EUGENIUSZ KOWALEWSKI

The need for implementing an Insurance Code in Poland

A legislative reform of private insurance law is a difficult and complex process. Private insurance law is a part of a comprehensive body of laws that regulates a very complicated and extensive area. This area consists of the civil-law insurance relations, issues concerning the provisions of administrative and financial law applicable to insurance and all organisational matters. Criminal laws involving insurance, insurance accounting and insurance mediation frameworks, and other areas regulated by the state should also be mentioned. Even such a cursory exemplification of relations falling within the sphere of private insurance law shows that regulating all these matters in a single enactment was at least a defective – if not an anachronic – concept, no matter how extensive and careful intellectual preparation it required. For all these reasons, there is a need for an overhaul of private insurance law which would ensure that this branch of law is properly adjusted to new economic realities. Equally importantly, an optimal legislative model of private insurance law should be selected.

Key words: insurance legislation, insurance code, Poland.

Introduction – the definition of insurance law accepted in Poland

Polish legal scholarship defines insurance law as legal regulations determining relations relevant to the existence and functioning of insurance as an economic category.[1] It is classified as a complex field of law, consisting of legal norms belonging to various domains of law, particularly to civil, financial and administrative law. Despite its complexity, Polish scholars consider insurance law as a distinct branch of law.

1. E. Kowalewski, "Prawo ubezpieczeń gospodarczych. Ewolucja i kierunki przemian", (Wydawnictwo "Branta", Bydgoszcz 1992), 237–238.

1. The reform of Polish insurance law after the year 1990[2]

A legislative reform of private insurance law is a complex and difficult process. Private insurance law is a part of a comprehensive body of laws that regulates a very complicated and extensive area. This area consists of the civil-law insurance relations (laid down in the Civil Code [hereinafter referred to as "CC"] and the Maritime Code[hereinafter referred to as "MC"]), issues concerning the provisions of administrative and financial law applicable to insurance and all organisational matters. Criminal laws involving insurance, insurance accounting and insurance mediation frameworks, and other areas of state control (procedural aspects, issues relating to labour legislation and tax law) should also be mentioned. Even such a cursory exemplification of relations falling within the sphere of private insurance law shows that regulating all these matters in a single enactment would be at least a defective – if not an anachronic – concept, might it be the most extensive and well-thought piece of legislation.

For all these reasons, there is a need for an overhaul of private insurance law which would ensure that this branch of law is properly adjusted to new economic realities. Equally importantly, an optimal legislative model of private insurance law should be selected.[3]

The concept of an insurance code, based on the French model, was the most far-reaching solution. Its adoption would consolidate the statutory autonomy of insurance law and above all, it would brought together standard disperse regulations on insurance relations into a single act. Although this concept was presented between ten and twenty years ago,[4] it has not gained wide recognition.

The concept of partial regulations was put into practice when the CC and the first MC came into effect. It came down to the distinction between the civil insurance law (insurance policy regulations) and administrative, financial and organisational aspects of private insurance. While the civil law part was to be regulated by the codes (the CC and the MC), other issues were to be covered by "insurance acts."[5]

In fact, this "pragmatic" legislative concept has never been carried out consistently because almost all "insurance acts" interfered with civil law issues. This resulted in an incoherent regulation of the insurance policy, and sometimes caused considerable chaos. The incoherence was particularly visible in the field of compulsory insurance (formerly, "statutory insurance") where public law elements became mixed up with the private law ones. The chaos was not dealt with by the abolition of the peculiar "statutory insurance" category[6] and the introduction of the uniform contract

