information about himself.

The interpretation offered here, furthermore, appears to be in keeping with the principles of fairness, equity, and reasonableness. After all, in such cases, had the insurer been aware of the correct information, he would not have entered into the insurance contract or would have entered into it under different terms, since the objective assessment of the insured risk would have been different. Therefore, the insurer's right to repudiate the contract should be not construed as a sanction, but rather as a means of ensuring that the mutual obligations of the insurer and the policyholder are balanced.

14 Under article 808, «1. When entering into a contract, the insured shall inform the insurer of all circumstances known to him/her that are material to the occurrence of the danger or event covered by the insurance. The circumstances that can influence the insurer's decision to repudiate the contract or enter into it on modified terms shall be deemed to be material. […] 3. If contrary to the rules under paragraph 1 of this article the insurer is not informed of a material circumstance, then the insurer may repudiate the contract. The same shall hold true if the insured intentionally avoids informing the insurer of a material circumstance. 4. The contract may not be terminated if the insurer knew of the concealed circumstances or if the insured was not responsible for the failure to communicate them».

15 Under article 809, «1. The insurer may also repudiate the contract if the notice of material circumstances includes incorrect data».

16 Under article 810, «If the insured was required to respond to written queries about the circumstances of a danger, the insurer may terminate the contract for the failure to communicate the circumstances, which, though not inquired about, were intentionally withheld by the policyholder».

This is confirmed by the provision that the contract may not be repudiated if the insurer was aware of the inaccuracy of the information in its possession.

This legal provision is only tempered by the rule that the insurer may not repudiate the contract if the insured was not responsible for communicating the incorrect data.

Although the wording of Articles 813[17] and 814[18] is somewhat less clear, in the opinion of the author, the observations above apply to them as well, in the light of the spirit of the law.

As for the case of suicide of the insured person, the wording of Article 850 is very clear: «[t]he insurer shall be released from liability if the person whose life was insured commits suicide».

17 Under article 813, «1. The policyholder shall immediately notify the insurer of an increased risk arising after the contract was concluded if it would have a material influence on the conclusion of the contract. 2. Where so provided for in paragraph 1 of this article, the insurer may terminate the contract one month after giving a notice of termination or demand a corresponding increase in the insurance premium. If the insured intentionally causes the increased risk, the insurer may terminate the contract without observing the notice period».

18 Under article 814, «1. Upon becoming aware of the occurrence of an insured event, the policyholder shall notify the insurer. 2. After the occurrence of the insured event, the insurer may demand any kind of information from the insured necessary to determine the extent of the insured event or of the liability. 3. The insurer may not resort to an agreement under which it is released from liability in the event of the policyholder's failure of notification, but if such failure of notification does not materially prejudice the insurer's interests. 4. The insurer shall perform its duty after having ascertained the insured accident and the extent of compensation».

Article 845 – Inadmissibility of repudiating a contract

If at the time of concluding the contract the policy holder breaches his/her duty to communicate information, the insurer may not repudiate the contract if five years has passed since the contract was concluded. Repudiation of the contract shall be allowed if the duty to communicate information was not fulfilled intentionally.

Giovanna Carugno

Summary: 1. Introduction. 2. The *bona fides* principle. 3. Comparative hints. 4. Final remarks.

1. Introduction

Art. 845 of the Civil code pursues the aim to balance the asymmetry of information which traditionally characterizes the insurance contractual relationship between the insurer and the policy holder[1]. This provision is placed in the fourth section of the chapter twenty (*Insurance*) of the Civil code; so, the scope of application of the rule settled in art. 845 is limited to the life insurance agreements, as those that «may cover the policyholder or another person»[2]. The legislator adds that «[i]f a life insurance contract is concluded for the benefit of another person, the written consent of such person or his/her legal representative shall be required» (art. 844, par. 2).

As the master of the agreement, the insurer has the burden and the right to be informed about the circumstances (health conditions, injuries, etc.) that, according to his point of view and interest, could affect the mortality risk of the policy holder. The duty of disclosure is disciplined in general terms by art. 318 of the Civil code as «to be fulfilled when it is important for defining the essence of obligation and party can give such an information without humiliating its own right». The Civil code acts as a limit to the unduly power of enquiry of the insurer, taking into consideration, nowadays, the last tenets of the GDPR normative

The Civil code places a burden of cooperation on the insured party with the insurer for collecting the data flows that are necessary for the

1 Under art. 799 of the Civil code, «the insurer shall be obligated to compensate the insured for the damages resulting from the occurrence of an insured event, subject to the terms of the contract».

2 Art. 844, par. 1, of the Civil code.

determination of the risk, without, however, defining an information obligation for the insurance company. This is, indeed, created by the praxis of the contractual agreement, where much of the relevant data are provided to the insured in light of the new regulation on the consumer law, operating also in the Georgian legal system[3].

In the specific domain of insurance law, this duty obliges the policy holder from the pre-contractual negotiations to the conclusion of the agreement, with reference to every change which potentially could impact on the insured risk under the contract[4].

The aleatory nature of the insurance contract implies the transfer of the economic consequences of a certain event to the insurer. In the case

3 T. Lakerbaia, V. Zaalishvili, T. Zoidze, *Consumer Law (The way towards harmonization with European Law)*, L.T.D. International Black Sea University, Tbilisi, 2018. A. Borroni & M. Seghesio, in the preface of the book of professors T. Lakerbaia, V. Zaalishvili, T. Zoidze said: «[t]he consumer is not seen merely as a "weak person" in search for protection against the complexity of the market, but also as an active and integrated partner in of the cross-border market. […] And it is growing the question if consumer protection measures should be incorporated in an autonomous Consumer Code, or if the private law rules should be incorporated in a Civil Code. […] This requires a complex balancing test so as not to unduly restrict the freedom of the partiers to negotiate». The authors, then added that: «[f]rom a comparative law perspective, undeniably one of the core of this work is the central role that the pre-contractual phase plays with the duty to inform, disclose, and advice buttressed by the guarantees deriving from the consumer contracts, the possibility in certain cases for consumer to withdraw from the contract. Indeed, pre-contractual protections contribute to making the defense of consumer interest that much more effective, because if a courts could only intervene after a contract had been signed only in relation to facts that occurred after that moment, consumer protection would be curtailed since professionals could take advantage of consumers' probable lack of knowledge and expertise compared to them». And to conclude "the authors also focused on the judges' power of ensuring that the terms agreed on by the parties be fair, namely intervening in deleting the unfair terms after a screening on their belonging to the nullity per se, or because are against the fairness principle. In other words, legal interpreters and practitioners are called upon to employ the principle of good faith in a different way in order to allow the judge to declare nullity of some specific clauses and, in so doing, to reshape the resulting contract".

4 S. Nitti, *Duty of disclosure nel contratto di assicurazione. Analisi comparata tra sistema italiano e sistema inglese*, in *Dir. econ. ass*., 2010, p. 530, underlines: «[l]a *disclosure* non si riferisce a qualsiasi circostanza nota ad una delle parti, e volendo delineare dei confini a tale dovere, si può iniziare considerando che le circostanze che, seppur rilevanti, la parte stessa potrebbe acquisire con l'ordinaria diligenza, non costituiscono *duty of disclosure*». See also art. 808 of the Civil code, that regulates the *Obligation to communicate information* in insurance agreements: «When entering into a contract, the insured shall inform the insurer of all circumstances known to him/her that are material to the occurrence of the danger or event covered by the insurance. The circumstances that can influence the insurer's decision to repudiate the contract or enter into it on modified terms shall be deemed to be material. Any circumstance, about which the insurer clearly and unequivocally inquires of the insured, shall also be deemed as material. If contrary to the rules under the first paragraph of this article the insurer is not informed of a material circumstance, then the insurer may repudiate the contract. The same shall hold true if the insured intentionally avoids informing the insurer of a material circumstance. The contract may not be terminated if the insurer knew of the concealed circumstances or if the insured was not responsible for the failure to communicate them».

of a life insurance, the insurer has the obligation to pay to the beneficiary of the insurance coverage an assured sum of money after the death of the policy holder. To counterbalance the position of the insurer, the national legislation requires that the terms of the obligations must be known before concluding the contract. In this perspective, the parties of the insurance agreement have different contractual forces.

The need to ensure that the insurer receives complete and correct information from the counterparty guarantees the proper formation of the contractual consensus in a situation characterized by uncertainties of the risk. That is to say that the information provided at the conclusion of the agreement creates a relevant *spatium deliberandi* for both parties[5].

During the negotiations, both parties must be truthful and, to this end, must exchange information which can be important for the economy of the agreement.

Therefore, the rule of information secures the transparency of the contractual relationship and represents an expression of the standard of loyal and correct behavior, encompassed also by the general provisions on insurance law defined in the first section of the chapter twenty of the Civil code.

In the whole domain of insurance law, the person holding the interest protected by the legislator – namely, the insured – has a larger knowledge of the actual risk of the insured event.

The amount of the premium and the insured sum[6] depends on that risk.

Notwithstanding the title of art. 845 of the Civil code, which suggested a negative meaning enclosing in the concept of "inadmissibility", the *ratio* of the provision can be interpreted in its positive consequences, as a specification of art. 809, par. 1- that recognizes the right of the insurer to repudiate the contract in case of incorrect information given by the policy holder - and art. 810 of the Civil code[7].

5 M. C. Cherubini, *Tutela del "contraente debole" nella formazione del consenso*, Turin, 2005, p. 42.

6 As reported by the Georgian legal doctrine, «[p]remiums are determined according to individual risk (i.e. the risk of morbidity based on individual assessment), public risk (averaged for a certain group of people based on risk assessment), group risk (risk assessment based on the average personnel) basis» (R. Gogitidze, *Voluntary health insurance development problems and improvement main trends in Georgia*, in *International Journal of Social Sciences and Entrepreneurship*, vol. 1, n. 11, 2014, p. 305).

7 Art. 810 - *Termination of insurance contracts by reason of failure to communicate information*: «If the insured was required to respond to written queries about the circumstances of a danger, the insurer may terminate the contract for the failure to communicate the circumstances, which, though not inquired about, were intentionally withheld by the policyholder».

As illustrated in the following paragraphs, parallel solutions were adopted in other national systems, laying the basis of a dialogue between different legal traditions, unified through the bond of common principles in the field of insurance law[8].

2. The *bona fides* principle

Art. 845 of the Georgian Civil Code recognizes the right of the insurer to repudiate the contract only after five years from the stipulation.

The inadmissibility of a repudiation in a shorter time works as a practical tool to preserve the contractual bond and the positions of both parties, that expected a profit from the agreement. In this context, the *bona fides* principle[9] plays a fundamental role.

In fact, the lack of *bona fides* allows the insurer to repudiate the contract in any moment after its conclusion[10], without any consideration of the term fixed by the law.

The good faith criterion is not explicitly mentioned in art. 845 of the Civil code, but its operativity can be suggested by the adverb "intentionally" in the second paragraph.

This criterion is generally imposed in the frame of the Civil code as the gold standard for every "legal relationship", whose parties «are obliged to fulfill their rights in a good faith manner»[11].

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8 Insurance legislations, developed from the XIX century to the contemporary time inside and outside the European area presents some recurrent patterns, deriving from the medieval transnational *lex mercatoria* (S. Nitti, *Duty of disclosure nel contratto di assicurazione. Analisi comparata tra sistema italiano e sistema inglese*, cit., p. 527). Similarly C. Castronovo, S. Mazzamuto, *Manuale di diritto privato europeo*, II, Milan, 2007, p. 1013: «[i]l diritto del contratto di assicurazione presenta convergenze molto significative nei vari Stati, anche esterni agli spazi europei. Le convergenze fanno premio sulle divergenze, quanto meno per quanto riguarda le regole di base e i principi fondamentali».

9 In the Georgian legal tradition, this principle has a "broad and comprehensive" content, as drawn in various provisions of the Civil Code. Among the various functions of the *bona fides*, the legal doctrine indicates "the occurrence of fair legal consequences and, at the same time, prevention of unfair ones, what is directly linked with stability and sustainability of civic relationships" (I. Nozazde, *Duty to inform as a specificity of demonstration of good faith principle in voluntary and compulsory insurance*, in *TSU Journal of Law*, n. 1, 2017, p. 130, quoting the Commentary on Civil Code of Georgia, *Article 799*, 2016, 14-15, available at https://gccc.tsu.ge/).

10 A specular remedy is indicated in art. 810, which regulates the *Termination of insurance contracts by reason of failure to communicate information:* "If the insured was required to respond to written queries about the circumstances of a danger, the insurer may terminate the contract for the failure to communicate the circumstances, which, though not inquired about, were intentionally withheld by the policyholder".

11 Georgian Civil code, art. 318 - *The Subjects of Civil Law*. See also art. 8, par. 3, of the code: "Participants in a legal relationship shall exercise their rights and duties in good faith".

The concept of *bona fides* favors the offsetting of the disparities between the contracting parties of the insurance agreement.

The Georgian legislator finds a balance between the costs of the contract breach: the one descending from the failure in contract enforcement and those coming from uncomplete information given by the policy holder.

The indication of the broad term of five years to exercise the right of repudiate the contract reflects the *voluntas legis* to maintain the contract, if the relationship between the parties is based on loyalty, correctness, and transparency. That is to say that the non-performance of the agreement represents a much significant harm, if compared to the potential damages resulting from the non-compliant behavior of the policy holder acting *bona fide*.

In the first paragraph of art. 845 of the Civil Code, the approach of the Georgian legislator is to assign relevance to contract execution.

The Civil Code shows interest to preserve the relationship between the parties in case of supervening circumstances which are omitted by the insured, breaching the *pacta sunt servanda* principle without fault. Differently, the intentional omission of certain information that could have the potential of making higher the economic risk for the insurer, could determine the repudiation of the agreement. In other words, the repudiation represents the sanction descended from the non-disclosure conduct of the insured party. In general terms, the termination of the contract is unfavorable for the policy holder, who has an interest in the maintenance of the agreement. On the other hand, the position of the insurer is affected by the economic disparity caused by the *vacuum* of information.

In this case, a renegotiation could facilitate the maintaince of the agreement and the achievement of a balance in the contractual relationship.

Another key-point is the long-term duration of the insurance agreement herein examined, that can be classified as a life-time contract, in which takes on significance the continuation over the time of the performances object of the binding obligations of the parties.

These contracts, defined by the legal doctrine as hazardous, require to be managed through a risk-sharing method and cannot be exempted from the application of the good faith principle.

3. Comparative hints

The analysis of the discipline of repudiation provided by art. 845 of the Georgian Civile Code can be deepen under a comparative lens.

As underlined by the doctrine, the legislator focuses on the duty of disclosure of the policy holder[12], in line with the historical legacy of an earlier idea of contractual asymmetry.

There have been attempts to further develop insurance law in a way that assigns the liability for having breach the information duty to the insurer, who is the party that exercises a more intensive power within the contractual bond[13].

The Georgian legislator views the relationship between the parties of the insurance agreement in an opposite way, defending the interest of the insurer through the institute of repudiation. Anyway, this protection cannot cause excessive and unreasonable disadvantages for the counterparty and, for this reason, a term of five years to claim the repudiatory breach of the contract is legally fixed.

A similar solution was adopted in common law Countries: for instance, Subsection 29(3) of the Australian Insurance Contracts Act (1984, amended in 2021) recognized the right to the insurer to repudiate the contract within three years from the stipulation in case of unfulfillment of the duty of disclosure by the policy holder occurred before or after entering into the agreement. The absence of *bona fides* should be proved and could constitute the basis for the liability of the insured party.

An analogous conclusion is drawn for some time now in the US legal framework, in which an «an ever-increasing number of states have adopted the approach that breach by an insurer should be compensable as a breach of the duty of good faith»[14].

12 K. Iremashvili, *Transparency in the Insurance Contract Law of Georgia*, in Pierpaolo Marano, Kyriaki Noussia (edited by), *Insurance Contract Law*, Cheltenham, 2020, p. 387.

13 See, for instance, the reconstruction proposed by Diana Cerini, who reminds that during the 19th and the 20th centuries the legal systems regulate the duties of information of the insured party; only in the last half-century there is an insistence on the dutifulness of the opposite flows. The change in perspective is evidently due to a different perception of information asymmetries, whereby the idea that the insured is much more able than the insurer to appreciate certain risks has certainly not disappeared (D. Cerini, *Diritto degli intermediary e "diritto del contratto" nella creazione del mercato unico delle assicurazioni*, in O. Troiano (edited by), *Verso una disciplina europea del contratto di assicurazione? Atti del Convegno (Foggia, 16-17 settembre 2005*), Milan, 2006, p. 183). The goal of full bilateral transparency and a more equal system is the final step of this process of continuous re-balancing of the power relationship between the parties of the insurance agreement.

14 T. A. Diamond, *The Tort of Bad Faith: When, If At All, Should It Be Extended Beyond Insurance Transactions?*, in *Marq. L. Rev.*, n. 64, 1981, p. 425.

The absence of information enhances the structural imbalance of the insurance agreement[15] and could increase the economic inequality between the synallagmatic obligations.

The UK Insurance Act comes into force in 2016 and provides as a remedy the duty of fair presentation, which requires the policy holder to indicate "every material circumstance" influencing the risk and other "sufficient information" to the insurer. The provisions introduced in the third section of the Act underline that this disclosure must be clear and transparent. If the insured intentionally fails to disclose the information, the insurer can avoid the policy.

The central role of the insurer as the party who has the right to receive information from the policy holder is also valued in some civil law Countries, especially in the European context[16].

For instance, the French *Code des assurances* obliges the policy holder to provide correct and accurate information to the insurer. Such obligation directly affects the content of the contract, with reference to the determination of the insured risk, and constitutes an indication of how the more general duty of good faith operates in contractual matters. The insurer cannot claim the repudiation of the contract if he or she is aware of the false declaration made by the insured[17].

In the Italian legal system, the information duty inspires the regulation of insurance law in the pre-contractual phase and after the stipulation of the contract. Even after the stipulation of the contract, the effective governance of the risk remains on the insured party, who is obliged to inform the insurer of any changes undergone by the insured risk during the implementation of the agreement.

This provision enables the company to fulfil its obligation and facilitates the risk management. In case of inaccurate and reticent declarations by the insurer, the sanctions set out in artt. 1892, 1893 and 1894 of the Civil Code will be applied.

15 See R. Ippolito, *Il sinallagma nel contratto di assicurazione*, in *Riv. dir. comm.*, n. 9-12, 1983, p. 483 ff.

16 As pointed out by M. P. Mantovani, the duty to inform the insurer is stressed at a soft law level through the Principles of European Insurance Contract Law (PEICL), especially in art. 2:102, par. 1: "When concluding the contract, the applicant shall inform the insurer of circumstances of which he is or ought to be aware, and which are the subject of clear and precise questions put to him by the insurer" (M. P. Mantovani, *Il contratto di assicurazione nel diritto europeo*, in *Annali della Facoltà Giuridica dell'Università di Camerino*, 2, 2013, that quotes the volume by J. Basedow, J. Birds, M. Clarke, H. Cousy, H. Heiss (edited by), *Principles of European Insurance Contract Law*, Munich, 2009).

17 Art. 113-8 of the *Code des assurances.*

Nevertheless, it is possible that the risk assumed by the insurer changes during the contractual relationship. The aggravation of the risk – regulated by art. 1898 Civil Code – implies the obligation for the insured to give immediate notice to the insurer[18], who has the right to withdraw from the contract, without prejudice to any rights of the company related to the payment of the premiums for the insurance period in progress (art. 1898, paragraphs 1, 2 and 4 of the Civil Code)[19]. Comparably, art. 813 of the Georgian Civil Code regulates the *Obligation to give notice of increased risk* to the insurer[20]. These provisions are confirmed by the *lex specialis* in the insurance sector (Legislative Decree n. 209 of 7 September 2005 – Code of Private Insurance), that aims at safeguarding the insurance companies, balancing their interest with the protection of the insured party[21].

This brief comparison demonstrates that, in different legal experiences, the objective to eliminate the imbalance which characterizes the relationship between the policy holder and the insurer is pursued, among the other instruments, through the recognition of the liability of the insured party

18 The Italian Supreme Court underlines: «non qualsiasi mutamento sopravvenuto nello stato delle cose obbliga l'assicurato a darne immediato avviso all'assicuratore, ma quello soltanto che sia caratterizzato: a) da una incidenza sulla gravità e sulla intensità del rischio assicurato, tale da alterare l'equilibrio fra il rischio stesso ed il premio oltre il limite della normale alea contrattuale; b) dalla novità della situazione venutasi a creare, nel senso che essa non sia stata prevista o non fosse, quanto meno, prevedibile dalle parti contraenti all'atto della conclusione del contratto; c) dalla permanenza o, quanto meno, da una certa relativa stabilità e durevolezza della situazione sopravvenuta, restando, invece, privo di rilevanza un mutamento che sia meramente episodico e transitorio» (Cass. civ., n. 1676/1977).

19 The elimination of the risk determines the termination of the insurance agreement *ipso iure* and without any the expression of will by the parties. The insured party is obliged to pay the premium related to the current insurance period (art. 1898 c.c.; see, on the judicial side, Cass. civ., n. 5081/1998).

20 According to which, «[t]he policyholder shall immediately notify the insurer of an increased risk arising after the contract was concluded if it would have a material influence on the conclusion of the contract. Where so provided in the first paragraph of this article, the insurer may terminate the contract one month after giving a notice of termination or demand a corresponding increase in the insurance premium. If the insured intentionally causes the increased risk, the insurer may terminate the contract without observing the notice period».

21 For instance, the rule settled by art. 177, par. 1, of the Code of Private Insurance, which recognizes the right of the policy holder to withdraw from the insurance contract, regardless of the existence of a good cause (*ad nutum* withdrawal clause), within thirty days from the moment in which he/she has received notification of the termination of the agreement has been concluded. In addition, the legislator assigns to the insurer the duty to inform the counterparty of the right provided by art. 177, par. 1, to avoid the asymmetry in the information obligations and reinforce the position of the policy holder. On the point, see A. Candian, G. Carriero (edited by), *Codice delle Assicurazioni Private* (*D. lgs. 7 settembre 2005, n. 209): annotato con la dottrina e la giurisprudenza*, Naples, 2014, p. 758.

that deliberately provides inaccurate information or does not communicate relevant situations to the insurer. It may be added that the Georgian legislator does not specify the content of the duty of information, resorting only to the general provisions included in the first section of the insurance law chapter within the Civil code architecture, based on principles of transparency, correctness, and diligence in the insurance relationships.

The *ratio* of the overall regulation is to guarantee an effective protection of the insurer, who has a different degree and intensity of knowledge, both from a qualitative and quantitative point of view, of relevant circumstances for the insurance agreement.

In fact, the policy holder is much more aware of the actual risk of the conditions related to the occurrence of the death event from accidents or natural causes.

On the other hand, the duty of information of the insured aims at reinforcing transparency and the recourse to correctness within the contractual frame.

In particular, the issue of lack of or incorrect information is relevant from the point of view of the conduct of the insured party, who has provided the insurance company with inaccurate information or has not communicated relevant circumstances. Thus, it determines the liability of the insured for having not correctly fulfilled the obligation to provide information to the insurer.

4. Final remarks

The provision delineated in art. 845 of the Civil code considers the different status of the parties of the insurance agreement, promoting the protection of the disadvantaged one through the repudiation institute. On the practical side, the insurer can choose to accept the violation of the duty of information of the counterparty or to resort to the cancellation of the contract.

In this sense, the renounce to the obligations under the contract constitutes one of the possible responses to the breach committed by the policy holder[22], defined as a particular hypothesis of repudiation provided by the legislator.

22 *Ex* art. 318 of the Civil code, the policy holder, as the "recipient of information" must cover the costs of breaching the duty of information.

More generally, this remedy operates to avoid the continuation of the agreement when a party does not fulfill a duty that could affect the contractual relationship. In this case, the duty is particularly important since it represents a direct expression of the *bona fides* principle, to which the relationship between the insurer and the insured should be conformed, as many others in the legal frame established by the Civil code[23].

In conclusion, repudiation serves both as an *extrema ratio* solution and as a shield, capable of neutralizing the effects of the lack of (if not, dis-) information descended from the conduct of the policy holder.

23 This principle is applied not only in insurance law, but in various areas of the civil law, including family law. Legal scholars emphasized that in the Georgian Civil code «civil agreements are based on the new legal ground – fides, which is the confidence of the parties shown to each other […]» (G. Rusiashvili, *Place of Georgian Civil Law in European Legal Family*, in *TSU Journal of Law*, n. 1, 2015, p. 96).

Article 846 - Termination of the contract where insurance premium is paid periodically

If the insurance premium is paid periodically, the insurer may terminate the insurance contract at anytime but only at the end of the current insurance period.

Maria Beatrice Pagani

Summary: 1. Analysis of the article. 2. Comparative analysis: Italy. 3. At transnational level. 4. Final considerations.

1. Analysis of the article

Article 846 of the civil code of Georgia forms part of the special part of book 3 (Law of obligations), title I (Contract law), chapter 20 (Insurance), section 4 (Life insurance).

In particular, the Article in question covers the situation in which the insurer wishes to terminate the life insurance contract despite the premium has been regularly paid by the policyholder[1]. Otherwise, would be the case of the situations provided for in Articles 817, 818 and 819, which regulate late or discontinuous payments of the premium[2].

The Article in question does not explicitly refer to any other type of omission or variation, in the first case will take note the provisions of Article 845 (Inadmissibility of repudiating a contract)[3], while the second, on the other hand, refers to the general framework of Article 399 (Repudiation of a long-term relationship of obligation)[4] and to that relating to changes in risk. In this last regard, Article 813, in particular, notes that the policyholder must, of course, communicate an increase in risk[5].

Each of the situations mentioned above provide for a specific procedure and a specific timing, the Article in question instead from this point of view is limited to setting a general limit to the prerogative of the insurer: the need to wait until the end of the current insurance period for the effects of the closure of the contract to occur.

This single limit explicitly provided for in this Article, which could also facilitate the infringement of the rights of the weaker party, should

1 *Civil code of Georgia*, article 846, in www.ilo.org
2 *Civil code of Georgia*, articles 817, 818 and 819, in www.ilo.org
3 *Civil code of Georgia*, article 845, in www.ilo.org
4 *Civil code of Georgia*, article 399, in www.ilo.org
5 *Civil code of Georgia*, article 813, in www.ilo.org

then be accompanied, with an appropriate reminder, by further safeguards such as those provided for in Article 802, determining the essential indications to be included in the contract and to be implemented in accordance with the principle of equity laid down in Articles 325 (Defining the terms of an organisation on fair basis)[6] and 852 of the Georgian civil code which, in the event of termination of a life insurance contract due to repudiation, dissolution or contestation, provides for the reimbursement of the amount of the premium paid, while allowing generic "appropriate deductions" by the insurer[7].

2. Comparative analysis: Italy

The provision in question relates to life insurance, a specific type of insurance contract which is frequently characterised by long duration. For this reason, it needs a particular discipline aimed essentially at considering the changes that may occur in the life of the insured person over the years but guaranteeing some safeguards.

It is also specified that life insurance can only be taken out in the case of life, only in the case of death or life-death. Within these, a number of hypotheses can be distinguished, but in any case, it is the strict technical basis on which the equivalence of performance of the parties is calculated that characterizes this contract[8].

The Italian rules on life insurance are contained in the Italian civil code, in particular in book four (Of obligations), title III (Of individual contracts), chapter XX (Of insurance), section III (Of life insurance).

The Italian system, like the Georgian one, is part of a wider regulatory framework and covers innumerable cases where there may be variations in the contract, for example in cases of increased risk. About this, it should be noted that if previously the changes which were included in the aggravations of risk relevant to life insurance contracts were unlimited, according to prevailing doctrine, under the civil code of 1942, the application of the general provisions of Article 1898[9] was considered too burdensome, on the basis of the principle that people must not find in

6 *Civil code of Georgia*, article 802, in www.ilo.org; *Civil code of Georgia*, article 325, in www.ilo.org

For standardised contracts see also Articles 346 et seq.

Civil code of Georgia, articles 346, 347 and 348, in www.ilo.org

7 *Civil code of Georgia*, article 852, in www.ilo.org

8 M. Irrera, E. Fregonara, M. Spiotta, *Lineamenti di diritto assicurativo*, Torino, 2019, 179.

9 *Codice civile italiano*, articolo 1898, in www.normattiva.it

the insurance contract an obligation to pursue their activities freely. For this reason, Article 1926[10], which is binding ex Article 1932[11], is limited to considering only cases of change of profession and activity of the insured person worthy of consideration[12]. It is considered important to underline that not all the jurisprudence is concordant[13].

Not only that, life insurance contracts are also excluded from the general discipline on the termination of the contract for termination of risk, as the risk of death can be reduced or increased, but never completely eliminated[14].

However, in Italy, the situation in which the insurer wishes to terminate the contract, regardless of changes or failures of the policyholder is not explicitly taken into account. In fact, the normal ways of terminating the contract in question are: the expiration of the term, the occurrence of the event provided for in the contract or the exercise of the right of redemption by the policyholder[15].

The reason for not considering this situation is linked to the rare occurrence of the present case, it therefore seems appropriate, before continuing, to recall certain essential elements of the general framework of the contract.

In particular, the principle of contractual autonomy of the parties is the basis of the Italian law, of which a corresponding is contained in the Georgian law Article 319 entitled precisely "freedom of contract"[16], according to which «the parties may freely determine the content of the contract within the limits imposed by law» and also «to conclude contracts which do not belong to types with special rules, provided that they are aimed at achieving interests worthy of protection under the legal system»[17].

This principle is of considerable importance because it is the result of a precise cultural and political choice linked to economic liberalism, in which the legislator state does not intervene in the definition of the use of resources, but leaves free choice to individuals and groups on the purposes, methods and definition of relationships, giving the possibility to define

10 *Codice civile italiano*, articolo 1926, in www.normattiva.it

11 *Codice civile italiano*, articolo 1932, in www.normattiva.it

12 *Spiegazione dell'art. 1926 Codice civile*, in www.brocardi.it

13 M. Rossetti, *Aggravamento del rischio*, in AA. VV., *Le assicurazioni*, a cura di A. La Torre, Milano, 2019, 141.

14 G. Scalfi, *Assicurazione (contratto di)*, in *Digesto Leggi d'Italia*, 1987, 19.

15 N. Gasperoni, *Assicurazione*, in *Enciclopedia giuridica*, Roma, 1988-2010, 11.

16 *Civil code of Gorgia*, article 319, in www.ilo.org

17 *Codice civile italiano*, articolo 1322, in www.normattiva.it

agreements with the value of law between the parties[18], but is not completely estranged. The state in fact, although not protagonist, maintains a fundamental role in the definition of the limits and of the so-called "rules of the game" with the aim of protecting important general and collective interests also of constitutional tenor[19], as well as the particular situation of weakness in which a part of the contract could be found[20].

In Italy, therefore, the only case where there is a recognised possibility of termination of the contract by the insurer, irrespective of other related issues, is the rare case, since it is unlikely that the policyholder would be willing to sign, where the insurer enters an exceptional clause providing for such possibility within the contract[21]. Moreover, this clause must be characterised by particular clarity, completeness and evidence, in compliance with the provisions of Article 166 of the Private insurance code[22] and, above all, with the more general principles of diligence, fairness and good faith of the parties[23].

Obviously, even in this case the manifestation of the insurer's will must be unambiguous and, therefore, take place in writing, as provided for in the case of withdrawal for aggravation of the risk pursuant to Article 1898[24].

The general discipline of the contract also helps in reference to the right of withdrawal in contracts with continuous or periodic execution, specifying that the withdrawal has no effect on all those services already performed or in any case in the course of execution[25]. In this sense, there-

18 *Codice civile italiano*, articolo 1372, in www.normattiva.it

19 It is recalled in particular in article 41 of the Italian Constitution: "*Private economic initiative is free. It cannot be carried out in contravention of social utility or in such a way as to harm security, freedom and human dignity. The law determines the appropriate programs and controls for public and private economic activity to be addressed and coordinated for social purposes*".

G. Iudica, P. Zatti, *Linguaggio e regole del diritto privato*, Vicenza, 2015, 289 ss.; *Costituzione italiana*, articolo 41, in www.normattiva.it

20 For example all the legislation on employment relationships.

21 Telephone consultation with IVASS, the Italian Institute for Insurance Supervision. Clause which could also be used in Georgia under article 416 of the Code. *Civil code of Gorgia*, article 416, in www.ilo.org

22 *Decreto legislativo 7 settembre 2005, n. 209*, articolo 166, in www.normattiva.it; I. Della Vedova, *Criteri di redazione,* in *Commentario breve al diritto dei consumatori, codice del consumo e legislazione complementare*, a cura di G. De Cristofaro, A. Zaccaria, Padova, 2013, 1958.

23 *Codice civile italiano*, articoli 1175, 1176, 1375, in www.normattiva.it; A. D'Angelo, *Il principio di buona fede e la disciplina del contratto*, in *Ambiente diritto*, in www.ambientediritto.it

24 F. Arangio, D. Colangeli, G. Iorio, A. C. Marrollo, M. Palisi, M. Perreca, F. Santi, *Aggravamento del rischio*, in *Commentario al codice civile*, a cura di P. Cendon, Milano, 2010, 304 ss.; *Codice civile italiano*, articolo 1898, in www.normattiva.it

25 *Codice civile italiano*, articolo 1373, co. 2, in www.normattiva.it; G. Scalfi, *Assicurazione (contratto di)*, *cit.,* 9.

fore, with regard to the period of validity of the insurance policy, it means an annual duration, but also a shorter duration if the premium has been divided in shorter periods[26].

We also note the provision of paragraph 2 of Article 1924, relating to the non-payment of premiums by the policy holder with a life insurance contract. The scope is in fact regulated by a specific discipline and not by the general one ex Article 1901 precisely because of the special function of savings performed by the insurance contracts in question[27]. In fact, according to the provision and similarly to Article 852 of the Georgian code, «the premiums paid shall remain vested in the insurer, unless the conditions are met for the redemption of the insurance or for the reduction of the insured sum», when there is an insurer's *certus an* debt[28].

Once again the law refers to the will of the parties: according to Article 1925 of the Italian civil code, in fact, policies must regulate the rights of redemption and reduction of the sum insured, so that the insured person is able at any time to know the value of redemption or reduction of the insurance[29]. In this connection it therefore seems essential to stress that if the contractor were to risk losing completely what he has paid, in the case referred to in the Article by its intention to terminate the contract or to reduce its content but with a ratio that can also be extended to cases of termination of the contract by the will of the insurer, there would be a serious imbalance in the contractual sinallagma because the policyholder would have performed all or part of the service. «It was also stressed that by the mechanisms implemented there is a final reduction in the obligations of the parties; and in any case, the result is achieved to ensure the success of the saving operation even when the payment of premiums is interrupted or the relationship is resolved before its natural expiry»[30].

26 Cass. Civ. Sez. III, 18 novembre 2010, n. 23264.

It is therefore noted that «the duration of the effects of the contract must be distinguished from the insurance period, which represents the time unit of statistical survey on which the actuarial calculation is based and in relation to which the premium is determined».

AA. VV., *Durata dell'assicurazione*, in *Commentario breve al codice civile*, a cura di G. Cian, Padova, 2020, 2048.

27 M. Rossetti, *Mancato pagamento del premio*, in AA. VV., *Le assicurazioni*, a cura di A. La Torre, Milano, 2019, 172.

28 *Codice civile italiano*, articolo 1924, in www.normattiva.it; N. Gasperoni, *Assicurazione*, *cit.,* 10.

29 *Codice civile italiano*, articolo 1925, in www.normattiva.it

30 G. Ballarani, *Riscatto e riduzione della polizza*, in AA. VV., *Le assicurazioni*, a cura di A. La Torre, Milano, 2019, 488.

Another case in which the situation in question could arise is that of the bankruptcy of the insurer.

In this situation will be applied the disciplines established[31].

In particular, Article 1902 of the civil code, paragraph 2, states that in the case of compulsory administrative liquidation, a particular collective procedure that applies when the activity of a company involves socially important interests[32], the insurance contract is terminated in the manner and with the effects established by special laws[33] and Article 169 of the Private insurance code, in paragraph 1, provides for a cover of risks until the sixtieth day following the publication in the Official Journal of the liquidation order for contracts in progress, so as to give the insured the time to protect himself with another insurer[34]. In addition, claims on policyholders arising from contracts with insurance undertakings which have had access to compulsory administrative liquidation «shall be reserved primarily for the fulfilment of the obligations arising from the contracts to which they relate»[35].

However, the vagueness of the provisions and limits placed on the parties must not be interpreted as a shortcoming within the Italian legal system, but as a freedom recognized in the framework of certain provisions, including those of EU origin, to protect the weaker part of the contract, namely the policyholder or consumer[36]. It therefore seems essential to recall here the consumer code, d.lgs. 206/2005, which enshrines the rights of consumers, also referring to their education[37] and consumer associations[38], and the aforementioned private insurance code, legislative decree no. 209/2005, in which there are further specific protections and special requirements for the start and the continuation of

31 Telephone consultation with IVASS, the Italian Institute for Insurance Supervision.; *Regio decreto 16 marzo 1942, n. 267, Disciplina del fallimento, del concordato preventivo, dell'amministrazione controllata e della liquidazione coatta amministrativa*, in www.normattiva.it; N. Gasperoni, *Assicurazione, cit.,* 11.

32 I. Della Vedova, *Effetti della liquidazione coatta di imprese di assicurazione,* in *Commentario breve al diritto dei consumatori, codice del consumo e legislazione complementare*, a cura di G. De Cristofaro, A. Zaccaria, Padova, 2013, 1971.

33 *Codice civile italiano*, articolo 1902, co. 2, in www.normattiva.it

34 *Decreto legislativo 7 settembre 2005, n. 209*, articolo 169, in www.normattiva.it

35 A. Bracciodieta, *Il contratto di assicurazione, disposizioni generali*, Milano, 2012, 208.; *Decreto legislativo 7 settembre 2005, n. 209*, articolo 258, in www.normattiva.it

36 C. F. Giampaolino, *Assicurazione*, *postilla di aggiornamento*, in *Enciclopedia giuridica*, Roma, 2002, 11.

37 To be understood as being informed about relevant issues in order to ensure the free formation of consent.

38 *Decreto legislativo 6 settembre 2005, n. 206*, in www.normattiva.it

an insurance activity[39]. It is in fact a shared opinion in doctrine, that the insured person is placed «at a disadvantaged position compared to the insurance company, which has more technical information and means of persuading the policyholder, and this imbalance is more acute in a delicate sector such as life insurance, in which the policyholder suffers from a lack of information, accentuated by the complexity of life insurance products»[40].

Finally, there is a special institution to draw up implementing regulations and supervise the Italian insurance market to ensure its stability and «the adequate protection of policyholders by pursuing the good and prudent management of insurance and reinsurance undertakings and their transparency and fairness towards customers», the Insurance Supervisory Institute (IVASS)[41].

3. At transnational level

A comparative analysis of insurance legislation leads to several difficulties because, despite the existence of certain common features, which are based on similar economic objectives and harmonisation processes, this particular discipline is also very influenced by the specificity of the context in which it is inserted[42].

In this regard, before continuing, it seems important to recall the European Union's intervention in this area. Indeed, recognising the importance and complexity of the subject under consideration, the European framework has focused in particular on the reliability of insurance companies[43] and the protection of the policyholder and his personal data[44], by

39 *Decreto legislativo 7 settembre 2005, n. 209, Codice delle assicurazioni private*, in www.normattiva.it

40 L. Locatelli, *Diritto di recesso*, in *Commentario breve al diritto dei consumatori, codice del consumo e legislazione complementare*, a cura di G. De Cristofaro, A. Zaccaria, Padova, 2013, 1971.

41 Istituto per la vigilanza sulle assicurazioni, *Chi siamo*, in www.ivass.it

42 R. Capotosti, *Assicurazione*, in *Enciclopedia giuridica*, Roma, 1988-2010, 1.

43 An example is the Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of insurance and reinsurance.

Direttiva 2009/138/CE del Parlamento europeo e del Consiglio in materia di accesso ed esercizio delle attività di assicurazione e di riassicurazione, 25 novembre 2009, in www.ivass.it; Parlamento europeo, *Politica in materia di servizi finanziari, note tematiche sull'Unione europea*, in www.europa.eu

44 Parlamento europeo, *La politica dei consumatori: principi e strumenti, note tematiche sull'Unione europea*, in www.europa.eu; Parlamento europeo, *Protezione dei dati personali, note tematiche sull'Unione europea*, in www.europa.eu

setting up an appropriate insurance and occupational pensions authority, EIOPA[45].

The European discipline, moreover, given the purely economic origins and in some ways still predominant in the Union, has also paid particular attention to the issue of contractual autonomy[46].

However, according to a 2014 report by the Group of Experts on European Insurance Contract Law, which is still somewhat up-to-date, there are «barriers to cross-border trade in the law of insurance contracts between Member States» because of «differences between the different rules on insurance contracts», it follows that there is a lack of legal certainty and difficulty in maintaining certain guarantees deriving from policies taken out in another member state[47].

With regard to the Spanish legal system, the civil code[48] is important, in particular the *libro cuarto* (*De las obligaciones y contratos*), and the *Ley 50/1980, de 8 de octubre, de Contrato de seguro*, which dedicates the entire *sección segunda del título III* to the "*Seguro sobre la vida*"[49]. Furthermore, in Spain too, the provisions referred to above must be considered in relation to the provisions on consumer protection[50].

In this context it can be also said that the principle of contractual autonomy (*Autonomía de la voluntad or libertad contractual*) is the foundation of all discipline in this field, and that it must be exercised within the limits of the law and, as stated in Article 1255, of the more or less vague and changing limits of morality and public order[51].

With specific reference to the withdrawal of the insurer from the life contract, in Spain as in Italy, there is no case unrelated to the non-payment of premiums or to changes in the situation of the policyholder. However,

45 *Regolamento UE n. 1094/2010 del Parlamento europeo e del Consiglio che istituisce l'Autorità europea di vigilanza, modifica la decisione n. 716/2009/CE e abroga la decisione 2009/79/CE della Commissione*, 24 novembre 2010, in www.europa.eu; *Autorità europea delle assicurazioni e delle pensioni aziendali o professionali* (EIOPA), in www.europa.eu

46 M. Grondona, *Derecho contractual europeo, autonomía privada y poderes del juez sobre el contrato,* in *Revista de derecho privado*, n. 22, 2012, 135 ss.; Parlamento europeo, *Il mercato interno: principi generali, note tematiche sull'Unione europea*, in www.europa.eu

47 Commissione europea, *Diritto dei contratti di assicurazione: un rapporto di esperti individua gli ostacoli al commercio transfrontaliero*, in www.europa.eu

48 *Real decreto de 24 de julio del 1889 por el que se publica el Código civil*, in www.boe.es

49 *Ley 50/1980, de 8 de octubre, de Contrato de seguro*, in www.boe.es

50 *Real decreto legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley general para la defensa de los consumidores y usuarios y otras leyes complementarias*, in www.boe.es

51 *Real decreto de 24 de julio del 1889 por el que se publica el Código civil*, artículo 1255, in www.boe.es

once again, particular attention is paid to the content of the contract[52] and to the regulation of the rights of redemption and reduction of the sum insured, so that the policyholder can know at any time the corresponding value of redemption or reduction. Provision that as already mentioned, it is considered to have a ratio that makes it applicable even in the case of termination of the contract by the will of the insurer[53].

In France, however, the discipline of insurance should always be sought in the civil code[54] and in the code des assurances, also with a specific part dedicated to "*Les assurances sur la vie et les opèrations de capitalisation*"[55], to be read always with a particular attention to the consumer code[56] and with a discipline always based on contractual autonomy, to be exercised however without the possibility of derogating from the law and the rules concerning public order[57].

Again, there is no provision similar to that provided for in Article 846 of the Georgian civil code, but it should be noted that the French legislator has made clear that the insurance contract must necessarily contain[58], and wanted to entrust to the Council of State the task of specifying all those «clauses designed to define, to ensure the safety of the parties and the clarity of the contract, the subject of the contract and the respective obligations of the parties» in the case of life insurance contracts and capitalisation contracts[59].

