ISSUES RELATED TO THE APPEARANCE, EVOLUTION, FUNCTIONS AND UTILITY OF THE LEGAL EXPENSES INSURANCE CONTRACTS, ESPECIALLY WITHIN THE EUROPEAN UNION'S STATES

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Abstract

This report aims to provide a concise comparative analysis of the features of legal expenses insurance (also known as insurance for legal protection or LEI), that can be found and have been adopted in several European jurisdictions (France, England and Wales, Germany, Austria, Switzerland, Finland etc), as well as in other law systems (Australia and Japan). We are studying the reasons that led to the implementation of this instrument in each jurisdiction, the evolution of its use and spread and, also, its effect on counteracting the shortcomings of the systems of justice fees and legal aid, resulting in providing access to justice, as a part of the right to a fair trial, as it is guaranteed by art.6 par.1 of the ECHR.

Keywords: *the right to a fair trial, access to justice, the European Convention of the Human Rights, justice fees, sharing of the legal expenses, insurance for legal protection (LEI).*

1. The importance of the research. Introductory concepts regarding the free access to justice in the ECHR system. The implicit limitations of the respective right, related to the ability of the states to regulate the duty to pay justice fees, as well as the instruments they implement, so that the exercise of „the discretion" would not be an obstacle in the way of the access to justice.

This study has a special practical importance, whereas its conclusions have in view the actual ways of ensuring access to justice, as a part of the right to a fair trial, as it is guaranteed by art.6 par.1 of the European Convention of the Human Rights.

Due to the lack of a Convention's specific regulation, regarding the content of the right to a fair trial, this one has been settled, in a praetorian way, within the jurisprudence of the Strasbourg Court[1].

As for the inclusion of the access to justice among the rights guaranteed by the Convention, which represent the content of the right to a fair trial, this has been achieved, for the first time, in the case Golder vs. United Kingdom[2], when the European Court of the Human Rights noted the fact that article 6 par.1 „does not state a right of access to the courts or tribunals in express terms. It enunciates rights which are

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[1] I.Deleanu, *Drepturile fundamentale ale părților în procesul civil*,.Universul Juridic Publishing House, București, 2008, p.130.

[2] The case Golder vs. the United Kingdom, par.28-31, 36,material studied online at December, 16th. 2016 at the address: http://hudoc.echr.coe.int/eng?i=001-57496.

distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term". This is the reason why it has been concluded that the Court should be the one to decide, by interpretation of the content of article 6, if the right of access to court is to be included in the mentioned content.

It has been noted[3] in the same above mentioned case that the Strasbourg Court admitted that the right of access to justice cannot be an absolute right, as it is subject to some limitations[4]. The Court established that those limitations are implicit, as the settlement of the right of access by the states is compelled by its very nature and the differences in settlement will be determined by the available resources and specific needs of each nation (more precise, its' society)[5].

These limitations are the expression of the states' sovereignty, this being the basis for granting them an „appreciation margin"[6].

The appreciation margin (discretion) has been defined as the recognized ability of the states to exert their national sovereignty, in the way of limiting the revaluation of some of the fundamental rights acknowledged by the Convention. The jurisprudence of the European Court has been permissive and constantly granted to the signatory states „some discretionary powers", „a certain freedom" or „an estimation power". This Court's approach has been qualified as „allowable and even necessary", in the context of numerous normative acts, with interpretable provisions[7].

The appreciation margin is shown by the very settlement of certain time limits of elapse and prescription, levying of legal taxes related to the justice activity or by the requirement of covering certain preliminary procedures, as a prior condition for the referral to the court.

On another case[8], it was noted that the appreciation margin must be exerted with caution, so that it would not alter the very substance of the right guaranteed by the Convention.

Even if the Strasbourg Court is the authorized forum to observe the compliance with the provisions of the Convention, this does not also imply empowerment of the Court to evaluate and decide upon the best solution to apply in the specific case.

On the same occasion of solving the Ashingdane case[9], there were noted the criteria that states must satisfy to exert „the appreciation margin" (hence, the name of

[3] C.Bîrsan, Convenția Europeană a drepturilor omului. Comentariu pe articole. Ediția 2, C.H.Beck Publishing House, Bucharest, 2010, p.430.

[4] "as this is a right which the Convention sets forth (see Articles 13, 14, 17 and 25) (art. 13, art. 14, art. 17, art. 25) without, in the narrower sense of the term, defining, there is room, apart from the bounds delimiting the very content of any right, for limitations permitted by implication", Golder case, precit, #38.

[5] „Certainly, the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access "by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals"…", The case Ashingdane v. the United kingdom, par.57, material studied online, at 04.01.2017, at the address: http://hudoc.echr.coe.int/eng?i=001-57425 .

[6] In this regard, there are of utmost importance (relevance), the reasons stated, both, in the previous case (Ashingdane) and, also, in the case Cordova v. Italy (no.1, 40877/98), par.54. The case Cordova v. Italy, studied at 26.12.2016, at the address: http://hudoc.echr.coe.int/eng?i=001-60913 .

[7] I.Deleanu, *Instituții și proceduri constituționale în dreptul român și în dreptul comparat*, C.H.Beck Publishing House, București, 2006, p.318.

[8] The case Ashingdane v. the United Kingdom, cited above, par. 57.

[9] Ibidem.

the „Ashingdane Criteria"[10]), in order to prevent the arbitrary application of the law and to ensure the right to access. These rules must be observed cumulatively and they are the following:

- the regulated measure or the ordered proceeding (aiming restriction of the right to access) has to be motivated by its very purpose (a "legitimate aim"). This is the case of consecrating a system of legal fees, aiming to protect the general interest, expressed by the proper administration of justice, which cannot be possible without a suited financing;
- the adopted proceeding (which leads to restriction of the right) must be proportional to the general interest that it has to defend. The reasonable relationship of proportionality ends when the very substance of the right of access is altered.

In the specialty literature, it was noted[11] that, in certain cases, the Court (E.C.H.R.) additionally asks for the fulfillment of the requirement that the normative act (the national norm), or the jurisprudence that represents the basis of the restriction of the right of access, should be clear, accessible and foreseeable[12].

The latter condition is pursued only in those cases when evaluating the satisfaction of the first two requirements is delayed or obstructed because, *primo*, it is considered that the restriction of the right has been a disproportionate measure in relation to the particular circumstances of the case or, *secundo*, the reality referred to justice has not been the subject of enough causes to make the interpretation be unequivocal.

In fact, the approach of this exam is not based on the specific requirement of the law, as it happens in the case of the relative rights, guaranteed by the art.8-11 of the Convention, (for these last ones, the right of interference must be provided by the national law, as it is, *per se*, a condition of legality), but it seeks exclusively to confirm the occurrence of an alteration to the very substance of the right or it is able to help assessing the proportionality degree of the measure[13].

Even if among the means to exercise state sovereignty, within the above-mentioned context, there also is the empowering of the member-states to regulate the imposing of the justice fees, for the purpose of partly covering the expenses of the public service of justice, the imposition of this requirement[14] has to comply to the same line of thinking presented above, so that it should not be exerted arbitrarily, but by observing some of the requirements noted in the European court of human rights practice and which also determines the evaluation of the proportionality of limiting the right of access.

As a consequence, the provisions leading to an exaggerated amount of court

[10] The reasons for the need of obeying those rules were frequently indicated within ECHR jurisprudence and may be found, inter alia, in the following cases: Bellet v. France (23805/94), Fălie v. Romania (nr. 23257/04), Kemp and others v. Luxemburg (no. 17140/05), R.P. and others v. the United Kingdom (no. 38245/08), Čamovski v. Croatia (no. 38280/10), Kardos v. Kroatia (no. 49069/2011), Baka v. Hungary (no. 20261/12), Zavodnic v. Slovenia (no. 53723/2013).

[11] D.Bogdan, *Procesul civil echitabil în jurisprudența CEDO. Vol.I. Accesul la justiție*, Hamangiu Publishing House, 2009, Bucharest, p.27.

[12] The case Lupaș and others v. Romania, #67, material studied online at the date of 04.01.2017, at the address: http://hudoc.echr.coe.int/eng?i=001-78568; the same conclusions were took over and used, among others, in the cases Tsasnik and Kaounis v. Greece (no. 3142/08), #35 and Nasui v. Romania, # 20 (no. 42529/2008).

[13] D. Bogdan, cited above, p.27.

