Association Internationale de Droit des Assurances

International Insurance Law Association

Asociacion Internacional de Derecho de Seguros

Internationale Vereinigung fur Versicherungsrecht

Associazione Internazionale di Diritto delle Assicurazioni

19th MEETING OF THE

AIDA CLIMATE & CATASTROPHIC EVENTS WORKING PARTY/PLENARY SESSION

OF THE AIDA MOROCCO CONFERENCE

09:30HRS AND 13:00HRS - FRIDAY 25 APRIL 2019

SAVOY LE GRAND HOTEL, MARRAKESH, MOROCCO

MINUTES OF MEETING

THEME: CATASTROPHIC EVENTS & INSURANCE

1. Welcome by HAKIM LAHLOU (MOROCCO)

1.1 A welcome was extended to all gathered by Me. Hakim Lahlou of AIDA Morocco. He acknowledged the presence not just of many members of the AIDA Presidential Council, but also Mr Bachir Baddhou (Morocco), Director General of the Moroccan Insurance & Reinsurance Federation (FMSAR), who had given up his time to make a presentation to the gathering. Other Moroccan representatives included members of the national regulator among others.

1.2 He expressed particular thanks to Prof Jerome Kullmann, the immediate past AIDA President (and his former personal supervisor) for pursuing the initiative of AIDA Morocco hosting this event and so help re-establish its standing both in Morocco and in the AIDA family of associations. The untimely death of their former President, who had been active in having AIDA Morocco host the 1998 AIDA World Congress, was something from which they had not fully recovered. With support on both sides it was hoped that AIDA Morocco could again become active. He further welcomed the current AIDA President, Peggy Sharon and those from AIDA who had committed to travel and make presentations in Marrakesh.

1.3 The chosen theme for the day of Catastrophic Events & Insurance was highly relevant for Morocco, presently introducing legal and market reforms to help the country better to tackle the challenges they faced from the consequences of natural catastrophes. He welcomed and introduced the AIDA Climate & Catastrophic Events Working Party representatives who would commence the morning's presentations.

2 INTRODUCTION/FIRST PRESENTATION: Catastrophic Events, Insurance, Climate Change and Insurability from an international perspective - TIM HARDY (UK)

2.1 Tim Hardy thanked AIDA Morocco for providing the excellent facilities for the event. It was timely to be in Morocco to discuss this theme while reforms here in both insurance law, practice and regulation are being implemented.

2.2 Conducting what is already the 19th meeting of the AIDA Climate & Catastrophic Events Working Party (CCEWP) meeting as a contributory part of this plenary session afforded the opportunity to remember how mandatory insurance and climate change were the two principal themes at AIDA's XIII World Congress in Paris in 2010, out of which our Working Party was formed. Both topics continue to be as important as ever.

2.3 With over 300 people having attended CCEWP meetings to date and keeping in touch, those attending for the first time, especially from Morocco, were encouraged to provide email addresses to allow us to circulate future mailings about our meetings and activities.

2.4 Among those unable personally to attend today's session, but who unfailingly provided a contribution to the discussions – something to be encouraged - are Maria Kavanagh (Argentina) and her Mercosur Group. They have prepared a report which like all materials is to be posted on the CCEWP's page of the AIDA website, addressing the particular challenges faced in the region of South America including the impact of major drought in Argentina and elsewhere in the worlds of agriculture and insurance and the continuing problems of environmental destruction in the wake of the Mina Gerais landslide in Brazil and other recent catastrophic events there.

2.5 Morocco presently faces many of the challenges and is opting for initiatives which are typical of current efforts to harness the benefits of insurance in tackling the largest global risk management challenge ever faced in climate change. A common awareness is the need to transition from preoccupation with disaster response to disaster risk management and prevention.

2.6 According to reliable reports, no less than a third of Morocco's population/GDP is at high risk from natural disasters, most notably, flooding, droughts, earthquakes, but other less obvious potential threats of significance, too, such as those arising from infrastructure projects, including dams. At the same time, the economy and urbanisation/coastalisation and concentration of large economic values at risk grows apace, yet with many businesses and homeowners alike without insurance coverage at all.

2.7 Mr Baddhou is to expand on exactly how Morocco is aiming to improve disaster risk financing and insurance, but in short a mixed system of obligatory insurance against the effects of cat events is being introduced, alongside a compensation scheme for those not covered by insurance. What experience/s have other counties to share and what lessons may be learned?

