1977 HAMBURG SEMINAR

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It is five years since the last seminar in Hamburg between members of the British Insurance Law Association and the Insurance Law Seminar of the University of Hamburg. During that time the skyline of the City has changed with the erection of a vast television tower and modern office blocks and hotels. In 1972 we tackled the, for us, new subject of insurance aspects of the Common Market but that, too, has changed with emergence of so many obstacles in the path to harmonisation. This was demonstrated by the programme for the seminar which included only one brief mention of the problems of achieving freedom of services, while the main emphasis was on the topical subject of professional indemnity. In addition, we brought ourselves up-to-date on current developments in each country's supervisory system and in the progress of legal expenses insurance.

Some things, of course, do not change, especially the warmth of our reception by our German hosts. Both Professor Hans Möller and Professor Gerrit Winter, in speeches of welcome, stressed the friendly spirit of co-operation which existed between our two organisations and their pleasure in greeting us to Hamburg. For BILA, your reporter, in response presented some books, reports and copies of recent UK insurance statutes and regulations to Professor Winter for the University library.

Mr. W. Tor Green then addressed the gathering on recent developments in the UK supervisory system, describing the effects of the 1967 and 1974 Insurance Companies Acts and the subsequent Regulations, the Policyholder's Protection Act, the new Insurance Brokers (Registration) Act and the EEC Establishment Directive.

Professor Bernt Bühnermann followed with a description of the current German situation, laying emphasis on the effects of the EEC directive. This had had the unfortunate outcome of removing the previous freedom of transacting transportation business across frontiers. However, subsequent regulations have restored the original position in which foreign insurers could accept German transportation insurance provided that they did not have 'persons permanently engaged in Germany to effect business'.

Professor Bühnemann went on to set out the position of the majority of German insurers on the question of freedom of services in Europe. They had six 'homogeneous basic principles', viz:

1. Equal protection of the insured by common policy conditions

2. Special attention to the protection of private (as compared with commercial) policyholders

3. Equalisation of the law of contract

4. Removal of the possibility of unfair competition (e.g. through differential tax laws)

5. Equalisation of supervisory systems

6. Simplification of insurance contracts.

Naturally, the British side had reservations about these 'principles' They pointed out that it was unreal to imagine that small policyholders would generally seek insurance from foreign insurers. The larger clients had access to professional advice and were well able to look after themselves. For sound commercial reasons no insurer would buy its way into a market irrespective of price, otherwise the free British market would have already been decimated by foreign competition. Nor should freedom of choice of law lead to conflict between the law of contract and other relevant law. The problem seemed to be purely hypothetical and certainly seldom arose in practice. The necessity for the equalisation of supervisory systems suggested that there was a lack of faith in each other's current arrangements. There could be co-operation and helpful contact between supervisory authorities without the need for identical systems. Finally, the freedom for insurers to fix their own rates and conditions for cases covered by the draft directive would be beneficial for clients and insurers alike.

As one would expect, these differing views were not resolved in discussion but they were considered amicably, with an attempt to see the way forward. There was, too, an apparent divergence of views between the Germans themselves on some of these issues and a genuine desire to see the problems resolved. This was also shown by questions relating to how German insurers could operate in Britain and our market, being freer and less clearly defined, presented a number of obscure areas to more tidy German minds.

The British party then joined an early evening meeting of the Versicherungswissenschaftlicher Verein, which was addressed by Gordon W. Shaw on the subject 'Lloyd's brokers in 1978: recent UK and other EEC legislation'. Mr. Shaw treated his audience to a torrent of facts and figures, well known to UK insurance officials, delivered with his usual speed and panache to a highly appreciative audience, who responded with some pertinent and searching questions. It is in situations like these that one realises the fluency that our German colleagues have in the English language, putting our (generally) feeble efforts in their tongue to shame. Subsequently we were guests of the Verein at a reception in the University Club.

The following morning's session was held in the new head office of the Hamburg-Mannheimer Insurance Company, situated in an impressive, modern complex of office buildings in north Hamburg. Here we devoted ourselves to the subject of professional indemnity. Professor Winter began by setting out the basic German law, while G.N. Crockford tackled the same topic from the UK side. On the whole, apart from the fact that

the German situation was based firmly on their Civil Code, whereas ours is derived largely from case law, the differences between the two positions was not very great. Neither had a statutory definition of a 'professional' but both accepted the idea of a profession as requiring a course of study; independent practice; membership of an association; and a code of conduct. However, in practice the Germans had a much broader view when it came to the question of liability as we shall see. There was a common move towards greater litigation against professionals and stricter judgements in the courts. Also common was the expectation that a person who claims to possess special skills must exercise them in a competent and reasonable manner. The duty of care might be expressed in different ways but its effect was roughly the same. There was, however, a variation in the rules of negligence. The question of forseeability in Germany is related to the rule of causality, i.e. the probability that damage will occur in certain circumstances. In the UK of course we have to consider the possibility of injury or damage in relation to the duty of care and must also take into account the remoteness of the damage and any intervening causes.

