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The Belgian conflict of laws rules and Insurance in the European Union

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THE BELGIAN CONFLICT OF LAWS RULES AND INSURANCE IN THE EUROPEAN UNION

Introduction

1. Belgian law has had a conflict of laws system specific to international insurance policies since 1991. This quite new and novel system finds its source in the so-called "second-generation" European Union or Community directives intended to facilitate the effective exercise of the freedom to provide non-life insurance services (Article 7 and Article 8)[1] and of life insurance services (Article 4)[2]. The so-called "third-generation" directives[3], which entered into force on 1 July 1994, have left practically intact this private international law system subject to the sole reservation of Article 27 of the third non-life insurance directive which expanded the free choice of the law applicable to all large risks.

Articles 7 and 8 of the non-life freedom to provide services (FPS) directive were transposed by Article 16 of the Royal Decree of 22 February 1991 inserting a Chapter III (b) entitled "Law Applicable to Insurance policies Coming Under the Non-Life Insurance Activities Group", in the Act of 9 July 1975 on the supervision of insurance enterprises (Article 28 (c-h))[4].

Article 4 of the FPS directive was transposed by Article 5 of the Royal Decree of 8 January 1993, inserting a Chapter III (c) entitled "Law Applicable to Insurance policies Covering Risks Situated Within the Member States of the European Communities and Coming Under the 'Life' Activities Group", in the supervision law (Article 28 (i) and (j))[5]. At the same time, the royal decree made some changes to the provisions of Article 28 (c).

The title of Chapter III (b) was replaced by the following: "Law Applicable to Insurance policies Covering Risks Situated in the Member States of the European Communities and Coming Under the "Non-Life" Activities Group". This distinction is important, as we shall see.

[1] Directive 88/357/EEC of 22 June 1988 coordinating the legislative, regulatory and administrative provisions on direct insurance other than life insurance, establishing measures to facilitate the effective exercise of the freedom to provide services and amending Directive 73/239/EEC, OJEC, No. L 172 of 4 July 1998, p. 1; infra non-life FPS.
[2] Directive 90/619/EEC of 8 November 1990 coordinating the legislative, regulatory and administrative provisions on direct life insurance, establishing measures to facilitate the effective exercise of the freedom to provide services and amending Directive 79/267/EEC, OJEC, No. L 330 of 29 November 1990, p. 50; infra life FPS.
[3] Directive 92/49/EEC of 18 June 1992 coordinating the legislative, regulatory and administrative provisions on direct insurance other than life insurance and amending Directives 73/239 EEC and 88/357 EEC OJEC, No. L 228 of 11 August 1992; infra third non-life insurance directive. Directive 92/96/EEC of 10 November 1992 coordinating the legislative, regulatory and administrative provisions on direct life insurance, and amending Directives 79/267/EEC and 90/619/EEC, OJEC, No. L 360 of 9 December 1992, p. 1; infra third life insurance directive.
[4] Moniteur Belge (Mon. B.) 11 April 1991, p. 7477.
[5] Mon. B. 9 February 1993, p. 2878.

A New System ...

2. The system of private international law introduced by these royal decrees warrants special attention, since the insurance sector had, until then, been largely spared by conflict of laws, if we exclude insurance that is "international by its nature", such as transport insurance or reinsurance contracts. This relative loss of privilege is explained by the compartmentalization of national markets resulting from supervision legislation. Before the advent of Community law, most continental legislation made the exercise of insurance activity within the country subject to a certification and the installation of an establishment in the country where the activity was to be exercised. This requirement, together with a rather broad definition of the criteria for localization of the insurance activity within the country, contributed to excluding extraneous elements capable of affecting the situation and contributed to making cases involving conflict of laws few and far between. The practical supervision of the insurance conditions established by the Belgian, French and German legislation completed this edifice, since it could be inferred from that legislation that any contract subject to such supervision became ipso facto subject to national law[6].

This solution was shaken to its very foundations by the opening of the insurance market to freedom to provide services. In the wake of the judgments of the Court of Justice of 4 December 1986[7], the FPS directives covering both life and non-life insurance[8] eliminated the requirement for installing an establishment in the country where the activity is exercised and freed the applicable insurance law from the influences of the law of supervision.

A Novel System ...

3. Was it essential, however, to introduce into these directives a conflict of laws system specific to insurance policies? It is rare in fact that the directives on the implementation of the Single Market intrude into the field of private international law. Among all the financial services, only insurance is the subject of special provisions in this regard. Banking contracts and investment contracts remain subject to the rules of the Convention of Rome of 11 June 1980 on the Law Applicable to Contractual Obligations[9].

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[6] This thesis of the nationalization of contracts subject to substantive supervision was defended in France by Picard and Besson. See M. Picard and A. Besson, "Les assurances terrestres en droit français" Vol. I, 5th Edition, Paris, L.G.D.J., 1982, p. 63, No. 40. Also, J. Ripoli, "Les conflits de lois en matière de droit des assurances", Trav. Com. Fr., D.I.P., 1989-1990, Ed. CNRS, 1991, p. 176-177, R.G.A.T., 1992, pp. 479-493; K.H. Basedow, "Le droit international privé des assurances", Paris, L.G.D.J., 1939, p. 37, No. 35 and p. 44, No. 90.

[7] CJEC, 4 December 1986, aff. 220/83, Commission v. France, Rec., 1986, p. 3663; aff. 252/83, Commission v. Denmark, Rec., 1986, p. 3713; aff. 205/84, Commission v. Germany, Rec., 1986, p. 3755; aff. 206/84, Commission v. Ireland, Rec., 1986, p. 3817.

[8] Cited in Notes 1 and 2 above.

[9] OJEC, No. L 266 of 9 October 1980. See also the Report drawn up by Professors M. Giuliano and P. Lagarde published in OJEC, No. C 282 of 31 October 1980. The Convention of Rome came into force on 1 April in the following Member States: Germany, Belgium, Denmark, France, United Kingdom, Greece, Italy and Luxembourg. It came into force on 1 September 1991 in the Netherlands and on 1 January 1992 in Ireland. It has not yet come into force in Spain or in Portugal. The Convention applies only to contracts concluded after its entry into force. It must be noted, however, that Germany (Act of 25 July 1986, BGBI, 1986, I, p. 1142); Luxembourg (Act of 27 March 1986, Mem, 1986); and Belgium (Act of 14 July 1987, Mon. B., 9 October 1987) had anticipated the entry into force, with some changes on occasion. On the law applicable to banking contracts, see F. Osman, "La loi applicable aux contrats transfrontières de credit à la consommation", DPCI, 1992, p. 279; J. Pardon, "La distribution des produits bancaires et

Why was the solution different in the insurance field? Two reasons can be advanced. The first has to do with the highly regulated character of insurance policies in the majority of the Member States (Belgium, France, Spain, Germany, Italy, Denmark, etc.). In the absence of coordination, divergencies among national legal rules entailed a high risk of being a source of disruption in competition among insurance companies doing business in the Community. Since the attempt to harmonize insurance law of the Member States failed[10], the only way to avoid or to attenuate such disruption was to adopt a common system of private international law making it possible to guarantee a certain uniformity in the solutions.

4. The Convention of Rome would admittedly have been able to fulfil this role, but certain of its provisions were rightly or wrongly considered undesirable by the Member States which did not want their protective regulations to be superseded in cases where the insurance policy is taken out with an insurance company not established in the country.

Instead of establishing purely and simply the principle of the free choice of the applicable law (see Article 3 of the Convention of Rome), the Community system has relied from the outset on a rule of inflexible and mandatory linkage ("rattachement") excluding any possibility of choice. The choice of the applicable law is provided only as a corrective measure to this rule in restrictively circumscribed situations.

Whether it be on the assumption of a choice or of an absence of choice, the law of the country of incorporation of the insurer to which the theory of characteristic services provided a right of application (see Article 4 of the Convention of Rome) is most often excluded. The privileged connecting factor is, on the contrary, that of the place where the risk is located, which generally permits, under freedom to provide services, making the policy subject to the law of the country where the activities occur and neutralizing the effects of disruption in competition.

Finally, the protection of the policy-holder or of the insured is not guaranteed by an alternative applicable law method (see, Article 5 of the Treaty of Rome), but by a method of inflexible linkage entailing excluding initially the choice of applicable law, then gradually opening it on the basis of the configuration of the particular international situation, until a complete choice which is admitted -- subject to a novel method of expansion of the choice -- only for certain insurance policies covering risks which do not require special protection of the policy-holder or of the insured.

5. Our intention is to comment on the Belgian rules of conflict of laws following the transposition of the European FPS directives. With the exception of certain references, we shall not

la loi applicable", Banque et Droit, 1998, p. 33; B. Sousi-Roubi, "La loi applicable aux contrats transfrontières après la deuxième directive de coordination bancaire", Rev. dr. bancaire et bourse, 1990, p. 155; by the same author, "La Convention de Rome et la loi applicable aux contrats bancaires", Dall, Ch. 1993, p. 183.

[10] Amended Proposal for a Council Directive seeking the coordination of the legislative, regulatory and administrative provisions governing insurance policies, OJEC, No. C 355 of 31 December 1980, p. 30.

be considering transpositions effected by other Member States. Nor shall we be examining the special rules which determine the international jurisdiction of courts in insurance matters[11].

Following a traditional approach, the presentation will be divided into three sections. The first section will be devoted to the definition of the scope of the rules of conflict of laws. We will then examine the rules which make it possible to determine the law applicable to a contract. Analysis of the practices likely to disrupt the settlement of conflict of laws will be the subject of the third section.

SECTION I. SCOPE OF RULES CONCERNING CONFLICT OF LAWS GOVERNING INSURANCE POLICIES

6. The definition of the scope of the rules concerning conflict of laws in Chapters III (b) and III (c) of the Act of 9 July 1975 on the supervision of insurance companies seeks to determine the contractual situations to which these rules are applicable. Three parameters can assist in this definition: the spatial criterion (*ratione loci*), the criterion based on the subject matter involved (*ratione materiae*) and the time criterion (*ratione temporis*).

§ 1. The Spatial Aspect

7. In derogation of a widespread practice in international agreements containing uniform private international law rules, the rules of conflict governing insurance policies have a field of application that is limited in space. The first criterion useful in this delimitation is deduced from the reading of the wording of Chapters III (b) and III (c) as amended by the Royal Decree of 8 January 1993: only insurance policies against risks within the Member States of the European Communities are covered. In addition to the criterion of the locus of risk, another criterion, the locus of the place of business of the insurer in the Member State, is deduced implicitly from the Community directives but has not been expressly incorporated in Belgian law.

A. The Locus of the Risk

8. The criterion of the locus of risk is explicitly stated in Article 7, § 1, of the FPS directive covering non-life insurance which limits its scope to insurance contracts covering risks located in the Member States. Article 4, § 1, of the FPS directive covering life insurance does not include the same

[11] These rules are set forth in Articles 7 and 12 (b) of the Brussels Convention concerning the jurisdiction and the execution of decisions in civil and commercial matters, as amended last year by the Accession Convention of Denmark, Ireland and the United Kingdom of 9 October 1978, as well as Article 19 (c) of the Act of 9 July 1975 on the supervision of insurance companies, as amended 19 July 1991, which prohibits clauses assigning jurisdiction to a foreign court. By virtue of the primacy of treaties, the provisions of the supervision law can come into play only outside the scope of the Convention. For a commentary, see F. Rigaux and M. Fallon, "Précis de droit international privé", Vol II, 2nd Ed., 1993, No. 1325-1328.

detail, probably because it is not based, strictly speaking, on the locus of risk but on the locus of the commitment. There is no doubt, however, that the commitment must also occur in a Member State of the European Union in order for the rules concerning conflict of laws governing life insurance to be applicable[12].

Belgian law provides this spatial limitation not in the body of the rules, but in the wording of Chapters III (b) and III (c). The locus of the risk within the meaning of these provisions is defined by Article 1 of the Royal Decree of 8 January 1993 inserting an Article 2, § 6, in the supervision law. According to that article, the risk is confined in theory to the locus of the normal residence of the policy-holder, except for insurance covering vehicles of any type, real property or travel of short duration. In these cases, the risk is deemed to be located in the place of registration of the vehicle, in the place where the building is located and in the place where the contract is entered into, respectively.

Article 2, § 6, transposes rather faithfully Article 2, d, of the non-life insurance directive, aside from the fact that it defines the locus of risk solely with respect to Belgium. This anomaly is explained by the fact that this provision seeks primarily to determine the field of spatial application of the supervision law and by the fact that this definition is construed in administrative law only with respect to Belgium. There is nothing to prevent using it as well to delimit the scope of the rules concerning conflict of laws, but in that case reference to Belgium must not be taken into account, since the application of the rules depends solely on the locus of risk within any one of the Member States. On the other hand, Belgian law includes no definition of the locus where the commitment takes place, although there is provision for this in Article 2, e, of the FPS directive covering life insurance. In order to avoid a proliferation of doctrines, the legislature preferred to address the problem in the definition of the locus of risk. This is superfluous, however, inasmuch as the locus of the commitment is itself defined by the directive as being that of the normal residence of the policy-holder.

9. The spatial delimitation of the Community rules concerning conflict of laws is reminiscent of Article 1, § 3, of the Convention of Rome which is intended to be applied only to contracts covering risks located outside the Member States. This restriction had been rightly provided to avoid any conflict with the directives then in preparation. Whatever the reasons advanced, it is clear that such fragmentation can logically be justified only if the specific conditions of the internal market render it indispensable to have a special system of private international law for contracts closely linked to the exploitation of that market[13]. It is therefore possible to see in the locus of risk a criterion intended to isolate the situations which present a sufficiently close link with the European Community.

[12] To this effect, E. Lorenz, "Das aufgrenzüberschreiende Lebensversicherungsverträge anwendbare Recht: eine Übersicht über die Kollionsrechtlichen Rechtsgrundlagen", Z. Ges. Vers. W., 1991, pp. 134 and 140.
[13] W.H. Roth, op. cit. Note 7, p. 689-690; by the same author, "EEC Treaty article fifty-nine and its implications for Conflicts Law in the field of insurance contracts", Duke Journ. I. L., 1992, p. 133; M. Fallon, "La loi applicable au contrat d'assurance selon la directive du 22 juin 1988", RGAT, 1989, p. 262, No. 37; E. Steindorff, "Europäisches Gemeinschaftsrecht und deutsches Internationales Privatrecth; Ein Beitrag zum Ordre public und zur Anknüpfung zwingenden Rechts", Europarecht, 1981, p. 441.

At a practical level, the definition of the locus of risk -- for which the Convention of Rome refers to the national law of the Member States -- must logically be defined with reference to the Belgian supervision law, i.e. relative to the same criteria as those defined above.

