

CITY OF LONDON LAW SOCIETY

INSURANCE LAW COMMITTEE

Minutes of a Meeting held at the offices of Allen & Overy at 5pm on Tuesday 9th December 2008

Present:

Ian Mathers (Chairman) – Allen & Overy
Martin Bakes – Herbert Smith
Jonathan Goodliffe (for Michelle Bramley) – Freshfields
Helen Clark (for Richard Spiller) – EAPD
Beth Dobson (for Glen James) - Slaughter & May
Geoff Lord – Kennedys
Martin Mankabady – Mayer Brown
Terry O'Neill – Clifford Chance
David Wilkinson - Dewey & LeBoeuf
Emily Benson – Barlow, Lyde & Gilbert
Leon Taylor (for Charles Gordon) – DLA Piper

Apologies for absence:

Stephen Lewis – Clyde & Co
Kenneth McKenzie – Davies Arnold Cooper
Catherine Hawkins – Berrymans Lace Mawer
Anna Tipping – Linklaters
Paul Wordley – Holman, Fenwick and Willan
Michael Mendelowitz – Norton Rose
Christian Wells – Lovells

1. Approval of minutes

The minutes of the meeting of 23rd September were approved, subject to an amendment proposed by Helen Clark relating to the proposal for a meeting with AIRMIC.

2. Membership

The Chairman reported that James Bateson's membership had lapsed; his contribution to the Committee's work, which had been much appreciated, was recognised.

3. Insurance Contract Law

Martin Bakes reported on the Law Commission's summary of responses to their consultation in respect of business issues. The Committee had before it a note of the responses which Martin had prepared. The main issue of contention concerned the control which the Law Commission had proposed over the proposed "default" regime (freedom to contract out of the proposed limitations on remedies) where the insured contracts on the insurer's standard terms. In such a case, the insurer should not be able to rely on a term of the contract that defeats the insured's reasonable expectations. A number of objections to this control had been raised, including that it was very uncertain what should be taken to be the insurer's standard terms, e.g. where policies had been based on a broker's standard wording or where various market wordings or combinations had been incorporated into the policy. However, the Law Commission appeared to think that there would be a reasonable degree of support for the provision of a degree of protection for businesses

which do not have the negotiating power to insist on the default regime, and it was likely that they would revisit the area in the further Issues Paper on business insurance which has been promised in the winter.

It was agreed that the Committee should hold off further comment until the further paper was published. Helen Clark also confirmed that she had initiated discussions with AIRMIC which could hopefully lead to an exchange of views with them at that time.

4. Third Parties (Rights against Insurers) Bill

Jonathan Goodliffe thought that the proposal by the Ministry of Justice to progress this Bill to replace the 1930 Act was very welcome, despite the fact that the judgment in *Re OT Computers* (which curiously was not mentioned in the Ministry's proposal) had already improved the ability of a plaintiff to obtain particulars of a defendant's insurance, and had therefore removed some of the criticism of the 1930 Act. He had a concern as to whether, as provided, the Bill should apply only where the defendant was subject to an English or Scottish liquidation or analogous procedure, but would not wish the Bill to be held up on that account, particularly since it included power to amend the scope by order. Terry O'Neill requested some clarification as to the extent of provisions obviating the need for the provision of "information" in certain circumstances and for overriding provisions "avoiding" a contract. However, subject to those points Jonathan agreed to draft a response to the Ministry of Justice supporting their proposal.

5. Rome I

The Chairman noted that the UK had given a favourable opinion on the UK's application to opt in to this Regulation, with the result that it would enter into force for the UK, along with other Member States, on 17 December 2009.

6. Part VII FSMA/other provisions

Jonathan Goodliffe reported that the paper which Freshfields were preparing on technical defects in Part VII and other provisions of the FSMA was still in hand, but hopefully it would be ready for discussion at the next meeting.

The Chairman drew attention to the FSA's note of a round table discussion in November 2007 concerning the formalisation of the role they were adopting in Part VII procedures, which he had circulated. He understood that the FSA were planning to consult in the next quarter on a description of their role for insertion in SUP. Beth Dobson said that this was welcome. The cases since the discussion indicated that the opportunity for policyholder objections to their report may have extended the proceeding by a couple of weeks; however, the idea of factoring in adjournments, which could have led to more substantial delay and had met with objection at the discussion, did not seem to have materialised.

