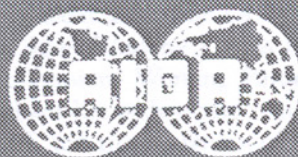


AIDA Mail



Association internationale de Droit des Assurances International Association for Insurance Law
 Associazione Internazionale de Diritto delle Assicurazioni Asociación Internacional de Derecho de Seguros
 internationale Vereinigung für Versicherungsrecht

Introduction

The 40th Anniversary of AIDA was appropriately commemorated at the Budapest Colloquium in November 2000, and thanks are due to the Hungarian Chapter for their unflagging hospitality. This marvellous achievement serves to remind us of Professor Donati, who played such a significant part in establishing AIDA and celebrated his 90th birthday last year. AIDA has grown enormously since the first World Congress in Rome, to branch out into almost every part of the globe where insurance is carried on.

In this connection therefore it was entirely appropriate that yet another new Chapter should join the AIDA fold at Budapest, with the approval by the General Assembly of Costa Rica's membership. A number of the Working Parties held well attended and productive meetings in Budapest (several are reported herein), and a new Working Party on Transport Insurance held its inaugural meeting.

Much progress has now been made with the plans for the XIth World Congress. It is to be

hoped that by now efforts by National Chapters to prepare their reports on the two themes are well underway. The two questionnaires, "Alternative compensation mechanism for damages other than those caused by automobile accidents" and "Integration of financial services" will both be available on the AIDA website shortly—www.aida.org.uk. It is hoped that increased use of the website in future will improve communications within AIDA.

John Butler
 Honorary President

NEWS FROM THE PRESIDENTIAL COUNCIL AND THE GENERAL ASSEMBLY

Meeting of the Presidential Council

The Presidential Council met in Budapest on 23 November 2000, in conjunction with the Budapest Colloquium, to mark the 40th Anniversary of the founding of AIDA.

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The President, Mikael Rosenmejer, thanked Professor Bullo, Ross Hensman and Professor Wetterstein, all of whom resigned from the Presidential Council, for their services to AIDA. The meeting agreed that Professor Cousy (who has for many years provided his invaluable services as Assistant Secretary General), Dr Mangialardi and Professor Barroso de Mello, be presented to the General Assembly to be elected as members of the Presidential Council, as was the President's recommendation to appoint Professor Jaramillo as Vice President.

Richard Kennedy and Steve Acunto presented a report on the preparations for the XIth World Congress, 2002 in New York. The slogan for the congress is to be "West Side Story", and details can be found in the US Chapters "Quarterly Update", which will be sent to all chapters. Details will also be published in forthcoming issues of AIDA Mail. Fundraising is underway, the goal is to raise US\$350,000. If this achieved, a registration fee of about US\$750 per person is to be expected. As regards the Scientific Program, National Reporters should have been appointed, and National reports should be concluded by the end of March 2001. General reports are due by end of January 2002.

The following new Chairmen were appointed to the AIDA Working Parties:

Motor Insurance—Mr Zimolo (Italy) (Mr Mesana will continue as his deputy)

Prevention—Professor J. Alarçon (Spain) Fidalgo

State Supervision—Dr Bárd (Hungary)

Transport Insurance—Professor Kris Bernauw (Belgium)

Distribution of Insurance—Mr Kamphuisen (Netherlands)

Consumer Protection and Dispute Resolution Working Party—It was noted that attempts to reactivate this Working Party have so far been unsuccessful. The President is of the opinion that this idea should be pursued, and he agreed to continue to try and find a charismatic person as Chairman. This Working Party remains dormant.

Richard Kennedy suggested that in connection with the theme of the US World Congress, the Council should consider whether to create a new Working Party on Financial Services, to deal with questions on insurance, banking services and 'transcompanies'. It was noted that the US Chapter already has a committee which deals with this topic, and would offer its help in establishing the Working

Party. Mr Kennedy would be willing to act as the first chairman. It was noted that there is a danger of an overlap with other Working Parties (e.g. the Reinsurance & Pensions Working Parties), and agreed that Richard Kennedy would provide a detailed framework for the activities of the suggested Working Party, in order to avoid duplication with the existing Working Parties.

The Secretary General, Colin Croly encouraged the chapters to appoint at least one regular representative per Working Party. He noted that many of the Working Parties have permanently changing participants at meetings these circumstances, making it difficult to carry out consistent, targeted activities leading to useful results.

The President announced that the Executive Committee has decided to award the AIDA Medal to Dr K Bárd, Professor E Caballero Sanchez, Professor F Sanchez Calero, Professor Dr. Dr. R Schmidt. Vice-President Michael Gill had drawn up recommendations for future guidelines for the awarding of medals, and everyone was asked to study these, for discussion and approval at the next meeting.

The South African Chapter applied to host the XIIth World Congress in 2006, and Mr Pieter Havenga introduced Durban as the potential venue, by way of a video presentation. It was noted that the best time of year would be either September or April/May. The suggested topic was Human Rights and Insurance. Shortly before the commencement of the meeting, the Argentinean Chapter also submitted an application to host the 2006 World Congress, supported by Professor Sanchez Calero. The proposed meeting venue is Buenos Aires, Professor Mangialardi gave a short introduction about this city. The congress fee would be in the region of US\$300 per person. The suggested topic was "Progress and its Relation to Insurance". It was noted that, as the tradition of Roman Law lives on in Argentina, this presents the opportunity for interesting comparisons.

