III AIDA EUROPE CONFERENCE

"Insurance and Reinsurance Law: Present Questions & Future Challenges "

AMSTERDAM, 26/27 MAY 2011

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III AIDA EUROPE CONFERENCE, AMSTERDAM, 26/27 MAY 2011

"Insurance and Reinsurance Law: Present Questions & Future Challenges "

NH Barbizon Palace Hotel, Prins Hendrikkade, 59-72, 1012AD Amsterdam

PROGRAMME HIGHLIGHTS INCLUDE:

- Nine Working Party Meetings on a variety of different topical insurance subjects.
- Recent Regulatory Developments in Europe – A single regulatory authority for the EU? Solvency II, Political Embargoes/Sanctions.
- How far does the duty of Good Faith extend post-inception of contract?
- Natural and Man-Made Catastrophes – claims and legal insurance and reinsurance issues arising
- European Environmental Liability – Legal issues. What if an oil spill in Europe?
- New Cases and Regulations and Emerging Trends in different European Jurisdictions

Included in the Conference, AIDA Working Parties (Full Agendas will be placed on the AIDA website) on:

- **Civil Liability Insurance**: *Considering decided cases, should a judge take into account or disregard the availability of insurance when deciding a civil liability claim? Is there case precedent that judges do give weight to the availability of insurance when deciding liability? Mandatory liability insurance covering marine pollution – a comparative analysis*
- **Climate Change:** *First Meeting of NEW Working Party - Reviewing effect of legislation and other regulatory measures introduced to combat Climate Change upon coverage and liability issues; update on Climate Change litigation in the US and elsewhere; carbon insurance products - recent developments.*
- **Consumer Protection:** *The Duty to advise of the Insurer and the Insurance Intermediary; Insurance Mediation in France; The New Turkish legislation on Arbitration in Insurance Disputes. Plus presentation by AIDA Europe student prize-winner - Ana Keglevic, University of Zagreb – "Pre-Contractual Information Duties in Insurance Law – Challenges for Croatia from the European Comparative Perspective"*
- **Credit Insurance:** *The Insured's Duties during Recovery and the "Trade Related" Implications on the Credit Insurance Market*
- **Distribution of Insurance Products (jointly with Marine Insurance):** *Marine Insurance Brokerage and Intermediaries*
- **Marine Insurance (jointly with Distribution of Insurance Products)**: *Marine Insurance Brokerage and Intermediaries*
- **Motor Insurance:** *Continuation of the Report on the Questionnaires concerning Compensation of Disadvantaged Parties; an Examination of the Working Methods*

of the Working Party and Proposals for a New Study with regard to Uninsured Persons and Vehicles

- **Reinsurance**: *Catastrophe Bonds and the ILS market - reinsurance coverage from the legal point of view of the securitisation model; Arbitration and Mediation in Reinsurance in particular the issue of Confidentiality in different jurisdictions.*
- **State Supervision**: *The new Corporate Governance Rules under the Solvency II Directive. Plus presentation by AIDA Europe student prize-winner - Bozena Hagen, European Institute of the University of Basel - "Establishment of EIOPA - Risks and Challenges for State Insurance Supervision in the EU"*

Keynote Addresses:	Mr Nout Wellink, President, Dutch National Bank, Amsterdam Mr Eberhard van der Laan, Mayor of Amsterdam

THURSDAY 26 MAY 2011

Morning

08.45 – 09.30 AIDA Europe Committee Meeting
Location: Prins Hendrik 1/3, NH Barbizon Palace, Prins Hendrikkade, 59-72, 1012AD Amsterdam

09.30 – 12.30 **CONFERENCE REGISTRATION OPENS**
Location: The Foyer, NH Barbizon Palace, Prins Hendrikkade, 59-72, 1012AD Amsterdam

09.45 – 17.45 **AIDA WORKING PARTY MEETINGS, NH BARBIZON PALACE HOTEL**

AIDA's Presidential Council has created several working parties over the years for the purpose of carrying out research in specific fields of insurance law and related matters. Participation at these meetings is open to all attending the AIDA Europe Conference and not just working party members.

09.45 – 12.15

Reinsurance – *Chairman, Colin Croly, London* **-** *St Olof's Chapel*

Afternoon

14.30 – 15.30 **CONFERENCE REGISTRATION**
Location: The Foyer, NH Barbizon Palace, Prins Hendrikkade, 59-72, 1012AD Amsterdam

12.30 – 15.00

State Supervision – *Chairman, Dr Gunne Baehr, Cologne - Prins Hendrik 2/4*

Consumer Protection – *Chairman, Professor Samim Unan, Istanbul* **-** *Prins Hendrik 1/3*

Climate Change – *Chairman, Tim Hardy, London – Henry Hudson II*

15.15 – 17.45

Civil Liability Insurance – *Vice-Chair, Sheila Dziobon, Plymouth – Prins Hendrik 1/3*

Distribution of Insurance Products jointly with Marine Insurance – *Joint Chairmen, Professor Ioannis Rokas – Athens, (Distribution of Insurance Products) and Professor Robert Koch – Hamburg, (Marine Insurance) – Henry Hudson II*

Credit Insurance – *Chairman, Louis Habib-Deloncle, Geneva - Prins Hendrik 2/4*

Motor Insurance – *Chairman, François Werner - Boardroom*

Evening

19.00 – 20.00	**CONFERENCE REGISTRATION** **Location: Heineken Experience, Stadhouderskade 78, Amsterdam**

19.00 – 20.30	**PRE-CONFERENCE DRINKS RECEPTION**: **Location: Heineken Experience, Stadhouderskade 78, Amsterdam**

All conference delegates and registered accompanying persons are welcome to attend

FRIDAY 27 MAY 2011 – AIDA EUROPE CONFERENCE, NH BARBIZON PALACE, PRINS HENDRIKKADE, 59-72, 1012AD AMSTERDAM

08.15 – 08.45 Registration and Coffee

08.45 – 09.00 Welcome
Chairman of AIDA Europe, Colin Croly

09.00 – 09.55 Keynote Speakers:

09.00 – 09.30 Mr Nout Wellink, President, Dutch National Bank, Amsterdam

09.30 – 09.55 Mr Eberhard van der Laan, Mayor of Amsterdam

09.55 – 10.55 (Utmost) Good Faith – The Continuing Duty of Good Faith: Is there? If so, what obligations on assured and insurer?

- The Assured
  - Duty not to present fraudulent claims
  - Birth of fraudulent devices
  - Exaggerated claims - claims tainted by dishonesty?
  - Fraudulent claims and interim payments
  - The insurer's remedy for the assured's breach of duty
- The Insurer
  - An obligation to handle claims efficiently and reasonably?
  - Damages for late payment?
  - US bad faith damages
- Litigation: the end of the duty of good faith

Chairman: Jan Heuvels, Partner, Ince & Co, Hamburg

Speakers:
Torben Bondrop, Partner, Plesners, Copenhagen
Pierpaolo Marano, Professor of Insurance Law and Commercial Law, Università Cattolica del Sacro Cuore, Milan
Victoria H. Roberts, Vice-President & Counsel, Meadowbrook/Century Insurance Groups, Scottsdale, Arizona

10.55 – 11.15 Coffee break

11.15 – 12.00 European Environmental Liability – The Regime - Legal Issues Arising?

- Coverage of general and special liability regimes (soil and sea)
- Environmental liability directive packaged as an "insurance product"

- Gaps in cover for clean-up costs in public liability policies
- Liabilities of States/Municipalities for lack of protection measures against pollution and the ELD

A Case Study - what if an oil spill occurred on land in Europe or in European waters?

A real situation - Red Sludge exposure – insurance and tort law consequences of the ecological catastrophe in Hungary

Chairman: Professor Ioannis Rokas, IK Rokas & Partners, Athens

Speakers:
Dr Otto Csurgo, CEO, CIG Pannonia General Insurance Company, Budapest
Valerie Fogleman, Professor of Law, Cardiff University and Consultant, Steven & Bolton LLP, Guildford
Harko Kremers, Senior Specialist – Insurance Techniques, Verenigde Assurantiebedrijven Nederland NV, Rijswiijk

12.00 – 13.15 Regulatory Developments, A Single Regulatory Authority for the EU?, Impact of Solvency II, Political Embargoes/Sanctions, Gender and other Discrimination Issues.

Chairman: Joanne Kellermann, Member of the Board of Directors, Dutch National Bank, Amsterdam

Speakers:
Herman Cousy, Professor at the Katholieke Universiteit, Leuven
Christian Felderer, General Counsel, SCOR RE, Zurich
Hermann Geiger, Member of Group Management Board, Legal, Swiss Reinsurance Company Ltd, Zurich
Dr Robert Purves, Barrister, 3 Verulam Buildings, London
Dr Yves Thiery, Attorney, Lydian, Brussels, K.U.Leuven University

13.15 - 14.30 Lunch – Hudson's Restaurant

14.30 – 15.50 Catastrophes – Natural and Man-Made (Chilean earthquake, Deepwater Horizon, Australian Floods, New Zealand and Japanese earthquakes)

- Claims and Legal Issues Arising:

  - Appointment of Agents and cooperation between Insurer and Insured.
  - The setting of reserves and the counter-pressures
  - Assessment of damages and inflation of claims
  - Protection of reputation

- Business Interruption
- Proper Law
- Hours Clauses
- Claims Cooperation/Control
- Fronting Issues
- Follow the Settlements
- Aggregation
- Dispute Resolution Alternatives and how do Catastrophes impact disputes

Chairman: Colin Croly, London

Speakers:
Judith Hanratty, former Company Secretary and Counsel to the Board, BP Plc; Non-Exec Director, Partner Re, Bermuda
Robert Merkin, Professor, Southampton University and Consultant, Norton Rose, London
Dr Andreas Shell, Global Head of Claims (Property, Engineering, Energy and Marine), Allianz Global Corporate & Specialty, Munich
Richard Traub, Partner, Traub Lieberman Straus & Shrewsberry LLP, New Jersey

15.50 – 16.10 Tea break

16.10 – 16.20 An Interesting Case Study in Good Faith and Life Insurance

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

16.20 – 17.20 Hot Cases, New Regulations, Emerging Trends in Different European Jurisdictions (including the European Union)

Chairman: Peggy Sharon, Levitan Sharon & Co, Tel Aviv

Speakers:
Professor Giuseppina Capaldo, Professor of Civil Law La Sapienza, University of Rome, Rome
Stijn Franken, Nauta Dutilh, Amsterdam
Charles Gordon, DLA Piper, London
Christian Lang, Prager Dreifuss, Zurich
Professor Pedro Pais de Vasconcelos, Faculty of Law, University of Lisbon, Lisbon

17.20 Closing Remarks

AIDA Europe reserve the right to change any part of the programme

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)
Hans Londonck Sluijk	(Ad Hoc – Dutch Chapter)
Herman Cousy	Treasurer (Belgian Chapter)

The AIDA Europe Committee was assisted in the organisation of this conference by the local Dutch AIDA Organising Committee.

AIDA Europe Conference, Amsterdam – 26/27 May 2011

Delegate List by Country

Argentina	Dr M Silvia M Kavanagh	
Argentina	Carlos A Estebenet	Bullo Tassi Estebenet Lipera Torassa Abogados
Argentina	Florencia Mangialardi	Estudio Mangialardi Y Associados
Argentina	Pablo S Cereijido	Marval O'Farrell & Mairal
Argentina	Leandro M Castelli	Marval O'Farrell & Mairal
Australia	David McKenna	Jarman McKenna
Australia	Chris Rodd	CGU Insurance Australia Ltd
Australia	George Alexander	Bluebird Consulting
Australia	Justine Bell	Global Change Institute
Austria	Dr Martin Ketzler	AVUS Group
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Belgium	Paul Becue	Euler Hermes Services
Belgium	Prof Herman Cousy	K.U. Leuven University
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Brazil	Gloria Faria	Cnseg Brazilian Insurance Confederation
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Hungary	Otto Csurgo	CIG Pannonia General Insurance Company
Hungary	Dr Zsuzsa Oroszlán	Dr Zsuzsa Oroszlán
Hungary	Péter Pal Szikora	Hungarian Financial Supervisory Authority
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UK	Michael Mendelowitz	Norton Rose LLP
UK	Judith Hanratty	Partner Re
UK	Valerie Fogleman	Stevens & Bolton LLP
UK	Michael Frisby	Stevens & Bolton LLP
UK	Sheila Dziobon	University of Plymouth
UK	Ling Ong	Weightmans LLP
UK	Ian Evans	Weightmans LLP
USA	Ed Kaplan	FDCC
USA	David Greenwald	Jenner & Block

USA	Vicki Roberts	Meadowbrook Insurance Group
USA	Andy Douglass	Morrison Mahoney LLP
USA	Rich Traub	Traub Lieberman Straus & Shrewsberry LLP
USA	Meryl Lieberman	Traub Lieberman Straus & Shrewsberry LLP

Biographies

EBERHARD VAN DER LAAN, MAYOR OF AMSTERDAM

Eberhard Edzard van der Laan was born in Leiden in 1955. He studied law at VU University Amsterdam and having graduated, took the initiative to set up his own law firm (Kennedy Van der Laan) in 1992. This grew grew into a medium-sized practice in the capital of the Netherlands.

Van der Laan joined the Dutch Labour Party (Partij van de Arbeid) in 1976. He sat on the Amsterdam City Council for the party from 1990 to 1998, from 1993 as chairman of his party's council representatives.

As a lawyer, Eberhard van der Laan showed a great deal of interest in social issues and often stood up for tenants, small civil-society organisations and people on the margins of society. On countless occasions Van der Laan acted both formally and informally as mediator in a variety of conflicts.

Eberhard van der Laan is married and has five children.

NOUT WELLINK, PRESIDENT, DUTCH NATIONAL BANK, AMSTERDAM

Dr. A.H.E.M. Wellink has been President of De Nederlandsche Bank since 1 July 1997. Since January 1999, Mr Wellink has sat on the Governing Council of the European Central Bank. Also, he has chaired the Basel Committee for Banking Supervision since July 2006. Since 1997, Dr. Wellink has sat on the Board of Directors of the Bank for International Settlement, which he chaired from 2002 until 2006. Mr Wellink is a member of the Group of Ten Governors, the committee of central bank governors of the G10 countries, and a Governor of the International Monetary Fund and member of the Financial Stability Board.

Nout Wellink's many secondary functions include the following. He is Chairman of the Supervisory Board of Leiden University, Chairman of the Board of Supervisors of the Netherlands Open Air Museum and member of the Supervisory Board of the Dutch Central Genealogy Bureau. He has been awarded a Knighthood in the Order of the Netherlands Lion.

In 1982 Mr Wellink became an Executive Director of DNB. Between 1970 and 1982, he held several posts in the Ministry of Finance, starting on the economic staff, from 1975 as the Director General of Financial and Economic Policy and later as Treasurer General. From 1965 until 1970, Mr Wellink worked as an assistant, later staff member, in the economics department of Leiden University.

After a study in Dutch law at the same university (1961–1968), Wellink obtained a doctor's degree in economics at the Rotterdam Erasmus University. He completed his secondary education (science and grammar stream) in 1961. Born: 27 August 1943 at Bredevoort.

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 specialised 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.

Because of his considerable litigation experience, Torben Bondrop also conducts court and arbitration proceedings within other areas of the law. Torben Bondrop has won his 11 most recent cases before the Danish Supreme Court. From time to time he 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.

GIUSEPPINA CAPALDO - HEAD OF LAW AND BUSINESS DEPARTMENT - SAPIENZA UNIVERSITY OF ROME

Giuseppina Capaldo is Head of Law and Business Department and is full professor of Civil Law in the faculty of Economics. Since 2008 she has been Deputy Rector for strategic planning - La Sapienza University of Rome.

She has both academic and professional experience. She is a Business Consultant, Auditor and Lawyer. Having wide skills, she works in banking, finance and insurance law, with a focus on commercial, company and contract regulation. She was (2006-2010) also member of the Board of Directors of the Insurance Company "Adir" (Assicurazioni di Roma).
She has been Director of PhD " Contract Law and Business" since 2007, and also (2009) Director of LLm "Financial Markets Law".

Author of many publications concerning: contract law; market legal theory; consumer protection; insurance contracts and regulation; financial contracts and regulation; financial derivatives; trusts. Director of research groups on different areas of study.

HERMAN COUSY, PROFESSOR OF THE KATHOLIEKE UNIVERSITEIT, LEUVEN

Herman Cousy is professor ordinarius of insurance law and commercial law at K.U.Leuven-University (since 1976) and Director of its Center for Risk and Insurance Studies.

He is a member of the (Common Frame of Reference) Project Group for the Restatement of European Insurance Contract Law.

He occupied various functions in Belgian governmental advisory bodies and was president of the "Commissie voor Verzekeringen" (Insurance Commission) for over 18 years.

He is since 1997 Assessor of the "Legislation" Section of the Belgian Council of State. He is Member of the Presidential Council of AIDA.

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 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 Zurich and Hamburg 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, is on the Supervisory Board of ARIAS Europe and is a Founding Committee member of INREM, the Mediation Service to the UK Market.

DR OTTO CSURGO, CEO, CIG PANNONIA GENERAL INSURANCE COMPANY, BUDAPEST

Dr Ottó Csurgó (54), CIG Pannónia First Hungarian General Insurance Company's CEO and member of the Board of Directors is a lawyer by profession, studied at Budapest Eötvös Loránd University's Faculty of Law.

He has nearly 30 years of professional experience. His career path included the following milestones:

- In-house lawyer at the State Insurance Company of Hungary, later Head of the Legal Department;
- Managing Director at AVUS-ÁB International Claims Handling LLC, Budapest;
- President and CEO at AXA Colonia Insurance Company, Hungary and member of the Board of Directors of the company's Central European holding company in Austria;
- Managing partner at ART Consult Management Consulting, a company providing consultancy in insurance and financial services sector of Hungary and other CEE countries;
- Advisor to the president of OTP Garancia Insurance Company in relation to its regional expansion;
- Founder and President of Millenium Medicina Health Fund, Hungary;
- Team Leader of the EU TACIS project for the Development of the Ukrainian Insurance Sector, Ukraine;
- Deputy CEO of OTP/Groupama-Garancia Insurance Company, responsible for non-life insurance business line.

Co-President of AIDA Hungarian Chapter,
Member of AIDA Europe Committee,

CHRISTIAN FELDERER, GENERAL COUNSEL, SCOR RE, ZURICH

Christian Felderer is the General Counsel of SCOR's Swiss based operations and additionally, as General Counsel *Operations* at the level of the SCOR Group, responsible for SCOR's reinsurance transactional legal matters. He has over 25 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.

VALERIE FOGLEMAN, PROFESSOR OF LAW CARDIFF UNIVERSITY AND CONSULTANT STEVENS & BOLTON LLP

Valerie Fogleman is a Consultant at Stevens & Bolton LLP and Professor of Law at Cardiff University. Her experience in environmental and insurance law includes advising on contaminated land and water pollution (including the first case under the UK contaminated land regime), advising on environmental, health and safety issues in share and asset transactions (including a transaction of over £1.2 billion), and advising companies and insurers in environmental claims (including acting as an expert witness on English insurance law in US litigation). Valerie was part of a team, with Bio Intelligence Services, who prepared the 2009 background study for the European Commission on the Environmental Liability Directive and related financial security issues.

Valerie is listed as a leading environmental lawyer in the Chambers UK legal directory, the Legal 500, Legal Experts, the International Who's Who of Environment Lawyers and the Guide to the World's Leading Environment Lawyers. She has written three books and co-authored others on environmental and insurance law.

Valerie is an Honorary Member of the Royal Institution of Chartered Surveyors and Vice Chair of the City of London Law Society Planning and Environment Committee. She is also a member of the Texas State Bar, the American Bar Association, and the Association of Industry and Risk Managers.

HERMAN GEIGER, HEAD OF LEGAL DIVISION, MEMBER OF GROUP MANAGEMENT BOARD, SWISS RE, ZURICH

Hermann Geiger was appointed Head of Legal Division and a member of the Group Management Board of Swiss Re with effect from 13 January 2009.

Hermann Geiger is a German citizen, born in 1963. He received LL.M. and Ph.D. degrees in law, as well as a Ph.D. degree in economics and political sciences. He started his career as an attorney in private practice with a major German law firm before moving to GE Insurance Solutions as an Associate General Counsel in 1995. In 2000, he was appointed General Counsel Europe & Asia and later became a board member of GE Frankona in Germany and Denmark.

Hermann Geiger joined Swiss Re as a Regional General Counsel Europe following the acquisition of Insurance Solutions from General Electric. He was a member of the Boards of Swiss Re Europe SA and Swiss Re International SE in Luxembourg, and of Swiss Re Germany AG in Germany.

CHARLES GORDON, DLA PIPER, LONDON

Charles heads the Insurance and Reinsurance team in London. The team focuses on London market and international insurance and reinsurance disputes, coverage issues and policy wording across all insurance classes but with a particular focus on energy, property and casualty. Charles has acted on behalf of Lloyd's syndicates and insurance/reinsurance companies in major insurance/reinsurance disputes affecting the London market. He also has substantial experience in the run-off sector.

Charles is a member of the firm's Global Insurance Steering Committee. He is an accredited mediator and has sat as arbitrator on insurance-related disputes. Chares is a member of the British Insurance Law Association, the Chartered Insurance Institute, the Association of Run-Off Companies and the City of London Club. Charles' clients include Munich Re, Swiss Re, Zurich, Hannover, Resolute, Crawfords and Scor. Charles regularly comments to the press on insurance-related issues and speaks at seminars on key insurance issues.

"partner" refers to a member of DLA Piper UK LLP

JUDITH HANRATTY CVO OBE, NON-EXEC DIRECTOR, PARTNER RE, BERMUDA

Judith Hanratty has been called to the Bar in England (Inner Temple); in Australia; and in New Zealand where she was educated and spent the first twenty years of her career. She retired as Company Secretary and Counsel to the Board of the BP Group in 2004.

She is currently Chairman of the Commonwealth Education Trust and is a Non Executive Director of Partner Re, and of Charles Taylor Consulting: and was for 9 years until 2007 a Member of the Council of Lloyd's of London, where she was also Chairman of the Market Supervision Committee.

In the UK she has been a Member of the Competition Commission; the Takeover Panel; and the Gas and Electricity Authority and a Non Executive Director of London Electricity; of the British Standards Group; and of Partnerships UK.

In 2002 she was awarded the OBE for services to the oil and gas industry; in 2005 she was made an Honorary Doctor of Laws by Victoria University of Wellington and in 2007 she was appointed a Commander of the Royal Victorian Order.

JAN HEUVELS, PARTNER, INCE & CO, HAMBURG

Jan heads up Ince & Co's Reinsurance Group and is the managing partner of the firm's Hamburg office. He divides his time between London and Hamburg. Jan joined the firm in 1993 having graduated with a law degree from Hertford College, Oxford and following a work placement with the Confederation of British Industry (CBI). He became a Partner in 2002.

Jan specialises in a wide variety of non-marine insurance and reinsurance work with emphasis on complex dispute resolution (litigation, arbitration and ADR) as well as non-contentious work and run-off solutions. Reported cases include Bonner v Cox [2005] EWCA Civ. 1512; KCM v Coromin & Others and Swiss Re & Others [2006] EWCA Civ. 5; Coromin v Axa Re & Others [2007] EWHC 2818 (Comm.); Equitas v Allstate [2008] EWHC 1671. Jan is regularly consulted on 'corporate risks' by large companies, their captives and their re/insurers including claims and coverage issues relating to high value liability, property and business interruption claims.

Jan has strong industry links in the London and international insurance markets including Germany (he is a member of the Hamburg Bar), Bermuda, the United States, Scandinavia and Australia. He is a past-chair of the Insurance Committee of the International Bar Association (IBA) and a member of the Insurance Institute of London (IIL) and the British Insurance Law Association (BILA).

Jan has "great knowledge of the law and practice of reinsurance, and a fine sense of practicalities', Legal 500, 2010.

jan.heuvels@incelaw.com
London tel: +44 20 7481 0010, Hamburg tel: +49 (0) 40 38 0860

JOANNE KELLERMANN, MEMBER OF THE BOARD OF DIRECTORS, DUTCH NATIONAL BANK, AMSTERDAM

Ms A.J. Kellermann is an Executive Director of De Nederlandsche Bank since November 2007. Her responsibilities include Pension Supervision, Insurance Supervision, Legal Services and Corporate Support. In 2005, Ms Kellermann joined DNB as its General Counsel and director of the Legal Services division. Ms Kellermann is member of the Board of Supervisors of EIOPA (European Insurance and Occupational Pensions Authority).

From 1992 untill 2005, Kellerman was a partner in the law firm NautaDutilh. From 2001 until 2005, she headed the firm's financial practice in London.

Ms Kellermann completed her study of Netherlands civil and international law at Leiden University in 1984 and was sworn in as a lawyer in Amsterdam that same year.

Currently she chairs the Financial Expertise Center, in which all Netherlands agencies involved in fighting financial crime participate.