2. This year can be deemed a starting point of the radical legal and constitutional changes in Poland. The changes obviously involved insurance law, previously based on the sophistic demagogy of the socialist regime which developed the concept of "socialist insurance."
3. J. Łopuski and E. Kowalewski, "Założenia legislacyjne dalszej reformy prawa ubezpieczeniowego," *Państwo i Prawo* 11 (1991): 5–18 and J. Łopuski, "Nowe prawo ubezpieczeniowe a ubezpieczenia morskie: refleksje na temat kierunków rozwoju prawa ubezpieczeniowego," *Prawo Asekuracyjne* 3 (2004): 5–25.
4. E. Kowalewski, "Propozycje zmian w ustawie o ubezpieczeniach majątkowych i osobowych," in vol. XI of *Studia Ubezpieczeniowe*, (Poznań, Warszawa–Poznań: Wydawnictwo Akademii Ekonomicznej, 1989), 191–192.
5. In particular, the Property and Personal Insurance Act of 2 December 1958 (Journal of Laws No. 72, item 357; as amended by Journal of Laws No. 16/1964, item 94); and the Property and Personal Insurance Act of 29 September 1984 (Journal of Laws No. 45, item 245, as amended by Journal of Laws No. 30/1989, item 160).
6. This category was introduced under the Insurance Activity Act of 28 July 1990 (uniform text published in Dz. U. No. 11/1996, item 62 with changes).

of insurance,[7] because in many cases statutory insurance achieved the status of compulsory insurance. Such contractual compulsory insurance schemes were governed by acts of secondary legislation (mainly by regulations of the Finance Minister) which contravened not only the very idea of the insurance policy but also the CC rules on insurance contracts.[8]

For these reasons, the legislative concept formulated by J. Łopuski and E. Kowalewski[9] in the early 1990s has begun to gain increasingly wider recognition amongst insurance practitioners and members of relevant legislative committees. The need for drawing up the "Insurance Act Package", covering insurance activity and insurance supervision, insurance mediation and compulsory insurance, was one of the objectives underlying this concept. It did not specify which legal instruments were to contain provisions governing insurance policies (the CC and the MC, or a separate act on insurance policies). However, the concept emphasized the necessity for a reform of civil insurance law, coupled with the introduction of the package solution.

2. The Insurance Act Package

On 22 May 2003, the Parliament passed four acts[10] regulating private insurance law: the Insurance Activity Act, the Act on Compulsory Insurance, the Insurance Guarantee Fund and the Polish Motor Insurers' Bureau, the Act on Insurance and Pension Supervision and on the Insurance Ombudsman, and the Insurance Mediation Act.

These acts, commonly called the "Insurance Act Package," provide a firm foundation for the new legislative framework of private insurance. Their enactment constitutes the most comprehensive and largest reform of this branch of law in the history of Polish legislation. In its wake, Polish standards and measures have been adjusted to the European Union law. This, in turn, resulted in the domestic insurance market effectively becoming part of the single European market.

There is no denying that many of the detailed measures introduced by the acts are imperfect, or even defective – and as such they will have to be amended.[11] Nevertheless, the general assessment of this private insurance law reform is quite positive. For the first time in the national legislative history this branch of law has undergone such an extensive, comprehensive and meticulous reform. The reform is of a systemic nature, as not only does it clarify the standards of the insurance market, abolishing the remnants of the Socialist-era insurance – for instance, by abolishing the Finance Minister's powers to issue "departmental regulations" on compulsory insurance – but it also brings Polish law in line with the requirements set by the European Union

7. Before 1990, this type of insurance was known as the "insurance by operation of law" (in Polish: "*ubepieczenie ex lege*").

8. E. Kowalewski and T. Sangowski, "Prawo ubezpieczeń gospodarczych. Komentarz," (Warszawa: Lexis Nexis, 2004), 14, see also footnote 9.

9. J. Łopuski and E. Kowalewski, op. cit., p. 5 et seq.

10. The Acts came into effect on 1 January 2004, but their certain provisions came into force when Poland became the member of the European Union, that is on 1 May 2004. (Journal of Laws No. 124, item 1151–1154).

11. See, e.g., the following commentaries and reviews of the discussed acts: E. Kowalewski and T. Sangowski, "Prawo ubezpieczeń. Ustawy z komentarzem," ed. S. Rogowski (Warszawa: Poltext, 2004), and K. Przewalska and M. Orlicki, "Nowe prawo ubezpieczeń gospodarczych. Wprowadzenie," (Bydgoszcz–Warszawa–Poznań: Oficyna Wydawnicza Branta, 2004).

and ratified international treaties.[12] On top of that, the reform fundamentally strengthens the consumers' protection in the area of insurance services, aligning the law to a number of the European Union directives.