It was agreed that the choice of venue for the XIIth World Congress would be discussed further at the next meeting.

Professor Cousy advised the meeting that his university is publishing an Encyclopaedia of Law and would like to produce those volumes on insurance within the framework of AIDA, bearing the AIDA monograph. Professor Cousy asked for the support of the AIDA Chapters, the President and the AIDA Presidential Council in this endeavour. Publication in the encyclopaedia would receive remuneration.

The President advised that the Costa Rican Chapter is to be newly admitted to AIDA at the General Assembly. An application from the Ukraine is being considered, and a new Chapter is being established in Iceland. Furthermore it is hoped that the dormant Chapters in Canada and Portugal may be revived.

It has been agreed that AIDA will continue to publish AIDA Mail, at its own expense, following LLP's decision to discontinue their arrangement with AIDA. The Editorship will remain with the General Secretariat.

The Treasurer's report was distributed, and it was noted that the subscription fee for the year 2000 had only been paid by half the Chapters. No fees had been incurred since the former AIDA Bulletin was discontinued in 1997. A suggestion for the funding of simultaneous translation services for Working Party meetings was discussed. This would avoid the trend toward Working Parties mainly using the language of their Chairman. Experiences of simultaneous translation in both Cartagena and Budapest have been positive. It was also suggested that AIDA Mail might be translated (at a cost of about \$14,000 per year).

Colin Croly noted that an increase in positive ideas and projects could allow for fundraising amongst insurance companies and lead to closer contacts with AIDA, in view of AIDA's 40 years of establishment and its results as an international association, and having regard to the current trend towards mergers and globalisation. "Indirect" financial support might also be possible if insurance companies are encouraged to support their employees taking part in AIDA events and Working Parties. For this purpose, it is important to inform the insurance industry that it can profit from AIDA's scientific work, and the insurance industry would benefit from making an active, or financial, contribution to such work. Some chapters already receive contributions from the industry. The General Secretariat will debate the draft of a letter which is to be sent to certain persons within the insurance industry to explain AIDA's scientific and financial concerns.

Colin Croly advised that an update to the AIDA website is urgently required. To enable the website to be used for practical purposes, such as distribution of questionnaires, costs in the region of £1000 (\$1400) are anticipated.

Professor Gambino invited the Presidential Council to hold its next meeting, together with the Working Parties on Motor Insurance and

Reinsurance, in Rome. The next meeting will take place on Friday 11 May 2001 in Rome. Further meetings may take place in Rosario, Argentina in November 2001 (date to be fixed) and in conjunction with the BILA Colloquium in May 2002.

Meeting of the General Assembly

The General Assembly met in Budapest on 23 November 2000, in conjunction with the Budapest Colloquium, to mark the 40th Anniversary of the founding of AIDA.

The President, Mr Mikael Rosenmejer welcomed the representatives of the Chapters, and other guests.

The General Assembly unanimously approved the admission of Costa Rica to AIDA.

The following were unanimously elected to the Presidential Council by the General Assembly:

Professor Hermann Cousy (Belgium)
Dr Edoardo Mangialardi (Argentina)
Professor S R Barroso de Mello (Brazil)

Professor Carlos Ignacio Jaramillo (Columbia) was unanimously elected to succeed Professor Bullo as Vice President.

It was agreed that AIDA Mail provides an important link between the World Association and the Chapters. In order to retain its appeal to the different language groupings within AIDA, it was suggested that AIDA Mail should in future be translated, and also that translation services should be made available at various meetings. It was noted that this would lead to a significant increase in costs.

Dr Speyer, chairman of the Accumulation of Claims and Subrogation Working Party presented a report. (A written report appears below).

Mr Colin Croly, chairman of the Reinsurance Working Party, presented a report. (The minutes of the Budapest meeting appear below).

Dr Karoly Bárd, who has recently taken over as sole chairman of the State Supervision Working Party following the death of Professor Frédéricq, delivered a report.

Professor Dr Lange, chairman of the Working Party on Pensions, presented a report.

Professor Zimolo, who has recently been appointed chairman of the Motor Insurance Working Party, delivered a report.

Professor Alarçon, who has recently been appointed chairman of the Prevention Working Party, delivered a report.

Professor Bocken (also representing co-chairman Professor Wansink) delivered a report on behalf of the Liability for Products, Pollution and New Technologies Working Party.

A new Working Party on Distribution of Insurance was established in Budapest, and will be chaired by Mr Kamphuisen.

A new Working Party on Transport Insurance chaired by Professor Bernauw held its inaugural meeting in Budapest.

The President awarded the AIDA medal to the following individuals, to honour their contribution to the development of insurance law in general and AIDA in particular:

Dr K Bárd

Professor E Caballero Sanchez (the award was accepted on his behalf by Professor Sanchez Calero)

Professor F Sanchez Calero

Professor Dr R Schmidt.