[14] ECHR held that they „have never denied that the interests of the good justice administration might justify imposing of financial restrictions regarding a person's access to a tribunal", the case Beian v. Romania (nr.2), 07.02.2008, par.26, material studied online at 05.01.2017,at the address: http://hudoc.echr.coe.int/eng?i=001-84881.

fees have been declared unacceptable. Nevertheless, the limitation of access is not caused, *eo ipso*, by the respective exaggerated amount, but by the specific situation or circumstances of the justice seeker, who is expected to pay those taxes. Such a situation, that can block the access, is "the total lack of plaintiff's means"15 or the fact that the party has no income[16].

The profession or social statute of the party is also irrelevant (*exempli gratia*, businessman), as long as the respective amount, "from the ordinary justice seeker's perspective, was unequivocally substantial", so that "the fee required for the plaintiff to formulate court action was excessive" and "led to his divestment from entering legal proceedings and his case not be heard by a court", which disagrees with the guarantees of a fair trial[17]. It also is irrelevant if the justice seeker, whose right to access has thus been violated, is a legal person, since they, too, benefit from the rights registered under "the same laws and same procedures"[18].

However, the Court decided[19] that "the judicial tax regime" is "flexible enough", when the party is offered "the opportunity to request (total or partial) exemption from payment of tax", if it satisfies the eligibility requirements or if it shows the risk to face "certain special difficulties". If these conditions are met, the establishing of the amount of legal fees, by reference to the dispute, fell under "the discretion (appreciation margin) of the state".

As a conclusion, the examination of internal rules, regarding the organization of court fees system, compatibility with the aim of an effective access to justice, will be undertaken necessarily by observing the dichotomy: *de facto* obstacle-positive obligation.

Given that the justice seeker's insufficient funds represent a hindrance[20] for the right of access, so that the regulating and organizing of the legal fees system complies with the above mentioned requirements, in order to ensure a real access to court, each state has the positive obligation[21] to adopt the necessary measures they appreciate to be useful, including among them, for example, the establishing of a legal aid system, to counteract the possible shortcomings of the requirement to tax the filled applications, claims and actions.

In our view, among the measures that must be considered by the Court when it decides if the provisions of art.6 par (1) of the Convention have been violated, there are also those related to the existence and functioning without failure of a legal expenses insurance system (LEI). Even though the states do not control the insurance companies that operate on their territory, the objective possibility of the justice seekers to ensure the financing of

[15] The case Ait-Mouhoub v. France (28.10.1998), par.61, material studied online at 05.01.2017, at the address : http://hudoc. echr.coe.int/eng?i=001-58259.

[16] The case Mehmet și Suna Yigit v. Turkey (17.10.2007), par.38, material studied online at 05.01.2017, at the address: http://hudoc.echr.coe.int/eng?i=001-81734.

[17] The case Kreuz v. Poland (19.06.2001), par.61-66, material studied online at 05.01.2017, at the address: http://hudoc.echr.coe.int /eng?i=001-59519.

[18] The case SC Marolux SRL and Jacobs v. Romania, par. 33-34, material studied online at 05.01.2017, at the address: http://hudoc.echr.coe.int/eng?i=001-123332.

[19] The cause Urbanek v. Austria, 09.12.2010, published in R. Chiriță (coordinator), *Dreptul de acces la o instanță. Jurisprudență C.E.D.O.*, Hamangiu, Publishing House, Bucharest, 2012, p.135-136.

[20] For explanations regarding the notion, the juridical nature and the list of the factual obstacles which may affect the right of access to a tribunal, see C.Bîrsan, cited above, p.437-442.

[21] For conclusions about the evolution of the ECHR jurisprudence regarding the recognition of the existence of the positive duties of the states and, latter on, about the expanding of this category's limits, see D. Bogdan, cited above, p. 14-15.

their actions to court, using this method, must be evaluated and taken into consideration as one of the factors to define the person's "specific situation", because, along with the possibility to access the public legal aid, it represents one of the instruments that help ensuring the free access to justice.

2. Legal expenses insurance. Definition. Legal nature. Classification.

Legal expenses insurance (or legal protection insurance) has been established in France, in 1820, the clients of the insurers being able to choose that the latter administrate their legal matters, regardless their quality in the litigation: plaintiffs or defendants. Another 100 years passed until this kind of policy started to be widely used. Their popularity emerged considering the beginning of the use of automobiles, so that they were adapted as provisions (clauses) of the car insurance contracts. The need to circulate in all the European countries also brought a series of risks, such as the differences between the national legal systems and the language differences, all these being covered by the very above mentioned instrument. Even nowadays, the legal expenses insurance (also known as legal protection insurance) is the most common, as an add-on to the motor insurance[22].

The shortcomings of the legal aid system, which did not cover a significant amount of justice seekers, have been crucial for the appearance of the legal expenses insurance (LEI), which was dedicated to the middle class people, as well as to the small businesses, namely people too wealthy to benefit from the legal aid, but, at the same time, not having enough financial means to cover all costs related to each and every insignificant litigation[23].

Legal expenses insurance (LEI) has been defined[24] as "a means of financing unpredictable legal costs by spreading the risk of liability among subscribers to a scheme (more exactly, the LEI insurance scheme), thereby reducing the cost to each".

Although the doctrine also uses the term of "legal expenses insurance", we think the phrase "legal protection insurance" is more appropriate, for it refers to a wider range of legal activities. In this respect, we must take into consideration the fact that the range of expenses payable by the insurer is not limited only to the legal fees (due to the state for the public justice service), but it may also include the ones for mere giving legal advice, drafting of legal documents (contracts) or initializing and carrying out of amicable procedures (such as mediation) etc.

Art.127-1 of Insurances Code from France[25] offers a comprehensive definition of this type of policy. According to its content[26], we are dealing with a legal protection insurance when this one aims

[22] Legal expenses insurance (LEI) Report – European market overview, Germany, the U.K. and Bulgaria, SeeNews (Research on demand), cited above, p.5.

[23] M. Reimann (editor), *Cost and fee allocation in civil procedure, Ius gentium: comparative perspectives on law and justice 11*, Springer Publishing House, Dordrecht, Heidelberg, New York, London, 2012, p.39.

[24] Material studied online at 23.12.2016, at the address: http://www.lawfoundation.net.au/report/lei.

[25] The law no. 2007-2010 of 19 February 19, 2007, material studied online at 27.12.2016, at the address: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=C02F5FB732C5E1E02EFEC240A3AB16AB.tpdila21v_3?idSectionTA=LEGISCTA 000006157261&cidTexte=LEGITEXT000006073984&dateTexte=20161227.

[26] The article no. 127-1 of the French civil procedural code states that: Est une opération d'assurance de protection juridique toute opération consistant, moyennant le paiement d'une prime ou d'une cotisation préalablement convenue, à prendre en charge des frais de procédure ou à fournir des services découlant de la couverture d'assurance, en cas de différend ou de litige opposant l'assuré à un tiers, en vue notamment de défendre ou représenter

"any operation which, in exchange for the payment of a premium or a tax, previously established, consists of taking over the procedural costs or provision of services on behalf of the insurance policy, in case any dispute or litigation arises between the insured party and a third party, especially for the purpose of defending or representing the insured party in his claim in a civil, criminal, administrative or any other kind of procedure, or against a complaint involving him, or to amicably achieve remedial of the caused damage."

Legal expenses insurance (LEI), or Legal protection insurance, is another category (a separate category) of "non-life" insurance[27]. This type of insurances ("Legal expenses and costs of litigation") has been specifically established by being included at point A of art.17 of the Annex to the Directive no. 73/239/EEC[28], the first Directive related to non-life insurances).

As for the overall share within the non-life insurances category, the LEI policies have a low percentage, of less than 2% (with variations between 1.5%-1.8% within the period 2002-2013, then a constant growth till 2010 and a slight decrease between 2011 and 2012, followed by a revival in 2013, which shows that this type of insurance is very sensitive to the economic fluctuations)[29].

A decisive fact for the individualization of LEI insurances is that the insured risk is represented by the necessity to cover the court costs related to justice actions brought against the policies' holders, irrespective of the fact the claimant is an individual or a legal person.

This type of insurance has its origins in Europe, where it is operated predominantly by private businesses (insurance companies) for profit. Policies tend to provide cover for unforeseeable legal events and may be sold either to individuals, or to a group or a category of subscribers, as stand-alone contracts or on add-on basis to other insurance contracts (for example, to a motor insurance)[30].

