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French perspectives on mortgage protection insurance

Melbourne, Wednesday 30th August 2023

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PREMIUMS 2022*
10 billions €

***To be compared to :**
- Personal Income Tax 2022 : 70 billions €

PROFITS 2022*
3,5 billions €

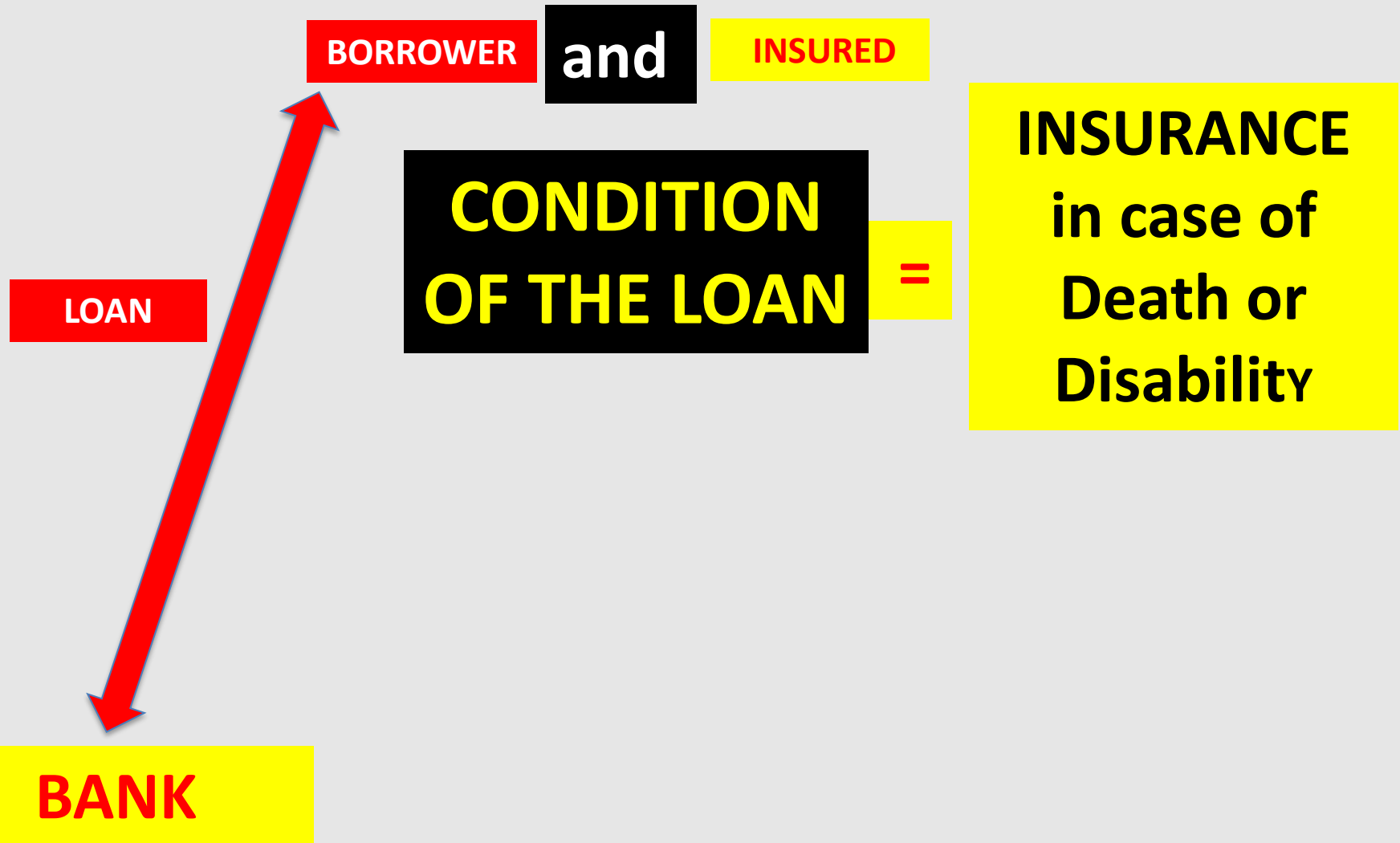
***To be compared to :**
- French Social Security : loss 2022 : 20 billions €

