Insurance contract: Historical and theoretical profiles from the perspective of European law

Abstract

From the beginning, the best doctrine understood that the true “essence” of the insurance “phenomenon” is to be found in the “support” by the insurer, to the extent agreed in the contract, the economic consequences of a risk looming in rerum natura on the insured, concentrating such this function in the ancient formula: susceptio periculi rei alienae. And this was the reason justifying the insurance contract or the cause for which the law system recognizes legal significance to this peculiar contract, making the same interest in socially useful. Today the insurance has been regulated as an autonomous type, because through the mechanism of “assumption” of risks” (essential factor in the pattern of business trade), has allowed the development of activities and lifestyles become inseparable from the human condition that, otherwise, “would have broken or late development”. The recognition of susceptio periculi as the unitary cause of every single insurance contract has been advocated by many appreciated Authors, while it was going to meet the resistance of those who considered the direct transfer of risk such as' the object of the contract of insurance” in the wake of other doctrine. In other words, “taking on charge” or “supporting” of risk by the insurance company means that the same should compensate the insured for injuries caused by loss (in property insurance or no life insurance). Otherwise, in relation to life insurance, the insurer will perform its financial benefit “capitalizing” the savings that the policyholder has decided to set aside in order to face their future with confidence (if survive beyond a certain date) or for safety to certain survivors (in the event of his death).

Key word: insurance contract historical and theoretical profiles

1. THE DOGMATIC PROCESSING OF INTERMEDIATE AGE: A DENIED IDENTITY

The rule by which the art. 18821 of the Italian Civil Code defines the contract of insurance, by refining the notion already contained in art. 417 old Commercial Code 1882, is the result of a centuries-old dogma which began after the birth of the insurance premium (the end of the century. XIV), ripens in the second half of the eighteenth century. It was a period, not by chance coinciding with the rise of big companies2, for which, the aspiration to achieve by the public authorities the exclusive concession of insurance3 was the sign of the now attained knowledge that it can not properly be carried out if not only on the basis of two fundamental

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1 It states: “Insurance is a contract by which the insurer undertakes, trough a premium, to indemnify any loss or damage that may result to the insubre from certain fortuitous events or force majeure, or to pay a money sum according to the duration or life events of one or more persons.”


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postulates: a) the professional character of the insurance activity, which must be regular and not sporadic, technically sophisticated and financially guaranteed, b) the assumption by the same company, of a "large mass risk "uniform and comprehensive as possible, in order to compensate, with the premiums paid for the risks not taken place, the disbursement of compensation payable in respect of claims that, proportionately small, occur in the same year. It had emerged clearly "the idea that it should not bet on successful completion of each transaction insurance, as this, is and remains inevitably uncertain". It was understood that the single operation must be connected with the many others of the same species on the basis of the greater number of risks associated with, so the easier will succeed for those who assures them (insurance company) compensation advantageous between cases favorable and unfavorable.

This was the decisive step towards the "modern insurance", which postulates just a cover mechanism of a mass of risks whose backbone is the stable link between the single contract and the insurance company activities4. So it was possible thanks to the work of Bernoulli who, at the beginning of 1700, he formulated the so-called law of large numbers, laying the foundation for statistical computing actuarial5. In this way, they created the theoretical basis essential for the development of the so-called actuarial method, aimed at evaluating the risks and the calculation of the corresponding premium6. But this outcome was reached only after four centuries since, in the mid-1300, the mercantile practices forged the first insurance premium7: in respect of which the new idea was that risk-taking was done as speculative operation in its own right and not as incidental transaction to another contract, as was previously the case with the so-called agreements or loans "for insurance purposes"8. Not only obligation assumed in priority, but at the same time, who "supports" the risk is quite an extraneous9. But the origins (and for a long time) this new speculative operation was practiced by traders as one of the many business trade and so as an act of "isolated", removed by the activity of specialized firm10. The doctrine, for centuries, has been plagued by the debate about the legality (which records the ideological contrast between the merchants and the moralists) and about legal nature of the insurance contract - originally sought in one of the traditional patterns of common law, origin of Romanesque (loan, purchase, guarantee, locatio operis). On the first point, the complaints against insurance

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4 La Torre, A. op. since last, 246–247 and ID., La disciplina giuridica dell'attività assicurativa, cit., 2-4. In the same view: Cassandro, G. voice: "Assicurazione (storia)" cit., 420, now Genesi e svolgimento storico dell'assicurazione, cit., 239, in according him towards the end of the 700 “the connection almost exclusive of the contract with a collective enterprise can operate over a wide market and with more exact calculations of the magnitude of risk, insurance gave those characteristics that have made it, the, define, in our times, business contract and especially of mass".

5 Bernoulli, J. (1713) Ars conjectandi, Basilea, 1713, 5 ss.

6 About the technical-insured process see also, amplius: La Torre, A. L'assicurazione nella storia delle idee, cit., 247 ff. 0

7 In particular, after an investigation in the Genoese archives; Melis, F. (1975) Origini e sviluppi delle assicurazioni in Italia (secoli XIV-XVI), (by INA), I, Le fonti, Rome, 7, he discovered the oldest written document of insurance, dated 20 February 1343, received by the notary Tommaso Casanova, wich guaranteed "ballas decem pannorum". This is, however, a masse policy the guise of loan; Spagnesi, E. Aspetti dell'assicurazione medievale, in AA. VV., L'assicurazione in Italia fino all'Unità (Saggi storici in onore di Artom E.), cit., 57-58.

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9 This seems the decisive argument that allows you to finally overcome the tesi of Goldschmidt L., (1913) A universal history of commercial law, Turin, 274-294, who gleans the genesis of insurance in the bottomry contract, undersood as its integral part,referring to the idea already proposed at the time by Benvenuto Stracca (ID., Tractatus de assecurationibus, Introductio, Ancona, 1569, I. 358): “traiectitiam pecuniam, instar cuius assurrtionem inventa est”; Schwarzenberg, C. (1969) Ricerche sull'assicurazione marittima a Venezia, Milano, 12 ff; Spagnesi, E. op. cit., 9, 37 ff. and 68; Nehlsen von Stryk, K. op. cit., 17 ff. and La Torre, A. op. ult. cit., 87 ff. With same considerations it is also refuted the tesi of Huvelin, P. (1929) Études d'histoire du droit commercial romain, Paris, 95 ff., wich identifies with stipulations sub condicione, since the roman times, the primitive models of insurance.

