BILA 40th Anniversary London Colloquium 20/21 May 2004 "Attribution of Knowledge and Obligations to Disclose in Current Insurance Contract Law Around the World"

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The theme of the 40th anniversary BILA London Colloquium held in May – the thirteenth BILA colloquium to have been staged – proved to be a very stimulating and popular choice. Over 150 participants, including legal practitioners, leading insurance market figures, academics and judges from more than sixteen countries, including representatives of AIDA Chapters, the FDCC in the US and ARIAS UK addressed the theme of increasing interest and complication in most jurisdictions with the advent of global trading and organisations and more and more transactions being dependent upon instantaneous electronic communication and information gathering.

Space does not allow a full report or summary of all the sessions to be reproduced, although full sets of copy papers are available on request. This report serves to highlight a few of the most interesting areas covered and some recent developments.

What is Knowledge?

Rob Merkin (consultant at Barlow Lyde & Gilbert and Lloyd's Law Reports Professor of Commercial Law at the University of Southampton), during his discussion on the treatment of knowledge and information during the period of insurance, identified and distinguished, under English law, the different ways in which knowledge has been characterised within this area:

1 Actual knowledge – that which the insured/insurer actually knows.

2 Blind-eye knowledge – that which the insured/insurers would have discovered on inquiry had the insured/insurer not deliberately chosen to ignore the obvious signs that the relevant facts existed.

3 Constructive knowledge – that which the insured/insurer is treated by law as knowing on the basis that a reasonable person in his position would have known it i.e. knowledge which ought to be known in the ordinary course of business.

4 Imputed knowledge – that which is imputed to the insured/insurer e.g. because it is in the possession of an agent acting for the insured/insurer.

Knowledge and Information at the Time of Contracting

In focusing more closely upon the duties and issues arising at the contracting stage, Professor Malcolm Clarke from Cambridge University was joined by Michael P Thompson of Edwards & Angell with a US perspective, and Timothy Price of Phillips Fox with an Australian one. Professor Jerome Kullmann from Universite Paris, Dr Christos Chrissanthis of IKRP Rokas & Partners, Jorge Angell of L C Rodrigo Abogados, and Reinhard Dallmayr of Bach Langheid & Dallmayr compared the positions in France, Greece, Spain and Germany respectively.

What can the insurer or insured be presumed to know? In the case of an insurer under English law, he is presumed to know matters of common notoriety or knowledge and matters which an insurer in the ordinary course of his business ought to know. But what does this mean today and is it the same for all jurisdictions?

Common notoriety or knowledge can come from the media. In *Brotherton v Aseguradora Colseguros SA* the Court of Appeal agreed that "Colombian reinsureds" ought to have known of allegations and investigations into the policyholder's (a Colombian state owned bank) employees acting dishonestly and fraudulently reported in the media, and these should have been disclosed to the reinsurers. The case of *Didier Pironi* in France is another example of media coverage making facts of common notoriety. In this case, Didier Pironi, a well-known racing driver, had stated on his insurance policy that he did not take part in any other sport save Formula 1 racing. He was, however taking part in offshore speedboat racing. Following his death during a speedboat race the insurers requested that the court declare the contract null and void due to misrepresentation. The Cour de Cassation disagreed. They stated that the insurers had effectively waived their right to declare the contract null and void due to failure to disclose that he took part in speedboat racing because:

1 they accepted the application form at a time when Didier Pironi's sports activities were common knowledge and his participation in the speedboat race was known to the public, and

2 while his activities were common knowledge they had continued to perform the insurance contract.

Whether the media coverage needs to be on a national scale is not clear but this case certainly throws up questions as to what sort of public facts insurers might need to take into account when underwriting.

What about what an insurer should know in the ordinary course of his business? How is this given effect in the case of global carriers with a worldwide network of subsidiaries and/or agents?

According to the English courts, knowledge possessed by one branch of insurers is not in the possession of another branch of the same insurer (*Gunns v Par Insurance Brokers*), and knowledge in the possession of the claims department is not in the possession of the underwriting department of the same insurer (*Mahli v Abbey Life*).

