Position Paper

EICL - Insurance Europe's Response to Discussion Paper IV

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Summary

Insurance Europe welcomes the opportunity to comment in writing on Discussion Paper IV, forming the basis of discussions during the fourth meeting of the expert group on European insurance contract law (EICL) (held on 17-18 July 2013), and the relevant section of the final report that will represent the work-output of the expert group by the end of 2013.

Introduction

Insurance Europe remains committed to the work of the European Commission on EICL and continues to assist the European Commission in its work of the expert group - set up to establish whether contract law obstacles exist that hinder the cross-border provision of insurance and, if so, establish in what areas of insurance such obstacles are most prevalent.

As work has progressed over the last five months, and further tasks have been added (such as the comparison table) it is increasingly difficult to determine the eventual output and scope of the work of the expert group. Added to this, is Insurance Europe's continued concern over the time frames envisaged for completing the work of the expert group, in particular the completion of the key output - a final report summarising the findings of the expert group.

Lastly, Insurance Europe has **yet to receive evidence that differences in contract law represent a major obstacle to cross-border insurance provision**; instead, discussions have been theoretical and lacking concrete evidence of problems related to contract law differences. In discussions with our member associations and in Insurance Europe's responses to the Commission's discussion papers, it is clear that differences in contract law do not feature as an object of complaint by insurers to cross-border provision of insurance. Care should be taken to avoid drawing conclusions that could have a negative, practical effect on insurance provision based merely on theoretical or legal abstract problems or situations. The practical and commercial reality must be considered in the work of the expert group. Several of the listed topics of contract

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law are theoretic/legal abstract problems that are not reflected in the commercial realities and experiences of insurers as is apparent from our responses. Policy must not be developed based on a faulty basis or without a strong evidence base for a need to address obstacles. Otherwise there is a risk of negatively impacting insurance provision within the internal market without a clear cause or purpose to the detriment of consumers and business customers.

At this stage, Insurance Europe remains to be convinced that there is evidence to support the need for further action by the European institutions in this area.

Overarching comments

Organisation

Insurance Europe remains **concerned that the timeframe set aside to conduct this detailed exercise is insufficient and risks jeopardising the outcome of the work** and conclusions made by the expert group. In particular, there is a real risk that the input the European Commission seeks, and the timeframes permitted to collate and develop responses, jeopardise the ability of the European insurance industry, through Insurance Europe, to be as constructive as is desired by the industry.

By way of example, we previously set out the work-patterns to date in our response to Discussion Paper III, dated 11 July 2013. Below we set out the volume of documentation to be dealt with over the summer period:

Document	Date of receipt	Length in pages	Deadline to respond to the Commission/prepare for meeting
Discussion Paper IV - Preparation for meeting - Deadline to respond	4 July	29	 17-18 July 2 September
Request by EC for country specific input on insurance contract law from up to 16 member states	17-18 July	-	End September
Draft section 1 of final report	25 July	20	2 September
Draft section 2 of final report	25 July	13	2 September
Discussion Paper V - Preparation for meeting - Deadline to respond	1 August	23	 9-10 September 24 September
Revised meeting conclusions 1	1 August	11	2 September
Revised meeting conclusions 2	1 August	16	2 September
Revised meeting conclusions 3	1 August	18	2 September
Draft meeting conclusions 4	1 August	10	2 September

The volume of preparatory documentation within tight timeframes and over the European summer-vacation jeopardises the quality of the input to be produced. The table above also illustrates the real practical difficulties associations such as Insurance Europe have in liaising properly and fairly with its own members, in order to enable members to agree on joint positions. The focus of the work should, after all, be on the report due by end 2013 and not on ancillary documentation such as agreeing detailed meeting conclusions.

Scope of work

Insurance Europe remains uncertain of the scope of the work to be conducted by the expert group. For instance, the Commission Decision establishing the expert group refers to considering "insurance contract law" and "contract law" interchangeably. **Clarity is necessary to limit the scope of the work to a realistic sphere in the light of the tight timeframes.** Further, considering contract law more widely is likely to be very complex and potentially pointless as it straddles into an area of national competence.