In Switzerland[60], the most important texts are: the federal law on the completion of the Swiss civil code (book five: Law on obligations)[61] and the federal law on insurance contracts[62], always accompanied by further texts on consumer protection[63]. Again, there is no provision similar to

52 *Ley 50/1980, de 8 de octubre, de Contrato de seguro*, artículos 2 y 3, in www.boe.es

53 *Ley 50/1980, de 8 de octubre, de Contrato de seguro*, artículo 94, in www.boe.es

54 *Code civil*, in www.legifrance.gouv.fr

55 *Code des assurances*, in www.legifrance.gouv.fr

56 *Code de la consommation*, in www.legifrance.gouv.fr

57 *Code civil*, article 1102, in www.legifrance.gouv.fr

58 *Code des assurances*, article L112-4, in www.legifrance.gouv.fr; *Code des assurances*, article L113-12, in www.legifrance.gouv.fr; *Code des assurances*, article L113-12-1, in www.legifrance.gouv.fr;

59 *Code des assurances*, article L132-5, in www.legifrance.gouv.fr

60 It is noted that Switzerland «is not a member state of the European Union, but pursues a European policy based on bilateral sectoral agreements». Confederazione Svizzera, *La Svizzera e l'Unione europea*, Berna, 2016, 3.

61 *Legge federale di complemento del codice civile svizzero (libro quinto: diritto delle obbligazioni) del 30 marzo 1911*, in www.admin.ch; *Codice civile svizzero del 10 dicembre 1907*, in www.admin.ch

62 *Legge federale sul contratto di assicurazione del 2 aprile 1908*, in www.admin.ch

63 *Legge federale sull'informazione dei consumatori del 5 ottobre 1990*, in www.admin.ch

that examined in the Georgian civil code, but contractual autonomy is guaranteed, albeit within the usual limits[64], and particular attention is paid to the obligations to inform the policyholder, with reference also to the redemption values[65] and the case of bankruptcy of the insurer[66].

4. Final considerations

It can be said that Article 846 of the Georgian civil code represents an exceptional provision, in the context of the countries analysed, which, in some respects protects the contractual autonomy of the parties but which, in some cases, risks undermining the rights of the weaker party of the contract. A similar provision, in fact, without a proper reading of the legislation as a whole and without adequate and important rules aimed at consumer protection, involves a great danger for the policyholder who may have invested his money with the intention of obtaining long-term benefits and risks being abandoned, with no great chance of solutions, by the insurance company, that is only obliged to wait until the end of the insurance period.

Although a similar provision can be considered positive and necessary, also by virtue of the rapid changes to which the world is subject today, some measures are therefore desirable to temper the tenor of the norm. In particular, provision should be made for clear information to be given to the customer concerning this possibility which the insurer retains and, furthermore, it would be necessary to provide for a specific framework requiring the parties to define this possibility through specific clauses to be included in the contract. It would also be important to explicitly refer to and lay down additional regulatory limits to the conduct of the insurer and certain measures that reduce the risk of taking advantage of the weakness of the policyholder, such as, for example, the provision of the payment of certain penalties in the event of early termination of the contract by the insurer.

64 *Legge federale di complemento del codice civile svizzero (libro quinto: diritto delle obbligazioni) del 30 marzo 1911*, articolo 19, in www.admin.ch

65 *Legge federale sul contratto di assicurazione del 2 aprile 1908*, articolo 3, in www.admin.ch; *Legge federale sul contratto di assicurazione del 2 aprile 1908*, articolo 90, in www.admin.ch

66 *Legge federale sul contratto di assicurazione del 2 aprile 1908*, articolo 37, in www.admin.ch

Article 847 – Transfer of the right to compensation to a third person

1. In the case of a cumulative insurance, the policyholder may transfer the right to receive benefits to a third party or replace the third party with another person, unless otherwise provided by the contract.

2. The third party entitled to receive benefits may exercise the right only upon occurrence of the insured event, unless the policyholder has instructed otherwise.

Giorgi Amiranashvili

Summary: 1. The Essence of the Norm. 2. The Difference of Transfer of the Right to Compensation to a Third Person from a Contract for Third Party Beneficiary. 3. The Specificity of the Norm.

1. The Essence of the Norm

According to the regulation provided by Article 847, the legislator gives the policyholder the right to designate a third party as a beneficiary of the cumulative life insurance[1]. In addition, the policyholder maintains the right to replace the beneficiary named by him/her, unless otherwise provided by the contract[2]. Therefore, in the given situation, the will and interest of the policyholder are a priority. In the case of cumulative personal insurance, the policyholder is always obliged to pay a fee[3].

2. The Difference of Transfer of the Right to Compensation to a Third Person from a Contract for Third Party Beneficiary

The agreement referred to in Article 847 differs from the agreements concluded in favor of a third party. Therefore, it is essential to distinguish between these two types of contracts. Although the case under discussion at first glance looks like a contract concluded in favor of a third party, in reality, it is still different from it.

1 K. Iremashvili, *Article 847*, *in Online Commentary of the Civil Code*, https://gccc.tsu.ge/, 16.03.2016, 1 (in Georgian).

2 K. Iremashvili, *Article 847*, *cit*., 1.

3 M. Tsiskadze, *Article 847*, in *Commentary to the Civil Code of Georgia*, *Volume 4*, *Law of Obligations*, *Special Part*, *Part II*, Samartali Publishers, Tbilisi, 2001, 169 (in Georgian).

To begin with, it should be determined whether the third party is directly insured (the life, health, or property of the third party) or the third party is only entitled to receive the insurance indemnity right which is transferred by the policyholder. The latter case can be broadly referred to as a contract in favor of a third party, as the third party appears to be the beneficiary, but, eventually, this case should be strictly separated from the case under consideration[4].

Article 847, para. 1 refers to a case when the policyholder has insured his/her own life under an insurance contract and entitles the third party to receive the benefit (insurance compensation) arising from this contract[5].

As in the case of a contract in favor of a third party, under Article 847, para. 1, the third party has the right to demand fulfilling an obligation. The third-party receives certain benefits in both cases, but for separation from the contract in favor of the third party, it is needed to be focused on the object, as well as the insurance interest and purpose of the contract, which is essential for the correct assessment of the insurance relationship due to the legal nature of the insurance[6].

In the case of cumulative insurance, when the death of the policyholder is determined as an insured event and the policyholder transfers the right to a third party to receive the benefit, in such case, it is the policyholder's and not the third party's life is insured[7].

It should be noted that «in the insurance doctrine, two life insurance contracts are separated from each other […] the first, by which the policyholder insures its own life, and the second, by which the life of a third party is insured»[8]. The latter should be considered as an insurance contract concluded in favor of a third party[9].

It should also be taken into account that the right to receive insurance compensation in a contract concluded in favor of a third party belongs directly to a third party. In case of transferring the right to claim benefits, the above mentioned right belongs initially to the policyholder, which can

4 D. Legashvili, *The Influence of an Expression of Will of a Third Party on a Contract for Third Party Beneficiary*, Tbilisi, 2020, 255 (in Georgian).

5 *Ibid.*

6 *Ibid.*

7 *Ibid.*

8 *Ibid.*

9 *Ibid.*

afterwards be transferred to a third party. The circumstance that the beneficiary may not be insured and he/she may have the right to claim only the benefit from the insurance contract derives from the Law of Georgia on Insurance, which distinguishes between the notions of the insured person and the beneficiary (Art. 10 para. 1, 11 para. 1 and 11 para. 5 of the same Law). Therefore, all contracts that provide for any kind of benefit to a third party should not be unconditionally considered as a contract entered into in favor of a third party[10].

3. The Specificity of the Norm

A cumulative type of insurance contract should contain a reference to the insured event as an essential condition, otherwise, it cannot be considered as an insurance contract[11]. Consequently, if the policymaker does not provide any other indication, the beneficiary can exercise the right granted by the contract as a result of the occurrence of the insured event[12].

The title of Article 847 "Transfer of the right to compensation to a third person" needs to be improved. Certainly, in "the right to compensation", the lawmaker means the right to receive compensation. It would be more appropriate for the title of the Article to be formulated accordingly. Considering the above is important for a correct interpretation of the Article. By transferring the right to receive compensation, the lawmaker, on one hand, puts the third party in a useful position, and on the other hand, protects the interests of the policyholder under the provisions of Article 847, para. 2[13].

For example, "A" has entered into a cumulative life insurance contract with the insurance company ("B"). In the insurance contract, the death of "A" is defined as the insurance event and the third party appears to be the beneficiary. Accordingly, if "A" does not die during the insurance period (if insurance events do not occur), he/she will receive the insurance indemnity. And if "A" dies during the insurance period, "C" will receive compensation. In addition, the clause given in 847.2 on the issuance of other instructions by the insurer should be taken into account. For in-

10 *Ibid.*
11 M. Tsiskadze, *Article 847*, *cit.*, 170.
12 K. Iremashvili, *Article 847*, *cit.*, 1.
13 *Ibid.*

stance, according to one of these cases, even if "A" remains alive, "C" may still receive insurance compensation (depending on the agreement between those two parties)[14].

Thus, life insurance may be cumulative and it can be concluded in favor of another person. But under this contract, a third party (another person) is not entitled to claim from the insurer the insurance premium paid by the policyholder. At this time, the insurer is obliged to pay the insurance premium to a third party only if an insured event occurs; Therefore, in relation to cumulative insurance, the lawmaker considers a third party as an inappropriate third party[15].

14 *Ibid.*

15 M. Tsiskadze, *Legal Regulation of Voluntary Insurance*, Meridiani Publishers, Tbilisi, 2001, 59 (in Georgian).

Article 848 – A non-rightful third party

1. If the right of the third party does not correspond to the duty of the insurer in the case of cumulative insurance, then the policy holder shall retain this right.

2. If the third party does not exercise his/her right to receive the benefit in the case of cumulative insurance, then the policyholder shall retain this right.

Andrea Cotillo

Summary: 1. Introduction: life insurance contract. 2. The Purpose of the norm. 3. The definition of Third Party. 4. Hints on the Article 847 CCG. 5. The previous versions of Article 848 CCG. 6. The Content of the norm. 7. Comparison with other legislative models.

1. Introduction: life insurance contract

Article 848 CCG is included in the provisions of the Civil Code dealing with life insurance, and it applies in particular in the cases where there is a dissociation between the policyholder and the beneficiary of the effects of the policy.

Life insurance policy is a contract signed between an insurer and a policyholder. Under the life insurance policy, the insurer undertakes to pay the beneficiary (the policyholder or another named person) a lump sum or an annuity upon the death of the insured person for the payment of premiums by the policyholder during his lifetime.

It is therefore necessary to clarify that although generally the person who makes the contract with the insurer is both the owner of the insured interest and the beneficiary of the benefit under the policy (in which case it is appropriate to refer either to the "insured"), it is frequently possible the dissociation between those positions.

In particular, a distinction may be made – and it often happens in the case of the life insurance contracts – between the Policyholder (the person taking out the policy and who may not necessarily correspond to the insured person[16]) and the Insured (the person in whose sphere the insured event occurs, for example his death) and the Beneficiary (the person who will receive the

16 See Art. 844 (I) CCG that provides the insurance may cover not only the underwriter but also "*another person*".

compensation when the insured event occurs)[17]. The latter is a person – other than the policyholder and normally than the insured person – who did not enter into the contract and (usually) indicated by the policyholder as the person on whom the insurance effects will produce upon occurrence of the insured event. This hypothesis represents a case of insurance in favour of a third party, regulated under the Arts. 349, 350 and 351 of Georgian Civil Code[18].

Life insurance can be basically grouped into Permanent life insurance and Term life insurance: the policies of the first type are effective until the policyholder dies or stops paying premiums or transfers the policy, while the policies of the second type terminate after a certain predetermined period of time[19].

Cumulative insurance referred to the Art. 848 CCG seems to be closest to the concept of whole life insurance.

2. The Purpose of the norm

Article 848 CCG is located in Book Three ("Law of Obligations"), Special Part, Section One ("Contract Law"), Chapter Twenty ("Insurance"), § IV "Life Insurance", of the Georgian Civil Code, and it is headed "A non-rightful third party".

17 Under the Art. 2 (d) and (e) of Georgian Civil Code, the policyholder is a "*person that has concluded an insurance contract whit the insurer*" while the insured is a "*person covered by an insurance policy*" and furthermore the policyholder "*may also be the insured, unless otherwise provided by the insurance contract*".

Under Art. 11 of Law of Georgia On Insurance, the beneficiary is a natural or legal person who, in compliance with the insurance contract or insurance legislation, receives the insurance indemnification.

18 The particularity of the agreement concluded in favour of the third party consists in the fact that the third party is not the signatory, the third party does not manifest the will on the conclusion of the agreement, and therefore acquires the right on request under the agreement without participating in the agreement.

The underlying requirement is the agreement concluded between two other parties. The contract concluded in favour of the third party isn't a trilateral agreement.

19 Term life insurance is the simplest form of life insurance: the insurer pays only if the insured event occurs during the term of the policy.

Term life insurance policies can be divided into level term and decreasing term, depending on whether the death benefit stays the same or drops over the course of the policy.

Permanent life insurance includes commonly both a death benefit and cash savings.

Permanent life insurance can be itself classified into different types such as whole life insurance and universal life insurance: the former – the most frequent type of Permanent life insurance – offers a death benefit in combination with a saving accounts, while the latter offers the possibility of different adjustment elements, providing greater flexibility.

Whole life insurance can provide lifelong coverage and allows the beneficiary to claim the death benefit under the policy whenever the insured person passes away. As mentioned, this type of insurance provides death benefit coverage for the life of the insured person and in addition contains a savings component in which cash value may accumulate: in fact part of the premium payments will accumulate in a cash value account (this accumulation is the major differentiating element between whole life and term life insurance).

There are further examples of the rule under comment in various legal systems, while in others it is absent. The rule certainly derives from German and Austrian law, which are the reference models of the Georgian Civil Code[20].

The purpose of Article 848 CCG is to regulate, in the case of cumulative life insurance, the consequences if the right of the third party to receive the benefit granted by the contract is not recognised or not exercised by the third party himself, by prescribing who is entitled to receive the compensation in such a case.

In its essence, the norm should be explained in connection with the previous Article 847 CCG, which contemplates the faculty of the policyholder to indicate a person other than the person whose life or death is insured (the 'Third Party') as the beneficiary of the annuity or capital sum provided under the policy in the case of the insured event occurs.

Before giving a brief overview of the Art. 847 CCG (see paragraph IV below), it is appropriate to specify the definition of Third Party under life insurance regulation.

3. The definition of Third Party

Contracts generate rights and duties, which are generally enforceable by and against the contractual parties. In some situations, contracts may create third party beneficiaries, who are not contract parties, but they have rights and obligations arising out of the contract as if they had been contractual parties.

Contracts which constitute benefits accruing to a third party introduce third party beneficiary situations. The third party who receives the benefit of the obligations arising from the contract, even though not owing any obligation according to the contract, is obliged by the contractual parties to a legal obligation. Life insurance policy beneficiary is the typical third party beneficiary, who identifies himself with the person who receives the benefit granted by life insurance policy once the insured event (*e.g.* the death of the policyholder or the insured person) occurs. In conclusion, the insurance policy (and thus the insurer) grants a benefit on

20 See paragraphs below for a brief overview of the corresponding rules in other legislations and in particular in German and Austrian law.

the third party even though he's not a contractual party and he has not issued a contract with the insurer[21].

The intention to confer a benefit on the third party must be clearly expressed in the contract, which may also be inferred from a specific reference to the third party or from wide language denoting a particular category of beneficiaries to which the third party belongs (under life insurance Georgian law, if a life insurance contract is concluded for the benefit of another person, his written consent must be required: in this sense, see Art. 844 CCG)[22], although the third party may not necessarily be named at the time the contract is made (in this sense, see Art. 836 CCG, second paragraph, according to which the agreement concluded for the benefit of another party does not require his name to be indicated)[23]. Nevertheless,

21 For in-depth analysis, see D. Legashvili, *Peculiarities for Definition of the Essential Conditions of the Agreement Concluded in Favor of the Third Party on the Basis of an Independent Require*, Journal of Law, No2, 2016. In this article it is assumed that there distinct categories of legal relations between the participants of the agreement concluded in favour of the third party, in which the third party has the independent right to demand performance from the debtor: between the debtor (promisor) and the creditor (promisee); between the promisee and the third party; and between the debtor and the third party. The debtor (promisor) and the creditor (promisee) enter the so called "implementation relationship", while the promisee and the third party enter the so called "monetary or transfer relationship".

In particular, the latter legal relationship indicates the relationship that assists the promisee in enforcing the obligations by the promisee towards the third party, since the promisor endows the third party with the right to demand performance if the third party enjoys the right to retain this right.

The principle of freedom of agreement applies to the agreement made between the promisee and the promisor.

No contractual relationship exists between the third party and the debtor (promisor). The implementation relationship emerges between the third party and the debtor based on the agreement concluded between the debtor and the creditor.

For in-depth information, see also H. Brox, W. D. Walker, *Allgemeines Schuldrecht*, 39. Aufl., München, 2015, § 32, Rn. 7, 379; I. Krofholder, I. Florian, M. Heiden, *Comment to the Civil Code of Germany*, Tbilisi, 2014, field 3-6, 233.

22 In German legal system, which as said is the principal model for Georgian legal system, see § 156 VVG («*Versicherungsvertragsgesetz*», German Insurance Contract Act of 23 November 2007), which requires the knowledge of the insured person. For in-depth analysis, see below in the text.

23 The Art. 836 CCG, envisaging insurance in favour of another party, directly prescribes that the policyholder is entitled to conclude the insurance contract with the insurer on own behalf in favour of another party. Identification of the hereof party is not mandatory. However, in line with the Art. 844 CCG, the conclusion of the contract in favour of the third party requires written consent of the third party.

In German legal system, the same rule is contained in the § 43, par. I, VVG, which envisages and regulates the case of the insurance for the account of a third party, by providing as follow: «the policyholder may make the contract of insurance in his own name for the account of another with or without naming the insured third party (insurance for the account of a third party». The other paragraphs of the same rule regulates the doubt cases.

For in-depth analysis on the point, see below in the text.

the third party must know about the contract and rely on it in order to acquire his rights under the contract.

It must be distinguished between third party insurance and insurance for the account of a third party. In the case of life insurance, the policyholder determines the beneficiary and the benefit under the insurance policy accrues to the third party, but since the direct loss occurs on the insured person (*e.g.* the event of his death) life insurance must be classified as first party insurance (thus insurance concluded for the benefit of another party)[24].

By classifying the various models of life insurance, it is possible to distinguish between insurance made on the policyholder's own life or on the life of a third party, and in other respects the insurance may be concluded in favour of the policyholder himself or in favour of a third party.

Depending on the different combinations of policyholder, insured and beneficiary, there is: *I)* insurance on the policyholder's own life in its own favour and in favour of his own heirs; *II)* insurance on the policyholder's own life in favour of a third party; *III)* insurance on the life of a third party in its own favour; *IV)* insurance on the life of a third party in favour of the same third party or of another third party[25].

24 In terms of applying insurable interest for life insurance cases, American doctrine distinguishes two different cases: *i)* when insured insures his own life and indicates the third person as a beneficiary; *ii)* when insured insures the other person and he pays the insurance premium.

Just to make a point, with regard to the aspect of the holders of request in case of life insurance, American doctrine considers the right to change the beneficiary under the contract if the relationship with him deteriorates, as a form of self-defence. For example, for property and liability insurance, only the insured has right to claim the insurable interest, whereas third person cannot have a claim against the annulment of the contract.

American courts approach insurable interest differently with respect to third party claims. Some judges are of the view that granting the right to claim insurable interest to third parties is unreasonable since it also conflicts with the autonomy of the will of the contract parties.

Under life insurance, third parties are also entitled to present a claim for an insurable interest. Accordingly, as long as there is a valid reason to doubt that the beneficiary had a certain connection with the insured's death, then a member of his family may request the annulment of the contract. (see J. R., Richmond D., *Understanding Insurable Law*, 4th Edition, "*LexisNexis*", 2007, 310).

25 Under Georgian Civil Code, these situations are dealt with in Articles 836, 844 and 847 CCG. Such situations also feature in the other legal system: for example, under Italian Civil Code, these situations are dealt with in Articles 1919, 1920, 1922 and 1923 Civil Code.

4. Hints on the Article 847 CCG

The Article 847 CCG regulates the case of the transfer of the right to compensation to a third person and provides, at the first paragraph, that in the event of a cumulative insurance, the policy subscriber may transfer the right to receive the benefit under the policy to a third party or replace a previously named third party with another person, if not otherwise specifically provided under the contract, and at the second paragraph, that the third party entitled to receive the benefit under the policy may only claim after the occurrence of the insured event, if not otherwise determined by the policyholder[26].

According to the first paragraph of Art. 847 CCG, in the case of cumulative insurance, the policyholder is entitled to indicate a third party to benefit from the life insurance contract, unless otherwise provided by the contract itself. If in the contract is already indicated the third party, the policyholder may indicate another person to replace the third party.

The conditions are established by the second paragraph of Art. 847 CCG.

Firstly, the realization of the right transferred to the beneficiary occurs only as a result of an accident. In fact, the right to receive the compensation arise once occur the insured event.

Secondly, the beneficiary may exercise this right only if provided by the insurance contract[27].

By transferring the right to receive the compensation, the legislature, on one hand, provides a useful reservation for the policyholder. On the other hand, in the second paragraph of Art. 847 CCG, it protects the interest of the insurer.

26 Article 847 CCG textually provides as follow: «1. In the case of a cumulative insurance, the policyholder may transfer the right to receive benefits to a third party or replace the third party with another person, unless otherwise provided by the contract. 2. The third party entitled to receive benefits may exercise the right only upon occurrence of the insured event, unless the policyholder has instructed otherwise».

27 Consider the following example. A signed a cumulative life insurance contract with insurance company B. The insured event with the contract is C death. In the contract is determined the beneficiary D. In the case of death policy, if C die during the insurance period, D will receive the compensation.

5. The previous versions of Article 848 CCG

The provision under comment has undergone some amendments in previous versions of the Civil Code, differing mostly in marginal and simply formal aspects, except for a relevant difference concerning the subjective profile.

In fact, previous wordings, regardless of their title and purely formalistic and linguistic differences[28], appear to be almost antithetical to the current one, in relation to the person entitled to receive the benefit under the policy in the event the third party does not.

The former Art. 848 CCG, under 1997 version[29], read as follow:

«Article 848. Improper third party

1. If in the case of accumulative insurance the right of a third party does not in accordance with the duty of the insurer, then this right remains with the insurer.

2. If in case of accumulative insurance the third party does not use himself the right to receive the benefit, then this right remains with the insurer».

The same provision, under the 2001 version[30], states as follow:

«Article 848. Non-Entitled Third Person

1. If, in case of "accumulated" insurance, the right of the third person does not correspond to the obligation of the insurer, then the insured shall retain this right.

2. If, in the case of accumulated insurance, the third person does not exercise his right to receive the benefit, then the insured shall retain this right».

As mentioned above, the main difference comes from the subjective point of view: while in the current version the person who retains the

28 For example, in the wording in force in 1997, the rule was headed "Improper third party", whereas in the subsequent 2001 version it was amended in "Non-entitled third person". Similarly, nominalistic revisions were made regarding the term "cumulative insurance", the 1997 version using the term "accumulative insurance" and the succeeding 2001 version referring to "accumulated insurance".

As it can be seen, these are slight amendments which do not affect the substantive meaning of the provision.

29 Civil Code of Georgia receipted by the Parliament of Georgia in 26 June 1997 (date of publication 26 July 1997).

30 Civil Code of Georgia of 31 May 2001. The reference is to the version translated into English within the project hosted by Professor Lado Chanturia and pursued with the support of the USAID and IRIS Centre (University of Maryland).

right to the benefit in the event of the third party is not entitled to receive the benefit is the policyholder, in the 1997 version it is the insurer and in the 2001 version it is the insured person[31].

This would represent a substantial modification. Therefore, Article 848 CCG in its old wordings provided that in the case of cumulative insurance, if the third party's right did not correspond to the insurer's obligation, the claim would remain with the insurer (1997 version) or with the insured (2001 version).

Nonetheless, given that the different formulations in the other parts of the text coincide with each other, there is a possibility that, since this is a translation from the mother tongue into English, there has been a mere misprint whereby the term "insurer" would actually refer to the "insured". In this case, the meaning of the previous wordings was in line with that of the current wording.

6. The Content of the norm

The Article 848 CCG regulates the relations between the policyholder, the third party and the insurer, in particular in the event that the third party is not entitled to receive the benefit granted under the insurance contract.

The Art. 848 CCG is divided into two parts, covering two different hypotheses leading to the same consequence.

According with the first paragraph of Art. 848 CCG, if the right of the third party in the case of cumulative life insurance does not in accordance with the duty of the insurer, then the right is retained by the policyholder.

In other respects, in the case of cumulative insurance – this type of insurance contract is an essential condition – when there is not identification between the policyholder and the insured person, if the third party indicated by the policyholder in the contract is not entitled to receive the compensation, then this right can still be exercised by the policyholder.

The same result of retaining the right by the policyholder occurs in the second assumption.

31 Nevertheless, considering that we are dealing with a text translated into English, the discrepancy between the 2001 previous version and the current version can be explained in the sense that the term insured can also indicate the policy subscriber.

According to the second paragraph of Art. 848 CCG, if in case of cumulative life insurance the third party does not exercise himself the right to receive the benefit, then this right remains with the policyholder[32].

Consider the following example. A has purchased a cumulative life insurance contract naming as beneficiary B. Once the insured event occurs, the beneficiary is entitled to request the benefit (847, second paragraph, CCG). Nevertheless, if the beneficiary's claim is rejected because he's not entitled since his right is not in correspondence with the duty of the insurer, or he does not exercise his right, then the right to the compensation remains with the policyholder.

A typical case of non-acquisition of the right to receive the benefit under the policy by the third party, in particular for non-exercise of such right, is the death of the beneficiary before the occurrence of the insured event, *e.g.* the death of the insured person in case of death policy.

Since, under Art. 847 (2) CCG, a third party named as beneficiary acquires the right to the insurer's benefit only upon the occurrence of the insured event, unless the policyholder provides otherwise, such an acquisition cannot occur when the beneficiary has previously died. The beneficiary has only a vested right that is unrecognisable until the occurrence of the insured event.

In conclusion, in the case of such a claim (the case of cumulative insurance, that as mentioned above seems to be closest to the concept of whole life insurance), if the right to the benefit under the policy is not acquired by the third party entitled to receive it, the policyholder is (also) entitled to do so (on its own behalf). Thus, the beneficiary himself would only be entitled to an expectable right.

The Art. 848 CCG may be considered as an exception to the general rule established by the legislature whereby the refund request is normally made only by the policyholder or the insured person in the case of insurance for the benefit of another person (see Arts. 837 and 838 CCG), with the exception of extraordinary cases.

Therefore, cumulative life insurance represents a deviation to the aforesaid general rule.

32 See M. Tsiskadze, *Commentary of SC*, Book IV, Vol. II, 2001, art. 848, p. 171; Keeton/Widiss, *Insurance Law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices*, West Group, 2003, p. 161.

In fact, the Art. 848 CCG authorizes the third party to request the compensation – *i.e.* to exercise the right to receive the benefit transferred by the policyholder – unless that request is improper or not enforced.

Ultimately, in order to understand the rule under analysis it may be useful to take into account the order given in Art. 853 CCG[33]. In fact, according to 848 (I) CCG, the beneficiary has no right to claim from the insurer the insurance premium paid by the policy subscriber.

Accordingly, in the presence of the first precondition established by 853 (I) CCG (at the stage of enforcement of the decision on the dispute over the insurance claim), the claim of the beneficiary is limited to the right to receive insurance compensation. In this case, the legal equality of the beneficiary to the insured might not be fully correspondent.

7. Comparison with other legislative models

The content of the rule at issue is adopted, albeit with adjustments, in a number of legal systems (*e.g.* in German and Austrian legal systems), while in others is not specifically regulated (*e.g.* in Russian and Italian legal systems)[34].

In particular, under Austrian law, the «*Bundesgesetz über den Versicherungsvertrag*» (abr. VersVG, the Austrian Insurance Contract Act of 2

33 Here is the text of the article under discussion: *Article 853 - Effects of forced execution* «1. If a judgment on an insurance claim is enforced or if a legal proceeding is pending in relation to the bankruptcy of the insured, then the person who is specifically named as the beneficiary may take the place of the policyholder in the insurance contract. If the person entitled to the benefits participates in the contract, then he/she shall meet all the requirements of the creditor or secure the bankruptcy assets to the extent of the amount that the policyholder could have received from the insurer upon termination of the insurance contract. 2. If the person entitled to the benefit is not interested in receiving the benefit or if he/she is not designated by name, then the spouse and children of the policyholder shall acquire this right».

34 Obviously, each national legislation provides its own rules, generating different regulation models. At the European Union level. there are attempts to harmonize insurance regulations. Among these can be included the Final Report of the Commission Expert Group on European Insurance Contract Law (2014).

By Commission Decision of 17 January 2013 an Expert Group on European Insurance Contract Law was set up. According to this Decision, the Expert Group's task was to carry out an analysis in order to assist the Commission in examining whether differences in contract laws pose an obstacle to cross-border trade in insurance products.

The Expert Group was convened for many meetings in 2013 and 2014, from which the above-mentioned Final Report originated.

That report examines the impact of differences between national contract laws on cross-border insurance business under the freedom to provide services and the freedom of establishment. The mandate of the Expert Group is to carry out an analysis in order to assist the Commission in examining whether differences in contract laws pose an obstacle to cross-border trade in insurance products.

Another harmonization attempt is the Freedom to Provide Services (FPS) regime, established by the third European Life Directive, the purpose of which is to create a single market in insurance.

December 1958, successively amended), offers in Section Two, First Chapter, III, §§ 74-80, the legal framework on insurance for third party account and, under Section Three, §§ 159-178, the life insurance regulation.

With regard to the first group of rules, the § 74 VersVG reproduces the principle according to which life insurance contract may be issued in policyholder's own name or for the account of another person, although not yet named[35], whereas the following § 75 VersVG provides that in this case the insured person is entitled to claim rights under the insurance contract[36].

These principles have been transposed into the above-mentioned Arts. 836, 837 and 838 CCG.

With regards to the second series of rules concerning the specific context of life insurance contract, the § 159 VersVG contains the general rule whereby life insurance may be purchased on behalf of the policyholder or another person[37], accurately replicated in the already mentioned Art. 844 CCG.

Other rules are dictated in relation with the doubt cases or where several beneficiaries are appointed (for instance, see §§ 166 and 167 VersVG, that are not properly reflected within the life insurance section of the Civil Code of Georgia[38]).

35 The § 74 VersVG provides textually as follow: «(1) The person who concludes the contract with the insurer can take out insurance in his own name for someone else, with or without naming the person of the insured person (insurance for the account of a third party). (2) If the insurance is taken out for someone else, even if the other person is named, in case of doubt it is to be assumed that the contracting party is not acting as a representative but in his own name for the account of a third party».

36 The § 75 VersVG provides textually as follow: «(1) In the case of insurance for a third party account, the insured person is entitled to the rights from the insurance contract. However, only the policyholder can request the transmission of an insurance policy. (2) The insured can only dispose of his rights without the consent of the policyholder and only assert these rights in court if he is in possession of an insurance policy».

37 The § 159 (1) VersVG textually provides that «the life insurance can be taken out on the person of the policyholder or another».

38 For exhaustiveness, the content of the aforementioned rules is given below: «§ 166 VersVG (1) In the case of capital insurance, it must be assumed that the policyholder has the right to designate a third party as the beneficiary without the consent of the insurer or to replace the third party so designated. In the event of doubt, the policyholder's right to substitute another person for the third party entitled to claim is reserved even if the third party is named in the contract. (2) Unless the policyholder stipulates otherwise, a third party designated as entitled to purchase shall only acquire the right to benefits from the insurer when the insured event occurs».

«§ 167 VersVG (1) If, in the case of a capital insurance, several persons are designated as beneficiaries without determining their shares, they are entitled to subscribe in equal parts; the portion not acquired by one beneficiary increases to the remaining beneficiaries. (2) If, in the case of endowment insurance, the insurer is to pay after the death of the policyholder and if payment to the heirs is stipulated without any further stipulation, then, in case of doubt, those who are appointed as heirs at the time of death are proportionate to their inheritance shares entitled to subscribe. A renunciation of the inheritance has no influence on the entitlement. (3) If the state is appointed as heir or if the federal government appropriates the estate (Section 750 ABGB), it is not entitled to a subscription right».

Among the provisions on life insurance contract can be found the source of inspiration for Art. 848 CCG, which is § 168 VersVG, that prescribes that if, in the case of a capital insurance, the right to the benefit of the insurer is not acquired by the entitled third party, the policyholder is entitled to do so[39].

Therefore, according to § 168 VersVG, the policyholder is entitled to the insurer's benefit if it is not acquired by the third party entitled to receive the benefit in the case of capital insurance.

As it is evident, the norm assumes the same situation and prescribes the same consequences as for Art. 848 CCG, albeit with some differences: while the former merely refers generically to the hypothesis that the third party does not acquire – whatever the reason – the right to the benefit, the latter is more specific as it essentially distinguishes two hypotheses of non-acquisition of the right by the third party, providing in the first and second paragraphs respectively that the third party does not acquire the benefit if his right does not correspond to the insurer's obligation or if he does not exercise that right.

Focusing on German law, the «*Versicherungsvertragsgesetz*» (abr. VVG, the German Insurance Contract Act of 23 November 2007[40]) dedicates in Part 1 ("General Part"), Division 4, a number of provisions concerning the case of the insurance for the account of a third party, by providing in particular, in Section 43, the faculty of the policy subscriber to make the insurance contract in his own name for the account of another person[41]. This principle is contained in § 74 VersVG and reflected in Art. 836 CCG (and, as explained below specifically for life insurance contracts, in Art. 844 CCG).

39 For judicial applications of the § 168 VersVG, see TE OGH 1999/11/10 7Ob254 / 99z and TE OGH 2007/1/31 7Ob290 / 06g.

40 At last amended by Article 13a of the Act of 17 July 2009. The translation offered in the text is provided by the Federal Ministry for Justice and Ute Reusch.

41 The other paragraphs of the same rule covers the doubt hypotheses by providing in particular, at the second paragraph, that for the case of insurance contracts made for another person, it is assumed, when in doubt, that the policyholder is acting in his own name for the account of a third party and, at the last paragraph, that if is not clear that the contract is in favour of another person, it is considered to have been concluded for the policyholder's own account.

Here is the text of the Section 43 VVG, headed "*Definitions*": «(1) The policyholder may make the contract of insurance in his own name for the account of another with or without naming the insured third party (insurance for the account of a third party). (2) If the contract of insurance is made for another, it is assumed in cases of doubt, even if the third party is named, that the policyholder is not acting as his agent but in his own name for the account of a third party. (3) If the circumstances do not indicate that the contract of insurance is to be concluded for another, it is deemed to have been made for the policyholder's own account».

The subsequent provisions deal with the rights of the insured person and the policyholder[42], reproduced in § 74 *et. seq*. VersVG and some of which transposed into the Civil Code of Georgia in Arts. 836, 837 and 838.

At the Part 2, the VVG governs specific classes of insurance, and in particular, under Chapter 5, life insurance contract.

The chapter opens with Section 150, in which is stated the possibility that life insurance may be concluded in favour of a person who is not the policyholder[43], provision which reproduces, as already mentioned about Austrian law (§ 159 VersVG), the content of the Art. 844 CCG.

The following Section 159 VVG provides the basic rules on the appointment of the beneficiary, by prescribing the right of the policyholder to appoint a third party as beneficiary or replace this one with another person without the insurer's consent and the time when the beneficiary acquires the right to receive the compensation[44]. Under the Civil Code of

42 Reference is made, for example, to Sections 45 and 46 VVG, which texts are given below: «Section 44 Rights of the insured person (1) In the case of insurance for the account of a third party, the insured person holds the rights resulting from the contract of insurance. However, only the policyholder may demand that the insurance policy be sent to him. (2) The insured person may only lay claim to his rights without the agreement of the policyholder and assert these rights in court if he is in possession of the insurance policy».

«Section 45 Rights of the policyholder (1) The policyholder may dispose of the rights to which the insured person is entitled on the basis of the contract of insurance in his own name. (2) If an insurance policy has been issued, the policyholder shall only be authorised to receive benefits from the insurer and to assign the rights of the insured person without the agreement of the insured person if he is in possession of the insurance policy. (3) The insurer shall only be liable towards the policyholder if the insured person has given his consent to the insurance».

43 Here is the text of the provision at issue: «Section 150 Insured person (1) Life insurance may be taken out for the policyholder or for another person. (2) Where the life insurance is taken out against the death of another person and the agreed benefit exceeds normal funeral costs, the written agreement of the other person shall be necessary for the contract to be effective; this shall not apply in the case of collective life insurances in company pension schemes. If the other person has no legal capacity to act or only limited capacity to act, or if a custodian has been appointed and the policyholder is entitled to represent that person's interests, he may not represent the other person when giving his consent thereto. (3) If one parent takes out the insurance for an under-age child, the child's consent shall only be required if in accordance with the contract the insurer is to be liable even in the event of the child dying before reaching the age of seven and the benefit agreed for this event exceeds normal funeral costs. (4) Insofar as the supervisory body has determined a specific maximum amount for normal funeral costs, this amount shall prevail».

44 Article text below: «Section 159 Appointment of beneficiary (1) In cases of doubt, the policyholder shall be entitled, without the consent of the insurer, to appoint a third party as beneficiary and to replace the thus appointed third party with the name of another. (2) A third party beneficiary by revocable designation shall not acquire the right to payment of the insurer's benefit until the insured event occurs. (3) A third party beneficiary by irrevocable designation shall acquire the right to payment of the insurer's benefit at the time when he is designated as beneficiary».

Georgia, the rules which regulate these issues are to be found in Articles 837, 838, 847[45].

Section 160 VVG gives criteria for the interpretation of the appointment of beneficiary and provides, in particular at the third paragraph, that if the insurer's right to benefits is not acquired by the third party, the insured shall be entitled to receive the benefits[46].

This is essentially the rule that has been reproduced in the Art. 848 CCG under comment.

As seen before in relation with the Austrian law, Section 160 VVG is drafted in a less specific way than the Art. 848 CCG, since it refers the effect of maintaining the right of the policyholder to the benefit to a general situation of non-acquisition of that right by the third party.

Now looking towards the Italian legal system, under the Italian Civil Code of 1942, no equivalent provision can be found, it merely establishes, in Art. 1920, first paragraph, c.c., the validity of life insurance contract concluded in favour of a third party, in the second paragraph that the designation of the beneficiary may be made in the insurance contract, or by a subsequent written declaration communicated to the insurer, or by will, and in the last paragraph that as a result of the designation, the third party acquires his own right to the benefits of the insurance.

Therefore, as a result of the designation, the beneficiary acquires his own right and thus can dispose of this right unconditionally.

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45 The Article 837 CCG concerns the rights of another person under insurance contracts, by prescribing, at first paragraph, that «if the insurance is for the benefit of another person, the rights arising out of the contract shall accrue to that person. Only the policyholder may demand the insurance policy»; and, at second paragraph, that «the insured person may exercise his/her rights without agreement with the policyholder and seek the exercise of his/her rights through a court only if he/she holds the insurance policy».

The Article 838 CCG concerns the rights of the policyholder, by providing, at first paragraph, that «the policyholder may exercise, in his/her own name, the rights to which an insured person is entitled under the insurance contract»; at second paragraph, that «if the insurance policy is issued, then the policyholder may receive compensation without the insured person's consent or transfer the right to the insured person only if the policyholder holds the insurance policy»; and, at third paragraph, that «the insurer shall pay the policyholder for the benefit of the insured person only if the policyholder proves that the insured person consented to the insurance contract».

The Article 847 CCG concerns the case of transfer of the right to compensation to a third person, by specifying, at first paragraph, that «in the case of a cumulative insurance, the policyholder may transfer the right to receive benefits to a third party or replace the third party with another person, unless otherwise provided by the contract»; and, at second paragraph, that «the third party entitled to receive benefits may exercise the right only upon occurrence of the insured event, unless the policyholder has instructed otherwise».

46 The Section 160 (3) VVG textually provides that «where the right to the insurer's benefit is not acquired by the third party beneficiary, it shall be due to the policyholder».

Accordingly, if the beneficiary dies before the insured, the benefit accrues to the legitimate heirs.

In other words, the death of the beneficiary at an earlier time than that of the insured is eligible to transfer the rights arising from the life insurance policy to the beneficiary's heirs[47].

Consequently, Italian law provides for an opposite solution to the one adopted by the Civil Code of Georgia, which, as mentioned above, prescribes that the right to receive the benefit, if the third party is not legitimated or does not exercise that right, remains with the policyholder[48].

47 This represents the uniform approach of the Supreme Court of Cassation, which regulates the case of the beneficiary's premature death by analogous application of the discipline of the contract in favour of a third party pursuant to art. 1412, paragraph 2, of the Civil Code, which in such a situation provides that the right to receive the compensation is transferred to the heirs of the third party, unless the benefit has been revoked or the stipulator has provided otherwise (in such sense, see for example Cass., 15 April 2021, no. 9948).

48 Having said this, there is still the phenomenon of dormant life insurance policies: it is not unusual for the person who takes out the policy to decide not to disclose the existence of the policy, or cases in which the beneficiary has been indicated in a way that is not clearly specified in the contract (for example, "the heirs" or "the unborn children"), or cases in which the insurance company is unable to identify the beneficiaries or is not aware of the event that would give rise to the right to collect.

In any case, when the right to claim the capital or the annuity is not exercised, the policy remains on deposit with the insurance company, hence the definition of dormant policy.

After a certain period of time has passed from the expiry of the contract or from the death of the insured person (today 10 years), the right is barred, and the relative capital is devolved to the Dormant Accounts Fund set up within CONSAP ("*Concessionaria Servizi Assicurativi Pubblici*"), which uses the amounts collected, for example, to compensate the victims of financial crashes or to reimburse holders or heirs of bank deposits left dormant for at least ten years.

Article 849 - Releasing the insurer from liability for damages

1. If the insurance contract is covering the death of another person, then the insurer shall be released from liability if the policyholder intentionally causes the death of such person by acting illegally.

2. If a third party has the right to receive the benefit in the case of life insurance, this right shall not be recognised if he/she, by acting illegally, intentionally caused the death of the person whose life was insured.

Fabio Zambardino

Summary: 1. Introduction. 2. The comparison with the Italian law. 3. The comparison with the German law. 4. The comparison with the Common law. 5. The Georgian law.

1. Introduction

Article 849 is intended to clarify the cases in which the insurer may be released from liability in the cases of death of the insured.

One of the founding principles of the insurance law, in fact, is represented by the prohibition of intentional damage. Therefore, given the specific features of the insured object, this principle acquires particular importance if considered in the context of life insurance.

On this point, the determination of the subject bearing the insured interest is the most important element. In this regard, depending on the case in question – whose interests are mainly protected by the insurance contract – it is possible to describe separately first and third party insurance.

In the first case «(for example in the case of property insurance), the damage occurs directly to the insured, and during the third party insurance (in the case of liability insurance), the damage occurs to both the insured and the third party»[1].

Since the "direct" damage – or loss – «is caused to the third party rather than to the insured, it is assumed that in this case the contract mainly protects the interests of the third party»[2].

However, the third-party insurance has to be distinguished from the contract made for the benefit of the third party. In fact, if considering the

1 K. Iremashvili, *The Characteristics of Legal Regulation of Health Insurance*, Ivane Javakhishvili Tbilisi State University Faculty of Law, Journal of Law, no. 2, 2011, *cit*., 38.

2 *Ibid*.

case of life insurance, the insured determines the beneficiary. Specifically, the benefit of the life insurance contract «goes to the third party, but as direct loss is made to the insured (his/her life is lost), life insurance is categorized as first party insurance. Health insurance represents the similar instance»[3].

Generally, an individual who desires «indemnification through insurance against a certain type of loss or injury cannot expect to recover the benefit of insurance when he intentionally causes the very loss or injury against which he sought protection»[4].

