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ON LINE INSURANCE (GENERAL REPORT)

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INTRODUCTION

The use of computers has become nowadays a widespread practice. The Internet is a worldwide system interconnecting computer networks allowing exchange of data. This facility has opened new doors and today an important part of the commercial and financial activities are taking place in the Internet.

Insurance (consisting in the protection of the insured against a risk) is considered a “service” (more precisely a “financial” service) not requiring the physical delivery. Insurance is therefore an “immaterial” service that can be rendered through the Internet.

Not only the conclusion of the insurance contract but also its execution can be achieved on-line.

- The parties can use the Internet for declaring their consent to each other.
- The Internet can be used also for the execution of the respective obligations of payment that the insurance contract imposes on both sides.

In the overwhelming majority of the cases, the obligation assumed by the insurer is the payment of a sum of money. On the other hand the counterpart of the service (the premium) is also a sum of money. The obligations of both the insurer and the policyholder can be executed on the Internet through the use of payment mechanisms.

On-line insurance became during the last decades one of the important issues of insurance law. The use of the Internet for different purposes (for example for advertisement, giving information or making disclosures or declarations, effecting payment etc.) led to the elaboration of new rules. Indeed the existing rules are insufficient to govern the formation of the insurance contract and the contractual relationship (different duties or obligations of both parties).

AIDA chose therefore on-line insurance as one of the main topics of the 2014 World Congress. The answers submitted by 26 AIDA national Chapters give us a clear idea on whether specific issues concerning on-line insurance are regulated in different legislations and if yes whether the solutions adopted are similar or conflicting.

The list of the AIDA national chapters having replied to the questionnaire (by alphabetical order) are as follows: Australia, Belgium, Bolivia, Brazil, Chile, Colombia, Costa Rica, Croatia, Denmark, France, Germany, Greece, Hong Kong, Hungary, Israel, Japan, Mexico, Poland, Republic of Korea, Serbia, Spain, Switzerland, Taiwan, Turkey, United Kingdom, Uruguay.

The on-line questionnaire elaborated by the AIDA Scientific Council contains five questions, namely:

- Whether the on-line insurance is governed by specific rules
- How the insurance contract is concluded on-line

- How the information duties incumbent on the insurer are complied with on-line
- How the policyholder is protected against fraud or concerning the payment of premium
- Whether there are specific rules for insurance intermediaries

The questions above are certainly amongst the most debated issues but the problems raised by the on-line insurance practice are not limited to these. As examples of the important topics not covered by the questionnaire we can give the following:

- On-line dispute resolution
- On-line claim handling
- Cross-border sales of insurance products (in this context, application of rules prohibiting foreign insurance companies to sell products within the territory of a State deserves special attention).

Below, we will quote some interesting passages from the national reports and try to draw conclusions by underlining where the answers concur and where they diverge. We will share also with the readers some personal thoughts.

A special remark: In the European Union countries legal rules are similar to the extent that they are taken from the relevant Directives. However the Directives often set the minimum requirements and the Member States are free to enact stricter laws. Moreover all is not regulated in the Directives and gaps are to be filled by national legislation.

Although the literature about on-line contracts is abundant, there are few works about on-line insurance. For guidance purposes, some of the remarkable works/publications are given below:

Electronic Commerce in Insurance Products (prepared by the **CCIR** – Canadian Council of Insurance Regulators Electronic Commerce Committee), January 2012

Herve JACQUEMIN, Conclusion et prevue du contrat d'assurance dans l'environnement numerique, , Forum de l'assurance, no.100, Janvier 2010, pp 249-255.

Distance marketing of Consumer Financial Services (www.netlawman.co.uk home >articles business> trade and commerce>)

Reinhard STEENNOT Allocating liability in case of fraudulent use of electronic payment instruments and the Belgian mobile payment instrument pingping, Financial Law Institute Working Paper Series Universiteit Gent July 2010

Reinhard STEENNOT Consumer Protection relating to contracts concluded online- The European Point of View, Financial Law Institute Working Paper Series, Universiteit Gent September 2005

Heinrich DÖRNER in **Beckmann/Matusche-Beckmann**, Versicherungsrechts-Handbuch, 2 Aufl. (§ 9. Abshchluss und Abwicklung von Versicherungsvertraegen im Internet), pp.484-507, München 2009

Richard GHUELDRE/ Fabrice NAFTALSKI in **LAMY Assurances 2014** (Directeur scientifique: **Jérôme KULLMANN**), Cinquieme Partie, E- commerce et assurance, pp 2233-2285.

Niko HARTING, Internetrecht, 5. Aufl., Köln 2014, pp 101-158.

Volker HAUG, Internetrecht, 2. Aufl., Stuttgart 2010, pp 320-352.

1. EXISTENCE OF A NATIONAL LEGISLATION OR REGULATION SPECIFICALLY DEALING WITH INTERNET INSURANCE

1.1. Whether the national legislations contain rules specifically dealing with operations and contracts on the Internet

At the outset we must underline that in countries where special rules are in force in respect of on-line transactions every specific issue may not be regulated by those rules. In many instances

- Rules applicable to off-line transactions are equally applicable to on-line transactions (for example the mutual consent of the related parties for the conclusion of a contract is a general principle also prevailing in contracts concluded on-line)
- Rules applicable to on-line contracts are applicable also to insurance contracts concluded on-line.

In other words, where on-line insurance is not specifically regulated, often general rules (relevant for all kinds of contract) or special rules (if any) material for contracts on-line shall apply.

A second important fact to underline is that in many countries the rules about on-line transactions exist only with regards to consumer transactions or have obviously an ample scope when it is question of a consumer transaction. Therefore it would be appropriate to mention that the protection of the consumers was one of the major concerns when on-line contracts are regulated.

1.1.1. Countries where specific rules exist

Australia (Electronic Translation Act –ETA- 1999; Privacy Act 1988)

Belgium (Protection of Privacy Act 1992, Electronic Communication Act 2005, Information Society Act 2003, Electronic Signature and Electronic Notification Act 2000, Electronic Communications Act 2005, Market Practices and Consumer Protection Act 2010, Payment Services Act 2009).

Chile (Norma de Caracter General No.171 dictated by the Superintendencia de Valores y Seguros is about the insurance contracts concluded on-line).

Colombia (La Ley 527 de 1999 – La ley de Comercio Electronico).

Costa Rica (The Electronic Certificates, Documents and Digital Signatures Act 2005).

Croatia (Law on Electronic Commerce, Law on Electronic Signature, Law on Electronic Signature, Consumer Protection Law)

Denmark (E-commerce Act).

France (Law on Information Technologies and Liberties of 1978 as amended in 2004; Law of 3 March 2000 adapting evidence law to information technology; EU Directives (on certain legal aspects of information society services, processing of personal data and protection of privacy, on distance marketing of consumer financial services); Law on Trust in the digital economy; Ordinance no.2011-1012 on electronic communications; French Insurance Code (especially art.L.112-2-1)).

Germany (The German Civil Code BGB Articles 312b-312d deal with distant contracts – However these rules are not applicable to insurance contract in respect of which special legislation exists).

Greece (Presidential Decree of 2003 harmonizing Greek legislation with EU Directive on electronic commerce and regulating the so called “information society services” ; Law on Consumer Protection as amended 2013; Ministerial Decision of 2005 aimed at harmonizing Greek legislation with EU Directive on Distance Marketing of Consumer Financial Services; Presidential Decree of 2001 for harmonizing Greek Law with EU Directive on Electronic Signatures; Greek Code of Civil Procedure Art. 444 with regards to the electronic documents).

Hong Kong (Electronic Transaction Ordinance)

Hungary (Distance Marketing Act of 2005, applicable only to consumer contracts).

Israel (Consumer Protection Law)

Japan (Electronic Contracts Act of 2001).

Poland (Act on Protection of Certain Rights of Consumers; Polish Civil Code; Act on Electronic Services).

Republic of Korea (Electronic Document and Electronic Transaction Basic Act; Electronic Financial Transactions Act)

Serbia (Law on Electronic Commerce 2009; Law on Electronic Document 2009; Law on Electronic Signature 2004; Law on Consumer Protection 2010).

Spain (Act on the Services of the Information Society and Electronic Commerce 2002; Act on Electronic Signature 2003; Act on Distance Marketing of Financial Products destined for Consumers 2007).

Switzerland (Federal Act Against Unfair Competition; Swiss Code of Obligations).

Turkey (Consumer Protection Act 2014).

United Kingdom (Civil Evidence Act 1995; Data Protection Act 1998; Electronic Communication Act 2000; Electronic Signature Regulations 2002/318; Electronic Commerce Directive (Financial Services and Markets) Regulations 2002/1775; Electronic Commerce (EC Directive) Regulations 2002/2013; Financial Services (Distance Marketing) Regulations 2004/2095; case law; ICOBS section of the FCA Handbook).

Uruguay (article 227 of the Law no.18.834 on the delivery of the goods bought on Internet).

1.1.2. Countries where specific rules don't exist

Bolivia

1.2. Whether the rules dealing with operations and contracts on the Internet are applicable to all contracts (including insurance contracts) or to all financial services contracts, or solely to insurance contracts

1.2.1. Countries where the rules apply to all contracts including insurance contracts

Hong Kong

1.2.2. Countries where the rules apply to all financial services contracts

In Hong Kong CIS Internet Guidance Note (for persons advertising or offering Collective Investment Schemes on the Internet) seems to apply to insurance as well.

European Union countries

Turkey (part of the rules on distant contracts apply to all contracts and part of the rules apply only to financial services contract).

1.2.3. Countries where rules apply solely to insurance contracts

In Belgium some of the articles of the Land Insurance Contract Act 1992 on some aspects of the distant conclusion of insurance contracts are applicable only to insurance contract.

In Australia ICA (Insurance Contract Act) is amended to deal with some aspects of the on-line insurance.

In Germany VVG (German Insurance Contract Act) Article 7 et seq. in conjunction with VVG InfoVO (Regulation on Information Duties under the VVG) regulates the insurer's

information duties and the policyholder's right of withdrawal solely in the context of insurance.

In Hong Kong the Guidance Note on the use of Internet for Insurance Activities seems to apply only to insurance.

In Japan, Comprehensive Guidelines for Supervision of Insurance Companies contain rules applicable to the supervision of the sales of insurance products .

In Mexico, Ley General de Instituciones y Sociedades Mutualistas de Seguros (General Insurance and Mutual Companies Law) and Circular Unica de Seguros (Insurance Regulation) deals with conditions to be fulfilled in order to offer insurance products on-line.

In the United Kingdom ICOBS section of the FCA Handbook contains rules that apply to the on-line conclusion of insurance contracts.

1.2.4. Self regulation and Soft Law

Belgium (Codes of Conduct elaborated by Assuralia – Belgium professional organization of insurance companies-: “Codes of Conduct for the distance selling of financial services”)

CONCLUSIONS IN RESPECT OF “EXISTENCE OF A NATIONAL LEGISLATION OR REGULATION SPECIFICALLY DEALING WITH INTERNET INSURANCE”

- a) In many countries rules applicable to on-line insurance are not codified and spread in different texts and the legislation doesn't look like homogenous: Some rules apply to all contracts; some only to financial services contracts; some only to consumer contracts and some exclusively to insurance contracts.*
- b) In most countries they don't regulate exclusively the insurance contract but have rather a general character.*
- c) In some countries rules applicable to (other) financial services apply also to on-line insurance. This is especially the case for EU countries.*
- d) In many countries there are special rules for consumers.*

2. THE CONCLUSION OF INSURANCE CONTRACTS ON INTERNET

2.1. In General

Insurers use the Internet for different purposes. For example they accomplish their information duties (before or after the conclusion of the insurance contract), deliver the insurance policy or other documents, summon the policyholder or the insured through e-mail messages or collect the premium or effect payment on-line. On the other hand, Internet constitutes an appropriate environment for concluding contracts. Sometimes all of the steps of an insurance contract are achieved on-line and sometimes only a part of the steps leading

to the conclusion are accomplished on the Internet (the remaining steps being completed off-line).

