BILA SEMINAR AT THE HAGUE

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The overseas seminars of the British Insurance Law Association are notably instructive and enjoyable, and none has been more so than that with Dutch insurance lawyers at The Hague on 8-9 March 1974. Our Dutch hosts were hospitality personified, and they took immense steps to ensure that the twenty-five strong British party were liberally catered for in that respect.

The seminar meetings were held in the splendidly equipped conference room of the Verzekeringsgebouw, the modern office block in The Hague that houses the Dutch insurance associations. There we were welcomed by Mr J A Timmerman, General Manager of the AGO Insurance Company, and Chairman of the Foreign Affairs Committee of the Dutch insurance industry. Following a reply by Michael Cohen, the Chairman of BILA, the seminar commenced under the chairmanship of Professor Dr F baron van der Feltz, Professor of Insurance at the Erasmus University, Rotterdam.

The first paper, by D G Postma, gave a detailed statement of the law relating to take-overs and mergers in the Netherlands, covering the rules, procedure and practice in Holland, the formation of 'small' and 'large' companies with a comprehensive description of the latter, and an explanation of corporate structure. This information can be of great value to British insurance companies seeking to acquire Dutch firms, and copies of the paper have been lodged with the CII Library for reference. It is not possible, however, to do it justice by a summary in this report. Some of the points made in it, however, led to an interesting discussion which must now be chronicled.

Works councils operate in every company in Holland having a staff of 100 or more. They consist of between fifteen and thirty people chosen by the employees, and meet about six times each year to discuss the company's affairs. They must be kept informed of all major decisions, for some of which their consent is needed, e.g. proposed mergers, changes in pensions and others. Their involvement in merger decisions has brought about the introduction of 'merger bonuses' paid to employees to give them a share of any profits made on a merger. As to works council - trades union relationships in most cases and, particularly in insurance offices, the councils have developed a stronger affinity with their firms than with the unions. They have not sought to be an instrument of worker power but just to have a share in management decisions. In some areas there have, in fact, been problems between the councils and the unions.

One of the duties of the councils is to appoint members to the supervisory boards of companies, and this led to questions about boards. One questioner wondered if the watch-dog role of a supervisory board might help to avoid company failures such as we had experienced in the UK in recent years. Mr Postma did not think so, and evidenced the case of Brandaris, although there it was pointed out that the board had secured payments to the shareholders on liquidation. As far as insurance was concerned, he felt that only an active supervisory authority could establish if a company was likely to fail and take remedial action.

In reply to a question as to whether every subsidiary of a conglomerate had to have a separate supervisory board he said that it could happen, depending upon the structure of the group, but that the practice of having one central board was growing. As to the remuneration of members of the board, they either fixed it themselves or it was provided for in the Articles of Association. In either case it had to be published.

He was not sure if supervisory boards would become compulsory under EEC regulations or, if so, whether the Dutch, German or some other system would be adopted. On the EEC generally he thought that business entrepreneurs were the real creators of a common market. In political terms 'freedoms' meant 'restrictions', and nearly every move towards common systems at that level had been torpedoed by the nationalism of governments. Mergers between Dutch and foreign insurance companies, particularly UK since its entry, made a real common market possible.

The seminar then moved on to consider the insurance problems across frontiers of multi-national companies on which a BILA paper had been prepared. This was introduced by G N Crockford who said that the multi-national organisation wants to run to a standard pattern everywhere and that pattern to include its insurance arrangements. But it does not happen!

Local regulations, wordings and rates run counter to international operational needs. This is not just a problem for the EEC, although its regulations for transactions with third countries could exaggerate the difficulties. Freedom on the UK pattern would be the best solution to these companies' problems.

