Applicable Law in Cross-Border Insurance Contracts and Environmental Liability Insurance in the EU

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Abstract

Insurance contracts constitute a special category of contracts in private law due to their function in the transfer and management of risk, as well as due to the combination of elements of private law with public regulation of the insurance market. Within the framework of the internal market of the European Union, the development of cross-border insurance has increasingly stimulated the need to clearly determine the law applicable to insurance contracts. Although these contracts are based on the principle of the autonomy of the parties' will, the particularities of the insurance sector and the need to protect the insured have led to the creation of a special regime for determining the law applicable in this area. Using a doctrinal legal method based on the analysis of EU legislation, CJEU case law and legal scholarship, this paper analyses the legal nature of the insurance contract and the determination of the law applicable to cross-border insurance contracts under Article 7 of Regulation (EC) No 593/2008 (Rome I). It then examines environmental liability insurance, which relates to complex and often long-term risks arising from environmental damage and the application of the "polluter pays" principle under Directive 2004/35/EC. The paper finds that Article 7 of Rome I allocates, rather than harmonises, the applicable law, leaving national divergences intact, and that this fragmentation is most acute in environmental liability insurance, where the cover may be governed by a different law from the liability it secures. In this context, the paper contributes to the existing literature by showing that environmental liability insurance is a field where insurance law, environmental law and the rules on the law applicable to cross-border insurance contracts are particularly intertwined.

Keywords: ***applicable law, cross-border insurance contract, environmental liability insurance, Rome I Regulation***

1. Introduction

European private law faces particular difficulties in relation to insurance contracts. Unlike many other contracts, the insurance contract is not governed solely by the classical rules of private law, but is also influenced by numerous rules of a public nature, referring to the supervision of the insurance market, financial stability, the protection of the insured and

the technical assessment of risk. For this reason, insurance, although operating within the framework of the European internal market, remains strongly linked to the national legal orders and the regulatory logic of each Member State (Nicolas, 1996).

In this context, the insurance contract is of not only theoretical interest but also particular practical importance. The definition of the insurance contract, its categorization, and its position in relation to other financial products or other forms of legal protection directly affect the clarity of the regulation, the level of protection of the parties and the possibility of the cross-border circulation of insurance products. That is the reason why debates on the nature and typology of the insurance contract are not simply terminological issues, but issues that affect the functioning of the European insurance market itself (Heiss, 2006).

Furthermore, the cross-border insurance contract clearly highlights the tension between market integration and legal fragmentation. Although insurers formally operate within the framework of the fundamental freedoms of the European Union, different insurance products remain conditioned by differences in national legislation, mandatory protection rules, fiscal treatment and the characteristics of the insured risk. As a result, the cross-border insurance contract constitutes not only a private relationship between the insurer and the insured, but also a meeting point between commercial interests, risk management techniques and public policy objectives (Basedow et al., 2015).

This combination becomes even more obvious when it comes to environmental liability insurance. Unlike more traditional forms of liability insurance, environmental liability insurance is associated with a specific legal regime, where environmental damage is not treated simply as a civil damage suffered by an identifiable private party, but as a violation of public interests, natural resources and the need for prevention and restoration. Thus, this type of insurance cannot be analyzed only with the traditional categories of insurance law, but must be seen in combination with environmental law, administrative liability and financial security instruments (Schulze et al., 2002).

The purpose of this paper is to examine the legal nature of the insurance contract, the approaches adopted in the European doctrine and the jurisprudence of the Court of Justice of the European Union (CJEU), as well as to analyze the notion of cross-border insurance contract. Moreover, it will analyze the obstacles faced within the internal market, and highlight the singularity of environmental liability insurance as a specific category of liability insurance, which clearly reflects the regulatory, economic and public function of insurance in European law.

In this context, the paper aims to show that the insurance contract, especially in the field of environmental liability, cannot be understood as a neutral instrument of risk transfer, but as a legal mechanism built on the balance between private autonomy, protection of the public interest and market logic. This paper also evaluates the impact of fragmentation on the growth and development of the cross-border insurance markets and assesses the role of environmental liability insurance in relation to the overall legal framework.

At EU level, the law applicable to insurance contracts is determined by Article 7 of Regulation (EC) No 593/2008 (Rome I), while environmental liability is governed by Directive 2004/35/EC, which is based on the polluter-pays principle. Against this background, the paper addresses three research questions: *(RQ1) How is the insurance contract defined and characterised in EU law and in the case law of the Court of Justice of the European Union*? *(RQ2) How does Article 7 of the Rome I Regulation determine the law applicable to cross-border insurance contracts, and to what extent does it mitigate the fragmentation of national insurance law? (RQ3) What specific difficulties does environmental liability insurance raise within this framework?* The paper is structured as follows: Section 2 sets out the methodology; Section 3 presents the results concerning the nature of the insurance contract (3.1), cross-border insurance contracts and Article 7 of Rome I (3.2), the case law of the Court of Justice of the European Union (3.3) and legal fragmentation (3.4); Section 4 discusses environmental liability insurance in light of these results; and Section 5 concludes.

2. Methods

The selection and integration of appropriate scientific research methodologies within the legal domain constitute both a critical challenge and an indispensable requirement. The study methodology must align with the attainment of the study's objectives. In light of the research's aims and objectives, the study adopts a doctrinal (normative) legal research design, combining several complementary qualitative methods described below.

The primary methodological framework employed is the normative approach, encompassing EU legislative standards pertaining to insurance contracts, with particular reference to Regulation (EC) No 593/2008 (Rome I) and Directive 2004/35/EC concerning environmental liability, in conjunction with the prevailing doctrinal approach and the jurisprudence of the CJEU on this matter.

Given the specificity of this study, it will primarily rely on the qualitative method for data collection. The qualitative

approach entails the systematic and organized collection and analysis of data throughout the research process. This study employs a qualitative approach to gather and analyze data concerning the legal doctrine of international private law, drawing upon existing literature presented in both written and electronic formats. Furthermore, this study incorporates the most significant judicial decisions from the CJEU, which have directly shaped the theoretical framework concerning the aspects under examination.

The qualitative methodology provides a framework for a paper grounded in findings derived from: the analysis of materials, the clarification of legal concepts, an in-depth examination of legal provisions and practice or judicial precedents, and the identification of the research object.

