REFORM OF THE HUNGARIAN INSURANCE LAW

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Abstract

There is a relevant lawmaking process in Hungary, the codification of the new Civil Code. The Hungarian Ministry of Justice and Law Enforcement and its experts stated, that their work is in final stage, so it's time to talk about the latest tendencies and improvements in a nutshell, focusing mostly on insurance contract law. In this paper I would like to deal only with matter of principles.

Introduction

There are countries with separate Act of Insurance Contract Law, for example the so called "Versicherungsvertraggesetz" in Germany, but in Hungary the lawmaker chose another way keeping the current dual system of codes: one for the private and one for the public law.

The **Hungarian Civil Code** was enacted in 1959, but came into force in 1960. At this time only one insurer existed, the so called State Insurer (ÁB – Állami Biztosító), which was a part of the social security system. The State Insurer was a monopoly, so there was no competition until 1988, when ÁB divided into two state owned insurance companies (Állami Biztosító and Hungária Biztosító).

Today there are 26 insurance private limited companies with registered office in Hungary, and two other companies have authorization of foundation. 35 insurer associations exist, 8 foreign companies have branch offices, and 200 insurers from EU member states [1] provide cross-border insurance services.

The first Act of Insurance (Act XCVI of 1995 on Insurance Institutes and Insurance Activities) contained mostly rules of public law, and this act was replaced by the second Act of Insurance (Act LX of 2003 on Insurers and the Insurance Business), which came into force on the first day of Hungary's EU membership (1 May 2004). This date was not coincidence,

this act made Hungary's insurance law conform to the EU rules. (This dual system was extended by the Act CLIX 2007 on Reinsurers.)

The second Act of Insurance enables to create insurance co-operatives, but there is no one on the Hungarian insurance market, so we can say, that all Hungarian insurance companies are profit-oriented, and the principle of **solidarity** is almost missing. There are a few exceptions however, for example The Insurance and Friendly Society of the Hungarian Attorneys helps for the orphans of its former members. This act contained contractual and other rules of private law, for example the minimum content requirements for insurance contracts, duty of disclosure etc.

The main goal of the original proposition was to separate consequently private and public rules, but the concept has changed during the codification, to make the Civil Code an abstract act, all rules with secondary importance will be promulgated on a lower hierarchical level.

The rules of electronic commerce, voluntary mutual insurance funds and private pension funds remain the field of sector-specific lawmaking.

The Hungarian Civil Code deals only with insurance contracts (characterized by the concept of risk-distribution), and says nothing about insurance associations with legal personality, which has to be revised, because there are insurance legal relationship on the ground of association's membership.

One-sided cogency

The question of using dispositive or cogent (mandatory) rules is always hard to answer. The principle of freedom of contract is often competes with the principle **of insurer and customer protection**. The definition of customer and customer contracts of the current Hungarian Civil Code are the followings:

Section 685. d) 'consumer' shall mean any person who is a party to a contract concluded for reasons other than economic or professional activities.

Section 685. e) 'consumer contract' shall mean any contract concluded by a consumer and a person acting within the scope of his economic or professional activities.

There is a trend in the EU to label micro ventures, or rather small and medium enterprises (SME) as customers, but the insurance sector has a promise from the under-secretary of the Ministry of Justice and Law Enforcement to label only natural persons as customers in connection with insurance contract law.

Of course there is a great need to create an effective customer protection but today there is almost a separate civil law of customer's so it's wise to define the requirement's of being customer as precisely as possible.

There are three main areas of one-sided cogency [2]: customer protection, insurance contract law and labour law. In all three legal fields the main goal of the regulation is to protect the weaker party of the legal relationship. The customer [3], the insured person and the employee are presumed indisputably to be weaker than the other party (insurer, employer etc.) from an economical point of view, but today it's not always true in insurance contracts. The rules of insurance contract law was modelled for community contracts with the State Insurer in 1959, but today in **business to business** (B2B) contractual relationships the insured (legal) persons are often stronger than the insurers.

For example banks and other financial institutions have mostly more ability of economic interest-enforcement, which is clearly demonstrated by the fact, that only one (the largest) insurer (Allianz) owns a bank, but several banks own an insurer company.