A Dutch speaker pointed out that there is full liberty in Holland to deal with world-wide general insurances. A British firm with a factory in Holland could insure it in England except for motor and life (pensions) cover. Even these could be placed with a British insurer trading in Holland. Insurance managers in Holland criticise their UK counterparts for not making enough fuss about the proposed

EEC restrictions - 'All who want freedom should get together to fight for it!' On this last point Mr Timmerman stated that there is the maximum co-operation between British and Dutch insurers through his Committee and BIEC, and that they are jointly doing their utmost to preserve freedom especially for the larger insured. UNICE is also operating in Brussels in the area where insurers' and consumers' interests do not always seem to coincide, but there is a long way to go to get complete agreement.

Outside the EEC the nationalistic laws of developing countries create further barriers to world-wide covers. This affects the decisions of companies in setting up branches in some areas, especially when they consider the pressures created by UNCTAD decisions. The part to be played by reinsurance in such situations can not be over-stressed.

Some multi-nationals get round these problems by having some subsidiaries which do not insure, their needs being met by transfers of capital between them and the parent companies who effect overall covers. Some 'fronting' arrangements are also used, but large claims can lead to difficulties.

The question of claims arising from the use in one country of products assembled in another from parts made elsewhere was raised. Mr Crockford saw this as a problem generally, rather than of insurance law. The policy would pay however the case was decided. The company, however, would be worried about the effects on its world-wide sales if it seemed to be trying to avoid its responsibilities, and so would be prepared to meet the claimant rather than to plead a defence through a tangle of laws to suit itself. At this point Professor van der Feltz pointed out that legal costs were cheaper in Holland than elsewhere as the courts decide firstly upon the legal points of a case before allowing it to go further, thus perhaps saving time, the expense of expert witnesses, etc.

After luncheon, Gordon Shaw of BILA took the chair whilst Professor van der Feltz presented his own paper on the 'Legal status of insurance intermediaries in the Netherlands'. He explained that, although the general law of agency in Holland is similar to that of the UK, that relating to insurance agents and brokers is governed by an Act of 1952. Under this the qualifications for practising as an intermediary are laid down, and four registers have been established into which intermediaries are placed.

Register A - the highest class - for sworn brokers (about 100) and other brokers who operate at this level of expertise (3782).

Register B - a lower standard but still requiring significant qualifications and a large portfolio of business (12,729).

Register C - for those who, having started (in Register D) have succeeded in gaining enough business to qualify for this register and obtained the appropriate qualification. The register is screened every three years, and those who do not meet its requirements may be removed (18,436).

Register D - for 'candidate' intermediaries. If their portfolios reach a certain size within twelve months of registration they are automatically placed in Register C. If not, they are deleted, and any commission earned is forfeited to the Government.

The Government has the power to fix maximum rates of commission but, so far, has not done so. A market agreement exists and most insurers abide by it (one well-known English company being a notable exception!). Neither insurers nor intermediaries are allowed to rebate commission (except in marine business) or offer other financial inducements to clients. When business is transferred from one agency to another, the original agent's right to the commission exists as long as the policy is kept in force. The non-rebating regulations have stimulated the formation of 'captive' brokers.

Authorised underwriting agents of home or foreign companies also have to be registered and there are regulations about their qualifications and rates of commission.

This regularised system, so different from our own, naturally attracted a number of comments and questions. One person said that there did not seem to be much difference between Registers A and B. At first sight this was so, said the Dutch, but the special tests and responsibilities demanded of sworn brokers in particular mean that higher standards are observed by those in Register A, and there are efforts to have this recognised by differential commission rates.

'Had broking standards improved, and had everyone who was an agent been allowed in when the Act was passed?', was the next question. There had been a 'grandfather clause' letting everyone in, said Professor van der Feltz, but the automatic scrutiny of Register C each three years means that those not up to scratch had been or were being removed. The Dutch believe that the standard of broking has been raised but some want even stricter regulations. The suggestion that registration conflicted with freedom was rejected with the comment that anyone can be an agent but he has to qualify.

