AIDA – Association Internationale de Droit des Assurances
The International Insurance Law Association

# IVth AIDA EUROPE CONFERENCE

## Testing Times, Uncertain Outcomes:
## How Are Insurers and Reinsurers Expected to Measure Up?

**LONDON - 13/14 SEPTEMBER 2012**

**A Two-day International Insurance Law Conference at**
**Grange Tower Bridge Hotel, 45 Prescot Street, London E1 8GP**

**in association with the**

British Insurance Law Association

SCOR Global P&C

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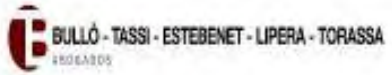
# IV AIDA EUROPE CONFERENCE, LONDON 2012 IS SPONSORED BY





















**AIDA Europe and BILA both wish to acknowledge the kind assistance of *Lloyd's Law Reports* with the promotion of the IVth AIDA Europe Conference 2012**

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**THURSDAY 13 SEPTEMBER 2012**

Morning

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| 08.30 – 09.00 | **AIDA Europe General Assembly**<br>Location: Bartholomew Suite, Grange Tower Bridge Hotel, 45 Prescot Street, London E1 8GP |
| 08.30 -12.00 | **CONFERENCE REGISTRATION OPENS**<br>**Location: Gallery, Grange Tower Bridge Hotel, 45 Prescot Street, London E1 8GP** |
| 09.15 – 17.45 | **AIDA WORKING PARTY MEETINGS AT GRANGE TOWER BRIDGE HOTEL** |
| 09.15 – 11.45 | **Accumulation of Claims and Subrogation** - *Chairman, Enrique José Quintana, Buenos Aires – Sidney Suite*<br>**Consumer Protection and Dispute Resolution** – *Chairman, Dr Samim Unan, Istanbul – Beaumont Suite*<br>**Marine Insurance** – *Chairman, Professor Robert Koch, Hamburg – Harpley Suite*<br>**Reinsurance** – *Chairman, Colin Croly, London – Bartholomew Suite* |
| 12.30 – 15.00 | **Civil Liability** – *Chairman, Osvaldo Contreras-Strauch, Santiago de Chile – Harpley Suite*<br>**Climate Change** – *Chairman, Tim Hardy, London – Beaumont Suite*<br>**State Supervision** – *Chairman, Dr Gunne Baehr, Cologne – Bartholomew Suite* |
| 14.00 – 15.30 | **CONFERENCE REGISTRATION**<br>**Location: Gallery, Grange Tower Bridge Hotel, 45 Prescot Street, London E1 8GP** |
| 15.15 – 17.45 | **Credit Insurance and Surety** – *Chairman, Louis Habib-Deloncle, Geneva – Beaumont Suite*<br>**Distribution of Insurance Products** – *Chairman, Professor Ioannis Rokas, Athens – Harpley Suite*<br>**New Technologies** – *Vice Chairman, Teresa Rodriguez de las Heras Ballell, Madrid – Bartholomew Suite* |

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| 18.30 – 20.00 | **CONFERENCE REGISTRATION**<br>**Location: Two Temple Place, London WC2R 3BD** |

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| 18.30 – 20.00 | **DRINKS RECEPTION**<br>**Location: Two Temple Place, London WC2R 3BD**<br><br>***Built to elaborate specifications by William Waldorf Astor, the first Viscount Astor, in 1895 as his residence and estate office, Two Temple Place affords the grandeur of a state occasion with the intimacy of a private house party in a unique location next to the Inns of Court, overlooking the River Thames.***<br><br>***Only recently restored and made open to the public, it memorably displays outstanding workmanship and architecture of the late-Victorian period.***<br><br>**www.twotempleplace.org** |

All conference delegates and registered accompanying persons are welcome to attend

**FRIDAY 14 SEPTEMBER 2012 – AIDA EUROPE CONFERENCE, GRANGE TOWER BRIDGE HOTEL, 45 PRESCOT STREET, LONDON E1 8GP**

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| 08.15 – 08.45 | Registration and Coffee |
| 08.45 | Welcome<br>Colin Croly, Chairman of the Conference and Chairman, AIDA Europe<br>Stephen Lewis, Chairman, BILA |
| 09.00 – 09.40<br>Keynote Speech: | **Karel van Hulle**, Head of Unit for Insurance and Pensions, DG Internal Market and Services, European Commission, Brussels |
| 09.40 – 10.40 | **Responding to Regulation in a Fast-Changing World: Financial and Political:**<br><br>Chairman: Professor Dr Herman Cousy, Member of AIDA Presidential Council and Vice-Chairman AIDA Scientific Council, Leuven<br><br>**(1) Changes in insurance contract law and regulation regimes for consumer redress**<br><br>Insurance Contract Law Reform/Restatement of European Insurance Contract Law<br><br>**(2) Compliance with Sanctions and Anti-Money- Laundering/Terrorism Requirements**<br><br>US/EU Distinctions<br>Compliance/penalties/practicalities/contractual provision issues/Data protection/Privacy/Sanctions inconsistencies<br><br>**Presentations/Questions/Panel Discussion** on the above topics as well as practical implications of Solvency II and other current Regulatory/Compliance Issues:<br><br>Panel/Speakers:<br>Christian Felderer, CEO Hub Zurich & Hub General Counsel, SCOR Global P&C General Counsel<br>Professor Dr Helmut Heiss, Chairman of the Project Group "Restatement of European Insurance Contract Law" and Zurich |

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| | University, Zurich<br>Sean McGovern, Director, North America – General Counsel, Lloyd's, London<br>Karel van Hulle, Head of Unit for Insurance and Pensions DG Internal Market and Services European Commission, Brussels<br>Svenja Richartz, Lawyer. VDVM e.V (Association of German Insurance Brokers), Hamburg<br>David Hertzell, Law Commissioner, Head of Commercial and Common Law team, London |
| 10.40 – 11.00 | Coffee/Tea Break |
| 11.00 – 11.30 | **Responding to Regulation in a Fast-Changing World: Financial and Political (continuation):** |
| 11.30 – 12.40 | **All Roads Leading to Rome?**<br>**2014 World Congress, Rome Topics:**<br><br>Chairman*:* Professor Jerome Kullmann,<br>Vice-President, AIDA Presidential Council and Chairman, AIDA Scientific Council, Paris<br><br>**(1) Transparency, Conflicts of Interest and Intermediary Remuneration:**<br><br>Speaker:<br>Professor Paolo Montalenti, President AIDA Italy, Turin<br><br>**(2) Arbitration – Procedure and Law:**<br><br>Arbitration as the product of more than one country …Bermuda Form – the best of both (all) worlds?<br><br>Speaker:<br>Richard Jacobs QC, Barrister at Essex Court Chambers, Co-Author of Liability Insurance and International Arbitration: The Bermuda Form, London<br><br>**(3) Preventive Measures:**<br><br>Effective provision and coverage for managed risks – |

pitfalls where boundaries between insured/uninsured risks become blurred.

Speaker:
Jerome Kullmann, Professor at the University Paris-Dauphine
Director of the *Institut des Assurances de Paris*, University of Paris I - Panthéon-Sorbonne, Paris

**(4) Discrimination and Insurance:**

- Gender, genes and uncertainties: the effects of *Test Achats*
- Legislation and guidance.

Speaker:
Daniel Beard QC, Barrister at Monckton Chambers,
Represented UK before ECJ in ***Test Achats***, London

**(5) On-line insurance:**

- Problems related to On-line Conclusion of the Insurance Contract
- Proof of the On-line Contract
- Cooling Off

Speaker:
Dr Samim Unan, AIDA Turkey, Chairman, Consumer Protection and Dispute Resolution Working Party, Istanbul

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| 12.40 – 13.55 | Lunch - Tower Bar and Grill |

13.55 – 15.45 **The View from the Claims Front Line - Latest Developments and the Next Big Claims**?

Chairman*:* Michael Gill, President AIDA, Sydney

"Life on the front line" for a claims manager

The legal issues involved and how is the Industry to prepare itself.

- Impact of Third Party Funding/Class Actions/ Claim Management Company/Contingency Fee/ATE insurance governance

- Changes in regimes for consumer redress
- Contracting out/ Implications of precedent-free dispute resolution
- Climate/Natural Catastrophes
- Major Business Interruption/Consequential Loss /Supply/Political Risk Claims
- New Products/Risks eg. cyber risks, renewable energy
- Financial Institutions
- Chronic Fiscal Imbalances
- Fraud

Speakers:
David Kendall, Partner, Edwards Wildman Palmer UK LLP, Vice Chairman, BILA, London
Peter Kochenburger, Executive Director, Insurance Law Center, University of Connecticut School of Law, Connecticut
Joachim Krane, Chief Claims Officer, Continental Europe, XL Insurance, Zurich
John Latter, Casualty Claims Director, UK Claims, Zurich Insurance Company, London
David Nayler, Executive Director, Head of UK Legal & Claims Practice Group, Financial Services Group, Aon Limited, London
Chris Rodd, Technical Counsel, CGU Insurance, Melbourne

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| 15.45 – 16.05 | Tea Break |

16.05 – 17.15

**Hot Issues/Cases and Liability Trends: What's Hot? What Next?**
Chairman: Taisto Hujala, Legal Counsel, If P&C Insurance Company Limited, Member AIDA Presidential Council, Helsinki

Quickfire Updates of Legal Issues presently of greatest concern in different jurisdictions. Comparative Review of trends in liability, legislation and reform

Speakers:

Torben Bondrop, Partner, Plesner, Copenhagen
Tobacco litigation in Scandinavia:

- Additives in cigarettes
- The construction of cigarettes

Charles Gordon, Partner, DLA Piper, London

- Wide Area Damage-Impact on Business Interruption Insurance
- Political Violence - Is The Classic Policy Terminology Outdated

Slobodan Jovanovic, Vice-President, Association for Insurance Law of Serbia, Belgrade

- Draft Serbian Civil Code New Rules:
  - Insurance Policies and Cover Notes
  - Liability Insurance.

Professor Pierpaolo Marano, Professor of Insurance Law, Catholic University of Sacred Heart, Of Counsel PWC Tax and Legal Services, Milan

- Distribution of Insurance Products Coupled with Mortgages and Loans:
  - Conflict of Interest
  - Duty of Comparative Offer

José Maria Muñoz Paredes, Partner J&A Garrigues, Commercial Law Professor, University of Oviedo, Oviedo

- Bancassurance in Spain:
  - Competition Problems
  - Conflicts of Interest of Insurance Brokers

Anna Tarasiuk-Flodrowska, Attorney-at-Law, Counsel at Hogan Lovells (Warszawa) LLP, Warsaw

- Bancassurance in the Polish Market – Fears and Expectations
- Expected Changes in the Insurance Law – Draft New Act on Insurance Activity – The Practical Impact

17.15 Conference closes


**ABOUT AIDA (ASSOCIATION INTERNATIONALE DE DROIT DES ASSURANCES), EUROPE**

AIDA Europe is the regional grouping of AIDA Chapters in Europe which was established in Rome in 2007 and held its inaugural conference in Hamburg in May 2008.

The present AIDA Europe Committee is comprised of the following:

Colin Croly Chairman (UK Chapter)
Jerome Kullmann Vice Chairman (French Chapter)
Torben Bondrop (Danish Chapter)
Pierpaolo Marano (Italian Chapter)
Otto Csurgo (Hungarian Chapter)
Slobodan Jovanovic (Serbian Chapter)
Robert Koch (German Chapter)
Jose Maria Munoz Paredas (Spanish Chapter)
Ioannis Rokas (Greek Chapter)
Peggy Sharon (Israeli Chapter)
Herman Cousy (Treasurer - Belgian Chapter)
Tim Hardy (Ad Hoc – UK Chapter)

The AIDA Europe Committee wishes to acknowledge the particular contributions made towards the organisation of this Conference by Colin Croly, Tim Hardy and the British Insurance Law Association (BILA) Committee, and by Sandra Dellimore of the AIDA Europe Secretariat. All sponsors are also again kindly thanked for their generous support.

Further details about the activities of AIDA, AIDA Europe and BILA may be found on the AIDA website (www.aida.org.uk) and on the BILA website (www.bila.org.uk).

AIDA Europe Conference, London – 13/14 September 2012
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# Biographies

**KAREL VAN HULLE, HEAD OF UNIT FOR INSURANCE AND PENSIONS DG INTERNAL MARKET AND SERVICES EUROPEAN COMMISSION, BRUSSELS**

**Karel VAN HULLE** is Head of Unit at the European Commission (Directorate-General "Internal Market and Services"), which he joined in 1984 after spending 8 years with the Belgian Banking Commission, where he worked in the legal department and served as the first secretary of the Belgian Accounting Standards Committee.

At the European Commission, he was subsequently Head of Unit for Accounting Standards, Head of Unit for Financial Reporting and Company Law and Head of Unit for Accounting and Auditing. In that capacity he was closely involved with harmonisation in the fields of accounting, auditing, and company law both at EU level and internationally and served as the Commission's observer with the International Accounting Standards Committee (IASC), the Consultative Advisory Group of the International Auditing and Assurance Standards Board (IAASB), the European Financial Reporting Advisory Group (EFRAG) and the financial reporting working party of the Committee of European Securities Regulators (CESR). He was Secretary of the High Level Group of Experts on Company Law which prepared the Commission's 2003 Action Plan on Company Law.

Since November 2004, he is Head of the Insurance and Pensions Unit. In his present function, his main responsibility is the preparation of a new solvency regime for insurance and reinsurance companies (Solvency II). Other areas of work include life and non-life insurance, reinsurance, insurance mediation, motor insurance, insurance guarantee schemes and pension funds. He represents the European Commission within the European Insurance and Occupational Pensions Authority (EIOPA) and within the Technical Committee of the International Association of Insurance Supervisors (IAIS).

Karel is a part-time lecturer at the Economics and Business Faculty of the KULeuven where he teaches "Solvency for financial institutions". He is also member of the Board of Directors of the International Centre for Insurance Regulation at the W. Goethe University in Frankfurt.

**DANIEL BEARD QC, BARRISTER AT MONCKTON CHAMBERS, LONDON**

**Daniel Beard** is a silk specialising in competition, EU, regulatory and public law. He is widely regarded as one of the Bar's leading specialists in these areas and noted as a "*first rate*" advocate.

As standing counsel to the Office of Fair Trading he is recognised as an outstanding competition and regulatory lawyer and has appeared in and advised upon many of the leading cases over recent years. He appears regularly in the Courts and the Competition Appeal Tribunal both for private clients and regulators in damages actions, judicial review challenges and infringement appeals. He has also acted on numerous occasions in the European Court of Justice and General Court in matters ranging from terrorist sanctions to gender based pricing in insurance.

**TORBEN BONDROP, PARTNER, PLESNERS, COPENHAGEN**

**Torben Bondrop** is partner and head of the practice areas Dispute Resolution and Insurance and Tort Law at Plesner Law Firm in Copenhagen, Denmark (www.plesner.com). Since being admitted to the bar, Torben Bondrop has specialized in insurance and tort law in general, and in addition to all aspects of traditional insurance law he has worked with consultants' liability, product liability, commercial liability and reinsurance. In this connection, Torben Bondrop has conducted a large number of court and arbitration proceedings within these areas.

Torben Bondrop is a highly experienced litigator and he therefore conducts litigation and arbitrations in other areas of the law. He has won his eleven most recent cases before the Danish Supreme Court. From time to time Torben Bondrop also acts as arbitrator. In May 2006 Torben Bondrop became a qualified arbitrator by the General Council of the Danish Bar and Law Society.

**Education**

Qualified Arbitrator, by the General Council of the Danish Bar and Law Society, May 2006.
Admitted to the Supreme Court, 1992.
Admitted to the bar, 1987.
Master of Laws, University of Copenhagen, 1984.

**HERMAN A COUSY, MEMBER OF THE AIDA PRESIDENTIAL COUNCIL AND VICE-CHAIRMAN, AIDA SCIENTIFIC COUNCIL LEUVEN**

Was professor ordinarius of commercial and insurance law and European insurance law at KU Leuven University (Belgium), where he was the Director of its Center for Risk and Insurance Studies until he became emeritus professor in 2011.

Throughout his career he occupied various official functions, e.g. as president of the Insurance Commission ("Commission des Assurances", advisory body to the Belgian government) for more than 18 years, and as Assessor of the "Legislation" Section of the Council of State of Belgium.

He was a member of the Tilburg-Vienna Group on Tort Law and he is presently member of the (Common Frame of Reference) Project Group for the Restatement of European Insurance Contract Law. He is member of the Presidential Council of AIDA-world and he is chairman of the Scientific Committee of AIDA Europe.

**COLIN CROLY, CHAIRMAN, AIDA EUROPE**

Acting for many of the leading insurance and reinsurance companies and syndicates, Colin Croly has advised for over 30 years on all areas of insurance, concentrating on reinsurance including contract wording and dispute resolution and issues relating to asbestos pollution and ART not only in London but in conjunction with overseas lawyers. Colin now acts as a Consultant, Arbitrator and Mediator.

Placed as one of the top 20 reinsurance lawyers in the world by Euromoney's Best of the Best survey Colin was again nominated by Who's Who Legal, the international Who's Who of business lawyers as the Insurance and Reinsurance Lawyer of the Year 2009, the fifth year running. He is also recommended in the *Legal 500* as a leading individual in reinsurance and *Chambers & Partners* identifies him as "basically Mr Reinsurance".

Colin is Secretary General of AIDA (Association Internationale de Droit des Assurances), Chairman of AIDA Europe and Chairman of AIDA's Reinsurance Working Party. An active member of the Federation of Defense and Corporate Counsel (FDCC) Colin was a member of the Board until 2008, being the only non-US member. He is an Adjunct Member of the International Association of Claims Professionals. A former government appointee to the IBRC (Insurance Brokers Registration Council) he has held numerous other offices. He lectures regularly at Hamburg and Zurich Universities and throughout the world; Colin originated *Reinsurance Practice and the Law* (Informa) and was joint editor (1993 – 2009) and is also an author of many published articles on reinsurance.

Colin is an ARIAS UK certified Arbitrator, an ARIAS Europe certified Arbitrator as well as being on the Supervisory Board of ARIAS Europe (Germany and Eastern European Countries) and is a Founding Committee member of INREM, the Specialist Mediation Service to the UK Insurance/Reinsurance Market.

**CHRISTIAN FELDERER, GENERAL COUNSEL, CEO HUB ZURICH & HUB GENERAL COUNSEL, SCOR GLOBAL P&C GENERAL COUNSEL**

**Christian Felderer** is the General Counsel of SCOR's Swiss based operations and also heads the Zurich Hub Services entity as its CEO, additionally, as General Counsel P&C *Operations* at the level of the SCOR Group, he is responsible for SCOR's P&C reinsurance transactional legal matters. He has over 30 years' experience in the insurance and reinsurance industry, prior to his current responsibilities at SCOR, as General Legal Counsel for the *Converium* Group, until 2007, and previously as Senior Legal Counsel for Zurich Re. Between 1990 and 1997 Mr. Felderer had various management responsibilities within the Zurich Group's International Division, including the establishment and management of the Captives and Financial Risk Management Department and the management of the Claims organization of the Zurich Group's International Division. He had started his business career with the Zurich Insurance Group as an underwriter in the International Division's Casualty Department.

Mr. Felderer has a law degree from the University of Zurich and is admitted to the Bar of the Canton of Zurich.

He is a founding member of the re-established AIDA Swiss Chapter, which he chairs.

**MICHAEL GILL, PRESIDENT AIDA, SYDNEY**

**Michael Gill** has practised for over 40 years as a specialist insurance lawyer.
He is now the current President of AIDA (the International Insurance Law Association), as well as a member of the National Board of AILA, and as the Independent Chair of the Code Compliance Committee for the General Insurance Industry.

Michael currently performs a consultancy role with DLA Piper and over the past 40 years of practice he has handled a wide variety of insurance and reinsurance related issues. He is recognised as one of the leading lawyers in the field.

Michael is also passionate about work in the not-for-profit sector. Within the firm he assists with pro bono activities on the Community Investment Committee, and outside the firm, he works with ActionAid Australia and is Deputy Chair of the James Milson Nursing Home & Retirement Village.

Michael was also President of the Law Council of Australia and the Law Society of New South Wales, the founding Chairman of the Australian Insurance Law Association, the inaugural Chairman of the Motor Accidents Authority, and Chairman of the Solicitors Mutual Indemnity Fund.

**CHARLES GORDON, PARTNER, DLA PIPER, LONDON**

**Charles Gordon** is a claims and coverage lawyer based in London and heads the DLA Piper Insurance and Reinsurance practice in Europe and the Middle East. He focuses on international insurance and reinsurance disputes, coverage and policy wording issues across a wide range insurance classes in the live market and run off sectors.. Recent assignments have included the UK Supreme Court decision on EL coverage for asbestos and other long tail diseases and the defence of reinsurers in BI claims arising from the Queensland floods.

Charles is an accredited mediator and has sat as arbitrator on insurance-related disputes. Chares is a member of the British Insurance Law Association and the Chartered Insurance Institute. He regularly comments on insurance-related issues and speaks at seminars on key insurance issues.

**HELMUT HEISS**,

**Helmut Heiss**, born 17th July 1963 in Innsbruck, is Professor ordinarius and Head of the Centre for Liechtenstein Law at the University of Zurich. He graduated from the University of Innsbruck in 1985, where he later obtained his Ph.D. in law (1987). Prof. Heiss also holds an LL.M. degree from the University of Chicago (1990).

Prof. Heiss is the Chairman of the Project Group on a "Restatement of European Insurance Contract Law". He has acted as an expert for the European Economic and Social Committee on the topics of the "European Insurance Contract" (see OJ 2005 C157/1) and the "28th Regime" (see OJ 2011 C21/26). Prof. Heiss has been admitted to the bar in Munich and acts as of counsel to gbf Attorneys-at-law in Zurich.

**DAVID HERTZELL, LAW COMMISSIONER, HEAD OF COMMERCIAL AND COMMON LAW TEAM, LONDON**

**David Hertzell** was appointed as Commissioner on 1 July 2007. He began his career as a trainee solicitor with Davies Arnold Cooper and was admitted as a solicitor in 1983. Davies Arnold Cooper made David a partner in 1989. He became Managing Partner in 1992; a post he held until 1996 and again from 1999 to 2006. Apart from his management responsibilities David specialised in professional indemnity, reinsurance, captive insurance and regulatory issues.

He is a past chair of the AIRMIC Captive and Risk Financing interest group and was a member of the BIS Drafting Committee on risk management. He has written and published a number of articles on commercial insurance law and captive insurance. He is a pension fund trustee and sits as the independent member on the audit and risk committee of the Judicial Appontments Commission. As Law Commissioner, David is responsible for commercial and common law projects including the reform of insurance contract law.

**TAISTO HUJALA, LEGAL COUNSEL IF P&C INSURANCE COMPANY LTD, FINLAND**

**Taisto Hujala** is Legal Counsel, If P&C Insurance Company Ltd, Finland
Have been the chairman of the Finnish AIDA Chapter during several years
Member of the AIDA Presidential Council, member of the AIDA Executive Committee,
Chairman of AIDA Finance Committee

**RICHARD JACOBS QC, BARRISTER AT ESSEX COURT CHAMBERS, CO-AUTHOR OF LIABILITY INSURANCE AND INTERNATIONAL ARBITRATION: THE BERMUDA FORM, LONDON**

**Richard Jacobs QC** graduated from Cambridge University in 1978, and has practised as a barrister at Essex Court Chambers, London, since 1980. He appears regularly as counsel in both litigation and arbitration in a wide range of insurance and other commercial disputes. Between 1995 and 2008, he acted as counsel for Lloyd's in a large number of 'Lloyd's litigation' cases. His recent arbitration cases as counsel include many 'Bermuda Form' liability insurance disputes, a business interruption claim arising from Hurricane Ike, ICC arbitrations relating to an Indian power project and a pharmaceutical distribution agreement, shipbuilding disputes, contingency risk insurance, an Article 81 shipping industry competition case, as well as court applications relating to arbitration proceedings. He is the co-author of *Liability Insurance in International Arbitration: the Bermuda Form* 2nd edition (2011, Hart Publishing Ltd., Oxford). The 1st edition was described by the Court of Appeal in *C v D* as the 'standard work' on the Bermuda Form policy. He has been appointed as arbitrator in LCIA, ICC, SIAC and ad hoc arbitrations, and also served as arbitrator on the Appeals Tribunal of the International Commission on Holocaust Era Insurance Claims. He has sat as a part-time judge (Recorder) in criminal cases in the Crown Court since 2003.

**SLOBODAN JOVANOVIC, VICE-PRESIDENT, ASSOCIATION FOR INSURANCE LAW OF SERBIA, BELGRADE**

**Slobodan Jovanovic** worked in different sectors before he joined the Insurance and Reinsurance Company DDOR Novi Sad in 1996. He was responsible for general inward and outward reinsurances in the reinsurance department. He was president of the supervisory board of the Reinsurance company DDOR Re from 2009 to 2011, editor of the Insurance Law Review published by the Association for Insurance Law of Serbia since 2006 and lecturer since 2002. He is associate professor in commercial and insurance law at Faculty of law, University Business Academy in Novi Sad. He is author of numerous articles in insurance and reinsurance law and holds a Philosophy Doctor degree in Law.

