

PROTECTION OF THE MICROINSURANCE CONSUMER: CONFRONTING THE IMPACT OF POVERTY ON CONTRACTUAL RELATIONSHIPS

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ABSTRACT

This paper provides a legal analysis of the contractual vulnerability of the microinsurance consumer and in so doing, studies mechanisms that effectively protect such consumer. Indeed, the microinsurance consumer is in a particularly vulnerable contractual position as consequence of his or her "poverty". Owing to "poverty", the microinsurance consumer typically lacks the essential capabilities required to provide free and informed consent to enter into, to perform and demand the performance of, the insurance contract and to complain and seek remedies in appropriate forums. Accordingly, the microinsurance consumer may not be able to benefit from the insurance contract and microinsurance may have limited utility. Consumer protection is essential to address this discrepancy. Consumer protection should be based on a legal framework and should place obligations on States and insurers, reinsurers and intermediaries who participate in the value chain of microinsurance.

INTRODUCTION

The "poor"² are particularly vulnerable to risk. They do not generally have access to effective risk management strategies. This situation leads them into

a poverty trap³. Indeed, risk management is an essential element in addressing vulnerability and poverty (especially given that vulnerability perpetuates and accentuates "poverty", and vice versa⁴).

There is evidence that insurance is an appropriate risk management strategy as it confers more control to the "poor" over their lives and therefore satisfies an essential element of leaving the poverty trap⁵. So could microinsurance be an effective way to fight poverty?

In international law, the fight against poverty is translated in the realisation of human rights, as the existence of poverty is considered as "a negation of human rights"⁶.

Taking the alleged benefits of microinsurance at face value, it could be an appropriate tool to realise certain economic, social and cultural rights, in particular, the right to social security, to have access to health care services and to an adequate standard of living.

³ The International Association of Insurance Supervisors (IAIS) describes it as: "Microinsurance is insurance that is accessed by low-income population provided by a variety of different entities, but run in accordance with generally accepted insurance practices (which should include the Insurance Core Principles). Importantly this means that the risk insured under a microinsurance policy is managed based on insurance principles and funded by premiums. The microinsurance activity itself should therefore fall within the purview of the relevant domestic insurance regulator/supervisor or any other competent body under the national laws of any jurisdiction". IAIS, *Issues in regulation and supervision of microinsurance*, approved in Basel on 31 May 2007, p.10.

⁴ F-X. ALBOUY, *L'assurance, cela sert d'abord à réduire la pauvreté*, in *Revue Risques* No.77, March 2009; D.NARAYAN, L. PRITCHETT and S. KAPPOR, *Moving out of poverty: Success from the bottom up*, The World Bank, 2009; BANQUE MONDIALE, *World Development Report (WDR): Attacking poverty*. New York, Oxford University Press, 2000, p.146.

⁵ For example, on this point David RODMAN notes that "(L) it is in the nature of financial services to give people more control over their financial circumstances", D. RODMAN, *Due Diligence- An impertinent inquiry into microfinance*, Centre for Global Development, 2012, p. 177. D. COLLINS, J. MORDUCH, S. RUTHERFORD and O. RUTHVEN, *Portfolios of the Poor -How the World's Poor Live on \$2 a Day*, Princeton, 2009. Regarding the relationship between the role of insurance to alleviate poverty, see: F-X. ALBOUY, *L'assurance, cela sert d'abord à réduire la pauvreté*, in *Revue Risques* No.77, March 2009; P. M. LIEDTKE, *L'assurance et son rôle prépondérant dans les économies modernes*, in *Revue Risques* No.77, March 2009; P. MOSLEY, S. GARIKIPATI, S. HORRELL, J. JOHNSON, J. ROCK, A. VERSCHOOR, *Risk and underdevelopment: Risk management options and their significance for poverty reduction*, Report to Department of International Development (DFID) (R7614), Program on Pro-Poor Growth, October, 2003, pp.110-124.

⁶ SOUS-COMMISSION DE LA PROMOTION ET DE LA PROTECTION DES DROITS DE L'HOMME, CONSEIL DES DROITS DE L'HOMME DES NATIONS UNIES, *Projet de principes directeurs « Extrême pauvreté et droits de l'homme: les droits des pauvres »*, in *Résolution 2006/9, Application des normes et critères relatifs aux droits de l'homme dans le contexte de la lutte contre l'extrême pauvreté*, adopted on 24 August 2006, A/HRC/Sub.1/58/36, 11 September 2006.

¹ This paper is a brief summary of Andrea's PhD, which is entitled "The dilemma of the consumer of microinsurance" and will be submitted in the winter of 2012 at the Paris Dauphine University. Andrea is a Colombian lawyer specialised in Insurance Law (Pontificia Universidad Javeriana of Colombia), in International Economic Law (University Paris 1-Panthéon Sorbonne) and International and European Business Law (Paris Dauphine University). Some of findings of this paper (which are further developed in her PhD) can also found in the study: "Microseguros: Análisis de experiencias destacables en Latinoamérica y el Caribe", which Andrea co-authored with Luisa Fernanda Montoya. In this study Andrea lead the analysis of the regulatory framework applicable to microinsurance in Brazil, Colombia, Guatemala, Mexico, Peru and Venezuela. Andrea could be contacted at: andreacamargog@gmail.com.

² In this paper we adopt the term "poor" instead of "low income population" or "low income households" as we consider that those terms restrict the multidimensional meaning of poverty, as they analyse poverty only from the perspective of income.

If so, the propagation of microinsurance could benefit not only the “poor” (by helping them to realise their human rights) but also States (as the latter must fulfil certain international, regional and national obligations to respect, protect and ensure human rights⁷). In addition, microinsurance could benefit the transnational corporations and other business enterprises who participate in microinsurance as “microinsurers”, “microinsurance reinsurers” and “microinsurance intermediaries”, not only owing to the profits that microinsurance can generate, but also because businesses have responsibilities in relation to human rights⁸.

Seen in this context, it would seem that microinsurance can be beneficial for consumers and stakeholders alike, a “win-win” situation.

However, the lack of access to effective mechanisms of risks management is not the only deprivation that the “poor” suffer. In fact, the “poor” suffer (and as far as this paper is concerned, the microinsurance consumer suffers⁹) other deprivations that are interrelated, such as: illiteracy, the scarcity of access to education, their lack of awareness of rights and of the business vernacular, their lack of proximity to urban centres, of awareness of the benefits of insurance, of financial services in general, of confidence in products with a deferred benefit, of experience in the formal economic, social, political and legal processes, and of access to justice¹⁰. Consequently, “poverty” amplifies the “standard” contractual vulnerability (that characterises the traditional consumer of insurance

products) leading to a “particular” contractual vulnerability of the microinsurance consumer¹¹.

Bearing this in mind, this paper has three primary objectives:

First, to prove that “poverty” amplifies the contractual vulnerability of the microinsurance consumer. Note that the traditional consumer of insurance products suffers a “standard” contractual vulnerability, as there is an asymmetry of information and an inequality of power between the insurance professional¹² and such consumer. Yet the degree of such imbalances that the microinsurance consumer experiences, is amplified as a

¹¹ Contractual vulnerability is defined in this paper as: the fragile state that a party to a contract experiences as a consequence of a deficiency, which surfaces in a relationship of unequal economic power. This deficiency is revealed in the contractual relationship by an asymmetry of information and an inequality of power. Contractual weakness is generally *juridique du contrat égalitaire* and *théorie de l'autonomie de la volonté*). The English system also flows from the basic presumption that the contracting parties are the best defenders of their interests (*caveat emptor*). For a detailed study, see the analysis undertaken in Andrea's PhD.

¹² The notion of the insurance professional is used in this paper to identify the insurer and the insurance intermediaries that are professionals, meaning: “*La qualité de professionnel des uns et des autres leur impose des obligations en matière d'information et de conseil à l'égard des profanes qui sont en face d'eux*”. GROUTEL, *Traité des assurances*, p.7., N.12. There are other entities that currently “intermediate” microinsurance contracts that are not professionals in this sense and are therefore not regulated or supervised. In this paper such entities are described as non-professional insurance intermediaries. The reason for adopting the term “intermediaries” instead of the term “distribution channels” is because the contracts are intermediated and not distributed. J.BIGOT and D. LANGÉ (Direction), *Traité de droit des assurances*, Tomo 2, *L'intermédiation d'assurance*, Ed. LGDJ, 2009, p.1.

¹¹ In this paper “Insurance Regulation” should be viewed as embodying all type of norms (laws, resolutions, circulars, etc.), which seek to regulate the insurance activity and the insurance contract. Therefore, Insurance Regulation includes not only the prudential, market conduct and product regulation rules, but also consumer protection rules and regulations in relation to the insurance contract. The term “consumer protection rules” is misleading, as with its use, one tends to forget that Insurance Regulation exists to protect consumers. seen as a “disturbing exception”. For instance in the French system, and in the countries that have adopted a similar system (the majority of Latin American countries), there is a general presumption that contracting parties are equal and sufficiently capable to assume contractual obligations and defend their interests (“*mythe juridique du contrat égalitaire*” and “*théorie de l'autonomie de la volonté*”). The English system also flows from the basic presumption that the contracting parties are the best defenders of their interests (*caveat emptor*). For a detailed study, see the analysis undertaken in Andrea's PhD.

¹² The notion of the insurance professional is used in this paper to identify the insurer and the insurance intermediaries that are professionals, meaning: “*La qualité de professionnel des uns et des autres leur impose des obligations en matière d'information et de conseil à l'égard des profanes qui sont en face d'eux*”. GROUTEL, *Traité des assurances*, p.7., N.12. There are other entities that currently “intermediate” microinsurance contracts that are not professionals in this sense and are therefore not regulated or supervised. In this paper such entities are described as non-professional insurance intermediaries. The reason for adopting the term “intermediaries” instead of the term “distribution channels” is because the contracts are intermediated and not distributed. J.BIGOT and D. LANGÉ (Direction), *Traité de droit des assurances*, Tomo 2, *L'intermédiation d'assurance*, Ed. LGDJ, 2009, p.1.

⁷ *International Covenant on Civil and Political Rights*, 16 December 1966; *International Covenant on Economic, Social and Political Rights*, 16 December 1966.

⁸ For a deeper analysis on this point please request information from the author as this is a chapter of the PhD referred to in footnote 1.

⁹ In this paper we adopt the concept of the microinsurance consumer in reference to the concept of “insurance consumer”, which is defined as “*toute personne souceptible de beneficier d'une couverture d'assurance*”. M. FONTAINE, *Droit des Assurances*, 3 ed, Brussels, Larcier, 2006, p. 46. Therefore, the concept of “microinsurance consumer” includes the policyholder (who enters into the contract and who pays the premium), the insured (who has the insured interest) and the beneficiary (who receives the benefits of the cover). One individual can act in all three capacities, but it is also possible that they are performed by different individuals.