However, the generally succsessful 2003 reform completed just the first step of the consolidation of Polish insurance law. It did not consider the modernisation of the most crucial part of insurance law – insurance contract law. There is now a need to take a second step of the reform, whose strategic aim is to design uniform insurance law. Hence, the next legislative initiative should aim at bringing together the public insurance regulation and the rules on insurance contract in one act.

3. Arguments in favour of an Insurance Code[13]

- **ARGUMENT 1:** It is necessary to unify, organise, consolidate and ensure the coherence of a large number of dispersed, chaotic and inconsistent regulations governing the socially and economically coherent area of **insurance relations** (excluding social insurance schemes). Insurance law should finally and definitely acquire its distinctive identity and the status of a fully independent branch of law.
- **ARGUMENT 2:** The basic terminology of insurance law must be clarified and arranged in an orderly manner, which involves defining core notions and measures, formulating insurance law principles and defining the limits of their application. There is a need for developing a new and appropriate **system for the classification of various branches of insurance law,** which would comply with the existing regulatory framework and include such areas as insurance contract law, insurance activity law and insurance supervision law, as well as compulsory insurance schemes, special regulation of consumer relations, insurance mediation and international insurance relations.
- **ARGUMENT 3:** Domestic regulations on private insurance should be adjusted to the European standards and the **EU law** – Directives, Council Regulations and treaties – must be transposed, to the extent possible, into national legal systems. In particular, development of an insurance code would create an opportunity to make use of the solutions presented by the Restatement of European Insurance Contract Law, which may be either en masse implemented into domestic legal systems, or autonomously incorporated into individual insurance contracts, following the example of INCOTERMS in international trade.
- **ARGUMENT 4:** Polish legislative framework should be brought in line with the **model** and developed contemporary European legal systems which have opted for and effectively implemented insurance code concepts (France, Italy, Bulgaria, Portugal). An Insurance Code, if enacted, would allow Polish lawmakers to remain the regional leaders in insurance legislation, setting directions and standards in the field.
- **ARGUMENT 5:** Normative consolidation of private laws governing insurance relations into a "code" seems to be the only and – at the same time – the optimal way to control the cur-

12. E.g. the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which binds Poland as from 1 January 2000 (Journal of Laws No. 10, item 132–133).

13. E. Kowalewski, "O potrzebie polskiego kodeksu ubezpieczeń," (Dom Organizatora TNOiK Toruń 2009), 15–22.

rent normative chaos, which features the co-existence of **multiple legal regimes** dealing with insurance contracts (non-marine and marine insurance, voluntary and compulsory insurance, consumer and "non-consumer" insurance, commercial and mutual insurance, insurance guaranteed by the State Treasury and commercial, "non-guaranteed" insurance, and domestic and foreign market insurance). It seems that a way to address this peculiar multiplicity of legal regimes, which makes the law very difficult to apply, would be to establish general and universal provisions concerning insurance contracts (in the first part of the code), followed by special provisions on **individual forms and types of insurance contracts** set out in the subsequent parts of the code (titles, sub-titles, sections). Such a legislative approach would prevent unnecessary repetitions and allow the lawmakers to clearly determine the relationship between the special regulations and general provisions on insurance contracts, which are presumed to be universally applicable (see the methodology of the Code des Assurances).

- **ARGUMENT 6:** Developing a modern insurance law codification would create an excellent opportunity to free insurance law from certain archaisms and address its redundant traditionalism (visible e.g. in marine insurance regulations). Accordingly, the code should be based on the contemporary classification of insurance types (property insurance, personal insurance and liability insurance), and not on the currently used, incorrect systematics.
- **ARGUMENT 7:** An insurance code would be a fine opportunity to unify conflict of laws provisions concerning insurance contracts, a body of law known as the "private international law of insurance." It also would be appropriate to extend these regulations to cover jurisdictional issues relating to insurance, including those concerning the enforcement of foreign court judgments, fully incorporating the Lugano Convention and Council Regulation No 44/2001. As regards private international law of insurance, the code should determine the relationship between the Polish Private International Law Act (which contains general provisions of private international law) and the relevant special private international law rules aligned with the EU law (in particular, the "Rome I" and "Rome II" Regulations). The code should also address overriding mandatory rules (the rules that must be applied regardless of the law applicable to the contract), which are becoming increasingly more relevant in international insurance relations, especially those involving compulsory insurance, and which restrict the autonomy of parties to exercise control over the choice of law.
- **ARGUMENT 8**: An insurance code would create an additional possibility to establish a detailed framework of **intertemporal rules** applicable to insurance relations and to determine intertemporal effectiveness of individual norms. It is particularly important to codify the intertemporal rules of insurance law because insurance relations are often of a continuous and long-lasting character (long-term insurance). A high degree of care must be exercised in any attempt to reform the legal regime governing such long-term relations and any changes need to follow clear legal principles, made known to contractual parties in advance.
- **ARGUMENT 9**: The development of a code, which is to regulate relations anchored in both public and private insurance law, will prevent too frequent amendments of insurance law and remove insurance law from the exclusive remit of the Ministry of Finance, transferring the relevant regulatory responsibilities to other government departments and bodies, in particular the Ministry of Justice and the Commission for the Codification of Private Law. Moreover, the parliamentary legislative process will ensure that any future amendments of the Insurance Code will follow a qualified legislative procedure require a special procedure to be adopted. This will guarantee

