



# Expert Group on European Insurance Contract Law

## Life insurance and pensions



Utrecht, 20 November 2013

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# Agenda

- Introduction
- Obstacles for cross-border provisions of life insurance company
- Expert Group on European Insurance Contract Law
- Draft report: contract law areas as possible barriers for cross border provision of life insurance
- Possible solution: 29<sup>th</sup> or 2<sup>nd</sup> regime

# Introduction

Erik Schouten

- International Legal and Tax Consultant at Aegon Levensverzekering and Aegon Global Pensions
- Member of Expert Group on a European Insurance Contract Law
  - ▶ Co-rapporteur of the chapter on life insurance
- Chairman of Working Group Europe of Verbond van Verzekeraars
- Member of Life Committee of Insurance Europe
  
- Phd / Doctorate Candidate, International and European Tax Law at VU University Amsterdam
  - ▶ "Solutions to eliminate tax impediments as an obstacle to the internal market for occupational retirement provisions"

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# Grensoverschrijdende activiteiten door verzekeraar

- Overnemen andere verzekeraar
- Vestigen van een dochter
- Oprichten van bijkantoor
- Producten vanuit Nederland aanbieden zonder een vertegenwoordiging



Via Levenrichtlijn

# Obstakels voor grensoverschrijdende dienstverlening

- Toepasselijk recht
- Bepalingen van algemeen belang
- Fiscale regelgeving
- Verzekeringsrecht
- Andere obstakels

# Toepasselijk recht

- Hoofregel: recht van land waar verzekeringnemer zijn gewone verblijfplaats heeft op het moment van aangaan van de overeenkomst
- Uitzondering: woonland staat rechtskeuze toe
  - ▶ Nederland, Groot-Brittannië, België (beperkt) en Italië staan rechtskeuze toe
- Geen rechtskeuze → hoofregel
- Uitzondering: natuurlijk persoon met Nederlandse nationaliteit

## Voorbeelden toepasselijk recht

Nationaliteit	Woonland	Verzekeraar	Recht
Fr	Fr	NI	Fr
It	It	NI	NI / It
NI	NI	Fr	NI / Fr
NI	Fr	NI	NI / Fr



# Bepalingen van algemeen belang

- Bepalingen van algemeen belang gaan altijd voor, ook bij rechtskeuze
- Definitie (art. 9 Rome-I)
  - ▶ Bepalingen van algemeen belang “zijn bepalingen aan de inachtneming waarvan een land zoveel belang hecht voor de handhaving van zijn openbare belangen zoals zijn politieke, sociale of economische organisatie, dat zij moet worden toegepast op elk geval dat onder de werkingssfeer ervan valt, ongeacht welk recht overeenkomstig deze verordening overigens van toepassing is op de overeenkomst.”
- Wat valt er onder?
  - ▶ Kunnen lidstaten zelf bepalen
  - ▶ Ingevuld door rechtspraak van het Europese Hof van Justitie

# Fiscale regelgeving

- Omkeerregel niet in alle lidstaten van toepassing
- Fiscale faciliteiten alleen van toepassing indien voldaan aan voorwaarden wetgeving woonland werknemer
- Uitvoerder moet hieraan voldoen!

# Pensioenen: sociaal-, fiscaal- en arbeidsrecht

## Voorbeeld: voorwaarden Belgische DC-regeling (voorwaarden 2011)

- Jaarlijkse informatie aan de individuele deelnemer
- Voorgeschreven berekeningsmethode van minimaal verworven rechten
- Minimaal rendement: werknemersbijdrage (3,75%) en werkgeversbijdragen (3,25%)
- Pand of afkoop onder bepaalde voorwaarden mogelijk
- Uitkering ineens mogelijk
- Strikte procedure tot waardeoverdracht
- Specifieke voorschriften bij omzetten pensioenkapitaal in een periodieke uitkering
- ....

