UDK: 651.57: 058.821:681.515 (044.4)(497.11)+(4-672EEZ):368.072:340.134:365.5

Prof. Jovan Lj. Slavnić, PhD[1]

REVIEW OF THE ARTICLE ON "NEED TO IMPROVE SERBIAN INSURANCE REGULATORY FRAMEWORK BY ADOPTING INSURANCE CONTRACT LAW"

SCIENTIFIC CRITICISM

An article by Nataša Petrović Tomić, Associate Professor at the Law Faculty of the University of Belgrade, was published under the above title and categorized by the editor as a scientific paper, in the issue 2/2018 of the "Insurance Trends Journal" (pp. 7-18). The article outlined and partially analysed the proposal / initiative / idea for adoption of a Special Insurance Contract Law of the Republic of Serbia. According to this idea, the inland insurance contract would be excluded from the Preliminary Draft of the Civil Code of the RS, which was completed by the Commission for drafting the Civil Code of the RS of the Government of RS and, instead, standardized under the mentioned Special Law.[2] [3] When presenting and elaborating on the subject idea and/or other proposals/initiatives/ideas concerning the regulation of the insurance contract under the Insurance Contract Law, the author failed to mention that her proposals/initiatives/ideas presented in the Article were not new and original, but have already been written of in the respectable literature published before this Article, supported by arguments and that those proposals/initiatives/ideas she was presenting were not the only possible and justified ones but that there were other, better and more suitable solutions for improving the regulatory framework through which the reform of the insurance contract in Serbia is to be implemented into the

[1] Honorary President of the Association for Insurance Law of Serbia.
E-mail: lolesl@eunet.rs
Paper received on: December 20, 2018
Paper admitted on: January 21, 2019
[2] Abstract, First Section of the Article and Conclusion (pp. 7-11 and pp. 16-17)
[3] Note that the last text of the Preliminary Draft CCRS was published by the Commission on May 29, 2015, after 8.5 years of working on its drafting and that during this period it was published in several versions, as a partial or complete project.

Serbian insurance law. The named Article also contains the incorrect and inaccurate statements and allegations that I cannot agree with, since they are doubtful.

1. Proposal/initiative/idea and its elaboration by considering particular reasons that justify transferring the regulation of the inland insurance contract (hereinafter: the insurance contract) from the Civil Code of the RS (hereinafter: CCRS) to a separate law - Insurance Contract Law of the RS - the adoption of which was to be modelled after numerous EU Member States' national laws that already incorporate such law as well as the states operating in the common economic area with the EU countries has been already exposed on several occasions in 2004, 2005 and 2008, as a result of the activities of the Serbian Insurance Law Association and by the authors signing the publications of this Association (namely, even before the Commission for drafting the Civil Code of Serbia (hereinafter: the Commission) was appointed in November 2006 and after the expiration of the first year of its office, in the 2008 Commissions' Preliminary Draft).

Prior to the formation of the Commission, the Association for the Insurance Law of Serbia held its (V) annual conference from 14th to 17th April 2004 on the topic of "Economy and Insurance Law in Transition". The results of this Conference were publically presented by the Association in the form of Conference messages published in the Association's *Insurance Law Review,* no. 1-2 / 2004. The messages were formulated by one of their authors, the writer of these lines. It is stated on page 57:

"The statutory regulation of the insurance business entities' status issues (under the Insurance Law – note by J. S.) by adopting the principles of an open insurance market are just one of the normative and legal preconditions that allow for vital changes in transacting insurance business in Serbia. A more complete provision of such conditions reflects, above all, in the adoption of:

Insurance Contract Law that would incorporate the international EU law consumer protection standards."[4]

When assessing the solution and how to incorporate the EU directives into the Insurance Contract Law of Serbia (in the areas where life insurance contractual relations have been defined by such directives) in a 2005 article written within the scope of activities of the Association for Insurance Law of Serbia and also before the beginning of work on the reform of the insurance contract regulated under Serbian Law on Contracts and Torts, an initiative of the author of this paper was repeated that this matter and the subject matter of the insurance contract in general in Serbia in the future should be regulated under a separate Insurance Contract Law.[5]

[4] Predrag Šulejić, Jovan Slavnić and Jasna Pak, "Messages from the Conference on Palić (14–17 April 2004)", pp. 57–61.

[5] Jovan Slavnić, "Influence of the EU Directives on regulating the relations under the life insurance contract", in the Proceedings: Insurance in the light of new legislation (pp. 123–138; 134–136), 2005, Beograd: Association for Insurance Law of Serbia and Montenegro.

On 28th October 2008, the Association for Insurance Law of Serbia, together with the Serbian Chamber of Commerce Banking and Insurance Committee, organized a round table on the topic of "Insurance Contract in New Civil Code of the Republic of Serbia." The reason for such event was the Commission's text titled "Insurance Contract: A. General Issues of Place and Method of Regulating the Insurance Contract in the Civil Code and B. Proposal for Amendments to the Insurance Contract", published in the book "Work on Drafting of Civil Code of Republic of Serbia: Commission Report with Open Issues", Belgrade, November 2007, pp. 232-245. At this expert forum, several participants continued to advocate the relocation of the insurance contract from the CCRS and the adoption of a Special Insurance Contract Law. One of the participants, Ljiljana Stojkovic, MA, at the very beginning of her discussion on the occasion, highlighted the following:

"It is my first proposal that insurance contract be regulated under a special law….Insurance Contract Law, since a special law can more comprehensively and precisely define the issues that are the subject matter of the insurance contract."

Moreover, she pointed out several other reasons why she considered justified to pass this special law. She highlighted that the Insurance Contract Law might be adopted as temporary, and its provisions later on included into the CCRS. The author of these lines exposed the practical steps he thought the passing of such Law would depend on, placing emphasis on the firm commitment of the insurance industry to accept the Insurance Contract Law as the source of the insurance contract law. .[6] By proposing that the Insurance Contract Law be adopted as temporary, Ljiljana Stojković, MA, anticipated a procedure that will later be adopted by the Czech legislator, who regulated the reformed insurance contract under the 2003 Insurance Contract Law and then amended and continued to reform it under the Civil Code enacted in 2012 which entered into force on 1 January 2014.[7]

Let me mention just another article of the "more recent" date, the beginning of 2012, in which the writer of these lines presented to the expert and scientific public the proposals for new solutions for the insurance contracts taken from over 20 published papers that the Commission did not include in the 2009 Preliminary Draft CCRR Project and that require to be brought before public by the Commission. At the point where the reasons for which the Commission did not accept these solutions sum up, it says:

"On this occasion, it is possible for the expert public to have different speculations, ranging from the fact that the Commission did not register the proposals

[6] "Insurance contract in the new Civil Code of the Republic of Serbia", Round Table Discussion, *Insurance Law Review*, 4/2008, pp. 63-64.

