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Insurance Regulation and
Supervision: a private law
perspective

European Insurance Contract Law?

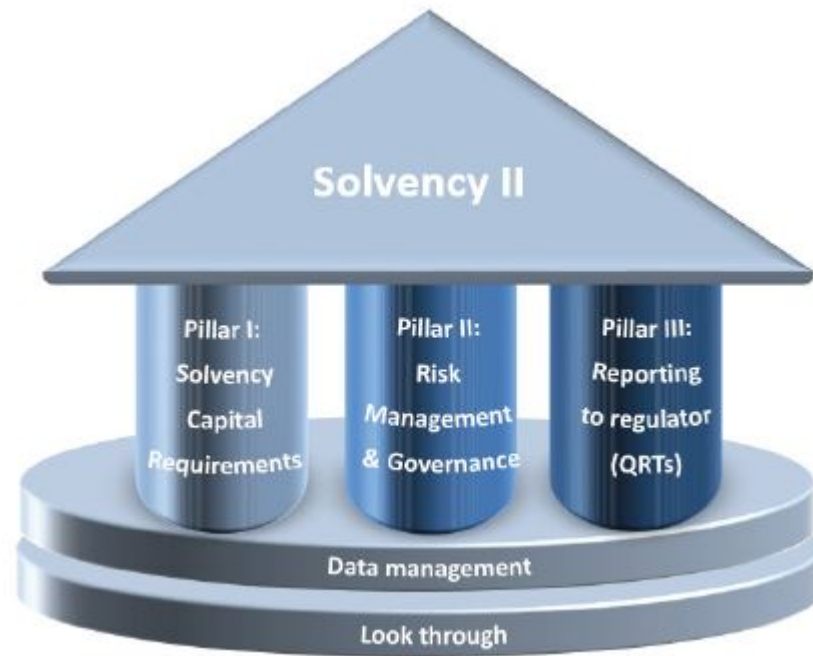
- The completion of the Single Market in insurance aims generally at providing free movement for insurers and insured throughout the European Union. It will offer freedom of choice in insurance contracts to the consumer. Consumers are given the right to decide whether they want to insure themselves in their own country, or abroad.
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- Insurance companies in the twenty first century are active on the European Market as a whole, and national boundaries are less important. However, opinions differ with regard to the results obtained since the 1990's.

- EU Policy towards insurance matters has not resulted in a move towards a common European market in insurance products. (...) There have been far-reaching changes in many insurance markets as a result of the directives of July 1994 which aimed to remove obstacles to competition, but in an examination of the British and German markets the two economists see two failures. There has not been any growth in 'cross-border' trade and there has been no influx of new entries from abroad into the profitable German market'. 'There is therefore no sign as yet of the growth of a 'single market' in insurance products, and market analysts do not expect there to be. The conclusion is that if European Commission policy aimed to create a single market in insurance, it has been a failure and will continue to be so unless a legal framework is developed within which standardised insurance contracts can be brought and sold across national boundaries [Rees/Kessner]

Achievements so far: the PEICL seems to agree on some principles of insurance contract law & the Expert Group on European Insurance Contract Law 2013 has identified if and to what extent contract law differences hinder cross-border provision and use of insurance products.



- The main findings of the report on European Insurance Contract Law are:
- For many life, motor or liability insurance products sold to consumers, insurance companies have to adapt their contracts to the national rules where the policyholder is based. This means they have to develop new contracts to comply, for instance, with rules on pre-contractual information.
- Contract law differences impede the supply of insurance products across borders. They increase costs for the cross-border provision of insurance, create legal uncertainty and make it very difficult for consumers and businesses to take out insurance in other Member States.
- Contract law obstacles are found primarily in the sector of life insurance, as well as areas such as liability and motor insurance. The report finds that problems are less likely to occur in insurance for large risks markets if linked to a trade or certain insurances for bigger companies – such as in the area of transport insurance.



- SII & Consumers:
- In an internal market for insurance, consumers have a wider and more varied choice of contracts. If they are to benefit fully from that diversity and from increased competition, consumers should be provided with whatever information is necessary before the conclusion of the contract and throughout the term of the contract to enable them to choose the contract best suited to their needs.

