# Comparative Legal Assessment of the Mass Risk Insurance in the Czech and European Private International Law

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**Abstract**
*The conflict of law rules applicable to the insurance of mass risks have crucial importance for the insurance contracts with international element from the legal and economical point of view, because the legal regime has overwhelming effect on the successful contract implementation. The differentiation between large and mass risks was developed historically in the European private international law by the legal regulation contained in the life- and non-life insurance directives, which contained conflict of laws rules designed for insurance contracts, which had to be implemented to the legal orders in the EU Member States. The relevance of the distinction between large and mass risks for the determination of applicable law is given also after entry into force of the Rome I Regulation, which had to codify in its art. 7 conflicts of laws rules of the insurance contracts for the purpose of elimination of the shortcomings, which were typical for the previous legal regulation, which was implemented from the EU life- and non-life directives also to the Czech legal order.*

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## 1. Introduction: Historical Development of Mass Risk Insurance

The choice of law rules for insurance contracts have undergone a rather complicated historical development in the legislation of both the Czech Republic and the European Union. Prior to the Czech Republic's accession to the European Union, the national legislation was contained in Act No. 97/1963 Coll., on international private and procedural law (hereinafter referred to as the "IPPLA"), which provided in Section 10(2)(d) that insurance contracts, including real estate insurance contracts, were governed by the law of the state where the insurer had its registered office (domicile). This legislation was advantageous to the insurer, which did not have to include choice of law clauses in the contract where the applicable law for the insurance contract was determined under the IPPLA. A fundamental change in the text of the IPPLA was introduced by its amendment under Act No. 37/2004 Coll., which implemented the directives of the European Union ("European Community" at that time) into Sections 10a and 10b of the IPPLA. From the very beginning, the EU regulation was based on the desire to protect the weaker party in the event that an insurance contract was concluded with a policyholder in the position of the weaker party, which is still reflected in the current and effective legislation, which will be discussed in more detail in this article (Ferrari et al., 2018, p. 273). The provision of Article 7(1) and (2) of the Second Council Directive on the

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coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239/EEC (Directive 88/357/EEC), was transposed into Section 10a of the IPPLA. The said provision of the IPPLA stipulated that the law applicable to other than life assurance contracts is the law of the country where the insurance risk is situated (Karfíková et al., 2018, p. 281). In accordance with Article 7(1)(d), the Czech legislator allowed, in Section 10a(1) of the IPPLA, the parties to an insurance contract to make an unrestricted choice of law. The law applicable to contracts in the field of life assurance was regulated in Section 10b of the IPPLA based on Article 32 of the Directive on life assurance (Directive 2002/83/EC), according to which the law of the country of residence or domicile of the policyholder applies to this type of insurance contract unless the parties choose a different law. In Section 10b of the IPPLA, the Czech legislator did not use the opportunity to extend the choice of law compared to the text of the Directive and allowed policyholders residing in the territory of an EU Member State to choose the law of the state of the policyholder's nationality. The Second Council Directive on other than life assurance and the Directive on life assurance have been implemented in various legislation in the individual EU Member States (the Civil Code, the Insurance Contract Act, or the Private International Law Act) and it was therefore difficult to find the harmonised choice of law rules for insurance contracts on the European level. The situation was further complicated by the fact that the Member States are bound by the 1980 Rome Convention on the law applicable to contractual obligations and by international treaties on legal aid, which applied when insurance contracts did not fall within the scope of application of the harmonised choice of law rules for insurance contracts, i.e. the insurance risk was located outside the territory of the EU Member States. In the case where the insured risk was located in the territory of an EU Member State, but the insurer did not have an agency or branch in the territory of the Member State, the "non-harmonised" choice of law rules of the Member State applied. According to Article 3 of the Second Council Directive on other than life assurance, "any permanent presence of an insurance company in the territory of a Member State shall be deemed to be an agency or branch, even if that presence does not take the form of a branch or agency but is merely an office run by the insurer's own staff or by a person who, although independent, has a permanent authority to act on behalf of the insurance company in a manner similar to that of an agency." It is clear from this definition that it differs from the definition of "domicile" of a legal person contained in Article 63 of the Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Regulation 1215/2012 Brussels Ibis). Hess (2021) does not regard the fact that in European private international law, there are different understandings of the concept of domicile in several different legal acts on the EU level as a negative phenomenon, but he believes that it would be *de lege ferenda* desirable to set out criteria for the determination of domicile in the recitals of the individual legal acts of the European Union (Hess, 2021, p. 540-541). The solution to this undesirable situation was to be provided by the choice of law rules on insurance contracts contained in Article 7 of the Regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Regulation 593/2008 Rome I), applicable since 17$^{th}$ December 2009. It was clear from the very beginning that the choice of law rules on conflicts of law in insurance contracts contained in the Rome I Regulation had resulted from a compromise, and the efforts to remedy the shortcomings of the legislation causing increased costs were only partially successful. This was due to the fact that the legislation contained in Article 7 of the Rome I Regulation is to some extent based on the previous legislation contained in the Second Council Directive on other than life assurance and the Directive on life assurance. In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the