Although the use of Internet increases with high speed from year to year, in some few countries insurance contracts (still) cannot be concluded on the Internet (Bolivia where Internet, at least to the extent that insurance is concerned, can be used only for marketing purposes; Costa Rica where the autograph signature is necessary. In Costa Rica however, some operations related to insurance can be conducted through the Internet: Claim processing and payment of premium; Uruguay where the signed policy is a condition of validity of the insurance contract. But it would not be a wrong guess that reformations will take place soon in those countries).

In other countries (constituting the vast majority) there is such a possibility. For example the Australian report states that Australia remains an insurance market with high levels of Internet participation: “A Roy Morgan research poll in 2013 indicated 49.6% of insured respondents viewed the Internet as the most useful medium in decision making based on price and product comparison. Another survey by TAL Group indicated that a third of Australians have researched home and vehicle insurance on-line and switched providers as a result. A poll of 1200 people commissioned by TAL found that 70% used the Internet to investigate cover and 43% visited comparator sites ultimately using the Internet to place cover..... In the US statistics suggest that over 80% of customers begin their insurance selection via the Internet and ultimately end up buying on-line”.

At this stage we must define the notion of “on-line insurance”. Unfortunately most of the national reports are silent on this issue.

In many cases electronic means (such as e-mails, SMS or MMS, e-conference) or other distant communication means (such as telephone) or electronic devices (such as USB or CD or other durable medium) are used in order to make the declarations of consent necessary for the conclusion of the contract. (In France, the Courts ruled out that the concurrence of the consents might take place on-line through a website or through the exchange of e-mails).

In cases where the Internet is not used at all (for instance the insurer makes an offer sending by post or by courier a CD containing the necessary information and declarations and the policyholder responds affirmatively by phone) it does not seem appropriate to speak of “on-line insurance”.

In instances where the Internet (for example an e-mail message) or other electronic communication systems (such as SMS) is used to send the electronic statement of consent, the question arises to know whether an on-line insurance exists and if yes what the rules applicable would be.

- It is beyond doubt that when all the steps are taken on the Internet, the transaction will qualify as an on-line transaction (no matter if some of the statements made by the policyholder are accomplished by different means: For example information is furnished to the insurer on the website by filling in the blanks; the acceptance is sent by an e-mail message). In this case the transaction will be subject to the specific rules about Internet transactions, if any.

- It is less clear when some of the steps are not taken on the Internet: For example the policyholder, after some steps accomplished on the internet (information given to the insurer, premium calculation and offer by the insurer) sends his acceptance by letter or by phone or declares it in a face-to face talk with the representative of the insurer. The Belgian report underlines particularly the possibility that the conclusion of the insurance contract doesn't occur totally on the Internet (for example the traditional "paper medium" is used from a certain stage): For sophisticated (tailor-made) products (where the disclosure of special data regarding the risk and special investigations take place) it is not appropriate to expect a fully automated contract.
 - In case only some of the steps leading to the conclusion of the contract occur on the Internet, the rules applicable to Internet (if any) will apply solely to those steps
 - The steps outside the Internet will not be governed by rules applicable to the Internet

Some countries differentiate between contracts concluded through the website and through (other) electronic means.

- In some countries the special rules about distant contracts apply only where the contract parties are physically absent until the completion of the contract and if a system specifically designed for conclusion of contracts on-line is in place (for example European Union countries, Turkey). Therefore if the contract is concluded off-line or without the use of the system designed for the purpose of contract conclusion it will not be subjected to the rules about distant financial services (*Directive 2002/65/EC concerning the distance marketing of financial services Recital 15: Distance contracts are those the offer, negotiation and conclusion of which are carried out at a distance; Recital 18: By covering a service-provision scheme organised by the financial service provider, this Directive aims to exclude from its scope services provided on a strictly occasional basis and outside a commercial structure dedicated to the conclusion of distance contracts; Article 2(a) "distance contract means any contract concluded under an organised distance sales or service provision scheme run by the supplier (service provider).*)
- In some countries some rules apply only to click-wrap or browse-wrap contracts (Croatia, Hong Kong).

In practice there are three types of websites: Informative (including advertisement purpose), interactive (simulations and quotations) and transactional (conclusion of contracts).

Insurance contract concluded on-line in the narrow sense is a contract fully automated (without human intervention). This is suitable for standardised products (Belgium). Thus, when the insurer provides only for quotation (tariff simulation) and concludes the contract off-line, this cannot be regarded as an on-line insurance contract.

2.2. Use of the Internet as a communication means by the insurer

Internet is one of the communication means available in the relationship insurer-policyholder (or insurer – insured or insurer- beneficiary).

The insurers use the Internet for accomplishing their information duties (pre or post contractual) or whenever they need to notify the prospective policyholder, the insured, the beneficiary or other persons related to insurance contracts (mortgagees, pledgees or third party victims).

The first issue in that regard is to know under which conditions the use of this communication means by the insurer is allowed. The possibility to lawfully use the Internet for communicating is the prelude (condition precedent) of the on-line transactions.

- In Australia, the insurer can send information electronically if the addressee has consented to be so informed.
- In the European Union, the solutions proposed are in the same direction. For example the draft insurance mediation directive (IMD 2) provides in its article 20 the possibility to provide information to the customer via the Internet
 - by means of a durable medium meaning inter alia “the hard drive of the customer’s computer on which the electronic mail is stored” (thus sending e-mails)
 - by the means of a website
- However in the draft IMD 2 the use of a durable medium or the website is possible only if certain conditions are met.
- For the use of a durable medium it is required that
 - it must be appropriate in the context of the business with the customer,
 - the customer must have been given the choice between information on paper and in the durable medium, and have chosen that other medium.
- The use of the website would be allowed only if
 - It is addressed personally to the customer
 - The provision of the information by means of a website is appropriate in the context of the business,
 - The prospective policyholder has consented to the provision of the information by means of a website;
 - The prospective policyholder has been notified electronically of the address of the website and the place on the website where the information can be accessed and
 - It is ensured that the information remains accessible on the website for such period of time as the customer reasonably need to consult it.
- The provision of information using a durable medium other than paper or by means of a website can be regarded as appropriate in the context of the business with the customer, if there is evidence that the customer has regular access to the Internet.

The provision by the customer of an e-mail address for the purposes of that business shall be regarded as such evidence.

A consumer may indeed use the Internet (even in a considerable extent) but this fact alone should not be considered enough for the time being to justify electronic summons or information addressed to him. He must rather express his willingness to that end. But the solution may be different for businesses and legal persons. (*For instance in Turkey a recent law provides that all summons and notifications to businesses must be made electronically – but in practice the infrastructure not being completed yet, the application is delayed*).

In the European Union, Directive 2002/65/EC concerning the distance marketing of the consumer financial services had already regulated the issue partly in the same sense: According to Article 5(1), contractual terms and pre-contractual information must be communicated to the consumer on paper or durable medium (including also websites if they fulfil the criteria contained in the definition of durable medium –Recital 20). However the consumer is entitled at any time during the contractual relationship to request that contract terms and information be given on paper (Article 5(3)).

(The information duty imposed on the insurer will be examined below under “3. Special information or warnings to be given to the prospective policyholder when concluding on-line”).

2.3. Characterisation of successive steps (offer, acceptance)

2.3.1. In general

In many countries, the basic traditional requirement for the conclusion of the insurance contract off-line is valid also for concluding an insurance contract on-line (for example Spain): Mutual consent of the parties on the essentialia negotii -the essential points of the insurance contract that draw the line of demarcation with other contracts- is necessary.

To this end, an offer (or an invitation to treat (if any) followed by the offer) and an acceptance of that offer as it stands must occur.

What makes the difference between on-line and off-line transactions is rather the manner of expressing and addressing the invitation to treat, offer and acceptance.

Between persons physically present the insurance contract can be concluded in a simple manner and within a relatively short portion of time by verbal agreement (if no form requirement exists). For distant persons the situation is more complicated: There is an additional problem of sending and receiving the necessary declarations. This may require time and the observance of the written form. Imagine that the insurer sends a letter to make an offer and the policyholder consents to it by letter. Here other additional problems arise. For example: How long will the offeror (insurer) be bound by his offer? Under what circumstances is the insurer (or the policyholder) allowed to assume that his declaration has reached the addressee? All those additional problems justify the existence of different rules about contracts concluded between physically absent persons.

On the other hand, technical progress led to specific rules. For example, after the invention of the telephone, contracts begun to be concluded on the phone and the question to know whether those contracts should be considered between present (or absent) persons was raised. Then the law intervened to bring a specific solution: Contracts concluded on the phone were assimilated to contracts entered into by persons physically present.

After the commencement of the Internet era, other means of direct communication where an immediate answer can be expected such as videoconferences, chats on the Internet or Internet phones, appeared. The rule is that an offer made through those other technical means from person to person must be accepted immediately as in the case of physically present contracting parties.

A further step was the establishment of websites with mechanisms allowing direct sale of goods or services. Today, many products (material or immaterial goods, travels, other services including the insurance) can be purchased on the Internet via fully automated systems.

In case of online offer there is no such kind of “person to person” contact. Thus it will be appropriate to apply the rule about “contract conclusion between absents” when the insurance contract is concluded on-line through a fully automated system. The same is valid also in respect of insurance contracts entered into via e-mails exchange.

One of the main concerns of the legal systems is the transactional security. Doubts were expressed as to the security level of the Internet sales. The involvement of other players such as Internet service providers increased the fears. Now, contracts with (secured) electronic signatures and payment via secured mechanisms permit the continuation of the e-commerce.

2.3.2. Manner of conclusion of the insurance contract on-line

Generally, the on-line insurance steps can be summarized as follows: *(It must be emphasized here that the manner of the conclusion of the insurance contracts varies depending on the type of the contract and the web-site of the insurer- Croatia, Mexico, Belgium).*

Step “1”

The insurer puts in the website the mechanism to gather the necessary information from the prospective policyholder (identity, type of the insurance, subject matter of insurance, details relevant for premium calculation).

Step “2”

When the information needed is given, the insurer calculates the premium and is then able to make an offer or invitation to make an offer.

If the insurer’s offer is accepted by the policyholder or if the prospective policyholder’s offer is accepted by the insurer the contract is concluded.

The Swiss report highlights the step “2”. According to this report two variants are conceivable:

Variant “1”

After calculation of premium the insurer notifies real time the policyholder about the premium and makes a binding offer. The insurance contract is made upon acceptance by the policyholder either by e-mail or through a confirmation button.

Variant “2”

The insurer notifies the policyholder about the calculated premium and provides the forms that the policyholder needs to fill and sign and return to the insurer. In this situation the insurer only makes an invitation to treat. The offer comes from the policyholder and the insurer accepts it usually by letter.

In Greece, the steps include the application for insurance and acceptance of the application.

In Mexico, the steps include also the payment of the premium (in accordance with the payment mechanism established by the insurer). In Korea the solution is the same: the policyholder is required to pay the full or partial premium.