The range of legal services covered by legal protection insurances is a wide one, from legal advice, to drafting of legal documents (*exempli gratia,* drafting of a contract or a will), or representing the parties in the court[31].

However, in case the legal protection insurance had been concluded voluntarily (*i.e.*, it is an independent policy), the settlement (the financing) of the above listed activities will be ensured up to the value limit established by the policy, irrespective of the fact that the expenses thus covered are those advanced by the victim of the accident for court referral, or, if the case, are the expenses that must be refunded to the

en demande l'assuré dans une procédure civile, pénale, administrative ou autre ou contre une réclamation dont il est l'objet ou d'obtenir réparation à l'amiable du dommage subi.

[27] Information from the guide "*The legal protection insurance market in Europe*", edit. oct.2015, p.4, material prepared by RIAD (the International Association of Legal Protection Insurers), studied online la 16.12.2016, at the address: http://riad-online.eu/fileadmin/documents/homepage/News_and_publications/Market_Data/RIAD-2015.pdf.

[28] First Council's Directive no 73/239/EEC of 24 July 1973, on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance, material studied online at 29.12.2016, at the address: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31973L0239.

[29] Information from the guide "*The legal protection insurance market in Europe*", oct.2015, cited above, p.4-5.

[30] Material studied online at 23.12.2016, at the address: http://www.lawfoundation.net.au/report/lei.

[31] Legal expenses insurance (LEI) Report – European market overview, Germany, the UK and Bulgaria, SeeNews (Research on demand), p.5, material studied online at 18.12.2016, at the address: https://seenews.com/static/pdfs/LegalExpensesInsurance ReportEuropeanMarket Overview.pdf.

adverse party by the losing party[32].

Therefore, the services granted to the holder of a legal protection insurance are not only limited to refunding the amounts paid by this one as lawyer's fee or other related court fees, but, in time, they were extended to offering professional advice, by the in-house lawyers of the insurance companies or by outsourced appointed professionals. The insurance holder can be granted professional assistance also for concluding extrajudicial transactions, or can be represented in court by the insurer himself. The range of the services settled on behalf of the respective insurance differs from a jurisdiction to another, due to the fact that they have different ways of regulating the outsourced legal services.

As a rule, the insurer is allowed to provide legal assistance, as well as assistance related to extrajudicial transactions. *A contrario*, in most of the EU states, the representation in court or in other administrative procedures is not allowed, or they must comply with conditions that differ from a system of law to another. The most restrictive related legislation is in Germany, where the only benefit the insurers can give is payment of damages, since they are not authorized to offer legal advice, to assist the insurance holders in the extrajudicial procedures or to represent them in court. Giving legal advice is prohibited in Poland, as well[33].

Classification of LEI type insurances subjects to the following criteria:

a) the date of concluding the insurance contract, considering the date of occurrence of the insured event;
b) according to the legal nature of the insurance and
c) according to the object of the contract (usually revealed by the policy's holder).

a) Depending on the date the policy has been concluded, the legal protection insurances can be: before-the-event (BTE) insurances or after-the-event (ATE) insurances, specifying that the latter category is sensibly more expensive than the first one[34].

The after-the-event type insurances are available only in England and Wales and, later on, we will come back with related details. Unlike the before-the-event type policies, they are purchased either when a litigation situation occurs, or even after the time the referral to court has been made. In order to study the particularities of the ATE type insurances, we must observe the risks involved in starting a lawsuit within the British legal system, such as: high litigation expenses, difficulty in estimating the costs and the risk undertaken by the losing part of having to pay burdensome legal costs. These risks motivate the parties to adopt safety measures for the event they lose in court, so that they shouldn't be forced to pay both their own lawyer's fee and a significant part or even the entire amount of the adverse party's expenses.

All these precautions can be materialized, on one hand, by concluding an ATE type insurance, which provides protection (to a certain point), in case the insured party would be compelled to pay for

[32] Report from the Commission to the European Parliament and the Council on certain issues relating to Motor Insurance, COM (2007), 0207 final, pct 2.2. material studied online at 21.12.2016, at the address: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52007DC0207.

[33] Information from the Report "The legal protection insurance market in Europe", oct.2015, drafted by RIAD (The International Association of Legal Protection Insurers), cited above, p.5.

[34] Legal expenses insurance (LEI) Report – European market overview, Germany, the UK and Bulgaria, SeeNews (Research on demand), cited above, p.5.

the litigation expenses of the adverse party and, on the other hand, by concluding a "no win-no fee" type convention with their own lawyer.

In England and Wales (but not in Scotland, too), the winning party is granted the right to ask for the adverse party to be ordered to pay the insurance premium related to the ATE policy, this one being included in the category of other litigation expenses. On the other hand, in case of losing, the risk is undertaken by the insurer, so that the insurance premium will not be paid at all. The immediate effect was that the insured party cannot be forced, under any circumstances, to pay for the litigation expenses.

Considering this situation, likely to defy the principle of equality of the parties, Lord Jackson's Report included, among its recommendations, the regulation of the inadmissibility of recovering the ATE insurance premiums and the success fees from the defendant and the analyzing of the opportunity to adopt the BTE (before-the-event) insurance system[35].

b) From the perspective of its legal nature (its' form), this type of insurance can be materialized in an added clause (package-deal or add-ons) within another insurance contract, over liability for traffic accidents, or professional indemnity or even a home insurance contract, the latter being the most prevalent form within the EU states. Still, in some jurisdictions (like Germany), the legal expenses insurances can even be stand-alone products[36].

In Switzerland and Finland, the package-deal type insurance (as a clause) can also be added to the insurance contracts for commercial activities liability. When the legal protection insurance is embedded in another policy, it devolves upon the insurer not only the task of undertaking the risk related to the liability, but also the financing of the costs related to the litigation following the occurrence of the insured event. From this type of legal protection insurance usually benefit the defendants in cases of tort liability and, for the insurers, it involves covering both the expenses of the insured party for preparing the defense and the possible litigation costs that ought to be paid in case the plaintiff wins.

The price related to the package-deal type insurances is kept to a reasonably low level, because the insurance scheme provides a spread of litigation costs to all the subscribers from the respective category, so the number of litigations occurred is small comparing to the number of sold policies.

This type of legal protection insurance is widely spread all over most of the E.U. states, but also in Australia, Japan etc. Its popularity within these jurisdictions is confirmed by the high percentage of citizens owing such an instrument, many middle class members being protected by such an insurance related to daily activities, such as: home ownership, driving a car, pursuing of a profession or developing a business.

As for the stand-alone type policies, they are also rather popular and spread (mainly in the West European states) and they are individual insurances, protecting the parties against any possible legal costs and aim both parties of a trial (the plaintiff and the defendant). There are two restrictions to this type of insurance: 1. limitation to a certain type of litigations, namely the ones frequently involving individuals (*e.g.*, tort liability related to the performance of real estate rental/lease contracts and consumer

[35] M.Reimann (editor), Cost and fee allocation in civil procedure..., cited above, p. 40-41.

[36] Legal expenses insurance (LEI) Report – European market overview, Germany, the UK and Bulgaria, SeeNews (Research on demand), cited above, p.5.

rights; there are cases when this insurance is also applicable in family law disputes) and 2. limitation in establishing an upper limit for the amounts to be covered by the insurer. Even if this type of insurance also provides a spreading of costs among subscribers, it still involves higher costs comparing to the package-deal type of insurance, since the insured risks are higher (whereas it addresses the plaintiffs as well), which means higher prices. In spite of this fact, most of the middle class people can afford the payment of the premiums[37].

It was found[38] that the stand-alone type legal insurance policies (always concluded voluntarily by the insured party) are offered, in most of the member-states, either by companies specifically dedicated to this type of insurance, or by companies that offer other types of insurances, as well. Still, the development level of the market for these insurances is different from a jurisdiction to another, depending on the degree of maturation of the market's profile, so, in some states, this type of insurance is completely non-existent (such as in Romania) or is very much less on demand and use, while in others (such as Great Britain, Belgium, Germany, Sweden) it is owned by a big part of the population, either as a stand-alone insurance, or as an add-on to contracts like motor insurances or home insurances.

c) The beneficiary of this insurance can be an individual and/or his family. In this case, the insurance covers the amounts related to legal services provided for the following: general legal advice, neighbourhood relations, injuries to the beneficiary, work litigations and even disputes with consumers. Motor legal expenses insurance (MLEI) is a higher category of insurance, which exceeds the upper limits and damage types covered by the standard motor insurances. Finally, the Commercial LEI insurances cover the costs related to any commercial litigation, such as: litigations related to the enterprise and enforcing of the contracts, debt collection, litigations related to ownership right, work disputes and tax issues[39].