¹⁰ COMMISSION DES DROITS DE L'HOMME, *La réalisation des droits économiques, sociaux et culturels, Rapport final sur les droits de l'homme et l'extrême pauvreté, présente par le Rapporteur spécial, M. Leandro Despouy*, E/CN.4/Sub.2/1996/13, 28 June 1996, n. 115. GENERAL ASSEMBLY - UNITED NATIONS, *Extreme poverty and human rights, Report of the Special Rapporteur on extreme poverty and human rights - Access to Justice*, A/67/278, 9 August 2012.

consequence of the deprivations that are embodied in his or her “poverty”. (Part 1)

Second, to prove that legal techniques developed to address the “standard” contractual vulnerability of the traditional insurance consumer, sometimes fall short of protecting the “particular” contractual vulnerability of the microinsurance consumer. Indeed traditional techniques, which are available under Insurance Regulation¹³, are sometimes inappropriate and insufficient to address the “particular” vulnerability of the microinsurance consumer, as is illustrated by the analysis of the sophisticated regulatory frameworks applicable to microinsurance in two countries of Latin America (Brazil and Colombia). (Part 2)

Third, this paper proposes certain mechanisms to restore the appropriateness of traditional protection techniques immediately prior to the entry into, and during the term of, the contract. These mechanisms fall into two categories: firstly, those that aim to address asymmetry of information by (i) considering the deprivations of the microinsurance consumer in the performance of the disclosure obligations placed on the insurer and the intermediary; and (ii) helping microinsurance consumers reach the same level of “non-understanding” as the traditional insurance consumer, principally by the promotion of financial education. Secondly, those seeking to address the inequality of power between parties by: (i) holding “all” the stakeholders of microinsurance to account; and (ii) creating appropriate complaints procedures and consumer associations to promote the defence of microinsurance consumers’ interests.

The originality of this proposal is that it flows from a rights-based approach, whereby the mechanisms proposed are grounded on legal obligations placed on insurers, intermediaries and States in favour of the microinsurance consumer as an “insurance consumer”, as a “citizen” and as a “human being”. Given this, the implementation of these mechanisms should not be viewed as voluntary, but as mandatory, which should be taken into account in their implementation (and in the economics of writing microinsurance products). (Part 3)

¹³ In this paper “Insurance Regulation” should be viewed as embodying all type of norms (laws, resolutions, circulars, etc.), which seek to regulate the insurance activity and the insurance contract. Therefore, Insurance Regulation includes not only the prudential, market conduct and product regulation rules, but also consumer protection rules and regulations in relation to the insurance contract. The term “consumer protection rules” is misleading, as with its use, one tends to forget that Insurance Regulation exists to protect consumers.

1. THE “PARTICULAR” CONTRACTUAL VULNERABILITY OF THE MICROINSURANCE CONSUMER

Microinsurance is characterised by aiming to provide the “poor” with access to insurance. As a consequence, the “poor” are in an unprecedented situation as they are seen as potential consumers, and in this particular context, potential consumers of insurance products.

The “poor” are characterized by being in a situation of “poverty”. However, it is important to understand that poverty is not restricted to deprivation of income. Poverty is a multidimensional deprivation where the opportunities of individuals play an important role¹⁴. Poverty encompasses deprivations in other non-material dimensions, for instance the deprivation of education, of social inclusion, of employment, of health care, of housing, of access to justice, of representation, amongst others. Such deprivations are a consequence of a broad deprivation that is embodied in the concept of poverty: the deprivation of substantial freedoms to choose the basic functionings to live a life that one has reason to value¹⁵. Such basic functionings include: being literate, enjoying good health, “being well nourished, being adequately clothed and sheltered, avoiding preventable morbidity, and so forth, to more complex social achievements such as taking part in the life of the community, being able to appear in public without shame, (...)”¹⁶. The deprivation of substantial freedoms impedes the poor’s participation in the economic, social, political and legal processes, not only because they do not have access, but most importantly, because they lack the capabilities to participate freely in those processes.

In the context of human rights, poverty is defined as a negation of human rights and in particular, as:

¹⁴ This paper does not intend to analyse the concept of poverty in depth, but adopts the concept of poverty advocated by Amartya Sen and adopted by international organisations such as the United Nations Development Programme (UNDP).

¹⁵ Poverty is “the failure of some basic capabilities to function – a person lacking the opportunity to achieve some minimally acceptable levels of these functionings”. Functionings are the beings and doings that the individual is able to enjoy and could be converted into capabilities to function depending on personal circumstances (i.e. age, gender, proneness to illness, disabilities, etc.) and social surroundings (i.e. access to public health and education services, physical and social environments, epidemiological characteristics, market opportunities, etc.). Capabilities of individuals are the combination of functionings that they can choose according to their opportunities. Therefore capabilities are substantial freedoms. A. SEN, *Development as freedom*, Oxford University Press, 1999, p. 36 and 75; A. SEN, *Capability and well being*, in M. NUSSBAUM, A. SEN, *The quality of Life*, 1993, p. 15-31.

¹⁶ A. SEN, *The political economy of targeting*, in D. VAN DE WALLE and K. NEAD, *Public spending and the poor*, John Hopkins University Press, 1995, pp. 15-16.

" (...) a human condition characterized by sustained or chronic deprivation of resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights"¹⁷

So poverty is a multidimensional phenomenon where all the human rights, civil, political, economic, social and cultural, are interdependent and indivisible¹⁸, in the same manner that all deprivations are interdependent and indivisible¹⁹. Indeed, The Committee on Economic, Social and Cultural rights was emphatic in endorsing a multidimensional understanding of poverty as this multidimensionality "reflects the indivisible and interdependent nature of all human rights"²⁰.

This is illustrated if we consider this statement of a "poor" person in Latin America:

"Without shelter, drinking water, electricity, adequate food, work, a minimum income or other resources, one simply cannot conceive of living a life in good health, having one's

children go to school, participating in local activities, including annual festivities or even birthday parties, participating in any political process as citizens, or even having one's family life respected."²¹

Amartya Sen, a Nobel Prize winner in Economics, argues that the substantial freedoms include basic capabilities like "being able to avoid such deprivations as starvation, undernourishment, escapable morbidity and premature mortality, as well as the freedoms that are associated with being literate and numerate, enjoying political participation and uncensored speech and so on"²². Substantial freedoms include effective instruments - "instrumental freedoms" - which enhance those basic capabilities. The five instrumental freedoms that (not only contribute to the capabilities of individuals, but also serve to complement one another) are²³: political freedoms²⁴, economic facilities²⁵, social opportunities²⁶, transparency guarantees²⁷ and protective security²⁸.

On studying Amartya Sen's approach to the human rights framework, we realize that instrumental freedoms can be translated into the realisation of human rights, such as: the rights to life, to personal integrity, to freedom of speech, for a person to be recognised before the law and to be registered, to take part in political affairs, to participate in social and cultural life, to justice, to privacy, to protection of the

¹⁷ SOUS-COMMISSION DE LA PROMOTION ET DE LA PROTECTION DES DROITS DE L'HOMME, CONSEIL DES DROITS DE L'HOMME DES NATIONS UNIES, *Projet de principes directeurs « Extrême pauvreté et droits de l'homme: les droits des pauvres »*, in Résolution 2006/9, Application des normes et critères relatifs aux droits de l'homme dans le contexte de la lutte contre l'extrême pauvreté, adopted on 24 August 2006, A/HRC/Sub.1/58/36, 11 September 2006, n. 1.

¹⁸ CONFÉRENCE MONDIALE SUR LES DROITS DE L'HOMME, *Déclaration et programme d'action de Vienne*, 12 July 1993, in *Rapport de la Conférence mondiale sur les droits de l'homme*, Vienne 14-25 June 1993, p. 5; SOMMET MONDIAL POUR LE DEVELOPPEMENT SOCIAL, *Déclaration de Copenhague sur le développement social de 1995* adopted on 12 March 1995, A/CONF.166/9, 19 April 1995, n. 15b. CDESC, *La pauvreté et le Pacte international relatif aux droits économiques, sociaux et culturels*, *Déclaration du Comité des droits économiques, sociaux et culturels à l'intention de la troisième Conférence des Nations Unies sur les pays les moins avancés*, adopted on 4 May 2001, Annexe VII, p. 192, n. 10; J. WRESINKI, *La grande pauvreté, défi pose aux droits de l'homme*, Intervention à la Commission des Droits de l'homme des Nations Unies pendant sa 43^{ème} session, Genève, 20 February 1987, E/CN.4/1987/SR.29.

¹⁹ ASSEMBLÉE GÉNÉRALE DES NATIONS UNIES, *Résolution 59/189, Droits de l'homme et extrême pauvreté*, 20 December 2004, A/RES/59.186; CONSEIL DES DROITS DE L'HOMME, *Rapport de l'experte indépendante sur la question des droits de l'homme et de l'extrême pauvreté*, Madame Magdalena Sepúlveda Carmona, sur le projet de principes directeurs sur l'extrême pauvreté et les droits de l'homme, A/HRC/15/41, 6 août 2010, n. 2; J. FIERENS, *La violation des droits civils et politique comme conséquences de la violation des droits économiques, sociaux et culturels*, RBDI, 1991/I, p. 46.

²⁰ "Today the term (poverty) is usually understood more broadly as the lack of basic capabilities to live in dignity. This definition recognizes poverty's broader features, such as hunger, poor education, discrimination, vulnerability and social exclusion. The Committee notes that this understanding of poverty corresponds with numerous provisions of the Covenant (International Covenant on Economic, Social and Cultural Rights)".

²¹ COMMISSION DES DROITS DE L'HOMME, *La réalisation des droits économiques, sociaux et culturels*, *Rapport final sur les droits de l'homme et l'extrême pauvreté*, présenté par le Rapporteur spécial, M. Leandro Despouy, E/CN.4/Sub.2/1996/13, 28 June 1996, n. 116.

²² A. SEN, *Development as freedom*, Oxford University Press, 1999, p. 36.

²³ A. SEN, *Development as freedom*, Oxford University Press, 1999, p. 38-40.

²⁴ Political freedoms refer to the opportunities of individuals to determine their government, the principles by which they are governed, the ability to scrutinise authorities, the exercise of freedom of speech and generally being able to exercise civil and political rights.

²⁵ Economic facilities relate to the "opportunities that individuals respectively enjoy to utilize economic resources for the purposes of consumption, or production, or exchange". In this context, economic entitlements are very relevant, such as access to financial services.

²⁶ Social opportunities denote "the arrangements that the society makes for education, health care and so on, which influence the individual's substantive freedom to live better". This also covers provisions for employment and housing. These opportunities are important, not only on a private level, but also to foster more effective participation in economic and political activities.

²⁷ Transparency guarantees are defined as "the freedom to deal with one another under guarantees of disclosure and lucidity", which are essential aspects of social interaction. Amartya Sen notes that this instrumental freedom has a clear role in preventing financial irresponsibility.

²⁸ Finally, protective security relates to the social safety nets, which prevent vulnerable individuals from being "reduced to abject misery, and in some cases even starvation and death".

family, to a decent standard of living, to health, to education, to social security, to work, amongst others²⁹.

Despite these deprivations and negations of human rights, the “poor” are nowadays seen increasingly as consumers of financial services. According to the World Bank, an estimated 150 million new financial service consumers were being added to the global economy each year until the onset of financial crisis in late 2007³⁰. The same rapid expansion has been taking place in microinsurance; in 2007, the study entitled *The Landscape of Microinsurance in the World's 100 Poorest Countries* published by The Microinsurance Centre, concluded that 78 million people were covered by microinsurance, whereas by 2009, the *Lloyd's 360 Risk Insight - Insurance in developing countries: Exploring opportunities in microinsurance* study, found that the figure had risen to 135³¹. The second volume of the “*Microinsurance Compendium, Protecting the Poor*” puts the figure today at 500 million³². Growth projections remain positive. In the recent study: *Microinsurance Network Survey: Involvement of commercial insurers in Microinsurance*, insurance companies representing 20% of the microinsurance market acknowledged that the microinsurance business has the potential for a 100% increase in size over the next three years³³, whilst the former microinsurance director of Allianz, Michael Anthony, estimated that by 2020, 5% of “clients” will be “very low income”³⁴. In addition, in Brazil alone it was projected that by 2016, 100 million new microinsurance consumers will be integrated into financial services thanks to microinsurance³⁵.