When a single contract covers several risks, some of which are located outside the European Union and others within the European Union, the spatial delimitation of the Community rules concerning conflict of laws requires a distributive application of the two systems of private international law[14]. If according to the rules of each of the systems, the insurance policy is subject to different laws, it will be necessary to split the policy, making it impossible to conclude a single policy in such a case.

B. The Insurer's Regular and Established Place of Business

10. The requirement that the insurer have its regular and established place of business in a Member State of the European Union is inferred implicitly from the place of Articles 7 and 8 of the FPS directive covering non-life insurance and from the place of Article 4 of the FPS directive covering life insurance under Title II devoted to the provisions supplementing the first place of business directive. This criterion of applicable law is noted by the majority of commentators[15]. In the framework of the directives, it could also be understood as the expression of a minimum connection to the Community legal system.

Under these conditions, the rules concerning conflict of laws would not apply to policies covering risks situated in the Community but contracted with insurance companies not having their regular and established place of business there. Since such policies would not come within the purview of the Rome Convention to any greater extent, they would remain subject to ordinary law. Just for the insurance policy contract by itself, we see emerging a landscape fragmented into three systems of private international law, each applicable on the basis of the international configuration of the situation, thereby creating a significant breach in the dogma of universality of the rules concerning conflict of laws.

11. This observation must, however, be qualified. The contracting of insurance policies with companies not having their regular and established place of business in the Community is not necessarily authorized by the legislation of all the Member States. Next and especially significant, it seems that the requirement for the insurance company to have its regular and established place of

[14] To this effect, M. Fallon, op. cit., Note 15, p. 247, No. 15; F. Reichert-Facilides, "Zur Kodification des deutschen internationalen Versicherungsvertragrechts", I. Prax., 1990, p. 4; B. Smulders and P. Glanzener, "Harmonization in the field of insurance law through the introduction of community rules of conflict", C.M.L. Rev., 1992, p. 788; contra J. Basedow and W. Drasch, "Das neue internationale Versicherungsrecht", N.J.W., 1991, p. 788, who, on the basis of German law, propose that the parties can benefit from the choice of the applicable system of private international law.

[15] F. Rigaux and M. Fallon, op. cit., Note 13, Vol. II, No. 1330; M. Fallon, op. cit., Note 15, p. 248, No. 16; P. Lagarde, "Présentation de la directive du 22 juin 1988 relativement à la loi applicable", RCDIP, 1989, p. 149; by the same author, "Le nouveau droit international privé des contrats après l'entrée en vigueur de la Convention de Rome du juin 1980", RCDIP, 1991, p. 296, No. 16; F. Reichert-Facilides, op. cit., Note 16, pp. 4 and 8; V. Hahn, "Die Europäischen Kollisons-normen für Versicherungsverträge", V.V.W. Karlsruhe, 1992, pp. 2 and 154; J. Basedow and W. Drasch, op. cit., Note 16, pp. 787 and 794; W.H. Roth, op. cit., Note 7, p. 699; K.W. Brevet, "De tweede richlijn schadeverzekering en het toepasselijkrecht", Verz. Arch., 1991, p. 22; Ph. H.J.G. Vanhuizen, "Grote en andere risico's van verzekering en het toepasselijke recht volgens de tweede richlin vrije dienstverlening", Verz. Arch., 1989, pp. 156-160.

business in a country of the Community has been intentionally or unintentionally removed in the process of transposition into the national laws[16]. Several commentators had, in fact, advised the legislature to take action to this effect[17]. The Belgian legislature, in particular, did not incorporate this criterion in the wording of Chapter III (b) and III (c), nor does the law exclude companies of third countries from its scope. We conclude from this that the company's regular and established place of business does not constitute a condition for the application of the rules concerning conflict of laws. The only spatial condition which can be inferred from the law would thus relate to the location of the risk within a Member State of the European Union.

§ 2. Substantive Scope

12. The insertion of the rules concerning conflict of laws into Community directives has incidentally the effect of conferring on them the same substantive scope as that defined by such directives for the supervision of insurance activities. This consequence, an unorthodox one from the standpoint of private international law, is verified both as regards the insurance covered (B) and as regards the companies subject to supervision (A).

A. The Companies

13. The Community directives regulating life and non-life insurance activities include some exclusions covering certain insurance companies which, for one reason or another, the intention was not to subject to supervision[18]. By force of circumstances, these exclusions also affect the scope of the rules concerning conflict of laws so that they could no longer be applied to international insurance policies contracted with such companies.

This consequence, an unjustifiable one in the eyes of private international law, could have been avoided by effective legislative craftsmanship consisting of inserting the rules concerning conflict of laws in a distinct chapter of Belgian law governing insurance policies. By their integration into the supervision law, those rules unfortunately fall within the purview of its particular scope, so that they could theoretically not be applied to companies excluded therefrom. These failings could not, *stricto jure*, be remedied by general private international law of contracts.

[16] This is perfectly admissible under Community law. The Member States in effect have the freedom to extend the solutions prescribed by the directive to situations not covered by it.
[17] P. Lagarde, op. cit., Note 17, p. 149; W.H. Roth, op. cit., Note 7, pp. 759-760; F. Reichert-Facilides, op. cit., Note 16, p. 8; V. Hahn, op. cit., Note 17, p. 154; Ph. H.J.G. Vanhuizen, op. cit., Note 17, pp. 156-160; M. Fallon, op. cit., Note 15, p. 248, No. 16.
[18] See Articles 3 and 4 of Directive 73/239/EEC of 24 July 1973, OJEC, No. L 228 of 16 August 1973, p. 3, amended by Article 3 of the third directive covering non-life insurance (cited supra). Also see Article 3 of Directive 79/267/EEC of 5 March 1979, OJEC, No. L 63 of 13 March 1979, p. 1.

B. Insurance Operations

14. In the same way as for the companies, Community directives exclude certain operations or certain activities from their field of application and in theory confer the same limitations on the rules concerning conflict of laws. This consequence, also a curious one, is inferred from an explicit reference in Article 7, § 1, of the FPS directive covering non-life insurance and in Article 4, § 1, of the FPS directive covering life insurance, respectively, a reference made to the insurance activities covered by the first directive covering non-life insurance and by the first directive covering life insurance[19]. This reference is incorporated in the wording of Chapters III (b) and III (c) of the Belgian law.

The influence of administrative regulations on private international law is, however, less open to criticism inasmuch as the majority of these exclusions are based primarily on the desire to exclude from the field of regulation operations which do not match the technical characteristics of insurance operations. The effect of that is no less novel, since the applicable choice of law rule of the law of conflicts specific to insurance policies is defined under these conditions by technical criteria found in administrative legislation. The operation of the technique of characterization, well-known in private international law, thus becomes partially dependent upon the delimitation of the substantive scope of the Community directives.

We also note that the directives do not cover direct insurance. The Community rules concerning conflict of laws are not applicable to reinsurance contracts. These remain, without exception, subject to the Convention of Rome (Article 1, § 4).

15. It should be mentioned, however, that the groups of activity to which the Belgian rules of conflict of laws refer are defined, in conformity with the annexes of the directives, solely by branch. An attempt to find therein a Community definition of the concept of insurance would prove fruitless. Nevertheless, it seems difficult to dispute the insurance characterization with respect to operations specially covered in the administrative classification.

The adoption of different rules concerning conflict of laws for life insurance and for non-life insurance requires further refinement in the choice of law approaches. Once again, this refinement depends upon technical criteria in European administrative regulations and not upon legal criteria such as insurance law. The content of the choice of law approaches is not therefore influenced by the traditional contractual distinctions between insurance against property damages and insurance against personal injuries, or between stipulated and compensatory insurance, but rather by the distinction between life and non-life insurance activities[20].

16. The administrative classification provided by the Belgian supervision law in conformity with Community directives exerts an influence not only on the positive definition of the operations subject to the rules concerning conflict of laws but also on the definition of excluded operations.

[19] Cited supra Note 20.
[20] See, to this effect, G.V. Putzolu, "L'influenza della normativa communitaria sul contratto di assicurazione", Assiurazioni, 1991, pp. 116-117.

That administrative classification also guides the distinction between insurance operations and banking operations, as well as between private insurance and social insurance. This observation is important when one considers the extent to which the boundaries of insurance are constantly moving. Certain life insurance operations are currently barely distinguishable from banking operations. While the former are subject to specific rules concerning conflict of laws, the latter come within the purview of the Convention of Rome. In addition, in several Member States, private insurers assume functions approximating social security, such as health insurance and industrial accident insurance.[21]. The application of the rules concerning conflict of laws found in Community directives covering such operations now depends upon the delimitation of the substantive scope of the Belgian supervision regulation.

§ 3. Temporal Field

17. Since the solutions of private international law provided by the Community directives are called upon to replace the former solutions under private international law, the entry into force of the rules concerning conflict of laws specific to insurance policies can give rise to a transitional conflict. Do such new rules apply to current policies or only to policies contracted after the entry into force of the rules?

Neither the FPS directive covering non-life insurance, nor the FPS directive covering life insurance explicitly answers this question, one for which the directives refer to the general rules of private international law of the Member States. Among the transposition laws, the Belgian law is, to our knowledge, the only one to have devoted special attention to the issue. Article 28 (h) of Chapter III (b) governing the non-life insurance activities group in effect provides that the provisions of Articles 28 (c)-(g) do not apply to current policies. Rather curiously, the same solution is not incorporated in Chapter III (c) governing the life insurance activities group. It seems applicable by analogy, however. Article 28 (h) in effect confirms the solution found in Article 17 of the Convention of Rome for all policies and in addition reflects the desire to respect the legitimate expectations of the parties.

The Belgian rules concerning conflict of laws apply therefore only to policies contracted after 11 April 1991 for the "non-life" group of activities, and after 9 February 1993 for the "life" activities group.

[21] See, in this regard, Articles 54 and 55 of the third directive covering non-life insurance (cited supra, Note 3).

SECTION I. THE LAW APPLICABLE TO INSURANCE POLICIES

§ 1. Applicable law Structure

18. The Community rules concerning conflict of laws governing insurance policies present, from the outset, a novel structure compared to the classical dualist structure -- the applicable law in case of choice or in the absence of choice -- rules concerning conflict of laws in contractual matters. The principle of party autonomy is in effect present only as a derogation from a first rule of conflicts, which could be characterized for this reason as "mandatory"[22]. In the FPS directive covering non-life insurance, this primary rule calls for an identity of two objectively-defined territorial connecting factors (the locus of risk and the normal place of residence of the policy-holder), each having to occur in a Member State (Article 7, § 1, a, first sentence). In the FPS directive covering life insurance, the rule relies, on the contrary, on a single territorial connecting factor (the normal place of residence of the policy-holder) which must also occur in a Member State (Article 4, § 1, first sentence).

The principle of party autonomy appears only in second place and in variable proportions with respect to the extent of the choice offered the parties. The concessions made to this principle are of three types. One choice is first of all available in situations characterized by a dispersion of certain connecting factors (FPS directive covering non-life insurance, Article 7, § 1, b, c and e; FPS directive covering life insurance, Article 4, § 2). Even so, this choice is limited among two or several laws constituting an objective link with the situation. This limited choice can then be expanded under a novel method, if and to the extent that a broader choice is authorized by a rule of private international law of the State whose law is made applicable by the primary conflicts rule (FPS directive covering non-life insurance, Article 7, § 1, a, second sentence, and d; FPS directive covering life insurance, Article 4, § 1, second sentence). Complete freedom of choice, in the sense generally understood in private international law, is accorded only for policies covering certain limitatively specified risks (FPS directive covering non-life insurance, Article 7, § 1, f, amended by Article 27 of the third directive covering non-life insurance). The FPS directive covering life insurance does not provide for any case giving rise to complete freedom of choice.

Traditionally, establishment of the principle of free choice of the applicable law entails a subsidiary conflicts rule which prevails in the absence of choice. Since the mandatory rule of conflicts is compulsory in the situations covered by it, the subsidiary rule of conflicts can play only a supplementary role at a third level, when choice was available to the parties but when no use was made of that faculty. Such a subsidiary rule of conflicts is provided by FPS directive covering non-life insurance (Article 7, § 1, h). It is not in the FPS directive covering life insurance where mandatory linkage seems to subsume the case of the subsidiary rule of conflicts.

It is necessary to examine how Belgian law has transposed these Community conflict of laws rules. To do this, each of the provisions of Belgian law will be systematically compared with the corresponding provision of the directive.

[22] Y. Loussouarn, "Les conflits de lois en matière de contrat d'assurance et la directive communautaire du juin 1988", RGAT, 1989, p. 302.

§ 2. Mandatory Linkage

A. In the Case of Non-Life Insurance

The FPS directive covering non-life insurance provides:

> "Where a policy-holder has his habitual residence or central administration within the territory of the Member State in which the risk is situated, the law applicable to the insurance contract shall be the law of that Member State."
> (Article 7, § 1, a, first sentence)

Belgian law provides:

> "Notwithstanding any provision to the contrary, when the policy concerns risks located in Belgium and the insurance policy-holder has it normal residence or its central administration there, the applicable law shall be Belgian law."
> (Article 28 (c), § 1)
>
> "When the policy concerns risks located in a Member State of the European Communities, other than Belgium, and the parties have not specified the applicable law, the policy shall be governed by the law of the Member State where the risk is located."
> (Article 28 (c), § 2 as amended by Article 4 of Royal Decree of 8 January 1993)

19. *Unilateralism or Bilateralization?* Comparative examination of the two provisions immediately discloses a technical difference. While the directive employs the traditional method of bilateral rules for determining the applicable law which allow the designation of a foreign law, the Belgian law initially employs a unilateral method based solely on the assumption that the two connecting factors occur in Belgium. Secondly, it considers the case where the risk is located in another Member State, but by omitting the requirement of identity between the State where the risk is located and the State which is that of the normal residence or the central administration of the policy-holder.

The unilateral character of the transposition must not be ascribed to support, even implicit, by the legislature for the unilateralist doctrine of private international law[23], but simply to a fortuitous and unfortunate influence of methods specific to administrative law since, in this field, it is always and exclusively for the legislature to delimit the jurisdiction of its own national authorities, without concerning itself with the jurisdiction of foreign authorities. The inclusion of conflict of laws rules in the supervision law has unfortunately added to the confusion.

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[23] According to this doctrine, each national legislature should limit itself to determining the spatial aspect of its own rules of substantive law, without seeking to define that of the foreign rules, and the intention expressed with respect to the applicable law must be respected in all legal systems in which the issue is raised. On this doctrine, see P. Gothot, "Le revouveau de la tendance unilatéraliste en droit international privé", RCDIP, 1971, pp. 1-6, 209-243, 415-450; by the same author, "La méthode unilatéraliste et le droit international privé des contrats", Riv. dir. int. pri. e proc., 1979, pp. 5-22.

20. The legislature, being aware of the gaps which such a transposition would not fail to create in private law when the factors of risk and of residence are located abroad, maladroitly attempted to fill them by adding, in Article 4 of the Royal Decree of 8 January 1993, a second paragraph to Article 28 (c) in the case in which the policy concerns risks located in a Member State of the European Communities other than Belgium.