Treaty on European Union and to the Treaty establishing the European Community, Denmark did not take part in the adoption of this regulation and the Rome I Regulation is neither binding upon it nor applicable to it. However, according to Article 1(4) of the Rome Regulation, a Member State for the purposes of Articles 3, 4, and 7 means all Member States, i.e. not only the Member States to which the Rome I Regulation applies. Dominelli believes that the mere provision of Article 1(4) of the Rome I Regulation is sufficient to oblige Danish courts to determine the law applicable to insurance contracts with an international element as provided for in Article 7 of the Rome I Regulation (Dominelli, 2016, p. 335). The situation with regard to Denmark became definitively clearer only when the Directive on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II Directive 2009/138/EC) entered into force, which extended the application of Article 7 of the Rome I Regulation to Denmark under Article 178 thereof, while this provision also obliges Member States to which the Rome I Regulation does not apply to apply Article 178 of the Rome I Regulation when determining the law applicable to insurance contracts. The consequence of this legislation is that based on the Solvency II Directive, the application of Article 7 of the Rome I Regulation is extended to States that would become new EU Member States even if they exercise the opt-out choice and the Rome I Regulation would not be binding on them in the remaining parts. Solvency II Directive was incorporated into Annex IX of the Agreement on the European Economic Area by Decision of the EEA Joint Committee No 78/2011 of July 2011 and for that reason is Article 7 of the Rome I Regulation also applicable in the framework of the national legislation and case law in Iceland, Lichtenstein and Norway.

The analysis carried out in this article focuses on the comparison of the choice of law rules for the insurance of mass risks before the Rome I Regulation entered into force and after this regulation of the European Union entered into force. Based on the synthesis of the findings obtained from the research of the legislation, relevant literature, and case-law, recommendations regarding the choice of law on the conflict of laws of mass risks will be made.

## 2. Definition of Mass and Large Risks

The Czech legal system did not use the concept of mass risks in its choice of laws regulation and the need to protect the policyholder as the weaker party in the case of determining the law applicable to the insurance contract appeared in our legislation in Section 87(3) of Act No. 91/2012 Coll. governing private international law (hereinafter referred to as the "PILA"). The provisions of Section 10 of the IPPLA did not protect the policyholder as the weaker party to the contract when it provided that the law applicable to insurance contracts under Section 1(2)(d) was the law of the insurer's domicile at the time the insurance contract was concluded. The change was introduced by Section 87(3) of the PILA, which in contrast provides that the policyholder and the insurer may choose the applicable law and, if they do not choose it, the law of the state of the policyholder's habitual residence applies. Section 87(3) does not distinguish between mass and large risks.

In contrast to Article 7(2) of the Rome I Regulation, which refers to the definition of large risks contained in Article 5(d) of the First Council Directive on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance (Directive 73/239/EEC - after the repeal of this Directive, the corresponding provision is contained in Article 13(27) of the 2009/138/EC

Solvency II Directive), there is no definition of mass risks in Article 7(3) or any other provision of the Rome I Regulation. Legal theory (Ferrari, 2015, p. 270) agrees that mass risks mean insurance risks other than large risks, so there is no need to define mass risks. At the same time, the position of the policyholder as a generally weaker party in insurance contracts is recognised as a reason for providing enhanced protection. Seatzu points out that, from a public law perspective, the reason for this division in the Second Council Directive on other than life assurance was also the empowerment of Member States to decide whether to grant authorisation to insure mass risks on their territory (Seatzu, 2003, p. 12). In the case of compulsory insurance, however, for the purposes of Article 7(4) of the Rome I Regulation, no distinction is made between large and mass risks, since the application of compulsory insurance provisions takes precedence over the autonomy of the will of the contracting parties guaranteed in the case of large risk insurance.

Large risks, as defined in Article 13(27) of the Solvency II Directive, fall into three groups. The first group consists of risks classified in several sectors (rolling stock, aircraft, vessels, transported goods, liability for damage arising from the operation of aircraft and vessels) where it is not important what economic activities the policyholder carries out but what is insured [Article 13(27)(a)]. Transportation of luggage of a policyholder who is not an entrepreneur therefore falls under Article 7(2) of the Rome I Regulation for the purposes of determining the applicable law. The second group includes credit and guarantee insurance, provided that the policyholder is professionally engaged in an industrial or commercial activity or a liberal profession and at the same time the risk insured relates to that activity [Article 13(27)(b)]. Here, therefore, cumulatively, the subject of the insurance must be the relevant insured risk, and, at the same time, the policyholder must carry on business activities connected with the insured risk in question. The third group of large risks [Article 13(27)(c)] is characterised by the risks classified in the classes of damage insurance (classes 3, 8, 9, 10, 13 in Part A of Annex I to Solvency II) and financial loss insurance (class 16 in Part A of Annex I to Solvency II) if the policyholder exceeds the limits for at least two of the following three criteria:

i) for a total balance of EUR 6.2 million in assets;

ii) for net turnover, the amount of EUR 12.8 million;

iii) for the average number of employees during the financial year: 250 employees.

