CITY OF LONDON LAW SOCIETY

INSURANCE LAW COMMITTEE

Minutes of a Meeting held at the offices of Allen & Overy at 5pm on Tuesday 11th March 2008

Present:

Ian Mathers (Chairman) – Allen & Overy
Kenneth McKenzie - Davies Arnold Cooper
Geoff Lord – Kennedys
Jonathan Goodliffe (for Michelle Bramley) - Freshfields
Beth Dobson (for Glen James) - Slaughter & May
Michael Mendelowitz – Norton Rose
Kate Buttrey (for Richard Spiller) – EAPD
Anna Tipping – Linklaters
Terry O'Neill – Clifford Chance
Catherine Hawkins - Berrymans Lace Mawer

Apologies for absence:

Martin Bakes – Herbert Smith
Christian Wells - Lovells
Martin Mankabady – Lawrence Graham

1. The minutes of the meeting of 11th December were approved.

2. Membership

Michelle Bramley's membership of the Committee was approved and Jonathan Goodliffe was welcomed to the Committee as her alternate.

3. Insurance Contract Law

Michael Mendelowitz had circulated a revised draft response to the Law Commission's Issues Paper 4 on insurable interest, following discussion in the Contract Law Working Party and in the light of a number of further comments from members. He said that the Law Commission might be surprised to find that, in contrast with the our general concurrence with the proposals made in their earlier papers, we were disagreeing in this case with their proposal that an insurable interest for general insurance policies should no longer be required. He invited any further thoughts, in particular on the consistency between different parts of the draft which had been drawn from separate sources. The Chairman opined that the historical basis for a requirement of insurable interest did not seem to him well articulated, particularly in the case of general insurance, and the technical rules governing what would or would not amount to such an interest were very confusing. This confusion was to some extent reflected in the draft, particularly in the consideration as to whether, if the requirement of insurable interest were to be retained, those technical rules should be retained or whether a broader test of there being a reasonable expectation of loss should be preferred.

As regards general insurance, KM agreed: the 2005 Act had at least undermined the strength of any moral objection to gambling and the focus of the arguments for its retention should probably be on the need to discourage the intentional or reckless destruction of property. Whatever steps might be required for that

purpose (in addition to the ordinary application of the criminal law and public policy) insurance law should not enshrine a position whereby a policyholder's claim should be denied on a technical ground which he could not reasonably have anticipated. TO'N replied that, while he did not dispute that point of view, he was concerned as to the ability of the courts to value claims based on simple expectations of loss, and the familiar scenario of their leaning against insurers might well be perpetuated. MM noted that the courts were accustomed to dealing with difficult cases of valuation, but thought that the law should nevertheless not needlessly extend the areas why they might be called upon to do so, in the case of insurable interest by requiring a retrospective determination of the policyholder's chances at the inception of the contract. The question appeared particularly acute in the case of valued policies on property, where claims would not be excluded by the normal principles of indemnity. AT pointed out that even if there were no longer to be a requirement for insurable interest in general policies, it was unlikely that as a matter of commercial practice, insurers would immediately cease to assess the value of prospective claims against them, and indeed as the Law Commission had pointed out, the practice in Australia indicated strongly that they would continue to do so. The Chairman also suggested that the insurance business limitation imposed by the EU insurance Directives would require them to do so, and there seemed little prospect of this limitation being removed by Solvency II. These pressures might therefore reduce the need for a strict definition.

As regards life insurance, it was agreed that there was a case for retaining a requirement of insurable interest at the outset of a policy for the purpose of assisting in the reduction of moral hazard; but equally that (1) the categories of relationship which would be deemed to establish such an interest should be extended, on the lines proposed by the Law Commission, and (2) an alternative test of actual or potential economic loss should be available where a person fell outside those categories. As to (1), insurance should be permitted up to any limit which the insurer is willing to provide while as to (2), insurance should be available for a value equivalent to the reasonable expectation of loss at the date the policy is taken out. BD pointed out that the valuation could, as TO'N had mentioned in relation to general insurance, be difficult to establish with any accuracy; probably reliance would need to be placed upon the judgment of the underwriter. It was also agreed that the current rule which dispensed with the need for an insurable interest after the inception of a policy was difficult to rationalise fully, but was probably so strongly embedded in market practice that it would be impractical to propose that it should now be reversed.

