Association Internationale de Droit des Assurances
International Insurance Law Association
Associazione Internazionale di Diritto delle Assicurazioni
Internationale Vereinigung Versicherungsrecht
Asociacion Internacional de Derecho de Seguros

MEETING OF THE

15th AIDA CLIMATE & CATASTROPHIC EVENTS WORKING PARTY

AND THE CILA CAMBIO CLIMÁTICO WORKING PARTY

11:00HRS AND 12:45HRS - WEDNESDAY 3 MAY 2017
LOS TAJIBOS HOTEL & CONVENTION CENTER AV. SAN MARTIN 455 SANTA CRUZ, BOLIVIA

Current concerns and solutions in the management of climate and catastrophic risks and events

MINUTES OF MEETING

1 Welcome and Chairman's Introduction - Tim Hardy (UK)

The meeting was a combined meeting of the AIDA International WP and the CILA WP. Despite any variation in name their goal was a common one and which benefited from close collaboration, not just today. The issue of Climate Change could not be more global in its impact and is not confined for insurers to catastrophic losses and environmental impact. By the same token provision for neither of those classes could be ignored in addressing the wider landscape of risk. Today's presenters, Pery Saraiva Neto (Brazil) and Chris Rodd (Australia) had contributed greatly to the past work and again to today's session. So, too, Maria Kavanagh (Argentina) and the MERCOSUR group whose regular reports were a feature of our meetings and about whose latest report a few words would be said later.

Given that much benefit was commonly derived by the Working Parties from the contributions of those who cannot physically attend every meeting those attending for the first time were encouraged to provide their contact details upon the register being circulated to allow them in turn to receive mailings and electronic newsletters and the like and make contributions in response. The Working Party's page on the existing AIDA website afforded a significant resource of material from past meetings and everyone was encouraged to visit there to see what had been loaded from meetings in the latter part of 2016 and following this meeting, all the presentations and materials from today's session, in more than on language where possible.

Before turning to today's agenda it was timely to observe more recent twists in the Climate Change tale. Only 18 months ago the Working Party had been meeting in Paris at the time of the COP21 which had led to nearly 200 countries, including previously missing major players, signing then ratifying the Paris Agreement committing to emissions reductions. In the space of less than a month has come the announcement in the US first that any reference to Climate Change has been deleted from the White House website. The same is now happening to the website page of the Environmental Protection Agency (EPA). We are told we must now wait to learn whether President Trump is to withdraw the name of the US unilaterally as a signatory of the Paris Agreement. Interesting times, indeed.

While in La Paz last week the Chairman had located the papers from a Congress President Morales had convened in Cochabamba in 2010 aimed at promoting the concept of Climate Justice among many countries dismayed by the lack of progress achieved at the previous year's COP in Copenhagen in recognising both the plight of underdeveloped countries suffering most from the effects of Climate Change and the potential need to stress the rights not simply of legal property rights, but those of Mother Earth herself. How might that quest for Climate Justice or other remedies be pursued if the advances of the Paris Agreement start to unravel? In the aftermath of a new wave of catastrophic losses in South America and elsewhere, of which more today, the picture may remain a very uncertain and challenging one for insurers, environmentalists and us all.

2. FIRST PRESENTATION: Mariana/Fundao Dam Disaster and aftermath – Eighteen months on – PERY SARAIVA NETO (BRAZIL)

This presentation was the third in a series upon the aftermath of what has been described as Brazil's worst ever environmental disaster. Earlier presentations were delivered by Pery at the Vienna meeting (14th) and by Gloria Faria in Helsinki (12th meeting).

A quick resume of the physical and economic impact of the disaster left no doubt about the severity of the occurrence. Nor, why some 18 months on, anger and a call for change is so prevalent. The losses took the form of individual losses, ecological/environmental and a wider mix of socio-economic impact. Conflicting news about the aftermath has very recently been emerging.