- However: many impediments remain. Questions of substantive insurance contract law and private international law (applicable law) still exist. And the impact of specific consumer protection rules on insurance contracts is still opaque (unfair contract terms, unfair commercial practices, pre-contractual information duties, distant selling of financial products).

- The national legislation and jurisprudence implementing three generations of EU directives, developed over course of decades, has been preserved by taking over most provisions as they had been previously formulated into Solvency II. As Member States had the freedom to adopt additional provisions or a higher level of protection, the national laws evolved differently in the areas harmonized at a minimum level.
- Cultural dimensions and the law & economics perspective cannot be ignored

- A number of areas of insurance contract law has not been harmonised at all and are entirely regulated at a national level. Thus, Member State's rules in these areas differ, as they have developed independently.
- They include some key areas for insurance contracts, for instance: the pre-contractual disclosure duty of the applicant, aggravation of risk, reduction of risk, consequences of non-payment, adaptations clauses concerning the premiums, retroactive and preliminary cover, duration of the contract and prescription. In these areas it is likely that Member States' laws differ even to a greater extent (eg health insurance)

Elementary questions (cf Cousy ELR):

- ‘Can one [...] conclude that insurance law has become entirely ‘consumerist law’? Professor Luc Mayaux, in his highly interesting recent book ‘Les grandes questions de l’assurance’, is inclined to think so, and so are many other authors. However the old traditions did not disappear. To paraphrase Oliver Wendel Holmes Jr., the old insurance law traditions ‘rule us from their graves’. The typical insurance law sanction of forfeiture of right to cover (‘la déchéance de la garantie’) is still alive, and so is the insurer’s right to unilaterally terminate the contract after the occurrence of a claim. The causation requirement is not recognised in every legal system and in some systems [...], the applicant still has the duty to *spontaneously* disclose all relevant data about the risk.

- And what is more, bringing in a consumerist approach into so delicate a construction as the insurance operation must be done with utmost care. Even Luc Mayaux appears to think that this has not been done so: **‘L’exigence consumeriste est floue dans ses pratiques, incertaine dans ses objectifs et dangereuse dans ses résultats.’** Under a specific insurance logic and approach, the preservation of the interests of the insured as a collectivity gains precedence over the fine-tuned justice towards the individual policyholder or insured. Insurers traditionally defend the occasional harshness of insurance law and of its sanctions by claiming that they are justified by the need to protect the collectivity of ‘the other ‘insureds’ ’.

- This insurance logic (precedence of the collective interests over the interests of an individual insured) is still very much present in the law. At the same time the consumer law logic, which rejects this collective approach, is introduced by recent legislative reforms. Modern insurance contract law remains hybrid.

Looschelders ZVersWiss (2015) 104: 481-499

...behandelt die rechtlichen Implikationen, die mit der zunehmenden Fragmentierung der Kollektive in der Privatversicherung verbunden sind. Dabei wird zunächst herausgearbeitet, dass der Begriff des „Kollektivs“ dem Versicherungsvertragsrecht fremd ist, weil der Versicherungsvertrag keine Beziehungen zwischen den einzelnen Versicherungsnehmern begründet. Da die Interessen der Versicherungsnehmer nicht immer homogen sind, ist der Gesetzgeber gehalten, die Interessenkonflikte im Kollektiv zu einem Ausgleich zu bringen.

Is market regulation the solution?

- Principles: ‘framed’ (ie limited) autonomy, protection of the weaker party, non-discrimination, effectiveness, also from a competition law perspective, balancing of interests, proportionality, good faith and the absence of abuse of legal rules.
- Is there a need for a European insurance contract law? Could supervision, self-regulation and negotiations be sufficient? Legislators do not seem to think so.

- The domain of EU insurance contract law comprises harmonized supervision regulation, but also specific rules (IMD, IDD, Motor car insurance). Also relevant are eg Mifid III, PRIIPS. Areas such as health insurance and pensions are largely unregulated by the EU.
- Although PEICL may serve as a ‘blue button’-option, Private International Law-barriers exist (see Reg Vo 2015/2012 & Rome I&2).
- Inroads are also made by Consumer Protection Rules (as mentioned) and Human Rights legislation etc.