The legal sources analysed were drawn from EUR-Lex, for EU primary and secondary legislation, and from the official database of the Court of Justice of the European Union (curia.europa.eu), for case law, cross-checked against the peer-reviewed academic literature cited throughout this paper. Cases and doctrinal sources were selected on the basis of their direct relevance to three criteria: (i) the legal definition and characterisation of the insurance contract in EU law; (ii) the determination of the law applicable to cross-border insurance contracts under Regulation (EC) No 593/2008 (Rome I); and (iii) the specific liability regime established for environmental damage under Directive 2004/35/EC. The analysis is confined to EU-level legal sources and predominantly English-language doctrine; national implementing measures are examined only insofar as they are directly addressed in the literature reviewed, which constitutes a limitation of the study's scope.

Specifically, the following research methods will be applied in this paper:

The "literature review" approach seeks to comprehensively survey and synthesize existing scientific and legal scholarship concerning EU insurance contract law, cross-border insurance regulation, and environmental liability insurance, while prioritizing the contributions of prior research. This approach facilitates the examination of the historical development and progressive harmonization of EU insurance law, spanning the initial conflict-of-law provisions to the contemporary regulatory framework established by Regulation (EC) No 593/2008 (Rome I) (historical method). Furthermore, it functions as an indispensable instrument for elucidating the concepts, definitions, and terminology pertaining to both the Rome I Regulation and Directive 2004/35/EC concerning environmental liability, while simultaneously elaborating the characteristics of an insurance contract from a legal-doctrinal standpoint through the descriptive method.

The "interpretive analysis" approach seeks to elucidate the pertinent provisions of EU insurance law, with a specific focus on the conflict-of-law rules governing insurance contracts under the Rome I Regulation and the liability framework established by Directive 2004/35/EC. This methodology aims to delineate the merits of the existing EU regulatory framework while simultaneously identifying its limitations and interpretive ambiguities inherent in cross-border scenarios. This approach is likewise employed in the analysis of the case law of the Court of Justice of the European Union (CJEU), focusing on the judicial interpretation of the concept of an insurance contract and the convergence between insurance law and consumer protection.

Throughout the study, the primary methodology entails a systematic and analytical examination of identified legal sources, achieved through an integrated analysis of legislation, case law, and doctrinal interpretations pertinent to cross-border insurance contracts. This approach facilitates the synthesis of divergent EU legislative and jurisprudential sources into a cohesive framework, thereby enabling an evaluation of fragmentation's impact on legal predictability and the effective operation of the European Union's internal market. Through an analysis of the interplay between the Rome I Regulation and Directive 2004/35/EC within cross-border contexts, this study delineates the interpretive complexities inherent in the field and provides a comprehensive overview of its recent developments.

The case-study method is applied to the leading judgments of the Court of Justice of the European Union on the characterisation of insurance contracts and on the scope of consumer-protection rules in relation to insurance (Cases C-166/11, C-215/08 and C-481/99). These judgments serve as a reference framework for assessing how the CJEU delineates the concept of an insurance contract. As no case law of the CJEU has been identified that directly addresses environmental liability insurance, or Article 7 of the Rome I Regulation in that context, the analysis of that field relies on legislative and doctrinal sources, which constitutes a further limitation of the study.

3. Results

3.1 General Findings on the Nature of Insurance Contracts

The analysis reveals several key findings regarding the legal nature of insurance contracts, cross-border insurance and the role of the Court of Justice of the European Union (CJEU). The efficiency of the single (internal) market is significantly affected by the European Union's fragmented approach to insurance regulation (European Commission, 2014). In particular, Fras's (2019) comparison of insurance contract law in different European countries shows that insurance contracts still differ greatly from one country to another in terms of their drafting and substantive scope.

Efforts to establish a single definition or classification of insurance contracts are consistently made difficult, not merely by differences in each country's private law, but also by the extent to which public law, particularly insurance supervision, affects the parties' freedom to draft their own contracts (Heiss, 2012).

In the absence of a single, autonomous and comprehensive definition applicable across the relevant EU legal instruments (European Commission, 2014), the results show that insurance contracts must be understood through their functional components (Nicolas, 1996). The essence of the insurance contract lies in the assumption of insurance risk, the existence of an insurable interest, and the insurer's obligation to indemnify upon the occurrence of a specified event (Basedow et al., 2015).

The analysis further shows that, in Fras's account, risk is not only the reason why the insurance contract is aleatory in nature, but also the basis for the financial and legal transfer of risk from one party to another, which constitutes the essence of the contract and clearly distinguishes it from wagering and gaming contracts (Fras, 2019). This is closely related to insurable interest, which draws the legal distinction between admissible insurance and contracts that lack a valid protective purpose (Nicolas, 1996).

Within this context, the findings indicate that different countries' perspectives on risk and insurable interest have a direct impact on the perception of insurance contracts and their types, particularly the distinction between indemnity insurance and fixed-sum insurance, as well as individual and group insurance. These differences may determine the scope of coverage, the level of indemnification, and the structure of insurance products and market strategies of insurers (Fras, 2019).

The findings further indicate that despite the fact that there is a single market and freedom to provide services, insurance contracts are nevertheless subject to the applicable-law framework established by Article 7 of Regulation (EC) No 593/2008 (Rome I), which lays down the specific conflict-of-law regime applicable to insurance contracts. The applicable law is determined according to the type of insurance and the relevant connecting factors under Article 7. As a result, insurers operating across borders must take account of different national legal frameworks, reducing legal certainty and contributing to fragmentation within the single market (Heiss, 2012).

This further suggests that national insurance rules often determine the scope of coverage, the extent of the insurer's liability, and the triggering events that give rise to payment. These differences may have a direct impact on premium structures and the balance between risk and payout. Therefore, discrepancies in the applicable law are not only theoretical legal concerns, but may produce practical differences in cross-border insurance pricing, the design of insurance products, and the companies' market plans (Heiss, 2012).

The analysis indicates that the integration of insurance markets could be undermined by the application of national insurance law through rules of private international law. By imposing differing mandatory rules on cross-border insurance agreements, the legislation that applies becomes a crucial tool through which national legal systems preserve control of insurance relationships, and thus may operate as a major impediment for the creation of a completely integrated European insurance market (Heiss, 2006).