Exceeding these limits will probably not be possible for most entrepreneurs, because the stipulated thresholds will be met only in case of small group of business companies. At the same time, some authors (Fricke, 2008, p. 446) are critical of the fact that the insurance of a policyholder meeting at least two of these limits who concludes a group insurance policy not belonging to one of the sectors listed in Article 13(27)(c) will be subject to the regime under Article 7(3) of the Rome I Regulation in determining the applicable law. In the case of, for example, group sickness insurance for employees, I consider it desirable to apply a legal order whose content will be known to the employees insured. In such a case, it does not seem to me to be undesirable to limit the choice of law to the law determined by one of the threshold determinants referred to in the first subparagraph of Article 7(3) of the Rome I Regulation.

## 3. Sources of Legal Regulation for Determining the Law Applicable to Insurance of Mass Risks

From a temporal point of view, we can distinguish several regimes that may govern the determination of the law applicable to insurance contracts in the Czech legal system or in the related EU legislation.

The first period begins on 1st April 1964, when the IPPLA came into force and the legislation contained in Section 10(1)(d) applied to insurance contracts. It can be assumed that there may still be insurance contracts for which the applicable law would be determined under this Act, since insurance contracts may have a long-term character. In this period, the provisions of bilateral international treaties on legal aid, to which the former Czechoslovakia was a contracting state, had to be reflected. The 1971 Convention on the Law Applicable to Traffic Accidents, which entered into force for the former Czechoslovakia on 11th July 1976, was also already relevant in the case of traffic accidents. According to Article 9 of that Convention, the law applicable to the assessment of whether injured parties may sue directly the insurer of the liable party is determined.

The second period begins on 1st May 2004, when the Czech Republic joined the EU and was therefore obliged to implement the choice of laws rules on insurance contracts contained in the Second Council Directive on other than life assurance and the Directive on life assurance, which was done by amending the IPPLA by Act No. 37/2004 Coll., which inserted the provisions of Sections 10a and 10b into the IPPLA. Another change in this period was brought about by the ratification of the Rome Convention on the law applicable to contractual obligations of 1980, which entered into force for the Czech Republic on 1st July 2006. One of the problematic aspects of the unification of the choice of law rules on contractual obligations by international treaty became apparent here because the 1980 Rome Convention on the law applicable to contractual obligations was ratified by the Member States on different dates and therefore entered into force for them at different points in time. Complications in legal practice arose from the need to determine the location of the insured risk, as the 1980 Rome Convention on the law applicable to contractual obligations applied to insurance contracts only if the insured risk was located in the territory of an EU contracting state.

In an attempt to unify the choice of law rules for contractual obligations, including insurance contracts, the Rome I Regulation was created. One of the reasons why the preparatory work for the Regulation took a relatively long time was, that the discussions concerning Article 7 of the Rome I Regulation were in a situation, where it was clear that Denmark would not take part in the adoption of the Rome I Regulation and would not be bound by it. Therefore, the drafters of the Rome I Regulation came up with a compromise solution that is compatible with the legislation originally contained in the Second Council Directive on other than life assurance, but at the same time, the part of these choice-of-law rules relating to mass risk insurance had become the subject of criticism from the professional community even before the Rome I Regulation came into force (Volken & Bonomi, 2009, p. 261-284, Pauknerová, 2013, p. 166-167). The third period is therefore defined by Article 28 of the Rome I Regulation, according to which this Regulation applies to contracts concluded after 17th December 2009. According to Article 1(2)(j), the Rome I Regulation does not apply to insurance contracts resulting from activities carried out by organisations other than those

referred to in Article 2 of the Directive on life assurance, the subject matter of which is to provide benefits to employees or self-employed persons belonging to an undertaking or group of undertakings or to a shop or group of shops, in the event of death or survival or in the event of interruption or limitation of activity or in the event of illness related to work or an accident at work. The legislation contained in Section 87(3) of the PILA, or possibly in bilateral legal aid treaties to which the Czech Republic is a party, applies to this category of contracts. An example of the provisions of such a bilateral international treaty is Article 48 (Contractual Relations) of the Treaty between the Czech Republic and Ukraine on legal assistance in civil matters published under No. 123/2002 Collection of International Treaties, as amended by the Additional Protocol to this international treaty. This provision allows for a choice of law for contractual obligations, and in case of failure to define a choice of law, the law of the place of conclusion of the contract shall apply.

## 4. Localisation of Mass Risk on the Territory of EU Member States as a Criterion for the Selection of Choice of Law Rules in the Rome I Regulation

Following on from the previous legislation contained in the Second Council Directive on other than life assurance and the Directive on life assurance, the Rome I Regulation maintained in Article 7 the distinction between cases to which its Article 7(3) applies and cases where it does not apply, depending on where the risk is situated. Some authors (Dominelli, 2016, p. 335-336) consider both the protection of the weaker party in the case of insurance of mass risks and the limitation of the application of the legislation contained in Article 7(3) of the Rome I Regulation to risks located in the territory of EU Member States to be discriminatory.

## 5. Determining the Applicable Law in the Case of Risks Located in the Territory of EU Member States

### 5.1. Choice of Law for Mass Risk Insurance under Article 7(3) of the Rome I Regulation

#### 5.1.1. Initial Interpretation of the Concept of Choice of Law for Mass Risk Insurance in Article 7(3) of the Rome I Regulation

The choice of law made under Article 7(3) of the Regulation must comply with the requirements for choice of law set out in Article 3 of the same Regulation. According to Article 3(1), the choice of law must be made either explicitly or implicitly (i.e. 'clearly implied from the terms of the contract or the circumstances of the case') and therefore a hypothetical choice of law is not permissible. The contracting parties can only choose the law (meaning the legal order) and not legal principles such as the 2016 Principles of European Insurance Contract Law.