The non-rebating of commission was also taken up by a British broker who wanted to know if a firm getting commission on its own insurances

through a captive broker could employ other brokers on a fee-paying basis. It was agreed that this could be done. On the subject of foreign brokers operating in Holland, the speaker said that, at present, they would have to take the Dutch examinations (in Dutch) and, if a corporate body, have an office in the Netherlands. Once the EEC intermediaries establishment directive was passed, other examinations such as those of the CII would be acceptable. Brokers could be limited companies.

Mr D G Sasserath then introduced his paper on the 'Regulations applying to intermediaries (in the UK)'. He said that until the Insurance Companies Amendment Act of 1973 there had been no control of agents' activities, and even now the position is unsatisfactory. Many broking firms would like to see a sensible registration system in the UK. They have, in fact, monitored themselves by the regulations of the major broking associations - the AIB, CIB and LIBA - but there are many brokers and agents outside the membership of these organisations. The work of UKIBEC, however, emphasises the forward part that these bodies are playing in the furtherance of European broking, and in this the brokers welcome Dutch support.

The vexed question of 'When is a broker the agent of the insured, and when of the insurer?' was raised in the discussion session, and of course, no clear answer was forthcoming, particularly since the case of Anglo-African Merchants Ltd. v. Bayley. Apparently, in Holland the broker is more clearly the agent of his client, and the British contingent argued that this is so in practice in the UK, except when issuing temporary cover notes and performing other direct actions for the insurers. Did not this then operate against a broker's freedom to place his client's business anywhere in the market?, a Dutchman wanted to know. In practice again, replied Mr Sasserath, a client's instructions could restrict one's market, but one was at least free to give him the best advice on what the market had to offer, even if he chose not to accept it.

The role of banks in broking was discussed, and it was suggested that for the present they would concentrate on personal lines. In future, however, they might well develop the expertise to handle all types of business. There is no evidence that they are forcing customers taking loans to use their insurance services, but an offer in those circumstances might have certain overtones.

At this stage R H Lawrence presented a short paper on 'The law of negligence with special reference to products liability'. Unfortunately, due to lack of time there was no chance of debating this fascinating topic, but some of Mr Lawrence's points deserve to be recorded.

He said that the insurance market is ill-equipped to write products

business, and covered most of it by accident under third party policies that have no products exclusion. So underwriters get insufficient premium for the risk. There is a need for more research into this problem, particularly in view of the social pressures on manufacturers as had been witnessed in the thalidomide case where large sums of money had been paid without proof of negligence. The possibility of 'no fault' liability in this area also has to be considered. Professor van der Feltz commented that The Hague Convention on International Private Law was to produce a paper on products liability which might clarify the situation. In Holland the situation is similar to that created in England by Donoghue v. Stevenson. There is, however, strict liability for the effects of oil pollution, and some people feel that this principle should be extended to other areas, e.g. motor accidents.

The first paper on the Saturday morning, presented by F Salomonson, dealt with 'Insurance and competition law' and the position that arises from Articles 85 and 86 of the Treaty of Rome. Article 85 seeks to ban any agreement or 'concerted practice' likely to affect trade between EEC member states and leading to the prevention, distortion or restriction of competition. Article 86 prohibits any action by one or more enterprises involving abuse of a dominant position within the Common Market. These articles have, of course, been elaborated by regulations and case law in recent years and 'prevention, distortion or restriction' has meant the possibility of a deep involvement of European authorities in the affairs of private firms. There are doubts whether insurance co-operation by co-insurance and/or reinsurance infringe Article 85, although a memorandum prepared for the Commission in 1963 had suggested that where only one risk was involved there was no infringement, whereas treaties covering several risks might have to be examined to see that the trade of others was not affected.

National insurance tariffs were also mentioned in the memorandum, and there had been varying opinions expressed. The reference of the UK fire tariff to the Monopolies Commission showed that this was a sensitive area. Increasingly, Mr Salomonson felt, insurance would find itself subject to rules governing market behaviour, either by voluntary agreements or by law. The pattern of progress in the EEC suggests that it would be by law. Insurance is in a special position because it faces none of the physical limits to production that affect the manufacturing industries, and reckless insurers can always write risks without regard to the ultimate consequences.

