Part 4 "Cases" is once again nicely set out. There is a list of subject matter, for example all motor cases being grouped together. This is followed by the normal table of cases for each topic. The majority of cases are dealt with in under half a page showing the facts and the findings so it will be appreciated that this is no more than a quick guide to case law.

Part 5 "EEC Law" contains three Council Directives - two on direct and the other on co-insurance and once again is set out in easily readable (if not digestible) form. The final part of the book is a first class index which unlike so many today actually appears to have been prepared with the practitioner in mind.

This book certainly makes reference quicker and easier which is after all what a reference book should do.

Michael Cohen

THE 1984 BILA LONDON COLLOQUIUM

Reports on the Five Working Sessions

1. i. "Origins of Legal Expenses Insurances" by Mr. R. Skrodski, West Germany

   ii. "Family Legal Expenses Insurance and Possible Alternatives to State Legal Aid" by Messrs. C. Jackson, United Kingdom, and C. Hagensgard, Denmark

(Reported by S.J. Armstrong)

Although there are present delegates from a large number of countries with political systems which range across a broad spectrum, one common feature of all of these political systems

is that they are all democratic in nature. Mr. Skrodski, in discussing the social aspects of Legal Expenses Insurance, pointed out that a prime feature of the democratic system is the freedom of the individual to assert his legal rights and he emphasised that indeed the democratic system provides various institutions where the individual can seek redress for his genuine grievances.

However, whilst there may be no legal or political restraints preventing the pursuit of legal actions, there may well be financial restraints on certain individuals. To alleviate these burdens, socially welfare-minded governments have introduced various sytems of legal aid to assist individuals who do not have the financial means to assert their legal rights.

Mr. Skrodski made the point that Legal Expenses Insurance should not be seen as a replacement for present systems of legal aid, rather it should be seen as an alternative system which should exist side by side with legal aid. The interrelationship between the two provoked some interesting questions from delegates and some doubts were raised as to whether Legal Expenses Insurance does offer a viable alternative. For example:

1. Does the legal system become overloaded by litigants who are insured and does this possibly result in other genuine but uninsured potential litigants being deterred from commencing action due to the expense and uncertainty of a delayed action?

2) Does the fact that where litigants are financed in one form or another, the aspect of justice or legal merits of an action could become blurred?

Delegates were also concerned that without financial assistance litigants may to some extent be deterred by the cost of legal action and also lawyers may advise settlement of an action rather than proceed the full course and have it decided on legal merit rather than on economic considerations.

Mr. Jackson, in his paper and in the discussion which followed, alluded to a number of factors which affect the current system of legal aid in the United Kingdom and which in his view will lead to increasing dissatisfaction:

1) One can expect a natural increase in the number of litigants as new areas of the law and legal rights emerge, e.g. the intellectual property area.

2) Ultimately, there must be a restriction of public funds which can be made available to finance such schemes.

3) There are also the wider implications associated with an increasingly smaller part of the population having to support a larger and ageing population.

Mr. Jackson, in taking a longer term view, advocated the setting up of a working party to examine various methods of funding legal aid to serve a greater number of people. He mentioned tax relief for legal costs incurred and legal expenses insurance amongst possible issues which might be considered.

Mr. Hagensgard then outlined some practical aspects of Legal Expenses Insurance for the family in Sweden.

In conclusion, the common thread to all three papers appears to be that whilst the cost of legal action is increasing and the amount of litigation likewise increases, in order to preserve the individual's democratic right to have access to the courts,

a viable and workable means of financial aid must be established to assist those potential litigants who have an action with legal merit. Legal Expenses Insurance at least goes part of the way to fulfilling this goal.

