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*THE HYBRIDIZATION OF THE REGULATORY FRAMEWORK OF INSURANCE CONTRACT LAW: ELEMENTS OF A NEW SETTING****

This article aims to highlight the phenomenon of hybridization of insurance contract law, which started with its emancipation from contract law. The next phase included its internal stratification, stemming from obvious differences between commercial and consumer insurance, and various contractual positions of contracting parties in these different insurance contracts. Two features of insurance contracts regulation are addressed, based on Serbian law as it currently stands, as well as comparative legal analysis. The first feature is that the legislatively envisaged unified regime for insurance contracts is incomplete and inadequate for all manifestations of this contract. The second feature is that regulation of this matter must enable balancing of interests between insurers and insureds, especially consumers. The authors conclude that insurance regulation can only be conducive when simultaneously ensuring protection of the weaker party, protecting insurers from the negligent actions of the insured, while facilitating conduct of insurance business.

Key words: *Contract Law. – Insurance Contract. – Consumer Protection. – Commercial Insurance. – Hybridization.*

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"What do they know of the law of insurance who only the law of contract know."[1]

1. INTRODUCTION

Insurance products have come a long way since Genoa and the year 1347, when one of the first insurance policy was issued in response to the need to protect goods in transit (Masci 2011, 30). The insurance industry has continuously expanded, to the extent that it now represents every risk management tool indispensable to society. Yet, the development of both the regulatory and contract insurance law legal frameworks has been anything but straightforward. The process has been lengthy and surprisingly is still ongoing, which results in certain answers being sought due to the rapid pace of development in the insurance industry and to which legislation sometimes lacks an immediate response. This phenomenon is particularly noticeable in the context of insurance contract law, which constantly faces the aforementioned challenge of adapting to the evolving nature of insurance business. At various stages of insurance development, contracting parties have essentially created something entirely new, namely a new form of transaction that was not governed by existing legal frameworks or any other rules (Cousy 2017, 32). It was only after a while that the specific rules of *lex mercatoria* emerge, adapted to this new type of legal transaction known as *lex assecurationis* (Cousy 2017, 32). However, even this development did not proceed at a uniform pace due to the speculative and aleatory nature of insurance,[2] which caused the legal aspect of these transactions to be sidelined for a long time, i.e., marginalized in terms of obtaining concrete legal form. Rules applicable to the legal transaction, whereby the insurer

[1] The question posed by Woodruff back in the 1920s, when commenting insurance case law (Woodruff 1924, v).

[2] At the core of both insurance and gambling lies the uncertainty of whether a certain event will occur. Although it is clear that these two phenomena differ because insurance premiums are paid to reduce uncertainty, while stakes in gambling are placed to increase uncertainty, insurance and gambling share a common history. In fact, the first insurance contracts were essentially forms of gambling. Namely, there was a long-standing practice of betting on whether a person would reach a certain age. It wasn't until the early 20th century that the English legislature reacted by prohibiting insurance policies containing elements of gambling. Furthermore, it was necessary to legally establish and regulate the differences between gambling and insurance. This was done by requiring that there must be a certain interest of a contract party, who would bear the financial consequences of the risk being, realized (Ćurković 2009, 18–20).

promises the insured coverage against specific risks for a certain premium over a period of time, could *only* be found in insurance policies drafted by insurers themselves.[3]

Today, the situation is different because the functioning of the entire insurance industry is subject to a series of laws and regulations, which, although separate, are part of the broader field of financial regulation. Although the body of topics covered by the insurance industry is extremely broad, this paper focuses on the contractual aspect of insurance law and analyzes how the insurance contract has approached and distanced itself from civil law and general contract law, as evidenced by the sources of law regulating this matter.[4]

In an increasingly comprehensive and detailed regulatory environment, both at the national and supranational levels, the subject of insurance contract law is of great practical and scientific importance for monitoring the evolutionary processes accompanying legislative developments in this field, especially considering the intersection of contractual and regulatory insurance law and its implications on the contractual position of the insured. Moreover, there is a growing perception, both in academia and in practice, that the specificities of insurance contracts require a special legal regime that would differ from the general contractual regime. Depending on the type of insurance contract, the distinctions between consumer and commercial insurance contracts and the consequences for the contractual parties require a more detailed consideration of the adequacy of the existing legal regime of the insurance contract law. Additionally, the insurance industry faces the question of how to maintain consumer trust – whether it is more effective to do so through industry self-regulation, insurance contracts, or state regulation of market conduct. Or perhaps the answer lies in a combination of all these factors?

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[3] Certain rules relating to the insurers business operations could be found in corporate statutes, professional codes, and later in court decisions. An example of this is Lord Mansfield, who established the principle of utmost good faith in insurance law in one of his decisions – *Carter v Boehm,* 3 Burr 1905, 1909 (1766).

[4] Although from a comparative law perspective there are solutions where the matter of insurance contract law is regulated by different laws, there are also numerous solutions where provisions regarding insurance contracts can be found in laws dedicated to general contract law (Petrović Tomić 2015, 52–54). In Serbian legislation, this matter is regulated by the Law of Contract and Torts, *Official Gazette of the SFRY* 29/78, 39/85, 45/89; Constitutional Court Decision 57/89, *Official Gazette of the FRY* 31/93, *Official Gazette of SCG* 1/2003 – Constitutional Charter, *Official Gazette of the RS* 18/2020, Arts. 897–965.

2. GENERAL REGIME OF CONTRACT LAW AND INSURANCE CONTRACT: MYTH OR REALITY?

Perhaps the most dominant characteristic of the development of insurance contract law is the constant, albeit slow emancipation of the legal act of insurance, on one side,[5] and of the insurance contract law, on the other side, which has become independent and particularly distinguished from contract law. This is not yet the case with the Serbian insurance contract regulation, which is partly a result of sociohistorical circumstances.[6] The matter of contract law is regulated by the Law on Contract and Torts, which, as one of the fundamental principles, provides the principle of freedom of contracting, according to which the contracting parties are free to regulate their relationships according to their will within the limits of compulsory legislation, public policy, and good faith.[7] Although never fully accepted in its pure and complete form,[8] freedom of contract is a principle on which the entire contract law rests and which has inspired many legislative solutions. Every legal system, every legal order allows contracting parties a certain space in which they can independently and freely regulate their relationships. Depending on social circumstances and dominant ideas, the space in which contracting parties can independently decide and regulate their relationships is greater or smaller. As one of the limiting factors of freedom of action, there has always been a need to protect the general norms of the community, which cannot be compromised by the will and actions of individuals (Perović 1981, 153). For this reason, imperative norms are created and established with the aim of protecting both general and individual interests, although this may sound contradictory.