According to the European Commission (2014), it is not only a matter of legal demarcation that shapes insurance contracts; major business considerations are at play as well. The Commission's analysis puts it in perspective: an insurance contract is, from a business standpoint if not a normative one, a measure of the risk an insurer can and will take on for a premium. That decision is driven by the insurer's tolerance for risk, its actuarial know-how, the cost of running a claims system and the ease with which reinsurance can be secured.

The European Commission (2014) findings also show that even where there is no variation in contract law, services may not be offered across borders if the contract fails to cover matters that bear on the insurer's capacity to price and accept a risk. These practical and commercial considerations may constitute significant impediments to cross-border insurance activity, alongside differences in applicable law. In the end, insurers are required to assess whether a particular risk can be adequately priced and managed within the applicable legal and commercial framework. To do

otherwise and price the risk poorly would put the insurer's viability and ability to pay out at risk, something that would not be in the interests of the policyholders.

3.2 Cross-Border Insurance Contracts in the EU Internal Market

Methodologically, the analysis in this section proceeds in two complementary stages. First, it identifies the principal characteristics of cross-border insurance activity and the practical forms in which insurance relationships may extend across Member States. Second, it examines how these relationships are addressed by the EU conflict-of-laws framework, with particular reference to Article 7 of Regulation (EC) No 593/2008 (Rome I) and the classification of "large risks" under Directive 2009/138/EC (Solvency II). This approach makes it possible to distinguish between the economic and functional dimension of cross-border insurance and the legal mechanism through which the applicable law is determined.

According to the European Commission (2014), the "cross-border insurance contract" is of particular import in the internal market when viewed from a commercial, legal and conceptual perspective. An insurance contract, by its nature, is an arrangement where premium payments are made in return for the transfer of a risk's monetary consequences. Yet how such a contract is defined will vary from one Member State to the next, with the terms set to reflect the risk and the state of the market.

The European Commission (2014) analysis makes it clear that what is usually meant by a "cross-border" contract is one put in place between an insurer and an insured who hail from different countries. The definition can be broader, however. It may cover cases in which the policyholder and insurer are in the same country but the risk lies elsewhere, for instance with a vehicle registered in another Member State or a second home. The involvement of intermediaries from abroad can give rise to more of this kind of activity. Then there is the "fly-to-buy" situation: a consumer makes a brief visit to one country to have an insurer there cover a risk in another.

Cross-border insurance activity in the internal market may be carried out either under the freedom of establishment, through a branch in another Member State, or under the freedom to provide services, without an establishment in the Member State where the risk is situated. Under the single-licence system laid down in Directive 2009/138/EC (Solvency II), an insurer authorised in its home Member State may cover risks situated in other Member States on either basis, subject to the notification procedures of Articles 145–149 and to the general-good rules of the host Member State (Article 180). These supervisory rules must, however, be distinguished from the question of which law governs the insurance contract, which is addressed by Article 7 of the Rome I Regulation, discussed below. The Commission's findings further note that, in practice, consumers' ability to "shop around" for insurance offered from other Member States remains limited, and that the extent of demand for such contracts is still an open question (European Commission, 2014).

An analysis put forward by the European Commission in 2014 indicates that certain insurance products, be it auto or UK-style housing cover, will extend to both domestic and overseas activities. Take a homeowner with household insurance for example: despite the geographic constraints on such policies, the private liability element can still be of use when one is away from home in another Member State. The same applies to a vehicle insured in one Member State and moved to another; motor liability insurance will see to any civil liability arising from an accident there, as required under Directive 2009/103/EC, amended by Directive (EU) 2021/2118, relating to insurance against civil liability in respect of the use of motor vehicles.

In the case of large risks, the contracts are more complex, involving several parties with their own place of business and subject to the laws of their home countries. It is customary for these parties to agree on a single law to govern the arrangement for its term. Whether a risk qualifies as "large" depends on legally defined classes of insurance and, for certain classes, on the size of the policyholder, as explained below with reference to Article 13(27) of Solvency II; marine, aviation and transport risks, for example, are always large risks. One need only look at the Lloyd's market in the UK, the principal provider of MAT (Marine, Aviation, Transport) cover for everything from damage and liability on large vessels and aircraft to goods in transit. Such policies are routinely traded across borders for EU and non-EU alike, often on identical forms no matter where the risk originates. That said, these elements may have to be tailored to the individual policyholder. Any cross-border transaction will call for the right kind of operational and administrative support, and the risk figures may require some adjustment (European Commission, 2014).

According to an analysis by the European Commission (2014), it is the legislation of the Member States that sets the conditions for a contract to be classed as "insurance." Differences in tax rules and insurance law can lead to discord. Take the case of someone with an investment-linked contract who relocates to Spain; under Spanish law, the nature of their investments might mean the product no longer fits the definition of an insurance contract. Or consider an

investment-linked life insurance bond of the “UK style,” which German authorities may not count as a life insurance contract on account of tax issues. Then there are personal pension products. Since these are put together to suit particular national tax systems and pension regimes, they encounter considerable resistance in “host” Member States. Such impediments to cross-border trade have a way of dictating the terms of contracts, even when the root cause is not insurance law *per se* (European Commission, 2014).

In this context, the findings confirm that "cross-border insurance contracts" refers to a functional definition of insurance relationships involving several connecting variables between Member States rather than a specific legal category.

This functional understanding of the cross-border insurance contract finds its specific legal expression in Article 7 of Regulation (EC) No 593/2008 (Rome I), which constitutes the principal EU conflict-of-laws framework for determining the law applicable to insurance contracts. Article 7 applies to contracts covering large risks, whether or not the risk is situated in a Member State, and to all other insurance contracts covering risks situated within the territory of the Member States; it does not apply to reinsurance contracts (Article 7(1)). For insurance contracts covering “large risks”, Article 7(2) provides for party autonomy in the choice of the applicable law; where no choice has been made, the contract is governed by the law of the country where the insurer has its habitual residence, subject to the exception where the contract is manifestly more closely connected with another country (Heiss, 2012).