2.8 First, there are clear strengths and weaknesses when adopting any compulsory insurance scheme. No two countries (or perils) involve identical challenges. EU member states have recognised how each must customise its response for the best effects to be realised. Second, attempted measures must contend with and not merely highlight or worsen levels of regional or social disparity of risk within any country. At least not without accommodating the particular social, economic and political challenges these present. Technology can be embraced to improve the gathering of risk data in a more sophisticated way than ever, but this can add to rather than reduce the concerns unless shared and utilised successfully.

2.9 To most it will be obvious when a natural catastrophe has struck. As lawyers and insurers know only too well, sometimes it is less than certain when a disaster has occurred or a hybrid of natural phenomena and human failing (either in prevention or response) such that determining legal and financial responsibility for disastrous consequences can involve many disputes.

2.10 Even the boundaries of what constitutes an insurance product or solution, rather than simply a financial or political one, can pose problems for regulators, insurers, governments and beneficiaries alike. The use of parametric triggers to determine pay-outs to those affected by climate- or cat-related losses**,** especially in managing agricultural risks, presents new opportunities and legal and insurance issues at the same time. The Moroccan government has been reported to be seeking protection from just such products, making this issue highly relevant.

2.11 A lot of ingenuity is being expended around the world to help close the so-called "Protection Gap": the sizeable gap between losses occasioned by natural disasters and those in fact covered by insurance products, often caused by the unaffordability or the uninsurability of covering some risks. Recent research has highlighted how some schemes introduced to help "bridge" this gap over the short-term can inadvertently simply reinforce, widen or perpetuate that gap unless stock is taken of long-term implications. There is much to have in mind when we learn more about Morocco's plans and the experiences of others.

3 SECOND PRESENTATION: Moroccan plans for compulsory coverage for catastrophic events - BACHIR BADDHOU (MOROCCO)

3.1 Mr Baddhou welcomed the opportunity to explain the extensive nature and details of the plans being implemented in Morocco. It had to be remembered, he said, that Morocco remained at present, rather like a "child" in insurance terms compared with many other nations represented by this gathering.

3.2 Concerns about the effects of catastrophic events spanned both provision for natural disasters as well as man-made events, such as terrorism (considered a higher risk than before).

3.3 Although it had been said that there was a potentially very high level of exposure to the risk of natural disasters in Morocco, he said it was not considered that this was either unmanageable or representing anything to cause undue alarm. It is certainly not as high a risk as in several other countries. There had been serious earthquake losses in the early 1960s, but activity had been low since then, but another incident had occurred only 4 years ago.

3.4 Tsunamis were very rare occurrences indeed (the last dating back to 1750) and considered one-in-a-hundred-year events, whereas floods were much more frequent meriting concerns for adequate coverage provision.

3.5 He elaborated upon how the obligatory system for insurance against the consequences of catastrophic events would feature in property insurance contracts, motor insurance coverage and in contracts protecting corporate/business insureds against corporate liability.

3.6 Each form of compulsory coverage would have a regulated per-event, per-year indemnity limit, with contractual limits and deductibles provided for.

3.7 In terms of the complementary compensation scheme this would provide compensation for personal injury up to a maximum of 70% of any estimated/quantified loss sustained. Additionally, there would be an allowance for any loss sustained of a principal residence, again

at a level the equivalent to 70% of values with other limits applying. A Solidarity Fund was also established for additional payments.

3.8 A public-private partnership in terms of providing coverage was deemed appropriate, drawing on reinsurance support to reduce risk. Although relatively limited in scale, the Moroccan insurance market was the second such market in size in Africa. Physical coverage of goods was being provided for both individuals and businesses. The French system of affording guarantees was the same as that adopted.

3.9 He provided other insights into how this work had been prepared and chosen and now implemented and how this was expected to expand into 2020. He also fielded a series of questions raised about this before having to depart before the session concluded.

4 THIRD PRESENTATION: Climate Change Litigation in the U.S.– the Insurance Implications – RICHARD TRAUB (US)

4.1 A brief timeline of major events in the history of climate change helps to explain how significant levels of litigation have reached the US Courts in recent years.

