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LEGAL CHARACTERS OF THE INSURANCE CONTRAC

Abstract: We live in a world full of events, changes that occur at an unimaginable speed, often catching us off guard. Life is full of circumstances over which we cannot directly act. There's nothing to be done; they exist. What we can do, however, is to be cautious and preventive. Insurance arose from the need to protect individuals and their accumulated property against the destructive forces of nature, accidents, and illnesses, as well as the need to establish means of livelihood in the event of loss or reduction of working capacity due to accidents, illnesses, or reaching a certain age. Humans must adapt to the constantly changing and evolving conditions, better protect their assets, and adjust their aspirations to new possibilities.

Keywords: insurance, insured person, insurer, insured risk, insured event, insurance premium, insurance policy

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CHARAKTER PRAWNY UMÓW UBEZPIECZENIOWYCH

Abstrakt: Żyjemy w świecie pełnym dynamicznych wydarzeń i zmian, które zachodzą z niewyobrażalną szybkością, a często nawet zaskakują nas. Życie jest pełne okoliczności, na które nie mamy wpływu. Często jedyne, co możemy zrobić, to zachować ostrożność i zapobiegać negatywnym działaniom. Ubezpieczenia powstały z potrzeby ochrony jednostki i jej zgromadzonego mienia przed niszczycielskimi siłami natury, wypadkami i chorobami, a także koniecznością zapewnienia sobie środków do życia na wypadek utraty lub ograniczenia zdolności do pracy na skutek wypadków, chorób, lub osiągnięcie określonego wieku. Człowiek musi przystosowywać się do stale zmieniających się i ewoluujących warunków, lepiej chronić swój majątek i dostosowywać swoje aspiracje do nowych możliwości.

Słowa kluczowe: ubezpieczenie, osoba ubezpieczona, ubezpieczyciel, ryzyko ubezpieczeniowe, składka ubezpieczeniowa, polisa ubezpieczeniowa

The insurance contract is a legal act through which the insured undertakes to pay a premium to the insurer, who takes on the insured risk, and, in the event of its occurrence, undertakes to pay compensation or the insured sum to the insured or a third party. The legal characters of the insurance contract can be deduced from its definition. From the presented definitions, it is understood that the essential elements for the concept of the insurance contract are the following (Bistriceanu, 2006 p. 934):

a) being a contract, the insurance contract is an agreement of will between two or more parties;
b) the agreement of will be incorporated into the insurance contract aims to create insurance legal relations;
c) the parties are:
   - he insured, meaning the insured person who undertakes to pay the premiums;
   - the insurer, meaning the insurance company that receives the premiums and undertakes to pay compensation or the insured sum to the insured or the beneficiary, as the case may be;
d) compensation is paid by the insurer to the insured or the beneficiary, as the case may be, only in the event of a specific risk;
e) insurance premiums and compensation will be paid only under the conditions and limits of the law;
f) insurance premiums and compensation will be paid within the agreed-upon deadlines.

If these elements are found in the definition of the insurance contract, it can be concluded that we are dealing with a complete definition. It is a personal, consensual, bilateral, unique, onerous, with successive performance, aleatory, and adhesion contract. The criterion used to determine whether the insurance contract is a consensual contract is the condition of form required for its validity. According to this criterion, contracts are classified into consensual contracts, solemn contracts, and real contracts. In our legal system, the consensuality principle of contracts operates, which, by extrapolation, suggests the consensuality principle of legal acts. According to this principle, for the valid formation of the contract, it is sufficient to have the validly expressed agreement of the parties. The consensuality principle dominates insurance matters, indicating that it also applies to the insurance contract. Observing contracts from the perspective of the criterion used, it can be easily seen that consensual contracts constitute the rule, while solemn and real

contracts constitute the exception. This is clear from the following elements:

a) the requirement for the existence of a validly expressed agreement of the parties is present in all three categories of contracts: consensual contracts, solemn contracts, and real contracts;
b) if, in the case of consensual contracts, which constitute the rule, the validly expressed agreement of the parties is sufficient, in the case of the other two categories, additional requirements are imposed:
   - for solemn contracts, in addition to the validly expressed agreement of the parties, it is required that they be drawn up in a certain form, under the penalty of absolute nullity. It is rightly said that in the case of these contracts, form is an essential condition;
   - a validity requirement, which is why it is said to be required ad validitatem (ad solemnitatem).

It must be clarified that this contract is a consensual contract because the valid formation of the contract is sufficient with the validly expressed agreement of the parties. As repeatedly emphasized and required by legal provisions, the insurance contract must be concluded in written form, and this does not deviate from its consensual nature; the written form is mandatory but only for evidence. It is required *ad probationem,* not *ad validitatem*. This is clear from legal provisions that, when discussing the proof of the conclusion of the insurance contract, elliptically provide, of course, that this is done with the contract in the sense of an *instrumentum probationis*. Still, using the conjunction „and," it explicitly states that this proof can also be made through the issuance and sending of an insurance document such as:

- the policy or certificate;
- the first payment request; or
- the document expressing the insurer's intention to conclude the contract.