During 1969, in Rome, it was founded the International Association of Legal Protection Insurers ("Rencontres Internationales des Assureurs Défense" - RIAD), an independent organization, consisting of insurance companies' representatives, but also legal specialists, from 8 European states. Meanwhile, the organization grew, so that it came to enlist members from 18 European states, Canada, Japan and South Africa.

RIAD's purpose is to establish a global network, capable of giving, to the legal protection insured persons, an easy, affordable and high quality access to justice and the law[40].

To reach this goal, the members of this organization assumed and observed the rules of a strict conduct code, according to which the specialized services are provided. At the same time, the organization submits to interested parties and informs the public about the specific activity of the legal expenses insurance companies, facilitates

[37] M. Reimann (editor), Cost and fee allocation in civil procedure..., cited above, p. 39-40.

[38] Report from the Commission to the European Parliament and the Council on certain issues relating to Motor Insurance, COM (2007), 0207 final, cited above, pt. 2.3.

[39] Legal expenses insurance (LEI) Report – European market overview, Germany, the UK and Bulgaria, SeeNews (Research on demand), cited above, p.5.

[40] Information from the webpage of RIAD, studied online at 26.12.2016, at the address. http://riad-online.eu/about-us/riad-what-is-that/ .

the dialogue between its board, politicians, authorities with control duties and other entities, in order to promote the interests of this specific insurance market. In this regard, the annual conventions are particularly useful.

The RIAD members provide both the related financing and the legal services for the legal protection insurances, expressed either by offering legal advice or by representing the insured persons in the dispute settlement, both, amicably or legally.

Therefore, members holding the status of insurance companies provide, to their clients, products that can: a) finance a quick access to already established legal and support services and b) absorb any risk that clients might face regarding the lawyers' fees or other court costs. The other RIAD members (that provide specialized legal services) offer to the clients high quality services, so that the legal protection can be effective[41].

3. Legal protection insurances regulation within the European Union.

The regulation of legal protection insurances within the union is provided by the Directive no.87/344/EEC[42].

Article no. 2 of the above mentioned Directive establishes its scope.

Therefore, article 2 par.(1) settles the regulation framework of the legal protection insurances, defined by the fact that, in exchange for payment of a premium, the insurers take over the risk of covering the legal costs, but also provide other services related to the object of the insurance, such as:

a) to make sure that the damaged or injured party will be properly indemnified, either by concluding a transaction, or by initiation of legal or criminal proceedings;
b) in case the insured party holds the status of defendant, to provide proper defending of its interests, namely to represent it in any related procedure, should it be civil, administrative or criminal or any other form of complaint.

Article 2 par. (2) also settles the application limits of the normative act, stating that its provisions does not apply in the following circumstances:

- in case of legal expenses insurance policies, when the arisen disputes or litigations concern operation of ships;
- actions taken, in any investigation or proceeding, by the insurer who insured the party for this type of risk, if the insurer is also a beneficiary of these actions;
- in exceptional situations, generated by the member states' sovereign will, regarding the following assumptions:

1. when the legal protection activities take place in another member-state than the one the insured party is resident of;
2. when the insurance policy concerns only legal assistance granted to persons facing a dispute on the occasion of traveling, therefore while being away from the place their permanent residence is;
3. in case the contract stipulates unequivocally that it covers only the situations mentioned in par. 1) and 2) and it is subsidiary to assistance.

The means to concretize the legal protection insurance are established in article no. 3 par.(1): it has to be either a

[41] Ibidem.
[42] Council Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance, studied online at 22.12.2016, at the address: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31987L0344:EN:HTML .

stand-alone contract, different from other types of insurances, or an add-on to a policy related to covering legal expenses. In this latter case, if the member-state requires it, the value of the premium matching this type of insurance must be indicated. Article no.3 par.(2) provides a series of obligations for the member-states, expressed by taking proper action to prevent any conflict of interest situation.

According to article no.4 par(1), the following express clauses must be included in the legal protection insurances:

a) If, during an investigation or a proceeding, it is necessary to hire an attorney or another law specialist, who is granted, by the national law, the right to offer assistance, to represent and defend the insured party's interests, the latter is given the liberty to choose his own attorney or specialist;
b) The insured person is granted the right to freely choose an attorney or another qualified person to offer assistance (if the law provides it), also in case a conflict of interests arises.

Paragraph (2) of the same text defines the notion of "attorney" by reference to the names (titles) under which the exercise of this profession is recognized in the Directive CE no.77/249/EEC.

As an exception, article no. 5 par.(1) regulates exhaustively the cases when the member-states can grant derogations from the provisions of article no. 4 par.(1), namely when a series of terms are cumulatively met:

1. the insurance covers the expenses generated by using of vehicles on the territory of the respective state;
2. the policy is related to a contract that stipulates ensuring of assistance in case of an accident or a malfunction of such a vehicle;
3. the legal liability is covered neither by the legal protection policy, nor the assistance policy;
4. in case that all parties in the litigation have their legal protection policy concluded with the same insurer, the necessary measures are ordered to ensure that the assistance and representation granted to each party are provided by „fully independent" lawyers.

Even when applying such a derogation, article no.5 par.(2) states that it doesn't exempt the member-states from further applying the provisions of article no. 3, related to the form of the contract and to the measures to prevent and combat any conflict of interests.

4. Debates regarding the application of provisions of article no 4 par.(1) of the Directive no.87/344. Interpretations given in ECJ Jurisprudence.

4.1. On the subject of recognizing, for the member-states, their ability to control the limits of the amounts payable by the insurers on the basis of the legal protection policies (LEI), in case the insured party freely chooses its own lawyer, ECJ ruled on the occasion of the execution of a request for a preliminary decision[43], regarding the interpretation of the text of art.4 par(1) lett. q of the European Union Council Directive no.87/344 EEC.

In the mentioned case, the forum did not recognize the interpretation that, in the lack of an express stipulation of article no.4 par(1) lett. a, to indicate who has the

[43] The preliminary decision of the ECJ, regarding the cause Sneller v. DAS Nederlandse (C-442/12), studied online at 23.12.2016, at the address: http://curia.europa.eu/juris/document/document.jsf?text=&docid=144208&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first &part=1&cid=779980.

authority to decide whether it is necessary to request the services of a law professional (the insured party or the insurer), it is to understand that the liberty the insured party benefits of, starts only if the insurer considers it is necessary to request that lawyer.

A contrario, it has been decided that the text „must be interpreted as meaning that precludes a legal protection insurer, who stipulates in his insurance contracts that legal assistance is in principle granted by his collaborators, to also stipulate that the costs related to legal assistance, provided by a lawyer or a representative freely chosen by the insured party, cannot be incurred unless the insurer agrees it is required to entrust the case to an outside counsel".

This resolution was based on the following considerations:

- the mere interpretation of the norm's text cannot lead to a solution, whereas the interpretation of the E.U. law provisions is exclusively made by referring to the specific context that generated the normative act, as well as to the objectives pursued by the legislator when adopting that regulation (the Eschig Decision[44]);
- the Court interpreted the provisions of the 11-th consideration of the Directive no.87/344 and of the article no. 4 par.(1) of the same Directive, that the liberty to choose a lawyer or other persons accredited to provide representation is justified by the insured party's very interest for legal expenses and it is recognized for any legal or administrative procedure (Stark Decision[45]). For this reason, the interpretation will be that the free choosing of a lawyer, by the insured party, does not justify the legal expenses' restriction only to the situations when the insurer decides it is necessary to engage a lawyer outside.
- in supporting this resolution, the intended purpose, when adopting this Directive, was of no less importance, namely to ensure a wide protection of the insured parties' interests, that does not agree to the restrictive interpretation of art.4 par(1) lett.a of the Directive.
- furthermore, as regards the free choosing of the representative, it has been noted that art.4 par(1) has a general applicability, so it has a binding force (with referral to Eschig par.47 and Stark Decisions, par.29).
- concerning the ability to control the limits of the insurance premiums' amounts, it was found that there are cases when the means (the criteria) according to which the insured party chooses its representative justifies the imposing of restrictions for the expenses that it has to advance or to settle with the insurers. In this respect, it has been reiterated the outcome of the Court in the Stark decision. According to ECJ jurisprudence, enshrining the right to choose a lawyer „does not involve the member-states' obligation to impose, in every circumstance, full coverage of the expenses incurred by defending an insured party, as long as this liberty is not without content". The lack of content would occur in case the upper limit established for the obligation of bearing the costs would lead to the impossibility of reasonably choosing a lawyer or a representative (as per Stark decision, par.33). The shortcomings of such a restriction can be avoided by the contract's parties themselves, as, based on the principle

[44] the case Erhard Eschig împotriva UNIQA Sachversicherung AG (C-199/08), studied online at 03.01.2017, at the address:http://curia.europa.eu/juris/document/document.jsf?text=&docid=72645&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=328942.