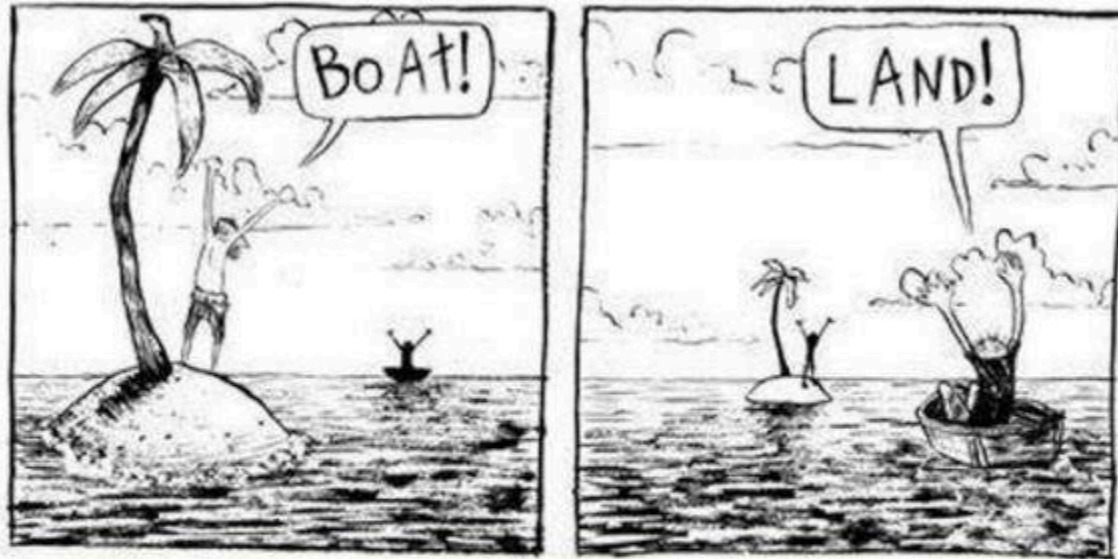
Insurance and life events: bridging the gap



Insurance contracts: characteristics

- Historically: coverage against risks & payment of a premium
- Modern: certainty and security in the future, against events of life
- Postmodern: universal service; social and cultural components, redistribution, spreading of risks, solidarity, segmentation and selection
> difficult to reconcile in a contractual relationship

Present developments: a comparative law perspective



Perspective...

Non-disclosure



Van Heerden JA in *President Versekeringsmaatskappy*, at 216D – G

- “(D)ie vraag (is) dus nie of na die oordeel van 'n redelike man die betrokke inligting wel die risiko beïnvloed nie, maar of dit redelikerwyse 'n effek mag hê op 'n voornemende versekeraar se besluit om al of nie die risiko te aanvaar of 'n hoër premie as die normale te verg. Anders gestel, is die toets of die redelike man sou geoordeel het dat die inligting oorgedra moes word sodat die voornemende versekeraar self tot 'n besluit kan kom. En so 'n oordeel sou hy bereik het indien die inligting na sy mening die voornemende versekeraar redelikerwyse kon beïnvloed het. “ [See also *Certain Underwriters of Lloyds of London v Harrison 2004 (2) SA 446 (SCA)*, at p 449B – C and at pp 451J – 452C].

coverage



Sentencia de la Sala 1ª del Tribunal Supremo núm. 82/2012 de 5 marzo, recurso núm. 838/2009

- la fijación de la cuantía de la cobertura de la responsabilidad civil contenida en la póliza de seguro objeto del litigio no es una cláusula limitativa de los derechos del asegurado, pues no lo son las que determinan qué riesgo se cubre, en qué cuantía, durante qué plazo y en qué ámbito espacial, incluyendo en estas categorías la cobertura de un riesgo, los límites indemnizatorios y la cuantía asegurada o contratada.

Restitution of premiums paid



BGH 16.7.2014 IV ZR 73/13

- **BGH-Urteil Alte Lebensversicherungen bleiben gültig: Das BGH-Urteil bringt Klarheit für Millionen von Menschen: Alte Lebensversicherungsverträge aus den Jahren 1994 bis Ende 2007 bleiben wirksam. Betroffene Kunden können eingezahlte Prämien daher nicht nach Jahren zurückfordern. (www.spiegel.de)**

- Der Kläger kann nicht gemäß den §§ 812 Abs. 1 Satz 1 Alt. 1, 818 Abs. 1 BGB Rückzahlung der Prämien und Nutzungersatz verlangen. Er hat die Prämien mit Rechtsgrund an die Beklagte geleistet (...). Im Übrigen ist ihm nach jahrelanger Durchführung des Versicherungsvertrages die Berufung auf dessen Unwirksamkeit nach Treu und Glauben wegen widersprüchlichen Verhaltens verwehrt.

