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Insurance Contracts in the New Hungarian Civil Code

I Introduction

We would like to give a short overview of the regulation of insurance contracts in the new Hungarian Civil Code (Act V of 2013 on the Civil Code, hereinafter referred to as NHCC)[1] in this paper. Of course, we cannot interpret this topic in detail in a short paper and so we will just focus on the following fundamental questions:

– What are the characteristics of insurance contracts according to the NHCC? Which typical questions about the characteristics of insurance contracts can be answered with the help of the norms of the NHCC?

– How does the structure of regulation of insurance contracts look like in the NHCC? What are the advantages and disadvantages of the classification chosen by the NHCC?

– What is technical form of regulation of insurance contracts in the NHCC? What are the mandatory and the default rules?

II The Definition and Characteristics of Insurance Contract in the NHCC

It is not easy to answer the question of what insurance is. Moreover, insurance has at least two legal aspects. On the one hand, we can speak about the insurance business, which is regulated by public law, and on the other hand we can speak about insurance contracts, which are regulated by private law.

We have to admit that these categories are not really separated in common law; as we can read in one English insurance law textbook,

> 'the courts have not fully defined the common law meaning of "insurance" and "insurance business", since they have, on the whole, confined their decisions to the facts before them. They have, however, given useful guidance in the form of descriptions of contracts of insurance. The best established of

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[1] The NHCC entered into force on 15th March, 2014.

these descriptions appears in the case of *Prudential v Commissioners of Inland Revenue* [1904] 2 KB 658. This case, read with a number of later cases, treats as insurance any enforceable contract under which a "provider" undertakes:

(1) in consideration of one or more payments

(2) to pay money or provide a corresponding benefit (including in some cases services to be paid for by the insurer) to a recipient

(3) in response to a defined event

(4) the occurrence of which is uncertain (either as to when it will occur or as to whether it will occur at all); and

(5) adverse to the interests of the recipient.'[2]

However, the legal science has tried several times to find a definition of an insurance contract. One of the best-known descriptions comes from the American Professor William R. Vance. 'Under his definition, an insurance contract was between the insurer and the insured and required five elements:

(1) The insured must possess an interest, the insurable interest, in the thing being insured and the value of that interest must be able to be assessed;

(2) The insured must be subject to a risk of loss if the insured interest is destroyed or damaged by the happening of certain specified fortuitous events;

(3) The insurer assumes the risk of loss (also known as risk transference);

(4) The insurer assumes this risk of loss as part of a general plan to distribute actual losses amongst a large group bearing similar risks; and

(5) The insured pays a fee to the insurer, which goes into a general insurance fund, as consideration for the insurer's promise to assume the risk of loss.'[3]

Moreover, we can find a definition of insurance contract in the statutory state law of the U.S., based on the practice of courts and the tests made by the legal science. For example, according to New York Insurance Law § 1101 (1) 'Insurance contract' means any agreement or other transaction whereby one party, the 'insurer', is obligated to confer benefit of pecuniary value upon another party, the 'insured' or 'beneficiary', dependent upon the happening of a fortuitous event in which the insured or beneficiary has, or is expected to have at the time of such happening, a material interest which will be adversely affected by the happening of such event.[4]

In the civil law systems, the jurisprudence tries to separate the categories of insurance business and insurance contract. For example, in Germany, insurance is the subject of an insurance contract.[5] Insurance is not defined by the legislator but, regarding the practice of the Federal Administrative Court of Germany *(Bundesverwaltungsgericht),* we can find the definition

[2] John P. Lowry, Philip Rawlings, *Cases and Materials in Insurance Law* (Hart 2004, Oxford) 26.

[3] See Elizabeth F. Brown, 'Will the Federal Insurance Office Improve Insurance Regulation?' [2012] Winter University of Cincinnati Law Review 569.

[4] Ibid.