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[5] The emancipation of the legal act of insurance is discussed in the context of abandoning the notion that insurance is merely a game of chance and gambling, which was even prohibited during certain historical periods. In fact, for a long time, the development of this legal act was accompanied by a sense of mistrust and suspicion. At the same time the French Civil Code provided for the application of rules on aleatory contracts to insurance contracts (Beckmann 2008, 15).

[6] In this sense, Petrović Tomić (2020, 101 fn. 2) emphasizes the importance of adopting the Insurance Law (*Official Gazette of the RS* 139/2014, 44/2021) for the more prosperous and productive development of insurance contract law, although the said Law is dedicated to the matter of status law and insurer operations.

[7] Serbian Law on Contract and Torts, Art. 10.

[8] An exception in this regard is the theory of autonomy of will, which developed under the influence of the ideas of the French Revolution and is based on the notion that individual will is without any limitations (Perović 1981, 156).

However, when looking at insurance contracts and policies as integral parts of contracts, as well as general market trends, it is clear that the limitations on the actions of contracting parties extend far beyond the framework established in Article 10 of the Law on Contract and Torts. The limitations are such that we can actually speak of a completely new legislation, a law of insurance contracts. Legislative intervention in insurance contracts has reached such proportions that it is justified to introduce the term *regulatory private law*. Since these are private law relations between insurers and service users, characterized by inequality, and since during decades of implementing consumer protection standards we have encountered countless violations of consumer rights and interests, the legislative goal of regulating this legal transaction can only be achieved through private law using regulatory techniques.[9] It is our opinion that such a private law complements the regulatory and supervisory law of insurance, which *in ultima linea* leads to the impression that insurance is a highly regulated area.[10] Additionally, the diversity of insurance transactions clearly indicates that the legislatively prescribed unified regime for insurance contracts is insufficient and incomplete for all forms of this contract, requiring an additional response. The idea of application of different legal regimes to different insurance contracts leads us to the question – is insurance contract law ready for hybridization?

2.1. Two or Three Regimes of Insurance Contract Law

To clarify why we believe that insurance contract law is ripe for hybridization, let us recall that there are three classes of insurance buyers/users. Since the beginning of the insurance development, there has been a clear distinction in the legal regime of commercial insurance contracts (so-called "large risks" in EU terminology) and contracts concluded with individuals (so-called "consumer contracts"). Somewhere in between are

[9] The insurance market is not self-sustainable based purely on market principles, rather, it requires regulatory intervention.

[10] Such a stance fits the concept of the development of insurance contracts, which has transitioned from a highly suspicious aleatory transaction to a highly regulated financial transaction and is an integral and unavoidable part of modern economic and social life. The entire history of insurance is inspired by the struggle against the dubious nature of insurance transactions and distrust toward the insured. Even today, many insurance principles testify that such fear has not completely disappeared. Take, for example, the principle of indemnification and the principle of utmost good faith, which continue to inspire numerous rules aimed at protecting the institution of insurance and public order in insurance.

the contracts with SMEs, for which there is still a dilemma whether they can be classified as consumer or commercial insurance contracts. Considering two completely different legal regimes, as well as the third one which raises the most dilemmas, the question arises whether insurance contract law is uniform. The differences that exist in practice and which mostly affect the freedom of contracting in this part of legal transactions are the main reason why, from our point of view, insurance contract law is like a *chameleon*: it adapts and changes according to whom it provides protection. The principle of freedom of contracting flourishes within the area of contracts concluded by companies and of a corporate nature (Picard 1939, 137–155; Petrović Tomić 2017, 417–439). Indeed, this is confirmed by the Law on Contract and Torts, whose scope of application *rationae materiae* does not include transport insurance, reinsurance, and insurance of claims.[11] In all of these mentioned areas, not only is this legal principle dominant, but it is also what is collectively referred to as the rules of conduct. These are rules and principles characterized by the fact that they are the result of business practice that the legislator did not feel the need to restrict, since the parties to the contract are more or less equal in their legal positions.

When we move on to the realm of consumer contracts, autonomy of will and freedom of contracting become something to strive for and something that cannot be found easily (Petrović Tomić 2020, 100–125). Based on the knowledge of the part of the Law on Contract and Torts dedicated to insurance contract, the authors namely argue that the search for nonmandatory provision within this Law is a more difficult task. Unlike other contracts, where it is harder to find imperative and mandatory legal provisions, insurance contracts feature a completely different legislative method of regulation, which in a way takes a step back. Why? Because freedom of contracting emerged as a legislative response to the development of the market mechanism and has been celebrated for centuries as a triumph of freedom over rules. In the field of insurance, which regulates contractual relationships between unequal partners (implying not only economic but also professional inequality), we observe the supremacy of state interventionism over freedom of contracting.[12] It should be noted that the developmental path of protecting the weaker party is highly instructive. The Law on Contract and Torts specifically, on one hand, perceives the insured as the weaker party and attempts to protect them, through a series of imperative rules, from the disproportionately stronger insurer. However,

[11] Serbian Law on Contract and Torts, Art. 899.

[12] Karanikić Mirić (2020, 114–136) uses the term "interventionist legislation", which we believe is also quite appropriate for the insurance contract relationship.

this protection is not enforced consistently. The legislator, in a very obvious way, fears what an unscrupulous insured could do to the insurer and/or the institution of insurance as a whole, and sporadically directs the protective function toward the insurer. This leads to an extremely inconsistent legislative policy.[13] The legislator sometimes protects the insured, and at other times applies measures primarily of a penal nature against them. As nicely observed in literature, early insurance legislation was influenced by a fear of the abuse of the insurance institution by the insured and by nurturing suspicion of their intentions toward the insurer.[14] The best examples of inconsistent legislative policy are the duty to disclose circumstances that are material for risk assessment and overinsurance, etc.

