

# INSURANCE OF ASSETS REGULATED BY SPECIAL LAWS

Matei DĂNILĂ\*

## Abstract

*Within the introduction the paper analyzes the main legal hypotheses which may bring into question the binding nature of the insurance.*

*The provisions of the Law no. 136/1995 (Art. 3) provide that, the legislator understands that, it is of binding nature the insurance that materializes through an agreement in which the rights and obligations of the parties shall be established by law.*

*Since the parties are “forced” by the law to conclude the respective agreement, the law also establishing the content of the legal relationship of obligations as well as the sanction for the non-conclusion of the agreement by the potential insured and by the insurer, the agreement is classified as a forced agreement.*

*In the legal field regarding assets insurance such an example is the mandatory home insurance against earthquakes, landslides and floods.*

*However, the legislation also comprises provisions that lead to the mandatory conclusion of an insurance agreement without establishing, by the law, the rights and obligations of the parties.*

*In such cases, the relationships between the parties are going to be established when the agreement is concluded, according to each insurer, based on certain (adhesion) agreements. For the insurer these insurances are always optional, without sanctioning the refusal of the conclusion. The mandatory conclusion relates only to the insured and exclusively regards the conclusion of the insurance agreement, which maintains the nature of the adhesion agreement and does not acquire the nature of a forced agreement.*

*The article analyzes the main special regulations regarding the mandatory insurances of assets, insisting on the mandatory home insurance against earthquakes, landslides and floods, the property insurance subject to mortgage loan agreements and the insurance of assets subject to leasing contracts.*

*The final part of each section presents the conclusions regarding the type of insurance analyzed.*

**Keywords:** *mandatory insurance, home, leasing, mortgage loan.*

## I. Introduction

The main normative acts governing the insurance field are Law no. 136/1995 on insurance and reinsurance in Romania, as subsequently supplemented and amended, Law no. 32/2000 on insurance companies and insurance supervision and the new Civil Code (Law no. 287/2009 on the Civil Code).

The insurance activity is also regulated by secondary legislation. We take into consideration the norms issued by the Insurance Supervisory Commission of Romania (“I.S.C.”) before its duties were taken over by the Financial Supervisory Authority (“F.S.A.”) and the norms subsequently issued by the new supervisory and control authority<sup>1</sup>.

Pursuant to art. 192 of Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code, art. 9-47 of Law no. 136/1995 were abolished,

and, thus, the main rules regarding the insurance contract and various forms of insurance are presented in the new Civil Code.

As a result of the changes caused by the entry into force of the new Civil Code, the application of the Law no. 136/1995 was substantially reduced, the normative act evoked currently regulates the compulsory motor third party liability insurance for damages resulting from road accidents.

The assets insurance contract is regulated by the Civil Code, in Section II of the insurance contract, entitled “assets insurance” (art. 2214-2220).

Referring to the categories of assets that may be subject to an insurance contract, according to an opinion<sup>2</sup>, only the traded goods can be insured, although, in certain cases, there is also accepted the insurance of assets that are temporary unassignable.

Furthermore, there are insurable the assets that are movable by their nature, the movables by anticipation, the assets that are immovable by their nature as well as the immovables by destination. It is

\* PhD Candidate, Faculty of Law, “Nicolae Titulescu” University of Bucharest ([mstdanila@gmail.com](mailto:mstdanila@gmail.com)).

<sup>1</sup> The Financial Supervisory Authority (F.S.A.) was established by G.E.O. no. 93/2012 on the establishment, organization and functioning of the Financial Supervisory Authority published in the Official Gazette, Part 1, no. 874 of 21<sup>st</sup> of December 2012 as a self-financed, independent, autonomous, specialized, administrative authority, with legal personality, that performs its duties by taking over and reorganizing all duties and prerogatives of the National Securities Commission (N.S.C.), the Insurance Supervisory Commission (I.S.C.) and the Private Pension System Supervisory Commission (P.P.S.S.C.);

<sup>2</sup> Irina Sferdian, „Asigurări. Privire specială asupra contractului de asigurare din perspectiva Codului Civil”, Editura C.H.Beck, București, 2013, page 166

possible to insure both specific assets, individually determined, and also generic assets, even the ones not individualized (e.g. the goods from a warehouse, unspecified, within the limits of an insured amount), provided that the individualization is possible when the insured risk occurs.

The consumable goods and the durable goods can be equally insured, specifying that, often, in the insurance contract, in case of some of the consumable goods, exclusions from payment of the compensation are found. (e.g. fuel from the tank).

Although productive goods can be insured, the insurance of fruits requires, in most cases, a special clause and a supplement of the insurance premium. The same situation may occur in case of the insurance of incidental goods. Thus, also basically the insurance of the main goods extends to incidental goods, in order to ensure the latter, one may claim to supplement the insurance premium that is owed.

The doctrine has also shown that certain assets and social values can not be subject to insurance, in this regard there are listed the assets resulted from committing a crime, fines of any kind, illegal activities.<sup>3</sup>

There are also excluded from insurance (i) the assets that are no longer of economical importance or the ones that can no longer be used as intended or due to the degradation, (ii), the assets that no longer meet certain requirements provided by the normative acts and (iii) the assets that, by their own characteristics or because of the place where they are located are not at risk or, on the contrary, are subject to an excessive risk.<sup>4</sup>

In this context, of the presentation of the categories of insurable assets, we specify that there are assets for which it is mandatory to conclude the insurance. Thus, we identified, in the specific legislation of certain activity fields, provisions that refer to the insurance of assets and that establish the obligation to conclude an insurance.

From the normative provisions analyzed one can draw the conclusion that, in certain cases, the insurance of assets is mandatory. Before proceeding to the presentation of the main aspects of interest regarding the insurance of assets regulated by special laws, we consider that it requires some comments and distinctions regarding the mandatory nature of certain insurances of assets, as they are regulated in the analyzed normative acts.

In terms of insurance classification, it shows great interest the classification of art. 1 of Law no.

136/1995, as subsequently supplemented and amended, that "in Romania, the insurance activity is carried out as life insurance and general insurance, mandatory or optional, under the law." Therefore, according to legal provision quoted, the insurances can be mandatory or optional.

In accordance with the provisions of the Law no. 136/1995, for the optional insurance, the relations between the insured and the insurer, as well as the rights and obligations of each party shall be established by the insurance contract, (art. 2) while, for the mandatory insurance, the relations between the insurer and the insured, the rights and obligations of each party are established by the law.

The determining criteria for the assessment of the mandatory nature of an insurance are, on the one hand, the source of the obligation to conclude the insurance, which is broadly represented by the law, and, on the other hand, the legal relationship that arises between the insured and the insurer by the contract concluded. The first criterion distinguishes the optional from the mandatory insurance, and the second criterion, distinguishes between the types of mandatory insurance<sup>5</sup>.

As an example, the Law no. 136/1995 on insurance and reinsurance in Romania regulates as mandatory insurance, the civil liability insurance for vehicles owners, the mandatory nature of the insurance arising from the law. For the application of the Law no. 136/1995, periodically, there are issued norms that regulate the content of the mandatory civil liability insurance contract, the latest normative act issued in this respect was the Financial Supervisory Authority Norm no. 23/2014 on compulsory motor third party liability insurance for damages resulting from road accidents<sup>6</sup> (MTPL).

Also, the Law no. 260/2008 on the mandatory home insurance against earthquakes, landslides and floods<sup>7</sup>, provides, even from the title, the mandatory nature of the insurance. Also, norms are issued for the application of this law. We refer to F.S.A. Norm no. 7/2013 on the form and clauses of the mandatory home insurance contract<sup>8</sup>.

