CITY OF LONDON LAW SOCIETY

INSURANCE LAW COMMITTEE

Minutes of a Meeting held at the offices of Mayer Brown at 5pm on Tuesday 9th June 2009

Present:

Ian Mathers (Chairman) – Allen & Overy
Richard Spiller – EAPD
Martin Bakes – Herbert Smith
Martin Mankabady – Mayer Brown
Geoff Lord – Kennedys
Kenneth McKenzie – Davies Arnold Cooper
Daniel Chumbley (for Charles Gordon) – DLA Piper
Michael Mendelowitz – Norton Rose
Kapil Dhir (for Paul Wordley) - Holman, Fenwick and Willan

Apologies for absence:

Michelle Bramley – Freshfields
Glen James - Slaughter & May
Terry O'Neill – Clifford Chance
Anna Tipping – Linklaters
David Wilkinson - Dewey & LeBoeuf
Christian Wells – Lovells
Stephen Lewis – Clyde & Co

1. Approval of minutes

The minutes of the meeting of 10th March were approved.

2. Chairmanship

The Chairman indicated that it was his intention to stand down at the end of 2009. He invited those members interested in taking over the chair to contact him in the first instance.

3. Insurance Contract Law

Martin Bakes introduced a discussion of two papers which had been circulated by the Law Commissions, the first on section 83 of the Fires Prevention (Metropolis) Act 1773 and the second on the insurance of micro-businesses. As to the first, it appeared that the original objective of the section, namely to deter arson by enabling third parties with an interest to insist on reinstatement, had not been deployed in any reported cases. Instead the recent cases had indicated only that it might have some other value in promoting third parties' interests in fire policies, notably claims by tenants where the tenancy agreement had not been effectively drafted. In discussion, it appeared that there was little experience of the section having been employed in practice and there did not appear to be any good reason for retaining it on the statute book. It was somewhat archaically drafted, and it seemed anomalous that it applied to England alone and, apparently, did not apply to Lloyd's underwriters (although the authority for this preceded the introduction of corporate capital). On

the other hand, no-one was aware of any case in which it had caused difficulties, and perhaps it should not be regarded by the Law Commissions as a priority for reform.

As to micro-businesses, Martin noted that the Law Commissions had previously proposed a scheme for protecting all businesses by preventing insurers from contracting out of the default regime to the detriment of the business where the contract was on the insurer's standard set of terms and the particular terms had not been properly brought to the policyholder's attention. However, responses had indicated that there would undue difficulty in determining whether a particular set of terms had become a standard form contract. But the nature of the responses had indicated to the Commissions that there was a case for affording more protection for unsophisticated businesses, and the best way of doing this would be to place micro-businesses in the consumer regime. In Martin's view, this approach was not necessarily unobjectionable, but it did give rise to problems in defining "micro-businesses", especially if, as the Commissions proposed, there should be extra filters for "sophisticated" micro-businesses, an extension of the UTCCR to cover micro-businesses and the introduction of a causal connection requirement for warranties about future conduct.

In discussion, some reservations were expressed as to the need for any protection for micro-businesses over and above the Law Commissions' proposed default regime for business insurance, combined with the FSA's conduct of business requirements. However, it was generally felt that some protection on the lines proposed could be acceptable provided that it was kept simple and did not amount to the introduction of a third regime. In particular, it would be best to align any definition of for micro-business on those applicable in one of those currently or prospectively applicable in other areas (including the Companies Act definition of small companies) rather than introduce a new one. It was recognised that there were special considerations driving the proposals (notably the relatively weak purchasing power of smaller businesses, including obtaining advice, and the relatively high impact on them of the absence or inadequacy of insurance). Nevertheless it did not appear likely that the inclusion or exclusion of particular businesses would substantially affect the market. It seemed more important that inclusion or exclusion was based on a test that was well known and easy to apply by both insurers and insureds.

Martin Bakes agreed to draft some short responses to the Law Commissions on both of the above papers.

4. Part VII FSMA

The Chairman reported that Freshfields' work on possible amendments to these and other provisions of the Act had been suspended for the time being, due to perceived other priorities for the Treasury.

5. With-profits: CP09/9

CP09/9 contains the FSA's feedback on responses to the proposals in CP08/11 for barring the payment of compensation costs out of the inherited estate. The Chairman reported that following further consideration, Glen James had considered that there was little we could usefully add to our previous response and he had agreed.

6. Solvency II: FS 09/1

The Chairman noted the recent publication by the FSA giving feedback on responses to DP08/4, The Path to Solvency II. Generally the FSA appeared to have been encouraged by the number of responses although most of these came from the larger UK firms, and the nature of the discussion indicated that respondents had appreciated the challenges in bringing their risk management systems up to the standard likely to be required by the time the Directive was brought into effect (scheduled for end-2012). However, Martin Mankabady said according to informal discussions he had had with actuaries and others, it was likely to be an uphill struggle for many. The FSA would no doubt be bringing increasing pressure to bear on firms as the deadline approached and the Level 2 measures began to crystallise. The feedback statement itself signalled that beginning in October 2009 the FSA will be visiting selected firms and compiling a detailed report on progress towards industry compliance.

The Chairman also noted that the Solvency II Legal Working Group was attracting an increasing number of practitioners: it had been reviewing the key provisions of the Directive and had already responded to one of CEIOPS' consultation papers, concerning the supervision of ISPVs.

7. Other EU proposals

The Chairman drew attention to a joint consultation paper published by CEIOPS and CEBS which recommended several amendments to the Financial Conglomerates Directive, mainly concerned with structural definitions. But he suggested that any response to this paper was more likely to be of interest to the Solvency II Legal Working Group.

The Chairman also drew attention to the Commission's recent discussion and consultation papers on collective redress and the Brussels I Regulation on jurisdiction and the enforcement of judgments. On the first, the Commission had canvassed a range of options designed to afford collective ADR or judicial redress mechanisms for consumers. The scope of any such mechanisms was not very clear but the Chairman pointed to the European Parliament's report on Equitable Life as being pretty compelling evidence of the inadequacy of current national systems. On the second, the Commission was consulting upon several perceived defects of the current Regulation, including the time and expense of the current exequatur system and also the possible removal or amendment of the arbitration exclusion. Any such amendment might helpfully resolve the controversy surrounding the judgment of the European Court in *West Tankers,* which the Committee had previously discussed.

8. Recent court decisions

There was a discussion of *Flexsys America v XL Insurance* [2009] EWHC 1115, where it was held that a drop down clause in a master policy did not, on its correct interpretation, enable a claim to be made under that policy which was outside its scope though within the scope of the local policy; and *Direct Line v Fox* [2009] EWHC 386 (QB), where it was held that the submission of a false invoice following the settlement of a claim for the purposes of quantification did not entitle the insurer to avoid the claim and recover amounts already paid out. The Chairman also drew attention to *ECJ Case C-518/06 Commission v Italy*, where the Court had upheld the right of Italy to impose upon all EEA insurers providing motor insurance in Italy mandatory parameters on the calculation of premiums an obligation to provide third party cover. These requirements were found to be justified by the general good and not inconsistent with provisions in the EU insurance Directives barring the prior approval of policy conditions and scales of premiums.

It was noted that the House of Lords' judgment *Lexington v Wasa* ("back-to-back" reinsurance) should appear shortly and that the appeal in the *EL trigger litigation* was set down for 9th November.

9. Next meeting

The Chairman thanked Martin Mankabady for hosting the meeting and confirmed that the next meeting would be held at Allen & Overy on 22nd September.