According to the Federal government and the states of Minas Gerais and Espírito Santo it was announced this week that a fund of R$20bn was being established with the mining company, Samarco, to clean up the river basin of Rio Doce over the next 15 years with a proviso that Samarco, be obliged to put up the first R$4.4bn. The external commission investigating the breakup of the dam in the region of Mariana, the Chamber of Deputies, the next day were reported as having unanimously voted for a motion of repudiation of any such agreement.

Their reason was that this would not provide any direct recompense to those directly affected by the failure. It would not discharge the legal obligation owed to which a false defence was said to be maintained by the company. The terms of the agreement were wrongly prioritising the long-term well-being of the company. More needed to be paid by the company.

The Report on the water contamination in Mariana also contradicts the official account released. While the Serviço Geológico do Brasil report into the water and sediment in the basin stated that the levels of heavy metal contamination fell within acceptable limits, independent research findings revealed the existence of manganese and arsenic lead far above permitted levels.

As for individual actions, proceedings were commenced to assess the claims brought by residents against Samarco, its joint owners, Vale and the Anglo-Australian company, BHP Billiton and the local municipalities and regional authorities. In total, some 5,500 such actions have been filed. It has been estimated at the end of March that a total of 10,000 might be expected. These were all people claiming to have suffered from the effects of ore tailings released upon the failure of the dam.

Proceedings pursuing compensation against Samarco and asking them to meet other legal obligations concerned with the quality of the water in the Rio Doce in special courts of Governor Valadares are being suspended pending review of whether they have the requisite jurisdiction to consider such actions.

As for the calculation of the cost of the ecological damage sustained and to be remedied on 16 March 2017 there was a move to have the courts acknowledge the terms of an initial agreement made between Samarco and all other parties calculating that a sum of R$2.2bn would need to be paid by way of financial commitments to secure costing analyses to be conducted and to finance the programme of reparation to the environmental damage and payments to be made to residents directly affected. Of this amount, R$100m would actually be paid, R$1.3bn would take the form of a guaranteed payment and the remaining R$800m by way of pledging Samarco assets.

A critical question remains of how one defines or recognises “ecological damage”. According to the UN Human Rights Council the measures currently employed by Brazilian President Michel Temer to try to contain the toxic mud and repair the environmental and socio-economic damages caused by the accident continue to remain insufficient and represent a failure to address the human rights losses sustained by many residents.

2 **SECOND PRESENTATION**: **Presentation on aftermath of Queensland floods/contrasting action involving Wivenhoe Dam – CHRIS RODD (AUSTRALIA)**

The presentation appearing on the screen - to supplement the contribution now being delivered – was prepared for a discussion in Australia of insurance liability implications for dam management and construction, not to lawyers and insurers, but to the dam engineers themselves.

The background to this was the interest generated in Australia by the flooding in Queensland and the water releases which occurred in January 2011 *inter alia* to save the Wivenhoe Dam. In the aftermath no fewer than 5,500 claimants had pursued class actions against *inter alios* the operators of the dam alleging that the dam had been operated in direct breach of its own Operations Manual and that the operators had been negligent in failing to utilise available rainfall forecasts and failing to adopt appropriate water release strategies as and when required.

In his earlier presentation Chris had compared and contrasted the 2015 failure of the Fundao Dam in Brazil, about which Pery had just spoken, and the allegations about the Wivenhoe Dam.

It was not necessary in this presentation to repeat much of what has just been rehearsed about the Fundao dam. Better simply to report upon the more obvious distinctions and contrasts in what emerged in each case against the history of past cases involving dams around the world.

One finding has been that mining dams and dumps are among the highest risk structures on earth and large tailings dams, like that in operation at Fundao, among the most dangerous of all. Given the variable levels of regulation and enforcement around the globe, the design and construction of many dams is almost a matter of self-regulation. The complexity of many almost defies pre-scripted regulation.