4.2 Latterly, in 1997 the Kyoto Protocol was signed with 192 countries/parties pledging to reduce emissions by an average of 5% by the period 2008-12, albeit with the US Senate declaring it will not ratify it. 2015 saw the Paris Agreement being signed by 195 countries, including the US. In 2017, President Trump stated that the US will pull out of the Paris Agreement, in keeping with his "America First" message. However, under the terms of the Agreement, US cannot withdraw until 4 Nov 2020, the day after the next US presidential election.

4.3 The extent and variety of "climate change litigation" brought in the US is too great to consider across the board. Instead, the purpose is to identify the major categories and the most notable examples within some of these.

4.4 Categories: Federal Statutory Claims; Constitutional Claims; State Law Claims; Common Law Claims; Public Trust Claims; Security and Financial Regulation; Trade Agreements; Adaptation Cases; and cases brought by scientists and protestors.

4.5 Federal statutory claims involve alleged violations of legislation such as the Clean Air Act, Clean Water Act and the National Environmental Policy Act ("NEPA"). About 150 suits have been brought re NEPA. Conversely, constitutional claims commonly involve claims that a state official or department has acted unconstitutionally in taking affirmative action of some kind to redress climate change. State law claims – numbering in their hundreds – can involve Freedom of Information Act ("FOIA") orders against govt or industry entities; or industry/environmental lawsuits such as activists against Exxon Mobil or energy companies challenging the legitimacy of regulations imposed.

4.6 Among the remainder: common law claims and adaptation cases involve the most direct kind of action to seek direct compensation for alleged failings causing climate change loss to be suffered. For example, the City of New York suing fossil fuel companies for injuries sustained from climate change for which they deemed accountable or power cos. vs. regulators or protesters vs. public bodies.

4.7 Defences**:** Two threshold obstacles to bringing successful suits have been: i) the standing of the claimant (needing to show direct loss caused to him by the defendant which remains very hard to demonstrate) ; and ii) political question – no case against legislation or executive action can be brought if this should really be for politicians to decide upon. Case law already established where claimants have been thwarted by courts so deciding.

4.8 Exxon Mobil/cases against oil/gas cos**:** A trove of documents extracted from Exxon Mobil has uncovered evidence on which claimants seek to assert that oil/gas cos. like Exxon Mobil foresaw concerns, but like tobacco cos., hid their knowledge and profited from fossil fuels without absorbing the economic costs of the consequences.

4.9 Two US states and the US Virgin Islands have brought proceedings alleging fraud against Exxon Mobil. Counterclaims of political motivation etc saw USVI withdraw from proceedings, but suits continue with Exxon losing claim to keep PwC accountings records secret. Other cities and counties have brought proceedings against oil/gas companies seeking recourse for increased cost of building sea walls/resilience measures, but some blocked by rulings that issues are for Congress, not the courts.

4.10 Our Children's Trust**:** Separate style of claim was brought in 2015 on the public trust doctrine to the effect that the federal govt. is failing in its duty to protect against climate change. Not based on breaches of laws, but deprivation of rights to life, liberty and property. Interlocutory appeals against refusal by court to dismiss the action continuing in June 2019. Affording encouragement to similar suits in other jurisdictions (the Netherlands, where claimants have succeeded; Pakistan; and India.

4.11 Insurers' position**:** Impact of climate change on insurers already being felt. At present, a dearth of cases on insurers' coverage issues, but this is bound to change. Increased litigation activity by municipalities and private parties against fossil fuel companies impact GL, D & O, and Property insurance. Coverage issues will include: do climate change suits seek "damages"; "property damage"; was the damage during the policy period (trigger); occurrence; allocation; and pollutant exclusions.

4.12 In 2018 Allianz announced it would no longer insure single fired coal power plants or any planned and operating coal mines. Swiss Re, Munich Re, AXA and Zurich have all opted to limit insurance dealings with coal. Lloyd's Banking Group announced that it will refuse to finance new clients whose revenues predominantly come from coal power plants and mines.

4.13 No dispute that the climate is changing and quickly. The cost will eclipse the GDP of many developed countries. Lawsuits against fossil fuel companies and other carbon producers will proliferate. Suits by stakeholders against public companies and directors and officers will also grow.

