

# ALLEN & OVERY

## *European Insurance Contract Law A practitioner's perspective from London*

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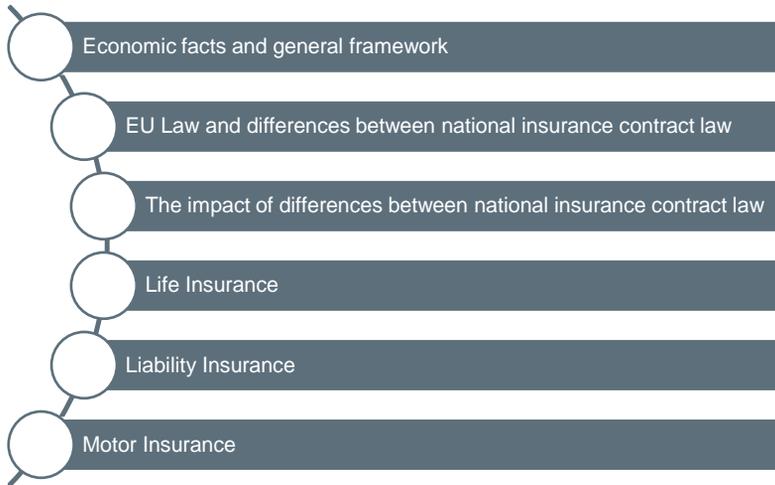
## **The Law Society Working Group – included...**

- Mickael Laurens, The Law Society
- Joanna Kielty / Emilie Balbirnie, The Law Society
- Carolyn Thurston Smith, The Law Society
- Pollyanna Deane, Simmons & Simmons
- Charles Gordon, DLA Piper
- Peter Causton, Berrymans Law Mawer
- Ian Mathers
- Martin Mankabady, Clyde & Co
- Jason Rix, Allen & Overy

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## Structure of sessions



## Is there a problem?

! Is there data which suggests there is a problem?

! Lack of definition of cross border business

## No dispute that ...

There exist differences in insurance contract law between Member States

Particularly in mass risks, local law will often have compulsory rules, often for the protection of the consumer

Differences in the law of Member States add to the complexity of doing business across the EU and have some potential to increase costs

As a result, these may present obstacles to cross-border trade

## Large risks – no dispute

### Extract from Executive Summary

*“With regard to large risks, the cross-border provision of insurance cover is already now a common occurrence; it rarely encounters obstacles arising from differences in insurance contract law since the parties are free to choose the applicable law.”*



#### Practitioners' perspective

the market in commercial risks works well; certainty is paramount and there is little or no appetite for exploring new cross-border approaches via insurance contract law

## Examples of differences which present obstacles

### Definition of an insurance contract and insurable interest

Eg: some products (eg unit linked) could be classified as a financial products in some countries and insurance products in others

### Pre-contractual duty of disclosure

Eg: even where rules may be similar, the time frames and procedures can be different; use of questionnaires varies (as does the permissible questions)

### Pre-contractual information

Eg: draconian consequences in France of non-compliance with pre-contractual info requirements – 8 year period of withdrawal

## Examples of differences which present obstacles 2

### Offer, acceptance and form of the contract

Eg: substantial differences between Member States on when the contract can be formed and level of formality required/availability of different marketing channels such as telephone

### Withdrawal periods/ waiting periods

Eg: differences between Member States as to starting date and length of withdrawal period

## Examples of differences which present obstacles 3

### Unfairness control of standard terms and conditions

- Much of EU approach is derived from Unfair Contract Terms Directive concerning consumer contracts but is subject to differing levels of protection under the minimum harmonisation principle
- Very different approaches to core terms which would fall outside unfairness control
- Findings of unfairness vary
- Adoption of grey lists and black lists influence local approach
- Modes of enforcement vary – eg courts vs ombudsman



## Examples of differences which present obstacles 4

### Remedies for non-performance

(Curiously not perceived as a substantial obstacle since contract already formed)

### Claims settlement

- Eg: some laws require prompt settlement of a claim and impose interest on late payment (Spain imposes 20% interest pa if claim unsettled after 2 years)

### Renewal and termination

- Eg: some Member States grant insured a right to terminate after one year irrespective of contractual length (France and Luxembourg)
- Eg: where a local law would operate such that a new contract would be formed (eg on a modification of the policy) this can cause difficulty on regulatory grounds/cause application of a new governing law



## Challenging issues in the definition of the problem...

- ➔ Defining what is insurance contract law (rather than just contract)
- ➔ Defining what is mandatory (hard mandatory and soft mandatory)
- ➔ Defining the extent of an obstacle and whether there can be an EU wide resolution which addresses the differences and saves costs

➔ Consider the following scenarios...

