Insurance Mediation and Advertising of Insurance Products in the AIDA 2014 questionnaires

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I. Insurance Mediation

1. *Introduction.*

Insurance mediation - understood as an activity carried out by a third party compared to the company and directed to encourage the signing of policies of various nature - is regulated, but in various ways, in all jurisdictions here considered. Despite the obvious and physiological distances between the many regulatory regimes, it is still possible to find a common denominator. At the core of every legal regime, be it statutory or judicial (common law), the unifying function of the intermediary may be easily detected. The intermediary is commonly considered the person who directs his professional activity in support of insurance companies and at the same time that is required to support and facilitate the contractor and / or the insured in the selection and conclusion of the contract best suited to satisfying their needs.

In other words, there emerges a line that tends to conceive the intermediary not like a mere facilitator, possibly vested with executive tasks, but as a person vested with the role aimed at ensuring the effective satisfaction of the policyholder and of the insured.

Therefore, it is given to isolate a common feature, albeit in a diversified regulatory landscape, that somehow allows to carry out a unified reconstruction of insurance mediation, thus overcoming the peculiarities resulting from different cultural traditions and degree of sensibility for the social function of insurance. In the face of the reported

significant differences, the discussion of individual national regimes will be carried out by taking into account geographical areas, reserving the last paragraph to the regimes of the countries of the European Union and of the Mediterranean, characterized by a tendency towards homogeneity pursuant to the action of detailed acts of harmonization, whose coherent application and interpretation is ensured by the operation of a centralized European supervisory authority.

In the international scene, however, the tendency emerges, at the level of legal orders more sensible to the complexity and technical nature of insurance contracts, to align the rules governing the conduct of insurance intermediaries to those of financial market mediators, thus burdening them, as it happens in Italy (art. 183 of the Insurance Code), of a number of requirements that must be observed during the contact with the potential customer . Requirements that if not or not fully fulfilled may generate, under certain circumstances, the liability of the intermediary together with the one of the insurer.

2.*Countries of the southern hemisphere (Australia, New Zealand and South Africa).*

In these three jurisdictions insurance mediation is reserved to individuals and entities who have obtained a specific license and intermediaries are subject to the same authority that oversees insurance companies. Intermediaries, when not engaged in a generic advising activity, but when empowered with the capacity to execute the contract, are subject to special duties of care. Duties, it should be noted, that establish not only the statutory framework for the proper performance of the services of an intermediary and therefore for the purposes of the ascertainment of his liability towards the customer ("private law level"), but also for the purposes of the ascertainment of his liability towards the supervisor ("administrative/public law level").

In all three countries, supervisors may, in case of violation of the rules of conduct, impose fines and other disciplinary sanctions, reaching up to the revocation of the authorization to pursue the activity. At the time of first contact with the customer, intermediaries must deliver him an informative document and assist him in choosing the

most suitable solution for his needs, moreover informing him of their relationship with the insurer as specified by insurance regulations as well as by general law.

It should be noted that the South African legal order admits that the client who assumes to have been harmed by a violation of the rules of conduct by the intermediary or insurer, may contact the ombudsman and may obtain a decision for certain effects similar to that of a judge. Finally the South African report specifies that where an intermediary, representative or employee of an insurance company, breached any of their duties to a client, the client has an action. It depends on the facts in each case whether the intermediary will be liable or whether liability attaches to the intermediary and the insurer. For instance, where the intermediary or advisor was in fact an employee or a representative of the insurer in terms of an employment or other contract, the insurer is liable as well because the employee or representatives rendered services under the insurer's supervision.

3.*Countries of the Far East*

Also in the countries of the Far East - with the exception of Hong Kong where a self-regulatory regime prevails - the activity of intermediaries is subject to the supervision by the same authority that is responsible for insurance companies (Korea, Japan, Taiwan). In Korea and Japan general disciplines are provided for the submission of insurance contracts, while in Taiwan the pre-contractual activity is subject to the law of consumers in financial matters. In principle, however, the laws do not provide for diversification of the rules of conduct with reference to specific policies.

Both at the level of self-regulation and of statutory regulation, a duty to advise and get information about the policyholder's needs and goals is provided. With regard to the specific goal of the knowledge of the needs of the contractor, this is expected to be achieved through the delivery of questionnaires. The intermediary is subject to compliance with other standardized duties, such as the delivery of descriptive and illustrative documentation that, however, can not replace the necessary evaluation by the intermediary of the specificity of each case at hand (duty of personalization). Personalization is thus essential in order to ensure the satisfaction of the interests of the client.

Also in these countries, the violation by the insurance agent – as opposed to the one by the broker – of the rules of conduct is considered as a source of liability of the insurance company for whom the agent is acting in the concrete case.