When confronted with such rapid expansion, we have two opposing thoughts.

On the one hand, we must promote access to risk management strategies, which are seen as an efficient way to protect the “poor”. If we apply Amartya Sen's conceptual framework of poverty, access to insurance can be seen as part of the so-called: “*instrumental freedoms*”, notably economic possibilities, as access to financial services has an important impact on economic entitlements³⁶, and protective security to individuals, who “*can be typically on the verge of vulnerability and can actually succumb to great deprivation as a result of material changes that adversely affect their lives*”³⁷. In terms of human rights, microinsurance could constitute an appropriate tool to achieve the right to social security, to have access to health care services, and to an adequate standard of living. In fact thanks to microinsurance, the “poor” (who are the object of special measures regarding the realisation of human rights³⁸) can gain access to available, affordable and quality health care; to financial security in the event of the death of a family member or in the event of unemployment, accident or incapacity; to security of their assets such as crops, housing, or tools which are essential for their economic activities. Therefore microinsurance can ensure the poor's rights to social security, health care, housing, food, work, and generally their right to an adequate standard of living³⁹.

Indeed, the Committee of Economic, Social and Cultural Rights (CESCR) recognized the importance of microinsurance as a social security strategy, stating that:

« States parties must take steps to the maximum of their available resources to ensure that the social security systems cover

²⁹ SOUS-COMMISSION DE LA PROMOTION ET DE LA PROTECTION DES DROITS DE L'HOMME, CONSEIL DES DROITS DE L'HOMME DES NATIONS UNIES, *Projet de principes directeurs « Extrême pauvreté et droits de l'homme: les droits des pauvres »*, in Résolution 2006/9, Application des normes et critères relatifs aux droits de l'homme dans le contexte de la lutte contre l'extrême pauvreté, adopted on 24 August 2006, A/HRC/Sub.1/58/36, 11 September 2006.

³⁰ S. RUTLEDGE, *Good practices for consumer protection and financial literacy in Europe and Central Asia: A diagnostic tool*, World Bank, 2010.

³¹ J. ROTH, M.Mc CORD et D. LIBER *The Landscape of Microinsurance in the World's 100 Poorest Countries*, The Microinsurance Centre, April 2007; LLOYDS and MICROINSURANCE CENTRE, *Lloyd's 360 Risk Insight- Insurance in developing countries: Exploring opportunities in microinsurance*, 2010.

³² ILO and Munich Re Foundation, Press Release “Microinsurance coverage expanding at breath taking pace according to ILO and the Munich Re Foundation”, 10 April 2012.

³³ M.A. COYDON, and V. MOLITOR, *Microinsurance Network Survey: Involvement of commercial insurers in Microinsurance*, Microinsurance Network, 2010, p. 7.

³⁴ A fifth of Allianz customers will be “very low income” by 2020, Post Online, 20 October 2010.

³⁵ Foundation Gertulio Vargas, Brazil.

³⁶ “The availability and access to finance can be a crucial influence on the economic entitlements that economic agents are practically able to secure”, A. SEN, *Development as freedom*, Oxford University Press, 1999, p. 39.

³⁷ A. SEN, *Development as freedom*, Oxford University Press, 1999, p. 40.

³⁸ COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, General Comment No. 19, *The right to social security*, November, 2007, E/C.12/GC/19, 4 February 2008, n. 23, 27, 28. In the same context the social protection floor developed by the International Labour Organisation (ILO) and endorsed by the General Assembly of United Nations in 2010 is also relevant. The social protection floor is a set of policies which seeks to guarantee income security and access to essential social services, such as health, water and sanitation, education, food security, housing for everyone, particularly to vulnerable groups. CHIEF EXECUTIVES BOARD OF COORDINATION (CEB), Initiative VI: A social protection floor, Geneva CEB Issue Paper, 2009; ILO, *Social protection floors for social justice and a fair globalization*, Report IV(1), International Labour Conference, 101st Session, 2012; GENERAL ASSEMBLY UNITED NATIONS, Resolution on integrated and coordinated implementation of and follow-up to the outcomes of the major United Nations conferences and summits in the economic, social and related fields, follow-up to the outcome of the Millennium Summit, A/Res/65/1, 2010.

³⁹ For a deeper analysis on this point please request information from the author.

those persons working in the informal economy (...) Measures could include: (a) removing obstacles that prevent such persons from accessing informal social security schemes, such as community-based insurance; (b) ensuring a minimum level of coverage of risks and contingencies with progressive expansion over time; and (c) respecting and supporting social security schemes developed within the informal economy such as micro-insurance and other microcredit related schemes (...)»⁴⁰

On the other hand, the growing enthusiasm for such “new” insurance consumers provokes certain legal concerns in relation to the misuse of microinsurance. As established, the “poor” are characterised by a deprivation of substantive freedoms that are consequence of a negation of human rights. Nevertheless, substantive freedoms (such as literacy, numeracy, education, participation in economic, social and political processes) are ensured by the fulfilment of the right to education, to participate in the social and cultural life, to access justice, to personal integrity, to freedom of speech, to recognition as a person before the law and of being registered, to take part in political affairs, to privacy and to the protection of the family. Such rights are prerequisites to enter into contracts in the formal economy, so as to: (i) guarantee that contracting parties understand the scope of their engagements and can act accordingly; and (ii) defend rights and seek compliance of the counterparty’s engagements and any appropriate remedies.

The deprivation of such basic capabilities and the negation of such human rights have an impact on the process of inclusion of such consumers into formal financial services, where such inclusion depends on contractual rights and obligations⁴¹.

Financial exclusion is not an isolated phenomenon suffered by the “poor”. Rather, financial exclusion is part of a wider systematic exclusion from participating in the economic, social, and political processes that are generally institutionalised in the formal economy through legal processes and bodies. Given this, the microinsurance consumer is “particularly” vulnerable in such contractual relationships because of the impact that his or her poverty has on such relationships.

In particular, as a consequence of their “poverty”, we wonder whether the “poor” are able to provide free

and informed consent prior to, and upon, entry into of the insurance contract and if they are fully aware of how to perform the contract and therefore, of how to actually benefit from such insurance. They are also unfamiliar with insurance and they do not know how to due diligence and perform contracts in the formal economy. Even if they are literate, they are unlikely to be aware of their rights and obligations or those of their counterparty. Likewise, we consider that they are unlikely to be aware of either complaint procedures or the remedies available to them if the insurance-provider fails to perform their contractual obligations. They do not know to whom to turn to complain or to seek enforcement of the contract or generally, how to settle disputes. Indeed, it is unlikely that they would have reasonable access to such remedies in any event⁴².

The “standard” contractual vulnerability of the traditional insurance consumer vs. the “particular” contractual vulnerability of the microinsurance consumer

The traditional consumer of insurance products is in a vulnerable contractual position in the traditional insurance contract. First, because the insurance relationship, between a “professional” and a “layman”, denotes a particular inequality of power between the parties⁴³. Second, because the technicality of the insurance activity combined with the particular regulatory framework to which the insurance activity is subject in most jurisdictions, adds a degree of specialisation and sophistication to the insurance activity and to the insurance contract, which lead to

⁴² Regarding the difficulties in accessing justice faced by the poor please refer to: M. BEDOS, *L'accès au droit et la lutte contre l'exclusion: la nécessité du 'lien'*, in *Droit et pauvreté - contributions issues du séminaire ONPES et DRESS-MIRe*, 2007. I. SAYN, *La place des outils procéduraux dans l'accès au droit et à la justice des plus pauvres*, in *Droit et pauvreté - contributions issues du séminaire ONPES et DRESS-MIRe*, 2007. E. RIGAL, *L'ordre public, le juge civil et le contrat*, in *Droit et pauvreté - contributions issues du séminaire ONPES et DRESS-MIRe*, 2007.

⁴³ In relation to inequality of power, the traditional insurance consumer does not enjoy the same economic power as an insurance professional. Consequently, insurance professionals could abuse such ascendancy or act on a whim in enforcing their contractual rights or in failing to perform their obligations. Insurance professionals receive money from third parties (premiums) in order to manage such third parties' risks. Without specific regulation and supervision, which counteracts this dominance, there is potential for insurance professionals to defraud consumers, or simply to fail to comply with obligations due to insolvency. The problem being, insurance consumers could be compelled to accept whatever contractual conditions are imposed upon them, as they do not have the awareness or the capabilities to propose alternatives. Insurance consumers are typically not able to negotiate the contractual terms, nor to reject amendments to the standard terms proposed by insurers, nor to oppose the imposition of abusive clauses, premature termination, indefinite renewal, nor resist unreasonably long delays before indemnification. In short, even the traditional insurance consumer has limited power to defend his or her interests.

⁴⁰ COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *General Comment No. 19, The right to social security*, November, 2007, E/C.12/GC/19, 4 February 2008, n. 34.

⁴¹ For a deeper analysis on this point please request information from the author, as this is a specific chapter of her PhD.

an asymmetry of information⁴⁴.

Asymmetry of information and inequality of power underlie the “contractual vulnerability” of the traditional insurance consumer, as they impede the consumer giving their informed and free consent to the contract, the knowledge needed for the consumer to perform and request the performance of the contract.

This “standard” contractual vulnerability of the traditional insurance consumer is a consequence of asymmetry of information and inequality of power when he or she deals with an “insurance professional”. The contractual vulnerability of the traditional insurance consumer is relational and intermittent, as it is only revealed when this consumer enters into a contract with a professional. However, the contractual vulnerability of the microinsurance consumer goes beyond this “standard” contractual vulnerability, as it is not relational, but personal, and is not intermittent, but permanent and coexistent with his or her situation of poverty. In fact, for the microinsurance consumer asymmetry of information and inequality of power are intrinsically linked with their “poverty”, and therefore the deprivations suffered by the poor have an impact on their contractual arrangements.

In order to illustrate the impact of poverty on contractual relationships, it is illuminating to refer to a case that took place between 1992 and 1994 in the Torres Strait Islands, a remote area in the north of Australia, where Australian aboriginals, who are characterised by similar deprivations to those suffered by microinsurance consumers, were offered long term life insurance products by three insurance companies⁴⁵.

In summary, after receiving several complaints from organisations protecting aboriginals’ interests, the Australian consumer protection watchdog⁴⁶ investigated and took the insurance companies to the Federal Court in Australia. The watchdog concluded that, through their intermediaries, the insurance companies had engaged in a systematic pattern of

deceptive or “unconscionable conduct”⁴⁷ by entering into unfair contracts which took advantage of the contractual vulnerability of the aboriginals⁴⁸. Once the facts were acknowledged by the Federal Court, the case was settled by the parties and the insurance companies compensated the Australian aboriginals and agreed to ensure that, before selling insurance products in future, consumers are made aware of what they are buying and how they can benefit from the product.

For an overview of factors which microinsurance consumers share with aboriginals which lead to a particular contractual vulnerability please see Part A of Appendix I and for an overview of the acts and omissions which, according to the TPC, comprised unconscionable conduct by insurance companies and their intermediaries see Part B of Appendix I.

Following such cases, special attention was paid to consumer protection. In particular, in relation to financial transactions entered into by Australian aboriginals. The “Moola Talk” initiative from the Australian Securities and Investment Commission (ASIC) and the Banking and Financial Services Ombudsman (BFSO) (See Part A of Appendix II) is an interesting example. This initiative aims to raise awareness amongst the Australian aboriginals about the importance of providing free and informed consent before entering into an insurance contract and about knowing what the benefits from such products are.