**DAVID KENDALL, PARTNER, EDWARDS WILDMAN PALMER UK LLP, VICE CHAIRMAN, BILA, LONDON**

**David Kendall** has been with the firm since 1988 and is co-chair of Edwards Wildman Palmer's international Insurance & Reinsurance Department. He focuses on all aspects of insurance and reinsurance and his cases include insurance coverage disputes, (including third party liability, marine, financial institution, political risk, D&O and property insurance), reinsurance disputes, insurance/reinsurance run-off and insolvency, arbitration and commercial court litigation. He has extensive experience of Bermuda form arbitrations in London. Court cases include *HIH v Chase Manhattan* [2001] (House of Lords) and *AE Grant v New Cap Re* [2012J (Supreme Court). David is Vice Chairman of the British Insurance Law Association and a member of Edwards Wildman Palmer's Executive Board.

**PETER KOCHENBURGER, EXECUTIVE DIRECTOR, INSURANCE LAW CENTER, UNIVERSITY OF CONNECTICUT SCHOOL OF LAW, CONNECTICUT**

**Peter Kochenburger** is the Executive Director of the Insurance Law Center, Director of Graduate Programs, and Associate Clinical Professor of Law at the University of Connecticut School of Law, where he teaches courses in insurance and consumer law. Professor Kochenburger has developed and taught the first online courses at the School of Law, including courses in Liability Insurance and Comparative Insurance Regulation, involving students and faculty from China, Italy and the United States.

Professor Kochenburger is a funded Consumer Representative with the National Association of Insurance Commissioners, where he advocates for consumer interests on property-casualty and life insurance regulatory issues. Professor Kochenburger consults with policyholders, government agencies, and nonprofit organizations on insurance and consumer issues, serves as an expert witness in insurance-related lawsuits, and is an associate editor for the ABA Tort Trial & Insurance Practice Law Journal. Professor Kochenburger graduated cum laude from Harvard Law School (1986) and holds his B.A. cum laude in history from Yale University (1982), where he won the McClintock Award for his senior essay in American history.

**JEROME KULLMANN, VICE-PRESIDENT, AIDA PRESIDENTIAL COUNCIL AND CHAIRMAN, AIDA SCIENTIFIC COUNCIL, PARIS**

Professor, University Paris Dauphine - Director of the *Institut des Assurances de Paris*, University of Paris I - Panthéon-Sorbonne, *Docteur d'Etat, mention droit* (PhD in Law)

*Avocat* at the Paris Bar - Consultant and arbitrator in cases relating to damage insurance and insurance of persons, on behalf of insurance companies, brokers, banks, industrial and commercial corporations.

Association Internationale de Droit des Assurances (AIDA.) - International Association : Vice Chairman - Member of the Presidential Council; - French Chapter (AIDA-France) : Chairman; AIDA-Europe : Vice Chairman.

*Lamy Assurances* (annual publication) : Chief Editor and author - *Revue Générale de Droit de l'Assurance :* Chief editor and author

French member of the Project Group *Restatement of European Insurance Contract Law.*

Member of the board of *Centre Français d'Arbitrage de l'Assurance et la Réassurance* (CEFAREA) : French association for arbitration in insurance and reinsurance.

Member of the scientific Committee of *Association pour le Management des Risques et des Assurances des Entreprises* (AMRAE) ."

**JOHN LATTER, CASUALTY CLAIMS DIRECTOR, UK CLAIMS, ZURICH INSURANCE COMPANY, LONDON**

**John Latter** has worked for the Zurich Insurance Group since 8 October 1984. In his current role of Casualty Claims Director, UK Claims, which he has held from February 2010, he is responsible for overseeing the management of all liability based claims arising from business underwritten in the UK.

This operation stretches over a number of locations and has an outstanding portfolio of in excess of 100,000 claims. The claims are predominately domestic in nature focussing on employers liability (including disease), public liability as well as financial lines. In addition to the domestic portfolio, Zurich's Global Footprint which allows it to provide extensive Global Programs to its corporate customers, brings an international flavour including claims arising from many geographies including Continental Europe, Asia, Australia plus North and Latin America.

From 2006 to 2010 John took a lead role in building, implementing and governing the Zurich Groups Multi National Insurance Proposition (MIP), transitioning to a full time central role with Global Underwriting as Global Head of MIP in 2007.

Prior to this he initially began his career in finance before moving to the claims department where he spent the next twelve years handling complex international claims across many lines of business. He then transitioned for a three year period to underwriting a direct lead excess US liability portfolio as part of a team. This was followed by seven years as Chief Claims Officer of Zurich's London Global Corporate operations during which he held a place on the London Executive Management Team reporting directly to the Chief Executive Office.

In addition to his day to day responsibilities, John is a member of the UK Claims Leadership Team which is responsible for setting and implementing the claims strategy for the whole of the UK.

**STEPHEN LEWIS, CHAIRMAN, BILA, LONDON**

Stephen Lewis joined Clyde & Co in 2004 as a Consultant. He is a member of the firm's International Insurance and Reinsurance Group. Stephen joined the firm from a leading "Magic Circle" practice where he was a partner for nearly 20 years.

He has extensive experience in all areas of insurance and reinsurance and specialises in arbitration, litigation and advisory work.

Stephen is a frequent writer on legal issues and regularly speaks at conferences and seminars.

He has over 30 years experience working in litigation and dispute resolution and since 1983 he has been primarily focusing on insurance and reinsurance.

Stephen has been Chairman of BILA since October 2012 and will stand down in October 2012.

**PIERPAOLO MARANO, PROFESSOR, CATHOLIC UNIVERSITY OF THE SACRED HEART AND CONSULTANT, TLS – TAX & LEGAL SERVICES, MILAN**

**Professor Marano** is a Professor of Insurance law at the Faculty of Banking, Finance and Insurance at the Catholic University of Milan, where he received his bachelor's degree in 1989. Professor Marano also holds a Ph.D. in Banking law and regulation from the University of Siena, and he is scholar in residence at the University of Connecticut, School of law – Insurance law center, where he co-teaches Comparative Insurance Regulation in the Insurance Law LL.M. program.

A widely-sought writer and speaker on insurance law and one of the drafters of the Italian Private Insurance Code, in June 2012 he was nominated member of the Insurance and Reinsurance Stakeholder Group appointed by the EIOPA (European Supervisory Authority on Insurance and Pension Funds), which is located in Frankfurt am Mein. He currently sits on the executive board of the International Association for Insurance Law—Europe and he is serving as an associate editor of the *Journal of Insurance Issues* and the *Insurance law Review*.

He is practicing in Milan as of Counsel at the TLS law firm which is the Italian member *firm of the international network PricewaterhouseCoopers Tax & Legal Services*, where he is counseling in the Department of Financial Services.

**PROFESSOR PAOLO MONTALENTI, PRESIDENT, AIDA ITALY, TURIN**

**Paolo Montalenti** is currently Professor of Corporate and Commercial Law in University of Turin Law School (Torino, Italy). Visiting Professor at Université Jean Moulin de Lyon and at Universitad Complutense de Madrid visiting Scholar at Columbia and Berkeley University he is professor at the International Trade of Law Course, organized in Turin by ILO, member of the Steering Committee of WIPO Post-Graduate specialization course on Intellectual Property, member of the Board of *Dottorato di Diritto dell'Impresa*, at Bocconi University in Milan. He is member of the editorial board of *Giurisprudenza Commerciale*, one of the main Italian Law Reviews.

He wrote many articles and books in the fields of Corporate, Commercial and Civil Law, on Corporate Groups, M&A, Leveraged Buyouts, Takeovers, insurance Unlimited Partnerships, Management Contracts, Arbitration, Corporate Governance. His last work is: *Società per azioni* corporate governance *e mercati finanziari*, ed. Giuffrè, Milano, 2011.

He practices as a lawyer in the fields of Corporate Law, Contracts, Banking, Securities Law, Takeovers, M&A and Arbitration.

He has been representative of no-voting shareholders of Fiat s.p.a. since 1996 to 2002.
He has been member of the Board of Directors of Banca Sella S.p.A., Banca Patrimoni Sella &C. S.p.A.. He has been President of Fondazione dell'Avvocatura Torinese Fulvio Croce in Turin. He is member of the Board of Compagnia di San Paolo.

He is Vice-President of the "Camera arbitrale del Piemonte", and of the Council of Milan International Arbitration Chamber, Scientific Head of The "Osservatorio sulla riforma del diritto societario" of The Chamber of Commerce of Milan.

He is Academic Member of European Institute of Corporate Governance.
He is President of AIDA– Sezione Italiana and member of the Presidential Council of AIDA World.

**PROFESSOR DR JOSE MARIA MUNOZ PAREDES, PARTNER J&A GARRIGUES, COMMERCIAL LAW PROFESSOR, UNIVERSITY OF OVIEDO, OVIEDO**

**Professor Dr Jose Maria Munoz Paredes** is Professor (Catedrático) of Commercial Law. University of Oviedo (Spain and Lawyer. Partner at J&A Garrigues

**Academic Background:**

Degree in Law, Universidad de Oviedo (1992) with special mention from the National Study Completion Awards.
Doctorate in Law (1995).

**Professional Experience:**

Wide professional experience as practicing attorney in insurance and commercial law questions.

Secretary of the board of directors of various companies.
Member of the Spanish Insurance Arbitration Court.
Editor of the Spanish Insurance Law Review.
Consultant for the Inter-American Development Bank on insolvency law reform in Guatemala.
Co-author of the Brazilian draft insurance contract law.

**Teaching Experience:**
Director of the Private Insurance Master's Degree course, Universidad de Oviedo.
Numerous Master's Degree courses and conferences in Spain and abroad (Germany, Brazil, Argentina, Guatemala).

**Publications**

Author of over fifty technical publications dealing especially with insurance law, company law, banking and insolvency, some of them having been distinguished with scientific awards. For example:

Co-insurance (*), Madrid (Civitas), 1996, 500 pages. Awarded with Joaquín Garrigues Prize 1996 and the José María Porras Prize 1995 for insurance law.

Insurance brokers (*), Madrid, 2008 and 2012, 300 pages. AIDA's International Scientific Prize 2006.

**SEAN MCGOVERN, DIRECTOR, NORTH AMERICA – GENERAL COUNSEL, LLOYD'S, LONDON**

**Sean McGovern** has been with Lloyd's since 1996 and has been a Director since 2002. He is responsible for promoting and protecting Lloyd's business in North America and is also Lloyd's General Counsel. In that role Sean is responsible for Lloyd's legal, regulatory and Government affairs around the world, maintaining Lloyd's licence network to ensure that Lloyd's access to its international markets is competitive.

Sean is a non-executive director of The CityUK, which promotes the UK financial services sector and is a non-executive director of Xchanging Insurance Services Limited which provides processing services to the London Insurance Market. In November 2011 Sean was appointed to serve as a member of the first US Federal Advisory Committee on Insurance.

Prior to joining Lloyd's Sean was with Clifford Chance in London. He holds a degree in law from Manchester University.

**DAVID NAYLER, HEAD OF UK LEGAL & CLAIMS PRACTICE GROUP, FINANCIAL SERVICES GROUP, AON LIMITED**

**David Nayler** is an experienced lawyer who specialised in high value, complex multi-jurisdictional disputes for commercial and insurance clients, who joined Aon from Eversheds LLP in April 2005

David heads up the Aon Limited FSG Legal & Claims practice, which is part of the global wording and claims offering for FSG clients. David adds his extensive experience to the analysis, negotiation, broking and settlement of claims, and the drafting and development of wordings and coverages for Aon's FSG clients (which covers clients and claims in the following areas):

- Financial Institutions (PI, Directors & Officers ("D&O") and Bond/Crime)
- Commercial (D&O and Fidelity)
- Transaction Liability (Warranty and Indemnity)
- Insurance Companies (PI, D&O and Fidelity)
- Fine Art & Specie.

Whilst in practice and at Aon, David has been involved in some of the largest losses that have affected Financial Institutions and the insurance market, including Fidelity, PI and D&O claims arising out of Film Finance litigation, Barings, Enron, Parmalat, Worldcom, Split Capital Investment Trusts, Endowment and Pension miss-selling, IPO laddering losses, Madoff, Lehmans, Al Ghosaibi, numerous regulatory investigations and the more 'routine' losses arising out of both internal and external fraud. David also both drafts and advises on insurance contract performance, client internal reporting guidelines and insurers reserving philosophies.

David's team also carries out ICAAP insurance reviews, and carries out insurance gap analysis for both clients and in relation to M&A work. David is also responsible for FSG internal technical training on insurance, banking and executive liability issues and runs training seminars for Aon clients. David is a Committee Member of the British Insurance Law Association, a member of the London Market Claims Council and speaks regularly at international insurance, banking and executive liability conferences.

**SVENJA RICHARTZ, LAWYER, VERBAND DEUTSCHER VERSICHERUNGS-MAKLER e.V. (ASSOCIATION OF INSURANCE BROKERS), HAMBURG**

**Svenja Richartz** is a lawyer working with VDVM e.V., based in Hamburg, which represents and supports the professional interests of German insurance broker members in various ways. Among other roles and responsibilities she is an active member of the AIDA Marine Insurance Working Party."

**CHRIS RODD, TECHNICAL COUNCIL, CGU INSURANCE, MELBOURNE**

**Chris Rodd**, a lawyer is a past president of Australian Insurance Law Association, having been national president 2008 and 2009. Chris is employed by CGU Insurance as a Technical Counsel and heads up the companies Internal Dispute Resolution Department. Prior to joining what was then CU Insurance in 1989, he was in private practice for 10 years with a large insurance law firm in Melbourne, primarily involved in insurance litigation.

Since joining CGU, he has had a variety of different roles within the organisation including a number of years as HO Claims Manager .He has participated in numerous industry working parties and committees during his 23 years with the company. Chris has spoken at many Insurance Institute, Financial Ombudsmans Service ( FOS) and AILA functions during his career with CGU. .Actively involved in AIDA ,Chris is a member of the international working party on "Climate Change and Insurance" and has recently presented papers at international insurance law meetings in Paris (2010) ,Amsterdam (2011) and Istanbul (2012) on this issue .A member of the Federation of Defence and Corporate Counsel ( FDCC) ,USA , he is also a part time lecturer in insurance law in the undergraduate program at Monash University, Melbourne

**ANNA TARASIUK-FLODROWSKA, ATTORNEY-AT-LAW, COUNSEL AT HOGAN LOVELLS (WARSZAWA) LLP, WARSAW**

**Anna Tarasiuk-Flodrowska** is an experienced attorney-at-law and has been dealing with insurance issues since 1999. She has been involved in the establishment of many companies on the Polish financial market and has advised on many ownership changes within financial institution groups. Anna advises in administration proceedings and represents clients before the regulators in the day-to-day business of financial institutions, as well as in very specific issues from both a corporate and regulatory perspective.

In her practice to date she has been involved in carrying out merger and take over transactions, as well as the restructuring of entities operating under international capital groups, particularly with respect to entities operating on the financial market. Anna is also deeply involved in consumer issues and bancassurance. She has also advised on very specific issues concerning data protection and professional secrecy which is a critical aspect of the activity of financial institutions on the Polish market. Anna is an expert in matters related to the activity of insurance and financial institutions within the area of EU law.

Anna is a co-author of publications on insurance and insurance-related issues, and a speaker at insurance conferences and training courses.

**DR SAMIM UNAN, AIDA TURKEY, CHAIRMAN, CONSUMER PROTECTION AND DISPUTE RESOLUTION WORKING PARTY, ISTANBUL**

**Samim Unan**: Born 1955 Ankara/Turkey.
Graduated from Faculty of Law, İstanbul University 1982.
Master and Doctor degrees obtained at İstanbul University.
Worked as Professor at İstanbul University and later at Galatasaray University.
Legal Consultant for various insurance undertakings and intermediaries (Anadolu Sigorta, Anadolu Life, Ak Sigorta, Coface, HSBC).
Honorary President of the Turkish AIDA.
Writer of books and articles.
Currently President of Turkish Maritime Law Association.
Chairman of the Consumer Protection and Dispute Resolution Working Party of AIDA.

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**Your reference**

**Our reference**

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31 July 2012

Dear Delegate

**AIDA CONFERENCE**

We would like to extend a warm welcome to AIDA Europe's Conference in London. DLA Piper is a very keen supporter of AIDA Europe and we are delighted to be one of the sponsors of this event once again.

AIDA Europe's conferences are always highly topical and this one is no exception. The focus is on the key issues which concern lawyers in the insurance and reinsurance industries:

Harmonisation of insurance laws, sanctions, claims developments, not forgetting Solvency II and insurance regulation.

I am delighted that a number of DLA Piper colleagues from our Insurance Sector practice are attending this conference and I hope you will meet many of them. Dr Gunne Baehr who heads our German insurance team will, as in previous years, chair the State Supervision Working Party and I will take part in the panel session on Hot Issues.

Across Europe, DLA Piper advises on insurance, corporate and commercial transaction, regulatory work, insurance mediation and insurance contract issues. Our claims team handles high profile insurance coverage issues and the defence of claims across a wide range of insurance classes. Our prime focus in recent months has been on natural catastrophe claims and claims arising from the Global Financial Crisis, including major D&O cases.

I am sure that this conference will be an inspirational and stimulating event and look forward to meeting you in London.

Yours sincerely

**CHARLES GORDON**
**Head of EMEA Insurance Group**
**DLA PIPER UK LLP**

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## WELCOME FROM THE FDCC

The Federation of Defense and Corporate Counsel welcomes the opportunity to again be a sponsor for the AIDA Europe Conference in London. This is a wonderful year to hold this conference in London, with the Summer Olympics and the Queen's Diamond Jubilee preceding. The Federation is also honored to have one of its own, Colin Croly, serving as Chairman of AIDA Europe. The Federation link to AIDA has recently strengthened when your AIDA World President, Michael Gill, came to the Federation's Winter Meeting in Phoenix, Arizona. We had a very productive discussion about how the Federation and AIDA can work together.

The Federation of Defense and Corporate Counsel (FDCC) limits itself to 1,065 attorneys in private practice in the United States, and in addition, we have corporate counsel members, insurance industry members, and also international members in addition to the 1,065 attorneys in private practice in the United States. In total we have close to 1,400 members. We have two annual meetings a year. In July, the Annual Meeting will be held in Whistler, Canada, and site of the most recent Winter Olympics. Since the Presidential and Congressional elections to be held in the United States in November are of the utmost importance at this time, we have featured speakers on the prospects of each political party, and many other speakers on varied subjects, including continuing education.

Within the FDCC, we have 24 substantive law sections, including, but not limited to, class action and multi-district litigation, commercial litigation, financial institutions, drug device and biotechnology, insurance coverage, intellectual property, and trial tactics among many others. We also have a corporate counsel initiatives committee, an insurance industry initiatives committee, and an international activities committee. Our international members include representatives from Australia, Bermuda, Canada, England, France, Germany, Hong Kong, Ireland, Israel, Mexico, Switzerland, Thailand and Venezuela.

In addition to our two annual meetings, we have a Corporate Counsel Symposium in the fall of each year, an Insurance Industry Symposium every two years in the fall, and we also put on a Litigation Management College in June of each year at Emory University is Atlanta, Georgia. The Litigation Management College is designed to enhance the capabilities of insurance industry members who wish to hone their skills in managing and directing litigation.

Most importantly, we in the Federation pride ourselves on our camaraderie and sociability. Our parties at our annual meetings are really fun and we have many other events at these meetings including golf tournaments, tennis tournaments, side trips such as river rafting, etc., that all enhance the Federation experience.

Not everyone qualifies to be a member of the Federation, and that is the way the Federation is designed. Each of us takes pride in having qualified to be a member. We think of ourselves not only as a defense counsel but as defense leaders. Our motto is: It's not impossible to become a FDCC lawyer; it just might feel that way. A potential member must be nominated by another member and then the potential member is carefully screened and vetted. After a thorough investigation, if the potential member meets our high standards of experience, expertise and professionalism, he or she will be admitted to the Federation.

On behalf of my wife, Jan, and myself, I want to thank AIDA Europe again for allowing us to join your conference in London and we look forward to meeting as many of you as possible.

Michael I. Neil
President
Federation of Defense & Corporate Counsel

# Freshfields Bruckhaus Deringer

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13 September 2012

Dear Delegate,

Welcome to the IV$^{th}$ AIDA Europe Conference, which promises to be a excellent few days of learning and discussion on a number of important hot topics for the insurance sector, as well as a great opportunity to network with friends and colleagues from across the industry.

At Freshfields Bruckhaus Deringer, we advise clients on many of the issues that will be discussed over the next few days. Our insurance team work with clients on a broad range of issues, including advising on:

- regulatory and compliance issues around the world, including handling regulatory investigations and enforcement proceedings;
- large, complex insurance and reinsurance litigation and arbitration;
- the impact and consequences of sanctions, anti-bribery and corruption legislation on clients' operations around the world;
- the development of insurance-related financial products, including complex structured financing products;
- mergers, acquisitions and disposals of insurance companies, as well as joint ventures, corporate restructurings and agreements for the distribution of products; and
- international and domestic finance, including financings of insurance businesses in compliance with industry capital requirements.

Our international network means we have the ability to respond quickly to clients' needs worldwide.

I look forward to meeting with you over the next few days.

Yours faithfully

Raj Parker, Partner

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# Welcome!

Dear Delegates

We welcome you to London and the AIDA Europe Conference 2012!

The Ince & Co network includes offices in London, Beijing, Dubai, Hamburg, Hong Kong, Le Havre, Monaco, Paris, Piraeus, Shanghai and Singapore. The firm practises English, French, German, Greek, Hong Kong and PRC law. The Ince Law Alliance, with local law practice Incisive Law LLC, provides Singapore law advice.

Ince & Co has worked with the insurance and reinsurance markets for over 100 years and has been involved in most of the leading cases in the evolution of insurance and reinsurance law. We have a global team of over 50 specialist lawyers, handling issues, disputes and corporate and regulatory matters across a wide range of classes.

"This firm is noted for its expertise on high-value insurance and reinsurance disputes, and it has established itself as a leader in this sphere, especially in the aviation, marine and energy sectors." Chambers UK 2012

Jan Heuvels
Head of Reinsurance

Chris Jefferis
Head of Insurance

PRAGER DREIFUSS

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Dear Delegates,

Prager Dreifuss is proud to be once more one of the sponsors of an AIDA Europe conference, this time taking place in post-olympic London.

Just like the athletes that were reaching out for medals during the Olympic Games just a few steps away from the conference hotel, we at Prager Dreifuss strive to perform at our very best every time we are called in to support our clients from the insurance industry.

Prager Dreifuss has many years of experience in Swiss and international insurance and reinsurance law and is one of Switzerland's leading providers of legal services in this field. We advise insurers and reinsurers, many domiciled or active here in London, in contentious and non-contentious matters. One of our main areas of expertise is the handling of complex claims, inter alia in the sectors of PI, E&O, D&O, BBB, fidelity, product liability, aviation and maritime law, from investigating claims and assessing coverage to representing clients before state courts and arbitration tribunals. We also advise our clients in regulatory matters and represent them vis-à-vis the Swiss regulator FINMA.

We hope that you will enjoy the conference and your stay in London and wish you a safe journey home thereafter.

When it comes to insurance and reinsurance law, your main contacts at Prager Dreifuss are:

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Dear Delegates,

As one of the sponsors of the 2012 AIDA Europe Conference, we are pleased to welcome you in London.

**SCOR,** the 5th largest reinsurer in the world, is optimally geared to support its clients in the current & foreseeable future economic and industry environment. As a multi-line risk carrier with 41 offices across 5 Continents, **t**he Group is organised around two main businesses, **SCOR Global P&C** (Property and Casualty reinsurance) and **SCOR Global Life** (Life reinsurance), plus an Asset Management business, **SCOR Global Investments.**

**SCOR Global P&C** is positioned as a market leader and a price maker in its targeted segments. It is recognised by its clients for its consistent underwriting policy and its continuity in its business relationships. It leverages on two strong balanced and largely non-correlated business areas:

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- **Specialty Lines & Business Solutions** : Is based on a more global approach. This business area is dedicated to specialized risks, including Agriculture, Aviation, Credit & Surety, Engineering, Inherent Defects Insurance, Marine, Space, Structured Risk Transfer as well as Large Corporate Risks.

**SCOR Global P&C's** strategy is consistent with the four cornerstones defined at a SCOR Group level: Strong franchise, controlled risk appetite, high risk diversification and a robust capital shield policy. This is the basis for a unique partnership supported by our long-term commitment towards our business partners.