5 FOURTH PRESENTATION: The Insurance Ramifications of Climate Change in Australia – CHRIS RODD (AUSTRALIA)

5.1 2018 was a highly significant year for Australia in terms of the impact of climate change**.** A series of major climate-related occurrences for the country – record-breaking temperature highs; rainfall lows; frequency of bushfires; drought across its most-populated state. In November the Australian Actuaries Climate Index (AACI) was finalised and released free to public access, revealing still more worrying data.

5.2 Based on data gathered by the Australian Dept of Meteorology between 1981-2010 it endeavours to reflect for the benefit of policymakers, the public, insurers and businesses whether the scale and frequency of extreme weather events (principally inland/coastal flooding, cyclones, droughts and heatwaves) are changing over time. The first AACI shows the frequency of extreme conditions in Autumn 2018 was higher than historical extremes for Autumns across the baseline period from 1981-2010.

5.3 The Index is not site specific, with the focus on zonal or regional risk, to enable homeowners and business to access the data to evaluate how zonal risk factors are assessed by insurers when pricing risk: a tool, not a solution!

5.4 Among headline facts: the number of high-risk zones is increasing; the number of extreme hot days is rising; and sea levels are rising. Countrywide, extreme hot days are now 80% more common and extreme cold days are 74% less common than the long-term average.

5.5 Consequences and the insurance challenge: According to projections – by 2100, 10% of all residential properties will be uninsurable (meaning annual premium will exceed 1% of property value). Premiums tend to reduce if mitigation strategies are in place, e.g. housing construction using more resilient materials, located according to cyclone codes, flood levy banks, away from areas subject to storm surge/flood. But, with the insurance industry in Australia not presently involved in setting building codes, people in high risk zones currently face unaffordable premiums.

5.6 Although prospective homeowners generally need insurance to obtain a mortgage, there is very limited checking on the maintenance of such insurance. If the property becomes uninsurable, there is a prospective risk to both the homeowner and the financial institution. Where widespread loss or damage ensues (e.g. from bushfires or flooding) the absence of adequate insurance gets passed to the public charity of federal or state govt such as occurred with Townsville bushfires and Queensland floods.

5.7 Based on the Index data many properties will not be affordably insurable during the lifetime of many mortgage terms. Insurers are unlikely to be able to provide any guarantee of cover on affordable terms. Populated coastal regions along the East coast (NSW and Queensland) remain particularly vulnerable to storm surge damage, coastal flooding and sea level rise.

5.8 In prospect**:** Australia faces a General Election on 18 May 2019. Polls suggest that factors having the most significance among prospective voters are responses to climate change and environmental issues. How those concerns and polls result in terms of policies to be pursued is hotly awaited.

6 FIFTH PRESENTATION: Israeli provision for agricultural natural hazard losses – PEGGY SHARON (ISRAEL)

6.1 Agriculture production involves both high investments and high-risk exposures. Risk management and insurance play critical parts. In Israel, like many other countries, exposures come from both natural disasters/catastrophes (affecting large scale damage/disruption – declared by government declaration and legislated response) and natural damage, in the form of unusual climatic damage, less extreme or widespread than where disasters, often provided for by way of express insurance coverage. Both risks are provided for by KANAT - the Israeli Insurance Fund for Natural Risks in Agriculture.

6.2 Disputes and legal issues have arisen over the years. They have turned on such questions as whether more than one climatic event gave rise to loss and compensation levels such as where damage was sustained but no disaster declared. Over the last ten years in Israel concern about frost, rain and storm has predominated, but major claims can concern hail, heat and resulting flooding or viruses among other causes

6.3 The risks can be broadly categorised between price (volatility where imbalance between supply and demand); productivity (reduced yields attributable to extreme climatic change); and income (revenue/cost affected by price fluctuations). Some level of risk is self-managed on the farm. Some can be formally shared with other farmers or transferred to those offering private market products. Larger scale drought or flood, for example, will most usually not be transferred, but farmers will draw on public/state aid.

6.4 Across the EU now there are agro risk schemes of three main types: private risk management (involving non-subsidised insurance and mutual funds); public-private partnerships (insurance and funds involving state subsidy); and public instruments (in the form of direct payments, state aid, reduced tax rates or provision of a market safety net). In addition, innovative schemes such as those involving the payment of benefits according to a pre-determined index or trigger point.

