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OBLIGATIONS, RESPONSIBILITIES AND PROFESSIONAL LIABILITY OF INSURANCE INTERMEDIARIES

SCIENTIFIC PAPER

Abstract

Insurance mediation is very complex, so it is understandable to have a variety of questions, such as those relating to the legal nature of mediation contracts, the rules applicable to the intermediaries' civil liability and liability insurance. Intermediary's obligations that are legally established are such that they far exceed characteristic intermediary's obligations in classical mediation contracts, which raises the question about the contract type. Specificity and complexity of the matter requires appropriate legal regulation of insurance intermediaries' professional liability that would ensure legal certainty of intermediaries and other interested parties. The author points out that it is necessary to apply uniform conditions to insurance to provide minimum insurance cover. Insurance intermediaries' professional liability is mandatory; therefore, it is not acceptable for insurance companies to conduct it based on conditions containing significant differences, especially with regard to exclusions from insurance that mostly limit it. The author points out that many of the questions raised during implementation of our regulations concerning insurance mediation cannot be answered without a good knowledge of the European Union law and the law of its Member States.

Key words: *insurance mediation, insurance intermediary, insurance mediation contract, insurer, insured, intermediary's liability, insurance terms and conditions*

1. Introductory Notes

The objective of insurance mediation is the sale of insurance products. Under conditions of fierce competition, insurance companies can more easily win the market if they do not sell their products directly, but through independent and

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professionally qualified entities. In modern comparative law, there are no major differences in regulating the sale of insurance products in this manner. In the European Union (EU), regulations of the Member States relating to insurance mediation have been harmonized by incorporation of rules from several supranational acts (three directives and one recommendation), which created conditions for performance of insurance activities in the EU's single market.

The EU directives and Member States' legislation use the term insurance mediation for activities performed by insurance agents and brokers.[2] Mediation is taken as an umbrella term because both insurance broker and agent connect persons interested in concluding an insurance contract and contribute to the establishment of communication between the two entities during the insurance period and at the time of fulfillment of insurer's obligation when the insured event occurs. An issue is whether the term "insurance intermediary", which is used in our Insurance Law, is adequate or not[3], since it indicates that an intermediary deals with mediation, although, more or less, an insurance agent does the same.[4] The term "insurance representative" does not correspond to the term of an "insurance agent", which is stipulated by laws in many countries, because a representative, first of all, undertakes legal actions, while an agent often undertakes, more or less, actions undertaken by an intermediary based on a mediaton contract and an employed party based on a service contract. In order to fulfil various obligations towards the insurer-employer, an agent must, first of all, connect a person interested in concluding an insurance contract and an insurer and, when concluding the contract, during its duration and

[2] EU Member States have incorporated in their legislation rules from directives on insurance mediation (in French: *intermediation d'assurance*; in Spanish: *intermediación de seguro*; in German: *Versicherungsvermittlung*; in English: *Insurance mediation*) and stipulated that they refer to activities performed by insurance brokers and agents who obtained a licence from the competent state authority (in French: *agent d'assurance/courtier d'assurance*; in Spanish: *agente de seguros/corredor de seguros*; in German: *Versicherungsmakler/Versicherungsverttreter*; in English: *insurance agent/broker*). A broker is a person who arranges transactions between a buyer and a seller. He is an intermediary (*middleman*) with, mostly, greater authorisations than the basic ones, who connects two persons for conclusion of a contract. The term *courtier* in French originates from the word *courir* (run), an intermediary between persons who wanted to conclude a contract went from one to another and delivered their requests and messages. The term "agent" means a person who acts in the name of and on behalf of an employer and performs other actions stipulated by a contract. In our law we should use terms "insurance agent" and "insurance broker" because they are widely accepted, they have their place in a long history if insurance mediation and they would not create any confusion with insurance clients.

[3] *The Official Gazette* no. 139/2014.

[4] The Law on Insurance Mediation of the Republika Srpska uses terms of a representative, an intermediary and a brokerage (Article 2 of the Law – the *Official Gazette of the Republika Srpska*, no. 47/2017). Previous law used terms an insurance representative and broker. Other countries arising from the break-up of SFRY use terms of an insurance intermediary and representative. Certain number of insurance mediation companies operating in the Republic of Serbia use on their websites terms "a broker" and "an agent", which can be explained by the fact that those two terms are more understandable to potential clients.

execution, undertake, to an extent that is not negligible, any material actions that are characteristic obligation of a contracting party from other contracts. Agents and brokers connect an insurer and a client and perform other business activities, depending on how their obligation is regulated by the contract with an insurer, or with an interested party, a client. Although the most important obligation of a broker is to mediate in the conclusion of an insurance contract on the basis of a contract binding him to a client, he has several obligations that are also legal, and not just factual ("technical", "material").[5] In practice, the broker's activities are rarely exhausted by connecting a potential policyholder and an insurer. These special relationships cannot be viewed within the frames of defined legal institutions.[6]

In legal theory, there is no single opinion as to whether a broker is only in contractual relation with a client or can be with an insurer; and an agent only with an insurer or may be with a client. First of all, the main difference between an insurance agent and a broker is their relationship with an insurer. A broker, unlike an agent, predominantly acts in his own name and on his own behalf, and an agent in the name of and on behalf of an insurer with whom he has concluded a long-term contract. A broker receives a service fee from an insurer, but also from an employer (a client or an insured), and an insurance agent receives it from an insurer.