The amendment in question does not, unfortunately, fulfil the objective of bilateralism sought and confuses more than it clarifies, since it no longer is based on the identity between the locus of risk and the normal place of residence of the policy-holder, although that is explicitly provided by Article 7, § 1, a. In addition, by the terms "when the parties have not selected the applicable law", Article 28 (c), § 2, leads one to believe, *a contrario*, that a choice would be available to the parties in the case of a proven identity abroad, which is formally contradicted by the directive, barring an expansion of choice. Lastly, by envisaging the hypothesis of an absence of choice, Article 28 (c), § 2, contradicts the solution provided in this particular case by Article 28 (c), § 7 (linkage with the law of the country with which the policy presents the closest bonds). The incompatibility of Article 28 (c), § 2, with the directive is thus manifest.

In our opinion, the "effectiveness" theory should make it possible for the court and the interpreter to eliminate this defective transposition in order to return to a multilateral interpretation in conformity with Article 7, § 1, (a), first sentence, when the risk and the habitual residence of the policy-holder are situated abroad[24].

21. *Identity of the Connecting Factors*. When the connecting factors of the locus of risk and of the habitual residence or of the central administration of the policy-holder are situated in the same Member State, the law applicable to the contract may only be the law of that State. Subject to derogations authorizing a limited, complete or expanded choice, any clause in derogation of said applicable law will therefore be deemed inexistent. This consequence is rendered by the terms "notwithstanding any provision to the contrary", used by the Belgian legislature.

The convergence on which Article 28 (c) rests, § 1, is indisputably favored by the definition of the place where the risk is presumed to be situated. With three exceptions, this place is in effect defined by Article 2, § 6, of the supervision law, as being that where the policy-holder has his habitual residence or, in the case where the policy-holder is a legal entity, that where the latter's establishment, to which the contract relates, is situated[25].

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[24] According to this theory, the Community rules can be directly invoked to confer on the rules of national law for which they are the source, an interpretation consistent with the content and the aim of the Community rules. Even if the effectiveness is not confused with the direct effect, it must be recognized that it is a convenient means to circumvent the absence of direct horizontal effect of Community directives. On this theory, see, recently, P. Mann, "L'invocabilité des directives: quelques interrogations", R.D.T. Eur., 1990, pp. 669-693. T. Dal Farra, L'invocabilité des directives communautaires devant le juge nationale de la legalité", R.D.T. Eur., 1992, pp. 631-667.

[25] This definition is in accordance with Article 2, d, of the FPS non-life insurance directive, other than the fact that it refers solely to the location of the risk in Belgium. It is true that, at the same time, it serves to delimit the scope of the supervision law.

If the policy-holder is an individual, it can be stated that the applicable law will, in the great majority of cases, be that of the place of habitual residence of the policy-holder[26]. If the policy-holder is a legal entity, a discrepancy can appear if the establishment to which the contract relates is not situated in the same country as the one in which the central administration of the policy-holder is situated[27].

22. Even if it is not drawn from traditional doctrines of private international law, the objective determination of the applicable law based on the identity of the two factors defined above undoubtedly serves a purpose of protection. In effect, it makes it possible to preserve in the majority of cases the legal environment of the policy-holder by guaranteeing application of the law most familiar to the policy-holder. In addition, subject to the expansion of the choice, the mandatory and inflexible nature of such linkage increases the predictability of the solutions and the legal safety of the parties so essential in insurance matters.

The factor of locus of risk also presents, in the eyes of the insurance companies, the virtue of being neutral in terms of competition. In the context of freedom to provide services, it in effect makes it possible to neutralize the disruptive effect which could arise from the divergence from national laws.

23. Although the directive and Belgian law are silent on the point, the identity of the two criteria for determining the applicable law must, normally, be verified at the time the contract is entered into. Subsequent dispersion of the factors (change of habitual residence, change in place of registration, etc.) should entail no change in the applicable law, in conformity with the general rules which govern conflict involving a change or shift in the connecting factor in private international law of contracts. On the other hand, it should not prevent a change in the choice of the applicable law, if such choice is authorized by virtue of the new configuration of the situation.

Since the risk must necessarily be localized on the territory of a Member State in order for the Community rules of conflict of laws to be applicable (paras. 11. and 12. supra), mandatory linkage can never result in determining the applicable law to be other than the law of a Member State of the European Union. We are therefore witnessing a phenomenon of regionalization of private international law, one that is not very compatible with the universalist concept of the rules governing conflict of laws.

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[26] The law of the State where the habitual residence of the central administration of the policy-holder is situated will in effect apply when that State is also:
-- the one where the property is located, for insurance covering real property
-- the one where the vehicle is registered, for insurance covering vehicles of any type
-- the one where the contract was entered into, for insurance covering risks incurred in the course of a trip or vacation, of a duration of less than four months.

[27] The concept of central administration seems to have been borrowed from Article 4, § 2, of the Convention of Rome. As this provision shows, it is not to be confused with the concept of establishment and refers in the most current acceptance to the unit which, in the economic entity constituted by the enterprise, exercises the function of management and control.

B. In the Case of Life Insurance

The FPS Directive governing life insurance provides:

> "The law applicable to contracts relating to the activities referred to in the First Directive shall be the law of the Member State of the commitment" (Article 4, § 1, first sentence).

Belgian law provides:

> "Notwithstanding any provision to the contrary, when the contract relates to risks situated in Belgium, the applicable law shall be Belgian law." (Article 28 (i), § 1, sub-para. 1)
>
> "When the contract relates to risks situated in a Member State of the European Communities other than Belgium, the contract shall be governed by the law of the Member State where the risk is situated." (Article 28 (i), § 2)

24. *Unilateralism or Bilateralization*? The structure of mandatory linkage ("rattachement impératif") in the case of the life insurance contract is parallel to that observed in the case of non-life insurance. Contrary to the Community conflict of law rule which is formulated in bilateral terms from the outset, the Belgian conflict of laws rule first deals with the case where the risk is situated in Belgium and then addresses the case where the risk is situated in another Member State of the European Union.

This method, influenced by the unilateralism of the administrative laws, poses fewer problems here, since the mandatory linkage governing the life insurance contract rests only on a single territorial criterion, the locus of the risk which equates to that of the commitment. The Belgian transposition remains subject to criticism, however, in that it allows one to believe that choice of law would be allowed without reservation when the commitment is situated abroad (para. 23 supra).

Even if the Belgian law formulation is somewhat concise, it seems to conform to the directive. The transition from the law of the locus of the commitment to the law of the locus of risk is not significant, since the definition of the locus of the commitment provided by Article 2, e, of the FPS directive covering life insurance corresponds to the residual definition of the locus of risk according to Article 2, (d), fourth dash, of the FPS directive covering non-life insurance.

25. *Mandatory Linkage ("Rattachement Impératif").* The rule for the determination of the applicable law prescribed by Article 28 (i), § 1 and § 2, proves quite simple in practice. Just as in the case of non-life insurance, it can be deemed mandatory, since with the exception of limitatively specified derogations, it does not admit of any different choice by the parties. It will be noted, moreover, that the concessions made to the principle of party autonomy are far fewer in life insurance. The field of mandatory linkage is therefore broadly defined: it applies both to individual life insurance and to group life insurance, whatever the arrangements for contracting the commitment.

26. *Individual Life Insurance and Group Life Insurance.* When the policy-holder is an individual, the contract is governed by the law of the Member State where the policy-holder has his habitual residence. It is necessary that it be a Member State because one would otherwise be going beyond the field of spatial application of the Community rules of conflict of laws (paras. 11 and 12 supra). The place of habitual residence of the person assured or of the beneficiary have no relevance.

When the policy-holder is a legal entity, the contract is governed by the law of the Member State where the establishment to which the contract relates is situated. This point is important since it means that a group insurance contract entered into by the parent company on behalf of one or more of its subsidiaries will be subject to the law of the place where each of such subsidiaries is established. The rule of mandatory linkage therefore prevents the conclusion of a policy subject to a single law covering personnel employed by establishments situated in different Member States. The rule is especially restrictive since the limited choice that is available to the parties when the policy-holder has his habitual residence in a different Member State than the one of which he is a national, does not come into play when the policy-holder is a legal entity (para. 46 infra).

27. *Active FPS and Passive FPS.* The conflict of laws rule diverges curiously from the approach which served as the basis for the FPS directive covering life insurance for the sharing of administrative law jurisdiction. Thus, freedom of choice is not even available in the cases where the requirement of protection for the policy-holder is deemed less important, thereby justifying the administrative law application of home country control. In effect, application of the law of the place where the risk is situated is required even when the policy-holder has himself taken the initiative of taking out the contract with a Community company established abroad (passive FPS). Even the third directive covering life insurance, which removes all relevance from the distinction between active and passive FPS from an administrative law standpoint, maintains this extremely inflexible solution whose compatibility with Article 49 (formerly 59) of the EC Treaty is open to question.

28. *Justification.* If one is to believe the EC Commission, linkage of the life insurance contract to the law of the place of habitual residence of the policy-holder is justified by the fact that life insurance always concerns, directly or indirectly, an individual (the beneficiary) and that family law occupies a predominant place in it[28]. This explanation is hardly convincing since issues of family law are generally governed in private international law by national law and not by contractual law. In addition, it will be observed that the applicable law chosen is not at all centered on the beneficiary but on the policy-holder[29].

[28] Explanatory Memorandum, COM (88) 729 final - SYN 177, p. 10.

[29] See K. Lenaerts, "La loi applicable et la libre prestation des services en matière d'assurance vie", Ann. Dr., 1990, p. 157, Nos. 15 and 16; M. Fallon, "The law applicable to compulsory insurance and life insurance", Special problems, E.U.I. Colloquium papers, Florence, 23-24 May 1991, p. 7, No. 19, Report published in "International Insurance Contract Law in the E.C.", F. Reichert-Facilides and H.U. Jessurun d'Oliveira, Kluwer-Deventer-Boston, 1993.

The choice of the criterion of the locus of risk defined as being the one where the policy-holder has his habitual residence translates in reality a policy of protection of the policy-holder similar to that which gave rise to the rules of the FPS directive covering non-life insurance. The same criterion also makes it possible to avoid disruptions in competition. This last justification cannot, however, gain acceptance in the light of Article 49 (formerly Article 59) EC, when it is a matter of assessing the compatibility of mandatory linkage with freedom to provide services. On the other hand, the grounds inherent in the requirement for consumer protection can justify a constraint upon the exercise of that freedom, but it must also satisfy a condition of proportionality which does not seem to be fulfilled in the case in point.

§ 3. The Choice of Law Applicable to the Contract

29. In derogation of mandatory linkage, the FPS directives covering non-life and life insurance have not provided for the cases where the contracting parties have the faculty of choosing the law applicable to the contract, either on the basis of a primary conflicts rule (limited choice or complete choice) or on the basis of a secondary conflicts rule drawn from the legal system designated by the primary conflicts rule and expanding the opportunities of choice accorded by this rule of conflicts (expanded choice).

A. Limited Choice

1. In the Case of Non-Life Insurance

30. Belgian law, like the directive, provides for three cases of limited choice which correspond to situations of dispersion of certain significant connecting factors.

a) Lack of Identity Between the Law of the Locus of the Risk and the Law of the Place of Habitual Residence of the Policy-Holder

The FPS directive covering non-life insurance provides:

> "Where a policy-holder does not have his habitual residence or central administration in the Member State in which the risk is situated, the parties to the contract of insurance may choose to apply either the law of the Member State in which the risk is situated or the law of the country in which the policy-holder has his habitual residence or central administration." (Article 7, § 1, b)

Belgian law provides:

> "In derogation of subparagraph 1, when the contract relates to risks situated in Belgium and when the policy-holder does not have his habitual residence or central administration there, the parties to the insurance contract are free to choose to apply either Belgian law, or the

law of the country where the policy-holder has his habitual residence or central administration." (Article 28 (c), § 1, sub-para. 2, as amended by the Royal Decree of 8 January 1993)

"Where the contract relates to risks situated in a Member State of the European Communities, other than Belgium, and the parties have not chosen the applicable law, the contract shall be governed by the law of the Member State where the risk is situated." (Article 28 (c), § 2, as amended by the Royal Decree of 8 January 1993)

31. *Unilateralism or Bilateralization*? Article 28 (c), § 1, sub-para. 2, presents the same anomaly relative to the directive as subparagraph 1. Influenced by the unilateral definition of the field of supervisory administrative regulation, it proceeds first on the assumption that the risk is situated in Belgium.

In its initial formulation, the Belgian rule of conflict of laws not surprisingly failed to take account of the case of the converse assumption in which the risk is situated in another Member State than Belgium. The legislature endeavoured, maladroitly, to bridge this shortcoming by the Royal Decree of 8 January 1993, by connecting the contract in that case to the law of the State where the risk is situated (unless such State allows a broader choice) (Article 28 (c), § 2). We have already had occasion to examine this provision, which is also applicable in the framework of mandatory linkage (para. 23, supra). The provision calls for the same criticism in this context.

This defective transposition could, in our view, be remedied, independently of an action for non-compliance with Community law, by the effectiveness theory of directives, which would make it possible to return to the rule of Article 7, § 1, b, in its multilateral formulation.

32. *Dispersion of the Connecting Factors*. Article 28 (c), § 1, sub-para. 2, directly echoes the first subparagraph. The assumption covered rests on the distribution in the Member States, of the two connecting factors whose coincidence in a single State entails the automatic application of the law of that State. In case of dispersion of the factors, the parties normally have the choice between the law of the State where the risk is located and the law of the policy-holder's habitual residence or central administration. The first law necessarily corresponds to that of a Member State by virtue of the spatial domain of the Community rules of conflict of laws (paras. 11 and 12 supra), the second law can apparently be that of a third country.

33. We have already said that the legal definition of the locus of risk contributed to promoting the identity covered by the first subparagraph and therefore produced a restrictive effect on the choice presented by the second subparagraph (para. 24 supra)[30]. If one agrees to exclude the Belgian rule in favour of a multilateral interpretation in conformity with the directive, the cases in which the parties have the power to avail themselves of such a choice can be placed into four distinctive categories:

[30] To this effect, J. Ripoli, op. cit., Note 6, p. 16; B. Smulders and P. Glazener, op. cit., Note 16, p. 781; M. Fallon, op. cit., Note 15, p. 252, No. 26.

-- the insured property is not in the same State as that in which the habitual residence or central administration of the policy-holder is situated, in the case of insurance covering either real property or real property and its content (insurance on secondary residences or vacation homes located abroad, etc.).

-- the place where the vehicle is registered does not correspond to that where the policy-holder has his habitual residence or central administration, in the case of insurance covering vehicles of any type. These assumptions risk being marginal in the small risks sector. In the case of insurance covering means of marine and air transport and major risk insurance, this choice hardly presents any interest since the parties benefit in that case from totally free choice of the applicable law.