[5] See Egon Lorenz, 'Einführung' in Roland Michael Beckmann, Annemarie Matusche-Beckmann (eds), *Versicherungsrecht – Handbuch* (CH Beck 2009, München) Rn. 111.

of insurance, which is the following: insurance is provided if a provider undertakes, in consideration of payment, to provide certain services in response to the occurrence of an uncertain event if the transferred risk is distributed to numerous people threatened by the same danger and risk taking is based on calculations using the law of large numbers and if risk taking is an independent subject of the contract and not just an ancillary obligation.[6] However, 'insurance contract' is defined by the German legislator in Section 1 of the Insurance Contract Act (*Versicherungsvertragsgesetz,* hereinafter referred to as VVG): 'By concluding an insurance contract, the provider undertakes to cover a certain risk of the policyholder or a third party by providing certain services in response to the occurrence of the defined insured event. The policyholder shall perform the agreed payment (insurance premium) to the provider.'[7]

In Hungary, the legislation also separates the terms insurance business and insurance contract. Section 4 of Act LX of 2003 on Insurance Institutions and the Insurance Business defines insurance business in the following way: it is a commitment that is based on an insurance contract, legal regulation, or membership relation, whereby the insurer undertakes to designate a group of persons deemed to be exposed to the same risk or similar perils (risk group) in order to assess the risks that can be measured by mathematical and statistical means, establish a consideration (premium) for the commitment, create specific reserves, assume the risks stipulated and provide services as contracted.[8] And Section 6:439 (1) of the NHCC contains the definition of 'insurance contract'. It prescribes that, under an insurance contract, the insurer undertakes to provide coverage for the risk specified in the contract, and to provide settlement or benefits for loss arising upon the occurrence of a specific event after the starting date of risk coverage, and the insured person undertakes to pay an insurance premium as agreed upon.

As we said in the introduction, our first aim is to examine what the characteristics of an insurance contract are according to the NHCC and which typical questions about the characteristics of insurance contracts can be answered with the help of the norms of the NHCC. To answer

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[6] The original German text is the following: 'Eine Versicherung ist gegeben, wenn sich ein Unternehmen gegen Entgelt rechtlich verpflichtet, für den Fall des Eintritts eines ungewissen Ereignisses bestimmte Leistungen zu erbringen, wenn das übernommene Risiko auf eine Vielzahl durch die gleiche Gefahr bedrohter Personen verteilt wird und der Risikoübernahme eine auf dem Gesetz der großen Zahl beruhende Kalkulation zu Grunde liegt und wenn die Risikoübernahme selbstständiger Gegenstand des Vertrags und nicht nur Gegenstand einer Nebenverpflichtung ist.' See Egon Lorenz, 'Einführung' in Roland Michael Beckmann, Annemarie Matusche-Beckmann (eds), *Versicherungsrecht – Handbuch* (CH Beck 2009, München) Rn. 119.

[7] The original German text is the following: 'Der Versicherer verpflichtet sich mit dem Versicherungsvertrag, ein bestimmtes Risiko des Versicherungsnehmers oder eines Dritten durch eine Leistung abzusichern, die er bei Eintritt des vereinbarten Versicherungsfalles zu erbringen hat. Der Versicherungsnehmer ist verpflichtet, an den Versicherer die vereinbarte Zahlung (Prämie) zu leisten.' This definition corresponds to the general definition technique: it prescribes the typical contractual obligations of the parties. As such, it is not a clearly defined term of insurance contract, but it is a description of the insurance contract as a particular agreement. See Dirk Looschelders, '§ 1 Vertragstypische Leistungen' in Theo Langheid, Manfred Wandt (eds), *Münchener Kommentar zum Versicherungsvertragsgesetz* (CH Beck 2010, München) Rn. 1.

[8] Our translations of Hungarian legal texts are based on the translations of Complex DVD JogtárPlusz.

these questions, first we have to summarize the characteristics of an insurance contract. Regarding the common law and German jurisprudence[9] we can find the following elements:

– uncertainty
– premium
– insurance benefits
– insurable interest
– risk calculation based on actuarial methods.

After that, we should see what significance these expressions have and which common problems or questions are connected to these elements.