10 La Torre, A. op. ult. cit., 198.
were particularly infamous, resulting even in the “charges” for wear\(^{11}\) and play gambling or betting\(^{12}\), beyond the alleged imbalance of benefits, with unlawful profit either of insured or of insurer, depending on whether the case of insurance materialization or less.\(^{13}\)

The criticism of usury is soon overcome when, on the one hand, the Decree of 22 October 1369 of the Doge of Genoa Gabriele Adorno, entitled “Contra allegantes quod cambià et assecuramenta... sint illeticta vel usuraria”, allows to impose penalties in those who denounced the usurious nature of insurance\(^{14}\), on the other hand, the law of 9 May 1393 in Florence expressly recognizes the validity of the insurance contracts relating to goods and ships of Florence\(^{15}\). On the other hand, Roman law already admitted the *emptio-venditio periculi* and numerous ancient moralists (including clearly the nature and function of the contract) see in the “periculi susceperit” (literally, in the supporting of risk) by the insurer “is not something fictitious and vain [...], but real and positive, so worthy of his reward. For them such compensation is not only wear, but is required by the same natural equity.”\(^{16}\) Unlike the gambling or the

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\(^{12}\) Sacchetti, F. *op. cit.*, 11; Consobrino, I. (1482) *De iustitia commutativa*, arte camporia et aliarum ludo, Paris, II, c. 6, according him the insurers “venit pro libellis quod suum non est nec esse potest, quia solus Deus est navem conservare; magnum idea inuiauram facit Deo quia non sufficit contractum facere cum inferioribus, imo etiam com operibus Dei occultis et nobis commutativa, arte campsoria et alearum ludo iuscer periculi susceperit” and also, Summenhart, C. (1580) *Tractatus de contractibus licitis atque illicitis*, Venice, 320: “primo sic: quia talis contractus” (insurance) “per omnia est similis illi contractui inominato qui dictatur vadiatio vel concertatio [...]. Nam Petrus in paredicto contracto nihil alid in re facit quam quod obligat se ad solvendum Paulo tantum quantum merx valet si non venit sibi salva; et alius contra se obigat ad dandum certam pecuniam si veniet salva; at cuius tamen salvum adventum nihil operatur”.

\(^{13}\) Sacchetti, F. *op. cit.*, 11; Consobrino, I. *op. cit.*, c. 6 and Tartareto, P. *op. cit.*, 286.


\(^{16}\) Pesce, P. G. *op. cit.*, 53. Already Francesco Da Empoli, *Quaesto seu Tractatus de Monte*, Cod. Vat. Lat., 2660, ff. 267-270. However, the first recognition of the legitimacy of the insurance contract is to be found in Ridolfi, L. (1403) *De usuris*, 3, n. 10, in *Tractatus universi iuris*, Venezia, pubblished 1584, VII, f. 38;

bet, then, the alleged risk in the insurance contract is real, “nor is the argument that it is entirely fortuitous event, having to replicate that in fact this is precisely the characteristic feature of ‘uncertain future event’”\(^{17}\). Finally, “accusation” of injustice profit was refuted in view of the *sinallagma* concept of reciprocity between the obligation to pay the premium (on one side) and that of “Securum facere” on the other, or rather an equivalence “geometricam: id est non absolutum, sed proportionalem, proportione servata ad dubium et ad praemium”\(^{18}\), so that the insured is “sheltered” from the consequences of the materialisation of a risk hanging over him, while the insurer is the “right” amount of the guarantee provided\(^{19}\). The debate about the legal nature of the insurance took start, however, from the consideration that, at least until the mid-1700, this contract, unknown to Roman law\(^{20}\), were seen as the genus of the ‘atypical’ contracts, so that the authors did their utmost to frame it in one of the schemas “appointed”\(^{21}\) in order to infer the relative rule. Keep in mind as “on the other hand it is also true that it was easier to emphasize the honesty”, emphasizing the who says same ideas of Francesco da Empoli, adding: “*datur enim ut faciat; non enim propter mutuum, cum nullum interveniit, sed propter id quod assurcat mercatorum de mercibus suis, quas periculo marino vel terrestri exponit, illud percipit*”.\(^{17}\)

\(^{17}\) La Torre, A. *op. ult. cit.*, 161 and Patuzzi, I. V. (1700) *Ethica christiania sive theologica moralis*, Venice, 77: “porro in assecurazione assecrator in se suscipit periculum rei si forte pereat: qui vero pro assecuratione pretium solvit, beneficium obtinet compensationis damnii, si forte obvenerit; quod profecto est pretium aeternabile; ergo licitus omno est huiusmodi contractus”.\(^{18}\)

\(^{18}\) De Onate, P. (1647) *De contractibus*, Roma, III, 677.


\(^{20}\) See supra, note n. 9 and D’Emerigon B. M., (1845) *Trattato delle assicurazioni e del contratto di prestito a cambio marittimo* (trad. it.), Venice, 11 and Endemann W., (1866) Das Wesen des Versicherungsgeschäfts, in *Goldschmid’s Zeitschrift*, IX, 300.

“likeness” (of the insurance phenomenon) “with other contracts accepted and practiced”\textsuperscript{22}. Obviously this is not the place to consider analytically all the different solutions proposed by the doctrine over the centuries\textsuperscript{23}; here it is enough just to remember that the insurance will now turn to the surety-guarantee, in consideration of the guarantee function on both contracts\textsuperscript{24}, now the mortgage-loan (based on a legal fiction that he saw the insured-lender and the insurer-borrower) subject to the risolutive condition “salvo arrivo del bene impegnato”\textsuperscript{25} now at the location of works, in which the lessor-insurer\textsuperscript{26}, by fare, performs its services in favor of the insured-tenant\textsuperscript{27} and, above all, to the purchase agreement for the insured property or the so-called “periculum eventi”\textsuperscript{28} or rather the contingent liability of the insurer to pay the price of the goods only in case of loss or damage (so to pay the compensation to the occurrence of a harmful event.)\textsuperscript{29}

2. THE DISCOVERY OF INSURANCE

IDENTITY AS AN AUTONOMOUS

CONTRACTUAL “TYPE”