It is understood that none of these documents or all of them together do not constitute the contract in written form (in the sense of *instrumentum probationis*), and ultimately, they are nothing more than evidence instruments proving the existence of the contract as a legal operation (in the sense of *negotium iuris*). In conclusion, it is unquestionable that the written form of the insurance contract is required *ad probationem*, not *ad validitatem (ad solemnitatem)* (Bistriceanu, 2006, p. 935). Therefore, if the existence of the legal operation in the sense of *negotium iuris* (proof of the contract) is demonstrated by the means mentioned, the lack of the written form of the contract does not imply its nonexistence or nullity because the written form required *ad probationem* is not subject, if lacking, to the sanction of absolute nullity. The insurance contract is a bilateral contract. The content of contracts is the criterion by which they are divided into bilateral and unilateral contracts. Sinalagmatic contracts are those that give rise to reciprocal obligations between parties, unlike unilateral contracts in which only one party assumes obligations. The insurance contract is sinalagmatic because the insured undertakes to pay the installment amounts at the terms and conditions agreed upon by the parties, and the insurer undertakes to pay the insurance indemnity if the insured event occurs. The connected character of the parties' obligations and the correlative relationship between:

- on the one hand, the rights of the insurer and the obligation of the insured; and,
- on the other hand, the rights of the insured and the obligation of the insurer.

The specificity of the sinalagmatic character in the insurance contract is that the obligation to pay compensation comes into action, in most cases, upon the occurrence of the insured event (Bistriceanu, 2006, p. 936). The insurance contract is an onerous contract. To determine whether the insurance contract is an onerous contract, the criterion is the purpose pursued by the parties at its conclusion. By applying this criterion, contracts are classified into onerous contracts and gratuitous contracts. In onerous contracts, each party pursues a benefit, a consideration, i.e., the realization of its own patrimonial interest. The insurance contract, without distinguishing by the type of insurance, is always an onerous contract because, on one hand, the insured undertakes to pay, under the established conditions, within the limits and deadlines set, the premium rates, and on the other hand, the insurer undertakes to pay the insurance indemnity, under the established conditions and limits, if the insured event occurs to the insured or the beneficiary. It does not matter whether the obligations of the parties are equivalent or not, because, as known, the insurance contract is also a random contract, a characte-

ristic that removes its potential lesionary character. The onerous nature of the insurance contract leads to the following consequences:

- The liability of the insurer, as well as that of the insured, in their capacity as debtors for the obligations they undertake, is appreciated as severely as possible in relation to the letter and spirit of the law, but also with the letter and spirit of the insurance contract itself.
- The paulian action or revocatory action may triumph more easily compared to the situation if it were a gratuitous contract.
- The defects of consent are appreciated considering both the onerous nature of the insurance contract and its random nature (Bistriceanu, 2006 p. 1044).

To establish the random nature of the insurance contract, the criterion of knowing the extent of the parties' performances at the time of its conclusion is used. Unlike commutative contracts where the parties know from the beginning the extent of the performances to which they commit, in the insurance contract, due to its random nature, only the insured knows the extent of the premium rates to which they commit. Neither the insurer nor the insured know whether the insured event will occur and, in relation to this, what the extent of the compensation will be. The random nature of the insurance contract has significant legal implications: the contract cannot be annulled for lesion. However, if the insured event and, in connection with it, the obligations of the parties are not established, the contract will be void due to the lack of the random element. The entire theme regarding the insurance contract demonstrates with sufficiency its random nature. To establish this character, the criterion of the mode of performance is used.Unlike contracts with immediate (instantaneous) performance where the performances are executed immediately after their conclusion, and the object of the obligation generally consists of a simple performance, in the insurance contract, due to its successive performance nature, the execution takes place over time, either in the form of continuous performances (as in the case of a lease, for example) or in the form of successive performances (as in the case of an insurance contract).The insurance contract appears to be, without a doubt, a contract with successive performance. By its nature, the performances to which the insured commits are successive performances because the premium rates are established from the beginning, along with the terms and conditions for their payment, as well as the duration of the insurance.

The character of the contract with successive performance of the insurance contract produces a series of consequences (Bistriceanu, 2006, p. 937):

- Firstly, in case of non-performance due to fault, termination takes place (not resolution as in the case of contracts with immediate performance), terminating the contract only for the future (ex nunc), not for the past (ex tunc).
- The issue of the suspension of the obligation arises, usually only in contracts with successive performance, allowing, in the case of the insurance contract, the reactivation of the insurance (reinstatement).
- Contractual risks are analyzed under the specific conditions of the insurance contract.
- In the case of the insurance contract, due to its successive performance nature, there is no issue of establishing already performed performances in case of termination. In the event of termination, only the premium rates already paid for the period after the termination will be subject to restitution.