1 INTRODUCTION

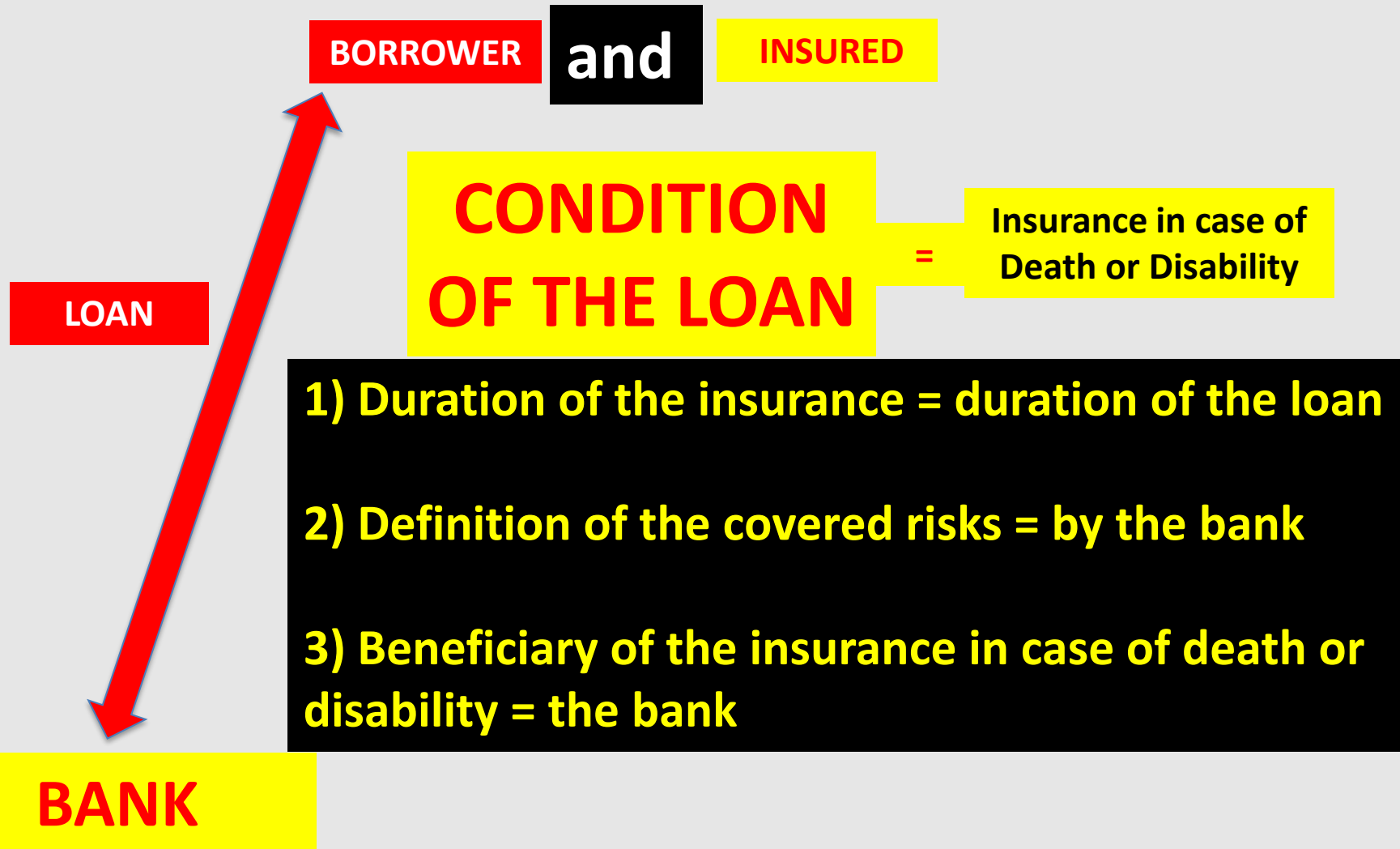
**a FRENCH EXAMPLE
of the war between
bancassurance operators
and
other insurers**

Personal Insurances for borrowers

1.1 BORROWER'S INSURANCE : CONDITION OF THE LOAN



1.1 BORROWER'S INSURANCE : CONDITION OF THE LOAN



1.2- INSURER – 1.2.1 : BANKINSURERS

BANK	INSURANCE COMPANY
Crédit Agricole	Pacifica & Predica
Société Générale	SOGECAP
Banque Postale Caisse d'Épargne	Natixis Assurances BPCE Vie
BNP Paribas	BNP Paribas CARDIF
Crédit Mutuel	Assurances du Crédit Mutuel
HSBC	HSBC Assurances
etc.	