However, the argument just now mentioned were misleading\textsuperscript{30} in the slow maturing of the belief that the insurance contract was not due to any of the traditional patterns, creating instead a “new figure”, with its own identity dogmatic. Absolutely crucial, in order to overcome the traditional approach, appear two contributions: the one that exists on the legal front, consisting nell’Ordonnance de la marine of Colbert of 1681\textsuperscript{31}, which “closes for the marine insurance the construction phase and opens the way to modern legislation”\textsuperscript{32}; the other, by the doctrinal, represented by the fundamental work of Casaregis that, completing the process of enucleation in order to the essential elements of insurance, comes, on the first, to a configuration of the insurance contract which type independent.\textsuperscript{33}

In fact, the order of Colbert regulated, in a complete way, marine insurance, setting the pattern in the abstract, “also using habits, especially those in the western ports and of the North”\textsuperscript{34}, so that, in according

\textsuperscript{22} Pesce, P. G. op. cit., 59.


\textsuperscript{24} So: Soto D., op. cit., 330 “fideiubent licet accipere pretium fideiussiosis, ita et multa magis licitum est assicuranti cum salvo arrivo del bene impegnato”\textsuperscript{25} now at the location of works, in which the lessor-insurer\textsuperscript{26}, by fare, performs its services in favor of the insured-tenant\textsuperscript{27} and, above all, to the purchase agreement for the insured property or the so-called “periculum eventi”\textsuperscript{28} or rather the contingent liability of the insurer to pay the price of the goods only in case of loss or damage (so to pay the compensation to the occurrence of a harmful event.)\textsuperscript{29}

\textsuperscript{25} now at the location of works, in which the

\textsuperscript{26} As the sea loan or bottomry contract (supra, nota n. 8); Bensa, E. op. cit., 59 and 192; Cassandro, G. voice: “Assicurazione (storia)”, cit., 422, now Genesi e svolgimento storico dell’assicurazione, cit., 242; Spagnesi, E. op. cit., 60-61 and La Torre, A. op. ult. cit., 172ff.

\textsuperscript{27} Di Castro, P. (1575) In secundum Digesti veterem paritem commentaria, Venice, 134 ff.

\textsuperscript{28} Bosco, B. (1390-1435) Consilia, Lyon, published on 1620, nn. 369 (“modus faciendi istas securitates inventus est per viam venditionis sub conditione resolvendae”) and 391; Giballino I., op. cit., 293, and La Torre, A. op. cit., 166ff.

\textsuperscript{29} Santerna, P. op. cit., 7 (“qui assecurationem facit propter pretium, dicitur emere eventum periculi”); Molina L., op. cit., 658: “alii [...] censent esse emptionem-venditionem aut ad eam reduci, qua pro certo pretio venditur susceptio periculi seu obligatio solvendi asestationem rei si perierit” Targa C., (1787) Ponderazioni sopra le contrattazioni marittime, Genova, 184-185, who defines insurance as ”contratto di indennità per un tal prezzo”, and Pothier R., (1830) Oeuvres, III, Bruxelles, 236, in according him insurance operation has as object il “prix du risque”.

\textsuperscript{30} I will confine myself here to indicate the first opponents (ratione temporis) about thesis already proposed. About surety-guarantee reconstruction, see: Azor L., (1611) Institutionum moralium, III, Rome, liber XI, 1020; about loan’s fiction: Ridolfi L., op. cit., f. 38; about location theory: Binsfeld P., op. cit., 527 ss.: “licitus et etiam talis contractus” (insurance) “etiam si suscipient periculum nullum laborem aut operam inpendat pro evitando periculo” and at, least about theory of buy see: D’Emerigon B. M., op. cit., 5-7.


\textsuperscript{32} About this point also Pene Vidari G. S., op. cit., 195 ff. Then, after this rule you must wait more than a century to be able to see, in panorama of european law, a subsequent rule regulating insurance as nominated contract (though only in maritime law).

\textsuperscript{33} Donati, A. (1952) Trattato del diritto delle assicurazioni private, Milan, I, 65.

\textsuperscript{34} Casaregis, G. L. M. op. cit., IV, n. 1 e VII. In argument: Bonolis, G. (1901) Svolgimento storico dell’assicurazione in Italia, Firenze, 36; Cassandro G., op. since last cit., in Bollettino dell’Archivio storico del Banco di Napoli, cit., 31 ff., now in ID., Saggi di storia di diritto commerciale, cit., 274 ff.; Pene Vidari G. S., op. cit., 211, especially note n. 43, and La Torre A., op. since last cit., 191-192.

\textsuperscript{35} Stefani, G. op. cit., 166.
with the old experience, it was verified and ordered the validity of insurance matters in a wide and articulated framework of rules.35

Casaregis, however, goes much further. He, starting from the elaboration of previous centuries, emphasizes the risk, not only objectively considered, but referring to the insured on which actually falls, so as to arouse in him the "need" to be provided for cases that the feared event should come true. This requirement is nothing if not "interesse assecurari"36, or rather the main "fundamentum assecurationis [...] sine quo non potest subsistere assecuratio"37, defined according to a formula now substantially reproduced in the art. 1904 Italian civil code 1942, with regard to insurance against damages38. This interest "real and legitimate", which, we repeat39, is missing from the bet, then allows to consider insurance as a contract can not be confused with it40. Because the interest is its distinctive character and typifying, so as to justify the conceptual autonomy.41

Always at the end of 1700 were no additional studies, continuing in the direction described above,35 La Torre, A. op. since last cit., 215.