For insurance contracts other than those covering large risks, Article 7(3) provides a more restricted framework for choice of law. The parties may choose, inter alia, the law of the Member State where the risk is situated or the law of the country where the policyholder has his or her habitual residence; additional possibilities apply to life assurance and to contracts covering certain risks connected with commercial, industrial or professional activities in more than one Member State. In the absence of a valid choice, the contract is generally governed by the law of the Member State in which the risk is situated at the time of conclusion of the contract. Article 7(4) further establishes specific rules for compulsory insurance: such a contract does not satisfy the insurance obligation unless it complies with the specific provisions of the Member State imposing that obligation, and that Member State may require the contract to be governed by its own law, while Article 7(5) addresses contracts covering risks situated in more than one Member State by treating them, for the purposes specified in the provision, as several contracts relating to individual Member States. Under Article 7(6), the Member State in which the risk is situated is determined by reference to the EU insurance directives; for liability insurance taken out by a legal person, this is in principle the Member State of the establishment to which the contract relates (now Article 13(13)(d) of Solvency II) (European Commission, 2016).

The distinction between large and other risks is therefore particularly significant for the present analysis. The concept of "large risks" is defined in Article 13(27) of Directive 2009/138/EC (Solvency II), by reference to specified classes of insurance and, for certain classes, to the policyholder's professional activity and financial or organisational size. Rome I itself refers to Article 5(d) of First Council Directive 73/239/EEC; following the repeal of that Directive, this reference is to be read as a reference to Article 13(27) of Solvency II, in accordance with Article 310 and the correlation table in Annex VII of that Directive. The classification is consequently not based solely on the economic value of the insured risk, but on legally defined categories and criteria.

Read together with the findings discussed above, Article 7 demonstrates that the EU internal market does not eliminate differences between national insurance laws. Rather, the provision establishes a conflict-of-laws mechanism for allocating the applicable national law to a cross-border insurance relationship. The substantive rules governing matters such as the scope of insurance coverage, the obligations of the parties and the legal consequences of an insured event therefore remain dependent, to the extent determined by the applicable law, on the relevant national legal system. In this sense, the EU framework facilitates cross-border insurance activity without establishing a uniform substantive law of insurance (Heiss, 2012; European Commission, 2016).

This distinction between market integration and the continued relevance of national insurance law is particularly important for environmental liability insurance. Environmental liability cover falls within class 13 (general liability), one of the classes (8, 9, 13 and 16) for which a risk qualifies as large only where the policyholder exceeds at least two of three thresholds: a balance-sheet total of EUR 6.6 million, a net turnover of EUR 13.6 million and an average of 250 employees during the financial year. Whether a given environmental liability policy is subject to Article 7(2) or Article 7(3) of Rome I therefore depends on the size of the insured operator. Moreover, as examined in Section 4, environmental risks may extend across national boundaries, involve multiple potentially responsible actors and generate liability over extended periods. The determination of the applicable law under Article 7 of Rome I, together with the law governing the underlying liability under Regulation (EC) No 864/2007 (Rome II), therefore becomes an important preliminary question in assessing the scope and operation of environmental liability insurance in cross-border situations.

3.3 The Concept of Insurance Contracts in CJEU Case Law

The case law of the Court of Justice of the European Union (CJEU) shows that EU law lacks a consistent and autonomous definition of the insurance contract. For methodological purposes, this section examines selected CJEU judgments in which the classification or treatment of insurance contracts arises in the context of EU consumer-protection legislation. It then considers the relationship between that case law and the sector-specific EU insurance framework, in order to determine whether the CJEU has developed an autonomous EU concept of an insurance contract. In doing so, the analysis distinguishes between the absence of a general, autonomous definition at EU level and the existence of sector-specific EU rules that identify or classify particular insurance relationships for regulatory purposes. In the absence of a single EU definition, Member States continue to regulate insurance arrangements under their own laws. At EU level, there is a commonly accepted understanding that insurance is centred on insurance risk, an insurable interest, the payment of a premium and the insurer's obligation to indemnify upon materialisation of the risk; however, this understanding has purposefully not been transformed into a strict legal definition (European Commission, 2014).

In González Alonso v Nationale Nederlanden (Case C-166/11, 2012), the CJEU was required to interpret Article 3(2)(d) of Council Directive 85/577/EEC on contracts negotiated away from business premises (the "Doorstep Selling Directive"), which expressly excluded "insurance contracts" from its scope without defining them. The CJEU examined whether a unit-linked life assurance contract fell within that exclusion and, drawing on the classification of life assurance in Directive 2002/83/EC concerning life assurance, concluded that a life assurance contract under which the premiums are invested in financial products falls within the exclusion and therefore outside the scope of Directive 85/577/EEC. The significance of the judgment for the present analysis lies not in the creation of an autonomous definition of an insurance contract, but in the CJEU's reliance on the characteristics of the contract and on the existing EU insurance framework to determine whether the contractual relationship constituted life assurance for the purposes of the exclusion. Accordingly, the case illustrates the interaction between sector-specific insurance legislation and general consumer-protection legislation, rather than establishing a comprehensive EU definition of insurance contracts (Váradi, 2018).

By way of comparison, E. Friz GmbH v Carsten von der Heyden (Case C-215/08, 2010) concerned the application of Directive 85/577/EEC to a consumer's accession to a closed-end real-estate fund rather than to an insurance contract. The CJEU held that the Directive applied, but accepted national rules under which, in the event of cancellation, the consumer's claim is calculated on the value of the holding at the time of withdrawal and may therefore be lower than the original contribution. The judgment is thus relevant to the CJEU's approach to the scope and effects of consumer-protection legislation, but it does not constitute direct authority on the definition of an insurance contract.