HARKO KREMERS, SENIOR SPECIALIST – INSURANCE TECHNIQUES, VERENIGDE ASSURANTIEBEDRIJVEN NEDERLAND NV; RIJSWIIJK

Harko Kremers is a senior specialist insurance techniques at the Verenigde Assurantiebedrijven Nederland NV. His responsibilities include advising of insurers and brokers in the field of environmental impairment and insurance. Within this range he supports various stakeholders on the assessment of risks, claims handling and product development.

Prior to joining Verenigde Assurantiebedrijven Nederland Harko worked in various positions at AMEV Netherlands NV for many years.

As of 2010 Harko is a member of the Environmental Liability Task Force of the CEA.

JEROME KULLMAN, UNIVERSITY PROFESSOR – UNIVERSITY OF PARIS-DAUPHINE (PRIVATE LAW)

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 : Member of the Presidential Council; Chairman of the international working group "Consumer protection". - French Chapter (AIDA-France) : Chairman; AIDA-Europe : Vice Chairman.

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) .

Chief editor of *Lamy Assurances* – Annual publication (first edition 1995 ; edition 2009 : 2500 pages)
Chief editor of *Revue Générale de Droit de l'Assurance,* LGDJ.

CHRISTIAN LANG, PARTNER, PRAGER DREIFUSS, ZURICH

Christian Lang is a partner with Prager Dreifuss Ltd., Attorneys at Law, in Zurich, Switzerland. He works for Swiss and foreign clients from the insurance industry in non-contentious and contentious matters, including litigation and arbitration. He also advises clients in insurance regulatory matters in connection with corporate transactions or their conduct of business in Switzerland. Christian is also a member of the firm's practice group "Corporate and M&A".

Christian graduated from Zurich University in 1997, and received an LL.M. from New York University in 2004. He is admitted in Switzerland and in New York and gathered some international experience as a foreign attorney with a Wall Street law firm in New York in 2004/2005. Christian is a member of the Swiss Bar Association, the Association of the Bar of the City of New York, the Federation of Defense and Corporate Counsel (FDCC), the British Insurance Law Association (BILA), and of the Organizing Committee of the Swiss Chapter of AIDA.

PIERPAOLO MARANO, PROFESSOR OF INSURANCE LAW AND COMMERCIAL LAW, UNIVERSITA CATTOLICA DEL SACRO CUORE, MILAN

Professor Marano has held the title of Associate Professor of Law at the University of Calabria in Italy since 2003. In 2010, he was appointed to the School of Banking, Finance and Insurance of the Catholic University of Milan, where he received his bachelor's degree in 1989. He teaches Insurance Law and Commercial law. Professor Marano also holds a Ph.D. in banking law and regulation from the University of Siena. A widely sought-out writer and speaker on insurance law and one of the drafters of both the Italian Insurance Code and regulation of insurance in the Republic of San Marino, he currently sits on the executive board of the International Association for Insurance Law - Europe. Moreover, Professor Marano teaches Comparative Insurance Regulation in the Insurance Law LL.M. program at the University of Connecticut – School of law, where he is Scholar in Residence.

ROB MERKIN, PROFESSOR, SOUTHAMPTON UNIVERSITY AND CONSULTANT, NORTON ROSE, LONDON

Rob Merkin is Professor of Commercial Law, Consultant to Norton Rose, President of the British Insurance Law Association and Vice-President of AIDA. Rob has written numerous books and articles on insurance, reinsurance and arbitration, and lectures on these subjects both to students and to practitioners internationally.

DR ROBERT PURVES, BARRISTER, 3 VERULAM BUILDINGS, LONDON

Robert Purves is a commercial lawyer with strong specialism in financial services law and regulation. Before transferring to the Bar in 2007.From April 2003, Robert was Chief Counsel, Insurance and Prudential Policy at the Financial Services Authority, the UK body responsible for the licensing, oversight and regulation of almost all financial services business in the UK.

Since commencing practice at the Bar, Robert has acted for financial services firms and individuals seeking advice and representation on a wide range of regulatory issues. Robert has also acted regularly for the Financial Services Authority and for the Financial Services Compensation Scheme.

Current Publications

Robert edits two chapters (on the definition of contracts of insurance and on the conflict of laws) in Clarke's Law of Insurance Contracts.

Deputy Editor of Blair, Walker, Financial Services Law, Oxford University Press 2009 (2nd. Ed.).

Academic Qualifications

Bachelor of Arts (Cape Town) 1984.

Bachelor of Laws (Cape Town) 1986.

Bachelor of Commerce (Honours) (Financial Management) (Cape Town) 1990.

Master of Laws (Cambridge) 1988.

Doctor of Philosophy (Cambridge) 2000. Dissertation title: "Aspects of the relationship between insurance and loss-prevention in English and American Law".

rpurves@3vb.com
www.3vb.com

VICKY ROBERTS, VICE PRESIDENT AND COUNSEL, MEADOWBROOK INSURANCE GROUP, SCOTTSDALE

Vicki Roberts is Vice President and Counsel to Meadowbrook Insurance Group. She heads an inhouse law department which provides coverage advice and manages claims-related litigation nationwide. An honors graduate of Mount Holyoke College, and the Villanova School of Law, she has served as an officer at CIGNA, where she managed environmental claims as well as the litigation management and staff counsel operation. At a subsidiary of Kemper, she was general counsel and head of claims. She was also a partner in private practice in Philadelphia, counselling carriers and acting as national coordinating counsel for environmental matters for a major chemical company. Vicki has testified as an expert on claim handling and bad faith and has spoken numerous times on good faith claim handling, coverage and environmental law topics. She serves as a Director of the Federation of Defense and Corporate Counsel and is a member of the 2011 DRI Insurance Roundtable Steering Committee.

PROFESSOR DR IOANNIS ROKAS, IKRP ROKAS & PARTNERS, ATHENS

Senior Partner of *IKRP Rokas & Partners* Law Firm, coordinator of the ***IKRP*** network of law & legal consulting firms, which spread across the countries of the Central & SE Europe.

He has long experience in international arbitrations, mergers & acquisitions, privatizations, dispute resolutions in corporate, insurance, banking and maritime law matters. He is denoted as the leading legal practitioner in Greece in Insurance & Reinsurance by the international Who's Who (IBA) and other such guides. Consortia led by *IKRP,* coordinated by him have been awarded with EC funded programmes, on strengthening the insurance industry of several East European countries.

Member of the Athens Bar Association (1971), of the Presidential Council of AIDA and AIDA Europe Committee, Chairman of the AIDA Working Group «Distribution of Insurance Products», President of the AIDA Greek Section. Former General Secretary of the CMI Greek Section, member of the project group "Restatement of European Insurance Contract Law", former Chairman of the Mediterranean Maritime Arbitration Association, Chairman of Drafting Committees for a number of Greek laws including the new Insurance Contract Act.

He has published numerous monographs and articles in local and international law reviews.

Phone: +30 210 3616 816
E-mail: i.rokas@rokas.com
Web: www.rokas.com

PEGGY SHARON, LLB, SENIOR PARTNER, LEVITAN SHARON & CO, TEL AVIV

Senior Partner at Levitan, Sharon & Co.
Practice Areas: Litigation of Insurance and Reinsurance claims, Professional Liability claims, Multi-jurisdictional Disputes, Class Actions and Aviation

As the head of the litigation department in the firm, Peggy was involved in various high profile insurance, reinsurance litigation and aviation cases and has brought about the creation of several important Supreme Court precedents.

In addition, Peggy lectures on various subjects of Insurance and Reinsurance and published various articles and newsletters in professional journals and for legal publishers.

- A graduate (Cum Laude) of the Tel Aviv University in which Peggy was assistant lecturer on Contract Law and Jurisprudence for six years.

Membership:

* The Israeli Bar Association;
* Member of the AIDA Reinsurance Working Party (Comparative Chapter on Limitation**);**
***** Member of the AIDA Europe Council;
* Member of the Presidential Council of AIDA.

Hobby: Painting: www.peggysite.com

Email: Peggysh@levitansharon.co.il

DR ANDREAS SHELL, GLOBAL HEAD OF CLAIMS (PROPERTY, ENGINEERING, ENERGY AND MARINE), ALLIANZ GLOBAL CORPORATE & SPECIALTY, MUNICH

Andreas Shell is the Global Head of Claims Short Tail (Property, Engineering, Energy and Marine) for Allianz Global Corporate & Specialty. In 1995 Shell was installed as the Head of Claims for German industrial lines business, subsequently transformed into the Head of Client Services for Allianz Global Risks. In 2001 he was put in charge of Allianz group wide losses in respect of 9/11, which then emerged into the role of Claims Crisis Manager for Allianz Group, which he still holds today. Hurricanes Katrina, Wilma and Rita, European Floods, Australian and New Zealand cat events as well as the current aftermath of the earthquake in Japan fall under his responsibility alongside his claims role. In 2005 readmission to the Munich bar as attorney at law with various assignments in arbitrations and mediations in the Near and Middle East and Europe. Further Shell conducts internal mediations to resolve intra group conflicts on claims/subrogations. Throughout his career, Shell has published various articles and book chapters on crisis and risk management and has held multiple presentations, speeches and panel discussions on those topics.

DR YVES THIERY, ATTORNEY, LYDIAN, BRUSSELS, K.U. LEUVEN UNIVERSITY

Yves Thiery (Ph.D 2010) is a member of the Brussels bar, working at the Commercial and litigation department of Lydian.

He is also research assistant in the Institute of Commercial and Insurance law at K.U.Leuven University.

Yves specializes in Insurance law, Discrimination law and Commercial law. He assists Belgian and international companies, brokers and policy holders in litigation and insurance issues.

He is in demand as speaker on insurance and discrimination issues and has regularly published on this subject. As an academic he was involved as expert for the European Commission study on discrimination in financial services. He also performed consulting assignments for the European and Belgian Parliament.

Education:

Doctor of Laws (K.U.Leuven)
Licentiate in law (K.U.Leuven)
Doctoral research at K.U.Leuven, University of Toronto, University of South-Africa..

Some publications:

THIERY, Y., *Discriminatie en Verzekering*, Antwerpen, Intersentia, 2011, 765 p.
THIERY, Y., The opinion of A.G. KOKOTT on gender discrimination in insurance, *Zeitschrift für Gemeinschapsprivatrecht* 2011, 28-33.

THIERY, Y. and VAN SCHOUBROECK, C., “Fairness and equality in insurance classification”, *The Geneva Papers for Risk and Insurance – Special issue on law and Economics and International Liability Regimes* April 2006, ed. 31, 190-211.

E-mail yves.thiery@lydian.be
Website: www.lydian.be

RICHARD TRAUB, PARTNER, TRAUB LIEBERMAN STRAQUS & SHREWSBERRY LLP, NEW JERSEY

Richard K. Traub. is a founding partner of Traub Lieberman Straus & Shrewsberry LLP and practices in the firm's insurance coverage, construction litigation, environmental, pharmaceuticals and mass tort areas. In all areas, he acts as both counsel of record and as coordinating counsel for national client programs. Mr. Traub is the co-managing partner of the firm and has been so since its inception. Under his guidance, the firm has grown from its original four members to its current national status with 80 lawyers in four regional offices.

He has authored or contributed to three books and has published numerous articles and papers dealing with insurance coverage, nanotechnology, environmental forensics, technology, cyber and risk assessment, and construction defect litigation.

Mr. Traub has served as Director of the Federation of Defense and Corporate Counsel, Dean of its Litigation Management College; and as a member of its Executive Committee. He is currently Chair of the Insurance and Bad Faith Section of UISLAW; a member of the Association of Defense Trial Attorneys, and has been named as a "SuperLawyer" in New York for Insurance Coverage multiple times, most recently for 2011.

He is admitted to practice in the States of New York, New Jersey and Florida, the United States District Courts for the Eastern and Southern Districts of New York, the District of New Jersey, the Third Circuit Court of Appeals, and the Supreme Court of the United States.

PROFESSOR PEDRO PAIS DE VASCONCELOS, FACULTY OF LAW, UNIVERSITY OF LISBON, LISBON

Academic Curriculum

Law degree in 1970, Master in 1985 and Ph. D. in 1995, all by the Faculty of Law - University of Lisbon. *Professor Catedrático* (Faculty of Law - University of Lisbon) since 2006.

Professor Catedrático (Faculty of Law – University of Lisbon) teaches Civil Law and Commercial Law (including Company Law).

Member of:

> Project Group "Restatement of European Insurance Contract Law" – "Principles of European Insurance Contract Law (PEICL)".
>
> *Roberto Schlessinger Association* and participant on the "*The Common Core of European Private Law*" with participation in: *Commercial Trust and Administration of Property* and on *Personality Rights in European Tort Law*.

Chairman of the AIDA PORTUGAL and member of AIDA Presidential Council.

Practices law since 1972.

INCE & CO | INTERNATIONAL LAW FIRM

Welcome!

Dear Delegates

We welcome you to Amsterdam and the AIDA Europe Conference 2011!

With a network of offices in Dubai, Hamburg, Hong Kong, Le Havre, London, Paris, Piraeus, Shanghai and Singapore, Ince & Co practises English, French, German, Greek, Hong Kong, PRC and Turkish law. Ince & Co Singapore has entered into a Formal Law Alliance with local practice Incisive Law LLC. Members of Incisive Law provide Singapore law advice and represent clients in both the Singapore courts and in domestic and international arbitrations.

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 arising in all non-life classes.

"Ince & Co has risen to the pinnacle of the market, reflecting the extent to which the firm has 'evolved into the top-calibre, full range provider that it has.'" **Chambers and Partners**

Jan Heuvels
Head of Reinsurance

Chris Jefferis
Head of Insurance

VanDoorne

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Dear Delegates of the AIDA AMSTERDAM Conference of 2011,

As one of the sponsors of the Conference we take the opportunity to give you some key information about our firm.

Independent law firm in the Netherlands

Van Doorne is one of the leading independent law firms in the Netherlands. Our history goes back a long way, to the founding of the firm by Pieter van Doorne in 1930. Over the years we have developed into a dynamic and flexible organisation of professionals, with a practical and no-nonsense approach. Van Doorne is an Amsterdam-based law firm and in association with VanEps Kunneman VanDoorne (Aruba, Bonaire, Curaçao).

Our clients include leading Dutch and international companies, financial institutions, the (semi-) public sector, not-for-profit foundations and government bodies. We work in close cooperation with our *best friends firms* from the legal networks we belong to.

The firm currently comprises approximately 150 fee earners, including 34 partners, and in total there are 270 people working in the Amsterdam office.

Adding value through legal and business insight

Van Doorne is a multi-service firm with specialised practice groups, which together cover all aspects of business law. The various practice groups cooperate closely to offer our clients the precise combination of knowledge and expertise relevant to the case. We have leading practices in Banking and Finance; Corporate/M&A; Employment and Pensions; European and Competition law; Information Technology; Insolvency; Intellectual Property; Litigation and Insurance; Notarial Practice; Real Estate; Public Law; and Tax.

Van Doorne's Insurance practice group

The Insurance and Litigation team, consisting of 6 partners, 2 counsels and 12 associates, is committed exclusively to the day-to-day handling of a wide range of sophisticated commercial litigation and arbitration on insurance and liability law. The group is proud to be highly ranked for their expertise in all major legal directories.

We are involved in a wide variety of insurance matters ranging from policy drafting, policy disputes, supervision of the insurance sector, contracts with brokers, coverage disputes, policy disputes, conflicts between insurers, conflicts between insurers and brokers, conflicts between insurers and insured parties and co-insurance. Clients include a large number of insurance companies and brokers from the international and Dutch insurance market. We handle specific insurance advice and litigation including third-party liability cases on behalf of insurers.

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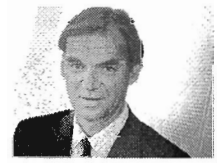
'A well-oiled machine. The experience throughout the team is outstanding.' **Chambers Europe 2011**

'This firm remains a preferred adviser for insurers and brokers, and continues to add new triumphs to its rich history in the sector.' **Chambers Europe 2011**

'Regularly selected for work of high value and high risk, such as dealing with multi-layered insurance policies, particularly in the financial sector.' **Chambers Europe 2011**

'Very good law firm that offers top services on a very professional level for decent hourly rates.' **Legal 500 EMEA 2011**



For more information:
Pieter van Regteren Altena
t +31 (0)20 6789 345
e regterenaltena@vandoorne.com

Walter hendriksen
t +31 (0)20 6789 269
e hendriksen@vandoorne.com

Maurits Kalff
t +31 (0)20 6789 645
e kalff@vandoorne.com

Annemieke Hendrikse
t +31 (0)20 6789 365
e hendrikse@vandoorne.com

Knowledge of your sector

As a full-service firm focusing on the business market, we consider a thorough knowledge of our client's markets just as important as legal expertise.

We do more than look at the legal aspects, we also make use of the latest research and sector-specific information to identify opportunities and possible risks.

In this way, we can guarantee legal services of a consistently high quality.

Expertise without attitude

Needless to say, our specialists have a great deal of expertise in legal areas relevant to Insurance law. Client-focus and practical solutions are our trademarks; our advice is sound and clear, and we do everything possible to keep it that way.

Van Doorne has a wide range of clients from the Dutch and international business market. However, we also work for government authorities, educational institutions, and non-profit organisations.

As Van Doorne's specialists can draw on a wide-ranging international network of attorneys, civil-law notaries and tax lawyers, they can approach any problem from different angles to help you find the ideal solution.

Van Doorne N.V.
Jachthavenweg 121
1081 KM Amsterdam
P.O. Box 75265
1070 AG Amsterdam
The Netherlands

t +31 (0)20 6789 123
f +31 (0)20 7954 589
e info@vandoorne.com
w www.vandoorne.com

NautaDutilh

NautaDutilh's Insurance Team is a dominant market leader in all major fields of civil liability and insurance. Clients characterise NautaDutilh's advice as a unique combination of pragmatism and commerciality. The team's insurance litigation practice has a strong reputation for dealing with complex, high-value and high-profile claims and is proficient in multi-party litigation, particularly in consumer-led claims.

The team provides a broad range of services to insurers, reinsurers and brokers, as well as large companies. These include assistance in connection with regulatory issues, the negotiation of insurance policies and, with respect to companies, the setting up of captive insurance subsidiaries and the analysis of their insurance needs with regard to major liabilities and/or damage.

NautaDutilh is a leading independent law firm in the Benelux with over 400 lawyers, notaries and tax advisers. Our firm has offices in Amsterdam, Brussels, London, Luxembourg, New York and Rotterdam and works on a non-exclusive basis with other leading firms worldwide.

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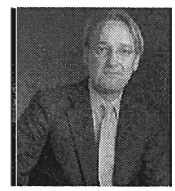


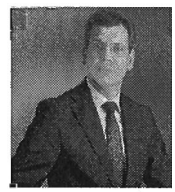
Stijn Franken

T: +31 20 71 71 867
M: +31 62 02 10 461
E: stijn.franken@nautadutilh.com

Rotterdam office

Eric van Niekerk

T: +31 10 22 40 470
M: +31 65 349 5350
E: eric.vanniekerk@nautadutilh.com



Sjoerd Meijer

T: +31 20 71 71 469
M: +31 65 16 23 024
E: sjoerd.meijer@nautadutilh.com

Tjitske Cieremans

T: +31 10 22 40 397
M: +31 62 02 10 452
E: tjitske.cieremans@nautadutilh.com

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Contacts

Amsterdam
Hans Londonck Sluijk
T +31206056116
E h.londonck@houthoff.com

Rotterdam
Berry Jonk-Van Wijk
T +31102172429
E b.jonk@houthoff.com

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Contacts:

Carlos A. Estebenet
carlosestebenet@ebullo.com.ar

Raúl C. Tassi
rtassi@ebullo.com.ar

Guillermo M. Lipera
glipera@ebullo.com.ar

Gustavo J. Torassa.
gtorassa@ebullo.com.ar

Carlos A. Estebenet

Alger
Bruxelles
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Christoph Graber
Prager Dreifuss Ltd.
Mühlebachstrasse 6
8008 Zurich, Switzerland
Tel. +41 44 254 55 55
christoph.graber@prager-dreifuss.com.

Christian Lang
Prager Dreifuss Ltd.
Mühlebachstrasse 6
8008 Zurich, Switzerland
Tel. +41 44 254 55 55
christian.lang@prager-dreifuss.com

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III AIDA EUROPE CONFERENCE Amsterdam, 27 May 2011 The Continuing Duty of Good Faith

- Scope of the assured's post-contractual duty of good faith
- Scope of the insurer's post-contractual duty of good faith
- Conduct constituting breach of duty by the assured
- Assured's remedy for breach
- Insurer's remedy for breach
- Duration of the duty of good faith
- Penalties for misconduct at the litigation stage
- Interrelationship between EU and national law

Jan Heuvels, Ince & Co LLP
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AIDA
27 May 2011
European Environmental Liability
The Regime – Legal Issues Arising
Prof. Dr. I. Rokas - Athens University of Economic & Business
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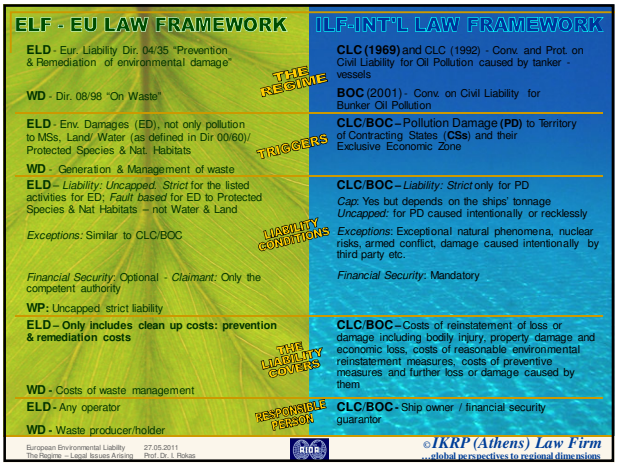
ELF - EU LAW FRAMEWORK
ILF-INT'L LAW FRAMEWORK
ELD - Eur. Liability Dir. 04/35 "Prevention & Remediation of environmental damage"
WD - Dir. 08/98 "On Waste"
THE REGIME
CLC (1969) and CLC (1992) - Conv. and Prot. on Civil Liability for Oil Pollution caused by tanker - vessels
BOC (2001) - Conv. on Civil Liability for Bunker Oil Pollution
ELD - Env. Damages (ED), not only pollution to MSs, Land/ Water (as defined in Dir 00/60)/ Protected Species & Nat. Habitats
WD - Generation & Management of waste
TRIGGERS
CLC/BOC – Pollution Damage (PD) to Territory of Contracting States (CSs) and their Exclusive Economic Zone
ELD – Liability: Uncapped. Strict for the listed activities for ED; Fault based for ED to Protected Species & Nat Habitats – not Water & Land
Exceptions: Similar to CLC/BOC
Financial Security: Optional - Claimant: Only the competent authority
WP: Uncapped strict liability
LIABILITY CONDITIONS
CLC/BOC – Liability: Strict only for PD
Cap: Yes but depends on the ships' tonnage
Uncapped: for PD caused intentionally or recklessly
Exceptions: Exceptional natural phenomena, nuclear risks, armed conflict, damage caused intentionally by third party etc.
Financial Security: Mandatory
ELD – Only includes clean up costs: prevention & remediation costs
WD - Costs of waste management
THE LIABILITY COVERS
CLC/BOC – Costs of reinstatement of loss or damage including bodily injury, property damage and economic loss, costs of reasonable environmental reinstatement measures, costs of preventive measures and further loss or damage caused by them
ELD - Any operator
WD - Waste producer/holder
RESPONSIBLE PERSON
CLC/BOC - Ship owner / financial security guarantor
European Environmental Liability 27.05.2011
The Regime – Legal Issues Arising Prof. Dr. I. Rokas
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...global perspectives to regional dimensions

PANNÓNIA
ÁLTALÁNOS BIZTOSÍTÓ

Red Sludge exposure – insurance and tort law consequences of the ecological catastrophe in Hungary

AIDA Europe Conference,
27 May 2011. Amsterdam
Dr. Ottó Csurgó

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ÁLTALÁNOS BIZTOSÍTÓ

Facts

- On 4th October 2010, dam of red sludge reservoir of MAL's Alumina Factory burst.
- 1 million m^3 sludge flooded out
- Spread over a 40 km^2 area, inundating the deep-seated parts of three villages
- 10 casualties
- More than 150 injured
- 300 houses became uninhabitable
- Roads, bridges, vehicles destroyed
- 1000 Ha cropland contaminated
- The entire fauna of the Torna Stream and River Marcal was devastated by the strong alkaline contamination
- Estimated loss: 10-12 billion HUF (EUR 40-50 mio)

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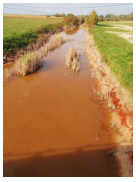
Damage to the environment

Stream Torna at Kolontár

Before Oct 4, 2010

After Oct 4, 2010

River Marcal at Mersevát



Red slugde

Red sludge is:

- a ***by-product of aluminum production***, containing toxic metallic compounds in quantities exceeding the average
- ***highly alkaline*** (pH 13).
- ***a hazardous waste***, eroding the skin similar to burns, but not poisonous
- the alkaline waste discharged to the environment ***destroys the fauna***, but the consequences of this destruction occur primarily in the ***short term***
- red sludge contains traces of radioactive metals, but due to low activity levels ***the environmental impact of direct radiation is negligible***, not exceeding significantly the activity of extracted bauxite

Responsibility

- Is MAL liable for the disaster?
- Public liability may also occur e.g. if licensing / inspections were not completely in order
- MAL's strict liability definitely arises by "hazardous plant" operation
- Issue of hazardous substance
- The reservoir itself is also a hazardous operation; the potential energy of the fluid stored in reservoirs surrounded by dams of several tens of metres of height also poses a direct threat to the environment

From an insurance point of view

- MAL's liability insurance does not suffice for settling even a small fraction of losses (limit:10 million HUF - 40 thou EUR);
- Except for some all risks property insurance policies, the retail / corporate policies of the parties affected do not cover losses by the disaster;
- Insurance companies provided assistance through loss inspection and emergency aid in cash.

