CITY OF LONDON LAW SOCIETY

INSURANCE COMMITTEE

Minutes of the meeting that took place at the office of Clyde & Co, The St. Botolph Building, 138 Houndsditch, London EC3A 7AG on Tuesday 4 June 2013 from 17:30 to 19:30

Present:

Richard Spiller – Holman Fenwick Willan LLP ("**RS**") (Chair)
Beth Dobson – Slaughter and May ("**BD**")
Jonathan Goodliffe – Freshfields Bruckhaus Deringer LLP ("**JG**")
Philip Hill – Clifford Chance LLP ("**PH**")
Stephen Lewis – Clyde & Co LLP ("**SL**")
Martin Mankabady – Mayer Brown International LLP ("**MartinM**")
Michael Mendelowitz – Norton Rose LLP ("**MichaelM**")
Christian Wells – Hogan Lovells International LLP ("**CW**")

In attendance:

Philip Kelleher – Holman Fenwick Willan LLP (Secretary)

1. Apologies for absence

Apologies were received from Charles Gordon ("**CG**") (DLA Piper UK LLP), Christopher Foster (Herbert Smith Freehills LLP), David Wilkinson (Kennedys Law LLP), Terry O'Neill ("**TO**") (Clifford Chance), Ken McKenzie (DAC Beachcroft LLP), Michelle Bramley (Freshfields Bruckhaus Deringer LLP) and Paul Wordley ("**PW**") (Holman Fenwick Willan LLP).

2. Approval of minutes

RS reported that the minutes of 12 March 2013 had not been finalised and would be circulated for approval at the next meeting.

Issues for discussion

3. Broker Market Services Agreements ("BMSAs")

3.1 MartinM led the discussion. He said that in his experience BMSAs were often in similar form and that brokers provided their services for a fixed percentage of commission or for a flat fee. He noted that the services provided were often opaque and general. In his experience, the definition of the services to be provided needed to be tightened up. Typically these included: renewal; premium collection; market information and data; and research.

3.2 When commenting on the range of services offered by the broker under BMSAs RS noted that there was a potential conflict in duties owed to the insured and the insurer, e.g. on collection of premium.

3.3 MartinM questioned whether the fee commanded by the broker was commensurate with the services offered under this type of arrangement, particularly where the services under the BMSA were already within the commission (e.g. premium collection).

3.4 MichaelM noted that the services provided were good at the 'intelligent' end but warned about involvement in these type of agreements at the 'moronic end', where secret commission and bribery were issues. He said that the Lloyd's Market Association ("**LMA**") had produced a paper on BMSAs but was unsure whether it had been made public. RS agreed to approach the LMA for a copy.

4. Discretionary Mutuals

4.1 CW led the discussion. Following the *Medical Defence Union* case, a discretionary mutual is not an insurer but exercises its discretion to apply its funds to the defence costs of its members. He noted that it was difficult to find circumstances where a mutual had not exercised its discretion in favour of the member. In referring to the Medical Defence Union before it became an authorised insurer, CW noted that if the doctors had behaved foolishly in litigation proceedings, the mutual would not advance the funds in respect of such proceedings.

4.2 CW noted that over the past few years members were not being told that there was a discretion and that genuine discretions to advance funds had not been exercised. CW said that it was difficult to indemnify the exercise of a discretion due to lack of fortuity, but that it was possible to provide a contractual indemnity in respect of the advancement of funds, which could be insured. CW asked the committee whether anyone else had come across these issues.

4.3 JG said that he had worked at the FSA before FSMA came into force and had come across situations where friendly societies paid out very small sums for funerals. These type of payments were regarded as unauthorised by the FSA. JG noted that for a discretion to avoid the status of an insurance contract, it had to be an 'unfettered discretion'. CW replied that P&I Clubs were outside the scope of insurance regulation when using their discretion to advance money to members.

4.4 MichaelM noted that in the case of Irish PI insurance, an indemnity is entirely discretionary.

4.5 RS noted that the exercise of discretion can't be reinsurance – you can't reinsure something that is not insurance. He asked whether anyone had seen a discretionary mutual with a reinsurance programme but noted that he did have a discretionary mutual client regulated by the FSA. RS noted that the FSA did not intend to regulate discretionary mutuals.

4.6 RS noted that the NHS Litigation Authority ("**NHSLA**")was a classic discretionary mutual and that in terms of liability, the NHSLA would make a call for the following year and manipulate settlement of claims so that the fund would not run out of money. The NHSLA did not hold reserves for claims and was funded on the basis of expected annual cash flow.

5. European Insurance Contract Law Expert Group

5.1 MartinM noted that the Commission set up an Expert Group to consider whether insurance should be harmonised and to examine any barriers to trade that exist due to different insurance laws in member states. The Law Society had appointed Joanna Page of Allen & Overy ("**JP**") as the UK's representative and had established a working group to support and consult with JP, of which MartinM and CG were members.

5.2 MartinM cited differences between member states in relation to the law of contract as a barrier to trade and the group was considering what approach the UK should take. The group had also considered the commercial and regulatory issues surrounding the harmonisation of insurance in the EU.