Although insurance contracts were expressly excluded from Directive 85/577/EEC under Article 3(2)(d), insurance-specific legislation nonetheless protects policyholders. Most notably, Article 186 of Directive 2009/138/EC (Solvency II) requires Member States to provide a cancellation period of between 14 and 30 days for individual life assurance contracts, subject to the conditions and exceptions laid down in that provision. Váradi (2018) has pointed out a tension between the CJEU's reliance on sector-specific exclusions for insurance and its demand for consistency in legal interpretation, criticizing the CJEU for failing to take the opportunity to address consumer-protection issues in insurance contracts directly. This observation further supports the distinction between general consumer-protection rules and the sector-specific framework applicable to insurance. The contrast is illustrated by Heininger (Case C-481/99, 2001), in which the CJEU interpreted the exclusion for contracts relating to immovable property narrowly, so that the right of cancellation under Directive 85/577/EEC extended to a credit agreement secured by a charge on immovable property. As Heininger did not concern insurance, it serves as comparative consumer-law authority rather than as direct authority on insurance contracts; it nevertheless shows that, outside the insurance context, the CJEU tends to read exclusions from consumer protection strictly (Schulze et al., 2002).

Taken together, the cases examined above do not establish a general autonomous definition of the insurance contract under EU law. Rather, they show that the concept of an insurance contract is determined mainly by insurance-specific rules rather than by general consumer-protection law, and that the classification of an insurance relationship may depend on the sector-specific EU insurance framework where that classification is relevant to the scope of another EU instrument. Although this approach produces a clearer legal situation in the regulation of insurance, it also exposes the limits of consistent interpretation where the goals of consumer protection conflict with the functioning of insurance legislation (Váradi, 2018).

This finding is directly relevant to the analysis of applicable law in Section 3.2: the absence of a single substantive EU definition means that Article 7 of the Rome I Regulation operates against a background in which the concept and regulation of insurance remain partly dependent on sector-specific EU rules and national law (Heiss, 2012).

Consequently, the determination of the applicable law does not, by itself, eliminate differences in the substantive treatment of insurance contracts across Member States. The European Commission's comparative study supports this conclusion and cautions against a compulsory EU definition of insurance, which might unintentionally exclude insurance-like schemes that are equivalent in practice (European Commission, 2016). Accordingly, the case law examined in this section supports a functional and sector-specific approach to the concept of insurance rather than a single comprehensive EU definition.

3.4 Legal Fragmentation and Market Impact

The analysis indicates that the insurance contract is interpreted differently in the legal systems of the EU Member States. Although EU legislation has progressively harmonised the conditions for carrying on insurance business, prudential supervision, market access and certain aspects of policyholder protection, it has not established a single EU-wide substantive definition of the insurance contract, and the substantive regulation of insurance contracts continues to be significantly influenced by the law of the Member State concerned (Heiss, 2012; European Commission, 2014). Consequently, matters such as the legal characterisation of the insurance relationship, the parties' contractual rights and obligations, the consequences of non-disclosure and the requirements relating to insurable interest may continue to be determined, at least in part, by national law. This distinction is particularly relevant in cross-border insurance, where the EU framework must operate alongside the substantive contract law of the Member States.

This fragmentation is not a recent phenomenon. The first generation of insurance directives: First Council Directive 73/239/EEC on direct non-life insurance and First Council Directive 79/267/EEC on direct life assurance focused on coordinating the conditions for taking up and pursuing insurance business and did not establish a uniform substantive law of insurance contracts. Directive 79/267/EEC was subsequently repealed by Directive 2002/83/EC concerning life assurance, which has in turn been replaced by Directive 2009/138/EC (Solvency II). This development illustrates the broader pattern of European insurance harmonisation: regulatory coordination has advanced without the unification of national contract law (Heiss, 2006; Basedow et al., 2015)

The cross-border dimension is addressed more directly by the EU rules on applicable law. As shown in Section 3.2, Article 7 of Regulation (EC) No 593/2008 (Rome I) distinguishes between contracts covering large risks, for which the parties enjoy broad freedom of choice and, absent a choice, the law of the insurer's habitual residence applies, and other insurance contracts, for which the choice is limited to specified connecting factors and, absent a valid choice, the law of the Member State in which the risk is situated applies. The Regulation also contains specific provisions on compulsory insurance and on contracts covering risks situated in more than one Member State. For present purposes, the decisive point is that these rules designate a national law and do not replace it.

Accordingly, cross-border insurance does not operate within a single substantive contractual regime. This has practical consequences: as Baranoff et al. (2014) emphasise, the legal framework governing an insurance relationship shapes how risks are assessed, how premiums are priced and how insurance products are structured. The applicable national law may therefore influence product design, underwriting practices and risk assessment, and may increase the legal complexity and transaction costs of cross-border insurance for both insurers and policyholders, particularly where contractual rights and obligations are interpreted under different national legal frameworks (European Commission, 2014).

The interaction between EU harmonisation and national law is also evident in Directive 2009/138/EC (Solvency II). Article 178 requires any Member State not bound by the Rome I Regulation to apply its provisions in order to determine the law applicable to insurance contracts falling within the scope of Article 7 of that Regulation, thereby ensuring a uniform conflict-of-laws approach throughout the Union. At the same time, Article 180 allows the Member State in which the risk is situated to apply its legal provisions protecting the general good, and Article 179 permits Member States that make insurance compulsory to require that such contracts comply with their specific provisions, a rule that corresponds to Article 7(4) of Rome I and is particularly relevant to compulsory financial security for environmental liability. By contrast, Article 181 prevents the host Member State from requiring prior approval or systematic notification of policy conditions and premium rates, although it may require their non-systematic notification in order to verify compliance with national provisions concerning insurance contracts. Thus, regulatory harmonisation and contractual fragmentation coexist within the EU internal market: EU rules facilitate cross-border insurance activity, while national law continues to influence the substantive treatment of contractual relationships.

The findings therefore suggest that the principal challenge is not simply the absence of a uniform definition of the insurance contract, but the interaction between EU harmonisation and the continued application of national contract-law

rules. In this setting, the level of policyholder protection varies with the applicable national law, and insurers must constantly balance party autonomy against regulatory oversight (Schulze et al., 2002).

Overall, the results of this study demonstrate the intricate interaction between the various aspects of cross-border insurance across the EU Member States, particularly with respect to legal fragmentation, market dynamics and public policy goals. EU harmonisation has reduced regulatory barriers to cross-border insurance, but has not eliminated the diversity of national substantive insurance law. This continuing interaction between EU-level rules and national legal regimes remains a central feature of the cross-border insurance market and explains much of the legal complexity identified in this study. As discussed in Section 4, it becomes particularly pronounced in environmental liability insurance, where the insured risk is closely linked to public-law liability regimes and to divergent national choices regarding compulsory financial security.