A clear legal distinction between an insurance broker and an insurance agent is difficult to determine when a broker is at the same time in some way linked to an insurer. Protection of a policyholder, in particular an insurance client, requires that he knows the capacity of a person who mediates and negotiates in order to conclude an insurance contract.[7] This is particularly important from the point of view of realization of his right to claim indemnity, since he is not in the same situation when he can claim compensation directly from an insurer or only from a broker.

2. Historical Overview

In the historical development of mediation activities, it was noted that in ancient times individuals connected persons who wanted to conclude a trade. In the Middle Ages, mediation did not have much significance in terms of business

[5] I. Babić, Privredno pravo, Beograd 2008. p. 302.

[6] Priručnik za obuku za polaganje stručnog ispita za sticanje zvanja ovlašćenog posrednika i ovlašćenog zastupnika u osiguranju (J. Pak, Posredovanje i zastupanje u osiguranju p. 103-130), Privredna Komora Srbije, Beograd 2016.

[7] In German insurance market there are representatives presenting themselves as independent intermediaries (Pseudomakler). That is an undesirable phenomenon because it leads to a legal uncertainty. Such intermediary gets clients he otherwise could not get; clients trust more in intermediaries who are not connected to any insurance company, Beckman/Matusche-Beckman, *Versicherungsrechts Handbuch*, Verlag C.H. Beck, 2004, p. 177.

operations, but from the 13th century it began to gain significance in bigger trade cities.[8] First documents on insurance brokers date to the 15th century in Italy. The first document is from 1319 when a certain Bardo from Pisa received a fee for mediation in marine cargo insurance. In other European countries, brokers appeared at the end of the 16th century. The first regulations relating to insurance intermediaries date back to the 17th century. The need for intermediaries emerged because contracting parties were from different countries and did not understand each other. Intermediaries were practically interpreters who delivered requests from one to the other contracting party.[9]

After the Second World War, upon introduction of a non-market insurance in 1967 and adoption of the Basic Law on Insurance and Insurance Companies,[10] for the first time in our country establishment of insurance business entities for mediation, representation, claim assessment and other insurance activities was envisaged, but that did not contribute to their significance. The Law on Basic Insurance of Property and Persons from 1990, the last one adopted in the SFRY, entrusted insurance mediation and representation activities and other activities (risk survey, survey and assessment of risk, legal aid and other intellectual insurance services) to special organisations.[11] Under the Law on Insurance of Property and Persons of the Federal Republic of Yugoslavia from 1996, other insurance services could have performed by agencies established as joint-stock companies or limited-liability companies.[12] For the first time the law stipulated that the evidence on qualifications of a candidate for the agency's director is submitted along with the request for issuance of the licence for work, as well as his/her professional and technical expertise for performance of the stated activities. An important novelty was the possibility for companies and other legal entities to deal with mediation and representation in insurance (and other insurance activities), provided they have a special organizational unit that is both professionally and technically qualified to provide such services. However, until adoption of the Insurance Law in 2004, the insurance mediation and representation was not developed. That law closely defines conditions for performance of activities and obligations of entities dealing with insurance mediation activities.[13] According to the changes and amendments to the Insurance Law of the Republic of Serbia from 2015, the Law was largely harmonised with the EU Directive on insurance mediation from 2002. The Law stipulated main conditions and rules applicable to insurance mediation and representation.

[8] J. Bigot/D. Langé, Traité de droit des assurances, Tom 2, La distribution d'assurance, L.G.D.J, 1999, p. 290.
[9] S. Deckers, *Die Abgrenzung des Versicherungsvertreters vom Versicherungmakler*, Verlag Versicherungswirtschaft, Karlsruhe 2004, p. 27.
[10] *The Official Gazette of the SFRY*, no. 7/67.
[11] *The Official Gazette of the SFRY*, no. 17/90.
[12] *The Official Gazette of the SFRY*, no. 30/96.
[13] *Priručnik privredne komore Srbije*, op. cit. p. 105.