The above-mentioned cases came to light thanks to the existence of organisations that aim to protect the interests of the Australian aboriginals. In this instance, they gave a voice to the complaints of the aboriginals (by providing the means to represent such interests and the power to access the relevant legal and political processes in Australia). Such consumer organisations are particular to certain countries, such as Australia and Canada, where such minorities are duly represented. Nevertheless, in developing countries it is extremely difficult to hear the voices of the “poor”, as such organisations are either inexistent

⁴⁴ In relation to asymmetry of information, given that the traditional insurance consumer is not an insurance professional, he or she has neither the technical expertise required by the insurance activity, nor the knowledge to understand the insurance vernacular that embodies this activity in order to engage on a level playing field. In addition, the insurance consumer is not aware of the regulatory framework applicable to insurance, which enshrines his or her obligations and rights and those of the counterparty, of the grievance mechanisms, which are also concealed by vernacular. Therefore, even the traditional insurance consumer suffers from asymmetry of information compared to the insurance professional, which could impede him or her from providing informed consent.

⁴⁵ The insurance companies were: Colonial Mutual Life Insurance Society Ltd, Norwich Union Life Australia Ltd and Mercantile Mutual Life Insurance Company Ltd.

⁴⁶ At that time the Trade Practices Commission (TPC), today the Australian Consumer and Competition Commission (ACCC).

⁴⁷ According to the Australian High Court, unconscionable conduct occurs when “one party to a transaction is at a special disadvantage in dealing with the other party because of illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affecting his ability to conserve his own interests, and the other party unconsciously takes advantage of the opportunity thus places in his hands”. The Australian High Court in *Blomley v. Ryan*, (1956) 99 CLR 362. The case set out certain underlying factors upon which unconscionable conduct could be based, being: ignorance of material facts, illiteracy or lack of education, poverty or need (of any kind), age, infirmity of body or mind, drunkenness and lack of assistance or explanation where these are necessary. Special Disability in Australia, Trade Practices Commission 1993.

⁴⁸ Trade Practices Commission, *Taking advantage: Sale of life insurance to aboriginal people in remote communities*, 1994.

or impotent and the “poor” rarely make use of justice or grievance mechanisms. This means that similar abuses could have already occurred in microinsurance but because of such barriers to justice we are not aware of them (yet).

Similar allegations of unfair practices have, however, arisen in certain countries in relation to the sale of insurance products to the “poor”. For instance, in Colombia the most important national newspaper reported in April 2011:

“Luis Robles (...) does not only pay his gas bill, but in addition, he receives bills for accident, cancer and funeral insurances, even though he did not authorize them. He was one of the victims of a gang of 15 people that visit his neighbourhood offering such insurance products with Gas Natural (A gas retail public utility in Colombia) IDs and uniforms. “A young woman asked me for the gas bill and said to me that I was entitled to free insurance covering cancer and accidents. I asked twice if the insurance cost anything and the young lady said that it didn’t, this is why I signed the paper” said Luis.”⁴⁹ (Emphasis added)

Following this, another young lady is reported to have offered Luis funeral insurance but this time Luis rejected the offer and registered a complaint about the other two insurance products. The young lady promised Luis that she would notify Gas Natural of his complaints. Nevertheless, the following month, Luis received bills for all three insurance products, including the one product he had expressly rejected. The Colombian newspaper reported that several people experienced similar difficulties to Luis, in that they had been told, by utilities companies that if they did not pay the insurance premiums, their access to utilities services would be cut off.

In Kenya, a recent study showed that most of the focus group (participants comprising 14 focus groups and a total of 112 consumers), either had no experience of insurance, or, if they did, their experience was not positive. The table set out in Part B of Appendix II illustrates the experiences of insurance users. Two cases mentioned in the study are particularly noteworthy; first, where an insurance agent had signed up a man from Mombasa for a policy which he had not authorized. He was only able to get his money back after hiring a lawyer. Second, another man in Mombasa noted that salespeople did not explain the products clearly, according to him: “It is like

they used anyone to sell insurance and they do not know the products, so you sign for product and then when the policy comes you find that it is totally different”⁵⁰.

These experiences are concerning. What is also concerning, is that the particular contractual vulnerability of the microinsurance has, in fact, been amplified by two strategies that have been systematically promoted in order to facilitate the expansion of microinsurance. Firstly, the “*de facto*” flexibility of the requirements for the provision and distribution of microinsurance insurance products⁵¹, which has been translated into a myriad bodies that are not “*insurance professionals*”, and therefore not always regulated and supervised. Secondly, the simplification of insurance contracts, undertaken to address the deprivations of the microinsurance consumer, can actually lead to an incomplete disclosure of information and prejudice the consumer.

In summary, although microinsurance is a tool that can help the realisation of human rights and therefore enhance the basic capabilities of the “poor”, human rights are intertwined, thus providing access to insurance without enhancing other human rights could hinder the supposed benefits of microinsurance and limit its impact to alleviate “poverty”. This is because the consumer is not aware and not able to perform and request the performance of the microinsurance contract. How, therefore, can they benefit from the microinsurance? Furthermore, by promoting financial inclusion, microinsurance, or more generally, microfinance, tries to empower the “poor”, but at the same time, it has the potential to exacerbate other interconnected deprivations by not providing the necessary capabilities to support understanding and therefore it restricts consumers’ ability to benefit holistically from such financial services. Viewed as such, at best, microinsurance is not the “win-win” situation we first thought and at worst, it could actually exacerbate “poverty”.

⁵⁰ CGAP, Ministry of Finance, Financial Education and Consumer Protection Partnership, *Consumer Protection Diagnostic Study on Kenya*, January 2011.

⁵¹ We refer to “*de facto*” flexibility of the conditions to provide and distribute insurance products, as opposed to “*de jure*” flexibility. The latter is the result of a relaxation of those conditions by the modification of Insurance Regulation by a legal or administrative decision. I refer to the reforms that have been taking place in the Philippines, Peru, India, Brazil, amongst other countries, as examples of the latter in microinsurance. I support the fact that certain countries are adapting their Insurance Regulations in order to make them more appropriate for and to facilitate microinsurance and at the same time protect the microinsurance and financial consumer. However, such efforts should always consider the holistic deprivations of the “poor”.

⁴⁹ *Quejas por cobro de seguros en recibo del gas*, 6 April 2011, El Tiempo, Colombia. I have translated this into English from the original Spanish version.

The “de facto” flexibility of conditions for the provision and distribution of insurance products

This limb has two potential aggravating factors: firstly, the increase of “risk takers” beyond regulated and supervised “insurers”. Secondly, the use of multiple insurance distribution channels that are not regulated or supervised, which means that they are not vetted or held to account for their acts and omissions by any supervisory authority. Insurance companies have integrated value chain bodies that have proximity to, and the trust of, the “poor” and consequently there has been a multiplication of bodies “distributing” microinsurance products under different contractual arrangements that tend to vary from the normal contractual arrangements between insurers and insurance intermediaries⁵². In addition, there has been a systematic use of types of “*contratos por cuenta de un tercero*” (tri-partite insurance contracts) where the distribution channel is seen as the policyholder (in French “*le preneur du contrat*”, or in Spanish, “*el tomador del seguro*”), and the real microinsurance consumer is the “insured party” or “beneficiary” (depending on the facts). Consequently, we are witnessing a constant multiplication of “insurers” and “intermediaries” of insurance in the microinsurance field.

The simplification of the insurance contract

Another strategy which has been adopted to address the deprivations of the microinsurance consumer (notably those related to education and participation in the economic, social and political processes) is the simplification of the insurance contract. This is not at all new. In fact this strategy is one of the techniques that has been designed to protect the “standard” contractual vulnerability of the traditional insurance consumer. What is new about this strategy is that the disclosure obligation placed on insurers and intermediaries has been eroded for the sake of simplification. Although, it is clearly necessary to translate the contractual and technical vernacular used in insurance contracts for the microinsurance consumer, we cannot justify partial or bias disclosure of information under the auspices of simplicity for the purposes of the entry into of the contract, whilst during the term of the contract insurers may seek to rely on limitations on their or their intermediaries obligations which were not (and should have been) disclosed to the consumer at the time of the entry into of the contract.

⁵² For instance there are: association contracts, strategy alliances, agreements for the provision of services, joint ventures, and other kinds of agreements which seek to concretize the relationship between the insurer and such channels of distribution.

2. THE INAPPROPRIATENESS OF THE TECHNIQUES DESIGNED TO PROTECT THE TRADITIONAL INSURANCE CONSUMER

It is therefore vital to consider how we can develop microinsurance and at the same time protect the microinsurance consumer by allowing a holistic realisation of human rights that does indeed empower the “poor”. Given that the contractual vulnerability of the microinsurance consumer surpasses that of the traditional insurance consumer, the question that instinctively follows is: are the techniques designed to protect the traditional insurance consumer appropriate to protect the consumer of microinsurance?

To answer this question it is necessary to study different jurisdictions, as the effectiveness of certain techniques differs between them. In the majority of countries, such protection techniques can be divided into two categories: firstly, techniques which address asymmetry of information; and secondly, those which address the inequality of power between the contracting parties.

In this paper we analyse the appropriateness of the techniques created by two regulatory frameworks applicable to microinsurance, which are very sophisticated in terms of protection of the consumer: the Insurance Regulation in Brazil and Colombia.

2.1 ASYMMETRY OF INFORMATION

The techniques available to tackle the asymmetry of information between the contracting parties in insurance in both countries are mainly embodied in contract law (1), Insurance Regulation (2) and other norms or strategies which seek to promote awareness regarding the financial products offered in the country (3).

2.1.1 CONTRACT LAW

Before studying the special regulation applicable to insurance, it is important to remind ourselves that insurance contracts are private contracts. Therefore, as a starting point, the principles of contract law (which is mainly contained in the Civil Code in the studied countries) apply. The act of entering into contracts (by which the parties gain rights and accept obligations) must be free and voluntary in order to be legally binding. Contract law is based on the general presumption that parties are able to freely discern and decide for themselves the parameters of the relevant rights and obligations.

In Brazil and Colombia the Civil Code establishes that (i) legal capacity; (ii) legal object; and (iii) consent, must

be present in a contract in order for it to be binding⁵³. In the event that one of these essential elements is absent, the contract is "void"⁵⁴. However, in order to obtain a declaration that a contract is void, either an interested party or the Public Attorney must initiate a civil process involving a judge as the judge is the only person who is competent to make such declaration: "*pas de nullité sans texte, pas de nullité sans arrêt*".⁵⁵ In both countries, capacity to contract is presumed and the only parties deemed incapable are those qualified by law. So the law in such countries does not take into account whether or not the deprivations suffered by the "poor" have an impact on their contractual capacities. The "poor" are simply considered capable by law and can therefore be bound by contractual undertakings as they are presumed to possess "autonomy of will" and to be able to provide free and informed consent to defend their own interests (in the same way as any other contracting party)⁵⁶. It is important to note, that consumer insurance contracts are generally "standard form contracts" ("adhesion contracts") and therefore insurance consumers are not able to negotiate the standard clauses of such contracts. Given this, the exercise of freewill in relation to the contract should not be viewed from the perspective of the consumers' ability (or not) to negotiate its specific terms and conditions but whether they are free to decline to enter into the contract at all.