36 Casaregis, G. L. M. op. cit., IV and La Torre, A. op.since last. cit., 190-191.

37 Casaregis, G. L. M. op. cit., IV, n. 1.


41 Casaregis, G. L. M. op. cit., IV, n. 1, who says that in the insurance contract "requiritur, de substantia illius, dominium seu interesse assecurari"; Perdikas, P. op.since last. cit., 295; Cassandro, G. op.since last cit., in Bollettino dell’Archivio storico del Banco di Napoli, cit., 35, now in ID., Saggi di storia di diritto commerciale, cit., 276, in according him "as it appears by use’s formula in policies and, as confirmed by authors, interest can coincide generically with risicum (‘risicum seu interesse assecuratum’)" and La Torre, A. op. since last cit., 190. Nehlsen von Stryk, K. observes , op. cit., 189 that "insurable interest as fundamentum of insurance contract was present to the giuridic medieval sense, although its observance was not probably implemented everywhere with the same resolve."

reinforce the idea, now mature, which sees in insurance an ontological identity, relying on the elements of risk and interest.42

The modern codifications thus could not ignore (over and over) that the effect that, in practice, was becoming more widespread from the marine sector to the "terrestrial", to cover events such as death or survival.43 So, starting from the last decades of the nineteenth century, first in Belgium and then Hungary enacted the first pieces of legislation containing a general definition of insurance44, which has certainly inspired italian legislature elaborating the concept of the insurance contract which appears for the first time in art. 417 old commercial code 1882. From this rule differs little in terms of content, the article stated by art. 1882 of the actual Italian Civil Code. Both dictate a general rule that, after identifying the common element in all forms of insurance, shall immediately adopt a dichotomous formulation, distinguishing the non-life insurance (which are intended to retaliate the insured for the damage resulting from an accident) than life (under which the insurer makes a payment to the occurrence of an event relating to human life)45. On the other hand, looking at the entire continental legal firmament, one can see that the definitions adopted by other European countries (even in their diversity) are, like the Italian one, the result of centuries of dogmatic evolution (that stops we just now briefly traced) which ended with the recognition of insurance as contractual autonomous type, having a separate cause from any other contracts. The more complete and articulated notion is found in the German Law of 30 May 1908, which defines the insurance benefit as "obligation in


43 From the sixteenth century (Gartias, F. op. cit., 657; Salon, M. B., op. cit., 683; Azor I., op. cit., 912, and Da Vittoria, F. op. cit., 222), also if life policies rise finally only in XIX century (Perdikas, P. op. ult. cit., 296-297).


45 In fact, by napoleonic legislation (Codice civil de Napoleon 1804 and Code de commerce 1807), "the italian codes on 1865 not rule about insurances in general" (La Torre, A. La disciplina giuridica dell’attività assicurativa, cit., 30).

46 La Torre, A., L’assicurazione nella storia delle idee, cit., 194, note n. 457.
damages insurance to compensation, in a contractually agreed, the damage produced by the loss and, in life insurance or of persons, to pay a capital or incombe, until service agreed, against payment of premium”. It ’a notion which, like the Italian one (1882 and 1942), is set on the dichotomy damages-life, but with the not slight difference that the German law put together life insurance with the accident insurance and “any other insurance of persons”, thus preventing the occurrence of these problems of interpretation registered in our system respect to the classification of the latter two categories. 47 A clear distinction (damages-life) comes only in embryo in the French law of July 13, 1930, which speaks of “obligation to pay to the occurrence of a loss a predeterminate amount” (with implicit reference to life insurance) “or an indemnity-compensation not exceeding the insured sum” (where the allusion is clear to life insurance) 48. Of this dichotomy, however, there is no trace in the Belgian Law of 11 June 1874, or in the Luxembourg on 16 May 1891 and in Dutch commercial code of 1838, which seem to give little space to insurance of persons (referring only to the obligation to compensation for losses and damages) but, conversely, explicitly take in consideration, in its definition, compensation for profit hoped.” 49


But what is the function of the insurance contract? Various solutions have been proposed in this regard. 50


The jurist who, rightly, can be considered the standard bearer of the scientific renewal of matter, is Cesare Vivante, who with his massive three-volume treatise on Insurance Contracts (1885-1890) was the first to perceive and theorize the link between “contract” and “firm”, when it actually was still ignored by the legislature. He developed the theory of the firm completely, enhancing the legal the technical data that is the foundation of the insurance activity. If it is true, that in every single contract, the insurer promises to insured to keep it free from the negative economic consequences of any loss behind the payment of a premium received in advance, it is true that the specific insurance benefits can not be ensured only through the assumption of a mass of risks of the same species from the same insurance company. 51

In this way it is possible to eliminate or, at least, to “absorb” all risk borne by entering into a number of contracts homogeneous so that the premiums paid by the insured, that many will not be affected by accidents, constitute a sufficient amount to cover the performance that the insurer will have to face in favor of policyholders for whom, in proportionately small, it will be operational warranty. The insurance company is well placed to guarantee the fulfillment of the promised service to policyholders and, at the same time, to portray a consistently profit from its activities, making a careful risk selection aimed at maintaining the above proportion, through careful statistical and actuarial investigation. 52

In other words, relying on “Rule of large numbers”, which governs the set of phenomena taken into consideration, implements a provision that allows you to determine with high accuracy, or at least, with significant approximation which will be the percentage of risks that

AA. VV., Il diritto delle assicurazioni, I, Turin, 14, 26 ff and La Torre A., op. since last cit., 294, especially note n. 686.

51 This practical need was already recognized and sustained with the advent of large insurance companies, since the second half of the eighteenth century. See in the foreign doctrine before Vivante: Quenault, M. (1828) Traité des assurances terrestres, Paris, 121 (“La jurisprudence, qui ne voit dans chaque assurance qu’un contrat isolé et qui se borne à connaître des rapports que cet contrat établit entre l’assureur l’assuré et ses représentants, ne comprend point dans son domaine toute la théorie des assurances. Une autre science prends aux combinaisons, qui établissent entre toutes les assurances faites par une compagnie une sorte d’ ensemble, dans lequel chaque risque assuré et chaque prime d’assurance ne figurent et ne concourent que comme des facteurs d’un seul tout”) and Goldschmidt, L. (1874) Handbuch des Handelsrechts, Erlangen, § 49, 582 (“Die Möglichkeit eines rationellen genossenschaftlichen Betriebes”, sicché “eine auf statistischer Grundlage beruhenden Durchschnittberechnung, ein gemeinschaftlicher durch die Beitrag der Versicherten aufgebrachter Ersatzfonds gebildet und verwaltet werden kann”).