[7] For more information see: Adam Forst, "Insurance Contract in New Civil Code of Czech Republic", in the Proceedings: *Insurance Law, Administration and Transparency - Basics of Legal Security,* 2015, Belgrade: Association for the Insurance Law of Serbia, pp. 65-72 and Jovanović Slobodan, "The Evolution of Czech Insurance Contract Law", *European Review for Insurance Law*, 4/2016, pp. 51-56.

of the expert public or rejected them because of the attitude that by their inclusion, the scope and variety of the norms regulating the insurance contract under the Preliminary Draft of the Civil Code could reactivate the discussion of a proposal previously stated by the insurance expert public that the insurance contract should be covered, as is the case in many EU legal systems, by its own codification – the Insurance Contract Law."[8]

However, the author does not mention anywhere in the Article that the proposal/initiative/idea to regulate the insurance contract in the Republic of Serbia under a separate Insurance Contract Law whereas her partial elaboration by specifying particular reasons for accepting such idea have already been published in the mentioned original papers. Moreover, the author had no reason not to mention this, since no special creativity was necessary to make such an "inventional idea". As I have said, in addition to few countries she mentioned (Finland, Denmark and Norway), there is a number of examples of states that we will later mention, that also have in place the insurance contract laws; therefore, we will see that it was not difficult to look up to these models and come up with an idea to pass the Insurance Contract Law in the Republic of Serbia. Much more difficult was to perceive this idea as justifiable, argument and present it to the public even before or at the very beginning of the work of the Commission on drafting the CCRS, as was done thanks to the activities of the Association for Insurance Law of Serbia.

2. Illustrating that the insurance contract is governed by the *lex specialis* on the example of Germany and France, the author says (page 8):

"As an example, we can list two *first-class* legal systems: German and French. The best example of legislative technique as regards the insurance contract is the 2007 German Insurance Contracts (Versicherungsvertragsgezetz) and the French Code of Assurances (1989). The applicable law in Germany stood in the place of 1908 Insurance Contract Law, which lasted for a full hundred years. Semi-imperative rules of the 1908 German Law were such an invention since the beginning of the twentieth century that modern legislators have still not found an instrument to replace them."

This statement of the author includes a few allegations that mislead the reader. One of them is that the French Code is a *lex specialis* referring to the insurance contract. This Code is, however, a codification of a large number of legal relations in insurance (the insurance contract is just one of the statutory relations) and is not the same as German Law regulating only the insurance contract as *lex specialis*. Namely, the French Insurance Code includes the legislative and regulatory section. In the legislative, the Code regulates Contract (on insurance – note by J.Sl.) in the Book I,

[8] Jovan Slavnić, "Review of topics for public discussion on solutions that are not accepted in the Preliminary Draft of the Civil Code of the Republic of Serbia with relation to insurance contract", *Insurance Law Review*, 1/2012, pp. 28

Compulsory Insurance– in the Book II (Part I – Motorized Inland Insurance of Vehicles, Trailers and Semi-Trailers; Part I bis – Household Insurance; Part II – Civil Liability Insurance (individuals and entities) owners of ski lifts, cable cars etc.; Chapter IV – Liability insurance for executed construction work; Chapter V – Medical malpractice insurance and Chapter VII – Clauses applicable to the islands of *Wallis* and *Futuna*), in Book III – Entities (supervision objects – note J. S.) regulates the companies under government supervision (insurance companies, mutuals, pension funds – note J. Sl.), in the Book IV – Organizations and special insurance schemes (book includes the provisions of the Advisory Board for the financial sector, for the compulsory insurance guarantee fund and types of claims it covers, the guarantee fund for the individuals that sustained damages in terrorist acts and other offences and the like) and in Book V - Insurance Distributors (brokers, obligation to notify, supervision in performing the activity etc. .). The regulatory part contains provisions on the mandatory content of the Policy, obsolescence with respect to the claims against certain professions, collective insurance, solvency, etc.

The next allegation is that the semi-normative rules of the aforementioned 1908 German Law were the invention of the legislator from the beginning of the twentieth century. Semi-normative rules were introduced under the Insurance Contract Law of Switzerland, judging by the period of its adoption / passing. This Law was passed on April 2, 1908, while the German Law was passed on May 30, 1908.[9] In one Article (Art. 98) that is, one of its provisions, this Law lists all semi-normative rules – the articles or paragraphs in particular articles of the Law, which cannot be changed by agreement, to the detriment of the Policyholder or insured, except under the contract on (land) transportation. The art. 97 gives a list of rules that are absolutely imperative.

In the footnote 2, pp. 8, the author informs the reader that the German Law, referred to as the *first-class* law, was translated into the Serbian language, stating that the authors of that translation were Prof Slavko Đorđević and Prof Darko Samardžić, the name of the publication where this translation was published and the publisher, missing out to inform that the French Law, also referred to as "*first-class*", was translated into Serbian, to name the author of the translation, prof Slobodan Jovanović, PhD and say that the translation, Book I - Contract, was published by the Association for Insurance Law of Serbia – *European Journal of Insurance Law,* no. 3/2015, 4/2015 and 1/2016. The translation of this Book of French Law is, without any doubts, serious and praiseworthy professional and translational venture of Prof. Jovanovic, such as is that of the author of translation of the German Law on Insurance Contract and there was no reason for the author of this paper not to mention that.[10]

[9] V. Slavko Đorđević and Darko Samardžić, *German contractual insurance law with translation of the law* (VVG), IRZ, Belgrade, 2014, p. 47 and *Assurances Privées, législation suisse*, edited by the Chancellerie fédérale, 1964, pp. 55)

[10] What the author did not mention regarding the translation of the Insurance Contract Law of the Republic of Germany published by the German IRZ Foundation in 2014, is that this translation was published

3. But these are not the only parts of the first section of this Article where the author fails to mention or misrepresents the facts, giving the reader incomplete information. It would take too much space for me to list, comment and numerate them individually. Therefore, I will first quote the parts in the article chronologically, as having been discussed, and then indicate what the author does not mention or inaccurately represents to the reader. These lines are included on pages 10 and 11 of the Article.

