CREDIT INSURANCE WORKING PARTY
19 Mai 2010 - Paris

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Minutes of the meeting

Professor Jérôme Kullmann, Chairman of the Credit Insurance Working Party, Vice-Chairman of AIDA Europe, welcomed the working party members and opened the second meeting related to legal issues in credit insurance.
He remembers the need for improving the knowledge in credit and political risk insurance rules and practices to score the best practices in the industry, by a comparative approach involving every Country.
The working party is a worldwide AIDA's group about credit insurance and its aim and objectives are to exchange and achieve a legal and practice data base in this matter and also to prepare a comparative study which contains proposals about credit insurance to be submitted to international or regional organisations such as OECD and European Union.

Louis Habib-Deloncle, co-chairman of the Credit insurance Working Party, and Chairman of Garant, explained the role that the Working Party plays to advocate a market discipline with regards to legal issues. Credit insurance law issues are global and go far beyond the borders of Europe. In this respect, the Working Party will deliver comparative studies between the different legal issues and practices in the global market.

The moderator Professor Diana Cerini (Italy) introduced the special topics for the seance. According to the previous Zurich meeting on the 22 october 2009 many legal issues are investigated and exposed.

I. **The Validity of the contract regarding the *full disclosure obligation* and *payment* of the premium principle** (a comparison between French and Common law system by M. Bernard Mettetal, HMN Law Firm, Paris-France).
About the full disclosure obligation. In *French law* credit insurance is governed by general rules of the contract, which are less favourable for the insured than the protective rules of the insurance contract. The full disclosure obligation of the insured is sanctioned by the cancellation of the contract under three categories: mistake, duress and fraud; the last one being the most recurring hypothesis. Under the contractual documents the insured has the disclosure obligation on certain elements of risk. So an untruthful statement by the insured constitutes a fraudulent misrepresentation and ultimately, a ground for rescinding the contract. If that is also stipulated in the contract, this one will be automatically terminated for such a misrepresentation. Such an avoidance clause can restrict the judge's discretionary power to interpret the will of the parties. In credit insurance matter customs may be relevant, and it is common to refer to the English practice in this regard. In French law only an arbitration clause shall permit to the arbitrator to take into account the market practices, for the French national judge will apply the general rules of the contract under the Civil Code. In *English law* things are different. Firstly, reinsurance is considered a particular branch of insurance. There is no law Act definition of "contract of insurance", but English Courts have defined it. Secondly, the contract of insurance contains the duty of "Utmost Good Faith" and the insured has the spontaneous obligation to reveal the elements of risk (but not in French law). Therefore if the insured does not perform this obligation the contract is terminated, which is a severe penalty. Another feature is the existence of the warranty system. The breach of a "warranty" leads to the rescission of the contract and the power of judge is restricted even though the breach of a condition is unrelated with the risk or the decision to subscribe.
About the payment of the premium. In *French law*, the disposals of the Code des Assurances are not applicable to the credit insurance, so the parties are free to arrange the consequences of the non-payment of the premiums. It may be established a termination-clause of the contract for the lack the payment of the premium after a certain date, and the contract shall be terminated. Such a clause would be void in a classic insurance contract, but is available in credit insurance contract. But if the contract doesn't contain such a clause the judge is free to appreciate if the non-payment must involve the rescission of the contract. In *Common Law* the situation depends on the circumstance whether the contract contains or not a "Premium Warranty Clause" (i.e. a "PWC"). If there's a PWC clause in the contract English Court do apply it with an extreme rigor. If the premium is not paid to the Insurer (and not to the Broker) before the dateline, the contract will be automatically terminated *ab nihilo* even though the premium is paid before any claims to the Insurer or the Broker. In this last case the Insured

could bring an action against his Broker. Without a "PWC" clause the judge shall apply the provisions prevailing in the contract with some discretion.