From the provisions of art. 3 of Law no. 136/1995 it comes out that, in the legislator's sense, the insurance of a mandatory nature, is the one that takes shape of a contract where the rights and obligations of the parties are provided by the law. Because the parties are "forced" by law to conclude the respective contract, the law also establishing the binding legal relationship as well as the sanction of

<sup>3</sup> Liviu Stănculescu, Vasile Nemeș, "Dreptul contractelor civile și comerciale în reglementarea noului Cod civil", Editura Hamangiu, 2013, page 472;

<sup>4</sup> Irina Sferdian, op. cit., page 167;

<sup>5</sup> Irina Sferdian, „Contractul de asigurare de bunuri”, Editura Lumina Lex, București, 2004, page 23;

<sup>6</sup> The Financial Supervisory Authority Norm no. 23/2014 on compulsory motor third party liability insurance for damages resulting from road accidents published in the Official Gazette, Part I, no. 826 of 12<sup>th</sup> of November 2014;

<sup>7</sup> Law no. 260/2008 on the mandatory home insurance against earthquakes, landslides and floods<sup>7</sup>, republished in 2013 was republished in the Official Gazette no. 635 of 15<sup>th</sup> of October 2013, Part I;

<sup>8</sup> The Financial Supervisory Authority Norm no. 7/2013 on the form and the clauses within the mandatory home insurance contract was published on O.G. no. 521 of 20.03.2013, Part I.;

non-conclusion of the contract by the possible insured and by the insurer, the contract being classified as a forced contract.

There are legislative provisions that lead to the obligation to conclude an insurance contract but, however, without establishing, by law, the rights and obligations of the parties. In these cases, the relationships between the parties shall be established in the contract, depending on each insurer, based on certain contracts (adhesion contracts).

In this regard we mention the professional liability insurances (lawyer, notary, doctor, accountant, etc.), the conclusion of which is mandatory, being required by the normative act that regulates each of those professions separately.

Also, regarding the insurance of assets the legal framework that establishes the binding nature of insurance is met, exclusive obligation of the insured.

Taking into consideration the obligation stated by the provisions of art. 2060 paragraph 2 of the Civil Code binding the consignee to conclude an insurance contract for the assets received as consignment<sup>9</sup>, the obligation to ensure the cultural movable assets temporary exported provided by the provisions of art.3 of G.O. no. 44/2000<sup>10</sup>, regarding certain measures on the temporary exported cultural movable assets<sup>11</sup>, the obligation provided by G.O. no. 51/1997 binding the financier or the lessor in a leasing contract, to conclude an insurance for the leased assets or the obligation to ensure the assets acquired by mortgage loans, during the contracts, the obligation provided by art. 16 of Law no. 190/1999 on the mortgage loan for real estate investments.

Also, by Law no. 15/1998 on optional insurances of assets, people and civil liability within the Ministry of National Defence, Ministry of Interior, Romanian Intelligence Service, Foreign Intelligence Service, Protection and Guard Service, Special Telecommunications Service and Ministry of Justice – General Directorate of Penitentiaries, republished<sup>12</sup>, there has been provided that these institutions conclude optional insurance contracts for the provided assets, in case of damage, destruction or other events.

These insurances can not be considered mandatory under the Law no. 136/1995 because the rights and obligations of each party are not established by law, not being forced insurance contracts, but they may be considered mandatory regarding the insured,

respectively the person that has the obligation to conclude the insurance, the obligation established by a normative act set forth for the regulation of the profession (notary, lawyer, doctor, etc.) or an activity (leasing, bank lending activity, etc.).

In the case of the latter, the insured has the obligation to conclude the insurance, as mentioned above, and as comes out from the law. Failure to comply with this obligation is sanctioned, for example, with the suspension of the professional activity that the person carries out, with the impossibility to conclude service contracts, or with the termination of the concluded contracts for non-execution of the contractual obligations, among which the conclusion of the insurance. As shown in the doctrine<sup>13</sup>, these insurances are always optional for the insurer, the refusal to conclude these insurances is not being sanctioned. This type of insurances is called “pseudo mandatory insurance”<sup>14</sup>.

In conclusion, if in case of mandatory insurances as the compulsory motor third party liability insurance for damages resulting from road accidents (MTPL) or the mandatory home insurance against earthquakes, landslides and floods, both the conclusion and the form, respectively the content of the insurance contract are enforced by the law, in case of “pseudo mandatory insurance”, the obligation lies only for the insured and regards exclusively the conclusion of the insurance contract, that keeps the adhesion contract nature and does not acquire the forced contract nature.

We, hereinafter, present the insurances of assets regulated by special laws, trying to approach the main aspects of interest with regard to (I) the mandatory home insurance against earthquakes, landslides and flood, (II) the property insurance subject to mortgage loan agreements and (III) the insurance of assets subject to leasing contracts.

## II. Mandatory home insurance

### 1. Legislative framework

Home insurance against hazards became mandatory with the coming into force of Law 260/2008 on the obligation to take out insurance for residential buildings against risk of earthquakes, landslides and floods, published in the National Gazette of Romania (NGR), No. 757 of November 11,

<sup>9</sup> In accordance with the provisions of art. 2060 paragraph 2 Civil Code “the consignee shall ensure the assets to the value established by the consignment contract or, in its absence, to the price estimate on the consignment date. He will be held liable to the consignor for the damage or loss of the assets for reasons of force majeure or due to a third party, if they were not ensured on the consignment date or if the insurance expired and was not renewed or if the insurance company was not agreed by the consignor. The consignee is required to pay regularly the insurance premiums.”;

<sup>10</sup> According to art. 3 paragraph 2 of G.O. no. 44/2000, “the temporary export may be approved only in special cases and only for movable assets classified as Thesaurus, National Commission for Museums and Collections without conditioning it by the existence of an insurance contract for the asset in question, as provided in paragraph (2)”;

<sup>11</sup> G.O. no. 44/30.01.2000 was published in the Official Gazette no. 788 of 12.12.2001, was approved and amended by Law no. 143/2001 and republished under art. II of the Law no. 143/2001, published in Official Gazette of Romania no. 171 of 4<sup>th</sup> April 2001, Part I.

<sup>12</sup> Official Gazette no. 200 of 30<sup>th</sup> of April 2001;

<sup>13</sup> Irina Sferdian, *Contractul de asigurare de bunuri*, Editura Lumina Lex, București, 2004, page 25;

<sup>14</sup> Irina Sferdian, op cit, page 25, also see Cosmin Iliescu, “Contractul de asigurare de bunuri în România”, Ed All Beck, București, 1999, pages 106-108;

2008, subsequently amended and completed both by Law no. 243/2013, published in the NGR, Part 1, No. 456/24.07.2013.

We specify that at the time this document was drawn up, the Chamber of Deputies of the Romanian Parliament, as decisional Chamber, approved a draft of a law regarding the amendment and the supplementation of the Law no. 260/2008<sup>15</sup>, the normative act being forwarded for promulgation to the President of Romania, so that, to be subsequently published in the Official Gazette of Romania. On 23 of april 2015 the law was rejected for promulgation by the President of Romania, who mentioned, in the reexamination request which was sended to the Parliament, the fact that the law has to be improved in certain aspects.

In order to turn mandatory home insurance into a practical instrument, the legislator has enacted a set of norms, initially designed by the Romanian Insurance Supervisory Commission ("I.S.C."), and subsequently by the Financial Supervisory Authority ("F.S.A."). These technical norms refer to issues such as authorization of insurance companies to offer mandatory home insurance policies in case of earthquakes, landslides or floods<sup>16</sup>, to the form of and clauses in the mandatory home insurance contract<sup>17</sup>, to the ways and methods to ascertain, valuate and compensate the damage incurred<sup>18</sup>.

In addition to this, the Pool for Insurance against Natural Disasters ("P.I.A.N.D.") was set up in September 2009, when the Certificate of Incorporation was signed. Its activity is regulated by P.I.A.N.D.<sup>19</sup> norms drawn up successively by I.S.C. and F.S.A.

Under Law no. 260/2008, P.I.A.N.D. is the only company authorized to issue mandatory home insurance policies against natural hazards, which was set up through the association of companies authorized to issue such policies.

The organization and operation of P.I.A.N.D, the conditions and documents required by F.S.A. to authorize P.I.A.N.D. to offer home insurance coverage, as well as the conditions to be met by shareholders and by officials in P.I.A.N.D are regulated at present by the F.S.A. Norm no.6/2013,

published in the National Gazette of Romania no. 521/20.08.2013.

The matter of mandatory home insurance coverage against hazards caused by natural phenomena is not dealt with in EU legislation, but this protection mechanism exists in seven European states, which apply to mandatory home insurance, namely, Denmark, Holland, France, Belgium, Switzerland, Norway and Spain.

## 2. The scope of the insurance

In keeping with Law no. 260/2008 any residential building can be covered by insurance.

Natural persons or legal entities have the obligation to take out insurance coverage if they own various types of property (dwellings). The law mentions private houses, state owned flats, official temporary housing, etc.