Insurance Europe has previously noted its view that the objective or mandate of the Commission in tagging on an additional, substantial task to the work of the expert group is unclear - the comparative table of contract laws in member states. Insurance Europe questions the mandate for this, and doubts the objective quality and consistency of such work which ultimately, again, will need to be reviewed and considered. This is a further task not envisaged in the original time-table of the work of the expert group or mandate and adds further pressure within an extremely tight timetable. In particular, several of Insurance Europe's members have discovered very late, and to their detriment, that duplicative work is being produced by them and members of another association, the CCBE, due to a lack of proper organisation and communication.

Lack of evidence

Thirdly, **it remains unclear whether there is any evidence to suggest that a cross-border insurance market, particularly in respect of mass risks, would develop if differences in contract law were overcome**. It also remains uncertain, for lack of evidence, whether there would be sufficient demand to overcome and warrant the inevitable business costs associated with the supply of cross-border insurance products. Therefore, there is as yet little evidence to suggest that consumers, businesses or insurers would benefit substantially from any attempt to address differences in national contract law provisions which may be identified by this expert group as causing obstacles to the supply of cross-border insurance.

The mere fact that there is less insurance provision cross-border under freedom of services provisions (FOS) than, say, freedom of establishment (FOE) does not mean that an additional market should or would be created by removing possible contract law obstacles. Several factors affect insurers' decision to offer insurance cross-border. These include important factors such as 'knowing your customer', understanding the true risk proposed for cover, language, culture (including expectations of the local policyholder), the form and prevalence of frauds, the tax environment and supervisory environment.

Likewise, there is no certainty that consumers would willingly take up cross-border products even if particular contract law obstacles identified by the expert group were removed and insurers were offering cross-border insurance provision on a broad scale. Several factors come into play for consumers considering their preferred service provider, including local presence, knowledge and expertise, reputation, pricing levels, service levels and so on of the insurance provider.

Additionally, **the mere fact that there is a difference in national contract laws does not mean that contract law differences pose a problem and deters insurers from offering their products cross-border** or makes it more difficult for them. Many important factors affect the decision to offer, or refrain from offering, insurance services cross-border (see above). Insurance Europe repeats its members' joint position that differences in contract laws represent only a minor aspect of the totality of obstacles considered and weighed up by insurers when considering whether to offer cross-border insurance within the internal market.

Discussion Paper IV, Section	Insurance Europe response
1.	**Unfairness control of standard terms and conditions of insurance contracts**
	Differences between member states in unfairness controls of standard terms and conditions of insurance contracts may have an impact on the cross-border provision of insurance services, in particular because consequences differ. The differences between member states arise not only as a result of harmonised legislation (the Unfair Contract Terms Directive) being in the form of "minimum harmonisation" permitting member states some flexibility of application locally, but reflect also cultural differences in member states. The example in Discussion Paper IV of a legal possibility for a UK insurer to rely on a breach of promissory warranty seems outdated, as UK FCA regulation states that insurers cannot rely on these breaches for consumer insurance unless there is a causal connection. These rules have been in place since at least 2005. In any event, English and Welsh courts have tended to disapprove of insurers relying on such defences. Local practices and enforcement therefore can differ from the strict letter of the law. The law regarding unfair contract terms control is strongly influenced by national jurisdiction that complicates adaptations to the national regime. In this context, the statement that the German jurisdiction would be more "generous", as far as the use of technical terms is concerned (quoted on pp. 4, 5), cannot be agreed to without any reservation. Apart from the fact that the quoted decisions are neither topical or based on insurance disputes, this claim can be disproved by the topical and very strict jurisdiction of the German Supreme Court concerning the validity of certain clauses in the legal protection insurance (s. BGH, May 8th 2013 – IV ZR 84/12, WM 2013, 1214). Differences in unfairness controls may require adaptations to an insurance product to be offered cross-border. The impact of differences in unfairness controls is likely to be greatest in B2C/mass risks insurance contracts where, for good policy reasons, there has been a focus on ensuring consumer rights are safeguarded. For this reason, unfairness controls feature much less in respect of B2B/large risks insurance contracts. Business customers are also generally assumed to have a better understanding of their insurance needs and legal rights, and are likely to be heavily involved in the policy or at least assisted by an expert broker in the negotiation, conclusion and on-going management of the insurance contract. More or less all insurance categories are affected. It should be added that insurers, ultimately, have a significant interest in maintaining a good relationship with its policyholders in order to safeguard the longevity of the business relationship. This of course will impact insurers' conduct towards its customers along with cultural norms, local consumer expectations and the competition within a particular market (be it a class of insurance or geographical location). However, despite differences in unfairness controls possibly causing difficulties for insurers considering or wishing to offer their insurance services cross-border, Insurance Europe is not currently persuaded that the solution rests in developing a harmonised or common European insurance contract law. This is in large part because unfairness controls are impacted in many member states by other national private/contract laws and the impact of these laws cannot therefore be disregarded in this discussion. Further, and as mentioned above, insurers will be keen to understand not only local unfairness controls but also their application locally, for instance by supervisory authorities or ombudsmen, and the customary interpretation of the unfairness controls. Local regulators are best placed to decide how their consumer protection regimes should be structured and enforced to comply with EU legislation.