Finally, although most legislations do not introduce a separate regime for SMEs and entrepreneurs, there have been advocacies in theory for their separation from the regime of commercial risks (Petrović Tomić 2015, 71–75). This leads to the following conclusions. Firstly, insurance contract law is definitively emancipated in relation to general contract law. Historically speaking, insurance contract law features a *lex specialis* approach. In top-tier legal systems, the insurance contract has always been regulated by special laws, creating a unique and comprehensive regulatory system for legal relationships arising from insurance.[15] Secondly, over centuries of

[13] Herman Cousy (Cousy 2012, 86) mentions the phenomenon of "schizophrenia" in modern insurance law. He emphasizes that in most modern insurance legislations, it is not easy to determine whose interests are protected by certain norms: are they the interests of the insurer, the insurance institution, or the insurance service users?

[14] "In insurance law this attitude was translated into an attitude of systematic suspicion toward the policyholder and the insured. In fact, nearly all of the traditional basic principles of insurance contract law can (only) be understood and explained as originating in this basic suspicion of 'fear and abuse'." (Cousy 2013, 124).

[15] The best example of legislative technique concerning insurance contracts is the German Insurance Contract Act (Versicherungsvertragsgesetz, BGBl. 2024 I Nr. 119, hereinafter VVG) of 2007, which came into effect in 2008, and the French Insurance Code (French: Code des assurances) of 1989. The current law of Germany replaced the Insurance Contract Act of 1908, which had been in effect for an entire century. The semi-mandatory norms from the German Act of 1908 are such an invention that modern legislators have so far failed to find an institute to replace them. This speaks to the adaptability of these norms to insurance matters and the beneficial effects achieved through their implementation.

The Insurance Code of 1989, which, with amendments, constitutes the positive law of France, does not fundamentally change the 1930 Code, whose most important provisions are still in force. In an era of regulatory inflation and legal regulations in general, one might wonder how this is possible – especially in a matter so sensitive and significant for consumer protection. The answer is simple: the 1930 Code was

practice, the insurance contract has become a classic contract, deserving the epithet "hybrid" due to the differences in the legal regime of the contractual relationships it governs. Thirdly, today it is justified to introduce the term "special legal regime" with the intention of highlighting all the peculiarities of insurance contract law, which in some segments (for example, investment insurance services; Kostić 2018, 465–468) is increasingly exposed to the influence of European directives such as the MiFID.[16]

The transition from the realm of classical contract law to the prominent segment of consumer insurance contract law undoubtedly lasted an entire century. During this period, it became clear that civil codes/laws were not the most suitable tool for regulating contractual relationships that are distinctive both in terms of the parties involved and the subject matter (the aleatory nature as a key characteristic necessitating the application of a set of rules) (Mimoun 2017, 61–63; Bigot 2014, 206). If the stronger contractual party is obliged by the contract to fulfill a duty to the weaker party, who is also insufficiently informed about the service being procured (often because it is imposed on them by law), this cannot in any way be equated with cases where contracts are entered into by parties who are equal in knowledge and/or economic power, and when they conclude contracts that are common in legal and business transactions and fairly understandable.

What we can assert with certainty, regarding insurance contract law, is that it is neither homogeneous nor inalterable.[17] Certain patterns in the terms of response encountered in the domain of insurance contract law can be defined nonetheless. In this matter it is not surprising that the issues Lord Mansfield resolved in his decisions in the late 18th century haven't drastically changed in the 21st century.

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ahead of its time. The majority of norms were formulated to ensure and protect the contractual balance between insurers and policyholders. To give an example, according to the norm regarding clauses on excluded damages. such clauses are void if they are not drafted in a clear and limited manner and if they are not printed conspicuously. A similar norm did not exist in general contract law. Only half a century later, consumer law introduced a norm stating that contract clauses proposed by professionals to consumers or nonprofessionals should be drafted and presented in an understandable and clear manner. Therefore, the "old" insurance contract law constituted a comprehensive system for protecting policyholders as the weaker party (Bonnard 2012, 21).

16 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ L 173 of 12 June 2014, 349–496.

17 In one of the most cited studies, Kenneth Abraham (Abraham 2013, 653–698) described insurance as four things in one: a contract, regulatory activity, a product, and corporate governance.

2.2. Inadaptability of the General Contract Law Approach to Insurance Contracts: Two Examples from the Law on Contract and Torts

Disclosure of circumstances significant for risk assessment is one of the fundamental duties of the insured, as it enables the insurer to form an opinion on the risk, categorize it, and determine the premium to be charged for the coverage. This duty is specific to insurance law because it directly results from the application of the principle of utmost good faith (Lambert-Faivre, Leveneur 2017, 280). In fact, provisions on precontractual duty to disclosure circumstances relevant for risk assessment can be found even in legal systems where the principle of good faith and honesty does not exist in the form it has in Continental Law, e.g., in Britain (Beale, Khanom 2007, 71–72). In Serbian law, the insured is obliged to disclose to the insurer, by the conclusion of the contract, all circumstances significant for risk assessment, known to them or which could not have remained unknown to them.[18] Regardless of whether it is an insured with consumer or professional status, they are obliged to provide the insurer with all this information. This duty of disclosure, as defined, is too broadly formulated and potentially unfavorable for the insured, taking into account the possible consequences. Apart from that, it is obvious that the logic behind the Serbian legal solution is inconsistent with contemporary trends. Namely, the Law on Contract and Torts is based on the idea that the party procuring insurance knows the risk and is obliged to share it with the party providing protection from the risk and which lacks sufficient data for risk assessment and business decision-making. One does not need to be an insurance expert to understand how much this logic is "twisted" nowadays.

The most drastic legal consequences arise from breaching the mentioned duty. The Serbian Law on Contract and Torts takes into account the insured's conscientiousness, on one hand, and the so-called materiality test, on the

[18] For the comparison's sake, in Belgian law, this duty is formulated as follows: "The insured is obliged to accurately disclose all circumstances of which they are aware and which they reasonably believe to be elements on the basis of which the insurer assesses the risk." Although in Belgian law, even after the 2014 reform, the system of spontaneous disclosure still applies, the formulation is such that a breach of the duty to disclose can only be attributed to the insured regarding circumstances of which they were aware and which are relevant to risk assess. This, therefore, opens the door to the possibility for the insured to prove that they could not reasonably have known that a certain circumstance should be reported to the insurer (Fontaine 2016, 210, translated by author).