As far as the term "residence" is concerned, the legislator refers to the provisions of Art.2 of Law no. 144/1996, taken in conjunction with the provisions in Art. 3, paragraph 1 of F.S.A. Norm no.7/2013<sup>20</sup>.

In the case of condominiums, the term "dwelling" refers both to spaces which are exclusive property as well as to the appurtenant quota of the joint ownership over the commonly used spaces and construction elements. (art 1 of Law no. 260/2008).

In the case of condominiums, a separate insurance policy must be taken out for each dwelling.

The insurance policy does not cover outbuildings, extensions, utilities, which are not structurally connected to the building insured, as well as the possessions therein (art.3, paragraph 7 of the law amending Law no. 260/2008)

The law distinguishes between type A and type B constructions. Type A buildings have the structural strength made of reinforced concrete, metal or wood, or outer walls made of stone, burnt bricks and/or any other materials having undergone chemical and/or thermal treatment. Type B buildings have their outer walls made of loam brick or any other materials which have not been subjected to any chemical and/or thermal treatment.

<sup>15</sup> The Chamber of Deputies passed by final vote on 25<sup>th</sup> of March 2015, "The draft of the Law regarding the amendment and supplementation of the Law no. 260/2008 on the mandatory home insurance against earthquakes, landslides and floods (PL-x411/2012) - ordinary law (291 votes for, 3 abstentions);

<sup>16</sup> Norms regarding the authorization of insurers to issue mandatory home insurance policies for earthquakes, landslides or, floods, enforced through FSA Order no.23/2008, published in the National Gazette of Romania (NGR) part 1 , no. 3 of 05.01.2009, with amendments brought by FSA Order no.19/2009, published in NGR a no.621/16.09.2009;

<sup>17</sup> The norms and clauses of the mandatory home insurance contract, enforced by F.S.A. Order no. 5/2009, published in NGR no.320/14.05.2009, amended by F.S.A. Order no.10/2010, NGR , part 1.no.538/02.08.2010 which represented the initial legal regulations were quashed , by FSA Norm no.7/2013 concerning the form and clauses contained in the mandatory home insurance contract published in NGR, part 1 no. 521 of 29/08/2013;

<sup>18</sup> Norms regarding the examination, valuation and compensation for damages for mandatory home insurance policies (MHIP) were enforced by F.S.A. Norm no. 7, published in NGR, no.369/02.06.2009.

<sup>19</sup> IPNH Norms, applied by F.S.A. Order no. 17/2009, published in NGR No.691/14.10.2009, amended by F.S.A. Order no 20.2009, published in NGR no. 691/14.10.2009 , which constituted the initial legal regulations were quashed by F.S.A. Norm no.6/2013- IPNH published in NGR, part 1, no.521/20.08.2013

<sup>20</sup> Art.3. Paragraph 1 of F.S.A. no.7/2013 states that "dwellings are considered to be those constructions destined for permanent or temporary living, which are made up of one or several rooms used for habitation, fittings an fixtures which are integral part of the construction used as dwelling, with the structural frame and walls presented in Law no. 260/2008, republished, city subsequent amendments and additions.

The law does not make either the features of the area the dwelling lies in or the state of the building, a prerequisite condition for taking out insurance coverage, as the law is primarily meant to provide social protection<sup>21</sup>. In the case of dwellings lying in areas with a high risk of natural hazards, or of buildings in an advanced state of disrepair, or raised disregarding legal regulations in force, the question arises whether in such cases the consequences of a natural disaster can be said to be "uncertain " and hence, if they can be subject to mandatory home insurance. One may wonder, with justification, if this is a matter of insurance or of social solidarity<sup>22</sup>.

The law does not provide for insurance coverage of property irrespective of its condition. The legislator expressly states that the unsatisfactory state of a building can cause the policy holder to forfeit his right to indemnification.

The following excluding alternatives have been taken into account: the collapse of the building is exclusively due to construction defects, even if related to one of the risks insured (art. 23 paragraph 2, point 2.3 of F.S.A. Norm no.17/2013); the damage was produced to a dwelling built in an unauthorized area (art 24, paragraph 1 of F.S.A. Norm no. 7/2013) or in case the insurance beneficiaries/ the insured have built, extended or modified a dwelling in the absence of a building permit, legally issued, or have not fully complied with its specifications, thus affecting its structural strength and consequently, enhancing the exposure to a risk legally covered by insurance. (Art.24, paragraph 2 of the F.S.A. Norm no. 7/2013).

The amendments brought to Law no. 20/2008(the respective bill has been approved by the Chamber of Deputies and is pending promulgation by the President of Romania) have established that dwellings which are part of buildings classified as presenting Class 1 seismic risk cannot be insured against hazards before they have been seismically refitted.

Insurance practice has been confronted with the question whether parish houses fall within the scope of Law no. 260/2008 or not.

The provisions of art. 170, paragraph 4 of Government Ordinance no. 53, referring to the Statute Governing the Romanian Orthodox Church (R.O.C.) places "parish houses" within the category of "Church Property", i.e. property used in the practice of the religious cult. According to a distinguished prelate of the Romanian Orthodox Church this destination does not allow "parish houses" to fall within the scope of Law no. 260/2008<sup>23</sup>.

One must also consider, for a correct classification, the provisions of the Statute Governing

the Romanian Orthodox Church recognized as such by Government Decision no. 53 of 16.01.2008, on the Statute for the organization and operation of the Romanian Orthodox Church, published in the Official Gazette of Romania, Part 1, no. 50/22.01.2008, according to which "general, mandatory norms regarding the insurance of church property belonging to the Romanian Patriarchate are subject to the approval of the Holy Synod". (art. 170 paragraph 8).

In our opinion, in keeping with the provisions of art.2, letter a) of Law 114/1996, taking out insurance coverage is mandatory if the parish house " meets the living conditions necessary for an individual or a family" (art. 2 , letter a) of Law 146/1996). We think that the possibility conferred by the legislator on the Romanian Orthodox Church to adopt general and mandatory norms regarding the mandatory insurance of its own property cannot lead to disregard for legal norms on mandatory insurance of dwellings passed by the Romanian State.

Finally, it is worth also pointing out that, the law amending Law no. 260/2008 does not allow insurance companies which are authorized to issue insurance policies for natural hazards to offer optional insurance policies to owners who have not first taken out the mandatory home insurance policy.

### 3. The parties of the insurance contract

**The Insurer.** In mandatory home insurance policies, the insurer is P.I.A.N.D., which is an insurance-reinsurance company, set up as a private legal entity, and not by the different insurance companies which through association go under the name P.I.A.N.D., the latter only acting as intermediaries in closing mandatory home insurance policies.

P.I.A.N.D. is the sole company authorized to issue mandatory home insurance policies.

In keeping with the provisions of art. 7, para. 1 of Law no. 260/200, the insurance contract is concluded in written form between P.I.A.N.D. and the homeowner, mediated by the insurance companies authorized to cover natural hazards risks, by derogation from the provisions of Law no.32/2000, subsequently amended and completed.

Therefore, the insurers do not incur the risk themselves, they only transfer it to P.I.A.N.D., in their capacity as intermediaries, in keeping with the provisions of art. 12 and 13 of F.S.A. Norm no.7/2013. The insured pays the premium to the insurer, who in his turn passes it on to P.I.A.N.D., as required by the provisions of art.7, paragraph 1 and 4 of Law no. 260/2008, as amended by Law no. 243/2013.

<sup>21</sup> Corneliu Bente, "Obligativitatea asigurării locuințelor", The Journal of the Faculty of Economics Science, Analele Universitatii din Oradea, Stiinte Economice, vol II, 2006, p.532, <http://steconomice.uoradea.ro/Analele/en.volum-2006-finance-accounting-and-banks.html>;

<sup>22</sup> "Asigurarea Locuințelor-o noua asigurare obligatorie.Intre experienta si experiment", author Mirela Carmen Dobrila in Analele Stiintifice ale Universitatii "Alexandru Ioan Cuza" Iasi, Tomul LVIV, Stiinte Juridice, 2010.