1 Uncertainty

It is quite clear that insurance shall cover an uncertain risk. We can classify the risks according to the level of their uncertainty. We can speak about absolute risks if the event will surely occur but its date is uncertain (e.g. death) or relative risks if it is also uncertain whether the event will occur (e.g. a theft). If the occurrence itself and its date is certain and known as well, we cannot speak about uncertainty; these events cannot be an insured event.

However, regarding uncertainty, it can be questioned whether an insured event can be one that occurred before the conclusion of the contract. If the insurance covers risks which occurred before the conclusion of the contract this is retroactive insurance. How can these events be uncertain? The answer is quite simple: these risks are still uncertain if the parties do not know, at the time of the conclusion, whether the insured event has occurred or not. If one of the parties knows that the event has occurred or has not occurred, that risk is not uncertain and therefore is not insurable. Although the retroactive coverage of an insurance policy is not common, the PEICL contains special provisions about it to avoid the coverage of those events of which the occurrence or non-occurrence is known by one of the parties.[10] However, the PEICL does not solve the problem, if the policyholder aims to cover those risks when the insured event occurs after the submission of the offer and before the conclusion (which is called unreal or false

[9] The definition of the Principles of European Insurance Contract Law (PEICL) does not contain any other relevant element. According to Article 1:201 (1) 'Insurance contract' means a contract under which one party, the insurer, promises another party, the policyholder, cover against a specified risk in exchange for a premium. The text of PEICL is available on this homepage: <http://www.uibk.ac.at/zivilrecht/restatement/draft>.

[10] See Article 2:401 of the PEICL:
Retroactive Cover
(1) If, in the case of cover granted for a period before the contract was concluded (retroactive cover), the insurer knows at the time of the conclusion of the contract that no insured risk has occurred, the policyholder shall owe premiums only for the period after the time of conclusion.
(2) If, in the case of retroactive cover, the policyholder knows at the time of the conclusion of the contract that the insured event has occurred, the insurer shall, subject to Article 2:104, provide cover only for the period after the time of the conclusion of the contract.

retroactive insurance).[11] These risks will not be covered by the insurance according to the PEICL because, at the time of conclusion of the contract, the policyholder knows that the insured event has occurred.[12]

The NHCC answers this question quite clearly. According to the definition of an insurance contract [Section 6:439 (1)], the insured event does not need to be a future event; it must simply be a specific event, which occurs after the starting date of risk coverage. Section 6:445 (1) prescribes that the coverage of risk by the insurance company shall commence at the time fixed by the parties in the contract or, failing this, at the time the contract is concluded. It means that the parties can choose a starting date for the risk coverage other than the time of conclusion of the contract and this date can be earlier or later. This is an important modification to Hungarian insurance law by the NHCC because the former Hungarian Civil Code (Act IV of 1959 on the Civil Code, hereinafter referred to as FHCC) prescribed in Section 536 (1) that the insured event shall be a future event. As such, the earliest starting date for the risk coverage could be the time of conclusion of the contract according to the FHCC.

The problem of unreal or false retroactive insurance is also solved – more or less – by the NHCC. Section 6:444 (3) prescribes that if an insured event occurs during the risk assessment period, the insurance company shall be entitled to refuse the offer only if the offer sheet contains an express warning to that effect, and it is instantly clear from the nature of the insurance cover requested or from other circumstances of risk coverage that an individual risk assessment is necessary for accepting the offer. However, it is questionable whether this norm will just be applied to consumer insurance or for all types of insurance, because the title of the Section refers to consumer insurance but the text of the norm does not. In our opinion, this norm shall also apply to non-consumer insurance if the offer – which is normally prepared by the insurer – states that the starting date of risk coverage is the submission of the offer. In this case the insurer is not free to refuse the offer; it must follow the rules of Section 6:444 (3), because, if the insurer could freely refuse the offer, its obligation to cover the risks which occur after the submission of the offer as well would have no meaning.