2.3.2.1. Electronic declarations of will

2.3.2.1.1. Constitutive elements

The declarations of will occurring on the Internet are called “digital” or “electronic” declarations of will.

The objective element of a declaration of will is the expression of the intent to establish, alter or terminate a legal act by a person. A declaration of will can be

- transmitted on-line (for example by an e-mail), or
- generated on-line (as in the fully automated contracts).

In case of a declaration of consent generated on-line the problem arises to know whether this is a genuine “will” (as discussed also in the English report, see 2.3.2. below). This question is answered positively taking into account the fact that there is always a real person who is the producer of the will.

The subjective elements of a declaration of will are the intent of acting, consciousness of making a declaration and intent of achieving the concrete legal act. When the subjective elements are lacking, often it is a case of “failure of intent”.

2.3.2.1.2. Effectiveness of a declaration of will

To be effective a statement must be first of all “issued” i.e. the person who makes the statement must have expressed his will to accomplish a legal act.

Second requirement is the “reception” by the addressee. But this requirement exists only for transactions between persons not physically present. At this point let’s remind that “chatting persons” are deemed as physically present (similarly as in the case of persons speaking on the phone) but not persons corresponding through e-mails.

The issuance and reception requirements create special problems that we will examine further in more details.

2.3.2. Insurer's (or intermediary's) website constitutes an "offer" or "invitatio ad offerendum" (invitation to treat)?

It is generally accepted that the website of the insurer where the purchase of insurance products is available constitutes an invitation to treat and not a contract offer (Germany, France, Japan). The insurers generate a true offer later when they are in possession of the necessary data about the concrete insurance to be given by the prospective policyholder.

In Japan, for some types of insurance the consent of the insurer is not required (under certain conditions): For example if the consumer makes an offer for an overseas travellers' personal accident insurance.

However in some countries the website of the insurer (offering insurance contracts subject to attached terms and conditions) constitutes an offer (Denmark, Israel).

In the United Kingdom, unless the information on the insurer's website clearly indicates the insurer's intention to be bound upon the acceptance of the policyholder, the advertisement of the insurance product on the website will be considered only an invitation to treat. However, the situation is different in case of automated B2B transactions. The general view seems to be that the automation does not prevent a binding contract. In the Queen (on application of Software Solutions Partners Ltd) v. Her Majesty's Commissioners for Customs and Excise ([2007] EWHC 971 Admin) the court took the view that "the insurers undertook that they would be bound by the automatically generated result even if they were temporarily unaware of that result".

Hong Kong's approach is also in the same direction: In the click-wrap agreements where the process is automated, the advertisement of an insurance product may constitute an offer (the clicking on the "I agree" button will then constitute the acceptance of the offer on the terms posted on the website). But where human involvement is required (such as the assessment of the risk) the advertisement amounting to an offer is said to be unlikely. In Hong Kong, the placement of ILAS (Insurance linked Assurance Schemes which are considered as investment products) on a website without the provision of transaction capability is generally not regarded as offering; the same is valid when an address box is provided where the investor may ask for an application form to be sent by post).

[Civil law experts think that on line sellers or service providers should not be deemed to have made an offer but rather to have solicited an offer from the customer. This widespread point of view is based on the fact that the on line sellers or service providers normally are not in a position to satisfy all the demands (due for instance to the lack of sufficient stocks). For that reason they intent not to be bound by an offer on the Internet and keep reserved the right to refuse any eventual offer by the customer. This argument is not convincing at least for insurance contracts where the insurer normally would welcome a large number of demands, this is particularly true for mass risks.

Yet it seems difficult to conceive that the web page of the insurer would always constitute an "offer" at least in countries where the contract offer must comprise all the essential elements of the contract in question. In these countries (for example Turkey) the simple affirmative answer such as "yes" or "ok" is sufficient for concluding the contract. However

in many cases the web site of the insurer would not contain enough data for an immediate contract formation. In those cases, it should not be regarded as an offer but may be considered as a promise to accept the offer under certain circumstances.

Another important issue concerns the compulsory insurances. In that respect we must first ascertain whether an insurer active in the insurance class of the relevant compulsory insurance is required to include this compulsory insurance in the products available on his web site. The second question consists to know whether the compulsory insurance available on the web site of the insurer constitutes an offer. We think both answers are negative. The insurer remains free to determine the insurance products he will sell on-line. However if he chooses to sell also compulsory insurances on-line, the sole fact that he is obliged to accept the offers made by prospective policyholders is not sufficient to accept that he offered already on-line.

On the other hand, debate exists to know whether the confirmation that the customer's order is received must be regarded under circumstances as an acceptance. The outcome will be dependent on the formulation of the confirmation message. The point of view that a confirmation message would be regarded at the same time as an acceptance if it does not contain the reservation that the seller or service provider may reject the offer seems favouring the customer].

2.3.4. Inclusion of disclaimer

The United Kingdom's report indicates that in principle, the insurers don't need to state clearly that their websites don't constitute an offer.

However in the European Union, the Directive 2000/31/EC on electronic commerce requires in its Article 10.1(a) that the insurers give information on the technical steps to follow to conclude the contract. Based on this, one may argue that the insurers must explain whether their websites constitute an offer or whether they intend to make an invitation only.

At least for the sake of clarity a disclaimer may be useful (In Hong Kong, disclaimers are used sometimes in order to avoid contracts with persons situated in a jurisdiction prohibiting the offering of insurance products to them by foreign insurers).

2.3.5. Failure of intent

As underlined above, the mutual consent of the parties is necessary for the conclusion of the insurance contract on-line. To this end the declaration of consent (of both parties) must be addressed to the other and received by the other. In this context many problems may arise. The first category of problems relate to the safe sending and reception of the electronic messages (relevant for insurance contracts where human interventions are in place). The errors constitute the second category. Some of the errors concern the fully automated insurance contracts (click on the wrong button while taking out a standard insurance on-line). Some others are frequent mostly in partly automated insurance contracts or in contracts not automated at all (declaration not fully transmitted as a result of transmission error).

2.3.5.1. Under what conditions on-line declaration of consent shall be deemed as (sent by the issuer and) received by the recipient?

2.3.5.1.1. In general

Sometimes technical failures occur on the Internet. They may for example give rise to the following consequences:

- The mutual consent is not established in reality but one of the parties mistakenly believes that the contract is duly entered into (*for example the e-mail containing the acceptance of the prospective policyholder is lost in the Internet; the insurers think the contract was not concluded but the customer believes that he is covered*)
- The mutual consent seems established but the content of the contract is perceived differently by the relevant parties (*for example some clauses of the contract did not reach the prospective policyholder due to an electronic failure and the insurers believe that those clauses are part of the contract whereas the customer pretends they are not*).

In normal circumstances, the receipt of the declaration by the addressee's network will be decisive.

- The German report underlines different eventualities: "If the electronic declaration of consent is lost before it has been saved on the target computer, it will not become binding. However if the recipient intentionally prevents the declaration to be saved, the declaration is valid although it failed to reach the recipient's sphere. If the declaration is lost or deleted after it has been saved on the target computer it is valid as the recipient then bears the risk of errors concerning his technical equipment and his provider".
- In Hong Kong, the contract will be concluded upon receipt of the electronic transmission conveying the acceptance by the insurance vendor's computer system.
- In the Republic of Korea, the offer must be processed and recorded in the host computer of the insurer.
- In Serbia, statements made electronically are considered received when the addressee can access them.
- In the United Kingdom, by analogy with telegrams, it is argued that an acceptance communicated via e-mail will be effective once it reaches the network of the recipient's ISP (the recipients mail server). In the UK declarations are deemed to be received when the parties to whom they are addressed are able to access them.
- The Colombian law provides a clear solution (Article 24 of the Law no.527 of 1999):
 - If the addressee has designated an information system for the reception of messages containing data, the reception shall be deemed to occur at the moment when the message has entered the information system so designated

- In case the message has been sent to a system other than the system designated by the addressee, at the moment when the message has been accessed to.
- If the addressee has not designated an information system, at the moment when the message has entered into the addressee's information system

From the above we can reach the conclusion that the sender of the declaration bears the risk until the declaration reaches the system of the recipient. If the message is lost before this moment, the declaration will not be considered as validly made.

The declaration of consent must arrive within the "power sphere" of the addressee in such manner that the addressee can learn its content in "normal circumstances". The moment of actual knowledge of the content is not relevant.

The arrival of the declaration of consent within the power sphere of the addressee occurs for example when it is stored in the mail server or data processing equipment and is available to the addressee. The expression "power sphere" may lead to confusion (since the e-mail message can be considered as already within the power sphere of the recipient even if his computer is on another continent). What is decisive is simply whether and if yes when the sender of the declaration can regard his declaration as received and its content as learnt.

Will the knowledge from an alien homepage be regarded as enough? This seems open to discussion.

E-mails sent to an incorrect address (for instance instead of a@xonline.au the message is dispatched to a@yonline.au) cannot reach destination and therefore are not accessible by the recipient. However the case of mails deleted by a mail filter aimed at filtering the virus containing mails or spam mails seems debatable. If the deletion by the recipient's system occurs for protective purposes against viruses the deleted message should not be regarded as arrived. But one can hesitate when the message is deleted for being identified as spam mail by the mail filter program.

In respect of the "knowledge under normal circumstances" requirement, it seems appropriate to make a difference between legal entities and private policyholders.

- The insurer and the customer who is a legal entity (or a real person trader) can be expected to have knowledge of a declaration of consent the same day of arrival in their power sphere within the office hours (or the next work day early hours). *According to another view the moment of storage would be decisive.*
- In respect of the "private policyholder" the following solutions can be adopted: When a real person policyholder not acting for the purposes of his trade or profession makes it clear to the insurer that he uses the Internet for communication purposes in legal matters (it is so for example if he answered on the Internet the questions asked to him by the insurer) he can be expected to have a look at his mail box regularly (once daily) and the insurer's communication can be regarded as effective the same date as its arrival and storage. However a policyholder who does not use the Internet as a communication means in legal matters will not be supposed to control his mailbox regularly and the actual knowledge would then be required for valid receipt. *If the consumer has at the same time a mobile phone on which he*

receives mail messages or if he has been warned at the same time by an SMS that a mail was sent to him, he can be expected to learn the content of the e-mail sent quicker.

The withdrawal of the declaration is possible. Normally it is effective when the addressee learns the withdrawal declaration before or at the same time. If both declarations are stored before the addressee is aware of their content, withdrawal can be deemed effective.

The insurer is obliged to confirm the receipt of the electronic statement of consent. But this is not a necessary element of the good receipt or the contract conclusion. The obligation to confirm can be lifted by agreement in b2b transactions.