4.Latin America

Particularly heterogeneous results the regulation of intermediaries with regard to their liability for breach of pre-contractual duties. In fact, while their task of facilitating the customer represents a common feature of the jurisdictions under examination, the regime concerning the liability of insurance intermediaries varies a lot. There are countries, like Mexico, where, relying on the responsibility of the insurer in the election of the intermediary or on the fact that the latter is not party to the insurance contract, only the insurer is in principle liable for the damage caused by the insurance intermediary; in others, as in Chile, the tendency is to exclude the possibility that the insurer may be liable for the acts of the intermediary, while this possibility is limited to exceptional circumstances under Argentinian law, which does not contain any statutory provision on this point.

The activity of insurance mediation is - with the exception of Uruguay – the object of an intense supervision, exceptionally - like in Brazil - with a selective character, as limited to only certain kind of operators. All reports - Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Mexico, Peru - highlight the existence of specific rules that require the intermediary to know the client, act impartially by orienting his choices in the most appropriate way, having regard to the actual situation. The work of the intermediary, then, is appreciated as a useful tool to compensate for such difficulties in understanding that the customer has to face when approaching a technically complex contract such as the insurance contract.

In some cases, the regime - as in Argentina - places a strong emphasis on the duty to advise the customer by the intermediary, which duty seems to represent the cornerstone of all the duties of the operator, who has to collect information about the customer and his needs and to provide the selection of the most appropriate and convenient contract. Sometimes, the duties of the intermediary are supplemented for some specific type of

intermediary, as it is the case under the law of Costa Rica, where the broker has not only the duty to hand over standard documentation to the client, but also to deliver him at least three different quotes by various insurance companies for the coverage of the given risk. The duty to support the client by the intermediary, if not provided for by a specific statutory discipline, is guaranteed, through the interpretation of general law by the judges, as it happens in the Uruguayan legal order.

5. *E.U. member States and Mediterranean countries*.

Proceeding by geographical areas we can, therefore, pass now to the examination of the last set, consisting of the E.U. member States and the countries of the Mediterranean area widely understood.

So, both those countries which are members of the European Union - where a convergence of the law is mandatorily required - as well as those which are not members, but are however related to the E.U. by reason of territorial contiguity and special international agreements.

All countries of the area, including those outside the Union - Serbia, Switzerland, Israel, Turkey - provide administrative control on the activity of insurance mediation and subordinate its commencement to an authorization, which marks the subjection of the operators to an administrative supervision which includes also acts of interpretation and integration of the applicable regulations.

Supervision, however, is particularly significant with regard to the States belonging to the European Union, since the mechanism of the single passport and the principle of the home country control, makes it operating beyond the single territory of the state of origin, thus when the intermediary acts by way of freedom of services and/or right of establishment.

At the E.U. level it may be observed that the control over intermediaries is frequently the task of the same authority that oversees insurance companies; authority which, not infrequently, is also competent for the supervision of further segments of the financial markets, as it is the case in Germany, the Netherlands and recently Italy.

Virtually all disciplines of the area here considered provide - at the pre-contractual stage - a complex duty of care borne by the intermediary. In fact, the operator must notify to his customer - in the most appropriate way - a range of data and information on himself, the contract, his position with respect to the insurer. The actual appropriateness of this activity, however, presupposes a thorough knowledge of the customer, which involves the analysis of his needs, characteristics and specificities. Knowledge, it should be noted, that fades only with respect of particular cases, in which the relevance of bargaining powers excludes - as in the case of “large risks” under French and Italian law - the existence of a need for protection of the customer. All regulations of the area enhance the function of the concrete specification and adaptation of the informative burden born by the intermediary, imposing on the latter duties of delivery and disclosure of documents and of continued assistance to the client even after the conclusion of the contract.

It should be noted, however, that the correctness of the conduct of the intermediary and the rules which the first must abide are derivable in some jurisdictions - such as Germany, France, Turkey – not only from the specific regulation of insurance but also from further regulatory legal frameworks, such as provisions of the laws for consumer protection.

With regard to the consequences of the violation of the rules governing pre-contractual disclosure, the liability of the insurer may only derive from negligence or misconduct of the companies' agent or employee and not from misconduct of a broker.
As regards the liability of the insurer for contractual breaches by the intermediary tied to the first by a steady relationship, there are however several solutions among jurisdictions. Significant diversification of this is the discrepancy that exists in the Scandinavian peninsula between the Danish and Finnish regime: the first excludes the liability of the insurer for the acts of the intermediary, while the second - placing itself on the same line as German and Polish law - admits it. Among the laws that provide the liability of the principal for acts of the agent or stable cooperator of the company, there are some - such as German law - which provide for a joint and several liability of the company for the conduct of the intermediary, thus allowing the insured to bring his lawsuit against the more solvent party.