Indemnity

- **Public aid vs. indemnity by MAL**
- In lieu of the party causing the loss, the government shall advance the amount of indemnity, to be recovered through legal means later on
- Parties injured may also be indemnified by the government parallelly with suing MAL Zrt. for damages
- **In case of property loss** results of special agreements or litigations to be included in public subsidy
- There is no limit amount in case of **non-property losses** - e.g. death or injury.
- **MAL is currently operated under state supervision.**

Legal / legislative developments expected following the disaster

- Prolonged litigations
- MAL's nationalization in return for indemnification
- Stricter licensing and inspection procedures
- Regulatory preparations:
  - liability insurance in proportion to risk
  - subject to specific limits
  - on-going control of liability insurance being validly in effect

Thanks for your attention!

Supporting success

A Case Study - What if an Oil Spill Occurred on Land in Europe or in European Waters?

Valerie Fogleman
Consultant, Stevens & Bolton LLP
Professor of Law, Cardiff University

Service Quality Relationships Results

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Claims for Oil and Chemical Spills

- Domestic law of individual Member States (MS)
  - claims for bodily injury, property damage and economic loss from inland and coastal pollution incidents
  - clean-up costs for inland and coastal pollution incidents
- Application of international marine conventions

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Environmental Liability Directive

- First EU polluter pays legislation
- Transposition deadline: 30 April 2007
- Full transposition into national law of EU-27: 1 July 2010
- Supplements existing MS domestic law
  - most MS imposed liability for cleaning up land and water pollution
  - but not restoring protected species and natural habitats (biodiversity)
- Exceptions
  - does not apply when international marine conventions apply
- Defences

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Liability

Two categories of "operators"

- Annex III: strict liability for preventing or remediating imminent threat of, and actual, environmental damage (ED) to biodiversity, water and land
- Non-Annex III: fault-based liability for preventing or remediating imminent threat of, and actual, ED to biodiversity

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Differences between Member States

Differences include

- joint and several or proportional liability
- adoption of optional defences
  - permit defence
  - state-of-the-art defence
- extension to nationally protected biodiversity
- extension of strict liability to non-Annex III activities
- thresholds for land, water and biodiversity

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Liability

Imminent threat of ED

- operator must carry out preventive measures "without delay"
- notify competent authority "without delay" if measures fail to dispel threat of damage

Occurrence of ED

- operator must notify competent authority "without delay"
- "immediately" carry out emergency remedial actions
- carry out remedial measures agreed by competent authority

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Land Damage

Threshold
- significant risk of adverse effect on human health

Remediation measures
- remove, control, contain or diminish contaminants to eliminate significant risk of adverse effect on human health

Remediation standard
- lawful current use or approved future use

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Water Damage

Threshold
- significant adverse effect on ecological, chemical and/or quantitative status and/or ecological potential of waters
  - inland surface, ground, transitional and coastal waters

Extent of seaward limit of waters differs between MS, e.g.
- Scotland: 3 nautical miles (5.56 km)
- rest of United Kingdom: 1 nautical mile (1.85 km)
- Ireland: 12 nautical miles (22.24 km)

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Biodiversity Damage

Threshold
- significant adverse effect on favourable conservation status

Biodiversity covered by ELD
- inland biodiversity in individual MS
- plus 200 nautical miles seaward
- nationally protected biodiversity: 14 MS

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Remediation Measures for Water and Biodiversity

- *Primary remediation*: remediation and restoration to "baseline" condition
- *Complementary remediation*: if damaged site cannot be fully restored, restoration of nearby site in addition to partial remediation of damaged site
- *Compensatory remediation*: losses between time ED occurred and its full remediation (providing, enhancing or improving same or new resources at damaged and/or alternative sites)

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Examples of ELD Incidents Involving Oil and Chemical Spills

France

- spill of crude oil from underground pipeline into Coussouls de Crau nature reserve (non-Annex III)

Italy - *Raffinerie Mediterranee (ERG) SpA v Ministero Dello Sviluppo economico* (C-378/08), (C-379/08 and C-380/08) (9 March 2010) (Annex III)

- numerous releases of petrochemicals into land and roadstead in Augusta harbour, Sicily

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Financial Security

- No mandatory financial security
- ELD directed European Commission to submit report and, if appropriate, proposal for system of harmonised financial security in 2010
- MS to "encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under [ELD]"

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Financial Security

MS proposing financial security

- Bulgaria
- Czech Republic
- Greece
- Hungary
- Portugal
- Romania
- Slovakia
- Spain

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Potential Revisions to ELD

European Commission ELD Report (October 2010)

- implementation and effectiveness of ELD need improvement
- insurance market for ELD liabilities growing
- insufficient justification to introduce harmonised mandatory financial security system at this time but optional mandatory financial security should be re-examined

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Potential Revisions to ELD

Evaluation of following issues

- extension of ELD to marine waters
- potential difficulties due to differences in MS law
- most efficient way to ensure financial security instruments cover large scale incidents involving operators with low or mediocre financial capacity
- ability of financial security instruments (including insurance, bank guarantees, funds and bonds) to cover large incidents

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Potential Revisions to ELD

European Commission Communication, Facing the challenge of the safety of offshore oil and gas activities (October 2010)

- Commission will
  - propose amendments to ELD to cover all marine waters including coastal waters, subsoil and seabed
  - re-consider introduction of mandatory financial security

Service Quality Relationships Results

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What if an Oil Spill Occurred on Land in Europe or in European Waters? Current Position

ELD application in individual MS depends on

- nature of activity (strict or fault-based liability)

Liability under ELD depends on whether

- MS imposes joint and several or proportional liability
- MS includes nationally protected biodiversity
- threshold for damage to natural resource in MS is exceeded
- (MS has adopted optional defences)

PLUS distance seaward for water damage

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What if an Oil Spill Occurred on Land in Europe or in European Waters? Future Position

Spill on land and inland waters

- liability: potential increase in scope and elimination of options in ELD
- financial security: potential harmonisation for specified activities
- (potential extension of scope of land damage)

Spill in European coastal waters

- liability: likely extension of ELD
- financial security: likely harmonisation for specified activities

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European Environmental Liability

Safety of offshore oil & gas activities

Harko Kremers, sr specialist insurance techniques

EU action on oil exploration and extraction

Gaps and weaknesses regulatory framework at EU level

- Environmental liability
- Mandatory insurance scheme for offshore oil activities to be implemented via the ELD

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Environmental liability

- Deepwater Horizon led the EC to assess whether the current European regulatory frameworks are adequate
  - Offshore exploration is less covered by international legislation
  - Parts of ELD are interpreted as to govern offshore oil & gas operations
- The commission will review possible need to close gaps in applicable legislation

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Mandatory insurance scheme for offshore oil activities to be implemented via the ELD

- Insurance coverage in offshore sector is partial
- Insurance market does not provide sufficient cover for damages of the magnitude seen in Deepwater Horizon accident
- No international or European funds covering environmental liability

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(re)insurers position on safety of offshore oil & gas activities

- System of ensuring sufficient financial solvency
- Voluntary system for the cover of environmental liabilities
- Geographical scope should be worldwide

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System of ensuring sufficient financial solvency

Insurance industry cannot provide the sole solution in protecting against oil spills
- Immense financial capacity
- Premiums multiply the potential consequences of most significant accident
- European solvency law

Long-tail effects of an oil spill
- Consequences of the pollution may not be known for several years
- Insurers may not be in a financial position to cover the liability for such an extensive amount of time

Joint and several liability under ELD
- Liability on all parties involved
- All are to contribute financially to the remediation
- If cover is given to some or all of them, the actual loss could be substantially higher than anticipated

Companies in the oil sector should be free to compound the required solvency guarantee alongside the range of options available for covering potential environmental liabilities

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Voluntary system for the cover of environmental liabilities

Insurance industry can play important role in ensuring operations are solvent for potential liabilities
- Financial security through insurance products designed for environmental liability, particularly losses falling under ELD
- Free and voluntary markets enhance suitable cover for environmental liability risks
- Voluntary system leads to mature and stable environmental liability insurance market in the long term

Each company should be able to choose how to protect itself against environmental liabilities

This remains within the spirit of the "polluter-pays" principle emphasised in the ELD

A voluntary financial security scheme is the optimal way to ensure sustainable insurance products to meet the MS environmental liability needs

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Voluntary system important for risks posed by offshore oil activities

Companies in the oil sector should be free to decide either to go self-insured or to buy insurance
- Damages incurred in the Deepwater Horizon incident far exceed the available capacity of the insurance market:
  - Damages amount to approx. $ 40bn in total, including environmental liability
  - Relative insurance market capacity approx. $ 1.5bn
- Mandatory insurance schemes are restrictive in nature
  - Difficult to match demanded cover
  - Difficult to adept cover to complex risk profiles (e.g. an oil company)

Oil companies are the most specialised experts within their sector, thus in the best position to assess their own appetite for insurance cover

Many oil companies have much more financial capacity than insurers, thus an own ability to cover these risk

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Geographical scope should be worldwide

International liability regimes are already in place
- Oil spills easily surpass the borders of the EU
- Several national & international liability regimes are in place which apply to losses by oil companies
- More likely to change existing conventions before changing the ELD
- EU regulation will not stop severe marine pollution caused by oil exploration in nearby third countries

Offshore oil sector is not covered by traditional ELD insurers
- Main focus of ELD is onshore activities, thus EU-wide insurance markets developed environmental impairment liability policies accordingly
- Markets are by no means mature enough to provide cover for risks of the oil sector activities
- Oil sector liabilities are a highly specialised market

Enhancement of insurability will help the whole system
- Best practices in the oil industry can enhance insurability of risks and improve prevention of environmental damage
- Focus on risk management is the best means of reducing environmental damage risks
- Cooperation amongst operating oil companies can promote safer offshore oil operations

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Conclusion

Insurance industry strongly:
- Advices against the introduction of a mandatory insurance scheme for the environmental liability risks posed by the offshore oil sector
- Recommends to keep any liability and financial security scheme for offshore oil activities within the scope of existing multinational conventions

VERENIGDE ASSURANTIEBEDRIJVEN NEDERLAND

Harko Kremers
Senior specialist insurance techniques

Verenigde Assurantiebedrijven Nederland N.V.
Reinsurance pools department:
* Dutch Nuclear Insurance Pool
* Dutch Terrorism Risk Reinsurance Company
* Dutch Environmental Impairment Insurance Pool

Tel.nr. +31 (0)70 319 53 34
Faxnr. +31 (0)70 319 53 39

E-mail harko.kremers@assurpools.nl

VAN

European Environmental Liability

Safety of offshore oil & gas activities

Harko Kremers, sr specialist insurance techniques

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Remuneration: Solvency II

Herman Cousy

Does EIOPA have sufficient power to create a single EU rule-book and make supervisory practices converge?

Dr Robert Purves
Barrister
3 Verulam Buildings
Gray's Inn, London

On these issues, EIOPA is no more relevant or powerful than CEIOPS

- EIOPA's primary objective is to contribute to financial stability, not harmonisation [EIOPA Reg. Art. 1(6)]
- Harmonisation is only indirectly relevant to stability [e.g. De La Rosiere Report, para. 104]
- Any EIOPA powers going beyond CEIOPS functions (i.e. promoting best practice and issuing non-binding guidelines) are very tightly constrained.

Examples

- Power to develop draft Technical Standards
  - Only in areas identified in sectoral legislation
  - Technical only, not strategic or policy choices
  - Legislative initiative remains with Commission
  - Political control
- Power to participate directly in enforcement
  - Intended to be exceptional
  - Must be necessary to restore competition or orderly market
  - Only in respect of directly applicable requirements

Remuneration policies under the spot light in the aftermath of the financial crisis

Swiss Re

- Widespread consensus that inappropriate pay packages and remuneration policies contributed to the financial crisis.
- Numerous initiatives have been introduced at global, European and national levels under four main principles:
  - Effective governance of compensation
  - Effective alignment of compensation with prudent risk-taking
  - Balanced structure of remuneration package
  - Effective supervisory oversight and involvement of stakeholders
- Regulators need to consider differences between banking and insurance when formulating policies as business models are different and insurers remuneration practices did not create problems.
- Global coordination and consistency is essential to guarantee a level playing field, ensure global competitiveness of European firms and promote sustainable marketplaces.

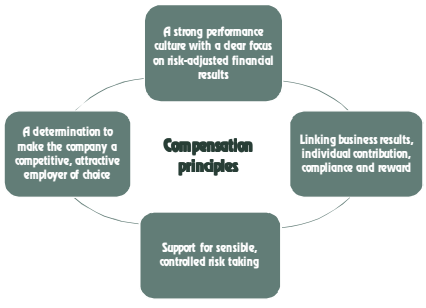
Swiss Re s compensation approach is well aligned to risk and long term-nature of business

Swiss Re

- Swiss Re has been at the forefront of compensation best practices, introducing compensation systems ahead of time, effectively anticipating recent regulatory trends:
  - Swiss Re already introduced deferred compensation (including a claw-back mechanism) in 2006;
  - Due to the long-term nature of the reinsurance business, economic profit, rather than accounting profit, is the key determinant for the value of a (re)insurance company. Swiss Re adopted economic profit as a primary performance measurement and driver of compensation allocation back in 2006.
- Swiss Re s compensation is strongly aligned with shareholders interests.
- Governance of Swiss Re's Compensation policy is independent. On an annual basis, Swiss Re reviews its compensation policy and philosophy and adapts where needed to changing regulatory and market trends.

Compensation must be based on clear principles

Swiss Re



AIDA Europe - Conference

Regulatory developments in the European Insurance Sector

"Reinsurance contracts, how should both insurance and supervisors review reinsurance contracts?"

Amsterdam, 27 May 2011

Christian Felderer

SCOR

Nature of Insurable Interests

Supervisor

⇨ Reinsurer

Business to Business

Reinsurance contract – generally no application of insurance contract law. General legal principles, market practice

⇨ Insurer

Ranging from large to small risks

Insurance contract – detailled provisions by national insurance contract law

Insured

SCOR 56

Contract Framework of the Solvency II Directive *

- Conditions of insurance contracts and scales of premiums
- Information to policy holders
- Legal Expense Insurance
- Rules specific to reinsurance (Finite Reinsurance)

* Directive 2009/138/EC - *Solvency II Directive*

SCOR 57

Competing interests

- Reinsurance contract - Freedom of contract. Negotiation of individual terms and conditions.
- Regulatory intervention - Ensure proper working of the insurance market place. Requires protection of concrete actual interests.
- Areas of public interest to be covered in the legislative process

How to cover the interests?

"Reinsurance contracts, how should both insurance and supervisors review reinsurance contracts?"

- Should Insurers review reinsurance contracts? *"Yes!"*
- Should Supervisors review reinsurance contracts? *"No, but!"*
- How should insurers review reinsurance contracts? *"Detailed review and understanding of the proper risk elements (e.g. coverage, exclusions, counterparty risk, applicable law, dispute resolution) of the contract."*
- How should Supervisors review reinsurance contracts? *"By ensuring a regulatory framework, which ensures fit and proper management of contracting parties, experienced to apply a comprehensive contract focus."*

LYDIAN lawyers

The Court's Ruling

"A provision, which enables the Member States in question to maintain without temporal limitation an exemption from the rule of unisex premiums and benefits, works against the achievement of the objective of equal treatment between men and women, which is the purpose of Directive 2004/113, and is incompatible with Articles 21 and 23 of the Charter."

- Already as from **21 December 2012**: unlawful to use gender as a risk factor in insurance contracts.
- Reason? "**Without temporal limitation**"??
- Equal treatment → **Comparable situations** must not be treated differently
- Men = Women?
  - → **Council: No**. Men and women can/must be treated differently
    - Levels of insured risk: different for male and female policyholders
  - → **Court: Yes**
    - Comparability of situations must be assessed "in the light of the subject-matter and the purpose of the measure which makes the distinction".
      - Purpose Gender directive = "*the use of sex as an actuarial factor should not result in differences in individual's premium and benefits.*"
      - → Men and women are comparable
  - → **discrimination**

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LYDIAN lawyers

The morning after…

- What about **Freedom to market insurance products / Freedom of tariffs**?
- At least… on the **same level playing field**.
- What about **existing contracts**?
- What about **premiums**?
- What about **pensions**?
- What about **Age** and **Disability**?
- **Alternative risk factors**: closer to risk?
- Need for ***explained decisions*** and sufficient instruments for ***weighing up interests***
  - Through *assessment of* ***justification***
  - **Translated** to characteristics of insurance classifation
  - **Questioning** traditional ideas of efficient risk classification

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FDCC
FEDERATION OF DEFENSE & CORPORATE COUNSEL

All Members Are Peer Reviewed

- Professional skills
- Ethics
- Honesty & integrity
- Likeability

KNOWLEDGE
JUSTICE
FELLOWSHIP

FDCC
FEDERATION OF DEFENSE & CORPORATE COUNSEL

The guiding principles of the FDCC are summarized in the three words underlying our logo: knowledge, justice and fellowship.

Our objectives and purposes are to assist in establishing standards for providing competent, efficient and economical legal services; to encourage and provide for continuing legal education of the members; and to use the knowledge and experience of its membership for the promotion of the public good.

In other words, our Objectives & Purposes:

1. Provide quality continuing legal education to our members.
2. Help establish standards for providing competent, efficient and economical legal services.
3. Use the knowledge and experience of our membership for the promotion of public good.

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Australia		Hong Kong
Belgium	Ireland	
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Canada		Mexico
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Germany		Taiwan

THE FEDERATION HAS GREAT PROGRAMS & SPECIAL PROJECTS

- **Corporate Counsel Symposium**
- **Litigation Management College**
- **Leadership Institute**
- **20/20 Insurance Summit**
- **Law Firm Management Conference**

International subjects have included:

- Arbitration & ADR in the U.S., U.K. and Australia—a comparative study.
- Experiences of Alternative Risk Transfer in the U.S, U.K. and Europe.
- Comparative study of "follow the settlements" in reinsurance of various jurisdictions.
- Contracts between the US, UK, European and Bermuda reinsurance markets
- What does the global insurance market hold for the future.

Our Munich Program, July, 2010 included:

1. International Perspectives on Managing, Measuring, and Enhancing the Representation of Clients in a Global Economy.
2. The Great Healthcare Debate at Home and Abroad.
3. Government Regulation of Industry in the Global Economic Crisis.
4. Expectations of Carriers in International Litigation (e-discovery, expectations of privacy in Europe and U.S.)
5. Internet liability – sexting, texting while driving, Internet predators, cyber bullying and other current Internet news issues from U.S. and International perspective.

AIDA EUROPE

Lunch Break sponsored by

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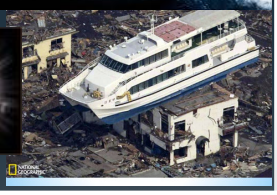
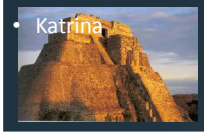
Impact of Catastrophic Events on the Insurance Industry

Richard K. Traub, Esq
Traub Lieberman Straus & Shrewsberry LLP
322 Highway 35 South
Red Bank, New Jersey, USA 07701
rtraub#@traublieberman.com

Did The Mayans Have it Right?

- Japan
- New Zealand
- Chile
- Australia
- Deep Water Horizon
- Violent Localized Weather
- Katrina





12/21/12

At last, the mystery of the Mayan calendar revealed.

Financial Impact

- Financial Impact
  - Insurance
  - Reinsurance
  - Business Interruption
  - Contingent Business Interruption
  - Other Indirect Losses
- Modeling
- BP Fallout

Insurance

- $50 billion in excess capital
- Loss estimates from Japan estimated $20-50b is not enough to place enough pressure to push rates up
- Loss won't be spread evenly…some will need infusion of capital
- Lloyds' combined ratio for 2010 still below 100%
- Another major event could pressure capital reserves

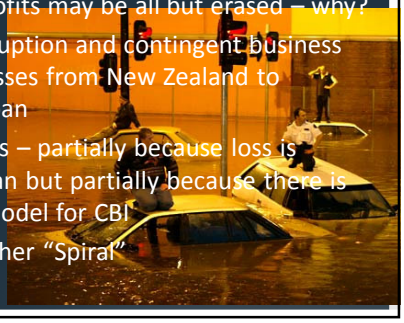
The fierce storms spawn tornadoes and winds that wiped out homes and businesses, forced a nuclear power plant to use backup generators.

P & C Premiums Tumble 4/26/11

- RIMS Benchmark Survey – three of four lines of business posted material decreases.
- Property insurance posted largest decrease, followed by Workers Compensation, D & O and General Liability.
- Catastrophes around the world have had little impact on premiums.
- This hurricane season may prove to be the difference

Reinsurance

- Reinsurance is taking a significant hit and reinsurance profits may be all but erased – why?
- Business interruption and contingent business interruption losses from New Zealand to Australia to Japan
- Huge unknowns – partially because loss is ongoing in Japan but partially because there is no adequate model for CBI
- Danger of another "Spiral"

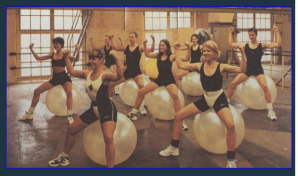


Business Operation and Contingent Business Interruption

- Learning from our mistakes?
- BI covers when the insured shuts down; BI if the supply chain breaks down
- CBI and BI exposure traditionally off the mark
- How much BI is sold?
- No central register

Indirect Losses

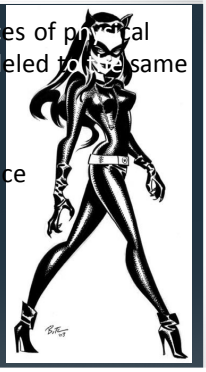
- Losses in sales, wages, profits due to loss of function;
- Can be physical damage to structure or infrastructure failure;
- Spending reductions from income losses (ripple effect)
- Short-term gains as well.



Chewing Gum Disaster

Cat Modeling

- Indirect losses from consequences of physical destruction, have not been modeled to the same extent as direct losses
- Much more difficult to measure
- No programs or processes in place



BP Fallout

- SOL 4/20/11
- Suits Against BP
  - State of Louisiana v. BP
  - Class Action
  - Multiple Derivative Suits
  - Minority Partners v. BP
- Many Other Defendants
  - State of Florida v. Feinberg
  - BP v. Halliburton;
  - BP v. Rig Owner;
  - BP v. Cameron International
  - Counterclaims

Questions?

- Thank you.