"... The question, therefore, arises which legal system the Commission (for composing the CCRS) needs to follow. We believe that a lot of attention should be dedicated to the issue of prior research and collection of adequate comparative materials and to the engagement of experts best acquainted with the insurance law."

By acknowledging differences between member states' laws (EU – note by J.S) and perceiving them as an obstacle, we are convinced that the Commission could benefit from the Principles of the European Insurance Contract Law (hereinafter: the Principles)….The Principles are contained in a general reference framework and should serve as a model law for European legislators They are conceived as an *optional instrument*, since they allow the policyholder (insured) and the insurer to choose to apply them instead of the national law, i.e. its imperative provisions…

Therefore, starting from the assumption that the insurance contract should be regulated by the CC Preliminary Draft, we should make clear as to which legislative technique to apply. In the twenty first century, we believe that the insurance contract cannot be regulated by the civil law codification, like at the beginning of the nineteenth century. After all, in the most representative legal systems - French and German - the substance of the insurance contract has been left uncodified. The speed of legal transactions and the introduction of new ways of concluding contracts in the Internet era are just some of the reasons why the insurance contract should be regulated in a fair manner, without the pretension to regulate in detail the issues that arise in its daily life.

According to our opinion, the CC Preliminary Draft should lay the foundations for a new insurance regulatory framework in Serbian law and strengthen the legal protection of the weaker parties to the insurance contracts. All this should be done through normative and semi-normative rules while all issues that could be regulated by optional rules should be left to the Special Insurance Contract Law. The rules of the Civil Code should be general and systematic and, as such, a necessary but not sufficient regulator of the insurance legal relations in the twenty-first century. They will be supplemented by the Insurance Contract Law ... The latter should amend and concretize the basics of the contractual insurance arrangement set up by the Civil Law.

much earlier in the journal of the Association for Insurance Law of Serbia, the *Insurance Law Review*, nos. 2, 3 and 4/2010 and no. 2/2011. The reader thus did not learn about the fact that the translation of the law was published on the initiative of the Association, the translators being its members, and that its publishing in the mentioned journal was upon consent of the Association.

Wondering, in the quoted text, to which legal system the Commission should look up when regulating the insurance contract, the author suggested that the Commission would benefit from the Principles of the European Insurance Contract Law (hereinafter: the Principles) and does not mention, as though she was not aware, that the Commission already used this project and included a number of legal institutes from the project in the Preliminary Draft of the CCRS. Thus, the reader remains deprived of information as to which of these solutions, if not all, were imported, as original or slightly amended, from the Principles into the CCRS Preliminary Draft, that would allow him to understand the extent and quality of some of the particular solutions taken over from the Principles. A better-informed reader can comprehend whether the appropriate legal institute solutions taken over from the Principe's are better or less suited to Serbian legal system than those applying to the same institute in some of the national insurance contract laws. Here, I will point out some of these solutions / institutes using the order of the provisions and/or articles of the CCRS Preliminary Plan where the solutions have been taken over from the Principles and then indicate in which article of the Principles these solutions are regulated as separate institutes,noting that the Commission took them over from the incompletely edited version of the Principles published on August 1, 2009, which is important if you have in mind that the Preliminary Draft of the CCRS was published without any subsequent amendments on May 29, 2015 and the final version of the Principles was amended by the rules referring to particular insurance types and special clauses, completed with a system of absolutely mandatory rules published on November 1, 2015 (Part IV - Liability Insurance, Part V - Life Insurance and Part VI - Group Insurance). These are, for example, language, interpretation of documents and proof of receipt of documents (Article 1395 CCRS - Articles 1: 203 and 1: 204 of the Principles), Form of Notification (Article 1396 CCRS - Article 1: 205 of the Principles), Assumption of Awareness of Facts (Article 1397 of the CCRS - Article 1: 206 of the Principles), Discrimination Prohibition (Article 1398 of the CCRS - Article 1: 207 of the Principles, this article of the Principles overtook the Directive 2004 / 113EC of 13 December 2004 on discrimination prohibition - note by J.S.), Duty to Notify (fact of significance for risk assessment - note by J.S.) (Article 1419 of the CCRS - Article 2: 101 of the Principles), Sanctions for Breach of the Duty to Notify (Article 1420 CCRS - Article 2 : 102 of the Principles), Exceptions to Sanctions (Article 1421 of the CCRS - Article 2: 103 of the Principles).[11]

Asking the question to which legal system the Commission could look up in regulating the insurance contract and taking the view that the answer to this

[11] In the Article, the author, not insignificantly, avoided informing the reader of some authors and examples of works by the authors who, in Serbian literature particularly and with sound arguments, advocate the acceptance of the solution from Principles, as well as for accepting such solutions into our future CC. Prof. Slavko Djordjevic wrote about this in his article which will be later discussed (see page 20). This author, as well, is stated in the article in footnote 8, pp. 31-32.

question should be brought only after the research and collection of adequate comparative legal material by experts in insurance law, the author of the article misses to inform the reader that this process has been ongoing in two directions in our literature for more than a decade. The first is the direction of testing the best choice of legal sources that should regulate the insurance contract and, relative to that, the dilution of rules that should regulate the relations under the insurance contract and the method of regulating the relations of the parties to the insurance contract (compulsory and / or optional rules). The second is the direction of proposing to the Commission new, modern / contemporary solutions from comparative legal sources that would reform and improve the insurance contract regulations compared to the solutions that were accepted under the Law on Contracts and Torts. She also does not mention that, in practical terms and with a view of legal source and the issues outlined in connection with the legal source, this procedure is visible and continuous in the translations and publishing of *The European Review for Insurance Law* of the Association of Insurance Law of Serbia, in an impressive number of different forms of legal sources according to which the insurance contract is regulated under the comparative law (Law on Insurance Contract, Civil Code, Law on Contracts and Torts ... which will be listed later). Translations were made to assist the Commission and Serbian legislator to eventually look up to or include into Serbian legislation some modern solutions from the EU Member States' legislation on insurance contracts. More importantly, to allow a wider circle of authors who understand well Serbian insurance contract law but, for no reason, do not have access to reliable translations of these EU Member States insurance regulations, to actively monitor the work of the Commission for drafting the Civil Code of Serbia and by submitting their reasoned proposals to the Commission, publishing articles in journals, participating in various conferences devoted to this matter or otherwise give their personal contribution in including into the Serbian legislation new tendencies from the legal systems of EU member states. Moreover, it was not mentioned that, in the area of accepting these new and modern solutions, a large number of authors gathered in the Serbian Association for Insurance Law, including the author of the subject article, sent to Commission numerous explanatory proposals in their numerous study articles[12], while the Association for Insurance Law has continually published and submitted