AIDA Working Parties

Minutes of the AIDA Transport Insurance Working Party inaugural meeting: Budapest, Hungary, 23 November 2000

In attendance: Prof. Dr. Kris Bernauw (BE), Prof. Dr. Mr. Ph. van Huizen (NL), Prof. Dr. JP van Niekerk (SA), Prof. Dr. I. Rokas (GR) (arrived later due to travel delay), Dr. S. Knap (HU), Dr. J. Kotrbata (CZ), Dr. J. Millivari (HU), Dr. L. Hargitai (HU), Mrs. M. Tudor (RO)

The following have expressed an interest but apologised for not being able to attend the WP meeting: Prof. Dr. T.-L. Wilhelmsen (NO), Mr. P. Naschitz (Israel), Mr. Borut Jezersek (Slovenia)

Appointment of officials: The General Assembly has elected the following officers, who accepted: Chairman, Secretary and Treasurer: Prof. Dr. K. Bernauw (BE), Vice-chairman: Prof. Dr. Mr. Ph. van Huizen (NL)

An interesting presentation was made by Dr. Susan Knap (HU) on the Central and Eastern European Transport Insurance Market

The assembly reviewed a series of possible interesting topics and decided to start the WP activities with drafting and distributing a questionnaire in order to establish an inventory

of the national transport insurance legislation, regulation, standards and policy conditions.

This will serve as a basis for the selection of the specific topics on which the Working Party will work.

Next meeting: to be announced

Kris Bernauw

Chairman, Transport Insurance Working Party

Minutes of the AIDA Reinsurance Working Party Budapest, Hungary, 23 November 2000

In attendance: Colin Croly (Chairman), Jean Alisse, Andras Balas, Christian Bouckaert, Osvaldo Contreras-Strauch, Istvan Csayni, Csilla Dancs, Johan De Decker, Zoltan Forgacs, Michelle George, Alistair Gunn, Paul Haiman, Karolin Havasi, Daisy Huczka, Richard Kennedy, Anthony Kay, Jermone Kullmann Beata Ligeti, Utaun Lincsey, Marta Maros, Michael Mendelowitz, Rob Merkin (secretary), Lars Molgaard, Imre Novack, Maria Novack, Ferenc Ozsvath, Dragos Pnaitecu, Mark Pring, Peter Rapai, Ioannis Rokas, Mikael Rosenemejer, Reimer Schmidt, Laszlo Szello, Zsuzsanna Szifeti, Zita Tatar, Soren Theilgaard, Gabor Valko, Nancy Anamaria Vila.

1. Report on progress of questionnaires

The Chairman gave a short introduction setting out the history of the Working Party and of the objective of publishing reports based on the responses of national chapters to questionnaires drafted by the Working Party. The Reports published to date are *What is Reinsurance*, *Follow the Settlements* and *The Proper Law of Reinsurance Agreements*. The aim is to publish six reports by the 2002 World Congress in New York. The Chairman emphasised the need for members of the Working Party to ensure that there was a response to each questionnaire from their own country, and that a negative return stating that there is no local law on the point is as informative as a detailed response. The position on the outstanding questionnaires was as follows:

- (a) 4—*Aggregation of Losses* This was recognised to be a difficult topic, and Michael Mendelowitz had prepared and circulated a model reply to show how the questions might be answered. There were almost enough replies for a report to be prepared, and this would now be done with a view to

publication early in 2001. Further responses should be sent to Michael Mendelowitz (mmendelowitz@blg.co.uk).

- (b) 5—*Custom and Practice* Only 9 responses had been received. There was a need for more responses, as every country has its own rules on the recognition of custom and practice and there were important national differences. Kathy Posner, the reporter, had prepared a short report on the responses so far. Further responses should be sent to Colin Croly (ccroly@blg.co.uk, or direct to Kathy Posner).
- (c) 6—*Cut-through* The questionnaire followed on from a discussion at an earlier Working Party meeting by Michael Gill and Dick Kennedy. More countries were urged to reply to the questionnaire, given the current significance of the topic. All responses to be sent to Michael Gill.
- (d) 7—*Intermediaries* This report has been out for a relatively short while, and more responses were required. All responses should be sent to Rob Merkin or to Colin Croly.

2. Publication of reports

The Chairman reported that Informa/LLP, which had published the first three reports, had decided to discontinue the publication of the *International Journal of Insurance Law* and AIDA Mail. It was not clear if this also meant that no further Reports would be published. However, if this was the case, the Chairman had investigated alternative publishing possibilities, which might allow reports to be published at a lower price.

3. Negative declaratory relief and anti-suit injunctions

Rob Merkin gave a short presentation and led the discussion on this topic.

4. The effect of commutations on retrocessions

Lars Moelgaard and Michelle George gave a short presentations and led the discussion on this topic.

5. Bankruptcy of insurance companies in Argentina

Nancy Anamaria Vila gave a short presentation on this topic. (Her paper will appear on the AIDA website shortly).

6. Next meetings

The Reinsurance Working Party will meet in Rome in May 2001. The following meeting

would be in Rosario, Argentina, at the CILA Colloquium in November 2001. There was a possibility of a Colloquium in London in the Spring of 2002.