1.2- INSURER – 1.2.1 : BANKINSURER

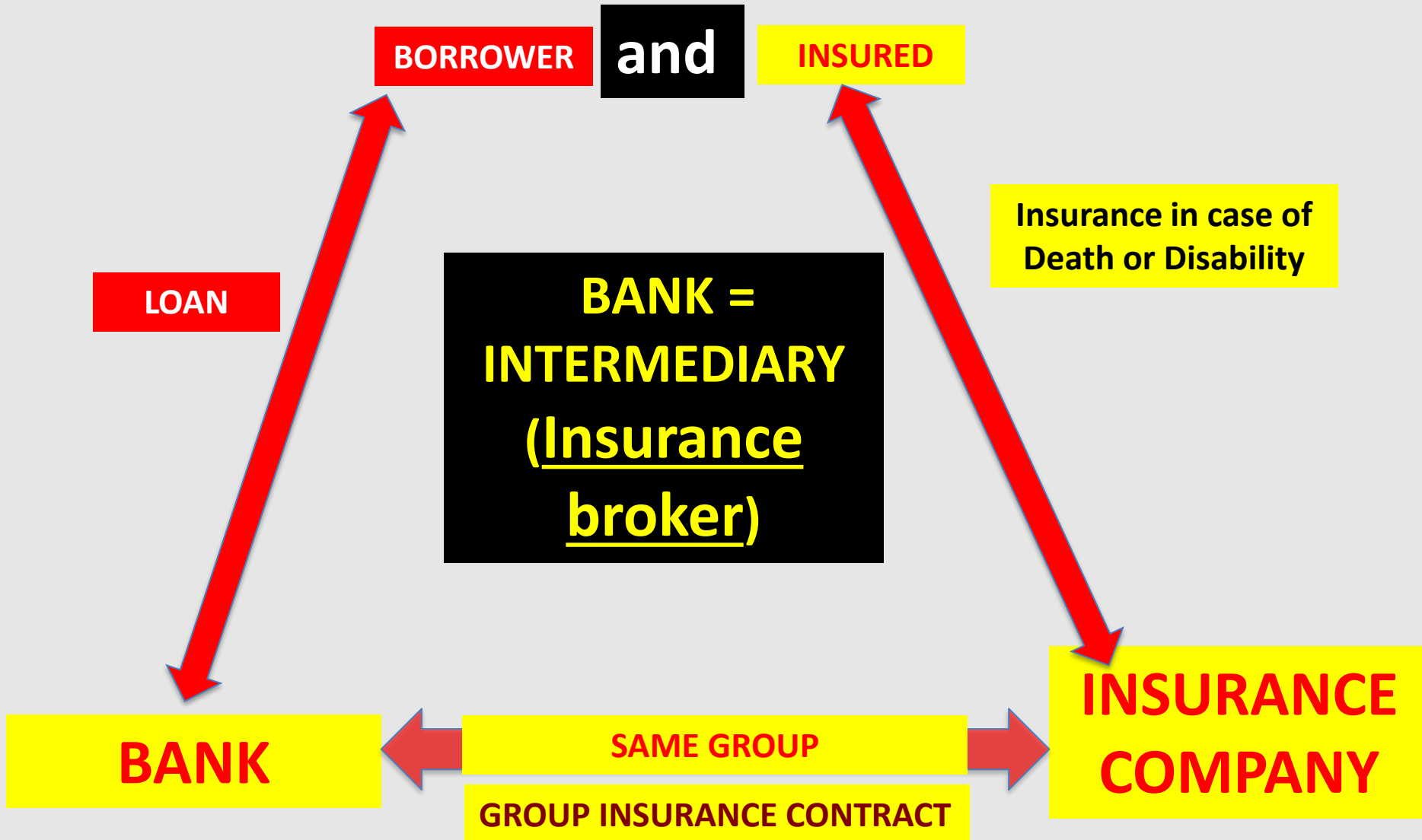


1) Insureds = borrowers

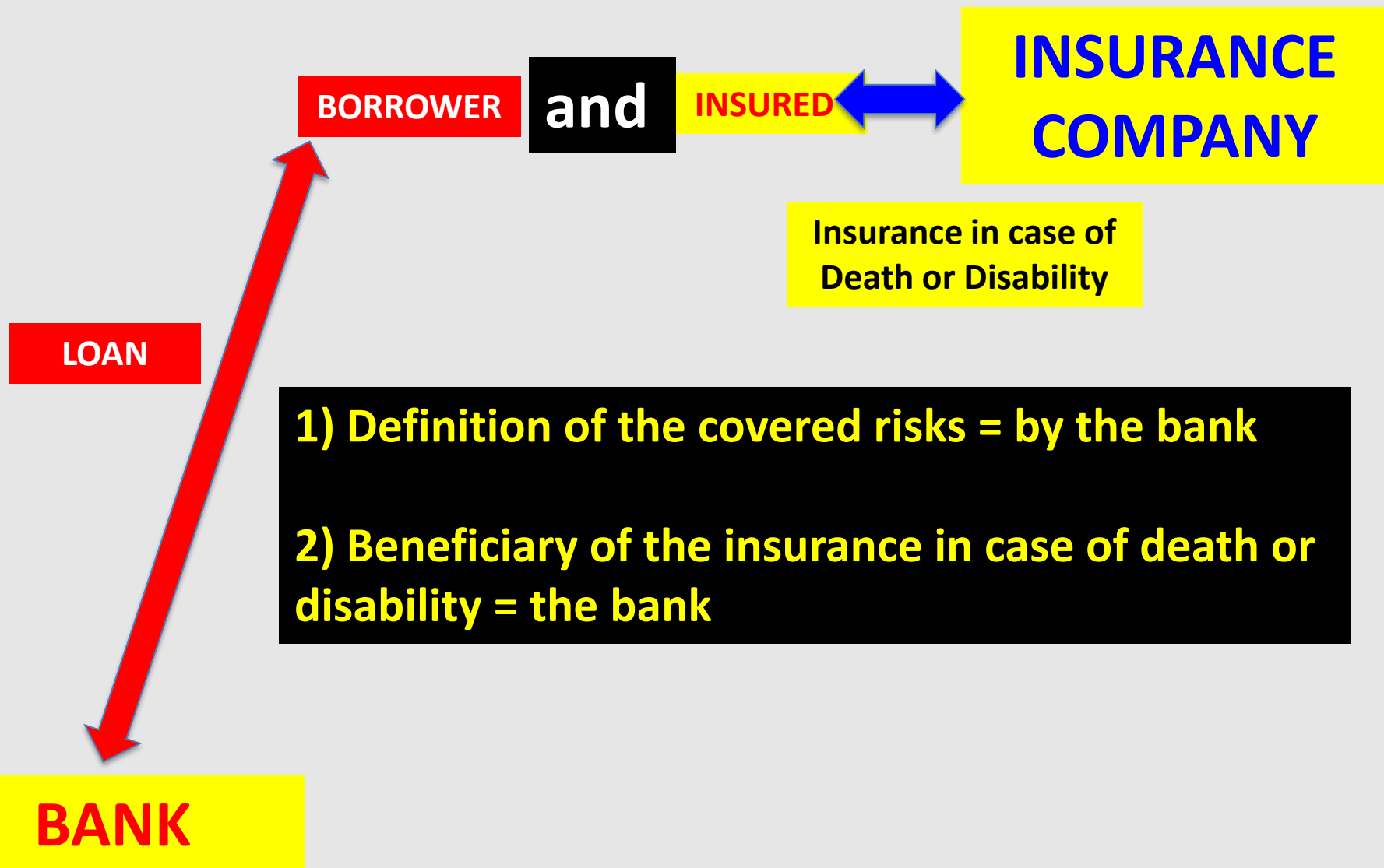
2) Definition of the covered risks

3) Beneficiary of the insurance in case of death or disability = the bank

1.2- INSURER – 1.2.1 : BANKINSURER



1.2- INSURER – 1.2.2 : OTHER INSURERS



BANKINSURANCE : Current situation

- To obtain the loan, the borrower accepts the Group Insurance contract proposed by the bank...
- and the whole operation (loan + insurance) is managed by the Bank-Insurance Entity
- **Profits... : Bank-Insurance Entity**

2- PROBLEMS

2.1 Insurer of the Bank or of the borrower?

2.1.1 Can the borrower oblige the bank to accept his own insurance contract ?

2.1.2 Is the borrower allowed to escape from the bankinsurance contract ?

2.2 Does the bankinsurance contract matches with the borrowers needs ?

2.1 BORROWER : BANK'S PRISONER?

2.1.1 Right to impose his own insurance

Consumer ONLY

YES, with a legal condition : same level of coverage

2.1.2 Right to escape ?

General provision of the Insurance Code* – Article L.113-2

The insured, and the insurer as well, is entitled to terminate the insurance contract **every year**

BUT... No more insurance, no more loan

** Life insurance excluded*

New special provision of the Insurance Code – Art. L113-12-2

New right to terminate the insurance contract

- When ?