[12] Jovan Slavnić, "Association for Insurance Law of Serbia is the birthplace of the proposal for solutions that reform the insurance contract in the (Pre)Drafts of the Civil Code of the Republic of Serbia", *European Journal of Insurance Law*, 2/2016, pp. 67-84. This article gives an overview of the contents of 31 articles published by the beginning of 2016 by authors gathered around the Association for Insurance Law of Serbia in which they highlighted a large number of proposals for modern solutions for reform and improvement of the regulation on the insurance contract in Serbian law. The titles of 14 articles written on the topic and numerous proposals for new solutions by the recently deceased long-time president and honorary president of the Association for Insurance Law, Prof. Dr. Predrag Šulejić, were also published. It should be noted that even after the publication of this article, the authors gathered in this Association

their proposals to that effect in the messages from its annual conferences (from the papers published in the conference proceedings – J.S.) in the *European Journal of Insurance Law* and on the website of the Association for Insurance Law of Serbia (*http://srbija-aida.org/*, message from conferences).

Disregarding the vague and unclear statement of the author of the article that Principles were included in the "general reference framework", whereby the title of this document is written in small initial letters without any explanation of the reference, if the author is already mentioning it and with the Principles having become a special part of the "General reference framework" for European contract law, there is no need for a reader to search for this explanation in the regularly unavailable literature listed in the article, in the footnote 7, in German and English (which the reader might not speak). It is a false claim that the Principles as an instrument allow the policyholder (insured) to choose to apply the Principles instead of a national law, i.e. its normative (compulsory) rules. Namely, the Principles are, *inter alia*, intended to enable this document be adopted ("on a future occasion") in the form of so-called optional document for European insurance contract law, i.e. become, if accepted by the contracting parties, an alternative contractual arrangement which the contracting parties may apply to their contract instead of a national insurance contract law. For this to be possible, the Principles need to be adopted in the form of EU regulations, as a legal act that would be directly applicable in the Member States and the Principles of a European (general) contract law should become part of the EU's regulations. It is only when they become so, that the Principles of the European insurance contract law may be functional. For this reason, the Art. 1: 105, par. 2 of the Principles stipulates that issues arising from insurance contracts which are not explicitly regulated under the Principles of European insurance contract law should be governed in accordance with the Principles of European Contract Law. By choosing the Principles as optional source of law for their insurance contract, the parties agree to accept the regime for the regulation of their insurance contract, which must be applied in full. This means that the choice of the Principles does not exclude only the application, as the author says, of the imperative provisions of a national law, but also of the optional ones. In this respect, the Art. 1: 102 of the Principles stipulates in the first sentence that by choosing the Principles, they will be applied as a whole and none of their provisions shall be excluded, nor shall some provisions of the Principles be replaced by the optional or imperative rules of the selected national law. Only the normative rules of the national law established for types of insurance that are not regulated under the special rules contained in the Principles shall remain in force after the choice for competent law to regulate the insurance contract. This has also been determined under the Art. 1: 105, par. 1 of the Principles. However, since the Principles (as well

have published new works for the same topic and all that one needs to do to confirm this is to look at the content of *the European Insurance Law Review* and *Insurance Trends Journal* in the period 2016-2018

as the Principles of European Contract Law) have not become to date part of the EU legislation, it was right to say in the author's article which pretends to be a scientific paper, that they as a document were conceived as the "future" optional instrument of insurance contract law of EU. That is, among other things, perfectly explained in the article by Professor Djordjevic Slavka, which the author does not mention. In fact, it is an article written on the basis of the opinions and attitude of authors who are most deserving for the existence of the Principle at a time when they have not yet been published in the final version. It was also published in the aforementioned publication of the Association of Insurance Law of Serbia.[13]

The author's attitude presented in one of the above cited paragraphs of her article, and repeated in section 4 (page 16), that she is convinced it was not possible to regulate an insurance contract at the beginning of the 21st century under the civil law – namely, Civil Code - in the same manner as it was at the beginning of the nineteenth century and that the French and German law, as the most representative legal systems, do not include the insurance contract regulations under the civil code, seemingly indicating that these legal systems proved her point, as well as in the title of the section 2 of the article, showing her categorical opinion / conclusion that in Serbia "... it is necessary to pass a law on insurance contract", is in direct conflict with the situation in the legal sources where an insurance contract is regulated under the comparative law. If the author had dedicated greater attention to research of the legal sources for insurance contract in the EU states, she could have found that there was a large number of EU member states that regulated the insurance contract under their civil laws, amended once or many times mostly during the first and second decade of this century, which cannot be identified, in the insurance sector or the entirety of their regulations, with the civil codes of the 19th century. All examples of civil codes that I will list sources for are eligible for an insurance contract in countries where insurance is significantly or far more advanced than in Serbia. They have been translated into Serbian and published in *the European Review of Insurance Law* ("ER"), with an indication of the amendments made and provided with information on the media on which they are available:

1. Civil Code of the Czech Republic, Part 15, Section 2, Insurance (ER, No. 4/2016 and No. 1/2017),
2. Law No. V on the Proclamation of the Civil Code of the Republic of Hungary, Part XXII Insurance Contract (ER, No. 2/2017),
3. Civil Code of the Kingdom of the Netherlands, Volume 7 - Individual Contracts, Chapter 17 - Insurance Contract (ER, No. 3/2017),
4. Civil Code of the Republic of Poland, Book III - Obligations, Part XXVII - Insurance Contract (EJ, No. 4/2017),

[13] Slavko Đorđević, "Principles of European Insurance Contract Law - a future optional instrument of EU law?", *Insurance Law Review*, 2/2011, pp. 19-28.