As discussed, a contracting party has to provide his or her consent, otherwise the contract will be void. The situation is different where the consent provided was not free and informed. In such case, in both countries,

the contract would be "voidable" if the consent is vitiated by: "error", "wilful misconduct" or by "duress"⁵⁷. In order to declare the "nulidad relativa" (in Colombia) or the "anulabilidade" (in Brazil) of a contract, again a judicial declaration is necessary, which only the contracting parties can request from the relevant judge⁵⁸.

The above analysis has important ramifications for the microinsurance consumer:

- (i) Firstly, the "poor" are legally capable and therefore it is not possible to allege that the contract is void because of their lack of capacity⁵⁹.
- (ii) Secondly, we must analyse the nature of their consent. On the face of it, one could argue that if the microinsurance consumer did not provide his or her consent because he or she never actually agreed to the insurance contract (such as Luis Robles mentioned in paragraph 9 above) the contract would be void in Brazil and "inexistente" in Colombia. However, in both countries a judicial declaration would be necessary, which presents the microinsurance consumer with a problem, as unfortunately the "poor" do not have appropriate access to justice and very rarely make use of judicial remedies⁶⁰.
- (iii) Thirdly, even if the microinsurance consumer's consent was obtained by "error", "wilful misconduct", "duress", or "lesion": first, he or she must initiate a civil procedure to prove that such event vitiates the contract which requires legal advice. As mentioned, the "poor" face difficulties in accessing justice and in any event, often cannot afford (even basic) legal advice. Second, it is difficult to prove that consent was vitiated⁶¹.

2.1.2 INSURANCE REGULATION

In addition to contract law techniques, Insurance Regulation in the studied countries imposes disclosure

⁵³ Article 1502 of the Colombian Civil Code. (In Colombia "legal cause" is also an essential element). Articles 104 of Law 10.406 of 10 January 2002 (Brazilian Civil Code).

⁵⁴ In particular, in Colombia and Brazil the lack of the essential elements in the contract makes the contract "absolutely void" (*nulidad absoluta* - 1740 and ss. of the Colombian Civil Code (*nulo*). This is different to the concepts "*nulidad relativa*" in Colombia, and "*négocio jurídico anulável*" in Brazil. It is important to mention the concept of "*inexistencia*" in Colombia as Article 898 (2) of the Colombian Commercial Code states that: "*Será inexistente el negocio jurídico cuando se haya celebrado sin las solemnidades sustanciales que la ley exija para su formación, en razón del acto o contrato y cuando falte alguno de sus elementos esenciales*". In such case, the contract will have no effect and the parties must be put back into the position they were in before entering into the contract. Note that in theory, although the intervention of a judge is not necessary, in practice it is important to obtain such declaration to fully restore the parties' respective positions (for instance the reimbursement of any premium paid) or, to initiate a process of "*enriquecimiento sin causa*" (unjust enrichment) which will require a judge to verify the existence of the contract.

⁵⁵ Articles 170 Brazilian Civil Code and 1742 Colombian Civil Code.

⁵⁶ It is interesting to note that the legal capacity of the indigenes in Brazil is regulated by special legislation: Article 4, the unique paragraph, Brazilian Civil Code. M. DE MAURA, *Uma análise atual da situação da capacidade civil e da culpabilidade penal dos silvícolas brasileiros*, Revista CEJ, Brasília, Ano XIII, n. 45, p. 70-76, April-June 2009.

⁵⁷ In Colombia this is established by Articles 1508 to 1516 of the Civil Code. In Brazil, not only those three circumstances vitiate the contract, but also the "endanger circumstances" (*estado de perigo*), the "lesion" (*lesão*), and the "fraud against creditors" (*fraude contra credores*) (Articles 156-165 of the Brazilian Civil Code).

⁵⁸ Articles 177 of the Brazilian Civil Code and 1743 Colombian Civil Code.

⁵⁹ Nevertheless, I found some cases in other jurisdictions where the poor were considered as lacking legal capacity. For more information please request information from the author.

⁶⁰ E. RIGAL, *L'ordre public, le juge civil et le contrat*, in Droit et Pauvreté - contributions issues du Séminaire ONPES et DRESS-MIRE, 2007 ; GENERAL ASSEMBLY - UNITED NATIONS, *Extreme poverty and human rights, Report of the Special Rapporteur on extreme poverty and human rights - Access to Justice*, A/67/278, 9 August 2012.

⁶¹ Please refer to Andrea's PhD for a deeper analysis in relation to the possibility of alleging that consent was vitiated.

obligations on “insurers” and “intermediaries” in order to reduce the information gap (between the professional and the consumer) and to attempt to ensure that both parties understand their respective rights and obligations. Nevertheless, the relevant Insurance Regulation does not rely exclusively on such obligations; as it also regulates the content (the information to be disclosed) and the form (the manner of its disclosure) of disclosure.

In both countries the implementation of disclosure obligations was undertaken in two ways: first by the regulation of the activities of insurers and intermediaries, notably by the regulation of the insurance policy whereby standard term clauses must be registered with supervisory authorities. Secondly, by reference to general obligations of transparency and good faith applicable before and during the term of the contract. In the first case, any sanctions that are imposed if an insurer or an intermediary fails to disclose the relevant information in the prescribed manner are primarily administrative in nature (rather than judicial)⁶². In the second case, failure to comply with the disclosure obligations could lead to an extra-contractual or, in some cases, contractual liability, nevertheless such determination is tricky and requires a judicial process.

In particular, in Brazil, Insurance Regulation⁶³(which recently focused on microinsurance⁶⁴) requires that insurance consumers are informed in a transparent manner about the relevant products, contractual conditions, their rights and the mechanisms by which they are exercised. The disclosure of information must be written in Portuguese, in a correct, clear, objective and precise way. In certain circumstances it is possible to use short phrases in a foreign language, but they must be accompanied by a translation or an explanation in Portuguese. Of more general application, the Consumer Defence Code requires contracts to be drafted in easily readable fonts, to use simple language and to highlight any clauses that limit consumer rights.

⁶² Such techniques should consider the rules regarding the prohibition of misleading advertising and general consumer protection legislation.

⁶³ Primarily contained in: Law Decree 73/66 (the Insurance Law), Decree 60.559/67 (The Decree that modifies the Insurance Law), the Civil Code and the Resolution CNSP 11/88. The Brazilian Supervisory Authority of Insurance (SUSEP) Circulars: 265/04, 302/2005, 110/04 and 295/05. Law 8.078/90 (Code of the Defence of the Consumer).

⁶⁴ CNSP Resolution 244/11 and SUSEP Circulars 439/12, 440/12, 441/12, 442/12, 443/12 and 444/12. In addition, I also considered: the Report of the Consultative Commission of Microinsurance of Brazil of 2009 and the Law Project 3.266/08 of the Brazilian Congress (Microinsurance Law Project), in relation to proposals to regulate microinsurance.

The relevant information must be disclosed in the policy, as this is the instrument where all the above-mentioned requirements are checked. Nonetheless, in Brazil not all insurance contracts are embodied in an insurance policy. Indeed, there are insurance contracts where an insurance proposal and risk assessment is not necessary. In such cases, the document which embodies the contractual terms and conditions is called the “*bilhete de seguro*”. This is a cover note certificate, which is much simpler than a policy and therefore contains less information. In any event, in both cases the relevant information is disclosed in writing, which also serves as evidence of the contract itself. The signing of the policy document evidences the requirement for informed consent (although a signature is not necessary in the case of “*bilhete de seguro*”).

Given the informal nature of microinsurance and the informal environment in which its consumers reside, the “*bilhete de seguro*” seems more appropriate for microinsurance. However, the information disclosed in “*bilhete de seguro*” is limited for the sake of simplicity, which seems inappropriate for a microinsurance consumer and could prevent such consumer providing informed consent and acting accordingly during the contract term.

The placement of the terms and conditions of microinsurance contracts in simplified policies (such as the “*bilhete de seguro*” and “*certificados individuais*” in the case of group insurance) was recognised as a valid method under Resolution 244 of 2011. In particular, Circular 440/12 of the SUSEP expressly states that even such simplified documents should include essential contractual conditions (such as, amongst others, insured risks, exclusions, exemptions, deadlines and the determination of beneficiaries) and should be expressed in a clear manner⁶⁵. The insurance policy, the *bilhete de seguro*, the *certificados individuais*, or any other document which proves the payment of the premium, can serve to prove the existence of the contract⁶⁶.

Although *bilhetes*, individual policies and *certificados individuais* can be issued “remotely” (such as via mobile phones or messaging)⁶⁷, if no physical contractual documents were issued, key contractual information must be provided using the same “remote”

⁶⁵ SUSEP, Circular 440 of 27 June 2012, Articles: 12, 14, 20, 22, 28 and 33. This Circular creates the obligation to complete and sign an insurance proposal as a condition of entering into the contract and completing the insurance policy or the individual certificate in the case of a group insurance. Such insurance proposal contains the main conditions of the contract and should be signed by the policyholder. SUSEP, Circular 440 of 27 June 2012, Articles: 24 and 30.

⁶⁶ SUSEP, Circular 440 of 27 June 2012, Articles 20 and 55.

⁶⁷ SUSEP, Circular 440 of 27 June 2012, Article 48.

means. So the policyholder should receive financial education messages during the term of the contract and at certain particular intervals, for instance, confirming the contract, the scope of cover, any amendments to the termination provisions, the website address where the full conditions of the contract are available and the free telephone hotline number to resolve complaints⁶⁸.

Another interesting element of the SUSEP Circular 440/12 is that it provides grace periods for the payment of premiums or instalments during which the consumer will continue to be insured notwithstanding any late payment⁶⁹. In addition, the Circular establishes a tacit list of documents to be produced by the microinsurance consumer to the insurer at the time of a claim. This is extremely important to the effectiveness of the cover, as it aims to avoid bureaucratic and unnecessary document requests by the insurer that could hinder the performance of the contract. As we have alluded to, the “poor”, given their deprivations, may struggle to obtain certain documentation. Indeed, the list contains some documents that could be difficult to produce and therefore the legislation is still lacking and it is important either to facilitate access to such documents or to amend the list to cater for the provision of alternative documents⁷⁰.

Colombia does not have a special regime for microinsurance. Nevertheless according to applicable Insurance Regulation⁷¹, insurance policies must be easy to understand and in legible fonts and any key provisions (such as the scope of the cover and any exclusions) must be prominent and underlined on the first page of the document. The insurance contract is evidenced in writing (in the policy or other document where the essential elements of the contract are contained) or by admission (*por confesión*) and informed consent is similarly evidenced by the signature of the insurance consumer.

Furthermore, the recent Law 1328/09 establishes a specific Financial Consumer Regime⁷² (FCR) based on the importance of the doctrine of obtaining the informed consent of the financial consumer. Accordingly, the supervised entities (insurance companies) are under an obligation to disclose information in a transparent, comprehensive, clear, legible, sufficient and appropriate way. They are also

under an obligation to disclose information relating to the key elements of the contract and the rights and obligations of the parties and the existence of compliance procedures. These obligations do not just apply at the time of entering into the contract but also on a periodic basis during its term. In addition, insurance companies must publish such contracts on the Internet and maintain a register of certain insurance contracts (life insurance and civil responsibility) so consumers are aware of the insured risks and the existence of such contracts.

The FCR is an excellent tool for reinforcing the informed consent of the financial consumer. However, the disclosure of information formalities may be inappropriate for the microinsurance consumer. For instance, the “poor” still have limited access to the Internet, particularly in rural areas. Moreover, the FCR is based on the idea that financial consumers are able to apply certain “good practices” in order to protect themselves, notably: (i) ensuring the provider is authorised and supervised by the Superintendencia Financiera (The Financial Supervisory Body); (ii) seeking information on the different products and services available before acquiring them; (iii) reviewing the terms and conditions of the contract; and (iv) reviewing the complaints procedures. However, we doubt that microinsurance consumers have the necessary capabilities to apply these “good practices” to protect themselves.