4. Discussion

The results indicate that the evolution and functioning of environmental liability insurance are directly affected by the fragmented legal framework governing insurance contracts. This finding is significant because it shows that fragmentation is more than a general backdrop for insurance contracts; rather, its impact is felt with greater force in those domains where insurance and public-interest regulation come into contact. Environmental liability insurance is perhaps the most telling example of such an intersection.

As shown in Section 3, insurance contracts, and particularly those which cross national borders, are characterised by a complex relationship between contractual autonomy and regulatory intervention, coupled with divergence in legal definitions and regulatory approaches. These features are not merely present in insurance contracts in general; they become more apparent and more problematic in specific lines of insurance. The results point to a tension between regulatory intervention and contractual autonomy, yet taken in isolation they do not fully explain how this tension plays out. What is suggested here is that such a conflict is not a uniform feature of insurance law: its intensity varies with the regulatory objective at stake and the nature of the risk, a nuance that the analysis of the sources alone does not fully delineate (Heiss, 2012; European Commission, 2014).

Environmental liability insurance provides a particularly illustrative example of this complexity. In this area, the dividing line between insurance law and environmental law is blurred, resulting in a legal regime that is not based solely on the conventional classifications of private law (Faure, 2022). This interaction between insurance and environmental law brings to the fore the problems relating to the nature of the risk and of the liability, and calls into question the function of insurance as a mere tool for shifting risk. If environmental liability insurance cannot be fitted into the usual private-law categories, the framework set out in Section 3.2 is of limited use. While Article 7 of the Rome I Regulation will determine which State's law governs the contract, it does not go far enough: it leaves open the question of how to properly classify, price and supervise an instrument that sits at the intersection of public environmental policy and private indemnification. The discussion returns to this gap below.

The analysis of environmental liability insurance must begin with the legal definition of environmental damage and the associated liability regime. Directive 2004/35/EC was designed as a framework for preventing and remedying environmental damage on the basis of the polluter-pays principle, rather than as a standard mechanism for obtaining civil compensation. Since environmental liability combines strong elements of public law, public-authority intervention and obligations to act in order to prevent harm, it is difficult to incorporate into the standard categories of civil law (Faure, 2022). According to Faure (2022), this means that such insurance functions at the intersection of private contract law and public policy objectives rather than as ordinary civil liability insurance. This is precisely the gap identified above. A regime that cannot be placed within the ordinary category of civil liability will not fit neatly into the applicable-law framework of Section 3.2, which was designed for contracts of a more conventional private-law nature. In the case of environmental liability insurance, the connecting factors of Article 7 of the Rome I Regulation are by no means without import; rather, they resolve the narrower matter of which State's law is in play. They do not, however, address the more fundamental question of how EU insurance law ought to handle an instrument of this hybrid public/private character.

The practical significance of Article 7 of the Rome I Regulation for environmental liability insurance becomes apparent once the product is placed within the categories of that provision. Environmental liability cover falls within class 13 (general liability) of Annex I to Solvency II and therefore qualifies as a "large risk" only where the insured operator exceeds at least two of the size thresholds laid down in Article 13(27)(c) of that Directive. The result is a two-tier regime: large industrial operators may freely choose the law governing their environmental liability cover under Article 7(2), whereas small and medium-sized operators. for which, as discussed below, the insolvency problem is most acute, are

confined to the closed list of Article 7(3) and, absent a choice, to the law of the Member State where the risk is situated. For operators with installations in several Member States, Article 7(3)(e) allows a single law to be chosen for risks situated in different Member States, whereas, absent a choice, Article 7(5) splits a single multi-site policy into as many notional contracts as there are Member States in which risks are situated.

Moreover, where a Member State has made financial security for environmental liability compulsory, Article 7(4) allows that State to require its own law to govern the contract. Consequently, the law applicable to environmental liability insurance depends not only on the parties' choice, but also on the size of the operator, the geographical distribution of its activities and the national implementation of Article 14 of Directive 2004/35/EC, factors which reinforce the fragmentation identified in Sections 3.1–3.4 (Heiss, 2012; European Commission, 2016) The applicable-law analysis must also take account of the non-contractual side of the relationship, which is governed not by Rome I but by Regulation (EC) No 864/2007 (Rome II). Article 7 of Rome II lays down a special rule for environmental damage: the applicable law is that of the country in which the damage occurs (Article 4(1)), unless the person seeking compensation chooses to base the claim on the law of the country in which the event giving rise to the damage occurred. Article 18 of Rome II further allows the injured party to bring a claim directly against the insurer of the person liable where either the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides. Environmental liability insurance thus stands at the junction of two conflict-of-laws instruments: the scope of cover and the insurer's obligations are governed by the law designated under Article 7 of Rome I, while the existence and extent of the operator's liability and, potentially, the victim's direct access to the insurer depend on the law designated under Rome II. Where these laws differ, the cover provided under one legal system may not correspond to the liability arising under the other. Rome II, however, applies only to civil and commercial matters and excludes administrative matters; the public-law obligations of prevention and remediation imposed by competent authorities under Directive 2004/35/EC, which, according to its Article 3(3), does not give private parties a right of compensation fall outside its scope. This further underlines the hybrid character of the risk that environmental liability insurance is expected to cover.

Environmental liability is justified by the need to address negative externalities. While the operator benefits financially from its activities, third parties, society and the environment bear the costs of the resulting pollution. Transferring these costs to the polluter is therefore one of the primary functions of environmental liability legislation. Faure (2022) demonstrates that environmental liability involves more than covering or recovering the costs of environmental damage: it also provides an incentive to prevent harm and to improve the behaviour of operators.

Environmental liability insurance should therefore be viewed as part of a broader set of rules intended to influence operators' behaviour and reinforce environmental norms, rather than merely as compensation for damage caused. When this preventive role is considered in light of the definitional fragmentation set out in Sections 3.1 and 3.3, an additional complication arises. EU law has no overarching definition of an "insurance contract"; environmental liability insurance, moreover, cannot be reduced to a question of indemnification (Faure, 2022). A framework designed chiefly to regulate risk-transfer instruments must therefore accommodate an instrument whose raison d'être is behavioural as well as compensatory. This is why the fragmentation noted elsewhere in this paper is more pronounced here than in the case of conventional insurance products.