Insurers almost always operate with general contract terms, and a natural person can hardly achieve its modification, but when the insurers are contracting with powerful transnational companies, the high amount if premium makes it possible to create discrete contract, differing from general contract terms [4].

Next to the economic size, the other argument of using one-sided cogency is the question of laymanship. The insurer is a professional, who works daily with damage statistics, mortality tables, using knowledge of **insurance mathematic** and insurance law. The insurance company is an employer of a leader actuary, a leader lawyer specialized in insurance law, but

an average insured person (mostly without a university / college degree) has no experience in the field of insurance contracts.

One-sided cogency is almost a Hungary-specific term, because it limits the freedom of contract of the parties, and makes is impossible to create a flexible agreement according to the interests of the parties.

This rule is likely to by revised, and its scope will be reduced relevantly: it will be mandatory for costumer insurance contracts, but it will be exceptional in business to business contracts. Of course an insurer being a legal person will be not defenseless, in case of unfair contract terms he can bring an action on the court against the insurer.

Formal requirements of the insurance contracts

The **written form** is necessary to the conclusion of insurance contract, and it will remain the main rule for the amendment of contract and resignation too. This written form is indispensable to all legal statements with legal consequences, but it's too strict rule for all will statements from an economic point of view. Sending letters by recorded delivery is very expensive considering the high amount of their clients and insurance policies (in Hungary the postal service is still a monopoly, but it will change in the near future). There are also problems with some modern ways of communication. Sending documents via fax or via email with qualified electronic signature is a good way to create written legal statements, but in that case only the date of sending is can be verified. Concerning the typical method of regulation, we can say, that almost all act and other legal instruments deal with the date of reception, so this modern ways of sending legal statements are not fully compatible with the legal requirements mentioned above.

Formation of the insurance contract with implicit conduct

In Hungary the insurer has fifteen days to answer its contractual offers, because there is a relevant sanction in case breaching the obligation mentioned just before.

Section 537. (2) A contract shall also be created if an insurer does not respond to an offer within fifteen days. In such a case, the contract shall be created retroactively as of the date on which the offer is conveyed to the insurer or its representative.

This rule sanctions the breaching of the principle of cooperation in the civil law, if the insurer is lazy to answer to the proposal, then the contract will be formed as a consequence, and it's irrelevant, if the proposition disagrees with the custom of trade or with the insurer's **commercial practice**. In that case the assumption of risk in the discrete insurance is in contrast to the principles of insurance mathematic and statistic, so the insurer will probably resign the contract. Of course in the practice the insurer makes the contractual offer, and not the client.

This rule will be reduced to customer insurance contract, and it will apply only to proposals which fit the general contract terms of the insurer's. In my opinion this change is very rational, because in business to business relations – according to the high insured value and complexity of perils – there should be more time for the insurer to answer, not to mention the principle of freedom of contract.

Liability insurance

The insured party shall be entitled, under a liability insurance contract, to request the insurer to exempt him, up to the limit specified in the contract, from paying for damages for which he is legally liable [5].

The liability insurance contract evolved firstly to protect the **tortfeasor**, it helps not to be cleared out in case of small negligence and high amount of damage, but today it protects the aggrieved person at least so much in case of the tortfeasor's ability or will to pay is missing [6].

Property insurance

The insurance contract can cover the so called self-damages, when the tortfeasor causes loss to himself. At first look it seems to be a matter of liability insurance, but there is no legal provision to pay self-damages (an owner can do everything with his property), so it's surely

property insurance. The main differences between first party insurance compared with tort liability are the following:

1. Insurance: almost entirely optional
2. Insurance does not provide ‘full compensation’
3. The negligence on the part of the insured will often not affect a first party insurance claim. [7]

The duty of damage prevention

From an economic point of view, it’s extremely important to avoid property damages. The **doctrine of insurable** interest provides that an insured person should not make any net profit from the event should only receive coverage for the actual loss. The duty of damage prevention binds the insured not only during the completion of the agreement, but before forming a contract too. Insurers generally make such requirements for contracting, for example the installation and usage of mechanical / electronical safety devices.