Such provisions in Brazil and Colombia are largely appropriate to protect microinsurance consumers as they impose obligations to disclose information related to the insurance contract and such obligations must meet certain requirements in order to guarantee the informed consent of the insurance consumer. Nonetheless, as a consequence of the “particular” contractual vulnerability of the microinsurance consumer, it is very likely that even with simplicity, plain language and prominent clauses, most consumers would not be able to provide informed consent. This is because they simply do not understand the concept of insurance (as was the case with many of the Australian aboriginals referred to above). They are not aware of the general contractual vernacular. Some cannot read. They are not aware of the existence of independent bodies that can clarify the meaning and scope of contractual provisions, or the judicial remedies available. Or if they are aware of them, they simply do not have access. Therefore, to ensure that such traditional insurance protection techniques are appropriate to protect microinsurance consumers, we must first ensure that they have the same level of “non-understanding” as the traditional insurance consumer.

Insurance consumer protection techniques have adopted “contractual protective formalism” as the preferred way to protect insurance consumers. The

⁶⁸ SUSEP, Circular 440 of 27 June 2012, Article 49 and 50.

⁶⁹ SUSEP, Circular 440 of 27 June 2012, Article 58.

⁷⁰ SUSEP, Circular 440 of 27 June 2012, Article 60-62.

⁷¹ Primarily comprised in Decree 663/06 (*Estatuto Orgánico del Sistema Financiero*, EOSF), Law 1328/09, that recently reformed the EOSF, External Circular 007/06, and the Commercial Code.

⁷² This expression embodies the client, the user and the potential client of the entities that are regulated and supervised by the *Superintendencia Financiera*.

idea being that if the information is delivered in writing and provided that the consumer confirms his or her consent (by signing), the consumer is somehow supposed to be aware of the contractual conditions. This “contractual protective formalism” could in fact not be protecting the microinsurance consumer at all. Firstly, because the development of microinsurance has increasingly relied on the use of mechanisms that tend to accelerate the uptake of products, by making use of mobile phones and simplified certificates. Secondly, given the particular contractual vulnerability of the microinsurance consumer, we can reasonably doubt whether written mechanisms are effective. In fact, they could be more alienating. Therefore, in this specific area, Insurance Regulation is falling behind the development of microinsurance.

2.1.3 FINANCIAL EDUCATION

Facing such difficulties, it is important to note that both countries seek to promote financial education, or more broadly, consumer education by way of legislation. The initiatives which promote financial education, in which microinsurance consumers acquire a similar level of “non-understanding” as traditional consumers of microinsurance⁷³, are extremely valuable given the limitations of disclosure obligations⁷⁴. It is worth noting that financial education is not the same as product marketing and does not replace, or obviate the need for, clear legal disclosure obligations on insurers and intermediaries.

In the case of Brazil, Article 6 of the Consumer Defence Code recognises that the consumer has the right to receive an education, or orientation, in relation to the offered product. In Colombia, Law 1328/09 and Circular 015/10 of the Superintendencia Financiera, establishes financial education as a right of the financial consumer⁷⁵. The recognition of these rights is excellent news, because that recognition encompasses obligations; therefore, regulated and supervised institutions in Colombia (including insurance companies) must now implement financial education programmes. Both countries have interesting strategies

of financial education, in particular, in relation to insurance and microinsurance⁷⁶.

2.2 INEQUALITY OF POWER

There are several techniques which can be employed to counteract the inequality of power between the insurance professional and the insurance consumer. Firstly, those that aim to ensure that insurance professionals are financially sustainable and qualified to provide and distribute insurance products and that they are accountable for acts and omissions (prudential, market conduct and sanction rules seek to address these concerns). Secondly, rules which aim to remove abusive clauses and practices⁷⁷. Thirdly, rules that purport to provide appropriate grievance instruments. This paper focuses on the first (1) and last of these techniques (2).

2.2.1 REGULATION OF THE INSURANCE ACTIVITY

In Brazil and Colombia the insurance activity is limited to stakeholder companies and cooperatives that are licenced to act as insurers⁷⁸. Under Resolution 244/11 and Circular 439/ 2012, the Brazilian supervisor, SUSEP, recently authorised certain other entities such as “*microseguradoras*” (“*microinsurance insurers*”) (with reduced capital requirements) to operate specifically in the microinsurance sphere.

In Brazil, insurers can offer their products directly to consumers, or via intermediaries (brokers) and “*estipulantes*”. Resolution 244/11 and the SUSEP Circular 443/12 finally introduce the concept of “*corretores de microseguro*” (broker bodies), which permit a physical person or an intermediary who is legally authorised to exclusively collect and promote microinsurance contracts. Such person or intermediary must undertake a course “*Habilitação Técnico-Profissional para Corretor de Microseguro*” and must receive a special technical and professional qualification in order to be registered as “*corretores de microseguro*” with the SUSEP⁷⁹. It is noteworthy

⁷³ It is not only the “poor” that require financial education. Financial products are becoming increasingly sophisticated such that it is necessary to promote financial amongst all potential consumers. The “*Estoi Seguro*” programme in Brazil and the “*Viva Seguro*” programme in Colombia are just two initiatives which aim to promote financial education (primarily in relation to microinsurance).

⁷⁴ *Supra. n.*

⁷⁵ It is noteworthy that when the Colombian Congress approved the “Plan Nacional de Desarrollo” for 2010-2014, it contemplated that the Ministry of Education should include in the design of the education programs, economic and financial education. Article 145, Law 1450 of 16 June 2011.

⁷⁶ A. CAMARGO and L. MONTOYA, “Microseguros: Análisis de experiencias destacables en Latinoamérica y el Caribe”, FIDES, FOMIN and FUNDACIÓN MAPFRE, 2011, pp. 95 and 107.

⁷⁷ In both countries abusive clauses and practices are prohibited. Abusive clauses are void or “considered not written” (similar to unenforceable). However, even if the supervisory authorities review contracts for the existence of abusive clauses when the policy is registered with them, some may remain in the contract. Also, during the term of the contract, insurers may seek to rely on a *prima facie* non-abusive clause in a way which makes it abusive. Moreover, a clause that is not considered abusive in traditional insurance contracts could be considered abusive in the context of microinsurance and therefore it is important to study this issue further. In such cases, the affected contracting party would have to seek redress via legal procedures.

⁷⁸ Nevertheless, in both countries a large part of the funeral insurance market is serviced by other types of companies.

⁷⁹ SUSEP, Circular 443 of 27 June 2012, Articles 3 to 11.

that the course requirements not only cover the basic concepts of insurance, microinsurance and insurance regulation but also consumer rights and ethics⁸⁰.

Circulars 440/12 and 442/12 of the SUSEP clarify the role of “*estipulantes*” and also introduce the “*correspondente de microsseguro*”. The “*estipulante*” is not an insurance intermediary, but the “*policyholder*” of a third party beneficiary. Service providers have used the “*estipulante*” structure in Brazil in order to distribute microinsurance products⁸¹. Circular 440/12 requires an “*estipulante*” to maintain a close relationship with the insured group by way of a collective contract⁸². However in my opinion, that measure was extremely artificial as it was based on the idea that when a service provider is distributing microinsurance products it is simply acting as policyholder in the context of collective insurance, where the consumers are the insured group. Moreover, the “*estipulante*” is not regulated and the Circular did not require “*estipulantes*” to be qualified.

Fortunately, this was considered by the SUSEP and in Circular 440/12, it noted that the relationship of the “*estipulante*” is different to the “*consumer bond*” between microinsurance consumers and product and service providers (including financial services). In the latter case, such institutions must act as “*correspondentes de microsseguro*”⁸³. In particular, the activities of the “*correspondente de microsseguro*” are regulated by SUSEP Circular 442/12. The “*correspondente de microsseguro*” is a legal person who is in charge of offering microinsurance products on behalf of the insurer when (i) it presents and receives the insurance proposal, (ii) it receives the payment of the premium, (iii) it receives the notification of the occurrence of the insured risk (and the claim); and (iv) when it pays any compensation⁸⁴. The insurer assumes the entire responsibility of the “*correspondente de microsseguro*”⁸⁵. It is interesting to note that even though the “*correspondente de microsseguro*” is not supervised by the SUSEP, the latter has access to the former’s offices, to review microinsurance contracts and other information where the “*correspondente de microsseguro*” is acting as an

intermediary.

Furthermore, Circular 442/12 requires the “*correspondente de microsseguro*” to publicly disclose on notice boards at its premises the fact that it is acting as “*intermediary*” of a particular insurance company. In so doing, it must clearly state such company’s name, the products being offered and the contact telephone number of the insurer⁸⁶. In the same vein, insurers must publish and maintain a list of their “*correspondente de microsseguro*” on their websites. In addition, the Circular makes specific reference to the obligation to assist the microinsurance consumer during the term of the contract⁸⁷ and to sanctions if the “*correspondentes de microsseguro*” perform functions for which the insurers or their intermediaries are strictly responsible⁸⁸. The Circular also permits “*correspondentes*” of financial institutions (and other institutions authorised by the Central Bank) to offer microinsurance products on similar terms to those of “*correspondentes de microsseguro*”⁸⁹.

In Colombia insurance products can be delivered directly or through qualified insurance intermediaries (brokers, insurance agencies and agents). In addition, certain products may be distributed by banking institutions (“*bancaseguros*”) and “*corresponsales no bancarios*” can be offered through “*bancaseguros*”, otherwise they would only be able to collect premiums directly.

In Colombia, MFIs, supermarkets and public utility companies are distributing microinsurance products⁹⁰. Although such methods of delivery may be useful for encouraging the uptake of microinsurance, they may not always be appropriate for the consumer. Indeed, such entities are often not qualified and are not accountable for their acts and omissions in the distribution of insurance products either to the insurance or to the financial supervisory authorities. Certain observers consider that this is not relevant because they are “*passive*” channels of distribution, but one wonders who then constitutes the active channel and upon who does the information disclosure obligations fall and how is disclosure performed? How will the consumer identify who the entity is behind a particular policy or receipt? This lack of visibility in respect of the contracting party is counterproductive for the microinsurance consumer given his or her particular contractual vulnerability.

Hence the regulation and supervision of the insurance activity are not always appropriate to protect the

⁸⁰ SUSEP, Circular 443 of 27 June 2012, Article 7.

⁸¹ For instance, this is the contractual arrangement used by Casas Bahia and Credi Amigo of Banco do Nordeste.

⁸² SUSEP, Circular 440 of 27 June 2012, Articles 38 and 39. The use of the “*estipulante*” is restricted to certain circumstances, for instance mandatory insurance. In the case of voluntary insurance, the “*estipulante*” should be seen only as a representative of the insured party. It is important to note that the “*estipulante*” is subject to the disclosure obligation and in the event of the retention or appropriation of premiums the consumer’s right of recourse would be against the “*estipulante*” and not the insurance company.

⁸³ SUSEP, Circular 440 of 27 June 2012, Article 38.

⁸⁴ Nevertheless, the “*correspondente de microsseguro*” cannot advertise microinsurance products without the prior approval of the insurer. SUSEP, Circular 442 of 27 June 2012, Article 2 and 6.

⁸⁵ SUSEP, Circular 442 of 27 June 2012, Article 4.