6.5 In April 2017 the Moroccan govt joined others before them in announcing the launch of an index-based insurance experiment. India has the Prime Minister (Modi) Crop Insurance Scheme (PMFBY), a revised weather-based insurance scheme and multi-peril yield insurance (MPCI) based on area-yield index data. In PR China, the government subsidised agricultural multi-peril yield insurance is based on farm-level yield.

6.6 Israel's KANAT govt. company/scheme was founded in 1967, co-owned between the govt and fourteen Farmers' Marketing Boards/organisations. With the govt contributing both to the farmers' premiums and supporting KANAT's reinsurance programmes, most of Israeli's crops and livestock are so protected.

6.7 The range of cover afforded by KANAT is extensive across their Natural Disasters Insurance and Multiple Peril Crop Insurance programmes. Cover for orchards, fruits and flowers makes up over 70% of their premium distribution. Cover for crops can extend to specific types such as avocado, olive oil and wine grapes, each raising disputes from time to time in terms of policy interpretation and claims.

6.8 Technological advances are already having an impact especially in the cases of the delivery of index-insurance initiatives for smallholder farmers, "blockchain/smart contract" crop insurance and artificial intelligence being applied to identify speedily and specifically plant diseases so a to inform/expedite both precautionary and responsive measures.

7 <u>SIXTH PRESENTATION</u>: Compulsory Insurance for natural disasters introduced in France – <u>JEROME KULLMANN (FRANCE)</u>

7.1 The most obvious problem presented for the private insurance market when trying to provide insurance against catastrophic losses is that no contracts ever limit the extent of payments needing to be paid out. Accordingly, prices needing to be charged for such risks are very (potentially, unaffordably) high.

7.2 In France, until 1982, whenever a natural catastrophe struck, people would die; and widespread damage and destruction would ensue. Governments, in turn, would be required to meet the payments required to respond to the disaster and to rebuild etc. No compensation, however, would be paid directly to victims of such catastrophes. Very low levels of insurance were in place.

7.3 In 1982, the Caisse Centrale de Réassurance (CCR) - which had existed since 1946 – provided, with the State's backing, specialty lines reinsurance for natural disasters, as well as other risks, such as terrorist risks, war risks and nuclear risks.

7.4 A number or problems had immediately to be addressed. One, was whether to prepare a list of specified events, e.g. flood, earthquake etc, or whether simply to provide that a natural catastrophe *was* itself an insured event, without specific qualification, but one needing to be determined by some extraneous means.

7.5 Various ways were considered, but the method decided upon was for the government to declare on a case-by-case basis whether a "natural disaster" had occurred. This involves a procedure starting with a local mayor (for any commune affected) needing to initiate a request

to the Prefect (of their department in France) whether this should be declared. Any decision is ultimately achieved via an Interministerial Commission deciding this via the CCR.

7.6 How does the "unlimited guarantee" afforded by the government under the Scheme in the case of declared natural disasters operate in law? In effect, it is not a true insurance scheme, but a compensation scheme based upon a public-private partnership. It does not impose a State monopoly on natural disaster reinsurance, nor extend to every natural peril considered to be otherwise insurable by the private market. Instead, the scheme extends to (otherwise) uninsurable material loss or damage resulting from the exceptional intensity of a natural element.

7.7 The guarantee afforded allows insurers to provide policyholders with natural disaster cover without limitation and helps to secure the long-term solvency of such an arrangement. Rate-setting and deductibles are taken out of individual insurer's control with a fixed percentage being attributable to the CCR reinsurance, irrespective of the level of risk associated with the individual exposure involved. Recoveries are made through the usual channels of a loss adjuster assessing the extent of damage and insurers paying out with backing from CCR/their private reinsurers.

7.8 In cases where losses have arisen from what is not declared a "natural disaster" then an insurer will afford coverage depending on its policy terms and conditions. Although insurers cannot determine or influence what has constituted a "natural disaster" there are naturally instances where different insurers either contend the extent to which specific losses have been demonstrated to have been sustained in direct consequence of such disasters. Further problems have arisen when there has been a change of insurance carrier during the period of any exposure, as well as in provisions governing the circumstances when and how multi-risk policies may be cancelled.

The session concluded with some questions and answers passing between the speakers and the delegates.

Tim Hardy/CCEWP Chair