Catastrophes – Natural and Man-Made

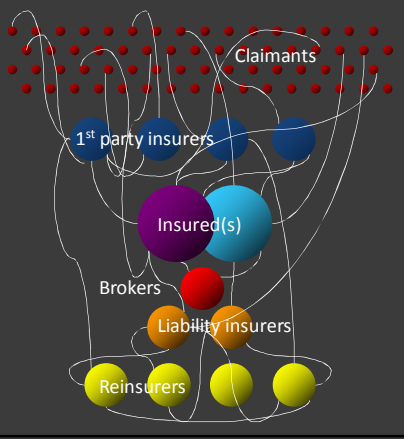
Practical claims management

Judith Hanratty

AIDA Europe Conference
Amsterdam, 27 May 2011

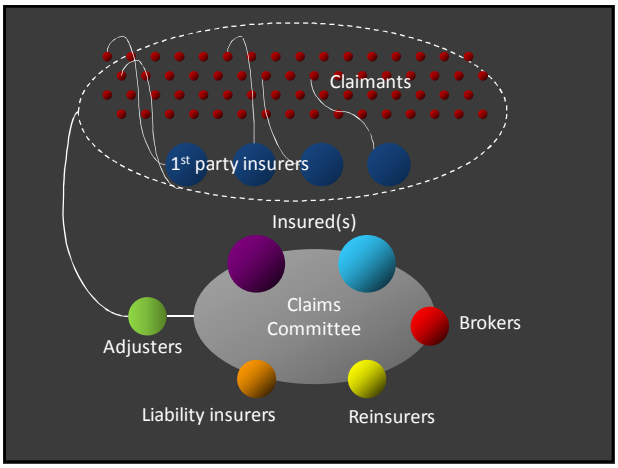
Case study

- Explosion at a fuel storage depot
- Thousands of claims
- Aggregate value in the hundreds of millions
- Affected:
  - Homeowners
  - Businesses
  - Local authority



Responding parties

- Insured(s)
- (Re)insurers
- Alignment of interests
- Leadership
  - Claims Committee

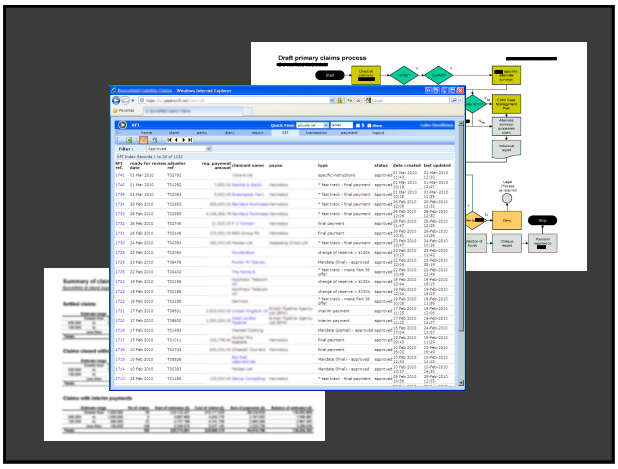


Resourcing

- Adjusters
- Experts
- Legal
- Project management
- Cost management
- Delegated authority
- Written procedures

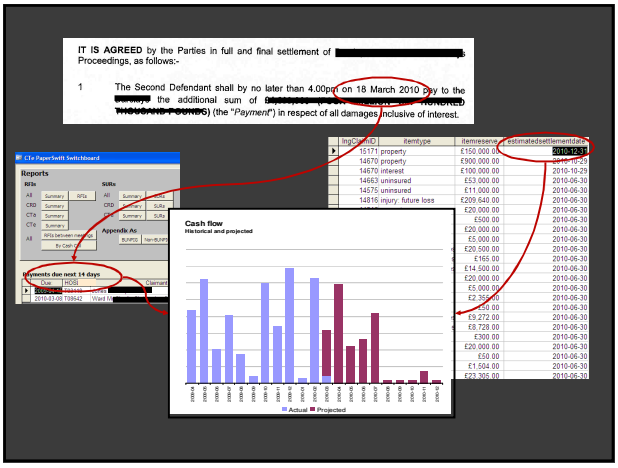
Information management

- Transparency
- Enforcement of agreed process
- Audit trail
- Reporting to satisfy each interest



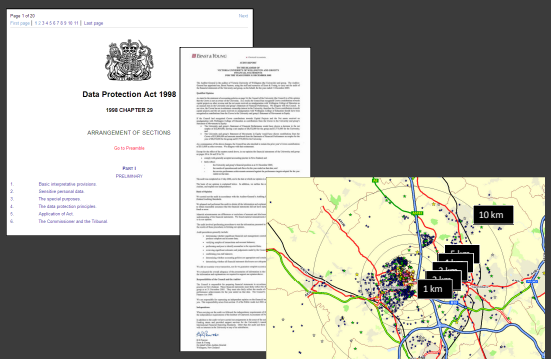
Financial management

- Payment process
- Payment timescales
- Transaction volume
- Record keeping
- Fulfilment
- Cash flow



Compliance

- Financial
- Data protection
- Fraud
- Best practice



Lessons learned

- Leadership
- Corporate Citizenship
- Claims management system

Allianz Global Corporate & Specialty

Claims Handling – Chance and risk for the relationship between Insurer and Insured

Dr. Andreas Shell
CUO Claims Short-tail
Amsterdam / May 27th, 2011

Allianz

Allianz

Table of contents

1 Cooperation between Insured and Insurer
2 The Reserving Process
3 Typical Legal Issues – "Not covered"
4 Dispute Resolution – when cooperation fails

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Cooperation between Insured and Insurer

- Insurers are slow to respond
- Insurers actions are in-transparent
- Insurers communicate badly
- Claims handling process takes forever
- Insurers do not pay

Allianz

The Reserving Process
Setting expectations or technical process

- Shareholders, analysts, regulatory bodies, auditors, press requirements vs. Insured's
- What is a reserve? Why is it not a check?
- Are legal issues already dealt with at an early stage?

Allianz

Typical Legal Issues – "not covered"

- Covered perils and exclusions vs. return on investment or VIP status
- Tailor-made policy solutions vs. precision and variance of life
- Insurance – a legal product or the red cross?

Allianz

Dispute Resolution – when cooperation fails

- How often is dispute resolution actually needed?
- Choice of resolution mode: why arbitration is more favored than mediation
- Choice of decision making bodies – the circus
- Why retired insurance executives and judges are not always ideal on a panel
- Arbitration: too slow – too costly

Source: nationalpost.tumblr.com

Thank you
for your attention.

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AIDA EUROPE CATASTROPHE COVER

Rob Merkin
University of Southampton
Norton Rose

May 2011

NORTON ROSE

THE GENERAL MEANING OF CATASTROPHE

- Dictionary: A great, often sudden, calamity
- Distinction between catastrophe and catastrophic losses
- Sudden event v series of events
- Disraeli definition: "If Mr Gladstone should fall into the Thames that would be a calamity. If somebody were to pull him out again that would be a catastrophe".

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CATASTROPHES AND DIRECT POLICIES

Use of the word catastrophe in direct policies?

Causation issues

- Floods: *Orient-Express v Generali* 2010
- Leaky houses: water or defective design?

Date of loss

- Peril or damage: *Kelly v Norwich Union* 1989; *Wasa v Lexington* 2009

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CATASTROPHE AND REINSURANCE

Coverage:

- "A form of reinsurance that indemnifies the ceding company for the accumulation of losses in excess of a stipulated sum arising from a catastrophic event such as conflagration, earthquake or windstorm. Catastrophe loss generally refers to the total loss of an insurance company arising out of a single catastrophic event."

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REINSURANCE AGGREGATION ISSUES

How many events?

Hours clauses:

- "Each loss by earthquake shall constitute a single claim hereunder, provided, if more than one earthquake shock shall occur within any period of seventy-two (72) hours during the term of this policy, such earthquake shall be deemed to be a single earthquake within the meaning hereof."

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OTHER REINSURANCE ISSUES

Follow the settlements

- Wasa v Lexington 2009

Allocation issues

- IRB v CX 2010
- Teal v Berkeley 2011

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Afternoon Tea Break sponsored by

DLA PIPER

The sad, but edifying, story of Article L132-5-1

In green: good

In red: bad

And in yellow on a red backgroud: appalling

According to JK

Article L132-5-1

Any natural person who has signed an insurance proposal or a contract may withdraw therefrom, **by registered letter with advice of receipt**, during a period of thirty days from the first payment.

The insurance proposal or contract must include a draft letter designed to facilitate the exercise of this right of withdrawal. . . . The insurance or capitalization undertaking **must moreover deliver, against receipt, an information sheet** on the main provisions of the contract, including . . . the conditions of exercise of the right of withdrawal . . . **Failure to deliver the documents and information** listed in this paragraph shall automatically entail **the extension of the time limit prescribed in the first paragraph hereof to the thirtieth day following the date of actual delivery** of such documents.

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SEASON I - Formalities

- Episode 1 -

How many documents?

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Cass. 2è civ., 7 March 2006, No 05-10366, etc.

failure to deliver **such** documents and information must, pursuant to the same Article L132-5-1, be penalized by **extension of the time limit for withdrawal** prescribed in the second paragraph thereof and, in the event of withdrawal, by refund of all amounts paid by the policyholder

Cass. com., 2 March 2010, No 09-12175

the information sheet is a document separate from the general and special terms and conditions of the contract, the main provisions of which it summarizes, and **failure to deliver this document cannot be compensated for by delivering the general and special terms and conditions of the contract**

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SEASON I - Formalities

- Episode 2 -

In what document?

123

Article L132-5-1

The insurance proposal or contract must include a draft letter designed to facilitate the exercise of the right of withdrawal

Market practice: draft letter in the information sheet

Cass. 2è civ., 25 February 2010, No 09-11352

the court below, which found that

there was no draft withdrawal letter **in the insurance proposal itself**,

correctly deduced therefrom that Mr X, who had not received information complying with the above provision, had validly exercised his right of withdrawal

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SEASON II – Waiver of the right of withdrawal

– Episode 1 –

Is there any principle?

Cass. 2è civ., 4 February 2010, No 08-21367

"waiver of the benefit of the public-policy provisions of Article L132-5-1 of the Insurance Code is not permitted"

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SEASON II – Waiver of the right of withdrawal

– Episode 2 –

Can acts of contract performance complying with the provisions of the contract be construed as a waiver of the right of withdrawal?

Cass. 2è civ., 7 March 2006, No 05-10366, etc.

"**the right of withdrawal** made available as a matter of law to a purchaser of insurance by the second paragraph of L132-5-1 of the Insurance Code, to penalise the insurer's failure to deliver the documents and information listed in that provision,
is independent of the performance of the contract,
the time limit for withdrawal being extended until the insurer fulfils his obligations"

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No waiver of the right of withdrawal:
acts performed after conclusion of the contract
but **before the waiver**

- Cass. 2è civ., 10 July 2008, No 07-12071: two partial surrenders

- Cass. 2è civ., 7 March 2006, No 05-12338: several successive arbitrages, in which the policyholder unilaterally decided to change his mix of stock-market investment instruments and unilaterally selected new instruments

- Cass. 2è civ., 4 February 2010, No 08-21367: advance

127

. . . providing that the contract exists at the time of the waiver!

Application: in the event of total surrender before the waiver

Cass. 2è civ., 19 February 2009, No 08-12280, etc.

an application for surrender of a life insurance policy terminates the policy and **renders nugatory the right of withdrawal exercised later**

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SEASON II – Waiver of the right of withdrawal

– Episode 3 –

Exception to the principle

<u>After</u> exercising his right of withdrawal, the policyholder carries out an act of performance:

waiver of the already exercised right of withdrawal?

129

"A life insurance policyholder who has exercised his right to withdraw from the contract pursuant to the above-mentioned article may waive it **by pursuing performance of the contract**"

"Acts of performance incompatible with the right to withdraw from the contract"

- Cass. 2è civ., 11 Sept. 2008, No 07-16149: application for surrender of the policy
- Cass. 2è civ., 4 Feb. 2010, No 08-21367: pledging of the policy
- Cass. 2è civ., 25 Feb. 2010, No 09-11352: assignment of claim to a third party
- Cass. 2è civ., 8 July 2010, No 09-68864: unqualified request for payment of the lump-sum death benefit

130

SEASON III – Consecration of bad faith
– Episode 1 –
Finding of bad faith

Cass. 2è civ., 7 March 2006, No. 05-12338, etc.

"**unhappy with the trend in his capital,**"

or

Cass. com., 13 April 2010, No. 08-21334

"noting the drop in value of his portfolio,"

the policyholder exercises his right of withdrawal
on the ground that he received only one document instead of two

131

– Episode 2 –
Good faith not required

Cass. 2è civ., 7 March 2006, No 05-12338; etc.

"by the terms of the above-mentioned article, the lawmakers intended to compel insurers to provide policyholders with sufficient information and subjected this obligation to an **automatic penalty**, **the application of which cannot depend on the circumstances of the particular case**"

"the deferred exercise of the right to withdraw from the contract, which right is available as a matter of law to penalise failure to provide the policyholder with the documents and information listed in that same article,

is **discretionary** for the policyholder, **whose good faith is not required**"

132

– Episode 3 –
Bad faith: Always find it, never talk about it

Cass. 2è civ., 4 February 2010, No 08-21367

"while it is true that the person concerned **works in finance and insurance**, he took out the impugned contracts in his capacity as a 'natural person,' which is the only condition laid down by Article L132-5-1 of the Insurance Code for the policyholder to be able to withdraw from the contract,

without the need to distinguish between a **well-informed and an uninitiated** natural person

and **without** the need to address the **good or bad faith** of the natural person concerned"

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For the edification of first-year law students

the right to withdraw established by Article L132-5-1 of the Insurance Code is never susceptible of abuse and may be exercised **regardless of**

"any consideration of morality, good faith and fair dealing"

Court of Appeal of Versailles, 5 June 2008

134

Explanation: A discretionary right is said to be incapable of being exercised in bad faith: it is said to be insusceptible of abuse

Contrary to many decisions made by the

Cour de cassation

in other areas

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Changes in Russian insurance legislation

Dina Dmitrieva
D.Dmitrieva@ingo-ondd.ru
Alexey Bezdenezhnykh
A.Bezdenezhnykh@ingo-ondd.ru

Moscow, 2011

REFORMS IN INSURANCE LAW

-Creation of the global Russian regulatory state body of financial market (excluding only banking sector and auditing service)

-Creation of state export credit insurance agency

-Toughening of requirements to chartered capital of companies providing insurance and reinsurance services

REFORMS IN INSURANCE LAW

-Increase of terms stipulated by law for obtaining license for insurance and/ or reinsurance activity

-New rules with respect to withdrawal of license of insurance company or its suspension: the financial regulator obtained new competence

-Several amendments were introduced to the bankruptcy law of insurance companies

INGOSSTRAKH ONDD CREDIT INSURANCE

AIMS OF REFORMS

- anti-crisis measure

- additional secure for insureds

- consolidation of insurance market

- "wiping out" insolvent and fraudulent insurance companies

INGOSSTRAKH ONDD CREDIT INSURANCE

AIMS OF REFORMS

- financial improvement of insurance companies position

- efficient regulating, control and supervision of the financial market in Russia in general

-combat money laundering and terrorist financing

INGOSSTRAKH ONDD CREDIT INSURANCE

United supervisors

Federal Insurance Supervisory Authority

\+ Since March 04, 2011

Federal Service For Financial Markets

=

Global State Supervisory authority of financial sector

INGOSSTRAKH ONDD CREDIT INSURANCE

Russian state export credit insurance agency

- Since the beginning of 2011 – active phase of Russian ECA establishment
- Consultations with the market participants
- Proposals to the legislative body to amend tax legislation and currency exchange regulation, stimulating the usage of ECA's services

INGOSSTRAKH ONDD CREDIT INSURANCE

INCREASE OF THE CHARTERED CAPITAL OF INSURANCE COMPANIES

Since January 01, 2012 the minimum size of the chartered capital of insurance company should be ***120 000 000 RUR*** (apr. EUR 3 mln.). The corresponding law was adopted in November 2010

For companies, carrying out inward reinsurance transactions – minimum ***480 000 000 RUR*** (apr. EUR 12 mln.)

INGOSSTRAKH ONDD CREDIT INSURANCE

INCREASE OF THE CHARTERED CAPITAL OF INSURANCE COMPANIES

For companies, providing only services in the medical insurance only ***60 000 000 RUR*** (apr. EUR 1,5 mln.)

No special provisions for insurance companies covering credit risks.

INGOSSTRAKH ONDD CREDIT INSURANCE

BANCRUPTCY PROCEDURES of INSURANCE COMPANIES

-Accurate definition of non-usage of external management and financial sanation procedures in respect of insurance companies

-Additional ground for implementation of bankruptcy preventing measurers

-Setting up the concrete procedures of the transfer of portfolio in the frames of bankruptcy preventing measurers

INGOSSTRAKH ONDD CREDIT INSURANCE

Positive effects from the amendments:

-Aggravation of insurance companies' solvency level

-Increase of transparency and understanding of the bankruptcy process

-Decrease the level of insolvencies, including fictitious ones

INGOSSTRAKH ONDD CREDIT INSURANCE

THANK YOU FOR YOUR ATTENTION

Questions, please?

DLA PIPER

EVERYTHING MATTERS

UK HOT TOPICS

Charles Gordon

Appeals from Arbitration Awards

OEH v Generali

- Application of "Island Theory" to Business Interruption claims.

IRB Brasil v CX Re

- Interpretation of follow settlement clauses and whether sums paid by CX Re under compromise agreements were properly recoverable from reinsurers.

UK Bribery Act - Implications for Intermediaries and Underwriters

- Prospect of unlimited fines if cover holders offer bribes. Issues as to broker remuneration.
- What is a bribe?
- How do you protect yourself from criminal liability?

Fraudulent Claims

- Proposals for reform of the law to allow for forfeiture of fraudulent claims but not affecting the validity of other claims under the policy. Law Commissions for England/Wales and Scotland.

D&O

- Safeway Stores decision narrows scope for claims against directors to recover fines and penalties paid by a company.

Piracy

- Masefield AG v Amlin case confirms that capture of a vessel by pirates does not automatically give rise to a total loss.

Reforms to Litigation Costs

- Insurers have been hotly debating the issue of PI costs for years. There will now be major changes to prevent the recovery of success fees and insurance premium from defendants. Jackson Reforms.

Asbestos Liabilities

- Supreme Court in Sienkiewicz case confirms that any exposure to asbestos will be sufficient for a claim - unless insignificant. Important implications for causation tests.

Immunity of Court Experts and Expert Reports

- Supreme Court has now restricted the immunity of expert witnesses from liability for breach of contract or negligence.
- Another case has seriously restricted the privilege from disclosure of expert reports.

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Amsterdam, 26-27 may 2011

Insurance and Reinsurance Law:
Present Questions & Future Challenges

Pedro Pais de Vasconcelos
Lisboa - Portugal

Topics – D&O Insurance complex situation

1. The Directors of a major Bank are covered by a D&O Insurance
2. Following an internal conflict between the majority and an important minority of shareholders, several legal proceedings are pending:
   - One "derivative action" started by a shareholder, demanding compensation to be paid by a number of Directors to the Bank for damages caused by allegedly illegal operations;
   - Several liability actions started by minor shareholders against the same Directors, for loss of share value allegedly caused by those operations;
   - Criminal action started by public prosecutor against the same Directors for the same facts;

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Insurance and Reinsurance Law:
Present Questions & Future Challenges

Pedro Pais de Vasconcelos
Lisboa - Portugal

PRAGER DREIFUSS
Attorneys at Law

PRAGER DREIFUSS

Zurich – Bern – Bruxelles

Recent Developments in Switzerland

AIDA Europe Conference 2011, Amsterdam

Christian Lang

Topics

PRAGER DREIFUSS

I. Swiss Solvency Test and the Financial Crises

II. Conditions Precedent under Swiss Insurance Law

III. Pre-Contractual Misrepresentations – Another Trap for Insurers

Swiss Solvency Test and the Financial Crises

PRAGER DREIFUSS

- Swiss Solvency Test (SST) is comparable to Solvency II.
- Introduced in 2006 revision of the Insurance Supervisory Act.
- Implementation is about to be completed.
- Were the Swiss insurers better prepared for the Financial Crises?

Conditions Precedent under Swiss Insurance Law

PRAGER DREIFUSS

Default situation under the law:
The violation of a contractual obligation of the insured only allows the insurer to reduce the insurance benefits to the extent such violation has impacted the loss.

The admissibility of strict conditions precedent was unclear.

The Federal Supreme Court recently clarified that **strict conditions precedent are admissible**, even in the absence of an explicit waiver of the requirement of prejudice in the insurance contract .
(4A_349/2010 of 29 September 2010).

Conditions Precedent under Swiss Insurance Law

PRAGER DREIFUSS

Remaining Caveats:

Article 45 ICA: If no fault for the breach of an obligation is attributable to the insured, the violation cannot be held against the insured.

Article 29 ICA: The violation of the insured's obligation to reduce and/or control certain risks is only relevant if its violation had an impact on the loss.

Misrepresentation / non-disclosure

PRAGER DREIFUSS

Article 6 Insurance Contract Act
Consequences of violating the obligation to notify

1) If, when concluding the insurance contract, the person who is obliged to notify omits to notify or incorrectly notifies a significant risk factor which he knew or ought to have known and about which he was questioned in writing, the insurer is entitled to terminate the contract by written notice. The termination becomes effective upon delivery to the policy holder.
2) **The termination right expires four weeks after the insurer has come to know the violation of the obligation to notify.**
3) If the contract is terminated according to para. 1, the insurer's obligation to indemnify damages already occurred terminated, provided that the omitted or incorrect notification of the significant risk factor **has influenced the occurrence or extent of damages**. If the obligation has already been fulfilled, the insurer is entitled to restitution.
4) [...]

Misrepresentation / non-disclosure

PRAGER DREIFUSS

The old question as to when the 4 weeks start:

- Knowledge of the misrepresentation;
- Imputed knowledge;

The bad news:

- When the insured's bad faith becomes apparent.

.

Misrepresentation / non-disclosure

PRAGER DREIFUSS

Decision from the Federal Supreme Court (BGer 5C.50/2007):

The Insurer asked for certain specific information seven times within a 6 months period. The insured did not react.

The Federal Supreme Court held that under these circumstances it was obvious that the information was not provided because it would have revealed a pre-contractual misrepresentation, and that therefore the four weeks deadline started to run when the assured 's bad faith refusal of cooperation became apparent.

Misrepresentation / non-disclosure

PRAGER DREIFUSS

When does the insured's bad faith become apparent?

- After seven reminders?
- After 6 months?
- Somewhere in between?

The Federal Supreme Court's suggestion: The insurer can threaten termination for the case of continued non-compliance.

Excellent, that is exactly how insurers like to run their business!

Misrepresentation / non-disclosure

PRAGER DREIFUSS

Recommendation for policyholders:

If your insurer threatens to terminate the Policy,

don't take it personal!

NautaDutilh

AIDA Amsterdam 2011

stijn.franken@nautadutilh.com

NautaDutilh

The Netherlands

- Hot topics:
  - New legislation
  - Case law
  - Market trends

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New legislation

- New civil code on insurance law (2006):
  - 'Action directe'
  - Non disclosure: sanction
- New code on regulatory law (2007)
  - *De Nederlandse Bank*: prudential
  - *Autoriteit Financiële Markten*: market behaviour

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Case law

- *HR, NJ* 2006, 326 (Winterthur/Janssen):
  - 'licence-clause' liability aviation insurance?
  - 'primary description of coverage', no condition of guarantee
- *HR, NJ* 2006, 378 (Polygram/Royal):
  - damages caused by late notification?
  - to a 'very limited extent' proven: 10% discount

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Market trends

- Consolidation
- Unit linked life insurances: consumer claims
- Intermediaries

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Hot Topics in Israeli Insurance Law

Peggy Sharon, Adv.
Levitan, Sharon & Co.
Tel Aviv, Israel

Amsterdam – 27th May 2011

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Yigal Alon 57 Tel Aviv 67891, Israel
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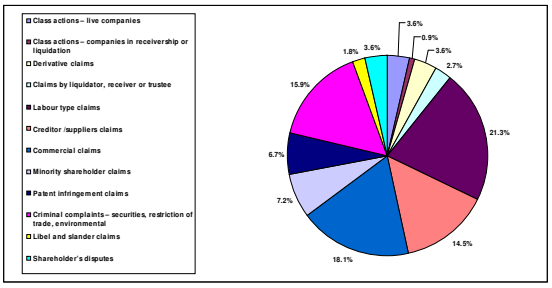
D&O Liability Insurance Claims Statistics



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Securities Claims – the Legal Environment prior to 17.1.2011

- Complex and expensive legal proceedings (against first league defence attorneys)
- Lengthy court proceedings (5-10 years)
- Imposing criminal liability usually required proof of criminal intent
- Limited number of criminal proceedings

The Law for Improvement of Enforcement Proceedings by the Securities Authorities (17.1.2011)

- The Securities Authority is authorized to instigate administrative proceedings for breach of the Securities Law – Investigation (unit of SEC), Adjudication (tribunal appointed by the SEC), Punishment (according to provisions of the Law).
- Liability does not require proof of criminal intent. Negligence is sufficient
- Tribunal friendly to the Securities Authority. Flexible procedural rules
- Sanctions – up to NIS 1 million – against D&O
  up to NIS 5 million – against company
- Possible compensation to injured parties (up to 20% of monetary sanction)

Implications on D&O Insurance

- Legal costs for defending administrative proceedings (no coverage for the administrative fines)
- Coverage for compensation ordered by the committee
- Expected increase of class actions based on SEC proceedings.

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The Commissioner of Insurance Directives – Recent Developments

The First Wave – Directives regarding Declination of Coverage 1998-2000

- Declination letter must include all reasons for declination
- An Insurer cannot rely on declination reasons not specified in the first declination letter
- New reasons can be raised only where based on new circumstances or where Insurer could not have known about them at the time of the original declination letter

Implications of the Commissioner's Directives in Court Judgements

The Supreme Court ordered to strike out the Insurer's defence allegations which were not raised in the original declination letter.

M.C.A. 10641/05 **Israel Phoenix Insurance Co. v. Haviv Asulin** (4.5.06)

The New Directives – Claims Handling

(Health and Personal Insurances – 1st June 2011)

- After receiving notice of claim, the insurer must send the insured as soon as possible a list of required information.
- 30 days after receipt of the insured's documentation, the insurer must send its decision regarding coverage or detailed reasons for required extension of time
- Notifications sent to the insured must include:
  - The date on which the insured's claim is expected to prescribe
  - The Insured's right to dispute the insurer's decision and the manner in which it can be done

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Claims Handling (cont.)