other hand.[19] If the insured acted unconscientiously, i.e., deliberately provided incorrect information about circumstances "being of a nature which would induce the insurer, if he knew the real situation, not to enter into contract", or if they intentionally suppressed them, the insurer may seek the annulment of the contract within three months of becoming aware of the false declaration.[20] It should be noted that there is a deviation from the general rules of contract law regarding the right to claim nullity of a rescindable contract.[21] The Law on Contract and Torts limits to three months the subjective deadline by which the insurer can demand the annulment of the contract, but says nothing about the objective deadline. It can be inferred from this that the objective deadline is calculated according to the general rules of contract law, which means that it is three years from the day of entering into contract. After the annulment of the contract, the insurer is not obliged to refund the premium paid by the insured for the unused period of insurance. Furthermore, they are entitled to payment of the premium for the insurance period within which they requested the annulment of contract.[22] This regulation of the consequences of rescission deviates from the general rules of civil law. The insurer is not obligated to refund what they received from the other contracting party, which represents a sort of *punishment and sanctioning* of the insured. Viewed from the perspective of contractual balance, this is an example of an unfair legal clause. Thus, the Law on Contract and Torts leaves it to the insurer to assess whether they will sanction deliberately incorrect reporting of circumstances significant and relevant for risk assessment by nullifying the contract or by subsequently increasing the premium. They are given a three-month period to consider, starting from the day they became aware of the incorrectness of reporting or suppressing of the relevant facts. The inconsistency of the legislator in these cases should be noted. On one hand, annulment – which depends on the will and assessment of the insurer – leads to punishing of the insured (who cannot recover a portion of the insurance premium by applying the principle of premium divisibility); on the other hand, the same unconscientious

[19] It is worth mentioning that, unlike comparative law, the Serbian Law on Contract and Torts does not make a distinction in the terminological sense between circumstances significant for risk assessment and circumstances affecting the legal validity of the contract.

[20] Serbian Law on Contract and Torts, Art. 908, paras 1 and 3. The breach of the duty to disclose manifests in two forms: non-reporting and incorrect reporting.

[21] Serbian Law on Contract and Torts, Art. 117, paras 1 and 2.

[22] Serbian Law on Contract and Torts, Art. 908, para 2.

insured will not be left without insurance protection if the insurer decides that it is more rational to request an increased premium (which is more common in practice).[23]

Another example of the provision from the Law on Contract and Torts, which speaks to the inadequacy of the general contract law approach, concerns overinsurance, an institution that is quite outdated in Serbian law and contrary to the interests of the insured. The first deficiency of a provision in the Law is that it is not specified how disproportionate to the real value of the insured object the insured amount should be for it to be considered overinsurance. This can easily lead to the inconsistency between insurers and judicial practices. The second, even more significant, deficiency lies in the legal consequences of overinsurance. Regarding the regulation of this issue, the Law on Contract and Torts distinguishes between initial overinsurance (which existed at the time of contract conclusion) and subsequent overinsurance that arises in the course of the insurance period. In Serbian law, if overinsurance is the result of the insured's intention to deceive the insurer, the other party, i.e., the insurer, has the right to request the annulment of the contract.[24] Since intentionally caused overinsurance is connected to the risk of intentionally causing damage in order to obtain greater compensation and unjust enrichment, it is severely penalized according to the Law on Contract and Torts. Not only does the insurer have the right to annul the contract, but they are also entitled to retain the

[23] If the insured unintentionally provides incorrect information or fails to report circumstances significant for risk assessment, the insurer has the right to choose whether to demand unilateral termination of the contract (in which case they are obligated to refund a portion of the premium corresponding to the unused period of insurance) or to increase the premium in proportion to the increased insurance risk, within one month from becoming aware of the breach of the reporting duty. If the insurer opts for termination due to noncompliance, the contract is terminated 14 days from the insurer's notification of the insured of the termination. However, if the insurer chooses to increase the premium (which is more likely), and the insured does not accept it within 14 days of receiving the proposal, the contract is terminated. If an insured event occurs in the meantime, the insurer is obliged to pay compensation in proportion to the paid premium and the premium that should have been paid according to the actual risk severity.

[24] This is the case if, by concluding the insurance contract and setting an increased insured amount, the insured intended to obtain a higher compensation than the actual incurred damage. What triggers the sanction of contract nullity is the fraudulent intent on the part of the insured, who through such actions abuses the insurance institution. However, proving this is not easy. It is precisely for this reason that insurers rarely invoke contract nullity. They usually compensate the insured up to the amount of the incurred damage; and the mere fact that the insured paid an increased premium represents a form of sanction.

premiums received and have no duties if an insured event occurs.[25] If the insurer discovers the overinsurance after payment of the insurance claim, they have the right to demand reimbursement from the insured.[26] This is an example of inadequate regulation of the legal consequences of contract nullity. While the logic of not paying out the insurance claim, or returning it to the insurer if paid before establishing overinsurance, can be understood, the same cannot be said for retaining the premium. Adhering to insurance industry standards and the technical organization of this business, the insurer may only be entitled to the premium until the moment they become aware of the overinsurance contrary to good faith. Taking into account the manner of regulating the legal consequences of overinsurance contrary to good faith in Serbian legislation, it can be inferred that the legislator intended to introduce some form of punitive compensation by allowing the insurer to retain the premium even after the annulment of the contract.

If the overinsurance is concluded in good faith, each party has the right to reduce the sum insured and the premium. An insurer, even in the case of conscientiously concluded overinsurance, retains however the received premium and is entitled to a non-reduced premium for the current insurance period. From the insurer's perspective, therefore, it does not matter whether it is conscientious or unconscientious overinsurance: they have the right to collect the non-reduced insurance premium. The consequences of overinsurance concluded in good faith have been regulated by the Law on Contract and Torts in a manner that is not in line with the consumer protection principles.[27] An insured who has not acted unconscientiously,

[25] Taking into account the provisions of the Insurance Law, the settlement of claims and in general, the actions of insurers in this regard should be in accordance with the risk management rules. This means that they should adhere to legal provisions limiting their liability, as well as provisions of general insurance terms and conditions. If the insurer were to agree to pay a higher compensation than the amount of the damage or the value of the property, this would be grounds for the National Bank of Serbia to take supervisory measures.

[26] Unlike the Serbian legal solution, which excessively protects the insurer by entitling them to retain the received premiums and to an unchanged premium for the current period (Serbian Law on Contract and Torts, Art. 932). in German law, the intention of the insured to obtain an unlawful pecuniary advantage is sanctioned by the annulment of the contract, but without retaining the same premium for the current insurance period by the insurers. According to VVG § 74, the insurer has the right to the premium until the moment they become aware of the circumstances causing the contract nullity.