-- the conclusion of the contract does not occur in the same State as that in which the policy-holder's habitual residence or central administration is situated, in the case of contracts of a duration equal to or less than four months, covering risks incurred in the course of a trip or vacation. This situation can exist when the policy-holder concludes a contract in the country of transit or in the country where the policy-holder is spending his vacation. The option which is available to the parties enables the insurer to propose a contract subject to the conditions of the law of the place of conclusion of the contract without being obliged to adapt to the law of the habitual residence of the policy-holder.

-- The State where the central administration of the legal entity entering into the contract is not that where the establishment to which the contract relates is situated, in the case of all other types of insurance. The opening of an option under this assumption appears less clearly from the legislative sources, but emerges from the rapprochement of the respective definitions of the two connecting criteria, the one referring to the subject of the insurance contract, the other to the policy-holder. A dispersion of the two criteria can therefore occur when the insurance is taken out by a legal entity on behalf of one of its establishments[31].

This limited choice in the case of dispersion of two connecting factors does not apply when the contract covers several risks located in different Member States. So extensive an interpretation would render bereft of interest Article 28 (c), § 3, which envisages precisely the assumption of a spreading of risks, but solely in the case in which the policy-holder exercises a commercial or industrial activity or a liberal profession.

b) Spread of Risks over the Territory of Several Member States

The FPS directive covering non-life insurance provides:

> "Where a policy-holder pursues a commercial or industrial activity or a liberal profession and where the contract covers two or more risks relating to these activities and situated in different Member States, the freedom of choice of the law applicable to the contract shall extend to the laws of those Member States and of the country in which the policy-holder has his habitual residence or central administration." (Article 7, § 1, c)

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[31] See to this effect, B. Smulders and P. Glazener, op. cit., Note 16, p. 781; V. Hahn, op. cit., Note 17, p. 32; H.J.G. Van Huizen, op. cit., Note 17, p. 161, No. 4.

Belgian law provides:

> Where a policy-holder pursues a commercial or industrial activity or a liberal profession and where the contract covers two or more risks relating to these activities situated in Belgium and in one or more other Member States of the European Communities, the parties to the contract may choose the laws of the Member States where such risks are situated or the law of the country where the policy-holder has his habitual residence or central administration." (Article 28 (c), § 3)

34. *Unilateralism or Bilateralization?* Continuing the same approach as in the previous paragraphs, Article 28 (c), § 3, assumes that at least one of the risks covered by the contract is situated in Belgium. By force of circumstances, this transposition entails a gap, when one of the risks covered is not situated in Belgium. In that case, which in fact promises to be rare by virtue of the rules of international jurisdiction, it will be necessary to return to the original rule as formulated multilaterally by Article 7, § 1, c, of the directive by taking advantage of the effectiveness principle (see para. 23 supra).

35. *Conditions of Application.* Article 28 (c), § 3, applies when the contract covers several risks spread over the territory of several Member States. The term is misleading, however, since the "risk" must be understood here in the sense of Article 2, § 6, of the Belgian supervision law and not in the sense which is generally accorded it in contract law.

Thus, the choice presented by this article redounds to the benefit of the parties when the contract covers, for example, several buildings (real property insurance), a fleet of vehicles registered in several Member States (vehicle insurance), or several establishments of a multinational company (insurance contracted by a legal entity). On the other hand, the contract covering the civil liability of a company on the occasion of the opening of several building sites in the European Union does not benefit from such choice, since the risk is deemed to be situated in that case in the place of the policy-holder's habitual residence.

When there exists a true spread of risks, the parties may elect to subject the contract to a single law among those indicated. But they are also free to conclude separate contracts on the basis of the situation of each risk. It is, moreover, this latter solution which will be applied if the parties have made no election (see Article 28 (c), § 7).

Although the law where the risk is situated can never be other than that of a Member State -- a conclusion which is logical given the spatial aspect of the rules of Community conflict of laws (para. 11 supra), the same requirement is not apparently stipulated for the relative to the central administration or the habitual residence of the policy-holder who may be situated in a third country.

36. It should be noted that the choice presented by Article 28 (c), § 3, benefits the parties only if the policy-holder exercises a commercial or industrial activity, or a liberal profession[32] and when the insurance contract covers that activity or profession. A significant connection must therefore exist between the occupational or professional activity and the insurance contract. This condition will, of course, be a delicate one to assess in the case of mixed contracts covering both occupational or professional activity and private activity.

37. *Justification.* Article 7, § 1, (c), doubtless finds its justification in the determination to encourage global European policies. By authorizing choice of a single law, Article 28 (c), § 3, in effect promotes the marketing of such policies by withdrawing their *raison d'être* from *fronting* policies concluded on the basis of local conditions, subject to the important reservation, it is true, of respect for the "internationally mandatory rules".

c) The locus of the accident

The FPS Directive covering non-life insurance provides:

> "Notwithstanding subparagraphs (a), (b) and (c), when the risks covered by the contract are limited to events occurring in one Member State other than the Member State where the risk is situated, as defined in Article 2 (d), the parties may always choose the law of the former State." (Article 7, § 1, e)

Belgian law provides:

> "Notwithstanding §§ 1, 2 and 3, where the contract covers risks situated in Belgium but such risks are limited to accidents which can occur in another Member State of the Community, the parties to the contract may choose the law of that State." (Article 28 (c), § 5)

38. *Principle.* In addition to the cases examined above, Article 28 (c), § 5, enables the parties to choose the law of the Member State of the locus of the accident, when the risks covered by the contract are limited to accidents which can occur in a Member State different from the one where the risk is situated.

This article constitutes an anomaly in international law, since up to that point, neither case law nor doctrine had conferred particular significance on the locus of the accident to determine the law applicable to the insurance contract[33]. This lack of interest is readily understood given the purely fortuitous nature of the locus of the accident, knowable only after the conclusion of the contract.

[32] The French translation of the directive might lead one to believe that artisanal activity is excluded, but it would be difficult to understand the reasons for such an exclusion.

[33] See W.H. Roth, op. cit., Note 7, pp. 388-389; F. Monette, A. De Ville, R. Andre, "Traité des assurances terrestres", Vol. II, Brussels, Bruylant, 1955, p. 516, No. 787.

The very ambiguous formulation of Article 7, § 1, e, indicates, however, that a choice is available to the parties only if the insurance guarantee is territorially limited to accidents which can occur in a single Member State different from the one where the risk is situated. Since it is a matter of determining the applicable law for a contract, this assessment must be able to be made as soon as the contract is concluded. Nor can there be any question of resorting to *dépeçage* (severing) according to the possible location of each accident, since the choice is not available when the cover extends to the territory of several States[34].

It is true that under these conditions, the rule is of a very limited interest. The case is often cited of a factory in France, located on the Rhine at the Franco-German border, whose wastes were allegedly creating a risk of pollution for the German neighbor[35]. One can also imagine a civil liability insurance guarantee product covering only accidents occurring in a Member State different from that where the risk is situated within the meaning of Article 2, § 6, of the supervision law. Article 28 (c), § 5, does not, however, limit its scope to civil liability insurance. It may also be invoked in the case of multi-risk residential insurance covering solely the furniture of a house situated abroad.

39. *Implementation.* Article 28 (c), § 5, continues to take as the norm the case where the risks are situated in Belgium. If the risks are situated in another Member State, the multilateralization of the rule could be achieved by recourse to the effectiveness of directives theory (para. 23 supra).

The law which may be chosen under this provision may not be other than that of a Member State. The trend toward a certain regionalization of private international law, already condemned, is especially clear here since the locus of the accident, unlike the locus of risk, does not constitute a criterion for delimitation of the spatial aspect of the Community conflict of laws rules.

2. *In the Case of Life Insurance*

40. Unlike the FPS Directive covering non-life insurance, the FPS Directive covering life insurance provides only a single case of limited choice. It corresponds to the lack of identity of the criteria of nationality and of the habitual residence of the policy-holder. On the other hand, the FPS Directive covering life insurance includes no special solution in the case of spread risks.

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[34] To this effect, A.F. Logez, "L'Europe de la liberté d'établissement et de prestation de services", Ed. L'Argus, Paris, 1991; V. Hahn, op. cit., Note 17, p. 41; *contra* M. Fallon, op. cit., Note 15, p. 251, No. 24.

[35] J. Bigot, "La loi No. 89-1014 of 31 December 1989 portant adoption du Code des assurances à l'ouverture du Marché européen des assurances: la directive du 22 juin 1988 sur la libre prestation des services", R.T.D. Eur., 1998, p. 670, No. 38.

a) Lack of Identity Between the National Law and the Habitual Residence of the Policy-Holder

The FPS Directive covering life insurance provides:

> "Where the policy-holder is a natural person and has his habitual residence in a Member State other than that of which he is a national, the parties may choose the law of the Member State of which he is a national." (Article 4, § 2)

Belgian law provides:

> "In derogation of subparagraph 1, where the policy-holder is a natural person who has his habitual residence in Belgium but is a national of a Member State of the European Communities other than Belgium, the parties may choose to apply the law of that State (Article 28 (i), § 1, subparagraph 2)
>
> Where the contract covers risks situated in a Member State of the European Communities other than Belgium and the parties have not chosen the applicable law, the contract shall be governed by the law of the Member State where the risk is situated (Article 28 (i), § 2)

41. *Unilateralism or Bilateralization?* Articles 28 (c), § 1, subparagraph 2, and 28 (c), § 2, similar to those found in non-life insurance, call for the same comment in terms of their compatibility with the FPS Directive covering life insurance. This defective transposition must be corrected in conformity with the spirit of the directive (see para. 23 supra).

42. *Dispersion of the Connecting Factors.* When the policy-holder does not have the same nationality as that of the Member State where he has his habitual residence, the parties may chose either law to govern their contract. This limited choice is available, however, only when the policy-holder is a natural person. It did not seem appropriate to extend it to companies which enter into group insurance contracts on behalf of their staff.

In the case of a choice which the parties had to exercise at the time of the conclusion of the contract, change of nationality or of residence after the conclusion of the contract will, in theory, have no impact on the applicable law[36].

The emergence of the criterion of nationality in the field of international contracts may be cause for wonder, especially since it is not a very popular connecting factor in Common Law countries where its application poses a problem[37]. Contrary to what one might believe, this choice is not explained

[36] To this effect, K. Lenaerts, op. cit., Note 31, p. 157, No. 15.

[37] Considering the inter-territorial spread of the legislative jurisdiction, there is no British law which allows a British subject a choice in a case where he has his residence in another Member State. Supposing that a choice were theoretically available between the law of each component territory of the United Kingdom, the question of knowing what legal link must exist between the law of such territory and the policy-holder so that said law can be recognized as being his national law is practically insoluble (see on this issue, C.G.J. Morse, E.U.I. Colloquium papers, Florence, 23-24 May 1991, p. 30, Edit. cited Note 31).

by the idea that most often family relations exist between the insured and the beneficiary. It is a matter of enabling those who take advantage of freedom of movement of persons to make their life insurance subject contract to the law of the State whose nationality they have and to which they plan to return when retired[38].

The wording of Article 4, § 2, of the FPS Directive covering life insurance, transposed by Article 28 (i), § 1, subparagraph 2, clearly shows that the choice between the law of the locus of risk and the national law of the policy-holder may only be exercised if the policy-holder possesses the nationality of a Member State. This requirement is consistent with the aim sought. Freedom of movement of workers under Article 39 (formerly 48) EC only redounds to the benefit of nationals of Member States.

b) Spread of Risks Covered by the Contract

43. The FPS Directive covering life insurance includes no provision similar to those of Article 7, § 1, c, of the FPS Directive covering non-life insurance. By the definition given to the locus of commitment, Article 28 (i), § 1, subparagraph 1, in effect requires the law applicable to the life insurance contract to be that of the location of each establishment, thereby preventing marketing of single European policies in the form, for example, of supplementary retirement plans covering all the personnel of a multinational company.

It is necessary, however, not to overstate the importance of these restrictions in international practice. In this sector as well, international economic operators have been able to accommodate to the divergence in national legal systems administratively, fiscally and contractually. International insurance "pools" have been created by insurance companies already well-established in the European Union[39].

B. Expanded choice

44. *Expansion of Choice*. By resorting to a method that is both complex and innovative, the FPS Directives covering life insurance and non-life insurance authorize a broader choice of applicable law than that provided for in the cases examined, to the extent that the law or laws of the Member State designated by the relevant rule of conflict of laws so permit.

This expanded choice made available by the FPS non-life insurance Directive in the three cases covered by Article 7, § 1, (a), (b) and (c) (but not (e)). It is covered by the FPS life insurance Directive only in the case covered by Article 4, § 1, and not in that covered by Article 4, § 2.

Belgian law incorporates, in terms whose appropriateness is open to evaluation, the possibility of an expanded choice in the two cases covered by Article 28 (c), § 2 and § 3 of the directive covering

[38] To this effect, A. Gianella, "La libre prestation de services dans le domaine des assurances", R.M.C., 1991, p. 131.
[39] See P. Sailly, "Appel aux poolings", L'Argus, 3 July 1992, p. 28.

non-life insurance[40]. This possibility does not appear in Article 28 (i) of the Directive covering life insurance.

45. *Justification and Technical Analysis.* At first blush, it may seem contradictory, on the one hand, to oblige each Member State to exclude or to limit free choice of the applicable law, and on the other hand, to allow the Member State to derogate from that exclusion or limitation at the secondary level when its own law is declared applicable by the primary rule of conflict of laws[41].

The intention of the Community legislature was clear, however. It was to provide satisfaction to the Member States which accorded a very broad freedom of choice to the parties before the directives and which did not intend to restrict the choice after their adoption. This safeguard seemed especially legitimate since the principle of autonomy of the parties of will seemed to go in the direction of freedom to provide services[42].

The introduction of different levels in the settlement of conflicts of the laws specific to the insurance contract carries with it marks of compromise. This compromise is not resolved, however, by an option in the traditional sense of the term since it does not allow the Member States to derogate from the primary rules of conflict of laws in a liberal sense. It is only at the secondary level, i.e. after the application of the primary rule of conflict of laws, that the Member State or States determined to be concerned by the situation under this rule, have the power -- if they so wish and as regards them -- to opt for an expansion of the choice granted to the parties. Only this method made it possible to maintain a certain uniformity in the solution of conflict of laws among the Member States.

46. The ambiguity and the difficulty of the method used consisted of the fact that it authorizes each Member State to do under a secondary rule of conflict of laws what that Member State is prohibited from doing under the primary rule of conflict of laws. In other words, it is only if the State in question is that in which one of the connecting factors called for by the primary rule of conflict of laws is substantiated that the expanded choice accorded at the secondary level can be made available to the parties. At a technical level, the possibility of expansion at the secondary level renders the transposition especially difficult since it requires the State that wants to take advantage of it to maintain two different rules of conflict of laws in its legal system to govern similar situations.