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ABOGADOS

Since its inception in the year 1925 in the city of Buenos Aires, the Law Firm Bulló- Tassi- Estebenet- Lipera- Torassa Abogados has been an outstanding benchmark when it comes to knowledge, expertise and trustworthiness in fields such as insurance, reinsurance, business, and bank in the Argentine Republic.

This has been the starting point for the active participation and specialization in different business scopes where the firm has always strived to support the full accomplishment of their clients´ objectives.

Its well known domestic and international client portfolio and the increasing demand for effectiveness in corporate advising has generated with time a sustained growth in its structure and resources, acquiring essential conditions in order to render a service which stands out in terms of celerity and quality.

The constant changing scenario of events all around the world in the last years, has built up a culture and vision work in the firm and in its members, granting them the highest flexibility and ability to adapt to keep their leadership in the 21st century.

The firm has 95 correspondent law firms in many cities throughout the country, which allows for the provision to its clients of a total coverage to satisfy their needs.

At the same time, we have correspondent firms in the capital cities of Latin American Countries, as well as in the United States of America, Spain and the United Kingdom.

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## CMS Cameron McKenna

The CMS insurance practice is a recognised market leader across a full range of work for insurers and reinsurers. It is consistently ranked among the UK's top legal insurance practices in the leading legal directories.

Areas of expertise include:

- **Corporate** (cross-border mergers and portfolio transfers; acquisitions and disposals; capital reductions, reattributions and restructuring capital for mutual insurers);
- **Commercial** (designing new products and securing their distribution);
- **Dispute Resolution** (handling large, complex dispute resolution cases as well as advising on non-contentious matters, including advising on policy wordings and regulatory issues, both domestically and internationally); and
- **Regulatory (**advising on insurers' and intermediaries' relationship with their regulators, handling supervisory processes and representing firms and officers in investigations and enforcement action).

We have extensive experience of advising all parties involved in insurance distribution, including insurance and reinsurance companies, Lloyd's syndicates, insurance brokers, agents and financial institutions. We can offer expertise in London, Bristol and Scotland (as well as across the entire CMS network).

As part of the CMS network, we offer the services of a total of 55 offices in 30 jurisdictions in Europe and beyond and, thanks to the way we are structured, we can provide specialist insurance lawyers who understand the local legal and commercial markets. As a firm with global links we have significant experience of co-ordinating multi-jurisdictional relationships.

As a major law firm, we have responsibilities that extend beyond our client work. We prioritise environmental management and are proud of our community schemes across our offices.

Edwards Wildman is a firm with more than 625 lawyers in 14 offices in the US, UK, Hong Kong and Tokyo. Our lawyers are known internationally for their work in insurance and reinsurance, private equity, venture capital, corporate and finance transactions, complex litigation and intellectual property. Chambers USA, Chambers UK and Chambers Asia-Pacific has ranked the firm: excellence in 42 categories.

The Edwards Wildman Insurance and Reinsurance Department is known as a world leader. With 75 lawyers and seamless access to outstanding firm resources, our group is part of a large international firm that has the experience and depth necessary to provide a full range of sophisticated, industry-wide services on a global basis.

Our Insurance and Reinsurance Department represents clients in a full range of corporate, coverage, regulatory, litigation, arbitration, claims and insolvency matters. Years of top-level experience have given us a solid technical understanding of the business of the industry and the ability to speak the language of insurance and reinsurance professionals.

We act for major clients in the London and European markets, North America, Latin America, Bermuda, Hong Kong and other important insurance centres. We work regularly with correspondent lawyers on transactions and proceedings throughout the world, but particularly in Canada, Europe, Latin America and the Pacific Rim.

Our clients are in all segments of the industry. They comprise major insurance and reinsurance companies, Lloyd's syndicates, captives, financial and investment service providers, P&I club managers, HMOs, agents, brokers, reinsurance intermediaries, state insurance regulators, guaranty funds, trade associations, insolvency practitioners, debtors and creditors of insolvent insurers, purchasers and run-off managers.

Members of the department enjoy national and international reputations, and the firm is regularly ranked among the top international firms by our Asian, European and American peers in leading publications such as Chambers and ReActions. Each year, our lawyers teach, publish and speak on emerging industry issues.

When it comes to Insurance and Reinsurance… we know your business.

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**gbf Attorneys-at-law** is a specialist law firm particularly focusing on insurance and reinsurance matters.

Our services include:

- Underwriting and claims support
- Defending claims and recoveries
- Advising on and drafting of contract and policy wordings
- Structuring solutions for complex risks
- Helping our clients with regulatory and similar issues
- Advising on the establishment of insurance companies, branches and captives
- Providing company secretarial services
- Providing run-off services and portfolio transfer
- Advising on the distribution of insurance products

Our aim is to provide support and advice to our clients of the highest level in every aspect of insurance law. We focus on reinsurance and ART, on commercial risk insurance, such as inland and ocean marine insurance, including the general law of transport and aviation, credit insurance, on investment products, such as with profits policies or unit linked insurances, on supervisory law, on national and international aspects of distribution as well as on corporate and competition law.

Our legal training and practical experience is multi-national, encompassing Swiss, EU, Austrian, English, French, German and Liechtenstein law. One of our special capabilities is to provide first hand transnational legal advice in cross-border situations, such as international litigation, co-ordination of parallel national supervisory proceedings or the setting up of international insurance schemes. Where appropriate we are also able to act in co-operation with the correspondent firms that comprise our extensive network.

Christopher L. Bell
Lars Gerspacher
Helmut Heiss
Emmanuelle Imbert
Ulrike Mönnich
Nando Stauffer von May

Heuking Kühn Lüer Wojtek is a name which is synonymous with legal competence. The firm is one of the largest commercial law firms in Germany, with about 250 specialised lawyers and tax advisers, representing the interests of national and international clients. Included in the client list are large and medium-sized German and international companies in all areas of the manufacturing industry, as well as trade and service industries, associations, governmental and public sector organisations and private clients and trusts.

Heuking Kühn Lüer Wojtek was founded in Düsseldorf, Germany, in 1971. Since then, the firm has spread geographically, and Heuking Kühn now has seven significant offices in Germany, as well as an office in Brussels and Zurich.

Heuking Kühn Lüer Wojtek has an international advisory capacity in Insurance law represented by several highly specialized and experienced lawyers. The firm represents insurance, reinsurance and industrial companies in court and arbitration, advises them as well outside of formal proceedings. The Cologne and Düsseldorf offices have special insurance departments. Heuking Kühn Lüer Wojtek is well known among German and foreign insurance companies, direct insurers as well as reinsurers. The insurance practice of the firm complements all other legal areas in which the firm specializes, particularly in Corporation law and M&A, Labour law, Unfair competition and IT-law as well as Taxes.

NCTM Studio Legale Associato is one of the leading law firms in Italy. Our strengths are more than 250 professionals including the 50 active and dynamic equity partners who drive the firm, offices in Milan, Rome, Verona, London, Brussels and Shanghai, a vocation for innovation and independence and a great client base. We deliver integrated legal services to enterprises and financial institutions through multidisciplinary teams reflecting client needs. We believe the growth in the number and needs of our clients is testimony to the success of our strengths and our culture.

Insurance law has a long history across different legal systems and so requires highly specific skills to navigate its complexities. NCTM is recognized as being a leader in this sector and our Insurance and Reinsurance group – composed of a team of highly experienced and skilled lawyers operating from our Milano, Rome, Verona and London offices – provides specialized italian legal services to international and domestic insurers, reinsurers and other key-players in the insurance industry.

Our services include advising in the creation, development and update of insurance products, handling of claims and representation in Court of insurers or their insureds, obtainment of insurance and re-insurance licenses, regulatory and compliance matters, corporate and M&A transactions, general advice on insurance law and so on.

Combining the expertise of our several departments, we can provide our clients in the insurance market with effective and coordinated advice on any relevant area of all insurance products. This allows us to effectively handle both the insurers-insureds relationship and any related aspects.

Our lawyers working in all NCTM domestic and international offices work in close connection and cooperation with international and Italian loss adjusters, experts and consultants.

Norton Rose Group is a leading international legal practice. We offer a full business law service to many of the world's pre-eminent financial institutions and corporations from offices in Europe, Asia, Australia, Canada, Africa, the Middle East, Latin America and Central Asia. Knowing how our clients' businesses work and understanding what drives their industries is fundamental to us. Our lawyers share industry knowledge and sector expertise across borders, enabling us to support our clients anywhere in the world. We are strong in financial institutions and insurance; energy; infrastructure, mining and commodities; transport; technology and innovation; and pharmaceuticals and life sciences.

We have more than 2900 lawyers operating from offices in Abu Dhabi, Almaty, Amsterdam, Athens, Bahrain, Bangkok, Beijing, Bogotá, Brisbane, Brussels, Calgary, Canberra, Cape Town, Caracas, Casablanca, Dubai, Durban, Frankfurt, Hamburg, Hong Kong, Johannesburg, London, Melbourne, Milan, Montréal, Moscow, Munich, Ottawa, Paris, Perth, Piraeus, Prague, Québec, Rome, Shanghai, Singapore, Sydney, Tokyo, Toronto and Warsaw; and from associate offices in Ho Chi Minh City and Jakarta.

Norton Rose Group comprises Norton Rose LLP, Norton Rose Australia, Norton Rose Canada LLP, Norton Rose South Africa (incorporated as Deneys Reitz Inc), and their respective affiliates.


## Norton Rose LLP

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# Firm Profile

Levitan, Sharon & Co. is a leading law firm specializing in insurance and reinsurance law in Israel. The firm's reputation is founded on its preeminence in Insurance and Reinsurance law, including insurance litigation, with specific expertise in complex International Law issues, as well as in litigation which takes place simultaneously in several venues. The firm has been involved in major insurance cases tried in Israel and its leading partners have several precedents on their name (the recent one relates to a double insurance issue).

## Clients and Services

The firm acts mainly for foreign insurers and reinsurers who operate in Israel, including various Lloyd's syndicates, Allianz, Axa, Swiss Re, Munich Re, A.I.G., G.E. Frankona, Chubb, Assicurazioni Generali, and others for whom the firm provides all aspects of administrative, insurance regulatory and legal work. In addition the firm is connected to most leading insurance and reinsurance law firms around the world, and acts on reciprocal basis with them.

The range of services provided by the firm includes complex litigation work, legal opinions regarding Israeli laws, interpretation of policies based on the said laws, claims handling services which include both technical and legal aspects, creating new insurance products and adapting products to the Israeli legal scene.

The firm is also involved in establishing off-shores captive insurance companies for large industrial and financial institutions in Israel.

The firm’s uniqueness is its concentration in limited areas of the law, which are all connected to insurance or reinsurance.

In all these areas the firm publishes newsletters, and arranges seminars on a regular basis which are directed at the professionals working in the specific type of insurance business.

## Specific Areas of Expertise

Financial Lines: The firm is known worldwide as a leading law firm in insurance of financial lines, such as Credit Insurance, Directors and Officers, Bankers Blanket Bonds and Jewellers Block policies. In all the above areas the firm is involved in most of the claims brought against the insureds either as defense attorney, or coverage attorneys. Some of these claims were filed outside of Israel.

**Liability Insurance:** The firm is involved in most types of liability insurance including public liability, employee`s liability, third party liability, and various professional liabilitiy.

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www.levitansharon.co.il

**Corporate Law for Insurance Companies:** A special department handles corporate issues including services required by the insurance industry, including in-depth knowledge of Insurance Control Law, antitrust law, laws relating to investments, and tax implications relating to insurance.

In the said field the firm is involved in drafting agreements and issuing legal opinions as well as litigation.

The firm has excellent reputation with the Commissioner of Insurance, and involved in the legal work needed for receipt of operation licenses both for insurers and insurance brokers.

The firm has expertise in M&A of insurance entities including mergers of brokers and setting up/ restructuring insurance entities. A member of the firm was recently nominated as Administrative Manager of an insurance company that collapsed (Continental Insurance Co.)

**Captive insurance companies:** The firm was involved in establishing various captives for different entities, such as banks, industrial companies and telecommunications companies. The firm is capable of providing claims handling services to such captive insurance companies, tax advises end insurance, regulation advises.

**Professional Indemnity:** The Israel Bar Association and the insurance industry elected the firm to act as claims handler for the Bar Association's Malpractice Scheme. The firm has been running the scheme, acting on behalf of insurers, for the past 15 years.

**Property Damage and Business Interruption:** The firm deals with complex and high value property damage and business interruption claims, either as litigators on behalf of insurers which are named as defendants in Court or as the monitoring counsel on behalf of Reinsurers. The firm was involved in the four largest property damage and business interruption claims in London.

**New Products:** The firm is engaged by international insurers to create new insurance products, mainly in the financial lines sector, and to adapt existing insurance products to the Israeli law.

**Medical Insurance:** The firm acts on behalf of Insurers in the handling of medical insurance claims involving questions of permanent and temporary disability, interpretation of policy in light of specific regulations regarding medical insurance.

The firm is also involved in various cases of litigation both in Israel and abroad regarding medical claims, including various aspects of jurisdiction relating to these claims and advice regarding the implications of the claims on policy wording.

**Claims handling:** Side by side to the law office, the firm owns a company which handles claims for various entities. About 50% of its clients are insurance companies which out-source certain type of claims (such as malpractice) to the company. Other clients are large corporations and municipalities which have large deductibles and are out-sourcing the handling of their claims within the deductibles to the company.

**Aviation:** The firm has a large department that deals with aviation claims both hull and third party bodily injury. In addition the firm has recently acquired new expertise in drafting aircraft leasing agreements.

**Subrogation claims:** A special department of the firm concentrates in subrogation claims mainly on contingency fee basis - The firm in commissioned to act by various credit insurance companies as well as regular insurers who were involved in Israel in substantial claims and are seeking now to recover from the wrong doers.

**Product liability and contamination:** One of the unique expertise of the firm relates to a special know-how in product liability cases as well as contamination. Both as litigators on behalf of manufacturers and coverage attorneys on behalf of insurers

**Swiss Re**

The Swiss Re Group is a leading wholesale provider of reinsurance, insurance and other insurance-based forms of risk transfer. Dealing direct and working through brokers, its global client base consists of insurance companies, mid-to-large-sized corporations and public sector clients. From standard products to tailor-made coverage across all lines of business, Swiss Re deploys its capital strength, expertise and innovation power to enable the risk taking upon which enterprise and progress in society depend. Founded in Zurich, Switzerland, in 1863, Swiss Re serves clients through a network of over 60 offices globally and is rated "AA-" by Standard & Poor's, "A1" by Moody's and "A+" by A.M. Best. Registered shares in the Swiss Re Group holding company, Swiss Re Ltd, are listed on the SIX Swiss Exchange and trade under the symbol SREN. For more information about Swiss Re Group, please visit: www.swissre.com or follow us on Twitter @SwissRe.

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**How are Insurers and Reinsurers Expected to Measure Up?"**

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## Insurance Law in the EU

4th AIDA Europe Conference

London, 14th September 2012

Prof. Karel VAN HULLE
Head of Insurance and Pensions

Internal Market & Services DG

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## How does EU law come about?

- Intensive consultation: public hearings, EIOPA stakeholder group, frequent meetings with stakeholders, with MS and with supervisors (EIOPA)
- Thorough IA with scrutiny by IAB
- Inter-service consultation within the EC
- Preference for Regulation above Directive

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## Drafting of EU law

- Commission proposals only adopted after agreement with EC Legal Service
- Intensive discussions between Services and Legal Service
- Final text (after adoption) subject to agreement between jurists-linguists of Commission, Council and European Parliament

Internal Market & Services DG 7

## Co-decision Procedure

- Council Working Party: general approach
- Draft report by Rapporteur (ECON)
- Adoption of Report by ECON
- Trilogue between Council, EP and EC
- Adoption by EP in plenary
- Final adoption by Council
- Legal & linguistic check before publication

Internal Market & Services DG 8

## European Commission and EIOPA

- Calls for advise to EIOPA
- EC actively participates in work of EIOPA
- EIOPA more resources than EC
- EIOPA further implements EU legislation via RTS and guidance/recommendations
- EIOPA helps moving national rulebooks into a single EU rulebook

Internal Market & Services DG 9

## The legislative insurance agenda

What is on the table?



## Insurance law in development

- New solvency framework for insurers and reinsurers (Solvency II and Omnibus II)
- Review of the Insurance Mediation Directive (IMD)
- Review of the Pension Funds Directive (IORP Directive)



## Solvency II

A complex project

## Solvency II

- Lamfalussy three level approach
- Framework Directive adopted in 2009 including recast of 13 Insurance Directives (level 1)
- Implementing measures to be developed by the Commission (level 2)
- Further guidance to be developed by CEIOPS (level 3)

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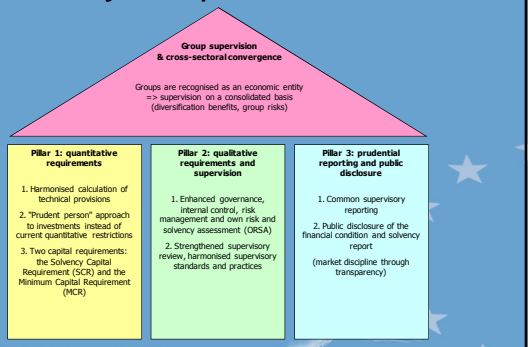
## *Solvency II: 3 pillars and a roof*

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## Legal aspects

- Role and powers of national supervisors and CEIOPS
- Role and powers of group supervisor
- Proportionality principle
- Governance structure
- Equivalence of third country solvency regimes

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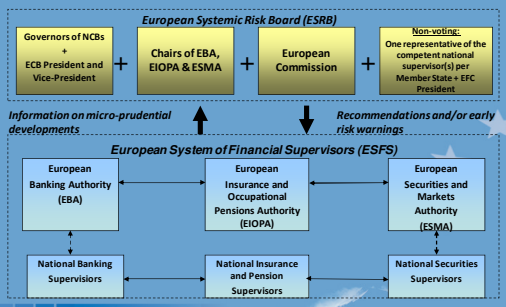
# Financial Crisis

## Omnibus II



## New European Supervisory Structure






## Omnibus II Directive: content

- Sectoral adaptation of insurance legislation to new supervisory architecture (powers of EIOPA)
- Alignment with new Lisbon Treaty (new procedure for empowerments to the Commission)
- Transitional measures, first time application, transposition by Member States of the Solvency II Framework Directive

## Omnibus II Directive - EIOPA

- Additional tasks to be attributed to EIOPA in the context of Solvency II
  - Binding mediation between supervisory authorities
  - Determination of exceptional fall in financial markets (pillar 2 dampener)
  - Definition of risk free interest rate curves
  - Definition of specific technical aspects of the SCR standard formula

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## Omnibus II Issues

- Empowerment to Commission and/ or to EIOPA (RTS or DA)
- Long term guarantee package (movement from level 2 to level 1)
- Transitional measures – Phasing in
- Treatment of SME's: proportionality
- Equivalence

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## Agreed timeline for Solvency II

- Adoption of Omnibus II before end 2012
- Presentation level 2 measures: early 2013 with objection period for Council and EP
- Consultation by EIOPA on draft level 3 measures: early 2013
- Transposition by MS of 2009 Directive: 30 June 2013
- Application of Solvency II: 1 January 2014

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## Review of the IMD

Insurance is a complex product



## Main changes envisaged

- Extension of scope to direct sales
- Improved transparency about potential conflicts of interest (business card solution, remuneration disclosure)
- Specific regime for packaged retail investment products (MifiD)
- Facilitating cross-border business
- Proposal presented by EC on 3 July 2012



## Legal aspects

- What is insurance mediation?
- Who should supervise an insurance intermediary: division of competence between home and host supervisors?
- Minimum or maximum harmonisation?
- Role of general good?
- How can too much complexity be avoided?

## Review of the IORP Directive

The pension challenge

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## Main changes envisaged

- Clarification of the scope of application
- Facilitating cross-border structures: social and labour law
- Introduction of a risk based solvency regime, improved transparency of pension commitments and improved pension fund governance
- Proposal planned for June 2013

Internal Market & Services DG

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## Legal aspects

- What is an occupational pension fund?
- What is social and labour law?
- Is there a difference between a pension promise and an insurance contract?
- What is cross-border business?
- Are occupational pension funds financial institutions?

Internal Market & Services DG

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## The EU insurance acquis

Not easy to administer

Internal Market & Services DG

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## The law in action

- Infringement cases: distinction between public and private law, general good
- Preliminary rulings: gender equality, bonus malus in motor insurance
- Legal consequences of Commission guidance (interpretative communications)
- Complaints: respective responsibilities of Commission and EIOPA

Internal Market & Services DG

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## The consumer agenda

Alternative ways to contribute to an internal market for insurance

Internal Market & Services DG

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## Harmonisation and consumer protection

- Consumer protection and financial innovation (Art. 9 EIOPA Regulation)
- Should EIOPA be empowered to prohibit certain insurance or pension products?
- The search for 28th regimes (insurance contracts, pensions)
- Insurance guarantee schemes



## Concluding remarks

- Insurance remains the great unknown although its importance is increasingly recognised
- Solvency II will have a profound impact on insurance products and markets
- Insurance regulation will become more consumer focused
- Not everything can or should be regulated



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**http://europa.eu.int/comm/internal_market/insurance/index_en.htm**

Responding to Regulation in a Fast-changing world: Financial and Political

Chairman: Professor Dr Herman Cousy,
Member of AIDA Presidential Council and
Vice-Chairman AIDA Scientific Council, Leuven

## (1) Changes in Insurance Contract Law and Regulation Regimes for Contract Redress

**Principles of European Insurance Contract Law**
**- an update -**

*Helmut Heiss*
Chair for Private Law,
Comparative Law and PIL
University of Zurich
London, 14th September 2012

Universität Zürich

## Developments since 2009

- PEICL 2009: General Provisions
  - Applicable to all insurance contracts (except reinsurance)
  - Applicable to all indemnity insurance contracts
  - Applicable to all insurances of fixed sums
  - **NO branch rules (see Article 1:105 (1) 1 PEICL)**
- = DCFR Insurance 2009/Model Optional Instrument (EU Regulation)

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## Academic Progress «PEICL II»

- Liability Insurance
  - General Liability
  - Direct Claims
  - Compulsory Insurance
- Group Insurance
  - Accessory Group Insurance
  - Elective Group Insurance
- Life Insurance

→ *Publication 2014*

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## Political Progress «2nd Regime»

- EESC on "28th Regime", 27th May 2010
  → follows PEICL ("2nd regime")
- COM Green Paper, 1st July 2010
  → follows PEICL ("2nd regime")/EESC
- DRAFT EU Sales Law, 11th October 2011
  → follows PEICL ("2nd regime")/EESC/Green Paper
  → however:
    - limited to cross border contracts
    - lacks explicit regulation on its "indirect elegibility"

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## Political Progress «2nd Regime»

- Advantage 1
  = o.i. is "domestic" law in every Member State
- Advantage 2
  = protects interests of third countries
- Advantage 3
  = allows "unilateral" accession to the o.i. for third countries

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## Political Progress «2nd Regime»

- Bridging legal cultures?
  - argument against CESL raised in Germany and Austria, especially with a view on English common law ("case law")
  - English position:
    - tendency to codify ICL
    - Advice by the Law Commissions on CESL
      - no interference with national legal culture
      - only one cultural issue: tension between certainty and fairness

    → no "legal culture problem" at the other side of the bridge!

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## Political Progress «Insurance Contract Law»

- EP Resolution, 8th June 2011
  → favours an o.i. of European Insurance Contract Law
- *Viviane Reding*, Press Release, 21st September 2011
  → favours an o.i. of European Insurance Contract Law
  → announces start of work for 2012/2013
- Draft EU Insurance Contract Regulation
  → coming soon????

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MORNING COFFEE BREAK
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Responding to Regulation in a Fast-changing world: Financial and Political (continuation)

(2) Compliance with Sanctions and Anti-Money-Laundering/ Terrorism Requirements

Verband Deutscher Versicherungs-Makler e.V.

## Compliance with Sanctions and Anti-Money-Laundering/Terrorism Requirements

Svenja Richartz, Corporate Counsel
AIDA Europe Conference London, September 14th, 2012

Verband Deutscher Versicherungs-Makler e.V.

## Agenda

Folie 47

Practical Experiences with Sanctions

Practical Experiences with AML

Conclusion

Verband Deutscher Versicherungs-Makler e.V.

## Agenda

Folie 48

**Cautionary Note**

- This presentation is from a German broker's perspective.
- Its main focus is on practical market difficulties.
- It may be provoking.

Verband Deutscher Versicherungs-Makler e.V.

## EU Sanctions Regimes

With the reference date of April 16th, 2012:

| Countries | Designated persons | |
|---|---|---|
| | Entities | Individuals |
| 21 | 899 | 1.570 |

"suffer" sanctions from the EU (and/or the UN or the US),
but only Iran and Syria face a general prohibition of (re-)insurance.



Verband Deutscher Versicherungs-Makler e.V.