[27] In German legislation, the legal consequences of conscientious overinsurance are regulated in such a manner that each party can demand a reduction of the insured amount, with a proportional reduction in the premium with an *ex nunc* effect. VVG § 74, Abs. 1.

i.e., who has inadvertently contracted a higher insured amount, is treated very unfairly according to the Law on Contract and Torts. After discovering overinsurance, a conscientious insurer retains the premiums received and has the right to a non-reduced premium for the current insurance period. This norm is an example of *inappropriate protection of the insurer's interests*. Precisely the information on the conscientiousness of the insured, a layman and non-expert in insurance, demands a completely different approach.

3. NEED FOR REGULATION OF CONSUMER INSURANCE CONTRACTS

Although today an insurance contract serves as an illustrative example of limiting the principle of freedom of contracting, historically it has long been a fundamental one of regulating insurance contracts.[28] Stimulated by philosophical debates, as well as economic and social circumstances, the principle that everyone has the right to decide whether to conclude a contract, with whom they want to conclude it, and what its content will be, has become the fundamental principle in regulating economic activities in many European countries.[29] The necessary condition for achieving these values was not recognized in state intervention, but in the strength of the contract as an agreement reached between the contracting parties. In fact, the guiding idea was to limit the role of the state (MacQueen, Bogle 2017, 292ff.). Civil codes and emerging codifications, as well as special laws on insurance contracts that derived from them, started from the idea that freedom of contracting is a necessary condition for the functioning of the market, although there were no explicit provisions on this.

However, during the 20th century, the entire concept of the dominance of freedom of contracting, based on *laissez-faire, caveat emptor*, and the prominent importance of individual will begin to be questioned. It became clear that establishing and sustaining freedom of contracting required the correction of the established dominance of the stronger contracting party over the weaker one, either due to the economic circumstances or

[28] This principle originated in the 18th and 19th centuries, based on liberalism (Reich 2013, 19; Barral Viñals 2020, 47).

[29] The principle that contracts have the legal force of law between the contracting parties can be found in Napoleon's Civil Code. "*Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites*" – Jacques Ghestin recognizes this principle in the Declaration of Human Rights of the French Revolution, while in England it is viewed as a "reasonable social ideal" (Beatson 1998, 4; Basedow 2008, 904).

possession of specialized knowledge (Canaris 2000, 273; Zöllner 1996, 35). Just as the ordoliberal theory had shown previously, market mechanisms inherently move toward self-elimination and self-distraction if they turn out to be unsustainable, while requiring significant and continuous state involvement to control the arbitrage of the market and its laws.[30] However, when it comes to insurance contracts, limitation of freedom of contracting has started to proliferate only in consumer insurance contract law, while in commercial insurance contracts, it has retained the form that exists in the rest of contract law. Numerous cases in the field of consumer insurance contract law have shown that when an approximate equality of bargaining power between parties is missing, a fair balance of their interests cannot be achieved solely by contract law, but corrective legislative measures are necessary. Therefore, the insurance contract has transitioned from being at the complete mercy of the will of the contracting parties to requiring additional legislative responses in order to ensure the necessary level of protection for the weaker contracting party who would otherwise be forced to accept the contract terms defined by the insurer.

It became obvious that such a position of the insurance consumer required an additional degree of state interventionism in consumer insurance contracts. Relying solely on existing legal provisions on insurance contracts did not and does not sufficiently consider the need to protect consumers, allowing continued exploitation the unawareness of consumers, whose indebtedness on various grounds has increased (Benöhr 2018, 687). Over the past two decades, we have witnessed a significant expansion of financial services, including insurance, which are becoming increasingly accessible to consumers, making them increasingly vulnerable to the risk of assessing the hazards and hidden characteristics of financial services. Apart from that, they are subjected to pressure from financially stronger parties to conclude contracts on the terms they were unable to negotiate (Ramsey 2015, 159; Benöhr 2013, 111ff.). Participants in the insurance market are no exception. Experiences from the insurance market have clearly shown that consumers require an additional level of protection, in addition to what the contract itself

[30] Two doctrines have influenced the legislature's will in the sense of regulating financial services. The first one is neoliberal, assuming that the consumer is a rational individual who can independently make decisions if provided with adequate information. It is clear that this approach advocates for the principle of autonomy of will to be given greater consideration than the principle of protecting the weaker contractual party. The other theory is based on the theory of the social market, which justifies greater state intervention in various forms (Garcia Porras, van Boom 2012, 23–24).

and statutory rules of contract law offer them.[31] The growing dissatisfaction and distrust among consumers, caused by the financial sector's inability to carry out and fulfill its basic societal role, can only be addressed this way.

The problem currently observed in modern insurance law, and Serbian insurance law is no exception, is the endeavor to protect the consumer on one hand,[32] while simultaneously not abandoning the traditional principles of protecting insurers and the insurance industry. Such a dual demand, attempted to be addressed by existing uniform norms, is unsustainable and undoubtedly will require legislative intervention. The question is whether legislative intervention in Serbian legislation will be proactive, by enacting new regulations or amending the existing ones, or whether the burden will be shifted to the judicial authority to retrospectively correct identified deficiencies. Considering the characteristics of the continental legal system, to which the Serbian legal order belongs, it is certain that changes to the regulations will be necessary. What is certain is that, despite all legal provisions, "contractual freedom to a certain extent is a surpassed category in insurance contract law" (Petrović Tomić 2020, 104, translated by author),[33] which will definitely be reflected either in new legal act on insurance contract

[31] The case law of the German Federal Constitutional Court is very interesting, as it has twice addressed life insurance (BVerfG 26 July 2005, 1 BvR 782/94 and 1 BvR 957/96, Neue Juristische Wochenschrift 2005, 2363; BVerfG 26 July 2005, 1 BvR 80/95, Neue Juristische Wochenschrift 2005, 2376). In both cases, the Federal Constitutional Court recognized the lack of substantive freedom of will of the insured and determined that the legislature was obliged to amend the Insurance Contracts Act to provide effective legal remedies for the insured. It is particularly important to emphasize that in the mentioned cases (1 BvR 782/94 and 1 BvR 957/96. 1 BvR 80/95), the insured were not disadvantaged based on age, education, lack of experience, or poverty. The contracts were also not unusually unfavorable to them. The lack of freedom of contracting materialized in the general inequality of the bargaining powers of the insurance companies and consumers, as well as in the overall lack of freedom of choice for each insured after concluding an insurance contract.