5. Romanian Civil Code, Book V - On Obligations, Part IX - Special Contracts, Chapter XVI - Insurance Contract (ER, No. 2/2015),
6. Civil Code of the Slovak Republic, Part VIII - Contract Law, Chapter XV - Insurance Contract (ER, No. 1/2018).

This list should extend to include:

7. The Civil Code of the Republic of Italy, which also regulates the insurance contract[14],[15] Book IV - On Obligations, Part III - On Individual Contracts, Chapter XX - On Insurance.

Not wanting to acquaint the reader with this or some of these or some other examples of the CC, the author avoided to answer why these countries, with more developed insurance industry than Serbia, decided it was more appropriate to regulate their insurance contract under their civil codifications, while for Serbia this was not appropriate. Moreover, why according to her it is necessary (stating the reasons in the section 2 of the article that support this view) for Serbia to adopt the insurance contract law, whereas these states find the same and / or other reasons not indicative of the same necessity; instead, it is quite appropriate / acceptable for them to regulate the insurance contract under the civil code. And why it is possible for these countries by practically amending their civil law to follow up the dynamics and continued development of an insurance contract under the influence of, in her opinion, the Internet and EU law (which she deems one of the key reasons why the insurance contract in Serbian legal system should be regulated under a separate law on insurance contract) (see page 13, section 2 and pages 15-16, section 4 of the article).

In examining the hypothesis according to which, in Serbia, the insurance contract should be incorporated in the Preliminary Draft of the CCRS, the author pointed out that, in this case, it should be clarified which legislative technique to adopt and takes the view that, in the event that this hypothesis is accepted, the new regulatory framework for the insurance contract should be set up by the Preliminary Draft of the CC and the legal protection of the weaker party to the insurance contract should strengthen, which she also calls the basis of the contractual insurance regime to be amended and specified in the Insurance Contract Law. She adds that such foundations should be standardized by the normative and semi-normative rules, whereas all other issues that complement and concretize the contractual regime foundations should be regulated by the optional rules of a separate insurance contract law

Not mentioning in the Article which institutes of foundation of the contract law should be regulated in the Preliminary Draft of the CC through normative and

[14] Available at: *http://www.altalex.com/documents/codici-altalex/2015/01/02/codice-civile*

[15] This book of the CC of Italy was translated in 1964 by the former professor at the Faculty of Law in Belgrade, Djurovic Radomir, in the formerly edited version of the Belgrade Institute for Comparative Law - *Translations of foreign laws*. In the part relating to the insurance contract, this Code is waiting to be published with its updated modifications in the ER in the new, already prepared translation.

semi-normative rules can mislead the reader to the wrong conclusion that, in view of the subject matter of regulation and the character of the rules under which the foundations will be regulated, the Preliminary Draft will standardize only a small number of institutes under few articles, while all others that are standardized by the optional rules in a large number of articles will be regulated under the Insurance Contract Law. However, considering the fact that the insurance contract is, if not mostly than at least in a large number of normative and semi-normative rules that ensure the protection of the policyholder, insured and the beneficiary as weaker parties to the contract which is undoubtedly stipulated under such clauses in, for example, the German Insurance Contract, we can conclude that the relocation of institutes under which they are regulated by imperative rules into the Civil Code cannot meet the expectation that a dual model of legal sources regulating an insurance contract can result in a higher quality and practically more favorable and feasible solution than when the insurance contract is regulated solely under the Civil Code or by a Special Insurance Contract Law.

The Article supresses the fact that amongst the EU member states, to which Serbian legislator looks up most because of the expected assession of Serba to EU, there is one state that under its legal system regulates the insurance contract by two legal sources. That is the Republic of Lithuania. In this state, the insurance contract is regulated under the Insurance Law of the 18th of October 2003, last amended on the 7th of May 2013.[16] In the Chapter V of this Law, the insurance contract is regulated by the Article 41 (Articles 75–116) and Article 2, which includes definitions relating to insurance contract and/or the Article 42 and under the Civil Code of the 17th June 2000, last amended on the 12th April 2011, Article 31 (Articles 6.987–6.1018)[17], Book

[16] Draudimo ĮSTATYMAS, Valstybės žinios: 2003-10-08, Nr. 94-4246, Valstybės žinios: 2003-10-08, Nr. 94-4246, Valstybės žinios: 2004-08-03 Nr.120-4434, Valstybės žinios: 2004-10-26 Nr.156-5688, Valstybės žinios: 2005-02-08 Nr.18-571, Valstybės žinios: 2005-11-03 Nr.130-4664, Valstybės žinios: 2006-07-18 Nr.78-3059, Valstybės žinios: 2006-08-08 Nr.87-3409, Valstybės žinios: 2007-06-02 Nr.61-2342, Valstybės žinios: 2007-12-01 Nr.125-5092, Valstybės žinios: 2008-11-15 Nr.131-5039, Valstybės žinios: 2009-04-04 Nr.38-1439, Valstybės žinios: 2009-12-28 Nr.154-6956, Valstybės žinios: 2010-11-23 Nr.137-6993, Valstybės žinios: 2011-12-01 Nr.145-6816, Valstybės žinios: 2012-11-03 Nr.127-6385, Valstybės žinios: 2013-05-07 Nr.46-2247.