the high quality of subsequent legislative changes and ensure the necessary stability of law, preventing a floodgate of low-quality amendments.

- **ARGUMENT 10**: From the perspective of the social perception of law and its judicial and extra-judicial application, the creation of a clear, understandable, transparent and coherent, **code-based** legal framework for the entire field of insurance will contribute to the raising of national insurance awareness and lead to the elimination of the phenomenon of "**insurance ignorance**," which has been present in Polish society for decades (and deplored by a doyen among the Polish insurance law academics[14]).

Conclusions

The present state of insurance law in Poland is highly unsatisfactory. Insurance law provisions are dispersed among a number of legal acts, and the regulation of the insurance contract is outdated. This creates extensive chaos, which manifests itself mainly in the lack of a clear distinction between the public and private spheres of insurance contract law. What is worse, laws governing the contract of insurance are scattered among the CC, the MC and other legal enactments; for example, the contract of compulsory insurance is regulated in the 2003 Compulsory Insurance Act, but also in the 2003 Insurance Activity Act.

The above shortcomings of Polish insurance law inevitably prompt a discussion about introducing a comprehensive codification of this branch of law in a single instrument – preferably an insurance code – which is a legislative model already adopted in France, Italy, Portugal or Bulgaria. This idea has been gaining increasingly more support in Poland, also among parliamentarians.

The future codification cannot be a partisan work of one or several, even most distinguished, authors. It should not strive to be original, but ought to draw on achievements and legal concepts developed by the legal doctrine and legislation of other countries, especially those with significant accomplishments in the field of insurance law.

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Potrzeba wprowadzenia Kodeksu ubezpieczeniowego w Polsce

Dokonanie reform legislacyjnych w zakresie ubezpieczeń gospodarczych jest trudnym i złożonym zagadnieniem. Prawo ubezpieczeń gospodarczych jest częścią prawa ogólnego regulującą bardzo skomplikowaną i szeroką kwestię. Składają się na nią relacje cywilne w ubezpieczeniach, zagadnienia dotyczące prawa administracyjnego i finansowego w ubezpieczeniach oraz wszystkie problemy organizacyjne. Należy wspomnieć także o ubezpieczeniowym prawie karnym, rachunkowości ubezpieczeniowej, pośrednictwie ubezpieczeniowym i innych obszarach kontrolowanych przez państwo. Nawet pobieżne spojrzenie na relacje w prawie ubezpieczeń gospodarczych pokazuje, że błędną koncepcją, jeżeli nie anachroniczną, było uregulowanie tych wszystkich zagadnień w jednej ustawie, nawet jeśli miała możliwie najszerszy zakres i była uważnie przemyślana. Z uwagi na powyższe, istnieje potrzeba stworzenia porządku prawnego na obszarze ubezpieczeń gospodarczych, który będzie dotyczył jego niezbędnego przekształcenia w nowych warunkach ekonomicznych, oraz wyboru dla niego optymalnej koncepcji legislacyjnej.

Słowa kluczowe: przepisy ubezpieczeniowe, Kodeks ubezpieczeniowy, Polska.

PROF. EUGENIUSZ KOWALEWSKI – head of Department of Insurance Law, Nicolaus Copernicus University in Toruń.