5.3 MartinM noted that the main problem with the initiative was that there were a lot of personal agendas within the group and parties pulling in different directions. In spite of this, certain products had been reviewed at to see if consensus could be reached on uniform terms. MartinM questioned whether there should be uniform terms in the first place.

5.4 In particular, MartinM noted that the group had discussed how 'insurable interest' was defined in different member states and had looked into what constituted a contract of insurance. MartinM had considered whether there was any merit in harmonising all of this and had concluded that he was not sure.

5.5 MartinM also mentioned dispute resolution mechanisms and whether there was any uniformity. He noted that the mechanisms transcended contract law.

5.6 In relation to the direction of the group, MartinM concluded that he was not sure what was going to come of the process. MartinM noted that there could be some consensus on the topic of insurable interest.

6. CLLS Land Law Committee's draft standard insurance provisions for leases of commercial property

CW noted that it was not possible to obtain insurance for many of the risks in the commercial leases. RS stated that it was not for the Committee to re-write the provisions, but that it could cast an eye over it. CW volunteered to comment on the provisions directly to the Land Law Committee.

7. EIOPA consultation on Guidelines for preparing for Solvency II

https://eiopa.europa.eu/consultations/consultation-papers/index.html

7.1 RS introduced the paper to the committee and summarised the division of the guidelines into four categories:

(a) system of governance;

(b) own risk;

(c) submission of information; and

(d) application of the internal model.

7.2 BD noted that UK firms were not required to comply with the guidelines until early 2014. She suggested that the guidelines were strangely presented in that they were preparatory. She also noted that the guidelines contained some 'hard requirements' and some reporting requirements which will be burdensome for firms. BD informed the Committee that the guidelines set out EIOPA's view on how the PRA should prepare for Solvency II.

7.3 JG suggested that the guidelines were not within the powers of EIOPA and reported that the PRA was not committed to compliance as it has its own powers, but would need to decide within two months. Insurance Europe was not in favour.

7.4 MartinM noted that the PRA has been encouraging compliance with Solvency II leading to firms incurring substantial costs. BD said that the issue for UK firms will be reporting. JG responded that the PRA may apply some of the reporting rules.

7.5 BD questioned whether there was value in law firms responding to the guidelines on Solvency II – Brussels doesn't listen to law firms.

7.6 JG noted that EIOPA itself required wider powers to enforce the rules in Solvency II. He stated that the PRA want Brussels to take the foot off the pedal.

7.7 BD noted that product intervention powers have been proposed by Parliament. RS asked whether the PRA will consult on this and BD responded that the PRA will only consult if it needs to change the rules to ensure compliance. RS noted that it is only at this point where law firms should get involved.

8. Commission consultation on insurance of natural and man-made disasters

http://ec.europa.eu/internal_market/consultations/2013/disasters-insurance/docs/green-paper_en.pdf

8.1 RS informed the Committee that this paper was included because elements of it may become of interest in due course. However, RS noted that the paper was at a very high preliminary level and that it was not within the remit of the Committee at this stage.

8.2 PH noted that the paper was very general. BD acknowledged this but was worried that the paper was gaining momentum and that it was important to keep tabs on it so that it did not get away from the Committee.

8.3 In light of this, RS concluded that the Committee should keep the paper on its radar.

9. Committee membership

9.1 RS proposed to the Committee that Jonathan Teacher ("**JT**") of Swiss Re be appointed as a new member. RS reported that JT was in the process of joining the CLLS and would have been a corporate member of the CLLS via Norton Rose prior to joining Swiss Re. RS asked for the Committee's view on having a member from outside private practice. The response was that provided he was a member of the CLLS, it would not be an issue.

9.2 RS noted that JT was very capable and could bring an in-house perspective to the committee which the Committee does not currently have. JG supported RS's comments and said that he is very reliable and that he would recommend him.

9.3 RS said that the CLLS had drawn his attention to two breaches of the membership rules by the Committee regarding perennial non-attendance and duplication of members from the same firm. Membership automatically terminated where a member failed to attend three consecutive meetings or failed to attend for a period of twelve months. RS noted that several members were in breach. The Committee agreed that membership should terminate automatically for non-attendance for twelve months on a rolling basis rather than three consecutive meetings.

9.4 As regards duplication of membership, TO should be reclassified in one of his new roles. RS informed the Committee he would consult with PW.

9.5 With regards to expanding membership, numerous law firms were mentioned. In particular, Ince & Co, Reynolds Porter Chamberlain, Allen & Overy, Linklaters, CMS and Eversheds were noted as significant omissions from the Committee. RS said that he would contact the CLLS, find out who the point of contact was at each respective firm, and contact those firms.

10. Future meetings

RS stated that the next meeting was to be held at Hogan Lovells at 5pm on 3 September 2013. The last meeting of the year was to be held at Herbert Smith Freehills at 5pm on 3 December 2013.

There being no further business, RS declared the meeting closed.