The other question about uncertainty is whether the insured event can depend on the conduct of the policyholder or the insured person. It is quite obvious that the insured event shall have an independent nature. For example, § 1101 (2) of the New York Insurance Law prescribes that a 'fortuitous event' is any occurrence or failure to occur which is, or is assumed by the parties to be, to a substantial extent beyond the control of either party, while section 536 (2) of the FHCC contained an illustrative list of events which could be insured events,[13] and all these events were ones that are beyond the control of either party.

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[11] See Jens Muschner, '§ 2 Rückwärtsversicherung' in Theo Langheid, Manfred Wandt (eds), *Münchener Kommentar zum Versicherungsvertragsgesetz* (CH Beck 2010, München) Rn. 5.

[12] See Christian Armbrüster, 'PEICL - The Project of a European Insurance Contract Law' (2013) Fall Connecticut Insurance Law Journal 133. We have to mention that Section 2 of VVG has very similar rules about retroactive insurance as the PEICL. However, according to the VVG, the knowledge of the parties about the occurrence of the insured event shall be examined at the submission of the contractual acceptance which can be a different date for the parties.

[13] Section 536 (2) prescribes that insured event means, among others:
a) an event of loss specified in the contract;

However, it is quite clear in insurance practice that there are cases when the occurrence of the insured event is not totally independent of the policyholder or the insured person. For example, marriage assurance is a legally accepted form of insurance:[14] it is obvious that the marriage of the insured person is not an event independent of the insured person. However, it does not only depend on the insured person: marriage is a decision by two people.

The NHCC demonstrates more clearly that the insured event does not need to be totally independent of the conduct of the policyholder or the insured person. On one hand, it does not contain the illustrative list of possible insured events; on the other hand Section 6:440 on insurable interest mentions birth and marriage insurance as accepted forms of insurance.

According to some Hungarian insurance policies, the insured event can be one where its occurrence mainly depends on the insured person, e.g. in the case of health insurance, where the insured event can be a medical check-up for the early diagnosis of diseases that is paid by the insurer. The rules of the NHCC do not answer clearly this question but in our opinion these events could not be regarded as insured events because the independent nature is totally missing.

2 Premium

Regarding insurance premium as a characteristic of insurance contracts, the most relevant question is whether insurance contracts can have a gratuitous form or not. The NHCC answers it unambiguously: the definition of an insurance contract [Section 6:439 (1)] prescribes that the policyholder shall pay insurance premiums. The NHCC contains special norms on the gratuitous contract form of several other types of contract (e.g. service provision agreement, lease agreement etc.). However, the NHCC does not regulate the gratuitous form of insurance contract. It means that, according to the NHCC we cannot speak about an insurance contract without premium because the definition of insurance contract prescribes the obligation of paying a premium, which is a mandatory rule as with all definitions in the NHCC and there is not any exception which could overwrite this mandatory rule.

Of course, it is possible to provide risk coverage in a gratuitous form in Hungary: an insurance company has offered free health insurance with very limited services for one year as a promotion. According to the NHCC it is a valid contract, but the rules of insurance contract cannot be applied to this contract because of the lack of premium.

b) death or attainment of a certain age;

c) an accident causing injury, disability, health impairment, or death.

[14] The European Parliament and Council Directive 2002/83/EC concerning life assurance [2002] OJ L345/1. (Life Assurance Directive) also mentions the marriage assurance.

3 Insurance Benefit

There are two interesting questions about insurance benefits. The first one is whether the insurer's service needs to be a payment or if it can be something else. The other is whether the insurer can choose another form of risk coverage than paying some level of reimbursement if the insured event occurs, i.e. if the insurer can offer services which are independent of the occurrence of an insured event.