The concrete types of the security devices mentioned above depend on the type of perils and the insured sum too, for example to avoid damages of theft could be useful installing a GPS (general positioning system), and to protect food from spoiling there can be ordered to install some kind of cooler device.

While the installment of the safety devices is easy to verify, it’s much harder to check, whether this instruments were functioning or not at the time of the damage (mostly, when the hull was perished or stolen). The existence of the facts has to be certified by the interested party, but in this case in my opinion only the theft can’t conduct the failure of the insured’s lawsuit.

Naturally the costs have to be beared by the insured, although insurers take off relevant load from the shoulders of their clients with – generally together with the state authorities - checking regularly the on the market buyable security devices, and giving certificate of „recommended”, guaranteeing the quality of the product, and the conformity with the general contract terms of the insurers.

During the accomplishment of the contract of carriage of goods, the carrier has to follow with attention the duty of damage prevention in his decisions, especially in case of choosing the appropriate hull, direction, resting-place, and – when the goods are valuable – keeping the parameters (price, destination, guarding etc.) of the freight in secret. In that case special legal regulations concerning dangerous goods make it impossible, but insurance law shouldn't tolerate marketing-inspirited steps in my opinion.

The duty of damage prevention is an obligation of performance in connection with the installment and usage of the safety devices, thus only their lack can be labeled as a breach of the contract, in connection with the resulting of the insured events we can speak of only a duty of care, because the most careful enforcement of the duty of damage prevention is only capable of lowering the chance of damaging events, and not of full exclusion (especially in case of vis maior).

"The unique characteristic of warranty is that materiality and causation are irrelevant. It is submitted that the rationale of warranty is that the insurer only accepts the risk provided that the warranty is fulfilled. The doctrine of warranty was necessary when it was introduced into common law over three hundred years ago; however, today it causes great hardship for the insured in both marine and non-marine insurance contracts." [8]

The duty of mitigation of damages

Under this principle the insured is obliged to lower the amount of the damages as small as possible. The obligation of mitigation of damages is secondary to the duty of damage prevention. The period of the duty mentioned above lasts after the materialization of the damaging event until the termination of the insurance contract.

This statement could be amazing first time, because the duty during the materialization of the insured event can be labeled notorious, but the other case can be grounded adequately too.

Amongst the classic obligations of mitigation of damages can be mentioned the fire service, the pumping of leaked ship, and the traction of a stranded ship etc.. At this point the damaging event has occurred, but its amount can be lowered yet.

In my opinion it's useful to rule the bearing of costs to be beared by the insurer, in case of both successful and what is more the unsuccessful efforts to mitigate damages. It can assist the insured to give a rational resolution, and he shouldn't hesitate about the economic efficiency and chance of his mitigation of damages.

(Naturally the insurer's mentioned obligation shall not cover irrational cases, misuse of rights, for example when the pilot maneuvers the burning truck straight into the river instead of using a fire-extinguisher.)

It's possible the reduce the damages posteriorly too, especially in case of theft / robbery the accusation and the seizure warrants of the hull's, watching the parameters of the integrated GPS could at least partially lower the materialized damages.

The duty of cooperation

The duty of cooperation is a classic principle of civil law [9], which influences – to correspond with the duty of disclosure – the whole insurance legal relationship, from contract's formation to the termination of the contract. In my opinion the most relevant form of this principle is the procedure of loss adjustment, where after asserting a claim the insured has several concrete duty to inactivity and sufferance.

The insured can hardly modify the field and parameters of the insured event, only in case of damage prevention and mitigation of damages. The insured has to create the possibility for the representative of the insurer, the check the damaging event. In that case the insurer can't verify the circumstances and parameters of the insured event, and can't create the real calculation of the damages.

According to the duty of cooperation the insured person has to provide **notice of loss** (immediately after the occurrence of a loss) and **proof of loss** for the insurer.

Summary

There is much to do with the codification [10], and of course it's hard to choose the correct solutions acceptable by both insurers and – especially customer – insureds too. Their direction

is unquestionable good, and I hope that their self-sacrificing work will be successful, and call forth a well-working Civil Code.

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