[17] Lietuvos Respublikos civilinis kodeksas, patvirtintas 2000 m. liepos 18 d. įstatymu Nr. VIII-1864 (su paskutiniais pakeitimais, padarytais 2011 m. birželio 9 d. įstatymu Nr. XI-1442). Pakeitimai: 1. Lietuvos Respublikos Seimas, Įstatymas Nr. IX-2172, 2004-04-27, Žin., 2004, Nr. 72-2495 (2004-04-30) CIVILINIO KODEKSO 1.3, 2.55, 2.61, 2.72, 2.79, 2.112, 2.152, 2.160, 2.167, 4.176, 6.292, 6.298, 6.299, 6.747, 6.748, 6.751, 6.753 STRAIPSNIŲ PAKEITIMO IR PAPILDYMO ĮSTATYMAS; 2. Lietuvos Respublikos Seimas, Įstatymas Nr. IX-2571, 2004-11-11, Žin., 2004, Nr. 171-6319 (2004-11-26) CIVILINIO KODEKSO 3.194 STRAIPSNIO PAKEITIMO ĮSTATYMAS; 3. Lietuvos Respublikos Seimas, Įstatymas Nr. X-730, 2006-06-22, Žin., 2006, Nr. 77-2974 (2006-07-14) CIVILINIO KODEKSO 6.470 STRAIPSNIO PAKEITIMO ĮSTATYMAS; 4. Lietuvos Respublikos Seimas, Įstatymas Nr. X-858, 2006-10-17, Žin., 2006, Nr. 116-4403 (2006-10-31) CIVILINIO KODEKSO 4.103 STRAIPSNIO PAKEITIMO ĮSTATYMAS; 5. Lietuvos Respublikos Seimas, Įstatymas Nr. X-1566, 2008-06-03, Žin., 2008, Nr. 68-2568 (2008-06-14) CIVILINIO KODEKSO 3.65 STRAIPSNIO PAKEITIMO ĮSTATYMAS; 6. Lietuvos Respublikos Seimas, Įstatymas Nr. XI-65, 2008-12-16, Žin., 2008, Nr. 149-5997 (2008-12-30)

VI of the Law on Contracts and Torts, Part I, Chapter LIII. However, this is not done as per the alternative model that the Author proposes for our legislator(to regulate the bases of the systems of this contract under the normative and semi-normative rules in the Preliminary Draft of the CC, and later amend and concretize the standards of the contractual insurance regime set in the Preliminary Draft of the CC and/or Serbian future Civil Code by optional rules), but following the voluntary criterion of the Lithuanian regulator according to which the institutes of the insurance contract are regulated under the imperative and optional rules and allocated into two groups, standardized in both legal sources.

For a reader to acquire the complete picture of different attitudes of the legislator in the EU states as regards the selection of source of law to regulate the insurance contract and bring a conclusion on the most appropriate model to apply in Serbian legal system, the article could have mentioned the example of the Republic of Estonia, where the insurance contract remained out of the Civil Code[18] and was regulated under the Law on Contracts and Torts, since this Code included only the

CIVILINIO KODEKSO 6.188 STRAIPSNIO PAKEITIMO IR PAPILDYMO ĮSTATYMAS; 7. Lietuvos Respublikos Seimas, Įstatymas Nr. XI-372, 2009-07-21, Žin., 2009, Nr. 93-3965 (2009-08-04) CIVILINIO KODEKSO 2.33 STRAIPSNIO PAPILDYMO ĮSTATYMAS; 8. Lietuvos Respublikos Seimas, Įstatymas Nr. XI-447, 2009-10-22, Žin., 2009, Nr. 134-5832 (2009-11-10) CIVILINIO KODEKSO 6.750, 6.751, 6.754, 6.865 STRAIPSNIŲ PAPILDYMO IR PAKEITIMO ĮSTATYMAS; 9. Lietuvos Respublikos Seimas, Įstatymas Nr. XI-485, 2009-11-12, Žin., 2009, Nr. 141-6205 (2009-11-28) CIVILINIO KODEKSO 2.72 STRAIPSNIO PAKEITIMO ĮSTATYMAS; 10. Lietuvos Respublikos Seimas, Įstatymas Nr. XI-595, 2009-12-22, Žin., 2009, Nr. 159-7202 (2009-12-31) CIVILINIO KODEKSO 1.21, 2.47, 2.49, 2.54, 2.55, 2.58, 2.62, 2.64, 2.65, 2.66, 2.70, 2.71, 2.72, 2.82, 2.100, 2.104, 2.106, 2.114, 2.180 STRAIPSNIŲ PAKEITIMO IR PAPILDYMO ĮSTATYMAS Šis įstatymas, išskyrus 20 straipsnį, įsigalioja 2010 m. sausio 1 d.; 11. Lietuvos Respublikos Seimas, Įstatymas Nr. XI-747, 2010-04-13, Žin., 2010, Nr. 48-2297 (2010-04-27) CIVILINIO KODEKSO 6.548 STRAIPSNIO PAKEITIMO ĮSTATYMAS Šis įstatymas įsigalioja 2010 m. liepos 1 d.; 12. Lietuvos Respublikos Seimas, Įstatymas Nr. XI-881, 2010-06-04, Žin., 2010, Nr. 71-3554 (2010-06-19) CIVILINIO KODEKSO 2.38 STRAIPSNIO PAKEITIMO ĮSTATYMAS; 13. Lietuvos Respublikos Seimas, Įstatymas Nr. XI-937, 2010-06-22, Žin., 2010, Nr. 76-3873 (2010-06-30) CIVILINIO KODEKSO 3.14 STRAIPSNIO PAKEITIMO ĮSTATYMAS; 14. Lietuvos Respublikos Seimas, Įstatymas Nr. XI-993, 2010-07-02, Žin., 2010, Nr. 84-4402 (2010-07-15) CIVILINIO KODEKSO 4.103 STRAIPSNIO PAKEITIMO ĮSTATYMAS Šis įstatymas įsigalioja 2011 m. sausio 1 d.; 15. Lietuvos Respublikos Seimas, Įstatymas Nr. XI-1031, 2010-09-23, Žin., 2010, Nr. 126-6456 (2010-10-26) CIVILINIO KODEKSO PAPILDYMO 2.11(1), 2.138(1) STRAIPSNIAIS IR 2.147 STRAIPSNIO PAKEITIMO ĮSTATYMAS Šis įstatymas, išskyrus šio straipsnio 2 dalį, įsigalioja 2011 m. sausio 1 d.; 16. Lietuvos Respublikos Seimas, Įstatymas Nr. XI-1254, 2010-12-23, Žin., 2011, Nr. 1-2 (2011-01-04) CIVILINIO KODEKSO 6.886 STRAIPSNIO PAKEITIMO IR 6.887, 6.888, 6.889, 6.890, 6.891 STRAIPSNIŲ PRIPAŽINIMO NETEKUSIAIS GALIOS ĮSTATYMAS Šis įstatymas įsigalioja 2011 m. balandžio 1 d.; 17. Lietuvos Respublikos Seimas, Įstatymas Nr. XI-1312, 2011-04-12, Žin., 2011, Nr. 49-2367 (2011-04-28) CIVILINIO KODEKSO 4.100 STRAIPSNIO PAKEITIMO ĮSTATYMAS; 18. Lietuvos Respublikos Seimas, Įstatymas Nr. XI-1441, 2011-06-09, Žin., 2011, Nr. 74-3545 (2011-06-18) CIVILINIO KODEKSO 1.134 STRAIPSNIO PAPILDYMO IR PAKEITIMO ĮSTATYMAS; 19. Lietuvos Respublikos Seimas, Įstatymas Nr. XI-1442, 2011-06-09, Žin., 2011, Nr. 74-3546 (2011-06-18) CIVILINIO KODEKSO PATVIRTINIMO, ĮSIGALIOJIMO IR ĮGYVENDINIMO ĮSTATYMO 11 STRAIPSNIO PAKEITIMO ĮSTATYMAS.