Considering as stated, before proceeding, it is important to make another key clarification; indeed, it is important to distinguish two of the main features that characterize the loss/damage in the insurance contract: *i.e.* the gross negligence and the willful misconduct[5].

In fact, they are often related concepts, but not always represent the same thing. In this regard, an insurance policy, generally, may specifically provide that some acts of negligence may be covered but, on the contrary, other acts of gross negligence may be not, or it may state that acts of negligence are covered but acts of willful misconduct are not[6].

Given these premises, in the follow paragraphs it will be analyzed the Civil law – *i.e.* the Italian and German discipline – and Common law discipline – with specific regard to the UK – aiming to compare the different disciplines and underline some of the key elements of foreign laws; then, in the last part of the comment, it will be analyzed the Georgian discipline, with the purpose to highlight the strength and weakness of the Article in comment.

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3 *Ibid*. Many times, the insurance company reimburses medical care expenses directly to the medical institution, instead of the insured person. In this case, too, the benefit goes to the third party, but as direct loss is made to the insured, health insurance contract is considered first party insurance, as well.

4 J. A. Fischer, *The Exclusion from Insurance Coverage of Losses Caused by the Intentional Acts of the Insured: A Policy in Search of a Justification*, SANTA CLARA L. REV., 1990, *cit*., 95. In this sense, in fact, it would not seem wrong to affirm that the losses knowingly and deliberately caused by the insured represent an inadequate case for compensation through insurance. See also, S. W. Gallagher, *The Public Policy Exclusion and Insurance for Intentional Employment Discrimination*, MICH. L. REV., 1994, 1256-1326.

5 K. Iremashvili, *The Characteristics of Legal Regulation of Health Insurance*, *cit*., 38-39.

6 J. A. Fischer, *The Exclusion from Insurance Coverage of Losses Caused by the Intentional Acts of the Insured: A Policy in Search of a Justification*, *cit*., 95-96. In this sense, in order for an action to be considered misconduct with respect to negligence, it must be configured as a deliberate decision to perform an action in order to cause damage. Mere recklessness, even if extreme, is usually gross negligence rather than intentional misconduct.

2. The comparison with the Italian law

Posing the attention on the Italian law, generally, the insurer can legitimately refuse to indemnify the damage in the cases in which the same has been caused by the policyholder, the insured or the beneficiary by acting with willful misconduct or gross negligence – this is provided, specifically, by the Article 1900 of the Italian Civil Code[7].

The law admits, however, the possibility for the parties to regulate the effects of gross negligence in different manners: the insurer, in fact, is not obliged unless otherwise agreed[8].

7 For a general overview of the Italian doctrine, see A. Antonucci, *L'assicurazione fra impresa e contratto*, Bari, 1994; G. Bavetta, voce *Impresa di assicurazione*, in *Enc. del dir*., XX, Milan, 1970, p. 624 ff; E. Bottiglieri, voce *Impresa di assicurazione*, in *Dig. disc. priv., sez. comm*., VII, Torino, UTET, 1992, pp. 155 ff; L. Buttaro, voce *Assicurazioni in generale*, in *Enc. del dir.,* III, Milan, 1958, p. 427 ff; R. A. Capotosti, voce *Assicurazioni private e imprese assicurative (Diritto comunitario*), in *Noviss. dig. it.,* Appendice, Turin, 1980, pp. 506 ff; a. Donati, *Trattato di diritto delle assicurazioni private*, I, Milan, 1952.; A. Donati & G. Volpe Putzolu, *Manuale di diritto delle assicurazioni private*, 8ª ed., Milan, 2006; G. Fanelli, voce *Assicurazione*, II *Assicurazione contro i danni*, in *Enc giur*., III, Rome, 1988; F. Garri, voce *Impresa di assicurazione*, II (Diritto amministrativo), in Enc. giur., XVI, Rome, 1988; N. Gasperoni, voce *Assicurazion*e, III, *Assicurazione sulla vita*, in *Enc. giur*., III, Rome, 1988; C. Giannattasio, voce *Impresa di assicurazione* (Parte generale), in *Noviss. dig. it*., *Appendice*, Turin, 1983, pp. 29 ff; A. La Torre, *Diritto delle assicurazioni*, I, *La disciplina giuridica dell'attività assicurativa*, Milan, 1987; G. Leone & C. De Gasperis, *Le assicurazioni private nella giurisprudenza*, in *Raccolta sistematica di giurisprudenza* commentata diretta da M. Rotondi, Padova, 1975; L. Mossa, *Sistema del contratto di assicurazione nel libro delle obbligazioni del codice civile*, in *Assicurazioni*, 1942, I, pp. 185 ff; L. Mossa, *Impresa e contratto di assicurazione nelle vicendevoli relazioni*, in *Assicurazioni*, 1953, I, pp. 141 ff; V. Salandra, *Dell'assicurazione*, in *Commentario del codice civile* a cura di A. Scialoja e G. Branca, Libro IV, Delle obbligazioni (artt. 1861-1932), 3ª ed., Bologna-Roma, 1966, sub artt. 1882 ff, pp. 172 ff; G. Volpe Putzolu, *L'assicurazione*, in *Trattato di diritto privato* diretto da P. Rescigno, XIII, Turin, 1985, pp. 55 ff; G. Volpe Putzolu, *Le assicurazioni. Produzione e distribuzione* (problemi giuridici), Bologna, 1992; G. Volpe Putzolu, *L'evoluzione della legislazione in materia di assicurazioni*, in S. Amorosino, L. Desiderio (a cura di), *Il nuovo codice delle assicurazioni, commento sistematico*, Milan, 2006, p. 3; P. Corrias, *Il contratto di assicurazione: profili funzionali e strutturali*, Naples, 2016. G. Volpe Putzolu, *L'assicurazione*, in *Trattato Rescigno*, vol. 13, Turin, 1985, 71. For an analysis of the ratio of the law, see also A. La Torre, *Responsabilità ed autoresponsabilità nell'assicurazione*, in *Scritti di diritto assicurativo*, Milan, 1979, 421 ff. The clause providing for the exclusion from liability of the insurer for claims deriving from gross negligence of employees of the insured, can be freely agreed by the parties, given the non-mandatory nature of art. 1900 of the Civil Code; however, when prepared by the insurer, it constitutes an unfair clause as it limits the liability of the insurer itself beyond the hypotheses provided for by law, with the consequence that it is void if it is not approved specifically in writing by the other contracting party, pursuant to art. 1341 of the Italian Civil Code. L. Tramontano (a cura di), *Codice Civile Studium. Dottrina, Giurisprudenza, Schemi, Esempi pratici*, La Tribuna, 20 ed., 2021, 10510.

8 *Ibid*. The old version of the Italian Civil code established in a single article (art. 434) which causes of loss were to be considered covered by insurance (fortuitous event and force majeure) and which were not covered fact or fault of the insured or his agents, principals or commissioners; unreported vice of the thing, and unless otherwise agreed, risks of war or popular uprisings, in addition to the reference to art. 450 for duel, suicide, crime to life. The new code, on the other hand, with its art. 1900, on the subject of general rules of the insurance contract, deals only with claims caused by the willful misconduct or fault of the insured or employees.

In principle, therefore, if the event inferred in the contract was caused by the person who had an interest in the insurance coverage and, moreover, if the accident was the consequence of willful or grossly negligent conduct, the insurer is not required to indemnify the policyholder[9].

Specifically, the reason for this provision must be found in the will of the legislator to discourage those seriously negligent behaviors which, manifesting an absolute lack of interest in preventing the accident from occurring, affect the community of interests (until the accident does not occur) which, at least until the time of the accident, must unite the aforementioned subjects and the insurer in the contract[10].

However, the law, in addition to admitting a different agreement between the parties in the case – as mentioned – of gross negligence, also provides for several cases of exception.

The insurer's obligation to bear the risk does not extend to those claims caused by willful misconduct or gross negligence of the contracting party, the insured or the beneficiary, unless otherwise agreed only for gross negligence and the case of civil liability where the exclusion concerns only cases of willful misconduct (1917 paragraph 1)[11].

The Article 1900 states that the insurer is not obliged for claims caused by willful misconduct or gross negligence of the policyholder, the insured or the beneficiary, unless otherwise agreed for cases of gross negligence[12].

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9 See, L. Tramontano (a cura di), *Codice Civile Studium. Dottrina, Giurisprudenza, Schemi, Esempi pratici*, *cit*., 10511.

10 A. Bracciodieta, *Il contratto di assicurazione – disposizioni generali*, in *Il Codice Civile Commentario fondato e diretto da Pietro Schlesinger*, Milan, 2012, 183.

11 L. Tramontano (a cura di), *Codice Civile Studium*, 10512. The malicious event of one of these subjects and, in particular, of the beneficiary does not give rise to the obligation of the insurer towards anyone, since it is a risk excluded from coverage and not a simple cause of subjective forfeiture, such as that provided for by Article 1922 c.c. charged to the beneficiary who pays attention (without fatal outcome) to the life of the insured. P. Corrias, *Le assicurazioni sulla vita*, in *Trattato di diritto civile e commerciale Cicu-Messineo*, 2021, 127-129. In all other cases, the insurer is required to compensate the damage, including the case in which the accident was caused by willful misconduct or gross negligence by persons for whom the insured must be liable pursuant to art. 1228 (auxiliaries), 2047 (incapable), 2048 (non-emancipated minor children or persons subject to guardianship who live, respectively, with their parents or guardian; pupils and apprentices during the time they are under the supervision of their tutors or those who teach a trade or an art) and 2049 (domestic and committed in the exercise of the duties to which they are assigned by their masters or clients). L. Tramontano (a cura di), *Codice Civile Studium*, 10512-10513.

12 In the event of willful misconduct, however, the contrary agreement is not permitted, therefore it is always excluded that the insurer may be called to respond.

In the first paragraph, the Italian legislator explicitly excludes the guarantee if the event is caused by willful misconduct or gross negligence by an interested party (*i.e.* the contractor, the insured or the beneficiary)[13].

According to the dominant doctrine, fraud must be understood as the conscience and will of the prejudicial act; therefore, the agent must be aware of causing the harmful event[14].

Furthermore, the scholars state, in addition, that between the insurer and the insured must exist a common interest in preventing the occurrence of the accident; it is precisely in this perspective, therefore, that the legislative provision that excludes the obligation of the insurer should be read when the event was caused by willful misconduct or gross negligence of certain subjects, namely the insurer, the insured, or the beneficiary[15].

The second paragraph of the Article 1900 states that the insurer is obliged for the loss caused by willful misconduct or gross negligence of the persons for which the insured must answer[16]. Since gross negligence arises as an impediment, the burden of proof rests with the insurer[17].

13 V. Salandra, *Dell'assicurazione*, in *Commentario Scialoja, Branca*, *sub artt. 1861-1932*, Bologna-Rome, 1969, 280.

14 See, *inter alia*, A. Donati, *Trattato del diritto delle assicurazioni private*, vol. 2, Milan, 1956, 131.

15 L. Tramontano (a cura di), *Codice Civile Studium*, 10512. On the same point, G. Fanelli, *Le assicurazioni*, in *Trattato Cicu, Messineo*, Milan, 1973, 78 ff. In a similar way, this would explain why a similar limitation does not apply if the harmful fact is attributable to a person for whose work the insured must answer, since in such cases the perpetrator of the fact would not have an interest contrary to the occurrence of the claim and therefore his conduct would be in no way different from that of the third party who, with willful misconduct or gross negligence, has caused damage to the insured and therefore obliges the insurer to intervene to eliminate the detrimental consequences.

16 For example, in the case of an accident caused by an incapable person (*ex* art. 2047 of the Italian civil code). L. Tramontano (a cura di), *Codice Civile Studium*, 10511.This obligation also exists in the case of a third party, even if contractually linked to the insured. The exclusion of this liability could only take place in the presence of a specific contractual clause, to be specifically approved, resulting in a limitation of liability. See Cass. Civ., Sez. III, January 27, 2015, no. 1430. In the specific case, it has been overturned the judgment on the merits which had excluded compensation for the damage resulting from the theft of a rental car, which the user had left open and with the keys inserted.

17 With regard to the existence of gross negligence referred to in the rule in question, this must not be assessed with reference to a specific duty of care based on the activity carried out by the insured, as instead provided for by art. 1176 c.c. On this point, also the jurisprudence of the Court of Appeal of Rome, with the very recent sentence no. 159/2020 ruled that, based on art. 1900 of the Italian civil code, the insurer is not obliged for claims caused by willful misconduct or gross negligence of the policyholder, the insured or the beneficiary, unless otherwise agreed for cases of gross negligence, and this in order to prevent the insurance guarantee from creating the interest of the 'insured to cause the accident. Court of Appeal of Rome, Sentence no. 159/2020. The ruling confirmed the first-degree sentence with which the claim of the insured was rejected, who claimed to have been the victim of a theft and consequently exercised his right to compensation.

With reference to the seriousness of the fault of the insured, the legislator, following a consolidated practice in the life insurance market, which tends to consider any negligent behavior of the insured as serious, regardless of its case-by-case assessment, has argued that the conduct of insured may be considered grossly negligent in any case in which it assumes a decisive causal importance in relation to the occurrence of the guaranteed risk[18].

Furthermore, the legislator intended to "measure" the degree of the fault of the insured in consideration of the relevance of his behavior with respect to the production of the guaranteed event, recognizing, in the same way, the existence of a significant fault pursuant to the rule in question. In this case, whenever the action or omission of the insured is considered a sufficient cause to determine the event[19].

On the contrary, the scholars considered that the conduct must in any case be assessed in concrete terms and, specifically, in the case of otherwise negligent conduct there will be different cases, with different effects on the extent of the compensation due to the insured[20].

The last paragraph of the Article in comment states that the insurer is also obliged, despite an agreement expressly providing for the contrary,

18 A. Donati, *Trattato del diritto delle assicurazioni private*, *cit*., 132-133. The Court of Appeal of Rome with the very recent sentence no. 159/2020 has stated that, based on art. 1900 of the Italian Civil Code, the insurer is not obliged for claims caused by willful misconduct or gross negligence of the policyholder, the insured or the beneficiary, unless otherwise agreed for cases of gross negligence, and this in order to prevent the insurance guarantee from creating the interest of the 'insured to cause the accident. And precisely with reference to the seriousness of the fault, the jurisprudence has stated that the conduct of the insured is seriously negligent if it was decisive for the purposes of the occurrence of the guaranteed risk, a situation that can also be configured when the conduct of the insured is characterized by willful misconduct or by gross negligence was not the sole cause of the occurrence of the harmful event, as for the purposes of the causal link between the said conduct and the damage, the principle of *conditio sine qua non* applies, tempered by that of causal regularity, according to the disposed of the articles 40 and 41 of the Italian criminal code. It follows that, when the event is derived from a plurality of commissive or omissive behaviors, including negligent behavior of the insured, it is sufficient to deny the extension of the policy to ascertain that, if said behavior had not occurred, the event would not have occurred. See, on this point, Cass. April 14, 2005, n. 7763. Moreover, the gross negligence provided for by art. 1900, first paragraph, of the Italian Civil Code, which excludes – unless otherwise agreed – the liability of the insurer, must not be commensurate (as, however, in the provision referred to in Article 1176, second paragraph of the Italian Civil Code) to a particular duty of care, in relation to the nature of the activity carried out by the insured. Cass. civ. March 24, 1994, n. 2995/1994.

19 *Ibid*.

20 P. Santoro, *Sulla colpa dell'assicurato in caso di furto*, in *Danno e Responsabilità*, vol. 12, Milan, 2007, 885 ff.

for claims resulting from acts of the policyholder, the insured, or the beneficiary, which have been committed out of a duty of human solidarity or to protect the interests common to the insurer[21].

This part of the article, hence, provides two exceptions to the exclusion from the insurance guarantee of accidents voluntarily caused, given the total absence in these hypotheses of the purpose of profit[22].

On this point, the mainstream considers that the application of the rule is reserved exclusively to non-life insurance, except for the hypothesis of insurance contracted in the event of the death of a third party and for the benefit of another third party[23].

On the other hand, the protection of common interests occurs when the insured person makes every effort in order to limit the harmful consequences of a previous accident or to fulfill the rescue obligation expressly contemplated by art. 1914 of the Italian Civil Code[24].

In fact, it is clear that the insurer is obliged, even if there is an agreement to the contrary, for claims caused as a result of acts of the policyholder, the insured or the beneficiary, carried out in the fulfillment of moral or social duties or in the protection of the interests common to the

21 Human solidarity means that act which, although not the object of a legal duty, constitutes the fulfillment of a moral duty, dictated by the rules of civil coexistence generally shared in a given community and at a given historical moment. M. Rosetti, in *Le Assicurazioni*, A. La Torre (ed.), Milan, 2007, 133 ff. Consider, for example, the case in which the subject acts causing a claim to avoid greater damage to the insurer.

22 V. Salandra, *Dell'assicurazione*, *cit*., 280-281. In this sense, the legislator admits that the parties with an express clause provide for coverage of the risks caused by gross negligence of the insured policyholder, but in this case any fault of the beneficiary in determining the claim remains subject to the provision of the first paragraph.

23 G. Fanelli, *Assicurazione contro i danni*, in *Enciclopedia Giuridica*, vol. 3, Rome, 1988, 117 ff. It is, however, also believed that it does not apply to compulsory insurance for the civil liability of vehicles and boats because in this case the need to protect the injured should prevail. G. Scalfi, *I contratti di assicurazione. L'assicurazione danni*, Turin, 1991, 73 ff; V. Cuocci, *Il tormentato inquadramento dell'assicurazione per conto altrui nel contratto a favore di terzo*, DANNO RESP., 2008, 482 ff; A. La Torre, *La responsabilità di chi stipula un'assicurazione per conto altrui senza renderla nota all'assicurato*, GIUST. CIV., 2003.

24 In view of this last provision, in fact, the insured has the right to reimbursement of the expenses incurred in order to avoid or reduce the damage and the insurer is also liable for material damage suffered by the insured items as a result of the means used by the insured for the purpose. to contain the damage, unless it proves the reckless use of these means. And in both hypotheses the contrary agreement is not allowed which, if foreseen, would be radically null because it is contrary to the mandatory rule.

insurer (*i.e.* in the case of the rescue of the insured property pursuant to art. 1914)[25].

In addition, the Italian law provides, in the Article 1917 of the Civil Code, that in order to prevent the insured from exercising the activity covered by the contract without the necessary diligence, the first paragraph excludes coverage of the risk deriving from malicious behavior[26].

However, the parties can extend the exclusion of the risk also to the cases of gross or very serious negligence[27].

If civil liability is insured – for example in the cases in which the insurer may be obliged to indemnify the insured for what he has to pay to a third party as a result of an event that occurred during the term of the contract – the insured has the right to be indemnified in the case of negligence (even serious) but not in the cases in which the damage derives from his willful act[28].

25 L. Tramontano (a cura di), *Codice Civile Studium*, 10545. As mentioned above, the main obligations of the insured also include that of doing everything possible to avoid or reduce the damage: *i.e.* rescue obligation. So said, it must be added that the expenses incurred for this purpose will be borne by the insurer in proportion to the insured value compared to what the thing had at the time of the accident, even if their amount, together with that of the damage, exceeds the sum insured, or the purpose has not been achieved, unless the insurer proves that the expenses were made recklessly.

26 G. Fanelli, *Assicurazione contro i danni*, *cit*., 24. See also, L. Tramontano (a cura di), *Codice Civile Studium*, 10558, In this field the hypotheses may be varied. The most common, also because it is mandatory, it is undoubtedly that relating to the circulation of motor vehicles and boats. The obligation is placed not so much for the protection of those responsible for the accident, as for the damaged third parties, to whom the legislator intends to guarantee certain and immediate compensation. On this point, the jurisprudence affirms that the obligation of insurance, regulated by the law of 24 December 1969, n. 990, is fulfilled through the stipulation of an insurance contract (articles 1882 and 1917 c.c.) and the existence of such a contract, in addition to its effectiveness in relation to the duration agreed between the policyholder and the insurer, constitute the prerequisite for the right of injured third party to be compensated directly by the insurer, within the limits of the sums for which the insurance was stipulated. Cass. sez. III civ., June 30, 2011, n. 14410.

27 According to the doctrine, the aforementioned coverage is not excluded where the willful misconduct is attributable not to the insured, but to persons for whom he must answer. See, *ex multis*, on this point, G. Fanelli, *Assicurazione contro i danni*, *cit*., 24; G. Scalfi, *I contratti di assicurazione. L'assicurazione danni*, *cit*., 73 ff; V. Salandra, *Dell'assicurazione*, *cit*., 280-281.

28 G. Fanelli, *Assicurazione contro i danni*, *cit*., 24. The clause that makes the operation of the insurance coverage subject to the circumstance that both the unlawful act and the request for compensation occur within the period of effectiveness of the contract or, in any case, within certain periods of time, previously identified (so-called mixed or unclean claimes made clause) is not vexatious. L. Tramontano (a cura di), *Codice Civile Studium*, 10566. However, in the presence of certain conditions, it can be declared void due to a lack of merit or, within the framework of consumer protection regulations, due to the fact of determining, for the consumer himself, a significant imbalance of the rights and obligations deriving from the contract; the relative assessment, to be carried out by the trial judge, is incensurable in terms of legitimacy, if adequately motivated. *Ibid*. See also, in jurisprudence, Cass. Civ., SS.UU., May 6, 2016, n 9140; Cass. Civ., sez. III, January 19, 2018, n 1465.

This provision derives espressely from art. 1917 paragraph 1 of the Italian Civil Code and this different treatment of "guilt" has its explanation in the special purpose of civil liability insurance[29].

3. The comparison with the German law

In a very similar way to the Georgian law, it also occurs in Germany, where «the insurer shall not be obligated to effect payment if the policyholder has intentionally and unlawfully caused the loss suffered by the third party»[30].

As a matter of fact, the most relevant remedy under German insurance law provides that the insurer may refuse to perform under certain prerequisites[31].

The regulation states that the damages caused intentionally and illegally by the insured person are not covered by the insurance contract, *i.e.* the insurer is not obliged to provide benefits. On this point, the provisions contained in the section 103 VVG (*Versicherungsvertragsrecht* – the German Insurance Act) do not represent an obligation, but a subjective risk exclusion[32].

29 In fact, unlike insurance against damage, where the interest of the insured consists in the compensation of the damage suffered by a specific asset following a claim, in that for civil liability this interest consists in protecting oneself against the risk of negative alteration of one's assets considered as a whole and exposed to unlimited liability for any culpable behavior, even serious, with its reinstatement through the payment by the insurer, of a sum of money equal to the disbursement due by the insured, in the area mostly of a maximum ceiling called ceiling. See Cass. civ., section I, sent., July 17, 1993 n. 7971. In particular, «[t]he choice of the Italian Civil Code, in shaping (professional) liability insurance, is in favour of the so called 'loss occurence' model, in which the trigger for coverage is an accident or untoward event causing damage or loss during the currency of the policy period. That means that the timing of the claim being brought against the insured to recover damages is irrelevant; so long as the loss occurs during the policy period, coverage is guaranteed». F. Delfini, *Claims-Made Insurance Policies in Italy: The Domestic Story and Suggestions from the UK, Canada and Australia*, in *The Italian Law journal*, *cit*., 2018, *cit*., p. 118. See, on this point, also A. Borroni, *Clausola claims made: circolazione parziale di un modello nella responsabilità civile italiana*, in *Ianus, Diritto e Finanza*, Rivista di Studi Giuridici, 2014, pp. 121-147; N. Spadafora & D. Scarpa, *Clausola claims made e disciplina del consumo (commento a margine della sentenza Cass. 6 maggio 2016, n. 9140)*, in dirittobancario.it, 2016. A. Candian, *La giurisprudenza e le sorti delle clausole claims made*, RIV. DIR. CIV., 2018.

30 Section 103 of the VVG (Versicherungsvertragsgesetz) – Causing the insured event. See for a general overview, R. Koch, *Insurance law in Germany*, Kluwer Law International, 2018.

31 C. Drave & F. Herdter, *Insurance Litigation in Germany*, Wilhelm Rechtsanwälte, 2016, p. 5. The insurer is released from liability «for any claim if the insured intentionally caused the insured event (in liability insurance: if the insured intentionally caused the loss suffered by the third party). The insurer is further released from liability if the insured intentionally breached a statutory or contractual obligation». *Ibid*.

32 The norm is *lex specialis* in § 81 VVG. In this context, the notion of intent corresponds to that of other civil laws. According to this, intent must be understood as knowing and wanting illegal success. The deliberate agent must predict the illegal success and include it in his will.

Specifically, if the policyholder (or a representative) causes the insured event, it may be considered exemptions from performance or at least only a limited obligation of the insurer to provide benefits[33].

In addition, if it can be shown that the policyholder intends to cause the insured event, and if there is also a causal link between the behavior of the policyholder and the occurrence of the insured event, the insurer is completely exempt from responsibility and, consequently, payment[34].

In such a case, the intentional breach of any contractual obligation of the insured – and, thus, not only the *ex ante* conditions to the insured event – gives the insurer the possibility to be released from its obligation to perform[35].

In this sense, indeed, the intentional intent is not only considered if the act of infringement consists of a positive act, but it can also be assumed in the implementation of liability in the event of non-compliance. In fact, since conditional intent is sufficient to justify the freedom of performance of the insurer, but the insurer is obligated to grant coverage in the event of willful negligence, it is necessary to distinguish between conditional intent and deliberate negligence[36].

In both cases, the injured party considers the possibility of realizing the damage. However, the latter accepts the damage with conditional intent, while in case of intentional negligence this subject trusts, contrary to his duty, that the damage will not occur[37].

In this case, therefore, the exoneration of the insurer occurs only in the cases in which the former has intentionally caused the event covered by the insurance[38].

Furthermore, in such case, the insurer remains fully liable if the breach by the insured was only negligent (*i.e.* the simple negligence)[39].

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33 See, on this point, M. Zimmerling & A. Pfeiffelmann, *Germany*, INS. DISP. L. REV., 2021; T. R. Berry-Stolzle & P. Born, *The Effect of Regulation on Insurance Pricing: The Case of Germany*, J. RISK & INS., Vol. 79, No. 1, 2012, 129-164.

34 *Ibid*. In the event of grossly negligent behavior on the part of the insured, a quota system has been applied to property insurance since the VVG reform.

35 *Ibid*.

36 See, generally, C. Drave & F. Herdter, *Insurance Litigation in Germany*, cit.

37 *Ibid*.

38 In civil liability insurance, if the insured has intentionally caused the damage suffered from the third. M. Wandt & K. Bork, *Disclosure duties in German insurance contract law*, Zeitschrift für die gesamte Versicherungswissenschaft, 2020, 81-103.

39 See, generally, C. Drave & F. Herdter, *Insurance Litigation in Germany*, *cit*.

However, the essential element in obtaining a liability of the insurer waiver lies in the assumption that the breach of the policyholder must be material to the occurrence of the insured event or to the extent of the liability of the insurer. In fact, if the insured event would have occurred even without the breach of an obligation, the insurer remains fully responsible for the loss / damage[40].

If the policyholder violates an obligation, the court will generally assume that the obligation has been recklessly violated. On this point, thus, in order to be fully exempt from liability, the insurer must prove the intentional breach of the obligation. On the contrary, «the insured must prove that he acted merely negligently to achieve full indemnification»[41].

If the policyholder does not disclose a material circumstance, German insurance law allows the insurer to terminate the contract and avoid paying future claims with one month's notice (in case of simple negligence), or to withdraw from the contract and consider the contract as void *ab initio* (in cases of at least gross negligence)[42].

The insurer, however, «remains fully liable if the violation by the insured was only negligent»[43].

Despite its withdrawal, in addition, the insurer may still be obliged to pay a claim «if the undisclosed circumstance is not responsible for the occurrence of the insured event that gave rise to the claim or for the extent of the insurer's liability»[44].

Finally, in the event of a fraudulent misrepresentation, the insurer can cancel the contract and withhold the premium paid[45].

40 C. Drave & F. Herdter, *Insurance Litigation in Germany*, *cit*., 5-6. The breach must have caused the loss or increased the extent of the loss. The insurer must notify the insured in writing of the possible consequences of a breach in order to be able to rely on the breach.

41 *Ibid*.

42 M. Wandt & K. Bork, *Disclosure duties in German insurance contract law*, *cit*., 81-103.

43 C. Drave & F. Herdter, *Insurance Litigation in Germany*, *cit*., 6. In particular, for a release of the insurer from liability, the violation of the insured must be relevant to «the occurrence of the insured event or the extent of the insurer's liability». *Ibid*.

44 *Ibid*.

45 *Ibid*.

4. The comparison with the Common law

In Common law, it is not expressly disciplined the case of releasing the insurer from liability for damages intentionally caused by the policyholder.

However, insurance contracts are generally based on mutual duties of good faith, which may be applied both before and after the contract is formed[46].

The specific situation considers policyholders' duties after the formation of the contract. In practice, the policyholder's main duty is to act honestly when making a claim[47].

The duty to act in good faith is codified in section 17 of the Marine Insurance Act 1906, which states that «[a] contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party»[48].

The main problem is that section 17 of the Marine Insurance Act 1906 mentions only one remedy, avoidance[49]. Section 17 provides that «if the utmost good faith be not observed by either party, the contract may be avoided by the other party»[50].

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46 See, generally, J. Lowry, *Whither the Duty of Good Faith in UK Insurance Contracts?*, CONN. INS. L. J., 2009, 97-156; Y. K. Chowdhury, *In Terms of Utmost Good Faith, the Law of Insurance Imposes Strict Obligation on the Insured as Compared to the Insurer: A Literature Review*, 2007; C. Butcher, *Good faith in insurance law: a redundant concept?*, J. BUS. L., Issue 5, 2008, 375-384; M. Song, *Insurance contract law reform in England*, in *Insurance law in China*, J. Hjalmarsson & D. Huang, Routledge, 2015, 274 ff; P. Merkin, *England*, in M. Fontaine (ed.), *Insurance contract law*, International Association for Insurance Law, 1990, 83 ff; D. Hertzell, *Reforms to UK insurance law: overview of key changes*, Thomson Reuters Practical Law, 2016. Available at https://uk.practicallaw.thomsonreuters.com. Last visited January 5, 2022.

47 C. Sparks, *Reforming Insurance Contract Law. Issues Paper 7: The Insured's Post-Contract Duty of Good Faith*, Scottish Law Commission, 2010, V. On the same point, J. M. Feinman, *The Law of Insurance Claim Practices: Beyond Bad Faith*, in *Tort Trial & Insurance Practice Law Journal*, AM. BAR ASS., 2012, 705-709.

48 Section 17 of the Marine Insurance Act 1906. See, V. K. Bhatia, C. N. Candlin, P. Evangelisti Allori, *Language, Culture and the Law. The Formulation of Legal Concepts across Systems and Cultures*, London 2008.

49 C. Sparks, *Reforming Insurance Contract Law. Issues Paper 7: The Insured's Post-Contract Duty of Good Faith*, *cit*., 9.

50 Section 17 of the Marine Insurance Act 1906.

This suggests that if the insured acts dishonestly, the insurer should be entitled to avoid the policy from the start and seek repayment of any money paid under it (including money paid for legitimate claims)[51].

The section 17 of the Marine Insurance Act 1906 continues to exist, and in theory it remains open to an insurer to argue that a fraudulent claim permits the insurer to avoid the policy[52]. However, it is unlikely that a court would find for the insurer on this basis. Instead, «the courts have consistently held that the appropriate remedy for fraud is forfeiture of the claim»[53].

In the case *Axa General Insurance Ltd v Gottlieb*[54], the Court of Appeal held that «the insurer was entitled to recover all sums paid in respect of the two claims in which there was fraud. However, the two claims which had been paid in full had arisen before any fraud had occurred and were not recoverable»[55].

Considering as stated previously, the law recognizes mutual duties of good faith. The problem with section 17 of the Marine Insurance Act 1906, however, is that the courts have interpreted it to mean that avoidance is the only remedy available for breach of good faith[56].

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51 C. Sparks, *Reforming Insurance Contract Law. Issues Paper 7: The Insured's Post-Contract Duty of Good Faith*, *cit*., 9. See also J. P. Lowry, *Redrawing the parameters of good faith in insurance contracts*, in C. O'Cinneide & J. Holder, *Current Legal Problems*, 2007, 338 ff. In particular, in the case *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea), 2001*, it has been stated that «[t]he insurer is able not only to treat himself as discharged from further liability but can also undo all that has perfectly properly gone before. This cannot be reconciled with principle». See, also, N. Davies-Fletcher, *Fraud and property claims*, The Chartered Institute of Loss Adjusters, 2017.

52 J. D. Ingram, *Misrepresentations in Applications for Insurance*, U. MIAMI BUS. L. REV., 2005, 105, footnote 9.

53 C. Sparks, *Reforming Insurance Contract Law. Issues Paper 7: The Insured's Post-Contract Duty of Good Faith*, *cit*., 10.

54 In this case, Mr. and Mrs. Gottlieb claimed under a buildings insurance policy on four occasions during the policy year. The insurer settled two claims in their entirety without any issue of fraud arising. It also made interim payments on the other two claims, before discovering that the policyholders had acted fraudulently in pursuing these claims. The insurer brought proceedings to recover all the payments it had made.

55 C. Sparks, *Reforming Insurance Contract Law. Issues Paper 7: The Insured's Post-Contract Duty of Good Faith*, *cit*., 10-11.

56 The remedy for a breach of the good faith duty from section 17 is that «the innocent party has the right to avoid the contract, ab initio. This retrospective avoidance unravels all previous claims and provides the assured with the return of the premium paid. The basis of this remedy is that the non-disclosure amounts to a vitiating factor so that the contract should have never existed». A. Naidoo, *Post-Contractual Good Faith. A Further Change in Judicial Attitude*, THE MODERN L. REV., *cit*., 471.

Thus, avoidance should not be the only, or indeed the primary remedy for a breach of the duty of good faith. Instead, the law should provide flexible and appropriate remedies[57].

The law should state that it is a breach of the duty of good faith for the insured to make a fraudulent claim, and the appropriate remedy is forfeiture of the claim[58].

5. The Georgian law

From reading the Article 849, it seems clear that there are two types of life insurance contracts that are separate. The first provides for third party insurance and the second for the life of the insurer. Specifically, the risk of intentional loss of life of the insured is increased in the first case[59].

The first difficulty that can be encountered in cases in which an exclusion of the liability of the insurer is applied for damage caused by an intentional act of the insurer is represented by the necessity to define, in the first instance, to what extent the exclusion in question is more or less restricted[60].

In fact, «[m]ost human conduct is volitional and therefore in the broad sense intentional; it is the consequences of that conduct that are unintended and unforeseen and the issue often is which viewpoint will encompass our inquiry»[61].

Therefore, analyzing the Georgian legal framework, the Article in the comment unequivocally provides for the exclusion of the liability of the insurer; this, in addition, is equally valid even if the insurance contract covers the case of the death of a third person[62].

In this regard, furthermore, the unlawful conduct with which this event is intentionally caused is considered a valid element for the exclusion of liability of the insurer.

The first paragraph of the Article in question, as previously analyzed, provides for the exemption from liability of the insurer, in cases where

57 C. Sparks, *Reforming Insurance Contract Law. Issues Paper 7: The Insured's Post-Contract Duty of Good Faith*, *cit*., 10-11.

58 *Ibid*.

59 See, for example, article 844.

60 K. Iremashvili, *The Characteristics of Legal Regulation of Health Insurance*, *cit*., 39-40.

61 J. A. Fischer, *The Exclusion from Insurance Coverage of Losses Caused by the Intentional Acts of the Insured: A Policy in Search of a Justification*, *cit*., 96.

62 K. Iremashvili, *The Characteristics of Legal Regulation of Health Insurance*, *cit*., 39-40.

the insurance contract covers the death of another person, if the insured intentionally causes death of that person by acting illegally.

The legislature, thus, determines the civil consequences of the intentional loss of life of the insured person by the policyholder. In particular, the legislature relieves the insurer of the obligation to pay[63].

The protection mechanism provided by the legislature under 844, paragraph 2, may be insufficient to protect the insured good[64].

In addition, with the aim of avoiding the fatal result referred to in the first paragraph of Article 849, the role of the insurer is to pay particular attention to the existence of insurance interests both during the conclusion of the contract and during the entire period of validity of the insurance coverage.

Hence, within the framework of his conscientious conduct, the particular obligation to establish the interest of the insurer in third party life insurance must be included.

Moreover, the second paragraph of Article 849 of the Georgian Civil Code, then, provides that in cases where a third party is entitled to receive the benefit under a life insurance, this right may be not recognized if, by acting illegally, the death of the person whose life was insured was caused intentionally.

Therefore, in these cases the insurer is released from the obligation to reimburse if the third party identified as the beneficiary in life insurance intentionally causes the loss of life of the insured.

In order to determine the precondition specifically provided by the law, the legislator has expressly used the formulation «the death of the person whose life was assured»[65].

In fact, the legislator should mean the policyholder or the insured in this mouth. Hence, as the analysis of the doctrine of insurance interest reveals, in this case the moral risk is less.

63 *Ibid.*

64 See, on this point, the comment on the article 844.

65 K. Iremashvili, *The Characteristics of Legal Regulation of Health Insurance*, *cit*., 40.

Article 850 - Release from liability for compensation in the case of suicide

1. The insurer shall be released from liability if the person whose life was insured commits suicide.

2. The heir of the policyholder may claim a refund of the insurance premiums paid.

Fabio Zambardino

Summary: 1. Introduction. 2. The comparison with the Italian law. 3. The comparison with the German law. 4. The comparison with Common law. 5. The Georgian law.

1. Introduction

The Article 850 of the Georgian Civil Code provides a special basis for the release from liability for compensation in the case of suicide. In particular, the provision of the Article in comment aims to protect the interests not only of the insurer, but also, on the other hand, the interests of the heirs of the policyholder[1].

The Article in comment may be analyzed in relation to and in the light of the considerations valid for Article 849. In fact, it describes a particular case of exemption of the insurer from liability.

Specifically, the Article provides for cases where the policyholder commits suicide, that represents a typically voluntary act of deliberate self-provocation of the accident[2].

1 See, generally, K. Iremashvili, *The Characteristics of Legal Regulation of Health Insurance*, Ivane Javakhishvili Tbilisi State University Faculty of Law, Journal of Law, no. 2, 2011.

2 The World Health Organization defines the suicide as an act of self-elimination, deliberately initiated and finished by the person concerned, in full awareness or expectation of its fatal outcome. World health Organization, *Primary prevention of mental, neurological psychosocial disorders*, Suicide, Geneva, 1998. See, A. Rainone, *Il fenomeno del suicidio: epiemiologia e definizioni*, in *Cognitivismo Clinico*, 2014, 169-184. There are several authors who, over time, have undertaken to provide a definition of this phenomenon. For example, J. H. Davis, *Suicidal investigation and classification of death by coroners and medical examiners*, in J. Nolan (ed.), *The suicide case: Investigation and trial of insurance claims. Tort and Insurance Practice Section*, Washington, 1988, 33-50, defines the suicide as a self-inflicted, life-threatening, fatal and intentional act, without a manifest desire to live; there are two implicit components: morality and intent. M. R, Rosenberg *et al.*, *Operational criteria for the determination of suicide*, J. FORENSIC SCI., 1988, 1445-1455 state that the suicide is a death resulting from an act inflicted on himself, with the intention of killing himself. A. Ivanoff, *Identifying psychological correlates of suicidal behavior in jail and detention facilities*, in *Psychiatric Quarterly*, 1989, 73-84, defines the phenomenon as a «self-initiated intentional death». In order to

This specific act may be considered the basis for the release of the insurer from liability.

Generally, it is possible to verify the existence of a suicide in cases in which it is possible to verify a full coincidence between the active subject and the passive subject of the fatal event.

Suicide cases present conflicting issues. On the one hand, «society has an interest in protecting the innocent beneficiary, often economically dependent on the insured, from economic ruin»[3]. On the other hand, «suicide has long been held by courts not to come within the coverage of ordinary life insurance policies or within the accident feature of a life insurance policy because the insurer should not be required to pay for the wrongful act of the insured»[4].

Given the introductive remarks, in the follow paragraphs it will be provided a comparison with Civil law – *i.e.* the Italian and German discipline – and Common law discipline – with specific regard to the UK – aiming at underline some of the key elements of foreign laws; then, in the last paragraph, it will be analyzed the Georgian discipline, with the purpose to highlight the strength and weakness of the Article in comment.

speak of suicide, therefore, there must be full coincidence between the active subject and the passive subject of the fatal event. Certainly, this coincidence does not exist in the "murder of the consenting party", which is the crime by which a subject causes the death of a man with his consent (Article 579 of the Italian Criminal Code): the consent of the victim, indeed, he does not exclude that his death is voluntarily caused by the one who kills him. A. La Torre, *Il suicidio e l'assicurato*, ASSICURAZIONI, 2019, 2-3. The coincidence, however, exists in this case that article 580 of the Italian Criminal Code calls "instigation or aid to suicide", concerning the case of anyone who causes others to commit suicide or reinforces the intention of others to commit suicide, or in any way facilitates its execution. Hypothesis, the latter, for which we now speak of "assisted suicide" which, or even decriminalized, does not remove the full coincidence between the active subject and the passive subject of the fatal event. Unlike murder, which is always and everywhere execrated, suicide is placed in a very varied spectrum of evaluations. *Ibid*.

3 N. Six & T. N. Thompson, *Misrepresentation in the Application for Life Insurance: Lies in the Eye of the Beholder*, INS. C. J., 1985, 288.

4 G. Schuman, *Suicide and the Life Insurance Contract: Was the Insured Sane or Insane? That Is the Question—Or Is It?*, TORT & INS. L. J., 1993, *cit*., 758.

2. The comparison with the Italian law

Talking about suicide, in the Italian legal framework, means the death that a subject causes voluntarily and, therefore, with the awareness of the acts performed in order to obtain it[5].

The following events fall outside this notion, entailing the persistence of the insurer's obligation: a) death caused by the agent by mistake, negligence, incompetence or carelessness, more properly falling within the concept of accident; b) the self-caused death by the madman or, more generally, by those who perform the insane gesture in a situation of inability to stand trial[6].

In the cases mentioned previously, the event of death must be equated to fortuitous events[7].

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5 Art. 1927 of the Italian Civil Code.

6 See, on this point, L. Tramontano (a cura di), *Codice Civile Studium. Dottrina, Giurisprudenza, Schemi, Esempi pratici*, La Tribuna, 20 ed., 2021, 10581-10582; A. Donati, *Trattato del diritto delle assicurazioni private*, Milan, 1956, 622 ff; N. Gasperoni, *Le assicurazioni*, in *Trattato di Diritto Civile*, G. Grosso & F. Santoro-Passarelli, Milan, 1966, 171 ff. It must be underlined that the psychic disturbance generated by emotional or passionate states does not exclude the stand trial. *Ibid*. This, unless it manifests itself in an already weak personality and takes on the connotation of real infirmity, albeit transitory. S. Balzaretti, *Il suicidio dell'assicurato*, in *Responsabilità Civile e Previdenza*, 1996, 502 ff. Nor can the fatal accident that the agent has caused himself in the fulfillment of duties of human solidarity be qualified as suicide, since this hypothesis, provided for by art. 1900, third paragraph, is mandatory – given its compliance with the general principles of law – and prevails over the provisions of art. 1927. *Ibid*. On the same argument, see G. Fiandaca & E. Musco, *Diritto penale, parte generale*, Bologna, 1995, 294 ff. On the other hand, the passionate states of the reasons for suicide are always irrelevant, and consequently, although the insured person was induced to suicide by a serious mental disturbance and in no way influenced his decision, the desire to make third parties profit from the sum insured, the insurer will be released if the suicide occurred before two years from the conclusion of the contract. P. Corrias, *Le assicurazioni sulla vita*, in *Trattato di diritto civile e commerciale Cicu-Messineo*, 2021, 201. However, part of the doctrine proposes a more restrictive interpretation of the provision on the basis of which the insurer can consider himself released only, when the decision to take his own life has been taken by the insured in order to obtain the indemnity from third parties. In this sense, L. Buttaro, *Assicurazione sulla vita*, in *Enciclopedia del Diritto*, vol. 3, Milan, 1958, 640.