Risk occurrence and claims

WHY WOMEN LIVE LONGER THAN MEN

1. Because of stuff like this:



Versloot Dredging [2016] UKSC 45 (collateral lies and the honest claim)

- The common law has long prohibited recovery from an insurer where the insured's claim has been fabricated or dishonestly exaggerated ("the fraudulent claims rule"). The purpose of the rule is to deter fraud. This appeal concerns the more recent extension of that rule to "fraudulent devices", i.e. "collateral lies" told by the insured to embellish their claim, but which are irrelevant because the claim is justified whether the statement was true or false. The fraudulent claims rule does not apply to collateral lies.

- The dishonest lie is typically immaterial and irrelevant to the honest claim: the insured gains nothing by telling it, and the insurer loses nothing if it meets a liability that it has always had. If a collateral lie is to preclude the claim, it must be material. The real test of materiality is that a collateral lie told in the course of making a claim must at least go to the recoverability of the claim on the true facts as found by the court. The test is not, as suggested by Mance LJ in *The Aegeon*
- [2003] QB 556 and the Court of Appeal and Lord Mance in this case, an attenuated test of materiality requiring that the prospects of the claim should apparently be improved, given the facts known at the time of the lie.

Annulment of the contract



- Peut-on résilier son assurance emprunteur annuellement ?
- Successivement la Cour d'appel de Bordeaux (23 mars 2015) et celle de Douai (17 septembre 2015 et 21 janvier 2016) avaient validé cette possibilité. Elles justifiaient cette décision en se basant sur le fait que le contrat d'assurance emprunteur est un contrat d'assurance vie mixte (c'est-à-dire à la fois un contrat d'assurance sur la vie et un **contrat d'assurance de dommages**) et que dans ces conditions, les dispositions de l'article L. 113-12 du Code des assurances sur la **résiliation annuelle** devraient s'appliquer.

- La Cour de cassation vient de mettre un frein à cette interprétation. Dans un [arrêt du 9 mars 2016](#), elle a cassé et annulé la décision de la Cour d'appel de Bordeaux en invoquant le principe selon lequel les lois spéciales dérogent aux lois générales. La Haute juridiction considère qu'étant donné qu'il existe un texte spécifique à **l'assurance emprunteur** ([l'article L. 312-9 du Code de la consommation](#)), la loi générale (l'article L. 113-12 du Code des assurances) n'a pas à s'appliquer à ce type de contrat.
- L'assuré-emprunteur ne peut donc pas résilier son assurance emprunteur annuellement. Cependant, il dispose toujours de la faculté de résiliation, dans les 12 mois de la signature du prêt, offerte par l'article L. 312-9 depuis l'entrée en vigueur de [la loi Hamon](#).

Unfair contract terms CJEU
28.6.2016 ECLI:612 C-191/15
(Verein für
Konsumenteninformation)



Corte Suprema di Cassazione Sentenza n. 9140 del 06/05/2016

- Nel contratto di assicurazione della responsabilità civile, la cd. clausola claims made mista o impura – che subordina la copertura assicurativa al verificarsi dell'illecito e/o della richiesta risarcitoria in determinati e preventivati periodi di tempo – non è vessatoria ma può essere dichiarata nulla per difetto di meritevolezza ovvero, nell'applicabilità del d.lgs. n. 206 del 2005, se determini un significativo squilibrio dei diritti e degli obblighi contrattuali ai danni del consumatore. (Società Cattolica di Assicurazione spa – claims made)

Practical and theoretical solutions: 10 essential points (Römer)

- *1 Beginn Ihres Versicherungsschutzes*
- *2 Ende Ihres Versicherungsschutzes*
- *3 Wer ist versichert*
- *4 Was ist versichert*
- *5 Was ist nicht versichert*
- *6 Verhalten nach Eintritt des Rechtsschutzfalls*
- *7 Und bei unterschiedlicher Auffassung über den Erfolg*
- *8 Änderung Ihrer Umstände*
- *9 Freie Wahl des Rechtsanwalts*
- *10 Prämienzahlung*

- Basedow:
- free choice of law for small commercial and consumer risks
- harmonisation of the law of insurance contracts
- implementation of an optional European insurance contract Act.