# Andere obstakels

- Distributie
- Sterftetafels
- Verzekeringsrecht

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# Expert Group on European Insurance Contract Law

- Objective:
  - ▶ Explore whether differences in insurance contract law lead to obstacles in cross-border provisions of insurance products
  - ▶ And if so, identify the insurance areas most likely to be particularly affected
- Deadline: report ready before 2014
- Subjects: general insurance contract law, motor, liability, life insurance (including pensions)

## Expert Group - participants

- European Commission (DG JUST)
- Insurer associations (Germany, France, Italy, Spain, the Netherlands, Insurance Europe)
- Other groups and organizations
  - ▶ Insurance companies
  - ▶ European federation of insurance intermediaries
  - ▶ European Consumer Association (BEUC)
  - ▶ Law Society of England and Wales
  - ▶ Council of Bars and Law Societies in Europe (CCBE)
  - ▶ European Association of craft, small and medium-sized enterprises (UEAPME)
- Legal practitioners and academics

## Expert Group - methodology of work

- Two weeks before each meeting: discussion paper prepared by EC
- Two-day meeting in Brussels
- Meeting conclusions drawn from verbal conclusions agreed at meeting
- Rapporteurs are appointed for each meeting to produce outcomes in writing
  - ▶ Draft report on life insurance prepared by Jürgen Basedow and Erik Schouten
- Every draft will be discussed
- Final report has to be delivered end of this year



# Draft report on life insurance and pensions

- Contract law areas as possible barriers for cross border insurance provisions
  1. Insurable interest
  2. Pre-contractual information
  3. Pre-contractual disclosure duties
  4. Payment of premiums
  5. Payment of insurance money
  6. Right of withdrawal
  7. Termination of the contract and surrender value
  8. Standard contract terms: transparency
  
- Other barriers

# 1. Insurable interest

- UK: life insurance contract is in theory void in the absence of an insurable interest which the person interested in the policy must have in the life of the person at risk
  - ▶ Intended to distinguish insurance from wagering, and to protect the person whose life is insured
  - ▶ Practice: insurers offer life insurance products in accordance with changes in family patterns, outside of what is allowed by law
- Continental jurisdictions: requirement of consent
- Study of UK Law Commission whether insurable interest is still needed
- **Conclusions**
  - ▶ Maybe obstacle in individual case of non-UK insurer concluding a contract in UK
  - ▶ Additional cost for legal advice

## 2. Pre-contractual information

- Minimum harmonization (EU directives)
- MS establish further information duties
  - ▶ By legislation and sometimes by supervisors
  - ▶ Pensions: social and labour law overrule certain provisions in insurance law
- Some investment-linked products: classified as insurance or financial instrument
  - ▶ Can have implications for insurer offering products cross-border, e.g. enquiry into client's knowledge and investment objectives
- **Conclusions**
  - ▶ Many differences relate to marketing of insurance product → higher cost
  - ▶ Legal uncertainty about consequences of incorrect information
  - ▶ Expert group: serious consequences of breach information duties → legal differences are considered as major obstacle to cross-border insurance
  - ▶ Various initiatives (EC and EIOPA) could lead to convergence of requirements

### 3. Pre-contractual disclosure duties

- Disclosure of data relating to age, health and profession → crucial for assessment of risk
- Rules differ considerably
  - ▶ Data protection laws, genetic testing laws or anti-discrimination laws; outside mandate of Expert group
- Contract law: two sides
  - ▶ Applicant has to disclose all relevant information
  - ▶ Applicant has to reply to clear and precise questions
- Legal consequences of breach of disclosure duties
  - ▶ Entire loss of cover, even in case of innocent breach *or*
  - ▶ Causal effect of inaccurate disclosure
- **Conclusion**
  - ▶ Differences in disclosure may impede development of interactive website for online business
  - ▶ No major obstacle for insurers, higher costs
  - ▶ Possible obstacle for policyholder (inaccurate answer may deprive them of cover)

## 4. Payment of premium

- MS have different general provisions aiming to protect policyholders in case of default in payment first or subsequent premium
- Life insurance with surrender value: often special rules
- Requirements to warn policyholder of consequence of non-payment differ per country
  
- **Conclusions**
  - ▶ No obstacle
  - ▶ Raise cost (IT system for invoicing etc.)