The topics for the next meeting would be:

- (a) *Follow the Settlements*. Discussion would be led by Alistair Gunn, and would be concerned with the resolution of disputes rather than the effect of commutations. There would also be consideration as to how the Second Report on *Follow the Settlements* could be updated.
- (b) *Inspection Rights*. Topics would include the existence of an implied right of inspection, and the relationship between inspection and payment. Discussion would be led by Christian Bouckaert. The Chairman would also try to find as a speaker a person who carried out inspections, so that practical problems could be considered.

7. Any other business

Alistair Gunn suggested that a suitable topic for a future might be the use of plain English and the ordinary meanings of words.

Rob Merkin

Secretary, AIDA Reinsurance Working Party

AIDA Working Party on Accumulation of Claims and Subrogation

Questionnaire prepared for the Working Group meeting held in New York on 3 November 1999

The purpose of this questionnaire was not only to provide information for the analysis of the subrogation issue according to the situation in each country, but also to enable recommendations to be formulated for the Working Group meeting to be held in New York in October 2002 during the AIDA XI World Congress. The full text will be available on the AIDA website: www.aida.org.uk.

Report from the Accumulation of Claims and Subrogation Working Party—Cartagena, May 2000

On May 26, 2000, during the celebration of the VI Ibero-American Insurance Law Conference, in Cartagena de Indias, Colombia, the Working Group "Accumulation of Claims and

Subrogation" held a meeting, presided by, Dr. Claudio Horst Speyer, Chairman, and Dr. Enrique José Quintana, as Secretary. Over 30 delegates were present at this event representing Argentina, Brazil, Colombia, Chile, Mexico, Paraguay, Spain and Venezuela.

Answers to a questionnaire which addresses the risks which are covered by compulsory Civil Liability Insurance in different jurisdictions were received in advance from Brazil, Colombia, Mexico and Argentina. The Questionnaire was also sent to AIDA National Sections, the Presidency and General Secretariat in advance of the conference. A copy will be posted on the AIDA website shortly.

The analysis of the answers received and the discussions at the meeting revealed deep differences in legislation, concepts and the methodology applied in the diverse issues under consideration.

Unlike the situation in Europe, where community rules on insurers' activity have followed the path of freedom of establishment, Latin America, on the other hand, has not yet consolidated this first stage, for this reason, important inconsistencies in approach are found.

With compulsory circulation insurance, the first major difference is between those countries with compulsory insurance in their regulation and those who have not yet adopted this, e.g. Paraguay (according to the paper delivered during Theme III of the Ibero Latin American Conference by the Paraguayan jurist Dr. Desidero Sanabria).

The second difference can be found in the legal nature of the compulsory insurance: some Latin American countries include it in the category of personal accident insurance, while others consider it a civil liability insurance. Thus, Brazil oversees compulsory insurance against personal damage caused by automobiles, known as DPVAT, established by Law 6194 of December 19, 1974. The amounts are certainly lower; in American dollars the cost of death or permanent disability amounts to U\$ 2,500 and hospital assistance can reach U\$ 750.

Since 1986 Chile and Colombia, through Law 33/86 regulated by Decree 2544/87, include compulsory insurance in the personal accidents insurance structure, with limited compensation and, in general, low significant value in terms of compensation, covering personal damages including death and certain hospital expenses assessed regardless of who is responsible for the damage. Other countries include compulsory insurance coverage within the civil liability

insurance, e.g. Mexico, where there is also federal legislation as well as the rule in force in each State, e.g. Jalisco. In Mexico compensation is assessed taking into consideration the minimal salary per day, e.g. 2000 salary days. The Civil Code of each State regulates the civil liability, objective as well as subjective, and the compensation assessment criteria. In the National Traffic and Transport Regulation, Argentina established a Civil Liability Compulsory Insurance, and Resolution 21999 of the National Insurance Superintendency, passed on December 29, 1992, fixed the amount of U\$ 30,000 in case of death or Total or Permanent Incapacity, U\$ 1,000 for hospital expenses and U\$ 1,000 for burial services, these last two amounts are considered an autonomous legal duty regardless of liability. The non compulsory car civil liability policies — voluntary in the case of personal vehicles — cover the amount of U\$ 3,000,000 and U\$ 10,000,000, in the case of public transportation. It should be underlined that the amounts of the compulsory insurance are exiguous before the amounts fixed by the courts.

The conceptual difference of the insurance structure is no minor issue since personal car accident policies give priority to the victims' interest, whilst the Civil Liability Insurance prioritises the insured's responsibility ahead of protecting the victim.

In the presentation by Dr. Don Fernando Sánchez Caleró, the President of CILA, on the future of the Civil Liability Insurance, (the main theme of the Ibero Latin American Conference), and in reference to so-called damage to persons in transit, there is a change towards coverage under the form of a personal accident policy. Compensation is awarded pursuant to values fixed in a table system (notwithstanding the constitutional reproach on limiting the concept of a full or integral compensation), keeping the physical damage in the orbit of the civil liability insurance.

Before the increasing advance of the social liability concept, which privileges the victims' interest over the protection of the estate of the person responsible for the damage, and provides coverage even when the responsible party cannot be found, the concept modification of the coverage is not a minor issue and will be the subject of further consideration by this working group, as the problem of the accumulation of claims from policies of different legal nature and subrogation gains relevance, not only regarding the technical economic aspects but as a matter of legislative policy in each State.