**Imagine...**

... a new client asks you to provide all necessary insurance coverage for his company active in the food production industry.

a) Your client is an Iranian Citizen;
he has no residence in Iran.

b) as above, but with a residence in Iran.



Verband Deutscher Versicherungs-Makler e.V.

**Company options**

- The company to be insured is a limited company with 3 shareholders, one is an Iranian Citizen; he has no residence in Iran.
- The company to be insured is a limited company with 3 shareholders, one is an Iranian Citizen. He has a residence in Iran and a share of 5%.
- As above. His share is 30%.
- As above. His share is 15%, but the company agreement states that he has authority to decide.

Practical experiences with sanctions

Folie 52

## How to be in line with compliance rules?

Check the trade/stock register at any time.

Be sure that you always get the company agreement in its current version.

Do not think about data protection requirements.

Check the Iranian registration office any day of the week.

Be sure to do the same for every existing client at least 4 times a year.

Practical experiences with AML

Folie 53

## Legislative Project

- The FATF has recently introduced new recommendations.
- Proposal for the 4th AML-Directive is in progress for autumn 2012.
- In Germany the 3rd AML-Directive (2005/60/EG) was transferred into national legislation December 2012 together with recommendations of the FATF dated February 2010.

Practical experiences with AML

Folie 54

## General Complications

- Due to the German federal system, Germany has 16 (!) supervisory authorithies for obligated parties/companies under the AML Act.
- In Rhineland-Palatinate for example a broker has to deal with the county administration, in Baden-Württemberg with the regional council and in Hamburg with the legal department of the Department of Economic Affairs.
- This year the "local" authorities started to make use of their supervisory duties. They all use different questionnaires and ask for different requirements.

## (Cont.)

- The German AML Act does not make a difference between brokers practising premium collection and those who don't.
- The AML Act includes many indefinite legal terms. The risk of misinterpretation of the legal terms is shifted to the insurers as well as to the brokers.
- If there is "something wrong" you are already obliged to collect data and record it. There is no need of a probable cause. The data has to be recorded at least 5 years in order to proof to the authorities that no probable cause was found.



## Forms of relief for Life Insurance Companies

- The obligation of identifying the insured is fulfilled if the insurer is allowed to debit the premiums directly from the insured's banc account, §80 f VAG (German Insurance Supervision Act), and the account belongs to a European Union-domiciled banc.
- The beneficiary can be identified after concluding of a contract as long as it is done before payment of the sum insured.



## Imagine...

… a new client is asking you to provide a life insurance.

- His name is Ali Muhammad.
- There are 4 different Ali Muhammad listed in the Black list.
- It takes 6 weeks for the FIU to check the data and to confirm that Ali Muhammad is a baker and has been living in Hamburg all his life.

## How to be in line with Compliance Rules?

- Check the Black Lists at any time (EU Consolidated List; FATF Black list; etc.)
- Install a database dealing with all ”PEPs” and their family members in your country.
- Order every journal you can reach to be sure to know all persons with close relationships to the ”PEPs” and add them to your database.
- Be aware that you are in charge of state duties. A ***slight negligence*** will already cost you a bunch of money, maybe bring you to jail and you might loose your license as broker.



## (Cont.)

- Do not think about Data Protection Requirements.
- Check your repertoire of good excuses for not having responded to your client during the last weeks while the FIU checked your client.
- Be sure that you do the same for every existing client on a regularly basis.



## Conclusion

The State is more and more outsourcing his duties to prevent crime to the insurance companies and the intermediaries.

The risk of interpretation as well as misinterpretation is outsourced to the companies and the intermediaries.

These duties can only be fulfilled by infringing data protection requirements and inflating your administration.

Verband Deutscher Versicherungs-Makler e.V.

Folie 61

**Thank you very much for your attention!**

## All Roads Leading to Rome? "2014 World Congress", Rome Topics

Chairman: Professor Jerome Kullmann,
Vice-President, AIDA Presidential Council and Chairman, AIDA Scientific Council, Paris

## (1) Transparency, Conflicts of Interest and Intermediary Remuneration

## (2) Arbitration – Procedure and Law

IVth Aida Europe conference:
London 13/14 September 2012

## THE BERMUDA FORM: The best of all worlds?

Richard Jacobs QC
Essex Court Chambers

## The origins of the Form and current usage

- the 1985/86 liability crisis
- Formation of XL and Ace
- Usage by other insurers/ concepts adapted
- XL 004 Form is latest version

## Basic coverage

- Booms and batches
- Personal injury
- Property damage
- Advertising liability

## Key features (1): Occurrence reported

- Two triggers; occurrence and reporting (notice)
- Notice to be given during 'Coverage A', unless extended reporting period (Coverage B) is purchased
- Avoids unknown 'tail' that led to major problems for insurers for asbestos and environmental pollution liabilities

## Key features (2): Aggregation

- Common problem triggers only one policy limit
- No 'stacking'
- Aggregation also enables policyholder to exceed the high attachment point, e.g. product liability mass tort giving rise to large number of small losses

## Key features (3): modified New York law

- New York law more acceptable than law of other US States
- Provisions to be construed in "even-handed manner: "without presumption or arbitrary interpretation or construction in favour of either the Insured or the Insurer"
- Modification readily applicable in English arbitration (no public policy difficulties)

## Reasons for choice of London arbitration

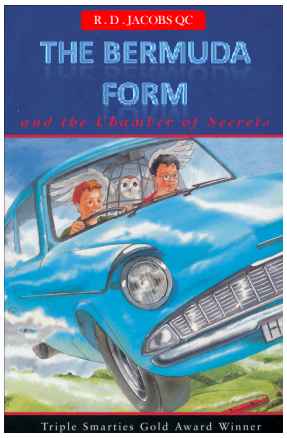
- Recognised centre for arbitration
- Ready supply of arbitrators who will apply policy terms
- Acceptable to US policyholders
- Confidentiality
- No body of adverse court precedent

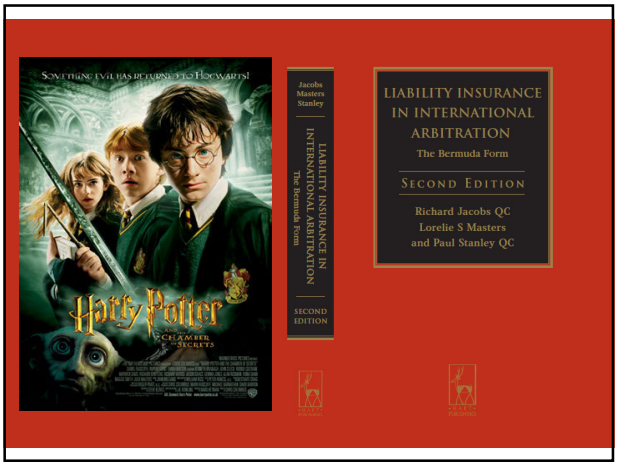
## Absence of reported decisions

- US proceedings likely to be stayed
- No appeals possible in England
- English court decisions are on peripheral issues
  - *XL v Toyota*: appointment of chairman
  - *C v D* (CA); proper law of arbitration agreement, and judicial supervision

## Consequences of confidentiality

- No precedent available to lawyers or arbitrators
- But some arbitrators and lawyers aware of what has been decided
- Purchasers (and some vendors, particularly new entrants) unaware of what has been decided



## Interplay of arbitration and governing law clauses

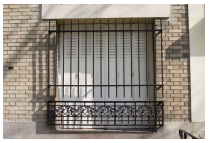
- Arbitration agreement is governed by English law
- Issues of substance (e.g. misrepresentation, scope of coverage) governed by NY law
- Issues of procedure governed by English law
- Borderline issues (e.g. Interest) which may be substance or procedure
- Judicial supervision is for English courts
- Which law governs privilege issues?

## Conclusion

- Arbitration in London has stood test of time
- Absence of precedent advantageous to insurance market
- Uncertainty compensated for by advantages of London arbitration

## (3) Preventive Measures

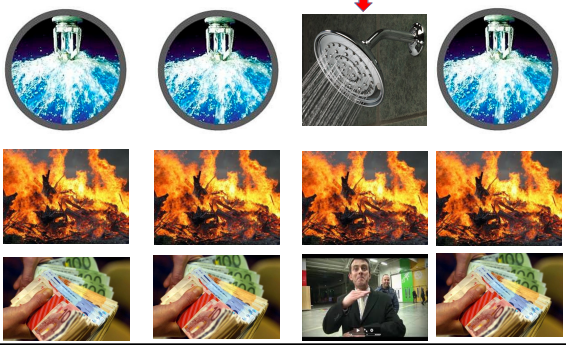
## Precautionary measures


## Breach of duty

## Definition of the risk - Exclusion : the event is ejected from the field of the insurance contract

## Relief from liability of the insurer

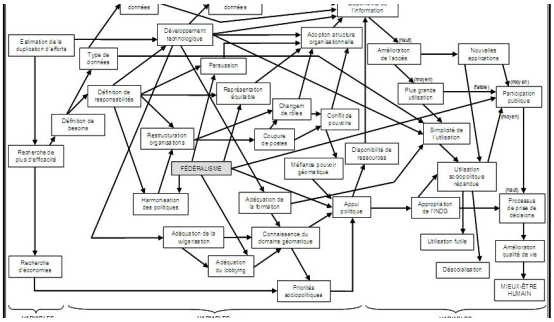


## For the future : termination of the insurance contract

## The insurer can avoid the insurance contract : retroactive effect

## Who has to comply with the duty ?
## -Policyholder ?
## - Insured

## Breach of duty and Occurence of the event : causation




## The onus of proof : who has to prove, and what ?




## At the end of the day, is THAT « Insurance » ?

Precautionary Measure # 1 + Precautionary Measure # 2 + Precautionary Measure # 3 + Precautionary Measure # 4 Precautionary Measure # 5 + Precautionary Measure # 6 + .+.+.+.... + Precautionary Measure # 247

---

A breach of warranty may enable the underwriter to terminate the policy

-from the date of that breach,

- and in some instances ab initio.

This may be the position regardless of whether there is any connection between the warranty breach and the loss which leads to that breach becoming event

## (4) Discrimination and Insurance

## IVth AIDA Europe Conference: ABC…learning a new alphabet?

Daniel Beard QC

## ABC Test-Achats

- The impact of fundamental rights
- The role of a temporal limitation
- How does the guidance work?

## Fundamental rights

- Gender as a factor in insurance premiums
- Specific legislative permission
- Fundamental rights: discrimination
- Legislative discretion overridden
- A bold step?
- The Charter as "amplifier"?

## Sturgeon

- Compensation for flight delays?
- Legislative difference between cancellation and delay
- AG Sharpston raises equality issues…
- Court says money all round
- *TUI* the rescue?

## Temporal limitation

- UK initiative
- ©AG Jacobs – *Banco de Cremona*
- Notice differences: AG and Court
- (Some) consensus in guidance
- Only courts can determine…

## "new contract"

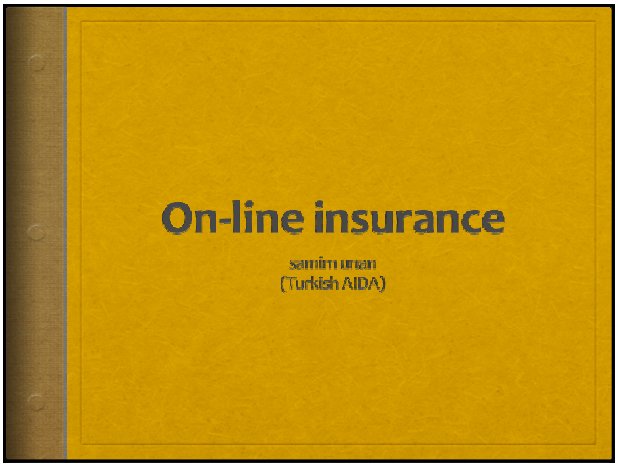
- Guidance EU Commission…
- What is an "autonomous EU meaning"?
- How can that work without a consistent law of contract?
- Linguistic comparisons
- Specific legal circumstances will matter.
- HMG too…

## Trends?

- Growth in use of fundamental rights jurisprudence
- Potential impact on indirect discrimination analysis
- Concerns about practicability
- The revenge of Barber?

thank you

(5) On-Line Insurance



## Increased use of the Internet

- The use of the Internet for the distribution of insurance products has begun in 1990's.
- The main advantages to use the internet for distribution/acquisition of insurance products are
  - for the insurer
    - reducing the costs
    - penetration of new markets
  - for the consumer
    - saving of time
    - price comparison
- Insurers (and insurance distributors) use the internet significantly more nowadays. This increased use is expected to continue.

## Some figures

- **In Canada**
  - More than three quarters of Canadians (approx.22 million people) used the Internet in 2009.
  - Approx. 40 % of them has placed an order online.
  - 95 million online orders represent a value of 15 billion of Dollars (35% more than in 2007).
- **In the USA**
  - In 2009, 17 million online searches on life insurance (15% more than the year before) were made
  - In 2009, 2 million quotes (for life insurance) were asked
  - In 2010 2,9 million automobile insurances were sold online (35% more than 2007).

## Consumer protection

- The concern to protect the consumer is even greater in deals over the Internet.
- Imbalance of information.
- Outside internet: intermediaries
- On the Internet, problem to solve by way of provision of adequate information

- Information to be given to the Internet user ("Internaut") should relate in particular to the following:
  - Products and services offered,
  - conditions governing the use of the website,
  - legal framework of the relationship between the provider and the user of the website,
  - security measures,
  - protection of personal data,
  - claim and complaint procedures,
  - contact information (to reach the insurer's representative).

- **Signature**
  - The traditional "wet" signature (i.e. ink on paper) is relevant in three respects: identification, the individual's becoming bound by the agreement, trustworthiness.
  - A properly designed on-line sale process and secure audit trail will help achieving the functions of wet signature. The insurer's records should evidence that
    - relevant information was given to the applicant
    - terms of the contract were provided
    - the applicant accepted those terms
- **Electronic Signature Directive (1999/93/EC)**

## Protection of personal (sensitive) data

- The insurer gathers "sensitive personal data" from customers.
- The insurer must comply with information and data protection requirements.
- If there are several parties involved (insurance sold through an aggregator site or through the common brand of joint venture providers) these parties must agree on how data will be used and by whom.

## Selling through third parties

- In sales made through
  - intermediary extranets,
  - portals, sites run by supermarkets

  one of the main problems is the respective roles of the parties involved (whose duty it will be to ensure the compliance of the website and the sales process, the data protection notice).

## Online conclusion of insurance

- **Legal framework**

- In Europe legal requirements to comply with when concluding contracts online are laid down in various directives: It is worth mentioning particularly the following:
  - Directive concerning the distance marketing of consumer financial services (2002/65/EC)
  - Directive on certain legal aspects of information society services, in particular e-commerce (2000/31/EC)
  - Directive on payment services (2007

## Distance Financial Services Directive

- "distance contract".
- The Directive provisions apply only when the supplier makes exclusive use of means of distance communication up to the conclusion of the contract.
- The insurer (in his capacity of distance service provider) is required to provide information in a clear and comprehensible manner

## Distance Financial Services Directive

- Article 5 imposes on the insurer the obligation to communicate the terms and conditions of the contract.
- The information and the terms and conditions of the contract must be given on paper or on other durable medium available and accessible to the consumer
- Further, the Directive grants the consumer the right to withdraw from the contract (Article 6), but puts him under the obligation to pay remuneration for the service provided before withdrawal (Article 7). Taking into account the importance of this topic, we will examine it in more details below.
- The Directive prohibits the unsolicited communications (Article 10).

## E-commerce Directive

- The Directive 2000/31/EC regulates certain aspects of the information society service including e-commerce to ensure legal certainty and consumer confidence.
- The Directive establishes a general information duty (Article 5) to be acquitted by the service provider about his identity and particulars.
- The Directive imposes the obligation to ensure that legal systems allow contracts to be concluded by electronic means.
- Prior to the placement of the order the customer (the consumer and –if not otherwise agreed- the merchant) must be informed
- In case of contracts concluded exclusively by exchange of e-mails or by equivalent individual communications, the information duty cited above shall not apply.

## E-commerce Directive

- Contract terms and general conditions must be made available in a way to store and reproduce them.
- The insurer has to acknowledge the receipt of the prospective policyholder's order without undue delay and by electronic means (this rule is not mandatory in b2b transactions).
- The order or the acknowledgement of receipt is deemed received when the addressee is able to access it.

## E-commerce Directive

- The insurer has to provide technical means appropriate, effective and accessible to identify input errors prior to placing of the order.
- The requirements to acknowledge the receipt and the provision of technical means can be derogated in contracts concluded exclusively by exchange of e-mails or by equivalent communications.
- The Directive requires the availability of out of court dispute settlements if a dispute arises between the insurer and the customer.

## Payment Services Directive (2007/64/EC)

- Insurers often collect the premiums online.
- Rules concerning payment transaction are set forth in the Payment Services Directive.
- the consent of the payer is necessary for an authorised payment transaction.
- If a payment order (instruction by a payer or payee) is executed in accordance with the unique identifier there will be a presumption of correctly execution with regard to the payee specified by the unique identifier (Article 74 (1)).
- If an unauthorised payment occurs, the payer's payment service provider refunds to the payer immediately.
- However the payer shall bear all losses relating to any unauthorised payment up to a certain amount resulting from the use of a lost or stolen payment instrument, if he has failed to keep the personalised security features safe, from the misappropriation of a payment instrument (Article 61 (1)). If the payer acts fraudulently or violates his obligations under Article 56 with intent or gross negligence, all costs shall be borne by him (Article 61 (2)).

## Some legal issues

- We underline that solutions defended by Dörner (in Beckmann/Matusche-Beckmann Versicherungsrechts-Handbuch, 2 Aufl. (§ 9. Abshcluss und Abwicklung von Versicherungsvertraegen im Internet), pp.484-507, München 2009) seem very satisfying.
- We adhere to most of the opinions expressed there.

## Conclusion of the contract

- A contract concluded online is subject to rules about formation of contracts. Agreement on the "essentialia negotii" by way of offer and acceptation is necessary.
- It is not relevant
  - Whether the parties reach this agreement by exchange of e-mails they formulate themselves
  - Whether the process is completed after the applicant fills the form on the website of the insurer
  - Whether the offer is completed by the support of an existing automatic programme (in this case the personal data provided by the applicant would be processed automatically and the insurer would be requested to explain the fact that led to his (automatic) refusal if the application is finally refused).

## Offer or invitatio ad offerendum

- Often the applicant visits the website of the insurer.
- Whether the mechanism of the website (i.e. the precision of the product indicated by the insurer after online interview) should be regarded as a binding offer or an invitation ("invitatio ad offerendum") is a matter of interpretation.
- But as the insurer is under the duty to inform about the steps leading to the conclusion of the contract, he must explain whether he intends to make an online offer or an invitation only.

## Offer or invitation to business

- If the insurer makes an offer on the Internet, the contract will be concluded by the online acceptation of the applicant.
- If the insurer is deemed to have made an invitation only, the contract will be concluded when the insurer will accept the applicant's offer. The insurer may accept this offer online or by other means (for example sending of the insurance policy).
- In civil law, invitation to business point of view is widely shared; but in insurance law the contrary should prevail.

## Terms and conditions

- The insurer is obliged to provide the terms of the contract in due time before the conclusion of the contract (to enable the applicant to make a conscious decision).

## Contract between absent or present persons?

- An insurance contract concluded online by filling forms or by exchange of e-mails is it between "present" or "absent" persons?
- The rule is that an offer made by "telephone" or "other technical means" from person to person must be accepted immediately as in the case of physically present contracting parties.
- However the expression "other technical means" refers to videoconferences, chats on the Internet or Internet phones where an immediate answer can be expected.
- In case of online offer or offer by e-mails, there is no such kind of contact. Thus it is appropriate to apply the rule about "contract conclusion between absents" when the insurance contract is concluded online.

## How long an offer on the Internet will be binding?

- In contracts between absent persons, the offeror will be bound until the moment he should expect an acceptation having regard to the circumstances.
- In respect of offers online, as a result of the communication means chosen, the acceptation can be expected in a relatively short time.
- If the insurer is the offeror, he will be bound only until the other party exits the web site. In any case there is always the possibility to impose unilaterally the length of the binding period.

## Online declaration of will

- The declarations of will necessary for the contract conclusion must
  - emanate freely from the issuer (for example: click on the send button or texts written in the box and enter button pressed) and
  - reach the addressee..
- The declaration of will must arrive within the power sphere of the addressee in such manner that the addressee can learn its content in normal circumstances. The moment of actual knowledge of the content is not relevant.
- The arrival of the declaration of will within the power sphere of the addressee occurs for example when it is stored in the mail server or data processing equipment and is available to the addressee. Will the knowledge from an alien homepage be regarded as enough? This seems open to discussion. Here download on its own computer may be decisive.

## Online declaration of will

- In respect of the "knowledge under normal circumstances" requirement, it seems appropriate to make a difference between legal entities and private policyholders.
- The insurer and the customer who is a legal entity can be expected to have knowledge of a declaration of will the same day of arrival in their power sphere within the office hours. (According to another view the moment of storage should be decisive).
- The case of the "private policyholder:
  - When such policyholder makes it clear to the insurer that he uses the internet for communication purposes in legal matters (for example if he answered on the internet the questions asked to him by the insurer) he can be expected to have a look at his mail box regularly (once daily) and the insurer's communication can be regarded as effective the same date as its arrival and storage.
  - However a policyholder who does not use the Internet as communication means in legal matters will not be supposed to control his mailbox regularly and the actual knowledge would then be required for valid receipt.

## Withdrawal of the declaration

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

## Confirmation of the declaration

- The insurer is obliged to confirm the receipt of the electronic declaration of will. But this is not a necessary element of the good receipt or the contract conclusion. The obligation to confirm can be lifted by agreement in b2b transactions.
- If the customer is offeror (the insurer having only made an invitation to offer) the insurer has to confirm the receipt of the offer.

## Confirmation of the declaration

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

## Communication failures

- The risk relating to communication failures (delay in reaching the addressee or the loss in the Internet of the declaration) is shared as follows:
- The sender of the declaration bears the risk until its arrival in the power sphere of the addressee.
- In case the declaration is lost in the Internet or hindered by the intervention of third parties, it does not arrive and will be ineffective.

## Communication failures

- In case the declaration reaches destination but is not stored for instance due to technical failures what will happen?
- Is the mere "storage possibility" enough? This is debatable.
- E-Commerce Directive provides that a declaration is received when the addressee is able to access it. That the accessibility requirement provided in the E-Commerce Directive is achieved only when the storage is completed seems to be the prevailing approach.
- If the addressee intentionally hindered the arrival of a declaration in his power sphere, the declaration will be deemed as "arrived".

## Communication failures

- In case the electronic declaration is stored at destination but destroyed before the addressee is expected to have knowledge of its content (for example due to a defective computer), the declaration shall be deemed as received. Here the risk is borne by the addressee. The same is valid when the technical failure is due to the service provider of the addressee. In that case the addressee's service provider will be seen as a "receiving agent".
- It is obvious that the declaration is "received" (a fortiori) when it is stored in the power sphere of the addressee but not read by him as a result of crashes, viruses or careless destruction by the addressee himself or a third person.

## Communication failures

- In respect of "compatibility risks" and "update risks" (the declaration reaches the addressee who is not able to have access to it or has access but the text is corrupt due to the fact that the addressee's technical equipment is not compatible with that of the sender or the software version used is different) there are three approaches
  - Not legible or not easily convertible declarations are to be regarded as "not received"
  - The Addressee must bear the risk of incompatibility or not being updated
  - For business it can be expected that they use the average standard; but for consumers this is not the case (this last point of view looks more satisfactory). Nevertheless the consumer can be expected on the ground of good faith and fair dealing to fall back on to the insurer and notifies him that the information sent was not received/read, if the consumer could identify the sender.

## Errors in declaration

- **First scenario**: The sender wants to make a declaration and for instance clicks on the send button for that purpose, but the declaration intended is different. In that case it is possible to avoid the contract on the ground of error.
- **Second scenario**: The sender does not know that by clicking on the mouse he makes a declaration. In that case, although the sender does not have the will (consciousness) to declare, he would be regarded as having made a declaration (as he should take into account that his declaration would be relied upon by the recipient). However an action based on error is not excluded (provided that the sender compensates the losses incurred by the addressee as a result of his trust).

## Errors in declaration

- The insurer must establish a system apt to hinder errors in declaration: The E-Commerce Directive imposes on the service provider to make available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to the placing of the order (Article 11.2). Awareness of those technical means is essential for their effective use. The insurer is thus under the duty to inform the customer of their availability (Article 10.1 (c)).
- In case of breach of the obligation to establish a correcting system and to inform thereof, the customer will benefit from an unrestricted period of withdrawal (due to the fact that the withdrawal period begins only after the information requirement is fulfilled and it makes no sense to fulfil it after the customer's offer is completed). Nevertheless this period can be limited according to good faith and fear dealing principle.

