CITY OF LONDON LAW SOCIETY

INSURANCE LAW COMMITTEE

Minutes of a Meeting held at the offices of Allen & Overy at 5pm on Tuesday 13th March 2009

Present:

Ian Mathers (Chairman) – Allen & Overy
Michelle Bramley – Freshfields
Helen Clark (for Richard Spiller) – EAPD
Glen James - Slaughter & May
Geoff Lord – Kennedys
Terry O'Neill – Clifford Chance
Kenneth McKenzie – Davies Arnold Cooper
Catherine Hawkins – Berrymans Lace Mawer
Anna Tipping – Linklaters
Daniel Chumbley (for Charles Gordon) – DLA Piper
Michael Mendelowitz – Norton Rose
David Wilkinson - Dewey & LeBoeuf
Kapil Dhir (for Paul Wordley) - Holman, Fenwick and Willan

In attendance: Beth Dobson (Slaughter & May)

Apologies for absence:

Emily Benson – Barlow, Lyde & Gilbert
Martin Bakes – Herbert Smith
Martin Mankabady – Mayer Brown
Christian Wells – Lovells

1. Approval of minutes

The minutes of the meeting of 9th December were approved.

2. AIRMIC Guide to Best Claims Practice

Geoff Lord introduced this paper, which he had previously circulated. It was essentially a set of high level principles designed to encourage a positive and effective approach to claims settlement by insurers. It referenced adherence to AIRMIC's protocol on Reservation of Rights which encouraged insurers not to enter such a reservation in the early days of a claim, apparently on the premise that such reservations are likely to inhibit early settlement. Geoff's view was that, while the various procedures recommended were capable of improving current practice, full compliance was likely to involve substantial increases in systems and manpower and it was doubtful how far insurers would be ready to commit to the attendant costs. David Wilkinson agreed: the document should be seen more as a public relations exercise, although perhaps it could have a value to that extent. Kenneth McKenzie suggested that the ROR protocol should be seen in the context of provisions in certain civil law jurisdictions such as Spain which imposed interest rate penalties on payment after e.g. 90 days. The Law Commission should perhaps consider the AIRMIC Guide in the context of the review of late payment which they had promised. The Chairman undertook to draw this point to the Commission's attention.

3. Recent court decisions

There were brief discussions of the *asbestosis trigger litigation*, which was set down for appeal beginning 9 November and *Wasa v Lexington* which is to be heard by the House of Lords in May. Anna Tipping drew attention to *Aspen v Pectel* where a notification requirement was held to be a condition precedent on a account of a general clause making payment by the insurer conditional upon the payment of premium and the observance of all terms and conditions. Michael Mendelowitz mentioned the controversy which had arisen from the ECJ decision in *West Tankers v Allianz* that an English anti-suit injunction issued to prevent a person from taking legal proceedings in Italy contrary to an arbitration clause was incompatible with the Judgments Regulation, under which the court first seised had exclusive jurisdiction to determine the applicability of an arbitration clause to the proceedings. It was not clear how the effectiveness of this clause should properly have been resolved, since it appeared that the Italian court would characterise the proceedings as sounding in tort rather than contract and would treat the arbitration clause as being inapplicable to the proceedings. Daniel Chumbley pointed out that the basis of the West Tankers judgment had recently been applied in *DHL v Fallimento Finmatica*. In that case the High Court refused an appeal which had been taken against the registration of a default judgment of an Italian court, on the argument that the judgment had been founded on an agreement which was subject to an English arbitration clause. An appeal against the judgment of the High Court was being expedited.

4. Insurance Contract Law

Helen Clark reported that the Law Commission were, as she understood it, due to publish on 11th March a further issues papers on business insurance; and she confirmed that Paul Hopkins of AIRMIC had expressed a willingness to attend a meeting of the Insurance Law Committee for the purpose of an exchange of views. [*Chairman's note: in fact the Law Commission published a further paper on insurance intermediaries and pre-contract information, together with a memorandum on section 83 of the Fires (Metropolis) Act: it appears that the business law paper has been postponed until later in the year.*]

5. Illegality

There was a brief discussion of the Law Commission's Consultative Report CP 189 on the Illegality Defence, where they have generally withdrawn their earlier proposal for the introduction of a statutory discretion based upon a list of relevant factors. Instead they propose that the defence should be left to judicial development and describe the policy rationales which they have drawn from the case-law as potential guidance for the courts when applying the defence in different contexts. The Law Commission invite responses to the report by 20 April. However, it was not immediately clear that there were any particular issues arising in relation to insurance contracts to which the Committee should draw attention. It was noted that there could be some areas on the margin where there were doubts about the risks which insurance contracts could properly cover, e.g. regulatory penalties (the FSA had introduced express provision prohibiting insurers from indemnifying against financial penalties) and penalties imposed overseas. However, it was not clear that these marginal areas gave rise to significant practical difficulties.