MM undertook to circulate a further revision of the draft which would reflect the above points and he would welcome a note of any other points which might be raised, including anything which might emerge from the Law Commission's presentation to BILA at the end of the week.

4. FSA/other consultation papers

MM drew attention to the proposed legislative reform order to amend the Lloyd's Act, contained in a consultation paper issued by HMT. It seemed that the proposals were mainly to do with governance issues, and perhaps of marginal interest to the Committee. TO'N commented that they also contained proposals relating to divestment. The Chairman said he would review the paper to see if there were any points for the Committee.

5. Part VII transfers

JG reported that HMT may be able to publish the long awaited feedback to their proposals for amending Part VII FSMA (control of business transfers) in April. BD commented on the FSA's proposals to introduce a standard form for their intervention on such transfers, which had been the subject of a meeting discussed by the Committee in December. She understood that the FSA had decided substantially to maintain those proposals, but would check.

6. Rome I

The Chairman reported that political agreement appeared to have been reached on the terms of this draft Regulation. As he had mentioned at the last meeting of the Contract Law Working Party, it seemed that the

text for insurance would effectively be limited to consolidating the relevant provisions of the Rome Convention and the insurance Directives.

7. EU Common Frame of Reference

The Chairman drew attention to the reports of the two expert committees commissioned for this project, the first being a general draft of a European contract law and the second being one entitled "Principles of European Insurance Contract Law". He had not yet had a chance to review either document in great detail, but would try to identify the key provisions of the PEICL for the next meeting.

8. Solvency II

The Chairman reported that, as promised at the last meeting, he had been in touch with the ABI to see if they intended to reconvene the legal working party in which he and other members of the Committee had participated. While it seemed that they might do so, there was no immediate proposal and he wondered whether there might be some value in the Committee setting up its own working party to do so. He noted that the EU had recently published a revised draft which could provide a focus for discussion. However, JG thought that the revised draft contained little substantial change from the original and it would be premature to look at it at this stage. The Chairman agreed to monitor developments at the ABI.

9. Training

The Chairman recalled that at the previous meeting there had been some discussion of the possibility of the Committee taking an interest in this field, following the consideration being given by the Construction Law Committee to the development of a foundation course in construction law. In discussion, it was noted that most insurance practices would be likely to use a mixture of in house and external providers, of whom there was no shortage. GL commented that his firm also encouraged new joiners to take the Lloyd's test and generally arranged for secondments to the market. The Chairman noted that Stephen Lewis had mentioned that his firm was intending to have discussions with Kaplan as to their offering, and it would be interesting to hear the result of those discussions at a future meeting.

10. Recent court decisions

GL drew attention to *Kosmar v Trustees of Syndicate 1243* (CA), where the defendant insurer successfully pleaded a condition precedent containing a claims notification clause. The Court rejected the claimant's argument that by continuing to deal with the claim the insurer had elected not to rely on the defence. He also mentioned *Blackwell v Gerling* concerning the liability of an insurer under an all risks policy for damage to construction works following heavy rainfall and *Seele Austria v Tokio Marine* concerning coverage under a combined contract works and third party liability policy for water damage following the repair of defective windows. MM mentioned *Standard Life v Oak Dedicated* where the court had construed an excess wording described as "each and every claim and/or claimant" as a per claimant rather than aggregate excess, notwithstanding that it would be highly unlikely for the excess to be reached by a single third party's claims. Also *Wasa v Lexington*, where the Court of Appeal applied a "back-to-back" construction of a reinsurance policy, thereby allowing a claim under the policy relating to pollution, in circumstance where a US court had upheld the claim under the original policy notwithstanding that it allocated damage outside the policy period.

12. Any Other Business

JG mentioned that that he had picked up a number of problems with Part VII which the Committee might be interested to discuss, including the position of transfers effected in Gibraltar.

13. Next meeting

The next meeting will be held at 5.00 pm on 10 June at the offices of Lawrence Graham.