<sup>23</sup> Fr. Mihai Valica: „Asigurarea obligatorie a patrimoniului bisericesc și nu numai-un abuz o jignire”, article from 07.08.2011 published on the website „Apologeticum”; article that can be read on the website [www.apologeticum.ro](http://www.apologeticum.ro);

**The Insured.** Pursuant to F.S.A. Norm no. 7/2013, the insured can be any natural person or legal entity having an insurable interest in the dwelling which is the subject of the mandatory home insurance policy, that is, the owner, building caretaker, lessor or the legal representative of the former who upon closing a mandatory home insurance contract with P.I.A.N.D. commits to pay the obligatory premium to P.I.A.N.D.

The insurance policy can include a beneficiary of the insurance, designated by the owner to receive the indemnification for the damage incurred by the dwelling insured.

Under the law, house owners whose title to a property is recorded with the tax authorities (art. 3, paragraph 1 of law 260/2008) have the obligation to take out insurance for their property. Persons or authorities designated as caretakers of the respective property incur the same obligation (art.3, paragraph 2).

Regarding the insured, according to the doctrine, it is the financier-lessor<sup>24</sup> who is under the obligation to close an insurance contract in cases of financial or operational leasing.

As regards the property right dismemberment (usufruct, habitation and easement) it is the obligation of the bare owner or of the owner to take out insurance for the usufruct and the habitation rights, since he holds over the legal provision for the building, keeping the capacity of owner thereof. In case of the easement right, this obligation belongs to the holder of the superficies right in capacity of construction owner, in case of life annuity contracts this obligation belongs to the annuity debtor in capacity of home owner, and for the caretaking contract the obligation for the insurance's conclusion belongs to debtor of the caretaking obligation<sup>25</sup>.

In cases in which the owner of the property changes, the liability of P.I.A.N.D. continues until the expiry of the validity of the insurance policy covering the dwelling (art.17, paragraph 2 of F.S.A. and Norm no.7/2013). The former owner must hand over the insurance policy to the next owner, who has the obligation to notify the insurer that the title to the property is now held by a different person. In this way the validity of the insurance contract is maintained *ope legis*, with no need for a new clause.

#### 4. The form and content of the mandatory home insurance contract

There are express legal provisions with reference to the written form and the clauses of the mandatory home insurance contract.

Both art. 7 of the Law no. 260/2008<sup>26</sup>, republished, and the provisions of the F.S.A. Norm no. 7 /2013 (art. 9) govern aspects regarding the (written) form of the contract, the content of the insurance contract and of the mandatory home insurance policy, the conditions that the insurance must fulfill in order to ensure its validity.

Under the current law the mandatory home insurance policy is considered to be valid if the following conditions are met cumulatively: a) the insurance policy covers the building for residential use for the mandatory amount; b) the insurance policy covers for the risks stipulated in art.6; c) the insured has paid the mandatory premium (art. 8 of Law 260/2008, republished in 2013)

The written form of the contract is required *ad probationem*, not *ad validitatem* and it ensures compliance with regulations regarding the content of the insurance contract, as laid out in art.2201/civil code, which lists the elements the insurance policy<sup>27</sup> must mention.

By the recent amendments to the Law no. 260/2008 the proof of the mandatory home insurance contract is carried out only with the mandatory home insurance policy, eliminating the provision from the previous regulation according to which the proof was made both by mandatory home insurance policy and by insurance certificate.

**The insured value** is the maximum liability assumed by IPNH to underwrite the risks listed in art.2 letter b) of Law 260/2008, subsequently amended and completed, for each type of dwelling insured, joint or several, irrespective of the number of covered hazards produced during the validity of the insurance contract. (art. 25 paragraph 1 of the F.S.A. Norm no.7/2013).

In keeping with the provisions of art 26, paragraph 1 and 2 of F.S.A. Norm no. 7/2013, for type A dwellings the value insured is the equivalent in RON of 20,000 Euros, at the exchange rate set by the National Bank of Romania on the day the mandatory home insurance contract is concluded. For type B dwellings the value insured is the equivalent in RON of 10,000 Euros.

Each time property damage occurs, the insured value diminishes, in keeping with the amount paid as compensation. The policy holder can increase the

<sup>24</sup> Vasile Nemeș, „Asigurarea obligatorie a locuinței” in the review “Buletinul Național pentru pregătirea și perfecționarea avocaților” no. 1/2010, page 77 ;

<sup>25</sup> Vasile Nemeș, *op cit*, page 79 ;

<sup>26</sup> Art. 7(1) Mandatory home insurance contract is concluded in writing either directly between P.I.A.N.D. and the owner of the house, or by insurance companies authorized to practice disaster risk, as a derogation from the provisions of Law no. 32/2000, as amended and supplemented, and must meet at least the following conditions;

<sup>27</sup> For aspects regarding the insurance contract probation and form see V. Nemeș, *Dreptul Asigurărilor*, Ed a 4-a Editura Hamangiu 2012, page 188;

value insured to the initial amount by paying a higher premium.

If the amount of the indemnification received for one or several hazards covered reaches the compensation limit, the owner is obliged to close a new mandatory home insurance contract, after carrying out all the repair work necessary to make the dwelling habitable again.

### 5. Insured risks

The insured risk is a future contingency, possible but uncertain, provided for in the contract of insurance, the insurance agreement being concluded against harmful consequences that may occur as a result of the occurrence of such risks.

The risks that can be subscribed by concluding the mandatory home insurance are: earthquakes, landslides and flooding.

Therefore the insurance contract *does not cover all the risks* incurred by the property insured, that is the building, the dwelling, respectively.

In certain cases (for which no details or examples are given) the law amending Law no. 260/2008 (PL-x411/2012, at present pending promulgation by the President of Romania), provides that the Pool for Insurance against Natural Disasters ("P.I.A.N.D.") can condition the conclusion of **the insurance policy against natural disasters** (mandatory home insurance policy) on a **risk inspection**.

The risk inspection shall be carried out according to the norms of the Financial Supervisory Authority (F.S.A.), and its costs shall be borne by the insurance – reinsurance company P.I.A.N.D.

According to art.6 of Law no. 260/2008, risks for which it is mandatory to take out insurance against natural hazards in fact represent the damage caused to buildings for residential use as a direct or indirect effect produced by any form of manifestation of a hazard.

The deficiencies in the formulation of art. 6 of Law no. 26/2008 require clarification since legal doctrine correctly points out the confusion between insurable risks and damage<sup>28</sup>, due to the legislator's lack of complete clarity.

The provisions of art.2, paragraph 1, b) of Law no. 260/2008 limit natural hazards to earthquakes, landslides and flooding, while for other risks additional optional insurance is required.

Consequently, mandatory home insurance can be taken out alongside an optional insurance policy as they cover distinct risks and types of damage. It should be mentioned that in case of damage, compensation is paid primarily by virtue of the mandatory home insurance policy, while the remaining indemnification due is paid based on the optional policy<sup>29</sup>.

Through its effect, Law no. 260/2008 makes it possible for damage produced as an indirect consequence of insured hazards to be covered by insurance, as well.

Thus, art. 20 paragraph 2 of the Financial Supervisory Authority Norm ("F.S.A.") no. 7/2013 on the forms and clauses in the insurance contract also stipulates the coverage of direct damages incurred by the constructions destined as dwellings, *the indirect consequence* of the occurrence of the events mentioned in paragraph (1), such as fire, explosion as a result of an earthquake or landslides or other similar cases.

In the specialized literature on this subject it is pointed out that the risks mentioned are limited, with the exclusion of severe storms or fire from the list of insurable risks.