- The insurer shall notify the insured of its intention to file subrogation claims and update regarding outcome of proceedings
- Liability insurers shall notify the insured of their intention to pay a third party
- Liability insurers shall provide third parties all information required as to the existence of an insurance policy insuring a certain person or event

Recent Supreme Court Judgements

Non Disclosure Prior to Policy Inception

- Deterioration in an insured's health after filing a proposal form:
  - 29.10.97: the insured signed a proposal form including health declaration
  - 13.12.97: the insured was hospitalized and diagnosed with Crohn's disease
  - 1.1.98 : the policy came into force

The Supreme Court: the insured's failure to notify insurer of deterioration in his health **does not release insurer from liability**

MCA 1014/08 **David Cohen v. Menora Ins. Co.** (2.2.2011)

Automatic Renewal of Policy

- Expiring policy period – 1.1.2004 to 31.12.2005
- 14.12.2005 – the insurer sent the broker an offer for renewal enclosing a draft policy for 2006. No response was received.
- 19.1.2006 – burglary and theft in the insured's business

The Supreme Court: according to the practice with the broker, the policy was automatically renewed on 1.1.2006 and thus coverage applies.

MCA 8711/10 **Shirbit Ins. Co. v. Kol Bo Aluminum** (3.4.2011)

Burden of proof of insurance fraud

- Three conditions for proving insurance fraud:
  (a) The insured provided false or untrue facts
  (b) The insured was aware of the fact the information was untrue
  (c) The insured acted with the intent to received money to which it was not entitled
- The Supreme Court: once the insurer proved conditions (a) and (b), the insured is required to prove that it acted with an intention other than deceiving the insurer = shifting the burden of proof.

MCA 9215/10 **Itzhak Feldman v. the Phoenix Ins. Co. Ltd.** (12.2.2011)

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Physical Damage is not Expenses for Replacement

Costs for tracing leakage from faulty tubes are not covered under Products Liability Policy as being pure financial loss

C.A. 1490/08 **Oil Products Pipelines Ltd. v. Middle East Tubes Co. Ltd.**


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Giuseppina Capaldo

Portability of loans and transfer of insurance policies

Insurance policies as a guarantee for bank loans

- The so-called "**loan policies**" as an insurance product collateral to real and personal securities of credit, proposed by the bank at the time of granting a personal loan or loan targeted at purchasing immovable property
- Policies are taken out by agreement for a period equal to that of the loan and their cost is usually spread in instalments, with an incidence on the total monthly cost of the loan.
- The concrete **Italian transactional practice** highlights the presence of different insurance products linked to a main loan agreement involving costs and a more or less articulate degree of complexity.

Insurance policies as a guarantee for bank loans

The different types

- **Fire/explosion policy**: it is functional to the coverage of the risk of a damaging event that could affect the property; it incorporates a form of guarantee to both the bank against the risk of damage to the assets and to the customer, who benefits from the opportunity to see his property restored .
- **Life insurance policy**: it is usually taken out in the perspective of a long-term loan. There is a widespread presence of specific insurance products providing for the reimbursement of the instalments by the insurance company instead of the customer including in the event of job loss.
- **Temporary insurance policy on death**: it is aimed at guaranteeing a capital in the event of death of the policy-holder (customer) in the period of disbursement of the loan. This policy guarantees the heir at the time of the bequest of the property
- **Surety policy**: it consists of the guarantee granted by the insurance company in the event that the customer is insolvent in paying back the debt to the bank.

Portability of bank loans: purposes

- **Portability of bank loans**, (introduced by the Bersani reform package *bis* on deregulation, now transfused in art. 120 *quater* of the Consolidated Banking Act) as an instrument to develop a **real competitive comparison among banks** in offering services and allow customers to get an **improvement in credit conditions**

4

Portability of bank loans : structure of the transaction

- Through this transaction, **the customer can "transfer"** - **free of charge** and keeping the same real and personal securities - **a loan from one bank to another** with which s/he can discuss economic conditions (e.g. questions relating to rate and / or duration) other than those of the original loan .
- The actual implementation of the portability institution has met many difficulties in the **Italian banking system**, characterized by a high concentration of companies as well as by the presence of numerous **hindrances to customer mobility**

5

Portability of bank loans : the problem of insurance policy handling

- In the event that the loan is assisted by an insurance coverage whose premium was paid outright in advance (**single premium**) for the entire duration of the loan, there is a risk for the customer of **losing the refund of the premium with regard to the part not yet enjoyed and having to take out another policy with the new bank**: the cost of redemption of the policies becomes a further deterrent to the actual implementation of the rules on loan portability

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Regulation No. 35/2010 of the ISVAP (Supervisory Body for Private Insurance) on information requirements and advertising of insurance products

- **Art. 49** of the ISVAP Regulation No. 35/2010 provides for **compulsoriness for insurance companies to repay the portion of premium not enjoyed** in the event that the loan of financing is paid off or in case of portability thereof to another bank .
- Alternatively, if the contracting party chooses the portability of the loan or financing and does not want to take out another insurance policy with another insurance company, s/he can bring to an end the previously signed contract: therefore, the insurance company (of the current contract) **must simply change the beneficiary (i.e. the new credit institution) at the request of the contracting party.**
- The regulation is effective as of December 1st 2010

7

Conclusions

- The intervention of the ISVAP urged by trade associations as well as by the Italian insurance industry itself highlights the need for **greater transparency in the regulatory framework** in terms of insurance policies linked to bank credit

8

Conclusions

- The same practical result might have been reached by way of application through a more careful consideration of the cause of each insurance policy in order to check whether the **interest in a separate coverage of his/her personal risk of insolvency for the customer** is pre-eminent or the policy is meant as a useful tool to enhance **the overall credit risk guarantee for the bank** and, in this sense, the insurance coverage proves closely bound to the assets and to the circulating alternations of the bank credit.

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Conclusions

- Consequently, in order to assess the destiny of insurance policies in case of loan portability, it seems necessary to set the question in terms of **contractual linkage** and **joint economic transaction to strengthen the loan security**. For this reason, the **transfer of the loan agreement** also justifies a **transfer** to the new bank **of the relevant insurance policies** until the natural expiration thereof, as required by law in terms of primary real and personal securities collateral to the credit.

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The Continuing Duty of Good Faith

Jan Heuvels, Head of Reinsurance,
Ince & Co LLP

AIDA Europe Conference - Amsterdam
26-27 May 2011

Whilst it is clear under English law that the doctrine of utmost good faith applies to the formation of the insurance contract (including renewals), there has been considerable debate over whether it applies during the claims process and, if so, the remedies for breach.

In 1985, hull war-risk insurers controversially persuaded the Commercial Court (Hirst J) that dishonesty by a broker pursuing a claim on behalf of the owner of a vessel amounted to a breach of the duty of utmost good faith as set out in section 17 of the Marine Insurance Act 1906, thereby enabling insurers to avoid the contract *ab initio* (*Black King Shipping Corp v Massie (The Litsion Pride)* [1985] 2 Lloyd's Rep 437).[1] However, subsequently the courts have taken a more restrictive view. In *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd (The Star Sea)* [2001] Lloyd's Rep IR 347 the House of Lords went the other way and rejected hull insurers' argument that allegedly fraudulent non-disclosure during litigation itself justified avoidance, as a breach of a continuing duty of good faith. As will be seen below, the law has continued to evolve.

The scope of the assured's duty

Under section 18 of the Marine Insurance Act 1906, the assured is under a duty to disclose to the insurer, before the contract is concluded, *"every material circumstance which is known to the assured…."* Prior to *The Star Sea*, it was a matter of debate as to whether the assured continued to have a duty of disclosure once the contract had incepted. However, in that case, the House of Lords confirmed authoritatively that the assured's duty of utmost good faith in the claims context is no wider than a duty not to make or present a fraudulent claim.

What constitutes a fraudulent claim?

No doubt there are others, but the circumstances in which English courts have made findings of fraud include the following:

- Where the assured has caused a loss deliberately.
- Where the assured has invented a loss.
- Where the assured has suffered a genuine loss but presented the claim in such a way as to disguise the fact that the insurer might have a defence.
- Where the assured has suffered a genuine loss but knowingly exaggerated the claim.
- Where the assured has suffered a genuine loss but deployed a 'fraudulent device' in support of it.

Exaggerated claims

The fact that a claim has been exaggerated does not of itself mean that it is fraudulent. English judges are prepared to accept that a certain amount of horse trading goes on between an assured and its insurers. The difficulty is in where the line is drawn. Generally, the courts look at the degree to which the claim has been inflated; the greater the exaggeration the easier it is to impute a fraudulent intent.

In *Orakpo v Barclays Insurance Services* [1995] LRLR 443, Lord Justice Hoffman stated:

> *"..one should naturally not readily infer fraud from the fact that the Assured has made a doubtful or even exaggerated claim."*

[1] Section 17 of the Marine Insurance Act 1906 provides that, ""*A contract of marine insurance is a contract based on the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party."*

But if there is fraudulent exaggeration, Sir Roger Parker said:

> *"If he is fraudulent, at least to a substantial extent, he will recover nothing, even if his claim is in part good."*

In *Danepoint v Underwriting Insurance* [2006] Lloyd's Rep IR 429, an assured claimed for loss of rent in relation to a property divided up into 13 flats, each of which had been sublet. The assured claimed that all flats had been vacated following a fire at the property and his loss of rent claim was based on all of the flats being unoccupied. This was plainly untrue; a lot of the flats remained occupied. The judge (Coulson J) concluded that the evidence in favour of fraud was overwhelming. He held that an exaggerated claim would be categorised as fraudulent where:

- The exaggeration was more than trivial;
- The assured was dishonest – exaggeration of itself did not establish dishonesty; there had to be an intention to deceive the insurer, or recklessness; and
- The fraud must have been material, in that it would have had a decisive effect on the readiness of the insurers to make payment.

Fraudulent devices

In *Agapitos v Agnew (The Aegeon)* [2002] Lloyd's Rep IR 573 hull insurers made an application to amend their defence in a claim regarding a fire aboard the vessel. They argued that the claim itself was forfeit at common law. The Court of Appeal held that the common law offered no private remedy for dishonesty during litigation and disallowed the amendment.

However, it added a key passage. If an assured had used a 'fraudulent device' - such as a falsified document or false evidence - to support his claim or to better his chances of a favourable settlement before litigation, then some rather old cases showed that insurers could invoke a common law defence of forfeiture. In other words, the claim where dishonesty had been used would be irrecoverable because insurers could invoke this forfeiture defence. The Court of Appeal perceived the need to protect insurers from dishonesty.

What Lord Justice Mance said in *The Aegeon* was that the law should treat as sufficient any lie or other fraudulent device, including forgery or concealing or destroying evidence:

- Directly related to the claim to which the fraudulent device relates; and
- Which is intended to improve the assured's prospects of obtaining a settlement or winning the case; and
- Which would, if believed, tend *"to yield a not insignificant improvement in the Assured's prospects…"*

These principles have been approved and applied in subsequent cases.

Subsequent withdrawal of a fraudulent claim

If a fraudulent claim is subsequently withdrawn, a question arises as to the consequences for the assured. This was considered by HHJ Seymour in *Direct Line Insurance v Fox* [2010] Lloyd's Rep IR 324. Mr Fox made a claim against Direct Line in respect of fire damage to his property. The claim was settled in part, and the second part of the loss adjustment took the form of a written agreement by Direct Line to pay a further sum,

once that had been vouched. Mr Fox put forward a false invoice in support. Direct Line had suspicions about its authenticity and informed Mr Fox that the loss adjusters would be making a further visit to verify the works. At this point Mr Fox wrote to Direct Line attempting to retract that part of the claim. The judge said, obiter, that *"it is no part of English law that the consequences of the rule concerning fraudulent claims can be mitigated in the case of retraction"*. It is fair to say that the weight of authority favours that view.

Interim payments

What effect does the discovery of fraud have on interim payments already made? The basic rule is that a claim, if made fraudulently, is forfeit (see below). This is simple enough when the claim has not been paid – the insurer simply never pays, provided he can make good this defence. But what if the claim is already part paid? Even more challenging, what if that part was paid before there any fraud was committed?

In *Axa v Gottlieb* [2005] Lloyd's Rep IR 369, insurers made payment on account for a property loss which to that extent was legitimate. The assured gilded the lily with a second claim (arising from the same fortuity) for alternative accommodation. That was supported by a fraudulent device – dishonest forged invoices - so that failed. The Court of Appeal also unanimously concluded that the payment on account was indeed returnable. Were the conclusion otherwise, the Lords Justice felt that an assured would not be exposed – as they felt it ought to be – to the proper rigour of the law. In short, an assured could collect the easy bit and then lie with impunity about the rest. By the ruling that payments on account are forfeit in the event of a later fraud in relation to the same claim, the assured remains at risk of losing not only the later fraudulent element, but the earlier 'honest' element.

Claims 'tainted' by dishonesty

If a claim for, say, loss of items by theft is partly genuine and partly fraudulent, the law says the claim is not severable. Thus if the degree of fraud in relation to one part of the claim is substantial, then the entire claim will be forfeited.

In *Galloway v Guardian Royal Exchange* [1999] Lloyd's Rep IR 209, Mr Galloway suffered a burglary and submitted a claim not just for £16,133 (the probable true value of the loss) but an additional £2,000 claim for a computer. In fact there had been no theft of a computer. There had been no computer at all. The Court of Appeal held that the degree of fraud was sufficient to render the entire claim fraudulent.

Corporate assureds

In order to establish fraud on the part of the assured, it is necessary to prove it knew that the claim (or the evidence deployed in support of it) was false. This is straightforward where the assured is an individual but more complex when a company is involved. In *The Star Sea*, the Court of Appeal adopted the test applied by Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] AC 500, namely that it is the person(s) whose acts should, under the general rules of attribution, count as the acts of the company. In the case of corporate assureds, this will be whoever is the *"directing mind and will"*.

Co-assureds

The position where a fraudulent claim is made by one co-assured without the knowledge of the other was considered by the Court of Appeal in *Direct Line Insurance Plc v Khan* [2002] Lloyd's Rep IR 364. In this case, the home of the co-assureds, Mr and Mrs Khan, was destroyed by fire. Mr Khan made a claim for rent, supported with forged documents.

In fact no such rent was paid because he owned the alternative accommodation himself. The Court of Appeal held that the consequence of Mr Khan's fraud was forfeiture of the entire claim, despite the fact that Mrs Khan had been entirely innocent of any wrong doing. (This should be contrasted with composite insurance, where each insured has a separate contract with the insurers and the fraud of one insured will not prejudice the claims of another in respect of the same loss: *Arab Bank plc v Zurich Insurance Co* [1999] 1 Lloyd's Rep 262).

The insurer's remedies for breach

As discussed above, prior to the decision of the House of Lords in *The Star Sea*, it was open to question as to whether insurers could avoid the policy as a result of fraud on the part of the assured in the presentation of the claim. It is now beyond question, following a number of decisions including those discussed above, that the insurer's remedy for a fraudulent claim is forfeiture of the whole claim, including any part of it which may otherwise be good.

The insurer's duty

Most cases on good faith are concerned with the assured's duty rather than the insurer's. However, there are tentative suggestions in the case law that in dealing with claims insurers should make enquiries, not act arbitrarily and not take into account extraneous circumstances. For example, in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd* [2001] Lloyd's Rep IR 667, the reinsurance policy contained a claims co-operation clause which stated that *"no settlement and/or compromise shall be made and liability admitted without the prior approval of reinsurers"*. Mance LJ held that the reinsurer's right was *"to be exercised in good faith after consideration of and on the basis of the facts giving rise to the particular claim, and not with reference to considerations wholly extraneous to the subject-matter of the particular reinsurance or arbitrarily."* He also gave examples of when an insurer's behaviour might amount to bad faith, including deliberate delay. In *Eagle Star Insurance Co Ltd v Cresswell* [2004] Lloyd's Rep IR 537, the Court of Appeal held that the discretion afforded to reinsurers by a claims control clause in the policy was tempered by the doctrine of good faith.

The assured's remedies for breach

What are the assured's remedies for breach of the duty by the insurer? Simply put, none with teeth. In *Banque Financiere v Westgate Insurance Co* [1990] 2 Lloyd's Rep 377, the Court of Appeal confirmed that where an insurer breaches its duty of good faith, the policyholder is not entitled to damages for the loss suffered. The decision has been much criticised but remains good law. The argument that English law recognises no claim for damages for breach of a policy went in insurers' favour in an otherwise unsuccessful hull & machinery case (the *Italia Express* [1992] 2 Lloyd's Rep 281) and was reaffirmed after limited argument by the Court of Appeal in *Sprung v Royal Assurance* [1999] Lloyd's Rep IR 111.

Moreover, whilst an assured who has not been paid a valid claim is entitled to sue the insurer for the money owed, plus interest, it is not entitled to damages for any further loss suffered through the delay in receiving the money. Under English law, insurance contracts are an exception to the general rule that a party in breach of a contract is liable for damages for foreseeable losses.

The duration of the duty of good faith

The House of Lords confirmed in *The Star Sea* that the duty of utmost good faith will not survive beyond the commencement of litigation. This is firstly because the trust which underpins the insurance relationship has effectively been destroyed and secondly because

once legal proceedings have been commenced, the parties' relations will be governed by the procedural rules of the court. Whilst there do not appear to have been any reported cases on the point, it can be assumed that the position is the same with regard to arbitration proceedings.

Dishonest conduct at the litigation/arbitration stage

There are a number of ways in which dishonesty in proceedings can be controlled:

Contempt of court

Statements of Truth were a 1999 innovation required for pleadings, disclosure lists and the like which put them almost on a par with sworn evidence. Civil Procedure Rule 32.14 provides that:

> *"(1) Proceedings for contempt of court may be brought against a person if he makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth."*

It did not take long for the courts to make plain that this permits a person to be pursued for contempt of court in civil proceedings if, without an honest belief in its truth, he made, or caused to be made, a statement in any document he verified by a Statement of Truth. It is also worth noting the expression *"causes a false statement to be made"*. That exposes the client who assures his lawyer that a pleading is true, while knowing it is not, so as to get the lawyer to sign it.

Perjury

Perjury is, if anything, even more serious than contempt, as perjury is a criminal charge for which imprisonment is almost a certainty.

In *Kelly v Churchill Car Insurance* [2007] RTR 309, a car driven by a Churchill assured driver caused damage to Kelly's vehicle. On behalf of its negligent assured, Churchill paid Kelly an agreed £1,500 for vehicle damage. Dissatisfied, he sued Churchill for £15,000 damages. The county court awarded £1,000 for lost earnings and £1,800 for pain and suffering, plus some costs. Churchill sought permission to call further evidence at an appeal. It had discovered that Kelly's lost earnings claim was imaginary. He had been dismissed from his job not because of the accident but instead for stealing. The 'letter of dismissal' supporting his false story was forged.

During Churchill's application for leave to call this new evidence, Gibbs J warned Kelly that he was not obliged to say anything unless he wished to do so and that anything he did say might be used against him. Kelly did not return to Court the next day. Gibbs J gave Churchill permission to call that fresh evidence at the appeal. Having allowed that evidence in, Gibbs J then made orders going beyond awarding Churchill its costs. Naturally he disallowed the £1,000 damages for lost earnings. The £1,800 personal injury damages had been based, Gibbs J concluded, on Kelly's say-so only. Given Kelly's demonstrable perjury, Gibbs J was not satisfied there was reliable evidence to support these. They were also set aside. Finally, he directed that the matter be referred to the Crown Prosecution Service to consider prosecuting Kelly for perjury and/or perverting the course of justice.

Adverse costs consequences

It is a long established principle in England that a losing party usually pays the winning party's legal costs – the so called 'costs follow the event' rule. However, in deciding whether to make a different order the court is entitled to take into account the conduct of

the parties. The courts have shown over recent years that they will express their disapproval of dishonest claims in adverse costs orders. For example, in *The Ikarian Reefer* [1995] 1 Lloyd's Rep 445, the Court ordered the owner personally to pay underwriters' costs, on an indemnity basis, for having funded an insurance claim for was proved to be a scuttler.

Jan Heuvels
Ince & Co LLP
jan.heuvels@incelaw.com

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Utmost Good Faith – The Continuing Duty of Good Faith
The U.S. Perspective

Victoria H. Roberts

In contrast to the U.K. and Europe, more often the focus in the United States is not on the insured's conduct in applying for insurance but rather on that of the insurance company in resolving claims. Further, there is no federal law which governs a standard of conduct for either party. Therefore insureds and insurers alike are faced with differing standards of review by the various states and, in many states, different legislative schemes which govern their conduct.

It is true that an insured in the U.S. has a duty to be honest in its dealings with the insurer, during both the underwriting process and the claims process. This falls short of the "utmost good faith" which is an ongoing obligation of an insured in the UK and elsewhere in Europe. In the U.S., the burden is clearly on an insurer to prove that an insured has provided false information when the carrier determines that it is faced with a risk different than that contemplated during the underwriting process. Usually this happens when a claim is presented whose facts and investigation reveal that the insured risk is not what had been contemplated. In that situation, statutes and case law across the United States fall into two general categories.

In the first group, an insurer must only prove that the risk would have been underwritten differently than it was if the true facts had been known, but the missing or false information is not material to the claim presented. This can be as minor a distinction as a different premium that would have been charged, even if the carrier agrees that it would have been an acceptable – albeit different – risk than that actually underwritten. An example of such an instance might be a roofer which is actually working on structures of more than 3 floors although the application for insurance indicated that the roofer's work was restricted to shorter buildings. A claim arises out of a slip and fall on the first floor. In these jurisdictions, even though the insured was untruthful, the insurer may not deny that claim because the underwriting issue had nothing to do with the claim presented.

In the second category are claims that can be denied and policies rescinded only if the misinformation presented by the insured during the underwriting process was material to the facts of the claim presented. The example here is a risk underwritten as an apartment house. A claim is presented for liability arising out of a drug overdose by a resident. It turns out that the "apartment house" was, in fact, a drug rehabilitation center. The underwriter's testimony was unequivocal that the risks presented by a halfway house did not meet the company's

underwriting criteria and would never have been accepted. Under these facts, it is clear that the mis-information, or lack of information, presented in the underwriting process was entirely relevant to the claim presented. In addition to denying the claim, the carrier also has the right to rescind, provided the insured is made whole financially, i.e. that all premium, commission and applicable taxes are refunded. In this instance, the policy is void ab initio.

These are the circumstances in which American jurisdictions focus attention on the conduct of the insured. However, it is far more common that the conduct of the insurer during the claim handling process is the subject of judicial scrutiny. Bad faith claims cost U.S. carriers a great deal of time and money. The vast majority of claims are resolved in the normal claim handling process with no complaint by the policyholder. However, the few which result in bad faith litigation are a very costly exposure to insurers both in terms of potential jury verdict and the time and expense involved in litigating.

In general, the basis of a bad faith claim involves an unreasonable denial or delay in providing benefits due under a policy. This may arise from various sorts of alleged conduct, including:

- Misrepresenting policy provisions
- Failing to acknowledge communications with reasonable promptness
- Failing to implement claim handling standards
- Failing to conduct a reasonable investigation
- Not making good faith settlement negotiations
- Requiring unreasonable documentation of claims.

Every state has statutes and/or regulations which define unfair claim practices under which policyholders can file bad faith claims in either the state or federal courts. The majority of states also permit either tort or contact actions (or both) against a carrier for bad faith arising from claim handling of either first party or third party claims. In addition, 11 states allow third party claimants to bring a direct action against a carrier either as a tort or under statute or both. Finally, all but 3 states (Nebraska, New Hampshire and Ohio) permit a punitive damages claim to be brought in addition to a bad faith claim if a jury finds that the carrier's conduct was particularly egregious. Thirteen of those states cap or limit the amount of punitive damages which can be assessed in such a situation.

Each state varies greatly in how difficult an environment is presented in terms of bad faith claims, but it is likely that the following are the most problematic for insurers: California, Florida, Washington, Texas, Oklahoma and West Virginia. In contrast, the New York state appellate courts have not upheld a trial court finding of bad faith in several years. It is critical to consult counsel in whatever jurisdiction you are involved to determine the standards applicable to a determination of an insurer's bad faith conduct.

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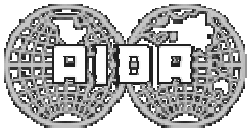

Paper on the continuing duty of good faith in Danish and Nordic Law

Paper written and presented by attorney-at-law, partner Torben Bondrop, Plesner Law Firm, Amerika Plads 37, 2100 Copenhagen, Denmark, email tbo@plesner.com

Introduction

The Danish Insurance Contracts Act contains a number of rules about the insured's duties in the post-contractual relationship between the insured and the insurer.

The aim of these provisions is to reduce the risk of insurance events and limit the loss when an event has occurred. The provisions contain rules about increase of risk, precautionary measures, prevention and reduction of loss, together with rules that aim to prevent insurance fraud although insurance fraud is not subject to regulation under this part of the Insurance Contracts Act.