An additional issue which exceeds the domestic law of each country is the liability for damages to a third party during an international trip. In this case, it would be necessary to further evaluate certain aspects of the coverage demanded to the domestic traffic in order to avoid asymmetries between the internal domestic law and the coverage values foreseen by the Treaties in order to avoid, in reference to the car producing the accident, different compensation criteria, also regulating the procedural rules and the applicable law, whether nationals of the same country are involved in a car accident in another country or not.

In reference to this subject, it will be necessary to study the possibility of achieving harmony in the rules, based upon common principles, establishing common rules on accumulation of claims and subrogation.

If the coverage value of the compulsory insurance is low, then it is impossible to avoid, restrict or prevent the injured party, who has proof of damage, from resorting to the courts against the responsible party for compensation. This would result in discounting the first compensation from the amount awarded by the court. The legal nature of the institutes has a decisive relevance in the possibility of subrogating as if this is not precise, it could be understood that subrogation would be inapplicable in the personal insurance.

A matter of special interest is how to homogenise compensation within a country since the Courts of one State or the different States could apply different assessment criteria. It will also be necessary to evaluate whether compensation could be fixed by law or whether the homogenisation should be achieved with values fixed by the highest authorities (National Supreme Court) of each country, in order to avoid decisions on unconstitutionality in furtherance of greater juridical security and the certainty of fair economic transactions in a general context.

Regarding the coverage of the victim's hospital or pharmaceutical expense, as a result of the actions of a third party, legislative progress is necessary to enable subrogation by the hospital, the Social Security agency or the insurer for the responsible party and to agree the solutions to specific situations in the case of occupational accidents since not all legal orders foresee an insurance to cover them; the coverage of occupational accidents is included in the Social Security context.

The deep transformations in the Social Security field during the last decade demand a detailed analysis of their relation with Insurance by this Working Group. During the meeting of the AIDA Presidential Council in New York, the Working Group made an encouraging long-term proposal to focus on these issues and the relevance of the Accumulation of Claims and Subrogation subject. The assistance to the meetings of the Working Group is increasing, and there is also greater co-operation in the answers to the questionnaires, enabling the clarification of the diverse points of view and generating answers to the new challenges.

Dr Claudio Horst Speyer
Chairman, Accumulation of Claims and
Subrogation Working Group
(speyer@interserver.com.ar)

Report from the Accumulation of Claims and Subrogation Working Group — Cordoba, September 23, 2000 (during the celebration of the IX National Insurance Law Seminar, VII International Conference and II Latin American Insurance Law Conference)

The meeting was chaired by Dr. Claudio Horst Speyer, Dr. Enrique José Quintana acted as Secretary. More than 65 people attended to consider:

- 1) Advantages, disadvantages and consequences of the coverage of car-driving risks by the Civil Liability insurance or the personal accidents policy;
- 2) Advantages, disadvantages and consequences of the establishment of a compulsory coverage in the case described;
- 3) Consequences of the regimes indicated, should they be established, regarding accumulation of claims and subrogation in the insured party's favour.

The Chairman and Secretary reviewed the discussions held in Marrakech 1998, New York 1999 and Cartagena de Indias, May 2000. The general consensus was that coverage of driving risks in voluntary insurance policies should be through liability insurance according to the provisions of the Insurance Law and the Civil Code. The Argentine domestic positive law requires this legal arrangement to deal with the case when the victim had voluntarily taken a personal accident insurance policy, the victim

would be otherwise entitled to double compensation: that corresponding to the civil liability insurer, and the victim's own personal accident insurance, with the noteworthy accumulation of claims. It was also underlined that the insurer which takes an insurance through a personal accident policy would not be entitled to bring a subrogation suit as individual insurance does not permit subrogation, pursuant to the provisions of section 80 of Act 17418 on Insurance Contracts.

Agreement was reached on the merits of a law on a compulsory driving insurance, fixing a maximum insured amount in values similar to the "cost of life" as predicted in labour accidents law. This law should give priority to the actual victim's interest, to avoid a legal action filed by this person, with its consequent complexity, extensive duration and costs. Compulsory coverage would only include the person's death or personal injury, establishing a reserve fund in the event the injured person is uninsured, the driver disappears or the insurance company is liquidated. The amounts exceeding the maximum insured values would then be ruled by a voluntary liability insurance policy which would operate in excess of the amount mentioned.

In case of recourse to the Courts to request the payment of the difference, the amount received on account of the compulsory insurance would be discounted. It was considered that, from the technical point of view, the policy should be a "record policy"; i.e., each driving licence bearer should have a policy in force. In a first stage, the coverage should be considered to belong to the civil responsibility branch. The diverse aspects of accumulation of claims and subrogation should be expressly considered in the law. This law should be autonomous and separate from General Traffic Law.