If the customer is offeror (the insurer having only made an invitation to offer) the insurer has to confirm the receipt of the offer. The insurer can rectify a lack of confirmation by a late reaction (by asking a new question, acceptance or refusal of the offer). Where the customer could have deduced from the lack of confirmation that his offer was rejected, the insurer can be liable for the resulting losses (*An interesting example given by Dörner (at p. 492) is as follows: The (first) insurer is late in confirming the receipt of the offer and the customer, believing that his offer is refused, gets cover from another (the second) insurer. At the same time the first insurer's acceptance reaches the customer. There is double insurance and the first insurer can be held liable for losses caused by the contract with the second insurer: The customer will be entitled to claim that he be freed from the first or second contract).*

2.3.5.1.2. Transmission errors

The risk relating to communication failures (delay in reaching the addressee or the loss of the declaration in the Internet) is shared as follows:

- The sender of the declaration bears the risk until its arrival in the power sphere of the addressee.
- In case the declaration is lost in the Internet or hindered by the intervention of third parties, it does not arrive and will be ineffective. But if the addressee intentionally hindered the arrival of a declaration in his power sphere, the declaration will be deemed as “arrived” (however we think that the installation of a mail filter program that deletes the virus containing mails should be excepted).
- Whether the mere “storage possibility” (for example the declaration reaches the destination but is not stored due to technical failures) can be regarded as sufficient seems debatable. The European Union Directive 2000/31/EC on electronic commerce provides in its article 11.1 that a declaration is received when the addressee is able to access it. The prevailing approach seems to be that the accessibility requirement of the Directive is achieved only when the storage is completed.
- In case the electronic declaration is stored at destination but destroyed before the addressee is expected to have knowledge of its content (for example due to a defective computer), the declaration shall be deemed as received. Here the risk is borne by the addressee. The same is valid when the technical failure is due to the service provider of the addressee. In that case the addressee's service provider will be seen as a “receiving agent”.

- It is obvious that the declaration is “received” (a fortiori) when it is stored in the power sphere of the addressee but not read by him as a result of crashes, viruses or careless destruction by the addressee himself or a third person.
- If the recipient has temporarily shut down his mail account or put it out of service or stopped accessing to his e-mails, he must notify this happenings to persons from whom he expects declarations of will otherwise he will not be allowed to invoke the late awareness.
- If the mailbox is full and the recipient is consequently hindered to receive messages, in most cases the sender is notified thereof electronically. Upon this notification the sender is not anymore able to invoke that in good faith he presumed the good and timely arrival of his declaration to destination. On the other hand, if the sender sends later in a second tentative successfully his message, the recipient would not be allowed to allege that the sender is late in sending the declaration since he must bear the risk of his mailbox (low or reduced) capacity. The sender notified of the mailbox fullness may also wait until reception instead of trying to resend his statement.
- On the Internet there is no “closing time”. If an insurer has established a system for selling insurance products requiring the customer to send his offer or acceptance by e-mail, the prospective policyholder may consider that the insurer took knowledge of his statement of consent immediately.

It transpires from the above that it is not relevant whether the recipient has effective knowledge of the declaration. If the recipient does not open his mailbox, he would nevertheless be deemed to have been aware of the messages sent to him.

But as to the moment of effectiveness let’s remind that a fine tuning must be envisaged: As stated above, a consumer who is not supposed to use the Internet for communication purposes for legal matters cannot be expected to check regularly (daily) his mailbox (he may be travelling or have other priorities).

Colombian law contains a special solution with regards to the conformity of the message sent to the message received: In the relation sender-receiver, the receiver is entitled to consider that the message received corresponds to the message intended by the sender. However the receiver is not allowed to avail himself of this belief in case of awareness or lack of due care to detect the error of transmission or if he failed to make use of an appropriate method in order to detect such an error.

2.3.5.1.3. Incompatibility errors

In respect of “compatibility risks” and “update risks” (where the declaration reaches the addressee who is not able to have access to it or has access but the text is corrupt due to the fact that the addressee’s technical equipment is not compatible with that of the sender or the software version used is different) there are three approaches

- Not legible or not easily convertible declarations are to be regarded as “not received”
- The Addressee must bear the risk of incompatibility or not being updated
- For business it can be expected that they use the average standard; but for consumers this is not the case

The last point of view seems more satisfactory. A legal entity or a business is expected to use software that is neither too old nor too restricted, thus corresponding to the average.

However this approach may not be appropriate for consumers (at least for some of them). A consumer is generally not supposed to use a modern version of software programs and capable of opening, reading and storing of any attachment. Therefore except where the program used by the consumer can be reasonably considered as worldwide abolished, the risk of incompatibility errors would be born by the insurer.

In any case, the consumer can be expected on the ground of good faith and fair dealing to fall back on to the insurer and notifies him that the information sent was not received/read, if the consumer could identify the sender.

2.3.5.1.4. Onus of proof

In case of conflict, the onus of proof that the e-mail has reached the recipient lies with the sender. A printed copy or a record would not be enough nor the encryption or electronic signature.

The confirmation of the recipient is indeed an effective proof.

Whether a successful arrival of the message to destination can be presumed when no “bounce-mail” notification is received is debatable. *Bounce mail is an e-mail that never arrives in the recipient's inbox and is sent back, or bounced back, to the sender with an error message that indicates to the sender that the e-mail was never successfully transmitted. There are two kinds of bounce e-mail: hard bounce and soft bounce. Hard bounce e-mail is permanently bounced back to the sender because the address is invalid. Soft bounce e-mail is recognized by the recipient's mail server but is returned to the sender because the recipient's mailbox is full, the mail server is temporarily unavailable, or the recipient no longer has an e-mail account at that address.*

2.3.5.2. Statement of consent occurred erroneously

It is frequent in fully or partly automated on-line contracts that the customer clicks on a wrong button or ticks in a wrong box due to his inexperience or inadvertence and communicates a declaration that is non-intended. Although not very common, the insurers may also have designed a website unintentionally (but mistakenly) to the advantage of the prospective policyholder.

2.3.5.2.1. Errors made by the prospective policyholder and possible remedies

In online transactions three types of errors that may be made by the prospective policyholders are worth being examined particularly:

- **Errors in declaration:**

First scenario: The prospective policyholder wants to make a declaration and for instance clicks on the send button for that purpose, but the declaration intended is different (fire insurance intended but instead theft insurance declared). In that case it is possible to avoid the contract on the ground of (fundamental) error.

Second scenario: The prospective policyholder, although is conscious that he clicks or ticks, does not know that by clicking or ticking he makes a binding declaration (he thinks for instance that he is asking for information about the insurance product). In that case, although he does not have the will (consciousness) to declare, he would be regarded as having made a declaration (as he should have taken into account that his act of clicking or ticking accomplished on-line would be relied upon by the insurer). However an action based on fundamental error is not excluded (such an action would be allowed under the condition that the policyholder compensates the losses/expenses –if any- incurred by the insurers as a result of their trust in the validity of the transaction).

If the error is due to a defective design of the website (an eventuality cited by the United Kingdom report, see also 2.3.5.2.2. below), the insurer (addressee of the declaration) would be regarded as being in a position to detect the erroneous statement and will be consequently required to refrain from considering the declaration as binding.

Third scenario: The prospective policyholder doesn't have the will to make any declaration but as a result of a reflex (he falls asleep in front of the computer and provokes the sending of a declaration for example by pushing the click button of the mouse). The sort of such a declaration can be debated. The understanding of the recipient can be regarded as decisive here too (if so the policyholder's declaration will be binding if the insurer could consider it as a valid statement). In the alternative, the absence of any "intent" to act would reveal that there is no question of contract conclusion.

- **Transmission errors**

Internet errors, virus attacks or software errors may give rise to incomplete or defective transmission. In this case, the understanding of the addressee will be decisive. The insurance contract will be deemed as concluded on the basis of "incomplete" or "altered" declaration. But avoidance of the contract will be possible for transmission error (which is also "fundamental").

- **Software errors**

If the error is due to the fact that the policyholder has installed and used defective software (and not to the declaration itself) it is question of an error that affected only the motives for concluding the contract. Such an error is not fundamental and the policyholder will not have any action for avoidance since in e-commerce, the risk of using defective software is borne by the user himself.

Beyond doubt, fundamental error (failure of intent) may constitute a solid cause for invalidating a contract also where the prospective policyholder does not make his declaration of consent by clicking on a button or ticking in a box. If the binding consent statement carried out through ordinary letter or e-mail was made under the effect of a fundamental error (for example the applicant desires to take out "fire" insurance but declares his consent for a "theft" insurance) the classical solutions of the civil law about failure of intent will apply.

But in addition to the classical (remedying) solutions of the civil law (preventive and remedying) solutions specific to on-line or consumer transactions are adopted:

- The imposition on the insurer (being a service provider) the duty to establish a system apt to hinder errors in declaration by providing mechanisms to correct the input errors and to inform the contract partner on their existence constitutes an important preventive solution. In the European Union, the Directive 2000/31/EC (E-Commerce Directive) imposes on the insurer (as a service provider) to make available to the prospective policyholder (as recipient of the service) appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to the placing of the order (Article 11.2). Awareness of those technical means is essential for their effective use. Thus the insurer is also under the duty to inform his customer of their availability (Article 10.1 (c)). In case of breach of the obligation to inform on the correcting system, the policyholder will benefit from an unrestricted period of withdrawal (due to the fact that the withdrawal period begins when the information requirement is carried out).
- As a remedying solution (where the preventive steps were not sufficient to avoid errors to happen) we can mention the right to withdraw from the contract usually granted to the consumers.

The Polish report states that the question to know to what extent the civil law rules in respect of errors would apply is not very clear and underlines the policyholder's right to withdraw (in case he discovers an error not detected despite the fact that the websites where consumers can conclude insurance contracts on-line are designed in a way to avoid such mistakes).

The withdrawal right is also cited as a remedy in case a consumer enters into an insurance contract by mistake in the United Kingdom report.

2.3.5.2.2. Insurer's website containing mistaken information

In rare instances the insurer's website may contain mistaken information (for example about the premium or scope of an insurance product) and this may have led the policyholder to make a declaration for a contract detrimental to the insurer. The problem here is whether the insurer shall be bound by such a contract.

United Kingdom is the only country mentioning the eventuality that the insurer is the author of an error. In the United Kingdom, the solution depends on how the insurer's website will be qualified. Unless the information on the insurer's website clearly indicates his intention to be bound in case of mere acceptance by the policyholder, this will be considered as an invitation to treat and the policyholder's declaration will not be sufficient to bind the insurer. United Kingdom report refers to the terms mistakenly indicated on the website (premium lower than the insurer intends to charge).

In case the insurer is deemed to have made an offer, he may invoke his error in accordance with the rules governing the error. In that respect, the role of the recognisability may be also relevant. In cases where the customer can be expected to recognize the error (for instance if a car insurance is offered mistakenly at \$1 instead of \$100) he is under the duty to take it into account and if he merely accepted the offer despite the manifest error he detected, there

is no mutual consent. In such case there is even no need to cancel the contract on the basis of error. The insurer will be allowed to invoke directly the “disagreement” hampering the effective conclusion of the contract.

But where the error is not recognizable, the outcome is different. If a relatively complex insurance product (granting cover for several risks) is launched on the Internet at \$1500 instead of \$3000 as a result of a software (calculation) defect and if the prospective policyholder cannot be expected to understand the error, (upon the offer made by the prospective policyholder on \$1500 and acceptance by the insurer) the contract will be concluded at the price of \$1500. In this case, the question to know whether the insurer is allowed to cancel the contract on the basis of error is a delicate one. Taking into consideration the fact that the error is not related to the declaration but is due to the reliance on a defective program, one can argue that the insurer is deprived from the right to allege the error (since his mistake affected only the motives for concluding the contract). The alternative solution is to grant the insurer the right to cancel the contract by arguing that he was still affected by the error when he stated his consent and it suffices to admit a declaration error.

If the prospective policyholder’s declaration is transmitted incorrectly by his electronic service provider he shall be entitled to cancel the contract because the error is committed by a person who is his messenger. But in case the error is due to the incorrect transmission of the insurer’s electronic service provider, the declaration will be deemed validly arrived in the power sphere of the insurer and will be effective.