Some insurance practices had already been notified to the European Authorities: the national atomic pools: the Dutch transport insurance agreement, and the war-risk practices of British insurers.

Following Mr Salomonson, the writer of this report presented a paper on insurance supervision, prepared for the seminar by A D Gale and J L Fuchs. In it they posed a number of questions beginning with the basic one 'Is supervision necessary and, if so, to what end?' 'Who does it seek to protect, the policyholder or a cartelised national insurance industry?' In this respect they also enquired how the law should relate to insurance as it conducts its business. Should there be as little law as possible, or should every operation be controlled? Premium taxes were attacked by the authors as a penalty on those who take the prudent and socially laudable step of protecting his or others' assets by insurance: taxation might only encourage self-insurance or no insurance at all. If the taxes can not be avoided is it necessary to harmonise them, or can we live with differential rates in member states as at present? Problems were seen in regard to the possible separation of life from general business under EEC directives, and to the reduction of freedom in investment policies. As to the freedom of insurance services, how free will they be in fact? And how can we resolve the conflict between freedom for the business man and protection for the individual when buying insurance?

As to contract law, the authors hoped that the Community will avoid the possibility, through harmonisation, of a hotch-potch of laws in areas such as misrepresentation or negligence. Again, freedom of choice of law seems to be the best approach.

The subsequent discussion covered a great deal of ground. The first questioner wished to know how to defend co-insurance and reinsurance from possible restrictions. Mr Salomonson said that we had to get across to the authorities that insurance techniques require these agreements to spread risks, not to restrict trade. The reinsurance directive already provides for freedom and it is unlikely that Article 85 will be involved unless, perhaps, very long-period treaties are envisaged. In a sense, of course, atomic pools are restrictive agreements, but they are the only way in which cover can be provided.

On the subject of Articles 85 and 86 another enquirer wanted to know if contracts of companies in countries affiliated to the EEC are affected. The reply was that these articles are repeated in contracts of affiliation but they can only be dealt with in a consultative manner as the European Court has no jurisdiction in the countries concerned. Co-operation agreements between companies in different EEC countries containing clauses to the effect that each would not enter the market of the other were mentioned as possibly being against anti-trust rules. Mr Salomonson thought they would be if between large insurers, but not if between smaller companies who would co-operate and provide more competition for their larger rivals: but if the smaller companies then became very large the position would have to be re-examined.

Most such agreements will any way be looked at at intervals of, say five years to see if they can be continued. This situation might slow down EEC insurance mergers, but the idea is to further growth by sensible competition so that smaller groups are encouraged to amalgamate while huge concerns are discouraged as at present in the UK and elsewhere. The movement towards financial conglomerates in England was mentioned and the speaker said that they will certainly be looked at unfavourably by the court if they seem to establish a dominant position in the financial sector.

On insolvency, a British delegate asked about the possibility of criminal sanctions against companies who negligently became insolvent. Mr Salomonson said that there are such sanctions in respect of fraudulent trading but not against carelessness. Another suggestion was that strict investment control is necessary to ensure continued solvency. It was agreed that those countries who have such controls would not relinquish them. The British, however, felt that the solvency margins should be left to control this aspect so that the insurer could do better for his clients with a free investment policy. They agreed, however, that if restrictions come, formulae could be produced within which they could work, although the question of what limits should be placed on investments in equities produced no agreement!

The seminar concluded with a note of thanks to the Dutch hosts by H A L Cockerell, a vice-president of BILA, who also presented Professor van der Feltz with a silver paper knife as a memento of the occasion.

So ended an extremely successful visit in which all concerned learned a great deal, particularly of the identity of interests and views of the British and Dutch insurance lawyers. This took the extreme form of opening quotations from Alice in Wonderland by virtually every speaker, showing as Mr Cockerell pointed out in his final remarks that we were almost as alike as Tweedledum and Tweedledee, but with hopefully all our battles behind us.