Environmental risk, moreover, is not an ordinary insurance risk. The OECD (2003) notes that the risk of environmental pollution, especially gradual pollution, is characterised by factual uncertainty, long-term effects and "long-tail" liability, because the damage may develop slowly, remain invisible for years and only become apparent much later. In these conditions, it is often very difficult to determine when the pollution began, when the damage materialised and, consequently, when cover is triggered under traditional policy wordings (OECD, 2003). The classic "occurrence-based" model is therefore not always adequate for environmental liability insurance, and more specialised forms of cover are required. This has implications for the cross-border dimension of the paper's argument, although not in the sense that the applicable law itself becomes uncertain: for mass risks, Article 7(3) of the Rome I Regulation fixes the relevant connecting factor at the time of conclusion of the contract. The difficulty lies elsewhere. Under Article 12 of Rome I, the law so designated governs, inter alia, the interpretation of the contract and the performance of the insurer's obligations, including the event that triggers cover (for example, "occurrence", "manifestation" or "claims-made" wordings). Where years separate the polluting act, the manifestation of the damage and the claim, the policy wording interpreted under that law may no longer match the liability regime applicable to the damage, which is determined separately under the Rome II Regulation. The long-tail nature of environmental risk therefore does more than create underwriting difficulties of the kind described by the OECD; it may produce a mismatch between the law governing the cover and the law governing the liability.

The difficulty of insuring environmental risk stems not only from factual uncertainty, but also from legal uncertainty.

The OECD (2003) emphasises that, for the insurance industry, environmental risk is essentially a liability risk; the way the legislator designs the liability regime, and the way courts and authorities apply it, therefore directly affect insurability. The more unclear or unstable the legal framework, the more difficult it becomes to calculate premiums actuarially, determine the limits of cover and develop a sustainable insurance market. Since environmental liability insurance depends primarily on normative clarity and on the predictability of legal implementation, it cannot be understood in isolation from the structure of environmental liability itself. This observation confirms the findings of Sections 3.1 to 3.4. Insurability rests on a predictable legal framework; viewed in that light, the fragmentation identified in Section 3 is more than a matter of doctrinal coherence. It may well determine whether, and under what conditions, environmental risk is insurable at all.The same reasoning is reflected at EU level in Directive 2004/35/EC.

According to Faure (2022), the Directive employs concepts from liability law, such as strict and fault-based liability, but essentially operates as an administrative regime in which the public authority plays a central role in initiating and overseeing the operator's preventive and remedial obligations. This is directly relevant to insurance, because the potential scope of cover is not limited to compensation of third parties, but extends to the costs of preventive measures, pollution control and environmental restoration (Faure, 2022). Environmental liability insurance therefore emerges as a hybrid category, linked simultaneously to civil liability, cost recovery and the operator's administrative obligations. This hybridity reflects the gap identified earlier in the discussion. A product that combines civil liability, administrative obligation and cost recovery in a single instrument does not fit comfortably within the general definitional framework of Sections 3.1 and 3.3 or within the applicable-law categories of Section 3.2. The administrative character of the Directive is thus far from a minor point: it is the reason why environmental liability insurance eludes the classification that the general framework applies to cross-border insurance contracts.

A particularly important issue in this area is operator insolvency. Faure (2022) underlines that one of the main weaknesses of environmental liability, especially where damage is caused by undercapitalised companies or by corporate structures designed to limit liability, is the risk that the costs of the damage are not actually covered. It is at this point that insurance and other forms of financial security acquire systemic importance: they are not simply private contractual instruments, but means of preventing the externalisation of the social costs of pollution.

Article 14 of Directive 2004/35/EC encourages the development of financial security instruments to cover environmental damage, but the absence of a mandatory requirement at EU level leaves significant gaps across national systems (Faure, 2022). Where Member States have responded by making financial security compulsory, Article 7(4) of the Rome I Regulation allows them to require that the contract be governed by their own law, so that divergent national choices on Article 14 translate directly into divergent applicable-law outcomes. This gap deserves particular attention. While the fragmentation outlined in Section 3 has so far been viewed as a matter of legal uncertainty and reduced predictability, the problem of operator insolvency shows that, in the field of environmental liability, fragmentation can have more immediate consequences: the polluter-pays principle of Directive 2004/35/EC may break down in practice if there is no insurer or guarantor to answer for the operator's obligations. Whether Article 14 should be made mandatory is a question that the methodology employed here cannot answer; the findings do, however, show that the existing framework has left that question open. The gap is all the more notable given that the European Commission has separately examined the case for EU-level protection of policyholders against insurer insolvency through Insurance Guarantee Schemes (European Commission, 2010), whereas no comparable harmonised mechanism exists to ensure that resources remain available to cover environmental damage where the liable operator is unable to pay.

Recent research further indicates that environmental liability insurance is more than an ex post mechanism for distributing losses. Empirical evidence suggests that it can also influence corporate behaviour, promoting better risk management and, in certain circumstances, supporting green innovation (Chen & Xie, 2024). This evidence derives from the Chinese market, however, so its transferability to the EU regulatory context requires caution. There is also a risk of moral hazard where operators perceive insurance as a substitute for investment in preventive measures (Faure, 2022; OECD, 2003). Environmental liability insurance thus has an ambivalent nature: it can strengthen prevention if it is built on accurate risk assessment and monitoring mechanisms, but it can weaken prevention if it functions as an unconditional financial shield. This ambivalence is consistent with the administrative and preventive nature of Directive 2004/35/EC described above. Since the central aim of the Directive is behavioural and not merely compensatory, the way environmental liability insurance is underwritten and monitored is more than a secondary market concern: it can either support or undermine the regulatory objective. For this reason, environmental liability insurance cannot be assessed by the standards applied to the more conventional insurance products examined in Section 3.