- What conditions ?

2.1.2 Right to escape ?

2.1.2.1. WHEN ?

a) First step : Act 17 March 2014

The insured borrower is allowed to terminate the insurance contract **at any moment during the first year.**

b) Second step : Act 28 February 2022

The insured borrower is entitled to terminate the insurance contract **at any moment after the signature of the loan contract**

... And this new Law is applicable to on going contracts

2.1.2 Right to escape ?

2.1.2.2 Conditions

*ONLY for Consumers
and
ONLY for real estate credit*

2.1.3 Same level of coverage ?

CONDITION

The borrower has to propose to the bank another insurance contract, **with the same level of coverage**

Same level of coverage ????

- Each bank has its own group insurance contract with an insurer
- Each bank chooses 13 criteria among 18 criteria listed by a legal French Committee

... What a mess !!!!!

Solution : article L.313-30 Consumer Code

If the bank refuses the own borrower's insurance, it has to :

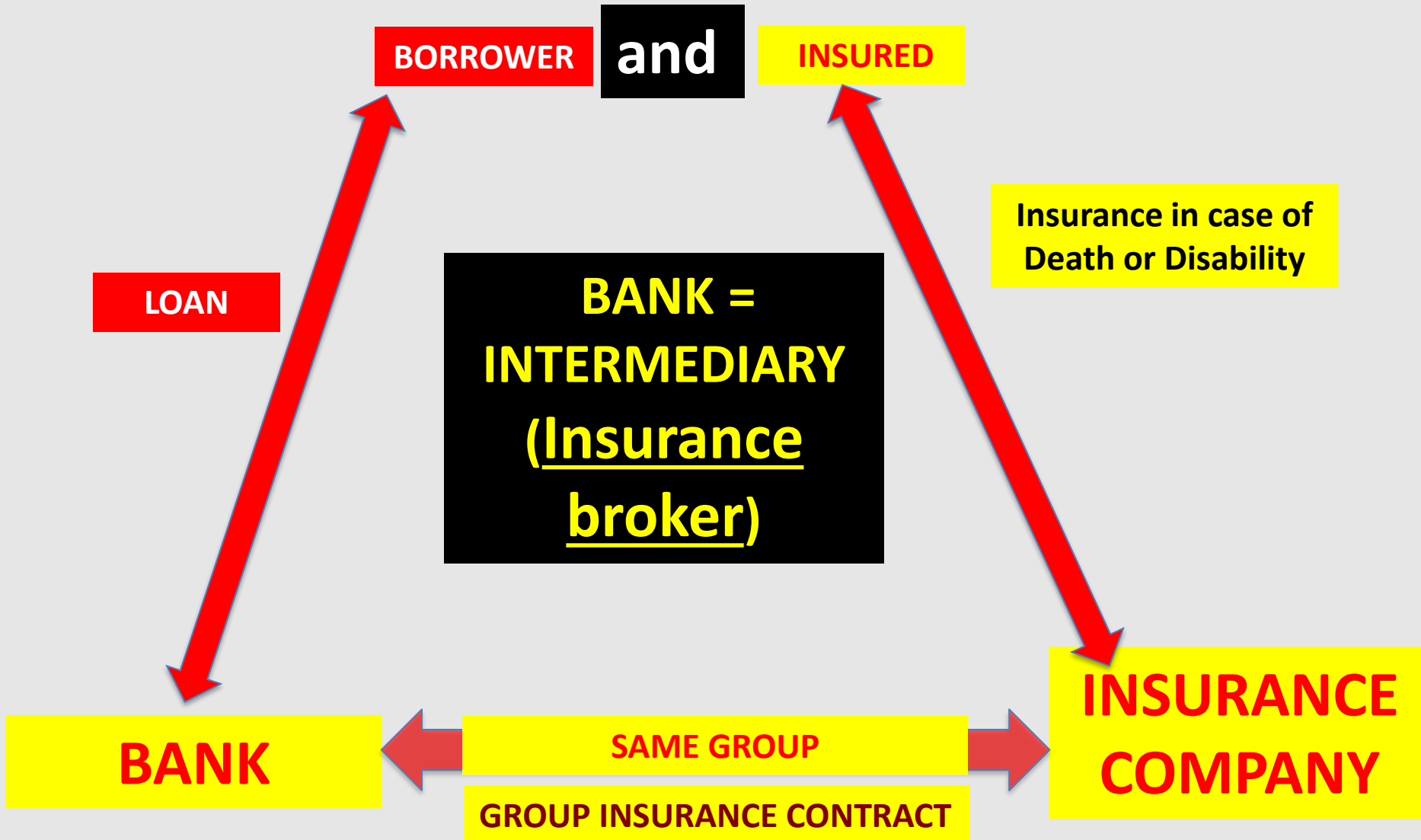
- prove that the level of coverage is lower than its group insurance contract
- and to say which insurance coverages are missing

2.2 NEEDS OF THE BORROWER

Group Insurance contract
REMEMBER

THE BANK IS A BROKER

2.2 NEEDS OF THE BORROWER



2.2.1 DUTIES of the BANK

INSURANCE DISTRIBUTION

DIRECTIVE (EU) 2016/97 (20 January 2016)

Article 20

Prior to the conclusion of an insurance contract, **the insurance distributor shall specify**, on the basis of information obtained from the customer, **the demands and the needs of that customer** and shall provide the customer with **objective information** about the insurance product in a **comprehensible form to allow that customer to make an informed decision.**

Any contract proposed shall be **consistent with the customer's insurance demands and needs.**

See Article L.520-1 French Insurance Code

2.2.1 DUTIES of the BANK

PRINCIPLES OF EUROPEAN INSURANCE CONTRACT LAW

PEICL, ARTICLE 2:202 - DUTY TO WARN ABOUT INCONSISTENCIES IN THE COVER

(1) When concluding the contract, the insurer shall **warn** the applicant of **any inconsistencies between the cover offered and the applicant's requirements** of which the insurer is or ought to be aware, taking into consideration the circumstances and mode of contracting and, in particular, whether the applicant was assisted by an independent intermediary.