## Example 1: Transferability of an insurance product

*A German citizen who moved to live in Italy was forced to sign a new insurance contract, after registering her car in Italy. However, the citizen had big difficulties in finding an insurance company that was willing to maintain her bonus points on the same terms. After long discussions, the citizen had to put up with the fact that only one Italian insurance company, the “correspondent” of her German insurer, would offer a contract under comparable terms. However the contract provided that the policyholder would lose her bonus points if she changed her company before a certain deadline.*



## What are the obstacles?



Insurer analysis of the relevant risk?

Availability of no claims bonuses (contractual choice or obstacle?)

Italian market typical terms

## Illustration 1: Transferability of an insurance product

*“An employee who has worked in different EU countries during her or his career may be interested in a pension product which will ensure that the accumulated pension rights in different countries remain valid and are recognised in any EU Member State. This is particularly important for citizens who may retire in another EU country.”*

## Obstacles?

! Regulatory restrictions on pension providers?

! Tax rules?

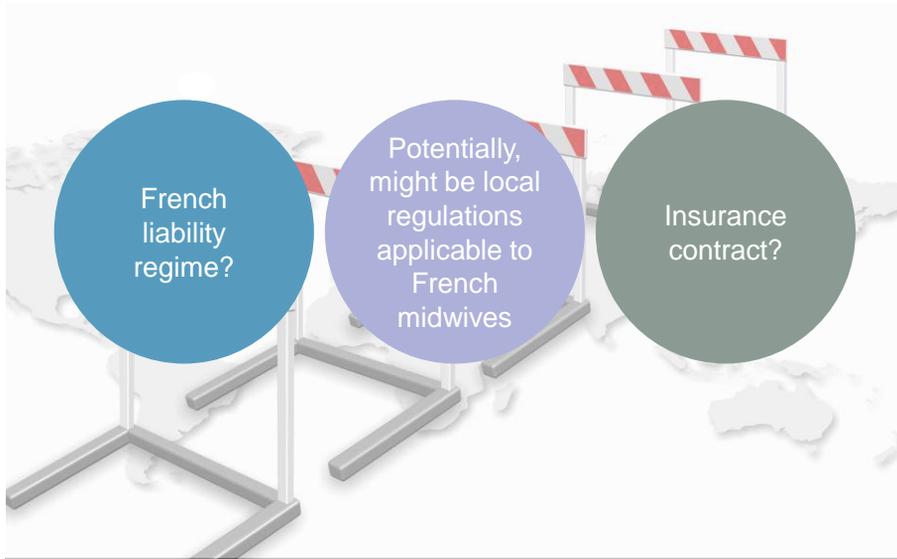
! Contract?

## Illustration 2: Problems relating to mandatory insurance coverage: example of professional liability insurance

*French legislation sets a mandatory requirement for professional liability insurance for midwives. The French case-law results in very high damages. Due to the higher risk for midwives in France, professional liability offered by French insurers is offered at relatively high cost. Belgian premiums are as little as 1/10 of the cost of French premiums. Therefore, insurance cover in France is unaffordable to Belgian midwives. Some are thus dissuaded from providing services in France, while others may operate illegally without the required cover.*



## What are the obstacles?



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## Wider factual, economic and social context

- Prudential regulation
- Differences in tax regime
- Understanding the risk – local knowledge
  - eg: local liability regime, geographical factors, driving habits, life expectancy,
- Regulatory restrictions on nature of cover
- Local cultural differences/policyholder expectations
- Need for local claims handling/language differences
- Market differentiation
- Methods of redress – courts, ombudsman, other?
- Local/national compensation regimes

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## Why not solve the insurance contract law issues?



- Will it increase certainty for insurers and insureds?
- Will it reduce costs and thus boost trade?
- Will it increase choice and access to insurance products across the EU?

## Questions?

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