3. EU Legislation in Insurance Mediation

Insurance intermediaries (agents and brokers) play a central role in sale of insurance in the EU market. Under the definition provided in the EU Directive, insurance mediation in terms of activities performed by insurance agents and brokers is any activitiy related to presenting or offering insurance contracts or its conclusion, a contribution to its realisation and execution especially in case of occurrence of an insured event. Insurance brokers in many countries can be both natural persons and legal entities. Due to the complexity of an insurer's relations with agents and brokers, interrelations between agents and brokers, as well as the relations between these three entities and clients, the need for performing activities by persons with sufficient insurance knowledge, the need for effective state supervision, it was necessary to conform the Member States' regulations relating to insurance mediation. The first directive should have been applied until expiry of the deadline for harmonisation of the Member States' regulations related to establishment and operations of insurance agents and brokers.[14] The Commission Recommendation on insurance intermediaries contributed to a certain extent to harmonisation of the Member States' regulations related to fulfilment of professional conditions required for performance of insurance activities.[15] Professional competence of brokers and agents is of great importance for performance of insurance operations in the best interest of an insured. They should possess general and professional knowledge, and the Member States can determine certain levels of knowledge for certain categories of intermediaries.[16] However, after adoption of the First Directive and the Recommendation, differences that presented an obstacle for free mediation activities in insurance and reinsurance in a single market remained in the national legislation. Two freedoms, the freedom of establishment and the freedom of service provision, could not come to life in this industry without elimination of these obstacles. Due to insufficient conformity of regulations and the need to conform the activity of intermediaries to other directives, especially in the field of remote service provision and protection of consumers of financial services, another directive was adopted.[17] It required that the Member States ensure that mediation activities are performed by persons with minimum level of professional competence and moral quality as stipulated in its rules. Incorporation of provisions on professional competence of agents and brokers in the legislation of the Member States, entry into a special registry of jurisdiction and cooperation of their supervisory authorities, mandatory insurance against civil liability and obligations of brokers and agents regarding information delivered to insurance clients, led to harmonisation of

[14] Directive 77/92 of 13.1.1976, OJL 026 of 31.1.1977.
[15] 92/48 EEC: Commission Recommendation of 18.12.1991, OJL 19 from 28.1.1992.
[16] Jasna Pak, *Pravo osiguranja*, Beograd 2011, p. 174.
[17] Directive 2002/92/EC of 09.12.2003, OJL L 9/3 of 15.01.2003.

national regulations in this area, which eliminated the main obstacles to achieving the freedom of mediation service provision in a single market. However, continuous development required further harmonisation of the Member States' regulations, which led to the third directive on sale of insurance products. Title of this directive is not insurance mediation since it is not applied only to independent brokers and agents, but to all entities dealing with sale of insurance products, even those employed in insurance companies. Objective of the directive is a better protection of insurance clients, especially against new market participants that are not intermediaries, in *strict sense* as they represent themselves, a greater transparency regarding fees received by intermediaries for their services and harmonisation of requirements related to continuous professional education of intermediaries. That consolidated act eliminates any remaining non-conformities in legislation of the Member States with the aim to ensure smooth performance of mediation services in a limitless market.

The Insurance Law is harmonised largely with the other EU Directive.[18] Insurance intermediaries and representatives perform mediation and representation activities, but also activities of an employed party under a service contract, upon order of an insurer, a client or a policyholder/insured, as stipulated in the legislation of the EU Member States.[19] The Law gives significance to professional competence for performance of mediation and representation activities. The National Bank of Serbia, entrusted with supervision over insurance companies and entities performing insurance mediation and representation activities, adopted the decision referring to certification and examination of knowledge required for performance of insurance activities.[20]

4. Legal Nature of Insurance Mediation Contracts[21]

Nature of an insurance mediation contract concluded by a broker and a person who wants an insurance cover is disputable in legal doctrine precisely because, which is mostly the case, an insurance brokers' obligation is not only connecting an insurer to a client, but also to a great extent performance of other activities that are similar to other contractual obligations. Insurance mediation contracts are governed by legal and contractual rules and certain custom rules that were created in the long history of insurance activities.[22]

[18] The Insurance Law contains greater number of provisions on insurance intermediaries and representatives (Chapter IV, Insurance mediation and representation, Articles 85-113).

[19] See Article 94 and Article 82 and 97 of the Insurance Law.

[20] Decision on Insurance Broker and Agent Certification and Further Professional Education (*the Official Gazette of the RS*, no. 38/2015 and 11/2017)

[21] Terms "insurance broker" and "insurance agent" from the Insurance Law shall be used hereinafter.

[22] Insurance brokerage and agency contracts are not designated contracts, although they are characterised by features that distinguish them significantly from mediation and representation contracts.

A broker concludes a contract with a client based on which he searches for an insurer with whom to conclude an insurance contract that would meet client's needs for insurance protection against a certain risk. When contacting an insurance company, a broker uses an authorisation given by a client based on a contract, which gives him a legitimate right to act as a client's contracting partner, a potential policyholder.

In principle, a contract with an insurance broker is concluded with a person interested in insurance protection. However, a broker may also have a contract with an insurer, either oral or written, which is in practice designated as a contract of (business) cooperation. Agreements between an insurer and an insurance broker contain provisions on commission, any authorizations granted to a broker in connection with the preparation for conclusion of the contract or its realisation. An insurer and a broker may conclude a contract for performing activities that are not insurance mediation activities (sale of insured damaged items, undertaking preventive measures, research of the insurance market, risk assessment and loss assessment).[23]

An insurance broker works primarily in the interest of a client, but he is also obliged to take care of the interest of insurers, as much as a policyholder has to take care of that interest himself.[24] Contracts concluded by a broker with a client and an insurer assume relations, rights and obligations of a broker both with a client /policyholder/ and an insurer, which leads to very complex legal relations.

Recently, in insurance markets of the Member States, an insurance broker increasingly acts as a client's agent (or a policyholder) on his behalf and in his name.[25] In transport insurance, brokers traditionally have broader authorisations unlike intermediaries in insurance of carriage of goods by road (e.g. to sign a policy).[26] There is a generally accepted rule in insurance of carriage of goods by road that a broker cannot oblige a client or an insurer unless specifically authorised. If a client

Foreign courts apply custom rules that were created in the long history of a non-direct sale of insurance products. These rules are in some countries codified, French courts apply customs that were published for the first time in 1935.