[32] As a result, legislative activities are emerging at both the national and international levels, aimed at providing appropriate mechanisms for economic and legal protection (e.g., G20 High Level Principles on Financial Consumer Protection and the UN Guidelines for consumer protection). Additionally, institutional activities are being undertaken, such as the establishment of the European Banking Authority and the European Insurance and Occupational Pensions Authority. The goal is to establish the ordoliberal concept of autonomy of will because in the case of consumer insurance contract law, freedom of contracting can provide its beneficial effects only through regulatory intervention (Basedow 2008, 906).

[33] Actually, even during the first half of the 20th century, revolutionary views could be found in literature stating that freedom of contracting plays no role in insurance contracts, which was subsequently confirmed in newly adopted codifications of insurance contract law (Picard 1939, 137, 139).

or in the amended legislation on the matter. This is the only way that the specificities of insurance contracts and the insured, as a consumer, can be taken into account. The existing interpretation of a consumer in insurance law is not enough or adequate and it definitely requires a more extensive approach (Petrović Tomić 2015, 124).

3.1. Arguments in Favor of Statutory Regulation of Consumer Insurance Contracts

Considering the quality and different capacity of the contracting parties, insurance contract law has evolved from being characterized as "ordinary" contract law to strictly regulated contract law. As we have hinted, it is not possible to adequately address insurance contract law theoretically without dividing it into at least two, and potentially three, segments. The perception of insurance contract law as a pure contract law, is limited to commercial insurance contract law. Every study on insurance can start with the assertion that insurance contract law is the segment of legislation that regulates contractual relationships related to risk. These are typical aleatory contracts that transfer risk from the endangered party to the party professionally engaged in risk protection (Petrović Tomić 2019a, 266–268). At the core of the contractual exchange is the payment of a certain amount of money by the insured to the insurer as consideration for the insurer's payment of a certain amount in the event of an uncertain event.[34] Another significant determinant of an insurance contract is that it is a service, not a goods contract. Thirdly, an insurance contract is exceptionally time-sensitive. Unlike other contracts, where it is common to exit the agreement with one contractual partner and enter into an agreement with another, in insurance, this is almost impossible. Why? Because by definition, risk is a future uncertain event that is not covered when it is certain to occur. In a way, an insured is racing against time because it is not predictable if, or when, a potentially adverse (harmful) event will occur, the consequences of which the insured wants to mitigate by entering into an insurance contract.

Based on the above, it is clear why the view that insurance is a typical product of neoclassical exchange is encountered in the earlier theory of insurance law (Daavey 2023, 5). Although it may sound interesting, it is only partially true, i.e., it applies only to commercial insurance because we

[34] Article 1:210 of the Principles of European Insurance Contract Law. Many authors have expressed their views on this issue (Basedow 2003, 2; Luik, Braun 2011, 195; Basedow, Fock 2002).

can only speak of exchange in the classical sense if the condition of equality of business partners is fulfilled. The differences between parties acting as buyers of insurance policies significantly influence the legal framework. Historically, commercial contract law, or in modern terminology the B2B contractual framework, was the first to develop, and this includes transport insurance, reinsurance, and all contracts covering large risks in terms of EU directives.[35] But after certain period of time, in all leading insurance cultures, the legislature "partitioned" insurance contract law by adopting separate legal sources during certain periods of the insurance institute development. The historical regularity is as follows: *the development of a particular type of insurance was accompanied by the development of insurance legislation applicable only to those types of insurance activities*.[36] Another regularity is: *the dominance of different insurance markets influenced the development of reference insurance legislation*. Thus, England features a highly commercial market for maritime and general transport risks, as well as reinsurance, while the European-continental area features the development of small and medium risk markets.[37]

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[35] The definition of large risks was first introduced by the Second Non-Life Insurance Directive (Directive 88/357/EEC, new Article 5(a)), later adopted in Directive 2009/138 on Solvency II. The purpose of introducing the category of large risks was to protect insurance policyholders through the choice of applicable law for insurance contracts. Only insurance policyholders in contracts covering large risks have the right to choose the applicable law. As emphasized in the preamble of the Second Non-Life Directive, these are risks where the policyholders, due to their legal status, size, or nature of the risk, do not require special protection from the state where the risk insured is located.

Large risks include: 1) classes of insurance for railway rolling stock, aircraft, ships, goods in transit, airline liability, and carrier's liability, as well as credits and guarantees when the insurance policyholder is professionally engaged in an industrial or commercial activity or one of the liberal professions, provided that the risks relate to that activity; 2) classes of insurance for motor vehicles, fire and natural disasters, other property damage, liability arising from the use of motor vehicles, general liability, and other financial losses, provided that the insurance policyholder exceeds at least two of the following three limits: a) balance sheet total of EUR 6.2 million; b) turnover of EUR 12.8 million; or c) an average number of employees of 250. Thus, large risks are determined based on the nature of the risk or the type of insured in relation to the nature of the risk.

[36] The development of legislative awareness regarding the regulation of insurance contracts through various legal instruments can be traced back to the English Marine Insurance Act of 1906.

[37] Historical reasons provide an explanation as to why the UK insurance consumer law was only adopted in 2012 (Consumer Insurance (Disclosure and Representation) Act 2012), while the Marine Insurance Act dates back to 1906. This certainly does not mean that there was no consumer protection in English law. The ombudsman

The need to provide an additional level of protection to the insured wasn't recognized for a long time. Main principles for regulating the relationship between contractual parties were established in line with this idea, as evidenced by the provisions of the Serbian Law on Contract and Torts. Over time, and through the adoption of consumer directives at the EU level, national legislators began to realize that the insured deserve certain and different levels of protection.[38] Comparative law nowadays knows numerous insurance contract laws containing provisions on cases where the position of the insured requires additional protection.

This however is not the case in Serbian law. Insurance as a financial service is subject to the Consumer Protection Act,[39] which provides that it will be always applicable to relationships between consumers and traders, except in cases where there are specific provisions with the same objective regulating those relationships, ensuring a higher level of protection in accordance with special regulations.[40] The Law on Contract and Torts does not contain specific provisions guaranteeing an additional level of protection to the insured. Furthermore, it does not contain any reference to the Consumer Protection Act. Despite all the praise for reintroducing insurance services to the scope of the Consumer Protection Act, the matter of consumers in insurance contracts still raises two questions: is the consumer concluding the insurance contract aware of the fact that there is a *lex specials* regulating their rights and duties pertaining to the insurance contract; and are they receiving the sufficient protection that their consumer status requires? The second question stems from the problem of clearly defining insurance consumers, which is by no means an easy task.