The choice of law under Article 7(3), first subparagraph, letter (a) limits the application of Article 3(4) of the Rome I Regulation, which provides that in the event of a choice of law of a third (non-member) state, the *lex fori* provisions of law resulting from the implementation of

EU law, which cannot be derogated from contractually, remain unaffected if all other elements relevant to the case are located in an EU Member State. The first subparagraph of Article 7(3), letter (a) allows only the choice of the law of the Member State where the insured risk is situated at the time the insurance contract is concluded, and therefore the choice of the law of a Non-Member State is not possible. This issue is dealt with in more detail by Dominelli, who considers this approach to be restrictive of the principle of universality contained in Article 2 of the Rome I Regulation, but he also points out that the limitation on the scope of application of Article 3(4) does not apply in the case of a choice of law under the first subparagraph of Article 7(3), letter (b) of the Rome I Regulation, which allows for the choice of law of the 'country' of the policyholder's habitual residence and not only of the 'Member State' (Dominelli, 2016, p. 337). Article 7(3), first subparagraph, letters (a) to (e) provide protection to the policyholder by limiting the choice of law to the connecting factors leading to the application of the legal systems whose content should be known to the policyholder. That is why there are three connecting factors used in that provision - the law of the location of the risk, the law of the policyholder's habitual residence, and the law of the policyholder's nationality. The connecting factor of the location of the risk gives the impression that its use is not advantageous to either party, but it can be assumed that the policyholder will often have their domicile in that State and should therefore be familiar with the legal system of that State.

### 5.1.2. Choice of Law under Article 7(3), First Subparagraph, Letter (a)

As mentioned in the previous subsection 5.1.1, the first subparagraph of Article 7(3) of the Rome I Regulation in letter (a) allows the contracting parties to choose the law of the Member State in which the insured risk is located with temporal stabilisation at the time of conclusion of the insurance contract. The Rome I Regulation does not define the term "risk" and we must therefore apply, pursuant to Article 7(6) of the Rome I Regulation, the definition of that term set out in Article 13(13) of the Solvency II Directive, which is based on the assumption that the risk is generally situated in the Member State where the policyholder has their habitual residence or in the State where the policyholder has an establishment if the policyholder is a legal person. There are three derogations from this general rule on the location of the insurance risk, which the Solvency II Directive has taken over from Article 2(d) of the Second Council Directive on other than life assurance. The first derogation is insurance covering either buildings or buildings and their contents covered by the same insurance policy, in which case the law of the Member State in which the property is situated applies [Article 13(1)(a)]. In the case of insurance of a vehicle, the law of the Member State of registration of the vehicle shall apply irrespective of its type [Article 13(1)(b)], which is an exception due to the fact that the vehicle is usually insured in that State. The third exception is represented by insurance contracts concluded for a maximum period of four months, covering risks on trips or holidays, irrespective of the insurance sector, where the place of risk is deemed to be the Member State in which the policyholder concluded the insurance contract [Article 13(1)(c)].

There is a debate in legal theory as to whether Article 7(3), first subparagraph, letter (a) can be interpreted extensively in the sense that the choice of law rules apply not only to the parties to the contract (the insurer and the policyholder) but also to the insured person, who may but does not have to be the policyholder. In practice, it is common that the policyholder (a policyholder is a person who has concluded an insurance contract with the insurer) and the insured person (under Act No. 89/2012 Coll., the Civil Code, an insured person is a person whose life, health, property, liability, or other value of the insurable interest is covered by the insurance policy) are two different persons. The individual language versions (English, Czech, French, German, and Spanish) use the term "parties", from which some authors

(Dominelli, 2016, p. 342 and Volken & Bonomi, 2008, p. 282) infer that an extensive interpretation should be made, extending Article 7(3) to the insured person as a participant in the insurance policy. They demonstrate the importance of this issue by using the example of group insurance, in which the policyholder and the insured person are usually different. This conclusion can be accepted when the term "policyholder" is used explicitly only in Article 7(3), first subparagraph, letters (c) and (e). As a supporting argument, we may note that the regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Regulation 1215/2012 Brussels Ibis) in Articles 11(1)(b) and 15(2) provides for more favourable treatment of both the insurer and the insured person in determining the jurisdiction of the court where, according to point 7 of the recital, the substantive scope of the Rome I Regulation is supposed to be in line with the Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Regulation 44/2001 Brussels I), where this point now applies to the Regulation 1215/2012 Brussels Ibis.

