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Claims for brokerage from the perspectives of Polish, German and Austrian law

The subject of the insurance broker's remuneration, and in particular that of substantive conditions of claims for brokerage, is of material importance for both legal studies and the practice of insurance brokers. As the literature suggests, Polish legislation fails to effectively address this topic as there are no provisions directly applicable to brokerage in the Insurance Mediation Act (in Polish, Ustawa o pośrednictwie ubezpieczeniowym).[1] *In consequence, the issue should be discussed in greater detail against the background of legislative solutions adopted in other European countries, such as Austria and Germany.*

Key words: brokerage, claim, insurance broker, Insurance Mediation Act, Germany, Austria.

Professional activity of insurance brokers

The professional activity of insurance brokers includes actions taken in order to conclude insurance contracts. According to the definition of an insurance broker's activity presented in the Insurance Mediation Act, this term covers the carrying out of an insurance broker's actions on behalf of or for an entity seeking the insurance coverage.[2] Article 26 (2) of the Insurance Mediation Act also obliges the insurance broker to perform a reliable analysis of insurance offers.[3] Legislators have excluded from this definition any counselling services that provide only general information about a possibility of concluding insurance contracts, contractual terms and conditions, as well as the scope of insurance coverage, provided that they are not taken with the purpose of actually concluding an insurance contract.[4]

The activity of an insurance broker involves concluding, causing, or performing work preparatory to the conclusion of insurance contracts, taking part in the administration or performance of insurance

1. E. Kowalewski, "Wynagrodzenie brokera ubezpieczeniowego", *Prawo Asekuracyjne* 2 (2008).
2. Art. 4 (2) of Polish Insurance Mediation Act.
3. T. Sangowski, E. Kowalewski, „Prawo ubezpieczeń gospodarczych. Komentarz", (Warszawa: LexisNexis, 2004), 429.
4. Art. 6 section 2 of Polish Insurance Mediation Act.

contracts as well as claims, and also organising and supervising the mediation / broker activities. Polish insurance law scholarship often divides these actions into two categories. The first one, known as *the preparatory phase*, consists of making assessments of technical risk and the development of insurance programmes. The second one includes the conclusion of insurance contracts and the calculation and payment of insurance premiums. Further actions relate to a situation that may precede the conclusion of an insurance contract or the occurrence of an insured event.

It must be noted, though, that actions of an individual broker do not have to be carried out by the same entity. There is no consensus in scholarship as to the legal nature of a broker's participation in the administration or the performance of insurance contracts. The Insurance Mediation Act is silent on who may entrust an insurance broker with the administration of insurance contracts. The Act also provides no guidance on whether a person other than the policyholder or the insured may demand the payment of indemnity. Insurance law scholars argue that the insurance broker should not, as part of their professional activity, handle claims of injured parties seeking to be compensated under third party liability insurance.[5] This exclusion is one of the reasons for the dynamic growth of so-called *claims management firms* in recent years.

Insurance broker's remuneration

According to article 2 (1) of the Insurance Mediation Act, an insurance broker's activity is performed against a remuneration. Still, neither Polish nor European Union law provide a detailed regulation of the key aspects of this principle, such as the obligation to pay the remuneration or the conditions of claims for brokerage.[6] Thus, this obvious legal lacuna needs to be filled by industry practices. Moreover, insurance brokers, insurers and legal scholars should support appeals for immediate remediation of this problem by way of legislative action.

Brokerage (in French, *courtage*) is an essential element of the insurance broker's remuneration; it is also called the broker's commission. It is paid to the broker upon the successful performance of the broker's intermediation services leading to the conclusion of an insurance contract and the provision of other deliverables of the insurance broker's work. It should be noted that brokerage is not the only component of the broker's remuneration: other remuneration elements, usually payable by the policyholder, can be agreed on in the contract. An example of an additional fee could be a counselling fee paid by the policyholder or a loss adjustment fee. The policyholder and the insurance broker can enter into a permanent co-operation contract, which governs the payment of the broker's fees. In summary, apart from the brokerage itself there are a number of other types of broker's remuneration, including collecting commissions, commissions on settled claims, commissions paid to life insurance brokers, commissions payable upon the issuance of a policy and the *del credere* commission.[7]

5. M. Serwach, "Umowa brokerska" in W. Katner, "Prawo zobowiązań – umowy nienazwane, System Prawa Prywatnego", (Warszawa: C.H. Beck, 2010), 709.
6. Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation, OJ L 9, 15 January 2003, 3–10.
7. E. Kowalewski, "Wynagrodzenie brokera ubezpieczeniowego", 10.

