

**CITY OF LONDON LAW SOCIETY**

**INSURANCE LAW COMMITTEE**

**Minutes of a Meeting held at the offices of Allen & Overy at 5pm on Tuesday 22nd September 2009**

**Present:**

Ian Mathers (Chairman) – Allen & Overy  
Helen Clark (for Richard Spiller) – EAPD  
Beth Dobson (for Glen James) – Slaughter & May  
Catherine Hawkins – Berryman Lace Mawer  
Geoff Lord – Kennedys  
Terry O'Neill – Clifford Chance  
Stephen Lewis – Clyde & Co  
Daniel Chumbley (for Charles Gordon) – DLA Piper  
Paul Wordley – Holman, Fenwick and Willan  
David Wilkinson – Kennedys

**Apologies for absence:**

Martin Bakes – Herbert Smith  
Martin Mankabady – Mayer Brown  
Michelle Bramley – Freshfields  
Kenneth McKenzie – Davies Arnold Cooper  
Michael Mendelowitz – Norton Rose  
Anna Tipping – Linklaters  
David Wilkinson - Dewey & LeBoeuf  
Christian Wells – Lovells

**1. Approval of minutes**

The minutes of the meeting of 9th June were approved, subject to minor correction.

**2. Chairmanship**

The Chairman reported that Geoff Lord had kindly offered to assume the chairmanship from the date of the Committee's next meeting, subject to approval by the CLLS Committee. His offer was warmly welcomed.

**3. Membership**

The Chairman noted that David Wilkinson had joined Kennedys from Dewey & LeBoeuf and approved the continuation of his membership.

**4. Insurance Contract Law**

The Committee noted that responses had been sent on behalf of the Committee to the Law Commissions' issues papers on section 83 of the Fires Prevention (Metropolis) Act 1774 and on the insurance of micro-businesses; and expressed its thanks to Martin Bakes for taking the lead in drawing these responses up.

**5. With-profits: PS09/9**

PS09/9 contains the FSA's policy decisions and Handbook text confirming their proposal to prohibit (with minor exceptions) insurers from charging compensation payments to a with-profits fund. The Chairman noted that the FSA had expressed themselves willing to reconsider the possibility of drawing a distinction between minor administrative errors and systemic errors if anomalies arising from the operation arose or if practicable and workable proposals for making a distinction of that kind arose. The Committee agreed that the basis for such a distinction could be problematical.

## **6. Aviva transfers and reattribution**

The Chairman noted that there had been some criticism by policyholders of the reduction in their anticipated payouts: however judging from the FSA's report this had been due to general falls in the value of investments rather than any management issues. There had also been criticism by the Policyholder Advocate of the regulatory context in which she had had to advise; but the nature of these criticisms was not altogether clear.

## **7. Solvency II**

The Chairman reported that the Solvency II Legal Working Group had made reasonable progress in getting to grips with the raft of consultation papers issued by CEIOPS for the purpose of developing Level 2 measures to implement the Framework Directive; and had submitted further responses to CPs 43 (own funds), 52 (reinsurance mitigation techniques) 60 (group solvency assessment) and 61 (intra-group transactions). Stephen Lewis inquired as to the reasons for the apparently late awakening of the industry to the additional capital costs likely to result from the new regime. Beth Dobson said that one issue which had emerged was the realisation that a requirement in the Directive which apparently required the use of a risk free rate to calculate technical reserves could have a serious impact, particularly on annuity business. The Chairman agreed. Possibly it was only the detailed proposals contained in CEIOPS' CPs that had focussed insurers' minds. Apart from the discount rate, there were other provisions designed deliberately to protect against a repeat of the recent financial crisis, such as a proposed restriction on the recognition of hybrid capital instruments: it might be that these proposals would be diluted, but the pressure on regulators to be seen to have responded appropriately to the crisis should not be underestimated.

## **8. Recent court decisions**

There was a discussion of *Wasa v Lexington* [2009] HL 40 relating to the reinsurance of US environmental risks where the US courts, applying the law of Pennsylvania, had found the insurer liable for damage which occurred before the inception of the cover. The House of Lords held that the reinsurance policy, despite being expressed "as original" and incorporating a follow settlements clause, should not be construed so as to cover the pre-inception losses: that construction would not have applied under English law, the underlying insurance had contained no governing law provision and the parties could not have contemplated, when the reinsurance was concluded, that Pennsylvanian law would apply. Differing views were expressed in the Committee as to the correctness of this decision, but it was agreed that its implications were far from clear (for example, would the decision have been different if there had been an express choice of Pennsylvanian law but the parties could argue that the effect of that law was uncertain?); and it could therefore lead to further litigation. There were also discussions of the judgment of the Court of Session in *Scottish Lion* [2009] CSOH 127 where the Court had declined to approve a solvent scheme of arrangement against the objections of a minority on the basis that there was no inter-creditor problem which needed to be cured by a scheme, since there was no evidence that the insurer would be unable able to run off its liabilities in the ordinary course of business (it was understood that this judgment is likely to go to appeal); and of the Court's approval of the transfer of business from Lloyd's Names to Equitas Insurance Limited. The Chairman also drew attention to *ECJ Case C-347/08 Vorarlberger Gebietskrankenkasse v WGV-Schwabische Allgemeine Versicherungs AG*, where the European Court had held that the protective provisions for insured parties in the Brussels I regulation on jurisdiction did not extend to a social security institution acting as a statutory assignee of claims against a motor insurer.

**9. Items for future attention.**

It was noted that the Law Commission's report on consumer insurance was likely to be published shortly and that it might be followed by an issues paper on business insurance before the Committee's next meeting. Paul Hopkin of AIRMIC had agreed to attend that meeting to discuss issues of mutual interest which had arisen from the Law Commissions' work to date.

**10. Next meeting**

The next meeting will be held at Allen & Overy on 8th December.