[23] See item 27 of the Decision of the National Bank of Serbia on Implementing Provisions of the Insurance Law Relating to Insurance Brokerage and Agency Activities (*the Official Gazette of the RS*, no. 55/2015).

[24] Insurance Law, Article 95 paragraph 2.

[25] A broker is deemed a client's representative in most foreign court practices.

[26] In the case of Maloney v. Rhode Island Ins it is stated: "Based on the agency agreement, the agent operates for the insurer, the insurance broker operates for the insured"; in the case of Kirby v. Northwestern Nat'l it is stated: "Broker is an independent agent representing an insured, not an insurer. However, an agent can operate for both an insured and an insurer, if both parties agree, J. Mahomedy, An examination of the legal liabilities of insurance intermediaries and the insurance thereof, doctoral thesis 2010, p., available on *https://www.insurancegateway*, Faculty of Commerce, Law and managament of the University of Withwatersrand Johannesburg. Lloyds' brokers are representatives of an insured, not an insurer. However, under accepted custom rule, a broker is responsible to insurers for premium collection and has the right to pledge the policy until premium is paid. In that case he can be deemed as an insurance agent only for the purpose of premium collection, R. Colinvaux, *The Law of Insurance*, Sweet&Maxwell Limited, 1979, p. 298.

wishes more than usual services within insurance brokerage, he can authorise him to undertake other activities. A client-employer pays those special services.

If an insurance broker is authorized to perform legal actions on behalf of and in the name of an employer, the issue is which legal actions can be taken, while retaining the status of a broker. When he has the authority to terminate the contract and collect an insurance fee then he has the role of an agent, not a broker. That is a factual issue; therefore, relations in each specific case are regulated by rules applied to contracts whose elements are prevailing.[27] It can be a brokerage contract, an agency contract or a service contract. If in one contract a broker has several various authorisations as an intermediary, an agent and an employed party (under a service contract) the court shall, depending on the breached obligation, apply corresponding rules of the contract law. If a broker undertakes material actions that do not bind the other party, the rules on the brokerage contract shall apply, if he received an order to take an action that binds an employer (a client/an insured or an insurer), the rules on agency shall apply, and if he is obliged to execute a service (make an offer, a proposal for renewal of a contract, proposal for premium reduction due to risk reduction, make an indemnity claim), the rules on the service contract shall apply. Regardless of engaged party's obligations, a contract concluded by a broker with a client cannot be qualified as a service contract. Similarity of a contract concluded by a broker and an agent with a client, i.e. an insurer, with the service contract exists, but there are significant differences. An insurance broker is entitled to a fee (commission) but it is paid by an insurer with whom he has not concluded a brokerage contract. An employed party is obliged to perform certain activities (make or repair some objects or perform certain physical or intellectual activities), and the client undertakes to pay him/her a compensation.

5. Obligations of an Insurance Broker

The basic obligation of an insurance broker is to provide an adequate coverage to an interested party if this is possible in a specific case. Some risks are new, extremely large, or a client has a "bad" past with losses, so it is difficult to find an insurer. A broker is obliged to take care that an insurer is not in financial difficulties, that it performs activities in accordance with the law and the rules of profession, which can be determined by checking whether the supervisory authority has taken certain control measures. Proposal of concluding a contract with a specific insurer should be influenced by the manner the insurer solves the insured's claims. He does not recommend an insurer with a large number of complaints by insureds or court proceedings initiated by insureds against an insurer.

[27] *Komentar Zakona o obilgacionim odnosima*, *II knjiga*, Savremena administracija, Beograd 1995, p. 1348.

Another important obligation of a broker is to provide information and advice, before conclusion of a contract, to a client upon which a client could make a decision on an insurer whose insurance terms and conditions largely meet his needs.

In each specific case, a broker should assess which notices and advice are necessary. He is obliged to provide administrative information relating to the business name, seat and address of the head office, the registry of the competent authority where it is registered as well as the manner of protection of the policyholder's rights.[28] He is also obliged to present a policyholder with all legal and economic relations to an insurance company, which can affect his impartiality in performance of obligations.[29] An insurance mediation company shall in particular notify a client whether the decision on selection of an insurer will be made impartially or he is obliged to work for one or more insurers, as well as inform a client about insurers he operates with.

Notices of relevance to an insurance contract, its subject matter, rights and obligations of a contracting party and the scope of an insurance coverage should be understandable so that the client can determine whether the offer suits his needs or not. A broker is obliged to inform a client on risks that are not accepted or not covered. In order for the advice given by a broker to a client to be useful, he should learn about client's needs. A broker should inform the client of any consequences resulting from incorrect reporting of circumstances that are important for risk assessment or non-stating of important facts.[30] He helps a client complete an offer template in order to avoid a situation where an insurer requires termination of a contract due to incorrect or non-stated circumstances relevant for risk assessment. He must precisely state the reasons behind his advice.[31] A broker is obliged to point to a significance of data provision, and not to check validity of all information stated by a client, a question is clearly misunderstood. In order to have evidence on provision of all required notices and avoid a risk of liability, in case of breach of an obligation to deliver a notice, brokers submit a written statement on information provided to a client. A client, when concluding a contract, confirms by his/her signature to have understood everything said to him/her and that the written statement has been read and delivered to him/her.