German law

In German law, the legal position of the insurance broker (*Versicherungsmakler*) is determined in a number of legal enactments, which creates some difficulties in obtaining a clear picture of the profession.[8]

The 2007 Insurance Contract Act (*Gesetz über den Versicherungsvertrag*)[9] defines an insurance broker as the person who professionally contracts to arrange or conclude insurance contracts for a client, and in doing so is not acting on behalf of the insurer or the insurer's representative.

The contract for insurance mediation services is governed by a plethora of legal provisions, including those of the German Civil Code (*BGB*). The majority of authors consider this contract to be an agency contract (*Geschäftsbesorgungsvertrag*) with some elements of a contract for services (*Dienstvertrag*) and a contract to produce a work (*Werkvertrag*),[10] and is also governed, to an extent, by the provisions regarding a mandate contract (*Auftrag*).

A clearly visible element of the *Dienstvertrag*[11] is the obligation to provide services for a client on the condition that the other party to the contract for insurance mediation services is not required to pay any remuneration. Insurance intermediaries may also provide their services by acting with a view to modifying an insurance contract, or by performing advisory or administrative activities.

The most significant feature of the *Werkvertrag*[12], which exists in the contract for insurance mediation services, is the fact that brokerage is a performance-related remuneration (*Erfolgsvergütung*), payable upon obtaining a pre-defined result.

A number of the provisions governing the *Auftrag*[13] apply to the prohibition of the early termination of a contract for insurance mediation services and the insurance broker's failure to follow the client's instructions, which – surprisingly enough – puts the former in a more advantageous position.

The claim for brokerage is regulated by different legal provisions than those applicable to the claims pursued under an agency contract, which provide that the client should pay the remuneration directly to the person providing the service. Brokerage claims should not be based on a contract concluded between an insurance broker and an insurer. It would not be consistent with the principle of the former's independence from the latter. The claim cannot be based on an insurer's unilateral obligation to pay the brokerage (*Courtage-zusage*), either. Such an obligation determines the remuneration amount and cannot serve as the legal basis for the payment of brokerage.[14]

8. M. Zinnert, "Recht und Praxis des Versicherungsmaklers", (Karlsruhe: Verlag Versicherungswirtschaft, 2008), 17.
9. Act of 30 May 1908, as amended by the Act of 23 November 2007, BGBl. I S. 2631, *vide*: E. Prolss, A. Martin, "Versicherungsvertragsgesetz (VVG). Kommentar", (Munchen: Verlag C.H. Beck, 2010).
10. M. Zinnert, "Recht und Praxis des Versicherungsmaklers", 29.
11. Ss. 611–630 BGB.
12. Ss. 631–651 BGB.
13. Ss. 662–674 BGB.
14. M. Zinnert, „Recht und Praxis des Versicherungsmaklers", 287.

Certain German authors and courts argue that the basis of the claim is an insurance contract concluded for the benefit of a third party – the insurance broker.[15] Currently, legal scholarship is vague as to whether policyholders must be made aware of the fact that the insurance broker receives a part of the insurance premium as the brokerage commission.

Under the earlier doctrinal approach it was believed that claims for brokerage should be based on a trade custom.[16] However, according to the current scholarly views, this claim is covered by the provisions of international customary law, which sets the following conditions of the claim that must be satisfied cumulatively. The first one is the actual involvement of the insurance broker in the conclusion of the insurance contract, which should be based on a contract for insurance mediation services entered into between the broker and the client. This type of contract covers the risks assessment, professional advice and the provision of substantive brokerage services, i.e. activities that may be classified as typical broker mediation; the performance of activities of a purely auxiliary character does not meet this requirement.