2. "Legal Costs Provisions in Other Insurances and their Potential Problems by Messrs. R. Doulton and B. Phelps, United Kingdom

(Reported by J.A. Pincott)

Although Roger Doulton conceded a reciprocal right to comment and therefore introduced his paper first, the logical starting point of the examination of this topic is found in the paper of Brian Phelps who gave a clear exposition of the mechanics of legal costs indemnity in civil liability policies available in the United Kingdom. He dealt first with standard provisions as to claimants' costs and then with defence costs and thereafter with the provisions in indemnity policies which entitle underwriters themselves to take over defence of claims against their policy holder. Against this informative background he surveyed the problems which arise. The first group touched and concerned limits of indemnity in policies and the associated problems of policy excesses. Mention was made in the discussion of German experience with obtaining settlement of policy excesses from policy holders but no fundamental differences with Mr. Phelps' analysis were brought to light - although the existence of a policy excess featured in the discussion of the more controversial problems. Mr. Phelps' mention of the problems arising from ancillary claims against policy holders or the problems which can arise out of provisions in the policy that certain matters require the written consent of insurers did not give rise to any wide-ranging discussion. Perhaps they were overshadowed by controversy which attached to the two remaining problems, conflicts of interest between policy holder and insurer and

choice of solicitor. These were the two problems which Roger Doulton had chosen to treat in depth in his paper on the subject.

On conflicts of interest, the perceived problems were two: first, the conflict which can arise when a policy holder is anxious to pursue defence of a claim so as to avoid any damage to his reputation even though a commercially reasonable settlement is available; secondly, the interest which a policy holder has to avoid settlement where this will have a substantial effect on his claims experience and perceptible effect on premium in following years. The solutions that were mentioned in the discussion on this point were, essentially, three. First, there was the Queen's Counsel clause in its common form. Mr. Phelps mentioned that he recalls it being used only once in a major case with his company - and the effect had been for insurers to pay a claim they would otherwise have disputed. Mr. Doulton, pointing out that the Queen's Counsel clause did not meet the particular problems, contended for a "reverse Queen's Counsel clause", that is to say one where insurers are obliged to continue defence where a Queen's Counsel opines that the settlement could cause damage to the policy holder's reputation. No wording for the clause in reverse was put forward and there was some doubt as to whether there really was a need for it or whether the cost and trouble of operating it might require increased premiums - although no one commented on the inconsistency of these observations. Secondly, despite a certain scepticism apparent from some of the lawyers participating in the discussion, conflicts of interest were thought in practice to be resolved by the generally benevolent and co-operative attitude of insurers. Thirdly, for an insurer to act in conflict with the interests of the policy holder might, in certain circumstances, give rise to independent liability of insurers - a possibility which Mr. Daniel Simon pointed out was well established in insurance disputes in California where insurers have been found

liable on tortious principles both to policy holders and third party claimants. Mr. Phelps thought that the legal framework of liabilities of insurers for want of good faith already existed under English Law. It was left to Sir Maurice Bathurst, the session's chairman, to point the narrow line between contracts of insurance and contracts of service in this area and to Mr. Schmidlin to state as a principle that the insurer is dominus litis to the extent of his interest.

Financial interest was also much to the fore with the final problem, choice of solicitor. Mr. Phelps defended insurers' right to choose the solicitor on a number of grounds, not least that the money at risk was insurers' money. That was not generally accepted by the participants who advanced an argument of principle, that the insurer is to serve the policy holder and arguments of monetary analysis, that the policy holder often himself shares the financial burden by way of excess and, more generally, increased premium. Mr. Weill analysed the alternatives for legal representation in legal expenses insurance ranging from internal department lawyers of the insurer concerned to an open panel of practising professional lawyers. Professor Klingmuller thougnt that there might be an element of unfair competition if insurers alone could choose the lawyers. Participants gave a measure of credence to the idea that insurers should choose the solicitor on the grounds that they are better able to assess the solicitor's competence - whether or not this was operated by way of a panel, as proposed by Mr. Doulton. It was left to an insurer, Mrs. Julia Snell, to point out that her experience was that insurers in London often had little idea of the competence of solicitors in the provinces and that she had been reduced to suggesting names simply taken from a book to a policy holder seeking legal representation covered by the policy.