It is not a question in insurance practice that the insured person can receive the insurer's service not just as a payment but in other forms, too. For instance, Article 1 of Council Directive 84/641/EEC of 10 December 1984 amending, particularly as regards tourist assistance, the First Directive (73/239/EEC) 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 [1984] OJ L339/21. prescribes the assistance insurance that the aid (the insurer's service) may consist of in the provision of benefits in cash or in kind. However, it is still not clear that, if the insured person receives an in kind service, it shall also be seen as an in kind service performed by the insurer (first standpoint) or it shall be seen as an in kind service performed by a third party which is paid by the insurer (second standpoint). It is not just a theoretical question because it can have important practical consequences, e.g. in the case of health insurance belonging to the in kind model,[15] the insurer is liable for any medical malpractice if we agree on the first standpoint, but it is not liable if we agree on the second. There is a debate in Spain, where insurers typically offer benefits in kind, on this question. According to the practice of the Spanish Supreme Court, the insurer is also liable for medical malpractice if the health care provider is not owned by the insurer but was chosen by the insured person from a list of health care providers made by the insurer. This practice is widely criticized by Spanish jurists because they think that an insurer cannot offer medical services: it can just bear the costs of medical services.[16] We agree with the first standpoint: of course an insurer cannot directly perform a medical service. However, if the insurer offers direct access to health services its service is more than paying the medical costs, in the context of another contract concluded with the health care provider. The insurer frequently chooses or helps to choose the health care provider and organizes the procession of health services and so its service is more than an indirect payment. In our opinion, the NHCC is closer to this standpoint: Section 6:439 (2) prescribes that the insurer's service covers the payment for the insured person's loss in the amount and in the manner defined in the contract and other policy benefits with regard to indemnity insurance. It clearly means that those services which are not directly performed by the insurer shall also be seen as the services of the insurer and it shall be liable for their failures.

We think that the second question is answered by the NHCC, too. Its Section 6:439 (1) prescribes that, under an insurance contract, the insurer undertakes to provide coverage for the

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[15] The in kind model means that the insurer does not offer the reimbursement of health costs but it offers direct access to health services.

[16] Fernando Carbajo Cascón, *La Responsabilidad civil del asegurador de asistencia sanitaria* (Fundación Mapfre 2012, Madrid) 162.

risk specified in the contract, and to provide settlement or benefits for loss arising upon the occurrence of a specific event after the starting date of risk coverage. According to the text, there are two form of the insurer's service: the first one is providing coverage for a risk and the second one is providing benefits in case of the occurrence of the insured event. It is clear that there is a conjunctive connection between the two forms of service because the NHCC uses the word 'and'. It means there is no insurance without services connected with the occurrence of the insured event. However, the insurer can offer other services within the framework of an insurance contract if these services also provide coverage for the insured risk. We can give some examples for these services, such as consultancy about prevention or medical check-ups for the early diagnosis of diseases.

It is an important legislative change because the FHCC prescribed that the service of insurer should be the payment of a certain amount of money or performance of another service upon the occurrence of the insured event. According to this amendment by the NHCC it is now clear that these services, which are independent of the occurrence of the insured event, can also be offered by the insurer in the framework of a 'pure' insurance contract and we shall not see these agreements as unclassified contracts.[17]

4 Insurable Interest

The FHCC regulated the insurable interest among the rules of property insurance. Its Section 548 prescribed that only persons who were interested in protecting a property or those who concluded contracts on behalf of an interested person should be entitled to conclude property insurance contracts. However, Section 545 – which was among the common provisions and so it had to be applied to personal risk insurance as well – prescribed that the insurance contract should terminate in the event of termination of the insurable interest. It means that, according to the FHCC, the insurable interest also was one of the characteristics of all insurance but the FHCC defined insurable interest only as it related to property insurance.

The NHCC terminates this contradiction. Section 6:440 – among the general provisions, just after the definition of an insurance contract – defines insurable interest. It prescribes that an insurance contract may be concluded by any person who has a vested interest in avoiding the occurrence of an insured event under some form of property or personal relationship, or who has a vested interest in the occurrence of an insured event in respect of life insurance policies, which comprises assurance on survival to a stipulated age only, birth assurance or marriage assurance, or those who conclude the contract on behalf of an interested person. Any indemnity insurance and group fixed-sum policy concluded in contradiction to this provision shall be null and void.