## Avoidance on the ground of failure of intent

- In online transactions errors are frequent. In that context, three types of errors :
- **Transmission errors**

Internet errors, virus attacks or software errors may give rise to incomplete or defective transmission. If this is the case, the understanding of the addressee is decisive. The contract will be concluded on the basis of "incomplete" or "altered" declaration. But avoidance will be possible for transmission error.

- **Software errors**

If the error is due to the software (and not to the declaration itself) it is question of error in motivation that results from the fact that the sender has installed and used defective software. However he will not have any action for avoidance since in e-commerce, the risk of using defective software is borne by the user himself.

## Right of Withdrawal

- As said above the consumers are protected also through the right of withdrawal that they may use discretionarily. The Directive concerning the distance marketing of consumer financial services (2002/65/EC) grants the consumer the right to withdraw from the contract within 14 days without penalty and without giving any reason. This period is extended to 30 days in case of a distant contract related to life insurance (Article 6.1).
- According to Article 12, the rights conferred to consumers under the directive have a mandatory character: The consumer cannot wave those rights.

## Right of withdrawal

- The period for withdrawal begins
  - From the day of conclusion of the contract (in life insurances, from the time when the consumer is informed of the conclusion of the distance contract)
  - From the day on which the consumer receives the contractual terms and conditions and the prior information (that are to be given to the consumer on paper or on other durable medium available and accessible to the consumer in good time before the consumer is bound by any distance contract or offer)
  - If the terms and conditions and the information are given to the consumer after the conclusion of the contract, the period for withdrawal will be calculated from this later date (Article 6.1)

## Right of Withdrawal

- The right of withdrawal is excluded
- in travel and baggage insurance policies or similar short-term policies of less than one month's duration
- in contracts whose performance has been fully completed by both parties at the consumer express request before the consumer exercises his right of withdrawal (Article 6.2).
- The insurer must inform the consumer about the existence or absence of the right of withdrawal, and where it exists, its duration and the conditions of exercising it (Article 3.1.(3) (a)).
- The consumer who wants to use his right of withdrawal must send a notification to the insurer within the time limit provided (dispatch is sufficient). The notification can be on paper or on other durable medium available and accessible to the recipient (Article 6.6) *[Thus delivery, posting, faxing or e-mailing or giving notice to the website indicated by the insurer for that purpose will be regarded as sufficient. Notification by phone is valid only if the insurer has given his consent].*

## Right of Withdrawal

- In case the insurance is attached to another distance financial service contract, the insurance (additional distance contract) shall be cancelled without any penalty if the consumer exercises his right of withdrawal in respect of the (main) financial service contract (Article 6.7).
- If service is provided before the right of withdrawal is exercised (commencement of performance of the service requires consumer's approval) a payment proportionate to the service actually provided can be claimed. The sum to be paid should not have the character of a penalty (Article 7.1). On the other hand the insurer must have informed the consumer also about the amount payable (Article 7.3).
- *In insurance contracts, usually the insurer performs (begins to bear the risk) after payment of the premium or the first instalment thereof. Thus, payment of the premium would mean that the consumer gives his consent to the performance.*

## Incorporation of contract terms

- The general conditions of insurance (general conditions of business) become part of the contract when the insurer refers them to the consumer before he gives his consent to the contract.
- Therefore insurers must send those conditions by e-mail or place them in their website (centrally placed, easily remarkable button). Further the customer must have the possibility to download and print these conditions (read copy only is not enough).

## Compliance with form requirements in electronic transactions

- Insurers must respect the form requirements set forth by special provisions such as the Electronic Signatures Directive or the Distant Financial Services Directive (for instance "durable medium").
- In some countries there are additional regulations (electronic form, text form).

## Unsolicited services

- Insurers who provide unsolicited service (for example renewal) and charge premium for it does not act in compliance of the rules.
- The use of a credit card details given by the (ex) policyholder or drawing money from his account will normally engender civil liability and criminal responsibility as well.

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The View from the Claims Front Line – Latest Developments and the Next Big Claim

Chairman: Michael Gill, President AIDA, Sydney

# Consumer Claims

AIDA Europe, London Conference
David Kendall

September 14, 2012

EDWARDS WILDMAN



## Recent Legal Developments

- Change in UK consumer insurance law
- Consumer claims against financial institutions
- Data protection and breach
- Insurance issues

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## Consumer Insurance (Disclosure and Representations) Act 2012

- Consumer insured will have no duty to disclose material information when buying insurance [s.2(4)]
- Consumer insured must take reasonable care not to make a misrepresentation [s.2(2)]
- Insurer can avoid policy for deliberate or reckless misrepresentation [s.4]
- Proportionate remedies for careless misrepresentation [s.4]
- "Basis of contract" warranties abolished [s.6]

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## Consumer Claims

- Misselling claims against financial institutions
  - Pensions
  - Mortgage endowment
  - Payment protection insurance
- Claims arising from financial default
- Claims arising from misfeasance
- Role of the FSA and Financial Ombudsman
- Role of the Courts

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## Data Protection and Breach

- Data Protection Act 1998
- EU General Data Protection Regulation
  - notify DPA of breach within 24 hours
  - notify data subject without undue delay
- FSA Supervision and Enforcement Powers
- Financial consequences
  - investigation, notification, remediation
  - fines and penalties
  - claims by consumers and investors

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## Insurance Issues

- Financial institutions insurance
  - bankers' blanket bond
  - professional indemnity
  - directors and officers
- Cyber insurance
- Aggregation: *Lloyds TSB* case [2003]
- Mitigation costs: *Standard Life v ACE* [2012]

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## The Future

- Increasing consumer awareness and protection
- Increasing financial misfeasance and default
- Increasing cyber risk
- Availability of public and private remedies
- Availability of litigation funding
- What is expected of insurers?

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# Consumer Claims

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# IV AIDA Europe Conference
# An (American) View from the Claims Front Line

Peter Kochenburger
Insurance Law Center
University of Connecticut

## Legal & Political Risks: U.S.

The legal and regulatory environment will help shape what will become the Next Big Claims.

In the U.S., contract, tort and insurance laws historically are based on state common law, statutes and regulations.

This means:

*56 common law and regulatory regimes*
*And, the federal government*

## A U.S. Perspective on:

- Asbestos
- Fracking
- Third Party Litigation Funding
- Claims Handling Regulations

## Asbestos

Continuing Asbestos Liability remains the "Next Asbestos"

- In 2011 AM Best increased estimate of ultimate insurance industry liability from $65 to $75 billion
- Major insurers increasing reserves (e.g. Travelers, 25% in 2011)
- Old Liabilities and New Theories

## Asbestos

Old settlements still paying out and litigation continuing:

**Manville Trust**: established in 1986, saw claims increase in 2011, and insurance-related litigation is ongoing.

- Travelers overturned a $500 Million judgment in March 2012 (*Johns-Manville Corp v. Travelers*, 845 F.Supp.2d 584)

## Asbestos

New Defendants:

One month ago the Washington Supreme Court ruled that respirator manufacturers may have a duty to warn users of asbestos dangers, potentially opening up a new class of asbestos defendants.

*Macias v. Saberhagen Holdings*, 2012 WL 3207245 (Wash. August 9, 2012)

## Asbestos

Continued Uncertainties

"It is difficult to estimate the reserves for asbestos and environmental-related claims due to the vagaries of court coverage decisions, plaintiffs' expanded theories of liability, the risks inherent in complex litigation and other uncertainties . . ."

*- Travelers 2011 Annual Report, Notes to Consolidated Financial Statements, p. 205.*

## Fracking: Overview

- Frequent practice in U.S. (over one million sites drilled). 5X increase in shale gas production between 2006 and 2010
- No direct federal prohibition, though environmental laws applicable (e.g. Safe Drinking Water Act)
- Environmental Protection Agency Study – progress report end of 2012, full draft report due in 2014
- Individual State Assessments:
  - New York, New Jersey – prohibition
  - Pennsylvania, North Dakota – "drill baby drill"

## Fracking

Pressures: Energy Sufficiency, Energy Cost, Profit & Employment

- Intense industry pressure in New York to open upstate regions to fracking
- North Dakota – 575,000 barrels a day (2X two years ago), lowest unemployment in U.S., population decline reversed

Great Uncertainty:

- Environmental effects uncertain and debate "vigorous"
- Inconsistent Regulatory Approaches: Federal, State, local
- Private Litigation – state common law, federal & state laws
- Coverage positions untested

## Fracking: Insurance Coverage

- Commercial General Liability – Pollution Exclusion will likely exclude coverage
- Specialized environmental liability endorsements – Questions regarding scope, retentions, limits, and judicial interpretations
- Homeowners First Party Property Coverage: pollution exclusion applies?
- Nationwide Insurance Company July 2012 press release stated fracking claims likely not covered

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## Fracking

**Nationwide Insurance:**

"From an underwriting standpoint, we do not have a comfort level with the unique risks associated with the fracking process to provide coverage at a reasonable price."

July 13, 2012 Press Statement

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## Funding Litigation in the U.S.

- Self-funding (deep pockets)
- Insurance – Liability Insurance and the "Duty to Defend" (costs typically outside the policy limits)
- Contingent Fees (often approximately 1/3 of settlement/award plus costs)
- Statutory and common law provisions awarding fees to prevailing plaintiff – civil rights, consumer, environmental & insurance cases (but *not* "loser pays")

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## Litigation Funding

"Litigation finance in the United States is in its infancy . . ."

Maya Steinitz, *Whose Claim is this Anyway? Third-Party Litigation Funding,* 95 Minn. L. Rev. 1268, 1271 (2011)

Due, probably, to well-recognized funding mechanisms such as contingency fees. However . . .

## Trial Magazine, July 2012


## Litigation Funding in the U.S. Discrepancies & Uncertainties

The doctrine of Champerty still alive, but applied inconsistently to 3rd Party Financing:

- Minnesota – Champerty bars 3rd Party Financing
- South Carolina – Champerty doctrine abandoned
- California – never part of the common law
- New York – 3rd Party Financing allowed but regulated

## Regulations Applicable to 3rd Party Funding in the U.S.

- Common law and statutory prohibitions (e.g. Champerty)
- Ethical restraints and regulations applicable to the legal profession

*but*

Attorneys are regulated by state (and sometimes local) ethical codes which have different approaches

## Ethical Issues for Lawyers

- Legality of practice altogether, with attention to jurisdictional differences in multi-state litigation
- Charging clients fees for referring or assisting them in obtaining financing, or passing on firm's fees paid to a 3rd party lender
- Financiers' role/control in the litigation, including settlement decisions
- Attorney/Client Privilege – communications

## 3rd Party Litigation Funding & Ethical Issues for Lawyers

*A lawyer shall not accept compensation for representing a client from one other than the client unless: . . . (1) informed consent . . . (2) no interference with the lawyer's independence of professional judgment . . .* "

ABA Model Rule of Professional Conduct 1.8(f)

*A lawyer may not represent a client if someone other than the client will . . . Compensate the lawyer . . . Unless . . . informed consent . . . [and that someone's] direction does not interfere with the lawyer's independence of professional judgment . . .*"

Restatement (Third) of the Law Governing Lawyers, § 134

## Insurance: A traditional 3rd Party Litigation Funding Mechanism

Ethical concerns, while valid, also exist in traditional liability insurance contracts between insurers and policyholders:

- Lawyers may have conflicting duties to their clients and the insurers or financiers
- Control over litigation tactics and settlement
- Desire to quickly resolve or prolong litigation for institutional reasons not shared by their client
- Insurer & Financier have financial interests independent of their clients

## Regulating Claims Handling

### Consistency

- Essentially every jurisdiction has adopted the NAIC's "Unfair Claim Settlement Practices Act" (UCSPA) with variations (of course).
- The UCSPA lists 14 categories of unfair acts and, depending upon the category, may protect claimants as well as policyholders:
- "Not attempting in good faith to effectuate prompt, fair and equitable settlement of claims submitted in which liability has become reasonably clear"

## Regulating Claims Handling

- State Insurance Departments have regulatory authority to enforce the UCSPA, but there are virtually no reported court decisions of them doing so:

Since 1959 . . . 62 volumes of California Reports and 297 volumes of California Appellate Reports have been published. In those 359 volumes there are more than 300,000 pages. On not one page of one volume is a single case reported in which the Insurance Commissioner has taken disciplinary action against a carrier for "unfair and deceptive acts or practices in the business of insurance" involving a claimant. *Not one case in 29 years.*" ***Moradi-Shalal v. Fireman's Fund Ins. Companies*** 758 P.2d 58, 77 (Cal. 1988) (Mosk, J, dissenting) (emphasis in the original).

## Regulating Claims Handling

- Little has changed since 1988. A few States provide private rights of action under their UCSPA, but most do not. This regulatory vacuum leads to a robust private litigation environment, which is the de facto primary method of enforcing these standards.
- While claim handling standards are similar among the states, the damages and remedies available to private parties are not.

## Regulating Claims Handling

Depending upon a State's common law, statutory requirements, and its definition of bad faith, damages can include:

- contract damages
- consequential damages, including emotional distress and payment of excess verdicts
- punitive damages (sometimes statutorily based -3X actual damages)
- recoupment of attorneys fees

## Claim Handling: What next?

- Continued private litigation against insurers– volume depends upon changes in State law (e.g. Texas)
- Consumer advocates pushing the NAIC & States to make complaint data and results from Market Conduct Exams more public
- Attacks on Computerized Claim Systems (Colussus)
- Legislative and public resistance to mining claims data for underwriting and marketing purposes
- A more aggressive federal role - led by FIO or the CFPB (e.g., its draft rules on force-placed insurance)
- The creativity of our plaintiff's and policyholder bar

John Latter
Casualty Claims Director, UK
Zurich

ZURICH


Zurich HelpPoint

Aon Financial Services Group

## Financial Institutions and Management Liability Insurances

## Claims Trends, Random Walks and some Common Issues

**David Nayler, Head of UK FSG Legal & Claims Practice**
**Aon Financial Services Group**

London, September 2012



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## Viewpoint

- Financial Institutions, BBB/fidelity and D&O claims
- High value / low frequency
- Canvassed Client GC's, Risk Managers and Insurance buyer contacts

## Trends – Financial Institutions

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- LIBOR
- Madoff
- Stanford
- Interest Rate Hedging
- Money Laundering
- Regulatory
- Mitigation
- Secondary errors



## Trends – Management Liability

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- Regulatory Defence costs
- M&A
- Remuneration
- Travelling Directors
- Stand-alone limits
  - Non-Executive Director
  - Main Board
  - JV's



## Random walks and other issues

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- What is a loss?
- Class Actions
- Global Programmes
- Choice of Law
- Outsourcing
- Claims made and notified
- Policy drafting issues

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# Financial Institutions and Management Liability Insurances

## Claims Trends, Random Walks and some Common Issues

**David Nayler, Head of UK FSG Legal & Claims Practice**
**Aon Financial Services Group**

London, September 2012

MONASH University

**Law**

## 1Vth AIDA EUROPE CONFERENCE – London Sept 13th -14th 2012
## "The view from the claims front"

Chris Rodd
Snr Lecturer Monash University - Faculty of Law
and Technical Counsel
CGU Insurance.
Melbourne .Australia

## Climate Change - Affordability and availability of cover

- Since the Queensland Floods Commission of Enquiry and concurrently with Federal Government Natural Disaster Insurance Review , flood insurance availability has increased.
- Marked premium increases in flood prone areas but areas still uninsurable with some insurers
- Insurers refusing Cyclone cover in areas of far North Queensland
- 1500 % premium increases for Strata Insurance cover for flood and cyclone risks in areas of Far North Queensland
- General insurance premium increases of 20 to 30% for both domestic and commercial property exposures
- Reinsurance premium increases between 40 to 45% with up to 80% increases for New Zealand
- Capacity and appetite of reinsurers to participate in Australian market surprisingly unaffected..

## Climate Change – Insurance

- 7% of Residential properties in Australia , prone to predictable and repetitive flooding .
- For one insurer (e.g Roma and Emerald in Queensland) flood insurance will only be offered, if local and state government implement significant flood mitigation strategies. Wait and see approach !
- Flood pricing based on site specific data.
- Some insurers offering opt out options – some other insurers flood cover is compulsory – some still exclude flood cover .
- Government push for all insurers to offer flood cover
- Federal Government Productivity Commission rejects the NDIR recommendation for the Govt to provide premium subsidies
- Affordability still a key issue in flood prone areas and Govt proposal for a key facts statement in policies is no solution to affordability, or availability .



## Climate Change - Insurance

- Prior to Queensland floods in 2011 ,State Govt uninsured for infrastructure losses. Now forced to buy reinsurance over all non road assets with a premium of $25 to 30 million annually to cover assets worth $53.6 billion . Unable to purchase cover for roads . Queensland Govt left with massive debt
- Following 2011 floods Q'land Govt relied on funds provided by the federal Govt – Natural Disaster Relief and Recovery Arrangements . Funding provided by tax payers though an additional national tax levy
- Reinsurers tacking a tougher line on risk – Focus on data quality and modelling results, insurers portfolio exposure ….and insurers claims handling .Insurers with high portfolio exposures in flood and cyclone prone areas have seen huge reinsurance premium rises
- **Bush fire prone areas - Major premium increases varying between 75% and 200% with similar increases in Fire Services Levy**
- **Major increases in all rural based exposures**



## Climate Change -Insurance

- Move to contain premium increases and maintain insurance affordability by the abolition of FSL ( Fires Services Levy ) nationally
- FSL only impacts parties who take out insurance . Move to make it a property based charge for all who own property by including the tax in property rates - More equitable and broadly based charge
- New scheme progressively introduced through out Australia – Complication- FSL is a state base charge – no uniformity of application
- No national uniform requirements for construction of flood resilient or cyclone resilient buildings and similarly no uniformity in construction of fire resilient dwellings or land clearance requirements to reduce fire risk . Absence of uniformity or constraints, ensures no inducement to insurers to control premium increases .( AIR Worldwide – Australian bush fire model - 10,000 ignitions annually- 12 likely to cause major property loss) Climate related claims experience is undiminished

## EMR –Claims Cost and Litigation Risk

- ALLEGED HARMFUL EFFECTS
- Salivary gland Cancer – Israeli study reporting that mobile phone use for 22 hrs a month 50%increased risk of parotid gland cancer
- Brain tumours- Various studies indicating that mobile phone use over 10 years- 2.4 times increased risk of acoustic neuroma and 2 times increased risk of gliomas (brain tumour)
- Lymphatic cancer and bone marrow cancer- Universities of Bristol and Tasmania studies of 850 patients diagnosed with lymphatic and bone marrow cancers concluded that those living for extended periods within 300 metres of high voltage power lines( particularly in childhood ) were up to 5 times more likely to develop the diseases
- Increased risk of miscarriage – EMR allegedly caused by electrical appliances
- Suicide – US study of rate of suicide among 5000 Electricity utility workers ,double the control group of the same size



## EMR Litigation Risk - Continued

- ALLEGED HARMFUL EFFECTS
- Asthma – California study of 626 children over a 13 year period . Magnetic fields greater than 0.3 mG ( average ) during pregnancy increased the risk of asthma by age 13 . Dose related response . Children of mothers whose average exposure was 2 mG during pregnancy were 3.5 times as likely to suffer asthma.
- In addition to the allegations of life threatening conditions there is also an alleged link to increased incidence of –
- Allergies , asthma ,autism , elevated BP ,electro sensitivity, headaches, hormone changes , immune system damage ,immune system damage ,nerve damage, sleep disturbance, sperm abnormalities .
- Clearly all these conditions are mere alleged effects and scientific studies yet to establish an indisputable link .



## EMR Litigation risk

- .Telstra Australia recently warned that insurance against any risk associated with EMR is becoming increasingly difficult to obtain, as insurers become either unwilling to provide cover or charge prohibitive premiums .
- Actual or perceived risk outlined in Telstra Annual Report
- 1)" lead to litigation against us
- 2) Adversely affecting us by reducing the number or growth rate of mobile telco services or lowering usage by customers.
- 3) Precipitate the imposition of more onerous applicable legal requirements
- 4) Hinder us in installing new mobile telecommunications equipment and facilities "

## EMR Litigation Risk

- In the late 1990's some US insurers were concerned about EMR as an emerging liability risk but when the claims failed to develop , the "industry became complacent " . With the proliferation of Mobile Phone towers more recently the risk is receiving increased attention .
- Approximately 290,000 towers in the US representing a 50% increase in the last 4 years . Multiple towers within an 8 mile radius of most locations
- Governments in Australia ,UK , France , Germany ,Israel, Switzerland etc recommending limiting cell phone exposure to children . US Senate enquiries re health risk suggest an environment for litigation potential .
- " state of art of state of knowledge defences" unlikely to deter the litigation risk – toxic tort litigation .
- For insurers , defence costs would be astronomical.- A 2007 Swiss Re Study indicated the potential for claims on a scale that could threaten its very existence .



## EMR Litigation Risk

- Both the US FDA and FCC have said that while the current evidence suggests that the available scientific evidence does not show any health problems associated with mobile phone usage , there is no proof that phones are absolutely safe
- In California a case against a utility company alleging a rare form of childhood cancer failed due to an inability to establish causation despite clear evidence of exposure to much higher than normal levels of radiation .
- Another suit by an employee engaged in electromagnetic pulse research for the MX missile , who contracted a form of cancer, resulted in a paid settlement
- The US Supreme Court decision in Daubert v Merrell Dow Pharmaceuticals Inc, indicates that the bar is set very high for a plaintiff to succeed



## EMR Litigation

- Studies in Australia , UK , a joint Canadian and French study , Denmark , Finland Ireland, and Sweden , have concluded no evidence of health risk with low level radiation emissions but a possibility with high level emissions .
- Eminent Domain Decisions – Actions based on an allegation of diminished market value for property caused by a prospective buyers fear of EMR arising from new transmission lines (regardless of whether the fear was reasonable ) . – A few successful plaintiffs claims in the US.
- EMF Workers compensation claims .- Risk still difficult to assess although some studies support a link
- Is this , as categorised by Swiss Re , in its report "Emerging Risks – a challenge for liability Underwriters " a phantom risk or an emerging risk ?? Suspect the latter !

## Food Contamination

- Contamination of imported foods – illegal additives ( the Chinese food contamination experiences )
- Imported genetically modified crops incorrectly labelled
- The unintentional blending of GM with non GM crops
- Imported livestock with antibiotic resistance
- Animals and animal product infected with BSE
- A strict liability applies in Australia in relation to contaminated food products with a liability attaching to the importer , wholesaler and retailer .
- Risk is increasing dramatically as Australian stores such as Coles , Woolworths etc source increasing quantities of foods both fresh and processed from overseas markets with less stringent food quality controls ,in order to retain a competitive price edge .



## Food Contamination

- Risk increases as Australian farmers and suppliers go out of business due depressed price of commodities resulting from foreign sourcing and price pressures imposed by major retailers
- . Contamination becomes an increasing risk for products liability insurers – Swiss re report describes the risk as “increasing dramatically”
- Importers , manufacturers, and processors and growers of GM seeds –The mixing of GM and non GM caused by wind conditions causing contamination of non GM crops claims for financial compensation resulting from cross contamination .
- Insufficient geographical segregation of crop types
- Bodily injury claims arising from allergic reaction and food poisoning
- Property damage losses resulting from mixing conventional product with GM product and omitting , incorrect or inadequate, declaration of additives.



## Food contamination

- Financial losses of third parties arising from recall and subsequent food disposal due to incorrect declaration of components in processed food and beverages
- Loss of reputation of product manufacturer resulting in market decline – Compensation claim for damages .
- Anti biotic resistance from the use of antibiotics in animal breeding and animal product for human consumption – Claims for personal injury arising from anti biotic resistance in humans and inability to treat for injury or disease.
- Food poisoning arising from imported contaminated crustaceans e.g sourced from SE Asia – polluted coastal farm waters .
- CONSIDER ALSO – The liability of statutory and regulatory authorities including local govt agencies – Failure to regulate , monitor, and assess

## Obesity – Insurance consequences of health risk

- Acknowledged as a major risk for cardiovascular disease ,diabetes, dementia and cancer ( Primarily colon cancer and breast cancer )
- In 2008 it was estimated that 1.46 billion adults worldwide were overweight and in addition 502 million were obese
- In the US alone obesity rates escalating alarmingly with health care costs for obesity related conditions amounting to $147 billion (or 9% of the US health care budget )
- By 2030 it is estimated that there will be 65 million more obese adults in the US and 11 million more in the UK adding 8 million additional cases of diabetes , 6 million cases of heart disease and stroke and 50,000 additional cases of cancer. .
- Combined medical costs are estimated to increase by $50 billion ,p.a in the US and $4 billion p.a in the UK .