To support this critical opinion it is shown that Prudential Norms on covering risks posed by natural hazards applied under I.S.C. Order no.4/10.04.2002, published in the National Gazette no.359/20.05.2002, which set out the conditions to be met by authorized insurance companies to be allowed to underwrite hazard risks, include in the category of hazards all risks associated with a catastrophic event or a series of events, which can cause substantial damage in a short period of time. Natural hazards are defined as events caused by natural calamities, among which, alongside earthquakes and floods, thefts are mentioned.(art.1).<sup>30</sup>

Besides the provisions of I.S.C. Order no.5/2009, F.S.A. Norm no. 7/2013 lists the risks which are not indemnified, art. 22, paragraph 1 and 2, and the cases in which the mandatory home insurance policy is not valid<sup>31</sup>. Also, art. 23 and 24 list the situations that

<sup>28</sup> Vasile Nemeș, „Asigurarea obligatorie a locuinței” in the review “Buletinul Național pentru pregătirea și perfecționarea avocaților no. 1/2010, page 76 ;

<sup>29</sup> Art. 19 paragraph 4<sup>1</sup> introduced by Law no. 243/2013 amending and supplementing Law no. 260/2008 provides: "In case a person has both a compulsory insurance contract, and an optional insurance contract, payment of damages is firstly carried out based on the compulsory insurance contract, for the remaining uncovered payment, the payment shall be carried out based on optional insurance contract. The insured value taken into account in order to determine the optional insurance installment is represented by the difference between the total value of the house insured and the insured value taken into account in order to determine the compulsory insurance installment";

<sup>30</sup> Mirela Carmen Dobrilă, op. cit., page 115;

<sup>31</sup> Art. 22. - (1) Mandatory home insurance against earthquakes, landslides or floods does not cover the damages caused by:

1.1. floods during barrier lakes formation or when changing artificial watercourses; by the formation of the barrier lake we understand filling with water the barrier lake up to the overflow;

1.2. in cases of sudden threat of collapse or landslide, as well as in case of the inability to use even by repairing or strengthening buildings, if these phenomena occurred, facilitated or aggravated by digging or by civil works of any kind, prospecting, exploration or oil or mining exploitation on the surface or in depth, regardless of the time passed since their completion or abandonment;

1.3. compaction (sagging) of the foundation soil either under the load of the construction or due to other causes;

1.4. the formation of cracks in the foundation soil or the ground around the building, due to the volume variation of the land, as a result of contraction/expansion caused by freeze/thawing;

entitle P.I.A.N.D.. not to grant the indemnification<sup>32</sup>, among which we can find the general provision referring to failure to comply with the contractual obligations, the one referring to failure of the insured to comply with the obligation to inform, lack of evidence regarding the justification of the right to indemnification, favor the damage or increase of the prejudice by the insured or the persons that live and take care of the household together with the insured, etc.

## 6. Insurance contract duration and effects

The mandatory home insurance contract is valid for 12 months, during which time P.I.A.N.D. assumes responsibility for the consequences of an insured hazard (art.15 of F.S.A. Norm no. 7/2013).

The insurance policy is binding starting at midnight on the fifth day after the obligatory premium was paid in and the insurance contract was executed and issued, with the exception of policy renewals where the policy becomes binding at midnight of the day following the day when the premium was paid, and the contract was executed and issued.

Therefore the responsibility of P.I.A.N.D. starts at midnight, of the fifth day after the insurance premium was paid, and on the following day for policy renewals, but not earlier than on the day following the expiry of the previous policy and the date on which the title to the property held by a natural person or legal entity takes effect. (art. 16 of F.S.A. Norm no. 7/2013).

Thus, as mentioned before, the change of the title holder is no cause for the termination of the insurance contract.

The responsibility of P.I.A.N.D. ends either on the date of the expiry of the validity of the insurance contract (midnight of last validity day written on the policy) or before it, the moment the building insured becomes completely uninhabitable or ceases to exist for causes other than those representing risks covered by insurance. (art. of F.S.A. Norm no. 7/2013).

Loss of dwelling status of a building does not entail reimbursement of the mandatory premium.

As far as the effects of insurance are concerned, these do not differ from the contractual effects of the other types of insurance policies.

The main rights and obligations are set out in art.15 and 16 of law no.260/2008, amended and completed, as well in FSA Norm no. 7/2013 (art. 11-12, 20-4, 29-34)

In order to be indemnified, the person having incurred the loss must send a written request for compensation to the insurer who has issued the mandatory home insurance policy on behalf of P.I.A.N.D.. This document is the notification of damage. In the case of social housing or of persons who receive social benefits the insurance policy will be issued directly by P.I.A.N.D. and, consequently, the request for compensation must be addressed directly to it, too. (Art. 29, paragraph 1-3 of F.S.A. Norm no.7/2013).

The damage notification must be done within 60 days from the production of the risk insured. The right to indemnification is established on the basis of the documents issued by the institutions authorized to ascertain the state of natural disaster.

The insurer will draw up a damage report and will work out the compensation amount due function of the demands and possible objections raised by the insured or beneficiaries of the mandatory home insurance policy, without exceeding the ceiling set by law or the value of the damage produced. (art. 28 of F.S.A. Norm no. 7/2013)

P.I.A.N.D. will directly reimburse the policy holder on the basis of the report forwarded by the insurer who has surveyed and valued the damage caused. (Art.29 and 31 of F.S.A. Norm no.7/2013).

In case there are several home insurance policies taken out for the same dwelling, issued by different authorized insurers, all valid at the date the hazard occurred, the indemnification due to the policy holder cannot exceed the effective value of the damage sustained as a direct consequence of the risk covered

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- 1.5. field surrounding the house and that is not associated with the notion of home and is not subject to insurance;
  - 1.6. extensions that are or are not part of the construction designated as insured home (garages, warehouses, sheds, stables, window boxes, pergolas, fences, etc.) and special installations and facilities (pools, saunas, auto ramps etc.);
  - 1.7. any kind of goods, other than the construction designated as insured home (goods or items necessary in order to live, valuable papers etc.)
  - 2) P.I.A.N.D. does not grant compensation for:
    - 2.1. homes built in areas where the competent legal authorities prohibited this by public documents or communications addressed to the insured;
    - 2.2. buildings collapse exclusively due to construction defects, even if it is related to the occurrence of an insured risk;
    - 2.3. temporary accommodation costs until the reconstruction of the house that is subject to the mandatory insurance policy and that was damaged as a result of a covered risk.

<sup>32</sup> Art. 23 – P.I.A.N.D. is entitled not to grant compensation if:

1. The insured/contractor has not fulfilled the obligations arising from the contract;
2. within the statements of the contractor/beneficiary or his representatives, on which the insurance contract is based on or that are made during the claim for compensation or on any other occasion, are being found untruths, forgery, fraudulent aspects, exaggerations or omissions misleading the P.I.A.N.D. or the insurer that issued a mandatory insurance policy;
3. The beneficiary does not present sufficient evidence in order to justify his right to pay the compensation, according to the provisions of art. 18 paragraph (2) of Law no. 260/2008, republished, with subsequent amendments and additions;
4. the damages were favored or aggravated by fault, for the part of the damage which was intentionally increased by the insured/beneficiary or by persons living together with the insured/beneficiary in the home insured, by the representatives of the insured/beneficiary, by the persons authorized to represent the beneficiary for compensation or by the insurance contractor.

by insurance. In these circumstances the first mandatory home insurance policy concluded overrides and cancels all later ones and P.I.A.N.D. will return the premiums already paid. (Art. 28 of F.S.A. Norm no.7 /2013)

**The penalty for not complying with the obligation to take out mandatory home insurance** is an administrative fine ranging from 100 to 500 RON, in keeping with the provisions of art.30, paragraph 1 of Law 260/2008, amend by Law 243/2013.

## 7. Conclusions

1. Close scrutiny of the special legislation in the matter of mandatory home insurance has brought to light several problems the solution of which, in our opinion, will play a crucial role in achieving the social goal the legislator had in mind when making home insurance mandatory.

2. Thus, in spite of the fact that Law no.260/2008 has been amended twice we think that the legislator has not found yet concrete solutions for several problems. The competence to solve many of these problems mentioned under Art 1 of F.S.A .Norm no.6 /2013 belongs to P.I.A.N.D.: namely, the setting up and administration of a data base recording all buildings for residential use, since there are no records for uninsured dwellings at present, the absence of an updated map of catastrophe prone areas in our country (areas at high risk of flooding, complete records of high seismic risk buildings), raising the minimum registered capital of P.I.A.N.D. (now the equivalent in RON of 12 million euros), closing reinsurance contracts with important reinsurance companies, since occurrence of hazards mentioned in the respective law will entail the accumulation of huge amounts in compensation due, which cannot be paid out at present, working out a highly precise insurance mechanism and description of the role played in it by each insurer that is part of P.I.A.N.D., the statutory conditions in which commissions are charged, and finally, a clear description of the role played by P.I.A.N.D. as an insurance-reinsurance company.

3. The law does not deal with a number of issues such as relations between shareholders, the conditions in which new shareholders can join P.I.A.N.D., the role representatives appointed by F.S.A. will play and the way conflicts of interest can be avoided, conditions in which a shareholder can withdraw from or be excluded from IPNH.