52 Supra, § 1.
occur. And it is for this reason that the insurance contract could not be concluded as an isolated affair; “the effective and systematic of the industry by a company is therefore not a fact extrinsic to legal relations of the parties, it is essential for ‘fulfilment of the rights and obligations that each took on’”53 so there is no insurance without insurance company.54

The theory of Vivante, soon welcomed by foreign authors55, was taken in Italy in the middle of the last century, especially from Mossa56, Sotgia57 and Ferri.58 The first, having focused on the mutual interrelationships between “act” and “insurance activities”59, comes to the conclusion that: “in the insurance contract the insurance company comes as a condition of the contractor, which position of law, subjective and organic of the insurer. The insurer is not only a person, but it is essentially a business enterprise with that particular form of joint-stock companies, or mutual society, with data and conditions”. From what the author brings down not only the policy ended with an insurer operator in an organization to a business company of one party, but could have major effects of the discipline and the relationship of the company, does not change the legal nature of the relationship “because” economic category and legal category do not necessarily coincide.60

Not a few, indeed, were the objections to such reconstruction, including distinguished himself in the past, especially the vehement criticism of Viterbo.61

53 Vivante, C. op. since last cit., 339.
54 Vivante, C. op. since last cit., 334.
56 Mossa, L. (1942) Sistema del contratto di assicurazione nel libro delle obbligazioni del Codice Civile, in Assicurazioni, I, 189 ff and ID., (1953) Impresa e contratto di assicurazione nelle vicendevoli relazioni, in Assicurazioni, I, 141 ff, after having abandoned theory of “possible need” that we shall examine after.
57 Sotgia, S. (1959) La prestazione dell'assicuratore, in Assicurazioni, I, 374, who insists that the distinctive and unified element of all insurances “is recognized by systematic exercise of an insurance undertaking or in the presence of an organization to exercise systematic and continuous insurance contracts.”
58 Ferri, G. (1963) L'impresa nella struttura del contratto di assicurazione, AA. VV., Studi sulle assicurazioni per il cinquantenario dell'INA, Rome, 111 ff.
59 La Torre, A. La disciplina giuridica dell'attività assicurativa, cit., 2 ff.
60 Mossa, L. op. since last cit., 149.
61 Viterbo, C. op. cit., 43-44.

The latter one claimed that there was no liability of the insurer in respect of the insured, to be organized in entrepreneurial activities, “to enter into new contracts or continue those already concluded”, or rather introducing into the rules of the policy a condition of this sort, because it is not “essential to the legal nature of a contract the circumstance, extrinsic to it, that one of the contractors habitually concludes contracts of the same nature”. In support of these assertions authoritative doctrine62 stated that “in itself, the fact of the organization to a business company of one party, but could have major effects of the discipline and the relationship of the company, does not change the legal nature of the relationship “because” economic category and legal category do not necessarily coincide.”63

4. THE PRINCIPLE OF “POSSIBLE NEED”

Parallel to Vivante’s idea, was drawn to a different building in order to preserve the conceptual unity of the insurance phenomenon: the theory of “satisfaction of a possible need for any partial cost”. Its original formulation was thought to economist Gobbi64, which starts from the observation that the human person acquires assets to meet current needs and certain, or rather future needs and possible. So, the individual, considering the possibility that occurs the so-called “possible need”, is induced to purchase immediately, even when the need is merely potential, the good that will be used to satisfy (if it arises) or he will ensure the provision of one third to refreshment in case of need come true by paying in advance a price far lower than the value of the res. The insurance would, in this way, the means by which this economic idea assumes legal status. The theory of the “possible need”, moreover, allows to understand exactly a further distinction between the insurance, on the one hand, and the game and bet on the other: “the payout amounts to an advantage supervenient and not to the compensation of a disadvantage, arisen for the occurrence of a risk”65.

This thesis originally received many supports and was revisited by Brunetti, who made reference to the so-called need originated from the destruction or damage of property. However, noted that the “need” is not an essential element of the insurance type, especially with regard to life insurance, to save render such theoretical construct, it distinguished between the concrete need that would have resulted from the occurrence of an injury and the abstract need inherent in an event relating to human life. To this solution also joined, at first, Donati, who called the cause of the insurance contract in these terms: “to satisfy the current and duration needs of the insured for certainly satisfy those needs that may will be caused by the occurrence of an uncertain event”. So at the time the author was trying to overcome the basic objection that had long since been put forward against the original formulation of the thesis, or rather the possibility that the verification of the insurance event does not rise to any need for insured, but rather, in economic terms, it was sometimes advantageous (for example see the case of the death of an life insured, terminally ill), so as to find the negotial cause at the time of conclusion of the contract. The author then changed his opinion when he realized that the subjective nature of the concept of need, which eschews any attempt to objectivation and look toward the cause of insurance. This theory, however, differs radically from that of Vivante because it “moves” toward the cause the question of the identification of a unitary foundation of the insurance contract, and it sees in this contract a function that exactly fits an social benefit.

5. THE PRINCIPLE OF “INDEMNITY”. SETTING UNITARY AND PLURALISTIC THEORETICAL CONCEPTIONS

The “Compensatory theory” or “principle of indemnity” owes its genesis to the French doctrine, before being accepted for the first time in Italy by Ascarelli. According to this view the cause of insurance lies in the function of restoring damage, arising from a specific risk event that affects a property or a person. Already on the basis of this short description we can deduce how well it is tailored to the life insurance but “the first widely practiced forms of insurance of risks relating to the human person, namely that of being taken prisoner by pirates or enemies and be taken into slavery, the compensatory nature of the contract could not be doubted, as the insurance covered the redemption price and the amount of money that should have been paid by the insured to regain their freedom”. Conversely, it is not equally obvious to the applicability of this theory to life insurance, for which the compensatory nature is a fact to test, not certain, because the insurance benefit here is the payment of a “capital” or a “annuity” upon the occurrence of an event relating to the duration of human life, regardless of the harmfulness or less of such an event. To bring also setting indemnity, it was said that, in the event of death, the risk is the loss of “life”, or in injury suffered by survivors, family and creditors, respectively dissatisfied and without means of livelihood, while in the insurance for the


71 Donati, A. Il contratto di assicurazione nel codice civile, cit., 24.


event of survival, the damage was made by increased requirements related to the state of old age.  

The criticism against the varied reconstructions that have attempted to identify an unitary core in all phenomena negotiating insurance lead some commentators to support the inability to perform a “reductio ad unum” of insurance, thus opening the way to the dualistic conceptions. One of the strongest supporters of the dichotomy between no life insurance and life insurance (although without denying the unity of the institute insurance) was undoubtedly Fanelli, who calls to mind the example of accident policies (or against accidental troubles) as confirmation of its most significant assertions.  