[45] the case Gebhard Stark v. D.A.S. Österreichische Allgemeine Rechtsschutzversicherung AG (C-293/10), consulted online at 03.01.2017, at the address: http://curia.europa.eu/juris/document/document.jsf?text=&docid=81542 &pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1 &cid=329332.

of contractual freedom, they can establish a higher limit for covering the legal expenses, with a possible increasing of the premium amount (Stark decision, par.34).

4.2. As regards the freedom of the insured party to choose a lawyer, it was considered the distinction between the terms of „administrative procedure" (inquiry) and (legal) „procedure", used by article no 4 of EU Council Directive no.87/344 EEC.

This text specifies that the insured party is granted the freedom to choose his lawyer (or another person, authorized by the national law to provide legal services) in case the situation requires it, „in order to defend, represent or serve the interests of the insured party in any inquiry or (legal) procedure".

In the European Court of Justice practice, there have been noted[46] the following aspects:

Primo, art.4 par. (1) of the above mentioned Directive establishes that all contracts of legal protection insurance (LEI) will stipulate the insured party's right that, in any inquiry or legal procedure that requires the services of a lawyer or another authorized professional (representative) to defend, to represent or to serve its interests by any other means, it can freely choose that lawyer (representative);

Secundo, the distinction between „administrative procedure" (inquiry) and (legal) „procedure" is unequivocally clear by the very regulation of article no.4 par.(1), so that the two terms are opposite. However, the insured party has the right to choose his representative in both situations.

The opposite solution, of the application of article no. 4 par.(1) only for the procedures undertaken before an actual court (namely, the ones with administrative jurisdiction) would result in making meaningless the notion of „administrative procedure" (inquiry), specifically indicated in the Directive. Given that, as the referred text doesn't make a distinction, applying of any restriction to the „administrative procedure" (inquiry) is considered unacceptable.

Tertio, regarding the constant jurisprudence referring to interpretation of the provisions of the Union law, it is noted that it involves, besides the examination of the wording, also the examination of the norm's context, but also of the European legislator's intend in adopting it (as examples, in this regard, the St.Nikolaus Brennerei und Likorfabrik Decision, 337/82, EU:C:1984:69, par.10, the VEMW and others Decision, C-17/03 EU:C:2005:362, par.41, as well as Eschig Decision, C-199/08, EU:C:2009:538, par.38). As the intend of Directive 87/344 [and, even more, of the article no. 4 par.(1), lett. a)] is to protect the interests of the insured parties, the regulation of a general applicability and of a required value, recognized for the right of choosing the lawyer or the representative, are incompatible with the restrictive interpretation of the mentioned text of the Directive [invoking the motives from the Eschig Decision[47] (C-199/08), as well as the

[46] C.E.J. preliminary decision (7.04.2016), related to the cause Massar v. Das Nederlandse (C-460/16), # 18-23, studied online at 16.12.2016, at the address: http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d602888ad73f4f4de1a9b7a80c4107c494.e34 KaxiL c3eQc40LaxqMbN4PahaLe0?text=&docid=175672&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=835112.

[47] the case Erhard Eschig v. UNIQA Sachversicherung AG (C-199/08), CEJ has noted that not even in the case that the ensured event takes place and determines prejudice to a significant number of policy holders, the ensurer is not entitled to designate himself a person to represent all those ensured persons, material accessed online at 26.12.2016, at the address: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62008CJ0199&qid=1482765745355&from=EN .

Sneller Decision[48]].

5. Particularities of the legal protection insurances instrument within some of the EU member-states, as well as within other jurisdictions.

It was noted[49] that, in most of the European Union member-states[50], besides the organization and functioning of a legal aid system (in order to ensure the free access to justice) it has also been established a specialized private insurance system, for covering the legal protection expenses (LEI).

A statistic[51] made during 2013, revealed a ranking of the EU member-states, based on the reference to the percentage rate of each state on the profile market. Thus, Germany was on the first place, with a rate of approx. 45%, followed by France (13%), Netherlands (9%), Great Britain (7.4%), Austria (6.3%) Belgium (5.4%) and Switzerland (5.1%).

In another study[52], it was found that, as regards the add-ons type legal protection insurances, the absolute market leader is Sweden, where the percentage of the households benefitting of such a policy is about 90%. The explanation for this performance is the fact that the LEI clauses are automatically included within most of the home insurances policies.

The LEI type insurances market is on a constant growth. Thus, starting with 2008, the Great Britain's market has been outrun by the Dutch one. The same study revealed the fact that Germany, France, Netherlands and Great Britain totalize 74% of the profile market's overall, while in the other jurisdictions (except for the ones targeted in the report, namely: Germany, France, Netherlands, U.K., Austria, Belgium, Switzerland, Italy, Spain and Finland) it is shown a low interest for this instrument, totalizing a cumulative market share of below 5%[53].

In the following, we will review a few relevant examples, regarding the particularities of the legal protection insurances systems, but also the means by which it has been tried to implement them in some states:

5.1. England and Wales.

As we showed in the above, these jurisdictions are the only ones to use the after-the-event (ATE) type LEI insurance,

[48] The case Jan Sneller v. DAS Nederlandse Rechtsbijstand Verzekeringsmaatschappij NV (C-442/12): in this case, CEJ has ruled that is incompatible with the provisions of article no.4, lett. a) of the Directive no. 87/344 the solution of conditioning the assumption of costs associated with the attorney fees only if the insurer "considers it necessary to entrust the case to an outside counsel" other than its' ordinary collaborators. In this regard, the interpretation of the norm will not be influenced neither by the fact that, in the administrative or judicial proceedings in question, legal assistance is or not compulsory, under the rules of national law. Material studied online at 26.12.2016, at the address: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62012CJ0442 &from=EN.

[49] Information from the Report „European Judicial Systems. Efficiency and quality of justice no.23" (ed.2016), drafted by the European Commission for the Efficiency of Justice (CEPEJ), Consolidated report regarding the „Authorities responsible for ensuring/granting of the judicial aid and the existence of a private legal protection insurance system", studied online at 27.12.2016, at the address: http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2016/publication/CEPEJ%20Study%2023%20report%20EN%20web.pdf.

[50] the only countries which do not have such an implemented system were, in 2014, Romania and Bulgaria.

[51] Information from the guide "The legal protection insurance market in Europe", edit. oct.2015, cited above, p.3.

[52] Legal expenses insurance (LEI) Report – European market overview, Germany, the U.K. and Bulgaria (September 2013), p.5, studied online at 29.12.2016, at the address: https://seenews.com/static/pdfs/Legal ExpensesInsuranceReportEuropeanMarketOverview.pdf.

[53] "The legal protection insurance market in Europe", edition oct.2015, cited above, p.3.

namely the policy concluded after the occurrence of the litigation.

Unlike the before-the-event type policies, the ATE policies are purchased either the moment when the dispute arises, or even after the moment the legal procedures have been initiated.

In order to study the particularities of the ATE type insurances, we must observe the risks involved in starting a lawsuit within the British system, i.e.: high litigation expenses, difficulty in estimating the costs and the risk undertaken by the losing part of having to pay burdensome legal costs. These risks motivate the parties to take safety measures for the event they lose in court, so that they shouldn't be forced to pay both their own lawyer's fee and a significant part or even the entire amount of the adverse party's expenses.

All these precautions can be materialized, on one hand, by concluding an ATE type insurance, which provides protection (to a certain point), in case the insured party would be compelled to pay for the litigation expenses of the adverse party and, on the other hand, by concluding a "no win-no fee" type convention with their own lawyer.

In England and Wales (but not in Scotland, too), the winning party is granted the right to ask for the adverse party to be ordered to pay the insurance premium related to the ATE policy, this one being included in the category of other litigation expenses. On the other hand, in case of losing, the risk is undertaken by the insurer, so that the insurance premium will not be paid at all. The immediate effect was that the insured party cannot be forced, under any circumstances, to pay for the litigation expenses.