Rules of material change in risk

The relevant articles in the Insurance Contracts Act safeguards the insurer's interest in preventing and regulating a material increase in the risk during the period of cover. The provisions concerning increase in risk are contained in Sections 45-50, and include a number of duties for the insured not to cause a material increase in the risk.

The provisions about increase in risk supplement the provisions on the duty of disclosure in Sections 4-10 of the Insurance Contracts Act, and concerns matters that occur after the conclusion of the insurance contract.

A material increase in risk is defined in Section 45(1). Certain conditions must be met in order for the insurer to be able to rely upon an increase in risk in non-life insurance. The three main conditions are:

(i) the change must relate to a circumstance stated specifically in the policy, i.e. "the building has a hard roof" (as opposed to a thatched roof),
(ii) the change must be of such nature that it increases the risk of the occurrence of the event insured against, i.e. the risk of fire, and
(iii) the risk of the occurrence of the event must be increased to an extent beyond matters that the insurer is assumed to have taken into account when concluding the insurance contract (the test of materiality).

When a material increase of risk has occurred the insurer will not be liable if the insurer would not have accepted the cover, had the increase of risk been known prior to the conclusion of the insurance contract.

If on the other hand the insurer would have accepted the risk, but on different terms, the rule of pro rata liability is applicable, cf. Section 45(2). According to this rule, the insurer is liable to the extent that it would have accepted the risk, against the premium paid, in the event of the increased risk existing upon the conclusion of the insurance contract.

In marine and other transport insurance, the rule of pro rata is replaced by the rule of causation, cf. Section 45(3). Under this rule, the insurer is liable only to the extent to which the insured can prove that the increase in risk did not influence the occurrence of the event or the size of the loss.

Where the increase in risk is not caused with the consent of the insured, the main rule is that the increase in risk is of no consequence to the insurer's liability. However, Section 46 of the Insurance Contracts Act states that when the insured becomes aware of the increase in risk, he must notify the insurer. If he fails to do so, the increase in risk is regarded to have occurred with the consent of the insured from that time onwards, with the in Section 45 mentioned legal consequences.

Under Section 47 of the Insurance Contracts Act, the insurer is always entitled to terminate the insurance contract with short notice in the event of an increase in risk caused with or without the consent of the insured.

Rules of precautionary measures

The insurance policies frequently stipulate that the insured must observe certain precautionary measures in order to prevent or reduce a potential loss. These duties are hence the result of the general insurance conditions and not the Insurance Contracts Act.

According to Section 51 of the Insurance Contracts Act, certain conditions must, however, be met in order for the insurer to be able to rely upon a failure to take such precautionary measures stipulated in the insurance policy. The main conditions are:

(i) The insurance policy itself must stipulate the precautionary measures that are to be taken,

(ii) the precautionary measures to be taken must be specified, i.e. "The insured shall install sprinklers in the warehouse" (more general statements, i.e. ""take due care of the premises" have no effect),

(iii) the precautionary measures must be aimed at preventing or reducing a potential loss.

If the policyholder through negligence fails to take such precautionary measures, the insurer is only liable to the extent that the insured can prove that the occurrence of the insurance event or the size of the loss was not attributable to his failure to take precautionary measures, but to other circumstances, i.e. a rule of causation.

The burden of proof lies on the insurer to prove that the policyholder negligently has failed to take precautionary measures.

Duty of mitigation

When an insurance event has occurred, or when there is an immediate risk of an event occurring, the insured has a duty to the best of his ability to prevent or reduce the loss, cf. Section 52 of the Insurance Contracts Act. If the insurer has made specific directions, these must be observed to the extent possible. If the insured fails to observe this duty intentionally or by way of gross negligence, the insurer will not be liable for any loss, which could have been prevented.

Fraudulent claims

As a main rule in Danish Insurance law fraudulent claims do not exempt the insurer from liability under the insurance contract. Consequently, insurance fraud in form of fraudulent claims is not subject to regulation under the Insurance Contracts Act. However, this constitutes no bar to an action for damages submitted by the insurer. If the insured makes a fraudulent claim, he can furthermore be punished according to the Danish penal code.

In Danish insurance case law it is assumed that the insurer can reserve the right to be exempt from liability, partially or totally, in case of insurance fraud when presenting a claim. Consequently, the insured has a post-contractual duty of good faith when presenting a claim.

Such terms are, however, not to be interpreted literally. Section 23 of the Insurance Contracts Act stipulates that such terms can be overruled by the courts. In Danish insurance practice, the sanction is normally restricted to, that the indemnification will be reduced with the amount which the insured attempted to defraud.

In more extreme cases the fraud can lead the courts to decide, that the insurance event has not occurred, because the court has lost any confidence in the insured's explanations.

The Danish conditions of insurance rarely contain terms about fraud. This fact might be attributed to the existence of Section 21 (2) and 22 of the Insurance Contracts Act, which gives the insurer the right to reduce the compensation to the insured if he is not fully co-operating with the handling of the claim, including giving the insurer all information at his disposal necessary for the correct handling of the claim. The indemnification will be reduced corresponding to the level of proper documentation the insurer has received.

The legal position in Denmark, Finland, Iceland, Norway and Sweden

The Danish Insurance Contracts Law of 1930 is a result of a legal co-operation with Finland, Norway and Sweden in the period 1915-1925 where commissions in the four countries prepared a common draft which resulted in four laws, substantially consistent with each other. In the middle of 1970's each of the four countries appointed a Committee in order to contemplate a revision of the Nordic acts. This had different results.

Denmark

Denmark chose not to do anything because Denmark was awaiting an initiative from EU, which Denmark had joined in 1972 as the first of the Nordic countries. Since then there has been no initiative from EU and Denmark has made do with limited updating of particular sections in the Danish Insurance Contracts Act.

Finland

Finland adopted a new Insurance Contracts Act, "Act No. 543 of 28th June 1994 on Insurance Contracts". The Finnish Insurance Contracts Act distinguishes between non-life insurance and personal insurance. The regulation on the duty of good faith after inception is more favourable towards the insured than in the old 1933 act.

Iceland

In 1954 Iceland adopted a law on insurance contracts, which was closely connected with the original Insurance Contracts Acts based on the 1925 draft in the other Scandinavian countries.

On 1 January 2006 Iceland adopted a new act on Insurance Contracts (act. No. 30/2004). This act is inspired by the Norwegian Insurance Contracts Act.

Norway

Norway has enacted a new Insurance Contracts Act, "Act No. 69 of 16th June 1989 on Insurance Contracts", which came in force on 1st of July 1990. The provisions concerning the insured's duty of good faith after inception are more generous towards the insured than in the old act.

Sweden

A new Insurance Contracts Act "Försäkringsavtalslag 2005/104" came in force in Sweden in 2006. The statute replaced the former Insurance Contracts Act of 1927, which was the original deriving from the common draft from 1925 between the four Scandinavian countries.

As regards certain non-life insurances which are taken out by consumers, it was formerly the Consumer Insurance Contracts Act which should be applied. Consequently, there were two applicable Swedish Insurance Contracts Acts.

The new Insurance Contracts Act covers all insurance: Consumer insurance, non-life insurance and life-insurance. As for the duty of good faith one can probably describe the most relevant change as being the introduction of rules of reasonability at the discretion of the courts favouring the insured.

Amsterdam, 27 May 2011

Torben Bondrop
Attorney-at-law, partner

What if an Oil Spill Occurred on Land in Europe or in European Waters?

Valerie Fogleman
Consultant, Stevens & Bolton LLP
Professor of Law, Cardiff University

I. INTRODUCTION

Liability for remediating environmental damage in the European Union ("EU") is likely to increase as a result of the Deepwater Horizon oil spill in the Gulf of Mexico on 20 April 2010. Following the spill, the European Commission began an examination of the safety of offshore oil and gas activities as well as the extent of liability if a similar spill was to occur in the EU. The examination occurred at the same time that the Commission was preparing a report on the Environmental Liability Directive ("ELD"),[1] the EU law that imposes liability for preventing and remediating environmental damage. The Commission, therefore, considered whether to extend liability under the ELD to cover spills from offshore drilling. In addition, the Commission considered whether to re-examine the potential introduction of mandatory financial security for costs that would be incurred in remedying environmental damage in the context of the potential for a serious oil spill in the EU.

This paper examines liability under the ELD for an oil or chemical spill. First, it provides an overview of the ELD, focusing on the remediation of environmental damage from such spills and noting differences between individual Member States ("MS") in responding to them under the ELD. The paper also examines the gap that has been identified in the ELD for marine oil spills and the potential for the European Commission to propose amendments to fill that gap, to propose other amendments to the ELD and to propose a system of harmonised financial security. The paper concludes by examining current and potential future liability under the ELD for oil and chemical spills on land in Europe and in European waters.

II. ENVIRONMENTAL LIABILITY DIRECTIVE

The ELD, which entered into force on 30 April 2004, is the first EU legislation specifically based on the "polluter pays" principle.[2] A major reason for enactment of the ELD is the creation of liability under EU law for preventing and remediating environmental damage resulting from oil and chemical spills. For example, in 1986, the pollution of the Rhine by chemicals from the fire at the Sandoz facility in Basel, Switzerland, led the Council and the European Parliament to adopt resolutions requesting the European Commission to propose legislation to create civil liability for environmental damage.[3] The oil spills from the *Aegean Sea* off north-west Spain in December 1992 and the *Braer* off the Shetland Islands in January 1993 again led the

[1] Directive 2004/35/CE of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage, OJ L143/56 (30 April 2004).
[2] See European Commission, Environmental Liability "Commission welcomes agreement on new Directive" IP/04/246 (20 February 2004).
[3] See L. Krämer, *Focus on European Environmental Law* (Sweet & Maxwell 2nd ed. 1997) 147 (citing European Commission, Bulletin of the European Communities No. 11/1986, para 2.1.146); [1987] OJ C7/116).

Council to request the Commission to examine the introduction of proposed legislation creating civil liability for such damage.

A. Background

The enactment of the ELD was lengthy and controversial. Differences between members of the Council and also between the Council and the European Parliament, concerning the form of the ELD and, indeed, whether it should be enacted at all, surfaced early and continued throughout the ELD's long history. As a result, the ELD does not establish a liability system that creates a level playing field across the EU. Instead, not only are there the usual differences to be expected between the law of individual MS in transposing a Directive;[4] the ELD itself contains options to be selected by MS.

The ELD is a public law system. That is, it directs MS to delegate power to competent authorities to implement and enforce the regime. In addition, it requires operators who have caused an imminent threat of, or actual, environmental damage to prevent or remediate that damage and to notify the relevant competent authority of such damage. As a public law regime, the ELD does not impose liability for property damage, bodily injury or economic loss.[5] Although early proposals for the ELD would have created such a civil liability system, these were dropped by the Commission in July 2001.

Even after the ELD finally entered into force on 30 April 2004, the controversy surrounding it, and the delays in its implementation, continued. These delays resulted in the European Commission bringing infringement proceedings against 23 MS for failing to transpose the ELD by 30 April 2007, and the European Court of Justice subsequently issuing judgments against seven MS.[6] It was not until 1 July 2010 that the ELD had finally been transposed into the national law of all MS.[7]

B. Liability

Under the ELD, the "operator" of an "occupational activity" who causes an imminent threat of, or actual, environmental damage to a "natural resource" is liable for preventing or remediating the environmental damage, respectively.[8] An operator may be an individual, a company or other private organisation as well as a governmental organisation.[9]

The term "operator" is defined to mean the person who operates or controls an occupational activity, including the holder of the permit or authorisation for it or the

[4] A Directive is a relatively flexible legislative instrument. It sets out the results that individual MS must achieve but does not require them to adapt their laws to transpose the Directive in a specific manner. An MS may, for example, enact transposing legislation that is more stringent than the Directive. It cannot, however, enact transposing legislation that is less stringent.
[5] ELD recital 14.
[6] ELD Report s 2.1.
[7] Ibid s 5.
[8] ELD arts 5(1), 6(1).
[9] Ibid art 2(6).

person who registers or notifies the activity. Estonia, Finland, Hungary, Lithuania, Poland and Sweden have adopted broader definitions of the term "operator".[10]

The intent in imposing liability on an operator is to channel liability to a single person in most cases. The ELD allows MS the option of imposing joint and several liability or proportional liability in respect of environmental damage caused by more than one operator.[11] All MS except Denmark, Finland, France, Slovakia and Slovenia have adopted joint and several liability.[12]

The term "occupational activity" is defined broadly to include not-for-profit activities as well as activities carried out for profit.[13] The term, thus, applies to virtually any activity other than a purely private activity.

The term "natural resource" means land, water and protected species and natural habitats ("biodiversity"),[14] that is, species and habitats protected under the Birds Directive[15] and the Habitats Directive.[16] The ELD does not apply to all of these natural resources wherever they exist however. Instead, as discussed below, the scope of each natural resource is limited. Further, only persons who carry out occupational activities under legislation listed in Annex III of the ELD are liable for preventing or remediating environmental damage to land and water. This approach reflects the supplementary nature of the ELD to existing MS environmental legislation. Whereas virtually all MS had enacted legislation requiring persons who caused water pollution and contaminated land to remediate them before the ELD was enacted, liability for preventing and remediating environmental damage to biodiversity was a new concept in most MS. Thus, a non-Annex III operator is still likely to be liable for remediating water pollution and land contamination caused by that operator. Such liability, however, is imposed by domestic legislation, not the ELD. If either an Annex III operator or a non-Annex III operator causes environmental damage to biodiversity, however, liability for such damage is imposed by the ELD, albeit with a requirement for the latter to have been at fault.

The ELD creates prospective liability only. That is, it applies only to environmental damage caused by an emission, event or incident that occurs after 30 April 2007. Further, damage caused by an emission, event or incident that occurs after 30 April 2007 is not within the scope of the ELD if it is derived from a specific activity that took place and finished before that date.[17] The date of 30 April 2007 for application

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[10] See European Commission, Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions under Article 14(2) of Directive 2004/35/CE on the environmental damage with regard to the prevention and remedying of environmental damage, COM(2010) 581 final, s 2.2 (12 October 2010) ("ELD Report").
[11] ELD art 9.
[12] ELD Report s 2.2.
[13] ELD art 2(7).
[14] Ibid art 2(12).
[15] Council Directive 79/409/EEC on the conservation of wild birds, OJ L 103, p 1 (25 April 1979).
[16] Council Directive 92/32/EEC on the conservation of natural habitats and of wild fauna and flora, OJ L 206, p 7 (22 July 1992). A consolidated version was issued on 1 January 2007. See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:01992L0043-20070101:EN:NOT
[17] ELD art 17.

of the ELD has been confirmed by the European Court of Justice.[18] Some MS have, nevertheless, continue to apply the ELD only from later dates.[19]

The ELD creates two liability systems; a strict liability system and a fault-based liability system.

1. Annex III liability

An operator whose occupational activity is subject to legislation listed in Annex III of the ELD is strictly liable for preventing or remediating an imminent threat of, or actual, environmental damage to all natural resources, that is, land, water, and biodiversity.

Annex III legislation includes the following activities which may result in an oil or chemical spill:

- the operation of installations pursuant to an environmental permit under the Pollution Prevention and Control Directive;[20]
- waste management operations, including activities concerning hazardous waste, landfills and incinerators;[21]
- the management of extractive waste;[22]
- authorised discharges into surface water and groundwater;[23]
- water abstraction and the impoundment of water authorised pursuant to the Water Framework Directive;[24]

[18] *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico* (Case No C-378/08) (9 March 2010); *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico* (Cases Nos C-379/08 and C-380/08) (9 March 2010).

[19] European Communities (Environmental Liability) Regulations 2008, SI No 547 of 2008, reg 5 (Ireland) (1 April 2009); Environmental Damage (Prevention and Remediation) Regulations 2009, 2009 SI/153 ("EDR") reg 8(1) (1 March 2009) (England); Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009, 2009 SI/995 (W.81) ("Welsh Regulations") reg 8(1) (6 May 2009); Environmental Liability (Prevention and Remediation) Regulations (Northern Ireland) 2009, SRNI 2009/252 ("NI Regulations") reg 6(a)-(b) (24 July 2009); Environmental Liability (Scotland) Regulations 2009, SSR 2009/266 ("Scottish Regulations") regs 5(f)-(g) (24 June 2009).

[20] Directive 2008/1/EC of the European Parliament and of the Council concerning integrated pollution prevention and control (codified version). OJ L24/8 (29 January 2008). The Industrial Emissions Directive will supersede the Pollution Prevention and Control Directive when it is transposed into the national law of MS. Directive 2010/75/EU of the European Parliament and of the Council on industrial emissions (integrated pollution prevention and control) (recast). OJ L/334/17 (17 December 2010).

[21] Directive 2006/12/EC of the European Parliament and of the Council on waste, OJ L 114/9 (27 April 2006), as amended; Council Directive 91/689/EEC on hazardous waste, OJ L 377/20 (31 December 1991), as amended; Council Directive 1999/31/EC on the landfill of waste, OJ L 182/1 (16 July 1999), as amended; Directive 2000/76/EC of the European Parliament and of the Council on the incineration of waste, OJ L 332/91 (28 December 2000), as corrected.

[22] Directive 2006/21/EC of the European Parliament and of the Council on the management of waste from extractive industries. OJ L 102/15 (11 April 2006).

[23] Council Directive 2006/11/EC of the European Parliament and of the Council on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community, OJ L 64/52 (4 March 2006); Council Directive 80/68/EEC on the protection of groundwater against pollution caused by certain dangerous substances, OJ L20/43 (26 January 1980), as amended; and Directive 2000/60/EC of the European Parliament and of the Council of establishing a Directive 2000/60/EC of the European Parliament and of the Council of establishing a framework for Community action in the field of water policy art 1, OJ L 327/1 (22 December 2000), as amended ("Water Framework Directive").

- the manufacture, use, storage, processing, filling, release into the environment and onsite transport of dangerous substances,[25] dangerous preparations,[26] plant protection products[27] and biocidal products;[28] and
- the transport of dangerous goods or polluting products by road, rail, inland waterways, sea or air.[29]

Offshore oil drilling is included in Annex III under the manufacture of dangerous substances.[30] Although an incident such as Deepwater Horizon has thankfully not occurred in the EU, catastrophic incidents on land have occurred, for example, the spill of toxic sludge by MAL, Zrt in Hungary on 4 October 2010. The incident resulted from an Annex III activity, namely an activity under a pollution prevention and control permit issued to MAL in 2006.

Annex III is not static. When the EU enacts environmental legislation for which liability for measures to prevent or remediate environmental damage may be imposed, the legislation is added to Annex III. The enactment of such legislation may be, and has been, enacted in reaction to a chemical or oil spill. For example, a key reason for enactment of the Extractive Waste Directive, which was added to Annex III when it entered into force in 2006, was the cyanide spill from a mining waste tailings pond at the Aurul SA Company facility at Baia Mare, Romania in January 2000. A break in the dam for the tailings pond resulted in 100,000 cubic metres of liquid and suspended solids containing cyanide and heavy metals entering the River Danube and other rivers.

2. Non-Annex III liability

The operator of a non-Annex III activity is liable for preventing or remediating an imminent threat of, or actual, environmental damage to biodiversity if the operator

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[24] Water Framework Directive art 1.

[25] Council Directive 67/548/EEC on the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous substances, art 2(2), OJ 196/1(16 August 1967), as amended.

[26] Directive 1999/45/EC of the European Parliament and of the Council concerning the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations, art 2(2), OJ L 200/1 (30 July 1999), as amended.

[27] Council Directive 91/41/EEC concerning the placing of plant protection products on the market, art 2(1), OJ L 230/1 (19 August 1991), as amended.

[28] Directive 98/8/EC of the European Parliament and of the Council concerning the placing of biocidal products on the market, art 2(1)(a), OJ L 123/1 (24 April 1998), as amended.

[29] Council Directive 94/55/EC on the approximation of the laws of the Member States with regard to the transport of dangerous goods by road, annex A, OJ L 31/7 (12 December 1994), as amended; Council Directive 96/49/EC on the approximation of the laws of the Member States with regard to the transport of dangerous goods by rail, annex, OJ L 235/25 (17 September 1996, as amended; Council Directive 93/75/EEC concerning minimum requirements for vessels bound for or leaving Community ports and carrying dangerous or polluting goods, OJ L 247/19 (5 October 1993), as amended.

[30] Regulation 1272/2008 on the classification, packaging and labelling of substances and mixtures contains the definitions of "substance" and "manufacture". These include oil spills from offshore oil drilling. See European Commission, Commission Staff Working Document, accompanying document to the Communication from the Commission to the European Parliament and the Council, Facing the challenge of the safety of offshore oil and gas activities, SEC(2010) 1193 final, COM(2010) 560 final, p 15, fn 18 (12 October 2010) (Staff Working Document).

intended to cause the damage or was negligent in doing so.[31] Belgium, Denmark, Finland, Greece, Hungary, Latvia, Lithuania, the Netherlands and Sweden have extended strict liability for some non-Annex III activities.[32]

An incident in August 2009 demonstrates the limitation of the ELD in respect of oil spills from pipelines. The incident involved a spill of over 4,000 cubic metres of crude oil from an underground pipeline onto two hectares of the Coussouls de Crau nature reserve in the South of France. The operation of an oil pipeline, however, is not an activity covered by Annex III. The operator is, therefore, liable under the ELD only if it was negligent.[33]

C. Environmental damage

The requirement to remediate, and the remediation of, land damage differ from those for water and biodiversity damage. The different requirements and remedial measures are described below.

In addition to requiring operators who cause environmental damage to remediate it, the ELD requires operators to prevent an imminent threat of environmental damage, that is, "a sufficient likelihood that environmental damage will occur in the near future".[34] The duty to prevent an imminent threat of environmental damage, and the duty to take emergency actions if environmental damage is caused, is self-executing.[35]

If an operator's activities cause an imminent threat of environmental damage, the operator must carry out necessary measures to prevent the damage "without delay" and notify the competent authority "as soon as possible" if the measures do not remove the imminent threat.[36] If the operator's activities cause environmental damage, the operator must take "all practicable steps to immediately control, contain, remove or otherwise manage the relevant contaminants and/or any other damage factors"[37] and notify the competent authority "without delay".[38]

1. Land damage

Land damage occurs when an operator directly or indirectly introduces substances, preparations, organisms or micro-organisms in, on or under land such that the contamination "results in a significant risk of human health being adversely

[31] ELD art 3(1)(b).
[32] ELD Report s 2.2.
[33] See European Commission, Study on the Implementation Effectiveness of the Environmental Liability Directive (ELD) and Related Financial Security Issues (Contract Reference: 070307/2008/516353/ETU/G.1, Final Report (November 2009) (prepared by Bio Intelligence Service in association with Stevens & Bolton LLP); available at: http://ec.europa.eu/environment/enveco/others/pdf/implementation_efficiency.pdf
[34] ELD art 2(9).
[35] See V Fogleman, Enforcing the Environmental Liability Directive: Duties, Powers and Self-Executing Provisions, [2006] 4 Env Liability 127.
[36] ELD arts 5(1)-(2).
[37] Ibid art 6(1)(a).
[38] Ibid art 6(1).

affected".[39] The standard of remediation is the removal of the significant risk to human health caused by the damage.[40]

The threshold for land damage varies between individual MS. England has, for example, adopted a particularly low threshold in which the ELD applies if an individual has a headache, nausea or a sore throat.[41] An ELD incident thus occurred when a supplier of diesel oil discharged the oil into a disused home heating oil tank, causing the oil to leak from the severed pipe connected to the disused tank into the ground around the home. The competent authority (a local authority) concluded that land damage had occurred due to members of the family having headaches, nausea and sore throats for two weeks and being unable to occupy part of the home until works to clean up the spill had taken place.[42]

Whereas environmental damage to water and biodiversity is linked to specific EU legislation, land damage is not. The reason for this limited scope is the absence of EU legislation on soil when the ELD became law.