If the reference made by the FPS Directives covering life insurance and non-life insurance is understood as a reference to the determination of applicable law rules of the State found to be concerned by the situation, the method used can be analyzed under the general theory of private

[40] Before its amendment, the Royal Decree of 22 February 1991 provided for the option of an expanded choice only in the case of lack of identity between the locus of risk and the place of habitual residence then covered by Article 28 (c), § 2, and in that of the spread of risks covered by Article 28 (c), § 3. The amendment effected by the Royal Decree of 8 January 1993 entailed the integration of the case covered by § 2 into § 1, but Article 28 (c), § 4, which provided for the possibility of an extension of the choice, by reference to § 2 and to § 3, remained unchanged.

[41] M. Fallon, op. cit., Note 15, p. 263, No. 37, Y. Loussouarn, op. cit., Note 24, p. 298.

[42] That is why several authors see in the expansion of choice at the second level an application of the "stand still" principle enunciated in Articles 53 and 62 of the Treaty. See F. Reichert-Facilides, op. cit., Note 16, p. 11; A. Gianella, op. cit., Note 41, p. 125; B. Smulders and P. Glazener, op. cit., Note 16, p. 782.

international law, as an application of renvoi[43], but a substantive renvoi since it relates to a specific objective: the expansion of choice[44].

47. The possibility of an expansion of choice is provided in the non-life insurance field by Article 28 (c), § 4.

> "Notwithstanding § 1, subparagraph 2, §§ 2 and 3, when the Member States mentioned in these paragraphs grant a broader freedom of choice of the law applicable to the contract, the parties may avail themselves of this freedom.

The transposition effected by the Belgian legislature does not excel by its clarity. It is true that the amendments made to Article 28 (c) by the Royal Decree of 8 February 1993 to avoid the gaps of unilateral transposition have further aggravated the situation, since the reservation for expansion of choice provided by Article 28 (c), § 4, was not adapted to the new numbering of the paragraphs.

The Belgian rule appears open to criticism first because it eliminates the possibility of expansion of choice when identity between the country of risk and that of the habitual residence of the policy-holder is determined to be abroad. In effect, since the provision for expansion of choice has not been transposed, the renvoi lacks, from the outset, an essential condition for its implementation. To our mind, the Member States had no option in this regard. The directives give every State the possibility of expressing itself on such expansion when the State itself is designated, but not the possibility of undermining the machinery at its base by eliminating the legislative power of the foreign legislature.

48. To achieve multilateralization of the rules of conflict of laws formulated unilaterally, the Royal Decree of 8 February 1993 added in paragraph 1 the case of lack of identity provided initially by paragraph 2, the latter having now been given over to the case where the risks are situated in a Member State of the European Communities other than Belgium. At the same time, Article 28 (c), § 4, has remained unchanged even though the provision for expansion of choice currently refers to all cases where the risks are situated outside Belgium, as well as to the cases of spread of risks located in different Member States including Belgium. It is possible to extricate ourselves from this tangled state of affairs only by returning to the rules of conflict of laws as initially formulated by Article 7, § 1, (a) and (d), of the directive, with the provision for expansion.

The law is unfortunately no clearer as regards the position taken by the Belgian legal system on such expansion in cases in which that system is determined to be concerned by the situation under the terms of the primary conflict of laws rule. No rule expressly indicates the rule of conflict of laws by which such expansion must be evaluated.

[43] To this effect, P. Lagarde, op. cit., Note 17, p. 148; H. Cousy, "Le droit applicable au contrat d'assurance dans le marché unique européen", Rapport final au Colloque d'Avignon, 4-7 October 1991, Risques, 1991/8, p. 113; F. Reichert-Facilides, op. cit., Note 16, p. 5; C.J. Berr, op. cit., Note 17, which considers that the reference to national law must be analyzed as a reference to the rules of domestic substantive law.

[44] F. Rigaux and M. Fallon, op. cit., Note 13, No. 1332.

49. As regards life insurance, Article 28 (c) adopts a low profile, since it includes no reference to the possibility of an expanded choice. By deleting the provision set forth in Article 4, § 1, second sentence, the Belgian legislature prevents the parties from relying upon the expansion possibly granted by the legal system of another Member State where the risk is situated within the meaning of Article 2, § 6, of the Belgian supervision law, which appears to us to be contrary to the directive.

50. *Implementation.* As the substantive renvoi machinery is based on the coexistence in the same legal system of a mandatory or limitative rule of conflict of laws and a permissive rule of conflict of laws, it is clear that it can only operate in a closed system, in the sense that the permissive rule of conflict of laws applicable at the secondary level can only be borrowed from the legal system of another Member State. On the other hand, this permissive rule can perfectly well authorize the choice of the law of a Third Country. The technique of renvoi requires, however, borrowing the procedures and the limits of such choice from the legal system declared to have jurisdiction by the primary rule of conflict of laws[45].

Application of expansion of choice entails particular difficulties when the primary rule of conflict of laws offers a limited choice among the laws of several Member States. That is the situation in the cases covered by Article 7, § 1, (b), and 7, § 1, (c), of the FPS Directive covering non-life insurance. Is it then necessary for each of the States to grant a broader freedom of choice than that accorded by the primary rule of conflict of laws in order for the machinery of expansion to come into play? A literal interpretation of Article 7, § 1, (d), which covers *the* Member States would lead one to answer this question in the affirmative[46]. A teleological interpretation might make it possible to justify a converse solution, since it is not normal for the possibilities of expansion of choice to gradually dwindle as the dispersion of the elements of the situation increases. The Community origin of the rules of conflict of laws should lead to preferring the interpretation which militates in favour of freedom to provide services. Similarly, it does not seem necessary for the choice of the parties to turn on a law whose authority is recognized by all the contending permissive rules of conflict of laws[47].

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[45] To this effect, Ph. H.J.G. Van Huizen, op. cit., Note 17, p. 166; Y. Loussouarn, op. cit., Note 24, p. 299; J. Basedow and W. Drasch, op. cit., Note 16, p. 792.

[46] To this effect, P. Lagarde, op. cit., Note 17, p. 148; Y. Loussouarn, op. cit., Note 24, p. 300; K.W. Brevet, op. cit., Note 17, p. 25; O. Lando, "Mandatory rules governing Insurance Contracts and Private International Law", E.U.I. Colloquium papers, Florence, 23-24 May 1991, p. 8, Edit. cited Note 31; M. Frigessi di Rattalma, "Osservazioni sui profili internazionali privatistici della seconda directiva communitaria sull' assicurazioni contro i danni", Riv. dir. int. pr. e. pr., 1989, p. 577; L. Forlati-Picchio, p. 70 and 185, "La legge applicabile ai contratti di assicurazione e diritto communitario", in Dir. comm. scambi int., 1983, p. 78. Article also published in *Verso una disciplina communitaria della legge applicabile ai contratti.* A cura di Tullio Treves, Padova, Cedam, 1983, p. 195.

[47] To this effect, J. Basedow and W. Drasch, op. cit., Note 16, p. 792; M. Frigessi di Rattalma, op. cit., Note 50, p. 577; F. Reichert-Facilides, op. cit., Note 16, pp. 5-6; the relevance of the reference to freedom to provide services is disputed by V. Hahn, op. cit., Note 17, pp. 33-34.

1. In the Case of Non-Life Insurance

The FPS Directive covering non-life insurance provides:

> "For the risks referred to in Article 5 (d) (i) of the first Directive, the parties to the contract may choose any law." (Article 7, § 1, f)

The Third Directive covering non-life insurance provides:

> "In the case of the risks referred to in Article 5 (d) of Directive 73/239/EEC, the parties to the contract may choose any law." (Article 27)

Belgian law provides:

> "For large risks as defined by the King, the parties are free to choose the applicable law." Article 28 (c), § 6, subparagraph 1)

51. *Risks That Benefit From Complete Freedom of Choice.* Initially, the FPS Directive covering non-life insurance accorded full freedom of choice only to contracts covering risks referred to in Article 5, (d), (i), i.e. transport risks classified under branches No. 4 (bodies of railway vehicles); No. 5 (bodies of air vehicles); No. 6 (bodies of maritime, lake and river conveyances); No. 7 (goods transported, including merchandise, baggage and all other property); No. 11 (civil liability covering maritime, lake and river conveyances, including carrier's liability).

Subsequently, Article 27 of the third FPS Directive extended freedom of choice to all large risks as defined in Article 5, d. The Belgian legislature seems to have taken this step with the transposition of FPS Directive covering non-life insurance. Article 28 (c), § 6, of the Royal Decree of 22 February 1991 in effect refers to large risks "as defined by the King". This definition can be inferred from Article 1 of the same royal decree by reference to all large risks.

52. *Principle and Limits of Choice.* When the risks covered by the contract come within the category indicated, the parties may choose "any law". The expression used in the directive, but not by Belgian law, indicates that the choice of the parties is not limited to the law of a Member State. It can be the law of a third country, even if that country has no link to the contractual situation[48].

Such freedom is not total, however. It does not, of course, prevent laws relating to public policy from coming into play. It is, in addition, tempered by Article 28 (c), § 6, subparagraph 2, which provides that " the choice by the parties of a law other than Belgian law may not -- when all the elements of the contract are located at the time of said choice on the territory of Belgium -- undermine the mandatory provisions of Belgian law."

[48] To this effect, M. Fallon, op. cit., Note 15, p. 252, No. 25; C.G.J. Morse, op. cit., Note 40, p. 7.

Article 28 (c), § 6, subparagraph 2, transposes in unilateral terms Article 7, § 1, g, of the FPS Directive covering non-life insurance in the sense that no solution is provided when all the elements of the contract are located on the territory of another Member State[49]. In any event, this rule is based on the interest of preserving the authority of the mandatory rules in the national law sense, defined as the provisions which may not be derogated from by contract.

2. *In the Case of Life Insurance*

53. Article 4 of the FPS Directive covering life insurance provides no case in which the parties may benefit from a full choice of applicable law by virtue of a primary rule of conflict of laws. The third directive provides no change in this regard.

This omission may cause puzzlement since the rules of conflict of laws thus do not reflect any influence of the administrative distinction between commitments made through active FPS which require protection in the country of habitual residence of the policy-holder, and the commitments made through passive FPS which do not require such protection. By making no adjustment, or only slight adjustment, to the restrictions on free choice on the basis of this distinction, one might think that Article 4 extends the protection of the policy-holder beyond what is necessary to the achievement of the objective, so as to call into question its compatibility with Article 49 (formerly 59) of the EC Treaty.

§ 4. Lack of Choice of Applicable Law

A. In the Case of Non-Life Insurance

The FPS Directive covering non-life insurance provides:

> "The choice referred to in the preceding subparagraphs must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. If this is not so, or if no choice has been made, the contract shall be governed by the law of the country, from amongst those considered in the relevant subparagraphs above, with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country, from amongst those considered in the relevant subparagraphs, may by way of exception be governed by the law of that other country. The contract shall be rebuttably presumed to be most closely connected with the Member State in which the risk is situated." (Article 7, § 1, h)

Belgian law provides:

> "The choice referred to in §§ 2, 3, 4, 5 and 6, must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. If this is

[49] Article 7, § 1, g, is itself drawn from Article 3, § 3, of the Rome Convention.

not so, or if no choice has been made, the contract shall be governed by the law of the country, from amongst those considered in §§ 2, 3, 4, 5 and 6, with which it is most closely connected.

"A severable part of the contract which has a closer connection with another country, from amongst those considered in the paragraphs cited above, may be governed by the law of that other country.

"The contract shall be rebuttably presumed to be most closely connected with the country in which the risk is situated." (Article 28 (c), § 7)

54. *Field of Application.* The applicability of a mandatory conflict of laws rule considerably reduces the role of subsidiary connection ("rattachement subsidiaire"). Subsidiary connection in effect applies only outside the provisions of Article 28 (c), § 1, subparagraph 1, if a choice (limited, expanded or full) was available to the parties but was not exercised. It can also be applied when a limited choice was possible but when the parties exercised that choice beyond the limitations authorized.

The absence of choice is not inferred automatically from the absence of an express contractual clause. Subsidiary connection will also be excluded when a choice results implicitly, but with certainty, from the clauses of the contract or from the circumstances of the case. In our opinion, the certain choice assumes awareness by the parties of the problem of conflict laws and a determination by them to resolve it[50].

Use of a standard contract governed by a particular system probably constitutes an important indicium in the insurance sector. The Explanatory Report of the Convention of Rome, Article 4 of which inspired the directive, cites as an example the utilization of a Lloyd's maritime policy[51]. This assessment surely should be qualified since the widespread use of English maritime insurance policies in the international transport sector reduces the significant nature of this indicium as an element of a certain choice of law applicable to the contract. The use of a standard contract or of standard clauses in reality has a decisive indicative value only when an effective and exclusive link exists between the standard contract or clauses and a national legal system[52].

55. The role of subsidiary connection has been even further reduced since the entry into force of the third directive covering non-life insurance. Article 31, § 1, of the directive in effect obliges the insurer to inform the policy-holder before conclusion of the contract, "of the law applicable to the contract where the parties do not have a free choice, or of the fact that the parties are free to choose the law applicable and, in the latter case, of the law which the insurer proposes to choose". In all likelihood, this obligation will be satisfied by a written clause inserted in the insurance proposal and

[50] See A.L. Diamond, "Harmonization of private international law relating to contractual obligations", Rec. Cours ADI, 1986, IV, p. 256.
[51] Note 11, cited supra.
[52] To this effect, A. Boggiano, "International Standard Contracts. The Price of Fairness", Graham & Trotman, 1991, pp. 20-22; W.H. Roth, op. cit., Note 7, p. 573; C.G.J. Morse, op. cit. Note 40, pp. 4-5; P.M. North, "Reform but not Revolution", Rec. Cours ADI, 1990, I, p. 155.

subsequently incorporated in the contract if the parties agree on the choice (when the choice is available). It should be noted, however, that the obligation to inform is present only when the contract is entered into with an individual.

56. *Technique of Determination of the Law Applicable to the Contract in the Absence of Choice.* On initial examination, the system of subsidiary connection provided by Article 28 (c), § 7, seems quite close to that provided by Article 4 of the Convention of Rome. One finds in it concern for a supple and flexible connection ("rattachement") to the law of the country with which the contract presents the closest links, corrected by a presumption which makes it possible to guarantee a certain predictability of the applicable law in the absence of choice. It differs therefrom, however, on two basic points. On the one hand, it limits the laws capable of being taken into consideration to effect the subsidiary connection, and on the other hand, it modifies the connecting factor intended to give concrete form to the presumption.