## Obesity – Insurance consequences

- The obese person spends 41% more on health care than a person of normal weight ..an extra $1500 p.a
- In Australia the situation is little better- a 2005 survey of 6410 adults 54.1 of whom were female ( mean age 56.5) 42.% noted as obese , 32.4% over weight and 24.7 % normal weight.
- Based on BMI total annual health care costs -$1710 for normal weight , $2110 for overweight and $2540 for obese
- Annual government subsidies for health care costs $2948 – normal weight , $3738 – overweight and $4153 - for obese ( MJA Survey )
- $21 billion in health care costs and 35.6 billion in government subsidies
- In 2007 -08 25% of children 5 -17 years were overweight or obese up 4% points from 21% in 1995 ( self reported figures to Aust Bureau of Statistics ) Self reported data likely to understate the problem



## Obesity- insurance consequences

- Insurers are entitled to discriminate in risk selection where discrimination is based on actuarial or statistical data as to risk
- Insurers can discriminate in pricing models based on risk
- Insurers could refuse to provide cover for risk where the risk is unacceptable – obesity and health related risk meets the criteria.
- A 50 to 100 % loading for an overweight individual is common as is refusal to insure those who are obese ( BMI in excess of 30 )
- The blow out in health related costs associated with obesity will make accident ,disability /illness insurance unaffordable for an increasing sector of the community particularly in the area of income protection
- Premiums will reflect the claims experience of insurers where injury accident and illness/injury recovery periods are prolonged by obesity

## Obesity - Insurance consequences

- Accident , illness / disability , life insurance , life cover under Superannuation even travel insurance will be profoundly impacted by the obesity epidemic .
- Even workers compensation schemes are observing an impact in work related injury and illness impacted by obesity ( cause or contribution).
- Overweight and obese , more likely to have additional health risks , short term disability and longer absence, and higher health costs, and higher claims costs .
- Australian workplace ( National Health Survey ) in 2001 found , obese employees were 17% more likely than non obese workers to be absent from work because of personal injury or illness in a work related context
- Obese workers are likely to have longer injury recovery times . Excess weight may also add complications to injury treatments ( Connecticut Hospital association 2005)
- Longer recovery duration for work related injury in the obese means higher medical expenses



## Obesity- Insurance consequences

- One study (Bungun et al 2003) showed employees medical exp increased from $114 for normal weight to $573 for overweight and $620 for the obese
- Costs were associated with general health risks , short term disability and illness absences ( Andreyeva et al (2004) )found health care expenditure was 25% higher for those with a BMI of 30 to 35 and 50% higher for those with a BMI of 35 and100% with a BMI of 40 and over
- Obesity limits physical functioning , mobility and flexibility leading to higher injury risk .
- In a study in 2005 of 370 respondents 7% of underweight individuals reported injury (BMI less than 18) 26% with a BMI greater than 35 reported injury (Xiang et al (2005))
- Anticipated that increases in accident numbers , claims duration and medical costs associated with obesity will place pressure on workers' compensation schemes in the future. ( Australian Safety and Compensation Council Report – August 2008)



## Obesity- Insurance consequences

- As more obese patients enter hospitals and aged care facilities, work place health and safety implications increase. Nurses dealing with obese patients or obese aged residence of care facilities . Trauma risk in handling larger patients – Similar risk for ambulance officers , fire fighters , and those in the funeral industry.
- Obesity a factor in increasing the likelihood of work place musculoskeletal injuries . A mismatch between the physical needs of the job and the physical limitation or incapacity to perform it
- Government policy to keep people in the workforce longer . Programs to promote work place participation after 55. however obesity rates are higher in older age groups . Obesity will hinder workforce participation by older people ( Bennett et al (2004) ;Tunceli et al (2005))
- The escalation of claims costs is a significant risk to the insurance , industry generally, governments and the community .

AFTERNOON TEA BREAK
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PRAGER DREIFUSS

RECHTSANWÄLTE
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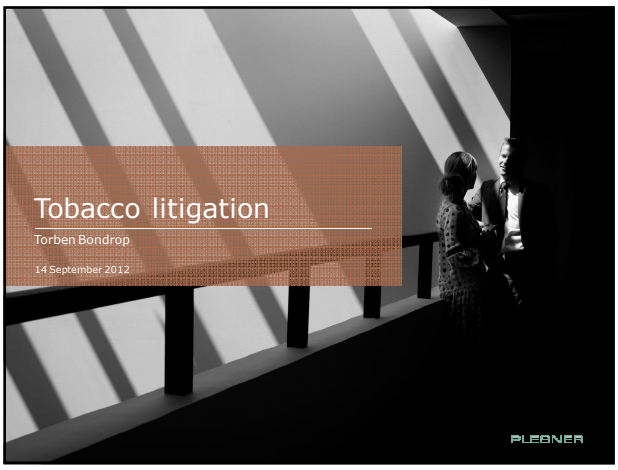
Hot Issues/Cases and Liability Trends:
What's Hot? What Next?

Chairman: Taisto Hujala, Legal Counsel,
IfP&C Insurance Company Limited,
Member of AIDA Presidential Council, Helsinki



## The Case

- The first and only pending tobacco litigation in Denmark.
- Filed in June 2003 before the District Court.
- Referred to the Eastern High Court in Copenhagen due to the general public importance of the case.
- Judgement of 8 December 2011.
- The Plaintiff's legal costs were paid by the Danish State as he was granted free legal aid.



## The Parties

- The Plaintiff is a 66 year old consumer.
- The Defendants are the manufacturers of the cigarette:



## Brief Introduction

- The case differs from various "classic" tobacco litigations in so far as:

1. The Plaintiff accepts knowledge and acceptance of health risks related to cancer caused by smoking.
2. The Plaintiff to some extent accepts knowledge and acceptance of the risk of dependency that would make it difficult to stop smoking.
3. The Plaintiff does not accept the risk connected to alleged manipulation of cigarettes causing increased smoking dependency and personal injury.
4. The Plaintiff do not accept the risk connected to the use of added ingredients in the cigarettes.

## Smoking History

- The Plaintiff was born in 1946.
- Started smoking around 1957 – at the age of 11-12.
- His consumption has ranged between 20 and 40 cigarettes a day.
- The Plaintiff has only been smoking the same brand of cigarettes produced by the Defendants.
- Strongly advised to stop smoking in connection with hospital examinations in the period from 1989 to 1993.
- Attempts to stop smoking since 1989 including use of hypnosis, nicotine products, chewing gum, homoeopathic medicine, implementation of metal balls in ears, collective attempts with family members etc.
- The Plaintiff finally stopped smoking in 2005.
- Legal action instigated as the Plaintiff became aware of added ingredients following the disclosure by the industry including the Defendants in 2000.



## Health

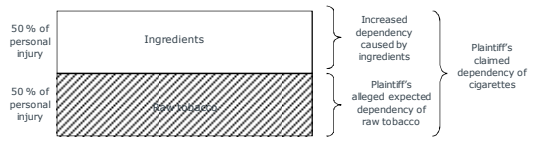
- The Plaintiff had normal health until the end of 1988.
- In 1989 the Plaintiff was examined at several medical institutions for pains in the region of the heart and chest. The pains continued at different levels until 1992.
- In September 1992 the Plaintiff acutely hospitalised, heart problems discovered and examined continuously until end of November 1992.
- The Plaintiff was hospitalised from 5 March 1993 to 16 March 1993 in connection with a permanent by-pass operation including "3 by-passes".



## The Claim

- Payment of DKK 53,175 (EURO 7,100) by the Defendants jointly or alternatively individually.
- The claim is calculated on the basis of a permanent personal injury ratio of 15 % caused by smoking-related illnesses.
- It is estimated by the Plaintiff that at least half the personal injury can be attributed to circumstances for which the Defendants are liable to pay compensation.
- The remaining half of the personal injury can thus be attributed to health risks and a level of dependency of cigarettes that the Plaintiff had knowledge of and accepted when starting smoking and as a smoker. However, this is not reflected in the Plaintiff's claim.

## The Claim






## Allegations

- The Defendants have manipulated with the pH value of the cigarette by adding ingredients e.g. ammonia to increase the effect of the nicotine.
- The Defendants have used sugar and aldehydes to increase the addictive effect of nicotine by a so-called MAO inhibition in the human brain.
- The Defendants have altered the product design by using ventilation holes to maintain the same level of nicotine as in the original cigarette from 1957.
- The Plaintiff has not accepted that he through the use of the cigarettes would be exposed to an increased harmful, dependence-producing effect that goes beyond what can be expected from smoking raw tobacco.



## Allegations

- The information given by the Defendants does not give a fair picture of the actual nicotine content and absorption as the used measuring methods are misleading.
- The Defendants have neglected their duty to inform the authorities and the consumers about the dangers involved with their products.
- The Plaintiff has been inflicted with personal injury due to smoking dependency and the Defendants are liable to pay compensation for the part of the injury that can be attributed to the defects of the product and the dependence-producing effect of cigarettes.

## Case History

- 8 years of preparation for the oral hearing, including:
  - 8 reports from the court appointed experts.
  - Presentation of more than 400 exhibits.
  - Statement from the Danish Medico Counsel.
  - Statement from the Danish National Board of Industrial Injuries.
- 10 full court days in September/October 2011.
- Massive media coverage in the Danish press
- Judgement of 8 December 2011 from the Eastern Division of the Danish High Court.



## The Judgement

- The High Court found that the Plaintiff had suffered a permanent injury of 15 % caused by smoking cigarettes.
- However the High Court also stated:
- The harmful effects of smoking cigarettes are so-called "systemic injuries" which are caused by a known, but unavoidable risk in the product for which reason the producer is not liable.
- For almost all of the period (1957-2005) it has been generally known that tobacco smoking is health-injurious and associated with the risk of serious diseases.
- It is lawful to produce and market cigarettes, just as it is permitted for producers to make their products attractive to consumers.



## The Judgement

- The Plaintiff has not proven that the Defendants have used ammonia to alter the pH value of the cigarette and thereby the absorption and addiction to nicotine.
- The Plaintiff has not proven that the use of additives has influenced the pH value of the cigarette and thereby the absorption and addiction to nicotine.
- Any influence on the pH value of the cigarette would not have significance for the absorption of nicotine in the body as it is determined by the pH value of the body.
- The Plaintiff has not proven that the use of sugar and aldehydes impose more nicotine addiction than the addiction that comes from smoking raw tobacco.
- The design changes made by the Defendants over the years have lead to a reduction of the quantity of nicotine and tar.

## The Judgement

- The measuring and declaration of tar and nicotine in the cigarettes was carried out by using internationally recognised measuring methods and standards and therefore was not misleading.
- In the overall conclusion it was not proven that the Defendants in any way had acted culpably and therefore the High Court found in favour of the Defendants.
- The Danish State was to pay DKK 2,400,000 (EURO 320,000) to the Defendants for legal costs due to the free legal aid granted to the Plaintiff.



## What is next?

- The judgment was appealed to the Supreme Court on 31 January 2012.
- The case is currently awaiting the Plaintiff's request for free legal aid.
- Central issues in the Supreme Court:
  - The Plaintiff's request for the full formula of the cigarette.
  - The general public knowledge of the risk associated with smoking.
  - The use of ventilation holes in cigarettes.
  - The effect of complex aldehydes.
  - The human body's absorption of nicotine.



DLA PIPER EVERYTHING MATTERS

**London Conference**
**AIDA EUROPE**

*Charles Gordon*
*13/14 September 2012*

## Business interruption losses following wide area damage

- Japanese and New Zealand earthquakes, Thai and Queensland floods
- What is the coverage issue?



## Business interruption losses following wide area damage

- What is the cause of the BI loss?
- The adjustments or trends clause
- OEH decision - will it be followed elsewhere?



## Business interruption losses following wide area damage

- UK reforms to Insurance Law
- Consumer/business approach
- Late payment of claims
- Pre-contract disclosure
- Warranties

# Insurance Law Reform in Serbia

## Insurance Policy – Cover Note – Liability Insurance

Slobodan Jovanovic
*Association for Insurance Law of Serbia*
*University Business Academy, Novi Sad, Serbia*

IV AIDA Europe Conference, London, 13 - 14 September 2012

## 1. FROM SERBIAN CIVIL CODE 1844 UNTIL TODAY

- Serbian Civil Code adopted in 1844.
- Great historical importance for Serbia.
  - Speed up of changes in the Serbian society and
  - Set up of the basic directions for civil law development.
- No rounded rules about insurance contract beside the following:
  - Insurance was indemnity insurance against an uncertain event,
  - Insurance disputes to be judged according to the "special regulations", and

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## *1. Continued*

  - Insurance was null and void if the insured knew for the loss at the contract formation as well as in case of deliberately causing event insured.
- However, no special rules about insurance contracts until 1978 with the Law on Obligatons (hereinafter: the LO).
- Upgrade of the Civil Code 1844 with sixty eight articles dedicated to land and personal insurances.
- Marine and aviation insurances regulated with special laws.

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## 2. INSURANCE CONTRACT IN THE CIVIL CODE DRAFT

- Commission for Civil Code Draft appointed in 2006 outlined several reasons for reassessment of the existing solutions in the Law on Obligations.
- Commission gave alternatives for changes and amendments in 2009.
- Civil Code Draft:
  - Changes in 16 articles,
  - 24 new articles,
  - 90 articles regulating insurance contract.

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## 2.1 CONTRACT FORMATION

- The most important changes relate to:

1. Departure from the formal nature of insurance contract.
   - Land insurance contracts – consensual,
     - Contract concluded on offer acceptance.
   - Personal insurances – formal.
   - Alternatively, insurance contracts for service consumers – formal.
     - Contract concluded after insurance policy signing.
2. Information requirements prior to contract formation.

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## 2.2 INSURANCE POLICY

- Taking into account minimum standards from the EU Directives, particularly information duty towards policyholder as service consumer, Commission is proposing
  - Extension of the policy mandatory elements,
  - Insurer duties to:
    - draw policyholder attention to the policy mandatory elements, and
    - issue insurance policy or other insurance document without delay.

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## 2.2 Continued

| | The Law on Obligations (Present) | The Civil Code Draft |
|---|---|---|
| 1 | Contract parties' names | |
| 2 | Object of insurance / Person insured | / Insurance beneficiary |
| 3 | Risks insured | |
| 4 | Insurance duration | |
| 5 | Cover period | |
| 6 | Sum insured / unlimited cover | |
| 7 | Premium / contribution | |
| 8 | Date of policy issuance | |
| 9 | Contract parties' signatures | |
| 10 | | Insured / beneficiary share in life profit |
| 11 | | Governing law if it is not the Serbian law |
| 12 | | Name and address of the supervising body |
| 13 | | Name and address of the body for complaints |

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## 2.2 Continued

- Another new rules are:
  - Issuance of electronic policy,
  - Mechanically signed policy.
- Rules when policy content is incomplete or incorrect from the agreement reached:
  - Essential departures (departures to detriment of the policyholder) do not bind policyholder and agreement reached is governing insurance.

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## 2.2 Continued

- However, insurance contract shall be agreed per the policy content despite departures, under the following cumulative conditions:
  1. Departures are not to detriment of the policyholder,
  2. Insurer has warned policyholder with departures and period for filing complaint, and
  3. Policyholder did not object to controversies over policy and contract contents.

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## 2.3 COVER NOTE

- Civil Code Draft brings special, detailed rules on cover note:
  - Insurance cover commences from issuance of cover note despite its subsequent replacement with an insurance policy.
  - No duty to hand over insurance conditions to policyholder when cover note serves for granting temporary cover.

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## 2.4 LIABILITY INSURANCE

- Great influence of the international markets regarding use of claims made.
- Problems because of discrepancy in trigger methods:
  - original insurances – loss occurrence
  - reinsurance / retrocession – often claims made
  - no cover for late claims in outward covers
- In order to allow back-to back agreements, Civil Code Draft has alternative solutions for event insured for reinsurance of original liability policies.

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## *2.4. Continued*

- Civil Code Draft allows contract parties to agree either: 1. Loss occurrence or 2. Claims made.
- Liability cover extended to all justified expenses made for establishment of the policyholder liability.
- Important questions remain:
  - Will the claims made principle be carried out as anticipated by insurers?
  - Or, will the courts continue to reject claims made safeguard for late claims?

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*Pierpaolo Marano*

*Professor of Insurance Law*
*Università Cattolica del Sacro Cuore - Milan*

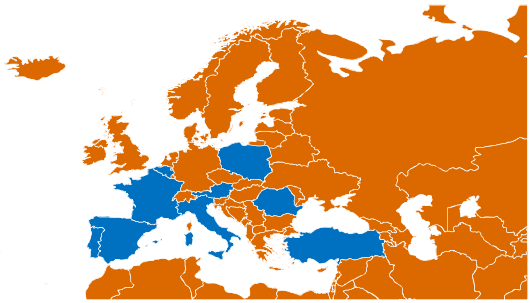
*Of Counsel PWC Tax and Legal Services - Milan*

# *Distribution of Insurance Products Coupled with Mortgages and Loans*

pwc

*IVth Aida Europe Conference, London - 13/14 September 2012*

## European Life Distribution Channel - Bankassurance



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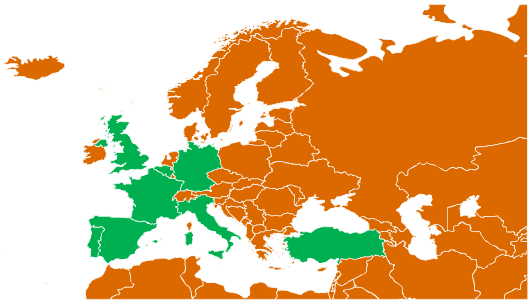
## European Non-Life Distribution Channel - Bankassurance



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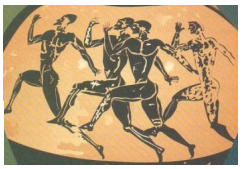
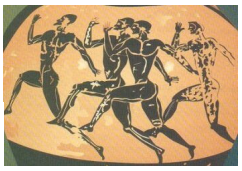
Competition



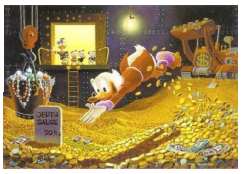
Profit



Competition



Profit



Too much **profit**?



## ISVAP Inquiry of 2009

- Banks and financial intermediaries require their customers to buy insurance policies as a condition to provide mortgages and consumer credit (Credit Protection Insurance);
- Policies are offered with a single premium, which is paid by the customer in advance and is funded by the bank;
- Banks and financial intermediaries are designed as beneficiaries of insurance benefits;
- The imbalance between the position of the bank and the customer allows the bank to sell insurance products with a high profit margin that insurers correspond to the bank;
- In conclusion, the banks charge customers an additional cost to satisfy an interest of the same banks.

## At the beginning …. a Transparency Approach

**REGULATION N. 35 of 26 May 2010**

*"Individual and group policies coupled to mortgages and loans should indicate the commission of the intermediary"*



## ISVAP Inquiry of 2011

Term life insurance to provide coverage to a 40 y.o. customer for his financial responsibilities for:

- Twenty-year Mortgage of 200.000 euro
  5.011 euro as Commission out of 9.636 euro Premium (52 % of the premium);
- Five-year Loan of 30.000
  1.177 euro as Commission out of 1494 euro Premium (79% of the premium)




## DECISION NO. 2946 OF 6 DECEMBER 2011

*"Intermediaries refrain from taking, directly or indirectly, the contemporary status of the beneficiary of insurance benefits and the intermediary of the contract in the form of individual or collective".*

DECISION NO. 2946 OF 6 DECEMBER 2011

*"Intermediaries refrain from taking, directly or indirectly, the contemporary status of the beneficiary of insurance benefits and the intermediary of the contract in the form of individual or collective".*

**CONSUMER CODE - ART. 21 AS AMENDED BY LAW 22 DECEMBER 2011, N. 214.**

*"It is unfair trade practice of a bank, a credit institution or a financial intermediary, if they oblige the customer to underwriting of an insurance policy provided by the same bank, institution or intermediary in order to conclude a mortgage contract"*



DECISION NO. 2946 OF 6 DECEMBER 2011 INTO FORCE SINCE 2 APRIL 2012.

*Intermediaries refrain from taking, directly or indirectly, the contemporary status of the beneficiary of insurance benefits and the intermediary of the contract in the form of individual or collective.*

CONSUMER CODE - ART. 21 AS AMENDED BY LAW 22 DECEMBER 2011, N. 214.

*It is unfair trade practice of a bank, a credit institution or a financial intermediary, if they oblige the customer to underwriting of an insurance policy provided by the same bank, institution or intermediary for the purpose of entering into a loan agreement*

**ART. 28 LAW 24 MARCH 2012, N. 27**

*"Banks, credit institutions and financial intermediaries are required to submit to the customer at least two quotations from two different insurance groups not related to banks, credit institutions and financial intermediaries themselves, if the purchase of a life insurance policy is the condition for the mortgage or consumer credit".*



**Italian law and the law of the European Union**

## Italian law and the law of the European Union

Is there a spread?

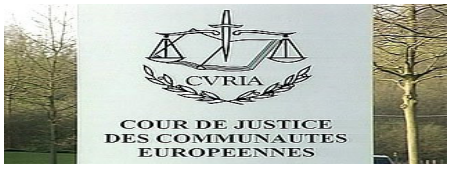


## Unfair commercial practices

**HIGH SPREAD**

Annex I to Directive 2005/29 establishes an exhaustive list of 31 commercial practices which are regarded as unfair 'in all circumstances'. Therefore, Directive 2005/29 must be interpreted as precluding national legislation to introduce other unfair commercial practices without a case-by-case assessment against the provisions of Articles 5 to 9 of the directive.

(ECJ 23 April 2009 Joined cases C-261/07 and C-299/07; ECJ 14 January 2010 Case C-304/08)



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(ECJ 23 April 2009 Joined cases C-261/07 and C-299/07; ECJ 14 January 2010 Case C-304/08)

**LOW SPREAD**

According to Art 3, par. 9, of the Directive and in relation to 'financial services', Member States may impose requirements which are more restrictive or prescriptive than Directive 2005/29/EC of 11 May 2005 in the field which it approximates.

## Conflict

### Remuneration


**HIGH SPREAD**

Directive 2002/92/EC on insurance mediation does not provide any comparable rule to the Italian law related to a such a conflict of interest, i.e. compulsory disclosure.



## Conflict of interest

### Remuneration

**LOW SPREAD … it may be!**

IMD2 aims to introduce a "two-step" disclosure.

**Compulsory disclosure for Life insurance products**




## Conflict of interest

### Remuneration

**LOW SPREAD ?**

**A disclosure on demand for non-life products ….. for the first five years. Then a compulsory disclosure.**

## Conflict of interest and cross-selling practices

What's spread?



*Member States shall allow bundling practices but not tying practices.*



## Transparency VS Ban?

IMD2 → TRANSPARENCY APPROACH

Article 21 Cross-selling

*"When an insurance service or product is offered together with another service or product as a package, the insurance undertaking or, where applicable, the insurance intermediary shall offer and inform the customer that it is possible to buy the components of the package separately and shall provide information of the costs and charges of each component of the package that may be bought through or from it separately".*

## Transparency VS ban?

IMD2 → TRANSPARENCY APPROACH

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However, IMD2 is a minimum harmonization Directive.



## Transparency VS ban?

IMD2 → TRANSPARENCY APPROACH

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However, IMD2 is a minimum harmonization Directive.

Do Italian bans comply with the General Good? → Uncertainty



## Conclusion: Two different approaches to the same issues. Where is the Single Market in Insurance?

He will know the answer…



## *Thank you for your time!*

*Pierpaolo Marano*
*Professor of Insurance Law*
*Università Cattolica del Sacro Cuore - Milan*
*Of Counsel PWC Tax and Legal Services - Milan*



## *Hot issues - Spain*

*Prof. Dr. José María Muñoz Paredes*

GARRIGUES

## Bancassurance – Competition problems

- Context: extraordinary growth of bancassurance market share
- Some brokers associations are questioning market practices such as:
  - Use of bank information to offer best conditions
  - Tied products.
- Resolution of the Competition Agency: no infrigements had been demonstrated.
- Supervisory authorities: just a matter of proof.



## Brokers: conflict of interest

- Spanish law authorises brokers to be paid by the company, by the insured or by both.
- Most brokers are paid by the insurance company (commision).
- Comission must be unvealed by the insurance company to the insured if he is also paying a fee to the broker.
- Supervisory authorities wanted the broker to be paid by the insured and, at least, the commission to be disclosed in any case. IMD II draft has opened again the discussions.



## New or renewed Insurance Contract Law?

- Last year the former Goverment presented a draft of new Insurance Contract Law, which would repeal the actual one (1980).
- Many critics and the elections results stopped the reform.
- Actual Goverment has announced in April a new draft to modernize the actual Law:
  - Improved information for the insured.
  - Deeper regulation of some insurance types (i.e. liability ins.)
  - New loss adjustment process for mass risks insurance.
  - Arbitration

Hogan Lovells

**Current trends on the Polish insurance market**

**Anna Tarasiuk – Flodrowska**
Hogan Lovells (Warsaw) LLP Branch in Poland
Legal advisor, Counsel

September 2012

**Current trends on the Polish insurance market**

## Bancassurance

Main forms of cooperation between banks and insurers on the Polish market:

- **Banks acting as insurance agents**
- **Banks acting as policyholders in group insurance contracts**




Current trends on the Polish insurance market

## Group insurance contracts

The Polish FSA has doubts concerning group insurance contracts:

- **can banks be remunerated?**
- **do the insured have sufficient rights under group insurance contracts?**

Current trends on the Polish insurance market

## Group insurance contracts

Can the banks eliminate regulatory risk?