II. Advertising of Insurance Products

1. *Introduction.*

All the reports received confirm that advertising of insurance products shall be fair and honest and that all the considered jurisdictions contain prohibitions against false or misleading statements and dishonest conduct.

However, there are relevant differences. While in some States we do have specific provisions on advertising of insurance products, in others, general rules of law apply. Moreover the degree of protection of the consumer is different in the various jurisdictions under examination.

In some jurisdictions the rule that the advertisement shall be consistent with the information and provisions contained in the documents concerning duties and rights arising under the contract is expressly established by the law.

Finally only few jurisdictions provide specific rules on comparative advertising.

2. *Countries of the southern hemisphere (Australia, New Zealand and South Africa)*

In Australia ASIC (Australian Securities and Investments Commission) ensures that the advertising of financial and insurance products is fair and honest. The Corporation Act contains prohibitions against false or misleading statements and dishonest conduct. A statement or representation in advertising or promotional material will be misleading and deceptive if it creates a misleading impression in the mind of the consumer irrespective of whether the promoter or maker of the statement or representation intended to mislead or deceive or whether or not the consumer was actually deceived.

ASIC has a wide range of powers to take action for dealing with breaches of the misleading and deceptive conduct prohibition which include seeking an injunction to

stop the advertisement, issuing a stop order on initiating a compensation claim or seeking an order to redress for losses by consumers.

Interestingly, in New Zeland, there are provisions regulating comparative advertising. Comparisons in advertising must not mislead or deceive consumers and should fairly and properly identify the competitors.

A detailed regulation on advertisement of financial (including insurance) products is provided by the law of South Africa. Accordingly, if the advertisement contains performance data (including awards and rankings), it has to include references to their source and date; if it contains forecasts, it has to contain support in the form of clearly stated basic assumptions (including but not limited to any relevant assumptions in respect of performance, returns, costs and charges) with a reasonable prospect of being met under current circumstances.

Moreover if the advertisement refers to returns or benefits which are dependent on the performance of underlying assets or other variable market factors, it must contain clear indications of such dependence and a warning statement about risks involved in buying or selling a financial product.

In case of violation of these rules, apart from administrative sanctions by the competent body, a client who had acted to his detriment because of advertising that was misleading has recourse against the advertiser.

No preventive controls are provided in Australia, New Zealand and South Africa.

3. *Countries of the Far East*

According to Taiwan Law, a financial services enterprise, in providing financial products or services, shall exercise the due care of a good administrator. A financial services enterprise, in publishing or broadcasting advertisements or carrying out solicitation or promotional activities, shall not engage in falsehood, deception, concealment, or other conduct sufficient to mislead another party, and shall verify the truthfulness of the content of its advertisements.

Similar provisions are contained in the law of the other countries pertaining to the Far East.

In Japan, according to the Comprehensive Guidelines for Supervision of Insurance Companies, both misleading representations of superiority and misleading representations of advantage are prohibited in explicit terms. Specifically, it is prohibited that, (i) at the time of showing the superiority of the guaranty of certain insurance products, misunderstanding is caused that the quality is extremely good by not referring in plain terms to other products inseparably related to them; (ii) at the time of showing the advantage of transactions, misunderstanding is caused that they are extremely good by not showing restrictive conditions in plain terms, etc.; (iii) representations are made without objective facts; (iv) representations are made using terms meaning the highest grades or other terms implying ranks, or terms to say that they are exclusive products or in a relatively superior position, without clarifying their grounds.

With specific reference to insurance contracts regulated by the Financial Instruments and Exchange Act it is necessary to show plainly certain important matters affecting the judgment of customers such as those concerning commissions paid by them and risks to be covered, and it is prohibited to make representations regarding the forecast of profits, etc. which are significantly different from facts or make representations which cause considerable misunderstanding to customers.

A strict regulation of advertising of insurance products is provided by the law of Hong Kong, as quotation of numerical examples of proceeds are prohibited and only authorized sales proposals and illustrations may be used.

The consequence which may ensue from non-performance of transparency and fairness duties in the advertisement in the countries of the Far East here considered are administrative fines.

4. *Latin America.*

According to the law of all the countries here considered the advertising of insurance product shall be fair and not misleading for the customer. Thus, under Argentinian law, advertising containing false, deceitful or ambiguous information or which may raise misunderstanding about the nature of the operations, conduct or financial position

of an insurer or in respect of contracts entered into and the use of improper means is prohibited.