6. Third Parties (Rights against Insurers) Bill

The Chairman expressed his thanks to Jonathan Goodliffe and Terry O'Neill for their comments on this Bill for which the MoJ had expressed their thanks. Geoff Lord said he understood that the Bill was now second on the list of those scheduled to be introduced in the House of Lords under the new Committee procedure, which would hopefully secure its passage. [*Chairman's note: this tallies with my subsequent research, but it is not certain that the Bill will be introduced in the current Parliamentary session.*]

7. Part VII FSMA/other provisions

Michelle Bramley indicated that the paper which Freshfields were preparing on technical defects in Part VII and other provisions of the FSMA was still in hand.

8. With-profit funds

Glen James reported on FSA's CP09/9 containing revised proposals by the FSA for prohibiting with-profits insurers from debiting compensation and redress payments to the inherited estate. The Committee had commented on their earlier proposals to this effect, specifically questioning their powers and their intention to make the proposals retrospective. The revised proposals were helpful in that they were not to be retrospective but it nevertheless still seemed that they would in effect enhance policyholders' expectation of receiving an interest in the estate rather than simply protecting an interest which they could be taken to enjoy under the legal and regulatory regime which had been applicable up until now. It was also noteworthy that the FSA did not intend to apply their proposals to payments permitted under a court-approved scheme, which appeared inconsistent with the above approach. The FSA had invited any further comments by 22 May. It was agreed that, even if the FSA could be assumed to have come to a settled view on their proposals, their would be merit in restating our position shortly, in case we should be taken to have accepted their arguments. Glen agreed to circulate a draft response accordingly.

9. Payment protection insurance

Michelle Bramley explained that the report by the Competition Commission on this business had actually been foreshadowed by a pledge by the major banks to stop issuing single premium policies. In fact the FSA had already requested all firms to stop selling single premium policies with unsecured personal loans, although further orders by the Competition Commission were expected. Glen James commented that the manner in which the product had been sold looked to have benefited the banks rather than policyholders, in terms both of their share of premium and their security. It was agreed that the report was difficult to contest, although the financial downturn might in principle make these policies more valuable to consumers. There seemed little doubt that the ban on concurrent sales would seriously dampen their take up; however, Anna Tipping suggested that if the product was of value there would be likely to be other sponsors filling the gap, e.g. credit card providers.

10. Credit rating agencies

The Chairman drew attention to the draft regulation which had been issued by the EU Commission which appeared to be designed largely to increase the transparency of credit rating methodologies. He understood that it had been criticised for not going far enough but had not reviewed the criticisms in detail. Michael Mendelowicz said that one problem with the existing system could be that in the US at least the agencies had found effective defences against legal proceedings, although there were several actions arising from the sub-prime crisis under way and those defences might be vulnerable. The Chairman undertook to look further into the status of the regulation and report back at the next meeting.

11. Credit crisis: developments for insurers

The Chairman noted that there had been any amount of talk of the need for financial and regulatory reform, but he was not clear what direction this might take. The de Larosiere Group's report in particular was encouraging the introduction of more effective supervisory arrangements at EU level to govern the financial sector. But so far as insurance was concerned, the main point which he had noted was the group's endorsement of the Solvency II objectives, in particular the group support regime proposed by the Commission. Discussions between the Council and the Parliament on this subject are ongoing and will hopefully reach a conclusion shortly.

12. Any other business

The Chairman mentioned that a number of practitioners had now formed a group to review, and if appropriate comment on, developments in relation to Solvency II, and others interested would be welcome to join. He undertook to circulate minutes of the two meetings which had been held so far.

13. Next meeting

The Chairman reported that Martin Mankabady had kindly agreed to host the next meeting of the Committee on 9th |June at the new offices of Mayer Brown at 201 Bishopsgate.