2.	**Payment of premiums and consequences of non-payment**
	Although insurance contracts may need to be adapted to reflect differences in rules on the payment of premium and the consequences of non-payment before they can be offered cross-border, the impact on adaptations to standard terms is likely to be small. The impact of these differences on the decision to offer insurance products cross-border is minimal. Other more important factors impact the decision to offer insurance cross-border, including 'knowing your customer', understanding the true risk proposed for cover, language, culture (including expectations of the local policyholder), the form and prevalence of frauds, the tax environment and supervisory environment. The biggest impact, from an insurance provider's perspective, of rules on payment of premiums and consequences of non-payment are on the internal procedures for the administration of the policy. Automated procedures for premium collection and the sending of notices of non-payment will have to be adapted to each market. This leads to added costs for the administration of insurance policies. It should be added that many other factors have an impact on how payment of premium and the consequences on non-payment are dealt with, depending on how the payment is effected, e.g. by credit agreement, direct debit or as an online transaction, as different consumer protection provisions may come into play. As in the context of unfairness controls, this is therefore not merely an insurance contract law issue but again is affected by wider provisions. Lastly, the practical impact of non-payment by a policyholder may, depending on the circumstances, be dealt with by the insurer on a commercial basis rather than a strict application of the law, in order to maintain the relationship with the policyholder.
3.	**Remedies for non-performance**
	Remedies available for the non-performance of obligations differ depending on the type of breach (non-disclosure, misrepresentation or fraud) and between member states as to the remedy available. Although an important aspect of the policy because these differences may cause costs of administration of the policy and uncertainty from an insurance provider's perspective, these differences do not cause major obstacles to insurers' decision to offer cross-border insurance. Other more important factors impact the decision to offer insurance cross-border, including 'knowing your customer', understanding the true risk proposed for cover, language, culture (including expectations of the local policyholder), the form and prevalence of frauds, the tax environment and supervisory environment. The differences may require adaptations to the contract and internal procedures. In most instances the substance of products should not be affected by these rules. For some insurance categories the impact could be more profound. Differences in the limitation periods for invoking a remedy for non-performance are not an issue that creates an obstacle to the cross-border provision of insurance contracts. By way of example, the issue of differences in limitation periods has previously been explored by the European Commission in the context of cross-border road traffic accidents in 2008, 2011 and 2012. In that context, Insurance Europe has emphasised the extremely small scale of the issue. Insurance Europe estimates that less than 1% of all road traffic accidents involve a cross-border element and out of these, only a very small minority is likely to be affected by the possible expiration of the applicable limitation period. This is because potential claimants (i.e. policyholders/injured third parties) are inevitably represented by a lawyer who will be capable of advising on the implications of limitation periods, and because the vast majority of claims are settled out of court. In this context therefore, it would be disproportionate to take any further action on harmonising limitation periods and Insurance Europe recommended that awareness-raising through, for instance, the Commission's E-Justice portal would be more appropriate. It is unlikely that differences in limitation periods for enforcing their contractual rights would