Considering this situation, likely to defy the principle of equality of the parties, Lord Jackson's Report included, among its recommendations, the regulation of the inadmissibility of recovering the ATE insurance premiums and the success fees from the defendant and the analyzing of the opportunity to adopt the BTE (before-the-event) insurance system[54].

As regards the representation of the insured party in commercial type litigation, usually the party already knows a specific legal adviser and prefers to be represented or advised by this one in the litigation. The insurance companies will try to influence the insured party to accept appointing and using their lawyers, invoking that they will not settle the entire expenditure. This practice is illegal (as we already showed in above). The contractual obligation of paying the amounts related to the legal expenses led to an ongoing concern of the insurers to reduce the level of those costs, which also involves using of professionals with the smallest fees, a solution that might be likely to contravene the interests of the insured parties.

The British insurance companies' Regulation admits to the insured parties the right of appointing their own lawyer. This solution is also confirmed by the Solicitors' Code of Conduct. Therefore, any clause that provides the limitation of the client's right to freely choose his lawyer is likely to question his independence and contravenes his interests.

Even if the insurance companies' Regulation also indicates the hypothesis that the insurer is entitled to appoint the lawyer (only after the initiation of the legal procedure), the same document shows that the right of the insurance holder to choose his representative arises the moment when this one can ask the insurer to pay the insured amount. In the legal practice, it has been assessed that the right of choosing the representative arises when it is obvious that

[54] Legal expenses insurance (LEI) Report – European market overview, Germany, the U.K. and Bulgaria (September 2013), cited above, p.5.

the dispute will develop in a litigation proceeding.

In spite of these established regulations, the insurers do not accept their interpretation, so that they would not be able to coerce, to the insured parties, a specific defender, by selecting him from their own panel of lawyers, which would mean, for them, not having any control over the legal costs or the way the legal service is provided. In sustaining the opposite solution, the insurers invoke the following arguments:

a) that only their panel of lawyers have enough experience in understanding and interpreting the insurance policies, due to the complexity of those conventions,
b) that certain policies do not also cover the legal expenses (even if it is not the case),
c) that the above mentioned Regulation does not apply to this type of insurance, too (which also is a false assertion).

The insurer's practice, to limit the settled amount to the equivalent upper limit value of their own panel of lawyers' fees, or the refusal to pay the fees of the lawyer chosen by the insured-client, can abusively limit this one's right of choosing his own defender[55].

As shown above[56], the provisions of article no.4 par(1) lett.a) of the E.U. Council Directive no.87/344 EEC, have been interpreted by ECJ by reference to the interest protected by the European legislator, meaning that, starting from the need for protection of the insured parties interests and by observing of the general and binding aspect of the right of choosing the representative, a conditionality of this right would be the same with a restrictive interpretation of the provision, which is not allowed.

As a conclusion, it is obvious that all the insurers that provide legal protection insurances all over Europe are compelled to allow their clients to freely choose their lawyer. The importance of conceding this right is proved by the situations when the form of exercising the profession, chosen by the insured party, had already provided a certain number of hours of legal activities (e.g., for clarifying the context of the litigation). In a situation like this, appointing one of the insurer's own lawyers would be an unjust solution.

In case the insured parties are not allowed to choose their own lawyers or there are signs of any conflict of interests between them and the insurers, they may undertake the following steps:

1. notify the insurer about the choosing of the lawyer (or the professional company) which is to provide assistance and representation, as soon as he had made his decision, so that any disagreement related to this aspect can be solved in due time. During these debates, the chosen lawyers or representatives can also intervene, by bringing arguments to prove their related experience and show their willingness to update the insurers about the evolution of the entrusted case;
2. ask for the insurance broker's help, to pressure the insurer to recognize the client's options for his representation. In this case, the higher chances go to the big clients, that can influence the insurer to make a decision, especially if the latter is interested in keeping those clients;

[55] The Guide „Legal expenses insurance and commercial disputes", edition 2011, accessed online at 19.12.2016, at the address: http://www.out-law.com/topics/dispute-resolution-and-litigation/pre-action-considerations/legal-expenses-insurance-and-commercial-disputes/.

[56] See the reasons of the CEJ preliminary decision, regarding the case Sneller v. DAS Nederlandse (C-442/12), cited above.

3. when running out of options, the clients are invited to address the Financial Ombudsman service[57], for settling the differences with the insurer[58].

5.2. Germany.

The percentage rate of the German profile industry on the European market of the legal protection insurances was of 44%, in 2013, a result that can be explained by the fact that it does not necessarily reflect the market volume, but rather its rate of coverage, considering that, in Germany, there are almost 50 operational insurance companies, offering LEI type policies and totalizing a number of 20 million contracts (including both the group and the individual ones). Even if the number of clients for this service diminished from 55% in 2003, to less than 43% in 2013, this decrease does not necessarily reflect a restriction of the activity, as much as a result of reaching a high maturing level of the market, comparing to other EU markets' important growth.

The beneficiaries of a legal protection insurance have the advantage of being able to exercise, or, if the case, to defend their subjective rights, any time it is required, without being held back by financial reasons. However, this advantage also comes with some shortcomings, as it can lead to a different perception within the society and to a malevolent exercising of certain procedural rights. Therefore, the client that has continuously paid his insurance premiums during the last decade will be much less interested in amicably solving the litigation, even if he is given an advantageous offer. Furthermore, even if he loses the case, the client, already caught in a vicious cycle, will also act on appeals, as long as their costs are still borne by the insurer. An experimented judge can easily see what party holds such a policy, by simply observing their attitude during the trial[59].

The explanation for the fact that the risk of the legal costs is more easily insured in Germany is that it's easier to anticipate those costs, in this jurisdiction[60].

This easy way of anticipating the costs is determined by the regulations[61] concerning the calculation method of the fees for the legal services. Thus, the related costs for the legal services are fixed, being established by reference to the value of the litigation's object, in a manner similar to that of establishing the justice fees.

Due to the structure of this legislative framework , the action's holder (the claimant) can calculate, before initiating the legal proceedings, what are the amounts he should advance, both for justice fees and his defender's fee[62].

There is no domestic norm to force the insurers operating in Germany offer the clients a certain type of legal protection insurance, as those contracts' provisions can be established on the basis of the contractual freedom's principle. Usually, the insurance services providers use a standard policy,

[57] The Financial Ombudsman is a national authority, founded by and subordinated to the British Parliament, whose task consist in solving the disputes regarding the financial services. Official page accessed at 19.12.2016, at the address: http://www.financial-ombudsman.org.uk/about/index.html.

[58] the Guide „Legal expenses insurance and commercial disputes", edition 2011, cited above.

[59] G. Dannemann, Access to Justice: an Anglo-German Comparison, material accessed online at 18.12.2016, at the address: http://germanlawarchive.iuscomp.org/?p=374#Legal%20Expenses%20Insurance.

[60] Ibidem.

[61] According to the Law on the Remuneration of Attorneys (Gesetz über die Vergütung der Rechtsanwältinnen und Rechtsanwälte - RVG), material studied online at 27.12.2016, at the address: https://www.gesetze-im-internet.de/englisch_rvg/englisch_rvg.html.

[62] The brochure „Law – Made in Germany", p.29, material studied online, at 30.12.2016, at the address: http://www.lawmadeingermany.de/pdfs/Law-Made_in_Germany_FR.pdf.

drafted according to the provisions of the General Conditions for the Legal Protection Insurances (Alldemeine Bedingungen fur die Rechtsschutzersicherung – ARB 2010)[63].

5.3. Austria.

This law system has similar characteristics to the German one, as it is easy to anticipate the costs of a possible trial, the costs of the lawyers' fees also being easily predictable, whereas there are regulated norms[64] for calculating them, established according to the value of the litigation's object. As a consequence, in this country, as well, there has been noted a significant growth of the popularity of the insurance policies related to all legal expenses.

Even if the LEI type contractual clauses, included within the home insurance policies or motor policies can ensure the financing of the legal activities related to those litigations, in most of the cases, the interested people are forced to additionally purchase stand-alone type LEI insurance contracts. To answer the market's demands, many insurers have accommodated the motor insurance policies, to automatically include the LEI clauses[65].

The procedure by which the insurer provides the necessary amounts is started by a notification from the client (claimant) or his lawyer, revealing the intention to initiate a litigation. The insurance company makes sure that two cumulative conditions, related to the litigation, have been met, namely: if the litigation, by its nature, corresponds to the ones covered by the policy and if there are clues that it will not exceed the insured amount. If these conditions are met, the insurer confirms, in writing, to the client the coverage of the costs[66].