In Brazil there are no specific rules on advertising insurance products. The rules regarding advertising are provided for by the Brazilian Consumer Code and are applied to all insurance contracts concluded with consumers. The advertising shall be disseminated in such a way that consumers will be able to easily and immediately identify it as such.

There is a self-regulatory regime for advertising (CONAR - Brazilian Advertising Self-Regulation Council), which evaluates under request of an interested party advertisements and impose sanctions – when the advertisement is considered to be in violation of the Brazilian Advertising Self-Regulation Code.

It is worth to note that the Brazilian Consumer Code considers as a crime the non-performance of transparency and fairness duties, i.e. to announce or to promote advertising knowing, or ought to know, that it is misleading or abusive. The penalty being from three months to one year's imprisonment and a fine.

Mexican law contemplates an ordinance prepared by the Insurance and Surety Commission in which requirements for Insurance products are mentioned. Similarly a specific regulation is provided under Chilean law by the Superintendencia de Valores y Seguros (so called “Circular N° 1.457”).

An interesting provision is contemplated by Peruvian law (Ley del Contrato de Seguros), according to it where there are differences between the conditions of the insurance shown in the advertisement and the content of the policy, the conditions most favorable to the insured prevail.

5. *E.U. member States and Mediterranean countries*.

In the absence of E.U. uniform rules on this subject, it will not come as a surprise that member States regulate advertising of insurance products in different manners. Moreover, while in some States we do have specific provisions for it, in others, general rules of law apply.

So, in Germany there are no specific legal provisions to explicitly cover advertisement activities of insurers. Insofar the Act Against Unfair Competition (Gesetz gegen

den unlauteren Wettbewerb) applies. Pursuant to the general clause, all unfair commercial practices shall be impermissible. Unfair practices are for example the use of commercial practices that are suited to impairing the freedom of decision of consumers or other market participants through applying pressure, the exploitation of a consumer's mental or physical weaknesses, the use of covered advertisement, the use of price reductions, premiums or gifts and promotional contest or games of an advertising nature (if their conditions remain intransparent), the discrediting or denigration of competitors and their products. Competitors are furthermore to not use practices that are susceptive of misleading the public and are not to mislead the public by omitting material facts in their publicity.

Whilst the insurance industry insofar is subject to the same standards as all other industries in Germany concerning their publicity, there is a particularity insofar as the insurance industry has given itself Insurance Competition Guidelines (Wettbewerbsrichtlinien der Versicherungswirtschaft, WettbRL).

Furthermore, it is possible that the insurance supervisory authority regulates the form that advertisements may take by way of passing guidelines (Rundschreiben).

In Italy, the advertising of insurance products is specifically regulated by the law. Insurance products (art. 182, Insurance Code), as well as of financial products (art 101, para 3, TUF), shall be recognizable and consistent with the information and provisions contained in the informative note and the other documents concerning duties and rights arising under the contract.

Moreover IVASS regulation no. 35 of 2010 provides that insurance products shall be advertised by taking into account the principles of clarity and fairness. The advertising message shall be so designed as not to be misleading with respect to the characteristics, nature, guarantees and risks of the product offered.

Interestingly expressions such as "guarantees", "guaranteed" or similar terms which suggest that there is a right to a certain benefit for the insured person or for the person having an interest in the insurance benefit can be used only if the guarantee is issued by the insurance undertaking.

Under Turkish law, insurance companies and intermediaries shall not design their brochures, explanatory notices, other documents and their advertisements and commer-

cials in a way that results in an understanding outside the limits and scope of the rights and benefits which they shall provide to the insured, and shall not make statements to persons or institutions that are unreal, misleading, or that give rise to unfair competition. This provision aims to protect the insured against advertisements that may cause a different understanding regarding the actual content and scope of the product and also to prevent statements that may result in unfair competition between insurance companies.

Similar provisions are contemplated in United Kingdom, Spain, France, Belgium and Denmark.

Interesting considerations on comparative publicity are contained in the Belgian report. According to local law comparative publicity is only allowed if it compares goods or services that provide for the same needs or are aimed at the same goal and if it compares in an objective manner one or more essential, relevant, verifiable and representative characteristics (possibly including the price) of these products. Comparative publicity may not lead to a dishonest advantage, may not pertain to imitation goods and may not be misleading, confusing or denigrating.

In practice insurers seem to restrain from comparative publicity concerning insurance products. They probably realize that the exact conditions and provisions of an insurance product depend highly on the individual situation (risk profile), what makes it almost impossible to give an objective comparison of insurance products.

In the jurisdictions under examination no preventive controls on insurance advertisement are provided.