7 L. Tramontano (a cura di), *Codice Civile Studium*, 10582; see also, L. Buttaro, *Assicurazione sulla vita*, *cit*., 640 ff. In order to talk about suicide, the will to cause his own death must exist in the acting subject. Therefore, cases in which the subject kills himself by mistake, negligence or inexperience do not constitute hypotheses of suicide. P. Corrias, *Le assicurazioni sulla vita*, *cit*., 201. On the same point, also, N. Gasperoni, *Assicurazione sulla vita*, ENC. GIUR., Rome, 1988, 5. In this direction, suicide was clearly distinguished from injury, specifying that the first is characterized by the consciousness and will of the people to produce the death event, while the second is understood as a fact produced by a fortuitous, violent, and external cause. Trib. App., March 25, 2010, in RESP. CIV PREV., 2010, 2122.

The law excludes that the person who is in unfavorable economic conditions or who, in any case, for other reasons, intends to end his life, can previously stipulate an effective insurance contract on his own death for the benefit of the survivors[8].

Specifically, the Article treating the case of suicide of the insured is the 1927 of the Italian civil code. In fact, in the case of suicide of the insured occurred before two years have elapsed from the stipulation of the contract, it does not require the insurer, unless otherwise agreed, to pay the insured sums. Moreover, the latter is not even obliged if, as the contract has been suspended due to non-payment of the premiums, two years have not elapsed from the day on which the suspension ceased[9].

The second paragraph, moreover, adds that the insurer is not even obliged if, since the contract has been suspended due to non-payment of premiums[10],

8 On this point, see, P. Corrias, *Le assicurazioni sulla vita*, *cit*., 200; see also, M. Irrera, *L'assicurazione: l'impresa e il contratto*, in *Trattato di diritto commerciale*, 2011, 418 ff; A. La Torre, *Il suicidio e l'assicurato*, *cit*., 131 ff.

9 Even in this case, as a general principle, common to all types of insurance and inferable from art. 1900, accidents caused by the insured with willful intent are excluded from the insurance coverage. See, *e.g.*, L. Buttaro, *Assicurazione sulla vita*, *cit*., 639 ff. The purpose of the law is to avoid that you can take out an insurance only to benefit the family that is in desperate economic conditions: this is the reason why it must be voluntary suicide. In fact, the two-year time limit does not exist if the insured has taken his life in conditions of natural incapacity as long as it is not provoked or by mistake as a result of a game or a bet. L. Tramontano (a cura di), *Codice Civile Studium*, 10582.

10 See articles 1901 and 1924 of the Italian civil code. Both the articles are related to the case of failure to pay the premium: the rules constitute application of the general institute of the exception of non-fulfillment (1460). Therefore, the insurer must be denied the right to refuse the insurance guarantee, if this is contrary to good faith, as occurs in the event that the insurer himself has, albeit tacitly, expressed the will to renounce the suspension (for example, through acknowledgment of the right to compensation, or acceptance of the late payment of the premium, without making reservations, despite the knowledge of the previous occurrence of the accident). L. Tramontano (a cura di), *Codice Civile Studium*, 10513 and 10576. With regard to life insurance, in the event that the parties, notwithstanding the provisions of art. 1924, paragraph 2, of the Italian Civil Code, provided for the possibility of automatic reactivation of the relationship, within six months of the expiry of the unpaid premium, towards payment of the outstanding premiums and legal interest, or the possibility of reactivation after six months within two years from the indicated expiry date, subject to the insurer's ascertainment of the good state of health of the insured, the legal termination operates only at the expiration of this last term, while reactivation does not lead to the emergence of a new contract , but the same relationship that, following the non-payment of the premium, had come to find himself in a situation of retirement. *Ibid*. On this point, Cass. Civ., Sec. I, October 20, 1994, n. 8558.

two years have not elapsed from the day on which the suspension ceased[11].

The system described by the Article 1900 of the Italian civil code is derogated, limited to life insurance in the event of death, from Article 1927[12].

This rule, specifically, provides for the release of the insurer in the most notable case of an accident maliciously caused by the policyholder – *i.e.* the case of suicide – if the event occurs during a waiting period of two years, starting from the signing of the contract or from reactivation of the same, if its effectiveness has remained suspended due to non-payment of premiums[13].

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11 In the event of death due to gross negligence, *i.e.* caused by voluntary behavior of the insured person such as to expose him to the danger of death, Article 1900 is to be considered applicable with consequent release of the insurer, unless it has been agreed that death caused by gross negligence is covered by warranty. P. Corrias, *Le assicurazioni sulla vita*, *cit*., 201-202. Given the *ratio* underlying the rule, the hypothesis considered by it is only that of voluntary suicide and not, for example, that of the suicide of a subject incapable of understanding and willing (see, for example, the article 428 of the Italian civil code) unless it is such due to a he attributable. In terms of life insurance, the regulations provided for by the second paragraph of art. 1927 of the Italian Civil Code in the event of suicide by the insured (according to which the insurer is not obliged if, as there has been suspension of the contract due to non-payment of premiums, two years have not elapsed from the day on which the suspension ceased) can be waived with the agreements of policy, since this provision is not included among the mandatory rules indicated by art. 1932 of the Italian Civil Code. L. Tramontano (a cura di), *Codice Civile Studium*, 10581. See, Cass. Civ., Sec. I, July 17, 1991, n. 7956. In particular, the article 1932 is intended to protect the insured as obliges the insurance company not to derogate from the pre-established conditions, unless these changes are no longer favorable to the "weak party", under penalty of the declaration of nullity of the unfavorable conditions and their replacement with the corresponding provisions of the law. L. Tramontano (a cura di), *Codice Civile Studium*, 10589.

12 *Ibid*. See also, N. Gasperoni, *Le assicurazioni*, *cit*., 170 ff. It is important to note that, with regard to accident insurance, dated jurisprudence of legitimacy has held that, if the insurance guarantee is extended to fatal accidents, it also includes the risk of suicide (subsequent to the expiry of the waiting period), without the contractual cause being distorted, provided that the parties have not excluded the operation of the contract in cases in which the voluntary or grossly negligent act of the insured participated in the production of the accident. See, on this point, the sentence of the *Cassazione Civile 3741/1976*. However, recent jurisprudence has disregarded this orientation and arguing from the logical irreconcilability between suicide (typically voluntary fact) and accident (event due to violent and external fortuitous cause), has excluded the former from insurance coverage against accidents, unless otherwise agreed. See, on this point, the sentence of the *Cassazione Civile 2215/1993*.

13 N. Gasperoni, *Le assicurazioni*, *cit*., 171 ff. Some scholars consider that the provision referred to in Article 1927 c.c. is also applicable in the event of the suicide of the subject on which the fatal event may affect, if it is different from the policyholder, considering that, in the case of third party life insurance, the subject to be taken considering both the person who has consented to take out life insurance. P. Corrias, *Le assicurazioni sulla vita*, *cit*., 201. From the same perspective also G. Pericoli, *Consenso e interesse nell'assicurazione sulla vita di un terzo*, RIV. DIR. CIV., 1976, I, 363 ff; A. De Virgiliis, *Rilievi in tema di assicurazione sulla vita del terzo*, RIV. DIR. CIV., 1963, 522 FF.

In analyzing the *ratio* of the Italian provision, it may be found its justifying reason, in addition to the typical social security nature of life insurance, in the presumption that the waiting period is sufficient to make suicidal intentions vanish, possibly matured in view of the stipulation of the contract or its reactivation[14].

In addition, it was considered also that the instinct of conservation normally prevails over the interest in obtaining the indemnity to heirs and beneficiaries[15].

On this point, the rule contained in the Article 1927 is freely amendable by the parties, as can be deduced from the express reservation of the contrary agreement, however contained only in the first paragraph[16], as well as the lack of inclusion among the mandatory rules if not in a more favorable sense for the insured[17].

The insurer can, therefore, assume the suicide risk immediately or under different conditions, just as it cannot assume it at all[18].

Considering as stated, a major part of the doctrine considers a breach of the pre-contractual duty of good faith pursuant to art. 1337 of the Italian civil code if the contract, containing a clause of immediate coverage

14 *Ibid.*

15 L. Buttaro, *Assicurazione sulla vita*, *cit*., 640-641. See, also A. Donati, *Trattato del diritto delle assicurazioni private*, *cit*., 623 ff. See Cass. Sez Un., April 30, 2021, no. 11421. In particular, the sentence made a firm point with respect to the diatribe that saw the reference to legitimate and / or testamentary heirs referred to in the insurance contracts pursuant to art. 1920 and 1921 of the Italian Civil Code as a concrete reference to the beneficiaries, where it has been reiterated that that identification has no practical meaning because what matters is that the right to receive the indemnity arises *iure proprio*. It is interesting because it represents a way of carrying out indirect donation. It is a multidisciplinary theme, because it can be traced back to the distinction between attribution *iure proprio* and *iure successionis*; because it belongs to the subject of the contract in favor of a third party, especially in the variant pursuant to art. 1412, in which the service must be performed in favor of the beneficiary after the death of the policyholder, therefore, as such, also belongs to the subject of inheritance contracts and to that of the post mortem mandate. Not only that, in this context, art. 1920 is nothing more than a specification of art. 1412. But art. 1920 – in connection with art. 1921 – does much more, because it establishes the possibility, which would normally be precluded, of appointing a subject as the beneficiary of a contract in favor of a third party - in which the service must be made after the settlor's death - but also because it provides for the possibility that by will, the attribution is changed by revoking the previous attribution made in the contract and, even, by designating a different subject as beneficiary with respect to the original. This outcome is not possible in the basic case pursuant to art. 1412 of the Italian Civil Code; vice versa, in matters of insurance contract it is. All this to say that these are attributions *iure proprio* and not *successionis*.

16 N. Gasperoni, *Le assicurazioni*, *cit*., 171 ff. On the same point, V. Salandra, *Dell'assicurazione*, in *Commentario Scialoja, Branca*, *sub artt. 1861-1932*, Bologna-Rome, 1969, 426 ff.

17 See article 1932 Italian civil code.

18 G. Volpe Putzolu, *L'assicurazione*, in *Trattato Rescigno*, vol. 13, Turin, 1985, 79 ff. As a rule, however, the policies comply with the provisions of the article in question. On this point, A. De Gregorio & G. Fanelli, *Il contratto di assicurazione*, Milan, 1987, 202 ff.

of the suicide risk, is stipulated by the policyholder with the preordained intention of taking his own life[19].

The jurisprudence, however, has specified that the provision of the second paragraph may be considered derogable with the policy agreements (even in the absence of an express provision to the contrary)[20].

In this sense, the clause which identifies the contents and limits of the insurance guarantee (such as the one that excludes from the insurance coverage the accident whose production the insured participated with willful or grossly negligent conduct), performs the function of circumscribing the subject of the limit the liability of the insurer[21].

Considering as stated in the previous pages, the question is to understand *quid iuris* in the cases in which the policyholder has caused his death with conduct marked by gross negligence.

More than one author excludes that in this case the general rule established by Article 1900 of the Italian civil code, on the finding that, where the release of the insurer is legally limited to suicide committed during the waiting period, it is not possible – in the absence of an express rule or policy clause – to attribute relevance, based on general considerations, to any other cause of accident that may depend on the conduct of the policyholder[22].

19 G. Fanelli, *Le assicurazioni*, in *Trattato Cicu, Messineo*, Milan, 1973, 118, footnote 58. In particular, article 1337 generally establishes that the parties, in carrying out the negotiations and forming the contract, must behave in good faith. According to the traditional approach, pre-contractual liability, which can be configured as a violation of the precept set out in the article in question, constitutes a form of non-contractual liability, which is linked to the violation of the rule of conduct established to protect the correct development of the contract formation process, so that its existence, the compensation for the damage and the assessment of the latter must be assessed in accordance with articles 2043 and 2056, also taking into account the typical characteristics of the offense in question. L. Tramontano (a cura di), *Codice Civile Studium*, 9100. See, in jurisprudence, Cass. Civ., ss. uu., July 16, 2001, n. 9645; Cass. Civ., ss. uu., June 26, 2003, n. 10160.

20 See the sentence of the Cass. Civ., Sez. I, July 17, 1991, no. 7956. In particular, on the subject of life insurance, the regulations provided for by the second paragraph of art. 1927 of the Italian civil code, in the event of suicide by the insured (according to which the insurer is not obliged if, as there has been suspension of the contract due to non-payment of premiums, two years have not elapsed from the day on which the suspension is terminated) it is derogable with policy agreements, since this provision is not included among the mandatory rules indicated by art. 1932 of the Italian civil code.

21 Therefore, even if unilaterally prepared by the insurer, it is not subject to the regulations pursuant to art. 1341 and, in particular, does not require specific written approval by the insured. See, on this point, the sentence of the Cass. Civ., Sec. I, October 22, 1976, n. 3741.

22 On this point, *inter alia*, L. Buttaro, *Assicurazione sulla vita*, *cit*., 641 ff; A. La Torre, *I sinistri cagionati con colpa grave dell'assicurato*, in *Scritti di diritto assicurativo*, Milan, 1979, 382 ff. In particular, according to the argumentation of the latter, it can be drawn from the nature of the insured risk – which, according to the life of the human person, necessarily differs from the principles that regulate the other insurance branches – and from the social security function, characteristic of life insurance, which gives it peculiar characteristics compared to other types of insurance and has an impact on the risk assessment criteria and its causes.

The Italian legislation, therefore, does not provide for the fate of the premiums already collected in the event of early release by the insurer, leaving ample room for the parties to self-regulate[23].

The second paragraph of the Article 1927 of the Italian civil code, moreover, provides a clear distinction according to whether the default relates to the first prize or a subsequent prize.

In the first case, the contract resumes effect from the midnight on the day on which the payment was made (provided that the six-month term referred to in Article 1924 has not expired).

In the second case, on the contrary, providing for Article 1924 – once the "grace" period has elapsed – no period of suspension, this will only occur if provided for by the policy and will cease at the time and in the manner indicated therein[24].

According to a large current of doctrine, the rule in question is also applicable in the case of suicide of the third party whose life insurance is contracted[25].

Concluding the analysis of the Italian legal framework, a final aspect that deserves to be mentioned concerns the burden of proof. In this sense, in fact, the burden of proving that the death depended on suicide falls on the insurer, since his release follows this circumstance. If the proof is not sufficiently achieved, the insurer remains obliged to pay the indemnity[26].

In other words, with reference to the burden of proof relating to the verification of the fatal event, it is believed that pursuant to the general

23 V. Salandra, *Dell'assicurazione*, *cit*.,428 ff. In the absence of a specific clause, it is considered fair – consistently with the principles regarding unjustified enrichment – to pay the redemption value to the entitled parties. However, with regard to the fate of the premiums collected by the company in the event of previous suicide and two years, considering that the law says nothing in this regard, the most part of the scholars consider correct to apply article 1925 by analogy and consequently argue that when the conditions are met for the exercise of the right of surrender (*i.e.* in insurance with *eventus certus an sed incertus quando*) the insurer is required to pay the surrender value to the heirs, in order to prevent them from making an undue profit from suicide. On this point, *ex multis*, P. Corrias, *Le assicurazioni sulla vita*, *cit*., 202; M. Irrera, *L'assicurazione: l'impresa e il contratto*, *cit*., 419.

24 A. Donati, *Trattato del diritto delle assicurazioni private*, *cit*., 624-625.

25 *Ibid*. However, the doctrine that has expressed to the contrary, points out that the third party cannot be considered insured (by this being meant the holder of the insured interest), but simply the bearer of the risk. *Inter alia*, L. Buttaro, *Il suicidio nell'assicurazione sulla vita di un terzo*, in *Enciclopedia del Diritto*, 1958, 647 ff; F. Carresi, *Qualificazione giuridica del "terzo" sulla cui vita è stipulato il contratto di assicurazione*, in *Assicurazioni*, 1958, 33 ff.

26 On this point, see V. Salandra, *Dell'assicurazione*, *cit*., 428 ff; N. Gasperoni, *Le assicurazioni*, *cit*., 172 ff; L. Buttaro, *Assicurazione sulla vita*, *cit*., 428 ff.

rule referred to in Article 2697 c.c., the beneficiary will be required to prove the fact that constitutes his / her right to receive the payment from the insurer – *i.e.* the death of the insured person – while it will eventually be up to the insurer, if he has an interest in exempting himself from his payment obligation, to prove that the death occurred by suicide, constituting this event an impediment to the law[27].

3. The comparison with the German law

As regards the German law, the suicide clause is contained in section 161 VVG (after the reform of 2008), which provides, after the amendment to the law of 2008, that the waiting period has been set at three years[28].

However, even before 2008, most German insurer companies had provided adequate waiting periods in their conditions. The general terms and conditions for term life insurance of the German Insurance Association (GDV) as of 25 October 2012 fully implement the requirements of the reformed section 161 VVG (2008), but do not go beyond them[29].

Nowadays, specifically, the German suicide law provides for the following:

(1) In the case of a whole life insurance, the insurer is not obliged to make the payment if the insured person intentionally commits suicide before three years have elapsed after the conclusion of the insurance contract. However, this does not apply if the act was committed while a person was in a morbid mental state that precluded his ability to freely determine his intent.

(2) The term referred to in paragraph (1), first sentence, may be increased by mutual agreement.

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27 P. Corrias, *Le assicurazioni sulla vita*, *cit*., 202. However, the case in which the insurance covers the risk of injury is different: considering that, in this case, the fact constituting the right to compensation is, in fact, the accident and not death, it will be up to the beneficiary to prove that this it is due to an injury and, therefore, to prove the fortuitous, violent and external cause. *Ibid*. Also the jurisprudence expressed in this way in Trib. Tivoli, June 6, 2007, in JURIS DATA.

28 Before 2008, § 169 VVG (old version) regulated the exclusion of benefits without a waiting period. See, on this point, M. Zimmerling & A. Pfeiffelmann, *Germany*, INS. DISP. L. REV., 2021. For insurance contracts concluded before the entry into force of the VVG amendment on 1 January 2008, the old provisions of the law on the subject continue to apply. See also, generally, P. Stoecker, *Der Vorsatz des Versicherungsnehmers bei der Herbeiführung des Versicherungsfalles im Sinne des § 103 VVG*, Universitätsverlag Göttingen, 2011, 99-100; C. Drave & F. Herdter, *Insurance Litigation in Germany*, Wilhelm Rechtsanwälte, 2016.

29 P. Stoecker, *Der Vorsatz des Versicherungsnehmers bei der Herbeiführung des Versicherungsfalles im Sinne des § 103 VVG*, *cit*., 99-100.

(3) If the insurer is not obligated to make the payment, he must pay the surrender value plus the surplus sharing in accordance with section 169[30].

If a claim is made after an increase in risk and the policyholder has deliberately caused the risk increase, the insurer may be considered released from the obligation to provide coverage[31].

Moreover, in the cases in which there is a gross negligence deriving from the action of the policyholder, the extent to which the insurer is released from the obligation to provide cover will depend on the circumstances of the individual case[32].

The insurer, in addition, has the right to reduce the coverage proportionally to the extent of the negligence of the insured. In both cases, however, the increased risk must have caused the loss or the extent of the loss[33].

One of the most relevant aspects of the German legislation is related to the deadlines. In fact, as stated previously, it is provided that, like the Georgian legislation, there is a period of time within which, in the event of suicide, no payment is foreseen[34].

Indeed, in German law the insurer is obliged to pay the insurance premium in the cases in which the suicide of the policyholder occurs after 3 years from the conclusion of the contract[35].

On the contrary, during the first 3 years from the time of signing the contract, the insurer is not obliged to pay the insurance premium. In particular, this affirmation is valid unless the policyholder, at the time of the event of suicide, was in a state of mental incapacity[36].

30 Section 161 of the VVG (*Versicherungsvertragsgesetz*) – suicide. In particular, the section 169 (2) provides that «[t]he surrender value shall only be paid insofar as this value does not exceed the payment made upon occurrence of the insured event when the contract is terminated. The share of the surrender value not paid after that time shall be used for the fully paid-up insurance. In the case of rescission or avoidance of the contract the full surrender value shall be paid».

31 W. Schnepp & T. Bomsdorf, *Insurance Law and Regulation in Germany*, CMS, 2018, 3-4.

32 M. Wandt & K. Bork, *Disclosure duties in German insurance contract law*, Zeitschrift für die gesamte Versicherungswissenschaft, 2020, 89-90.

33 W. Schnepp & T. Bomsdorf, *Insurance Law and Regulation in Germany*, *cit*., 3-4.

34 P. Stoecker, *Der Vorsatz des Versicherungsnehmers bei der Herbeiführung des Versicherungsfalles im Sinne des § 103 VVG*, *cit*., 99-100. See also, on the same point, M. Wandt & K. Bork, *Disclosure duties in German insurance contract law*, *cit*., 89-90.

35 As provided from the Section 161 (1), sentence 1, of the German Insurance Contract Act.

36 As provided from the Section 161 (1), sentence 2, of the German Insurance Contract Act.

4. The comparison with Common law

Life insurance in common law generally covers a policyholder's suicidal death in many cases. However, some life insurance policies include contestability and suicide clauses which must expire before a suicidal death will be covered[37].

Taking in consideration the cases of suicidal death in UK, most life insurance policies have a death by suicide clause. This clause – *i.e.* suicide clause – sets the terms and conditions for payment of a suicide claim and how this coverage applies to a specific policy[38].

In this sense, in fact, it is not always known that life insurance contracts generally cover suicide, normally after a period of time has elapsed from the purchase of the policy[39].

However, the coverage against suicide was not possible until 1961, when the suicide phenomenon was "decriminalized" by the Suicide Act

37 The contestability clause accounts for the circumstances around a policyholder's death and usually applies to the first two years of a policy. During this timeframe, the contract enables insurers to deny claims for a variety of reasons, including suicide or performing an illegal act. K. S. Noble, *Accidental Death … Or Was It - The Question of Suicide in Life and Accidental Death Insurance*, BRIEF, 2010, 50 ff. During the contestable period «in a life insurance policy, the burden of relying on a suicide exclusion and proving suicide rests on the insurer». *Ibid*. In a way, «incontestability clauses act as a statute of limitations for insurers to dispute liability based on the insurance contract's validity». A. N. Morris, *A Right to Die, a Right to Insurance Payouts? The Implications of Physician-Assisted Suicide on Life Insurance Benefits*, MONT. L. REV., 2020, 223-224. In addition, «some insurance policies even include a fraud exception within the incontestability clause, allowing the insurer to contest liability for fraud even after the contestable period has lapsed». *Ibid*. On the same point, also, C. French & R. Jerry, *Insurance Law and Practice: Cases, Materials, and Exercises*, in *American Casebook Series*, 2018, 742 ff; M. Song, *Insurance contract law reform in England*, in *Insurance law in China*, J. Hjalmarsson & D. Huang, Routledge, 2015, 274 ff; P. Merkin, *England*, in M. Fontaine (ed.), *Insurance contract law*, International Association for Insurance Law, 1990, 83 ff; D. Hertzell, *Reforms to UK insurance law: overview of key changes*, Thomson Reuters Practical Law, 2016. Available at https://uk.practicallaw.thomsonreuters.com. Last visited January 5, 2022.

38 A. N. Morris, *A Right to Die, a Right to Insurance Payouts? The Implications of Physician-Assisted Suicide on Life Insurance Benefits*, *cit*., 235.

39 J. Davey, *Insurance Risk?*, NEW LAW J., 2006, 1-2. This recognises that «life insurance has an important social function, in providing support for the dependants of the deceased, and, in particular, in covering outstanding mortgage commitments». *Ibid*. The suicide clause was a stipulation included in insurance contracts concerning self-inflicted death. See R. A. Smith, *Life Insurance and Suicide*, CAN. BAR REV., 1939, 508-512. It did not, as one would expect, «void the insurance contract between the insurer and the insured rather, it stipulated the conditions under which beneficiaries of life insurance policies would receive payouts in cases of suicide». E. Richardson, *The Suicide Clause*, CAN. MIL. HISTORY, 2020, *cit*., 10.

1961[40]. Before then, insurers would not be held to their contractual promise to pay where the act of committing suicide was a criminal offence[41].

The position of law in UK was that in any case in which the policyholder died by suicide, while he was sound, it equated a fraudulent act to *felo de se* and, thus, the insurance company was released from liability because no one could have benefited from his own misconduct[42].

Leading case on this point is *Beresford v. Royal Insurance Co Ltd*, in which the executioners of Major Rowlandson's estate brought a suit to recover the sum of £50,000 allegedly payable under the defendant's five life insurances policies[43].

The Court of Appeal held that, «it was contrary to public policy for the plaintiff to be entitled to enforce the contract and entered judgment for the defendants. It is the over-riding duty and inherent power of the court to refuse its aid to enforce a promise where the plaintiff has to set up his own crime or the estate of a deceased seeks to benefit from a crime of the deceased»[44].

Suicide is generally not covered in the first two years of a life insurance policy, but is covered after. This two-year period is known as the suicide clause.

Suicide clauses generally exclude coverage for death by suicide and insurers generally return the monthly payments made toward the policy's premium, at least for suicides that occur within the contestable period[45].

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40 On this point, in fact, the Section 1 of the Suicide Act states that «the rule of law whereby it is a crime for a person to commit suicide is hereby abrogated».

41 J. Davey, *Insurance Risk?*, *cit*., 2. The clearest example of this is *Beresford v Royal Insurance Co Ltd*, where the insured «shot himself minutes before the expiry of his life insurance policy, but the court refused to order the insurer to pay, even though the loss was prima facie within the terms of the policy». *Ibid*.

42 S. Pandagre, *A Comprehensive Analysis of the Suicide Clause in Life Insurance Policy in India, USA and UK*, INT'L J. L. MANAGEMENT & HUMANITIES, 2021, 330-331.

43 *Ibid*.

44 *Ibid*. The effect of the above decision does not prohibit an insured person from suing the company and cannot «reinforce the common interpretation of the above-mentioned suicide clause and restrict suicide on the company, even where it has clearly been shown that this is suicide, the denial of liability and payment on the basis of public policy, the company will not be prevented. Here, suicide is also an act of felony under Common law and a crime». *Ibid*.

45 A. N. Morris, *A Right to Die, a Right to Insurance Payouts? The Implications of Physician-Assisted Suicide on Life Insurance Benefits*, *cit*., 225. In fact, although beneficiaries are not entitled to death benefits if suicide occurs during the first two years of a policy, they can receive a refund of premiums that were paid into the policy prior to death.

Suicide clauses, in this sense, «act as a deterrent for insureds who purchase life insurance with the intent to harm themselves»[46].

As anticipated, a suicide death clause typically refers to a period of time from the start date of the policy.

Most suicide death clauses will last for a period of 12 months from the start date of a policy currently, however, some are for 24 months. This time period is subject to change and may vary from one insurance company to another[47].

The history of suicide and life assurance has shown that civil law considerably penalizes such ways of consensual death. Where a criminal mode of death exists, those who participate in the crime normally cannot take advantage of death[48].

5. The Georgian law

Analyzing the Georgian regulatory framework, in relation to the event of suicide, some considerations emerge from the reading of the two paragraphs of which Article 850 is composed.

First, the insurer is exempt from liability in any case in which the person whose life was insured commits suicide. This prediction is much simpler in its formulation if compared with both the Italian German regulation; in fact, it does not provide for any "temporal" consideration[49].

Equally, this provision is different from as provided in Common law in which, as stated previously, the suicide clause sets the terms and conditions for payment of a suicide claim[50].

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46 *Ibid*.

47 A. N. Morris, *A Right to Die, a Right to Insurance Payouts? The Implications of Physician-Assisted Suicide on Life Insurance Benefits*, *cit*., 235.

48 S. Pandagre, *A Comprehensive Analysis of the Suicide Clause in Life Insurance Policy in India, USA and UK*, *cit*., 331-332.

49 On this point, see, P. Corrias, *Le assicurazioni sulla vita*, *cit*., 200; see also, P. Stoecker, *Der Vorsatz des Versicherungsnehmers bei der Herbeiführung des Versicherungsfalles im Sinne des § 103 VVG*, *cit*., 99-100.

50 A. N. Morris, *A Right to Die, a Right to Insurance Payouts? The Implications of Physician-Assisted Suicide on Life Insurance Benefits*, *cit*., 235.

Specifically, the Georgian discipline represents a difference with most life insurance policies that, in fact, exclude coverage for death by suicide within the first few years of the commencement of coverage[51].

This exclusion, specifically, «helps control for the problem of adverse selection, insofar as it eliminates one motive that suicidal individuals might have for obtaining insurance (and, in turn, for committing suicide)» [52].

The same is provided in the Italian case, for example, in which, as analyzed in the previous pages, in the event of the suicide of the policyholder, which occurred before two years have elapsed from the stipulation of the insurance contract, the insurer is not required to pay the insured sums, unless otherwise agreed.

In both cases, of course, the rule is aimed at preventing the insured from taking out life insurance for the express purpose of defrauding the insurance company. However, considering that this choice would be the result of desperation in the face of a serious situation, the Italian legislator, for example, has considered that the two-year term from the stipulation or reactivation (1924 of the Italian civil code) may be sufficient to eliminate the suicidal intention or at least, to dissuade the policyholder from entering into fraud[53].

German legislation, also, expressly provides for a period of time, quantified as three years, within which, in the event of suicide, the insurance is not required to pay the premium. In fact, within the first 3 years from the duration of the contract the insurer will have to pay the insurance money only if the person at risk has committed suicide in a state of mental incapacity[54].

51 European Commission, *Final Report of the Commission Expert Group on European Insurance Contract Law*, Directorate General for Justice, 2014, 34. See also S. P. Croley & J. D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-And-Suffering Damages in Tort Law*, HARV. L. REV., 1995, 1182-1183.

52 *Ibid*.

53 On this point, see, P. Corrias, *Le assicurazioni sulla vita*, *cit*., 200.

54 P. Stoecker, *Der Vorsatz des Versicherungsnehmers bei der Herbeiführung des Versicherungsfalles im Sinne des § 103 VVG*, *cit*., 99-100. See also, on the same point, M. Wandt & K. Bork, *Disclosure duties in German insurance contract law*, *cit*., 89-90.

The same occurs in UK, in which the suicide clause lasts for a period of 12 months from the start date of a policy – even if, however, some are for 24 months[55].

In the Georgian law, in addition, the legislature also takes into account the interests of the heirs of the insured person and gives them the right to request a refund of the insurance premium paid[56]. In fact, the second paragraph of the Article in comment provides that «the heir of the insured can request reimbursement of the insurance premiums paid».

The *ratio* of legal protection of the insurers and their heirs of the insured is expressed by the fact that the heir receives a certain amount as compensation, but not the insurance premium.

55 A. N. Morris, *A Right to Die, a Right to Insurance Payouts? The Implications of Physician-Assisted Suicide on Life Insurance Benefits*, *cit*., 235.

56 Refund of premiums paid is considered an exception to the insurance doctrine. Such an exception is cumulative insurance (subject to 851 II). See as well as 850 II and 852.

Article 851 - Substitution of insurance contracts

1. The policyholder may demand, at any time before the end of the current insurance period, substitution of the insurance contract with a premium-free insurance contract.

2. If the policyholder demands such substitution, then from that moment on the amount of insurance or the amount of benefit shall be substituted with the amount that corresponds to the liability of the insurer, considering the age of the insured person, provided the reserve of accumulated premiums is regarded as a single premium.

Maryna Vahabava

Summary: 1. Introduction. 2. Systematic placement of the norm in comment. 3. Comment on Article 851 of the GCC: the content of the norm between the first and second paragraphs. 3.1. Purpose of the norm. 3.2. Scope of application and to which types of contracts. 4. The main differences between the substitution on contracts and other similar legal figures. The comparison between a substituted contract, the subrogation on the contract and the novation. 5. Comparative study of the regulation of substitution on insurance contracts in other countries: Regulation in Italy. 5.1. Regulation in Russian Federation. 5.2. Regulation in Germany. 6. Conclusions.

Keywords: *substitution on insurance contracts; life insurance; comparative analysis.*

1. Introduction

Georgia's insurance system was an organic component of the Soviet State Insurance System. The process of establishing a market insurance system in Georgia required the creation of a legislative framework for insurance activities, the basis of which was laid: the Georgian Civil Code (hereinafter – GCC), adopted on 26.07.1997, was enacted on 25.11.1997 (with changes and additions from 2014), Georgia's Insurance Act, which was passed by the Georgian parliament in 1997, Georgia's Non-State Pension Insurance Act of 30.10.1998. Law of Georgia "On Protection of Health" of 10.02.1997 with amendments and additions of 30.03.2015. Resolution of the Government of Georgia No. 218 of 09.12.2009 «[o]

n carrying out activities within the framework of the state program for public health insurance and determining the conditions of the insurance voucher»[1].

Resolution of the Government of Georgia No. 165 of 07.05.2012 "On carrying out activities within the framework of the state health insurance program for persons of retirement age, students, for children with disabilities and for persons with pronounced disabilities, as well as determining the conditions of the insurance voucher". Order of the Government of Georgia No. 306 of 15.02.2015 "On approval of the agricultural insurance program" and the Resolution of the Government of Georgia No. 102 of 02.05.2013 "On the Establishment of the State Insurance Supervision Service of Georgia and its Supervisory Board"[2], etc.

The elimination of the state monopoly in the field of insurance led to the transition from directive-planning to free pricing for insurance protection, which is realized through the formation of insurance tariffs[3].

In Georgian legislation the insurance contract is a real contract, as it comes into force only after payment of first insurance premium and not after agreement between the parties[4]. According to Article 816 of Georgian Civil Code, the insurer is free from the obligation until the payment of the first or the single insurance premium by the insured.

On this point the doctrine has not always been agreed and some have suggested other cases. In particular, the question has been raised about life insurance contracts, such as those which are the subject of the comment.

The opinion has been expressed in legal literature that insurance contract belongs to the conditional contracts, as fulfillment of insurer's obligation depends on occurrence of certain condition – an insurable event[5]. Although, it must be taken into consideration that in case of health insurance, contract commencement and realization of rights and obligations of the parties do not depend on actualization of insurance risk. As actualiza-

1 R. Pachulyya & J. Meshyya, *Questions Formation and Development Insurance system in Georgia (Вопросы становления и развития страховой системы в Грузии)*. Available in Russian language on: http://www.insur-info.ru/press/d2451213/ (last consultation 21.05.2022).

2 *Ibid.*

3 The insurance market in Georgia is going through hard times (Страховой рынок в Грузии переживает не лучшие времена), available in Russian language on: http://georgianpress.ru/main/48953-strahovoy-ryinok-v-gruzii-perezhivaet-ne-luchshie-vremena.html (last consultation 21.05.2022).

4 K. Iremashvili, *The characteristics of legal regulation of health insurance*, on *Journal of Law* n. 2, 2011, p. 45.

5 *Ibid*.

tion of insurance risk is an unpredictable event, insurance contract may expire without occurrence of insurable event.

In this general context, the legislative model that inspired the Georgian legislator is undoubtedly the Western one and, in particular, the German model of insurance law.

Without a doubt, the first difficulty of every legal comparatist is linguistics. These differences have also been taken into account in this commentary and also those of the various official English translations of the norm in comment. The Russian language version of the text of the norm in comment has also been considered and compared.

The attempt of the commentary was to understand the *ratio legis* of the norm and its systematic framing as well as a comparative comparison with legislative systems that over the years, for historical-political or other reasons, have been able to influence the evolution of Georgian law.

2. Systematic placement of the norm in comment

In order to better understand the legal institution provided for in the Article 851 in comment its place in the GCC needs to be better analyzed. First of all, from the point of view of the classification, the institution is covered by the legislation dedicated to life insurance contracts.

More generally the source of legal regulation of life insurance contract is represented by GCC, which on the one hand, defines principles of contractual relationship and on the other hand, contains the separate set of regulatory norms for insurance contract. Articles from 799 to 858 determine guiding principles for insurance contracts on a general level, as well as on examples of individual types of insurance. The Part IV of Book 3 from the Article 844 to the Article 853 deals specifically with life insurance.

The parties agree on an amount of insurance premium, as well as payment rules and conditions. Insurance premium represents a price of "risk bearing" by the insurer. By paying insurance premium, the insured "buys peace and financial stability". On the other hand, contract interest of the insurer lies in receiving insurance premium. Payment of premium is a provision, that results in reciprocal provision from the side of the insurer.

Emergence of new information about the object of insurance during the period of validity of the contract (like information about the increase of risk) determines the insurer's decision about possible change of con-

tractual provisions and about continuation of the contractual relationship. Possession of complete information by the insurer at the stage of occurrence of insurable event determines existence of obligation of loss reimbursement. Breaching the obligation of provision of information by the insured gives a right to the insurer to terminate the contract.

In other cases, however, it is a question of substitution of insurance contract provided for in Article 851 of the GCC.

3. Comment on Article 851 of the GCC: the content of the norm between the first and second paragraphs

The Article 851 of the GCC provides for the institution of substitution on the insurance contract in the field of life assurance. The norm in comment is divided into two paragraphs.

The first paragraph provides for the policyholder the possibility to demand the substitution of the insurance contract with a premium-free insurance contract only on condition that the request is made before the end of the current insurance period.

If the policyholder demands such substitution the second paragraph of the Article provides then from that moment on the amount of insurance, or the amount of benefit shall be substituted with the amount that corresponds to the liability of the insurer. In the count it is necessary to consider the age of the insured person, provided the reserve of accumulated premiums is regarded as a single premium.

The second paragraph of the norm, in fact, prohibits the insurer from receiving insurance premiums. According to the norm, the terms agreed on the insurance amount and reimbursement change from the moment of the agreement to change the contract. In particular, in such a case, the sum insured or reimbursed is an amount that corresponds to the insurer's duty. However, the legislature emphasizes such criteria as the age of the insured[6].

Consideration of age is important as it is one of the crucial factors in forming the will of the insurer in life insurance.

According to the norm, a prerequisite for this change is a review of the accumulated premium reserve for a one-time deposit. For example, 62-year-old person decided to replace accumulative insurance with risk

6 K. Iremashvili, *Online Commentary on the Civil Code*, available on: https://gccc.tsu.ge/, 2016 (last consultation 21.05.2022).

insurance. The Insurer consented to such a change and explained that the insurance premium paid by this person would be considered a one-time insurance premium insurance contribution[7].

Given that the insurer may substitute the contract at any time before the end of the current insurance period, it would not apply for such limitation.

3.1 Purpose of the norm

Under the provisions of Article 851, according to Georgian doctrine[8], the legislature protects the mutual interests of the parties. In particular, on the one hand, the norm takes into account the interest of the insurer and gives him the right to replace the accumulative life insurance with a risky contract. On the other hand, even the legislator considers the interest of the insurer and prohibits the insurer from receiving the premiums paid[9].

In conclusion, the provision of the Article 851 of the GCC - the substitution on contracts - is what the Italian doctrine would call a *"potestative right"*[10]. It means that right which attributes an advantage to only one party, while the other party can only passively bear the exercise of this right. The policyholder can choose to exercise this right when he wants, provided only that the insurance contract has not yet come to the end. On the other hand, the insured cannot oppose this choice, but always on condition that the prescriptions of the second paragraph of the Article 851 of the CCG are respected. From that moment on the amount of insurance or the amount of benefit shall be substituted with the amount that corresponds to the liability of the insurer. At the same time, it is necessary to consider the age of the insured person, provided the reserve of accumulated premiums is regarded as a single premium.

3.2 Scope of application and to which types of contracts

This right provided for in the article 851 of the GCC is recognized only in favor of the policyholder and not also for the insurer and concerns the life insurance contract and not all insurance contracts in general. The fact that the place within the Code is that within the rules specifically

7 S. C. Tsiskadze, *Commentary*, Book IV, Vol. II, 2001, art. 851, p. 173.
8 K. Iremashvili, *Online Commentary on the Civil Code*, *cit*.
9 *Ibid.*
10 A potestative right allows his holder to create, modify or extinguish another's legal situation.

devoted to the life insurance contract and not in the general part on insurance contracts suggests that, precisely, it is a legal institution provided exclusively in the context of life insurance contracts. Otherwise, we would have found a similar rule in the general part applicable to each insurance contract, regardless of the type.

Giving this right to the insurer by the legislator is logical, because his interest in the insurance contract may change due to deteriorating health or a number of other reasons. However, the interest of the insurer must also be taken into account at such times[11].

Even if the right is foreseen exclusively in favor of the policyholder, the law tends to rebalance the position of contractors and prescribe the specific procedures for exercising the right itself and how to calculate the new insurance premium in substitution. This also in consideration of the importance of the life insurance field.

4. The main differences between the substitution on contracts and other similar legal figures. The comparison between a substituted contract, the subrogation on the contract and the novation

To better understand the legal institution provided for in Article 851 of the GCC, it is useful to consider other institutions that may seem very similar and are not in fact. The main differences between the substitution of the contract with other similar institutions such as substituted contract, subrogation and novation should be evidenced.

The Article 851 of the GCC provides for the institution of substitution on the insurance contract. It is the right of the policyholder to demand the substitution of the insurance contract with a premium-free insurance contract only on condition that the request is made before the end of the current insurance period. In the case of substitution on contract the conditions for amendment laid down in the standard are as follows: from that moment on the amount of insurance or the amount of benefit shall be substituted with the amount that corresponds to the liability of the insurer. It is also necessary to consider the age of the insured person, provided the reserve of accumulated premiums is regarded as a single premium.

A substituted contract, instead, is an agreement between parties that were involved in a previous contract. The substituted contract replac-

11 *Ibid.*

es the original contract, completely taking its place and discharging the terms of the original agreement.

Substituted contracts discharge the previous contract immediately and merge it into the new contract. This results in an effect that renders the original contract unenforceable unless there is a specific agreement in place that states otherwise.

Substituted contracts are created with the intention to circumvent rules that were unsatisfactory until recently when certain executory accords came into play.

Substituted contracts are not the same as novation, because novation requires a third party who was not part of the original contract to be involved. In novation scenarios, when the third party is accepted by the obliged, the agreement is discharged immediately.

It should be considered that a substituted contract occurs only when two or more persons, between whom a previous contract already exists, realize that the current agreement is no longer relevant or effective. In this case it's possible to proceed with a substitution of the original contract with a new one and the agreement of all the parties involved is required. A substituted contract - in this sense - involves the birth of a new contract unrelated to the previous one. In the event that the new contract as a whole is left unchanged it can be considered as a modification of the previous contract in order to meet certain requirements.

Novation, on the other hand, is essentially an agreement involving a third party replacing one of the original parties to the contract and releasing the replaced party from any obligations they may have had under the agreement. The main factor in novation is the original contract remains unchanged and is still in effect.

There are a few similarities between a substituted contract and novation, the most significant being they both involve making a change in partnership. However, the nature of this change in a substituted contract is in the contract itself whereas, with novation, the change lies with the involved parties to the contract.

Some of the most significant differences between novation and substituted contracts include substituted contracts require a change to be made to the entire contract while when novation occurs, the contract usually remains largely intact. The same parties who were involved in the original contract remain involved in a substituted contract.

When novation occurs, a new party is brought into an existing agreement, but a substituted contracts are made to satisfy all current parties to a contract.

A substituted contract continues to contractually bind all existing parties. When novation occurs, the incoming party releases the party they are replacing from the contract.

Do not confuse the substitution with the subrogation. In the case of subrogation, there are the substitution of a person or group by another in respect of a debt in insurance claim, accompanies by the transfer of any associated rights and duties[12].

In other words, the subrogation is a right held by most insurance carriers to legally pursue a third party that caused an insurance loss to the insured. This is done in order to recover the amount of the claim paid by the insurance carrier to the insured for the loss.

The rights of subrogation only arise when the policy is a valid contract of insurance. To bring into existence, the insurer's rights of subrogation, it is necessary that the claim of the insured under the policy actually to him, and it arises upon payment of partial as well as full claim of loss. The rights of insurer to subrogation must be understood with this limitation, which is the right must be incidental or attached to the ownership of the thing, insured. The insurer is entitled to every benefit to which the assured is entitled in respect of the thing to which the contract of insurance relates, but to nothing more[13].