The Chairman also drew attention to some mergers involving UK insurers which were utilising the absorption procedure of the Cross-Border Mergers Directive. It seemed that in these cases Part VII was being operated in tandem, although he thought it arguable whether merger by absorption involved a "transfer" in the sense of Part VII. However, Jonathan Goodliffe said that so far as he knew in other EU countries which had recognised merger by absorption there had been compliance with the transfer provisions in the insurance Directives, although he was not clear as to the legal mechanics in the relevant countries. So it appeared that the use of Part VII might well be required to ensure the proper implementation of the Directive requirements so far as the UK is concerned.

7. Acquisitions Directive

The Chairman noted that that this Directive was due for implementation by 21 March 2009 and that HMT had issued a consultation paper seeking comment on their proposals for implementation by 12 December 2009. The Directive consolidated regulatory approval requirements which were common to the various

financial services, including insurance, Directives (but not the insurance intermediaries Directive. This had been coupled with several amendments, including a simplification of thresholds, shortening of the notification periods and a list of the permitted grounds of objection. He understood that the Regulatory Law Committee were reviewing the consultation paper and it did not appear that there was anything which called for comment by the Insurance Law Committee. This was agreed.

8. Solvency II

The Chairman reported that he had attended the conference organised by CEIOPS in Frankfurt on 19 November. That had included a presentation of the results of the fourth quantitative impact study (QIS 4) which had involved a considerable number of insurers (more than 60% of solo undertakings and 60% of groups). There had been general approval of the main structure of the new prudential requirements (MCR/SCR) and although further work was required to refine a number of the calculations, it seemed reasonable to think that the Commission's target of implementation by 2012 or early 2013 was attainable. There had, however been a set back in the view of the UK industry in that the French Presidency had secured the adoption by ECOFIN on 2nd December of a compromise text for Solvency II which removed the provisions allowing the SCR to be satisfied at group level. It remained to be seen whether these could be restored.

The Chairman said that he hoped to set up a lawyers group to review and exchange views on the text of the draft Directive as it now stood in the New Year and would circulate the Committee with a proposed date, for those who might be interested.

9. Lloyd's: Legislative Reform Order

The Chairman noted that this order had now been made, in a form unchanged from the draft discussed at the previous meeting, which had also been approved by the House of Commons Regulatory Reform Committee. At the previous meeting there had been some questions raised as to the timing of the changes relating to investment, but there was no indication that these had given rise to any problems.

10. Credit crisis

The Chairman said that there had been nothing said at the Frankfurt conference which cast doubt upon insurers' ability to withstand the current crisis or had been thought to require any substantial change in the Solvency II architecture, although there had been debate about the "dampening" factor proposed to reduce the capital required for liabilities with a duration of more than 3 years. Jonathan Goodliffe noted that the Presidency text for Solvency II included alternative tests for the valuation of equities which tended in the same direction.

11. CLLS profile raising exercise

The Chairman reported that he had attended a meeting of Committee Chairs which generally supported the suggestion of the Society that Committees should where appropriate make more use of available opportunities to gain press coverage of their views on issues of interest. The most obvious step would be to issue summaries of responses made to public consultations e.g. our responses to papers issued by the Law Commission, such as already appeared in the City Solicitor. However, if we were to form a view about other legal developments e.g. judicial decisions, a short comment could also be appropriate. For example, we might make yet make some comment about the recent judgment in the asbestos trigger litigation, although ideally that would have been done earlier. The Chairman said he might try out a form of words in relation to that judgment and test the Committee's reactions. Leon Taylor indicated that there was every chance that the case would go to appeal. In that event, maybe an alternative form of words should be prepared for potential release after the judgment on appeal.

12. Recent court decisions

See the previous item.

13. Any other business

Geoff Lord drew attention to an interesting statement of principles which had been agreed between AIRMIC and some insurers and would allow a period of 90 days between a claim and any reservation of rights by the insurer. He agreed to circulate the statement and perhaps the implications of the statement might be considered at the next meeting.

14. Items for future attention

The Chairman also noted that, in addition to a further Issues Paper on Business Insurance, the Law Commission are intending to publish one on late payment, which Stephen Lewis has kindly agreed to look at. He also noted the European Commission's draft Directive on the regulation of credit agencies which might be worth considering and the current state of their work on guarantee schemes.

15. Meetings for 2009

It was agreed that next year's meetings would be held on 10 March, 9 June, 22 September and 8th December. Subject to further advice by the Chairman, they would be all be held at the offices of Allen & Overy.