(2) In the event of a breach of para. 1

(a) the insurer shall indemnify the policyholder against all losses resulting from the breach of this **duty to warn** unless the insurer acted without fault, and

(b) the policyholder shall be entitled to terminate the contract by written notice given within two months after the breach becomes known to the policyholder.

2.2.2 DUTIES of the BANK in France

FRENCH EXAMPLE

Personal Insurances for borrowers

2.2.2 DUTIES of the BANK in France

BANK, as a broker : 3 periods

- **Duty to inform (French Law)**
- **Duty to advise (French Law)**
- **Duty to warn (French Supreme Court : *Cour de cassation*)**

2.2.2 DUTIES of the BANK in France

THE WOODMAN'S STORY

The spark that ignited the fire

Group Insurance Contract – Definitions

« Disability »

***« To find it absolutely impossible
to be in gainful employment »***

2.2.2 DUTIES of the BANK in France

1) Bank : Duty #1 : Duty to inform

Insurance contract

Disability : Definition

« To find it absolutely impossible to be in gainful employment »

Judge : CLEAR

2) Bank : Duty #2 : Duty to advice

- to take an insurance : **DONE**

- to propose an insurance contract : **DONE**

Judge : No liability of the Bank

End of the story : no coverage for the woodman

2.2.2 DUTIES of the BANK in France

Revolution

**Plenary Assembly of the Cour de cassation
2 March 2007**

Duty #1 : Duty to inform

Duty #2 : Duty to advice

3) BANK: Duty #3

DUTY TO WARN

2.2.2 DUTIES of the BANK in France

2007

Duty #1 : Duty to inform

Duty #2 : Duty to advice

3) BANK: Duty #3

DUTY TO WARN

2.2.2 DUTIES of the BANK in France

DUTY to WARN

The poor match between the covered disability and the insured's requirements

« The contractual definition of the disability, proposed by the bank, is unsuited to the personal situation of the borrower »

2.2.2 DUTIES of the BANK in France

DUTY to WARN

Example #1 : **Borrower's Job**

Policeman working in a dangerous area

Insurance contract : only *partial temporary* disablement

Personnal requirement : *total permanent* disability

2.2.2 DUTIES of the BANK in France

DUTY to WARN

Example #1.1 : Borrower's Job

Truck Driver

Insurance contract : absolute impossibility of being
in **gainful or non gainful** activity

Personnal requirement : impossibility of being a truck driver

Clause known as The Coma Clause

*Court of Justice of the European Union, 23 April 2015, aff. C-96/14 :
to be valid (and not be an abusive clause), the clause must allow the consumer
« to evaluate, on the basis of precise, intelligible criteria, the economic
consequences for him which derive from it ».*

2.2.2 DUTIES of the BANK in France

DUTY to WARN

Example #1.2 : **Borrower's Job**

Farmer

Insurance contract : exclusion of lumbagos, etc.

Personnal requirement : coverage in case of back pains

Cass. 2è civ., 17 juin 2021, n° 19-24.467

2.2.2 DUTIES of the BANK in France

DUTY to WARN

Example #2 : Borrower's Age

Borrower : 58 years old / Loan : 20 years

Insurance contract : disability insurance *stops at 65*

End of the loan : borrowers will be 78

Personnal requirement : insurance for the *duration of the loan*

Cass. 2^e civ., 13 janv. 2011, n° 10-30.009

Cass. com., 13 janv. 2015, n° 13-24.026

Cass. 1^{re} civ., 13 mars 2019, n° 17-27.102

Cass. Com., 6 janvier 2021, n°18-24.954

2.2.2 DUTIES of the BANK in France

DUTY to WARN

Example #3 : **Waiting Period**

Borrower : manager of a very small company

Insurance contract : waiting period between disability and reimbursement of the loan by the insurer : 90 days

Personnal requirement : no waiting period

Cass. Com., 21 septembre 2022, n°20-20.685

2.2.2 DUTIES of the BANK in France

DUTY to WARN

MORAL OF THE STORY

What you can't get from the insurer (insurance contract),

Try to get it from the bank (civil liability)

2.3 Premium & Gender discrimination

Fact : if the borrower is a man, the premium is higher than for a female borrower (same coverage : disability / death)

2.3.1 European Union Directive 2004

General principle : Directive 2004/113/EC1 prohibits all discrimination based on sex in the access to and supply of goods and services.

Insurance : prohibition of the use of gender as a factor in the calculation of insurance premiums and benefits in relation to insurance contracts entered into after 21 December 2007.

Derogation : the Directive provides that Member States may, as from that date, permit exemptions from the rule of unisex premiums and benefits, so long as they can ensure that the underlying actuarial and statistical data on which the calculations are based are reliable, regularly updated and available to the public.

Member States may allow such an exemption.

*Texts From Court of Justice of the European Union - PRESS RELEASE No 12/11
Luxembourg, 1 March 2011*

2.3 Premium & Gender discrimination

2.3.2 France

Article L.111-7 Insurance Code (**Law 19 December 2007**)

1) **Principle** : Prohibition of the use of gender as a factor in the calculation of insurance premiums and benefits in relation to insurance contracts

(...)