2.3.5.3. Techniques to avoid and correct errors and mistakes

The insurer’s duty to inform the prospective policyholder about the technical means to identify and correct the input errors (as provided for example in the European Union) is meaningful only when those technical means are effectively in place. Thus the insurer will be required to provide the cited technical means (Belgium, Croatia, Germany) that may consist in the following (Belgium):

- Progressive built up of the process instead of one click system (split in different steps; access to next steps requiring the confirmation; possibility to return to previous steps to correct errors previously committed)
- General conditions acceptance made a condition of the process
- Blocking of the access to next steps upon detection of input errors and warning of the prospective policyholder
- Existence of a help function
- Double confirmation (one click not being sufficient)
- A preview of the contract before the final approval (first click generating the preview, second click leading to the contract formation = validation). In Japan the insurers are requested to show the final confirmation of the insurance contract on the PC screen.

- Contract confirmation sent to policyholder after validation with a recapitulation (to avoid the contract by using the withdrawal right and obtaining the opportunity to correct the errors made in a new contract). *In addition to its informative function the confirmation sent to the policyholder may also constitute under certain circumstances a proof of the contract.* Colombian law states clearly that in consumer contracts, the insurer must provide a recapitulation including information about the insurance product, price, costs and expenses. That recapitulation must be ready for being either printed or downloaded.

In Israel, the consumer who made a clerical typing error is allowed a reasonable period of time to correct the mistake (the contract will then be amended according to the common intention of the parties but not cancelled).

In Japan, the insurers are required to take necessary measures to enable the applicant to verify the contents before starting the on-line operation. If this requirement is not met, the application may be void because of the error in declaration.

2.3.5.4. Exoneration clauses (disclaimer)

Sometimes insurers disclaim any liability in conjunction of the use of their websites. For example in Switzerland, they don't guarantee the accuracy, completeness and confidentiality of data transmitted over the Internet nor that the hardware and software will function without error; they disclaim liability in case a third party interferes and alters or misuses the data entered by the prospective policyholder or the insurer or for Internet failures, transmission errors or imported data of any kind (infiltration of viruses) or links to other websites. But the insurers nevertheless incur liability in Switzerland on the basis of unfair competition if they have failed to provide appropriate technical means for identification and rectification of errors before the insurance order is sent off.

2.4. Moment when the consent is established

2.4.1. General rule

As stated above, the mutual declarations of consent with regards to “essentialia negotii” is a basic requirement (Croatia, France, Belgium).

The contractual offer can be made either by the insurer or the policyholder. There is no mandatory rule requiring that the offer be made by one of the parties (Germany, Switzerland).

In fully automated contracts the acceptance of the policyholder will be achieved usually when the policyholder will complete a plurality of entries relating to the offer (Denmark, Australia, Croatia). A single click shall in most cases not constitute an on-line acceptance.

As a basic principle of the law of contracts, the statement of consent can be “express” or “tacit”.

- Is it possible that for concluding an insurance contract on-line, the prospective policyholder's declaration of consent (usually the acceptance) be tacit? Some

national laws at least in consumer transactions require that the acceptance of the consumer be express, unequivocal and verifiable by the relevant public authority (Colombia).

- On the other hand, the insurer's acceptance can also be tacit. It is so when the insurer upon the prospective policyholder's offer prepares and sends the insurance policy without expressly stating his agreement to the contract conclusion. In countries where the insurance contract can be concluded by way of "silent acceptance" (for example Turkey) if the insurer does not expressly reject the prospective policyholder's offer within the time limit provided by the law, the contract shall be entered into at the end of that time limit. But in the absence of such a legal provision, the silence of the insurer would lead to the conclusion of the contract in rare occasions only (i.e. when the parties have unequivocally agreed that the silence shall be regarded as a declaration of consent or when the principle of good faith and fair dealing would impose such a consequence).

The law can provide that the conclusion of a contract on line is subordinated to the condition that the trader's web site so structured that the customer confirms his liability to effect payment when he passes the order (the so-called "bestellbutton" = "order button").

2.4.2. Form requirement

The form requirement fulfils two functions: warning function and the proof function. For insurance contracts the involvement of a public officer (for instance a notary public) is not conceivable. Therefore as a form requirement only the written form (achieved by the autograph/wet signature) can be envisaged (this is the solution adopted in some Latin America Countries). However a wet signature is out of question in on-line business.

In countries where the insurance contracts can be entered into without observing any form requirement, on-line insurance contracts can be concluded with the exchange of the concerned parties' respective consent statements fully or partly on-line. Electronic signature or advanced electronic signature or qualified electronic signature is not a constitutive element (except when the parties agree otherwise which would be a very rare case).

In countries where the written form is prescribed by the law, the use of qualified electronic signatures appears to be the only permissible way since the equivalent of the hand written signature is the qualified electronic signature. However it must be underlined that so far insurers did not use in a wide extent the qualified electronic signature. Instead, they preferred ordinary electronic signature or the unsigned electronic documents or fax. At this point we must also underline that a "soft" form requirement appeared during the last decades: the so-called "text(ual) form" utilised especially in the accomplishment of information duties or when the right of withdrawal is invoked. The text form can be described shortly as follows: the statement is on durable medium, the author of the statement is named and the end of the statement is marked with the reproduction of the signature or otherwise designated. Undersigned telefax and ordinarily signed e-mail can be given as examples of documents conforming to the text form characteristics.

According to the Directive 1999/93/EC of the European Union on electronic signatures

- "Electronic signature" means data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication;

- “Advanced electronic signature” means an electronic signature which meets the following requirements:
 - (a) it is uniquely linked to the signatory;
 - (b) it is capable of identifying the signatory;
 - (c) it is created using means that the signatory can maintain under his sole control; and
 - (d) it is linked to the data to which it relates in such a manner that any subsequent change of the data is detectable;

“Qualified electronic signature” is an expression used in some legislation (for instance Germany) to design an electronic signature bearing the characteristics of the advanced electronic signature. The difference between the qualified and advanced electronic signatures resides in the fact that the former is certified and deposited by a specialized provider.

The proof of an insurance contract concluded on-line can be difficult under circumstances. On the other hand, the proof that the conditions for exercising some of the rights conferred to the customer are materialised can also create problems. In order to protect the customer and to give him the chance to be in a better position, the European Union legislation and the laws of some other countries imposed on the insurer some obligations, examples of which are given below:

- Directive 2011/83/EU on consumer rights Article 8.7 prescribes that the insurer must provide the consumer with the confirmation of the contract concluded on a durable medium within a reasonable time after the conclusion of the distance contract, latest before the performance of the service begins. That confirmation must include all the pre-contractual information (if not already given to the consumer prior to the conclusion of the distance contract). The insurer is required also to confirm the policyholder’s prior express consent to the commencement of the service and his acknowledgement that (upon commencement of performance) he loses his right to withdraw from the contract.
- Directive 2000/31/EC on electronic commerce Article 11.1 stipulates that the insurer has to acknowledge the receipt of the prospective policyholder’s order without undue delay and by electronic means.

On the other hand, where the law permits the parties involved can agree that simple transmissions by telecommunication (digital messages such as e-mails or telefaxes, SMS, WhatsApp facilities) would have value of the written form.

2.4.3. How long shall the party who makes a contractual offer be bound by his offer?

In contracts between absent persons, the offeror will be bound until the moment he should expect an acceptance having regard to the circumstances.

In respect of offers on-line, as a result of the communication means chosen, the acceptance can be expected in a relatively short time.

Where the website of the insurer can be regarded as an offer (and not an invitation to treat), the insurer will be bound by his offer as long as the insurance can be taken out from the

website. However in practice, this would mean that the insurers (who are the “offeror”), will be bound only until the customer exits the website.

The Polish report states that pursuant to Polish Civil Code an offer made electronically shall be binding on the offeror if the other party confirms its receipt without delay. On the other hand, in Poland before making an offer to the consumer, the insurer must obtain his consent.

Where the policyholder makes an offer by using a standardized form on the insurer’s website, he will be bound during such time in which the arrival of an acceptance (express or tacit) can be reasonably expected (Turkey). A time limit as to the binding effect of the offer can be imposed. Thus, if the standardized form provides a time limit for the binding effect of the offer (this is so in most cases in Germany) the insurer’s acceptance that reaches the policyholder after this time limit has elapsed shall be considered as a contract offer by the insurer.

2.4.4. When does the contract come into effect between distant parties?

The answers given by the national reporters are diverse as can be seen below:

- When the proposer learns (or has the opportunity to learn) the acceptance of his offer by the counterpart (the moment when the insurer receives the acceptance from the policyholder) (Belgium, Colombia, Croatia, Denmark, Greece, Serbia).
- When the client expresses (to the insurer) hision to be bound by the proposed insurance contract; silence not being interpreted as acceptance or so presumed (Chile).
- In Hungary: If the insurer does not reject the client’s offer within 15 days from receipt (after the elapse of 15 days the contract is deemed to have been concluded at the moment when the offer was made to the insurer (retroactive effect)).
- In Hong Kong: In case the insurance is offered as a click wrap agreement where the prospective policyholder is called to agree the terms as advertised on the website, the contract is concluded when the policyholder clicks on the “I agree” button and sends his consent (but the message is considered sent when it is accepted by an information system outside the control of the originator).
- In Israel: when the consumer clicks on the “I agree” button that can be regarded as a notice or an act-behaviour of acceptance.
- In Japan, when the acceptance of the insurer is received by the policyholder.
- In Mexico, when the contracting party has knowledge of the acceptance by the insurer.
- In Australia: The applicant is required to complete the on-line application and if all the information accords with the insurer’s acceptance standards, the insurer makes the offer. By accepting this offer the applicant incepts the cover. If the application

fails to meet all acceptance criteria, either the application is rejected or the applicant is given the opportunity to speak to a consultant by making a phone application.

- In Germany the ICA provides that the insurer is entitled to send a policy deviating from the application or from the agreement. If the policyholder does not object within one month from receipt, he shall be deemed to have approved the deviated provisions (under the strict condition that the insurer informs and warns the policyholder on the effected modifications and their legal consequences). *Turkish law contains a clear provision conflicting with the German solution: Provisions in the insurance policy contrary to the application for insurance or the agreement of the parties are invalid.*
- In the Republic of Korea, if the insurer fails to give notice to the contrary, the offer made by the policyholder will be deemed accepted. The same solution is provided also in Turkey where at the end of a silence of 30 days the offer is regarded as agreed.
- In Switzerland the consent is established when the insurer's acceptance arrives in the sphere of the policyholder (in case of a letter when the letter is dropped in the mailbox) or –if the offer was made by the insurer, upon the arrival of electronic confirmation or confirmation letter from the policyholder.

Inspired by the comments cited above we can summarise as follows:

In fully automated on-line insurance contracts where the system is designed in such a way that upon the offer put by the insurer the prospective policyholder has to click on the “accept” button or tick in the “accept” box, the contract formation would be achieved by the acceptance of that prospective policyholder.

Where the human intervention occurs without the use of Internet, the conclusion of the insurance contract will be governed by general rules prevailing in the law of contracts.

If an agent of the insurer intervenes by using the Internet (for example the acceptance of the insurer is sent in an e-mail addresses to the prospective policyholder) the rule developed for on-line transactions will apply (in the example above, the contract will be formed when the e-mail reaches the system of the recipient).