5. Comparative study of the regulation of substitution on insurance contracts in other countries: Regulation in Italy

It is useful to analyze - in a comparative way - the experiences in other legislative systems in order to better understand the function of the legal institution of substitution on insurance contracts. Other legislations also have similar legal institutions. For example, in Italian legal system the corpus of insurance legislation is represented by different rules: the Article 165 of legislative decree n. 209 of 7.09.2005[14] prescribes that the

12 C. S. Deepak & P. Singh, *Doctrine of "Subrogation" under Insurance*, on *Corporate Law,* 2020, available in https://taxguru.in/corporate-law/doctrine-subrogation-insurance.html (last consultation 21.05.2022).

13 *Ibid*.

14 Rule of coordination between Civil Code and Code of Private Insurance.

Italian Civil Code still applies for insurance contracts where not derogated by the Code of Private Insurance[15]. The Article 1882 and following articles of the Italian Civil Code define the insurance contract and other aspects relating to the field of insurance. It is considered to be an "upon payment" and "synallagmatic" contract: in fact, this assumption has to be clarified. Insurance is considered by a large part of the doctrine [16] to be a synallagmatic contract even if it is at the same time an aleatory contract, we can also say that it has a synallagmatic element with reference to the genetic moment where the insurer assumes the duty to cover and even if the insured event will never occur.

In Italian legislation there is the transformation of insurance contract which represents the same hypothesis described in Article 851 of the GCC in commentary.

The definition of the transformation of the insurance contract was provided for the first time within the Circular of a public entity that dealt specifically with the insurance sector[17]. It consists in amending certain elements of the contract in force such as, for example, the duration, the type of risk insured and the method of payment of the premium[18].

It should be pointed out that the processing operation of the transformation in the Italian legal system is not regulated in the insurance contract, so the conditions for it are, from time to time, agreed with the undertaking which has to deliver an information document. In fact, those who take out a life insurance policy can be invited by the company or insurance consultant to transform the current insurance contract into a new contract.

Normally, this is done in two ways: by signing a contractual appendix; or - more frequently - by redeeming the existing contract and signing a new contract.

15 Legislative Decree of 7.09.2005, n. 209, available on: https://www.ivass.it/normativa/nazionale/primaria/CAP.pdf (last consultation 21.05.2022).

16 R. Ippolito, *The synnallagma in the insurance contract on Review of Commercial Law and General Law of Obligations, issue 9-12*, Piccin Nuova Libreria S.p.A. editorie, Padua, year 1983, p. 483.

17 ISVAP is the Institute for Insurance Supervision, circular number 551 of 1 March 2005. This institute has been replaced by IVASS (Institute for Insurance Supervision) since 2012.

18 In the previous legislation provided for in the circular it was established that: the insurance undertaking is not obliged to comply with the request for transformation but must submit a document comparing the characteristics of the new contract with those of the previous one. The contract resulting from the processing must clearly indicate the essential elements of the contract processed.

This rule, unlike Georgian legislation, is not found in the Italian Civil Code which, although it devotes a specific part to the life insurance contract[19] does not specifically provide for its transformation. The rule governing its operation is of secondary rank and by this it is intended to say that it is provided for in the circular of a public entity responsible for supervising the insurance sector.

In Italy, in fact, as has been pointed out, there is an independent authority that deals specifically with the insurance sector. This legal entity is called IVASS or the Institute for Insurance Supervision[20]. It is a public entity with legal personality under public law which works to ensure the adequate protection of policyholders by pursuing the sound and prudent management of insurance and reinsurance undertakings. It deals with the transparency of insurance companies and fairness towards customers. The institution also pursues the objective of ensuring the stability of the system and financial markets[21]. IVASS was established in 2012 with the task of ensuring the stability of the insurance market and consumer protection. It has replaced ISVAP (Institute for Insurance Supervision), continuing to perform the same functions and adding others[22].

Among the functions of IVASS are found in more detail: supervision; control; the transparency of enterprises; the collection of market data; the possibility of making complaints. It is important to know how this entity works because it has the power to enact regulations and circulars, which are sources of secondary law, in the field of insurance. The supervision which it carries out is aimed at the observance of laws and regulations by undertakings and their insurance agents.

19 The Italian Civil Code devotes to the discipline articles ranging from 1919 to 1927 of Book IV – Of obligations, Title III – Of individual contracts, Chapter XX – Of insurance, Section III – Of life insurance.

20 The Head of IVASS is the President, who corresponds to the Director-General of the Bank of Italy and who chairs the Board, composed of two other directors, and the Integrated Board, a collegiate body in which the Governor of the Bank of Italy also participates. It is thanks to the integration with banking supervision that IVASS has been able to offer greater insurance supervision, protecting consumers from possible scams but also by checking that insurance companies and their agents comply with the laws and regulations of the sector.

21 See https://www.ivass.it/chi-siamo/index.html?com.dotmarketing.htmlpage.language=3 (last consultation 21.05.2022).

22 The Institute for Insurance Supervision has replaced ISVAP in everything related to insurance supervision in Italy. The Institute was governed by Law 135 of 2012 and began operating from 1 January 2013, the year in which it integrated some new functions to those already implemented in the past by ISVAP.

The legislation of this type of operation (transformation) has recently been reviewed by IVASS, and today finds space within Article 19 of Regulation 41 of 2 August 2018[23].

It is essential to point out that this provision constitutes a genuine safeguard for the protection of the contractor, so that the contractor can reach, as informedly and consciously as possible, the decision to sign a new contract, after processing.

Within the Article mentioned in paragraph 1, the supervisory institution gives us a clear examination of the transaction in question: in any transaction, however, called that involves the replacement of the guarantees and conditions of an existing contract, also implemented through the preparation of contractual appendices, or in the event that the circumstances or modalities of the transaction lead to the possibility of the transformation of the contract being considered configurable, the undertaking shall provide the contractor with the necessary elements of assessment so as to enable him to compare the characteristics of the existing guarantees and conditions with the new guarantees and conditions, highlighting, in particular, the guarantees and possible benefits, including tax benefits, to which it renounces as a result of the transaction.

With this new regulation of the processing operation, the supervisory authority no longer places the emphasis not only on a change «of the services accrued on the previous contract»[24], typically a benefit in the event of death, or in the case of life in products with duration, but on an operation that involves a «replacement of the guarantees and conditions of an existing contract».

According to the provisions of the norm, it is essential that the insurer is fully aware of the type of operation he is undertaking. In essence, the contractor must be fully aware of all the characteristics (performance, increases, exclusions and limitations, costs, options, guaranteed minimum returns, penalties in case of early redemption) of both products, of the one already in his possession and of what is proposed to him, so that he can correctly compare them and be able to evaluate their actual convenience.

In order to prevent the contractor from taking a decision not informed enough, with the new wording, IVASS within the 2nd paragraph of the norm, has decided to introduce a kind of "period of reflection" between

23 See https://www.ivass.it/normativa/nazionale/secondaria-ivass/regolamenti/2018/n41/index.html (last consultation 21.05.2022).

24 As required by the repealed Article 19 of Regulation 35/2010.

the time of delivery of the information to be delivered to the contractor and the signing of the new contract[25].

The norm provides, in particular: for the purposes of paragraph 1, seven days before any transformation of the contract, the undertaking shall deliver to the contractor: (a) the standardized information referred to in Annex 7; (b) the information set for the new guarantees and conditions.

The information referred to in point (a) is precisely the "comparison document", that is a document with opposing sections that explains, according to the guidelines provided by the supervisory authority, the characteristics, and differences of the two products being processed.

The concept of "good time before" had already been expressed by Directive (EU) 2016/97, better known as the "IDD" directive, and transposed in Italy on 1 October 2018[26]. The aim is to ensure that consumers of insurance products have the same level of protection, regardless of the distribution channel adopted. This time frame therefore takes the customer to make a "conscious" decision, a decision tailored to their needs[27].

This new set of rules, common to all European countries, aims to change the perspective of the insurance industry, placing the actual needs of the customer at the center of the logic of product construction and distribution.

The objective of IDD Directive is the protection of the policyholder, similar to what Mifid II did for financial products. Therefore, the new Directive provides, first of all, for the needs and profile of the saver to be defined taking into account different parameters. This step allows the customer to be more aware of his needs and expectations and the insurance company to propose a more suitable product, thus facilitating the transition from a "centric product" logic to a "centric customer". Another key aspect of the new legislation is transparency. The customer must be informed about every element of the insurance product, starting with the conditions and costs, in order to facilitate the comparison between different solutions.

Finally, communication must be simple and clear. In this regard, a pre-contractual Information Document (DIP) has been introduced with a standardized format and content for up to three sheets, written in a sim-

25 Article 19, 2nd paragraph, of Regulation 41 of 2 August 2018.

26 IDD stands for Insurance Distribution Directive and is the new European Directive on the distribution of life and non-life insurance products, which also came into force in Italy on 1 of October 2018.

27 See https://www.anasf.it/idd-la-direttiva (last consultation 21.05.2022).

plified language, which is delivered to the customer in the pre-contractual phase[28].

The Italian regulation took the opportunity of the transposition of the Directive to induce the insurance industry to digitize. In fact, the new legislation imposes on companies the obligation to manage documentation in digital format in order to facilitate the collection of data, useful for the management of the different customer targets.

Another aspect to consider is that the increased protection of savers translates into a number of obligations for insurance companies: reviewing documentation using simpler language; the training of its distributors in compliance with the new rules; the provision of adequate after-sales assistance services[29].

5.1 Regulation in Russian Federation

More generally the basic contents of the insurance contract in Russian Federation are the essential terms of such a contract. According to the legal rule of Part 1, the Article 432 of the Civil Code of Russian Federation can be considered concluded only if an agreement is reached between the parties on all essential terms of the contract. Substantial terms of the insurance contract are determined by the rules of the Article 942 of the Russian Civil Code[30].

It is essential condition of the contract under the rule of Part 2, Article 432 of the Russian Civil Code is also the condition on which an agreement should be reached. For the insurer, as well as for the insurer, an important condition of the insurance contract is the amount of the insurance fee namely the amount of the insurance premium.

The Russian Civil Code gives the following definition of a personal insurance contract in paragraph 1 of Article 934: under a personal insurance contract, one party (insurer) undertakes to pay a lump sum or pay the amount (insurance amount) periodically stipulated by the contract for the fee (insurance premium) paid by the other party (the insured) pay a

28 See https://www.cnppartners.it/blog/idd/ (last consultation 21.05.2022).

29 *Ibid.*

30 O.V. Korneeva *et al.*, *Commentary to Chapter 48 "Insurance" of the Civil Code of the Russian Federation (part two)* of January 26, 1996 No. 14-FZ (article-by-article), available on: http://www.consultant.ru/cons/cgi/online.cgi?req=doc&cacheid=50F6CE2C2999E057802610D6E-8FA17D1&BASENODE=32799&ts=10299903480312557420116039 93&base=CMB&n=18384&rnd=0.765990290292581#09680944552027575 (last consultation 21.05.2022).

lump sum or pay periodically stipulated by the contract amount (insurance amount) in case of harm to the life or health of the insured himself or another citizen (insured person) named in the contract, reaching a certain age or the occurrence in his life of another event (insured event) provided for in the contract.

The definition should include the second paragraph of paragraph 1 of Article 934 of the Civil Code of the Russian Federation: «the right to receive the sum insured belongs to the person in whose favor the contract is concluded»[31].

In the definition of the personal insurance contract, an open list of insurance risks that may be the object of personal insurance is formulated - in this capacity, harm to the life or health of the insured himself or another citizen (insured person) named in the contract, the achievement of a certain age or the occurrence in his life of another event (insured event) provided for in the contract are considered.

According to the Russian law, there are different classifications in the insurance sector and the life insurance falls between: with the survival of citizens to a certain age or term, with death, with the occurrence of other events in the life of citizens. This classification by types of insurance activity provides for 23 types and is an innovation in the insurance business in Russia[32].

The concept of a personal insurance contract refers to the Civil Code of the Russian Federation, and the legal concept of personal insurance is attributed by the legislator to the scope of the Law of the Russian Federation "On the organization of insurance business in the Russian Federation"[33].

According to Article 32.9 of the Law of the Russian Federation "On the organization of insurance business in the Russian Federation"[34] the following types of insurance are distinguished: 1) life insurance in case of death, survival to a certain age or term or the occurrence of another event; 2) pension insurance; 3) life insurance with condition of periodic

31 I. A. Mitrichev, *The concept of personal insurance in Russian law / Business, Management and Law*, 2017. № 3. p. 45.

32 Available on: https://studopedia.ru/3_9831_obyazatelnoe-strahovanie.html (last consultation 21.05.2022).

33 Law of the Russian Federation No. 4015-I of November 27, 1992 "On the Organization of Insurance Business in the Russian Federation" (with amendments and additions).

34 *Ibid*.

insurance payments (rent, annuities) and (or) with the participation of the insurant in the investment income of the insurer; 4) insurance against accidents and diseases; 5) health insurance and so on[35].

In accordance with the legislation, two forms of insurance are provided: voluntary (by virtue of agreement) and mandatory (by virtue of law). Voluntary insurance is carried out on the basis of a contract between the insured and the insurer[36]. If, in the implementation of voluntary insurance, the features and procedure for concluding an insurance contract are determined solely at the discretion of the parties to the contract, then a special procedure is established by the legislator for the conclusion of an insurance contract within the framework of compulsory insurance.

Mandatory insurance is carried out on the basis of the law[37] and it has a public nature, by virtue of which, the law imposes on the persons specified in it the obligation to insure the life, health or property of other persons or their civil liability to other persons at their own expense or at the expense of interested persons.

Life insurance is part of the voluntary insurance hypotheses, except for cases prescribed by law as mandatory. In particular, in accordance with Art. 935 of the Civil Code of the Russian Federation, the objects of compulsory insurance are: life, health or property of persons defined by law in case of harm to their life, health or property; the risk of civil liability of persons specified in the law, which may occur because of causing harm to the life, health or property of other persons or violation of contracts with other persons[38].

According to Part 1 of Art. 927 of the Russian Civil Code, a personal insurance contract is a public contract. This means that: a) the insurer is obliged to ensure the risks of any policyholder who applied for the conclusion of this contract, and the terms of the personal insurance contract must be the same for all policyholders; b) an insurer licensed for any type of personal insurance is obliged to enter this contract with anyone who applies to it[39].

35 There are 23 types of classification.

36 Articles 929, 934 of the Civil Code of the Russian Federation.

37 Insurance is carried out by concluding contracts in accordance with the rules of Chapter 48 of the Civil Code of the Russian Federation.

38 Annual report of the Association of Life Insurers "Life Insurance in the Russian Federation in 2016", available on: http://www.aszh.ru/wpcontent/uploads/Annual_report_ASZ_2017.pdf (last consultation 21.05.2022).

39 G. R. Igbaeva, *Civil and legal characteristics of the insurance contract / Arbitration and civil process*, 2007, № 9. p. 21.

In Russian legislation a legal institution similar to the one in comment (Article 851 of GCC) is represented by the modification of the insurance contract. There is no specific norm, as is provided for in Georgian law, but the norms relating to the general principles applicable to all contracts are used.

By agreement of the parties, it's possible modify the contract of insurance, unless otherwise provided by the treaty, with a significant change in the circumstances from which the parties proceeded at the conclusion of the contract.

Although the terminology used in Russian legislation is not identical to that of Georgian legislation there are important similarities between the institutes.

Personal insurance has an increased social value, so the Russian legislator directly restricts the right of the insurer to demand changes/modifications or substitution in the terms of the contract, additional payment of the insurance premium, termination of the contract with compensation for losses. This is possible only if it is provided for by the insurance contract itself.

After the entry into force of the insurance contract, situations may arise when the parties will be forced to change or terminate the contract. If the policyholder, for example, has taken measures that have significantly reduced the degree of probability of occurrence of the insured event and or reduced the amount of possible damage (harm) from it, then he has the right to demand from the insurer to change the insurance contract, unless otherwise provided by the contract[40].

A change in circumstances is recognized as significant when they have changed so much that, if the parties could reasonably foresee this, the contract would not have been concluded by them at all or would have been concluded on significantly different terms[41] .

The norms of Article 452 of the Russian Civil Code establish the form and procedure for modification and terminating the contract. According to the norm of Part 1 of Article 452 of the Civil Code, an agreement to amend or terminate the contract is made in the same form as the contract, unless otherwise follows from the law, other legal acts, contract or customs of business turnover.

40 Article 451 of the Civil Code of the Russian Federation.

41 Part 1 of Article 451 of the Civil Code of the Russian Federation.

The agreement to modify or substitute the contract is made in the same form as the contract, unless the law, other legal acts, contract or customs of business turnover arise otherwise. When the contract is substitute, the obligations of the parties are kept in an amended form.

At the request of one of the parties[42] contract may be changed by a Court decision only in case of a significant violation of the contract by one of the parties - on which violation can be recognized as significant -[43], or in connection with a significant change in the circumstances from which the parties proceeded when concluding the contract.

By Russian law a life insurance contract cannot be concluded for a period of less than 1 year[44].

In the event of the modification (*ergo* substitution) in the contract, obligations are considered to be changed from the moment the parties agree to transform the contract, unless otherwise derived from the agreement or the nature of the contract change.

Given the importance of life insurance, regulators around the world are paying close attention to this segment of the financial market, including the creation of preferential conditions for life insurance, which makes it possible to use it as one of the most effective tools of social policy[45].

The role of life insurance as a tool for the formation of national capital is largely related to tax incentives for both individuals and legal entities using it[46].

42 the policyholder or the insurer.

43 See paragraph 2 of Article 450 of the Civil Code of the Russian Federation.

44 Available on online portal "Insurance Today": www.insur-info.ru (last consultation 21.05.2022).

45 E.V. Zhegalova, *Investment life insurance in the digital economy: foreign experience and prospects in Russia*, on "*Insurance in the digital economy: challenges and prospects*" collection of the works of the 19th International Scientific and Practical Conference, 5-7 June 2018, Book 1, Rosgosstrach, 2018, p. 36.

46 Report for public consultation Proposals for the development of life insurance in the Russian Federation. Bank of Russia Herald 03.10.2017 website of the Central Bank of the Russian Federation: http://www.cbr.ru/sbrfr/ (last consultation 21.05.2022).

5.2 Regulation in Germany

In German law, the specific regulation of the insurance contract is provided for the § 1 of Insurance Contract Act (VVG)[47] deals with the main obligations of both parties: «by making a contract of insurance the insurer undertakes to cover a certain risk of the policyholder or a third party by paying a benefit upon occurrence of the agreed insured event. The policyholder is obligated to pay the agreed contribution (insurance premium) to the insurer».

In particular, the Chapter 5 of VVG contains the norms relating to the life insurance contract[48].

There are several legal institutions that have great similarities with that provided for in Article 851 of the GCC. Of particular interest is Section number 165 which deals with "Fully paid-up insurance" and Section 167 which deals with "Conversion to qualify for exemption from attachment".

The Section number 165 of VVG regulates the fully paid-up insurance. In the first paragraph it states that the policyholder may, at any time from the end of the current period of insurance, demand that the insurance be converted into a fully paid-up insurance, insofar as the agreed minimum insurance cover is achieved. If that is not the case, the insurer must pay the applicable surrender value plus surplus in accordance with section number 169 of the VGG.

The second paragraph of the Section provides for «fully paid-up insurance benefits shall be calculated in accordance with the accepted actuarial rules using the bases for calculating the insurance premium based on the surrender value in accordance with section 169 (3) to (5) and shall be quoted in the contract for each insurance year».

Fully paid-up insurance benefits shall be calculated for the end of the current period of insurance, taking into account any premium payments in arrears. The policyholder's claims arising from surplus sharing shall remain unaffected.

The reference of the standard to Section 169 of VVG was made for the determination of the parameters for calculating the converted premium.

47 Insurance Contract Act of 23 November 2007 (Federal Law Gazette I p. 2631), as last amended by Article 2 of the Act of 10 July 2020 (Federal Law Gazette I p. 1653).

48 Available on: http://www.gesetze-im-internet.de/englisch_vvg/englisch_vvg.html (last consultation 21.05.2022).

Norms of the Section 169[49] provides: if an insurance offers insurance cover for a risk for which the insurer is certain to be liable and the insurance agreement is rescinded because the policyholder terminates the contract or because the insurer rescinds or avoids the policy, the insurer shall pay the surrender value.

The second paragraph of Section 169 specifies that the surrender value shall only be paid insofar as this value does not exceed the payment made upon occurrence of the insured event when the contract is terminated. The share of the surrender value not paid after that time shall be used for the fully paid-up insurance. In the case of rescission or avoidance of the contract the full surrender value shall be paid.

The specific calculation of the insurance premium is carried out on the basis of the expected parameters in accordance with Section 169 (3) to (5) of the VVG.

The surrender value is the insurance's premium reserve calculated with effect to the end of the current insurance period according to the accepted actuarial rules using the bases of premium calculation, in the case of the termination of the insurance agreement the amount of the premium reserve resulting from a symmetrical allocation of the calculated acquisition and distribution costs for the first five insurance years[50].

The regulations stipulated by the supervisory authorities in respect of maximum rates shall remain unaffected. The policyholder is to be informed of the surrender value and the extent to which it is guaranteed before he submits his contractual acceptance. Finally, the statutory ordinance referred to in section 7 (2) specifies further particulars[51].

The norm provides that if the insurer's headquarters are located in another Member State of the European Union or in another state party to the Agreement on the European Economic Area, he may base his calculation of the surrender value on another reference value comparable in that state rather than on the premium reserve.

The norms apply in the case of fund-based insurances and other insurances which provide for benefits of the type described in Section 123 (2), second sentence of the Insurance Supervision Act are provided for in the subsection 4 of the Section 169 VVG. In this case the surrender value shall be calculated based on the accepted actuarial rules as an end value of the

49 named "Surrender Value".
50 Section 169 (3) of VVG.
51 *Ibid.*

insurance, insofar as the insurer does not guarantee payment of a certain benefit. The subsection 3 shall apply in other respects. The principles on which the calculation is based shall be cited in the contract.

The guarantee rule for respecting the balance of positions is provided for in the subsection 5. The insurer shall only be entitled to deduct the amount calculated in accordance with subsection 3 or 4 if it has been agreed, put in figures and is appropriate. An agreement regarding a deduction for as yet unsettled acquisition and distribution costs shall be void.

Another institution to be taken in comparison with that provided for by the Article 851 of GCC is provided for by Section 167 of VVG. The Section named "Conversion to qualify for exemption from attachment" it consists of a single paragraph and prescribes: «the life insurance policyholder may at any time demand that the insurance be converted to the end of the current period of insurance, into an insurance which meets the requirements of section 851c (1) of the Code of Civil Procedure. The costs of the conversion shall be borne by the policyholder».

The norm in comment refers to the German Code of Civil Procedure for the determination of the requirements. In particular, the Section 851 c of the GCC regulates exemption from attachment in the case of old-age pensions[52].

The Article provides that claims to payments made since agreements may be attached like earned income only in certain hypotheses. When the payment is made at regular intervals on a life-long basis, but not prior to the recipient's 60th birthday, or only upon the occurrence of occupational disability. If the claims under the agreement may not be disposed of. When the determination of third parties as beneficiaries is ruled out, to the exception of surviving dependents or beneficiaries and no payment of a capital lump sum was agreed, except as death benefits[53].

In order to enable the debtor to provide for his old age within reasonable bounds, he may accumulate a determined amount that is exempted from attachment, on the basis of an agreement designated in subsection 1.

Up to a total of 256.000 euros, such accumulation being scaled in accordance with his age in life and taking account of the developments

52 The German Code of Civil Procedure is available on: http://www.gesetze-im-internet.de/zpo/BJNR005330950.html includes the amendment(s) to the Act by Article 1 of the Act of 10 October 2013 (Federal Law Gazette I p. 3786) (last consultation 21.05.2022).

53 The Section 851 c (1) of the GCC.

on the capital market, the mortality risk, and the amount of the attachment-exempt threshold[54].

The debtor may accumulate, from when he is 18 years of age until his 29th birthday: 2,000 euros per year, from when he is 30 years of age until his 39th birthday: 4,000 euros per year, from when he is 40 years of age until his 47th birthday: 4,500 euros per year, from when he is 48 years of age until his 53rd birthday: 6,000 euros per year, from when he is 54 years old until his 59th birthday: 8,000 euros per year, and from when he is 60 years old until his 67th birthday: 9,000 euros per year[55].

Where the surrender value of the old-age provisions exceeds the amount that is exempted from attachment, three tenths of the surplus amount shall be exempted from attachment. The third sentence shall not apply to the part of the surrender value that is in excess of the amount set out in the first sentence, multiplied by a factor of three.

From the analysis carried out and the comparison made can be concluded that the German insurance regulation model undoubtedly inspired the Georgian law.

6. Conclusions

Formation of the effective insurance market in the context of legal economy creation requires settling methodological matters concerned with determination the significance and the role of insurance in a financial system of a country as well as development of a conception of its functioning and enhancement.

Considering the peculiarities of the formation and development of the insurance system in Georgia, it should be noted that if in the conditions of a planned economy insurance was a state monopoly and was mainly limited to the framework of insurance of personalities, property of citizens and agricultural enterprises, then during the transition to a market economy it became possible to more fully take into account the risk intensity and probability of losses from emergency events and more fully meet the society's need for insurance protection[56].

54 The Section 851 c (2) of the GCC.

55 *Ibid*.

56 R. Pachulyya & J. Meshyya, *Questions Formation and Development Insurance system in Georgia (Вопросы становления и развития страховой системы в Грузии)*. Available on in Russian language: http://www.insur-info.ru/press/d2451213/ (last consultation 21.05.2022).

At the same time, it should be noted that, despite some progress, insurance has not yet become one of the strategic sectors of the Georgian economy, the range of insurance services is still very small (does not exceed 14 types)[57].

Insurance companies try to focus mainly on compulsory insurance, their goal is not to protect the population and economic security of the country, but to insure low-like risks to obtain high own incomes and profits[58].

It is useful to consider the recent statistics on the basis of which it emerges that Georgia's insurance market grew by 6.76% in 2020, to 667.28 million lari, while both insurance sectors grew: nonlife - by 6.48% and life insurance - by 10.33%, according to the report of the insurance supervision service of Georgia[59].

Market payments for the year decreased by 27.61%, to 385.48 million lari. At the same time, a decrease in payments was observed only in non-life insurance, while life insurance payments, on the contrary, increased by 48% compared to 2019.

The life insurance sector is growing and represents an important segment of the financial market. It will certainly represent for the future growth and evolution of the country and a new opportunity for study and insights for doctrine and jurisprudence. Another important aspect is the challenges in the technological field that have already led several countries of the European Union to adapt their internal legislation in the field of insurance. Similar issues probably can also affect Georgian legislation.

57 *Ibid.*

58 The insurance market in Georgia is going through hard times (Страховой рынок в Грузии переживает не лучшие времена), available on Russian language: http://georgianpress.ru/main/48953-strahovoy-ryinok-v-gruzii-perezhivaet-ne-luchshie-vremena.html (last consultation 21.05.2022).

59 See "The Georgian insurance market grew by 6.76% in 2020" (Рынок страхования Грузии в 2020 году вырос на 6.76%), available on Russian language: https://forinsurer.com/news/21/04/13/39569 (last consultation 21.05.2022).

Article 852 – Deductions upon termination of the contract

If a life insurance contract is terminated due to repudiation, dissolution or dispute, the insurer shall refund the amount of the premium that it has received under the contract. The insurer may also make appropriate deductions.

Fabio Coppola

Summary: 1. Systematic location of the norm and insurance discipline. 2. Field of application of the norm. 3. Conditions of termination of the contract. 4. Identification of the deductions criteria. 5. Comparative perspective. 5.1 The Italian system. 5.2 The Swiss system.

1. Systematic location of the norm and insurance discipline

Article 852 of the Georgian Civil code is a general rule, which affects the contractual balance between the policyholder and the insurer in the context of life insurance contracts.

In general, the insurance contract identifies three indefectible elements that contribute to forming it: the premium, the event, and the payment obligation borne by the insurer, bound to the occurrence of the event[1]. In the life insurance contract, the performances of the insurance company depend on the duration of human life, therefore of the insured person, who enters into the insurance contract by taking on the obligation himself to the benefit of the beneficiary, who will receive the payment of the contract if the event occurs[2].

Since the insurance contract is based on risk protection, and therefore, it being understood that the event capable of triggering the compensation obligation may or may not occur, the insured party pays and undertakes the obligation even though he does not know *ex ante* whether he will obtain the benefit against the premium paid[3].

Unlike what has been outlined so far, the rule in question ensures that the *alea* in the context of life insurance contracts gets limited, ensuring

1 M. Rossetti, *Le assicurazioni private*, edited by Alpa, Torino, 2006, 780.

2 K. Iremashvili, *The characteristics of legal regulation of health insurance*, in Journal of Law no. 2, Tiblisi University Press, 2011, 38-39.

3 On the concept of *alea* of the contract, E. Betti, *Teoria generale delle obbligazioni*, III, Milano, 1954, 76.

the policyholder the certainty that, given a set of circumstances, the premiums paid will be returned by the insurer, despite the fact that the event foreseen by the contract did not occur.

The article, in fact, limits itself to providing for an obligation - the return of premiums received under the contract - to be borne by the insurer which must be fulfilled upon termination of the contract, assuming that the termination takes place «…due to repudiation, dissolution or dispute…».

In the context of insurance contracts, this peculiar obligation constitutes a precise choice of the legislator to intervene in the economic-contractual balance between the parties, reducing the uncertainty of the contract in favor of the insured party and substantially determining a limitation to contractual freedom. These kinds of limitations are generally encountered in civil law systems among strategic and more delicate economic sectors such as, in the case we are dealing with, that of insurance[4].

By framing the case in general terms, the legislator intervenes in the contract so that – precisely in a sector such as the insurance one – the economic resources allocated in the sector by private individuals, flow towards the use considered more efficient and by partially remedying the information asymmetry[5] that sometimes characterizes consumer contracts[6].

Looking into the rule under analysis, applied in general to life insurance contracts, we note that it does not provide details about the provision of the last period of the text: «The insurer may also make appropriate deductions». The norm resolves itself in a loose and, apparently, not sufficiently determined formula.

The Georgian Law on Insurance, the specific legislation governing insurance law in the Country, contains some provisions, also of a technical and economic nature, which contribute to establishing the detailed

4 Another sector strongly influenced by this legislative policy is that of the financial markets, closely connected to the insurance sector due to the subtle differences between the purchase of life insurance policies and financial products for the same purpose.

5 On the information asymmetry in the insurance negotiation relationship, see S. Nitti, *"Insurtech": suggestioni e dubbi dal mondo assicurativo*, in *Percorsi di diritto comparato*, edited by Rossella Esther Cerchia, Milano University Press, 2021, 129.

6 This assumption contradicts the theory that it is the contractual freedom of the parties that is capable of reaching the best allocation of resources, towards their most efficient uses. According to this perspective, the only admissible limitation to contractual freedom would be that aimed at preventing damage to the community. The so called "*harm principle*", expressed in the treaty *"On Liberty"* di J. S. Mill (1860).

provisions relating to insurance contracts. In this sense, the full understanding of the Article examined here is partly hidden by the overall discipline of the matter, which acts as an integration of the general provisions of the Civil Code and which, therefore, must be briefly analyzed here to clarify the meaning and the application consequences of the Article in question.

2. Field of application of the norm

The scope of application of the rule, as noted, lies in the bed of life insurance contracts which, due to their nature and the systemic interests which they affect, are always treated in a particular way compared to other insurance contracts (*e.g.*, against damage) and must be placed halfway between an effective insurance contract and an investment product.

In fact, life insurance has always been characterized by a financial component. In consideration of the generally long duration of the contracts and the monetary content of the obligations, it emerges the need that the premiums, as well as the redemption value of the contract, first of all, are not eroded (the latter) and/or made excessively expensive (the former) because of phenomena like inflation. At the same time, must be ensured that the choice of insurance products remains convenient - at least from a risk/reward balance point of view[7] - compared to purely financial counterparties (mainly government and corporate bonds).

To do so, life insurance policies are connected to financial instruments by creating hybrid products, by way of example only the most common types of life insurance contracts available on the market are mentioned:

– Revaluable Insurance Policies. In this type of product, the premiums and part of the company's capital are linked to the performance of a management of financial instruments, which at the same time constitute a store of value and the basis of the performance of the insurance product. In these policies, unlike Linked policies, the sum indicated in the policy is guaranteed by the insurer, regardless of the performance of the underlying assets;

– Unit Linked and Index Linked Insurance Policies. Unlike revaluable policies, the benefits insured with the Linked policies vary according to

7 Risk understood in a financial sense, as the risk of product return, traditionally directly connected to the volatility of the capital.

the fluctuations in the value of the underlying assets. These assets, in the case of Unit Linked policies, constitute units of a collective investment scheme for savings; in Index Linked policies the performance of the product depends on the performance of a market index (equity, bond, etc.)[8].

This hybrid nature of the insurance contract, substantially close to an investment in financial instruments can be clarified by referring to a well-known jurisprudential approach reached by the Italian Corte di Cassazione[9] – then followed by various judgments on the merit - to briefly set aside the problem of the distinction between investment and insurance contracts, leaving room to investigate the legal consequences that the hybrid nature of the life insurance contract entails.

Therefore, the distinction between the two types of contracts, in the framework outlined by Italian jurisprudence, lies in the fact that: «any conflicting clause that leads to the exclusion of the guarantee for the return of the premium violates the social security cause of the life insurance contract because it is typical of life insurance contracts the irrelevance of the methods of investment of the premiums received by the insurance company, which always remains responsible towards the policyholders for the payment of the insured sums "and therefore" the life insurance contract is such only if it bears the guarantee of capital conservation upon maturity»[10].

In this sense, it will be up to the trial judge, when interpreting the contract, to establish whether it, beyond the *nomen iuris* attributed to it, is to be identified as a life insurance policy (in which the risk relating to an event of the policyholder's life is assumed by the insurer) or concretely in the investment in a financial instrument (in which the performance risk is fully borne by the policyholder).

3. Conditions of termination of the contract

To further specify the field of application, the norm identifies three specific causes of termination of the contract that are preliminary for the insured party to have access to reimbursement of premiums: repudiation; dissolution; or dispute.

8 A. Donati, G. Volpe Putzolu, *Manuale di diritto delle assicurazioni*, Giuffrè, Milano, 2009, 202.
9 Corte di Cass., 30 aprile 2018, n. 10333
10 Trib. Bari, 21 ottobre 2019, n. 3885.

For the first cause of termination, we also need to consider the first comma of Article 399 of the same Georgian Civil code: «1. Any party to a contract may repudiate, for a valid reason, a long-term relationship of obligation without observing the period of time fixed for termination of the contract. The reason shall be valid when, taking into account the specific situation, including force majeure and the mutual interests of the parties, the party terminating the contract cannot be required to continue the contractual relationship until the lapse of the agreed period of time or until the expiry of the period of time fixed for termination of the contract».

The reported first comma of the Article is a general provision, while Article 852 specifically regards insurance contracts. From this point of view, Article 852, by conditioning the exercise of the option of reimbursement of premiums to repudiation, involves a tacit reference to the aforementioned Article 399 of the Civil Code.

In the light of the provisions contained in the first paragraph, the insured party's position seems to be made more burdensome than that described exclusively by the rule that establishes the right to reimbursement, in reality, this reference is useful to specify the scope of the protection.

In particular, the last period of the first paragraph is particularly relevant for life insurance contracts, since they are generally contracts with a very long duration, it is well possible to imagine that the policyholder may encounter certain circumstances during the term of the contract, occurrences that make it impossible to continue the execution of one's obligation to pay the premium.

In part, this possibility was mentioned in the second paragraph of this comment, with regard to the eventuality that, for example, inflation, affects the contractual balance by compromising the functional synallagm (the relationship) between the obligations of the parties.

Regarding the cause of dissolution, we note that the Civil Code does not provide a precise notion, however, we can imagine the dissolution as a consensual termination of the agreement, which can take place for the most disparate causes. In this sense, it will be the same insurance contract to establish the cases in which the termination of the contract and the mention of dissolution in art. 852 is nothing more than a "general clause", aimed at covering all the other causes – other than repudiation and dispute - for the dissolution of the agreement determined by the contract.

Finally, the hypothesis of termination of the contract at the outcome of a dispute certainly raises fewer questions, since in this case the decision on the termination of the contract is left to the judge. Furthermore, all the concrete reasons that can lead to a dispute within a contract are innumerable and impossible to predetermine and the same must be said with regard to the events that may occur during the trial and, consequently, the outcome of the same.

4. Identification of the deductions criteria

The possibility for the insurer to make deductions when the premium is repaid, and therefore to retain a part of it, constitutes a clear favor towards the insurance industry and the contractual position of the insurer which thus reduces the risk deriving from a life insurance contract which, being long-term by nature, implies that its early termination constitutes exclusively costs borne by the insurer.

Otherwise, the indiscriminate right of the insured party, to be able to terminate the insurance contract at any time and get back the total premiums paid up to that moment, would constitute an economically difficult activity for the insurance company to sustain.

As anticipated, the provision in question, providing for a provision of a general nature, remains deliberately vague and does not further detail the amounts of the deductions, where there are limits to these, nor on their legal basis except on the fact that, it is easy to understand that they will originate from the insurance contract, in particular from the general conditions of the life insurance contract.

So, are there any objective criteria on the basis of which the insurer can make the aforementioned deductions? A partial answer must be sought in the rules that detail the regulation of insurance law, the more detailed provisions subject to regular changes that take into account the economic-financial circumstances, are generally adopted by regulatory bodies specifically entitled to do so.

In fact, as will be explained in the comparative analysis, in consideration of the characteristics of the insurance market, which is certainly delicate due to its systemic importance and its economic-financial entity, in Georgia as well as in other countries it is subject of a specific regulatory regime (partially mentioned) of independent institutions with specific

powers and prerogatives, with functions of integration of the legislative discipline through soft law and regulatory instruments in the hands of these specific public guarantors[1112].

First of all, in the analysis of the Georgian Law, the regulator of the insurance market is the LEPL - Insurance State Supervision Service of Georgia. The regulator was first established in 1997, with the first law of Georgia on Insurance[13], still valid today even after a series of updates and amendments[14].

The LEPL works to guarantee consumers and the stability of the insurance market, producing periodic reports, adopting soft law acts such as recommendations and indications for insurance and reinsurance activities that operate as registered entities with the entity.

As further evidence of the findings with regard to the peculiarities of the insurance market and, in particular, the hybrid nature of life insurance contracts, the LEPL operates in a cooperation and coordination regime with the National Bank of Georgia - from which it was made independent in 2013 - in charge of supervising the entire financial assets market in the country.

11 Article 3 of the Private Insurance Code: «The main purpose of supervision is the adequate protection of policyholders and those entitled to insurance benefits. To this end, IVASS pursues the sound and prudent management of insurance and reinsurance companies, as well as, together with CONSOB, each according to their respective competences, their transparency and fairness towards customers. Another objective of supervision, but subordinate to the previous one, is the stability of the financial system and markets».

12 On the prerogatives and tools available to the Insurance Market Supervisory Institute: «…IVASS adopts regulatory measures aimed at insurance sector operators characterized by high technicality and a degree of detail not found in primary sources. The regulatory function of IVASS is expressed through the adoption of Regulations and Provisions of a general nature having a binding nature. In addition, the Institute issues recommendations and guidelines (soft regulation) through communications, letters to the market and circulars. It also discloses explanatory documents, of a non-binding nature, aimed at sharing the expectations of the Institute on specific matters with the supervised parties. In the adoption of the regulatory acts, IVASS identifies a series of guarantees aimed at creating a clear, transparent and aware regulatory process». Available at: https://www.ivass.it/normativa/nazionale/secondaria-ivass/index.html (Accessed on Nov 14th, 2021).

13 Law of Georgia "On Insurance" by the Parliament of Georgia on May 2, 1997.

14 For a complete timeline of legislative updates affecting the industry, see: https://www.insurance.gov.ge/en/page/about-us (Accessed in Nov 14th, 2021).

5. Comparative perspective

Article 852, although being a common norm, posed by the legislator to delicately balance the interests and contracting power between the parties of an insurance contract, it's somehow peculiar, considered that the same mentioned objective – as already observed, giving the insurer the right to make deductions to the amount due to the client, upon the contract termination – is achieved in other jurisdictions through diverse means and norms, often more complex but not necessarily more or less effective. To that extent, going forward on the analysis, we're going to analyze the Italian and Swiss systems, trying to identify similar provisions, highlighting differences and similarities in relation to the Georgian Law.

5.1 The Italian system

In Italy, insurance law is generally disciplined by the Civil code, but for a substantial part, it is also specifically disciplined in the Private Insurance Code, a special set of norms intended to fulfill the scope of regulation taking into account the aforementioned peculiarities of the insurance sector. The norm was published in 2005, with the aim to regroup and systematize, in a unique and coherent legislative body, the entirety of the insurance law discipline[15].

Article 176 of the Italian Private Insurance Code can be identified as the counterpart – although only partially - to the Georgian Article 852, containing similar provisions. The Italian norm, standing as "Revocability of the proposal", is included in the context of the Life Insurance sector, and states that: «1. The proposal relating to an individual life insurance contract referred to in classes I, II, III and V of Article 2, paragraph 1, is revocable. 2. Any sums paid by the policyholder must be returned by the insurance company within thirty days from the moment in which it received notice of the revocation. 3. The provisions of this Article do not apply to contracts with a duration equal to or less than six months».

Divided into the three reported paragraphs, the norm, first prescribes – via a direct link to Article 2 of the same Code - the revocability regime of the life insurance contracts, in this way effectively posing a limit to the revocability of such contracts, differently from the general civil rules. Dif-

15 G. Gallone, *Codice delle Assicurazioni Private*, Repubblica di San Marino, 2006, Prefazione.

ferently, in the Georgian norm, limits to the revocability of the contract, and so to the field of application of the norm, are defined through the identification of mandatory causes of termination as previously exposed.

The second *comma* of the Italian norm, while posing the obligation on the insurer to return any sum paid by the policyholder, also poses another limit to its applicability, defining a specific – and quite short – time frame in which the said return of the sum must be fulfilled. This is one first differences between the Italian and Georgian systems: in the latter, there is no defined time frame, this way the Georgian legislator is describing a bigger discretionary space set to benefit the insurer.

That same discretionary space is even enlarged, as previously highlighted, given the insurer's ability to determine the amount of deduction. And that seems to be the biggest difference between the two systems, there is no explicit quantitative limit in the Italian norm, in which the only limit to its applicability is merely in regard to the characteristics of the contract as described and as stated in the third comma, prescribing in six months its minimum elapsed duration.

In addition to that Article 176, there's another provision, Article 1925 of the Italian Civil code, that is worth being analyzed in comparison to Georgian Article 852.

Article 1925[16], in the context of life insurance contracts, establishes the right of the policyholder to request the insurance company to redeem the insurance product and reduce the sum insured. The right of redemption consists of the policyholder's right to withdraw from the insurance contract and obtain from the company the payment of a sum commensurate (but not corresponding!) to the premiums paid at the time, known as the "surrender value". The rationale of this rule, similar to that of art. 852, is to be found in the possibility that due to the need or mere will of the contracting party, the same no longer has an interest in insurance protection.

The specific provision found in the Georgian norm, even if not expressly prescribed, allows the policyholder to reduce the amount of the insurance contract and consequently the premiums paid; therefore, it is also functional to maintain the social security-protective function of the

16 Italian Civil code, art. 1925: "*The insurance policies must regulate the rights of surrender and reduction of the sum insured, in such a way that the insured is able at any time to know what the surrender or reduction value of the insurance would be.*"

insurance contract even where the insured party is no longer able to economically support the payment of premiums to the insurer.[17]

The entity that in Italy carries out the supervision and regulation activities of LEPL and the National Bank of Georgia are IVASS (*Istituto per la vigilanza sulle assicurazioni*) and Consob (*Commissiona nazionale per le società e la borsa*). The first in particular - like the Georgian counterpart - in addition to carrying out primary and secondary legislative and regulatory activities; exercises supervisory functions in relation to: «… companies, however named and incorporated, which carry out insurance or reinsurance activities in the territory of the Republic in any branch and in any form, or operations of capitalization and management of collective funds set up for the provision of benefits in the event of death, in case of life or in case of cessation or reduction of working activity; insurance groups and financial conglomerates in which insurance and reinsurance companies are included in accordance with the specific legislation applicable to them; of the subjects, entities and organizations that in any form perform functions partially included in the operating cycle of the insurance or reinsurance companies limited to the insurance and reinsurance profiles, without prejudice to the powers over the insurance or reinsurance companies for outsourced activities; insurance and reinsurance intermediaries and any other operator in the insurance market»[18].