The answer to this question determines who will receive special treatment based on the insurance contract, in terms of the insurer's specific duties toward that contractual party. Even though an insurance contract is a synallagmatic one, it involves and concerns other parties who did not participate in the conclusion of the contract. For this reason, the concept of a consumer in insurance law should encompass the insurance policyholder, the insured, the beneficiary, and the third party suffering loss, who have not

played a particularly significant role, contributing to relieving the judicial system and serving as a warning system to the regulatory body about business practices that were unethical and/or unfair (Petrović Tomić 2024, 296–300).

38 This also applies to modern forms of concluding insurance contracts, which raise a series of questions related to consumer protection (Grujić 2024, 105–117).

39 Serbian Consumer Protection Act, *Official Gazette of the RS* 88/2021, Art. 4, para 5.

40 Serbian Consumer Protection Act, Art. 4, para 1.

acquired their status based on large-risk insurance contracts (Petrović Tomić 2015, 124). Moreover, in consumer insurance contracts, the same level of equality does not exist in all transactions. Let us demonstrate this with at least one example. Namely, a distinction should be made between contracts concluded directly between consumers and insurers and contracts involving an insurance intermediary. In the former case, there is a clear contractual imbalance, as the service buyer is economically and professionally weaker than the service provider. The latter case involves a different way of concluding contracts, namely, the involvement of three parties. Only when an insurance intermediary is present, bringing an element of contractual balance due to their expertise, can consumers expect adequate protection of their interests (the so-called broker meets underwriter situation). It is now widely accepted that the intermediary has a duty to advise the client and generally protect their interests (Petrović Tomić 2019b, 355–370). Therefore, we cannot equate service users, in terms of negotiating position and overall vulnerability, when a qualified intermediary is involved and when one is not.

It is clear that the Serbian legislature faces the obligation to modernize insurance contract law by providing an additional level of protection to various types of consumers in this contract. In legal systems like the French or German, the process of codifying insurance law was accompanied by the "integration effect", which involves incorporating rules on the protection of insurance consumers into laws dedicated to insurance contract law (Brand 2012, 58–59). This means that all issues related to insurance contracts, including the special provisions required by consumer insurance contract law, are regulated in a single statute. This is the only way that consumers under insurance contracts can be certain of their rights and obligations under mass risk insurance contracts involving non-large risks. This way general consumer regulations would still be applicable to issues not explicitly regulated by the law governing the matter of insurance contract law.

3.2. Further Humanization of Insurance Contract Law through Market Conduct Rules

Following the 2008 financial crisis, international supervisory bodies began analyzing the operations of financial institutions in order to identify shortcomings that indirectly or directly contributed to the economic downturn. One of the triggers identified were weaknesses in the corporate governance of financial institutions, particularly manifested in the lack of effective mechanisms for controlling them and dealing with clients

(Marzai Abliz 2019, 23). Consequently, the European legislator embarked on reforming the regulation of the market conduct of financial institutions with the aim of providing protection to clients from abuses or unfair treatment by financial service providers, as well as to empower supervisory authorities with appropriate powers (Prorowski 2015, 196–206). The result was the adoption of the MiFID and the IDD,[41] which dedicate a significant portion of their provisions to market conduct rules regarding interactions with clients (insureds and investors) during the necessary counseling and provision of necessary information.[42] By establishing new market rules of conduct, numerous new regulations were created for various participants in the insurance market that were not (and some still are not) regulated by insurance contract laws. A key requirement in both directives is the provision of appropriate and targeted advisory services to clients by timely disclosure of product portfolios, all product details and costs, and service costs.[43] For example, insurance distributors have been imposed new, extensive, and comprehensive obligations under market conduct rules, including fair, honest, and transparent dealings with clients, acting in the best interests of the client,[44] assessing the client's demands and needs, informing clients before concluding a contract, as well as new organizational requirements regarding effective product supervision and management policies.[45] At the same time,

[41] Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution, OJ L 26 of 2 February 2016, 19–59.

[42] At this point, the authors also mention the MiFID, which relates to the market for financial instruments, but not directly to insurance. However, the insurance industry has started to expand its business territory to other providers of financial services, such as investment firms and banks (Cousy 2017, 40), while at the same time banks are taking on an increasingly important role in distributing insurance products. In fact, there is a gradual despecialization of financial service providers, with the distinctions between them gradually disappearing. The ultimate results of this process are the distribution of insurance products by banks (bancassurance), the emergence of financial conglomerates consisting of various financial service providers, and the development of insurance products whose legal nature is subject to doubt, such as insurance with savings components and insurance linked to investment funds. This has opened up significant space for the application of this Directive to the business operations of insurers, which is particularly significant because national regulations contain almost no provisions regarding such mixed financial instruments (Cronstedt *et al*. 2021).

[43] Only the MiFID recognizes this duty, while the IDD prescribes the duty for distributors to identify and document the demands and needs of the client, which should then have implications when consulting on product selection.

[44] IDD, Art. 17.

[45] The Serbian Insurance Law recognizes rules of conduct by prescribing the obligation of precontractual information for the insured (Arts. 82–84), protection of the rights and interests of the insured (Art. 15), conducting activities in accordance

these established market conduct rules provide supervisory authorities the possibility to examine the behavior of insurance companies (and other insurance distributors), as well as their relationships with clients, with the aim of taking preventive action to preclude undesirable situations in which insurance users may be harmed, rather than just reacting to unwanted situations after they occur.[46] These rules are autonomous and directly addressed to insurers and insurance intermediaries, with a supervisory authority empowered to enforce and implement them, as well as to sanction noncompliant behavior, all with the aim of further humanizing insurance contract law by providing a higher level of protection to the insured, shifting the burden onto insurers in terms of duties that were previously solely on the insured.[47]

The significance of rules of conduct regulating relationships between participants in the financial market has begun to expand as a result of the adoption of these directives, as numerous provisions on market conduct by financial service providers have found their place in them. In this way, the concept of rules of conduct as a source of law entered the field of insurance contract law, albeit it lies on the border between contractual and regulatory or business law, as emphasized. Market conduct rules are nowadays gradually becoming a significant source of regulation for emerging relationships arising from insurance contracts (Cousy 2017, 45).