The proposed Soil Framework Directive[43] would fill this gap.[44] Further, its enactment would also be likely to extend the scope of land subject to liability under the ELD to land on which human activities do not necessarily occur. This is because the proposal for the Soil Framework Directive uses the term "a significant risk to human health or the environment"[45] instead of limiting damage to a significant risk of an adverse

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[39] Ibid art 2(1)(c).
[40] Ibid annex II, para 2.
[41] Department for Environment, Food and Rural Affairs and Welsh Assembly Government, The Environmental Damage Regulations; Preventing and Remedying Environmental Damage para A1.94 (November 2009).
[42] Mid Devon District Council, Mid Devon first to use new Environmental Regulations (press release, 17 November 2010); available at http://www.middevon.gov.uk/CHttpHandler.ashx?id=14986&p=0
[43] Proposal for a Directive of the European Parliament and of the Council establishing a framework for the protection of soil and amending Directive 2004/35/EC. COM(2006) 232 final.
[44] Ibid recital 29. The proposed amendment would also remove the provision in the ELD that provides that a competent authority should remediate environmental damage only as a last resort. The proposal for the Soil Framework Directive states: "The competent authority shall require the remedial measures to be taken by the operator. Subject to Article 13(1) of [the Soil Framework Directive], if the operator fails to comply with the obligations laid down in paragraph 1 or 2(b), (c) or (d) of this Article, or cannot be identified or is not required to bear the costs under this Directive, those measures may be taken by the competent authority itself". Ibid art 23. Although the word "may" is used, article 13(1) of the proposed Soil Framework Directive requires MS to ensure that land damage will be remediated. Article 13(1) reads: "Member States shall ensure that the contaminated sites listed in their inventories are remediated".
[45] Ibid art 13(2). Indications are that the proposal will continue to expand the scope of damage to soil. For example, the version of the proposed Soil Framework Directive that was amended at its first reading in the European Parliament defines a "contaminated site" as "a site where there is a confirmed presence on or in the soil, caused by human activities, of dangerous substances of such a level that Member States consider the soil poses a significant risk to human health or the environment, taking the current and approved future use of the site into account". Article 13(2) of the proposed Soil Framework Directive reads: "Remediation shall consist of actions on the soil aimed at the removal, control, containment or reduction of contaminants so that the contaminated site, taking account of its current use and approved future use, no longer poses any significant risk to human health or the environment". European Parliament legislative resolution of 14 November 2007 on the proposal for a directive of the European Parliament and of the Council establishing a framework for the protection of soil and amending Directive 2004/35/EC. COM(006) 0232 – C6-0307/2006 – 2006/0086(COD), art 2(10).

effect on human health. A risk, or a significant risk, of harm to human health or the environment is used in many jurisdictions as a goal of environmental law or the trigger for liability for remedial measures. It would not, therefore, be unusual for EU legislation to adopt that trigger.[46]

Enactment of the proposed Soil Framework Directive is, however, highly unlikely to occur either in its current form or in the reasonably foreseeable future due to a blocking minority of MS in the Council.[47] It is, however, likely that the Directive will eventually enter into force in some form because, not only is the proposal still referred to by the European Commission,[48] there is a significant gap in EU legislation for the protection of soil. It is also relevant that the ELD was eventually enacted despite a period of about 20 years between initial proposals for the introduction of liability imposed by it and its enactment.

2. Water damage

Water damage is damage to "all waters covered by [the Water Framework Directive]",[49] that is, surface, ground, transitional and coastal waters.[50] Some MS have narrowly defined water damage so that it must occur to a water body or body of groundwater instead of all waters covered by the Water Framework Directive,[51] a limitation that raises the threshold for water damage because it limits the extent of the waters to which the damage must occur. The threshold for water damage is a significant adverse effect on "the ecological, chemical and/or quantitative status and/or ecological potential of … waters".[52]

The Water Framework Directive applies to waters in the territorial sea, which extends seaward to a maximum of 12 nautical miles but not to waters in the exclusive economic zone, which extends seaward to 200 nautical miles. There is, therefore, a gap in the application of the ELD to such waters. Thus, liability under the ELD would not necessarily apply to all damage caused by an oil spill from offshore drilling in the EU.

The extent to which the ELD applies to coastal waters also depends on the extent of the territorial sea in individual MS. In England, for example, the ELD applies to

[46] For example, the US Environmental Protection Agency's mission statement includes the purpose of ensuring that "all Americans are protected from significant risks to human health and the environment where they live, learn and work"; see http://www.epa.gov/aboutepa/whatwedo.html

[47] The blocking minority consists of Austria, France, Germany, Malta, Netherlands and the UK.

[48] See European Commission, Commission Staff Working Paper Impact Assessment accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Our life insurance, our natural capital: an EU biodiversity strategy to 2020, COM(2011) 244 final, SEC(2011) 541 final, para 3.5.2, p. 19 (3 May 2011) (noting that "the evolution of soil biodiversity will depend to a significant extent on the outcome of current discussions on the Commission proposal for a Soil Framework Directive, still under discussion").

[49] ELD art 2(5).

[50] Water Framework Directive art 1.

[51] See V. Fogleman, The Environmental Damage Regulations; the New Regime [2009] 5 Env. Liability 147 (discussing English legislation transposing the ELD).

[52] Water Framework Directive art 2(1)(b).

water seaward to one nautical mile from the baseline.[53] In Scotland, the ELD applies seaward to three nautical miles.[54] In Ireland, the ELD applies seaward to 12 nautical miles.[55]

3. Biodiversity damage

The species and natural habitats that are subject to the ELD are those indicated in article 4(2) of the Birds Directive[56] and listed in annex I of the Birds Directive and annexes I, II and IV of the Habitats Directive.[57] The Birds and Habitats Directives apply to territorial waters and the exclusive economic zones of MS. For example, the ELD applies to such species and natural habitats in the land area of England, inland water, the seabed of the continental shelf[58] and water (but not the seabed) in the renewable energy zone,[59] that is, water out to approximately 200 nautical miles seaward.[60]

The threshold for biodiversity damage is damage with 'significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species'.[61] Annex I of the ELD sets out criteria for determining whether biodiversity damage exists.

Austria, Belgium, Cyprus, the Czech Republic, Estonia, Greece, Hungary, Latvia, Lithuania, Poland, Portugal, Spain, Sweden and the UK have applied the option in the ELD to extend its scope to nationally protected biodiversity as well as EU protected biodiversity in some or all of their jurisdictions.[62] In the UK, for example, nationally-protected biodiversity is within the scope of the legislation transposing the ELD into English, Welsh and Northern Irish law but not Scots law.[63]

D. Remediation of Water and Biodiversity Damage

Remedial measures for water and biodiversity damage are broader in scope than measures to remediate land damage. There are three categories of remedial measures.

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[53] EDR art 6(1). The baseline is the baselines from which the breadth of the territorial sea is measured. Territorial Sea Act 1987; see EDR reg 6(2).
[54] Scottish Government, Environmental Liability (Scotland) Regulations 2009 Draft Guidance para 50.
[55] European Communities (Environmental Liability) Regulations 2008, SI No 547 of 2008, reg 2(1); see Environmental Protection Agency, Environmental Liability Regulations, Draft Guidance Document para 6.5.1, table 6.4 (2010).
[56] Council Directive 79/409/EEC on the conservation of wild birds, OJ L 103, p 1 (25 April 1979).
[57] ELD art 2(3)(b); Council Directive 92/32/EEC on the conservation of natural habitats and of wild fauna and flora, OJ L 206, p 7 (22 July 1992). A consolidated version was issued on 1 January 2007. See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:01992L0043-20070101:EN:NOT
[58] EDR regs 6(1)-(2). The continental shelf is the areas designated by Order in Council under the Continental Shelf Act 1964, as amended, s 1(7).
[59] EDR regs 6(1)-(2). The renewable energy zone is the waters that are superjacent to the seabed located within areas designated by Order of Council under the Energy Act 2004 s 84(4).
[60] EDR reg 6; see Guidance paras 2.1-.2. The Birds and Habitats Directives apply to territorial waters and exclusive economic zones of MS. See also European Communities (Environmental Liability) Regulations 2008, SI No 547 of 2008, reg 2(1) (200 nautical miles seaward in Ireland); see Environmental Protection Agency, Environmental Liability Regulations, Draft Guidance Document para 6.4.1, table 6.2 (2010).
[61] ELD art 2(1)(a).
[62] ELD Report s 2.2.
[63] EDR reg 2.1; Welsh Regulations reg 2.1; NI Regulations reg 2.2.

Primary remediation is the remediation and restoration of the damaged water or biodiversity and the services rendered by it to its baseline condition, that is, its condition before it was damaged. Services that must be restored are services to other natural resources as well as to the public.[64]

Complementary remediation is required when it is not possible fully to remediate the damaged water or biodiversity. In such a case, the operator must remediate the damaged water and biodiversity and provide a similar level of natural resources and services at another site in close proximity to the damaged site.[65] The purpose of improving natural resources at the undamaged site is to compensate for the inability fully to restore the damaged water or biodiversity to its baseline condition.

Compensatory remediation is the provision of improvements and other measures at the damaged site in order to compensate for the loss of the damaged water or biodiversity, and the services rendered by them, from the time of the damage to its remediation to its baseline condition.[66] The measures may be similar to complementary remediation measures.

The ELD does not differentiate between remediation of environmental damage and its restoration even though the two actions may be very different. For example, an operator whose activities cause an oil spill to a special conservation area could be required to clean up the oil first and then restore the damaged and destroyed ecological features.[67] The ELD refers to both actions as primary remediation.

E. Exceptions

The ELD exempts an imminent threat of, or actual, environmental damage from specified activities.[68] The exceptions are as follows:

- an act of war, including terrorism;[69]
- an act of God (described as "a natural phenomenon of exceptional, inevitable and irresistible character");[70]
- an activity, the main purpose of which is to serve national defence or international security;[71]
- an activity, the sole purpose of which is to protect from natural disasters;[72]
- diffuse pollution when it is not possible to establish a causal link between the damage and activities of individual operators;[73]
- nuclear risks covered by specified international conventions;[74]

[64] ELD annex II ss 1(a), 1.1.1.
[65] Ibid annex II ss 1(b), 1.1.2.
[66] Ibid annex II ss 1(c), 1.1.3.
[67] See generally V Fogleman, Liability for damage to natural resources: a landmark US case provides guidance on its scope, [2007] 1 Env Liability 1.
[68] ELD art 4.
[69] Ibid art 4(1)(a).
[70] Ibid art 4(1)(b).
[71] Ibid art 4(6).
[72] Ibid
[73] Ibid art 4(5).
[74] Ibid art 4(4).

- national legislation implementing the Convention on Limitation of Liability for Maritime Claims 1976 or the Strasbourg Convention on Limitation of Liability in Inland Navigation 1988;[75] and
- incidents for which liability or compensation is imposed by marine pollution and carriage of dangerous goods conventions.[76]

The ELD does not, therefore, apply to oil and chemical spills in the marine environment and from inland transportation if the same liability that would be imposed by the ELD is imposed by a specified convention.

The applicable marine pollution and carriage of dangerous goods conventions are as follows:

- the Convention on Civil Liability for Oil Pollution Damage;
- the Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage;
- the Convention on Civil Liability for Bunker Oil Pollution Damage;
- the Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea; and
- the Convention on Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels.[77]

The marine conventions apply to oil spills from vessels; they do not apply to oil spills from offshore oil and gas activities.[78] Environmental damage from such activities would, therefore, be covered by the ELD.

The exception for diffuse pollution illustrates the way in which the ELD imposes liability for an extended history of oil and chemical spills by more than one operator.

In *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico,*[79] the European Court of Justice concluded, among other things, that a competent authority may establish a rebuttable presumption that an operator is liable for remediating a pollutant that is present at a contaminated site. In order to establish the rebuttable presumption, the competent authority must have plausible evidence such as the proximity of the operator's activity to the contaminated site and a correlation between the substances identified at that site and substances used by the operator in connection with its activities. In order to rebut the presumption and, thus, avoid liability, the operator must show that another person caused the contamination.

The causal link between an operator's activity and diffuse pollution is, therefore, weak. There is no requirement for a competent authority to establish that the substance at the contaminated site originated from the operator's activity. That is,

[75] Ibid art 4(3).
[76] Ibid art 4(4).
[77] Ibid art 4(2), annex IV.
[78] See generally ClientEarth, Legal background paper: Environmental Regulation of Oil Rigs in EU Waters and Potential Accidents s 1.4 (Sandy Luk and Rowan Ryrie).
[79] *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico* (Case No C-378/08) (9 March 2010); *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico* (Cases Nos C-379/08 and C-380/08) (9 March 2010).

there is no need to “fingerprint” the substance; it is sufficient that the same chemical is present at both locations.

F. Defences

The ELD contains mandatory and optional defences. All MS were required to adopt the two mandatory defences; they had the option whether to adopt either or both of the two optional defences.

1. Mandatory defences

The first mandatory defence provides that an operator has a defence to liability if it shows that a third person caused the environmental damage from the operator's activity and the damage occurred despite appropriate safety measures.[80] The second mandatory defence provides that an operator has a defence if the environmental damage resulted from its compliance with a compulsory order or instruction by a public authority. The compulsory order or instruction must not have existed due to the operator's own activities.[81]

2. Optional defences

The optional defences are known as the permit and the state-of-the-art defences. The permit defence applies if the activity that causes environmental damage is fully in accordance with a permit for an activity under legislation in Annex III.[82] The state-of-the-art defence applies if the emission or activity was not considered likely to cause environmental damage according to scientific or technical knowledge when it occurred.[83] The defences apply only to remedial measures; they do not apply to measures to prevent an imminent threat of environmental damage.

Whereas the mandatory defences may apply to environmental damage from a chemical or oil spill, it seems highly unlikely that the permit defence would apply to damage caused by such a spill. That is, an operator would almost certainly have breached its permit if its activities result in a spill that causes environmental damage. It is also questionable whether the permit defence would apply to environmental damage resulting from a long history of small spills because such spills would, in most cases, result in exceedances of emission limit values in environmental permits.

Both optional defences were adopted by Belgium (regional level), Cyprus, the Czech Republic, Estonia, Greece, Italy, Latvia, Malta, Portugal, Slovakia, Spain and the UK. Neither defence was adopted by Austria, Belgium (federal level), Bulgaria, Germany, Hungary, Ireland, the Netherlands, Poland, Romania and Slovenia. The permit defence was adopted by Denmark, Finland and Lithuania. The state-of the art defence was adopted by France. Sweden adopted the permit and state-of-the-art defences as mitigating factors rather than actual defences.[84]

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[80] ELD art 8(3)(a).
[81] Ibid art 8(3)(b).
[82] Ibid art 8(4)(a).
[83] Ibid art 8(4)(b).
[84] ELD Report s 2.2. In addition, Ireland has drafted a Bill that may result in the adoption of both defences. Draft Environmental Liability Bill 2008 General Scheme; available at http://www.environ.ie/en/Legislation/Environment/Miscellaneous/FileDownLoad,17908,en.doc

G. Non-governmental organisations

Proposals for non-governmental organisations ("NGOs") to be provided authority to enforce the ELD in certain cases were deleted during the ELD's long history. In lieu of these provisions, qualified NGOs and other persons have the right to request a competent authority to take action against an operator whose activities are causing an imminent threat of, or actual, environmental damage.[85] They also have a right to request a court or other independent and impartial public body to review the competent authority's decisions, acts of its failure to act.[86]

H. Financial security

The ELD does not require an MS to enact legislation to require an operator to have evidence of financial security, that is, a source of funds to cover the cost of remediating any environmental damage caused by its activities. The issue was highly controversial during the history of the ELD due to strong opposition in the Council. For example, an amendment by the European Parliament to phase in financial security for Annex III operators was deleted by the Council.

In lieu of requiring mandatory financial security, the ELD provides that:

> "Member States shall take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under this Directive".[87]

The ELD further directed the European Commission to:

> "present a report on the effectiveness of the Directive in terms of actual remediation of environmental damages, on the availability at reasonable costs and on conditions of insurance and other types of financial security for the activities covered by Annex III. The report shall also consider in relation to financial security the following aspects: a gradual approach, a ceiling for the financial guarantee and the exclusion of low-risk activities. In the light of that report, and of an extended impact assessment, including a cost-benefit analysis, the Commission shall, if appropriate, submit proposals for a system of harmonised mandatory financial security".[88]

The ELD directed the Commission to issue its report by 30 April 2010.[89] Due to all MS not having transposed the ELD until 1 July 2010, the Commission issued the ELD Report on 12 October 2010.

[85] ELD art 12.
[86] Ibid art 13.
[87] Ibid art 14(1).
[88] Ibid art 14(2).
[89] Ibid

III. THE FUTURE OF THE ENVIRONMENTAL LIABILITY DIRECTIVE

The ELD Report notes the slow transposition of the ELD, limited awareness of it, and the small number of ELD incidents in individual MS. Based on reporting of ELD incidents by individual MS, the Commission estimated that there had been about 50 such incidents since the beginning of 2010.[90]

In the ELD Report, the Commission concludes that the following measures would improve the implementation and effectiveness of the ELD:

- the promotion of an exchange of information and communication about the ELD by operators, competent authorities, providers of financial security, industry associations, governmental authorities with responsibility for the ELD in individual MS, NGOs and the Commission; and
- the development of further guidance on the application of the ELD with the potential for EU guidelines and the clarification of various definitions and concepts in the ELD itself.

The Commission commented that the insurance market that provides policies for ELD liabilities was growing and that there was an increasing variety of such policies. It considered, however, that there was insufficient justification to introduce a harmonised system of mandatory financial security at that time. In particular, the Commission stated that it would "actively monitor recent developments such as the oil spill in the Gulf of Mexico, which may provide the justification for an initiative in this area". Still further, it stated that it may re-examine the issue of mandatory financial security even before the date of the next report directed by the ELD.[91]

The ELD directs the Commission to issue its next report by 30 April 2014. It further directs the Commission, among other things, to propose in that report, any amendments to the ELD that it deems necessary.[92] The report will be based, in substantial part, on reports to be submitted to the Commission by individual MS. The ELD directs MS to submit their individual reports to the Commission by 30 April 2013.[93]

The ELD Report also states that the Commission will evaluate the following issues:

- inclusion of the marine environment in the scope of the ELD;
- potential difficulties due to differences in transposing the ELD into MS national law, in particular, the uneven application of the permit and state-of-art defences and the uneven extension for environmental damage in nationally protected biodiversity;
- the most efficient way to ensure that financial security instruments cover large scale incidents involving operators with low or mediocre financial capacity; and

[90] ELD Report s 2.3.
[91] Ibid s 5.
[92] Ibid art 18(2).
[93] ELD art 18.

- the ability of financial security instruments (including insurance, bank guarantees, funds and bonds) to cover large incidents.[94]

On the same day that the Commission issued the ELD Report, it issued a Communication entitled "Facing the challenge of the safety of offshore oil and gas activities".[95] In respect of liability for environmental damage, the Commission stated that it would:

- propose amendments to the ELD to cover environmental damage in all marine waters defined in the Marine Strategy Framework Directive,[96] that is, marine waters including coastal waters, subsoil and the seabed; and
- reconsider the introduction of mandatory financial security, including an examination of "the sufficiency of actual financial ceilings for established financial security instruments with regard to potential major accidents that involve responsible parties with limited financial capacity".[97]

Also in October 2010, the European Parliament adopted a Resolution in response to the Deepwater Horizon oil spill.[98] In the Resolution, the Parliament called on the Commission, among other things, to fill gaps in the ELD and other EU environmental legislation including introducing compulsory financial security provisions under the ELD and a potential European fund to be funded by levies on operators of offshore installations.

On 16 March 2011, the Commission followed up its October 2010 report on oil and gas offshore safety with a public consultation.[99] The public consultation document, entitled "Improving offshore safety in Europe" states among other things that there should be "a robust liability regime … as accidents resulting in major oil spills may cause extensive environmental, economic and social damage". The document notes the ELD and states that it covers waters seaward to 12 nautical miles but not all marine waters, that is, waters within the jurisdiction of MS seaward to 200 or 370 nautical miles.

Further, the consultation document states that "[t]he insurance market does not currently provide products sufficient to cover damages of the magnitude seen in the Deepwater Horizon accident. Moreover, there are no international or EU-wide funds similar to those in maritime transport that would cover environmental or traditional liability". Still further, the document comments that the ELD "addresses pure ecological damage in terms of protected species and natural habitats". An accompanying memo by the European Commission notes, without comment, that the

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[94] Ibid

[95] European Commission, Communication from the Commission to the European Parliament and the Council, Facing the challenge of the safety of offshore oil and gas activities, COM(2010) 560 final, SEC(2010) 1193 final (12 October 2010).

[96] Directive 2008/56/EC of the European Parliament and of the Council establishing a framework for community action in the field of marine environmental policy. OJ L164/19 (25 June 2008).

[97] ELD Report s 2.3.

[98] European Parliament Resolution of 7 October 2010 on EU action on oil exploration and extraction in Europe. B7-0540/2010.

[99] Public Consultation, Improving offshore safety in Europe; available at http://ec.europa.eu/energy/oil/offshore/standards_en.htm The consultation closed on 20 May 2011.

ELD "does not cover fish in terms of commercial commodities but protected fish …".[100]

Liability for economic loss suffered by fisheries from an oil spill in marine waters would, of course, not be covered under the current version of the ELD. Further, liability for economic loss from a marine oil spill from offshore oil and gas activities would not be covered by the marine conventions.[101]

Questions in the consultation include:

- whether the ELD should be extended to cover environmental damage in all marine waters under the jurisdiction of MS;
- whether "the current legislative framework [is] sufficient for treating compensation or remedial claims for *traditional damage* caused by accidents on offshore installations"; and
- "the best way(s) to make sure that the costs for remedying and compensating for the environmental damages of an oil spill are paid even *if those costs exceed the financial capacity* of the responsible party" (emphasis original).

"Traditional damage" is described as "loss of life; personal injury, health defects; damage to property and economic loss affecting for example fishermen".

The consultation document does not specify whether the Commission is considering including liability for traditional damage in the ELD or whether it is doing so in some other legislation that may be proposed. If the Commission was to submit a proposal to include traditional liability under the ELD, doing so would include within the ELD the civil liability scheme that was superseded by the public law scheme in 2001.[102] It would also echo provisions imposing liability for economic loss under the Oil Pollution Act 1990, the US federal legislation that imposes liability for oil pollution from vessels, offshore oil and gas activities and other specified activities.[103] In contrast, the US federal legislation that imposes liability for clean-up costs and natural resource damage from chemical spills, commonly known as Superfund, does not impose liability for economic loss or any other so-called traditional damages.[104]

IV. CONCLUSIONS

If a chemical or oil spill occurs on land within the EU, application of the ELD depends on the nature of the activity and the MS in which it occurs. That is, if the activity is carried out under Annex III legislation, liability is strict and the operator is liable for environmental damage to all natural resources specified in the ELD. Otherwise, the operator is liable under the ELD only for environmental damage to

[100] European Commission memo/10/486, Safety of Offshore Oil and Gas Exploration and Production: Questions and Answers (Brussels, 13 October 2010).
[101] See text accompanying fn 78.
[102] See text accompanying fn 5.
[103] The Oil Pollution Act imposes liability on a "responsible party" for, among other things, the cost of cleaning up oil pollution, natural resource damage and the "loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources". 33 USC s 2702(b).
[104] The US legislation is entitled the Comprehensive Environmental Response, Compensation, and Liability Act 1980, 42 USC xx 9601 *et seq.*

biodiversity. Whether strict or fault-based liability applies depends on the individual MS.

The limitation of liability under the ELD does not mean that an operator who causes environmental damage to land or water is not required to remediate them. As indicated above, when the ELD entered into force most MS had already enacted legislation that imposes strict liability on an operator for remediating land and water pollution. The vast majority of such legislation, however, does not impose liability for complementary and compensatory remediation or, in some MS, liability for remediating any harm to biodiversity.

Further, the ELD does not create a level playing field. As noted by the Commission in the ELD Report, liability under the ELD depends on whether, among other things, an individual MS:

- imposes joint and several or proportional liability;
- has adopted the permit defence and/or the state of the art defence;
- has extended the scope of the ELD to include nationally protected biodiversity;
- has extended strict liability to non-Annex III activities; and
- the extent to which the MS has defined an "operator".

Still further, liability depends on the extent to which an individual MS has transposed the ELD including the establishment of thresholds for environmental damage and the distance seaward for water damage.

The ELD is likely to be extended, with the most likely time for amendments being 2014 when the European Commission issues its second report under the ELD. The ELD Report and the Commission's report on offshore oil and gas activities indicate that proposed amendments could – but would not necessarily – include:

- extension of water damage under the ELD to 200 nautical miles seaward of MS coastlines;
- elimination of the permit and state-of-the-art defences;
- application of the ELD to nationally protected biodiversity;
- extension of strict liability to non-Annex III incidents;
- harmonised mandatory financial security for the cost of remediating environmental damage from offshore oil and gas activities; and
- harmonised mandatory financial security for the cost of remediating environmental damage from other Annex III activities.

Other amendments to the ELD could result from:

- the enactment of legislation concerning offshore oil and gas activities, with such legislation being added to Annex III of the ELD;
- an extension of liability to include traditional damage, including liability for economic loss, such as loss of income from fishing caused by an oil spill from offshore oil and gas activities; and

- the establishment of an EU-wide fund (or perhaps individual MS funds) to pay for the cost of remediating environmental damage, in particular, serious damage resulting from oil and chemical spills.

The European Commission would obviously investigate and consider potential amendments such as those indicated above in great detail before deciding whether to propose them due to their broad implications. The number of potential amendments may also increase depending on any further incidents that cause environmental damage before the Commission issues its 2014 report.

In conclusion, if an oil or chemical spill was to occur in the EU in the future, the nature and extent of liability under the ELD for environmental damage caused by the spill is currently unknown. It is, however, likely that such liability will be more extensive than under the current ELD.