[17] This amendment has another consequence: it makes clear that the insurer also fulfils its obligations if no insured event occurs before the termination of the insurance contract. See Zavodnyik József, 'A biztosítási szerződések' in Osztovits András (ed), *A Polgári Törvénykönyvről szóló 2013. évi V. törvény és a kapcsolódó jogszabályok nagykommentárja III. kötet* (Opten 2014, Budapest) 1112.

The NHCC – as well the FHCC – distinguishes two types of insurable interest. On the one hand, it is generally those persons who have a vested interest in avoiding the realisation of a risk who will conclude an insurance contract. We can call this type direct insurable interest. On the other hand, there are those persons who conclude the contract on behalf of an interested person. We can call this type indirect insurable interest. The NHCC does not say anything about the relationship between the policyholder and the insured person with regard to indirect insurable interest. However, in our opinion, the practice of the FHCC should be followed in this question. It means that a special relationship between the policyholder and the insured person shall justify the insurable interest of the policyholder as well, e.g. that the policyholder shall be the employer or a relative of the insured person.

According to the NHCC there are exceptional cases when the insurable interest may be a positive one: the insured person may be interested in the occurrence of an insured event. This positive event may be the attainment of a certain age, birth or marriage according to Section 6:440. However, it does not mean that it is not possible to conclude an insurance contract which contains another positive event as insured event. The definition of life insurance (Section 6:477) prescribes that the insured event of a life insurance policy may be the insured natural person's death or attainment of a certain age, or at another predetermined time or occurrence of a specific event. It means that the insured event may also be, for example, the graduation of the insured person or other positive events as well.

It is a bit strange how the NHCC handles the lack of insurable interest because only indemnity insurance and group fixed-sum insurance are null and void but individual fixed-sum insurance is not if the insurable interest is missing. The reason for this distinction should be that in the case of individual fixed-sum insurance it is more difficult to examine the insurable interest. Section 6:475 of the NHCC therefore prescribes that, in connection with fixed-sum policies, the written consent of the insured person shall be required for concluding or amending the contract if they do not personally conclude it. It means that the insured person may decide on the existence of insurable interest; their written consent substitutes for the examination of insurable interest.[18]

5 Risk Calculation Based on Actuarial Methods

It is quite clear that risk calculation based on actuarial methods is an important characteristic of insurance business or activity. However, it is still questionable whether it also is one of the characteristics of an insurance contract. The definition in NHCC of an insurance contract (Section 6:439) only prescribes that the insurer shall provide coverage for the risk specified in the contract, but does not say anything about the calculation of this risk. Only the definition of insurance business or activity (Section 4 of Act LX of 2003 on Insurance Institutions and the Insurance Business) prescribes that the insurer shall apply risk calculations based on actuarial

[18] Takáts Péter, 'A biztosítási szerződések' in Wellmann György (ed), *Az új Ptk. magyarázata V/VI.* (HVG-ORAC 2013, Budapest) 338.

methods and insurance business or activity may be performed only when in possession of the authorization of the supervisory authority.[19]

In our opinion regarding these two definitions, this fifth element is not a mandatory element of an insurance contract according to the Hungarian law. If a bicycle shop offers a service that it repairs all defects to the client's bicycle in a determined period of time for a specific sum of money fixed in the agreement, this contract shall be considered as an insurance contract, despite the lack of risk calculation based on actuarial methods. Of course this activity by the bicycle shop shall not be considered as an insurance business because of the lack of risk calculation based on actuarial methods. It means that this very simple insurance service can be offered in the framework of an insurance contract but the service provider does not need the authorization of the supervisory authority.