5.2 The Swiss system

In the Swiss system, similar provisions to the Georgian one apply in regard to Article 852, those are disciplined by the Federal Law on Insurance Contract (LIC)[19], in particular by the following articles, taken as elements of the comparative analysis.

Art. 6, 4th paragraph of the law states that: «[…] In the event of withdrawal from a life insurance contract, redeemable under this law (Article 90 para. 2), the insurer provides the expected service in the event of redemption».

That norm is much similar to the Italian Article 1925 c.c., but also, similarly to the Georgian law, that provision prescribes the obligation dis-

17 V. Salandra, in *Commentario al Codice civile Scialoja-Branca* – art. 1925 c.c., Bologna, 2011, 410.

18 Article 6 of the Private Insurance Code.

19 Federal Law of April 2nd 1908 on the insurance contract (Law on Insurance contract, LIC).

cussed by the insurer concerning the Georgian norm, but asks for further specifications to art. 90, making an explicit reference to another provision (art. 90 para. 2), absent in art. 852 which leaves blank further specifications which, as we have seen, must be derived from other provisions of the Civil Law.

Now, leaving aside the considerations on the legislative method and returning to the reference expressed to clarify the meaning of the Swiss law, art. 90, 2nd paragraph, requires that: «At the request of the entitled person, the insurer is also required to redeem all or part of any life insurance for which there is certainty that the insured event will happen provided that the premiums of at least three years have been paid».

This provision, therefore, provides for a different mechanism than the Georgian one which, instead of having a quasi-discretionary power of the insurer - exercisable through deductions to the surrender amount in a similar way to the Italian law - explicitly provides for the hypothesis in which surrender can be exercised providing a sort of safeguard clause, where due to unexpected causes the random element of the contract is missing completely, there being certainty regarding the occurrence of the insured event.

At the same time, the law protects the insured who gets back the premiums paid, provided that the first three years of premiums have been paid - here providing more stringently than the Italian law which provides for a period of only six months, even though the scope being different since the Italian norm is only applicable in the case of revocation.

The Georgian law, as we have seen about the causes of termination, takes into consideration a similar hypothesis by formulating the tacit reference to art. 399 of the civil code, that "open clause" provides that, if the continuation of a long-term contract becomes too expensive, or impossible for valid reasons, the contract can be terminated giving rise - in life insurance contracts – to the application of art. 852.

In this context, the Georgian law does not appear to be lacking in protection, in fact, it is well possible to imagine that, where the termination of the insurance contract occurs due to dissolution because of an excessive burden of the obligation, in this case might be included also the vanishing of the *alea* element of the contract, originating from the certainty of the event deduced in the insurance contract.

Article 853 - Effects of forced execution

1. If a judgment on an insurance claim is enforced or if a legal proceeding is pending in relation to the bankruptcy of the insured, then the person who is specifically named as the beneficiary may take the place of the policyholder in the insurance contract. If the person entitled to the benefits participates in the contract, then he/she shall meet all the requirements of the creditor or secure the bankruptcy assets to the extent of the amount that the policyholder could have received from the insurer upon termination of the insurance contract.

2. If the person entitled to the benefit is not interested in receiving the benefit or if he/she is not designated by name, then the spouse and children of the policyholder shall acquire this right.

Gianmaria Cotillo

Summary: 1. Introduction: life insurance contract. 2. Previous version. 3. Purpose. 4. Life insurance contracts and enforcement proceedings. 5. Prerequisites. 6. The right of «subrogation». 7. Consent, term and notification. 8. The «named» beneficiary. 9. The other persons «entitled to the benefit». Inheritance implications. 10. Payment of the surrender value.

1. Introduction: life insurance contract

Art. 853, entitled «Effects of forced execution», closes the chapter of the Civil Code dealing with the rules on life insurance and it aims at defining the effects of any forced execution against the insured (or in the event of bankruptcy proceedings are opened against him and his assets) with respect to a life insurance policy previously taken out and on the claim which the insured has against the insurer on the basis of policy. The rule makes sense if and when the insurance is taken out for the benefit of a third party. Well, in the practice, life insurance policies are characterised by a "subjective dissociation" between the insured and the beneficiary of the same policy.

In general, life insurance is a contract by which the insurer undertakes to pay the insured a lump sum or an annuity on the occurrence of an event pertaining to human life, against payment by the insured of an insurance contribution (the so-called «premium»). However, although normally the

person who enters into an insurance contract is also the holder of the interest and the beneficiary of the insurance benefit at the same time – in this case, it is correct to speak generically of «insured» – there may well be a dissociation between them.

In its essential form, it is possible – and indeed this is the practice in the field of life insurance – that other parties are added to the bilateral relationship between insured and insurer. At first, it is necessary to distinguish from the «insured» the figure of the «policyholder», that is the person who has underwritten the policy and who may not necessarily be the same as the insured, that is instead the person in whose sphere the accident occurs and on whom the fulfilment of the insurer's performance depends: in fact, it is the same Article 844 CCG that specifies the insurance may cover not only the policyholder but also «another person». This is the so called "insurance of a third party".

Secondly, a central role, as far as we are concerned, is played by the indication of a «beneficiary», that is the person, other than the policyholder and possibly also the insured, towards whom the effects of the insurance are intended to be produced at the time of the claim, i.e. essentially the payment in his favour of an amount by the insurer. This is the different case of "insurance in favour of a third party" (the Civil Code of Georgia regulates the contract in favour of a third party in articles 349, 350 and 351). Thus, in its most common form, life insurance is a multifaceted relationship.

Having said this general premise, the rule under comment looks specifically at the relationship between insured and beneficiary[1]. The rule 853 CCG intends to regulate a problem that, for reasons set out below (§IV), may arise in the practice: if there is a creditor acting *in executivis*, either

1 A relevant, albeit semantic, remark should be made at once. Art. 853 CCG, at least in its official English translation, refers to the «insured» as the subject against whom is exercised the enforcement action or is pending bankruptcy proceeding, while it refers to the «policyholder» as the subject against whom the beneficiary may exercise the right of takeover. Although the lexical issue should not be overdramatised, since it is still a translation and since in the practice of life insurance contracts the status of policyholder tends to coincide with that of insured, it cannot strictly be ruled out that in the individual case at hand there may also be two distinct subjects. The Georgian legislator, in fact, correctly distinguishes the two figures, specifying in Article 2 (d) and (e) of the Georgian Law On Insurance respectively that *i)* the policyholder is «a natural or legal person that has concluded an insurance contract with an insurer»; *ii)* the insured is «a natural or legal person covered by an insurance policy» and that «a policyholder may also be the insured, unless otherwise provided by the insurance contract». See also arts. 836-838 of the Civil Code of Georgia about «Insurance against Damages».

The same distinction can be found in several others legal systems (for an example, see §150 of German Insurance Contract Act or Art. 1920 of Italian Civil Code).

in the form of ordinary enforcement proceedings or through the petition for bankruptcy, what happens if the debtor against whom the creditor is acting for the satisfaction of his own claim was also the insured in a life insurance policy of which in turn benefits a third party? In other words, the problem arises of regulating the legal effects of enforcement on the debtor's life insurance contract if it was taken out for the benefit of a third party.

2. Previous version

From a subjective point of view, the rule seems to have undergone a significant change compared to the previous wording in force in the amended version of the Civil Code of 31 May 2001. In fact, the previous wording – at least according to its English translation[2] – regulated the case where insolvency involved the «insurer» and not the «insured»[3]. This is clearly a substantive difference, although the remaining wording, the legal effects and the requirements of the rule were the same as in the present wording. So, the previous Art. 853 CCG allowed a beneficiary named in a life insurance policy to succeed the insured in the relationship between the insured and the insurer if the latter had been subject to enforcement proceeding in respect of the insurance claim or bankruptcy proceeding had been opened against the insurer's assets. However, given the strong similarity between the two formulations, it is not entirely implausible to envisage that the version of Article 853 of the Civil Code amended on 31 May 2001, as translated from the mother tongue into English, could have contained a simple typo, and that therefore also the previous formulation intended to refer to the «insured» and not to the «insurer».

2 The reference is to the version of the Civil Code of Georgia translated into English within the project presented by Lado Chanturia (Professor and Chairman of the Supreme Court of Georgia) and carried out with the cooperation and support of the United States Agency for International Development (USAID) and the IRIS Center at the University of Maryland.

3 Particularly, the former Art. 853 CCG read as follows: "1. If a court judgment based on an insurance claim is entered through a forced execution against assets, or if legal proceedings are carried out in connection with the bankruptcy of the insurer, then the person who is specifically named as the beneficiary shall be entitled to subrogate the insured in relations under the contract of insurance. If the person entitled to the benefits participates in the contract, then he shall satisfy all requirements of a creditor, or secure of the bankruptcy mass to the extent of the amount which the insured could have received from the insurer upon dissolution of the contract. 2. If the person entitled to the benefit has no interest in receiving the benefit, or if he is not designated by name, then such right shall accrue to the spouse and the children of the insured."

3. Purpose

The provision under comment is adopted in other legal systems and plainly finds its primary source of inspiration in German law, which in turn was inspired by Austrian law[4]: its purpose is to regulate and safeguard family welfare.

In particular, the purpose is to protect the beneficiary (and, if applicable, the insured's next of kin) involved in a life insurance policy taken out by the insured, whenever the latter were to get into financial difficulties and his creditors undertake enforcement or bankruptcy proceedings against him. The intention is to protect such persons from sudden financial losses. As will be seen later, without the right of succession granted by Art. 853 CCG, the insured's creditors (or the trustee in bankruptcy) would be entitled to terminate the life insurance contract and collect the surrender value attached to the policy taken out by the insured but in favour of the beneficiary; so that the latter would lose an economic value on which it had reasonably relied.

4 In German legal system, the §170, «*Eintrittsrecht*», *Versicherungsvertragsgesetz* (VVG), which in turn accurately transposed the same provision already set in the Austrian Insurance Contract Act (VersVG) unless of linguistic adaptations, currently provides: «(1) Wird in die Versicherungsforderung ein Arrest vollzogen oder eine Zwangsvollstreckung vorgenommen oder wird das Insolvenzverfahren über das Vermögen des Versicherungsnehmers eröffnet, kann der namentlich bezeichnete Bezugsberechtigte mit Zustimmung des Versicherungsnehmers an seiner Stelle in den Versicherungsvertrag eintreten. Tritt der Bezugsberechtigte ein, hat er die Forderungen der betreibenden Gläubiger oder der Insolvenzmasse bis zur Höhe des Betrags zu befriedigen, dessen Zahlung der Versicherungsnehmer im Fall der Kündigung des Versicherungsverhältnisses vom Versicherer verlangen könnte. (2) Ist ein Bezugsberechtigter nicht oder nicht namentlich bezeichnet, steht das gleiche Recht dem Ehegatten oder Lebenspartner und den Kindern des Versicherungsnehmers zu. (3) Der Eintritt erfolgt durch Anzeige an den Versicherer. Die Anzeige kann nur innerhalb eines Monats erfolgen, nachdem der Eintrittsberechtigte von der Pfändung Kenntnis erlangt hat oder das Insolvenzverfahren eröffnet worden ist». For the reader's convenience, the English translation of § 170 VVG is given below: «(1) If attachment is executed on the insurance claim or compulsory execution has been carried out or insolvency proceedings are opened against the assets of the policyholder, the designated beneficiary may, with the consent of the policyholder, subrogate to the contract of insurance. Where the beneficiary subrogates, he must satisfy the demands of the creditor initiating the proceedings or of the insolvency estate up to the amount of the payment which the policyholder could demand from the insurer in the event of the termination of the contract of insurance. (2) Where no beneficiary is designated or named, the policyholder's spouse or life partner or children shall be entitled to the same right. (3) The subrogation is effected by giving notice thereof to the insurer. The notification may only be made within one month after the time when the person entitled to subrogate learns of the attachment or after the insolvency proceedings have been opened».

Despite it coming into force long time ago (about 50 years), the rule has had little practical impact, with very few case law rulings in the German system. Anyway, although it plainly appears the primary source of inspiration of the Georgian legislator, Art. 853 CCG differs in some respects from §170 VVG, as will be said in the text and especially in the following paragraph VII.

It is clear the beneficiary would have an interest in keeping alive the life insurance policy taken out by the insured/debtor: the equivalent of the surrender value the beneficiary is in any case obliged to pay to the creditors under the second sentence of Art. 853 CCG is likely to be lower than the amounts paid in the meantime to the insurer. Moreover, in this way the beneficiary would keep the policy in force without having to negotiate a new one for himself again and pay the acquisition costs again. It may therefore make sense from the point of view of the beneficiary to succeed to the insured, continuing to pay the premium in the place of the insured and thus securing the future receipt of the insurance benefit when the insured event occurs. This is the reason why the Georgian legislator granted such a possibility to the beneficiary, offering him greater protection from this point of view. Well, a first logical condition can certainly be already drawn: the insurance benefit must be higher than the surrender value and the premiums to be paid. The significance of this last consideration will be discussed below.

4. Life insurance contracts and enforcement proceedings

Another general consideration about the rule 853 CCG is the implicit choice by the Georgian legislator to subject claims connected with and arising from life insurance to enforcement and bankruptcy proceedings. This can be deduced from the very wording of the first part of the first paragraph, which exactly intends to regulate the effects of enforcement or bankruptcy towards the insured. Since the legislator regulates the effects, it confirms the possibility that the claim arising from a life insurance contract may be subject to attachment or may fall within the bankruptcy estate. If the insurance claim had not been subject to attachment, of course there would have been no reason to provide the right of succeed set in rule 853 CCG.

Well, this solution is not common to all European legal systems. While this is true, for example, in Germany, it is not in Italy. The Italian legislator, in fact, starting from the nature and eminently social security function of life insurance, which would otherwise be compromised by the actions of insured's creditors, has radically ruled out the possibility of seizing the insurance credit connected with life insurance or making it subject to bankruptcy proceedings, and therefore there was not the need to regulate

the case provided for by Article 853 of the Civil Code of Georgia and face the problems connected with[5].

Actually, the possibility of seizuring insurance claims arising out of life insurance contracts does not appear to be a plain choice. There might be several (and good) reasons for excluding such claims from the demands of the insured's creditors. As this is certainly not the place to dwell further on the matter, it is sufficient to highlight how such actions could, on the one hand, undermine the stability of the insurance system by involving the insurer in third party enforcement proceedings (i.e. the creditors of the insured) – not to mention the additional costs of litigation – and ultimately disturb the process of collecting and capitalising savings, on the other hand, they would not ensure that the benefits of the insurance contract are actually and in any event enjoyed by the beneficiary, who instead has a legally relevant expectation of receiving them once the insured event occurs.

5 The Italian Civil Code provides specific rules for life insurance but does not deal with the specific case of the bankruptcy of the insured or the beneficiary, just providing that the sums owed by the insurer to the insured or the beneficiary may not be subject to enforcement or precautionary action. Most scientists maintains that the social security and savings function performed by life insurance justifies the insensitivity of the sums due by the insurer to executive or precautionary actions and guarantees that the benefits of the insurance contract are effectively enjoyed by the beneficiary (U. Tedeschi, *Assicurazione e fallimento*, Padova, 1969, 145; G. Gasperoni, *Le assicurazioni*, in Trattato di diritto civile, diretto da Grosso e Santoro Passarelli, Milano, Vallardi, 1966, 231; G. Castellano, *Riscatto o revocatoria?*, in Assicurazioni, 1966, II, 229; L. Bianchi D'Espinosa, *L'art. 1923 del codice civile ed il fallimento del contraente o del beneficiario*, in Assicurazioni, 1959, II, 23; A. De Martini, *Natura del credito del beneficiario di assicurazione sulla vita e sua impignorabilità, in sede ordinaria e fallimentare*, in Assicurazioni, 1956, II, 101).

A minority states, on the contrary, that article 1923, para. 1, of the Italian Civil Code, is aimed at preventing the insurer from being involved in executive procedures with third parties by the creditors of the insured. In the same logic, the insensitivity of the sums owed by the insurer to executive or precautionary actions would prevent the costs of legal disputes from being incurred (L. Buttaro, voce "*Assicurazione sulla vita*", in Enc. dir., III, Milano, Giuffrè, 1958, n. 38, 651; A. Donati & G. Volpe Putzolu, *Manuale di diritto delle assicurazioni*, Milano, Giuffrè, 2012, 193. On the subject also P. Gaggero, *Pignoramento e sequestro del credito verso l'assicuratore sulla vita*, in Le assicurazioni private, a cura di G. Alpa, Torino, Utet, 2006, 2969, who considers the acquisition by the creditors of the sums already collected by the beneficiary does not invalidate the social security programme of the life insurance contract, which would be indifferent to the subsequent use and the concrete destination of the sums paid by the insurer).

5. Prerequisites

Because of the choice point out in the previous § IV, the Georgian legislator is rightly concerned with the position of the beneficiary nominated in the life insurance contract: the Art. 853 CCG regulates the right of the beneficiary to take over the same contract when the insured is subject to the enforcement actions of creditors or bankruptcy proceeding is opened against him. The prerequisites set out in para. (1) for the rule to apply are thus *i)* the existence of an enforcement proceeding against the insured in respect of the insurance claim, or *ii)* the existence of a bankruptcy proceeding against the insured. A creditor might, for example, attach the life insurance policy of the debtor/insured against whom he has obtained a payment order by way of enforcement.

In other words, it is necessary that one or more creditors of the insured alternatively take enforcement actions against the latter, with specific reference to the insurance claim arising from the pending life insurance contract, or that bankruptcy proceeding has been opened against the debtor/insured and his assets. In the first case the rule refers to a «judgment», the legislator intending this term to refer to a decision of a court; the general rules on claims will therefore apply, in particular Art. 142 of the Civil Code concerning the limitation period, as well as Arts. 264-268 of the Civil Procedure Code concerning the enforceability of the decision.

It is clear from the wording of the first paragraph that the enforcement against the insurance claim must be effectively existing and formally initiated or that the insolvency proceeding against the insured's assets has already been opened, since the mere threat by the insured's creditors to take such actions is not sufficient to allow the beneficiary to succeed into the contract. Thus, the mere existence of an enforceable court decision (or, *a fortiori*, one that has not yet become enforceable: in this respect, see what is provided by Articles 251 and 264 et seq. of the Georgian Code of Civil Procedure) is not sufficient to allow the beneficiary to exercise the right of subrogation granted by Art. 853 CCG, since it could not necessarily be followed by the actual attachment.

Moreover, the enforcement measures must allow the creditor to find effective satisfaction from the claim arising from the insurance. This means that the object of the actions of the insured's creditors must be the entire insurance claim.

6. The right of «subrogation»

The first paragraph of Art. 853 takes into account two different situations: on the one hand, the enforcement of a judgment concerning an insurance claim and, on the other hand, the bankruptcy proceeding opened against an over-indebted and insolvent insured.

Although the rule expressly mentions both individual enforcement by attachment and total enforcement in the context of the insured's insolvency, the legal effect that follows remains the same: one who is named as beneficiary in the life insurance policy has the right to take over the insured's rights against the insurer.

It is worth noting that, in this part, the rule follows the same prescription provided by the Georgian legislator in Article 372 of the Civil Code with reference to contracts in general, which regulates precisely the effects that the satisfaction of a claim by a third party produces in the relations between the obligated parties. Art. 372 CCG states that, precisely in cases where «a creditor seeks enforcement against a thing belonging to the obligor», each person «who is at risk of losing the right to the thing as a result of the enforcement may satisfy the creditor». The consequence for the third party who satisfies the creditors is precisely the transfer to him of the «right of claim».

That said, Art. 853 CCG uses the phrase «take the place» and in the second part of para. (1) the verb «participates» in an a-technical and generic manner. It is worth considering the legal meaning of these terms. From the practical point of view, the effect described remains essentially the same: the beneficiary takes the place of the insured in the relationship with the insurer. However, many legal systems, at least those of continental Europe, know different ways in which a subject may "take the place" from another in a given legal relationship. As a first approximation, we can speak of assignment (cession) or subrogation. Each of these two legal constructions, which are absolutely independent of each other, brings with it considerable differences and consequently produces very different legal effects, rights and obligations for the parties.

Many contemporary legal systems (it is the case of Italy, Germany, France, Switzerland, Russia, to name but a few) make a clear distinction between assignment (cession) and subrogation, also in the respective legal disciplines. The difference, as often, is not merely nominal since the reference to one or the other institution places different rights and obliga-

tions on the parties. Although this difference is certainly well known and has existed for a long time in most continental European legal systems, the Georgian legal system seems to know very little about the doctrine of subrogation, which is often confused with the different doctrines of assignment (cession) or regress. The Georgian legislator, in fact, does not seem to be particularly sensitive to this issue, not distinguishing clearly between the two institutions, on the contrary often adopting rather general formulations as in the case of Art. 853 CCG.

Indeed, the phenomenon of «subrogation» is hardly ever described in the Civil Code, nor is its regulation outlined[6]. The only case in the Civil Code where the Georgian legislator makes clear reference to the doctrine of subrogation and expressly uses that term is that provided for in Art. 473, which concerns the «right of subrogation in the case of entire performance by one of the obligors». A further reference to the doctrine of subrogation, but only as regards the effects, is made in Art. 832 of the Civil Code where, in regulating the legal relationship in which the parties are successors to their rights during the pendency of the relationship, a subrogation phenomenon is essentially outlined.

Precisely because of the consequences the choice of one or other doctrine produces, the underlined confusion could create many problems for legal practitioners and for the parties themselves, who struggle to identify the rights and obligations that are actually imposed on them following the change of subjective position in a given legal relationship (in the case under comment, the relationship between creditor, insured, beneficiary and insurer) and which they can therefore claim from each other. So, it is appropriate asking what the legislator in Art. 853 CCG substantively intended to refer to and therefore to which discipline one may actually refer. This is certainly not the right place to dwell on the various theoretical constructions[7], but it is appropriate to indicate at least some of the effects produced by the phenomenon of subrogation.

Subrogation, like assignment (cession), describes the transfer of a right of credit. According to Georgian legislation, both involve the transfer of the creditor's rights to a third party. But, in the case of subrogation, the third party obtains these rights in full, also without prejudice to the secu-

6 For cession the references are instead to Arts. 198 and 199 of the Civil Code of Georgia.

7 For a more discussions and references about the distinction between cession and subrogation in Georgian legal system see N. Motsonelidze, *Separation of Subrogation from Regress and Cession,* Ivane Javakhishvili Tbilisi State University Faculty of Law, Journal of Law, n. 1, 2014, pp. 130 ss.

rities, privileges and interests that were initially agreed upon between the creditor and the (original) debtor. So, subrogation by payment produces the succession of a third party who thus takes the place of the rights of the subrogated party, giving rise to a subjective modification of the obligatory relationship already established by the latter with another party as a result of the payment of the debt by the subrogating third party.

Given such ambiguity of the rule 853, in order to try to resolve the *impasse* it is necessary to take into consideration the entire wording of the rule as well as the rationale and purpose for which it was introduced, including the effects it intends to produce, trying to understand which of the two institutions it might be referred to. In determining that (and so, in practice, which discipline the parties should follow after the takeover), it firstly should be noted that there is no provision requiring the parties to give notice of the takeover. It will also be said in the following that the payment set in para. (1) must be considered more properly as a requirement for the takeover and not its effect.

However, the absence of any agreement or consent on the part of the insured or the insurer, as well as of the insured's creditor, is probably decisive. In fact, the institution of «cession» undoubtedly presupposes such consent since it is based on the agreement of the parties (in this sense, Articles 198 and 199 of the Civil Code of Georgia), whereas subrogation is based on the law and only rarely on the agreement of the parties.

Despite the uncertainties, it can be quite reasonably concluded that Art. 853 CCG produces a particular succession that can be in some way traced back to the characters and forms of legal subrogation[8]; and it is because it produces a succession without the agreement of the parties and indeed hypothetically even against the will of the parties (if it does not, the rule could not achieve its purpose, that is the protection of the beneficiary and the expectation that he/she has regarding the life insurance policy taken out in his/her favour), with all the consequences as regards the legal effects produced between the parties. The rights of the insured against the insurer are thus not transferred to the beneficiary on the basis

8 Although the wording indicates otherwise, «subrogation» could find some legal basis in Art. 207 CCG. The rule 207, in fact, establishes the possibility of a legal «cession», but derogating from the requirement set in the second paragraph of Art. 199 CCG which instead imposes the existence of an agreement for the cession to be perfected. It is therefore not unreasonable to assume that this rule can be taken as the basis for the recognition of the (different) legal phenomenon of subrogation in Georgian legal system.

of a contract concluded between the insured and the insurer or between the insured and the beneficiary but are due to the law.

Well, in the case of Art. 853 CCG it should be argued that the rights of the insured are transferred to the beneficiary who takes over the legal relationship previously existing between the insurer and the insured by paying the debt to the creditors of the debtor/insured. The subrogated beneficiary acquires the legal position of the insured, who thus becomes only the person to whom the insured event is connected. Consequently, the subrogating party becomes fully liable for the payment of the premium. With subrogation the legal relationship and its content remain the same, since the previous relationship does not cease and a new one is not formed. As mentioned before, the same rules and procedures already in force in the pre-existing relationship between the insured and the insurer continue to apply between the beneficiary and the insurer and the beneficiary who is subrogated must respect them: in short, the rights and obligations originally envisaged by the parties remain unchanged (even the limitation period remains so). Only the subjective side of the mandatory relationship is modified. The difference is relevant from the point of view of the cause of the legal transaction: if the pre-existing legal relationship – the only existing one, which continues to exist as it is despite the subjective change – turns out to be invalid, this invalidity also affects the relationship with the subrogating party.

7. Consent, term and notification

The Georgian legislator does not make the right of subrogation granted to the beneficiary conditional on the prior consent of the insured. It is therefore an automatic legal effect attributed directly by the law to the beneficiary, who may then decide whether to exercise it or not, and from whose effects the insured cannot resist. Even this solution is not common to all legal systems: for example, §170 of German Insurance Contract Act (*Versicherungsvertragsgesetz*) – source of deep inspiration of Art. 853 CCG as already said – requires the insured to give his consent to the beneficiary's subrogation in the relationship with the insurer[9]. So,

9 According to most German scientists, not only the insured is not obliged to give his consent, but in principle he could also refuse it without any specific reason, except extreme cases of wholly abusive refusal (*MünchKommVVG/Mönnich* § 170 Rn. 22; R/L/ *Langheid* §170 Rn. 6; B/M/ *Winter* §170 Rn. 37; *Hasse* VersR 2005, 15, 33; *Schauer,* Das österreichische VersVertragsrecht, 3, Aufl. 1995).

it is got to be a precise choice by the Georgian legislator. However, the absence of the need for the insured's consent is not entirely irrelevant: in fact, it overlooks the creditors' interest in clarity and, above all, legal certainty of the matter within a precise time frame.

Besides, Art. 853 CCG does not indicate a time limit within which the beneficiary may exercise his subrogating right. This is a rather unfortunate omission: it is clear the absence of a time limit makes the situation between the parties deeply uncertain. The creditors, on the one hand, would not know until the end who is liable to pay their debts; on the other hand, the insurer would not know until the end who to consider as its contractual counterpart. Instead, according to §170, (3) VVG the subrogation is effected by giving notice thereof to the insurer within one month after the time when the person entitled to subrogate learns of the attachment/forced execution or after the insolvency proceeding has been opened.

In the end, it should be inferred from the silence of the Georgian legislator that the beneficiary may anytime exercise the right of subrogation, at least until the last useful moment, that is until the insured's creditors have been satisfied with the insurance claim or the insurance relationship has been terminated.

Given the absence of a consent and of a time limit for exercising the right of subrogation, it is doubtful the granting of any burden of notification (of the enforcement actions) on the insured's creditors towards the named beneficiary. However, this would prevent a potential damage to the position of the beneficiary, which is who Art. 853 CCG on the contrary means to protect, since the latter could factually lose the benefit provided by the rule if he has not informed of the enforcement or bankruptcy proceedings initiated against the insured[10].

Equally doubtful is whether any burden of notification is charged to the insured, who could therefore eventually be held liable for the damage caused to the beneficiary in the event of its omission. Anyway, the problem is mitigated by considering that, at least in matrimonial relationships (which likely represent the chosen field of life insurance), the duty of notification could be inferred indirectly from the legal obligations in force between spouses under Article 1179 of the Civil Code or under Articles 1198-1199 of the Civil Code with respect to children if the second paragraph of Article 853 of the Civil Code applies.

10 Despite the drawback, in German legal system several scientists exclude such an obligation charged to the insured's creditors or to the insolvency administrator.

Anyway, once it has occurred, the event of succession is definitive: any subsequent event that might modify or extinguish the subrogation right is no longer relevant (just think of the case of divorce between the insured and the beneficiary).

8. The «named» beneficiary

According to Art. 853 (1) CCG, in the first instance the person entitled to subrogate is the beneficiary «specifically named» in the life insurance contract. Well, the rule applies when the insured designates a third person as beneficiary of the insurance benefit at the time when the insured event occurs (e.g. the death of the insured). As already mentioned, the beneficiary of a life insurance policy is usually the insured, unless the legislation on compulsory insurance or the insurance contract stipulates otherwise or the beneficiary has not been designated by the contract (Art. 11 (4) and (5) of the Georgian Law On Insurance). That's the case covered by Art. 853 CCG: according to Art. 11 (8) of the Georgian Law On Insurance, the conclusion of an insurance contract in favour of the beneficiary does not release the policyholder from the fulfilment of the obligations defined in the contract itself, which therefore remain within the relationship with the insurer, except when the beneficiary exercises the right of subrogation granted under Art. 853 CCG.

According to Art. 11 of the Georgian Law On Insurance, the beneficiary is a natural or legal person who receives the proceeds of an insurance policy according to an insurance contract or to the insurance legislation. At least about the voluntary insurance, the third paragraph of the said Art. 11 states that the beneficiary could be designated by the insured. For this purpose, in the specific context of life insurance, pursuant to Article 844 (2) of the Civil Code it is necessary that the beneficiary gives his consent in writing, which represent the moment from which the right to get the benefit upon the occurrence of the insured event arises for him.

In other words, Georgian legislator does not impose to name a beneficiary in the life insurance contract[11], so the insured could abstractly and legitimately not specify the identity of the beneficiary in the insurance contract (or specify him/her only later, by written notice to the insurer or by provision in the Will) and even not name him/her at all (as well as

11 Article 844 (1) of the Civil Code of Georgia expressly states that «life insurance may cover the policyholder or another person».

revoke him/her at any time, Art. 350 (2) CCG[12]) without affecting the validity of the insurance contract in any way.

However, this choice is bound to affect the applicability of the rule itself: because manner of designation for the purposes of validity is one thing, designation for the purposes of the applicability of Art. 853 CCG is another one[13]. In fact, rule 853 para. (1) refers only to cases in which a beneficiary is specifically appointed and consequently the right of subrogation is granted to the beneficiary only if he/she is clearly identified. That the identity of the beneficiary must already be clear from the life insurance contract can be deduced from the very wording of the provision when *i)* in the first paragraph, it links the right of subrogation to the person who «is specifically named as the beneficiary»; *ii)* in the second paragraph, when regulating the succession of the right of subrogation to the spouse or children of the latter, it makes the transfer of this right conditional on the case in which the beneficiary «is not named». A merely generic designation is therefore not sufficient (just thinking of the indication «spouse», «cohabiting partner», «parents» or «heirs»), and it undoubtedly produces the effect envisaged by the second paragraph of Art. 853 CCG. Although this is certainly the closer interpretation to the wording of Art. 853 CCG, there is no need to make the rule inapplicable also in cases where the beneficiary is not determined but determinable: matters of reasonableness and efficiency should lead to assume as valid even all those designations which, although not expressly named, allow the identity of the beneficiary to be unequivocally determined (for example, this could be the case where the contract generically refers to the «parent» as the beneficiary and the insured has only one direct ascendant). In conclusion, a further requirement of the rule is that the beneficiary should actually be determined in the life insurance contract at the time of execution or the opening of bankruptcy proceeding against the insured.

12 Even the rule 350 (2) CCG is not common to all legal systems: in the Italian one, for example, the beneficiary can always be revoked, unless he has declared his intention to take advantage of the appointment and its benefits (Art. 1921 of the Italian Civil Code).

13 Also in Italian legal system, for example, the designation of a beneficiary in life insurance contracts is effective even if the beneficiary is only generically determined (Art. 1920, para. 2, Civil Code).

9. The other persons «entitled to the benefit». Inheritance implications

Those entitled to the right of subrogation are not only the persons «specifically named» as beneficiaries in the life insurance contract. In fact, para. (2) of Art. 853 CCG establishes a gradation between persons who are given the same right to succeed because of the beneficiary's failure to exercise it. In particular, the same right also applies to the insured's spouse or to his or her children. Although the rule is silent on this matter, the terms «spouse» and «children» should be read in a systematic way with the others provisions of the Georgian legal system, concluding for the equivalence also with cohabiting subjects or adopted children or children born out of wedlock (this, of course, in compliance with the rules governing these hypotheses: the reference is, for example, to what set in Articles 1190, 1191, 1239 and following and 1309 of the Civil Code).

These other persons, however, are placed in a subordinate situation with respect to the «named» beneficiary, and the subrogate right granted in the first instance only to the latter is extended to them only if one of the two conditions set out in the second paragraph of Art. 853 CCG is met, that is *i)* the lack of interest by the «named» beneficiary to exercise the right of subrogation and thus to receive «the benefit», or *ii)* the absence of a specific indication of the beneficiary's identity[14]. At a closer look, the first of the two requirements lose some of its importance due to the inexistence, as mentioned above, of a time limit within which the named beneficiary may exercise the right of subrogation; because it becomes rather complex to ascertain with confidence the lack of interest of the latter and so the fulfilment of the former requirement above.

Said this, some questions could ensue from this clear provision. First of all, it is surely possible for a number of persons to be named as beneficiaries in a life insurance contract. In such a case, what happens? Georgian legislator, indeed, does not expressly consider such a hypothesis, but anyway it is possible to conclude that if several persons entitled to the benefits succeed to the insured, they all become joint debtors in the relationship with the insurer. They will all therefore must pay the premium *pro rata*, for instance. They will also be joint creditors, so they can only

14 Whereas §170 VVG does not contain any reference to the interest in receiving the benefit by the named beneficiary: in German legal system, the subrogation right of the spouse or the children of the insured arises only if the beneficiary is not specifically named in the life insurance contract.

manage the insurance relationship jointly. To reason otherwise would unfairly burden the position of the insurer who had to accept the splitting of the insured's role typical of the life insurance.

It is also possible, rather more likely, that even the persons who become entitled to the right of subrogation only after the beneficiary under para. (2) Art. 853 CCG are more than one (e.g. if the insured has several children). While the rule certainly places the «named» beneficiary in a preferential position, it does not seem to do the same for the spouse and children of the insured. Therefore, according to a strictly literal interpretation, these subjects would all have the same right to subrogation at the same time. According to a different interpretation, the legislator could have intended to continue the gradation scale, so subordinating the takeover right of the insured's children to the non-exercise of the same right by the spouse, in turn subordinated to the non-exercise by the «specifically named» beneficiary. Under this last approach, there would be no problem in regulating the succession of the different beneficiaries. If, on the other hand, it is the first interpretation that should be adopted, there would undoubtedly be a need to regulate the hypothesis in which several persons exercise the same right: if necessary, the adoptable solution could be, by analogy, the same already described for the case of a number of «named» beneficiaries, that is everyone is entitled may jointly and in equal parts participate in the life insurance contract. Obviously, as in the case of several named beneficiaries, the general limitation for its exercise remains in place: the spouse or child who alone exercises the takeover right cannot be subrogated *pro quota* but must be subrogated in the relationship in its entirety and is therefore obliged to satisfy the insured's creditors for the full.

At this point, a clarification is required: the right to the insurance claim and the right of subrogation accorded to the beneficiary are quite different in themselves, but in practice inevitably end up overlapping in the event of the situation described by Art. 853 CCG occurs: in fact, if the beneficiary does not exercise the right of subrogation, then the creditors of the insured will certainly satisfy themselves on the insurance claim, thus removing the "benefit" from the ownership of the beneficiary named in the contract by the insured/debtor.

This situation inevitably affects the rules governing inheritance. In practice, in fact, it could also happen that the «named» beneficiary passes to the insured. The problem arises as to who is «entitled to the benefit» at the time of the occurrence of the insured event. Therefore, Art. 853 (2)

CCG must be coordinated with the provisions of Book VI of the Civil Code, in particular Art. 1328, according to which «an estate shall include the aggregate of both property rights (assets of the estate) and liabilities (liabilities of the estate) of a decedent as of the moment of his/her death». So, it is necessary to establish whether or not the right of subrogation granted by Art. 853 CCG falls within the beneficiary's estate: one way or the other clearly produces different outcomes. In the first case, the right of subrogation belongs to the beneficiary's heirs of course, who may or may not decide to avail themselves of it (in the latter case, because of reasonableness the right reverts to the subjects set in Art. 853 para. (2) CCG). In the second case, the right to take over belongs to the spouse of the insured or to his or her children (substantially equating death with waiver), or otherwise, in application of Article 351 CCG, it belongs to the insured party.

The Art. 1328 of the Civil Code expressly includes in the estate all the property rights of the deceased: such must certainly be considered the right of claim arising from the conclusion of the life insurance policy, but also the subrogation right under Art. 853 CCG, especially because of the consequences that would follow: if this were not the case, the beneficiary's right (and the heirs' expectation) to obtain the insurance claim would be prejudiced without any real reason and only by the mere accidental death of the beneficiary.

The above considerations lead to the conclusion that the right of subrogation passes to the heirs of the beneficiary. The gradation provided for in Art. 853 (2) CCG does therefore not take place: it is expressly applicable only in the event of waiver or non-designation of the beneficiary and not in the event of his/her death, the latter event which would instead give rise to the normal succession phenomenon governed by the law and to the opening of the estate, that thus could also include the right of subrogation placed by Art. 853 of the Civil Code in the hands of deceased beneficiary.

10. Payment of the surrender value

Art. 853 CCG requires the beneficiary who intends to «participate in the contract» and so to exercise his/her right to take over, to carry out a specific operation: «he/she shall meet all the requirements of the creditor or secure the bankruptcy assets to the extent of the amount that the policyholder could have received from the insurer upon termination of the insurance contract». This is a fundamental requirement, around which the entire mechanism of the rule basically revolves.

Firstly, the insurance contract must obviously exist and must also be valid. In addition, a further premise is necessary in order to understand the aforesaid requirement: for the application of Art. 853 CCG, the life insurance policy must be redeemable, *i.e.* it must be a policy for which the payment of a surrender value is expressly provided for by law or by the contract itself. This latter is, in fact, the value to which the Georgian legislator refers in Art. 853 CCG with the term «the amount».

Well, the surrender value is the amount accrued under the life insurance policy up to the moment the insured decides to exercise early withdrawal. In the practice, the surrender value is substantially lower than what the insurer is obliged to pay when the insured event occurs. Usually, the surrender value is very low or even zero in the early stages of the life of the insurance policy, partly due to the insurer's need to amortise the related costs. Anyway, the surrender value subsequently is set to increase more and more with the duration of the life insurance contract.

So, a further requirement for the application of the rule is the existence of a positive surrender value. Although the rule does not expressly provide for such a value, its provisions (and the rule itself) would be meaningless if such a value did not exist, since it makes no sense either for creditors to take enforcement actions on the insurance claim in the absence of a value on which to satisfy themselves, or for the beneficiary to take over the contract in place of the insured by paying his/her creditors. If so in principle, it is however possible to argue that the surrender value need not necessarily be already current but may also be future: in fact, in such a case it is reasonable to recognise the creditor's interest in seizing the rights of the insured as they accrue, and thus expect to take enforcement action against the insured only later.

Well, the beneficiary must guarantee the payment to the creditors of the insured/debtor or to the bankruptcy estate of the surrender value of the life insurance policy, *i.e.* of the sum that in abstract terms would be reimbursed at the termination of the insurance contract by the insured: the beneficiary's convenience in making this payment and taking over the contract in place of the insured has already been mentioned in § III above[15].

15 What said with respect to the «named» beneficiary certainly also applies to the case where the right of subrogation is exercised by the different persons envisaged in Art. 853 (2) CCG.

In other words, the party entitled «to take the place» of the insured in the life insurance contract must pay to the creditors who have enforced the contract against the latter (or to the bankruptcy estate following the opening of bankruptcy proceeding against him and his assets) the amount that would have become due on the date of the attachment (or the opening of the insolvency proceeding) if the insured had exercised his notice of termination and requested the insurer to pay the surrender value of the insurance contract. Although the rule on this point seems to be very clear, the interpretation of the statutory requirement is rather controversial. In particular, it is doubtful whether the obligation to pay «the amount» on the party who «participates» in the contract is to be considered as a mere legal consequence of the takeover or, on the contrary, whether it is an actual condition for the exercise of that right. In other words, it is not clear from the wording of the rule if the payment by the beneficiary is a mere effect of the exercise of the right of subrogation or if it plays the role of a legal requirement. According to a strictly literal interpretation, the qualification of the payment obligation sets in Art. 853 CCG should certainly be understood as a consequence, an effect of the subrogation itself. Well, this approach could also be justified by the assumption that the beneficiary's right of subrogation takes priority and that the interests of creditors are already adequately protected somewhere else by the law. This conclusion is widely accepted by scientists of legal systems in which is in force the same rule (*e.g.* the German legal system, §170 VVG[16]). Such an approach, *mutatis mutandis*, would also seem to be suggested by the wording of Art. 372 CCG.

However, such a conclusion actually clashes precisely with the history, meaning and purpose of the rule 853 CCG, which would on the contrary consider the payment as a real condition to be fulfilled in advance: while it is true the rule clearly intends to protect the interests of the beneficiary, thus facilitating the takeover, at the same time this must be done without endangering the needs of insured's creditors, since they too are protected by the same rule although indirectly. But the rights of creditors would be seriously jeopardised if the beneficiary could formally take over the insurance contract without creditors being satisfied in advance with their claims against the insured. Well, it would be much more difficult for them to recover their claims once the beneficiary had exercised his right of sub-

16 MünchKommVVG/*Mönnich* § 170 Rn. 22; Sch/B/*Ortmann* § 170 Rn. 18; L/P/*Peters* § 170 Rn. 11; *Elfring* BB 2004, 617, 620.

rogation, since they would lose the asset on which they could easily have been satisfied (*i.e.* the claim under the life insurance contract). In other words, the payment mechanism envisaged by the Art. 853 CCG would no longer fulfil the role it was intended for, that is securing creditors' claims: the insured's creditors are really protected only if the subrogation takes effect after the payment of the surrender value to them. Otherwise, the insured's creditors will certainly lose a claim of good solvency (the surrender value) and receive in exchange a claim of the same amount but less solvable, since this time it is owed from the party who takeover and no longer from the insurer (usually a pretty much solid legal person). So, the true protection of the legitimate interests of creditors requires that the payment of the surrender value (*i.e.* the value which would have become payable if the insured had exercised its right of withdrawal at the earliest moment following the attachment or the opening of bankruptcy proceeding) be considered a legal condition for being able to exercise the subrogation right. It should be therefore more correctly included among the conditions referred to in Article 350 (1) (b) of the Civil Code of Georgia. Even the mentioned absence of a time limit for the beneficiary to exercise the right of subrogation and pay creditors (§ VII above) suggests that this must be the right qualification.

Otherwise, it would allow the beneficiary to achieve its purpose (*i.e.* to take over the life insurance contract) without having any real control over the moment of the payment and so not adequately guaranteeing the rights of creditors, who are exposed to the possibility of an uncertain payment at least in time (if not in being). In short, the consequence would once again be total uncertainty for creditors who have acted against the insured/debtor. As is seen, in the end the choice is not completely without practical implications.

V – ACCIDENT INSURANCE

Article 854 - Concept

1. An accident insurance contract may be concluded for an accident affecting either the policyholder or another person.

2. If the accident insurance contract is concluded not by the insured person but for his/her benefit, then the life insurance rules shall apply to such contract.