57. *Limitation of the Laws Capable of Being Taken into Consideration.* Out of concern for restricting the court's discretion and for reducing the uncertainties specific to the method of the objective localization of the contract, Article 7, § 1, h, of the directive, transposed by Article 28 (c), § 7, limits the number of laws which can be taken into consideration on the basis of subsidiary connection. This connection depends solely on the connection criteria referred to in the previous provisions. The court may therefore take into consideration only the law which would be the subject of a choice by the parties under the rules provided by Article 28 (c), § 2, § 3, § 4, § 5 and § 6.

Belgian law is more specific in this regard than the directive, which satisfies itself with a reference to the countries "which are taken into account under the terms of the previous items". This reference posed a problem in effecting the "rattachement" of contracts covering risks for which the parties enjoy complete freedom to choose the applicable law. There existed, in that case, no indicium permitting an objective localization of the contract. One was prompted to wonder then whether, under those conditions, the court refound total discretion to designate the law with which the contract presents the closest links[53]. The reference made by the Belgian Royal Decree to Article 28 (c), § 6, makes it possible to reply to that question in the affirmative[54].

The reference to Article 28 (c), § 2, must, on the other hand, be considered as an anomaly, because since the criticizable amendment made by the Royal Decree of 8 January 1993, this paragraph clearly envisages the assumption of failure of choice, introducing a clear contradiction already noted above, between paragraph 2 and paragraph 7 (para. 23, supra).

This novel indicative method probably finds its justification in the concern for avoiding the uncertainties inherent in the search for the center of gravity of the contract. By selection of the connecting criteria, the directive increases predictability and, at the same time in the majority of

[53] M. Fallon, op. cit., Note 15, No. 27; M. Frigessi di Rattalma, op. cit., Note 50, p. 583.
[54] A similar response can be provided to the question of whether, among the laws which enter into consideration under the previous points, it is necessary to include the laws of the States which might have been able to be the subject of an expanded choice. Article 28 (c), § 7, makes express reference in fact to § 4.

cases, prevents the law of the insurer's regular and established place of business being invoked to govern the contract. This law may in fact be selected on the basis of an objective localization only in cases where the parties have been able to enjoy a full or expanded choice. This trend is further strengthened by the presumption in favor of the law of the place where the risk is situated.

58. *The Presumption in Favor of the Member State Where the Risk Is Situated.* Article 28 (c), § 7, sub-para. 3, resolutely excludes the presumption provided by Article 4, § 2, of the Convention of Rome, in favor of the country where the party who is to provide the characteristic service has his habitual residence at the time of the conclusion of the contract or, if the party is a company, association or legal entity, its central administration. The application of this presumption to the insurance contract would inevitably lead to privileging the law of the jurisdiction of the regular and established place of business. The directive prefers the law of the place where the risk is situated -- which can only be that of a Member State -- by pointing out the central role played by this criterion in the Community system[55].

Placed back in the context of freedom to provide services, this presumption undoubtedly responds to an objective of protection of the policy-holder, an objective considered legitimate by the Court of Justice in the decisions of 4 December 1986, in the absence of harmonization of insurance conditions[56].

B. In the Case of Life Insurance

59. Rather curiously, Article 4 of the FPS life insurance directive includes no provision specifically settling the determination of the law applicable to the contract in the absence of choice. This gap can be explained by the importance conferred on the mandatory rule of conflict of laws, whose field is so broadly defined that it seems to include even the case of the absence of choice.

In rare cases where the parties enjoy a limited or expanded choice of the law applicable to the contract, but where the parties have not availed themselves of that choice, the contract will be governed, in accordance with Article 28 (i), sub-para. 1, and § 2, by the law of the Member State where the risk is situated, i.e. by the law of the place where the habitual residence of the policy-holder is situated or, if the policy-holder is a legal entity, the law of the jurisdiction of the regular and established place of business to which the contract relates.

We note that Article 31 of the third directive covering life insurance of 10 November 1992 also requires the insurer to inform the policy-holder, clearly, accurately and in writing, prior to the conclusion of the contract, of the law which will be applicable to the contract or the law which the insurer intends to choose if the parties have the possibility of choice, thereby reducing the need for subsidiary connection (see Annex II of the third life insurance directive). In addition, in the life

[55] The non-life FPS directive, contrary to the Convention of Rome, does not resolve the issue of a change or shift in a conncecting factor. Article 4, § 2, of the Convention provides that the connection criterion is evaluated at the time of conclusion of the contract. In our opinion, this solution must also prevail in the insurance field.
[56] See V. Hahn, op. cit., Note, p. 56.

insurance sector, the obligation to inform is not limited, as in non-life insurance, to the cases where the contract is entered into by an individual.

Section III. Laws Relating to Public Policy and Fundamental Tenets of Justice under Private International Law

60. The modes of settlement of conflicts of law such as we have examined them until now can be disrupted by the intervention of the various mechanisms which seek to exclude or to override contractual law in private international law matters.

First of all, private international law recognizes the existence of internationally mandatory rules which apply an approach specific to them, and which take precedence over the substantive provision of the law called upon to govern the contract. These rules are called "lois de police" in the French version and "Mandatory Rules" in the English version of Article 7 of the Rome Convention upon which Article 7, § 2, of the non-life FPS directive and Article 4, § 4, of the life FPS directive draw. Herein the term "lois de police" is rendered by "laws relating to public policy".

More conventionally, the general theory of private international law also recognizes the existence of a mechanism that makes it possible to override the law designated by the conflict of laws rule, when that rule shows itself to be incompatible with the fundamental concepts of the forum. The mechanism is that of international fundamental tenets of justice ("l'ordre public international") in the private international law sense.

The first concept appears expressly in Article 28 (d) of the Belgian law as regards non-life insurance and in Article (j) as regards life insurance. The second is not explicitly articulated but is no less applicable under the general rules of private international law concerning contractual obligations referred to in Article 7, § 3, of the non-life FPS directive and in Article 4, § 5, of the life FPS directive.

In both cases, the key problem consists of loosening the implicit links which exist between concepts of national law (fundamental tenets of justice, mandatory rules) and concepts of private international law (international public policy and internationally mandatory rules). We have already devoted a study to this delicate issue. We shall only restate the key elements here[57].

§ 1. Laws Relating to Public Policy in the General Theory of Private International Law

61. The role of laws relating to public policy is a key question for the international insurance contract. Article 3 of the new Belgian law of 25 June 1992 on the national insurance contract

[57] B. Dubuisson, "Unité ou diversité des notions d'interêt général d'ordre pubic et de normes impératives dans les directives communautaires relatives aux assurances", in *L'Europe de l'Assurance, Les directives de la troisième génération,* Maklu - Academia - Bruylant, 1992, pp. 187-260.

provides that all provisions which the law contains are mandatory, except when the possibility of derogating therefrom appears from the language itself. It is therefore appropriate to ask whether the mandatory nature of such rules recognized by national law is maintained in private international law or whether the only rules from which the parties may derogate by contract are laws relating to public policy under private international law.

62. There hardly exists doctrinal or jurisprudential unanimity on the substance and scope of the concept of laws relating to public policy.

According to the well-known definition proposed by P. Francescakis, "the laws relating to public policy would be the laws whose observance is necessary for the safeguard for the political and social organization of the country"[58]. The element of state organization which they entail requires that they apply whatever the extraneous element affecting the situation.

This definition is open to criticism in that it perpetuates the confusion between fundamental tenets of justice in the national law sense and laws relating to public policy[59]. According to this concept, laws relating to public policy are nothing other than the manifestation in private international law of the fundamental tenets of justice of national law, whence the term sometimes used of "laws reflecting the fundamental tenets of justice" ("lois d'ordre public"). Based on a notion as difficult to circumscribe as that of collective interest or of political, social or economic organization, the conceptual approach does not constitute real progress in the delimitation of the concept[60].

According to a functional approach, laws relating to public policy seem to be rather like laws whose content and purpose call for their application to situations which are not subject to it by the rule of conflict. The purpose which they pursue requires in the eyes of the national legislature that they be given a scope which is directly adapted to that objective. It is the close link between their purpose or their content and their scope which constitutes the key characteristic of laws relating to public policy[61].

63. Whether they are understood in a conceptual or only in a functional sense, laws relating to public policy are primarily the expression of a specific character which intends to see prevail the concepts of a State that is resolute as regards normal solutions of the rules of "rattachement". As such, they disrupt considerably the resolution provided by the rule of conflict of laws. This danger is all the greater since national authorities appear as the sole masters of the importance which they wish to give to the concept of laws relating to public policy. The situation is the same with respect to their field of spatial application. In effect, public international law apparently contains no

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[58] P. Francescakis, Rép. Dr. Int., Conflit de lois, No. 124 and 137; by the same author "Quelques précisions sur les lois d'application immédiate et leurs rapports avec les règles de conflit de lois", RCDIP, 1966, pp. 1-18, spéc. p. 12; "Lois d'application immédiate et règles de conflit", Rev. dir. int. pri. et pre., 1967, p. 691.
[59] See in particular P. Mayer, "Les lois de police étrangères", Clunet, 1981, p. 291, No. 16.
[60] P. Mayer, "Les lois de police", Travaux du Comité fr. de D.I.P., CNRS, 1988, p. 107; P. Gothot, "Le renouveau de la tendance unilatéraliste en droit international privé", RCDIP, 1971, p. 209 and 415; P. Francescakis, "Quelques précisions sur les lois d'application immédiate et leurs rapports avec les règles de conflit de lois", op. cit., Note 63, p. 12; M. Fallon, "Les règles d'application en droit international privé", Mélanges Vander Elst, p. 302, No. 12
[61] P. Mayer, ibid.

customary rule of a nature to restrict the legislative jurisdiction of States in the area of private law[62]. Community law, on the other hand, could impose limits on the exercise of this national jurisdiction, especially when the law relating to public policy adopted by a Member State constitutes an obstacle to the exercise of one of the fundamental freedoms of the Treaty.

§ 2. Laws Relating to Public Policy, Mandatory Norms and Fundamental Tenets of Justice in Insurance Law

64. An essential question in the case of the insurance contract is knowing whether the mandatory rules of the laws which have something of the character of public policy in the national law sense can or must be construed as rules related to public policy in the private international law sense.

It is necessary to distinguish in national law the mandatory rules from the suppletory rules or rules reflecting fundamental tenets of justice. In accordance with the concept of Belgian law inspired by De Page[63], we shall connote here by mandatory rules, the rules whose purpose is to protect the party to the contractual relationship deemed to be in a weaker position than the other. Although not bereft of economic or social objectives, these rules comport a mandatory character that is less in degree than that which characterizes the rules reflecting fundamental tenets of justice, but one that is greater than that which characterizes the suppletory consensual rules. Unlike the suppletory rules, the contracting parties may not in theory agree to derogate from the mandatory rules, except in favor of the party to be protected[64].

The rules reflecting fundamental tenets of justice wholly limit the freedom of the parties for the sake of the public interest or of the general interest, to the point of preventing the parties from freely disposing of their rights and obligations. In Belgium, "a law affects fundamental tenets of justice only if it involves the essential interests of the State or of the community or if it establishes in private law the legal bases on which the economic or moral order of the society rests"[65]. Each State determines in its sovereign discretion what does and does not constitute fundamental tenets of justice.

The recent Belgian law of 25 June 1992 on the national insurance contract has, as we have said, a broadly mandatory character. According to Article 3, all the provisions therein are mandatory, except when the opportunity to derogate therefrom follows from the language itself. Most of these

[62] To the effect of the unlimited legislative jurisdiction of States, see R. Ago, "Règles générales de conflits de lois", Rec. Cours ADI, 1936, IV, pp. 277-293; P. Mayer, "Droit international privé et droit international public sous l'angle de la notion de compétence, RCDIP, 1979, p. 22, No. 20, p. 537, No. 71 and p. 555, No. 88. Only a rule of reason inherent in the very notion of legal order, as that which seems to inspire Article 3, sub-para. 1, of the Civil Code, or the companion principle of effectiveness are in a position to establish boundaries to the legislative jurisdiction of States. See to this effect, F. Rigaux, "Les situations juridiques individuelles dans un système de relativité générale", Rec. Cours ADI, 1989, I. p. 103, No. 72-74; P. Mayer, loc. cit., p. 22, No. 20.

[63] H. De Page, "Traité élémentaires de droit civil belge", Vol. I, 3rd Ed. No. 91.

[64] See A. Meeus, "La notion de loi impérative et son incidence sur la procédure de cassation et sur l'office du juge", RCJB, 1988, p. 511, No. 15.

[65] This definition inspired by the De Page doctrine on several occasions received the endorsement of Belgium's Cour de cassation. See in this regard, X. Dieux, "Le contrat, instrument et objet de dirigisme", in Les obligations contractuelles, Ed. Jeune Barreau de Bruxelles, 1988, pp. 260 and 261.

provisions seek to protect the party deemed to be in the weaker position in the contractual relationship. Some of them evince a mandatory quality superior to the simple regulation of private interests and can, on that account, be considered as affecting fundamental tenets of justice.

65. *Are the Mandatory Rules of Belgian Law Relating to Insurance Contracts Laws Relating to Public Policy in the Private International Law Sense?* Article 28 (d), § 2, of the Belgian supervision law for non-life insurance and Article 28 (j), § 2, for life insurance both provide that "the mandatory provisions of Belgian law shall applicable whatever the law chosen by the parties when the risk is situated in Belgium". These articles lead one to believe that all mandatory provisions in the national law sense are rules relating to public policy applicable whatever the law governing the contract, once the risk is localized in Belgium.

Such a far-reaching interpretation of the doctrine built upon laws relating to public policy must be rejected categorically[66]. It is incompatible both with the general theory of private international law and with Community law.

66. Under private international law, it is uniformly recognized that the choice of the parties exercised on the basis of the principle of consensual autonomy of the parties covers a particular legal system with all its elements, including the mandatory rules which influence the contractual relationship[67]. Characterizing all mandatory rules of national law indiscriminately as laws relating to public policy would considerably reduce the scope of the designation of the contractual law, especially when the contract is the subject, as in insurance, of a broadly mandatory regulation. Not only the contract would risk being totally called into question by the application of the mandatory rules, but the principle of consensual autonomy of the parties, or the rule of conflicts substituted for it, would lose all significance in private international law, since it could occupy only the areas which national law agreed to leave parties free to dispose of.

The functional analysis of the laws relating to public policy arrives at the same conclusion. It in effect lays down as a constituent element of those laws, the inability of the conflict of laws rule to assume responsibility for the individual interests promoted by national law. On several occasions, however, we have seen that the system of Community conflict of laws rules was based on a desire to protect the policy-holder and the insured. Once the rule of conflicts integrates this characteristic teleology of the substantive law of the insurance contract in its presumptive premise, the mandatory rules which share this purpose no longer qualify as laws relating to public policy. Their application depends exclusively on the overall regulation provided by the rule of conflicts which thus regains its full authority. This analysis calls for a reservation, however, when the law applicable to the contract follows from the expansion of choice granted by a State other than that of

[66] To the same effect, F. Rigaux and M. Fallon, op. cit., Note 13, No. 1335.