⁸⁶ SUSEP, Circular 442 of 27 June 2012, Article 6.IV.

⁸⁷ SUSEP, Circular 442 of 27 June 2012, Articles 2.

⁸⁸ SUSEP, Circular 442 of 27 June 2012, Articles 13.

⁸⁹ SUSEP, Circular 441 of 27 June 2012.

⁹⁰ Utility companies are authorised to collect premiums under Decree 828/07.

"particular" vulnerability of the microinsurance consumer because the majority of stakeholders in microinsurance are not insurance professionals and they are not duly supervised or regulated. This is a huge problem as it is then difficult to implement techniques designed to address asymmetry of information because some of the stakeholders in microinsurance are not subject to any disclosure obligations.

2.2.2 GRIEVANCE MECHANISMS

In respect of grievance mechanisms, as mentioned, insurance contracts are private contracts, so usually any dispute as to the non-performance of the contract would be resolved in the civil or commercial courts (or perhaps by conciliation, mediation or arbitration). Nevertheless given the importance of providing affordable, accessible and quick complaint procedures, insurance and consumer protection regulations choose to provide different options to allow the insurance consumers to defend their interests. This has been tackled in three ways, by: (i) providing a simple procedure for complaints handling; (ii) promoting consumer associations or similar bodies that can assist consumers in understanding their rights and empower them in their defence; and (iii) creating alternative dispute mechanisms (mediation and conciliation), by accepting class actions in the legal framework, or by creating ombudsman that have competence to settle disputes. Obviously, supplemental to these three limbs, the insurer must have internal complaint procedures (where we often find the ombudsman appointed by the insurance companies).

In Brazil, we found four interesting developments: (i) The National Department for Consumer Defence, which is responsible for the receipt and review of claims against providers and also for providing advice to consumers about their rights. (ii) The recognition that consumers may make use of class actions under the Consumer Defence Code. (iii) The SUSEP consumer service telephone and email hot lines, which operate on a 24/7 basis and the Consumer Servicer Process (CSP) where the SUSEP is responsible for the review of consumer insurance claims and for accepting or declining claims. (iv) The insurance ombudsman (appointed by insurance companies) who is responsible for the disclosure of information to consumers in respect of their rights and obligations and the processing of complaints.

In Colombia, there are instruments of particular interest: (i) the obligation on insurance companies to appoint an "Ombudsmen of the Financial Consumers" (OFC) who is responsible for processing claims in a timely manner, who can act as an extrajudicial conciliator at law and who generally represents

financial consumers⁹¹. However, the OFC is remunerated by the relevant insurance company and so there are clear conflict of interest concerns. (ii) The obligation on insurance companies to implement a Customer Service System.

Such initiatives are interesting and should be expanded and improved. It is, however, important to focus on how to guarantee impartiality, real access and increase awareness about such measures' existence and function. Indeed, the "poor" are rarely aware of the existence of the regulatory frameworks and the techniques, which seek to protect them. Nor are they aware of the entities that are responsible for ensuring their protection and compliance with the law⁹². Indeed, the poor experience multiple physical, economic, cultural and administrative obstacles, which restrict their access to justice⁹³.

The table below summarises the inappropriateness of certain techniques designed to protect the traditional insurance:

⁹¹ Decree 2555, 15 July 2010, Law 1480, 12 October 2011.

⁹² CGAP, Ministry of Finance, Financial Education and Consumer Protection Partnership, *Consumer Protection Diagnostic Study on Kenya*, January 2011; D. BROUWERS et al, *Étude diagnostique, protection des consommateurs de services de microfinance Sénégal*, CGAP GIZ and KFW, October 2011; IDLO, *Consumer Protection and microfinance, Country Reports*, Legal Empowerment Working Paper Series, 2011.

⁹³ HUMAN RIGHTS COUNCIL, *Report of the independent expert on the question of human rights and extreme poverty*, Magdalena Sepúlveda Carmona, on the draft guiding principles on extreme poverty and human rights, A/HRC/15/41, 6 August 2010.

The inappropriateness of certain techniques designed to protect the traditional insurance consumer

- (i) The “*de facto*” flexibility of the requirements for the provision and distribution of products has led to the increase of non-insurance professionals, who are not regulated or supervised (and sometimes not financially sustainable, not qualified or not accountable). This makes it impossible to require them to fulfil consumer protection obligations, which only apply to regulated and supervised entities.
- (ii) Microinsurance consumers do not have the same level of “*non-understanding*” as traditional insurance consumers.
- (iii) Extreme simplification of insurance contracts has led to an incomplete disclosure of information.
- (iv) A judge’s intervention is required to declare a contract void.
- (v) Abusive clauses are included in contracts before a supervisory authority or judge can determine if they are in fact abusive.
- (vi) The non-existent representation of the “*poor*” by consumer associations.
- (vii) Microinsurance consumers are unaware of the techniques and the entities aiming to protect them.
- (viii) Certain grievance mechanisms are not affordable, nor accessible or impartial.

3. THE RESTORATION OF THE APPROPRIATENESS OF PROTECTION TECHNIQUES

By making use of some of the techniques that have been considered in this paper, it is possible to restore the appropriateness of the protection techniques for the microinsurance and microinsurance consumer⁹⁴.

The key to such mechanisms is that they are grounded on specific legal obligations that are imposed on insurers, intermediaries and States. This approach is extremely relevant as we must not think about

⁹⁴ This paper considers the following documents: G20, *High-Level Principles on Financial Consumer Protection*, October 2011; United Nations, *Consumer Protection Guidelines*, adopted in 1985 and expanded in 1999; S. RUTLEDGE, N. ANNAMALAI; R.L. SYMONDS, *Good practices for consumer protection and financial literacy in Europe and Central Asia: a diagnostic tool*, World Bank, August, 2010; World Bank, *Good Practices for financial consumer protection*, Consultative Draft, March 2011; IDLO, *Consumer Protection and microfinance, Country Reports*, Legal Empowerment Working Paper Series, 2011; Smart Campaign (CGAP and Center for Financial Inclusion at Accion International), *The client protection principles*, July 2011; D. ROZAS, I. BARRES and E. RHYNE, *Implementing client protection in microfinance, The state of the practice*, 2011, Center for Financial Inclusion, Publication N. 14 November 2011.

consumer protection as a voluntary act of morality⁹⁵. Insurance Regulation exists to protect insurance consumers. Insurance professionals are under clear obligations to protect insurance consumers and States have international, regional and national mandates to respect the economic social and cultural rights of their citizens, and in particular, to promote consumer protection. Only by protecting microinsurance consumers effectively, will microinsurance be beneficial to both stakeholders and consumers alike (and fulfil its aspirational social goals).

The International Covenant on Economic, Social and Cultural Rights; the United Nations Consumer Protection Guidelines; the G20 High-Level Principles on Financial Consumer Protection; the guiding principles on business and human rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, endorsed by the Human Rights’ Council of the UN; amongst other instruments, provide the international context to support the obligation on States, transnational corporations and other business enterprises, who are engaged in such initiatives, as part of their obligations to their citizens and consumers, and in general, to individuals.

Accordingly, States (via regulatory and supervisory authorities) and microinsurance providers should take into account the below mechanisms.

The first group of mechanisms aims to deal with asymmetry of information, and therefore to ensure that the microinsurance consumer is able to provide informed consent and knows how to perform the contract in order to obtain benefits from it:

- (i) Improving the disclosure obligation on insurers and intermediaries given the deprivations of the microinsurance consumer:
 - a. Simplify products as a condition to simplifying contracts: The simplification of the insurance product, the procedures of payment and claims handling, are prerequisites for the simplification of the insurance contract itself. If the product and its associated processes are simple and transparent, so will the contractual language. The contract must represent the product that it is offered and cannot misrepresent the product conditions for the sake of simplicity.
 - b. Comply with disclosure obligations prior entering into the contract and during its term: Even if the product and the contract are simple, the insurer and any intermediary must

⁹⁵ CGAP, *Protection des emprunteurs dans le secteur de la microfinance*, Note Focus, N. 27 May 2005.

still be under an obligation to disclose important information to ensure the informed consent of the consumer. Such disclosure must be simple, transparent and provided prior to the entry into of the contract and during its term on a periodic basis. Such information should not only refer to the cover provided (and exclusions) but also to the basic rights and obligations of the consumer and the insurance providers, the ways that consumers can exercise their rights and demand performance of the contract, clearly express any deadlines for the submission of claims or information, set out procedures that the consumer must comply with and any actions that are required from the consumer during the term of the contract and clearly identify the complaints procedures and the bodies which administer them.

- c. Rethink how information is disclosed: As microinsurance is characterised by the “informality” of the delivery of its products, written disclosure “formalities” are not generally appropriate. We must therefore revisit regulation of the disclosure formalities in the microinsurance chain of value and include new technologies and protective mechanisms. Consider using text messages, as alerts or updates to the microinsurance consumers, during the life of the contract. Regularly provide intelligible information during the term of the contract, such as the Australia Moola Talk comic (*Appendix II, Part A*). This is key for the microinsurance consumer to take full advantage of the insurance product.
- d. The Self-regulatory approach against abusive clauses and practices: Insurers and intermediaries should consider adopting memorandums of understanding or codes of ethics, which address terms that are likely to be problematic or unintelligible in the context of “poverty” and bans their use in microinsurance products⁹⁶. Consumers of traditional insurance products in both developed and developing countries are becoming increasingly aware of the importance of the social responsibility of insurance companies and insurance

intermediaries⁹⁷. The implementation of systems that approve or certify consumer-friendly insurance professionals is an encouraging development and could also be applied to microinsurance⁹⁸.

- e. Transparency, publicity and accessibility of the information: The informed consent of the microinsurance consumer can be protected and reinforced by the implementation of systems that centralise information on microinsurance contracts and make it publicly available (as in Colombia).
 - f. Easy access to qualified and independent financial and legal advisors: Consider expanding the work of NGOs who seek to provide legal empowerment and the possibility of using existing legal clinics at universities (where final year law students provide free legal services). In addition, consider making legal advisors available in consumer associations.
- (ii) It is important to dovetail the obligation to disclose with the obligation to promote financial education⁹⁹.

Such approaches must clearly distinguish marketing from financial education.

- a. Financial education as an obligation on insurers: The promotion of financial education is a legal obligation on insurers in certain countries, such as in Colombia. If there are no such legal obligations, it is important to remind insurers that it is necessary to tackle both: (i) the ineffectiveness of the obligations to disclose when the level of understanding of the consumer is extremely poor; and (ii) the lack of financial education of potential consumers.

In fact, generally, if insurers enter into contracts with uninformed parties, they are in breach of their disclosure obligations and if they do so with

⁹⁶ It would be interesting to apply this kind of instrument to all insurance products. On this point please refer to the recommendations of the Fédération Française des Sociétés d'Assurance: *Amélioration du langage de l'assurance*; Recommandation de la Fédération Française des Sociétés d'Assurance; RGAT, 1993. Also see the Client Protection Principles of The Smart Campaign Initiative.

⁹⁷ For a deeper analysis on how CSR should be seen by insurers and insurance intermediaries, please refer to Andrea's PhD.

⁹⁸ In this context I support initiatives such as the Client Protection Certification Program, which is part of the Smart Campaign presented in November 2011, and, in a broader sense, the creation of the “RSE ISO 2600” standard of the International Standard Organisation, which certifies CSR compliance by companies.