If the insurer has made an offer and the acceptance of the prospective policyholder occurs via the Internet (for example the prospective policyholder sends an e-mail message to express his intention to conclude the insurance contract), here again the same principle will apply (i.e. the contract will be concluded when the acceptance message reaches the system of the insurer).

2.4.5. Contractual waiting period

In Colombia, according to an established custom, the insurers provide in their proposal a waiting period for the inception of the cover in order to facilitate reinsurance placements.

2.4.6. Rules concerning the policyholder's right of withdrawal

In most countries the policyholders are entitled to withdraw from the insurance contract (usually within a period that follows its conclusion). However, in Switzerland the law does not provide for a right of withdrawal in favour of the policyholder.

2.4.6.1. Meaning of the right of withdrawal

The right of withdrawal means the cancellation of the insurance contract (“*ab initio*”) at no cost and without need of justification.

2.4.6.2. Effect

The insurance contract shall be erased to begin from the contract conclusion (retroactive effect, revocation). This means that the contract did not and cannot generate any valid obligation. The legal cause of the respective obligations (which is the insurance contract) disappears upon withdrawal (cancellation). Then the respective obligations already performed -if any- must be returned (especially the premium or a portion thereof paid by the policyholder).

However in the European Union countries a balanced solution is adopted in accordance with the Directives. For instance German Law provides that the insurer may be entitled to a portion of the premium under certain conditions: If the insurer complied with his duty to warn and inform the policyholder (including on the fact that the latter will be obligated to pay a contribution) and if the policyholder agreed that the coverage begins before the revocation period elapses, the insurer shall be entitled to the portion of the premium until the revocation. Polish law provides also a similar solution.

- Directive 2002/65/EC on distance marketing of financial services Article 7 states that the consumer must pay for the service he received before the right of withdrawal is exercised (commencement of the service requires consumer’s approval). Thus the insurer can claim a payment proportionate to the service actually rendered. The sum to be paid should not have the character of a penalty (Article 7.1). On the other hand the insurer must have informed the consumer also about the amount payable (Article 7.3). *In insurance contracts, usually the insurer performs (begins to bear the risk) after payment of the premium or the first installment thereof. Thus, payment of the premium would mean that the consumer gives his consent to the performance.*
- However, we must underline that the Directive 2002/65/EC on distance marketing of financial services Article 7.2 leaves it to the decision of the Member States to provide that the consumer cannot be required to pay any amount when withdrawing from an insurance contract.
- The Directive 2011/83/EU on consumer rights Article 14.3 stipulates that the consumer who requests the service shall pay to the trader an amount which is in proportion to what has been provided until the time the consumer has informed the trader of the exercise of the right of withdrawal, in comparison with the full coverage of the contract.

In the European Union, if the insurance is attached to another distance financial service contract, the insurance (additional distance contract) shall be cancelled without any penalty

if the consumer exercises his right of withdrawal in respect of the (main) financial service contract (Directive 2002/65/EC on distant financial services, Article 6.7; the same solution with some minor differences is also maintained in the Directive 2011/83/EU of the European Union on consumer rights, article 15).

2.4.6.3. Source

The source of the right of withdrawal can be the “general rules” applicable to all contracts or the general consumer law or “specific rules” about the insurance contract law (In Belgium ICA is considered as “lex specialis”. In Croatia as there are no special rules in the LEC – Electronic Commerce Law- the matter is governed by the Insurance Act).

2.4.6.4. Time limit

In respect of the right of withdrawal, generally a longer period applies or with regards to life insurance.

(Belgium, France, Greece, Germany, Hungary): 14 days in case of non-life and 30 days for life insurance

(Denmark): 14 days for life and 30 days for individual pensions scheme.

(Poland): 30 days in consumer transactions

(United Kingdom): 14 days (in case of contract for pure protection or payment protection insurance 30 days).

(Australia): 14 days provided no loss has arisen.

(Hong Kong): 21 days from the delivery of the policy or notice to the policyholder (whichever is earlier) in respect of long term insurances (such as life insurance or ILAS products).

(Israel): 14 days in consumer transactions.

(Japan): 8 days from the date of insurance contract

(Mexico): as a general rule the insured may at any time cancel the insurance contract (if so, the insurer will return the non-incurred premium).

(Serbia): 14 days.

2.4.6.4.1. Compliance with the time limit

German report underlines that (in accordance with the European Union legislation, i.e. article 6.6 of the Directive 2002/65/EC on distant financial services) dispatch is sufficient.

Alternatively the withdrawal declaration must reach the insurer (or, as in Turkey, to the insurance agent who concluded the insurance contract on behalf of the insurer) before the end of the time limit.

2.4.6.4.2. Condition for the time limit to begin running

The solutions reported for the beginning of the time limit about the right of withdrawal are as follows: The time limit for the right of withdrawal will begin to run upon receipt by the policyholder of the contract terms and conditions and all additional information or the day of conclusion of the insurance contract (Germany, Belgium, Poland) –in life insurances the day the insurer informs the policyholder of the contract conclusion (Belgium).

In the European Union Directive 2002/65/EC on distance marketing of financial services Article 6.1 provides that the period for withdrawal shall begin either from the day of the conclusion of the distance contract, (except in respect of the life assurance, where the time limit will begin from the time when the consumer is informed that the distance contract has been concluded), or from the day on which the consumer receives the contractual terms and conditions and the information, if that is later than the date of the day of the conclusion of the distance contract (or in life insurance the information of the consumer thereof).

2.4.6.5. Form requirement for the right of withdrawal

There is no form requirement reported. In on-line insurance contracts the right of withdrawal can be used also through electronic means.

In the European Union, according to article 6.6 of the Directive 2002/65/EC on distance marketing of financial services the withdrawal from the insurance contract must be communicated on paper or on durable medium available and accessible to the recipient. *Accordingly, delivery, posting, faxing or e-mailing or giving notice to the website indicated by the insurer for that purpose will be regarded as sufficient. But notification by phone will be valid only if the insurer has given his consent.*

Directive 2011/83/EU of the European Union on consumer rights provides in its article 11.1 that the consumer who decides to exercise his right of withdrawal may either use the model withdrawal form as set out in Annex I(B) of the Directive or make any other unequivocal statement setting out his decision to withdraw from the contract. On the other hand, Annex I(A) of the Directive mentions that a letter sent by post, fax or e-mail are amongst the appropriate means for that statement.

2.4.6.6. Fate of the contract during the cooling off period

The contract is provisionally valid (Germany).

2.4.6.7. Exceptions

The right of withdrawal is not provided for a number of cases: Short term insurances (Belgium, France, Germany, Hungary), insurances less than one year (Japan), travel and luggage insurance (Belgium, France, Hungary), life insurances linked to an investment fund (Belgium), executed contracts upon request of the policyholder (France), compulsory motor vehicle liability insurance (France), large risks (Germany), contract for provisional covers provided they are not distant contracts (Germany).

In European Union legislation, according to the Directive 2002/65/EC on distance marketing of financial services the right of withdrawal is excluded in travel and baggage insurance policies or similar short-term policies of less than one month's duration and in contracts whose performance has been fully completed by both parties at the consumer's express request before the consumer exercises his right of withdrawal (Article 6.2 b and c).

CONCLUSIONS IN RESPECT OF "THE CONCLUSION OF INSURANCE CONTRACTS ON INTERNET"

- a) *Insurers use the Internet for different purposes. The on-line insurance in the narrow sense is a fully automated insurance contract concluded on the Internet without human intervention. But fully automated contracts are available only for standardised products. For sophisticated products the human intervention is envisaged. The human intervention may occur by using the Internet. If rules are provided for on-line transactions (this may be the case for distant contracts, or consumer contracts) they will apply for the steps taken on-line; the steps off-line being subject to general rules.*
- b) *In consumer contracts, the insurers will be allowed to use the Internet in their legal relations with the policyholders/ insureds/ beneficiaries only when those persons are consented to it. However the solution may be different for businesses and legal entities.*
- c) *On-line insurance is nowadays possible in most countries (though some few countries still don't allow it)*
- d) *An insurance contract concluded (totally or partly) on-line may be characterised with the following steps: A mechanism on the insurers' (or their representative's) website appropriate for contract conclusion (for gathering the necessary information from the prospective policyholder: his identity, the nature of the insurance, the risk etc.), the input of the relevant information by the prospective policyholder, premium calculation and finalisation of the contract by acceptance of the relevant party (acceptance of the policyholder upon the offer made by the insurer for example when the insurer communicates the premium; or acceptance of the insurer upon the offer made by the prospective policyholder for example by filling forms returned to the insurer).*
- e) *The generally accepted view appears to be that the website of the insurer is not an offer (but exceptions exist).*
- f) *In on-line contracts, the consent of both parties is a basic requirement (as in off-line contracts).*
- g) *Sometimes the declarations of consent are made erroneously or communication errors (transmission or incompatibility errors) happen.*
- h) *In case of declarations of consent made erroneously, general remedies (avoidance of the contract) are available but solutions proper to on-line transactions are also put in place (mechanisms to identify and correct input errors, right of withdrawal)*
- i) *In case of transmission errors, the risk is born by the party making the declaration of consent. The declaration is deemed received by the addressee when it reaches the recipient's systems. Dispatch is not enough. If it is lost after it has reached the recipient's systems, it will produce legal consequences.*
- j) *In case of incompatibility errors, businesses will be deemed to use an average system whereas the consumer is not expected to be up to date. The risk that the consumer possesses an old system (causing that the declaration is not received or understood) will be on the insurer.*

- k) *The insurer will be required to implement technical means to identify and correct the input errors before the prospective policyholder makes his declaration of consent for the conclusion of the insurance contract on-line.*
- l) *Exoneration clauses (in respect of the website functions) must be prohibited at least vis-à-vis the consumers.*
- m) *In insurance contracts concluded on-line, the mutual consent of the parties is regarded as established*
- i. In case of a fully automated contract in which the constitutive step is the acceptance of the policyholder by clicking on a button or ticking in a box, at the moment when the click or tick is accomplished.*
 - ii. Where human intervention occurs outside the Internet, in accordance with general rules (as in off-line contracts).*
 - iii. In case an agent of the insurer intervenes and the contract is formed either upon acceptance on-line of the prospective policyholder (for example by e-mail) or upon acceptance on-line of the insurer (for example by e-mail), the rule developed for on-line transactions will be decisive (reach of the declaration sent via Internet in the systems of the recipient).*
- n) *The right of withdrawal (exercisable freely at no cost and without need to justify within a relatively short period after the conclusion of the insurance contract and having retroactive effect) exists in most of the legislations.*

3. SPECIAL INFORMATION OR WARNINGS TO BE GIVEN TO THE PROSPECTIVE POLICYHOLDER WHEN CONCLUDING ON-LINE

3.1. Information and warning requirements

3.1.1. In General

In old times the insurance law imposed an information duty only to the policyholder. Nowadays the insurer is also under the duty to inform his contractual partner on a number of points. This evolution is due mainly to the protection afforded to the consumers.

Therefore in many countries the existence or the extent of information duties depends on whether the transaction in question is a consumer transaction (For example Greece).

On the other hand, the (generally broader) duty of information is mandatory in case of a contract entered into with a consumer and the exoneration clauses are invalid (Croatia, France, Greece).

In contracts concluded face to face, the prospective policyholder (the applicant) is often assisted by an agent of the insurer (or if he has appointed a broker, by that broker) and has the opportunity to ask questions. To ensure that he makes an informed decision when he

contracts on-line all his possible questions must be answered in advance i.e. the pre-contractual information given to him should encompass the answers.