Lorena Di Gaetano

Summary: 1. Introduction. 2. Legal framework. 3. Analysis of the article. 4. Comparative analysis. France and Italy.

1. Introduction

Article 854 is located under Chapter XX ("Insurance"), Section Fifth, of the Georgian Civil Code (Law No. 786 of 26th June 1997)[1].

It is made up of two paragraphs: the first one states that an accident insurance contract may be concluded for the risk of an accident affecting either the policyholder or a third party. Paragraph 2 refers to the different case in which the insured person and the policyholder don't coincide, but there's a coincidence between the insured person and the beneficiary of the policy; in such case, life insurance rules will apply.

The Article doesn't provide any definition of "accident insurance" but limits itself to list the parties involved by the contract; as to the discipline, paragraph 2 recalls "life insurance rules".

Arguing from the position of the article, which follows the sections on health (III) and life insurance (IV), closing the whole chapter (XX), accident insurance contract can be seen as a contract whose object is the person and not the patrimony of the insured. Missing a clear regulatory definition, an

1 Available at https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/90468/118660/F999089720/GEO90468 Geo.pdf (last access 30th September 2021).

indirect confirmation comes from Article 4 of the Law of Georgia on Insurance, 2 May 1997 No 690 ("the object of insurance")[2], which states: «1. The object of insurance may be any property or personal non-property interest (…), including: a) insurance related to the life, health, ability to work, pension provision and other personal interests of the insured (personal insurance); b) insurance related to owning, administering and using property (property insurance); c) insurance related to an injury that the insured causes to third persons (natural or legal) or to their property (liability insurance)».

Provided that "the accident" considered by the law is the one affecting "the person", the corresponding contract of insurance should be qualified as a kind of "personal insurance" (a) due to its relation to «life, health, ability to work … and other personal interests of the insured». Among the "other personal interests", bodily integrity certainly is included.

As to the event, the word "accident" refers to «any sudden, unexpected and unforeseen event affecting the body of the insured person against his will and resulting in temporary bodily injuries or traumas»[3].

2. Legal framework

Personal accident insurance has not a long history.

The earliest companies were founded in England and America in the XIX century; they were chiefly intended to ensure travellers from accidental bodily injuries. Actually, those companies started their activity by selling "accident tickets" at railroad stations; afterwards they established a general accident insurance, often combining it with life insurance. A fixed sum was payable for fatal accidents, while "a reasonable compensation" was due for accidents not causing death. A modern system of personal accident insurance is traditionally dated from this provision of compensation for non- fatal injury. The lack of reports prevent from stating how the compensation was calculated, thus it is hard to say whether the contract was ruled by the indemnitary or by the stated-value principle[4].

2 Available at:https://matsne.gov.ge/en/document/download/29884/17/en/pdf (last access 30th September 2021).

3 The aforeamentioned definitions match the so called "Basic concepts" used in the Law of Georgia on Insurance (Law No. 690 of 2nd May 1997, article 2). Compare W. C. Niblack, *Law of Voluntary Societies, Mutual Benefit Insurance and Accident Insurance*, Chicago, 1894, p. 701: "Some violence, casualty or *vis major* is necessarily involved in the term "accident." It means, in short, in insurance policies, an injury which happens by reason of some violence, casualty or *vis major* to the assured, without his design or consent, or voluntary co-operation".

4 McGill Guide, *Accident insurance*, in *American Law Review*, vol. 7, no.4, 1873, pp. 585-587.

According to the general principles, non-life insurance is intended to retaliate the insured for the damage resulting from an accident; in life insurance, instead, the insurer makes a payment to the occurrence of an event relating to human life[5].

A problem of qualification remains with regard to accident insurance contracts. Companies tend to compensate the loss (medical expenses…) suffered by the insured because of the accident, but at the same time such events affect humain life; indeniably, accident insurance policies share with life policies the aspect of being related to human life.

Whenever the statutory discipline is poor, applicable rules depends on the solution of this dilemma. For scholars supporting the idea that accident insurance is a *species* of life-insurance *genus*, «life is invaluable and none amount of money can compensate the death or disablement of a human being»; consequently, «the amount recoverable is not measured by the extent of the insured's loss, but is payable whenever the specified event happens, irrespective of whether the assured in fact sustains a pecuniary loss or not». That means that accident insurance policies should be deemed non-indemnity contracts[6]. Some European countries gave a statutory solution to the question; an articulated definition can be found in § 1 of the Austrian Versicherungsvertragsgesetz (Insurance contract law act): «In the case of indemnity insurance, the insurer is obliged to compensate the policyholder the financial damage suffered. In the case of life assurance and accident insurance, the insurer is obliged to pay to the policyholder the agreed amount». European Insurance Law separates life from non-life insurance as well[7].

The problem related to the accident insurance is that, in other law systems, it lies between the two. Article 854 of the Georgian Civil Code is no exception, as it designs the contract as a combination of a damage insurance disciplined by life insurance rules when it comes on behalf of others. The indemnitary principle is well expressed in Article 858, which states «the policyholder has no right of recourse against the person who is liable for the damage» and whose meaning is preventing to get a sum of money exceeding the compensation. Thus, the problem of picking out the

5 ESA, *Insurance,* chapter 16.08, available at: https://ec.europa.eu/eurostat/esa2010/chapter/view/16/. Last access September 30th 2021. Compare the terms and expressions in article 799 e 808 of the GCC: "compensate damages/ firm fixed insured sum"; "danger or event".

6 E.R. Hardy Ivamy, *General Principles of Insurance Law*, London, 1966, p.9.

7 See the Definition of Insurance Contract in European countries by the European Commission: https://ec.europa.eu/info/sites/default/files/definition_of_insurance_contract_en.pdf (last access September 30th 2021).

applicable provisions remains. Preliminarily, we need to detect the *ratio legis* under the *renvoi* to life insurance law when the insured, other than the policyholder, coincides with the beneficiary.

3. Analysis of the article

The concept expressed in Article 854 is a specification of a more general principle implied by other articles of the Civil Code, which admits that a contract, signed by two parties, may have effects onto another person[8].

From the combinations of these provisions, different scenarios are possible:

1. The policyholder insures him/herself against the risk of an accident to his/her own person.
2. The policyholder insures him/herself against the risk that a third party may be affected by an accident.
3. The policyholder insures a third person against the risk of being affected by an accident.
4. The policyholder pays the premiums, but in the event of a damage the sum is paid to a third person.

The first case is also the ordinary one, as any person has an interest in subscribing a policy aimed to protect his own physical integrity. When the insured is other than the contractor, two different situations may occur: insured is just the one who bears the risk (n. 2); the insured is also the beneficiary (n.3). At last (4), the insurer may be obliged to pay the proceeds to a person other than the policyholder and the insured person.

The general principle which unifies all these cases in point is that of the dissociation from the subjective side of the relationship; that means that the promisee can be other than the insured person, who can be other than the beneficiary.

Article 854, paragraph II, refers to the particular case in which the insured person, other than the policyholder, coincides with the beneficiary.

As a specification of the rule expressed in Article 836 («The policyholder may conclude an insurance contract with the insurer in his/her own name for the benefit of another person»), the provision in point differentiates through the referral to life insurance rules.

8 See articles 836-838 about damage insurance, 843 on health insurance, 844. 1 on life insurance.

This particular discipline is probably justified by the fact that, in Article 836, the policyholder doesn't act in the name of the other person but he concludes the contract in his own name. Actually, the beneficiary needs not to be named (art. 836, part II); he remains external to the structure of the contract, as his role comes up just if the insured event occurs; not as the damaged person, but just as the one vested of the right to the policy benefit. His right is nonetheless alternatively subordinated to the consent of the policyholder or to the possess of the policy document (art. 837-838).

Article 854 seems to be based on a different assumption. Here, there's in fact a perfect coincidence between the beneficiary and the insured person; i.e., the one who bears the risk of having an accident is the same person entitled to receive the policy proceeds. The reason why the legislator recalls the rules about life insurance contract is probably connected to the need of an active participation of the insured in the contract. By giving *ex ante* his written consent (*ex* Article 844), the insured, aware of his rights and duties, ceases to be an outside to the contract[9].

4. Comparative analysis. France and Italy.

The object of the accident insurance contract in France is to grant the beneficiary a sum of money in the case of a personal accident causing death, illness or incapacity, either temporary or permanent, according to what the parties agreed upon. The difference from other personal policies lies in the cause of the event, limited to the "accident", while other policies cover the same event independently from its cause.

The policy documents usually define the accident as «a sudden and violent action cuased by something external and independent from the insured willness». This definition allows to tell illness form accident. The first one is a lasting process, the second one is a sudden event. Nonetheless, a sudden event, such as a heart stroke, is not deemed to be an accident whereas the victim was already affected by heart disease. In the case, indeed, the cause of the event was not "external"[10].

According to Article L-112 of the French Insurance Code, «L'assurance peut être contractée en vertu d'un mandat général ou spécial ou même sans mandat, pour le compte d'une personne déterminée. Dans ce dernier cas,

9 M. Mazzola, *Polizze vita e assicurazione "per conto altrui"*, in *Responsabilita' Civile e Previdenza*, fasc.6, 1giugno 2019, p. 2135.

10 J. P. Vial, *Assurances contre les accidents corporels. La «mort subite» du sportif en question*, 29 novembre 2016, https://institut-isbl.fr/assurances-contre-accidents-corporels-mort-subite-sportif-question/ (last access 30th September 2021).

l'assurance profite à la personne pour le compte de laquelle elle a été conclue, alors même que la ratification n'aurait lieu qu'après le sinistre». The contract stipulated on the account of another person, in other words, has effect in his legal sphere only with his consent; however, insured' s will may intervene at the time of the stipulation or at the time of the accident either.

The definition of what is an "Accident" is similar all around Europe, and the risk covered is quite the same in all European countries[11]. However, there are strong differences on a practical level. First of all, most European countries have introduced a specific discipline tailored for different types of insurance. Italian insurance law is an exception, as it is evident from the lack of the personal damages insurance category within the civil code[12]. The Italian insurance system, based on the outdated dichotomy life/damage insurance, essentially assignes jurisprudence the task of facing the needs coming from society.

Georgian civil code seems to be more modern, as it contemplates different diciplines for diverse types of contracts, but at last it seems to have missed the goal. The referral to life insurance rules requires the same task to Georgian courts.

Italian insurance law is based on the strict dichotomy damage insurance/life insurance; *tertium non datur.* Accident insurance and other forms of policies originated by practical experience are not contemplated. Many of them are governed by private agreements between companies and clients, within the limits of inderogable rules. Accident insurance, in particular, is just mentioned in Article 1919 of the Italian Civil Code with the purpose of extending a typical institution of the damage insurance, the insurer right of subrogation, to the accident insurance contract[13].

As to the other applicable rules, after a long period of debate the Civil Court of Cassation gave the final word; accident insurance law is deemed to be a damage insurance contract when it covers the risk of non fatal accidents; life insurance rules, in fact, are applicable when the accident provokes the insured death[14].

This distinction doesn't match Article 854 of the GCC, where the *discrimen* is given not by the event, but by the subjects to the contract.

11 See the paper by the European Commission, cit. (https://ec.europa.eu/info/sites/default/files/definition_of_insurance_contract_en.pdf).

12 I. Clemente, *L'assicurazione infortuni:una figura in cerca di disciplina. Nota a: Cassazione civile, 10 aprile 2002, n.5119, sez. un.*, in *Diritto e Fiscalità dell'assicurazione*, fasc.1, 2004, pag. 236.

13 M. Sanna, *Polizza infortuni e natura del debito di indennizzo dell'assicurato. Nota a: Cassazione civile, 11 gennaio 2007, n.395, sez. III*, in *Responsabilità Civile e Previdenza*, fasc.6, 2007, pag. 129.

14 Corte di Cassazione, Sezioni Unite, sentenza n. 5199 del 10 aprile 2002.

Article 855 - Effects of injury to health

If the insurer's liability depends on injury (harm) intentionally done to health, then the absence of intent shall be presumed until proven otherwise.

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Summary: 1. Introduction. 2. The provisions of the 1942 Italian Civil Code. 3. The Common law discipline. 4. The comparison with the Georgian law.

1. Introduction

Article 855 of the Georgia Civil Code refers to cases where an injury is intentionally caused by the party whose interest is the basis for the insurance claim; from the reading of this Article, it can be inferred that the absence of the casualty requirement does not provide for insurance coverage[1]. Consequently «fortuity – probability, contingency, risk – is essential to insurance»[2].

Fortuity, in this sense, «is a perspective-ladened concept, and each of its possible perspectives is more or less closely associated with a theoretical view of insurance»[3].

Hence, it can be emphasized that there is neither a definition of "accident" in the provisions of the Georgian Civil Code nor an exhaustive list of covered events; instead, it is provided only a reference to injury (harm) caused to health and to the element of intentionality which, in accordance with article 855, is presumed absent from the act that caused the injury unless proven otherwise.

Given these premises, in the following paragraphs it will be conducted an analysis of both the provisions included in the Italian Civil Code and the Common law discipline, with the aim to compare them to the Georgian dispositions.

1 As stated by scholars, «[f]ortuity, or lack thereof, is primarily a matter of intent». R. E. Keeton & A. I. Widiss, *Insurance Law: a Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices*, Minnesota, 1988, *cit.*, p. 475.

2 J. E. Scheuermann, *Fortuity, Intent, and Causation in Liability Insurance Law*, ELON L. REV., vol. 9, issue 2, 2017, *cit*., p. 330.

3 *Ibid*. In particular, «[i]n the liability insurance context, an event may be deemed fortuitous, or not, from the perspective of (a) the injured third party, (b) the insured, or (c) the insurer». *Ibid*.

2. The provisions of the Italian Civil code

According to the Italian Civil Code, article 1882, insurance contracts can be divided into two macro sectors: life insurance and insurance against damages. Accident insurance contracts are certainly difficult to link to a predefined regulatory framework given that they contain both the concept of injury (and therefore of harm) to the person and the one of an event pertaining to human life.

However, in these kinds of insurance contracts the insurer is bound to pay in the event of injury resulting from an accident, *i.e.* an injury to the insured caused by a fortuitous, violent and external event, objectively ascertainable, capable of determining a disability (temporary or permanent) or death[4].

Thus, in the first case, the insurance can be qualified as insurance against damages, with the peculiarity of having as its main element an injury to a person and not to things[5]; in the second case, on the contrary, it may be considered more properly within the sphere of life insurance[6].

Considering as stated, the detailed contents of these contracts are subject to the general principle of contractual autonomy[7]; still, some specific aspects remain regulated by the Civil Code: in particular, given the existence of the requirement of the fortuity of the event that causes the injury, it is applicable the principle stated by article 1900 c.c.

4 L. Farenga, *Manuale di Diritto delle Assicurazioni Private*, Torino, 2019, p. 245.

5 Since, in this circumstance, the object of the risk is represented by a person and not a thing, an economic value cannot be attributed to the damage. Consequently, the application of the indemnity principle and of the norms that are linked to it, namely articles 1905-1909 of the Civil Code (limits of indemnity, defects of the thing, value of the insured thing, partial insurance, over-insurance) should be excluded. However, there is a contrast with the case law on this matter. For more on the topic see *ivi*, pp. 245-246.

6 On this topic, art. 2 of the Code of Private Insurance (legislative decree no. 209 of 7 September 2005) provides a classification of risks that has its roots in the EU legislation. This Code has replaced over a thousand special regulations in force with 355 articles with the aim of bringing together, within a unitary *corpus*, the existing regulations while also innovating them, to ensure their compliance to EU provisions and international agreements. P. Perlingieri, *Istituzioni di Diritto Civile*, Napoli, 2012, p. 366.

7 As provided by article 1322 of the Italian Civil Code, the parties can freely determine the content of the contract within the limits imposed by the law and the corporate norms; moreover, the parties are also free to enter into a contract that does not belong to the regulated categories, provided it is aimed at achieving interests that are worthy of protection according to the legal system.

According to this article, the insurer may be considered not obliged to pay in the case in which the event has been willingly caused by the insured, the policyholder (if different from the insured) or by the beneficiary[8].

The presence of willful misconduct[9] – *i.e.* the will to determine the event while being aware of the damaging effects that can derive from it – in order to get a benefit from the agreement means that the fortuity requirement is no longer met[10].

In conclusion, from the combined reading of articles 1900 and 2697 of the Civil Code, the burden of proof of willful misconduct falls on the insurer who can use it as an exemption from performance[11].

In fact, the Italian legislator provides in the first paragraph of article 2697 c.c. that the parties making a claim at trial must prove the facts that form its basis. On the other hand, as stated in paragraph 2 of the same article, the parties challenging the efficiency of such facts or objects that the law is modified or extinguished bear the burden of proof of the facts on which the objection is based.

In this way, Article 2697 places the burden of proof on each party who has made a claim in court, making it relatively easy for the court to decide in individual cases. Thus, the article refers to the procedural position of the parties to divide between the plaintiff and the defendant the negative consequences resulting from the lack of proof of facts (according to the latin maxim *onus probandi incumbit ei qui dicit*)[12].

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8 Conversely, as stated by article 1900, paragraph 2, c.c., the insurer is liable for the event caused by intent or gross negligence of the individuals for whose action the insured is liable; also, in the same article, paragraph 3, it is provided that the insurer is also obliged in case the event is a consequence of an act committed by the policyholder, the insured, or the beneficiary out of human solidarity or to protect those interests which are common with the insurer.

9 See, for a more detailed analysis of the willful misconduct, F. Zambardino, *Comment on article 849*, in this book.

10 On the other hand, an action capable of producing damage is contrary to the principles of public order, since it can involve, beyond the intrinsic illicitness of the act, a dangerous situation (for example, fire). L. Farenga, *Manuale di Diritto delle Assicurazioni Private*, *cit*., p. 151.

11 *Ivi,* p. 152.

12 See generally L. P. Comoglio, *Le Prove Civili*, Torino, 2004; M. Taruffo, *Onere della Prova*, Dig. Civ., vol. XIII, Torino, 1996.

The rule expresses the fundamental so-called "dispositive principle"[13] according to which only the evidence that the parties have produced in the course of the proceedings should be placed at the basis of the decision of the judge, with the exception of the cases in which evidence may be obtained *ex officio*, as provided by the law (which therefore constitutes a derogation from the rule in question).

The doctrine states that this rule must not be intended only as aimed at dividing the procedural initiative among the interested parties; instead, it is also aimed at allowing a judicial pronouncement even in the hypotheses in which the fact has remained uncertain[14]. In fact, the judge is subject to the prohibition of *non liquet*[15].

From the Article 2697 c.c., therefore, it can be derived that where the preliminary results do not offer suitable elements for the full ascertainment of those facts, the loss of the party that had the burden to provide the relevant evidence is declared.

Moreover, with a crucial judgment handed down in unified sections on the subject of labor proceedings, the Court of Cassation affirmed that the absence of contestation binds the judge to consider the not contested facts as existing[16].

On the issue of non-contestation, it is also important to point out that the legislator has amended (by Law no. 69 of June 18, 2009) article 115 of the Civil Procedure Code. The new wording of par. 1 allows the judge to

13 One of the corollaries of the dispositive principle is the "principle of request", expressed by article 99 of the Civil Procedure Code, according to which any person seeking to assert a right must make a request to the competent judge: therefore «an individual must therefore take positive action to obtain a right and not count on the outcome of official procedures set in motion by the judge». Another corollary linked to it is the so-called "evidential principle", expressed by article 115 of the Civil Procedure Code, «whereby the judge can reach a decision only on the basis of evidence [...] adduced or presented by the parties» and cannot obtain knowledge of them ex officio. G. Alpa & V. Zeno-Zencovich, *Italian Private Law*, Abingdon, 2007, *cit.*, p. 279.

14 See generally F. Agnino, R. Amatore, G. Buffone, A. Celeste, C. Costabile, F. Di Marzio, M. Di Marzio, G. Ianni, A. Massafra, G. Romano, D. Salari, A. Scarpa, P. Sordi, C. Trapuzzano, *Codice Civile Commentato*, Milano, 2021.

15 The principle of the prohibition of *non liquet* dates back to Roman law. According to it, the judge could not refuse to deliver a judgment because of the lack of clarity of the situation. C. Pinelli, Il Giudice e la Legge, RIV. AIC, n. 3, 2016, 9. For more on the topic see also: A. M. Rabello, *Non Liquet: From Modern Law to Roman Law*, ANN. SURV. INT'L & COMP. L., vol. 10, 2004; J. Stone, *Non Liquet and the Function of Law in the International Community*, BRIT. Y. B. INT'l L., vol. 35, 1959.

16 Cass., ss.uu., no. 761/2002. The principles affirmed in this judgment were also reiterated by subsequent case-law in relation to non-contestation in ordinary proceedings (Cass., I, no. 6936/2004).

consider as proven those facts that have not been specifically contested by the other party either directly or indirectly. This reform has been crucial for the actual implementation of the provisions of Articles 2697.

3. The Common law discipline

The insurance can be considered as a private contractual relationship through which «the insured and insurer agree that, should a contingent event (within a class of identified contingent events) happen, the insurer agrees to bear all or some defined portion of the economic costs created by the happening of that event, costs which, but for the contract, the insured would bear. In more common parlance, by the insurance contract the insured transfers to the insurer the risk (and not the certainty) of the happening of an event that causes economic costs»[17].

The main element of this definition is represented by the requirement of fortuity, a concept that has been explained many times in different sources of the Common Law jurisdictions.

For example, in New York's insurance statutes, a "fortuitous event" is described as «any occurrence or failure to occur which is, or is assumed by the parties to be, to a substantial extent beyond the control of either party»[18].

Specifically, within the framework of accident-based liability policies, there's a provision of indemnity coverage for injury caused by an "occurrence" or "accident": a definition of the term can be found in the current standard-form Commercial General Liability policy, in which the insuring agreement provides coverage for property damage and bodily injury caused by such an event[19].

17 J. E. Scheuermann, *Fortuity, Intent, and Causation in Liability Insurance Law*, *cit.,* pp. 337-338. In an insurance claim «"[w]ho pays" is a question of concern to all of the parties »: the frequent answer to the question is the insurer, «either because it has a legal duty to do so or because public policy favors compensating a victim by turning to the party with the "deep pocket"». L. J. Kibler, *Intentional Injury Exclusionary Clauses: The Question of Ambiguity*, VALPARAISO UNIV. L. SCH., vol. 21, issue 2, 1987, *cit.*, pp. 361-362.

18 See generally N.Y. INS. Law § 1101(a)(2), available at https://law.justia.com/codes/new-york/2020/isc/article-11/1101/. Accessed on 11 February 2022.

19 Therefore, «there is an actual or alleged causal relation between an accident (or occurrence) and the injury to the interests of a third party for which the insured is allegedly or actually liable». However, despite agreeing on the fortuity requirement, in the case law and commentary it has been debated for a long time a key interpretive question about what should be regarded as "accidental": the act *per se* or the injuries resulting from such act. For further information on the topic see J. E. Scheuermann, *Fortuity, Intent, and Causation in Liability Insurance Law*, *cit.*, p. 345.

In particular, it is expressly provided that that an occurrence is «an accident, including continuous or repeated exposure to substantially the same general harmful conditions»[20].

Moreover, liability insurers «have the contractual right to place limits on their obligations as long as the limitations are against neither statutory provisions nor public policy»[21].

In doing so, they can include in their insurance policies conditions, definitions and exclusions such as the so-called intentional injury exclusionary clause which has the function to release the insurer from liability for bodily injuries or property damages that have been intentionally caused[22].

It is possible that a dispute may arise if those limits are not clearly understood by all the parties: in fact, it is plausible that a claim will be filed asking the courts to resolve any ambiguity pertaining to the intentional injury exclusionary clause[23]. However, Common Law jurisdictions disagree on the interpretation of the clause and on its level of ambiguity[24].

In general terms, the courts take into consideration two main factors to rule on the matter. The first one is the language of the clause which if

20 The standard *Commercial General Liability Coverage Form* is available at https://www.techriskreport.com/wp-content/uploads/sites/26/2019/05/2012-CGL.pdf. Accessed on 11 February 2022.

21 L. J. Kibler, *Intentional Injury Exclusionary Clauses: The Question of Ambiguity*, *cit.*, p. 362.

22 *Ibid.*

23 From the interpretation of the courts it is determined «whether the insured is entitled to coverage under the terms of the policy or whether he forfeits his right to coverage when he commits an intentional act resulting in an injury to a third party. But the court's interpretation also may determine whether the injured party is to be compensated at all, particularly if the insured is judgment proof». *Ivi,* 363. The courts may decide to give priority to the compensation of the injured party instead of the analysis of the policy according to the principles of contract law. In fact, «[l]iability insurance was initially designed to protect an insured against loss caused by his tort liability to a third person [...]. But liability insurance has come to be used openly and extensively as a device for insuring compensation to victims». See generally R. Keeton, *Basic Text on Insurance Law*, St. Paul, 1971, *cit*.

24 In this respect, courts that have ruled that the clause in question is inherently ambiguous are those in California, Connecticut, Idaho, Indiana, Kansas, Maine, Michigan, Minnesota, and New York. Conversely, courts in Arizona, Arkansas, the District of Columbia, Georgia, Louisiana, Montana, North Carolina, Oregon, Washington, and Wisconsin have stated that the intentional injury exclusionary clause is not ambiguous. There are also courts in other states (such as in Minnesota and Illinois) that have reached both conclusions and others that rule on the matter on a case-by-case basis. See generally the collection of cases by J. L. Rigelhaupt, *Annotation, Construction and Application of Provision of Liability Insurance Policy Expressly Excluding Injuries Intended or Expected by Insured,* 1984.

deemed ambiguous will consequently ensure that the party which drafted the contract, *i.e.*, the insurance company, must provide coverage for the intentional act[25].

The second factor taken into consideration by the courts is the intent of the insured. In fact, if he intentionally caused the injury the clause will be triggered and, as a result, the insurer will be not obliged to pay the claim, to compensate the victim or have a duty to defend the insurer[26].

It must be taken into account that «just as they are split on determining whether the language of the intentional injury exclusionary clause is ambiguous, courts are split on how to define intent»[27]. This is especially noticeable in the rulings by courts who deemed the exclusionary clause to be ambiguous. For example, the Court of Appeals of Indiana (in the 1975 case *Home Insurance v. Neilsen)* assigned three different meanings to the phrase "caused intentionally": «(1) Intentional refers to the volitional act which produces injury [...]. (2) Intentional refers to the result achieved. Only where the insured intended to inflict the precise injury or degree of injury which in fact resulted should the injury be considered as not accidental. (3) Intentional is more demanding than (1) but not so difficult of proof as (2). It refers instead to the volitional performance of an act with an intent to cause injury, although not necessarily the precise injury or severity of damage that in fact occurs»[28].

To determine whether or not the act in question falls within the provisions of the policy, the definition of the concept of intent is pivotal in-

25 Naturally, the insured will seek to prove that the clause is indeed ambiguous, arguing that its wording may be open to different interpretations. On the contrary, the insurer will state the opposite. The courts have taken three different positions on the matter, namely: (i) the ambiguity of the clause is linked to the *de facto* situation of the case; (ii) the clause is ambiguous by its very nature; (iii) the clause is unambiguous. For example, some courts have ruled that the clause is free from ambiguity based on its literal wording: by looking at the plain, ordinary and popular meaning of the words, it can be held that there's only one reasonable interpretation that fits the clause (*i.e.* the so called "plain meaning approach"). L. J. Kibler, *Intentional Injury Exclusionary Clauses: The Question of Ambiguity*, p. 368.

26 In this context, the insured will typically take one or more of the following positions: «(1) [h]is act was privileged and thus not wrongful, *i.e.* he acted in self defense. (2) The blow was unintended, i.e., he was merely negligent or was not at fault at all. (3) He did not commit the act charged, i.e., someone else struck the blow. (4) He intended only a minor bodily contact, not a major injury such as is alleged to have resulted». D. F. Farbstein & F. J. Stillman, *Insurance for the Commission of Intentional Torts*, HASTINGS L. J., vol. 20, issue 4, 1969, *cit*., p. 1229.

27 L. J. Kibler, *Intentional Injury Exclusionary Clauses: The Question of Ambiguity*, *cit.*, p. 372.

28 *Home Insurance v. Neilsen,* Court of Appeals of Indiana, 1975.

deed[29]. The overall definition that Common Law jurisdictions have adopted can be traced back to tort law and can be linked, in particular, to the *Restatement of Torts*[30] and Prosser's *Law of Tort*: the two core elements of these definitions are «the desire of the actor to cause the consequences of his act and his understanding or belief that certain consequences will probably follow from his act»[31].

In particular, the *Restatement of Torts* refers to the actor who «desires to cause the consequences of his act, or [...] believes that the consequences are substantially certain to result from it»[32]; similarly, Prosser uses the wording «to those consequences that are desired, but also to those which the actor believes are substantially certain to follow what he does»[33].

Ultimately, the *ratio* of the intentional injury exclusionary clause is to prevent the insured, «who commits an intentional wrongful act which results in harm to a third party [from passing] the responsibility of his wrongful act to his insurer»[34].

4. The comparison with the Georgian law

From the reading of article 855 of the Civil Code of Georgia, the insurer's duty in accident insurance contracts is based on the absence of willful misconduct aimed at inflicting damage (injury) to health; therefore, it is presumed that the conduct was not intentional until the opposite is proved.

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29 Each party in a dispute concerning a liability insurance policy is interested in the court's decision about the ambiguity of the clause: «[t]he insurance company, which believes it is being asked to pay an unjustified claim, argues that the clause is not ambiguous. But the insured, who believes he is entitled to protection under the terms of his policy and who fears his acts may not be covered, argues that the clause is ambiguous. The third party in the dispute, the injured person who may find that the harm was caused by a judgment-proof defendant and who believes that he is entitled to compensation, also argues that the clause is ambiguous». L. J. Kibler, *Intentional Injury Exclusionary Clauses: The Question of Ambiguity*, *cit*., p. 364.

30 The American *Restatement of Torts, Second*, is a treatise by the American Law Institute, the leading organization in the US which works to clarify, modernize, and improve the law. Indeed, the *Restatement* offers coverage of the general principles of the law of torts and constitutes a revision of the original Restatement of Torts. For more information about the topic, see also https://www.ali.org/publications/show/torts/. Accessed on 11 February 2022.

31 L. J. Kibler, *Intentional Injury Exclusionary Clauses: The Question of Ambiguity*, *cit.*, p. 372.

32 See generally *Restatement (Second) of Torts*, 1977.

33 See generally W. Prosser & W. Keeton, *The Law of Torts,* 1984.

34 L. J. Kibler, *Intentional Injury Exclusionary Clauses: The Question of Ambiguity*, *cit.*, p. 385.

Hence, under such circumstances, the insurer has the right to request any valuable information[35] related to the causes on the basis of the insured event[36]. Similarly, in the Italian legal framework, the insurer has the burden of proof of the existence of willful misconduct, as can be deduced by article 2697 of the Civil Code.

In addition, the requirement of the fortuity of the event appears in the Georgian, Italian and Common Law disciplines of insurance contracts. However, while the Georgian and the Italian Codes specifically contain a disposition on the matter, in Common Law jurisdictions it is generally discretion of the insurer to provide an intentional injury exclusionary clause in the contract to limit their obligations.

In conclusion, Georgian solutions provided by Article 855 are in line with the Civil law tradition and have some similar elements with the Italian regulation – specifically, both Codes provide that the burden of proof falls on the insurer and that he cannot be obliged to pay in the case of willful misconduct by the party that caused the injury.

Conversely, the same cannot be stated about the comparison with the Common law discipline. In fact, in this context, a similar pattern to the one of Article 855 is recognized to be in between tort law (as shown by the circumstance that some definitions have their roots in sources as the *Restatement of Torts*) and contract law (as reflected by the importance of the intentional injury exclusionary clause).

Nevertheless, it would seem that this difference is not as deep as it can be imagined since, both in Italy and Georgia, when it is needed to resort to some form of benefit, restoration or indemnification, party autonomy on the contract side and tort law or civil liability are entangled.

35 In this regard, as per article 8, paragraph 3, of the Georgian Civil Code,«[p]articipants in a legal relationship shall exercise their rights and duties in good faith». It follows that «for abidance by the principle of good faith it is necessary to duly perform the duty to inform». I. Nozadze, *Duty to Inform as a Specificity of Demonstration of Good Faith Principle in Voluntary and Compulsory Insurance*, J. LAW (TSU), 2017, issue 1, *cit.*, p. 131.

36 *Ivi*, pp. 141-142.

Article 856 - Effects of intentionally causing an accident

1. The insurer shall be released from liability if the person entitled to benefits under a contract concluded for the benefit of another person intentionally causes the accident by acting illegally.

2. If another person has the right to receive the benefit, he/she shall be deprived of the right if he/she intentionally causes the accident by acting illegally.

Maria Beatrice Pagani

Summary: 1. Analysis of the article. 2. Comparative analysis: Italy. 3. At transnational level. 4. Final considerations.

1. Analysis of the article

Article 856 is situated in the special part of book 3 (Obligations), title I (Contract law), chapter 20 (Insurance), section 5 (Accident insurance).

In particular, the Article in question provides for the case where the beneficiary of a contract concluded in favour of another person or the person entitled to receive compensation intentionally causes the accident by acting unlawfully. This situation relieves the insurer of any obligation and excludes the beneficiary from any right of collection[1], thereby ensuring the actual reason of the insurance contract and the compliance with the general principles that an obligation cannot be the result of an infringement, unjust enrichment or other reasons prescribed by law[2] and the parties may also conclude contracts not provided for by the same but not in contravention[3].

It is noted that similar rules are provided for each specific type of insurance contract.

About the insurance against damages, Article 829 states the release of the insurer from all obligations if the insured event has been caused intentionally or through significant negligence by the policyholder[4]. This Article plays a fundamental role because it defines the degrees of

1 *Civil code of Georgia*, article 856, in www.ilo.org
2 *Civil code of Georgia*, article 317, in www.ilo.org
3 *Civil code of Georgia*, article 319, in www.ilo.org
4 *Civil code of Georgia*, article 829, in www.ilo.org

intentionality that can be considered, widening the spectrum to all those cases in which the event is determined also because of a serious, albeit unintentional, bad conduct of the person who concluded the contract. Not only, in the context of insurance against damages, there is also a further provision to clarify even more the concept of intentionality, in fact, Article 830 establish the obligation for the policyholder to follow the instructions of the insurer to avoid or reduce damages, of course, as far as possible, including eventual reimbursement by the insurer for expenses incurred in this regard[5]. Special rules are applied to cases in which the damage is caused by war or other force majeure causes, for which a special agreement is required[6], and to cases in which the damage is caused by a third party outside the insurance relationship[7].

Other provisions similar to the one under consideration are also found in the area of civil liability insurance, for which Article 842 is relevant. It merely refers to a circumstance caused intentionally by which liability arises[8], and in the field of life assurance, in particular with regard to the provisions of articles 849 and 850 which exclude the insurer obligations when the policyholder intentionally causes the death of the person whose death is covered by the contract, as well as in cases of suicide of the insured (while explicitly providing for the possibility for heirs to claim reimbursement of insurance premiums paid)[9]. It should be noted that the provisions on life insurance contracts, pursuant to Article 854, also apply in the context of accident insurance contracts, if such a contract «is concluded not by the insured person but for his/her benefit»[10].

2. Comparative analysis: Italy

The Italian law does not explicitly deal with accident insurance, which has led to an interpretative dispute as to their systematic place among life insurance, a position prevailing in the case law, or, vice versa, among those against damage, prevailing position in doctrine. However, it can be said that are accident insurance all those insurances which offer to the

5 *Civil code of Georgia*, article 830, in www.ilo.org
6 *Civil code of Georgia*, article 831, in www.ilo.org
7 *Civil code of Georgia*, article 832, in www.ilo.org
8 *Civil code of Georgia*, article 842, in www.ilo.org
9 *Civil code of Georgia*, articles 849 and 850, in www.ilo.org
10 *Civil code of Georgia*, article 854, in www.ilo.org

policyholder a «compensation for damage to the person - resulting from personal injury [...] resulting in death, permanent invalidity (total or partial) or even temporary incapacity»[11].

In insurance policies the accident is defined as an event due to accident, violence and external.

Therefore the causes must be completely independent of the will of the person who suffers it, or in any case that would benefit from compensation, moreover, the action must be sudden and abrupt, as well as linked to factors external to the body[12]. It necessarily follows that the voluntary cause of the event from which the accident arises, regardless of the illegality or otherwise of the conduct, does not imply obligations for the insurer.

However, before referring to the general framework, certainly applicable to accident insurance contracts, and to other provisions which are considered to be relevant, a further consideration should be given to the general theory of contracts. In fact, the present case, not only would lead to an imbalance in the synallagmatic relationship but, a contract that provided for benefits resulting from the execution of unlawful acts, would be considered entirely or partially void, in other words, an invalidity to which neither the passage of time nor the acquiescence of the parties can remedy. In particular, pursuant to Article 1418 of the Italian civil code, «the contract is null and void where it is contrary to mandatory rules, unless the law provides otherwise»[13]. In particular, as far as our interest is concerned, reference should be made to the illegality of the contract that occurs for: illegality of the case, illegality of the object, illegality of the reason and illegality of the condition. The case, the object or the condition are considered unlawful when they are contrary to «imperative rules, public order or morality»[14] or when «the contract is the means to circumvent the application of an imperative rule»[15]. For the unlawful reason, reference is made instead of the provisions of Article 1345 of the civil code[16].

11 M. Irrera, E. Fregonara, M. Spiotta, *Lineamenti di diritto assicurativo*, Torino, 2019, 205 ss.

12 Mizar International Insurance Broker s.r.l., *La causa fortuita, violenta ed esterna*, in www.mizarbrokers.it

13 G. Iudica, P. Zatti, *Linguaggio e regole del diritto privato*, Vicenza, 2015, 346 ss.; *Codice civile italiano*, articolo 1418, in www.normattiva.it

14 The latter refers to "current morality". G. Iudica, P. Zatti, *Linguaggio e regole del diritto privato*, *cit*., 350.

15 *Codice civile italiano*, articoli 1343, 1344, 1346 e 1354, in www.normattiva.it

16 *Codice civile italiano*, articolo 1345, in www.normattiva.it

In the light of the specific rules governing insurance, reference should be made to Article 1900 of the Italian civil code, which provides, in general, for all types of insurance contracts[17] and in accordance with the general rules governing the principle of authorship[18], an ex lege definition of insurable risk[19]. In fact, according to the norm, the insurer is not obliged «for the claims caused by wilful misconduct or gross negligence of the policyholder, the insured or the beneficiary, unless otherwise agreed for cases of gross negligence»[20]. The derogation is therefore only allowed in the second case and must be expressed and approved specifically in writing[21], an exception to this general provision is found, however, in cases of insurance for civil liability in which the claim caused by gross negligence is included in the insurance guarantee unless otherwise agreed[22]. Not only that, according to the general discipline of the obligations, «if the fault of the creditor has contributed to the damage, the compensation is decreased according to the gravity of the fault and the entity of the consequences that have derived from it»[23].

It is specified that the insurer is obliged «for the accident caused by intent or gross negligence of the persons to whom the insured has to answer», the identification of which is the subject of debate but is essentially linked to the provisions of Article 2047, 2048, 2049 and 2051, 2052 of the

17 Although its applicability to life insurance is debated as unrelated to the principle of indemnity. However, the rules of articles 1922 and 1927 seem to admit, albeit with some beveling, such norm.

F. Arangio, D. Colangeli, G. Iorio, A. C. Marrollo, M. Palisi, M. Perreca, F. Santi, *Sinistri cagionati con dolo o colpa grave dell'assicurato o dei dipendenti,* in *Commentario al codice civile*, a cura di P. Cendon, Milano, 2010, 342.; A. Bracciodieta, *Il contratto di assicurazione, disposizioni generali*, Milano, 2012, 184.; *Codice civile italiano*, articoli 1922 e 1927, in www.normattiva.it. With specific reference to accident insurance including the event of death, article 1900 of the Italian Civil Code was deemed applicable, specifying, however, that the insurer has the right to refuse the payment of compensation only against the culprit. «The other beneficiaries not participating in the crime remain due compensation, but must be reduced from the share due to the beneficiary murderer». M. Rossetti, *Sinistri cagionati con dolo o colpa grave dell'assicurato o dei dipendenti*, in AA. VV., *Le assicurazioni*, a cura di A. La Torre, Milano, 2019, 157.

18 F. Peccenini, *Assicurazione*, Bologna, 2011, 155.; *Codice civile italiano*, articolo 1227, in www.normattiva.it

19 M. Rossetti, *Sinistri cagionati con dolo o colpa grave dell'assicurato o dei dipendenti*, *cit.*, 156.

20 *Codice civile italiano*, articolo 1900 co. 1, in www.normattiva.it

21 Cass. Civ., Sez. I, 8 giugno 1988, n. 3890.

22 F. Peccenini, *Assicurazione*, *cit.*, 89.; *Codice civile italiano*, articolo 1917, in www.normattiva.it

23 *Codice civile italiano*, articolo 1227 co. 1, in www.normattiva.it

Italian civil code[24], or «for the consequent claims of the policyholder, the insured or the beneficiary, made out of duty of human solidarity or in the protection of the common interests of the insurer»[25].

In these two cases, in fact, there is no interest of the agent contrary to the occurrence of the accident, indeed, in the latter there is even a moral duty, dictated by rules of civil coexistence generally shared in a given community and at a given time[26].

At this point it seems essential to clarify the concepts of intent and gross negligence, so the support of criminal discipline is fundamental, especially with reference to the issue of guilt[27].

In Italy, as in the Georgian system[28], there are different degrees of culpability. The wilful misconduct, similar to intentional crime, is the most serious form and occurs if the harmful event consequence of the action/omission is planned and wanted[29]. If initially the main guideline was to restrict the scope of Article 1900 of the Civil Code only to cases of specific intent, in which conduct was therefore required for the purpose of obtaining a compensation, today the application is also extended to cases of generic willfullnes[30].

24 The articles are about: incapacitated, emancipated minors or persons subject to protection and supervision, things in custody and owned animals. F. Arangio, D. Colangeli, G. Iorio, A. C. Marrollo, M. Palisi, M. Perreca, F. Santi, *Sinistri cagionati con dolo o colpa grave dell'assicurato o dei dipendenti, cit.,* 340.

25 *Codice civile italiano*, articolo 1900 commi 2 e 3, in www.normattiva.it

26 M. Rossetti, *Sinistri cagionati con dolo o colpa grave dell'assicurato o dei dipendenti*, *cit.*, 162; A. Gambino, *Assicurazione*, in *Enciclopedia giuridica*, Roma, 1988-2010, 9.

27 A. Bracciodieta, *Il contratto di assicurazione, disposizioni generali*, Milano, 2012, 185 ss.

28 «An act committed with direct or indirect intent shall constitute an intentional crime. An act shall be considered to have been committed with direct intent, if the person [who commits it] is aware of the unlawfulness of the act, foresees its unlawful consequences and desires those consequences, or foresees the inevitability of the occurrence of such consequences. An act shall be considered to have been committed with indirect intent if the person was aware of the unlawfulness of his/her action, was able to foresee the occurrence of the unlawful consequences and did not desire those consequences, but consciously permitted them or was negligent about the occurrence of those consequences. […] An act that has been committed through reckless misconduct or negligence shall be considered a crime of negligence. An act shall be considered to have been committed with reckless misconduct if the person was aware that the act was prohibited under the standard of care, foresaw the possibility of the occurrence of the unlawful consequences, but groundlessly counted on their being prevented. An act shall be considered to have been committed with negligence if a person was not aware that of the act was prohibited under the standard of care, did not foresee the possibility of the occurrence of the unlawful consequences, although he/she was obliged and was able to foresee them. An act committed through negligence shall be considered a crime only if so provided by the relevant article of this Code».*Criminal code of Georgia*, articles 9 and 10, in www.legislationonline.org

29 *Codice penale italiano*, articolo 43, in www.normattiva.it

30 F. Arangio, D. Colangeli, G. Iorio, A. C. Marrollo, M. Palisi, M. Perreca, F. Santi, *Sinistri cagionati con dolo o colpa grave dell'assicurato o dei dipendenti, cit.*, 335.