[67] M. Giuliano, "La loi d'autonomie: le principle et sa justification théorique", Riv. dir. int. pr. e. pr., 1979, p. 229; R. Vander Elst, "L'autonomie de la volonté...", op. cit., Note 71, p. 979, No. 4; A. Toubiana, "Le domaine de la loi du contrat en droit international privé", Paris, Dalloz, 1973, p. 26, No. 34; F. Rigaux, "Les situations juridiques individuelles", op. cit., Note 72, p. 193, No 137; F. De Ly, "Rechtskeuze in internationale overeenkomsten", Tijd. v. Priv., 1989, p. 1010, No. 9; J.Y. Carlier, "Autonomie de la volonté et statut personnel", Brussels, Bruylant, 1992, p. 73, No. 69; H. Batiffol and P. Lagarde, Traité, Vol. II, 1983, p. 260, No. 569, p. 316, No. 595; J.M. Jacquet, "Principe d'autonomie de la volonté et disposition impératives en droit international privé des obligations", RCDIP, 1957, p. 604; A.C. Imhoff-Scheier, "Protection du consommateur et contrats internationaux", Genève, 1981, p. 69.

the forum. In that case in effect, the State of the forum retains an interest in the application of its own rules which protect the interests of the insured.

67. As regards Community law, recognizing the character of the laws relating to public policy in mandatory rules of national law would be an intolerable constraint upon freedom to provide services. The service provider would in effect be systematically obliged -- even beyond the solution provided by the conflicts rule -- to bring its contract into conformity with all the States in which it seeks to exercise an activity.

It is necessary to be aware that systematic alignment of private international law with national law would lead to considerable legal uncertainty, since the court or the administrative authority responsible for exercising supervision over the substantive content of the contract would thus have the opportunity of systematically hiding behind its own mandatory rules of national law, taking advantage of their character as laws relating to public policy. Articles 28 (d), § 2 and 28 (j), § 2, must therefore be considered as contrary to Article 49 (formerly 59) of the EC Treaty on this point.

68. It follows from all this that the mandatory rules of national law which are intended to harmonize the opposing interests of the parties in a contractual relationship do not maintain their mandatory character in private international law. Their application will therefore depend solely on the law governing the insurance contract, in accordance with the rules of conflicts provided by Articles 28 (c) and 28 (i). Among the mandatory provisions of national law whose application is exclusively a function of contract law, we shall cite in random order, and without going into detail, the rules relative to:

-- the formation of the insurance contract and to the inception of the guarantees;
-- the declaration of the risk at the time the contract is concluded and in the course of performance of the contract (procedures and sanctions);
-- payment of the premium (procedures and sanctions);
-- payment of the indemnity;
-- prevention and declaration of the accident, as well as the rules relative to the minimization of damages;
-- the duration of the contract and the extent of the guarantees in time and in space;
-- the fate of the contract in the event of the transfer of the property insured;
-- the modes of termination of the insurance contract (procedures and sanctions) and the prescription of actions in law relating to the insurance contract;
-- the language, currency and interpretation of the contract.

The above enumeration is far from exhaustive of the diversity of the rules designed to circumscribe the insurance contract with mandatory rules. Generally, failing authority to the contrary in the rules of conflicts specific to the insurance contract, the field of contract law should be able to be determined by reference to Article 10 of the Convention of Rome. Although Belgian law makes no mention thereof, Article 7, § 3, of the FPS non-life insurance directive and Article 4, § 5, of the life FPS directive in effect refer the settlement of issues not covered by specific rules to the general rules of private international law concerning contractual obligations. This referral does not, in our view, prevent reference to the Convention of Rome, even if that document excludes from its field of application insurance contracts covering risks situated on the territory of Member States. What is more, such a reference would make it possible to apply to the insurance contract, either directly or by analogy, the specific rules of conflicts which the Convention prescribes as regards: Material Validity (Article 8); Formal Validity (Article 9); Incapacity (Article 11); Voluntary Assignment (Article 12); Subrogation (Article 13); and Burden of Proof (Article 14).

69. *Are All Law and Order Rules ("règles d'ordre public") Laws Relating to Public Policy Within the Meaning of Private International Law?* Contractually, there certainly exists a correlation between laws relating to public policy and the fundamental tenets of justice character ("caractère d'ordre public") of national law norms. This observation does not suffice in and of itself, however, to establish in theory that every "ordre public" provision under national law is a mandatory law in the private international law sense.

Despite a trend in this direction[68], it is necessary to resist the tendency. Granting national "ordre public" norms a substantial role in the solution of problems of private international law would be tantamount, as Professor Lagarde states "to eliminating any influence of foreign law in the settlement of such problems, by automatically imposing the law of the forum"[69]. In effect, under this concept, foreign law should only be applied if the corresponding law of the forum is not "d'ordre public" in the national law sense[70].

Similarly, there must be condemnation of the legislative trend which has recently appeared in French law which consists of characterizing certain rules as "règles d'ordre public", in order to supplant the application of the substantive provisions of foreign contract law. Even if such rules warrant the characterization as "public policy rules" in the sense that its content and its purpose would imply derogation from the rule of conflicts normally applicable to the contract, it is clear that "l'ordre public" does not in and of itself constitute an adequate basis for determination of the applicable law. It is necessary to infer from the law a criterion of spatial applicability, without which there would exist a danger of ill-considered extension of the field of application of the law of the forum[71].

§ 3. Laws Relating to Public Policy in the Insurance Field

70. The refusal to consider mandatory rules seeking to balance and harmonize contractual relations between the parties, one of whom is deemed to be in a weaker position than the other, as internationally mandatory rules, makes it possible to trim down considerably the laws relating to

[68] The confusion between laws relating to public policy and fundamental tenets of justice is very widespread in French case law despite criticism of the doctrine. See, in particular, A. Toubiana, op. cit., Note 7, pp. 211-213, No. 245; the same is true in England where the concept of laws relating to public policy has no specific content and seems to approximate the concept of "public policy". See P.M. North, op. cit. Note 59, p. 192.

[69] P. Lagarde, "Recherches sur l'ordre public en droit international privé", Paris, LGDJ, 1959, p. 129, No. 112.

[70] It is according to P. Lagarde, ibid, the fundamental fault of all the theories which seek to determine public policy in international law n the basis of public policy in national law.

[71] To this effect, A. Toubiana, op. cit., Note 7, p. 216, No. 248; J.P. Karaquillo, op. cit., Note 64, p. 149, No. 469; N. Watte, "Quelques remarques sur la notion de l'ordre public en droit international privé", RCJB, 1989, p. 74; J.M. Jacquet, op. cit., Note 80, p. 277, No. 422.

public policy category. In the extension of the functional analysis, this characterization should be reserved for those rules which guarantee interests which are different from and extraneous to those taken into account by the conflict of laws rule. Such "internationally mandatory" rules would be those which seek to promote and to safeguard the interests of third parties or of the community as a whole and which therefore go beyond the simple search for contractual equity. The functional character of laws relating to public policy makes it difficult to formulate a more specific definition. If the effort is restricted to the rules which relate directly to insurance contracts, however, it is possible to place several types of substantive rules in this category.

1. Laws which impose an obligation to contract insurance: mandatory insurance laws are definitely laws relating to public policy. They promote a community interest deemed sufficiently important to standardize certain aspects of insurance cover to encompass the entire country out of concern for protection of victims. They are recognized as such by Article 28 (d), § 2, of the Belgian law which transposes Article 7, § 2, sub-para. 2, of the non-life FPS directive, and by Article 28 (e) which transposes Article 8, § 3.

2. Rules which impose mandatory guarantees: there exist in Belgium law insurance rules which, without creating an insurance obligation as such, require that certain guarantees be mandatorily incorporated into a contract freely entered into ("murder attempts", "riots", "labour disputes", "natural disasters", etc.) and which establish at the same time the content of such guarantees. Translating the determination to collectivize certain risks within the country in order to reduce the cost of insurance and in order to avoid "opting out", such rules also form part, in our opinion, of the category of laws relating to public policy in the functional sense.

3. Fundamental rules and principles of insurance law (the indemnification principle, the campaign against voluntary accidents, the advantage of insurance): the rules affecting "l'ordre public" in insurance law are organized around some fundamental principles generally shared by all Member States. They generally draw their inspiration from concern for avoiding insurance being used as a source for enrichment for the insured or of insurance being reduced to a simple game or bet. One might be tempted to consider all of the rules which affect these fundamental principles as rules relating to public policy in the private international law sense. We have said, however, that one must be wary of an immediate transposition of the concept of "l'ordre public" into private international law. These fundamental principles are in effect undergoing moderating measures, sometimes even derogations, in the law of the various Member States. There comes to mind specified-value insurance, replacement-value insurance (a divergence from the indemnification principle), or cover for willful misconduct by minors under 16 (a divergence from the prohibition against insuring for willful misconduct). Truth be said, "l'ordre public" involves more the safeguard of the principle itself than its procedures and sanctions. As regards safeguarding the fundamental principle of insurance law, recourse to the notion of international "ordre public", conceived as an exception allowing disregard of foreign law when it runs counter to the fundamental economic and moral concepts of the forum, seems more appropriate to us.

This solution would make it possible to avoid all the rules involving directly or indirectly the indemnification principle, the advantage of insurance or the prohibition against intentional accidents automatically being recognized as rules relating to public policy and on that basis, taking precedence over the substantive provisions of contract law (rules on over-insurance, multiple insurance, exclusion of willful misconduct, etc.). The court or administrative authority would thus be in a position to limit its role to determining the harm done by the foreign rule to the fundamental economic and moral concepts of the forum, while taking into account all the procedures which accompany the possible derogation from the fundamental principle in question and which are perhaps suitable for avoiding the contradiction with international "ordre public" (example: mandatory deduction for wear and tear when such depreciation exceeds a certain percentage in the case of replacement-value insurance). In brief, the "ordre public" exception makes possible a more flexible assessment that is more deferential to the foreign law. It could, on that basis, gain the favour of Community law.

4. Risks deemed immoral or unlawful: the prohibition against covering certain risks considered as immoral or unlawful finds its origins either in a positive norm that forms part of the law on insurance contracts, or in the supervision legislation (prohibition against insurance contracts covering the withdrawal of driving licenses, criminal fines, the death of young children, etc.). Such rules undeniably have a literal "ordre public" quality. As regards a prohibitive rule which incorporates an immediate civil sanction -- nullification of the contract -- its inclusion in the category of rules relating to public policy seems difficult to question. It will be applied by the court independently of the law which governs the contract if the risk is located on the territory of the forum. Since it has the effect of prohibiting the marketing certain contracts within the country, rules of this type undoubtedly constitute a constraint upon freedom to provide services. They will therefore be subjected to the supervision of Community law.

When the prohibition against covering certain risks has its origin in a negative concept of "ordre public" (virtual "ordre public") and no longer in a positive law norm (literal "ordre public"), recourse to the "ordre public" exception in the private international law sense seems preferable technically, especially since it will in that case produce the same effects.

5. The rules which determine the right of third parties in the provision of insurance services: the rules of conflicts applicable to the insurance contract promote, as has been said, the aim of protecting the contracting party deemed to be in the weaker position. On the other hand, they clearly do not take into account the often decisive interests of third parties. The rules whose purpose is to grant preferential rights to certain third parties as regards insurance indemnities therefore respond to the functional concept of laws relating to public policy. Among the rights granted to third parties on the provision of insurance services, particular attention will be paid to those granted by the law to third-party victims against the insurer of the party liable, generally in the form of a direct cause of action, and to those who are recognized as preferred creditors, mortgagees or pledgees against the property insured in case of deterioration or of destruction of that property following an accident covered by the contract[72].

[72] The law applicable to the direct action has long been the subject of controversy. The only way to resolve the problem correctly consists, in our view, of approaching it from the viewpoint of the laws relating to public policy in the functional sense. The establishment by the legislature of a special system intended to facilitate the indemnification of victims clearly translates the assumption of responsibility for interests higher than those of the contracting parties, which are not taken into account by the rule of conflicts applicable to the insurance contract. The guarantee of indemnification of the victim which results from the direct action cannot therefore depend on contract law. To this effect, A. Toubiana, op. cit., Note 7; J.P. Karaquillo, op. cit., Note 64; L. Forget, "Les conflits de lois en matière d'accidents de la circulation routière", Paris, Dalloz, 1973; J. Ripoli, op. cit., Note 8, p. 172 et seq.

§ 4. Applying Laws Relating to Public Policy to the Insurance Field

71. The function of the law relating to public policy is to impose the substantive solutions which it embodies, regardless of the law applicable to the contract. It is necessary, however, for the law relating to public policy in question to be one that lends itself to being applied to the situation in question, i.e., that it include the situation in its substantive, temporal and spatial field of application.

Determination of the spatial criterion takes on decisive importance for the application of laws relating to public policy. This criterion emerges either from an express provision of the law, or from a functional analysis centered on the aims and objectives which it promotes. We have noted the uncertainties which that method entails. It appears moreover that the Community authorities considered it as inadequate in the insurance field. Instead of leaving it for the court to articulate the necessary scope of the law on the basis a functional analysis, the directives themselves define *in abstracto* the criterion upon which their operation is presumed to depend. This criterion is that of the locus of risk. We shall see that this technique entails several disadvantages.

On the basis of the role of laws relating to public policy, Article 28 (d) of the Belgian law, which transposes Article 7, § 2, of the non-life FPS directive, draws a distinction -- for the "non-life" activities sector -- between the laws of the forum relating to public policy and the laws of third-countries relating to public policy (not constituting part of the legal system of the forum). Article 28 (j) of the same law, which transposes Article 4, § 4, of the life FPS directive, contains identical provisions for the "life" sector. Particular attention is paid to mandatory insurance which is the subject of certain special provisions, in Article 28 (e), notwithstanding the fact that that type of insurance is already covered in Article 28 (d), § 1, sub-para. 2.

A. Laws of the Forum Relating to Public Policy

The FPS life insurance directive and the FPS non-life insurance directive provide:

> "Nothing in this Article shall restrict the application of the rules of the law of the forum in a situation where they are mandatory, irrespective of the law otherwise applicable to the contract." (FPS non-life insurance directive, Article 7, § 2, sub-para. 1; FPS life insurance directive, Article 4, § 4, sub-para. 1)

Belgian law provides:

> "Where the matter has been referred to a Belgian court, nothing in the provisions of Article 28 (i) shall restrict the application of the rules of Belgian law in a situation where they are mandatory, irrespective of the law otherwise applicable to the contract." (Article 28 (d), § 1, sub-para. 1; Article 28 (j), § 1, sub-para. 1)

72. Drawing upon Article 7, § 2, of the Convention of Rome, the provisions of the FPS life and non-life insurance directives transposed into Belgian law affirm the primacy of the laws of the

forum relating to public policy not only over the law normally applicable to the contract, but also over the laws of third countries relating to public policy.