## 5. Payment of insurance money

- Time of payment
  - ▶ Delays: sanctions for default differ
- Form of payment
  - ▶ Lump sum or annuity
  - ▶ Social and tax law
- **Conclusions**
  - ▶ Time of payment no obstacle
  - ▶ Form of payment (insurance law) may be obstacle
  - ▶ Insurer offering cover in kind to MS where that is not allowed: business model needs to be adapted. Considerable costs → obstacle (?)

## 6. Right of withdrawal

- Harmonized in SII
- Some national divergence
  - ▶ Cancellation period 14 – 30 days
  - ▶ Starting point and end in case policyholder is not informed (e.g. France: no information; cancellation period 8 years)
- **Conclusions**
  - ▶ No obstacle
  - ▶ Increase of uncertainty, complexity and costs

## 7. Termination of contract and surrender value

- Termination of contract often ruled by social, labour or tax law
- Calculation of surrender value: mainly supervisory law
  - ▶ Contract law: deductions from gross surrender value (costs of contracting including commission paid to intermediary)
  - ▶ E.g. German law: max 20% of these costs may be deducted per annum
- **Conclusions**
  - ▶ No major obstacle
  - ▶ Adjustment of products needed → costs



## 8. Review of standard contract terms: transparency

- Judicial review of unfair contract terms
- German case-law
  - ▶ Contract terms should be transparent
  - ▶ But: standards of transparency are not very clear and emerge only in course of development of case-law
  - ▶ Intransparency may for example result, not only from the wording of a contract clause, but also from its allocation in the whole contractual framework
- **Conclusion**
  - ▶ Compliance is difficult, especially for foreign insurers

## Other impediments – other legislation

- Many links between life insurance and other parts of private law such as family law, succession law or insolvency law
- Legal rules on data protection, genetic tests and anti-discrimination differ from MS to MS
- Many MS: tax benefits for life insurance/pensions
  - ▶ Many details of insurance contract prescribed by national law
  - ▶ These often overrule general provisions in insurance contract law

## Other impediments – pension

- Cross-border movement of policyholder can cause problems
  - ▶ Pensions: accumulation and decumulation phase. Example of Dutch policyholder moving to other MS. Not possible to get a pension annuity and levy of 72% income tax
  - ▶ Third pillar pensions. Policyholder wants to change pension contributions from one scheme to another or transfer pension value, lives in other MS → Barriers
  - ▶ Great significance of divergent tax law and social security law on cross-border life insurance
    - Pension products: recent consultations by EIOPA and the Commission
  
- **Conclusion**
  - ▶ Impact of divergent tax and social law exceed that of divergent contract laws

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## Possible solution: 29<sup>th</sup> or 2<sup>nd</sup> regime

- Discussion Paper on a possible EU-single market for personal pension products
  - ▶ EIOPA/13/241, 16 May 2013
  - ▶ Deadline consultation: 16 August 2013
  - ▶ Interim report: February 2014
- 2<sup>nd</sup> regime
  - ▶ Creates an alternative uniform European system to different national regimes
  - ▶ Does not replace existing national level rules
  - ▶ Regulation
- Private parties (providers and consumers) can choose which of the two bodies of law will govern their legal relations

## Elements of 2<sup>nd</sup> regime

- Accommodation of national tax regimes
- System of individual accounts
- Robust consumer protection framework
- Supervision of prudential aspects by home country supervisor
- Supervision of consumer aspects by host country supervisor
- Transferability of accumulated savings without taxation of transfer value
  
- Product should be highly standardised
  - ▶ Must be obvious when the “same kind of product” is sold by different providers, both within the same country and on a cross-border basis

## Advantages of the 2<sup>nd</sup> regime

- Implementation possible without harmonisation of national tax legislation
- Expands options for businesses and citizens operating in the single market
- Provides a reference point and an incentive for the convergence of national regimes over time
- Enables the development of a single market in parallel with national systems, thus preserving national specificities

# Disadvantages of the 2<sup>nd</sup> regime

- 2nd regime is complex
  - ▶ Implementation burdensome for providers and supervisors
  - ▶ Increase of administrative costs of supervision; two regimes in parallel – a national and a European one
- Another regime alongside existing national regime: adding complexity for individuals and providers
- Development of 2nd regime: takes a long time with no guarantee of ever having the desired effect



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# Thank you for your attention

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