The fault, however, similar to crimes of negligence, occurs when the event, even if predicted, is not wanted by the agent but are broken precautionary rules of care, prudence and expertise which should be respected in the specific situation by the person concerned, without reference to the nature of the professional activity of the person[31]. If the broken rules are of social origin, they refer to general fault, but if they are legal, they are a specific fault. The fault is defined as gross when the violation is of particular importance, that is, if there is a «failure to use that minimum of care even of the most inconsiderate people or as conscious behaviour of those who, even without the will to cause damage, operate with extraordinary and inexcusable imprudence [...] or as omitted minimum observance of the diligence»[32]. According to Article 1900, therefore, all cases in which the precautionary rules are breached but without conduct of particular seriousness, through negligence, meaning that the prescribed conduct is not taken, imprudence, in the sense of realising what should not be achieved, or incompetence, in the event that particular technical skills are involved, are covered by the insurer.

The Italian jurisprudence has also outlined further concepts designed to reflect the many facets, often characterized by blurred boundaries and debates, which may take on reality, in particular the eventual intention, in which, despite the lack of will of the event, the risk of its realization is accepted resulting from the maintenance of a given conduct, and conscious guilt, in which, despite the awareness of the possibility of certain consequences, is trusted in their non-implementation[33].

The application of Article 1900 in the event of such situations is uncertain, however, whether an applicability in the event of intentional conduct seems more secure since, the absence of will would be compensated by

31 F. Arangio, D. Colangeli, G. Iorio, A. C. Marrollo, M. Palisi, M. Perreca, F. Santi, *Aggravamento del rischio*, *cit.*, 335 ss.; Cass., 28 marzo 1994, n. 2995.; *Codice penale italiano*, articolo 43, in www.normattiva.it; *Codice civile italiano*, articolo 1176, in www.normattiva.it

32 F. Arangio, D. Colangeli, G. Iorio, A. C. Marrollo, M. Palisi, M. Perreca, F. Santi, *Aggravamento del rischio*, *cit.*, 335 ss.; G. Fiandaca, E. Musco, *Diritto penale, parte generale*, Torino, 2019, 363 ss.

33 S. Canestrari, *La distinzione tra dolo eventuale e colpa cosciente nei contesti a rischio di base "consentito"*, in *Diritto penale contemporaneo*, 2013, p. 1 ss. In order to clarify the complex distinction between these two concepts, the Thyssenkrupp case, which saw the process of the CEO, of the members of the executive board, of the director and of two executives in charge of occupational safety, who managed, or should have managed, the Turin plant in which, on the night of 5-6 December 2007, seven workers were killed in a fire.

A. Aimi, *Il dolo eventuale alla luce del caso Thyssenkrupp*, in *Diritto penale contemporaneo*, 2014, p. 1 ss.

the acceptance of the risk of the event[34], in cases of conscious negligence the Article is considered relevant only if the conduct held, while relying on the non-implementation of the fact, was the result of a serious breach of precautionary rules.

The criminal discipline also helps in reference to the definition of the causal relationship between the conduct held by the insured, the contractor or the beneficiary and the actual realization of the damage[35]. In this sense, the most well-established doctrine is that of the *conditio sine qua non*, which over time has been accompanied by several corrective, which resort to a «process of mental elimination of conduct» to identify whether the conduct of the person was necessary for the occurrence of the event[36]. The vision presented here is fundamental to resolve also issues arising from the presence of multiple cases in competition[37]. Moreover, Article 40 paragraph 2 of the penal code states that not preventing an event that you have the legal obligation to prevent, is equivalent to causing it[38].

This perspective can be found also in all those rules, present both in the Italian[39] and in the Georgian[40] civil code, on the obligation to rescue[41].

34 Although the need to capture the c.d. "*psychological substance*" of the agent poses many problems.

G. Losappio, *Formula BARD e accertamento del dolo eventuale*, in *Diritto penale contemporaneo*, 2017, p. 1 ss.

35 «No one may be punished for an act foreseen by the law as a crime, if the harmful or dangerous event, on which the existence of the crime depends, is not a consequence of its action or omission». Even in cases of concurrent causes the causality relationship is not automatically excluded. *Codice penale italiano*, articoli 40 comma 1 e 41, in www.normattiva.it; Cass. Civ., Sez. III, 14 aprile 2005, n. 7763. See also article 8 of the Georgian criminal code. *Criminal code of Georgia*, article 8, in www.legislationonline.org

36 G. Fiandaca, E. Musco, *Diritto penale, parte generale, cit.,* 241 ss.; AA. VV., *Sinistri cagionati con dolo o colpa grave dell'assicurato o dei dipendenti*, in *Commentario breve al codice civile*, a cura di G. Cian, Padova, 2020, 2049. In the case of insurance contracts, all those measures which, by being part of the causal process, are likely to prevent the damage from being fully or partially realized, must be regarded as rescue measures. Cass. Civ., 28 gennaio 2005, n. 1749.

37 *Codice penale italiano*, articolo 41, in www.normattiva.it. See also article 8 of the Georgian criminal code. *Criminal code of Georgia*, article 8, in www.legislationonline.org

38 *Codice penale italiano*, articolo 40, comma 2, in www.normattiva.it

39 *Codice civile italiano*, ad esempio articolo 1914 ss., in www.normattiva.it The article referred to is inserted in the section on non-life insurance. In Italy, as already mentioned, there is no a specific section devoted to accident insurance, which has opened a dispute on the interpretation of their collocation, according to the jurisprudence prevailing in life insurance and, according to the prevailing doctrine, in insurance against damages. In addition, there are also intermediate positions that consider such contract as a tertium genus.

M. Irrera, E. Fregonara, M. Spiotta, *Lineamenti di diritto assicurativo, cit.,* 206. The rule referred to, even with all the necessary measures in specific cases, seems to be a sort of corollary of the provision that the insurer is relieved of liability if the accident is caused by intent or gross negligence of the insured, of the contractor or beneficiary.

40 *Civil code of Georgia*, ad esempio articolo 830, in www.ilo.org

41 To be understood as the duty of the insured to do everything possible to avoid or reduce the damage. Cass., 29 maggio 1980, n. 3533.

The rules in question «therefore require the policyholder to conduct specific action», pursuing the dual purpose of protecting the interest of the insurer and promoting the general interest in public order, in the prevention of accidents and in the limitation of their consequences, avoiding that the insurance contract becomes a means of profit[42].

According to the prevailing doctrine and jurisprudence, this obligation arises not as a result of the conclusion of the contract and of the insurance cover, but rather as a result of the phase of materialisation of the risk[43]. Moreover, the binding norm[44] that states the costs incurred in order to avoid or reduce the damage shall be borne by the insurer, albeit in proportion and «unless the insurer proves that the costs have been incurred on an unreasonable basis»[45] , provides further protection against the fact that the concern to incur in excessively expensive expenses become a hindrance to the rescue effort[46].

All the provisions examined above are therefore intended to prevent that the policyholder, the insured or the beneficiary, with the aim of making a profit on compensation, causes the harmful event voluntarily and, therefore, also to maintain public order[47]. However, if the accident is the result of the behaviour of a third party of which the policyholder, but also the insured or the beneficiary, is not liable, obviously not determined by unlawful agreements otherwise the *ratio* of the norm would be lost.

In procedural terms, such a situation constitutes an impediment to the guarantee claim, so that the burden of proof of the presence of intent or gross negligence rests upon the insurer, unless otherwise provided for in the contract, in any case in compliance with the provisions of Article 2698 of the civil code. The insurer may also produce evidence collected in criminal proceedings in civil proceedings[48].

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42 F. Arangio, D. Colangeli, G. Iorio, A. C. Marrollo, M. Palisi, M. Perreca, F. Santi, *Obbligo di salvataggio,* in *Commentario al codice civile*, a cura di P. Cendon, Milano, 2010, 498.; F. Peccenini, *cit.*, 89.

43 S. Toffoli, *Obbligo di salvataggio*, in AA. VV., *Le assicurazioni*, a cura di A. La Torre, Milano, 2019, 259.

44 *Codice civile italiano*, articolo 1932, in www.normattiva.it

45 *Codice civile italiano*, articolo 1914 co. 2, in www.normattiva.it

46 F. Pecennini, *Assicurazione, cit.*, 157.

47 A. Bracciodieta, *Il contratto di assicurazione, disposizioni generali*, Milano, 2012, 183.

48 F. Pecennini, *Assicurazione, cit.*, 90. «The terms under which the burden of proof is reversed or modified shall be void where the rights of the parties are not available to them or where the reversal or modification has the effect of making it excessively difficult for one of the parties to exercise the right». *Codice civile italiano*, articolo 2698, in www.normattiva.it; F. Arangio, D. Colangeli, G. Iorio, A. C. Marrollo, M. Palisi, M. Perreca, F. Santi, *Sinistri cagionati con dolo o colpa grave dell'assicurato o dei dipendenti, cit.,* 336.

3. At transnational level

A comparative analysis of foreign insurance legislation is characterised by many problems. In fact, although there are similar characteristics resulting from the presence of common economic objectives and harmonisation processes, the subject of insurance is very influenced by the peculiarities of the context in which it is inserted[49].

With regard to the Spanish legal system, are important the civil code[50], in particular the *libro cuarto* (*De las obligaciones y contratos*), and the *Ley 50/1980, de 8 de octubre, de Contrato de seguro*, which dedicates the entire *Sección tercera* of the *título III* to the "*seguro de accidents*"[51].

Here too there is a general requirement similar to the present one, in particular according to Article 17 of the law of 1980: «[t]he policyholder or the insured must use the means at his disposal to reduce the consequences of the accident» otherwise the insurer will be entitled to reduce the benefit in proportion to the extent of the damage and to the degree of fault of the policyholder[52]. In addition, if the breach «occurs with the manifest intention of harming or deceiving the insurer, the insurer will be exempt from all the obligations arising from the event». Also in this context, the costs arising from the fulfilment of the obligations in question are borne by the insurer up to the contractual limit and if not inadequate or disproportionate[53].

In France, on the other hand, the discipline of insurance should always be sought in the civil code[54] and in the Code des assurances, also with a specific part dedicated to "*Accès à l'assurance contre les risques d'invalidité ou de décès*"[55], which refers to the public health code[56].

For what is of interest here, Article L113-1 states that the insurer is not liable for losses and damages resulting from the policyholder's wilful intent[57]. In addition, Article L113-11, according to which all the general clauses of loss of the benefit of the policyholder in case of violation of

49 R. Capotosti, *Assicurazione*, in *Enciclopedia giuridica*, Roma, 1988-2010, 1.
50 *Real decreto de 24 de julio del 1889 por el que se publica el Código civil*, in www.boe.es
51 *Ley 50/1980, de 8 de octubre, de Contrato de seguro*, in www.boe.es
52 S. Toffoli, *Obbligo di salvataggio, cit.*, 267.
53 *Ley 50/1980, de 8 de octubre, de Contrato de seguro*, artículo 17, in www.boe.es
54 *Code civil*, in www.legifrance.gouv.fr
55 *Code des assurances*, in www.legifrance.gouv.fr
56 *Code de la senté publique*, in www.legifrance.gouv.fr
57 *Code des assurances*, article L113-1, in www.legifrance.gouv.fr

laws or regulations are void, unless such violation constitutes an unlawful act[58]. «French law is noteworthy for not providing for the rescue obligation. This can be translated in contractual clauses providing as a penalty the forfeiture of the right to compensation (or the reduction of the same), which are considered valid only if properly precise and well-highlighted typographically»[59].

In Switzerland, on the other hand, the most important texts are: the federal law of the completion of the Swiss civil code (book five: Law on obligations)[60] and the federal law on insurance contracts[61].

Article 14 of the federal law on insurance contracts relieve the insurer of any liability where the accident was caused intentionally by the policyholder or the person entitled, whereas in cases of gross negligence it provides for a proportionate reduction of the insurer's obligations according to the degree of fault of the agent. It should also be noted that this reduction is also allowed when the accident is the result of the intentional or gross negligence of «the person living with the stipulating or entitled person» and of «the person whose acts they are responsible for, […] if the contracting party or the person entitled has committed serious negligence in the supervision of that person, either by taking her to his service or by admitting her to himself»[62].

Variations are not allowed instead for slight fault and even if the persons considered above acted for the duty of humanity[63]. In addition, the Swiss legislation also includes a rescue obligation[64], and a regulation of rescue costs, which must be reimbursed by the insurer where not manifestly inappropriate[65].

58 *Code des assurances*, article L113-11, in www.legifrance.gouv.fr

59 S. Toffoli, *Obbligo di salvataggio, cit.*, 266.

60 *Legge federale di complemento del codice civile svizzero (libro quinto: diritto delle obbligazioni) del 30 marzo 1911*, in www.admin.ch; *Codice civile svizzero del 10 dicembre 1907*, in www.admin.ch

61 *Legge federale sul contratto di assicurazione del 2 aprile 1908*, in www.admin.ch

62 *Legge federale sul contratto di assicurazione del 2 aprile 1908*, articolo 14, in www.admin.ch

63 *Legge federale sul contratto di assicurazione del 2 aprile 1908*, articoli 14 comma 4 e 15, in www.admin.ch

64 *Legge federale sul contratto di assicurazione del 2 aprile 1908*, articolo 61, in www.admin.ch

65 *Legge federale sul contratto di assicurazione del 2 aprile 1908*, articolo 70, in www.admin.ch

4. Final considerations

Article 856 therefore plays a fundamental role in the discipline of the insurance contract, not only for the protection of the insurer's interest, avoiding that the contract becomes a means of profit for the other party, but also of the general interest in public order, accident prevention and limitation of their consequences.

In fact, although the Article in question is placed within the framework of the accident insurance, as noted, there are similar articles, albeit with some nuances in terms of guilt, in the regulation of each specific insurance contract.

The conduct envisaged could be capable of excluding the obligations of the insurer even by reference to the general discipline of the obligations, but the rule in question, like all other similar rules, respond to a need for legal clarity. At this point, however, it seems appropriate to point out that, in order to minimise the possibility of doubts, thereby also contributing to the objective of deflating litigation, it would be appropriate to provide explicitly, with reference to each contract under examination, also obligations on the insurer when the event is determined by persons to whom the insured person is liable or when the event was committed for reasons of human solidarity or in the protection of the insurer's common interests, as is in Italy and in other country previously analysed.

Article 857 - Duty to notify accidents

If the duties are to be performed for the benefit of the person entitled to benefits, then this person shall make a declaration about the accident. This rule shall also apply to the duties of communicating information and handing over documents.

Sabrina Darbali

Summary: 1. Introduction. 2. The Georgian Law. 3. Comparison with French law. 4. Comparison with Moroccan Law. 5. Comparison with Canadian Law. 6. Conclusion

1. Introduction

Since there is no such thing as zero risk, when an accident occurs, no matter how minor, we are constantly wondering about the possible consequences, particularly with regard to the duty to notify the accident, as well as the duty to communicate information and to provide documents.

The duty to notify an accident is a fundamental obligation of the Insured, which is specific to this contract of good faith in which the Insurer must rely on the Insured's statements to assess the risk that he will have to cover and to classify it in the risk categories listed in his statistics. Since the insurance contract is a contract of successive performance which will be adapted to changes in risks which may occur, the Insured must declare any subsequent changes in the risk.

2. The Georgian law

According to Article 857 on the duty to notify an accident (the fifth point entitled "Accident insurance", chapter twenty "Insurance" - Civil Code of Georgia). The purpose of Article 857 is to specify the duties to notify the accident, as well as the duties to provide information and documents.

The insured has only one legal duty after the occurrence of the "accident", namely to report the event to the insurer. Generally, this duty must be fulfilled within a specific time limit. Fraudulent or late reporting of the accident may be sanctioned by forfeiture of coverage[1].

1 The delay of the notification allows the insurer to apply the forfeiture, provided that it is foreseen in the contract and that it proves the reality of a prejudice.

When an accident occurs, the insured must notify the insurer within a certain period. In fact, the insured has the duty to notify the insurer, as soon as he/she becomes aware of it and at the latest within the time limits fixed by the contract, of any claim likely to entail the insurer's guarantee. The deadlines may be extended by mutual agreement between the contracting parties. This provision is of public order[2]. The parties may not derogate from it, except in a way that is more favorable to the insured, *i.e.* by extending the time limits.

The declaration of the accident presupposes two facts: firstly, that the risk has indeed occurred and secondly, that it falls within the scope of the insurance cover. Thus, an excluded risk does not have to be reported. On the other hand, when the two facts are met, the insured must declare the accident to the insurer because it is he who bears the consequences. He must be informed quickly in order to defend his interests as best as possible. The insurer is therefore at the mercy of the insured. Indeed, only the insured can assess whether the event will trigger the guarantee, since only he knows about it and can determine whether the event must be reported or not.

3. Comparison with French law

Article L 113-2-4° of the French Insurance Code states that: «the time limit for reporting an accident may not be less than five working days. [...] The above deadlines may be extended by mutual agreement between the contracting parties».

For the Court of Cassation[3], the insured must notify the claim as soon as he is aware of two elements. First, the event constituting the loss, but also the possible harmful consequences likely to entail the insurer's coverage. This second element is much less objective than the first and leaves a margin of appreciation that is all the more important given that the consequences that need to be assessed are future. However, in order for the insured to declare the event quickly, without waiting to know with certainty whether or not the consequence is actually harmful to the insurer, the Court specified that the insured «has a duty to investigate, to the extent of his means, the immediate consequences and those which could be conjectured». Thus, the Court of Cassation admitted that an insured

2 The legal reporting deadlines are public policy, meaning that the parties can extend them but not shorten them.

3 Cass. 1re ch. civ. 21 June 1985, n° 86-15.439, n° 773, " Rgat " 1988, p. 558, note Kullmann.

could be unaware of the harmful consequences of an accident because the victim seemed to have no injuries after the impact and returned home by his own means[4]. Nevertheless, the insured does not have to wait for a possible claim from the victim to report the loss. However, nothing prevents the company from stipulating in the policy that the declaration must be made at the time of the claim. There is then no doubt as to the harmful consequences of the loss. Moreover, such a stipulation is favorable to the insured since it extends the legal time limit for notification[5].

Concerning the form of the accident declaration, article L 113-2-4 of the Insurance Code does not impose any particular form for the accident notification and the insurer cannot require one form to the exclusion of another. However, it should be noted that in the case of damage insurance, the insured must make his declaration in writing, either against a receipt or by registered letter with acknowledgement of receipt (Article A 243-1, Annex II of the Insurance Code). In other insurance policies, the notification can therefore be made by simple letter, but also by telegram or telephone. However, it is obvious that the insured has a particular interest in providing proof of sending the notification, as this proof is incumbent on him/her when the insurer disputes having received it. According to article 1315 of the Civil Code, «he who claims the performance of an obligation must prove it». Conversely, a person who claims to be discharged must justify the payment or the fact that produced the extinction of his duty. Thus, when the insured proves that he or she has made the declaration, or that this point is not contested, it is up to the insurer who claims that the declaration was sent late to provide proof.

Regarding the reporting of accidents to the authorities, the only legal duty of the insured after the accident is to report the event to the insurer. However, the policy may include other duties. For some coverages, the

4 Cass. soc, February 24, 1965, n° 63-12.345, n° 233, " Rgat " 1996, p. 472.

5 The insured must notify the accident as soon as he/she becomes aware of it, so as to allow the insurer to make the necessary investigations. However, article L 113-2 of the Insurance Code provides for minimum time limits to allow the insured to make a claim. The insurer cannot therefore set shorter time limits. The common law time limit for reporting a claim cannot be less than five working days. Saturdays, Sundays and public holidays are therefore not taken into account. This period is reduced to two working days for theft and twenty-four hours for livestock mortality. According to article L 123-1 of the Insurance Code, it is four days for damage caused by hail. Finally, claims due to natural disasters must be declared within ten days of the publication of the ministerial order recognizing the state of natural disaster (Article A 125, Annex I (e) of the Insurance Code). There is no time limit for life insurance. The jurisprudence has specified that the day of the disaster does not count. The time limits therefore only start to run from the day after the accident occurred, or the day the insured became aware of it.

insured must report the accident to the authorities. Thus, the delay in the execution of these contractual duties is sanctioned according to the rules of common contract law. Article L. 113-11 of the Insurance Code prohibits forfeiture in the event of delay in reporting to the authorities. The only sanction allowed for such breaches consists of compensation proportional to the loss suffered. The damages can then be offset against the indemnity due to the insured.

4. Comparison with Moroccan Law

The Moroccan Insurance Code imposes a number of duties on insurers with regard to the management and compensation of accident cases, and the insured is required to declare the occurrence of the accident in question.

Thus, Article 12 of the Moroccan Insurance Code sets out the insured's duties at the time of subscription with regard to the declaration of the accident and other insurance policies covering the same risk, while specifying the conditions and modalities of the declaration to be made in the event of a claim. Therefore, in the first letter you will receive from your insurer after the declaration, the insurer must decide whether you are entitled to full or partial compensation. If you are partially entitled to compensation, the insurer must explain to you why it is holding you responsible.

It is also important to know that the insurers have signed an agreement with each other which regulates the rules of sharing according to the circumstances of the accident. Thus, it happens that even when you are not responsible, but because the circumstances of the accident make it fit in such or such other case, your insurer retains you a share of responsibility. You are under no duty to accept this. If you believe that you are not at fault for the accident, you will have to contest the insurer's decision and provide all the necessary explanations to allow him to re-evaluate your case.

The insurer must also tell you on behalf of which insurer it is acting, the time limits for compensation, your duties as a victim, etc.

In Morocco, there are two distinct classifications of the duty to report accidents, I will mention the duty to report accidents at work (or work accident) and traffic accidents.

– The « work accident » insurance.

In Morocco, work-related accidents are currently subject to Law No. 18-12 on compensation for work-related accidents. Promulgated in 2015, this law introduced, for the first time in Morocco, the mandatory conciliation procedure between the insurance company and the victim, the revision of certain indemnities and the adaptation of the civil procedure. It also defines the declaration procedure, rights and duties of the parties involved.

All employers subject to the provisions of the Dahir of July 27, 1972 relating to the social security system are obliged to subscribe to an "occupational accident" insurance. The same applies to local authorities and public establishments not covered by the civil service or the social security system. Workplace accident insurance is a liability insurance policy taken out by the employer for the benefit of his employees to cover them against the risks they incur in the course of their professional activity.

– In case of a « traffic accident/car accident ».

When the insured is the victim of a traffic accident, whether he is responsible or not, victim or passenger of one of the vehicles involved, if the police forces are not called to the scene of the accident, the first act to be done is to fill in the accident report form.

A good accident report is the guarantee of a good compensation procedure. Check the boxes corresponding to the circumstances of the accident, make a sketch and give all the necessary explanations on the front of the form. When the police or the gendarmerie are called to the scene of the traffic accident, the officers will record the identities of the persons involved in the accident and of any witnesses. When the accident has only resulted in minor injuries, the police officers will often write a handout, indicating the identity of the parties and the circumstances of the accident;6 when the injuries are serious, they will write a police report. In some cases, there is an investigation that can lead to proceedings before the Criminal Court, if serious offences are found.

6 In the event of an injury, even a minor one, it is strongly recommended that you consult a doctor or an emergency room as soon as possible in order to obtain an initial medical certificate detailing your injuries and pain. If the pain does not appear until much later, it is also recommended to consult a doctor who must establish in his certificate the link between the accident and the pain you describe or the injuries that were diagnosed late.

The joint report or the handrail must be sent to the insurer within 5 days from the day of the traffic accident. But before sending one of these documents, it is possible to make an accident declaration by means of a telephone call. Then, to be attached with the statement, all documents useful for a better understanding of the circumstances of the traffic accident (photo of the accident site, identity of witnesses, medical certificate or hospitalization certificate). Upon receipt, the insurer will determine the responsibilities of each party. To avoid any difficulties, it is therefore important to pay particular attention to the drafting of the report.

5. Comparison with Canadian Law (Province of Quebec)

The main provisions which the legislator deemed as appropriate to enact with respect to the duty to declare an accident are, for the most part, set out in the Civil Code, and more particularly in articles 2485 to 2489 of that Code. We must also add to these rules section 240 of the Quebec Insurance Act.

The principles set out in this section impose on the insured the duty to inform the insurer of all facts and circumstances that may have an influence on his opinion of the accident. It is clear that this is a very subjective dimension of the mandatory regime of the initial declaration of accident and that, moreover, it is far from being in the insured's favour. The reason for this is that at the time of codification, the insured was in a better position than the insurer with respect to the perception of the accident in question. The imbalance at that time, however, has been significantly reduced due to the professionalism of the insurer. Consequently, the disclosure of a claim today appears to be a joint effort by the insurer and the insured, an effort that must be marked by mutual cooperation.

The provisions of the Civil Code were enacted as part of a unitary approach to the duty to disclose. Their legislative framework is an eloquent testimony to this and leaves no doubt about it. These provisions are located in Division 2 of Chapter 1 of the Title of Insurance and Chapter 1 is entitled "General Provisions".

If the Quebec legislator had wanted to particularize the initial accident notification regime according to the type of insurance contemplated, he would not have done so. The intention of the Quebec legislator is clear. In fact, it was clearly expressed in article 2503 of the Civil Code with respect to marine insurance, article 2568 of the Civil Code with respect to

fire insurance, and article 2585 of the same code with respect to life insurance, where it was stated that the provisions of Chapter 1 of the Insurance Title generally applied to these types of insurance insofar as they were not incompatible with their specific provisions.

For example, article 2485 of the Canadian Civil Code sets out the facts that must be reported to the insurer in the event of an accident, and it refers to three types of facts:

a. Those which may indicate the nature and extent of the accident (risk);

b. Those which may influence the insurer not to assume the claim in question;

c. Those which affect the premium rate.

The insured must therefore declare to his insurer either the facts which indicate the nature and extent of the accident and which may prevent him from assuming it, or the facts which indicate the nature and extent of the accident and affect the rate of the premium.

This is, at the very least, an inconsistent provision; and the significance of the inconsistency is that there are facts that may prevent a particular insurer from assuming an accident even though they do not affect the nature and extent of the risk.

6. Conclusion

As a party to the insurance contract, the insured, like the insurer, owes several duties. In addition to the payment of the premium, the insured is also subject to reporting duties. These obligations are provided for in several laws and insurance codes world wide.

The accident declaration is the account given by the insured of the accident he caused or of which he is a victim. Insofar as this statement contains a statement of the facts, it can, in certain circumstances, be considered as an admission. According to established case law, a confession is a unilateral act from which evidence can be deduced and which must be made by the party against whom it is made, but which must not be intended to serve as evidence for the opposing party.

Thus, according to all the legislation studied in the Countries chosen for this comparative comment, the duty to report an accident is of considerable importance, insofar as its examination conditions the insurer's

decision as to whether or not to pay for an accident, and the beneficiary of an insurance contract is under a duty to report claims to the insurer as soon as he is aware of them and at the latest within the time limit set out in the insurance contract.

Therefore, most insurance laws require the insured to notify the insurer in case of an accident. This duty is justified because the insurer has a legitimate interest in being informed as soon as possible of the accident; he must know the circumstances and the consequences. The declaration of the accident, in that it describes the facts, can be considered as an admission made by the insured.

Once the accident has taken place, the insurer will bear the burden of the loss. A quick and accurate information is therefore necessary to allow the insurer to take all necessary measures to verify and evaluate the extent of the accident.

Georgian law is in line with these standard and complies with the international state of the art.

Article 858 – No right of recourse

The policyholder has no right of recourse against the person who is liable for the damage.

Giorgi Amiranashvili

Summary: 1. Introduction. 2. The Essence of the Principle of Subrogation. 3. Separation of Subrogation from Similar Institutions. 4. The Current Version of Article 858 and its Shortcomings. 5. Concluding Remarks.

1. Introduction

Insurance provides compensation for damage caused to a natural or legal person under the influence of various harmful factors. Harmful factors can be destructive forces of nature, as well as negative factors of socio-economic nature, etc. Insurance can be considered as an important civil legal guarantee for the protection of the rights of participants in civil turnover[1].

The origin of the insurance relationship between the insurer and the insured person is based on a contract. In this case, the parties relate the existence of certain circumstances (the occurrence of the insurance case) to the outcome of the agreement, i.e. it deals with a conditional transaction[2].

After the occurrence of an insurance accident, a relationship arises between several parties, and the injured person acquires the right to claim the same damages from two different persons simultaneously: From a third party who is liable for the occurrence of the insured event and from the insurer who has incurred the insurance indemnity under the contract[3]. There is a problem of legal redistribution of liabilities between the insurer, the policyholder, and the third party causing the damage[4].

1 M. Tsiskadze, *Legal Regulation of Voluntary Insurance*, Meridiani Publishers, Tbilisi, 2001, 5 (in Georgian).

2 G. Amiranashvili, *Claim for Damages Asserted Against a Third Person (Analysis of the Article 832 of the Civil Code of Georgia)*, in *Justice and Law*, 1(40)'14, 92 (in Georgian).

3 N. Motsonelidze, *Subrogation as Means of Insurer's Claims Satisfaction*, Meridiani Publishers, Tbilisi, 2016, 9 (in Georgian).

4 *Ibid*.

2. The Essence of the Principle of Subrogation

"Subrogation" is a word of Latin origin (*subrogare*), which means the replacement of one object by another[5].

It is used to describe the process by which one party takes the place of another person so that he/she can exercise the latter's rights over a third party in his/her favor[6].

For example, if "A" damages "B's" property and at the same time "B" is insured, the insurance company will pay "B" and the latter's tort claim against "A" should be transferred to the company. Hence, subrogation can be seen as a means of avoiding unjust enrichment of "A"[7].

It is true that the Georgian lawmaker does not use this term in the Civil Code but substantively reinforces it in Article 832. According to the first sentence of paragraph 1 of this article, «[i]f the policyholder can assert a claim for damages against a third party, then the claim shall be transferred to the insurer if it pays the damages to the policyholder». Such a transfer of the right to claim is known as the principle of "subrogation"[8].

3. Separation of Subrogation from Similar Institutions

Through subrogation, instead of the policyholder, the insurer has the right to claim compensation for the damage caused by the insurer's property interest encroached within the issued insurance indemnity[9].

In this case, the content and nature of the obligation do not change, because the obligation to compensate the damage caused by a third party, i.e., the person who caused the damage, arises within the framework of a tort. The one thing that is changed is the creditor. No new claim arises, only the creditor changes. To be clear, the affected policyholder is replaced by the insurance company. In such a case, there is an assignment of claims (cession), which is regulated in Article 199 of the Civil Code of Georgia[10].

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5 G. Amiranashvili, *Right of Subrogation Disallowed (Legislative Improvement Issues of the Article 858 of the Civil Code of Georgia)*, in *The Student Law Journal*, 2011, 19 (in Georgian).

6 *Ibid.*

7 *Ibid.*

8 M. Tsiskadze, *Article 832*, in *Commentary to the Civil Code of Georgia*, *Volume 4*, *Law of Obligations*, *Special Part*, *Part II*, Samartali Publishers, Tbilisi, 2001, 153 (in Georgian).

9 G. Amiranashvili, *Right of Subrogation Disallowed (Legislative Improvement Issues of the Article 858 of the Civil Code of Georgia)*, *cit*., 21 (in Georgian).

10 *Ibid.*

One of the important differences between subrogation and cession is that during cession an agreement is made to cede the right to claim. In case of subrogation, the transfer of rights takes place not by the agreement, but by the payment of insurance premium in the event of an insured accident, this payment is made by the new creditor to the original one. Consequently, the cession is carried out as a result of the will of the creditor, while the subrogation takes place by the force of law. Thus, subrogation differs from ordinary cession in that the transfer of claim takes place not on the basis of an agreement but on the basis of law[11].

It is also important to define the different meanings of the right to recourse and subrogation when analyzing the Article under consideration. The notions of subrogation and the right to recourse are unsystematically and vaguely established in the insurance regulations of the Civil Code. For insurance doctrine and practice, it is essential to separate these two institutions and determine their interdependence[12].

It is also important to note that subrogation is one of the most common forms of recourse claims. The right to recourse as a legal institution has been narrowly defined by the Supreme Court. This is evidenced by the meaning of the word recourse – reverse and includes the right of recourse arising both through a change of creditor and on the basis of a new obligation[13].

The difference between subrogation and the right of recourse is that during the latter, not the person is replaced in an existing obligation, but the tort is terminated, and a new obligation arises. In case of recourse, one obligation replaces another, and in case of subrogation, only the creditor is changed, while the obligation itself remains unchanged[14].

According to the Supreme Court of Georgia, Article 832 does not provide for the right of recourse. As stated by the Court of Cassation, this regulation envisages a change of creditor in a tort liability and not the right to recourse, because the essence of the obligation itself remains unchanged[15].

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11 *Ibid.*

12 K. Iremashvili, *Article 858*, *in Online Commentary of the Civil Code*, https://gccc.tsu.ge/, 16.03.2016, 2 (in Georgian).

13 R. Rogava, *Scope of Transfer of the Right to Claim Damages to the Insurer and its Limitation Period*, in *The Student Law Journal*, 2013, 20 (in Georgian).

14 G. Amiranashvili, *Right of Subrogation Disallowed (Legislative Improvement Issues of the Article 858 of the Civil Code of Georgia)*, *cit*., 21 (in Georgian).

15 K. Benashvili, *The Principle of Subrogation in the Civil Code of Georgia and its Relation to the Compensation of Damages by Recourse and Cession*, in *ALFG Journal*, №5, 2018, 96 (in Georgian).

This provision does not exclude the unity of the functional purpose of the institutions of subrogation and recourse, which is reflected in the reimbursement of the insurance indemnity (which is at first issued by the insurer), carried out by the debtor responsible for the damage[16].

Scientists agree that subrogation and the right to recourse have common signs[17], namely, there are varieties of both claims that are aimed at getting the money back[18]. The formal basis for the origin of both relations is the law, and as for the material basis, it is the performance of an obligation by a third party. The purpose is to prevent the unjust enrichment of either party to the relationship of obligation[19].

In case of both recourse and subrogation, the creditor loses the right to claim. In an event of recourse, this is due to the emergence of a completely new, independent legal relationship with the new parties, where the obligation in which the party was a creditor is only a prerequisite for the emergence of a new legal relationship. In an event of subrogation, the creditor leaves the legal relationship and is replaced by a person who has performed the obligation in his/her favor[20].

As it is known, the subject of a pledge can be not only a thing, but also intangible property, such as a demand. Its peculiarity lies in the fact that the latter is not a physically tangible object. Therefore, when the debtor performs the obligation early, the pledged demand should be replaced by something else. In the Civil Code such an event is called "Substitution".[21]

4. The Current Version of Article 858 and its Shortcomings

Article 858 of the Civil Code of Georgia (No right of recourse) is used in case of accident insurance. As of today, this Article is worded as follows: «[t]he policyholder has no right of recourse against the person who is liable for the damage»[22].

16 G. Amiranashvili, *Right of Subrogation Disallowed (Legislative Improvement Issues of the Article 858 of the Civil Code of Georgia)*, *cit*., 22 (in Georgian).

17 N. Motsonelidze, *Subrogation as Means of Insurer's Claims Satisfaction*, *cit*., 171 (in Georgian); N. Motsonelidze, *Separation of Subrogation from Regress and Cession*, in *Journal of Law*, №1, 2014, 159 (in Georgian).

18 *Ibid*.

19 *Ibid*.

20 *Ibid*.

21 G. Amiranashvili, *Right of Subrogation Disallowed (Legislative Improvement Issues of the Article 858 of the Civil Code of Georgia)*, *cit*., 22 (in Georgian).

22 *Ibid*.

It turns out that if the injured person is insured against an accident and he/she receives the insurance premium from the insurance company or it is given to the beneficiary, then the policyholder has no right to file a recourse claim against the encroaching and claim damages. Thus, the policyholder has no right to claim double compensation for the damage caused by the accident[23].

In determining the purpose of the norm under consideration, it was necessary to focus on the subject of restriction of the right of recourse. According to Article 858, such a subject is a policyholder. However, with a literal explanation of the norm, the goal that the lawmaker should logically reach cannot be achieved in this case. Therefore, the conclusion that the lawmaker refers to the insurer instead of the policyholder should be thoroughly considered[24].

Unfortunately, it is impossible to agree with the expressed opinion, according to which an error in Article 858 of the Civil Code of Georgia is only in one word. In particular, according to this view, at the beginning of the norm, instead of the word "policyholder" there should be an "insured person" (beneficiary)[25].

This view is less responsive to the inaccuracies that actually exist in this norm. It is true that the law distinguishes between "insurer", "insured" and "beneficiary", but in this case, it is not a matter of a terminological error, since these concepts are considered in a unified context in the legal literature within the framework of the relations under consideration[26].

The problem lies in something completely different. To begin with, the title of Article 858 is "No right of recourse". It is necessary to determine the linguistic meaning of the words of the law and for what purpose the lawmaker uses them[27].

What meaning can the word "recourse" be given in this case? According to this title, there is an expectation that this word would imply a

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23 M. Tsiskadze, *Article 858*, in *Commentary to the Civil Code of Georgia*, *Volume 4*, *Law of Obligations*, *Special Part*, *Part II*, Samartali Publishers, Tbilisi, 2001, 179 (in Georgian).

24 K. Iremashvili, *Article 858*, *cit*., 1 (in Georgian).

25 G. Amiranashvili, *Right of Subrogation Disallowed (Legislative Improvement Issues of the Article 858 of the Civil Code of Georgia)*, *cit*., 23 (in Georgian); N. Niavadze, *Subrogation and Recourse in Insurance Law (Comparative Legal Analysis)*, Tbilisi, 2012, 40 (in Georgian).

26 G. Amiranashvili, *Right of Subrogation Disallowed (Legislative Improvement Issues of the Article 858 of the Civil Code of Georgia)*, *cit*., 23 (in Georgian).

27 *Ibid*.

recourse obligation since the word should be used in the sense given to it by a particular legal system[28].

In addition, attention should also be paid to syntactic connection, *i.e.* the interdependence of individual words of the norm. The meaning of the word used in the norm should be clarified not in isolation, but in connection with the text (context).[29]

Therefore, it should be analyzed to what extent the policyholder may have the right of recourse against the person liable for the damage. If the life or health of the insured persons has been damaged, they should have the right to claim tort liability rather than recourse against the person who caused the damage. It should be noted that such an error is not typical for only Georgian reality, as some Russian authors also believe that subrogation is manifested in the insured person's right to recourse[30].

For a thorough analysis of the above definitions, two distinct compositions should be considered separately. On one hand, it is possible to assume that the lawmaker would prohibit the insurer from receiving double compensation. Restriction of the right to file a claim against the person who caused the damage to the policyholder is admissible if he/she has already received compensation from the insurer. However, in such a case it is unclear on what grounds the lawmaker refers to the insurer's tort claim as a right of recourse against the person causing the damage. It is also highly necessary to find out more about the connection between such kind of definition of the norm and personal insurance that is established by the Georgian court practice[31].

In the given formulation, if it is assumed that the right of the insurer to recourse is meant in the norm, it will not bring the right results either, as this would be an indication that the insurer had compensated the injured person and thus replaced the person who caused the damage. The insurer who has given the insurance indemnity to the injured person does not change the person who caused the damage, but fulfills its obligation to the injured party, according to the insurance contract[32].

28 *Ibid.*

29 G. Khubua, *Legal Theory*, Meridiani Publishers, Tbilisi, 2015, 187-188 (in Georgian).

30 G. Amiranashvili, *Right of Subrogation Disallowed (Legislative Improvement Issues of the Article 858 of the Civil Code of Georgia)*, *cit*., 23 (in Georgian).

31 K. Iremashvili, *Article 858*, *cit*., 1 (in Georgian).

32 G. Amiranashvili, *Right of Subrogation Disallowed (Legislative Improvement Issues of the Article 858 of the Civil Code of Georgia)*, *cit*., 23 (in Georgian).

In the wording of Article 858, the lawmaker presumably refers to the insurer and, in case of personal insurance, indicates the restriction of his/her right of subrogation. Such reasoning is consistent with the Georgian practice and, in general, the legal nature of personal insurance. In this regard, it is worth considering the Court's reasoning that the definition of Article 832, as the norm regulating special relations, for the purposes of analogy in life insurance does not meet the objective purposes of the law[33].

It is well known that the law is based on some kind of purpose. It is necessary to find out the objective purpose of the law. A literal definition of the text may conflict with the purpose of the norm[34].

The law is unified insofar as its constituent norms are logically connected with each other and form a unified system. Accordingly, the law should be perceived in conjunction with other norms and not in isolation[35].

In Article 858, the lawmaker implies the principle of subrogation, i.e. this norm relates to Article 832, but in this case, different legal consequence arises. As already mentioned, the term "recourse" is misused in relation to the policyholder. If the policyholder has suffered damage, he/she does not need recourse to anything because he/she can claim tort liability. The insured person itself needs compensation. It turns out that the company should have the right of subrogation against the encroaching within the scope of the insurance indemnity, and this is probably the correct content of Article 858, but it is interesting why the lawmaker prohibits the exercise of this right[36].

Article 832.1 states that if the policyholder can file a claim for damages against a third party, then that claim transfers to the insurer if it reimburses the insured for the damage. If the policyholder renunciates its claim or the right to secure a claim against a third party, then the insurer shall be released from the obligation to reimburse the amount of money for damages it could have received in respect of the right to reimburse its costs. Such a transfer of the right of claim is known as the principle of "Substitution"[37].

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33 K. Iremashvili, *Article 858*, *cit*., 1 (in Georgian).

34 G. Khubua, *Legal Theory*, *cit*., 193 (in Georgian).

35 *Ibid*.

36 G. Amiranashvili, *Right of Subrogation Disallowed (Legislative Improvement Issues of the Article 858 of the Civil Code of Georgia)*, *cit*., 24 (in Georgian).

37 M. Tsiskadze, *Legal Regulation of Voluntary Insurance*, *cit*., 45 (in Georgian).

Article 832.2 also regulates the case when the policyholder was harmed by a family member. According to this norm, if the policyholder's right to compensation for damages applies to the family members living with them, then the transfer of the right is unacceptable if the family member intentionally caused the damage[38].

If during the insurance against damages (Article 832 of the Civil Code) the insurer has the right to first pay the insured person and then demand the encroacher to pay for damages (on the basis of subrogation), there is a different rule in personal insurance. In particular, under the rule of insurance law, the principle of subrogation does not apply to a personal insurance contract. This means that the insurer is not entitled to issue an insurance premium to reimburse the costs incurred for the life or health of its policyholder and then claim that amount from the encroacher. This is due to the peculiarities of personal insurance, which means that insurance assessment is practically impossible here, as life and health are invaluable. In addition, the limit of the amount of money is not restricted, as the restrictive norms by which the insurance against damages was initiated (Art. 820-822 of the Civil Code) do not apply in this case, therefore its determination depends on the agreement of the parties. The persons decide for themselves within what amount to insure his/her life or health. The risk of being overpaid (both from the insurance company and the encroacher) is less in personal insurance. Accordingly, the content of Article 858 should be that, in case of life and health insurance, the insured person should not have the right to subrogate the person liable for the damage[39].

And lastly, the title of the Article should be defined as "No right of subrogation". To formulate the content of the article, let's recall Article 832 of the Civil Code, according to which, «[i]f the policyholder can assert a claim for damages against a third party, then the claim shall be transferred to the insurer if it pays the damages to the policyholder». Based on an analysis of the unity of both of the above mentioned articles, Article 858 can finally be formulated as follows: «[i]f the policyholder can assert a claim for damages against a third party, this claim does not transfer to the insurer, if it compensates the policyholder for damages»[40].

38 *Ibid.*

39 G. Amiranashvili, *Right of Subrogation Disallowed (Legislative Improvement Issues of the Article 858 of the Civil Code of Georgia)*, *cit*., 24 (in Georgian).

40 *Ibid.*

5. Concluding Remarks

Finally, it can be said that despite some shortcomings, the Georgian legislation shares the experience of developed countries in terms of strengthening the rule of subrogation and determining the scope of its action, however, it is necessary to eliminate the existing shortcomings to make better use of this principle in insurance[41].

41 *Ibid.*

ISBN 978-9941-8-5032-5