Also Scalfi, about the problematic issue of the applicable rule to this insurance figure, noted the recognition of a “right of citizenship” in favor of the benefi ts of insurance as “facere and claiming the existence of a plurality of models of insurance” as there are types of risks that the law allows to cover. In this way Scalfi differs radically from Fanelli, according to which there is “not even allowed into the dichotomous system of our law a “quartum”, distinguishing the risks simply by depending on whether or not about the duration of human life.

In any case, these authors agree on one consideration: by the configuration of the event, whose fulfillment materializes the negotiated risk, it would depend the divisions within the insurance contracts.

In fact, the various arguments that have been developed, beyond the criticisms that have led to their rejection, are constantly trying to trace the cause of the insurance (more or less indirectly) taking into account the perspective of the insurer or that of insured. It accepts, implicitly, a notion of this essential element, different from the idea that now dominates and defining it as objective social-economical function, or rather wich purpose that unrelated to the reasons pursued by either party by choosing a particular type of negotiation. So, while the theory of the firm can infer a general and unspecified function profi t of the insurance contract, since it focuses all the problems of the unitary foundation on the figure of the insurer, by contrast, the doctrine of “possible need” and that one of the compensatory-indemnity principle describe the cause of the contract having regard only to the position of the insured.

This “logical fl aw” represented by the acceptance of one-sided perspective is already noted “between the lines” of the writings of Donati, despite the fact that, as we discuss here shortly (infra, § 8), has also contributed to reformulate the indemnity thesis. So, to outline the socio-economic function of insurance we must reflect about the actual objective fi nality that the contract carries on stipulation, of course without taking into account the fact that the parties subsequently run (or not) their performance.

The same Donati notes in this connection, persuasively, that the thesis (by the same described as a “theory of the function with respect to both parties”) that the insurance would generate a mere exchange of corresponding obligations (premium against insurance guarantee) does not identify the cause of insurance, since it is on a “quid” common to all bilateral-synallagmatic contracts, without allowing any identification within them. But, then, is it possible in this respect intending a unitary notion of insurance function?

Scalfi itself does not deny that the cause of guarantee characterizes the insurance contract, only he elevates the risk for typifying element, so as to postulate a breakdown of the insurance type in a variety of types as there are many cases of the abstract risk insured. So, against the abstract cause of insurance cover can be distinguished many really and effective causes (“guarantee of an indemnity, warranty service, solvency insurance, to assume the financial burden of a debt or a loss, a guarantee of a social security benefi t, etc.)

77 Krosta, B. (1911) Über den Begriff der Versicherung, Berlino, 63 ff.
78 Fanelli, G. (1962) La “summa divisio” nelle assicurazioni private: riflessioni su un vecchio problema, in Foro it., IV, 58, now in ID., (1971) Saggi di diritto delle assicurazioni, Milan, 507 and Herrmannsdorfer, F. Versicherungswesen, Berlino, 1928, § 1, 6 ss.). For a complete overview about thesis that refutes dicothomy of risks that the law allows to cover. In this way Scalfi differs radically from Fanelli, according to which there is “not even allowed into the dichotomous system of our law a “quartum”, distinguishing the risks simply by depending on whether or not about the duration of human life.

81 Fanelli, G. op. ult. cit., in Foro it., cit., 68, now in ID., Saggi di diritto delle assicurazioni, cit., 522.
82 By myself the most exact theory of this principle is by: Santoro-Passarelli, F. (1966) Dottrine generali del diritto civile, Naples, 181.
83 Donati, A. La causa del contratto di assicurazione, cit., 224 ss.
84 Donati, A. op. ult. cit., 239.
85 Scalfi, G. op. ult. cit., 148. The same author says that it’s possible a "synthesis" between life and no-life insurance only by
One might add that the answer to the question is to be found in the sources that are at historically when the markets begin to spread massively the first forms of insurance premium.\(^86\) This is because, during that time, the authors (even more than before) were faced with the need to overcome the old “accusations” of illegality directed against the phenomenon insurance, then atypical.\(^87\) But of this we will look at later.

6. THE DICHOTOMY

“NON-LIFE – LIFE INSURANCES”

On the basis of briefly exposed in the previous sections, you can already emphasize that with regard to the choice of the Italian legislature to dictate a dualistic definition of insurance (damages or no life-life), as the art. 417 old Italian commercial code 1882 as art. 1882 actual Italian civil code, there has been an extensive debate in the literature with different positions. And this happens: now in an attempt to exceed this dichotomy - in order to justify the “reductio ad unum” of the insurance phenomenon\(^88\) or different classifications\(^89\) or pluralistic conceptions\(^90\) - now in order to enhance it, without denying, however, the conceptual unity of the institute.\(^91\) And it is well immediately inform that this dichotomy, present in the same legislative definition (art. 1882 Italian civil code), is functional to a discipline which, in part, is common to all insurances, because it is included in the section I, dedicated to the “General Provisions” (Articles artt. 1882-1903 civil code) and is partly differentiated, since the Section II is devoted to “Insurance against damages” (Articles 1904 to 1918 civil code) and section III to the “Life Insurance” (Articles 1919-1927 civil code), followed by a section IV (“the reinsurance” Artt. 1928 to 1931 civil code) and section V “Final Provisions” (art. 1932 civil code). It is thus to outline a regulatory design that describes a “type” of contract (insurance) and two subtypes (non-life – damages insurance and life insurance). But, beyond this dualistic approach (subtypes), the point is to identify the essential element that distinguishes the “type”, which is to say: the cause which characterizes the contract of insurance and distinguishes it from any other negotiating plan. In fact, all the various arguments that have been developed seem united by a single objective, undeclared, which always occurs with remarkable intensity for further reading: the quest for the “lowest common denominator” that is the foundation of all insurance transactions.\(^92\)