In Australia the focus is on the actual or constructive knowledge of the insured which means the scope for insurers to reduce their liability for breaches of the duty of disclosure is limited. The majority of the High Court in the case of *Permanent Trustee v FAI* were also of the opinion that where a broker is involved in pre-contractual negotiation, the broker's knowledge alone (even if acting as the agent of the insurer) may not be regarded as the knowledge of the insured.

Under current German law (Act on Insurance Contracts VVG in place since 1908), the knowledge of another company within an insurance group will not be attributed to the insuring company automatically (BGH VersR 1992, 217). If the insurer has access to data of the affiliated company, however, and had cause to get this data they will be deemed to have had such knowledge even if they did not actually get it (BGH VersR 1993, 2807). Although this Act has proved very efficient, there is extensive case law where the courts have sought to develop more consumer friendly rules. Possibly in recognition of this, the reform commission, appointed by the Federal Ministry of Justice, submitted its draft proposals for a new Act on Insurance Contracts in April this year, and it is expected that this draft will be passed without any fundamental changes. Whether the new Act will change the position outlined above remains to be seen.

Knowledge and Information During the Period of Insurance

Professor Rob Merkin introduced some of the challenges presented once insurance contracts had already been made. He highlighted some of the most common problem areas in English law, including questions arising by way of any increase or aggravation of risk, upon renewals, the position upon the making of declarations to open covers and treaties and the notification of claims and losses more generally.

Dr Dallmayr and Professor Kullmann spoke of issues of interest in Germany and France, and Jack T Riley Jnr of Johnson & Bell in Chicago provided a US perspective.

From a reinsurance perspective, Colin Croly, of Barlow Lyde & Gilbert and Chairman of the AIDA Reinsurance Working Party led a session addressing recent developments in the law governing claims control clauses and their interrelationship with follow the settlements provisions and principles, as well as practical issues arising in connection with inspections of cedants' and others' records. Stefan Speyer of Allianz in Germany provided some interesting illustrations of how inter-jurisdictional principles affecting direct and reinsurance contracts may become confused when coverage for large risks or by way of reinsurance pools involves fronting arrangements of various kinds.

Electronic Disclosure

On the second day of the Colloquium attention turned to the interesting issue of how knowledge is established and rules of disclosure are applied and enforced in the era of increasing electronic communication. It was observed that "electronic commerce, interactive web sites, digital videos, word processing, e-mail, databases, hard drives, servers, CDs, floppies, voicemail, SMS and text messages are all used in business". Do businesses give proper thought to the storage and/or destruction of any electronically made and held communication? What impact does the electronic format have on the gathering of evidence in litigation? Recent developments in the UK and USA regarding the latter were discussed by Neil Mirchandani of Lovells, England and Steven L Barney of Plunkett & Cooney, United States. Trevor Horwitz of Ernst & Young LLP, England discussed the collection of evidence and put forward some practical suggestions for maintaining the integrity of digital files.

The characteristics of electronically created and stored documents have created unique problems in the collection, review and production of these documents on both sides of the Atlantic. First, there is the sheer *volume* of electronic documents. As noted in "The Sedona Principles: Best Practices Recommendation and Principles for Addressing Electronic Document Production, January 2004": *"There are vastly more electronic documents than paper documents and electronic documents are created at much greater rates than paper documents"*. In large businesses the same information can be sent to a wide number of people, thereby duplicating the same document at a variety of internal addresses, and the same document can then easily be forwarded on in its entirety causing further duplication.

Secondly, electronic documents contain information about the document or file that is recorded by the computer automatically and this is called *metadata*. For example, the time a document was created, the name of the author, the edit history. This sort of information is not normally available from a paper version of the document.

Finally, electronically created information has a number of quirks that affect the *preservation of data*, namely:

- Computer information has dynamic content that can change over time e.g.: "workflow systems that automatically update files and transfer data from one location to another; tape backup applications that move data from one cartridge to another to function properly; web pages that are constantly updated with information fed from other applications; e-mail systems that re-organise and remove data automatically" (taken from "The Sedona Principles: Best Practices Recommendation and Principles for Addressing Electronic Document Production, January 2004").
- Documents in electronic form can be modified in numerous ways that are difficult to detect without computer forensic techniques. Sometimes the act of accessing or moving electronic data can change it, e.g., booting up a computer can alter data contained on it, moving a word processing file from one location to another can change creation and modification dates and drafts of documents may be retained without the user's knowledge or consent.
- It can be more difficult to determine the source of electronic documents because they can reside in numerous locations such as desktop hard drives, laptop computers, network servers, floppy disks and backup tapes and be accessible to a variety of people on a shared network;
- It is not unusual for an organisation to undergo several migrations of data to updated/upgraded computer systems. When the earlier data needs to be accessed it may be found that neither the personnel familiar with the obsolete systems nor the technological infrastructure necessary to restore out-of-date systems are available.