The National Bank of Serbia has issued Guidelines on Minimum Conduct Standards and Good Business Practices for Participants in the Insurance Market, in response to the solutions from the Insurance Distribution Directive and the obligations of the Republic of Serbia in the process of harmonizing regulations (Ćeranić Perišić 2023, 128). The content of these guidelines and similar rules now imposes certain duties on insurers or other financial service providers[48] that exceed the obligations and duties covered by insurance contracts and legal provisions of insurance contract law. Some

with the law, general acts, business policy acts, insurance profession rules, actuarial rules, good business practices, and business ethics (Art. 19).

46 This is the *Product and Oversight Governance* concept, a system of supervision and management of insurance products (European Bank Authority 2017).

47 In literature, this trend of acknowledging the significance of conduct rules as a source of substantive law is referred to as "Mifidization", since the rules of conduct expanded after the adoption of the MiFID (Cousy 2017, 45–48).

48 Thus, the Guidelines of the National Bank of Serbia on Minimum Standards of Conduct and Good Practice for Participants in the Insurance Market specifically apply to the operations of insurance companies, insurance intermediaries, insurance representation companies, insurance representatives, banks, financial leasing providers, and public postal operators who conduct insurance representation

of the duties now imposed on insurers include precontractual information and acting in the best interest of the policyholder (Radojković, Kostić, Gajić 2021, 93), all of which have implications for the performance of contractual duties under insurance contracts, although some of them are not yet part of the law.[49] The additional significance of the prescribed obligation to act in the best interest of the policyholder lies in the fact that it reflects Article 17(1) of the IDD, which is emphasized as mandatory. Consequently, insurers are deprived of the possibility to exclude this duty toward the insured through insurance contracts. Additionally, the rule of acting in the best interest is formulated in such a way as to serve to fill legal gaps in the absence of a norm regulating the insurer's relationship with the insured.[50] This opens up additional space for regulating relationships arising from insurance contracts through rules of conduct, which are necessary considering the position of the insured as a consumer and which are not integrated into legal frameworks. Market participants have recognized the need to establish an additional level of protection for policyholders, leading to the emergence of a new source of insurance contract law.

It is clear that the changing nature of the insurance market and the fundamentally different positions and needs of individuals purchasing insurance should be taken into account when conceptualizing insurance contract law and defining the regulatory framework. The question arises: is there one insurance contract law? Or are there more? The answer is apparent. Insurance contract law is an example of a branch characterized by fragmentation, accompanied by legislation fragmentation. In addition to the consumer and commercial aspects, it is possible to clearly distinguish between indemnity and sum insurance (Glintić 2022, 53–78), insurance and reinsurance, etc. Insurance contract law differs from general contract law, and there are also differences within insurance contract law that justify its treatment as a separate branch of law and legal discipline. What connects them into a meaningful whole is a special legal regime. Cousy's hybridization

activities based on prior approval from the National Bank of Serbia. See: Purpose of the Guidelines on Minimum Standards of Conduct and Good Practice for Participants in the Insurance Market.

[49] Currently, the Insurance Law also stipulates that supervision of the performance of insurance activities is carried out to ensure the protection of the rights and interests of policyholders. Insurance Law, Art. 13.

[50] Some of the current legal gaps include issues such as the conclusion of insurance contracts without verifying whether the insured event has already occurred, the method of calculating the refund of insurance premiums in case of termination of an insurance contract and insurance contract related a credit agreement.

of insurance law is an attempt to find a theory's response to numerous deviations from the general contractual regime and to the internal struggle within insurance law.

4. INSTEAD OF A CONCLUSION – THE HYBRIDIZATION OF INSURANCE CONTRACT LAW

We agree with the assertion that we are living in an era of hybridization of insurance contract law. As Herman Cousy noted, "modern insurance law has been contaminated with [...] a kind of 'hybridity', which may give rise to uncertainties in its interpretation, its application, and its implementation. Modern insurance law and legislation increasingly tend to protect the insurance consumer (i.e., the policyholder, the insured, and the third [party] beneficiary) by introducing several protective devices that draw their inspiration from the sphere and the logic of consumer law. But while so doing, legislators have not abandoned the basic principles of traditional insurance law, which were and are clearly inspired by a different logic and goal, namely the will to protect the insurer and to support and promote the insurance business" (Cousy 2023, 123).

Cousy's observations are significant for two reasons. First, he clearly points out changes in the very nature of insurance law. The center of gravity is shifting, leading to transformations that have, in turn, resulted in pluralism – not only in insurance contract law itself but also in the plurality of contractual obligations and duties. Thus, the obligation of precontractual disclosure of risks is conceptually different in consumer insurance compared to commercial risks. Second, and unavoidably, he brings us back to the paradigm of insurance contract law as a commercial law and to the key principles of protecting insurers from opportunistic behavior by insured parties, a principle that remains relevant even in the era of consumerism.[51] In fact, in commercial insurance, greater attention is paid to the duties of the insured, reflecting efforts to avoid moral hazard and/or inadequate risk selection. It is as if the legislator implicitly trusts the insurer more and expects them to protect the market mechanism in insurance. At the same time, in the consumer sector, the focus is on the obligations of the insured, which can be divided into two key subcategories. The first is related to maintaining the level of risk on which the insurer accepted the insured for coverage and

[51] Traditional insurance contract law actually started from a completely opposite assumption to that on which modern insurance contract law is based: namely, that the insurer is the party in need of protection (Cousy 2023, 124).

tariffed, and the second is related to submitting a claim for compensation. The guiding idea behind the legal regulation of these duties is to protect the insured from losing their rights under the insurance, as a sanction for the nonperformance of any of the insured's obligations and duties, and generally introducing the principle of proportionality of the sanction to the type of breach of the contractual duties, which undoubtedly influences consumer insurance law (Mayaux 2011, 242).

Therefore, insurance contract law is a mixture of classical contract law, insurance best practices, and legislative interventionism in relationships concluded between unequal partners. Modern insurance contract law is based on a balanced weighing of the interests of insurers and insured parties, especially those in a typical consumer position. This does not diminish the role and importance of high-budget commercial insurance. It is time to adopt a nuanced pluralistic approach to insurance contract matters, and thus insurance should be recognized for its societal and market significance. Insurance regulation cannot be called supportive if it does not simultaneously provide protection for the weaker contractual party, protection for insurers from the irresponsible actions of insured parties, and for conducting of insurance business.

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