In short, the Fundao dam is widely seen as a lesson in bad design, with design flaws that had already been identified before the spills occurred. A series of alleged errors in design and supervision included the granting of a licence to increase dam capacity in 2013 despite a failure previously to have complied with previous conditions and a lack of monitoring.

Whether the losses sustained at Fundao will be insured ones (the operators' property programme is underwritten by ACE) depends in part upon the outcome of the Brazilian prosecutors' criminal proceedings against Samarco and criminal charges against their executives. A finding of criminal culpability could mean neither the property and casualty covers, nor any D&O cover will respond.

The story of the action brought against the operators of the Wivenhoe Dam (Seqwater) among other defendants, turns more upon causation issues. The claimants have the task of demonstrating that even if the failure to adhere to the operations manual and other alleged negligence are shown that on the balance of probabilities the extent of the flooding and damage which occurred was caused or exacerbated by such breaches.

Criticisms in the Royal Commission Report will not suffice as proof. Few if any insurers have joined the subrogation proceedings. Insurers have of course already paid out millions in flood and storm water claims. Seqwater had assets and insurance to the tune of A$3bn against whom subrogated proceedings could be pursued if a negligent third party.

Other local dam operators, Sunwater, similarly had sizeable assets and insurance. The Queensland Government Insurance Fund (QGIF) in turn has reserves of approximately $900m to respond to claims arising from proven liability, but other defendants, the Queensland Government, did not insure its infrastructure assets – its roads, bridges etc.

A further question concerns whether any proven acts of negligence re any failure to effect a more timely and controlled release of water were actually covered under general liability or P.I. policy terms. P.I. or D&O covers may respond for operational failings but a critical question may be whether general liability insurers are responsible for failures by the insured to effect maintenance routines or repairs. Also, what material damage exactly is covered. Is it affected by the fact that the release of water causing damage to spillways was a deliberate act, albeit in response to an unexpected if not unforeseeable sequence of events?

The answer to a number of these issues may yet come to light in the litigation still being pursued. The class action, vacated in September 2015 as not being ready for trial, is now scheduled for hearing in 2017 with a time estimate of one year.

4 THIRD PRESENTATION: Presentation on MERCOSUR Report upon recent catastrophic events in region – TIM HARDY (UK)

Had time permitted it had been hoped to present to the meeting a short synopsis of the 69-page Report prepared for the meeting by the MERCOSUR Group, co-ordinated by Maria Kavanagh (Argentina) describing some lessons and considerations to be drawn from the series of catastrophic events affecting the region during the summer season of December 2016/January 2017.

Maria had also kindly produced a Powerpoint presentation and a video supplementing the Report, all to be loaded shortly onto the AIDA website, along with today's other presentations, in both English and Spanish versions.

Given the constraints on time and with the encouragement that it is possible only to do full justice to the Report if those attending read it themselves, it was decided not to attempt to discuss its contents now. The value of the contribution was acknowledged just the same. There were some interesting general observations made. Two were mentioned briefly.

First, it was observed that across the region mitigation of damage caused by natural hazards is generally improving by the employment of, *inter alia*, hurricane warning systems, highway construction resilience against landslides and building resilience in earthquake zones. At the same time, however prevailing weaknesses remained. These included: limited political incentive for investment; lack of general awareness at all levels; and a prevailing sense that disasters are "natural" and hence unavoidable…

Second, periods of reconstruction in the wake of a disaster often afforded an excellent opportunity to integrate risk reduction techniques or features into development planning. An interesting question to which to try to establish an answer is how far and how often such opportunities are being taken and what role if any insurers are playing in that respect?

5 FOURTH PRESENTATION: Parametric Insurances – Some Legal Thoughts – PERY SARAIVA NETO (BRAZIL)

Three issues would be addressed: i) the concept of parametric insurance; ii) the risk and possibility of accumulated damage insurance; and iii) damage insurance in the absence of damage and the compensation principle.