4. Last, but not least, setting up a monopoly on this market segment and restricting market access by imposing the condition of adhering to P.I.A.N.D. need to be closely correlated with the principles and legal norms in force in the matter of competition.

5. In addition to this, given the absence of distinct provisions referring to dwellings classified as

posing an extremely high seismic risk, we suggest these should be exempt from the obligation to be covered by insurance, and should form the subject of special regulations.

## III. Property insurance subject to mortgage loan agreements

### 1. Legislative framework. Scope and type of insurance.

Law no. 190/1999 (updated)<sup>33</sup> governs the legal regime of the mortgage loan for real estate investments.

According to the Law no. 190/1999, the mortgage loan for real estate investments is the mortgage loan granted in order to carry out real estate investments meant for dwelling purposes or other purposes than dwelling or in order to repay a mortgage loan for real estate investments previously contracted (art.2, lett. c).

The wording of the legislator according to which “granting the loan is secured *at least* by the mortgage of the estate that is subject to the real estate investment for whose financing the loan is granted” (art. 2, lett. c, paragraph 2 of Law no. 190/1999) is fully consistent with the subsequent provisions of the regulatory document evoked.

Therefore, pursuant to the provisions of section II of the law, entitled “*Compulsory Insurance Contracts*”, “in case of a construction mortgage, the borrower shall conclude an insurance contract covering all its risks. The insurance contract shall be concluded and renewed in order to cover the entire validity period of the loan, and the insured’s rights arisen from the insurance contract shall be assigned in favor of the mortgagee for the entire validity period of the mortgage loan for real estate investments”. (art. 16 paragraph 1 and 2 of the law).

Consequently, the insurance contract for the property subject to mortgage loan agreements shall be binding due to the express provision of the law, the parties shall transpose this legal provision within the content of the agreement between them.

The insurance of the loan’s securities may not be mistaken for the insurance of the secured loans. The scope of the insurance for the insurance of the loan’s securities is made of movables and immovables with which the creditor secured the repayment of the loan and the insured risks are represented by the risks of loss, theft or total or partial loss of the respective property (for example: fire, flood, theft, damage, destruction etc.) while for the insurance of the secured loans, the insured risk is represented by the lack of repayment of the loan<sup>34</sup>.

Although the property insurance subject to the mortgage loan agreements is an insurance concluded

<sup>33</sup> Law no. 190/1999 was amended and supplemented by Law no. 201/2002, Law no. 34/2006, G.E.O. no. 174/2008 and G.E.O. no. 50/2010;

<sup>34</sup> Vasile Nemeş, „Dreptul asigurarilor”, Ediția a 4-a, Editura Hamangiu, 2012, page 280;

in order to ensure the repayment of the loan, in our opinion this insurance is a **property insurance** (and not a suretyship insurance – fifteenth class of general insurances)<sup>35</sup> whereas, even if the borrower doesn't repay the loan on due date, the insurer can not be bound to pay the compensation in the absence of the occurrence of the insured risk. In such a situation the mortgagee will proceed to the capitalization of the movable or immovable that is subject to the security.

Therefore, if regarding the insurance of the secured loans the insurer will grant the compensation due to the non-repayment of the loan, keeping the action for the capitalization of the property used as security, regarding the insurance of the loan's securities the insurer is liable only in case of the loss of the property used as security not seeking for remedy unless it is proven that there is a person who is guilty of the property loss.

In this latter case we are in the presence of a case of legal subrogation, that is carried out in case of insurances, if the insured risk has occurred, when the insurance company subrogates by law the rights of the insured that is indemnified against the person guilty of the occurrence of the damage.<sup>36</sup>

Not the least, distinct from the provisions of the Law no. 190/1999, are also of interest in this matter the provisions of the Civil Code, with reference to the provisions of art. 2330-2332, that we'll develop within chapter IV regarding the assignment of rights from insurance and payment of the compensation.

## 2. The parties of the insurance contract

The borrower has the capacity of the insured, and it falls under the obligation of the borrower to conclude the insurance contract with an insurance company of his choice, the law expressly prohibits the lender to impose on the borrower a certain insurer (art. 18 of Law no. 190/1999).

The insurer may be any insurance company at the choice of the insured. In practice, there was discovered the abusive nature of the terms which established the obligation of the borrower to conclude the insurance contract with an insurance company that was a partner of the bank or approved by the bank and the bank's right to choose the new insurance company which renews the insurance policy.

Thus, certain Courts have decided that it may not be held the defense of the bank according to which the

necessity of choosing an insurance company by the bank is required for the reason of avoiding any risk as the risk of inefficient compensation, total lack of compensation or the risk that the policy may not cover certain situations, etc.<sup>37</sup>

## 3. Insurance contract duration.

Law no. 190/1999 establishes the rule that the duration of the insurance contract is at least equal to the repayment period of the mortgage loan.

Art. 16 of the law provides that the insurance will be concluded and renewed in order to cover the entire validity period of the loan.

For this purpose, multi-annual contracts or a single insurance contract may be concluded, valid for the entire period provided for the repayment of the loan.

## 4. Assignment of insurance rights. Holder of the right to compensation.

The insurance contract, regardless of the means chosen, will be concluded in order to cover all risks associated with the construction and the insurance indemnity will be assigned to the mortgagee.

The law provides the assignment of the insurance rights, both in case of insurance of the mortgaged construction and in case of insurance regarding the risk of non-completion of the real estate investment.

The assignment of rights arising from the insurance contract entails the consequence of receipt of compensation by the mortgagee, no doubt within the loan balance, otherwise we would be in a situation of unjust enrichment.

In this regard, by a test case decision<sup>38</sup>, interesting consequence of the multitude of issues approached, the jurisprudence has held both the binding nature of the insurance of property subject to mortgage loan agreements and the fact that the right to compensation is assigned only insofar as the non-performance of the contractual obligations and only within the claim credit limit agreed.

Moreover, it was also noted the opposability of assignment to the insurance company, the latter being bound by this agreement.

Pursuant to art. 24 of Law no. 190/1999<sup>39</sup>, the mortgage debts that are part of the portfolio of an institution authorized by law, may be transferred to another institution of the same type or to other entities

<sup>35</sup> In this regard, study the classification of the insurances within the Annex no.1 of the Law no. 32/2000

<sup>36</sup> In this regard, art. 2210 paragraph (1) new Civil Code provides: "Within the limits of paid indemnity, the insurer is subrogated to all the rights of the insured or the beneficiary of the insurance against those responsible for the occurrence of the damage, except for insurance of persons";

<sup>37</sup> We mention the Civil Decision no. 17199/17.12.2012 delivered by the District Court of the 2nd District Bucharest as well as the Civil Decision no. 6953/25.10.2010 delivered by the District Court of Targu Jiu, court decisions quoted by Associate Professor PhD Răzvan Dincă in the paper „Abusive clauses in the non-banking financial services contracts”, presented within the ALB national conference, Romania, IX<sup>th</sup> edition, with the title „Revival of the economy lending by rebuilding the confidence in the non-banking financial institutions”, conference held at the Intercontinental Hotel Bucharest on November 21<sup>st</sup> 2013;

<sup>38</sup> Civil Decision no. 64/24.02.2014 delivered by the Court of Appeal Cluj in the file no. .84/2013, published by the Court of Appeal Cluj Civil Section II, administrative and fiscal courts in the collection of relevant decisions, year 2004, I<sup>st</sup> quarter;

<sup>39</sup> By Decision no. 30/2015 delivered on 02.03.2015 and published in the Official Gazette of Romania on 03.25.2015, the Constitutional Court of Romania rejected as inadmissible the critics of unconstitutionality of the provisions of art. 24 of Law no. 190/1999, deciding that the motivation of the authors can not constitute a genuine criticism of unconstitutionality;

authorized and regulated for this purpose by special laws.

The assignee acquires, besides the right under a mortgage associated with the mortgage loan for real estate investments and the rights arising from the insurance contract for the property covered by this mortgage and the other guarantees accompanying the mortgage debt transmitted. No doubt that the assignee may also acquire the rights arising from the insurance of the risk for the non-completion of the construction started with the amount of money borrowed from the bank.