During the insurance period, a broker monitors insured's needs for changes in the insurance cover, an increase of the sum insured, elimination of the causes that led to the underinsurance or over-insurance. They monitor the insured's needs during the insurance period and propose changes in cover if there are new moments

[28] Insurance Law, Article 111, paragraph 1.

[29] Insurance Law, Article 95, paragraph 4 and 5.

[30] "If a broker makes a mistake when completing a proposal form, but requires from an insured to read, check and sign it, which he did without noticing a mistake, a broker shall not be liable to an insured", R. Colinvaux, op. cit. p. 297. fn. 81.

[31] Insurance Law, Article 94, paragraph 2 item 4).

related to the insured risk (increase or decrease of risk), take care of the regularity of premium payment for long-term insurance and, when it is agreed, that the premium is paid in instalments. He checks the policy contents, assists the insured during insurance period, and takes care that any activities relevant for realisation are performed in defined deadlines, i.e. insurance contract's rights are maintained (checks all calculations and documents submitted by an insurer, takes care that no reason arises for termination of a contract, takes care on the insurance expiry and continuity of coverage).[32]

An insurance broker has obligations after occurrence of an insured event in accordance with authorisations under the brokerage contract or the contract with an insurer. An insurance broker reports occurrence of an insured event, cooperates with an insurer or his agent and seeks to determine the compensation fully in accordance with insurance terms and conditions. He is obliged to warn an insured to report the insured event and point any consequences of the late reporting. In practice, a broker advises his client to first notify him on occurrence of an insured event. When he checks whether an event is covered by insurance, he submits a report to an insurer. If he is authorised, he charges a fee in the name of an insured or the sum insured based on life insurance, accident insurance or illness insurance.

6. Insurance Broker's Liability

The law prescribes obligations of an insurance mediation company and practically determines limits of its civil liability.

A policyholder mostly sustains a loss because a broker failed to conclude, extend, cancel or terminate an insurance contract or the coverage is narrower than expected one.

Broker's liability toward a client or a policyholder/an insured is contractual and based on proven guilt. They should prove that the obligation a broker failed to fulfil was his contractual obligation. Then, that he did not fulfil the undertaken obligation or fulfilled it with delay or incompletely.

In each specific case, it is assessed whether a broker fulfilled his obligation in accordance with the rules of profession. He did not act contrary to these rules if, for example, he did not check the calculation of the value of the insured item, in case he did not have such obligation towards a policyholder. Therefore, he is not liable for any loss caused by underinsurance.

Broker's liability towards an insurer exists in rare cases. Undoubtedly, this liability exists, but its basis is disputable, whether it is contractual or non-contractual, and if it is contractual, what is the type of a contract.

[32] Insurance Law, Article 94, paragraph 2, item 7).

Custom rules and nature of profession are in favour of broker's liability towards an insurer. If a client has given an order to a broker to conclude a contract, then a broker could be liable not only to a client, but also to an insurer if he can prove that he sustained a loss because the contract was not concluded. For example, if a broker knew that a client was insolvent and could not pay premium, he would be liable for any loss sustained by an insurer due to non-payment of premium. A broker can have an obligation to compensate any loss to an insurer even if he failed to notify an insurer that an insured was convicted. [33]

7. Insurance Broker's Professional Liability

Obligation to conclude liability insurance is one of the conditions for obtaining a licence for insurance brokerage activities.[34]

Insurance is sold by insurance companies with a licence for sale of civil liability insurance. Insurance companies issue conditions and tariffs, the law does not stipulate minimum scope of an insurance coverage so that the scope in the market often differs significantly in conditions of various insurance companies.

Broker's business activities are one of the sources of civil liability risk and can be insured within the general liability insurance that includes various sources of liability risk not covered by special insurance. Therefore, this insurance does not refer to carrier's liability, MTPL and liability of owners of marine and aviation means of transportation because these are special types of insurance against liability from a certain source of risk (motor vehicle insurance, marine insurance, aviation insurance, cargo insurance). Insurance covers contractual and extra-contractual liability of an insured. The basic cover is the liability for direct and indirect (consequential) losses due to damage to or destruction of items and losses due to death, bodily injury or health impairment (losses to property and persons). Other losses (pure property and losses due to disappearance of items) may be specifically agreed, or they are automatically insured if this is envisaged in special terms and conditions or special conditions for particular sources of liability risk. The scope of an insurance coverage for liability risk based on general terms and conditions for general liability insurance does not provide an adequate insurance protection to persons performing certain activities, in particular professional ones. Conditions contain special provisions that adjust the coverage to the specificities of these sources of risks. In carrying out certain activities as sources of risks, in terms of these conditions, pure property loss and loss due to disappearance of items affect largely or even exclusively persons performing these activities. Losses due to disappearance of items affect, for example, warehouse

[33] R. Colinvaux, op. cit. p. 297. fn 85.