Overall, environmental liability insurance should be understood as a distinct category of liability insurance, distinguished from conventional policies by its object, its high factual and legal uncertainty, its close connection with the

prevention and remediation of environmental damage, and its function in ensuring the effectiveness of the environmental liability regime (Faure, 2022; OECD, 2003). Precisely because environmental damage is often latent, technically complex and linked to the intervention of public authorities, the relevant insurance cannot be treated as a peripheral appendix to insurance law, but should be recognised as a structural instrument at the intersection of environmental law, liability law and financial risk management (Chen & Xie, 2024). The foregoing discussion supports the argument advanced in the Introduction: environmental liability insurance is not a neutral means of transferring risk, but a legal construct shaped by the interplay of market forces, private autonomy and the public interest. The findings also confirm that EU insurance contract law is a fragmented body of rules. As has been argued, however, this fragmentation is not encountered to the same degree in every line of business; it is most pronounced in areas such as environmental liability, where the imperatives of private indemnification and public regulation are inextricably linked. Whether a specific regulatory approach is warranted as an alternative to the general cross-border framework of Section 3.2 is a question left for future research.

5. Conclusion

Referring to the research questions set out in the Introduction, the above analysis allows several interrelated conclusions to be drawn, which follow the line of argument developed in this paper.

As regards the way in which the insurance contract is defined and characterised in EU law (RQ1), the analysis in Sections 3.1 and 3.3 shows that EU law does not contain a single, autonomous and comprehensive definition of the insurance contract. The contract is understood through its functional elements: the assumption of risk, the existence of an insurable interest and the insurer's obligation to indemnify upon the occurrence of the insured event, while its substantive regulation remains largely a matter for national law. The case law of the CJEU confirms this approach. In González Alonso (Case C-166/11), the CJEU did not develop an autonomous definition of the insurance contract, but relied on the sector-specific insurance framework, namely Directive 2002/83/EC, to determine whether the contract fell within the exclusion laid down in Article 3(2)(d) of Directive 85/577/EEC. Consequently, the concept of the insurance contract in EU law is functional and sector-specific rather than unitary.

As regards the role of Article 7 of Regulation (EC) No 593/2008 (Rome I) (RQ2), the analysis in Sections 3.2 and 3.4 shows that this provision allocates, but does not harmonise, the applicable law. Article 7 distinguishes between contracts covering large risks and other insurance contracts. For large risks, the parties enjoy full freedom of choice and, absent a choice, the law of the country in which the insurer has its habitual residence applies. For other risks, the choice is limited to a closed list of connecting factors and, absent a valid choice, the law of the Member State in which the risk is situated applies. These rules are supplemented by the specific provisions of Article 7(4) on compulsory insurance and Article 7(5) on contracts covering risks situated in more than one Member State. Directive 2009/138/EC (Solvency II) complements this framework: Article 178 ensures the uniform application of the conflict-of-laws rules throughout the Union, while Articles 179 and 180 leave Member States room for their own rules on compulsory insurance and the general good. The EU framework thus reduces uncertainty as to which law applies, but does not eliminate the diversity of national substantive insurance law. Regulatory harmonisation and contractual fragmentation coexist within the internal market, with direct consequences for risk assessment, premium setting, product design and the costs of cross-border activity.

As regards the specific difficulties raised by environmental liability insurance (RQ3), the analysis in Section 4 shows that the fragmentation identified earlier appears here in its most acute form. Environmental liability insurance falls within class 13 (general liability) and therefore qualifies as a large risk only where the operator exceeds the thresholds laid down in Article 13(27)(c) of Solvency II. This produces a two-tier regime. Large industrial operators enjoy full freedom of choice under Article 7(2) of Rome I Regulation, whereas small and medium-sized operators, precisely those for which the risk of insolvency is highest, are subject to the closed list of Article 7(3) of Rome I Regulation. Where an operator has installations in several Member States, Article 7(5) of Rome I Regulation splits its policy into as many notional contracts as there are Member States in which risks are situated. Where a Member State makes financial security for environmental liability compulsory, Article 7(4) of Rome I Regulation allows it to impose its own law on the contract.

This complexity is compounded by a potential mismatch between cover and liability. The insurance cover is governed by the law designated under Article 7 of Rome I, whereas the operator's liability for environmental damage is governed by the law designated under Article 7 of Regulation (EC) No 864/2007 (Rome II), and the possibility of a direct action against the insurer depends on Article 18 of that Regulation. Where these laws differ, the cover provided under one legal system may not correspond to the liability arising under another. Moreover, the administrative obligations of

prevention and remediation under Directive 2004/35/EC fall outside the scope of Rome II. The long-tail nature of environmental risk deepens this problem further. Although Article 7(3) of Rome I fixes the relevant connecting factor at the time of conclusion of the contract, under Article 12 the law of the contract also governs the event that triggers cover. Where the pollution, the manifestation of the damage and the claim are separated by years, the policy wording may no longer match the liability regime applicable to the damage.

The problem of operator insolvency makes this fragmentation even more significant in practice. Article 14 of Directive 2004/35/EC merely encourages the development of financial security instruments without making them mandatory. Divergent national choices on whether to make such security compulsory translate, through Article 7(4) of Rome I, directly into divergence in the applicable law. In the absence of an insurer or guarantor to answer for the operator's obligations, the polluter-pays principle risks remaining ineffective in practice. At the same time, environmental liability insurance has an ambivalent nature: it can strengthen prevention where it is based on accurate risk assessment and monitoring mechanisms, but can weaken it where it functions as an unconditional financial shield.

Overall, the analysis confirms the thesis advanced in the Introduction that environmental liability insurance is not a neutral means of transferring risk, but a legal construct shaped by the interplay of market logic, private autonomy and the public interest. EU insurance contract law remains a fragmented body of rules. This fragmentation, however, does not manifest itself with the same intensity in all lines of insurance, but it is most pronounced where private indemnification and public regulation are inextricably linked, as in the field of environmental liability.

Finally, the study is confined to EU-level legal sources and predominantly English-language doctrine, and there is as yet no case law of the CJEU directly addressing environmental liability insurance under Article 7 of Rome I. On the basis of its findings, two questions merit further research. The first is whether the financial-security mechanism of Article 14 of Directive 2004/35/EC should become mandatory at EU level. The second is whether a specific conflict-of-laws rule for compulsory environmental liability insurance, aligning the law of the contract with the law governing the liability, would better serve the polluter-pays principle than the general framework of Article 7 of Rome I. A comparative analysis of how Member States have implemented Article 14 would naturally complement this line of research.

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