### 5.1.3. Choice of Law under Article 7(3), First Subparagraph, Letter (b)

The borderline connecting factor in Article 7(3), first subparagraph, letter (b) allows the parties to choose the law of the country of the policyholder's habitual residence. The provision in question lacks temporal stability of the connecting factor, which may give rise to a dispute as to whether the law of the place of habitual residence applies at the time of conclusion of the contract or at the time of the initiation of legal proceedings in the event of a dispute arising out of the contract. Dominelli presents arguments for both options. The protection of the policyholder as the weaker party and the absence of the phrase "at the time of conclusion of the contract" in letter (b), compared to the choice of law option under letter (a), are in favour of the option of applying the law of the habitual residence of the policyholder at the time of the litigation. In support of the second option, Dominelli cites the need to respect the principle of legal certainty and the predictability of the determination of the applicable law (Dominelli, 2016, pp. 346-347). However, in legal practice, in my opinion, such a problem will not arise because the contracting parties will choose the particular law of the state where the policyholder's habitual residence is located at the time the contract is concluded. Obviously, the insurance contract will not use the wording that the parties have chosen "the law of the country where the policyholder has his habitual residence" unless the parties are persons who do not have the necessary knowledge of private international law and the correct application of the Rome I Regulation. Given that one of the parties will be the insurer, usually using its own contractual forms and policy conditions, it can be assumed that a person with legal education will draft the choice of law clause for the insurer in an appropriate manner.

Article 7(3), first subparagraph, letter (b) of the Rome I Regulation deliberately uses the term "country", so that the contracting parties may choose, in accordance with Article 2, the law of the country in which the habitual residence of the policyholder is situated, irrespective of whether it is the law of a Member State or a Non-Member State.

It is clear from the text of the Rome I Regulation that it is not permissible to choose the law of the habitual residence of the insured person or of another party to the insurance contract, even if such a party is in the position of a weaker party.

### 5.1.4. Choice of Law under Article 7(3), First Subparagraph, Letter (c)

When it comes to life assurance, the contracting parties may choose the law of the Member State of which the policyholder is a national, since the content of that law should be known to the policyholder even if he or she is habitually resident in another state. Dominelli thinks that the connecting factor of nationality in modern private international law does not represent a

real link with the policyholder's person (Dominelli, 2016, p. 349). Staudinger also points out that for citizens of EU Member States, with regard to the free movement of persons, it can only represent a formal union and therefore the choice of this connecting factor is not appropriate (Ferrari et al., 2018, p. 290). It is therefore impossible to choose the law of a non-member state. Although the temporal stabilisation of the connecting factor is missing in Article 7(3), first subparagraph, letter (c) of the Rome I Regulation, I am inclined to conclude that the parties may choose the law of the nationality of the policyholder at the time of the conclusion of the contract, and a subsequent change of the nationality of the policyholder does not affect the choice of law. Dominelli, Staudinger, and Wendt have reached the same conclusion, stating that the validity of the choice of law is not affected even if the policyholder is a national of a Member State at the time of the conclusion of the insurance contract and subsequently becomes a national of a Non-Member State while ceasing to be a national of a Member State (Dominelli, 2016, p. 352; Rauscher, 2023, p. 317; Ferrari, 2015, p. 273). According to Steinrötter, the temporal stabilisation of the connecting factor of nationality can also be concluded with regard to the systematic classification of this provision under Article 7(3), first subparagraph, letter (a) of the Rome I Regulation, which contains the temporal stabilisation (Ferrari, 2020, p. 201).

It may seem disputable whether, in the case of life assurance, the insurer and the policyholder may choose, under Article 7(3), a different applicable law from that offered in letter (c) of the first subparagraph. Another thing to consider here is the application of Article 7(3), first subparagraph, letter (a) or (b) since the Rome I Regulation does not exclude their application to life assurance. Application of the choice of law options under Article 7(3), first subparagraph, letters (d) and (e) is, by its very nature, out of the question. The option under letter (d) is not applicable because in the case of life assurance the risk and the events associated with it are located in one State. Letter (e) concerns business risks. Wendt believes that such an option is permissible in view of the wording of Article 32 of the repealed Directive on life assurance (Rauscher, 2023, p. 318). Since there is no prohibition in the text of letter (c) or in any other part of the first subparagraph of Article 7(3) of the Rome I Regulation on the choice of law for life assurance under another letter of the same provision, I am inclined to the conclusion that the choice of law under letters (a) and (b) is possible and that the policyholder may thus choose the law of the state of the policyholder's domicile or the law of the state of the location of the insured risk for life assurance. Given the fact that, in the case of life assurance, the risk is located in the place of residence of the policyholder, it is in fact a single option in this case. Martiny, on the other hand, rejects the choice of law option for life assurance under the other provisions of Article 7(3), first subparagraph, of the Rome I Regulation, since in the case of such policies there is often still a relationship of the policyholder with their home state (Von Hein, 2018, p. 314).

### 5.1.5. Choice of Law under Article 7(3), First Subparagraph, Letter (d)

Article 7(3), first subparagraph, letter (d) of the Rome I Regulation offers a choice of law option for insurance contracts covering risks limited to events occurring in one Member State other than the Member State in which the risk is situated. In such a case, the contracting parties may choose the law of the Member State where the event covered by the insurance contract may occur, while it is not possible, in view of the wording of this provision, to choose the law of a Non-Member State, even if it is the only state in which the insured event may occur. An example might be a situation where emissions from a factory located in one Member State may affect the environment in the territory of another Member State, and the policyholder and the insurer may choose the law of the State where the insured event -

environmental damage covered by the business liability insurance - may occur as the law applicable to the insurance contract.