7. THE “NEW” PRINCIPLE OF INDEMNITY

This insurance common core, compared to the original formulation of the theory of indemnity, Donati\(^93\) cites the same decisive reasons that led him to reject the theory of “possible need” and so he claims that not always death constitutes a damage, indeed it can relieve suffering, not always causing injury to family members of the deceased, if he was poor, or to the creditors if the inheritance is large enough, on the other hand, survival is not always detrimental, rather it is advantageous if the insured is (for example) a professional or a businessman fully productive. It was therefore attempted to reformulate the theory trying to overcome objections just now described. Beginning by proper consideration that the risk is mere likelihood of damage, the compensatory function of life insurance would be safeguarded extending the notion of detrimental event to the case of mere potentiality of injury and the fact that nothing precludes the overall basis of the damage , regardless of the evidence of its objective existence (as is the case of so-called non-pecuniary damage or alleged).\(^94\) In life insurance, then, interest in art. 1904 Italian civil code, would also immanent (having to subject the person as such) and would also assessed on forfait. In other words, all events relating to human life, raised in this contract are (at least) potentially harmful, so as to recover the indemnity due.\(^95\) The most penetrating criticism against

\(^{86}\) La Torre, A. op. since last cit., 113 ff.
\(^{87}\) La Torre, A. op. since last cit., 147 ff., who refuted the claims of usury, gambling or betting, imbalance of benefits, un fair profit for insured (in case of loss) and unfair profit of insurer (if the loss not trues).
\(^{88}\) I refer to supporters of theory of “firm” (supra, § 3).
\(^{89}\) Supra, note n. 78.
\(^{90}\) Scalfi, G. Dalla classificazione dualistica alla concezione pluralistica dei contratti di assicurazione: contratto o contratti di assicurazione?, cit., 147-148.
\(^{91}\) The supporters of “compensatory theory”, despite in different formulations (supra, § 5 and infra, § 8).
\(^{92}\) Wich also seeks Scalfi G., op. ult. cit., 148.
\(^{93}\) Donati, A. op. since last cit., 230. See further Scalfi, G. voice: “Assicurazione (contratto di)”, cit., 339.
\(^{94}\) Donati, A. op. since last cit., 242ff. and ID., Trattato del diritto delle assicurazioni private, cit., II, 21 ff.
such a concept was formulated by Fanelli, who points out that it has "forced on the same level of no life insurance, namely at the level of one of the two main areas of legislative dichotomy, any other subspecies insurance, deleting or at least making precarious and superficial each of the rules for the classification of insurance contracts." On the other hand, to justify the extension of this function to the life insurance he had to resort to artifice (or legal fiction) to conceive the existence of an abstract damage resulting from events relating to human life, whereas the same does not appear detrimental. In fact, the death of a wealthy terminally ill patient who is insured in case of death, without having creditors, has no harmful for him, for the third / or beneficiaries of the policy. Also happens if the insured is young and in full working phase: its survival over a certain period does not impoverish him, potentially even to rich him. Yet in all these cases, the life insurer will always have to pay any income or capital to the occurrence of the insured event: it is therefore an operation of mere savings or capitalization.

8. CONCEPTUAL UNITY OR FRAGMENTATION OF THE CASE?

The fact is that, despite the traditional dichotomy, the definition by italian civil code offers us to identify the "type", that is the cause of the contract as a minimum and characteristic content: or rather the pact under which one party (the insurer), to the payment of a premium, undertakes to perform a certain service-benefit for the occurrence of a risk looming on the other party (insured). It is also true that this notion, as already mentioned (supra § 6), finds its roots in the theories of the sixteenth and seventeenth centuries. In fact, already the doctrine of the time respectively observed that the insurance “est contractus quo quis alienae rei re periculum suscipit obligando se” or “est alienarum rerum sive mari sive terra exportandum periculis suscepito certo constituto pretio.” The same semantic idea is present in the thinking of other distinguished authors a little later and it finds, perhaps, her best formulation in the work of Martino Bonacina, who, after having proved the groundlessness of all “causa nullitatis” of insurance contract, he concludes “licita est assecuratio qua in se suscipit periculum rei alienae cum spe lucrandi”. And a more complete theoretical system you have in the early nineteenth century, thanks to a author beyond the Alps, for which the insurer assumes the risk of fortuitous accidents involving the insured, forcing it to carry out the guaranteed benefit upon the occurrence of the same accidents. From the beginning, therefore, the doctrine understood that the true "essence" of the phenomenon insurance is to be found in the "support" by the insurer, to the extent agreed in the contract, of the economic consequences of a risk looming in rerum natura on the insured concentrating such a function in the formula: suscepito periculis rei alienae. And this is the reason justifying the insurance contract or the cause for which the order recognizes legal significance to this contract, making the same interest in socially useful.

The insurance has been regulated as a stand-alone type, from the enactment of the old italian Commercial code 1882, because through the mechanism of “assumption” of risks (“essential factor in the pattern of business trade”) has allowed the development of “activities and lifestyles become inseparable from the human condition”, otherwise “would have broken or late development.” The recognition of suscepito periculis as the cause of every single insurance contract has been advocated by authors, but by meeting resistance of those who saw directly the transfer of risk such as the object of contract of insurance, in the wake of