As far as the third item is concerned, it was agreed that accumulation of claims and subrogation are issues of major relevance. In the case of the former, it sets the maximum limit to all types of insurance or coverage of the injured party. In the case of subrogation, the technical incidence of the coverage was underlined and special consideration was given to the social importance of the fact that the liable party or its insurer must be accountable for the damage caused and should not otherwise be set free by the existence of the victim's coverage. All participants committed themselves to analyse these issues in more depth for the following Group meeting to be held in Rosario, Argentina,

during the next Ibero Latin American Insurance Law Conference in November 2001.

Dr Claudio Horst Speyer
Chairman, Accumulation of Claims and
Subrogation Working Group

AIDA WORLD CONGRESS

XI AIDA World Congress, New York, 20-24 October 2002

The two themes of this Congress are "Alternative compensation mechanisms for damages other than those by automobile accidents" and "Integration of Financial Services". Questionnaires on these two themes have been prepared, respectively, by the Professors Hubert Bocken and Bill Dufwa on behalf of the Presidential Council and by Jonathan Macey on behalf of the US Chapter. The texts of the questionnaires are available on the AIDA website (www.aida.org.uk).

LEGAL DEVELOPMENTS

Elf decision no help to Australian insurers

At a meeting of the Australian Insurance Law Association's Western Australian branch, Sean Mullins, a partner with Sean Mullins & Co, in Perth, Western Australia, spoke on the Scottish Court of Sessions decision in the *Elf* case (*Caledonian North Sea Ltd v. London Bridge Engineering Ltd*). Although it offers a degree of certainty for insurers in English jurisdictions, Mr Mullins concluded, the Scottish Court of Session's *Elf* decision does not apply in Australia.

The Court's reasoning did not meet accepted Australian legal subrogation and contribution principles. "This is not to say the decision is wrong in Scotland, it is simply that the principles applied in Scotland do not have application in Australia", said Mr Mullins.

Elf Enterprise owned the North Sea-based Piper Alpha drilling platform and individually hired contractors to work on the platform. Each

contract contained clauses which indemnified Elf against loss or damage suffered from meeting contractors' employees' claims.

On July 6, 1988, there was an explosion on the platform which injured or killed 134 contractors' employees. After the explosion, Elf paid US\$130 million in employee claims. Elf's insurer then reimbursed Elf for the loss and started action against contractors in Elf's name. The contractors argued that Elf's claim could not succeed because it had already been indemnified by the insurer. The court found indemnity was extinguished upon payment to Elf by its insurer, so there was no indemnity to which the insurer could be subrogated against the contractors. Elf's insurer could not claim a contribution in its own right because, by that time, a claim against the contractors was time barred. On appeal, the Court of Session's four judges found the insurer was entitled to be indemnified by the contractors. The judges found a party was not entitled to receive more than one indemnity for a loss, and, when an insurer indemnified an insured, it was entitled to claim a contribution from co-insurers. The appeal judges concluded contractual indemnity was primary and insurance indemnity secondary. Therefore contractual indemnity was 100% liable for the claim, and the contractor had no right to contribution from the insurer.

The Australian legal position was "almost exactly opposite to that articulated by the Scottish Lords", Mr Mullins said.

"The Australian approach follows the traditional English approach. An insurer is only entitled to be subrogated to an insured's claim once he has indemnified the insured for the loss in full."

Australian Insurance Law Association

Recent Czech Legislation Regulating Insurance

For the Czech Republic, a gradual return to the fold of economically and politically developed countries as well as the hoped-for E.U. membership will require not only changes of an economic and political character, but also modifications in individual aims and ways of life.

This development is, of course, also reflected in the evolution of the Czech insurance industry. While at the beginning of the nineties, the most pressing need was to resurrect an insurance market, the objective at present is to incorporate

European law into Czech insurance regulations by the end of 2002. The first step in this direction consisted in transforming the ex-lege MTPL insurance into a standard compulsory product.

The next step was to update the legislation on insurance, for as competition in the market grew fiercer, it became clear that the role of the state supervision had to be shored up and its focus shifted away from material supervision, mainly of insurance products, to an effective control of financial adequacy. Originally, the changes in the legislation were drafted as an amendment, but the range of modifications as well as the effort to speed up the harmonization of the Czech legal system with that of the E.U. led to its being passed as a separate piece of legislation, approved by the Parliament under no. 363 at the end of 1999. Together with its corresponding Application Decree no. 75, it came into effect on 1 April 2000. This legislation adopts the regulatory principles of insurance contained in the European directives of the first and third generation; the second generation directives are to be incorporated in the Insurance Policy Bill and there are still some areas in which full compatibility has not been reached.

The new legal provisions distinguish clearly among the various activities of insurance, reinsurance and brokerage and institute anew the office of appointed actuary. The supervision carried out by the Ministry of Finance is focused on insurance operators' solvency and asset management and its role is buttressed by a wide range of sanctions and remedies which have now become available. This should contribute significantly to the stability of the insurance market.

Magdaléna Wawerková
Czech Section of AIDA

Portugal — creation of the Financial Supervision Council

In the note, "*Financial Supervision in Portugal*" (published in AIDA Mail, July 2000, p7), reference was made to the Finance Minister's announcement of the "solo-plus" supervision model to be adopted in Portugal. Also mentioned was the upcoming formalisation of a financial supervision council to co-ordinate the activities of all the supervisory authorities.