To establish the character of the insurance contract as a named contract, the criterion of the existence or absence of a proper name and specific regulation is used. Unlike unnamed contracts which, as the name implies, do not have a proper name or specific legal regulation, named contracts have a name resulting from their own regulation. The insurance contract is a named contract. It is the legal form of insurance economic activities. In other words, insurance economic activities find their legal expression in the insurance contract (Bistriceanu, 2006, p. 347). In all the normative acts, the subject of the matter is specified: the contract is found under the invariable name of „insurance contract".

On the other hand, as already emphasized, the insurance contract not only has its own legal regulation but the regulations in this matter are special regulations, hence their character of strict interpretation. Significant for the presented insurance contract as a named contract is the fact that, to the extent that the parties have not provided for absolutely all implications of the relationships they enter into, these rela-

tionships are considered to have been engaged in accordance with the special legal regulations. In other words, in unnamed contracts that do not have specifically consecrated regulations, parties are obliged to regulate in detail the relationships between them, due to the action of the rule in the matter according to which what is not specified in the contract does not exist; in the insurance contract, the lack of stipulations that, due to their importance, do not attract its nullity, is supplanted by the legal provisions in the matter.

The principal character of the insurance contract is established according to the criterion of independent existence or dependence on the contract. The insurance contract is a principal contract because it has its own, independent existence and its own legal identity and physiognomy. The existence of the insurance contract does not depend on the existence of another contract, meaning that this contract is not an accessory contract. From the principal character of the insurance contract, the following consequences arise (Bistriceanu, 2006, p. 938):

a) It does not depend on the existence of other contracts, and therefore, the accessory follows the principal rule does not apply.
b) The validity of the insurance contract is not assessed in relation to the validity of another contract, but only in relation to its own essential conditions (validity).
c) The termination of the insurance contract occurs only for causes that concern it, and it does not depend on the termination of another contract.
d) The execution of the performances to which the parties have committed in the insurance contract is done according to its provisions; its execution does not depend in any way on the execution of another contract.

The determination of the adhesion character of the insurance contract can be made by appealing to the criterion of the mode of expression of the parties' will. From this point of view, contracts are:

a) Negotiated contracts;
b) Adhesion contracts;
c) Mandatory contracts.

The insurance contract is primarily an adhesion contract, as the clauses provided in it belong to one of the parties (the insurer) without the other party having the possibility to discuss them, but only to accept or reject them. The use of the phrase "primarily" aims to emphasize a mitigation of the adhesion character of the insurance contract. Thus:

- The total removal of the negotiated contract aspect of this contract cannot be achieved because the parties introduce into it a series of clauses that they decide on mutually: the agreement regarding the extent of damages, clauses regarding the extent of premium rates, the extent of insurance premium, the terms, and conditions under which premium rates are paid, etc.
- Obviously, the adhesion character of the insurance contract predominates. This is why it is considered that this contract is primarily an adhesion contract (Bistriceanu, 2006, p. 939).

Two criteria are considered regarding the consideration of the legal nature of the insurance contract:

a) The criterion of the legal nature of this contract, according to which contracts can be of a commercial nature, civil nature, mixed nature, etc.; and
b) The criterion of the complexity of contracts.

The insurance contract is, generally, of a commercial nature and, exceptionally, of a mixed nature:

a) It is of a commercial nature because it is the legal expression of insurance economic activity, which, in turn, is commercial activity, seen as such according to the objective and subjective criteria, especially in relation to one of the parties - the insurer - which is always a commercial company;
b) It is of a mixed nature – namely – commercial-civil because:
    - The insurance contract is always of a commercial nature, from the point of view of the insurer, more precisely of the activity carried out by it (commercial economic activity), from the objective criteria, but also from the subjective criteria because the insurer is a commercial company;
    - The insurance contract is sometimes, from the point of view of the insured, of a mixed nature, in the sense that it largely has a civil character.

From this point of view, complexity lies in the multitude of types of insurance activities and the multitude of types of their object. It is sufficient to say that for each type of insurance, an insurance contract can be concluded, and the specificity of the contract depends on the specificity of the type of insurance

(Bistriceanu, 2006, p. 940). The national law, in force since January 1, 2023, imposes a series of capacity limitations for the parties to the insurance contract:

- Insurance or reinsurance activity can be carried out in the territory of the Republic of Moldova only based on licenses issued by the supervisory authority, the National Bank of Moldova (Article 9 (1) of Law No. 92 of April 7, 2022, on insurance or reinsurance activity);
- Residents of the Republic of Moldova, within the meaning of Law No. 62/2008 on foreign exchange regulation, can conclude insurance contracts only with insurance companies registered in the Republic of Moldova or with branches of companies from third countries registered in the Republic of Moldova, except in cases where the requested insurance is not practiced on the domestic market, and except for cases provided for by international treaties to which the Republic of Moldova is a party (Article 87 (2) of Law 92/2022).

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