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99 Fanelli, G. op. since last. cit., in Foro it., cit., 51 ss., ora in ID., Saggi di diritto delle assicurazioni, cit., 495 ss.
97 Fanelli, G. op. ult. cit., in Foro it., cit., 54, now in ID., Saggi di diritto delle assicurazioni, cit., 500.
98 Gasperoni, N. op. cit., 21.
100 Santerna, P. op. cit., n. 129 and Stracca, B. op. cit., f. 46.
102 Bonacina, M. op. cit., 588.
103 Pothiser, R. (1821) Trattato del contratto di assicurazione (trad. it.), Naples, 69 ff.
105 Stefan II op. cit., 81.
106 La Torre, A. op. since last cit., 257.
107 Lordi, L. (1936) Obbligazioni commerciali, 2° ed., Rome, 605. The most famous supporter of this thesis is Santoro-Passarelli, F. La causa del contratto di assicurazione, in AA. VV., Studi sulle assicurazioni, cit., 213 and in Assicurazioni, cit., 457. In Germany, finally, this solution was accepted by Bruck E., (1930) Das Privatversicherungsrecht, Mannheim, 52 ff.
108 Saldandra, V. op. since last cit., 11-12.
other doctrine. But, if formulated in terms of “risk transfer of a harmful event”, it is clear that the thesis will be exposed to the same objection that drops the compensatory-indemnity theory: the operation of the guarantee in life insurances is independent of the harmfulness or potential harmfulness of the event relating to human life, raised in the policy. On the other hand, if also we want to consider this phenomenon as the object of negotiation, we must not forget that the insurer, in fact, confined to “take charge”; in legal terms, of certain consequences of the insured as threatened a risk, without any “transfer” that would naturally impossible. In other words, the “take on charge” of risk by the insurance company means that the same should compensate the insured for injuries caused by the loss (in damages insurance). Otherwise, in relation to life insurance, the insurer will perform its financial benefit “capitalizing” the savings that the policyholder has decided to set aside in order to face his future with confidence (if survive beyond a certain date) or for safety to certain survivors (in the event of his death). And of course, insurance, in view of the company, aimed at fulfilling the purpose of profit, while in the perspective of the insured, it need to guarantee security that comes from the possibility of suffering harm or an event relating to human life. Not failed in this regard to point out that life insurance and the risk depends on the possibility “that the life duration of the insured is different from the average duration resulting from mortality tables”, under which the company bases his “charges” or premiums. But, in more general terms, the insurance function is clearly highlighted by the author which has adopted the formula of the “neutralization of individual risks”, “primary reason for the general regulation of the insurance contract, which placed in the Italian Civil Code”; it means the risk is “cleared” by the contractor-insured as it is “supported” by the insurer, which just “guarantees” service-benefit agreed for the case that the event will come true. And the operation of the system is made possible by the technique of the insurance procedure insurance, thanks to which the modern insurance company was able to adopt, on a large scale, the principle of the communion of risks. Now, in front of the considerable variety of the risks that may be the subject of insurance, you can also say, as it has been said, that there are many types of guarantees. But this is not to escape from the notion of suscepio periculi rei alienae, being so many manifestations of the same negotiation function, that is due in the cause of the contract. Then “dreaded event” on both sides, so as to generate the risk and interests communion which will now consist either in an offense committed against a third (as is the case for civil liability), now in a damage to a single property (think of the fire policies), now in a pecuniary loss (legal expenses insurance), now in an accident which results in a difficult situation (“Services”), now in death or survival, it is not the fact of in itself justify a disruption of the unitary insurance “type.”

9. TYPES AND SUBTYPES OF INSURANCE: CONCLUSIONS

The point which now remains to be clarified is whether they related to insurance “type” cases of “suscepio periculi” not properly categorized under the legislative dichotomy damages-life. And the problem can not be solved in the same way that the criterion concerning the “limits of elasticity of the cause”. In this regard, authoritative doctrine warns that “as long as the contract is viewed as a means, but without reference to the subject, for whose benefit it was designed and using it, it can not be adequately capture the cause”. With regard to the insurance contract, the idea of “shifting the risk” fits perfectly in that thesis. In this function, objectively prepared by order, you

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110 La Torre, A. op since last cit., 295, reminds us that this formula was near to old idea about emptio-venditio periculi (supra, § 1).
111 De Gregorio, A. – Fanelli, G. op. cit., 11, with referring to the ancient notion of “risk transfert”.
113 Guarantee obligation has ancient origins until the time of the “Twelve tables” (Talamanca, M. (1979) voice: “Obbligazioni (dir. rom.)”, in Enc. dir., XXIX, Milan, 8ff.). In classic age, the category of obligations of “praestare” was considered as tertium genus with those of facere and of dare. In this matter see the contribute of Betti E., (1955) La struttura dell’obbligazione romana e il problema della sua genesi, Milan, 34 ff.
114 La Torre, A. op since last cit., 249.
115 Scalì, G. Dalla classificazione dualistica alla concezione pluralistica dei contratti di assicurazione: contratto o contratti di assicurazione?, cit., 148.
must compare, casu pro casu, “the real intention of the parties and the purposes for which it is designed, more specifically, to achieve”, “to see if there is at least one essential coincidence that can justify the birth and the normal existence of the same contract”\textsuperscript{118} In application of these principles can be observed as, in effect, the “mechanism” of “susceptio periculi rei alienae” simply requires, for its implementation, that an other subject than the one on which the risk burden (in rerum natura) assume on himself the “incidence.”\textsuperscript{119} What, then, can prohibit that the freedom of contract, in order to satisfy a “predetermined purpose”\textsuperscript{120} but different from that to be kept free from damage or obtain a sum of money upon the occurrence of an event relating to human life, enabling a person to “take charge” of a risk for other nature? In this rhetorical question responds unanimous the historical evolution of the institution of insurance and the same legislative notion. On the first point it is undeniable that the insurance contract, from its origins to the present day, has gradually developed in extent and in depth, never straying from the core primitive that is still the essential basis namely, risks-taking on charge of others persons against payment of a premium. And this, in reality, is the broad notion in art. 1882 of the italian Civil Code 1942 gives us. In fact, “the progressive identification of risks, which provide, did not compromise the unity of the legal contract of insurance, from insurance against various kinds of damage to accident insurance, life assurance.”\textsuperscript{121} The insurability of each new type of risk must be, then, considered about “common core” to all forms of insurance, as his time was with regard to life insurance policies.\textsuperscript{122}

A problem of qualification was posed in more recent times, with reference to the so called insurance surety or guarantee, whose legal nature is discussed for decades. The doctrine that proposed qualification as insurance\textsuperscript{123} has focused primarily on the causal profile, because those contracts carry a “displacement of risk” from the customer to the company – namely the possibility (or probability) of a failure in the first one in order to obligation assumed by the same against a third party\textsuperscript{124} - and extending also to the case in question the rules laid down in articles 1411 and 1891 italian civil code, respectively, about the contract in favor of third and insurance on behalf of those whom it may concern.\textsuperscript{125} Beyond the commonality or otherwise of the results which they reach these authors\textsuperscript{126}, the reconstructive procedure adopted is correct: we evaluate the nature of the insurance contract on the basis of “common core”, represented by “susceptio periculi”, regardless of the problem, merely classificatory, if the single type of risk is categorized in one or other side of the traditional dichotomy damages-life, because it can also be placed outside of it. The example is a personal insurance (accident, illness), for which the Courts\textsuperscript{127} have considered applicable, in addition to the general rules (Articles 1882 to 1903 actual italian civil code), part of the same rules on insurance damages-property (Articles 1904-1917) and, in part, those of life insurance (Art. 1919-1927).