Before the conclusion of the distance contract the consumer must be informed on many items by appropriate means (If the distance communication method used does not allow the provision of the information before the contract conclusion, the information must be provided immediately after the contract is concluded) (Poland).

In the European Union, information duties applicable also to insurance are regulated in different instruments:

- Directive 2000/31/EC on e-commerce Article 5, 10, 11
- Directive 2002/92/EC on insurance mediation Article 12, 13
- Directive 2002/65/EC on distance marketing of financial services Article 3, 4, 5 and 6.1 and 7.3
- Directive 2011/83/EU on consumer rights Article 6, 10

In the European Union, there are also draft instruments bringing more sophisticated (sometimes debated) solutions about information requirements. *For example: The IMD 2 (Insurance Mediation Directive 2 Proposal - 2012/0175) proposal Article 16 to 21 and 22 to 25. The tendency is in the direction of achieving more transparency (disclosure of the conflicts of interest, additional customer protection requirements in relation to insurance investment products especially in respect of the assessment of suitability and appropriateness and reporting to customers).*

Colombian law provides that the insurer must give all information enabling the consumer to take his decision freely and without error. For insurance contracts there is a special provision in the Colombian Consumer Act requiring the insurer to deliver the contractual stipulations concerning the extent of the coverage with exclusions to the consumer in advance.

3.1.2. Form requirement for the information

In off-line contracts the information must be given to the prospective policyholder on paper or on durable medium available and accessible to the customer (Belgium, Poland). For contracts concluded on-line in the narrow sense the information duty will be (mostly) accomplished on-line. However according to new tendencies and proposed/recently enacted laws the policyholder may be granted the right to request to be informed on paper even if he uses regularly the Internet.

In the European Union, the Directives require that the information be given on paper or on durable medium (Directive 2002/65/EC on distance marketing of financial services Article 5; Directive 2011/83/EU on consumer rights Article 7 allows durable medium only if the consumer has agreed on it).

3.1.3. Confirmation of the reception

In Chile, the confirmation by the prospective policyholder that he received the information is a prerequisite of the insurance contract.

3.1.4. Content of the information

With regards to the information to be given to the prospective policyholder national reports put the emphasis on different points. According to these reports the information to be given may include information on

- The procedure for contract formation (Serbia)
- The identity of the insurer (as service provider) (Belgium, Colombia, Croatia, Greece, Hong Kong, Poland, Republic of Korea, Switzerland)
- The website address of the insurer (Mexico: to enable the policyholder to identify and review the standardised clauses).
- The financial service (insurance) with its total price (premium), expenses, charges (Greece, Hong Kong; In Mexico the prospective policyholder must be informed about the trade name of the insurance product; in Poland also the rules governing the payment)
- The distant (insurance) contract details (Hong Kong, Republic of Korea, Serbia)
 - Existence or absence of the right of withdrawal (Greece, Poland, Republic of Korea)
 - General conditions of insurance (Greece, Republic of Korea, Serbia; In Colombia the insurers must put on their websites the general conditions of insurance easily accessible and ready for printing or downloading)
 - Governing law (Greece, Hong Kong, Poland)
 - Insured period (Hong Kong, Poland)
 - Applicant's duty of disclosure and consequences of non compliance (Hong Kong)
- Redress and complaint mechanisms (Belgium, Greece, Poland)
- Dispute resolution mechanism (Republic of Korea)
- The languages offered for the conclusion of the contract and for communications during the contract (Croatia, Greece, Poland, Serbia)
- Any relevant codes of conduct to which the insurer has subscribed and information on how those codes can be consulted electronically (Croatia, Greece, Serbia)

In the United Kingdom there are supplementary rules in the ICOBS 6 (Product Information)

The general conditions of insurance must be read (at least the opportunity be aware of their content must be given to) and accepted expressly or tacitly by the policyholder otherwise they will not become part of the contract and be binding on the policyholder. To make sure that the policyholders are bound by the general conditions they can be required to tick on a box.

The Belgian report underlines that a positive action from the policyholder would be less equivocal, thus a pre-ticked box must be avoided. The Belgian report further states that with

regard to general conditions two mechanisms are used: The click wrap agreement (where the policyholder will be forced to visit the web page containing the general conditions before consenting to the insurance contract) and the browse wrap agreement (where the policyholder is given only the possibility to surf to the web page containing the general conditions). In the case of browse wrap agreement the Belgian report recommends a hyperlink to each page rather than to the home page only. But a pop up screen is not recommended.

The insurer who will invoke a version of the general conditions of insurance will be required to prove that when the contract was concluded that version was made part of the contract (Belgium). However in Turkey the subsequent changes in the general conditions of insurance favouring the policyholder/insured/ beneficiary will benefit to them automatically. To remedy the problems related to the date “electronic time stamping” is recommended (Belgium).

Information must be given also about the archiving (filing) of the insurance contract and its accessibility (Belgium, Croatia, Greece).

In Colombia, the contract stipulations exonerating the insurers for the access to or use of their website or for the discrepancies between their printed documents and electronic documents put on the website are considered “abusive”.

A confirmation of the insurance order must be sent to the policyholder (Belgium).

3.1.5. Information about the mechanisms to avoid mistakes

The insurer is required to inform the prospective policyholder

- on the different technical steps leading to the contract conclusion (Belgium, Croatia, Greece, Serbia)
- on the technical means to identify and correct input errors before the contract conclusion (Belgium, Croatia, France, Germany, Greece, Spain, Serbia).

The Swiss report states that the Swiss law does not contain any rule imposing on the insurer the duty to warn or inform the policyholder about the communication errors arising out of on-line operations. *But Swiss law provides that the insurer must ensure that the potential policyholder has the possibility to verify and rectify his data entry before submitting the final invitation for an offer or declaration of acceptance to the insurer.*

The mechanisms to identify and correct the errors would be no doubt much more effective if the prospective policyholder is warned at the outset of their existence.

3.1.6. Sanction of the violation of the information duty

National reports don't indicate whether the violation of the information duty would have different consequences when the insurance contract is concluded on-line. It appears that the same consequences as in the case of an off-line insurance contract would apply.

In Croatia, in case of serious breach of the information duty about the identity of the insurer, the technical steps for the contract formation, the correction of input errors, the language and the codes of conduct and the provisions of the contract terms in a way enabling the recipient to store and reproduce them, the court may take a provisional measure decision and prohibit the activity of the insurer 3 to 9 months.

3.2. Communication failures: errors in declaration, transmission and software errors (press the wrong button, click on the wrong box; the electronic message is lost in the Internet or the software is not fit to send/receive the intended message, etc.)

3.2.1. Duty to warn about errors in declaration, transmission and software errors

As stated above (see 2.3.5.2.1), in many legislations the insurer is under the duty to provide special mechanisms to ensure that the prospective policyholder, before he makes his declaration of consent for the conclusion of the insurance contract, is given the opportunity to identify and correct the input errors. To achieve this aim, the first step would be to inform the policyholder on the existence of such mechanisms.

3.2.2. Duty to warn about the communication errors detected

The information duty imposed on the insurer with regards to the existence of mechanisms enabling the prospective policyholder to correct the input errors before he makes his declaration of consent, will be complied with at the pre-contractual stage and before the input error is committed. What about if the error is discovered by the insurer subsequently (i.e. after the prospective policyholder's declaration has been made)? National reports don't indicate that such a duty exists in their respective countries.

In such a case the insurer can be expected to warn the contract partner. This duty may be based on the principle of fair dealing and good faith.

3.2.3. Duty to confirm that the order is received/contract is concluded

As underlined above (see 2.4.2) in some countries the insurers are under the duty to acknowledge that the insurance order placed by the prospective policyholder is received or the insurance contract is concluded. In principle, the accomplishment of that duty would reveal to the prospective policyholder that no transmission error (that totally hampered insurers' declaration to reach the destination) occurred. However other kinds of errors may have happened.

CONCLUSIONS IN RESPECT OF "SPECIAL INFORMATION OR WARNINGS TO BE GIVEN TO THE PROSPECTIVE POLICYHOLDER WHEN CONCLUDING ON-LINE"

- a) The information duty exists also when the insurance contract is concluded on-line.*
- b) The rules about distant contracts provide a broader extent for that duty (for example the information about mechanisms to identify and correct errors or about the archiving of the contract).*

- c) *In particular, the contract terms (general conditions of insurance) must be provided properly so that they become a part of the contract and bind the policyholder. In insurance contracts concluded on-line special mechanisms to that effect (i.e. positive action of the prospective policyholder as in the click wrap or browse wrap agreements rather than pre-ticked box) would be appropriate as well as electronic time stamping.*
- d) *Taking into account that errors are frequent when concluding contracts on-line, the prospective policyholder must be informed on the mechanisms enabling him to identify his eventual errors and to correct them before placing the order.*
- e) *The insurer's acknowledgement that the order is received (and the contract is concluded) is also an important step. It would assist the prospective policyholder to understand that his declaration is not lost "en route".*

4. THE SPECIAL PROTECTION OF THE INSURED AGAINST FRAUD OR WITH REGARDS TO THE PAYMENT OF PREMIUM

4.1. In General

Internet is sometimes a dangerous environment. Customers may be induced to entrust persons acting with bad faith or their confidential data may be used by third persons to draw or transfer their money. Thus there is need to create a secure transaction platform.

In Hong Kong, the insurer (as a financial service provider) is required to take all practicable steps to ensure that

- Comprehensive security policies which reflect the advancement of Internet security technology are maintained
- Mechanisms are installed which maintain the integrity of data stored in the system hardware whilst in transit and as displayed on the website;
- Appropriate back up procedures for the database and application software are implemented
- A valid insurance contract shall not be cancelled accidentally, maliciously or consequent upon careless computer handling

In Chile, the insurers are under the duty to provide a security system controlling the access, ensuring the confidentiality, integrity and no repudiation. In order to comply with this duty they must have a certificate of secure website (certifying that the information will be transmitted in an encrypted form of the best level available in the market).

In Israel the Commissioner of Insurance proposed the use of a secure browser confirmed by an external company.

4.2. Specific (exclusive) rules with regards to protection against fraud or concerning the payment of premium

In many countries (for example Mexico, Japan, Brazil, Israel, Hungary, Australia, Chile, Costa Rica, Denmark, France, Greece; Germany, Uruguay, Switzerland) there is no special legislation in force providing protection against fraud in on-line insurance or in respect of premium payment on-line. However general rules (penal provisions) applicable in case of electronic fraud or in the absence of such rules, criminal provisions as well as civil law or competition law rules will be applied. Swiss law constitutes a good example illustrating the situation: In Switzerland the policyholder taking out insurance on-line is protected against fraud through

- The Swiss Criminal Code (One article of this code deals with computer manipulation)
- The Swiss Civil Code (better: The Swiss Code of Obligations which is an integral part of the Civil Code, offering protection in case of fraud of a third party)
- The Swiss Unfair Competition Act (stating that a fraudulent or deceptive behaviour may constitute an unfair business practice).

The Spanish report underlines that the withdrawal right and the option to recover the sums paid by means of a credit or debit card may be regarded as specific rules in respect of fraud.

Then Serbian report refers to the possibility to decrease of premium in case of risk diminution and to the policyholder's right to claim losses for having agreed the contract as a result of the fraud (in accordance with rules of the law on contracts and torts).

The United Kingdom report states that the client should seek redress directly from the relevant firm that has to make an appropriate compensation where the complaint is justified. If this is not satisfactory to the complainant the resort to Ombudsman (FOS) is then available. In case of a not on going concern, there may be redress under the compensation fund (FSCS). The United Kingdom report refers further to the liability of payment service providers.