III The Structure of Regulation of Insurance Contracts in the NHCC

The FHCC divided the insurance into three groups: property insurance, life insurance and accident insurance. The NHCC does not follow the FHCC, but Section 6:439 (2) distinguishes between indemnity insurance[20] and insurance of fixed sums.[21] This classification is based on PEICL. According to this, the regulation of insurance contracts in the NHCC is structured as follows:

- General Provisions on Insurance Contracts
- Indemnity Insurance Contracts
  - *a)* General Provisions on Indemnity Insurance Contracts
  - *b)* Liability Insurance Policies
- Fixed-sum Policies
  - *a)* General Provisions on Fixed-sum Policies
  - *b)* Life Assurance Policies
  - *c)* Accident Insurance Policies
- Health Insurance Contracts

This structure is not typical of insurance codes. The most common one is a first part covering general provisions; the second part is on indemnity insurance and the third one on human risk insurance.[22] However, the NHCC is not the only code which applies the category of fixed-sum insurances, e.g. the Chapter on Insurance in the Dutch Civil Code contains the following sections: General Provisions, Indemnity Insurance and Sums Insurance or Non-

[19] The supervisory authority is the Hungarian National Bank.

[20] 'Indemnity insurance' means insurance under which the insurer is obliged to indemnify against loss suffered on the occurrence of an insured event.

[21] 'Insurance of fixed sums' means insurance under which the insurer is bound to pay a fixed sum of money on the occurrence of an insured event.

[22] See e.g. the *Code des assurance* (the French Insurance Code), the *Ley de Contrato de Seguro* (the Spanish Act on Insurance Contracts) or the *Versicherungsvertragsgesetz* (the Austrian Act on Insurance Contract Law).

indemnity Insurance. However, the Dutch Civil Code does not contain special provisions on accident insurance and health insurance because the Section on Sums Insurance is separated into subsections, General Provisions of Sums Insurance and Life Insurance.

In our opinion it is not a good solution which was chosen for the NHCC applying side by side the category of fixed-sum insurance and the classical categories of human risk insurance (life, accident and health insurance). Our first problem is that the NHCC does not have an organic structure. Health insurance cannot be classified in the distinction between indemnity insurance and fixed-sum insurance because it can be both. As such, health insurance is placed in a separate chapter after indemnity insurance and fixed-sum insurance as an outsider, which is not an elegant solution. Our second problem is that the separation between indemnity insurance and fixed-sum insurance is not sharp enough in the NHCC. As well as the fact that health insurance cannot be classified, Section 6:486 (3) prescribes that the provisions on indemnity insurance shall apply to accident insurance with some exceptions. It means that the NHCC regulates only one fixed-sum type of insurance (life insurance). This is not simply a theoretical problem, because the provisions of the NHCC do not prescribe clearly which rules of indemnity insurance shall apply to accident insurance, to those types of health insurance which are indemnity insurance and to health insurances that is fixed-sum insurance.

IV The Technical Form of Regulation of Insurance Contracts in the NHCC

The majority of insurance codes normally apply more mandatory rules than for the regulation of other particular contracts, in order to protect the interests of the policyholders, the insured persons and the beneficiaries, who are typically consumers. It is a quite common solution that an insurance code prescribes that the contract between the parties shall not deviate from the provisions of the code to the disadvantage of the policyholder, the insured person or the beneficiary unless expressly permitted by the code. The Ley de Contrato de Seguro (the Spanish Act on Insurance Contracts) and the FHCC contain a similar prescription. The other typical method is that the code expressly enumerates those sections which are mandatory rules. This solution is chosen e.g. by the German and Austrian Versicherungsvertragsgesetz (the German and the Austrian Act on Insurance Contract Law).

The legislator of the NHCC chose another way. The mandatory rules (e.g. the waiting period shall not be longer than 6 months) are exceptional among insurance rules. However, it does not mean that the other sections regulating the insurance contract would be clearly default rules. Section 6:455 prescribes the following: if the policyholder is a consumer, the contract shall be allowed to derogate from the provisions of the insurance contract only to the benefit of the policyholder, the insured person and the beneficiary, where that provision pertains:

a) to the insurance company's implicit conduct in a consumer contract;
b) to any considerable increase in insurance risk;
c) to the consequences of non-payment of premiums;
d) to maintaining the amount of insurance cover;

e) to the obligation to prevent and mitigate damages;

f) to the obligation of disclosure and notification of changes and the obligation of reporting the occurrence of an insured event;

g) to any composition between the insured person and the injured party;

h) to premium payment obligations when the contract is terminated;

i) to the insurance company's exemption from settlement obligations;

j) to claims for compensation.