2) **Derogation** : the minister of Economics can **permit exemptions from the rule of unisex premiums and benefits**, so long as they can ensure that the underlying actuarial and statistical data on which the calculations are based are reliable, regularly updated and available to the public.

(...)

Derogations (France) :

- Corporal Accidents
- Diseases
- Motorcar
- Life
- ... **And insurances for borrowers**

2.3 Premium & Gender discrimination

2.3.3 Court of Justice of the European Union : Judgment

1st March 2011, C-236/09 & C-236/09 : The derogation violates the principle and the European Chart.

The Court rules that, in the insurance services sector, the **derogation** from the general rule of unisex premiums and benefits is **invalid with effect from 21 December 2012**.

How can you understand this obscure and abstruse judgment ???

2.3.4 European Commission : « Guidelines »

13 January 2012 : Guidelines on the application of Council Directive 2004/113/EC to insurance, in the light of the judgment of the Court of Justice of the European Union in Case C-236/09 (10 pages)

2.3. Premium & Gender discrimination

2.3.5 France – Article L.111-7 Insurance Code (Law 26 July 2013)

Same rules

1) **Principle** : Prohibition of the use of gender as a factor in the calculation of insurance premiums and benefits in relation to insurance contracts

(...)

2) **Derogation** : the minister of Economics can **permit exemptions from the rule of unisex premiums and benefits**, so long as they can ensure that the underlying actuarial and statistical data on which the calculations are based are reliable, regularly updated and available to the public.

(...)

New Precision : ongoing insurance contracts (article A.111-6 Insurance Code)... *Remember : financial issue : 10 billions euros / year*

- Borrowers' Insurances taken **after the 20th December 2012** : discrimination prohibited

- **20 December 2012** : Ongoing borrowers' insurances : derogation allowed until the contractual end of the cover

Problem : what if the borrower escapes from the on-going insurance contract ?

2.3 Premium & Gender discrimination

2.3.6 European Commission : discriminations still possible

2.2. Gender-related insurance practices which remain possible

14. Article 5 prohibits any result whereby differences arise in individuals' premiums and benefits due to the use of gender as a factor in the calculation of premiums and benefits. **It does not prohibit the use of gender as a risk-rating factor in general.** Such use is allowed in the calculation of premiums and benefits **at the aggregate level**, as long as it does not lead to differentiation at individual level. After the Test- Achats ruling, it therefore remains possible **to collect, store and use gender status** or gender-related information within those limits, i.e.:

— **reserving and internal pricing:** insurers remain able to collect and use gender status for internal risk assessment, **notably to calculate technical provisions** in line with insurance solvency rules and to monitor their portfolio mix from an aggregate pricing perspective.

— **reinsurance pricing:** reinsurance contracts are contracts between an insurer and a reinsurer. It remains **possible to use gender in the pricing of these products, as long as they do not lead to gender differentiation at individual level.**

— **marketing and advertising:** pursuant to Article 3, the Directive does not apply to the content of media and advertising, and Article 5 only addresses the calculation of individuals' premiums and benefits. It therefore remains possible for insurers to use marketing and advertising to influence their portfolio mix, e.g. by **targeting advertising at either men or women.** However, insurers may not refuse access to a specific product because of a person's sex, unless the conditions of Article 4(5) are met (6).

.../...

2.3 Premium & Gender discrimination

2.3.6 European Commission discriminations still possible

2.2. Gender-related insurance practices which remain possible

.../...

- **life and health underwriting**: the unisex rule means that premiums and benefits cannot be different between two individuals **for the same insurance policy simply because their gender is not the same**. There are however other risk factors, e.g. health status or family history, on the basis of which differentiation is possible and for the assessment of which insurers need to take gender status into account, in light of certain physiological differences between men and women (1).

*(1) For example, a family history of breast cancer does not have the same impact on a man and on a woman's health risk (and the assessment of this impact **requires knowledge of whether the person is a woman or a man**). Obesity is a risk factor, a measurement of which is the waist to hip ratio, which is not the same for women and for men. A more developed list of examples is provided under Annex 3.*

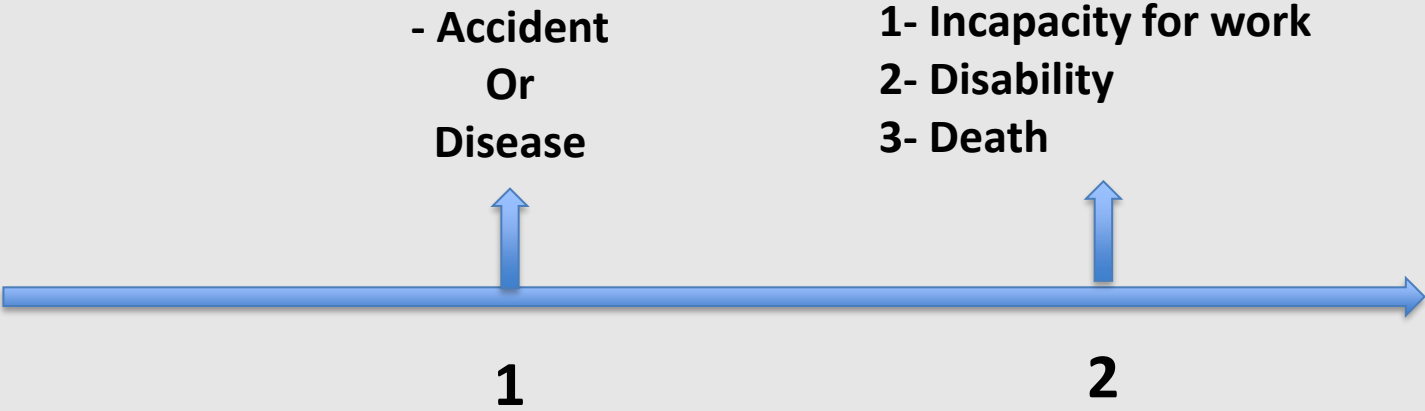
15. The Commission also considers that, under the conditions of Article 4(5) of the Directive, it remains possible for insurers to **offer gender-specific insurance products** (or options within contracts) to cover conditions which exclusively or primarily concern males or females (2). This possibility is however excluded for **pregnancy and maternity**, in light of the specific solidarity mechanism created by Article 5(3).