At the same time, reference was made to the government's intention to review the statutes governing insurance supervision, to provide the Authority (the Insurance Institute of Portugal) with greater autonomy, and to have the two measures in place by the end of the year 2000.

The revision of the statutes governing insurance supervision has still to be finalised, but an important step has been taken with the publication of Decree Law 228/2000, dated 23 September 2000 and the National Council of Financial Supervisors (the "Council") is now in place.

The Council came in the wake of this announcement (and it was within the terms of the philosophy put forward in the note referred to above). It represents the attempt to respond to the needs of various organisations with supervisory roles to co-operate more closely, to improve the exchange of information and co-ordinate their activities. It was also designed to eliminate disputes over responsibilities, loopholes in the law and the many and varied ways in which their own resources were used.

The creation of this Council does not in any way affect the responsibilities and autonomy of each of the supervisory authorities (the Bank of Portugal, the Insurance Institute of Portugal and the Security and Exchange Commission of the Portuguese Stock Exchange). In the words of the preamble to the Decree Law, the purpose is to "formalise the organisation and co-operation between them, creating a forum for co-ordination of the supervision of the financial system".

The Council's key responsibilities are:-

- to enhance the co-ordination of the supervisory authorities' activities;
- to simplify and co-ordinate the exchange of information between these authorities;
- to foster the development of rules and mechanisms for supervising financial conglomerates;
- to formulate proposals for regulating the issues within the sphere of action of more than one of the supervisory authorities;
- to issue professional opinions as requested by the Minister of Finance or by the Governor of the Bank of Portugal, as the figure with most responsibility for the stability of the financial system, or indeed issue opinions on their own behalf
- to foster co-ordinated policies with foreign organisations and international institutions;
- to undertake any action agreed to be within the scope of the Council and commensurate with the aims of each of the supervisory authorities.

The Council is made up of the Chairman of the Insurance Institute of Portugal, the Chairman of the Security and Exchange Commission of the Portuguese Stock Exchange and the member of the board of the Bank of Portugal who is responsible for bank's supervision. The Governor of the Bank of Portugal is the Chairman of the Council.

The fact that the Bank of Portugal has two figures on the Council could have been avoided. It could well be considered a way of introducing a "supervisor leader" by stealth and is in any case a negation of the principle of "solo-plus". The legislators were almost certainly aware of this potential criticism — in the preamble of the legislation it is stated: "the fact that the Governor of the Bank of Portugal is in the chair can be justified by the fact that the bank is chiefly responsible for the stability of the financial system."

The Portuguese solution has brought in a new point, i.e., that *representatives of other public and private organisations* can take part in the work, especially if they are from the Deposit Guarantee Fund, the Mutual Agricultural Credit Guarantee Fund, the Investors Compensation System(*) or other associations which represent institutions subject to prudential supervision. This leaves the way ahead very open, but much will depend on how these organisations are called on to take part, the issues they can have a say in, their role on the Council (simply to listen and be consulted or with the right to vote?) and so on. The legislation makes no mention of any of these points and this should quickly be rectified if in fact the wish is to try out a self-regulatory model which is to a certain degree untested in Portugal.

Another important aspect of the new Decree Law is the fact that it lays down in Portuguese law *the legal definition* of the supervisory authority of the financial system and financial conglomerates.

A *financial conglomerate* is defined as a group of companies with operations subject to the supervision of both the Bank of Portugal and the Insurance Institute of Portugal.

And *the supervisory authorities* of the financial system are defined as the authorities in Portugal which cover prudential supervision of

- credit institutions and finance houses
- insurance and reinsurance companies, brokerages, companies linked to or complementary to the above mentioned and pension funds
- the Stock Exchange.

The publication of the new statutes of the Insurance Institute of Portugal is currently awaited. This will complete the reform package.

Manuel Guedes-Vieira

Portugal — A new Legal Framework for Insurance Premiums

Under Portuguese law, the payment of insurance premiums has been governed by a stand-alone statute since 1984. At that time the general terms of the company code were considered insufficient for insurance contracts.

This special situation was contested by many on the grounds that it treated insurance managers as though they were under age and it was revised in 1994. It has now been revised again.

The new system, covered by Decree Law 142/2000 dated 15 July, was due to be enacted on 1 October 2000. It is clearly justified as a means of cutting down the work of the courts, where there are “tens of thousands of suits filed every year for premium collection” as stated in the preamble to the new legislation.

In fact the system still operative meant (indeed still means) that the risk in compulsory insurance (e.g. third party civil liability or accidents at work) must be covered even if the insured does not pay the premium due.

This unfortunately happens all too frequently and shows the state of mind of insured parties in the face of their contractual duty. It has led to the above-mentioned “tens of thousands of suits” which insurance companies have had to set in motion in order to receive due payment.

This is the reason for trying to improve the system through the creation of a new legal framework covering the payment of insurance premiums.

The present situation really did require that drastic measures be adopted. The issue is not just the very real logjam in the courts, caused by insurance companies who refuse to accept that they are charitable institutions. They have every right to seek redress for non-payment of premiums. It is also a question of repercussions on the cost of premiums caused by the behaviour of certain insured persons, their non-payment and lack of civic spirit. The brunt of all this is borne by the insurance companies and those who do pay their premiums. Fortunately these are in the majority.