How do the banks deal with risk?



Current trends on the Polish insurance market

## New Act on Insurance Activity

Why a new law?

How do the insurers participate in the preparatory works?

When can we expect the draft law?



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**Arbitration as the product of more than one country … Bermuda form – the best of both (all) worlds**

**Richard Jacobs QC, Essex Court Chambers, London***

*Introduction*

1. The Bermuda Form is a remarkable success story for the insurance industry. It has been around for over 25 years. The two companies which used it initially, XL and ACE, have prospered and expanded well beyond providing the personal injury and property damage liability coverage desperately needed by US corporations during the 1985/6 liability crisis. It was this liability crisis which led to the creation of XL, Ace and the Bermuda Form. That crisis arose from massive claims, in respect of asbestos and pollution, which threatened the survival of Lloyd's and destroyed other insurers. It demonstrates the devastating impact on both policyholders and insurers that personal injury and property damage liability problems can create.

2. Not only are Ace and XL an astonishing success story, but the Bermuda Form is itself a success. Now in its fourth iteration (commonly described by reference to the XL designation "004"), it is widely used by other insurers in the London and European as well as Bermuda markets for excess liability business. Other types of policies, such as professional liability, first party property, and business interruption, utilise Bermuda Form concepts, in particular the key concept of dispute resolution by arbitration in London but applying New York law or a modified form of New York law. This wide utilisation and adaptation is certainly a compliment to the Form.

3. This paper explains why the London arbitration provisions of the Bermuda Form have been a key to its success, and identifies some of the substantive and procedural complications which arise from arbitrating in London under an insurance policy which is governed by a "foreign" (e.g. New York) law. Before doing so, it is helpful to understand the key features of the Bermuda Form, and easier to do so by an appreciation of their historical background.

*The coverage provided by the Bermuda Form*

4. The key coverage provided by the Bermuda Form is coverage for liability for personal injury and property damage. The policy covers what are sometimes referred to as "booms" and "batches": for example explosions or collisions, and mass torts arising from the sale of products. Typical cases include personal injuries from the use of drugs with serious side-effects; hospital medical malpractice on a large number of patients; property damage from defective products;

---

* Richard Jacobs QC is a barrister at Essex Court Chambers, and co-author (with Lorelie Masters and Paul Stanley QC) of *Liability Insurance in International Arbitration: the Bermuda Form,* 2nd Edition (Hart Publishing, 2011, Oxford).

and injury and damage caused by collisions or explosions. The policy provides high level catastrophe cover, for example losses in excess of US 50 million or US$ 100 million, and even higher for some policyholders. The main purchasers are large US or multinational corporations, principally concerned about their liability exposure in the US.

5. It was claims for personal injury and property damage – in particular asbestos injuries and environmental pollution – which created the "liability crisis" of the mid-1980's. At that time, the insurance market for liability insurance largely dried up, and ACE, XL and the Bermuda Form rose from these ashes. The initial shareholders of ACE and XL were the very US corporations who desperately wanted the liability insurance which the existing market was unwilling to provide. Those corporations provided the capital for the new companies, which aimed to provide high level excess coverage; XL attaching at excess of US$ 25 million, and Ace at $ 100 million. Ace and XL were the brainchildren of the US broking firm, Marsh and MacLennan and the investment bank JP Morgan. The Bermuda Form itself is usually credited to a lawyer at Cahill Gordon in the US, Thorn Rosenthal.

6. The liability crisis also had its origins in coverage decisions in the United States, largely adverse to insurers, on asbestos and pollution claims. For example, in some US jurisdictions, cases established that liability policies which covered personal injury or property damage during their currency were required to respond on a "continuous" or "triple trigger" basis, and also that a policyholder could claim the loss in full on a "joint and several" basis from any of the policies in force during this continuous period. The most important and well-known decision was ***Keene Corp v Insurance Co. of North America*** 667 F.2d 1034 (D.C. Cir. 1981), which held that a liability policy in force on any of exposure, injury or manifestation of injury was required to respond, and that each insurer faced joint and several liability.

7. These circumstance led to the initiative for a new policy form, the Bermuda Form, which provided coverage on a very different basis to the "occurrence" policies which had been interpreted adversely to insurers in the US courts. I will highlight three features of the substantive coverage provided by the Form, which collectively illustrate a response on behalf of the drafters of the policy which was sophisticated and imaginative.

*(1) An occurrence reported policy*

8. The Bermuda Form is an "occurrence reported" policy. In order to have coverage, it is not sufficient for there be an occurrence within the policy period, but the occurrence needs to be reported to the insurer during the policy period. It is therefore a hybrid of an "occurrence" policy and a "claims made" policy. If an occurrence takes place during the policy period, and it is not

reported before the expiry of the policy, then there can be no claim. Similarly, if there is no occurrence during the policy period, the mere fact that it is reported is not sufficient for the purposes of coverage.

9. This "occurrence reported" policy contrasts with the "pure" occurrence policies which had been written during the many decades prior to the 1980's, and which were before the US courts. An asbestosis sufferer breathed in asbestos dust over a period of 30 years, and this potentially gave rise to occurrences in each of the years of exposure to asbestos, not simply to the year in which the disease manifested itself. The consequence was that policies responded years or decades after each occurrence, in circumstances where the insurer's books had been closed and where, as became apparent, insufficient reserves had been established to meet claims in the future. The same problem arose in relation to environmental pollution, where the act of polluting was the occurrence, and this had taken place over many decades, and each policy in place during the period of incremental damage was potentially responsive.

10. By requiring not simply an occurrence, but the reporting of an occurrence, a Bermuda Form insurer can know far more readily what his exposure is; it is only to those claims which have been the subject of a notice during the policy period. Anything else is not his concern.

*(2) Aggregation*

11. A second major problem, which the Bermuda Form addressed, was the problem of "stacking". An insurer who had written a policy to an asbestos producer for a number of years could find that each year's policy would be exposed and required to pay for the policyholder's liability and massive defence costs. Even if a policy contained an aggregate limit, the policyholder could often simply exhaust that aggregate limit and then turn to the next year's policy. This meant that all the insurer's limits were in practice cumulative, with insurers finding themselves liable on each year's policy up to the policy limits.

12. Anti-stacking is a cornerstone of the Bermuda Form. This is achieved in two ways. First (see above), it is an essential part of the trigger of coverage that the occurrence should not simply take place, but that it should be reported to the insurer. Accordingly, coverage is not actually triggered until the reporting takes place; it is not triggered simply by the underlying occurrence itself. Secondly, the policy contains aggregation provisions, often referred to as "batching" or "occurrence integration" provisions, which positively require the policyholder to sweep all related injuries into the occurrence which has been notified. Accordingly, in very broad terms

(and there are complications here[1]) if there is a common set of problems, there is only one occurrence – an integrated occurrence – and this common set of problems does not trigger multiple limits. The policy limits are, generally, those applicable in the year when the occurrence is reported. (The policy can in fact continue for many years).

13. The batching provision also benefits the policyholder in that it enables it to add together a large number of small individual occurrences and thereby exceed what are usually quite substantial per occurrence retention amounts. Thus, in the case of products liability, it would be unusual for a single injury to result in a liability exceeding $ 100 million, but far from unusual for a serious mass tort, for example in the pharmaceutical industry, to produce that result.

*(3) Modified New York law*

14. Thirdly, the drafters of the Form decided that it should be governed by the law of New York. This law would likely be acceptable and familiar to the US corporations who were the intended purchasers of insurance on the Bermuda Form. From the insurers' perspective, however, New York law was acceptable because (when compared to the law of many other US states), it is less pro-policyholder and more "even-handed". Even then, however, the Bermuda Form choice of law clause modifies New York law, and disapplies various New York principles of contract interpretation in order to make the approach even more even-handed.[2]

15. The list of disapplied principles has grown through successive versions of the Form. For example, it is not permitted to rely upon contra proferentem (the principle which in practice means that ambiguous terms are to be construed against the insurance company as the drafter of the policy), nor upon extrinsic evidence such as what was said during pre-contractual negotiations. This aspect of the clause again has its origins in the historically pro-policyholder approach taken by the US courts, and their perceived unwillingness to apply the policy language in accordance with its terms. The requirement of the Bermuda Form as to how to approach ambiguities – essentially looking for an interpretation most consistent with the language used and the policy as a whole – is in contrast to the general approach in the United States that

[1] For a more detailed discussion, see Jacobs, Masters & Stanley, *Liability Insurance in International Arbitration*, 2nd Edn, Chapter 3.

[2] The relevant part of the governing law provisions states: "... provided, however, that the provisions, stipulations, exclusions and conditions of this Policy are to be construed in an evenhanded fashion as between the Insured and the Insurer, without limitation, where the language of this Policy is deemed ambiguous or otherwise unclear, the issue shall be resolved in the manner most consistent with the relevant provisions, stipulations, exclusions and conditions (without regard to authorship of the language, and without any presumption or arbitrary interpretation or construction in favour of either the Insured or the Insurer or reference to the 'reasonable expectations' of either thereof or to contra proferentem and without reference to parol or other extrinsic evidence)."

ambiguous clauses are to be construed in favour of coverage, coupled with (in the case of the courts in some jurisdictions) a liberal approach to the finding of an ambiguity.

16. Although it might seem unusual for an insurance contract to select a "modified" system of law as its applicable law, the concept is not dissimilar from an "honourable engagement" provision in a reinsurance treaty. An advantage of English arbitration, in contrast to resolution by some national courts, is that there are no "public policy" considerations which prevent an arbitral tribunal from giving effect to the parties' agreement to modify a system of law. I now turn more generally to the choice in the Bermuda Form of English arbitration, as the dispute resolution mechanism.

*Arbitration in London*

17. The drafting of policy provisions, which seek to produce a different result to existing US precedent, was seen as only part of the solution. It is, after all, one thing to draft wording which seems more favourable. It is another thing to try to ensure that courts, which scrutinise and apply the wording, are faithful to wording which has been chosen.

18. When Ace and XL and the Bermuda Form were created, it was thought that if the newly created companies were to survive, it was essential that disputes should be removed from the US court system which was perceived by insurers as being too pro-policyholder and unwilling to give effect to the language used in their policies. The drafters of the Form therefore looked outside the US for dispute resolution. The choice of London rather than Bermuda, and arbitration rather than the English courts, reflected various factors.

19. First, even 10 years before the 1996 Arbitration Act provided a clear and modern statutory framework for English arbitration law, London was a recognised centre for international arbitration, albeit that back in 1986 it was unusual for there to be international arbitrations on direct insurance policies governed by the law of one of the states of the United States.

20. Secondly, London offered a ready supply of experienced QC's who were available as potential arbitrators, and who (it was thought by insurers) would be willing to apply the policy language, and perhaps take a black-letter approach to it, rather than searching for some more elusive intent of the policy in order to favour the policyholder. To this day, insurers' arbitrators of choice remain English QC's, together with a flow of retired English judges who now sit as arbitrators. (It is easy to forget that in 1986, the idea of an English judge hanging up his judicial boots, and then sitting as an arbitrator, was unheard of).

21. Thirdly, the choice of arbitration rather than the English courts provided something which would likely be viewed as more acceptable by US policyholders who might be unwilling to buy policies whose dispute resolution involved litigation in foreign courts. A risk manager of a US corporation might be deterred from English law not simply because of unfamiliarity, but also because of its relatively favourable (to insurers) approach to avoidance for non-disclosure. Dispute resolution in the courts of another European country would likely be equally unfamiliar and unattractive to an insurance company and policyholder more familiar with common law rather than civil law principles.

22. Fourthly, arbitration is a confidential process. The awards of tribunals remain confidential, and therefore cannot contribute to a body of "informal" precedent.

23. Finally, and perhaps most significantly, the choice of English arbitration meant that no body of precedent adverse to insurers would be built up.

24. By agreeing London arbitration, claims brought in the US court system were liable to be stopped. I do not know of any US court decision where there has been a successful challenge to the effectiveness of the Bermuda Form arbitration clause, although it is not wholly unusual to find an insurer nevertheless taking pre-emptive action by seeking, as claimant in London arbitration proceedings, a declaration of non-liability.

25. London arbitration does not of itself prevent cases reaching the English court system. For example, there is an extensive body of law on the New York Produce Exchange charterparty form, which contains an arbitration clause, and where the courts have (even after the more restrictive gateways for appeals implemented following the 1979 and 1996 Arbitration Acts) permitted appeals to be advanced under what is now section 69 of the Act. However, s. 69 only permits appeals on issues of English law. The substantive law of the Bermuda Form is New York law, and in fact a modified version of that. An appeal under s.69 is therefore out of the question. Furthermore, the arbitration clause in more recent versions of the Form contains an effective exclusion of the right to take court proceedings by way of appeal.

26. Accordingly, there are no court decisions which aid an understanding of the Form. In so far as issues have arisen before the English courts, they are relatively tangential.

- There is an unreported decision of Aikens J, in *XL v Toyota Motor Sales* (14 July 1999) concerning the selection of a chairman following the inability of the parties' arbitrators to agree. Aikens J. decided to appoint an English chairman on the facts of the case, which does not stand for the more general proposition that an English chairman should always be

appointed. (The selection of a chairman is often, to this day, relatively contentious, with insurers preferring another QC or retired English judge, and a policyholder usually favouring a person less in the mould of the insurers' party-appointed arbitrator).

- There have been three cases, culminating in the decision of the Court of Appeal in *C v D* [2007] EWCA Civ 1282, which have decided that the proper law of the arbitration agreement contained in the Bermuda Form is English law. This is of some importance in that it puts an end, at least as far as the English courts are concerned, to possible arguments that the arbitration agreement is ineffective because of failure to comply with the formal requirements of New York law. It also means, because of the liberal interpretation of arbitration clauses mandated by the House of Lords decision in *Fiona Trust v Privalov* [2007] UKHL 40, that even esoteric disputes are likely to fall within the scope of the arbitration clause.

In the context of the issues which are of real importance to the parties in Bermuda Form cases – for example substantive issues as to how to interpret the "occurrence" definition – this handful of authority is of relatively little interest.

27. The consequence is that if you are a newcomer to the Form, there are no authoritative decisions to which you can turn. That is certainly a problem. It is always helpful to lawyers advising their clients, and arbitrators who are resolving disputes, to know how similar problems have been addressed in the past. Our system of precedent in court proceedings is designed to lead people to know where they stand, and avoid the unnecessary expense of rearguing points which have been decided. There can be no doubt that arbitration tribunals, and indeed the parties themselves, would be greatly assisted by being able to see, consider and review the approach taken by other tribunals to similar issues; particularly if one bears in mind that the individuals on Bermuda Form panels are often very distinguished and experienced. Although the Bermuda Form is on the whole very well drafted, there inevitably remain areas which are controversial and unclear. One cannot help feeling that an arbitration tribunal is more likely to come to the right conclusion if it were able to see what had previously been decided.

28. On the other hand, it can be said that these particular problems do not cause any real unfairness. Awards are not binding on subsequent arbitration panels, and in the event of a dispute both parties can put their respective cases to a new panel of its choosing. The insurance industry cannot be criticised for deciding, if this is what it wishes, that it does not want a body of precedent to be built up in relation to its contract form, and that it should be free to argue issues, if necessary again and again, before different arbitration panels.

29. What in my view creates a more difficult problem is that because the Form has been around for 25 years, and because there have been a substantial number of arbitrations which have considered the Form, a newcomer will soon become aware that there is in fact quite a substantial body of informal "precedent" in existence in the form of previously decided arbitral awards, and that there are companies, lawyers and arbitrators who are familiar with it or at least substantial parts of it. These prior arbitral awards are, however, not accessible and available. Thus there exists the undesirable situation where some market participants know what points on an important standard form have been decided in arbitration awards, and which way they have been decided by which arbitrators, but other participants do not. The consequence is that there can be, in these cases, an imbalance of knowledge between some participants and others. The confidentiality of the arbitral process means that neither the parties nor arbitrators can freely make available the awards of arbitral tribunals.

30. Whilst I might welcome greater transparency[3], it is important not to lose sight of the circumstances which led to the creation of XL, Ace and the Bermuda Form. It was the hammering of insurance companies in the US that led to the liability crisis, and it is to the disadvantage of potential policyholders if insurance coverage ceases to be available. If the confidentiality of Bermuda Form arbitrations, and the lack of a body of precedent, has helped to preserve the market, then it can certainly be argued that that is a good thing.

31. What cannot, however, be doubted is that arbitration of disputes under the Bermuda Form, and similar policies which have adopted the approach of New York law in London arbitration, has provided a valuable source of very interesting work for lawyers and arbitrators in London. Arbitration in London undoubtedly has features which make it attractive; confidentiality; the neutrality, quality and diversity of arbitration panels; a court system which supports, but is reluctant to intervene in, the arbitral process; the generally high quality of reasoned awards which are produced by arbitration tribunals; the flexible nature of arbitral procedures; and the starting point that the "loser pays" the costs of an unsuccessful arbitration, thereby leading to a weeding out of unsustainable claims or defences.

32. Nevertheless, although arbitration in London has been an almost constant feature of Bermuda Form policies since the outset, and is an approach adopted in other policy forms, that does not mean that this is a provision which is here to stay. London lawyers and arbitrators should not become complacent, in particular in relation to the amounts charged for their services, as to which there has been criticism from at least one prominent company, which has mooted the possibility of dispute resolution in Canada.

[3] See Jacobs, *The Bermuda Form and its Chamber of Secrets*, BILA Journal 121 (March 2011).

*If the law of the arbitration (English law) differs from the law of the contract (New York law), what are the practical consequences? Which issues are governed by which law?*

33. Interesting, and sometimes complex, questions arise from the division between the place of the arbitration (London) and the governing law of the contract (New York law, modified as discussed above). Which issues are governed by English law, and which issues are governed by New York law? Similar questions would arise whenever a "foreign" law is to be applied in a London arbitration; e.g if an insurance contract were to be governed by Swiss or French law, but arbitrated in London.

34. Complexities arise because English case-law has distinguished between a large number of potentially relevant laws, including: the law governing the arbitration agreement; the legal rules which govern the conduct of the arbitration; the system of law that provides judicial supervision of the arbitral process; the legal rules that govern substantive issues of conflict of laws; and the legal rules which govern the substance of the dispute.[4] Some basic propositions can, however, be stated without too much difficulty.

35. First, English law will govern issues as to the scope of the arbitration agreement. If one party alleges that a particular dispute falls outside the scope of the agreement to arbitrate, English law will determine that question. This point was decided, as far as the English courts are concerned, in *C v D.* A similar conclusion has recently been reached by the Court of Appeal, in a non-Bermuda Form insurance case: *Sulamérica Cia Nacional de Seguros S.A. v Enesa Engenharia S.A.* [2012] EWCA Civ 638. In practice, disputes as to the scope of the arbitration agreement are rare, particularly since English law now takes an expansive view of the disputes encompassed by the arbitration clause.

36. Secondly, the basic distinction is between issues of substance (which are a matter of New York) and procedure (English law). Often, this distinction is relatively straightforward. New York law will govern issues which relate to the interpretation of the policy. It will also govern ancillary issues, such as waiver and (probably) estoppel. New York law also governs issues which relate to the circumstances in which the policy can be set aside because the negotiation for the policy was tainted by misrepresentation. The policy can only be avoided if there is misrepresentation applying New York law principles. English law principles, which permit avoidance for pure "non-disclosure" will therefore not apply.

[4] For a more detailed discussion, see Jacobs, Masters & Stanley, *Liability Insurance in International Arbitration*, 2nd Edn, Chapter 3. See too the decision of the Court of Appeal in *Sulamérica Cia Nacional de Seguros S.A. v Enesa Engenharia S.A.* [2012] EWCA Civ 638.

37. By contrast, it is English law which governs the arbitration procedure: for example, the scope of the arbitrators' powers to order discovery of documents. In fact, English law in the shape of the Arbitration Act 1996 gives arbitrators almost complete discretion as to how the proceedings are to be conducted. Judicial supervision of the arbitral process is also a matter for English law. The English court will expect any challenge to the award to be made in England in accordance with the Arbitration Act 1996. Accordingly in *C v D*, the English court obtained an anti-suit injunction against a losing party that sought to set aside an award in the courts of New York.

38. Although the position is usually straightforward, it is sometimes not easy to determine whether a particular issue is a matter of substance rather than procedure. By way of example, an important area of some difficulty concerns the award of interest. The general approach of the English courts is to treat the rate at which interest is to be awarded as a *procedural* matter, and to award interest at the rate which a borrower in a similar position to the successful claimant would have to pay in order to borrow the money that should have been paid earlier. By contrast, there is a New York statute which provides for simple interest at the rate of 9% to be awarded to a successful claimant; a rate which, for some years now, has been very substantially in excess of the rate which would be paid by a commercial borrower. As a matter of New York law, this entitlement to 9% is probably a ***substantive*** rather than a procedural right. Many arbitrations raise the question of whether a claimant is entitled, either as a matter of right or discretion, to an award at the 9% rate. Is this a procedural issue governed by English arbitration law, or a substantive right governed by New York law? To my knowledge, this issue – which can itself involve many millions of dollars – has given rise to different approaches by different arbitration tribunals. My own view is that a London arbitration tribunal is probably not bound to award the 9% rate, but does have a discretion to do so. Under s. 49 of the 1996 Act, arbitrators have a discretion to award interest at appropriate rates that meet the justice of the case. This will often result in an award at US prime, sometimes compound rather than simple interest. But there is no definitive or uniformity of approach, and some panels have awarded interest at 9% reflecting the substantive right under NewYork law.

39. Another recurring area of controversy, not unique to Bermuda Form arbitrations but particularly important, is what law to apply to the issue of whether documents are privileged from production as part of the process (typically applied in common law jurisdictions) of pre-hearing "discovery" or "disclosure" of documents. In a typical Bermuda Form case, the defence of the underlying actions will have been conducted by the policyholder itself, without any involvement from the high-level Bermuda Form insurer who (unlike a primary insurer in the US market) has no duty to provide a defence on behalf of the policyholder. Inevitably, a considerable amount of documentation will have been generated as between the insured and its attorneys in relation to

the defence of the underlying cases, and the Bermuda Form insurer may be very interested in seeing those materials. Is the question of whether the documents are privileged to be decided in accordance with English law principles of privilege, New York law, or the law with which the documents themselves are most closely connected?

40. Arguments can be advanced in favour of all these potentially applicable systems, and there is now a significant amount of academic writing relating to the issue of applicable law of privilege in arbitration.[5] My own view, and an approach commonly taken, is as follows. If the documents are privileged under the law of the forum (i.e. by the application of English law principles), then that privilege should be upheld. However, if a privilege wider than that available under English law applies under the law with which the documents were most closely connected, then a claim for that privilege should also be upheld. Thus, a tribunal should give effect to a claim for privilege (even if such a claim would not be recognised by English law) which would be recognised by the law of (for example) the relevant state in the United States where the document was created, or (in the case of a communication between lawyer and client) the law that governed the relationship between the client and the lawyer. This is because, at the time that the document was created, there was a reasonable and legitimate expectation that it would be privileged. Furthermore, each side should be entitled to take advantage of privileges which are available to the other side. Otherwise, a situation would arise where one party would be demanding wider disclosure than it is itself prepared to give.

*Conclusion*

41. Arbitration in London of insurance disputes under the Bermuda Form has stood the test of time, and insurance companies continue to issue policies which require the arbitration of disputes in London but applying New York law (or a modified version thereof). The absence of a body of precedent has, on balance, been advantageous to the insurance companies which have adopted this approach. Whilst this potentially creates uncertainty, this is compensated for by the fact that there is no body of precedent adverse to insurers, as well as the advantages of London arbitration and in particular the availability of arbitrators who are neutral and can be expected to apply the policy language. Arbitration in London has therefore provided a neutral forum and a choice of applicable law (New York, modified), which is generally acceptable to policyholders. It has also provided arbitral decisions which, whilst confidential, are likely to be faithful to the contract which the parties have made. Is this the best of all worlds?

[5] There are excellent discussions in: Fabian von Schlabrendorff and Audley Sheppard, *Conflict of Legal Privileges in International Arbitration: An Attempt to Find a Holistic Solution* in *Liber Amicorum in Honour of Robert Briner* 743 (2005), in particular at 764 – 766 and 770-771; Klaus-Peter Berger, *Evidentiary Privileges: Best Practice Standards versus/ and Arbitral Discretion*. (2006) 4 Arbitration International 501, in particular at 509 and 518.

# Some problems related to online conclusion of insurance contracts

**Samim ÜNAN (AIDA Turkey)**

The use of the Internet for the distribution of insurance products has begun in 1990's.