(2) For example, prostate cancer, breast or uterus cancer.

2.4 Covered risks

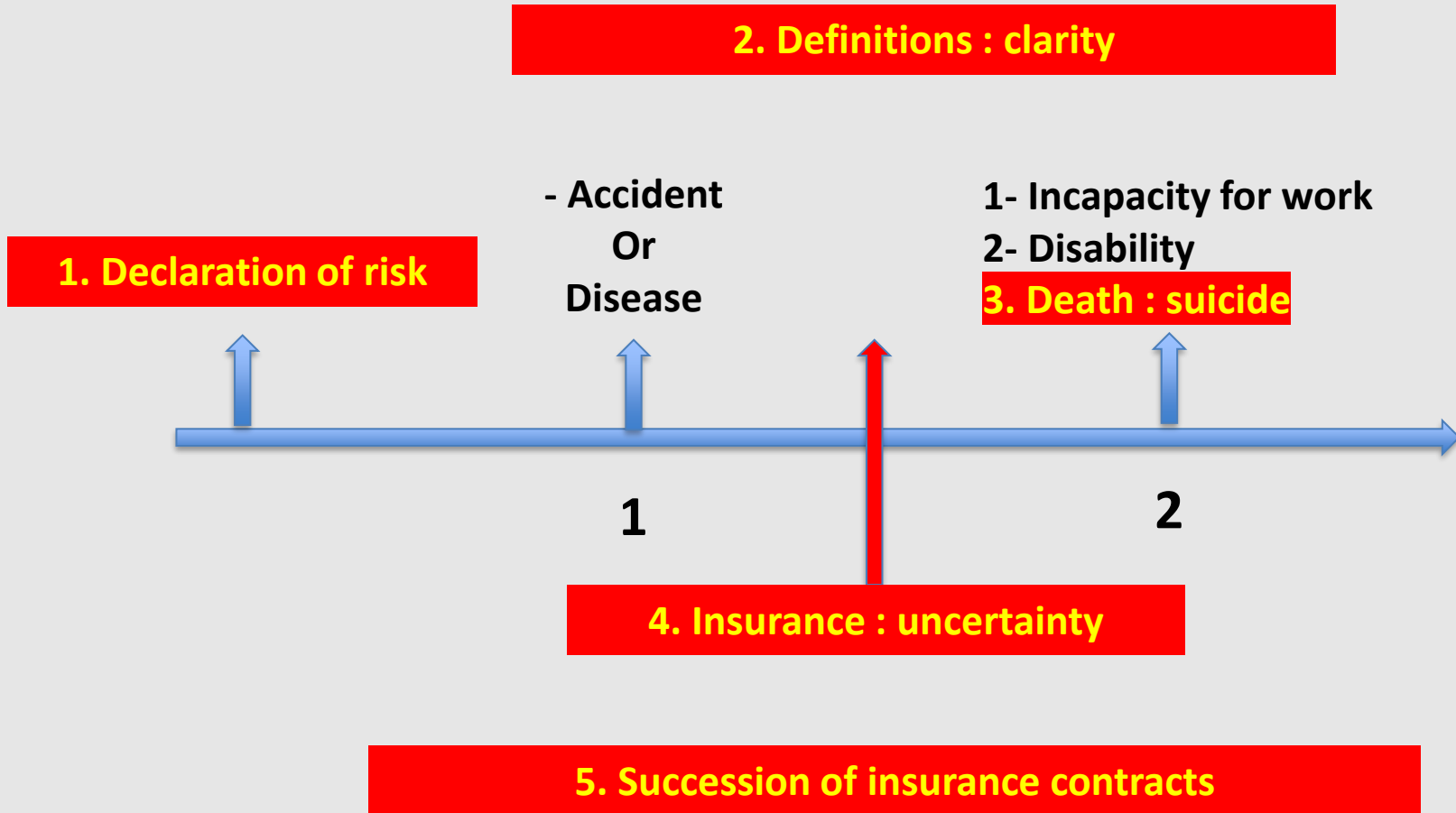
2.4.1 Two events

Definitions : freedom of contract



2.4 Covered risks

2.4.2 Five main problems



2.4 Covered risks

2.4.2.1 Declaration of the risk : France

- 1) Questionnaire : indispensable (article L.112-3 Insurance Code : all insurances)
- 2) Unclear questions (« are you in good health ? ») (article L.112-3 Insurance Code)
- 3) Forbidden questions
 - genetic tests (*article L.133-1 Insurance Code; Cass. 2^e civ., 31 août 2022, n°20-22.317*)
 - health : **no** question for loans under 200000€ and expiring before the age of 60 (*Law 28 February 2022 : article L.113-2-1 Insurance Code*)*
 - cancer and hepatitis C : remission of 5 years and insurance expiring before the age of 71 : not to be declared *

* *Article L.1141-2 « Code de la santé publique »*

2.4 Covered risks

2.4.2.2 Definitions of the elements of the risk : France

1) First Event

a) Disease

- No legal definition : only contractual definitions
 - Problems of exclusions : an unclear exclusion is invalid (deemed no written)
Example : lumbago (*clear*), sciaticalgia (*clear*), dorsalgia (*clear*), cervicalgia (*clear*) and « other back pain » (*unclear, void*)
- New solution from the French Supreme Court : because of one unclear exclusion (« back pain »), the whole clause is void (Cass. 2^e civ., 17 juin 2021, n° 19-24.467)

b) Accident

- No legal definition : only contractual definitions
 - Exclusions : see above « Disease »
 - Usual definition : an event which is unexpected, sudden and with an external origin
- Extensive litigation !

c) Difference between Disease and Accident

2.4 Covered risks

2.4.2.2 Definitions of the elements of the risk : France

2) Second Event

a) Work Incapacity and Disability

- No legal definition : only contractual definitions
- Problems of exclusions : see above « Disease »

Contractual definitions : often wordy and complicated

Extensive litigation !