5.4. France.

The legal protection insurances are regulated, in France, in the Insurances Code[67], (Book I, title II, chapt.VII, articles L127-1-127-8).

The essence of the legal protection insurance is the fact that it is optional. This convention is like a precaution measure, taken for the situation when the client is involved in a legal procedure and it consists of transferring the related risk to the insurer.

The difference between the LEI insurance and the public legal aid is of a legal nature: while the public legal aid is based on the social solidarity concept, law provided, the LEI insurance is based on

[63] ARB 2010, material studied online at 27.12.2016, at the address: https://www.arbeitsgemeinschaft-finanzen.de/mediathek/ARB_2010.pdf.

[64] the General Fee Criteria for Lawyers *(Allgemeine Honorar-Kriterien für Rechtsanwälte) material studied online at 27.12.2016, at the address:* https://www.rechtsanwaelte.at/index.php?eID=tx_nawsecuredl&u=0&g=0&t=1482967599&hash=d7b836769c25fd18c3e9d08521e11dd4a366a485&file=uploads/tx_templavoila /ahk_ 28052015_01.pdf and The Lawyers' Scales of Fees Act *(Rechtsanwaltstarifgesetz), material studied online at 27.12.2016 at the address:* https://www.rechtsanwaelte.at/index.php?eID=tx_nawsecuredl&u=0&g=0&t=1482968050&hash=d1869c7c70adaad63606eacc0bccf7b46c5e48d0&file=uploads/tx_templavoila/ratg_01012016_01.pdf.

[65] M.Roth, Litigation in Austria – Are costs and fees worth it?, article published in M.Reimann (editor), Cost and fee allocation in civil procedure..., cited above, p.75.

[66] Roth in Vershraegen (Ed.), Austrian law – an international perspective: selected issues, Jan Sramek Verlag 2010, p.144; Wandt, Versicherungsrecht, 5th. Edition, Heymann, 2010, para.938, apud. M.Roth, Litigation in Austria – Are costs and fees worth it?, article published in M.Reimann (editor), Cost and fee allocation in civil procedure..., cited above, p.75.

[67] The Ensurance's Code, material studied 29.12.2016, at the address: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=98DC092B94BD5DE64CE2BC704BAE4543.tpdila09v_1?idSectionTA=LEGISCTA000006157261&cidTexte=LEGITEXT000006073984&dateTexte=20161229.

common risk-taking (according to a contract). In this respect, the insurance for the legal expenses has the same foundation as the one for fire insurance or hospital insurance[68].

Article L127-2 of the Insurances Code provides the means to materialize the legal protection insurance: either as a stand-alone contract, or as a distinct add-on clause of an independent policy, which has to define the LEI insurance's content and to indicate the related insurance premium's value.

Article L127-2-1 defines the concept of "insured event" (sinister) as being the refusal to a request made to, or made by the insured party, as the case. So, the legal quality of the client (plaintiff or defendant) is not relevant.

According to article L127-2-2 par.(1), the consultations granted or the legal actions taken before the moment of the insured event's occurrence does not justify the unlocking of the guarantee. Any contractual clause to provide another solution is considered unwritten. As an exception to this rule, par.(2) of the same article provides that the request of those consultations or taking of those legal actions might be settled by the insurer, provided that the client proves an emergency situation, that required those measures.

Article L127-2-3 states it is compulsory to offer the client a lawyer's assistance or representation, provided that the client or even the insurer acknowledges the fact that the opposite party in the trial benefits of the same conditions for representation.

The provisions of article 4 par. (1) of the Directive no.87/344 EEC are applied in the domestic law by the regulation of art.L127-3 par(1), which provides that when it is required to use the services of a lawyer or another person legally authorized to represent or defend the client's interests, the latter has the right to freely choose in this respect.

According to art. L127-3 par.(2) the client's right to choose his lawyer (or another representative) must be stipulated in the contract for all situations generating a conflict of interests between the client and the insurer. Under no circumstances a contractual clause can provide the restriction of the client's right to choose, unless the upper limit of the guarantee's value is not exceeded (par.3).

Finally, the par.(4) of article L127-3 states that the only case when the insurer is allowed to recommend a lawyer to his client is when the client himself has made a written request in this respect.

On the same line, article L127-5-1, states that the amount for the lawyer's fee will be established only by negotiation between the client and the lawyer. The French legislator specifically forbade the insurers to intervene in this matter.

According to article L127-4, if the case is that the insurer and the client do not agree upon the actions to be taken in order to settle the litigation, this impasse can be overcome with the help of a third party, jointly designated by the first two parties. Furthermore, if parties cannot agree upon the third party, the decision will be made by the court, following a brief procedure. As a rule, the insurer will have the obligation to pay the costs related to that procedure. As an exception, the court can rule for the client himself to make the payment, if it has been established he abusively started that procedure.

In case the client starts the above mentioned contentious procedure and is granted a more advantageous solution than the one suggested by the insurer or by the third party indicated in the previous

[68] R.Perrot, Institutions judiciaries, 15e edition, Montchrestien Publishing House GDJ), Paris, 2012, p.83.

paragraph, the insurer will have to offset the expenses related to that action, up to the guarantee's value upper limit.

In the situation the procedure is held before the third party or in court, the procedural terms established for the appeal are suspended for all the legal procedures covered by the policy and the client can initiate the procedure, by formulating the court referral, until the designated third party finds a solution and presents it to the parties.

Art.L127-5 states the obligation of the insurance companies, should a conflict of interests between them and their clients arise, to inform them they can exercise the rights stated by articles L127-3 and L127-4.

5.5. Switzerland.

In Switzerland, the legal protection insurance policies have been used since 1925, they are widely spread and they cover various legal aspects.

For those who are interested, there have been made available motor insurances, individual insurances and professional and business risk insurances. Regarding the package-deal type insurances, in this jurisdiction, as well, they involve a limitation of the covered litigations' range, so that they cannot be used in family litigations, neighborhood relations, real-estate issues or construction work contracts.

There is a maximal upper limit for the amounts that can be insured by a LEI insurance and it established by most of the profile companies to the amount of CHF 250000 (corresponding to approx. USD 250000). The insurer has the option to deny the financing of the client's actions, should he consider there are no chances of success, in which case he has to inform the client, in writing, about his opinion. The resolution of the financing denial can be appealed to a quasi-arbitrary court, on the insurer's expense[69].

5.6. Finland.

For individuals, the legal protection insurances (LEI) are included as clauses (standard, therefore, compulsory clauses) in the home insurance general policies. The companies, as well, can use such an instrument, in regards to certain claims against them (for example, in case of work accidents, or for discriminatory treatment etc).

Under these circumstances, the range of litigations for which the legal expenses can be insured is rather restricted, as most of the litigations categories (divorce and child custody, work or business litigations) cannot be financed in this way. The amount paid in 2012 was, in general, of 8500 Euro the most, which sufficed only for a modest financing or low value litigations and it only covered the insured party's legal expenses.

The using of this type of insurance policies by legal entities clients has been estimated as much more reduced, specifying that unequivocal statistical data could not have been accessed. Depending on the contractual terms, these insurances cover the financing of the client's expenses and they could, also, involve the adverse party's expenses, should the client have any claims, being forced to pay for them, as well[70].

5.7. The Japanese System – a successful implementation model of the legal expenses insurances mechanism.

From the regulation point of view, the legal protection insurance contracts have to comply to the provisions of the Insurances Law and the insurers observe the provisions

[69] C. Zellweger, Pricey but predictable: civil litigation costs and their allocation in Switzerland, material published in M.Reimann (editor), Cost and fee allocation in Civil procedure..., cited above, p. 284.

[70] J.Männistö, Cost and fee allocation in Finland, published in M.Reimann (editor), Cost and fee allocation in civil procedure..., cited above, p.133.

of the Insurance Business Act. There is no equivalent norm for the EU Directive no.87/344/EC.

The first LEI type insurances appeared, in Japan, in middle 90's. They did not consist of stand-alone contracts, but they were add-on special clauses to non-life type insurance contracts, such as automobile insurances, fire insurances or holder's accidents insurances. Therefore, also the litigations, for which those clauses were effective, were limited to the ones pursuing compensation of damages to the clients' properties or those following a car accident.

During 2012, it was founded a specialized insurance company, providing, to the interested people, stand-alone LEI policies, to cover the financing of a wider range of civil litigations: from divorce cases or inheritance to individual work litigations or even litigations related to contracts' interpretation and unfolding.