[18] The general part of the Civil Code of the Republic of Estonia was enacted on March 23, 2002, and entered into force on 1 July of the same year. Translated from Estonian into English available at: *https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/509012018002/consolide*

general part of the civil law.[19] Since she advocates for regulation under the Special Insurance Contract Law, the author should have mentioned some other states that have adopted such law, in addition to previously mentioned ones, like the Republic of Greece[20] and the Kingdom of Spain[21]. Moreover, there is the Republic of Austria, whose Insurance Contract Law was last reformed in 2016.

4. Considering in the Chapter 3 (pp. 14–15) which legislative technique to apply for the protection of the Insured as a weaker party, the author highlights that: „Apart from the normative and few optional rules, there are the semi-normative rues in the field of insurance. The LCT (Serbian Law on Contracts and Torts – note by J. S.) provides that the deviation from other provisions, unless forbidden under this or any other law, is allowed only if in the interest of the insured" and proposes to consider the German approach, where the law traditionally stipulates the unilaterally binding norms and criterion of clear construing of the character of legal norms, unlike in the Serbian law. In this legal system: "the compulsory rules which cannot be deviated from are clearly separated at the end of each chapter, whereas other rules can be deviated from only if not to the detriment of the Insured." According to the author's opinion, this German criterion of deviation creates less problems in practice than the criterion „to the undoubtful interest of the insured" from Serbian law (regulated under the Article 900, paragraph 2 of the LCT and accepted in the Article 1394, paragraph 2 of the Preliminary Draft of the CC where only the concept „to the undoubtful interest of the insured" has been replaced by the concept "not to the detriment of the Insured" – note by J. S.).

Which were the solutions proposed to the Commission by the authors gathered in the Association for Insurance Law of Serbia much before the author came forward with her solution described in the paragraph above, as regards the method of defining the norms that are to be considered absolutely mandatory and/or criterions for defining the semi-mandatory norms, at the time being regulated under the Article 900 of the LCT? The answer will be best illustrated if we use particular quotes regarding the mentioned proposed solution:

"Based on the general provisions of the Article 900, there is entire literature where the authors try, by construing, to ensure which articles or provisions in articles are absolutely mandatory and which are semi-mandatory. Eight provisions are listed as semi-mandatory, as examples, for which we can 'believe to be so" (In the footnote referring to the previous text, there is a literature where Professor Šulejić Predrag and Jankovec Ivica present their construing of the provisions and/or articles of the LCT as semi-mandatory rules - note J. S.).

[19] Law on Contracts and Torts of the Republic of Estonia, Part 4 Insurance Contract, published translated into Serbian in the ER no. 3/2018.

[20] Translation published in the ER, no. 4/2007

[21] Translation published in the ER, no. 2/2018

"Because of the uncertain result of construing the rules on insurance contract in the LCT as compulsory, it was pointed out in the discussion that the special category of relatively compulsory rules is a source of legal unsafety for contracting parties, as is the category of „undoubtful interest of the Insured" as a condition where deviations are possible from the pure compulsory norm. It was proposed that the CC, instead of the solution included in the Article 900 of the LCT, apply one of the following two methods: 1. List the articles and/or provisions and statements, in one or following articles, the application of which is compulsory in all segments of insurance and then list the articles and/or provisions and statements of the articles where the rules cannot be changed to the detriment of the policyholder or beneficiary, as it was in the Articles 97 and 98 of the 2008 Insurance Contract Law of Switzerland; 2. As in Austrian or German Law on Insurance Contract, in a separate article at the end of each section (or alternatively, the chapter) list the provisions that cannot be amended by agreement to the detriment of the Insured (for example, in the paragraph 18, 32, 42 etc. of the 2007 German Insurance Contract Law). Expanding the prohibition of application to the detriment of insured and policyholder."[22]

As it can be seen, the author in her article, proposes to adhere to the "German criterion"/"German approach" – the one that has already been elaborated before, so her proposal is not original. Failing to mention the existence of this proposal in the literature, she avoided dealing with basic proposal originating from the Association for Insurance Law of Serbia - the "Swiss criterion" / "Swiss approach", the better and more suitable solution for semi-long and / or semi-dispersed legal acts by which (insurance contract laws) or in which the insurance contract is regulated (civil codes), such as, in scope, the insurance contract in the Preliminary Draft of the CCRS.Together with the reinsurance contract, whose rules are optional, the insurance contract has been regulated under the Preliminary Draft of the CC by 114 articles and/or 108 when the reinsurance provisions are disregarded. Therefore, its scope is like that of the reformed Insurance Contract Law of Switzerland, where this contract has been regulated by 100 Articles. As opposed to the Swiss, the Austrian Law has 192 and German 216 paragraphs which define, behind each section and in a separate paragraph, which provisions of that law from the relevant chapter cannot be amended to the detriment of the Insured. In German Law, these are the paragraphs: 18, 32, 42, 67, 87, 112, 129, 171, 175, 191 and 208. Therefore, the application of the "German criterion"/"German approach" required that the legislator define eleven new/additional paragraphs. The „German criterion"/"German approach" is appropriate for the large-scope laws, while for the laws of medium length or shorter, this approach would unnecessarily enlarge the number of articles and transparency of the clauses that cannot be amended to the detriment of the insured and/or transparency of the

[22] Jovan Slavnić, Article publiched in footnote 8, pp. 33.