It is not clear how to deal with cases where claims may occur in several different Member States that are not the states of the localisation (location of the insured risk). Due to the use of the singular in the word "risk", Gruber believes that it is not possible to choose in the same contract two or more different Member State laws of the location where the insured event may occur (Heinze, 2009, p. 450). He sees a possible solution to this situation in the negotiation of two or more insurance contracts in which the choice of law of the different states where (insured) events may occur will be made (Callies, 2015, p. 207). Steinrötter, on the other hand, believes that it is possible to make a partial choice of law under Article 7(3) in conjunction with Article 3(1) of the Rome I Regulation and thus does not rule out making a choice of law in a single insurance contract for multiple events that may occur in different states (Ferrari, 2020, p. 202). Staudinger shares the same opinion, explaining that the choice of only one law would lead to the destruction of the consistency between the contractual and tort regimes (Ferrari, 2015, p. 274).

### 5.1.6. Choice of Law under Article 7(3), First Subparagraph, Letter e)

The last variant of the choice of law may be made by the policyholder and the insurer in an insurance contract covering group risks where the policyholder carries on a professional or business activity or a liberal profession and the insurance contract covers two or more risks relating to that activity and situated in different Member States. In such a case, the parties may choose the law of any Member State where the risk is situated or the law of the country where the policyholder has their habitual residence. The EU legislator, in an attempt to avoid splitting the obligatory statute, allows the contracting parties to choose only one law to govern their insurance contract. The condition for the application of Article 7(3), first subparagraph, letter (e) is that all the risks are situated in the Member States.

Borderline situations may arise if the policyholder insures an activity that is partly business and partly non-business in nature. In such a case, it is appropriate to apply the conclusion of the Court of Justice in Johann Gruber versus BayWa AG (Case C-464/01) and not to allow the application of letter (e) in cases where the policyholder's business is only marginal. The said judgment concerned the Convention of 27th September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, but the Court's conclusions can presumably be applied by analogy to the Brussels Ibis Regulation and, for the sake of a consistent interpretation, also to the Rome I Regulation (see point 7 of the recitals to the said Regulation). The opinion expressed in this judgment is also shared by Dominelli (Dominelli, 2016, p. 359) and Steinrötter (Ferrari, op. cit., 2020, p. 202).

### 5.1.7. Extended Choice of Law

The second subparagraph of Article 7(3) of the Rome I Regulation contains a provision, criticised by some authors, which allows the Member States to extend the choice of law option in the cases referred to in paragraphs (a), (b), or (e) to other legal systems or other connecting factors allowing to choose legal systems other than those referred to in the said paragraphs. Heiss even states that this provision leaves it to the discretion of the Member States whether they use the extension of the choice of law (Volken & Bonomi, 2008, p. 274). The object of the criticism is therefore primarily the need to ascertain the content of the relevant national legal systems of the Member States, which is contrary to the unification efforts in the field of European private international law. According to Bělohlávek, the courts are thus forced to carry out a double check on the admissibility of the choice of applicable law

- under the Rome I Regulation and, where appropriate, under the national legislation of the relevant Member State (Bělohlávek, 2009, p. 1177).

### 5.2. Determination of the Applicable Law Under Article 7(3) of the Rome I Regulation in the Absence of a Choice of Law

In the absence of a choice of law or an invalid choice of law agreement, the law of the Member State in which the risk is situated at the time of conclusion of the contract shall apply to the insurance contract pursuant to the third subparagraph of Article 7(3). This provision shall apply both in the case where the contracting parties do not negotiate a choice of law clause and in the case where such an arrangement is invalid (e.g. the contracting parties negotiate a law which they cannot choose in view of the limitation under Article 7(3) or fail to comply with the formal requirements of the applicable law for a choice of law clause).

In Dominelli's opinion, the above provision of the Rome I Regulation protects not only the weaker party, the policyholder, but also the insurer (Dominelli, 2016, p. 365). The policyholder is protected by the fact that, according to the third subparagraph of Article 7(3), instead of applying the law of the insurer's domicile, the law of the place of risk will apply, which will often also be the place of the policyholder's habitual residence, as explained above. The protection of the insurer can be seen in the temporal stability of the connecting factor at the time of the conclusion of the contract, which allows the insurer to predict which applicable law will apply. At the same time, the legislation guarantees equal conditions in a competitive environment, because if the connecting factor of the insurer's domicile was applied, the applicable contract law might provide more favourable conditions to insurers originating from a state other than the state where the risk is situated, while those conditions would not be known to insurers established in the state of the risk and might constitute a disadvantage for them when offering their insurance products.

Unlike Article 7(2), Article 7(3) of the Rome I Regulation lacks an escape clause, which makes Article 7(3) more rigid. This approach seems to be guided by the desire to avoid situations where it would be unclear whether the insurance contract is manifestly more closely connected to a country other than that referred to in the third subparagraph of Article 7(3). Such situations could give rise to disputes as to the determination of the applicable law and also to legal uncertainty. The Rome I Regulation thus provides protection similar to the consumer protection under Article 6 of that Regulation, which also contains an escape clause. However, this argumentation does not stand up when it comes to the choice of law rules on contracts relating to transport (Article 5) and individual employment contracts (Article 8), which contain escape clauses in Article 5(3) (transport contracts) and Article 8(5) (individual employment contracts) of the Rome I Regulation. The insurer may be a small or medium-sized enterprise, which could in some cases benefit from the derogation from the choice of law rules contained in Article 7(3). However, Wendt rightly points out that the connecting factor of the location of the risk is conveniently chosen in that it is usually the place most closely linked to the insurance contract (Rauscher, 2023, p. 321) and therefore the application of the escape clause would rarely be an option anyway.