By way of comparative study of the legal costs provisions in indemnity policies with legal expenses insurance proper, four

differences emerged from the papers and discussions. First, obviously, the principal purpose of liability policies is to indemnify against legal liability and cover for legal costs is ancillary to that purpose. Secondly, cover for legal costs in liability policies is in respect of defence costs whereas cover under a legal expenses insurance is both by way of defence and in order to prosecute claims. Thirdly, under a liability policy, it is the allegation of liability which triggers underwriters' indemnity for costs - even though it may subsequently transpire that the insured peril (e.g. negligence or fraud by an employee) is proved not to have occurred. Lastly, in liability policies, insurers have the right to choose a solicitor as a matter of contract. In legal expenses insurance the practice is for the policy holder to choose the solicitor - a practice which will become a matter of EEC policy when the draft regulation on Legal Expenses Insurance is (if ever) adopted.

3. "COMMERCIAL LEGAL EXPENSES INSURANCES" by Messrs. B. Raincock (U.K.) and H. Ullman (Denmark)

(Reported by G.N. Crockford)

When I first read the two excellent factual papers presented this afternoon by Mr. Raincock and Mr. Ullman, I must confess that I feared their very completeness might lead to a desultory discussion.

I need not have been so pessimistic. We have had a most enlightening and stimulating discussion, although it would be truer to describe it as comparative rather than controversial.

The papers have focused our attention upon an aspect of legal expenses insurance in which we in this country need not feel at any disadvantage, despite the longer history of legal expenses insurance as a whole on the Continent.

Mr. Raincock's paper referred to the rapid increase in recent years both in litigation and in lawyers' fees, which suggests that the public is losing its dislike of going to law to some extent, even if it dislikes lawyers as much as ever. That dislike is traditional, and I found it neatly expressed in some lines by a brewer-turned-poet, James Hurnard, written in 1867:

"But least of all would I be bred a lawyer
Because I have a humble hope of heaven."

which he capped with;

"A lawyer if a fool is good for nothing
And if a clever fellow he is worse."

Mr. Raincock quotes the delightfully named group of Common Law offences abolished by the Criminal Law Act, 1967, as a result of which legal expenses insurance could be underwritten here. It is a class still in its infancy, with a premium income of some £10m. per annum, a fraction only of the potential market. He then outlined the cover given by the six companies offering commercial legal expenses cover in the U.K., in the four basic areas of contractual disputes, employment disputes, property disputes and the defence of criminal prosecutions, and the more recent extensions into the fields of intellectual property infringement, motor vehicle legal protection, Revenue and VAT disputes, licence disputes and defamation. In addition, advisory services are sometimes made available to insureds.

Commercial legal expenses cover is, as Mr. Ullman says in his paper, also a young class in Sweden, although family covers have been available in comprehensive policies for many years. Insurers need a good spread of cover to write the business profitably and the future may lie in covers for trade associations.

Large companies may not need general legal expenses cover, especially when covers are low and deductibles high, but Mr. Ullman gives an example of a cover for which there does seem to be a demand: cover for legal expenses incurred through criminal environmental pollution.

Limits in Sweden are low, equivalent to some £5,000 or £6,000 only, with a small basic deductible and a 10% coinsurance clause above that.

The attractiveness of the cover to large companies was one of the main features of the discussion. Large companies have the ability to retain the risk without insurance, and low limits deter them from insuring anyway. It was suggested that an excess approach might lead to a better growth in this class of insurance than offering potential customers unacceptably low limits. It was pointed out that the insurance is available on this basis in the U.K. for large accounts.

Large companies are also likely to have multinational interests, and the territorial limits on policies in different countries were compared. U.K. domiciled companies can extend cover beyond this country for an appropriate additional premium, while Swedish policies extend to cover the Nordic countries and German ones cover European and Mediterranean countries.