The main advantages to use the internet for distribution/acquisition of insurance products are

- for the insurer
    - reducing the costs
    - penetration of new markets
- for the consumer
    - saving of time
    - price comparison

Insurers (and insurance distributors) use the internet significantly more nowadays. This increased use is expected to continue.

Following figures illustrate the current situation:

In Canada

- More than three quarters of Canadians (approx.22 million people) used the Internet in 2009.
- Approx. 40 % of them has placed an order online.
- 95 million online orders represent a value of 15 billion of Dollars (35% more than in 2007).

In the USA

- In 2009, 17 million online searches on life insurance (15% more than the year before) were made
- In 2009, 2 million quotes (for life insurance) were asked
- In 2010 2,9 million automobile insurances were sold online (35% more than 2007).

Internet and other distance communication means have made life easier. **Nowadays entire claim process can be carried out using a mobile phone**: The insured reports the accident together with transmission of photos taken with his (smart) phone. He can monitor the status of repairs and pay the bill through the phone.

**Today Internet is used not only for concluding the contract but at different stages (almost every stage) of the contractual relationship:** An interesting example is the use of the Internet in credit insurances to obtain a credit limit.

**Consumer Protection**

The concern to protect the consumer is even greater in deals over the Internet.

There is an imbalance of information between the consumer (weaker party) and the insurer (specialist).

This gap is narrowed with the intervention of intermediaries (who advise, answer the questions and help the consumers to understand the product).

On the Internet, this positive role played by the intermediaries is either absent or reduced and if not remedied, this can create a number of risks:

- Invalid contract (lack of consent – product not understand, contractual commitment
- Inappropriate purchase of insurance product (excessive or insufficient cover)
- Buying expensive insurance product
- Overinsurance
- Omission to buy
- Inappropriate selection of insurer
- Doubt as to the appointment of beneficiary (if this act is subject to written form)
- Failure to accomplish adequately contractual duties

In the practice following developments merit special attention in order to achieve broader consumer protection:

**Provision of information to the consumers**

It is vital to provide adequate information to the Internet user ("Internaut") to make run the system. Information to be given should relate in particular to the following:

Products and services offered, conditions governing the use of the website, legal framework of the relationship between the provider and the user of the website, security measures, protection of personal data, claim and complaint procedures, contact information (to reach the insurer's representative). *[According to the decision of the European Court of Justice dated 16 October 2008, the provision of the e-mail address alone would not be sufficient to satisfy the requirements of rapid contact and communication in a direct and effective manner stated in Article 5.1 (c ) of the E-commerce Directive, the insurer must put at the disposition of the recipient of the service other means such as telephone or personal contacts in the premises of the service provider or fax].*

**Quote obtaining:**

Consumers often try to obtain a quote on the Internet. But the process is sometimes not completed online.

- Consumer makes a request
  - Insurer's representative contacts the consumer to give a quote
  - Or the consumer is invited to contact the insurer's representative (usually by phone for concluding the insurance contract)

- Process can be completed online. To that end, the consumer completes secure forms, answers to questions about identity, eligibility and premium rates (mainly in property and automobile insurance).
    - In car insurance for example
        - the consumer indicates the model, the frequency of use, casualty record
        - Forms are "interactive" – questions asked vary according to answers ("yes or no tree structure").
        - If consumers are eligible, the premium amount is displayed on the screen
- When firms present quotes via the Internet consumers have the possibility to compare the rates of different insurers and make a choice.

**Conclusion of the contract:**

- Only few insurers conclude the contract online. Usual steps are as follows:
    - Consumer validates the form containing the information entered, indicates the date of entry into force and accepts online the quote proposed.
    - The insurance policy is sent to the consumer via Internet or by ordinary mail.
- Online modification of the contract:
    - In some cases the consumers (policyholders) are given the possibility to amend the contract online (for example in case of replacement or storage of the motor vehicle, additional drivers)
- Advising the consumer
    - Insurers may provide technical and advisory service to consumers
    - A representative of the insurer is sometimes charged with the duty to check the answers of the consumer regarding the rates, eligibility. On the other hand, consistency and logic of the answers are also checked. If any inconsistency is detected, the consumer is warned and a revision is made.
    - The revision process is susceptible of causing delay for the entry into force of the policy.

The legislations regarding the insurance and in particular the insurance contract were developed in periods where Internet did not exist. But today, new rules are elaborated taking into account the particularities of the e-commerce.

Modern rules tend to ensure the protection of consumers who purchase goods or services at the Internet.

Consumers should particularly

- have access to additional information/advice
- be aware that they are dealing with a regulated entity
- have the necessary information about the product and understand this information.

- have the possibility to review the information they provide
- be aware of the terms and conditions
- rely on the transaction and
- are sure that their personal data is secure.

Generally speaking, few financial services products are sold on-line with no off-line element. In the field of insurances, general insurance products are maybe the exception.

On-line selling of insurance products require systems that are

- Robust
- Technically efficient
- Legally compliant with regulatory standards

This requirement is a dissuasive factor because it is not always easy to achieve.

We must also mention two other factors having negative impact on taking out insurance on-line:

- Legal complexity
- Uncertainty of completing a sophisticated contract on-line.

However there are also significant drivers of change:

- The need to maximize effective use of consumer data
- Reduction of expenses

On the other hand there are also risks in doing business on-line:

- For example there is no “wet” signature on the application

But the danger of fraud exists also for off-line transactions.

**Signature**

The traditional “wet” signature (i.e. ink on paper) is relevant in three respects: identification, the individual’s becoming bound by the agreement, trustworthiness.

A properly designed on-line sale process and secure audit trail will help achieving the functions of wet signature. The insurer’s records should evidence that

- relevant information was given to the applicant
- terms of the contract were provided
- the applicant accepted those terms

**Electronic Signature Directive (1999/93/EC)**

In Europe rules about electronic signatures are set forth in a Directive dated 1999.

“Electronic signature” is the data in electronic form attached to or logically associated with other electronic data and serve as a method of authentication.

“Advanced electronic signature” is an electronic signature

- Uniquely linked to the "signatory" (being the person holding a signature creation device which is a configured software or hardware used to implement the signature creation data which means unique data such as codes or private cryptographic keys used by the signatory to create an electronic signature)
- Capable of identifying the signatory
- Created using means under the sole control of the signatory
- Linked to the data in such a manner that any subsequent change of the data is detectable.

Advanced electronic signatures based on a qualified certificate and created by secure signature creation device

- Are equivalent of hand written signatures on paper
- Are admissible as evidence in legal proceedings.

But electronic signatures may be attributed legal effect too. The Directive prohibits that an electronic signature is denied legal effect and quality of evidence solely on the grounds that it is

- In electronic form, or
- Not based upon a qualified certificate (an electronic attestation linking the signature verification data to a person and confirming the identity of that person, provided by a certification service provider fulfilling certain requirements)(signature verification data means codes or public cryptographic keys used for verifying the electronic signature), or
- Not based upon a qualified certificate issued by an accredited service provider, or
- Not created by a secure signature creation device (configured software or hardware used to implement the signature creation data, meeting certain requirements).

*Is the "click" (on the "buy" button) a kind of electronic signature? It is open to discussion.*

**<u>Protection of the data</u>**

The insurer gathers an important quantity of "sensitive personal data" from customers. For example: in life insurance or health insurance the physical and/or mental health of an individual. Other examples: In some of the property insurances the insurer is almost aware of all the details of the policyholder's financial situation. The same is also valid in credit insurance. An important part of the data is shared with the insurer on line and is electronically stored by the insurer.

The insurer must comply with information and data protection requirements.

If there are several parties involved (insurance sold through an aggregator site or through the common brand of joint venture providers) these parties must agree on how data will be used and by whom.

**Risk allocation**

The risk allocation on the Internet is also an important issue. It depends on technical factors.

For example in life insurance:

- The acceptation of the application for insurance will be depending on the software used (whether it is apt to analyse the information given by the applicant, to identify the terms of the contract especially the exclusions).
- The commencement of cover may be pending on a medical doctor confirmation.

Detailed questions contribute to immediate (real time) decisions but have a dissuasive impact on the prospective applicants.

**Selling through third parties**

In sales made through intermediary extranets, portals, sites run by supermarkets one of the main problems is the respective roles of the parties involved (whose duty it will be to ensure the compliance of the website and the sales process, the data protection notice).

## Some legal issues related to online conclusion of insurance contracts

### Legal framework

In Europe legal requirements to comply with when concluding contracts online are laid down in various directives: It is worth mentioning particularly the following:

- Directive concerning the distance marketing of consumer financial services (2002/65/EC)
- Directive on certain legal aspects of information society services, in particular e-commerce (2000/31/EC)
- Directive on payment services (2007/64/EC)

**Distance Financial Services Directive**

The Distance Financial Services Directive defines the “distance contract” as being a contract concerning financial services concluded between a supplier and consumer under an organized distance sale or service provision scheme run by the supplier.

The Directive provisions apply only when the supplier makes exclusive use of means of distance communication up to the conclusion of the contract.

Means of distance communications refers to any means used for distance marketing without the simultaneous physical presence of the supplier (insurer) and the consumer (policyholder).

According to Article 3, the insurer (in his capacity of distance service provider) is required to provide information in a clear and comprehensible manner on

- His identity and particulars (address, register in which he is entered, supervisory authority)
- the financial service (insurance) with the overall price to be paid
- the distance contract (including with the right of withdrawal, minimum duration, right to terminate early or unilaterally the contract, law applicable, language)
- redress (out of court complaint, redress mechanism, existence of guarantee funds).

Article 5 imposes on the insurer the obligation to communicate the terms and conditions of the contract.

The information and the terms and conditions of the contract must be given on paper or on other durable medium available and accessible to the consumer ("durable medium" means any instrument which enables the consumer to store information addressed personally to him in a way accessible for future reference for an adequate period of time and which allows the unchanged reproduction of the information stored).

Further, the Directive grants the consumer the right to withdraw from the contract (Article 6), but puts him under the obligation to pay remuneration for the service provided before withdrawal (Article 7). Taking into account the importance of this topic, we will examine it in more details below.

The Directive prohibits the unsolicited communications (Article 10). The prior consent of the consumer is necessary for the use of distant communication techniques towards him (automatic calling machines, fax machines and others).

**E-Commerce Directive**

The Directive 2000/31/EC regulates certain aspects of the information society service including e-commerce to ensure legal certainty and consumer confidence.

Recital 27 makes it clear that the e-commerce directive together with the distance marketing financial service directive contributes to the creating of a legal framework for the on-line provision of financial services.

The Directive establishes a general information duty (Article 5) to be acquitted by the service provider about his identity and particulars.

The Directive imposes the obligation to ensure that legal systems allow contracts to be concluded by electronic means.

Prior to the placement of the order the client (the consumer and –if not otherwise agreed- the merchant) must be informed of the following:

- Different technical steps leading to the conclusion of the contract
- Whether the service provider will file the concluded contract
- Whether the concluded contract will be accessible
- Technical means for identifying and correcting input errors prior to the placing of the order
- Languages offered for the conclusion of the contract
- Codes of conduct to which the service provider subscribes and information on how those codes can be consulted electronically.

In case of contracts concluded exclusively by exchange of e-mails or by equivalent individual communications, the information duty cited above shall not apply.

Contract terms and general conditions must be made available in a way to store and reproduce them.

The insurer has to acknowledge the receipt of the prospective policyholder's order without undue delay and by electronic means (this rule is not mandatory in b2b transactions).

The order or the acknowledgement of receipt is deemed received when the addressee is able to access it.

The insurer has to provide technical means appropriate, effective and accessible to identify input errors prior to placing of the order.

The requirements to acknowledge the receipt and the provision of technical means can be derogated in contracts concluded exclusively by exchange of e-mails or by equivalent communications.

The Directive requires the availability of out of court dispute settlements if a dispute arises between the insurer and the customer.

**Payment Services Directive (2007/64/EC)**

Insurers often collect the premiums online. Rules concerning payment transaction are set forth in the Payment Services Directive.

According to Article 54 (1) the consent of the payer is necessary to execute an authorised payment transaction (an act initiated by the payer or the payee, of placing, transferring or withdrawing funds, irrespective of any obligation between the payer and the payee). Otherwise the payment will be regarded "unauthorised".

If a payment order (instruction by a payer or payee) is executed in accordance with the unique identifier (password [combination of letter, numbers or symbols] specified to the payment service user who has to provide it to identify unambiguously the other service user and/or his payment account for a payment transaction) there will be a presumption of correctly execution with regard to the payee specified by the unique identifier (Article 74 (1)).

If the unique identifier provided by the payment service user is incorrect, the service provider will incur no liability for the payment service provider for non-execution or defective execution of the payment transaction (Article 74 (2)).

If an unauthorised payment occurs, the payer's payment service provider refunds to the payer immediately. However the payer shall bear all losses relating to any unauthorised payment up to 150 EURO resulting from the use of a lost or stolen payment instrument, if he has failed to keep the personalised security features safe, from the misappropriation of a payment instrument (Article 61 (1)). If the payer acts fraudulently or violates his obligations under Article 56 with intent or gross negligence, all costs shall be borne by him (Article 61 (2)). (Article 56 imposes on the payment service user the obligation to use the payment instrument in accordance with the contract terms (relating to the issue and use of that payment instrument) and to notify the payment service provider without undue delay on becoming aware of loss, theft or misappropriation of the payment instrument or of its unauthorised use. The payment service user must in particular take all reasonable steps to keep its personalised security features safe).

The local law can opt for a less heavier liability when the breach of the obligations stated in Article 56 is neither intentional nor fraudulent (Article 61 (3)).

In case of unauthorized payment transaction initiated by or through a payee, the payer can claim a refund from his payment service provider under certain conditions (Article 62 (1) (a) (b)) in eight weeks (Article 63 (1)).

**Some legal issues**

At this point we must underline that solutions defended by Dörner (in Beckmann/Matusche-Beckmann Versicherungsrechts-Handbuch, 2 Aufl. (§ 9. Abshcluss und Abwicklung von Versicherungsvertraegen im Internet), pp.484-507, München 2009) seem very satisfying. We adhere to most of the opinions expressed there and for more details we refer to this high quality publication.

**Conclusion of the contract**

A contract concluded online is subject to rules about formation of contracts. Agreement on the "essentialia negotii" by way of offer and acceptation is necessary. It is not relevant

- Whether the parties reach this agreement by exchange of e-mails they formulate themselves
- Whether the process is completed after the applicant fills the form on the website of the insurer
- Whether the offer is completed by the support of an existing automatic programme (in this case the personal data provided by the applicant would be processed automatically and the insurer would be requested to explain the fact that led to his (automatic) refusal if the application is finally refused.

Often the applicant visits the website of the insurer. Whether the mechanism of the website (i.e. the precision of the product indicated by the insurer after online interview) should be regarded as a binding offer or an invitation ("invitatio ad offerendum") is a matter of interpretation.

But as the insurer is under the duty to inform about the steps leading to the conclusion of the contract, he must explain whether he intends to make an online offer or an invitation only.

If the insurer makes an offer on the Internet, the contract will be concluded by the online acceptation of the applicant.

If the insurer is deemed to have made an invitation only, the contract will be concluded when the insurer will accept the applicant's offer. The insurer may accept this offer online or by other means (for example sending of the insurance policy).

The insurer is obliged to provide the terms of the contract in due time before the conclusion of the contract (to enable the applicant to make a conscious decision). The usual way to achieve this is the possibility given to the applicant to download the terms before the process is completed. The applicant must be in a position to run forth the programme after downloading and examining the contract terms.

*[Civil law experts think that on line sellers or service providers should not be deemed to have made an offer but rather to have solicited an offer from the customer. This widespread point of view is based on the fact that the on line sellers or service providers normally are not in a position to satisfy all the demands (for instance for lack of sufficient stocks). For that reason they intent not to be bound by an offer on the Internet and keep reserved the right to refuse any eventual offer by the customer. This*

*argument is not convincing at least for insurance contracts where the insurer normally would welcome a large number of demand, this is particularly true for mass risks].*

An insurance contract concluded online by filling forms or by exchange of e-mails is it between "present" or "absent" persons?

The rule is that an offer made by telephone or other technical means from person to person must be accepted immediately as in the case of physically present contracting parties. However the expression "other technical means" refers to videoconferences, chats on the Internet or Internet phones where an immediate answer can be expected. In case of online offer or offer by e-mails, there is no such kind of contact. Thus it is appropriate to apply the rule about "contract conclusion between absents" when the insurance contract is concluded online.

How long will the offer be binding? In contracts between absent persons, the offeror will be bound until the moment he should expect an acceptation having regard to the circumstances. In respect of offers online, as a result of the communication means chosen, the acceptation can be expected in a relatively short time. If the insurer is the offeror, he will be bound only until the other party exits the web site. In any case there is always the possibility to impose unilaterally the length of the binding period.

**Declaration of will sent and received online**

The declarations of will necessary for the contract conclusion must emanate freely from the issuer (for example: click on the send button or texts written in the box and enter button pressed) and reach the addressee. A declaration not intended by the text writer (issued by a third person without his knowledge) will not have a binding effect (but may give rise to liability for losses caused).

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

The arrival of the declaration of will within the power sphere of the addressee occurs for example when it is stored in the mail server or data processing equipment and is available to the addressee. Will the knowledge from an alien homepage be regarded as enough? This seems open to discussion. Here download on its own computer may be decisive.

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

- The insurer and the customer who is a legal entity can be expected to have knowledge of a declaration of will the same day of arrival in their power sphere within the office hours. (According to another view the moment of storage should be decisive).

- The case of the "private policyholder" the following solutions can be adopted: When such policyholder makes it clear to the insurer that he uses the internet for communication purposes in legal matters (for example if he answered on the internet the questions asked to him by the insurer) he can be expected to have a look at his mail box regularly (once daily) and the insurer's communication can be regarded as effective the same date as its arrival

and storage. However a policyholder who does not use the Internet as communication means in legal matters will not be supposed to control his mailbox regularly and the actual knowledge would then be required for valid receipt.

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

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

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

**Communication failures**

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

The sender of the declaration bears the risk until its arrival in the power sphere of the addressee.

In case the declaration is lost in the Internet or hindered by the intervention of third parties, it does not arrive and will be ineffective.

In case the declaration reaches destination but is not stored for instance due to technical failures what will happen? Is the mere "storage possibility" enough? This is debatable. E-Commerce Directive provides that a declaration is received when the addressee is able to access it. That the accessibility requirement provided in the E-Commerce Directive is achieved only when the storage is completed seems to be the prevailing approach. If the addressee intentionally hindered the arrival of a declaration in his power sphere, the declaration will be deemed as "arrived".

In case the electronic declaration is stored at destination but destroyed before the addressee is expected to have knowledge of its content (for example due to a defective computer), the declaration shall be deemed as received. Here the risk is borne by the addressee. The same is valid when the technical failure is due to the service provider of the addressee. In that case the addressee's service provider will be seen as a "receiving agent".

It is obvious that the declaration is “received” (a fortiori) when it is stored in the power sphere of the addressee but not read by him as a result of crashes, viruses or careless destruction by the addressee himself or a third person.

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

- Not legible or not easily convertible declarations are to be regarded as “not received”
- The Addressee must bear the risk of incompatibility or not being updated
- For business it can be expected that they use the average standard; but for consumers this is not the case (this last point of view looks more satisfactory). Nevertheless the consumer can be expected on the ground of good faith and fair dealing to fall back on to the insurer and notifies him that the information sent was not received/read, if the consumer could identify the sender.

**Avoidance on the ground of failure of intent**

In online transactions errors are frequent. In that context, three types of errors should be examined particularly:

- **Errors in declaration:**

  **First scenario**: The sender wants to make a declaration and for instance clicks on the send button for that purpose, but the declaration intended is different. In that case it is possible to avoid the contract on the ground of error.

  **Second scenario**: The sender does not know that by clicking on the mouse he makes a declaration. In that case, although the sender does not have the will (consciousness) to declare, he would be regarded as having made a declaration (as he should take into account that his declaration would be relied upon by the recipient). However an action based on error is not excluded (provided that the sender compensates the losses incurred by the addressee as a result of his trust).

  The insurer must establish a system apt to hinder errors in declaration: The E-Commerce Directive imposes on the service provider to make available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to the placing of the order (Article 11.2). Awareness of those technical means is essential for their effective use. The insurer is thus under the duty to inform the customer of their availability (Article 10.1 (c)).

  In case of breach of the obligation to establish a correcting system and to inform thereof, the customer will benefit from an unrestricted period of withdrawal (due to the fact that the withdrawal period begins only after the information requirement is fulfilled and it makes no

sense to fulfil it after the customer's offer is completed). Nevertheless this period can be limited according to good faith and fear dealing principle.

- **Transmission errors**

  Internet errors, virus attacks or software errors may give rise to incomplete or defective transmission. If this is the case, the understanding of the addressee is decisive. The contract will be concluded on the basis of "incomplete" or "altered" declaration. But avoidance will be possible for transmission error.

- **Software errors**

  If the error is due to the software (and not to the declaration itself) it is question of error in motivation that results from the fact that the sender has installed and used defective software. However he will not have any action for avoidance since in e-commerce, the risk of using defective software is borne by the user himself.

**Right of Withdrawal**

As said above the consumers are protected also through the right of withdrawal that they may use discretionarily. The Directive concerning the distance marketing of consumer financial services (2002/65/EC) grants the consumer the right to withdraw from the contract within 14 days without penalty and without giving any reason. This period is extended to 30 days in case of a distant contract related to life insurance (Article 6.1).

According to Article 12, the rights conferred to consumers under the directive have a mandatory character: The consumer cannot wave those rights.

The period for withdrawal begins

- From the day of conclusion of the contract (in life insurances, from the time when the consumer is informed of the conclusion of the distance contract)
- From the day on which the consumer receives the contractual terms and conditions and the prior information (that are to be given to the consumer on paper or on other durable medium available and accessible to the consumer in good time before the consumer is bound by any distance contract or offer)
- If the terms and conditions and the information are given to the consumer after the conclusion of the contract, the period for withdrawal will be calculated from this later date (Article 6.1)
  *[The Directive seems to admit that the contract can be concluded without the consumer being aware of the content of the insurer's terms and conditions. If there is no agreement reached by the insurer and policyholder that these terms would, by way of incorporation, form part of their contract the policyholder will not be bound by them (for lack of mutual agreement). The Directive supposes that the insurer's terms and conditions are incorporated: Insurer refers to these terms and conditions and the policyholder accepts to be bound by them without being aware of their content. If the policyholder is not happy with these terms and conditions, he*

*may nevertheless cancel. At this point it would be appropriate to remind that non-negotiated contract terms would not bind the consumer (nor the business, in countries where the protection against unfair contract terms exist also in b2b transactions).*

The right of withdrawal is excluded

- in travel and baggage insurance policies or similar short-term policies of less than one month's duration
- in contracts whose performance has been fully completed by both parties at the consumer express request before the consumer exercises his right of withdrawal (Article 6.2).

The insurer must inform the consumer about the existence or absence of the right of withdrawal, and where it exists, its duration and the conditions of exercising it (Article 3.1.(3) (a)).

The consumer who wants to use his right of withdrawal must send a notification to the insurer within the time limit provided (dispatch is sufficient). The notification can be on paper or on other durable medium available and accessible to the recipient (Article 6.6) *[Thus delivery, posting, faxing or e-mailing or giving notice to the website indicated by the insurer for that purpose will be regarded as sufficient. Notification by phone is valid only if the insurer has given his consent].*

In case the insurance is attached to another distance financial service contract, the insurance (additional distance contract) shall be cancelled without any penalty if the consumer exercises his right of withdrawal in respect of the (main) financial service contract (Article 6.7).

If service is provided before the right of withdrawal is exercised (commencement of performance of the service requires consumer's approval) a payment proportionate to the service actually provided can be claimed. The sum to be paid should not have the character of a penalty (Article 7.1). On the other hand the insurer must have informed the consumer also about the amount payable (Article 7.3).

*In insurance contracts, usually the insurer performs (begins to bear the risk) after payment of the premium or the first instalment thereof. Thus, payment of the premium would mean that the consumer gives his consent to the performance.*

**Incorporation of contract terms**

The general conditions of insurance (general conditions of business) become part of the contract when the insurer refers them to the consumer before he gives his consent to the contract. Therefore insurers must send those conditions by e-mail or place them in their website (centrally placed, easily remarkable button). Further the customer must have the possibility to download and print these conditions (read copy only is not enough).

**Compliance with form requirements in electronic transactions**

Insurers must respect the form requirements set forth by special provisions such as the Electronic Signatures Directive or the Distant Financial Services Directive (for instance "durable medium"). In some countries there are additional regulations (electronic form, text form).

**Unsolicited services**

Insurers who provide unsolicited service (for example renewal) and charge premium for it does not act in compliance of the rules. The use of a credit card details given by the (ex) policyholder or drawing money from his account will normally engender civil liability and criminal responsibility as well.

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