[34] Insurance Law, Article 89, paragraph 3, item 9.

operators, and a liability insurance they conclude would not make sense if the cover of such losses had to be specifically agreed. Lawyers, when performing their activities, may cause pure property losses, and not losses to persons or losses to objects. The same applies to activities performed by auditors, brokers, translators or actuaries. Therefore, special provisions stipulate that insurance covers only those losses, or that they are covered in addition to losses to objects and persons, but without special contracting. When the need arises to adjust the insurance coverage of the liability risk from a particular source of risk, it is proper to incorporate several special provisions into the terms and conditions, and not to impose special conditions. In case of a specific risk of civil liability requiring greater deviations from the general rules of conditions, there are grounds for the adoption of special conditions (e.g. liability for defective products, environmental pollution, and liability for nuclear losses).[35] In addition to insured's professional liability insurance for pure property losses, a coverage from other sources of risk can be agreed (for example, liability for losses arising from the use of business premises or someone else's equipment, organization of conferences and other events, preparation of beverages and food for employees and guests, etc.)[36]

Insurance companies operating on our market offer brokers' professional liability insurance based on special conditions that contain a large number of provisions taken from the general liability insurance conditions. This practice is not consistent with the manner in which general liability insurance is implemented, because in our insurance it traditionally includes liability from sources of professional liability risk. It is one of the most important property insurance that should be carried out in accordance with the rules of profession.

The subject matter of brokers' liability insurance is liability for pure property losses.[37] These losses may arise from various sources of liability risk, but usually result from breach of contractual obligations. In performing his professional activities, an insurance broker may cause to clients and the insurer a loss that is originally

[35] Prölss/Martin, *Versicherungsvertraggesetz*, 27. Auflage, Verlag C.H. Beck, p. 1331.

[36] Standard conditions applied in Belgium (model of conditions of the company Sobegas that manages an insurance pool for brokers' liability insurance) to brokers' liability insurance provides a cover for professional and general liability. Due to a broad coverage they are called "Brokers' liability insurance terms and conditions", and not "Brokers' professional liability insurance terms and conditions", available on: *www.sobegas.be/infos-generales/conditions-generales.aspx*.

[37] Recently, conditions of certain national insurance companies, renamed these losses into "pure economic losses". General civil liability insurance terms and conditions refer to them as "pure property losses", which corresponds to the name prevailing in foreign practice, legislation and insurance theory: in French: *dommage économique pur*; in Spanish: *daños patrimoniales puros*; in German: *reine Vermögensschaden*; in English: *pure economic loss* (rarely: *pure financial loss*). General liability insurance terms and conditions (previously: General liability insurance terms and conditions adopted in 1983 on the level of the Association of Insurance Companies in Yugoslavia) are similar to terms and conditions applied in German and Austrian insurance market.

monetary, which is not a loss to persons and objects. If, for example, due to a failure or an error of an insurance broker, an insurance contract is not concluded or extended, an insured event is not reported within legal or contractual deadline or an insured's claim becomes obsolete, a loss suffered by an insured is monetary because no insurance benefit has been paid or it has been reduced.

Insurance exclusions exist in all types of insurance as the insured risk, for all or the largest number of insureds, is necessary to limit to those consequences that can be insured having in mind the public interest, rules of insurance techniques or insurer's capabilities.[38]

When the law does not determine the basic scope of an insurance cover in compulsory insurance, there is a risk that the intended goal is not achieved. By defining a subject matter of insurance, an insured event, predicting a deductible and a large number of exclusions, insurance can even be made senseless.[39] Insurance terms and conditions of national insurers envisage numerous exclusions, some of which are vague, some are redundant and some are inadequate with respect to the subject matter of insurance. Having in mind the fact that insurance is compulsory, a standpoint could be defended that insurers are obliged to provide cover that is limited only by exclusions provided by the law. Liability insurance was initially unlimited, however, some restrictions should have been foreseen since, in order for an insurer to calculate the premium he had to know severity of the risk being insured. However, when it comes to compulsory insurance, it must be adequate so that the insurance could provide a protection expected to be achieved by a compulsory insurance.[40]

Sum insured is the maximum amount of insurer's liability because a cover without the maximum amount of insurer's liability would be far too big risk and could

[38] There is a great number of exclusions in conditions of various national insurance companies. Exclusions include, for example, losses incurred by payment of fine, obsolete claims that result from unfair behaviour on the market, losses an insured is obliged to indemnify under labour relations arising from lack of personnel, material, technical or technological conditions and other. These are the most sensitive provisions that limit the coverage in compulsory insurance. All insurance companies should implement conditions that contain minimum scope of cover that would protect brokers against a liability risk, but also ensure to third parties the expected indemnification.

[39] The amount of deductible in the largest number of conditions of national insurance companies is 10%. Deductible should not be at a level that does not correspond to the purpose for which it exists: to avoid costs due to a large number of minor losses, or, in case of major risks, the greater share of the insured in the loss. In our business conditions, it is difficult to claim that there are both reasons: there is not a large number of third-party claims, no litigations, no high claims that would justify a deductible of 10% for all insureds. The deductible amount should depend on the total income of the brokerage company.