II. **The *English Legal View* of Trade Credit Insurance and the *due diligence* principle** from the viewpoint of a practitioner (by M. Glenn H. Sexton, United Kingdom).
The Marine Insurance Act 1906, while referring to marine insurance and giving directions for the interpretation of the Lloyds SG Form, it was taken from its inception as a guide to insurance generally. The Act defines the duty of "utmost good faith", but does not mention such a thing as a "*claims waiting period*". There is a very sparse list of reported cases involving trade credit insurance contracts and not all trade credit insurance policies take the same line in setting out what the insurer expects from the insured in case of a loss under the policy. The *waiting period* sometimes passes without the insured having any duties except to follow policy conditions and immediately, or very soon after, buyer default pass the debt to the debt recovery company specified by the insurer. The recovery company takes on recovery action reporting to the insurer. Any step requiring action by the insured is done under instruction from the insurer, with the recovery company acting as agent. In such a case, *the waiting period gives time for the recovery to be made*, or for the buyer to be made insolvent, or possibly simply disappear.The usual view of the waiting period is that it exists for the loss to "crystallise" or for the maximum recovery to be realised, and so is established on an empirical basis of how long this process might take. We see a difference between the two main forms of credit insurance; *wholeturnover*, and *excess of loss*. The insurer under the wholeturnover policy, requires the insured to have all buyers approved as to maximum value of credit and often of the term extended. Any discretionary limit is small, but, more importantly, the freedom of the insured is restricted. *Due diligence* is required of the insured in the sense that they must be alert as to the progress of the sale, make appropriate declarations and reports to the insurer and, when required, pass the debt to the collection agency nominated by the insurer. An excess of loss policy, where the insured bears a deductible or aggregate first loss, generally based on actual loss history, usually gives the insured a discretionary credit limit often equal to the deductible. Both forms of policy require the insured to warrant their credit procedures, but this form requires the insured to exercise the procedures independently of the insurer, for example in setting most of the credit limits. In case of an overdue payment, or potential loss, the insured reports to the insurer, but proceeds to take recovery action as under their credit procedures and at their own cost until ultimate recovery or established loss. The due diligence required of the insured under such policy terms is of a high order and it is assumed that the insured will have the resources and experience to handle the matter better even than the insurer's claims department.

III. **US and EU regulation on money laundering and the potential financing of terrorism** (by Hans Londonck Sluijk, Houthoff Buruma Law Firm, Amsterdam). The presentation opens with a law case about a Dutch company who made a sale transaction with a Mexican company in US dollars. A insurance contract covered the commercial risk related to the transaction, and the Insurer did indemnify the Insured. The Arbitral Tribunal had considered that an order of payment from a Bank to another foreign Bank in a different currency from the previous currency of the contract (US$) it's not considered a money laundering hypothesis.

Louis Habib-Deloncle pointed out the need to distinguish the "turn-over" (both the domestic and export short term risk activity) from the "single risk" insurance activity. The last one includes nowadays the *political* and the *commercial* risk covered together by the same policy, although in the past the single risk activity covered the pure political risk. Today the same police often cover the export risks related to political decisions that preclude the performance of the contract as well as the insolvency of the (private) debtor towards the insured. So synergies and networking activities between private and national public insurers are quite convenient for we face the same risks under the single risk activity.

Louis Habib-Deloncle noted that the Working Party received relevant contributions from the members about *national credit insurance legislations and regulations* of Argentina (by Pablo S. Cereijido from MARVAL, O'FARRELL & MAIRAL, Buenos Aires), Austria (by Erhard Böhm from BAIER BÖHM Rechtsanwälte, Wien), are welcome, Spain (by Jorge Angell from L.C. RODRIGO ABOGADOS, Madrid) and United Kingdom (by Glenn H. Sexton). We thank all the members for their support.

Furthermore more other presentations and papers are welcome for the next meeting on 10-11-12 November 2010 in LISBON (date to be confirmed), in order to achieve an overall overview and data base about all national regulations and jurisprudence concerning credit insurance law.

A debate followed and some members asked for a deeper analysis about the turnover and single risk activities as well as a first bibliography to be available on the matter. Irit Shapira Weber also asked for the EU regulations and OECD recommandations (Bâle II compliant wordings) related to credit insurance law to be presented in the next meeting.

Louis Habib-Deloncle and Prof. Jerôme Kullmann noted the following legal issues to be treated in the next Working Party meeting:

- ✓ A presentation about OECD Basel II recommandations and EU regulations
- ✓ Where to buy a credit insurance policy? It's about the location of the risk or the location of the Insured?
- ✓ Euler-Hermes in India: law case
- ✓ Use of the concept of « non-insured event »
- ✓ Do national European legislations consider the Insured as a « weak party »?

Also a first bibliography on credit insurance law works will be soon available on the site.

The Credit insurance Working Party will meet in LISBON on 10-11-12 November 2010 (to be confirmed).