The second condition is the effective conclusion of an insurance contract – technically the acceptance of an insurance proposal by the insurer. There must be a causal link between the conclusion of an insurance contract and the activities of the insurance broker. The third and last condition is the payment of the insurance premium by the client.[17]

Austrian law

The Austrian laws regulating brokerage seem to be easier to study because all the provisions regarding this matter are contained in one legal instrument governing the activity of brokers, the Brokers Act.[18] The Act sets out the general rights and obligations of brokers. It distinguishes several types of brokers: real estate brokers, commercial brokers, and personal loan intermediaries. Here, an insurance broker is a type of commercial broker.

Pursuant to the above-mentioned Act, an insurance broker is a commercial broker (*Handelsmakler*) who acts as an intermediary in the conclusion of insurance contracts.

It is worth noting that the framework commission agreement with an insurer does not affect the character of the broker's activity, which should guarantee the client's best interests. The broker's obligations listed in the Act include, first and foremost, providing any clarification or advice regarding insurance coverage, offering a profound analysis of any potential risks to the client, outlining the concept of coverage and how to possibly eliminate these risks. The insurance broker should also be able to assess the financial condition of the insurer and recommend coverage based on the best market offers[19].

15. Bundesgerichtshof's sentence, 22 May 1985, BGH VersR 1985, 930
16. W. Gauer, "Der Versicherungsmakler und seine Stellung in der Versicherungswirtschaft", (Weisenburg/Bayern: R. Fischer, 1951), 66.
17. M. Zinnert, „Recht und Praxis des Versicherungsmaklers", 301; A. Kufel-Siemińska, "Makler ubezpieczeniowy (system niemiecki) a broker ubezpieczeniowy (system polski)", *Wiadomości Ubezpieczeniowe* 7–8 (1997)..
18. Bundesgesetz über die Rechtsverhältnisse der Makler und über die Änderungen des Konsumentenschutzgesetzes, 1 July 1996, BGBl. No. 262/1996 as amended, (MaklerG).
19. M. Fras, "Reżim prawny ubezpieczeniowej umowy maklerskiej na tle ustawodawstwa austriackiego – uwagi prawno-porównawcze (Part III)", *Prawo Ubezpieczenia Reasekuracja* 4 (2008).

Contrary to German law, in Austrian law the conditions governing the claim for brokerage are specified directly in the Austrian Brokers Act. This legislation determines that, except for any written agreements, a client is not obliged to pay a commission to an insurance broker. Pursuant to the general provisions of the Brokers Act regulating the commission, this is the responsibility of the insurer in respect of any concluded broker contract (*Maklervertrag*)[20].

Unlike the German doctrine, Austrian law stipulates more conditions of an effective claim for brokerage. The most essential one is the above-mentioned broker contract concluded between the insurer and the insurance broker. This contract is considered the legal basis of the claim. Another condition is the effective activity carried out by the insurance broker as referred to in Article 30 (3) of the Act, which defines a presumption of predominant merit (*überwiegende Verdienstlichkeit*). A causal link between the insurance broker's activity and the concluded insurance contract should also exist. The contract has to be carried out, e.g. it cannot be terminated.

Polish regulations and conclusions

Under Polish law, an insurance broker contract is a type of mediation contract. It is neither regulated in the Polish Civil Code nor in other legal acts. Generally, in the opinion of Polish authors,, the prevailing features of this contract (in particular the character of services provided by an insurance broker) have their roots in the contract known as the *umowa o dzieło* (a contract to perform a specific task or work. Services provided under the contract include the development of an insurance programme or other documents adjusting the general insurance terms and conditions to specific future needs of the policyholder. The insurance broker is obliged to not only exercise the duty of care, but also to achieve a specified result.[21]

As mentioned above, the conditions of claims for brokerage are not regulated in Polish law. The courts and the legal doctrine have to assess the issue independently and define solutions they consider beneficial.