[40] Belgian Financial services and Markets Authority originally defended the standpoint that conditions of compulsory insurance cannot contain exclusions and deleted from the registry any brokers who had concluded contracts with exclusions. The standpoint was changed under influence of insurers, unlimited coverage would disable determination of an adequate premium. In addition, insurers could not reinsure the risk, and reinsurers do not accept unlimited coverage, Eeman/Follet/Alface, op. cit. str. 79.

hardly be reinsured. In case of compulsory insurance, the law stipulates minimum sums insured. Insurance law stipulates that broker's liability insurance must be concluded to the amount of 200.000 Euros at the middle exchange rate of the National Bank of Serbia on the day of payment, and does not specify whether it is the amount per insured event or in the year of insurance. Sum insured is generally determined per insured event, which should also be the case with brokers' insurance. Insurers understood it in this manner, so they introduced a provision in conditions on the sum insured per insured event to be 200.000 Euros, and envisaged an aggregate sum (double or triple amount of the sum per insured event).[41] Given that the law does not specify that the amount of 200.000 Euros applies to the insured event, it would be more precise to conclude that it refers to the amount of the insurer's obligation in the year of insurance. If we interpret the provision so that the sum envisaged by the law applies to each insured event, the issue of legitimacy of contracting the aggregate sum would arise because the law envisages only one and not two sums per insured event and in the year of insurance. National insurance companies envisage the maximum amount of an insurer's obligation in the year of insurance according to such restriction in the conditions of foreign companies. A question arises as to how to limit the insurers' liability in a country in which the risk of civil liability is not as significant as in economically strong countries where activity of brokerage has a long tradition. Extensive court practice in developed countries shows that this is a high risk. Large sums for indemnities that should be paid by brokers led to creation of insurance pools so that the risk could be more easily reinsured.[42]

Insured event in civil liability insurance can be differently defined depending on which source of liability risk is insured. Definition of an insured event as a harmful event in professional liability insurance for pure property losses is not appropriate given the specificity of this source of risk. Insured event is defined as a harmful event in those sources of risk where due to the actions or omissions of an insured an event occurs which can be observed at a certain place and at a certain time (traffic accident, collapsing of a crane, a tree, a building). Errors occurring with some

[41] Article 8, paragraph 3 of Terms and conditions of professional liability of agents and brokers in insurance company Wiener Stadische: "Total insurer's liability for all insured events occurred in insurance period (aggregate limit) is determined in insurance document at the maximum amount of triple agreed sum insured per insured event".

[42] In Belgium, in 1942, several insurance companies established a pool (Cobelias) so that intermediaries could insure the risk of civil liability. In 1989 pool members founded a limited liability company -Sobegas- and entrusted pool management activities to the new company. Sobegas is a representative of the pool members and as such deals with acceptance of risk, issuance of policies, premium collection and claim settlement. Several entrepreneurs in 1981 established an association (today it is called Ancoras) that provides to association members the basic insurance through a collective policy. Additional cover is provided by Ancoras to its members with insurance companies that are not members of any pool, Eeman/Follet/Alfase, op. cit. p. 76.

professional activities, as well as insurance brokers, are not such events; the loss does not occur simultaneously with the cause itself, longer or shorter time can pass until its manifestation. In contemporary professional liability insurance, an insured event is defined as a claim or as an error (cause of loss). A claim is any claim for loss compensation submitted during the insurance period caused by an insurer's fault in performing business operations that are the subject matter of insurance. Due to a large number of litigations in relation to indemnity for defective products, which were instituted after several decades from expiry of an insurance contract, insurers limited the coverage to claims that were submitted at the time of the validity of contracts if they resulted from the cause that also occurred at that time. Courts ignored such clauses at first, and based their decisions on traditional rule that an insured event occurred when a harmful event occurred, regardless of when the claims were filed, in order to later accept the claim as an insured event if the covered claims were filed after the contract expiry. Judicial practice influenced the legal regulation of the concept of an insured event in insurance of certain sources of civil liability risk, primarily professional activities. It can be agreed that an insured event occurred when the claim was filed, only under condition that the period prescribed by the law after its expiry is covered (subsequent cover).[43] It can be agreed that the insurance covers claims resulting from a cause before conclusion of a contract, if an insured was not aware of them (retroactive coverage). If an insured event is defined as an error, the insurance covers all consequences from such errors from conclusion of the contract until its expiry.[44]

Law of the EU Member States differs from what is relevant to occurrence of an insurer's obligation. Traditionally, it is accepted that it is the original event (act, deed) that causes the insured risk. If the event occurred in the insurance period, an insurer is obliged to indemnify the loss resulting from that event. That can be a harmful event, an error or a claim. Terms and conditions of general civil liability

[43] French law permits contracting parties to select an event that led to a loss and a claim, in liability insurance (except in liability insurance as a natural person), provided that it includes a period after expiry of the contract that cannot be shorter than five years (Article 124-5 of the Insurance Code). Belgian Insurance Law permits a cover based on a claim, provided that all claims filed minimum three years after expiry of the contract are covered (Article 142 of the Law). In German practice, occurrence of an insured event with property insurance is connected to the cause of an event or the event itself that led to a damage to or destruction of property, and for an error (Verstoß) or a claim. However, German courts do not accept that a claim from the compulsory insurance is valid regarding occurrence of an insured event, if that is not in accordance with legitimate expectations of an insured based on the fact that the insurance is compulsory (Prölss/Martin, op. cit. p. 818). Draft of the Civil Code of Serbia proposes that insurer's liability arises after occurrence of an insured event, but the contract can envisage that it happens when a claim has been filed, if such harmful event occurred in the coverage period (Article 1459 and 1460 of the draft).