Rights protection insurance or Attorney insurance (or „Kenrihogo-hoken") is a system created by JFBA Legal Access Center (JFBA-LAC) and which is administrated by the latter, in cooperation with insurance companies. On September 1-st, 2014, 12 insurance companies joined the system, among which, 3 of the 3 largest groups of non-life insurances.

The „Attorney insurance" system is organized in such a way to observe the provisions of the Attorney act, which do not allow to provide consultancy or representation by other persons than lawyers (art.72), or to intermediate such services, all these actions being submitted to criminal law. Therefore, the insurance companies can neither provide legal services themselves, nor indicate specific lawyers to the clients.

In this context, the only task the insurers have is to finance the related legal costs (justice fees, management of evidence costs, expertise fees etc.), but also the lawyers' fees. On the other hand, in order to properly inform and guide the client, upon this one's special request, JFBA-Access Center will ask the local bar to recommend a lawyer.

Lately, the popularity of this insurance system has grown exponentially. Rights protection insurance had reached a number of 20 million contracts, in 2012, and was used in over 20000 trials, helping to significantly improve the access to justice for the Japanese citizens[71].

5.8. Australia – a different approach for the legal protection insurances (starting by the state's involvement, followed by the slowly transferring to the private insurance system).

The concern for ensuring the free access to justice to the middle class people, not eligible for the public legal aid but, still, not affording to pay the legal services costs, made the object of a huge public debate, in Australia, starting with middle '80s.

The ability of the legal protection insurance systems to provide an improved access to legal services, has been noted in the conclusions of the Australian Senate's Cost of Justice Inquiry-1992, the Access to Justice Advisory Committee's Report - 1994 and observed in the research made by the Law Council of Australia.

In 1983, the Law Foundation started to search for means to improve the general access to justice, by providing legal services affordable to people with small and medium income. After reviewing several possibilities, it has been considered that the

[71] M. Omoto, Judicial system and finance for civil litigations in Japan (contribution paper to the 24th. RIAD Congress in Sevilla, Spain), p. 3, 6-7; material accessed online at 28.12.2016, at the address: http://riad-online.eu/fileadmin/documents/homepage/News_and_publications /Reports_Information/general_publications/_final_version__Judicial_System_and_Finance_for_Civil_Litigation_in_Japan.pdf.

most efficient one would be the establishing of a company specialized in legal protection insurances marketing. In this respect, the Law Foundation and the Government Insurance Office=GIO have established, in 1986, the Legal Expenses Insurance Limited (or LEI Ltd.).

This company operated between July, 1989 and 1996, when the shares of the Law Foundation have been bought by GIO, who, subsequently, liquidated its portfolio of this type of insurances.

The fact that this enterprise supported by state, was not successful, was due, on one hand, to the particularities of the Australian legal system, which does not benefit of a specific regulation regarding the establishing of the lawyers' fees (as we showed *supra* that is the case in some European states, like Austria and Germany), so that it was nearly impossible to estimate the costs for those procedures.

On the other hand, the lack of success was also due to the mistrust in this type of insurances. It has been tried to implement a solution which borrows specific elements of this profile insurances from both USA (where these policies provide protection to insured groups – mostly, members of unions, for usual and predictable legal costs) and Europe (where the insurances address the individuals, but provide protection for a small number of litigations types). The result was a product intended for groups of potential clients (unions, clubs and associations), which was financing the legal costs indicated in the policy, but was also entitling the holders to certain complementary services, such as phone counselling and a small category of in-house type legal services for all litigations.

Even so, neither the large public, in general, nor the potential clients aimed by the insurers, in particular, did realize the benefits of this type of insurance, especially that nor the insurance brokers were familiar to the product's particularities, so they were not able to efficiently promote it. The recession, along with the lack of providing any fiscal facilities, were all the more reasons to prevent the employers from purchasing legal protection insurances, as benefits granted to employees.

Even if it didn't have the expected results, the LEI Ltd. Company's action contributed to the establishing of a legal protection insurances industry in Australia.

After the LEI Ltd. company's liquidation, the respective insurance policies continued to be offered by several insurance companies (private companies). Most of the legal protection insurances offered afterwards were aiming the needs of the educated and financially independent citizen and of his family, addressing, especially, to those concerned by the economic stability. Usually, the protection offered by these policies extends, also, to the client's family, living under the same roof. The same as in Europe, the legal protection insurances can be used related only to certain types of litigations (such as, cases of civil liability tort, the consumer's right, home selling or buying litigations, auto liability, defense in litigations related to the anti-discrimination legislation). They don't include matters of family law, inheritance or real estate business, transfer of real estate property, most of criminal cases.

However, the number of insured persons is not established, but the popularity is significantly lower than the one that these instruments have on the United States and Europe markets[72].

In order to improve the market and to widespread the use of this type of insurance,

[72] A. Goodstone, Legal expense insurance: an experiment in access to justice, Justice Research Centre, Sidney, 1999, material studied online at 27.12.2016, at the address: http://www.lawfoundation.net.au/ljf/site/articleIDs/1A084093CE99046ACA257060007D1456/$file/ insurance.html.

there have been made several suggestions[73], among which:

1. Taking certain fiscal policy measures, expressed by including the costs related to purchasing the legal protection insurances in the scope of deductible expenses;
2. The government should assume the role of promoting the LEI type insurances, so that the public can realize the necessity and the benefits resulting from purchasing this product;
3. Still the government, as being the employer of an important number of people, can encourage the spread of this type of insurance amongst its employees, by supporting certain collective bargaining schemes (enterprise bargaining etc.);
4. To complete the above mentioned promoting activity, the insurance brokers should be properly trained and improved as regards the particularities of this product.

6. Conclusions (and accounts) regarding the use of the stand-alone legal protection insurance contracts in the Romanian jurisdiction.

In Romania there is a widespread use of the clauses referring to the legal protection, included in the professional liability insurance contracts (*exempli gratia*, for lawyers', architects', physicians', expert accountants', assessors' liability etc), RCA type contracts (for motor insurances), home insurance contracts, or the employer's tort liability contracts. Policies that are found less often are the ones intended for the clients-legal persons, like general liability contracts or policies that aim the risks related to a specific business (such as: insurances for construction and assembly works, or insurances for forwarding liability). In these cases, as well, the legal protection insurance is embedded in the main contract and not as a stand-alone type.

Although we went through the websites of at least 20 insurance brokers, we could not find, in their general offer, any product, addressed either to individuals or to legal persons, to be an actual insurance contract for this type of risk. The author shows he found no different situation regarding the profession liability and couldn't find any signs of it either, in the specialty literature or the national courts' practice.

The same fact is revealed also in the „European Judicial Systems. Efficiency and quality of justice no.23 (ed.2016)" report74 drafted by the European Commission for the Efficiency of Justice (ECEJ). This document shows that the only Union's member-states not having such a system, in 2014, were Bulgaria and Romania.

The explanation of this fact is that, usually, the legal protection insurance systems are very developed in the states where the costs related to lawsuits are predictable, for the exact reason that there are established lawyers' fees (as we showed in the above75, regarding the fees' regulation for the law professionals, in Germany and Austria). We consider that this justification can only be partly accepted, since the lawyers' fees, in Romania and Bulgaria, are among the modest ones from the entire European Union.

Therefore, we think that the only possibilities to finance the costs of a civil lawsuit in our jurisdiction remain: either to

[73] Ibidem.

[74] The report „European Judicial Systems. Efficiency and quality of justice no.23 (ed.2016)" made by the European Commission for the Justice Efficiency (CEPEJ), cited above, p.69.

[75] See footnotes no. 60 and 63.

be borne by the involved parties (both, individuals and legal persons), or, if the case, to obtain the approval for the public legal aid, for individuals (under the conditions of the article no.4 of the Emergency Government Ordinance no.51/2008, regarding the legal aid within civil trials) and facilities regarding the payment of the justice fees, granted to the legal persons (according to article no.42 par.(2) of the Emergency Government Ordinance no.80/2013, regarding the court fees).

Given that, both in the national courts' jurisprudence and in CEDO's practice, there have been criticism referring to the inefficacy of the legal assistance system, it results that the implementation and the promotion of certain legal protection insurance policies would be very useful and would be an additional guarantee to ensure an effective access to justice. It remains to be seen how and when such a reform in insurance will be adopted, considering the system's fragility and the development level of the market profile in Romania.

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