	hinder customers from searching for cross-border insurance products because the likelihood of this becoming an issue is very small. The applicable limitation period is therefore unlikely to be one of the major criteria for customers, when considering and comparing various options available to them for insurance cover. Even within member states, different products and different types of losses have different limitation periods. Consumers are not expected to know what these periods are, and lack of knowledge about this sort of detail does not represent a barrier for their ability or desire to purchase an insurance product, nor does it stop insurers from moving into different markets with different limitation periods.
4.	**Renewal**
	There are presently no obvious benefits to cross-border provision of insurance that would arise from harmonising rules on duration and renewal of insurance contracts at European level. This is because, to a large extent, these rules are influenced not only by national laws but also local customer expectations and understanding of financial products, and market customs developed over many years of practice. In general, these differences should not require adaptations to insurance contracts offered cross-border that cause difficulties to insurers, although particular types of insurance may be affected. In the majority of cases the product characteristic should not be affected by these rules. However, for some insurance categories, the rules on renewal are of specific relevance. Thus, different rules might generate the need to change, amongst other things, the product design. Differences in rules on renewal of insurance contracts do not cause an obstacle to the cross-border provision of insurance contracts; in the context of **mass risks** such differences are overcome by insurers once the decision to enter a market cross-border has been reached based on other more important factors, including 'knowing your customer', understanding the true risk proposed for cover, language, culture (including expectations of the local policyholder), the form and prevalence of frauds, the tax environment and supervisory environment. In the context of **large risks**, renewal of contracts is addressed in cooperation with the broker/policyholder and therefore is not an obstacle to cross-border provision of insurance.
5.	**Termination**
	Although differences in rules on termination of insurance contracts exist, it is not a decisive factor in the consideration of whether to offer insurance services cross-border. It is unclear whether the examples quoted within Discussion Paper IV, section 5, relate to life and/or non-life insurance. In general, these differences should not require adaptations to insurance contracts offered cross-border although particular types of insurance may be affected. It is important that insurers retain the right to vary contract terms for reasonable or justifiable reasons without this resulting in the customer having a right to terminate the contract. For instance, in the case of pension annuities payable by insurers, annuity rates reflect assumptions made about the tax laws. However, should tax laws change in the future; this may have an impact on the annuity rates payable to customers. Contract changes arising in such circumstances, for instance, should not permit customers to terminate their contract. These differences do not create an obstacle to the cross-border provision of insurance services. The insurer's right to terminate the contract after the occurrence of an insured event or after an aggravation of risk is of particular importance in large risks (property, liability).

6.	Claims liquidation
	Differences in rules on claims management do not, in themselves, create an obstacle to cross-border provision of insurance. The legal aspects and the need for adaptations of the contract terms are of minor relevance in this regard. Nevertheless, there might be the need to adapt several contract terms to the rules on claims liquidation and to align the claims management procedure on these provisions. In this respect it is underlined that rigid legal deadlines during which the insurer must complete the processing of claims could be highly problematical. However, the impact on the product (design and pricing) should be low and the product design might be affected only in particular cases such as where national rules prohibit restitution in kind so that an insurer is not allowed to offer products with these specific benefits. As previously stated in this and other Insurance Europe responses to the Commission's discussion papers, insurers will consider a number of factors when deciding whether to offer their insurance services cross-border. The main obstacle to cross-border provision of insurance services is not differences in insurance contract law, but other important factors such as 'knowing your customer', understanding the true risk proposed for cover, language, culture (including expectations of the local policyholder), the form and prevalence of frauds, the tax environment and supervisory environment. Differences in claims management rules do not create an obstacle to cross-border provision as these differences will be overcome by the insurer once a decision has been reached based on these other factors (mentioned in the preceding paragraph). What does create an obstacle to cross-border provision of insurance contracts in the context of claims management are practical - the costs of setting up a sufficient network of third-parties, capable of assisting an insurer in providing its services in a manner and to a standard acceptable to that local market's policyholders and reflecting the insurer's reputation, and business model and objectives. By way of example of these practical obstacles, in the case of property insurance, an insurer will need to build up relationships with a network of builders, plumbers, locksmiths, roofers, electricians, etc. This takes time and investment. Further, this need for a local presence to succeed in operating a successful claims handling process for cross-border contracts was echoed in the 2010 Retail Market Study, prepared for the Commission, where it was found that a lack of local presence for claims handling was treated sceptically by consumers (e.g. refer to para. 3.8, pg. 30 and para. 3.12(d), pg. 33). These are however not insurance contract law obstacles but rather practical obstacles that impact the viability of offering insurance services to a standard reflecting the insurer's reputation, and business model and objectives.