The market is everywhere a small one. In the U.K. there is 6% penetration of the market, in Switzerland the cover is virtually unknown and in Germany commercial business is very small and they have a poor experience with what there is, especially in the field of contractual disputes. The U.K. market, which underwrites more closely on claims history, has benefited here and because they underwrite the management of the company and not the trade it operates in, they have not found specific industries to be uninsurable. The construction industry may be less desirable, but it is not beyond the limits of acceptability at a suitably adjusted premium.

There was some discussion of whether there was the necessary element of fortuitousness in cover for claims pursued, since the decision whether or not to litigate was in the insured's hands. It was thought that the element of fortuity lay in the occurrence of the event which created the necessity to sue, but it was conceded that there was a problem over the possibility of foreseeing the event when the policy was taken out.

The discussion also turned to the question of how best to sell this type of cover. Suggestions included selling it on the possibility of catastrophe brought about by the unexpected large claim. In this it was little different from any other class of insurance. The recession might also provide a selling opportunity, since many firms had dispensed with their in-house legal services. It was also suggested that personal covers might also be sold to companies as an employee benefit or to provide staff with a source of funds to bring actions as an alternative to that provided by the trade unions.

This has been a most interesting session. I, who knew next to nothing about this type of insurance, have learned much from the papers and from the discussion, and I should like to thank the speakers, and the participants in the discussion for making learning so pleasurable.

4. "ORIGINS AND CURRENT LAW OF DIRECTORS AND OFFICERS LIABILITIES"

by Mr. Daniel Simon (U.S.A.) and
Dr. Michael Müller-Stüler (West Germany)

(Reported by F.G. Cornish)

Corporate Directors and Officers Liabilities in the U.S.A. by Daniel Simon

In the U.S.A corporations are encouraged to pay premiums in full on behalf of their directors and officers. To date 132 acts and omissions by directors and officers have been identified as establishing liability.

In California Section 309 (a) of the Corporations Code sets out the director's standard of care which is basically to act in good faith and to work with a view to the interests of the corporation. This standard of care includes a duty to exercise "reasonable inquiry" on the part of an outside non-executive director and includes a fiduciary duty to the corporation and its stockholders.

Section 317 of the Corporations Code establishes the right of a corporation director or officer to indemnification in respect of acts or omissions for which he is personally liable and Sub-section (f) provides for the possibility of insurance coverage being taken out by the corporation which is broader than the indemnity which it may provide. This type of indemnity cover has been held by a Californian court not to be contrary to public policy.

With regard to expenses and fines incurred in connection with criminal matters, corporate directors may be indemnified for these according to Californian Law.

The Securities and Exchange Commission plays quite a significant role in matters pertaining to the liability of a director or officer. There are two federal statutes covering the offer and sale of securities, namely the Securities Act 1933 and the Securities Exchange Act 1934.

The possibility of a corporation indemnifying its directors and officers is normally regulated by statute. In some cases the statute has mandatory, in others it has permissive provisions.

Directors and Officers Liability Insurance as a means of indemnity has become increasingly popular over the past 20 years and corporations have a more or less free hand to protect those directors and officers who act in good faith but who nevertheless become caught in commercial litigation.

The Liability of the Director: Avoidance - Restriction - Indemnification by Dr. Michael Müller-Stüler

The liability of a director may be either avoided or restricted or, if it is established, he may be indemnified in respect thereof.

In approaching these three possibilities there is a chain which consists of the following three links:

(i) Duty of care.

This, so the national reports received established, is the essence of a director's work, although the scope of the duties depends on the person concerned, i.e. whether he is a managing director or is perhaps only employed in an advisory rôle.

(ii) Accountability.

A director or officer is accountable for any deliberate or wilful act. However, when one talks about negligent acts the position is less clear. Except in the case of slight negligence exculpation is not allowed in any jurisdiction.

(iii) Amount of damages.

The usual principle referred to in national reports is that of full restitution. Generally agreements made before the loss which exempt directors from responsibility are rarely found, but agreements made after the loss do tend to be admissible, as they only concern the one event as opposed to giving a blanket indemnity.