There are a few regulations in Polish law that describe the insurance broker mediation contract as a non-gratuitous contract. Mediation is defined in the Act as the performance of factual and legal acts rendered against remuneration in connection with the conclusion or performance of insurance contracts.[22]

In 2005, Polish legislation adopted provisions stating that an insurance premium paid by a client to an insurance broker is deemed paid to the insurer, but any payments made by an insurer to an insurance broker are not deemed as paid to the policyholder. In this situation, the insurance broker turns into a legal representative of the insurer, who is entitled to obtain an insurance premium. Such position of the insurance broker supports the conclusion that the broker has the right to receive brokerage from the insurer, with whom he generally should not have any contractual

20. M. Fras, "Uwagi o transparentności wynagrodzenia brokerskiego na tle ustawodawstwa austriackiego (wzór dla polskiego ustawodawcy?)", *Prawo Asekuracyjne* 4 (2007).
21. E. Kowalewski, "Wynagrodzenie brokera ubezpieczeniowego", 6.
22. J. Pokrzywniak, "Pośrednik coraz bardziej niezależny", *Rzeczpospolita*, Prawo co dnia (18 June 2003); Ł. Laszczyński, "Jak wybrać brokera", *Przetargi Publiczne* 6 (2010).

relations.23.The reason for such an understanding of the brokerage payment is the fact that the insurance broker makes the insurer an obvious beneficiary of his activity – the insurer does not have to bear the costs of the canvassing.

Another issue worth mentioning is the brokerage agreement (*porozumienie kutrażowe*). It is very common for an insurer to reject a claim for brokerage or question its amount due to the lack of a relevant agreement between the insurer and the broker. According to Professor Eugeniusz Kowalewski, the conclusion of a brokerage agreement cannot be considered a substantive condition of a claim for brokerage. Such agreements specify the amount, manner and deadline for the payment of brokerage by the insurer.[24]

In summary, conditions of a claim for brokerage should be derived from an insurance broker's activity which gives rise to the claim. In the opinion of Professor Eugeniusz Kowalewski, the basis of this kind of claim is the "broker effect" and the actual application of this effect by the benefiting insurer. The broker effect is understood as the achievement of the goal sought by a broker – i.e. the conclusion of an insurance contract containing tailor-made provisions.[25]

It seems that in cases without brokerage agreements, it is necessary to examine the conditions of a claim for brokerage because it is quite difficult to find the essential elements in the broker's activity when the parties have made no arrangements. In such cases it is advisable to consult German legal doctrine and thoroughly examine whether the broker has concluded a mediation agreement with a client and whether these activities have led to the successful conclusion of an insurance contract for which an insurance premium has been paid.

Legal scholars in Poland have unanimously called for the urgent regulation of the issue of claims for brokerage, even though they may differ on details of such regulation. The insurer should be obliged to pay a brokerage, which is already a common practice in dealings between insurers and insurance brokers. The best way to regulate this essential issue is to incorporate the relevant provisions in the Insurance Mediation Act, which contains general provisions on the activity of brokers.[26]

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23. E. Kowalewski, "Wynagrodzenie brokera ubezpieczeniowego", 4.
24. E. Kowalewski, "Wynagrodzenie brokera ubezpieczeniowego", 5.
25. Ibidem.
26. I. Tatulińska, Ł. Zoń, "Potrzeba uregulowania zasad wynagrodzenia brokera w polskim prawie ubezpieczeniowym" in E. Kowalewski, *O potrzebie polskiego kodeksu ubezpieczeń* (Toruń: TNOiK 2009), 331.

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Roszczenia o zapłatę kurtażu z perspektywy prawa polskiego, niemieckiego i austriackiego

Tematyka wynagradzania brokerów ubezpieczeniowych, a w szczególności materialnoprawnych przesłanek roszczeń o zapłatę kurtażu, jest niezwykle istotna zarówno dla nauki prawa, jak i praktyki brokerów ubezpieczeniowych. Jak wynika z literatury przedmiotu, kwestia ta nie została skutecznie uregulowana w prawie polskim, ponieważ w Ustawie o pośrednictwie ubezpieczeniowym brakuje przepisów odnoszących się bezpośrednio do kurtażu.[27] W związku z powyższym tematyka roszczeń o zapłatę kurtażu powinna zostać omówiona bardziej szczegółowo w świetle rozwiązań legislacyjnych przyjętych w innych krajach europejskich, takich jak Austria i Niemcy.

Słowa kluczowe: kurtaż, roszczenie, broker ubezpieczeniowy, Ustawa o pośrednictwie ubezpieczeniowym, Niemcy, Austria.

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27. E. Kowalewski, "Wynagrodzenie brokera ubezpieczeniowego", *Prawo Asekuracyjne* 2 (2008).