⁹⁹ Financial education is considered by the OECD as “the process by which financial consumers/investors improve their understanding of financial products, concepts and risks and, through information, instruction and/or objective advice develop the skills and confidence to become more aware of (financial) risks and opportunities to make informed choices, to know where to go for help, and take other effective actions to improve their financial well-being”. OECD, *Improving Financial Literacy, Analysis of issues and policies*, 2005.

parties that did not provide free and informed consent, the contract itself could be void. In this regard, I recall a case in France where, even though the insurer formally complied with its disclosure obligations, it was held to be in breach, as it had failed to consider the specific characteristics of the consumer and to ensure that she understood the relevant conditions¹⁰⁰. This is in line with the position adopted by the TPC in Australia. The TPC established that insurers must ensure that consumers understand their products, especially when such consumers are particularly vulnerable.

Furthermore, microinsurance stakeholders must consider the institutionalization of Corporate Social Responsibility principles (CSR). For instance, in the recently adopted Principles for Sustainable Insurance (PSI), almost 30 insurers and reinsurers agreed that they “*will embed in [their] decision-making environmental, social and governance issues relevant to [their] insurance business*” and in order to do so, they suggested: “*develop[ing] or support[ing] literacy programmes on risk insurance and ESG (Environmental, Social and Governance) issues*” and “*mak[ing] sure product and service coverage, benefits and costs are relevant and clearly explained and understood*”¹⁰¹.

It is also important to consider the recent developments regarding business and human rights, whereby transnational corporations and other business enterprises (regardless of their size, sector, location, ownership and structure) are increasingly “*required to comply with all applicable laws and to respect human rights*”¹⁰². In this context, selling insurance products to the poor in the belief that those products will help them to manage their risks without ensuring that the poor provide free and informed consent or that they are aware of the benefits of such products, could be considered as a violation of the right to information, to self determination, to participation and to personal integrity¹⁰³.

- b. The obligation on States to provide financial education: States have special mandates to respect and protect human rights and remedy

any abuses. Amongst such obligations are social rights such as the right to social security, to food, to housing, to healthcare and to education¹⁰⁴. States must take appropriate measures to guarantee a “*minimum core*” of those rights, particularly for the “*poor*”¹⁰⁵. If States use third parties to provide such “*minimum core*” services, by issuing licences and authorizations, the State must protect its population in respect of the actions of such third parties. However, obligations could also be fulfilled by providing the tools for obtaining real benefits from the products provided. In other words, by providing financial education. As the insurance activity is in the public interest, insurance in most jurisdictions is regulated and providers are specifically authorized and supervised. Therefore States must ensure that consumers are protected and a preventive way to do so is to provide and support the provision of financial education¹⁰⁶.

There is a body of international instruments that outlines specific responsibilities in this regard, for example the OECD/INFE High-Level principles on National Strategies for Financial Education adopted in June 2012¹⁰⁷, the United Nations Consumer Protection Guidelines¹⁰⁸, the G20 High-Level Principles on Financial Consumer Protection¹⁰⁹ and the International Principles and Guidelines on Financial Education developed by the OECD International Network on Financial Education.

In this context, private and public partnerships should be promoted in order to reinforce financial education initiatives.

- c. Transparency, impartiality and objectivity of the content of financial education programmes: The content of the programmes should be defined by different stakeholders (consumer associations, sociologists, lawyers, anthropologists) and should be tested and evaluated by different stakeholders.

¹⁰⁰ Cour de cassation Française, 1re Ch. civ., 20 octobre 1983, RGAT. 1994, n.1, note Kullmann.

¹⁰¹ UNEP FINANCE INITIATIVE, *Principles for Sustainable Insurance*, June 2012.

¹⁰² Human Rights Council, United Nations, Resolution 17/4 of 6 July 2011 endorsing the “*Guiding principles on business and human rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*”, of the UN Special Representative John Ruggie, 21 March 2011.

¹⁰³ For a deeper analysis on this issue, please refer to Andrea’s PhD.

¹⁰⁴ For instance, see the *International Covenant on Economic, Social and Cultural Rights*, New York, 16 December 1966, which has been ratified by 160 States.

¹⁰⁵ Committee of Economic, Social and Cultural Rights, *General Comment 3, The nature of States parties obligations*, 14 December 1990.

¹⁰⁶ For a more detailed analysis, please refer to Andrea’s PhD.

¹⁰⁷ OECD INTERNATIONAL NETWORK ON FINANCIAL EDUCATION (OECD/INFE), *High-Level principles on National Strategies for Financial Education*, June 2012.

¹⁰⁸ United Nations, *Consumer Protection Guidelines*, adopted in 1985 and expanded in 1999.

¹⁰⁹ G20, *High-Level Principles on Financial Consumer Protection*, October 2011.

- d. Financial education should be seen in a holistic way: The promotion of financial education should be accompanied by basic legal education in order to enforce the insurance contract (rights' awareness, access to justice and available remedies). Hence legal empowerment must be on the agenda.

The second group of techniques aims to address inequality of power:

- (i) All stakeholders of microinsurance must be held to account through the following measures based on the IAIS Insurance Core Principles:
 - a. Regulation of the stakeholders of microinsurance: It is important to implement appropriate prudential, market conduct and product rules for microinsurance where necessary.
 - b. Progressive professionalization: The progressive and proportional professionalization of all stakeholders of microinsurance is essential. Brazil is a great example of this.
 - c. Compliance by non-regulated and non-supervised stakeholders with certain requirements when they work with regulated and supervised stakeholders: Regulated and supervised stakeholders must verify compliance with such requirements. To support this we must create codes of ethics to support the contractual arrangements between insurance professionals and non-professionals.
 - d. Trained microinsurance intermediaries: Insurance professionals or insurance associations should provide training to non-professionals in relation to the products to be offered before and during the contract term. Otherwise, the supervisory authority should provide mechanisms to guarantee requisite levels of expertise.
 - e. Accountability: It is important to reinforce the position that insurers are liable for the acts and omissions of their non-professional "distribution channels".
- (ii) Encourage the participation of consumer associations to determine the appropriate conditions for microinsurance contracts: It is essential to discuss the implementation of protections (such as: identifying abusive clauses, providing "cooling-off" periods, tolerance or grace periods, suspension periods, promoting

freedom to choose providers and protecting personal data) with consumer associations.

- (iii) Grievance mechanisms: We must create and bolster independent, affordable, fast, effective and accessible access, notably:
 - a. The creation or the improvement of independent consumer associations and other bodies, which seek to protect the interests of the microinsurance consumer against insurance professionals (civil society plays an important role in this process).
 - b. The creation of independent and simple complaints procedures within insurance companies, where statistics in relation to inquiries, complaints and disputes must be handed over to a supervisory authority and published.
 - c. The provision of simple complaint procedures within one institutional structure, in addition to any internal complaint procedures. Submission of complaints should be easy and accessible (toll-free phone lines, email, post and in person).
 - d. The provision of independent bodies that are competent to settle disputes with final and binding decisions. If justice is administered by an ombudsman who is appointed and remunerated by the insurance company, we should consider implementing democratic procedures for his or her appointment, perhaps whereby consumer associations and supervisory authorities are part of the process. This would also help address the deprivations of the "poor" as they would participate more fully in economic, social and political life. However, the fact that many ombudsmen are paid by insurance companies is indicative of an underlying potential for conflict of interest. Therefore, we must consider making use of "legal clinics" (at universities), or other pro-bono initiatives, such as TrustLaw¹¹⁰, or "micro-justice" programmes.
 - e. The ability to use class actions, mediation and conciliation should be welcomed and explored further. Such initiatives should focus on rights' awareness and access to justice.

¹¹⁰ TrustLaw is a Reuters Foundation initiative that seeks to provide legal advice on a pro-bono basis. It puts the institutions and associations in contact with qualified lawyers around the globe.

- f. Mechanisms that seek to represent and defend the interests of microinsurance consumers should be guided by overarching principles of fairness and reasonableness, such as the English consumer rights protection approaches and consumer dispute resolution mechanisms.

APPENDIX I

PART A

Factors which the microinsurance consumers share with the aboriginals which lead to a particular contractual vulnerability

The TPC considered that the aboriginals were in a situation of particular contractual vulnerability, as a consequence of following five factors (which are also shared by microinsurance consumers):

- (i) Social: The aboriginals were poorly educated and sometimes illiterate and were not aware of their rights or how to enforce them.
- (ii) Economic: The aboriginals had little commercial experience, limited exposure to financial transactions and lacked awareness of insurance. In addition, they had low and irregular incomes.
- (iii) Geographic: The aboriginals lived in remote areas, with no access to independent financial or legal advice, and far from the reach of the supervisory bodies.
- (iv) Historical: The aboriginals have been consistently discriminated and excluded from Society since colonization.
- (v) Cultural: The aboriginals have special cultural characteristics such as "*gratuitous concurrence*". This means the tendency of a speaker to agree with any proposition or question which is put to him or her, regardless of whether the speaker truly agrees with such proposition or question, or of whether the speaker understood the proposition or question. The incidence of "*gratuitous concurrence*" is widespread amongst the "poor" and usually explained as not wanting to be seen to "*lose face*".

PART B

Acts and omissions that constituted a systematic pattern of deceptive or "*unconscionable conduct*" by the insurance companies and their intermediaries according to the TPC

- (i) Not providing necessary information: The interviewed aboriginals did not know what they had bought; they did not understand the fundamental nature of the transaction, nor their rights or obligations under the agreement. They did not receive copies of the policies (the agents claimed that this was because they thought that the consumers would lose them).
- (ii) Using aggressive selling tactics: In this particular case, the "door to door" and telephone sales that were used.
- (iii) Misrepresenting the benefits of the policies: For instance, one family invested their life savings to cover the education of their daughter after an agent convinced them that the life insurance product would cover such expenses, which was not the case. Some insurance agents told the aboriginals that if they did not sign the policy, they would go to jail. Some agents also misrepresented the policies by claiming that as insurance products were saving products, they would get their "*investment*" back in two years.
- (iv) Not assessing the financial capability of the aboriginals to pay the regular premiums.
- (v) Twisting from one policy to another policy. Mixing up the benefits of the agreements and confusing consumers.
- (vi) Ignoring complaints and implementing standard and non-adapted complaints procedures: Some insurance companies implemented complaints procedures via telephone hotlines, which were useless as the aboriginals did not have access to telephones in the remote areas in which they lived.

APPENDIX II

PART A

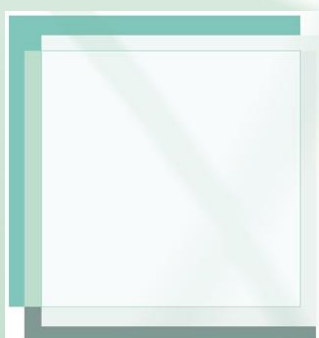
Extract of the “Moola Talk” comic produced by Streetwise for ASIC and BFSO



PART B

Experiences of insurance users – Consumer Protection Diagnostic Study, Kenya, 2011

	Were the details explained to you in writing?	Did you understand the details of the insurance?	Were you able to take the agreement away with you before	Have you made a claim?	In your opinion, was the claim processed quickly?
Yes	87%	89%	74%	19%	74%
No	13%	11%	17%	81%	26%
Total	194	190	191	457	86



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Housed at the International Labour Organization's Social Finance Programme, the Microinsurance Innovation Facility seeks to increase the availability of quality insurance for the developing world's low income families to help them guard against risk and overcome poverty. The Facility was launched in 2008 with generous support from the [Bill & Melinda Gates Foundation](#) to learn and promote how to extend better insurance to the working poor. Additional funding has gratefully been received from [several donors](#), including the [Z Zurich Foundation](#) and [AusAID](#).