# 6. Determination of the Applicable Law in the Case of Risks Located Outside the Territory of EU Member States

## 6.1. The Law Applicable to Insurance Contracts Concluded Between a Consumer and an Entrepreneur Covering Risks outside the EU

Since only some insurers insuring mass risks are in the position of consumers, Article 6 of the Rome I Regulation does not apply in situations where the policyholder is acting as a professional (entrepreneur) or where the insurance has both a business and a non-business purpose (Case 464/01, para. 39 and 42), but the business purpose is quite insignificant compared to the consumer purpose (Rauscher, 2023, 329).

Article 6(2) of the Rome I Regulation allows for a choice of law in an insurance contract concluded between a consumer (Article 6(1) of the Rome I Regulation defines, for the purposes of the conflict of laws regime for consumer contracts, a consumer as a natural person acting in the conclusion of a contract for a purpose which does not relate to his professional or business activity and a professional (entrepreneur) as another person acting in the conclusion of a contract in the exercise of his professional or business activity.) and the professional, whereby the choice of law must not deprive the consumer of the protection provided by the provisions of the legal order which cannot be derogated from by contract and which would apply in the absence of a choice of law under Article 6(1). Such a limitation on the scope of application of the chosen law may be very restrictive depending on how many of the provisions which cannot be derogated from by the parties' agreement contain national law that would apply under the Rome I Regulation in the absence of a choice of law.

If no choice of law is made, Article 6(1) will apply, stipulating that the law of the country of the policyholder's habitual residence will apply to insurance contracts between a consumer and a professional in two cases:

> a) the professional pursues their trade or business in the country where the consumer has their habitual residence; or
>
> b) such activity is in any way directed at that country or at several countries including that country and at the same time the insurance contract falls within the scope of that activity.

The option provided for in Article 6(1)(a) is rightly considered by Wendt to be redundant because it concerns purely domestic cases where the professional and the insurer have their habitual residences in the same state. Wendt examines several options that could give an international element to the contractual relationship but he does not find convincing arguments in favour of the conclusion that an international element is given (Rauscher, 2023, p. 326). The determination of whether the professional focuses their activities on the state where the consumer has their habitual residence is crucial for the application of Article 6(1)(b). The focus of the activity will be fairly clear in the case of distributing advertising in the print media or public media in the territory of the state of the consumer's habitual residence. The disputed cases mainly concern offering the possibility to conclude a contract over the Internet. As a result, the case law of the Court of Justice has developed in relation to Article 15(1)(c) of the Brussels I Regulation (jurisdiction in consumer matters), which can be applied by analogy to Article 6(1)(b) of the Rome I Regulation. This concerns, in particular, the judgment of the Court of Justice in the Joined Cases *Pammer* and *Hotel Alpenhof* (Joined Cases C-585/08 and C-144/09), in which the provisions of the Rome I Regulation were also

applied in interpreting the Brussels I Regulation and the Court of Justice concluded that it was necessary to examine, whether, prior to concluding the contract with the consumer, it was apparent from the professional's website and from the professional's overall activities that the professional intended to deal with consumers resident in one or more Member States, including the Member State in which the consumer is resident, and intended to conclude a contract with that consumer. The judgment of the Court of Justice in paragraphs 82 to 94 also contains an illustrative list of indications that may lead to the conclusion that the professional focuses their activities on a particular country.

If the insurance contract does not fall within the cases referred to in Article 6(1) of the Rome I Regulation, it is questionable whether Article 4(1)(b), or 4(3), or 4(4) of the Rome I Regulation should apply to such contracts in the absence of a choice of law under Article 3. The application of Article 4(1)(b) (service contracts) is favoured by the clarity of the determination of the applicable law, in accordance with the legal certainty of the parties, since the law of the domicile of the service provider, i.e. the domicile of the insurer, would apply. Arguments in favour of the application of Article 4(2)(b) can also be based on the judgment of the Court of Justice in *Commission versus the Federal Republic of Germany* (Case C-205/84, paragraph 16) and the judgment of the Federal Court of Justice (Germany) of 16th September 2014, File No. XI ZR 78/13 (para. 30). Wendt mentions the complications and costs that the splitting of the statute causes in the calculation of the policy conditions and mentions the costs that are likely to be passed on by the insurer to the policyholder (Rauscher, 2023, p. 330). Conversely, the application of Article 4(3) or (4) can be based on the interest in protecting the weaker party because the insurance contract will usually have the closest link to the state where the insured risk is located, which is the state where the weaker party, the policyholder, will be habitually resident.

### 6.2. The Law Applicable to Insurance Contracts Not Concluded Between a Consumer and an Entrepreneur Covering Risks outside the EU

Insurance contracts not concluded between a consumer and an entrepreneur, covering risks outside the territory of the EU Member States, are governed by the general rules for determining the applicable law laid down in Articles 3 and 4 of the Rome I Regulation unless an international treaty not concluded exclusively between Member States and laying down the choice of law rules for contractual obligations applies. The parties to the insurance contract may therefore make a choice of law under Article 3 and, if they do not, Article 4 of the Rome I Regulation applies to determine the applicable law.

