AMERICAN LEGAL LIABILITIES

The final mid-day meeting of the current session of BILA was held on Wednesday 16th April at the premises of the Institute of London Underwriters, 40, Lime Street, EC3. Introducing the speaker - Daniel Simon, a Los Angeles Attorney - the Chairman (Eric Gumbel) recalled that he had provided an interesting contribution to the BILA London Colloquium in July 1979 and explained that the firm in which Mr. Simon was a partner had a long and important connection with the insurance industry.

Mr. Simon began by tracing the cause of the current acute problems in the US products liability field as international expansion in trade with the third world coupled with consumer orientation in the western world. It was seldom appreciated outside the United States that its civil law largely stemmed from decisions of the Californian Supreme Court in an eastbound current which sometimes took five years to reach New York! The Californian Court was so strongly in favour of policyholders that even the Statutory rights of Insurers could be threatened. Punitive damages would be awarded against a company for a mere error of judgment - good or bad faith was immaterial - and it was ironical that the quantum of such damages was related to solvency margin and not to any real loss which a policyholder could justify. Up to four weeks net premium income had been imposed. A claim for a leg injury sustained in a store which would have normally been settled through simple procedure, involved a most arduous compromise because of allegations of unfair treatment in the settlement process. Litigation under an Unfair Claims Practices Act could even extend to third parties. The implications of the general attitude to the courts in relation to errors and omissions were horrendous and inevitably there would be a severe impact on the reinsurance market.

Another example of potential danger to insurers' interests was where a Californian Court confused a direct excess of loss contract (over a self-insured layer) with a reinsured excess of loss and ruled that the Reinsurer was directly liable to the original insured. The implication is that a Reinsurer may now be exposed to a claim by a policyholder who is not happy with the original settlement and thus be called on to pay twice over.

Mr. Simon explained that although insurance is exempt from anti-trust laws (mostly Federal) nonetheless the individual State Insurance Superintendents shackled the freedom of companies with rating bureaux plus control of expenses, licence fees and so on.

Turning to the topic of Bermuda where as many as 800 captives or off-shore subsidiaries were now registered, the speaker said that many of these were managed on a bulk basis by large broking firms who were exposed to claims for damages resulting from poor supervision. Indeed, one suit had already been initiated on this basis coupled with the allegation that certain risks could have been placed more cheaply in the US market. The Bermudan Government was certainly introducing tighter control (which had taken two years to implement). However, this had been too late to prevent a serious insolvency involving a captive which had received no premiums: there was a dual liability to the parent and to reinsurers and, although the Government were co-operating, the brokers were endeavouring to persuade them to bring in legislation which would compel contributions from the reinsurers. This was being defended on the grounds of extortion. The business was originally written in California where reinsurance brokers are not compelled to register and in the meantime the Insured have collected claims from the placing broker direct. (This individual has been expelled from the New York Exchange).

Mr. Simon concluded with an interesting exposé on the machinations of a case somewhat similar to the British Thalidomide saga where a number of drug manufacturers had at various times and stages combined in the manufacture of a drug known as 'DE8'. It had been decided to settle on an "industry" basis because any member of it would be unable to show that he was not responsible but if he was the amount would be small. The general exposure was and had been a wide one and it would be impossible to say which source related to which injury. The judgment was that each would contribute in proportion to its share of the market at the time of the injury and this had caused chaotic problems - for example in the case of a claim which had originated in 1942. The Californian Supreme Court had ruled that on this basis the case had been "artfully drawn but not very well reasoned".

In reply to a question, the speaker confirmed that the Unfair Claims Practices Act was currently restricted to California but likely to spread. To another, he said there was no law against champerty but the lawyers "cut" would not apply to compromise settlements or to such items as health insurance claims. In regard to "hold harmless" agreements where a defective raw material used in a UK product consumed in the US caused injury there, Mr. Simon thought the importer could be sued but the wisest course would be to include the maker's name in the distributor's policy. In assessing personal injury claims he said deductions for personal insurance claims would only be made where group insurance applied. No adjustment for individual policies would apply. Where, owing to professional negligence, a lawyer was sued,his own share of the loss would be included. On the subject of a unified Federal law for Products liability, he thought the soft market could be an inhibiting factor. If in the case of an import from UK, there would be no liability under UK law, the lawyers would seek to attach the profits. It was difficult to dissect (in numbers) cases for punitive damages purely resulting from repudiation of a claim from overtones on other claims.

The Chairman thanked Mr. Simon on behalf of those present and this was greeted with a round of hearty applause.

A. McC.