The concept of parametric insurance: The 2015 Paris Agreement expressly recommended in respect of the mitigation of Climate Change that an information clearing house for insurance and risk transfer be established. This would serve to help everyone develop and implement more effective global risk management strategies. It highlighted the importance of preventing, minimising and addressing the adverse effects of Climate Change, both in terms of extreme events, but also less extreme gradual losses. It suggested use be made of traditional insurance, mutualisation of risk and alternative solutions.

One challenge is how can mass product insurances operate in the face of such unstable and uncertain times ahead, with increasing frequency of high exposures? The answer lies in developing new models. Parametric insurance operates by the payment or settlement of the contract being determined simply according to a settled climatic or geological or observational index, not the actual losses of some category suffered by any individual.

The calculation of payment is a direct correlation of the index, so a different trigger from traditional insurance. No need for actual loss or causation issues to be considered simply the application of the detailed provisions specified in the contract.

One application concerns the loss of a power supply for large consumers. In Brazil the Energia Natural Afluente (ENA) supplies electricity to approximately 65% of the country. The company derives its energy directly from the natural flow of the river, an index measured daily by the national system operator. If the ENA experiences extended reduction in the index reading below 90% of the long-term average then by the terms of a contract provided to it it becomes entitled to specified monetary payments. Legal issues do arise around those elements triggering liability missing from traditional insurance.

The basic risk and accumulation of damage: It is of course possible that by the terms in which the parametric insurance is calculated no payment is triggered, yet the insured will have sustained losses. This may always lead to some frustration and offend the rightful expectations of some consumer insureds. There will be need to make legal provision by way of the quality of information provided about such products and consideration about what concerns arise when parametric mass products are applied to large risks.

Unless there is a clear understanding about the precise purpose of the product and a two-way exchange of information between the parties, as well as express provision for the anomalous position described above, it is likely great frustration will be experienced about what is expected, resulting in likely litigation.

A possible solution, but one which contradicts one of the main features of parametric insurance (cost reduction) is to combine parametric insurance with traditional cover for the same risk. In this case, however, they would of course *not* in any true sense represent the *same* risk.

Damage insurance in the absence of damage and the compensation principle: With parametric insurance the opposite can of course occur, namely there will be a trigger for a payment when an index reading arises despite no occurrence of damage having resulted for the insured or to their assets. The essence of insurance is the indemnity principle, requiring a loss to have occurred. That is how traditional insurance is structured – is it possible to change?

If there is a risk and an insurable interest – that suffices if there are associated insured losses. This will not work however if the parties to the contract determine how much is paid in respect of things within their control. Will it be possible in cases where policies are covering estimated damages?

By s757 of the Insurance Civil Code the answer appears to be, “Yes”. The general principle is: “by the insurance contract, the insurer undertakes, against payment of a premium, to guarantee a legitimate interest of the insured regarding a person or thing against predetermined risks". The object of the guarantee of insurance is not the compensation indemnity of future damage, but the legitimate interest of the insured which is to be specified in the contract. So, there is no argument. Exposure to a climate parameter *can* be sufficient interest of the insured.

BUT, by s776 of the Insurance Civil Code, the answer is “No”. The principle applying specifically to the payment of claims concerning damage insurance specifies that the insurer is obliged to pay in cash to indemnify the prejudice suffered by the risk taken unless it is otherwise agreed to replace what has been damaged. This affirms the need for prejudice to have been suffered by the insured as a pre-requisite for any indemnification.

6 Conclusion

Time allowed for nothing more than for the Chairman to thank all the presenters and those attending for their time and interest, as well as those who had contributed to the meeting by submitting materials: a practice again encouraged for those not able to attend meetings in person. Also, again AIDA Bolivia and the translators for enabling the meeting to occur at all.

Materials would be loaded on the AIDA website where information could also be found about the next meetings of the CCEWP in Singapore in October, then Warsaw next April, ahead of the meeting at the World Congress in Rio in October 2018.

Tim Hardy

Chair, AIDA Climate & Catastrophic Events Working Party (CCEWP)