## 7. Relationship between Compulsory Insurance Legislation and the Law Applicable to Insurance of Mass Risks

Article 7(4) of the Rome I Regulation addresses the situation where there is a desire in the public interest to enforce the application of the law of the Member State that imposes the obligation to take out compulsory insurance by giving preference to the application of the provision of the law imposing the obligation to take out insurance over the law of the state where the risk is situated. In Heiss's opinion, the term "provision" was deliberately used in Article 7(4) of the Rome I Regulation in order to emphasise the priority application of provisions imposing an obligation to take out insurance, regardless of whether it is national or EU legislation. At the same time, this author claims that provisions imposing an obligation to

take out insurance also prevail over the 2016 Principles of European Insurance Contract Law, if the parties could choose them as the applicable law (Basedow et al., 2016, p. 9).

The possibility of imposing the obligation to take out insurance in the legal system of the Czech Republic in comparison with some other European countries is addressed by Dobiáš (Fenyves et al., 2016, p. 83-90), concluding that in the Czech Republic, only the law can impose the obligation to take out insurance, while in some other EU Member States this obligation can also be imposed by statutory instruments.

It is clear from the wording of this provision that it does not apply to compulsory insurances provided for in the legal systems of Non-Member States, and therefore the legislation on compulsory insurances in the legal systems of Non-Member States can only be taken into account as a limit for the application of the applicable law only if it is an overriding provision, which is not an optimal solution since in the event of a dispute it will be necessary to determine whether and which provisions of the law of the Non-Member State are overriding. In her article, Van Bochove concludes, based on an analysis of the case law of the Court of Justice of the EU that the protection afforded to policyholders by overriding mandatory rules under Article 9 of the Rome I Regulation is less extensive than the protection guaranteed to consumers (Van Bochove, 2014, p. 147).

## 8. Conclusion

The choice of law rules on insurance contracts contained in the Rome I Regulation have faced criticism from the professional community from the very beginning, which is reflected in the fact that Article 27 of the Regulation provides for its revision on the basis of a proposal from the EU Commission. The first problematic aspect of the legislation contained in Article 7 of the Rome I Regulation is its excessive complexity, conditioned by the link to the Second Council Directive on other than life assurance and the Directive on life assurance, and by the desire to find a compromise between the different interests of the EU Member States. A relatively simple solution to the current state of the law would be to abolish the distinction between mass and large risks, i.e. to unify the choice of law rules for insurance contracts. Here, it would clearly be sufficient if the choice of law was allowed and, in the absence of a choice of law, the law of the state of location of the risk would apply, but the impact of this solution will need interdisciplinary legal and economic analysis executed on the EU level. In addition, it would be possible to apply an escape clause to all insured risks, which the current legislation only allows for the insurance of large risks in Article 7(2) of the Rome I Regulation. If this modification was implemented, insurance contracts concluded between a consumer and an entrepreneur would be governed by Article 6 of the Rome I Regulation, which would also need to be amended to this end. If abolishing the distinction between mass and large risks would not be acceptable, the exclusion of the application of Article 7(3) of the Rome I Regulation to risks located outside the EU should at least be abolished, as there is no fundamental reason for the current legislation, and it is of a discriminatory nature. It should also not be overlooked that the conflict of laws rules contained in Article 7(3) of the Rome I Regulation partly conflict with the principle of universal applicability under Article 2 of the Rome I Regulation, since the choice of law options provided for under Article 7(3), first subparagraph, letters (a), (c), and (d) allow choosing exclusively the law of a Member State without sensible reason for the exclusion of the laws of other European and non-European states.

Another possible solution is to include the choice of law rule for insurance contracts in the list found in Article 4(1) of the Rome I Regulation, which is the solution that was found in Article 10(2)(d) of the IPPLA. This solution does not appear to be acceptable at present for two reasons. The first reason is the desire to provide protection to the weaker party in the Rome I Regulation, which is also reflected in the legislation on contracts for transport (Article 5 of the Rome I Regulation) and individual contracts of employment (Article 8 of the Rome I Regulation). The inclusion of insurance contracts in Article 4(1) would mean a change in the concept of the choice of law rules protecting the weaker party and could logically lead to the inclusion of transport contracts and individual employment contracts in Article 4(1) of the Rome I Regulation. The second reason is the need to reflect the specificities of compulsory insurances in relation to the choice of law rules, whereby moving the rules from Article 7(4) of the Rome I Regulation to Article 4 would not be appropriate from the point of view of the systematic nature of the legislation.

In the Czech legislation, it would be desirable to consider *de lege ferenda* amendment to Section 87(3) of PILA, as in its current form it does not differentiate between insurance of mass and large risks in the absence of a choice of law. In its current form, this provision provides protection for the policyholder by providing that, in the absence of a choice of law, the law of the state in which the policyholder is habitually resident will apply, which is legislation designed to protect the weaker party to the contract. However, the said legislation does not correspond to the concept of the distinction between mass and large risks contained in Article 7 of the Rome I Regulation.

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