- (Weber-Rey:) In order to deal with this sensitive and, for the time being, still very abstract topic of European insurance contract law, some key questions are:
- 1 Why special treatment of the insurance sector?
- > Insurance contract law is not independent from general contract law, although some aspects of the laws differ. The fundamental principles of insurance contract law vary in the Member States, although they have common origins and similar structures. Characteristics are: life long contracts; a high protection level for all consumers, e.g. by means of understandability [sic: comprehensibility?] and legibility for all, sometimes compulsory; its nature as a mere legal and intangible product (particularly suitable for cross-border trade).

- 2 Is the insurance sector such a key component to breaking down the barriers in the creation of the Single Market to merit special treatment?
- > The contribution of insurances to the Single Market is undisputed regarding sales volume and employment. Furthermore, the industry is important for society as a whole (increased risks and the development of adequate pension schemes). Despite this, there is a low level of take-up of cross-border insurance by households. In different legal systems, insurance contract provisions are different. Insurance contract law is highly affected by other branches of the law (general contract law, tax law, inheritance law, liability law etc.). A harmonised European insurance law would have to take into consideration all these other branches, differing provisions regarding the formation of contracts, as well as the rules concerning the conceptual framework of a transaction, e.g. agency. But see www.cea.assur.org: regulations for the insurance industry: a tidal wave.
- 3 Is European 'general' or 'insurance contract law' a front-line priority for the insurance sector?

- The EESC proposes a step-by-step solution:
- harmonisation of mandatory rules of general insurance law (creation of an internal insurance market in all branches not covered by specific mandatory legal rules), e.g.:
- -pre-contractual duties, mainly information
- -formation and duration of the contract
- -insurance policy, nature, effects and formal requirements
- -duration of the contract, renewal and termination
- -insurance intermediaries
- -aggravation of risk
- -insurance premium
- -insured events
- -insurance on account of a third party
- sector-specific mandatory rules of, for example, health and life insurance should be covered.

- Weber-Rey provides an overview of the pro's and cons of the proposed solutions:
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- Pro: European contract law is a step forward to a single – internal – market. Differing traditional insurance contract laws are substantial barriers to cross-border transactions (the possibility of offering cross-border policies EU-wide and its risk-pooling offers increased competition but requires easier access; it leads to lower transaction costs for insurers and insurance intermediaries; the freedom of movement would possibly be improved, which would benefit 'Euromobile policy holders').

- Con: harmonisation does not necessarily lead to the completion of the Single Market. The introduction of a new regime of insurance contract law would make litigation in insurance matters less reliable and less predictable (uncertainty, local and foreign courts). An opt-in model ('blue button') is also likely to cause confusion among consumers (and insurers, one would suppose, auth.). The benefits for policyholders are dubious: harmonisation of supervisory law and European passports have not yet lead to a convergence of insurance contracts. The EC-Commission's time-scale is too tight, the topic is much too sensitive with regard to costs and benefits.

Concluding remarks

- The measures taken to ensure the completion of the Single Market in insurance will probably result in changes in the bargaining position of the market parties. However, the effect of these measures should *prima facie* not be overestimated, given the fact that effectiveness and success of disclosure requirements have not been established in full. And, in insurance law, even the well informed consumer needs more protection, either on a national basis, or, more preferably, on a European level.

- Balancing the parties' rights and duties to an insurance contract does not only require clear, intelligible language in offers and policy conditions, but also a harmonised framework of the contents of the insurance contract. For the time being, the existing significant imbalance in the position of the parties to an insurance contract could be detrimental to the consumer and the development of the Single Market in insurance. Member States (both in civil and common law systems) may well be forced to differentiate even further existing national protective measures for consumers, especially for cross-border insurance contracts. From the legal, social-economic or law and economics perspective, this development cannot be desirable for the completion of the Single Market in insurance.