For this reason, the new state of affairs has

been welcomed by the legal fraternity, by the insurance companies and by consumers. Unfortunately, however, there are some rather less felicitous aspects in the legislation, relating to some kinds of insurance where the premium varies (such as credit insurance, some forms of health insurance etc.) and here there could well be certain problems in practical terms. But overall, if the new legal system is applied rigorously, it will bring discipline to the market and cut down on situations which can really be classified as nothing less than fraudulent.

The main features of the New System

The new regulations are in line with the situation in the majority of member states of the European Union. The insurance contract will only be valid when the initial payment is made. The insurers are thus not obliged to cover the risk until the premium has been received and will therefore not need recourse to the courts to collect premiums due.

As for subsequent premiums or parts of premiums when they are divided up, the insured must be given prior notice that payment is due. The notice however is now 30 days. Moreover, non-payment by the due date means that the contract is automatically rescinded and cannot be renewed. This particular feature, relating to notice and the way notice is given, may in fact, lead to practical problems. First of all, the move from 60 to 30 days may be excessive (40 or 45 days may have been preferable). Then there is the point that for contracts with variable premiums and those with open policies, “the premiums or subsequent fractions” and the “premiums or fractions relating to renewals” are due on the date when the receipt is issued. The legislation goes on to state: “the insurance company is duty bound to inform the insured up to 30 days before the date when the premiums or subsequent fractions are due, and must inform the insured in writing, indicating the date of payment, the amount and the form of payment.”

There are, however, cases where the policy is open and the premium variable and where it is only possible to know at the end of the month what premium is due — how then can the 30 days notice be respected? Only if the issue of premium invoices are phased over 30 days, which could mean a loss of a month in financial inflow.

It must be regretted that this aspect was overlooked by those who framed the legislation, and by all those who were asked to give their opinions when the statute was being drawn up.

Other points worth mentioning are those which refer to compulsory policies covering accidents at work. In Portugal, this branch is in the hands of private insurers.

When the contract is rescinded for non-payment, the insurer is obliged to inform the Labour Inspectorate (the public body which is responsible for seeing that companies uphold the law). This rescission is not applicable to other injured parties until 15 days as and from the date at which the Inspectorate receives notice that the contract has been rescinded.

As for other compulsory insurances, no new special system has been created. This is not really a surprise, since the most important is automobile liability and for this there exists the Automobile Guarantee Fund.

It should also be mentioned that the automatic rescission of a contract for non-payment of premium does not mean that the insured can avoid paying all the premiums due, plus any surcharges, corresponding to the period when the contract was in force.

The following branches are excluded from the new system: crop insurance, life insurance and temporary insurance taken out for under ninety days.

As a last point, the new system allows insurance companies to choose the insured they wish to accept. They can therefore refuse to enter into a contract with anyone in default. It could be objected that this legal situation allows the insurance company to refuse to enter into an insurance contract for compulsory insurance. It could therefore be considered at fault on the grounds that it is in a situation tantamount to not permitting a civil liability insurance which is compulsory. This was not the way those who framed the legislation saw the matter. In fact, the new system merely defines the criteria and conditions in more detail insofar as they related to the system by which the insured can be identified and which could lead to insurance contracts being refused.

The new system works on a data-base administered by the Portuguese Insurers Association (APS) and covers all members companies. It is governed by an agreement which has already been signed by members of the Institute, covering full respect for the rules of fair competition on the one hand and the security of personal data on the other.

The following conditions are likely to apply. Member companies will be obliged to uphold the rules of reciprocity and supply other members

with all information relating to contracts where there are payments due to cover the risks which they are designed to cover. This information is limited to the default in question, since it applies to payments of premiums for the same type of insurance. It is also available only to insurance companies which are members of the Institute and cannot be supplied to any other party. Policyholders are guaranteed access to the information needed to change or update all relevant data.

Bearing in mind that this legislation is also designed to cut down litigation in the courts, we must expect insurance companies to make a more efficient use of the selection system. Such use will also be a healthy and rational way of ensuring that the rules of fair competition are applied. We shall see if this is what happens in practice.

Manuel Guedes-Vieira

AIDA MAIL: Distribution Arrangements

The General Secretariat have now taken over responsibility for publishing and distributing AIDA Mail. In future we aim to increase the electronic distribution, both via email to individuals, and via the AIDA website. This should ensure prompt distribution to a wider network of AIDA members, and will substantially reduce the printing and mailing costs to AIDA. In order to facilitate this arrangement, can we please ask all current readers of AIDA Mail to send their email addresses (and full contact details) to Marlene McConway, the Assistant Editor, c/o Barlow Lyde & Gilbert, via email to mmcconway@blg.co.uk. You will then be added to the AIDA Mail email circulation list, and will receive the next AIDA Mail by email on the date of publication.

All contributions to AIDA Mail are most welcome. Contributors should send copy via email to Marlene McConway (or by fax to +44 207 643 8509). If there is insufficient space to reproduce questionnaires, reports or longer contributions in full in AIDA Mail, these will be posted on the website. Comments for the future developments of both AIDA Mail and the AIDA website would be welcome.