Furthermore, Section 6:456 prescribes that if the policyholder is a consumer, the contract shall be allowed to derogate from the exclusion of derogation only to the benefit of the policyholder, the insured person and the beneficiary with respect to fixed-sum and health insurance policies.

The key point of these regulations is the fact of whether the policyholder is a consumer or not. If the policyholder is not a consumer then most insurance norms of the NHCC are default rules. If the policyholder is a consumer, those norms are mandatory rules which are listed in Section 6:455 and Section 6:456. Those norms which are not listed in these Sections are mostly also default rules in those contracts which are concluded by a consumer as policyholder. According to Section 8:1 (1) point 3, 'consumer' shall mean any natural person acting for purposes which are outside his trade, business or profession. It has no significance whether the insured person or the beneficiary is a consumer or not.

The NHCC thus uses quite a rare regulatory method. However, other codes also apply this approach, e.g. the Dutch Civil Code contains several levels of mandatory rules. There are some articles from which the parties may not derogate. In other cases, the Dutch Civil Code prescribes that it is not possible to derogate from the specified articles to the disadvantage of the policyholder, beneficiary or other persons (e.g. insured person, injured person, pledgee or other third party). Finally there are such articles where it is not possible to derogate from the named articles to the disadvantage of the policyholder or beneficiary when the policyholder is a natural person who, when they entered into the insurance agreement, was not acting in the course of his professional practice or business.[23]

As we mentioned before, the FHCC did not allow derogation to the disadvantage of the policyholder, the insured person or the beneficiary from all articles regulating insurance contracts. The NHCC thus offers insurers a new opportunity to deviate from the provisions of the insurance contract in the cases mentioned above. However, the insurers will face at least two problems because of the regulations in the NHCC. First, they have to find the correct way of applying contract terms which derogate from the insurance contract rules of the NHCC to the disadvantage of the policyholder, the insured person or the beneficiary. It is well known that normally the entire content of insurance contracts shall be considered as general contract terms and conditions. According to Section 6:78, those general contract terms and conditions that differ substantially from the relevant legislation shall form part of the contract only if the other party has expressly accepted them after being explicitly informed about them. It means that the insurers (if they intend to derogate from any insurance contract rule in the NHCC) must

[23] See the Article 7:943, 7:963, 7:974 and 7:986 of the Dutch Civil Code.

find out which differences are substantial and which not and, in the case of substantial differences, how the policyholder must be informed and how the policyholder shall conclude the contract in order to fulfil the criterion of being explicitly informed about the differences, which must also be expressly accepted by the policyholder. These are very important questions because, if the insurer does not fulfil these criteria by the conclusion of the insurance contract, those terms differing from the rules of the NHCC will not form part of the contract and the rules of the NHCC shall be applied instead of them. As such, we can give the following advice to insurers: they should prepare a separate document which lists all the parts of the terms that differ from the rules of the NHCC and the policyholder shall also sign this document to declare that he expressly accepts those terms after being explicitly informed about them. In our opinion, this is the best way of concluding the contract that guarantees that all the differing terms will form part of the signed contract.

The second problem which insurers may face is the consequences of such a contract being entered by a consumer as an insured person, but which was originally concluded by a person who cannot be considered as a consumer. In this case the policyholder becomes a consumer after the insured person has entered the contract. It is unclear what happens to those contract terms which derogate from the rules of the NHCC to the disadvantage of the policyholder, the insured person or the beneficiary but these derogations are prohibited by Section 6:455 or Section 6:456 if the policyholder is a consumer. In our opinion, these terms must be amended automatically by the rules of the NHCC because Section 6:455 and Section 6:456 do not contain such restrictions that they shall be applied just in those cases where the policyholder is a consumer at the time of conclusion of the contract. It means that these provisions shall also be applied if the policyholder later becomes a consumer (i.e. if the insured person who is a consumer enters the contract concluded by a policyholder who is not a consumer).