In the specialized literature it has been shown that for property insurances the loss of the legal relationship of the property leads to cessation of the insurance. However, in case of assignment provided by art. 24 paragraph 3 of Law no. 190/1999 this occurs not as an exception expressly regulated by this legal provision, so that the insurance continues to produce effects regardless of the number of assignments occurred, the assignment becomes effective regardless of the insurer's will, on condition of its notification for opposability.<sup>40</sup>

The opposability of the assignment to third parties, except for the insurer, is carried out through its registration with the Electronic Archive of Security Interests in Movable Property, at the expense of the insured (art. 16 paragraph 3).

Towards the insurer the opposability of the assignment is carried out through its notification by registered letter with acknowledgment of receipt or by judicial officers (art. 16 paragraph 4).

We note that, in relation to the provisions of the new Civil Code (art. 1578) which provides for the possibility of notification of the assignment of a debt by written communication of the assignment, on paper or electronically, Law no. 190/1999, a special regulation and previously dated, contains more stringent provisions, the notification is possible only by letter with acknowledgment of receipt or by judicial officers.

We also note that, in practice, the notification of the assignment is accompanied by the remittance to the assignee of the original insurance contract, which is usually in the possession of the assignor, the contract containing the mention regarding the assignment.

The mortgagee, acquiring the capacity of assignee for the insurance rights, will become the beneficiary of the compensation, so that, in case of the occurrence of the insured risk, the insurance indemnity will be paid directly to him.

Law no. 190/1999 establishes that the compensations received by the mortgagee will lead to the settlement of the claim, the imputation and the order of payment are being set: due and unpaid interests related to borrowed capital, the amount of the

loan installments remaining to be paid, other amounts owed by the borrower to the mortgagee on the date of receipt of the compensation based on the loan agreement (art. 16, paragraph 5).

We believe that, even in the absence of an express provision regarding the assignment of rights for compensation to the mortgagee, within the loan balance, the issue of granting the compensations in case of occurrence of the insured risk was resolved by the Civil Code. We take into consideration the provisions of art. 2330 - 2332.

In this respect, the legislator of the Civil Code has provided that, in case of the destruction or damage of the property encumbered, if the property encumbered is destroyed or damaged, the insurance indemnity or, where applicable, the amount due as indemnification should be affected by the payment of the preferential or mortgage debts, according to their rank. (art. 2330, paragraph 1).

Regarding the recording procedure of the amounts of money representing the insurance indemnity or compensation, it was provided that the amounts due under this title to be recorded in a separate bank account, bearing interest on behalf of the insured and being available to the creditors who have registered the security in the publicity registers. The debtor can not dispose of these sums until the settlement of all secured claims unless with the agreement of all mortgagees or preferential creditors. But he has the right to charge the interests. In the absence of agreement between the parties, the creditors can satisfy their claims only according to the legal provisions regarding the execution of mortgages (art. 2331).

Moreover the law provides the possibility that, by the insurance contract, the insurer may also reserve the right to repair, rebuild or replace the property insured. In such a case, the insurer shall notify the intention to exercise this right to the creditors who have registered their security in the publicity registers, within 30 days of the date he acknowledged the occurrence of the insured event. The holders of the secured debts may require payment of the insurance indemnity within 30 days of the date of receipt of the notification (art. 2332).

The content of article 2332 of the Civil Code leads to the conclusion that, in case of partial disaster, the insurance indemnity is due to the creditor "only if it is not spent on repairing, restoring or replacing the insured assets". The specialized literature<sup>41</sup> underlines that the right of the creditor is of **subsidiary nature**, because if the insurer repairs the building partially destroyed, the holder of the security interest will not be able to keep the insurance indemnity; instead he will have to give it to the insured debtor.

<sup>40</sup> Vasile Nemeş, "Contractul de asigurare a bunurilor obiect al contractelor de credit ipotecar", article published in "Revista de drept bancar şi financiar" no. 3-4/2008, page 6

<sup>41</sup> Irina Sferdian, „Asigurări. Privire specială asupra contractului de asigurare din perspectiva Codului Civil”, Editura C.H.Beck, Bucureşti, 2013, page 188;

## 5. Conclusions

From the regulations mentioned the following conclusions are drawn:

1. The insurance contract regarding the constructions for which the mortgage has been established in order to guarantee the real estate investment is a contract distinct of the insurance contract of the mortgage loan for real estate investments, but they interact closely, the insurance representing a security made to protect the mortgagee in case of occurrence of one of the insured risks.

2. Despite the indemnity nature and the purpose pursued by the conclusion of the insurance contract (guaranteeing the repayment of the loan in case of destruction or damage of the mortgaged property), the insurance of the property subject to the mortgage loan agreement is a property insurance included in class 8 and 9 of insurance, classification provided in Annex 1 of the Law no. 32/2000 on insurance and insurance supervision.

3. The legislator gives binding nature to the construction insurance contract. Art. 16 of Law no. 190/1999 provides that the borrower shall conclude an insurance contract covering all its risks. The wording of the legislator is imperative, the binding nature of the insurance contract for the real estate purchased under the law no. 190/1999 being construed from both the section title ("compulsory insurance contracts") and the content of the regulation of art. 16.

4. It is possible that the legislator sought to establish the binding nature also to the insurance contract for the risk of non-completion of the real estate investments for which the loan was granted.

5. Thus it explains the introduction in Section II ("compulsory insurance contracts") of the provision regarding the conclusion of an insurance contract for the risk of non-completion of the real estate investment by the borrower (art. 17) and the provision provided by art. 16 ("in case of a construction mortgage, the borrower shall conclude an insurance contract covering *all its risks*" - therefore also the risk of non-completion of the construction).

6. However, the provision provided by art. 17 of Law no. 190/1999, that "the mortgagee **may** require to the borrower to conclude an insurance contract for the risk of non-completion of the real estate investment for which the loan was granted" does not induce the idea of incumbency but rather the idea of possibility, faculty, the wording of the legislator not being compulsory.

7. In the specialized literature<sup>42</sup>, regarding this issue, it was shown that "the insurance for the risk of non-completion of the construction is optional."

8. The provisions regarding the assignment in favor of the mortgagee of the rights of the insured deriving from the insurance contract (art. 16 paragraph

2, art. 17 and art. 24 paragraph 2 of Law no. 190/1999), as well as the ones regarding the ways to carry out the assignment (art. 16 paragraphs 3 and 4) or imputation of payment for the amounts received as compensation (art. 16 paragraph 5) consequence of the occurrence of the insured risk regarding the real estate, represent the legal provisions meant to ensure the repayment of the loan granted by the financial institution. Legal provisions with the same purpose can be found in the Civil Code, art. 2330 - 2332.

## IV. Insurance of assets subject to leasing contracts

### 1. Legislative framework. Scope and type of insurance.

The leasing operations are governed by the G.O. no. 51/1997.

According to the provisions of ar.1, the Ordinance applies to the leasing operations whereby one party, called lessor/financer, in his capacity of owner, transfers, for a determined period of time, the right of use over an asset to the other party, called lessee/user, at his request, for a periodic payment, called leasing installment, and at the end of the leasing period, the lessor/financer undertakes to comply with the lessee/user's option right to purchase the asset, to extend the leasing contract without changing the type of leasing or to terminate the contractual relationships.

The subject of the leasing operations may be assets immovable by their nature or that become movable by destination and movable assets, in civil circuit, to which the right to use computer programs is added.

The insurance obligation is expressly provided within the evoked regulatory document<sup>43</sup>.

The insured risks are represented by the risks of loss, theft or total or partial destruction of the assets subject to a leasing contract, after the occurrence of certain risks such as fire, flood, theft, damage, destruction, etc.

The insurance of the assets subject to a leasing contract is a compulsory insurance of assets.

The insurance contract of the property subject to the mortgage loan agreements shall be binding, the parties shall transpose within the content of the agreement between them this legal provision, aspect also provided by the law. Thus, according to art. 6 paragraph 1 lett. e, the leasing contract should comprise, beyond the contracting parties, at least the following elements:...e) "the clause regarding the obligation to ensure the asset."

<sup>42</sup> „Contractul de asigurare a bunurilor obiect al contractelor de credit ipotecar”, author Vasile Nemeş, article published in „Revista de drept bancar şi financiar” no. 3-4/2008, page 5;

<sup>43</sup> Such provision can be found within art. 5, paragraph 1 lett. e) art. 6 paragraph 1 lett. e), art. 9 lett. f), art. 10 lett. d), art. 26 of the G.O. no. 51/1997;

## **2. The parties of the insurance contract. Rights and obligations from the insurance's outlook.**

The parties of the insurance contract are the insurer and the lessor/financer.