Polluter Pays Principle, art. 191(1) TFEU & The EU approach to a disaster such as Deep Water Horizon/Mexico

EU & Int'l Law Framework

Prof. Dr. Ioannis Rokas*

1. A **catastrophe** scenario (both **natural** & **man-made**) leads as a rule to **environmental pollution**, but only environmental pollution arising out from man-made catastrophe or "man-made pollution" which cannot be characterised as catastrophe triggers in addition civil (and/or criminal) liability claims against polluters. Natural catastrophes (**nat.cat**) do not trigger liability claims although they provoke as a rule huge environmental damages and in spite the fact that some **nat.cat** origin from human activities (in particular those which contribute to **climate changes**). This is because environmental liability is based on "**polluter pays principle**" which can only exceptionally be applied to **nat.cat** . The "Polluter pays principle" aims to release tax payers form the costs of prevention and remediation of environmental damages and to deter polluters, but it is not appropriate to face pollution damages consisting or arising out from man-made cat because of their huge size and of the lack/ poor of causal link.

2. We could say that the liability regime of **international conventions** for pollution of the sea from oil and other substances (CLC 1992,, Fund Convention 1992, Civil Liability for Bunker Oil Pollution 2001, Carriage of Hazardous and Noxious Substances by Sea, 1996, etc.) was designed taking into consideration the capacity of the insurance industry to cover the respective claims; In effect, we are talking about a tailor made civil liability for the insurance industry, because – in introducing new civil liabilities regimes, other than those provided in general law - it aims, firstly, to create a secure source for an appropriate prevention and remediation of environmental damages and secondly to deter the polluter.

3. At EU level, the "polluter pays principle" introduced by the ELD, while leaving lacunas in terms of coverage of environmental damages and not creating a secure source of the necessary cost for the appropriate prevention and remediation of these damages, (non-mandatory financial security is provided) it also constitutes a considerable step towards the creation of an EU **common frame of principles of environmental liability**, aimed towards the augmentation of the **strictness** of the polluter's liability and the overall **enlargement** of the civil liability regime. The definition of environmental damages, the extent of the cost for prevention and remediation for which polluter should be liable, the person entitled for claims, the nature of liability, exceptions, causal link issues, etc. count within the EU common frame of principles. The new polluter liability EU regime reflects upon the civil liability of other persons such as producers of products, engineers, manufacturers etc.

* Dr. Ioannis Rokas is Professor of Law at the Athens University of Economics & Business and Senior Partner at the *IKRP* International Law Firm.

The EU approach towards environmental protection via the implementation of the TFEU "Polluter pays principle" leaves further considerable coverage issues to the Member States national rules and in doing so it results into partial harmonization.

Both the above stated lacunas and the partial harmonization effect are imminent to the EU system of the gradual integration and to the idea of its approach via a system of common frame of principles. Regrettably, any further improvements of ELD based on the so-far experience are conducted at slow pace whilst the prevention and remediation of environmental damages cannot wait. In short, the existing regime cannot face effectively catastrophes such as Deep Water Horizon one.

4. Even if a revision of the ELD would cover some important lacunas - such as e.g. the extension of the scope of its coverage to include also marine waters, or the coverage of land damages not only in cases whereby they constitute and result to pose a significant human risk , or lastly the potential introduction of a mandatory financial security scheme (containing a feasible cap for the insurance industry) and the simultaneous introduction of a fund for cases which cannot be covered as per the above regime covered - nevertheless the above measures are not the proper way to tackle pollution impairments and their overall results such as those emanating from the Deep Water Horizon. Moreover, this inability to adequately respond to a disaster such as the Deep Water Horizon is due to: a) the fact that the latter has been exceptional in size, b) the fact that it is a catastrophe with international dimensions.

   Different than the operator of the usual environmental damages which are being covered by the ELD, the offshore drilling oil polluter is a high risky operator. If tanker oil and bunkers pollution is regulated via workable international conventions which have been tested during many years and have been accepted by the insurance industry, it seems rather more appropriate that also pollution from offshore oil drilling rigs should be regulated via a similar Convention and not via harmonization proceedings. However, the above conclusive result does not necessarily speak against the improvement of the ELD, rather it serves as a vivid illustration of the fact that common environmental liability issues and environmental liability issues entailing a highly catastrophic element and owed to pollution in the open seas should probably be treated in different ways.

5. Last but not least, possible further food for thought requests the setting of a borderline between common environmental damages and catastrophe damages. The claims arising out of an **accident with an impact to the environment** could further be divided in two categories irrespective if whether they also entail a catastrophic element in or not. The first category should include body injury, property damage and economic loss claims whereas the second one should include costs related to remediation (such as e.g. clean-up costs) and/or prevention of the further catastrophic impact to and pollution of the environment. Civil liability issues of the first category (i.e. **claims for body injury, property damage and economic loss**) are mainly governed by heterogeneous national rules, for neither international Conventions nor EU legislation include coherent and harmonized regulations. On the contrary, liability issues of the second category (i.e. **costs related to remediation and/or prevention of the** further catastrophic impact to and pollution of the environment **environment**) are mainly governed, in a

harmonized way, by rules originating either from EU law or from international Conventions, although as already noted the existing regulatory regime is not able to completely respond. Furthermore, the reason for the above default of the existing regulatory regime is also the fact that clean-up costs claims have been the object of great concern at an international and EU-level over the last 50 years - due to the increase of harmful human activities towards the environment and therefore due also to the dramatic downgrading of the environment in combination with the insufficiency of the general/traditional civil law to give a solid ground for clean up claims of *res communis*).

Moreover, another obvious reason is the difficulty to define/identify the claimant and the need, for that purpose, to introduce new rules (such as a competent authority for the ELD). International and EU regulations covering the notion of "**environmental claims**" and of the "polluter-pays principle" are restricted to such claims. However, an event which has caused environmental damage can at the same time cause bodily injury and/or property damage and/or economic loss without the relevant claims being able to be characterised as environmental ones, because such claims are as per the currently in force legislations, only restricted to the clean-up and prevention costs. Therefore they are not regulated in a harmonized way both at an EU and at an international level.

Position Paper

CEA comments on the European Commission's Communication on the safety of offshore oil and gas activities and related EU debates

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Contact person:	Carmen Bell, Policy Advisor Non-Life Insurance	E-mail:	bell@cea.eu
Pages:	5		

Introduction

As the representative body for more than 5,000 insurers and reinsurers across Europe, the CEA wishes to comment on the current EU discussions on safety of offshore oil and gas activities. This paper especially relates to the suggestions regarding a possible introduction of *mandatory financial security measures* at the EU level, with a possible view toward doing so through the Environmental Liability Directive (ELD). The CEA's aims to clarify how and under which circumstances the insurance market can best contribute to financial security related to offshore oil and gas spills.

As indicated in DG ENERGY's 13 October 2010 Communication on safety of offshore oil and gas activities, the Commission is considering whether to introduce an EU-wide mandatory financial security measure for offshore oil exploration and extraction, possibly through the ELD. This Communication follows the European Parliament's September 2010 Motion for Resolution on EU action on offshore oil exploration and extraction in Europe, which called for the Commission to examine "all financial and liability questions associated with oil exploration in the EU with a view if necessary to the introduction of compulsory EU-wide insurance or other appropriate instruments".

The CEA fully understands the Commission's concerns about ensuring that there are enough economic resources to remedy the environmental damage and associated losses due to large offshore oil spills with important economic consequences. In line with these objectives, the CEA welcomes and supports any intention to clarify the environmental liabilities of operators in potentially hazardous activities based upon the "polluter pays" principle. It should also be noted that the CEA wholly supports the objectives of the ELD as well as the Commission's goal of preventing and remedying environmental damage in Europe.

Moreover, the CEA clearly supports the promotion of solvency, particularly for those companies performing risky operations such as offshore oil drilling, and understands that the EU places priority on effective prevention and remediation of marine pollution caused by offshore oil spills. Thus, the comments and recommendations below aim to help the European Commission in its task to draft its proposals in terms, as far as concerns the insurance industry, are feasible and useful. Such proposals should match the nature and possibilities of this financial tool and the reach of the insurance sector in Europe.

CEA aisbl
Square de Meeûs 29, B-1000, Brussels
Tel: +32 2 547 5811 • Fax: +32 2 547 5819
www.cea.eu

Comments and Recommendations

(A) In designing a system for ensuring sufficient financial solvency, a set of alternative or complementary financial instruments should be considered and allowed for; not only insurance

The insurance industry cannot provide the sole solution in protecting the EU against offshore oil spills, mainly due to the immense financial capacity that would be required under a mandatory scheme. To provide these amounts would require each individual insurer to be in a position to collect premiums that multiply the potential consequences of the most significant accident so that its capital reserves could be sufficiently built in accordance with European solvency law. In the context of offshore oil spills, this is incredibly difficult to achieve even in a worldwide context, much less if the geographical scope is Europe.

This is not to suggest that the European insurance industry cannot cover any catastrophic losses. Insurance products for the cover of natural catastrophes (eg floods, storms, earthquakes) are available in several markets, including globally. However, these risks pose a very different type of damage. The damage caused by natural catastrophes can be more quickly assessed with the help of advanced risk modeling tools (eg flood mapping, instruments to detect high-risk earthquake zones) and the detailed experience and capacity of a wide market of catastrophic insurers. The impact of natural catastrophes also can lead to a quick settlement of claims and speedy recovery of the cost through premiums based upon modeled risk patterns. This is contrary to the industry's experience with offshore oil spills, which present long-tail damage of which the full economic cost may not be realised for several years. The environmental consequences of offshore oil spills are further not predicted through such advanced risk modeling tools as those available for natural catastrophes. Hence, the long-tail characteristic of this risk is a serious concern for insurers not in a financial position to cover the potential environmental damage for such an extensive amount of time.

Moreover, insurers are faced with a different kind of risk under the ELD, which gives Member States the option to implement a "joint and several liability" measure. This measure, adopted by many Member States during transposition of the directive, can impose liability on all parties involved and require them all to contribute financially to the remediation. If an insurer or reinsurer has issued cover to some or all of them, the actual loss could be substantially higher than the (re)insurer might have anticipated. Such a loss could thus only be managed through lower policy limits or withdrawal from the market overall, both of which are likely to hinder further development of environmental liability insurance products. In the offshore oil sector, *numerous* different operators are involved and, under the ELD, can be held jointly and severally liable regardless of their level of liability for the damage.

Considering the enormity of financial losses that an offshore oil spill can present, companies in the offshore oil sector should be free to compound the required solvency guarantee alongside the range of options available for covering potential environmental liabilities. This could even be done through a combination of various methods:

- insurance / warranties and guaranties
- self-insurance and private funds
- Public funds (properly designed to respects the principles of proportionality between the risk created by given sectors and their contribution)

(B) Regarding the role to be played by insurance, an EU-wide voluntary system remains best for the cover of environmental liabilities

Insurers can play an important role in fulfilling the objective of ensuring that operations are solvent for potential liabilities, as they can offer financial security through insurance products that continue to be designed for the environmental liability field and, particularly, to address losses falling under the ELD. Contrary to mandatory schemes, **free and voluntary markets in the EU** can further the enhancement of suitable cover for environmental liability risks, as it encourages innovation in the market and permits the freedom to contract cover that is specific to a company's risk exposure. An EU-wide voluntary system is also more likely to lead to a mature and stable environmental liability insurance market in the long term, as opposed to the "quick fix" that may be sought through a mandatory insurance scheme.

In line with the competitive nature of a free market economy, as is within the spirit of the EU, each company should be able to choose how to protect itself against environmental liabilities and to show that it will be in a position to cover the losses caused by their activities. Allowing companies to choose how to cover their exposure to environmental liability also remains within the spirit of the "polluter-pays" principle that is emphasised in the ELD.

Therefore, an **EU-wide voluntary financial security scheme** is the optimal way of ensuring that Member State environmental liability needs are met with **the best possible insurance capacity and covers,** as well as that **sustainable insurance products continue to be developed within the environmental sector**.

A voluntary system in the EU is particularly important for the risks posed by offshore oil activities

The Deepwater Horizon oil spill clearly demonstrates why a voluntary financial guarantee scheme for the environmental pollution caused by offshore oil activities remains to be the best option, as involved stakeholders should be free to decide either to go self-insured or to buy insurance. Firstly, the damages incurred in this incident exceed the level of coverage available from the insurance market. Based on media reports, the Deepwater Horizon damages amount to approximately $40B in total, including both civil and environmental liability. While insurance market capacity fluctuates according to the needs of the market, it is unlikely that the absolute maximum cover available for the offshore oil sector can go beyond $1.5B (which, additionally, may not be available for all offshore risks). Secondly, mandatory financial security schemes are generally restrictive in nature and make it difficult for insurers to match the cover demanded under the mandatory scheme as well as adapt their cover to complex risk profiles (eg of an offshore oil company).

Being highly specialised experts within their own sector, offshore oil companies are also in the best position to assess their own appetite for insurance cover within their financial guarantee scheme and to determine to what extent they will require it. Moreover, many offshore oil companies **have as much, if not *more*, financial capacity than insurers** due to the amount of capital they regularly generate through their businesses. Thus, their own ability to cover these risks independently of any financial security instruments should be one of the options considered.

(C) The geographical scope of the applicable legal system for offshore oil risks should be worldwide

International liability regimes are already in place for marine oil pollution

The objective of protecting the marine environment is a global concern that would be best enhanced through cooperation with the international community. Considering that offshore oil spills constitute an environmental problem that can easily surpass the borders of the EU, more effort should be placed on addressing offshore safety and liability measures at the international level.

There are already several international liability regimes in place for the losses caused by oil pollution. The International Convention on Civil Liability for Oil Pollution Damage (1969) was adopted to ensure that adequate, prompt, and effective compensation is available to persons who suffer damage caused by spills of oil, when carried as fuel in ships' bunkers. This Convention applies to damage caused on the territory, including the territorial sea, and in exclusive economic zones of States Parties. Moreover, the UN Convention on Law of the Seas defines the rights and responsibilities of nations in the use of oceans and gives guidelines for business, the environment and the management of marine natural resources. The EU, in particular, is a signatory to this framework agreement.

A focus on these existing conventions and other pertinent international legislation would, in our view, be more appropriate before revising the ELD. Likewise, it seems crucial to seek solutions through international channels, as EU regulation will not prevent the severe marine pollution that can still be caused by oil exploration and extraction conducted in nearby third countries. Finally, the creation of a further liability regime could create unnecessary duplication and legal uncertainty over which regime is immediately applicable.

The marine and energy insurance markets have regularly dealt with these conventions and are most adept at covering the liability under them. These types of insurers have been able to respond to the civil liability measures regulated at an international level and there is no evidence to suggest they could not do so within the realm of environmental liability.

Offshore oil sector risks are not covered by traditional environmental liability insurers

The EU-wide insurance market has been steadily developing appropriate cover for environmental liability risks through environmental impairment liability (EIL) policies as well as General Third Party Liability (GTPL) policies. Since the introduction of the ELD, the insurance industry has begun modifying some of these policies to specifically cover ELD risks as well. This development, however, is ongoing and there is currently not sufficient capacity within the environmental liability insurance sector to cover the risks of oil sector activities.

Risks posed by offshore oil sector activities are not generally addressed in EIL and GTPL policies. To the contrary, these risks are covered by specialised policies offered by the **marine and energy lines of the insurance market**. These markets have the detailed expertise to assess and manage the complex offshore oil sector risks. These markets also have the means to perform risk assessments and pricing for losses caused by offshore oil spills as well as a track record of responding to such losses. As mentioned above, these types of insurers have effectively offered related liability cover under the primary international conventions dealing with sea pollution.

While the insurance industry may be exploring ways to build capacity for the cover of oil sector liabilities in Europe, these products represent a highly specialised market of marine and energy insurers with a limited consumer base. This type of market is vastly different from the widely established markets that fall under an EU compulsory insurance scheme already (eg motor liability insurance, which involves less complex risks and is more widely established).

Measures to enhance insurability will always help to the success of the whole system

While insurance plays a significant role in the cover of damages under the ELD – **with respect to risk assessment and prevention as well as risk transfer** – the CEA strongly advises to look toward the offshore oil industry for best practices that can enhance the insurability of risks and lead in the prevention of environmental damage. For example, the offshore oil industry is most adept at advising and developing risk management with respect to offshore oil drilling,

safety and loss prevention. These measures already help to protect human beings and the environment from catastrophic oil spills.

The insurance industry's experience has revealed that a **better focus on such risk management** is the best means of reducing environmental damage risks. This can be effectively promoted by public authorities in two ways:

- enforcement of risk management and prevention measures that is aimed at lowering the risk and, hence, the guarantee requisites; and
- widespread availability of information to better aid with risk assessment (eg technology and best practices).

In addition to the above, the CEA suggests that oil operators should act in accordance with well-established safety practices for offshore oil drilling and maintain a **strong, functional risk and claims management system**. Such measures can aid in significantly minimising the very risk that leads to oil spills. Moreover, increased industry supervision of offshore oil drilling activities could be improved to encourage that more risk preventive measures are taken within the oil sector. This can help ensure that the controlling systems of oil operations work accurately and safely.

Finally, **cooperation amongst the operating oil companies** can promote safer offshore oil operations in the future. Such cooperation could include:

- wider information exchange and communication network between key stakeholders;
- joint effort by industry associations, financial security associations and competent authorities in promoting safety awareness and management amongst oil company operators;
- greater guidance through international laws and institutions.

Conclusion

For the aforementioned reasons, the CEA strongly:

(a) advises against the introduction of a mandatory insurance scheme for the environmental liability risks posed by the offshore oil sector. A voluntary financial security scheme is more appropriate for the development of market-driven solutions in which a certain level of insurance capacity can be maintained, developed and contemplated amongst the various other methods of covering potential liabilities (eg self-insurance, guarantees, funds). While the insurance sector does hold an important and active role in this issue, it is misplaced to rely upon insurance as the sole financial solution for remedying the pollution caused by offshore oil spills.

(b) recommends keeping any liability and financial security scheme for offshore oil activities within the scope of already existing multinational conventions and not restrict it to European law.

European insurers are progressive in building and maintaining a sustainable and innovative market and will continue to take a proactive stance in offering its expertise for legislative proposals. Thus, the CEA continues to welcome a dialogue with EU policymakers in order to assist with the further development of successful environmental liability insurance solutions across Europe.

Solvency II: A bird's eye view and some general questions[1]

Herman Cousy

A. AN AMBITIOUS PROJECT

1."Solvency II" is a huge and ambitious project of the EU that aims at creating a renewed and comprehensive regulatory framework for the prudential regime of insurance undertakings (Directive 2009/138/EC of 25 November 2009 on the taking up and pursuit of the business of Insurance and Reinsurance).

Solvency I" (prudential regime on the basis of the internal market directives) was said to be lacking in sophistication, in diversification and in harmonisation effects, and incapable to adequately respond to the needs of the diversified situation of the insurance undertakings and their supervisory regimes throughout the E.U. In particular the Solvency I "capital requirements" appeared to be too narrowly based on the sole (and rough) calculation of the insurance risks, whereas capital requirements should be calculated on the basis of a more sophisticated and global assessment of the different risks to which an insurance undertaking is exposed both on the liability side (technical provisions) and on the asset side (market risk, credit risk, operational risk) of its balance sheet. Capital requirements should be determined on the basis of a "total balance sheet approach".

2. Solvency II is not just about capital requirements and quantitative aspects, but as in Basel II and the Capital Requirements Directive for banks, there is more. In fact there are not two but three sides to the coin, or three "pillars", as is often said: one on quantitative requirements (capital requirements), one on qualitative aspects like the quality of the governance system, and a harmonized Supervory Review Process (SRP) and a third one, dealing with reporting and information toward the outside world. But the ambition appears to go even further and Solvency II also intends to have an enhancing effect on the adequacy and transparency of the internal governance system (fitness and proper senior management, compliance function,

[1] This text contains a summary of H. COUSY, "An outsider's view on Solvency II", in *Consumer and Financial Services* (J. Stuyck, ed.), special issue of the *European Journal of Consumer Law/Revue Européenne de la Consommation*, Larcier, 2010, 109-116. See also H. COUSY, "Solvabilité II – Un très bref apercu et quelques points d'interrogation", to be published in the forthcoming issue 2011/2 of *Euredia. European Banking and Financial Law Journal*.

actuarial function, internal audit). In every undertaking an effective and integrated system of risk management must be installed, all decision making must be impregnated with a risk-sensitive approach, and the risk and capital management must be integrated in the strategic decision-making.

In the wording of a by now famous quote by the (then time) CEIOPS chairman Thomas Steffen: “Solvency II is not just about capital. It is a change of behaviour”. Or how ambitious (and idealistic?) regulators can be.

B. QUANTITATIVE ASPECTS

1. Capital requirements should be determined on the basis of market consistent and risk sensitive overall appreciation.

In determining capital requirements two thresholds are used: the Solvency Capital Requirement (SCR) and the Minimum Capital Requirement (MCR). Highly remarquable is the fact for the calculation of the SCR an “Internal Model” can be used by those undertakings who have the means to do it. Companies who are not apt to do so will have to make use of the “Standard Approach” prescribed by the directive. Insofar as the Standard Approach would, because of a lesser degree of sophistication, lead to higher capital requirements than the internal one, the distinction is seen by some as another way of privileging the larger undertakings.

2. The starting point of the Solvency II approach is that capital requirements must be in line with the actual risks to which an insurance company is exposed to (as said both on the asset and on the liability side of the balance sheet). The basic idea appears to be that the capital requirements will have to be adapted to those risks.

A fundamental question is whether the view on Solvency II, and especially the assessment of its effects in the real world, does not become entirely different when the order of thought is turned around. It is not conceivable that in the real world the capital situation of an insurance undertaking (the amount and quality of its own funds, its possibility of access to new capital, its actual remuneration) will be taken as the

starting point of the exercise that is imposed by Solvency II, instead of being considered as the outcome of a complicated process, of risk evaluation and capital calibration.

If such approach is adopted, numerous questions arise about the effect that Solvency II will have on the ways in which the manifold risks can be handled and reorganized, in view of justifying a supposedly given capital base.

In particular, questions can be asked about the possible influence of Solvency II upon the size and nature of the insurance undertaking, upon its policy of underwriting, and upon its investment strategy.

3. Influence on size. Solvency II may perhaps benefit large companies, not only because they have the means to conceive their own internal models, but also because the system clearly rewards risk-diversification and risk-mitigation. Large undertakings have by nature more diversified portfolio's and have probably better access to the use of risk mitigation systems.

4. Influence on underwriting policies. Insofar as the insurance risk will have an effect on the risk-assessment of the undertaking and thus indirectly on the capital requirements, it is to be expected that insurance companies will adapt their underwriting policies. Is there no danger that entire branches of insurance (like the insurance of complex risks with high degrees of uncertainty, of long tail risks - like e.g. liability insurance -, of new and less known risks) will be disfavoured and even abandoned because of their adverse effect on the ensuing higher capital requirements. Will prudent underwriting not lead insurers to limit the scope of their activities?

5. Influence on investment policies. A similar sort of reasoning can be applied to the influence of Solvency II on the investment policies of insurance companies. In this respect Solvency II seems to give conflicting impulses. The "prudent person" principle (which comes to replace the prudent quantitative restrictions) appears to lead to more freedom for insurance companies but the influence of the market risks and the ensuing capital requirements might and probably will induce insurers to a

more prudent investment behaviour. Solvency II, so it is said in a CEA brochure, should provide incentives to invest in assets that suit the underlying risks. The question can be raised whether there is no inducement here to invest in bonds rather than in shares, and whether there is no danger for a negative influence on stock markets?

C. QUALITATIVE ASPECTS

Another feature of this reform is that the responsibility for a coherent risk- and capital management is very much put upon the controlled undertakings, whereas the role of the supervisory authority consists in controlling whether the strategies, processes and reporting procedures that have so been determined, satisfy the requirements of the directive. The same applies to the evaluation of the risks and the company's ability to adequately assess them.

Contrary to first appearances, such changes may make the supervisory tasks more intensive and delicate than under the existing system which is much more based on a simple control of figures and ratio's. In a way one might qualify the new type of control as being of a more "qualitative" nature. It is not excluded that such type of control leads to more "implication" of the supervisor. As it is said in a PWC working paper: "The move to a principle-based approach to supervision will transform the relation between supervisors and regulated entitites in many Member States. Companies are likely to find themselves working more closely with regulators as part of a more hands-on system of review, in particular when seeking internal model approval. This is likely to be a steep learning curve to both".

D. A COUPLE OF OTHER QUESTION MARKS

A predominant preoccupation of the Solvency II architects is to eliminate as far as possible the existing differences in the exercise of supervision "in practice" between the different Member Stares, and to bring them on one line. The age old difference of

insurance cultures may undoubtedly be an obstacle that may prove to be hard to eliminate.

It has been suggested that Solvency II may have an impact on the role of reinsurance (itself subject to the Solvency II directive), and the question is indeed whether the reinsurance is apt and will be found willing to serve as a part of the solution to a risk – capital disequilibrium.

One step further would be that Solvency II induces insured's to seek protection under some technique of Alternative Risk Transfer, which could be detrimental to the central role that traditional insurance and reinsurance used to play in the management of risks.