[44] Article 3 of description of risks and special terms and conditions for liability insurance of (pure) property loss of an insurance broker (Versicherungsvermittler) applied by a German insurance company ALLCURA, February 2016 (RB VersV 2016-02).

insurance envisage that one insured event exists when the same cause leads to losses to a greater number of persons (series of losses).[45] Provisions on series of losses are the most important for the liability risk for losses from environmental pollution and defective products. One disadvantage in a product that is produced in series (medicines, food products) can lead to death or health impairment of a large number of persons and filing of a large number of claims that affect one contract. Due to the nature of an insurance broker's activity an insurer cannot be exposed to the real risk of indemnification for a series of losses.[46] Broker is liable to a client that is a claimant, and not to persons whom a client caused a loss. Client is entitled to a direct lawsuit against an insurer, and not persons whom a client is obliged to compensate a loss. When a broker is liable to a client for failure to conclude an insurance contract, an insurer shall indemnify a loss up to the amount of agreed limit per insured event. There is no danger of several claims because a claimant, a client, regardless of the fact that he/she is liable for series of losses, shall file to an insurer one claim. Insurers can protect themselves against high claims by a sound risk management policy.[47]

8. Conclusion

Insurance brokerage is an activity that has recently began to gain significance in our country. Without any experience in business operations on a developing market, difficulties can be expected in implementation of regulations that are not comprehensive because they are mainly based on supranational acts of the EU. Since the law is not unified but harmonised, the Member States have a lot of freedom to apply their regulations and common rules in the field of brokerage, which differs more or less from country to country. In order to improve the legislation, ensure

[45] Article 10, paragraph 2 of Terms and Conditions of General Liability Insurance, Dunav Insurance Company, 2009.

[46] Brokers' professional liability insurance does not record any cases of series of losses. However, it is deemed that it is good to define insurer's obligations in case of series of losses and cumulative losses, having in mind banks' liability. After bankruptcy of an American bank Lehman Brothers in 2008, many brokers received claims for losses from the bank's clients, Eeman/Follet/Alface, op. cit. p. This is not an adequate example for brokers' liability because the bank's clients cannot request from brokers indemnity but from a bank, and the bank can request it from brokers, i.e. their insurers, for an indemnification of up to the sum insured in the year of insurance. Since the sum insured in these policies is determined per insured event, the bank cannot receive the entire amount of indemnity due to its liability for series of losses, if it exceeds the sum insured. If some clients are exposed to a liability risk for series of losses, a broker should advise contracting of a higher sum insured than the minimum one.

[47] Since Terms and Conditions of General Liability Insurance apply to professional liability insurance, it is not necessary to limit an insurer's liability related to series of losses in special terms and conditions. (See Article 5 of Terms and Conditions of Intermeiaries' Professional Liability Insurance of Dunav Insurance Company, and Article 7 and 8 of Terms and Conditions of Brokers'/Agents' Professional Liability Insurance of insurance company "Wiener Städtische").

necessary legal security in this important economic activity, and reduce legal gaps to the minimum, it is necessary to study the legislation, the common rules, the judicial practice and the legal doctrine of the more developed countries. Only based on good knowledge of the matter can regulations be made and applied in practice without any difficulties.

Since an insurance brokerage contract is not regulated, how shall complex issues be resolved in practice? Adoption of the Civil Code of Serbia is in progress and a possible solution is to incorporate provisions that would apply to this contract. Solution may be adoption of a special law that would completely regulate mediation and representation in insurance.

National insurance companies conduct compulsory Brokers' Professional Liability Insurance as a voluntary insurance. Analysis of insurance terms and conditions shows that there are many open issues, especially regarding the implementation of general liability terms and conditions and the scope of insurance coverage. Objective of compulsory brokers' liability insurance is protection of insurance services' users. This objective cannot be achieved if the conditions for general liability insurance are ignored, if the used terms are not appropriate, if there is a large number of exclusions and other limits of coverage that do not make any sense in the compulsory insurance. Numerous exclusions that are not adjusted to the subject matter of insurance do not contribute to achievement of the objective of compulsory insurance. Instead of exclusions, more attention should be paid to extension of coverage, and to offering insurance from other sources of liability risk beyond professional activity, theft, loss or inadvertent destruction of professional documents.

It is important for insurance brokers, who need adequate insurance protection, that conditions and tariffs represent documents that are clear, unambiguous, consistent and understandable. It seems that such conditions should be adopted in our market. This will be possible if they are developed by the main interested parties: insurance brokers. Regular operation of insurance brokers can be provided only by working on protection of common interests, which is possible by association that is characteristic for all occupations as well as insurance brokers, which is confirmed by a large number of national, regional and international associations of insurance brokers.

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