In compliance with the provisions of art. 5 of G. O. no. 51/1997, the obligation to ensure the asset is incumbent on the lessor. The obligation of insurance of the asset by the lessor is reiterated in art. 9 lett. f according to which the lessor/financer, in capacity of owner of the asset <sup>44</sup>, undertakes to ensure, by an insurance company, the assets under lease.

The provision of art. 5 paragraph 1 of G.O. no. 51/1997 has a double meaning: on the one hand binds the contracting parties to ensure the asset under the leasing operation and, on the other hand, protects the user in case of total or partial destruction of the asset, knowing that one of the obligations established by the law binding the user is to bear the risk of loss, destruction or damage of the asset used including fortuity<sup>45</sup>.

The lessor/financer, that is bound to ensure the asset, may also choose the insurer (unless the parties have agreed otherwise) with the mention that the insurance costs are paid by the owner of the asset. (art.5 paragraph 2)

This obligation, borne by the lessor/financer, is expressly provided also within the provisions of art. 10 let. d), the lessee binds to the lessor to pay all the sums owed according to the contract – leasing installments, insurances, contributions, taxes for the amount and on the terms mentioned in the contract.

Since the leasing performance is accompanied by an insurance performance of the asset that is subject to the leasing, concluded by the lessor, from the financial-accounting point of view the operation shall be invoiced by the latter to the lessee.

According to a recent decision of the Court of Justice of the European Union <sup>46</sup> when the lessor under a leasing contract ensures himself the asset subject to the leasing and invoices to the lessee the exact cost of the insurance, such an operation is qualified as insurance and a VAT exemption is applied based on art. 135 paragraph (1) letter (a) of the Directive 2006/112/EC of the Council from 28<sup>th</sup> of November 2006 on the common system of value added tax.

The Court qualified, in principle, as distinct and independent performance of services for VAT purposes (i) the services performance of the proper

leasing and (ii) the services performance of the asset's insurance subject to leasing, especially in circumstances such as imposing an insurance contract conclusion through the leasing contract, but especially when the insurance of the asset subject to the leasing is essentially an end in itself for the lessee, and not the way to benefit from the leasing service in the best conditions.

If the insurance premiums are borne by the lessee/user, their counter value may be financed by the lessor, based on an expressed agreement in this regard.

We state that, as in the case when the payment for the insurance premiums is carried out by the lessee/user, the lessor/financer shall have the capacity of insured person instead of the lessee/user.

The main consequence arising therefrom is that, if the insured risk occurs, the indemnity insurance will be paid by the insurer directly to the lessor/financer and not to the user, issue on which we shall return.

In this context we specify that the rules governing the insurance relations of the assets contracted by leasing are of optional nature, so that the parties may agree that the lessee/user has the capacity of insured and that he collects the insurance indemnity, or the capacity of insured of the financier may be kept, but it may be provided that the user is the beneficiary of the insurance, in which capacity he will also collect the compensation.

In the event that the insurance is concluded by the user, in practice, an assignment clause of the rights to compensation in favor of the lessor is provided.

Regarding the obligation to conclude a civil liability insurance for car owners (RCA), in case of car leasing, it is borne by the user, who is mandated by contract by the Lessor (leasing company) to conclude it. Constraining the user to conclude the civil liability insurance for cars with the same insurance company where the Casco insurance policy is concluded, represents, in our opinion, a violation of his right to freely choose a contractual partner.

## **3. Insurance contract duration. Holder of the right to compensation.**

Similar to the property insurance subject to mortgage loan agreements, the duration of the insurance contract shall be at least equal to the period of the leasing contract.

For this purpose, multi-annual contracts or a single insurance contract may be concluded, valid for the entire period of the leasing contract.

<sup>44</sup> Before passing the Law No. 287/2006 amending G.O. no. 51/1997, it was not provided the requirement of the financier's capacity of owner of the assets subject to leasing operations. In its current form, however, although G.O. no. 51/1997 maintained the principle of transmission of the right to use of assets subject to the leasing contract, the condition regarding the financier's capacity of owner of the assets was introduced.

<sup>45</sup> Pursuant to art. 10 lett. f of G.O. no. 51/1997, "the lessee undertakes to assume, for the entire period of the contract, unless otherwise stipulated, all the obligations arising from the use of the assets directly or through his representatives, including the risk of loss, destruction or damage of the used asset due to fortuity, and the continuation of payment of the leasing installments until the full payment of the amount of the leasing contract".

<sup>46</sup> Decision no. C-224/11-17.01.2013 of the European Court of Justice may be found on the website <http://www.juridice.ro/282621/cjue-prestatie-de-leasing-insotita-de-o-prestatie-de-asigurare-a-bunului-care-face-obiectul-leasingului-scutire-de-tva.html>;

In case the insured risk occurs, if all conditions of validity of the contract are met, the obligation to pay the compensation is incumbent to the insurer, we will distinguish between the case of total and partial loss.

In the first case, respectively, the assumption of total loss of the asset subject to the leasing contract, the insurance indemnity will be received by the lessor/financer and he will turn against the user under the leasing contract, if the compensation does not cover the damage caused, i.e. the total value of the leasing contract.

The conclusion is set based on the common law principles regarding the coverage for damages, arising from partial or total loss of the assets, but it also results from the correlation of the provisions of the G.O. no. 51/1997.

Thus, according to art. 10 letter f) of G.O. no. 51/1997, the user bears the risk of total or partial loss of the asset, and has the obligation to continue the payment of the amounts as leasing installments until the full payment of the value of the leasing contract is carried out.

This provision is to be correlated with the provisions of art. 26 of G.O. no. 51/1997, according to which, in the case of damage registration and of payment of the amounts stipulated by the insurance for the assets subject to the leasing contracts, the parties may agree to settle the mutual claims by compensation, under the law.

The principle of settlement of the mutual claims by compensation, in case of loss of the asset, established by art. 26, refers precisely to the financier claim against the user, consisting of the equivalent leasing installments to be paid after the loss of the asset. Therefore, the remaining leasing installments to be paid will be compensated with the insurance indemnity received by the financier as a result of the occurrence of the insured risk.

In practice there has been raised the issue regarding the effective date when the leasing contract is terminated, in case of theft or total loss, aspect relevant with regard to the determination of the amounts to be compensated.

This issue has been judicially solved, the Court establishing that, in relation to the obligation of the user to continue the payment of the monthly leasing installments, there can not be affirmed that the leasing contract was terminated on the date of the theft because the leasing contract concluded expressly establishes the obligation of the user to continue the payment of the monthly leasing installments in case of theft.

The user's obligation ceased on the date when the lessor has received the compensation from the insurer, however, the lessor has the obligation to pay the user the difference between the compensation value and the amount due in relation to the provisions of the leasing contract, allowing the user to claim compensation from the insurer, in other procedural framework, for the delay of the payment of the compensation or the unfounded refusal to pay<sup>47</sup>.

In case of liability for the loss of the assets, in common law, the compensation can not exceed its value from the moment of the occurrence of the prejudice. In other words, it is prohibited unjust enrichment of the owner, by receipt of compensation exceeding the value of the asset. Leasing regulations do not contain any derogatory rule, meaning that, as shown above, the financier may turn against the user, only for the difference that does not cover the value of the leasing contract<sup>48</sup>.

Admission of another solution would equate to an unjust enrichment of the lessor/financer, consisting of, on the one hand, collecting the insurance indemnity and, on the other hand, the leasing installments due, intolerable situation in our legal system.

In the event of the occurrence of partial damage, to the extent that the user has paid the leasing installments up to date, the lessor may agree that the payment of compensation shall be carried out directly to the user's account, taking into consideration also the fact that he incurred the costs of bringing the asset in the state before the insured risk occurred.

#### 4. Conclusions

Summarizing the aspects presented above, we point out the following:

1. The lessor is the one who has the freedom of choice regarding the insurance company in order to conclude the insurance contract;
2. The insurance premiums will be paid by the lessee/user;

The rules governing the insurance relations of the assets contracted by leasing are of optional nature, so that the parties may agree that the lessee/user has the capacity of insured and that he collects the insurance indemnity, or the capacity of insured of the financier may be kept, but it may be provided that the user is the beneficiary of the insurance, in which capacity he will also collect the compensation.

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