The next series of papers, by your reporter and Dr. Bischoff, dealt with the particular duties of various professions. From these it seemed that the medical profession in Germany had a stronger contractual relationship with patients than in the UK and, in gaining consent for treatment, doctors had to explain it sufficiently to enable the patient to understand its purpose and effects to a much greater extent than here. The position of lawyers was similar but they were obliged by law to have professional indemnity insurance for DM50,000. They have a liability to non-contractual clients close to that under Hedley Byrne in this country. Architects faced two different periods for limitation of actions: thirty years for work that they had superintended (with the burden of proof on them) and five years for planning work, with the burden of proof on the claimant. Architects' and builders' liability could be joined together so that a client could choose whom to proceed against.

Many problems had arisen in Germany from persons seeking to avoid liability by special conditions of contract and in several cases such conditions had been declared invalid in the courts. The new UK Unfair Contract Terms Act is mirrored in Germany by the 1977 Standard Conditions Act but it contains no test of reasonableness and it does not apply to all private contracts.

In the discussion on the morning's papers questions were asked about the wide range of periods of limitations in Germany. It seemed that these varied from the general limitation of 30 years down to 2 years for certain types of contract but these were laid down in various rules and were fairly easy to establish. Reference was also made to the current UK practice of commencing the period of limitation from the time when the injured party becomes aware of the defect. In Germany it applies from the time when the defect occurs. The UK view is the more generally accepted principle outside Germany and this makes world-wide covers for some German professional firms

very difficult to arrange except on a contingency basis. It was agreed that German law gives a plaintiff, in cases of professional negligence, more assistance than the UK law. However, the German application of contributory negligence is stronger than in Great Britain where it has been much watered down since the removal of the absolute bar to action in 1945. In both countries where there were doubts on this score actions were mostly settled out of court.

At the end of the session, the BILA party was taken on a tour of the Hamburg-Mannheimer office. Every floor is the same, so they have various colours and pictures on each level to avoid people getting lost.

There were the usual large 'open-plan' work spaces, broken up with partitions and plants in an attractive but rather antiseptic way. A sign of the times was the TV security system with the aid of which the house staff have a complete surveillance of doors, car-parks and other entry points. The sporting facilities in the basement included a ten-pin bowling alley and a large gymnasium, to the envy of some of our party. Thence to an excellent lunch in the company's executive dining-room and back to the University for the next business session.

Here Dr. Johannsen and D.G. Sasserath spoke on the insurance of professional liability. I mentioned earlier the wide range of apparent 'professions' in Germany and this was clarified by Dr. Johannsen's references to compulsory P.I. insurance. This extends not only to accountants, auditors, taxation specialists and lawyers but also to night-watchmen, hunters and game-keepers and to those providing entertainments services. This seemed to us to be more like an 'occupational' than a 'professional' indemnity but, perhaps, our attitude stems from the nature of our society! One or two other special points about the German scene are that in liability cases the claimant has two legal actions: one to establish the liability of the plaintiff and a second in order to proceed against insurers (usually settled out of court); again, the insured cannot waive a claim at the expense of a third party. Third parties have special protection in German law under which they can sue insurers direct, and if the insurer becomes bankrupt they have preferential rights on the residual assets. The payment of costs by insurers if they initiate actions is their responsibility but in other cases where the sum insured is exceeded can be shared with the policyholder.

David Sasserath showed how sophisticated the P.I. market had become in the UK with special package deals for accountants, architects, insurance brokers and solicitors, inter alia. He pointed to the importance of continuation of cover, especially on the 'claims made' basis and the problems of a restricted market, limited capacity, differential experience in package schemes coupled with poor results, inflation and constantly rising premiums.

All agreed that this was a difficult market in which greater international co-operation between insurers was necessary. Everyone, too, feared the development of American practices in Europe, and their effects not only on costs but also on the provision of professional services.

The total day's discussions occupied several hours at the end of which the British party were ready to close the proceedings. Not so our German friends. They carried straight on with another domestic session (to which we were invited) which lasted until after 7 p.m. Then they were ready to take us out to see the sights of Hamburg!

On the following morning we re-convened to consider legal expenses insurance - well known in Germany but in its infancy in Britain. Our speakers were Professor Dr. Werber and, for the UK, Alan Dolden who presented a paper written by Professor Hugh Cockerell, unfortunately in hospital at the time of the seminar. We were told that in Germany 50% of all cars and 35% of all households have legal expenses cover and that the 1976 premium income was DM1,000,000,000,000. It is transacted as a separate class of business because of possible conflicts of interests. Of course, fewer German motorists have full comprehensive cover than British drivers, and this has been a major influence in its development. There are many more law suits in Germany than Britain but no one seemed to know if this had been affected by widespread legal expenses cover.

This last session of the seminar was followed by luncheon and then a boat-trip around the flourishing Port of Hamburg hosted by Jauch and Hübener, the large German insurance broking firm. The picture of busy ship repair yards contrasted very favourably with some of our empty yards, even though we appreciated that there were immense government subsidies and not a few problems in areas such as pay demands. Then on to our final function, a splendid dinner at which a whole roasted suckling pig was served, hosted once again by Jauch and Hübener.

It is impossible in one article to do justice to the depth and quality of the papers and discussions at this seminar. However, all the papers will be placed in the CII library and those on professional indemnity, in particular, will be extremely valuable to students in that field. Impossible, too, to convey the tremendous warmth and abundant generosity that we received from our hosts. They were kindness personified and we shall long remember our stay with them with gratitude and affection.