4.2.1. Anti fraud devices

The anti fraud systems recommended can be summarized as follows:

- Limited access system (user names and personal access codes, in combination with TAN cards, figure strings, private software, encryption etc.) (Belgium, access control is imposed on the insurer in Chile)
- Firewalls (Belgium, Chile)
- Individual oral confirmation via mobile phone contact for money transfers abroad (Belgium)
- Warnings against phishing e-mails (Belgium)

The service provider shall be liable for the failures of security caused by the mechanisms he uses (without having regard to the fact that the mechanisms used belong to the provider or to somebody else). The sum paid by the consumer must be reimbursed in five days following request in case of fraud, unsolicited operations, undelivered products or products not conform or defective (Colombia).

In Hong Kong, in respect of protection against fraud, the insurer (as a service provider) is required to take all practicable steps to ensure that

- A client's electronic signature (if any) is to be verified
- The electronic payment system is secure

4.2.2. Evidence regime

It is important for policyholders to prove that an insurance contract is concluded and that payment of the premium (execution) is effected on-line. The policyholder must have reliable proof in his hands (otherwise the trust to on-line insurance would diminish) and must be given the chance to enforce his rights when necessary on the basis of the proof he possesses.

The evidence regime in respect of the insurance contract varies.

- In some countries a written agreement is required for the validity (Latin America countries, Belgium) whereas in other countries no form requirement exists.
- There are also countries where the written form is required not as a condition of validity but as evidence (for example Turkey).

The difference between “validity form” and “evidence form” lies in the following: In the former case, the contract is deprived of any legal effect even if the other party does not contest the formal defect (or even does explicitly acknowledge that a verbal contract is entered into). The judge is required to take into account the formal defect “ex officio”. In the latter case, the contract would be valid and enforceable in the absence of any written document if the opponent does acknowledge its existence. The acknowledgement will remedy the lack of the written document (or replace the written evidence).

When concluded on line it is obvious that a “wet signature” will be lacking. In countries where the advanced electronic signature is equivalent to the wet signature as a matter of law, an advanced electronic signature would be required if the validity of the contract is subordinated to the wet signature of the parties. In countries where such requirement does not exist (for example in France the insurance contract concluded on the Internet is valid without the signatures of the parties- electronic signature is not a requirement), the proof that an insurance contract is concluded on-line will be depending on the evidence regime applicable to the electronic transactions.

In the European Union, the Directive 2000/31/EC on e-commerce Article 9 provides that Member States must ensure that their legal system allows contracts to be concluded by electronic means (in particular they must ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means.

In practice the use of advanced electronic signature is not widespread (this can be expected perhaps only in B2B contracts and not in B2C contracts) nor the electronic registered mail.

In the Republic of Korea, the insurer is obliged to preserve the transactional record for a reasonable period.

4.2.3. Prohibition of default option systems

Especially in bundling practices, only opt-in systems (the policyholder ticking in the box for buying the product) should be allowed and opt-out systems must be avoided (Belgium: A travel contract sold together with cancellation insurance).

4.2.4. Misleading or unsolicited advertisement - Misuse of private data –Installation of permanent cookies

Electronic commerce created the need to adopt special rules or increased the application of certain rules. In the field of insurance contracts, rules about misleading or unsolicited advertisements, infringement of private and sensitive data and undesired electronic applications are particularly important.

The requirement to take appropriate measures to ensure that personal data is not misused and disclosed to third parties will be examined below under “5. The Special Role of Insurance Intermediaries”

4.2.5. Payment

In Belgium the payment service bears the risk of non-authorized payment transactions. The same solution exists in the United Kingdom.

CONCLUSIONS IN RESPECT OF “THE SPECIAL PROTECTION OF THE INSURED AGAINST FRAUD OR WITH REGARDS TO THE PAYMENT OF PREMIUM”

- a) In most countries there is no exclusive rule aimed at protecting the policyholder against fraud or in respect of premium payment. Nevertheless the general provisions of the penal codes, civil codes or unfair competition acts provide remedies. In few countries regulatory rules imposes on the insurer to take appropriate measures for a secure digital environment.*
- b) In practice anti fraud measures such as limited access system (user names and personal access codes, in combination with TAN cards, figure strings, private software, encryption etc.), firewalls, individual oral confirmation via mobile phone contact for money transfers abroad, warnings against phishing e-mails are widespread.*
- c) The issue of the evidence regime in respect of on-line insurance contracts (and in respect of legal acts or initiatives on the Internet) is not very clear. In particular the use of advanced electronic signature is not developed. The evidentiary value of mails or Internet records seems debatable.*
- d) The protection of personal and sensitive data is of utmost importance. Insurers must take the necessary measures for securing the privacy.*
- e) In case of payment effected via Internet, the payment service bears the risk of unauthorized payments.*

5. THE SPECIAL ROLE OF INSURANCE INTERMEDIARIES

5.1. In General

Insurance intermediaries may have their own website through which they sale insurance products (for example a bank acting as insurance intermediary).

Insurance Brokers may conclude insurance contracts on-line for and on behalf of their principals if they are empowered to do so.

Aggregators operate websites through which the prospective policyholders can make price (premium) comparison and buy the appropriate insurance product.

5.2. Specific rules for intermediaries when acting in Internet operation

Most of the national reports indicate that there are no “special” rules for insurance intermediation on-line (Australia, Belgium, Croatia, Denmark, France, Germany, Greece, Israel, Brazil, Japan, Mexico, Poland, Republic of Korea, Spain, Switzerland, Uruguay).

However it transpires from those reports that at least some of the rules provided for insurers or rules provided for insurance intermediaries with regards to off-line transactions are also applicable to those intermediaries when they conduct on-line operations.

Perhaps it is more appropriate to state that there are no (or very few) rules exclusively applicable to insurance intermediaries operating on-line.

5.2.2. Registration Requirement

It appears that insurance intermediaries must comply with the (general) registration requirement when the law provides it, but there is no particular registration requirement for being allowed to do insurance business on the Internet unless the law provides otherwise.

In the European Union, the Directive 2002/92/EC on insurance mediation Chapter II deals with the registration requirements (in particular Articles 3 to 8). In the draft IMD 2 the system is maintained (Chapter II about registration requirements- Article 3).

5.2.3. Information Duty

When the insurance contract is concluded with an insurance intermediary acting for and on behalf of the insurer, the information duty incumbent to the insurer may (and often will) be accomplished in most cases through that intermediary who is also required to give information in accordance with laws (if any) dealing with insurance intermediation.

The intermediary must inform the prospective policyholder on his identity and status (according to the IMD in force in the EU, for example).

The insurance intermediary engaged in e-commerce must fulfil his information duty on the Internet if the duty in question is not complied with otherwise.

5.2.4. Advice

In Germany and in France the insurance intermediary, in addition to its duty of information, is also under the duty to advise the prospective policyholder. But the German report states that the both insurer and intermediary will be exempted from this duty in case of distant contracts *i.e. contracts entered into between an entrepreneur and consumer solely by the use of means of distance communication (including without limitation letters, catalogues, telephone calls, faxes, e-mails and radio, teleservices and media services) in the context of a sales or service system organized for distant sales.*

5.2.5. Responsibilities with regard to Website

The insurance intermediary that runs a website must comply with responsibilities incumbent to a website operator.

5.2.6. Protection of Personal Data

The insurance intermediary that collects personal data during on-line business is required to take the necessary measures to protect these data.

The United Kingdom report contains detailed information on the personal data processing (*“Personal data” is defined as data relating to a living individual who can be identified from it or from it together with other data in the possession of or likely to come in the possession of the data controller; the expression “data processing” includes collecting, holding, storing or carrying out any kind of operations on it including among others matching, mining, use or erasure*). The UK Data Protection Act 1998 requires that the personal data be fairly and lawfully processed for specified and lawful purposes with a legitimate basis. The data subject’s informed consent or a specified necessity (in case of sensitive data such as health data the “express consent”) is required. For that reason the United Kingdom report recommends the use of a check box with in site disclosures about what the processing encompasses, who does it, what further processing could take place and with whom any data might be shared when obtaining the consent. Other data processing principles: Data must be adequate and relevant for the purpose, not excessive, kept not longer than needed, accurate and up to date. Further data must be kept secure. Adequate security measures should not be limited to technical measures only but should comprise also organisational ones (United Kingdom).

The Hong Kong report highlights that where the service provider utilises a third party website to advertise its services or insurance products there will be additional responsibilities to ensure third party website compliance: For example the service provider must ensure that adequate security measures are implemented, relevant information about his identity and for the identifications of his products is displayed and accurate and up to date etc. In Hong Kong the insurance intermediary’s use of personal data is subordinated to six data protection principles:

- Data should be collected by lawful means, for lawful purposes; data collection is necessary for that lawful purpose or directly related to it; data is adequate but not excessive in relation to that purpose; the data subject is informed on whether it is obligatory or voluntary to supply the data and any consequences, the purpose of data collection, the persons to whom the data must may be transferred, the data

subject's right to access to and request the correction of the data and the identity and contact details of the individual who is to handle any such request

- All practicable steps must be taken to ensure that the data is accurate (if inaccuracy is discovered, the data must be erased and not used and where inaccurate data is disclosed to a third party, that third party should be informed about the inaccuracy) and not kept longer than needed
- Data should not be used for a new purpose without the consent of the data subject
- All practicable steps must be taken to ensure that personal data held by a data user are protected against unauthorized or accidental access, processing, erasure, loss or use
- All practicable steps are taken to ensure that a person can ascertain a data user's policies and practices in relation to personal data, be informed of the kind of personal data held by the data user, be informed of the main purposes for which personal data held by a data user is used
- A data subject must be entitled to ascertain whether a data user holds personal data of which he is the data subject, request access to personal data and reasons should a request for access be refused and object to such a refusal, request the correction of personal data and reasons should a request for correction be refused and object to such a refusal.

In the European Union, the Directive 95/46/EC on data protection provides detailed rules :

According to Article 6, personal data must be processed fairly and lawfully; collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes; adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed; accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified; kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed.

According to Article 8 the processing of special categories of data (personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life) is prohibited (however exceptions exist). Article 10 sets forth the minimum information to be given to the data subject and Article 11 the information to be given where the data have not been obtained from the data subject. Data subject's right to object is dealt with in Article 14.

5.2.7. Moneys paid to insurance intermediaries

If the policyholder has paid the premium amount via the Internet (or otherwise) to the insurance intermediary empowered to collect the premium, the obligation to pay the relevant amount of premium to the insurer would be duly performed even if subsequently the intermediary becomes insolvent and is not able to transfer the sums collected to his principals (the insurers).

5.2.8. Evidence

In Costa Rica, if the intermediary has delivered pre-contractual documents via the Internet, he will be under the duty to file and store reliable, exact and retrievable proof that those documents were delivered.

CONCLUSIONS IN RESPECT OF “THE SPECIAL ROLE OF INSURANCE INTERMEDIARIES”

- a) In most countries there is no legal rule exclusively applicable to insurance intermediaries doing business on-line.*
- b) However, when the intermediary acts on behalf of the insurer, he must comply with the duties imposed on the insurer such as the pre-contractual information duty and with the duties incumbent upon himself as an insurance intermediary.*
- c) The insurance intermediary who is dealing with on-line insurance will be under the duty to take all the necessary measures in order to protect the personal and sensitive data.*