Example : « definitive disability » : when will you know it ?

b) Death

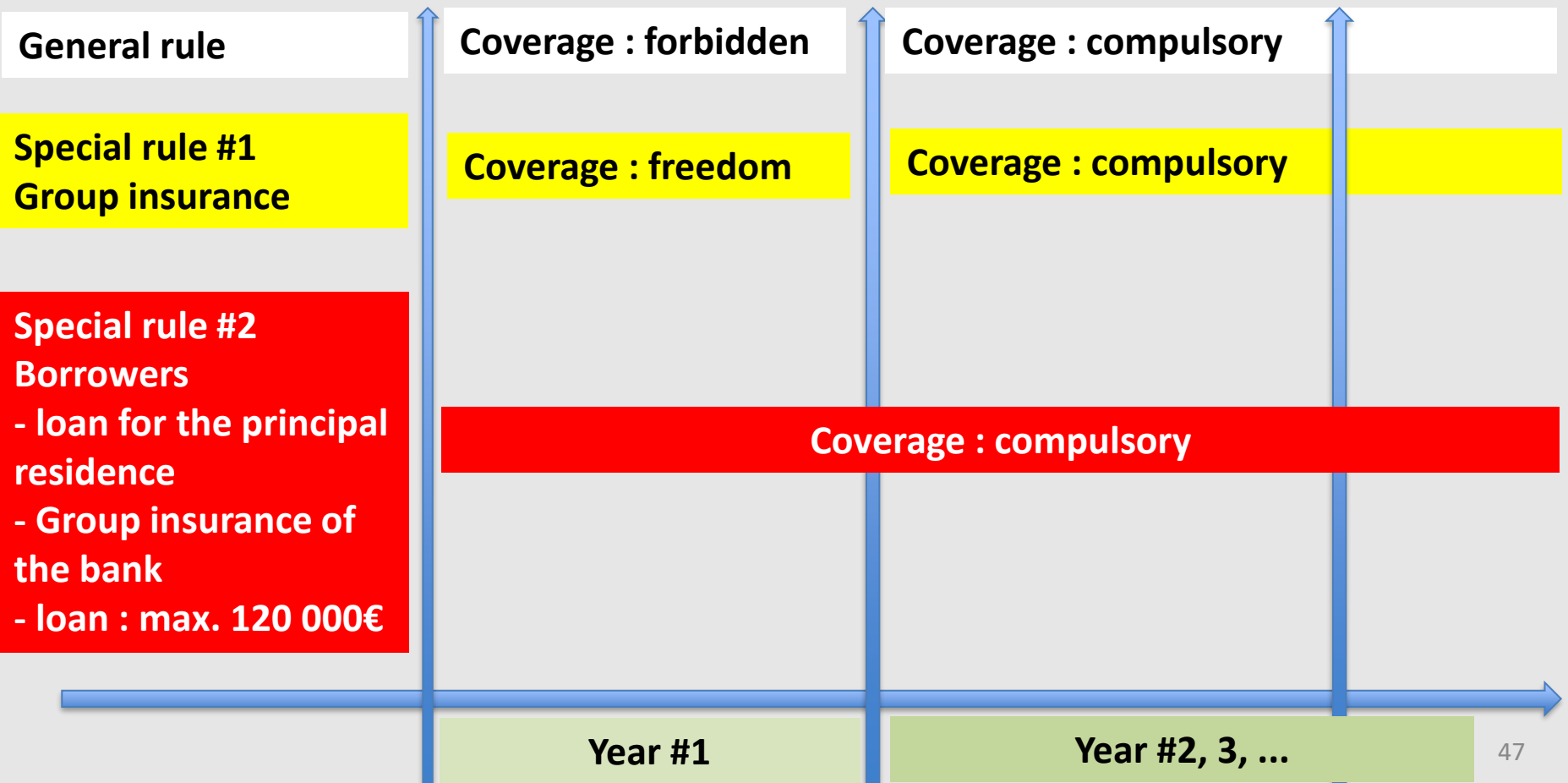
See below « Suicide »

2.4 Covered risks

2.4.2.3 Suicide : France

2.4.2.3.1 Legal regimes (art. L.132-7 Insurance Code)

As soon as the risk of death is covered, legal regime of suicide :



2.4 Covered risks

2.4.2.3 Suicide : France

2.4.2.3.1 Death : Accident or Suicide

Example #1

- Clause : first element of the risk : corporal accidents are covered
- Clause : second element of the risk : death is covered
- Suicide ? No clause

French Supreme Court : suicide is not covered

Cass. 2^e civ., 9 February 2023, n°21-17.681

Example #2 : for Adults only

Death because of a self strangulation : accident or suicide ?

Cass. 1^{re} civ., 2 July 1996, n°94-12.955, RGDA 1996 p.903, note A.Favre Rochex

2.4 Covered risks

2.4.2.4 Uncertainty : France

Event #1 : Accident or Disease before the conclusion of the insurance contract

Event # 2 : Consequence : incapacity, disability or death during the insurance contract

Question : the indispensable uncertainty (*alea*) : is it present ?

2.4 Covered risks

2.4.2.5 Succession of insurance contracts

WHO PAYS to the bank ? And HOW MUCH ?

See above : Right to terminate / Right to escape