The lesson that can be learned is therefore rather limited. The provisions of Belgian law, like those of the directive, are silent on the content of internationally mandatory rules, as well as on their field of spatial application. On the first point, such silence is justified by the essentially functional character of the concept of laws relating to public policy. Such silence is less understandable as regards the second point since a special connection is provided for laws relating to public policy of third countries through the locus of risk criterion. The absence of a similar criterion as regards laws of the forum relating to public policy might lead one to believe that there is an automatic tendency to apply such laws in litigation. That is not the case. Laws of the forum relating to public policy are applicable only if they are intended to apply to the situation, i.e. if they encompass the situation in their field of application. They therefore require an effective link with the legal system of the forum[73]. In the absence of expressly defined criteria in Articles 28 (d), § 1, and 28 (j), § 1, the criterion making it possible to give concrete form to this effective link must be inferred from an analysis of the objectives and of the nature of the rule relating to public policy in question.

73. The rules of special jurisdiction provided by the Brussels Convention on insurance, as amended on 9 October 1978 by the Luxembourg Convention, further increases the difficulty for the parties of anticipating the application of laws relating to public policy (Article 7--Article 12 (b)). In view of the multiplicity of fora before which suit can be brought against an insurer domiciled on the territory of a Contracting State, it is impossible for the parties to specify with certainty the court to which the dispute will be referred and doctrine of laws relating to public policy which it will adopt, particularly since the criterion of domicile is evaluated in the context of jurisdictional rules at the time the action is instituted[74]. Clauses specifying election of forum make it possible to remedy this uncertainty only partially since they must satisfy the very strict conditions laid down by Articles 12 and 12 (b).

B. Third-Country Laws Relating to Public Policy

The FPS life and non-life insurance directives provide:

> "If the law of a Member State so stipulates, the mandatory rule of the law of the Member State in which the risk is situated or of the Member State imposing the obligation to take out insurance may be applied if and so far as, under the law of those States, those rules must be applied whatever the law applicable to the contract." (FPS non-life insurance directive, Article 7, § 2, sub-para. 2; FPS life insurance directive, Article 4, § 4, sub-para. 2)

Belgian law provides:

> "Effect can be given to the mandatory provisions of the law of the Member State in which the risk is situated or of a Member State imposing the obligation to take out insurance, if and

[73] See H. Cousy, "Le droit applicable au contrat d'assurance dans le marché unique européen", Risques, 8/1991, p. 115; B. Smulders and P. Glazener, op. cit. Note 16, p. 784.

[74] To this effect, K. Lenaerts, op. cit., Note 31.

so far as, under the law of that State, those rules must be applied whatever the law applicable to the contract." (Article 28 (d), § 1, sub-para. 2; Article 28 (j), § 1, sub-para. 2)

74. *The Special Conflict of Laws Rule in the Case of Laws Relating to Public Policy.* Clearly inspired by Article 7, § 1, of the Convention of Rome, the rules specific to insurance are distinctive on two accounts. Whereas the purpose of Article 7, § 1, is to allow the application "proprio vigore" (by their own force) of foreign laws relating to public policy which have a close link with the situation, the directives and Belgian law only envisage the application of the laws relating to public policy of the Member State in which the risk is situated or of the Member State imposing the obligation to take out insurance. In addition, Article 7, § 1, of the Convention of Rome sets forth several conditions (nature, purpose, effects) which the court must assess in taking into consideration laws relating to public policy; no such conditions appear, however, in Articles 28 (d) and (j).

Beyond the case of mandatory insurance, the technique utilized suggests a special applicability ("rattachement spécial") of the laws relating to public policy of the Member State in which the risk is situated (in the sense of Article 2, d, of the FPS non-life insurance directive) or the Member State of the commitment (in the sense of Article 2, e, of the FPS life insurance directive). By recourse to this novel technique, there is no doubt that the Community authorities wanted to avoid the legal insecurity inherent in the application of laws of third countries relating to public policy. In addition, the choice of the locus or risk criterion also makes it possible to reduce the cases of intervention of a foreign law relating to public policy outside the field of contract law. Since such a law will most often be that of the country of risk, the difficult problem of identification of laws relating to public policy in the insurance field is thereby avoided.

75. *The Locus of the Risk Criterion.* Despite these advantages, the technique of special applicability ("rattachement spécial") presents serious disadvantages. In effect, the criterion of the jurisdiction in which the risk is situated, as defined by the directives and by the law, decidedly does not make it possible to realize the applicability of all the laws relating to public policy capable of affecting the insurance contract[75]. By that we mean that this criterion, as defined by the directives, does not necessarily flow in all cases from a functional analysis. This is clearly the case for the peripheral laws relating to public policy which are not aimed at insurance contracts but which can exert an influence on their validity (laws involving monetary policy; laws involving economic policy prohibiting the export of certain goods; laws supervising insurance activities; laws on the confidential character of certain data and on respect for privacy, etc.). The applicability of "rattachement spécial" can also be called into question in the case of certain laws relating to public policy directly affecting private insurance relations. A functional analysis of the rules relating to public policy governing the law on indemnification by insurance of the victim leads, for example, to making the application of those rules depend upon the law of the place of the incident giving rise to the damages. But application of Article 2, d, of the FPS non-life insurance directive transposed

[75] For a similar criticism, see M. Fallon, "La loi applicable...", op. cit., Note 15, p. 257, No. 31; A.K. Schnyder, "Observations From a Third Country in the Development of International Insurance", EUI Colloquium Papers, Florence, 23-24 May 1991, p. 28, edit. cited supra Note 41.

unilaterally by Article 2, § 6, of the supervision law, designates the place of habitual residence of the policy-holder or the place of registration where the insurance relates to a vehicle.

76. It will be observed that "rattachement spécial" to the Member State of the locus of risk curiously does not extend to the laws of mandatory insurance. With regard to them, Article 28 (d), § 1, limits itself to a tautological affirmation that makes it possible to give effect to the law of a Member State which imposes the obligation to take out insurance without defining the spatial criterion for limiting the scope of the law. The court must infer this criterion from the content and from the purpose sought. Functional analysis is therefore rehabilitated here. It is possible to believe that the scope of mandatory insurance law will generally be delimited by a territorial spatial criterion: the location of the activity generating the obligation to take out insurance on the territory of a State imposing that obligation (in civil liability automobile insurance, the incident is putting the vehicle in circulation on the national territory).

§ 5. Laws Imposing an Obligation to Take Out Insurance

77. *Compulsory Insurance Laws as Laws Relating to Public Policy.* Although compulsory insurance laws are unquestionably laws relating to public policy in the functional sense and although they are already covered by Article 7, § 2, Article 8 of the FPS non-life insurance directive accords them very special attention. Belgian law devotes three articles to them (Articles 28 (e), (f) and (g)), which, in the main, only confirm the consequences which attach to the "internationally" mandatory role of laws relating to public policy. Only Article 28 (f) adds a new element in that it eliminates any possibility of choice of applicable law when the contract is intended to satisfy an insurance obligation imposed by Belgian law.

78. Confirming in the main the role of the laws relating to public policy, it is fair to wonder about the purpose of Article 8 of the FPS non-life insurance directive (Article 28 (e)-(g) of the Belgian law) with respect to Article 7, § 2, sub-paras. 2 and 3. The intention of the Community legislature was probably to expressly establish the internationally mandatory nature of compulsory insurance laws, without concern for the general machinery of private international law. Article 8 nevertheless has a purpose since it leaves no option to take into consideration foreign compulsory insurance laws.

79. *The Law Applicable to the Contract Intended to Satisfy an Obligation to Take Out Insurance*

The FPS non-life insurance directive provides:

> "A Member State may, by way of derogation from Article 7, lay down that the law applicable to a compulsory insurance contract is the law of the State which imposes the obligation to take out insurance." (Article 8, § 4, (c))

Belgian law provides:

> "Contracts intended to satisfy an obligation to take out insurance imposed by Belgian law shall be governed by Belgian law" (Article 28 (f), sub-para. 1)

Article 8, § 4, (c), makes it possible to extend to the entire contract the jurisdiction of the law of the Member State which imposes the obligation to take out insurance by excluding at the same time any choice of applicable law. The law of the Member State imposing an obligation to take out insurance would thus govern the entire system of contract law, thereby going beyond the strict framework of the substantive solutions embodied in that law. Rightly criticized by several delegations, this approach was introduced in the form of an option. The Belgian legislature, as well as the legislatures of Spain, France, Portugal, the Netherlands and Germany, unfortunately chose to exercise it.

By extending the jurisdiction of Belgian law which imposes the obligation to take out insurance to the entire contract, Article 28 (f), sub-para. 1, has the advantage of eliminating any inconsistency and contradiction between the law of the contract and the compulsory insurance law. It presents as serious disadvantage, however, in the case of compulsory insurance that covers mobile risks or activities capable of being exercised in different places, a disadvantage which the Community authorities seem to have overlooked. Although the activity in question is subject to compulsory insurance in several Member States, Article 28 (f), sub-para. 1, makes it practically essential to conclude a different contract in each Member State where the activity is exercised or is capable of being exercised. That obligation constitutes a certain restraint on freedom of movement of persons in the Community, especially when such movement involves travel by automobile. The obligation even seems unnecessary in that the doctrine of laws relating to public policy is adequate to guarantee the protective aim sought by compulsory insurance laws[76] [77]. In any event, a derogation for the benefit of automobile civil liability insurers and for the benefit of vehicles of every type is required.

§ 6. International "Ordre Public" (Fundamental Tenets of Justice) Within the Meaning of Private International Law

80. *The "Ordre Public" Exception.* Neither the FPS life and non-life insurance directives, nor the Belgian law transposing them refer to the "ordre public" exception within the meaning of private international law. There is, however, no doubt that this exception can be raised by the court on the basis of its own general private international law rules.

As regards conflict of laws, international "ordre public" is traditionally presented as a rectification to the normal rules of "rattachement" (a doctrine analogous to the Anglo-American "most significant relationship" conflict of laws doctrine), a device for rejecting the foreign law assumed to

[76] To this effect, see R. Rigaux and M. Fallon, Traité, Vol. II, 2nd Ed., 1993, No. 1332.
[77] In automobile insurance, Article 2, second dash, of the third Council directive of 14 May 1990 on civil liability insurance resulting from the circulation of automotive vehicles reestablishes competition between the law of the place of the accident and that of the law of the law of the place of the habitual location of the vehicle in a way resolutely favorable to the victim.

be normally applicable, when its application would run counter to the moral, political or economic order or the "fundamental tenets of justice" of the forum. This exception comes into play only after determination of the applicable law in a comparison of the effects which the foreign law would produce under the legal system of the forum with the fundamental tenets of justice of that legal system[78].

It is both difficult and dangerous to try to predict the cases in which "ordre public" may be invoked in the field of insurance.

Limited to its negative function, "ordre public" in the private international law sense should allow rejection of foreign rules whose application would seriously offend the principles which undergird insurance law in a given State. It is not expected to come into play very often in conjunction with Community conflicts rules since the majority of these fundamental tenets are shared by all the Member States (the principle of indemnification, the prohibition of coverage against willful misconduct, the requirement of an insurable interest, the prohibition against covering immoral or unlawful risks, etc.) (see para. 70, sub-para. 3 supra).

Under a more extensive doctrine, the "ordre public" exception might also be used to justify a legislative policy deemed essential by the lex fori. In the field of insurance law, that would make it possible to reject provisions of foreign law not offering a level of protection for the weaker party comparable to that offered by the lex fori. International "ordre public" would also serve to sanction fundamental divergencies in the legislative policy of the various Member States. The court could envisage invoking the doctrine to reject, for example, the too restrictive warranty system of English law.

The legitimacy of recourse to the "ordre public" exception in such a context can be called into question, however, since it supposes a value judgment against foreign law. Pleading the "ordre public" exception under such circumstances would be tantamount to balancing the virtues of the consensual autonomy of the parties against those of mandatory regulation. But the Community rules of conflicts already reflect this dichotomy in their formulation and their structure. It would seem curious to reintroduce it through international "ordre public".

Conclusion

Examination of Articles 28 (c)-28 (j), inserted by the Royal Decrees of 22 February 1991 and of 8 January 1993 in the supervision law of 9 July 1975, discloses several departures from the text of the Community directives.

[78] See P. Lagarde, "Recherches sur l'ordre public en droit international privé", Paris, LGDJ, 1959, p. 164, No. 140; R. Vander Elst, "Ordre public international, lois de police, lois d'application immédiate", Mél. Legros, 1985, p. 661, No. 12; N. Watt, "Quelques remarques sur la notion d'ordre public en droit international privé", RCJB, 1989, p. 100, No. 53; F. Rigaux, Traité, Vol. I, 2nd Edition, p. 348, No. 510.

What is particularly striking is the unilateral Belgian transposition of the rules of conflicts -- rules formulated multilaterally by the directives. The reference to the location of the risk in Belgium, which arises from the inclusion of the rules of conflicts in an administrative type law, is not expected to matter since multilateralization seems possible on the basis of interpretation of the directives themselves.

The Belgian legislature has itself on occasion attempted to bridge the gaps created by the method it adopted when the risk was situated abroad. These modifications introduced *in extremis* pose more problems than they solve, however. This method, currently in vogue, which consists of effecting successive rectifications with a view to remedying errors, filling gaps or eliminating contradictions contained in a regulation adopted in haste does considerable wrong to the coherence of our insurance law and, as such, must be condemned.

An even more serious anomaly arises from the construction conferred by Belgian law on the "loi de police" or law relating to public policy doctrine. Such a construction drawn from national law applications of the doctrine cannot be attributed to inadvertence, but rather to a determination to ensure continuation of the already considerably limited choice of law applicable to the insurance contract. To the extent that the scope of free choice is thereby reduced beyond what appears necessary for the protection of the policy-holder and for the protection of the insured, this stand seems to us to be incompatible with the directive and with freedom to provide services within the meaning of Article 49 (formerly 59) of the EC Treaty.

Another question which we have only been able to touch upon is whether the rules of conflicts provided by the FPS life and non-life insurance directives are themselves compatible with Articles 43 (formerly 52) and 49 (formerly 59) of the EC Treaty. By bringing these rules into line with the approach adopted by the Court of Justice in its decisions of 4 December 1986, the Community legislature seems to have shielded itself from any criticism in this regard. Although the distinction between large risks and small risks in the case of non-life insurance influences the solutions adopted in the choice of applicable law, in the case of life insurance the distinction between passive FPS and active FPS does not give rise to a differentiated solution in terms of choice of law. The choice is available only in marginal cases, the principle being that of inflexible and mandatory linkage. The reasons advanced to justify this lack of flexibility are hardly persuasive. The compatibility of the mandatory rule of applicability provided by Article 4, § 1, of the FPS life insurance directive might therefore, in our opinion, be called into question.

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