clauses considered semi-compulsory in the law. This, however, cannot be argued against the "Swiss criterion" / "Swiss approach". That is why it was more suitable for inclusion in the 2015 Preliminary Draft of the CC which, nevertheless, comprises a considerably larger number of articles regulating the insurance contract than its2009 version or some future Serbian Insurance Contract Law.[23]

5. The author's justifiable advocation in the conclusion of the Article (pp. 16–17) for the inclusion into a separate section of the future Serbian Insurance Contract Law special rules for indemnity insurance (property and liability), a special chapter dedicated to the liability insurance, divided into the paragraph comprising general provisions and paragraph regulating the basic traits of compulsory insurance and special chapters regulating accident and health insurance still does not coincide with the proposal published before hers, by the Association for Insurance Law of Serbia expressed in the Messages from the XV Conference of the Association "Modern insurance law: actual issues and trends" held on Palić from 11th to 13th April 2014, saying that "… Serbian legislator should in more detail process the theme of the named insurance contracts, test the necessity for their regulation and take the attitude", and that "… the law should regulate the basic differences and minimum scope of cover for some standard named contracts on insurance that already exist or are emerging on the insurance market in Serbia, since only then the user of the insurer's services would be protected by preventive effect of such provisions…"[24] However, the author of this proposal also avoided to inform the readers that the need to regulate particular insurance contracts as named in the new Civil Code or Special Insurance Contract Law, the advantages of their regulation as named under the named contracts which are standardized in comparative law and the proposals for regulating particular contracts of this type in the Serbian law by the Serbian

[23] The proposal to include the "Swiss criterion" into our Civil Code was explained in detail by the author of these lines in a discussion at the aforementioned roundtable (*The Insurance Law Review*, 4/2008, pp. 66-67). If I neglect the fact that the author in her article failed to mention this proposal / criterion that was presented to the public far before her proposal to accept the "German criterion", it cannot be understood why she failed to make any statements about the third proposal that came from the Association for Insurance Law of Serbia, which was neither mentioned in the basic wording above, nor cited. A Better and more practical proposal than the previous ones – to specify numerous clauses articles in one of the first articles under which the insurance contract is regulated, in paragraph 1, of the CC, and/or the provisions whose application is obligatory for the contracting parties, to stipulate in para. 2 that it is possible to deviate from other provisions of the contract if such deviations are not at the detriment of the policyholder, the insured or the insurance beneficiary, and in paragraph 3 that a deviation in favor of either of the contractual parties is permitted in the contracts with heavy risks as subject matter. So, like specified in Art. 1: 103 of the Principle of the European insurance contract law, which provisions are imperative, and which are semi-imperative. And we saw that the lady author stated that she was convinced it would be useful if the Commission looked up to these Principles in regulating the insurance contract.
24 Available at: *http://srbija-aida.org/files/2014/PORUKE%20SA%20XV%20SAVETOVANJA%20UPOS%2011-13.4.2014.pdf.* and in *the European Review for Insurance Law* no. 3/2014, pp. 49–50.

authors, was already written about by Mira Todorović Simeonides[25] in 2014, and that the author of these lines, in 2011, published an article proposing the Commission for drafting the Preliminary Draft of the CCRS (that unjustifiably failed to include into the general provisions on the liability insurance a set of modern solutions which have long been present in the insurance contract law of the developed EU countries) to include large number of solutions into the provisions of the CC on liability insurance and into the new chapter on compulsory insurance, of which some were adopted in the Preliminary Draft of the CCRS (Articles 1464–1467)[26]; and that also the author of these lines in 2010 wrote on private health insurance, its inclusion into the CC or special code and modern solutions accepted in the comparative insurance contract law that need to be accepted into the private health insurance in the Serbial law.[27] Not mentioning the fact that the writer of these lines wrote in detail on what she is only generally advocating for – to include into the future Serbian insurance law the general provisions on liability insurance already present in the Preliminary Draft of the CC but not sufficiently (Articles 1458–1463) and "the basic traits" of the provisions on compulsory insurance, which are insufficient, in the Articles 1464 and 1465 and to regulate in a separate chapter (private) health insurance – is even more confusing since she was well aware of the themes and proposals made in the mentioned papers written by the author of these lines, stated in the footnotes 26 and 27, since she has published articles on particular themes for the publications in which the author hereof wrote about the above issue in detail.[28]

6. In this case as well as in the cases mentioned above, failing to mention the fact of existence of the same ideas/proposals/initiatives published by other authors and most often more widely elaborated, for setting up of regulatory framework by means of which the reform of insurance contract should be realized in our law opens

[25] Mira Todorović Simonides, „Named contracts in nonlife insurance – special review on solutions in Greek contract law", in the in Proceedings: *Modern Insurance Law: Current Issues and Trends*, 2014, Belgrade, Association for Insurance Law, p. 256-271.

[26] Jovan Slavnić, „Special provisions on compulsory insurance against liability as the subject of regulation of the law regulating the insurance contract - Attachment to the discussion on regulating the insurance contract in the new Civil Code of Serbia", in the Proceedings: *Changes in the insurance law of Serbia within the European (EU) development of insurance law*, 2011, Belgrade, Association for Insurance Law of Serbia, pp. 188-220 (see especially pp. 216-219: "How to regulate the health insurance contract in the Civil Code of Serbia?").

[27] Slavnić Jovan, „Contract on voluntary health insurance as a subjest of legal regualtion – Attachment to the discussion on regulating the insurance contract in the new Civil Code of Serbia", in the Proceedings: *European (EU) reforms in the insurance law of Serbia,* 2010, Belgrade, Association of Insurance Law of Serbia, pp. 188-220 (see especially pp. 216-219: "How to regulate the health insurance contract in the Civil Code of Serbia?"

[28] In the ublication named in the footnote 26, the lady author published the paper: "Impact of directors' liabilitiy insruance on the third agency problem", and in the publication from the footnote 27 the paper: "Impact of directors liablity insurance on the first agency problem."

for the reader, having read her article, and reviewed the papers listed in this text as well as the presentations of other authors on the same subject she writes on in her article, one question that only the lady author may answer: what is a sense thereof? Adding the wrong and inaccurate explanations in the article, and/or disputable statements and representations, the conclusion is unavoidable that the article made a step away from the achievements of the insurance law science on the themes that have been processed in the article. Precisely opposite to what would be expected from a writer of the author's reputation.

Translated from Serbian by: ***Bojana Papović***