How have the US and UK legal systems responded to these challenges? In the UK the Civil Procedure Rules ("CPR") do not provide much assistance in terms of categorising electronic data or the scope of any disclosure or inspection exercise and the parties and the courts are largely left to deal with this on a case by case basis. It is likely that the courts will take into account issues of reasonableness and proportionality, with particular reference to the overriding rule of proportionality under CPR Part 1. Since the Colloquium, the working party of the Commercial Court Users' Committee, chaired by Mr Justice Cresswell, has published a report in which it recommends various modest amendments to the CPR and the Commercial Court Guide, but concludes that English law is sufficiently flexible to cope with the

demands of e-disclosure, largely because of the reasonableness and proportionality tests governing the search for documents under the CPR. The report is available on www.commercialcourt.gov.uk or www.scl.org.

As Neil Mirchandani noted during his discussion, the question still remains, what amounts to a "reasonable search" for electronic data? Is it appropriate to:

- Restrict the search to key word searches?
- Go further than searching active data?
- Undertake data sampling?
- Call in IT consultants to search backup data?
- Search handheld devices and portable media (e.g. CDs, DVDs)?
- Search voicemails, SMS text messages on mobiles?

Recently, (October 2004), the Commercial Litigators' Forum have produced a final version of their Electronic Disclosure Paper (first published in October 2003) which sets out, amongst other things, practical guidelines for the exchange of electronic documents. The paper is available to view on the website www.commerciallitigatorsforum.com but for the purposes of this article we have extracted the following pertinent suggestions. Some of these were also mentioned at the Colloquium as they were contained in the earlier Electronic Disclosure paper:

The parties should meet a soon as possible and identify:

(a) the nature of the information required from their respective clients;

(b) the scope of the search for information in terms of individuals who may hold data and the appropriate time frame when potentially relevant data may have been created;

(c) the range of electronic data to be searched for the information sought;

(d) the keywords or concepts to search;

(e) the types of files to be searched (e.g. e-mails, word files, powerpoint files etc);

(f) the hardware on which data may exist (PCs, servers etc); and

(g) ensure that the clients have been advised and have taken measures to preserve potentially disclosable data from inadvertent alteration or destruction.

The US courts have also introduced the principles of proportionality into the disclosure exercise by considering both the accessibility of documents and whether the costs burden should be shifted to the inspecting party in appropriate circumstances. In the case of *Zubulake v UBS Warburg LLC (2003) US Dis LEXIS 7939 (SDNY May 13 2003)*, the court found the request for electronic disclosure unreasonable, but it was decided that it could be allowed at the expense of the requesting party. In January 2004 the Sedona Conference Working Group produced the "Sedona Principles: Best Practices Recommendations and Principles for addressing Electronic Document Production". There are 14 Sedona Principles and can be viewed in their entirety, along with extensive guidelines, on the Sedona Conference website : www.thesedonaconference.org. It is interesting to note that this website also contains guidelines for business retention policies.

Comparable Powers and Resources of the English Judge, the Arbitrator and the Government-Appointed Inspector in Establishing Truth and Knowledge

In a fascinating presentation which preceded the discussion of both electronic disclosure issues and detailed problem areas confronting arbitrators in the insurance and reinsurance fields led by leading ARIAS UK representatives, the Rt Hon Lord Justice Thomas (now BILA President, who has served in all three capacities the subject of his presentation), outlined many of the distinguishing features and challenges presented to the establishment in different contexts – both effectively and cost-effectively – of the truth and knowledge possessed by parties and witnesses alike.

He spoke of the dual challenges of balancing justice and costs, the effect of the Woolf reforms, the formulation and make-up of arbitration panels and the different approaches taken to the treatment and disclosure concerning witness statements in criminal and civil proceedings among other issues.

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