Additional Discussion Points

(i) The liability of committees of soccer clubs and of trustees of foundations had not been dealt with in the reports which had concentrated on public and private companies. It was explained by an underwriter that in the U.K. Lloyd's wrote a scheme for three years for soccer clubs and that schemes are regularly written on an error and omission basis for trustees. Under Swedish Law it was pointed out that a trustee may be held liable for breach of trust.

(ii) Whereas in the U.S.A. in 1980 37% of persons questioned felt that there was no need to be indemnified, in 1982 that figure had risen to 53%. The reason for this apparently lies in the increasing costs in the U.S.A. of D & O Liability Insurance.

(iii) The U.S. experience so far is to the effect that it is not so much the actual claims which are being settled as the legal costs. The reason for this is to be found in the high level of pre-trial settlements achieved.

(iv) In Australia some directors are only liable if they are guilty of gross negligence, e.g. in the field of credit institutions.

(v) In Germany, which has a two-tier system of management, there are different levels of responsbility attaching to directors and officers. For instance, a member of the board of management is subject to a more stringent duty of care than a memeber of the supervisory board, whose duty of care is somewhat more remote.

(vi) In the case of liability for the manufacture of "Agent Orange" in the U.S.A. it was considered to be unlikely that a company director may be held liable even though he was aware of the risks involved.

(vii) In France, directors are not liable if they have acted in good faith, but liability policies in France do not cover criminal penalties.

Other national reports indicate that any policy which purported to provide indemnity in respect of a criminal act would be void because of public policy. However, in the U.S.A. there are a few insurance policies which are intended to indemnify in respect of a criminal action by a director or officer.

5. "SCOPE, COVER AND MARKETS FOR DIRECTORS AND OFFICERS LIABILITY INSURANCE"

by Messrs, K. Davidson (U.K.),
R. Brown (U.K.),
H.M. Maters (Netherlands),

(Reported by I. West)

Mr. K. Davidson presented a "Summary of the National Reports submitted to the AIDA Working Party on Directors and Officers Liabilities". He advised that, by the time of the Colloquium, the countries that had submitted replies were:- Australia, Brazil, Czechoslovakia, Denmark, Finland, France, Germany, Netherlands, Poland, Sweden, U.K. and the U.S.A. Later submissions were awaited from Belgium and Japan. On reviewing the Summary a number of observations were made, including an expression of surprise that the Federal Republic of Germany appeared to permit few opportunities to provide this insurance. He stated that the Working Party would terminate its activities on the Colloquium's end. Mr. Davidson thanked the participants and went on to suggest that investigation of the duty of care and attendant liability that might exist in the area of trusteeships, notably trusteeship of pension funds, might be both a fruitful and a natural progression from the findings of the Working Party.

Mr. R. Brown presented a paper entitled, "Directors and Officers Liability cover - a practical view with particular reference to Lloyds", Mr. H.M. Maters one entitled, "Personal Liability in Civil Law for Economic Loss", prepared by himself and Mr. P.C. Schellevis.

It was stated that in both the U.K. and the Netherlands the available policies are similar in most regards and are generally issued on a "claims-made" basis, although some

variations in the extent of cover exist from insurer to insurer. Whereas the propensity is to provide cover for all Directors and Officers within a company, not every insurer provides cover for Directors and Officers on subsidiary boards.

The question "who is an officer" was discussed by Mr. R. Brown. He stated that some insurers do not define the word, thereby seeking to meet the definition that exists in any locale.

It was stressed that contingent liability a company might have for the actions of the Directors and Officers is also usually insured. Such cover responds when the company is allowed or compelled to reimburse the expenses of legal defence within the span of the policy wording. Whereas the standard wording is composed of both covers, cover for Directors and Officers only is available, although this is not widely sold in the U.K. or the Netherlands.

Cover is for legal liability generally contained in the term "Wrongful Act", which varies only little from policy to policy.

The normal aspects of cover are defence costs, plaintiffs' costs and damages awarded against the Director or Officer. Fines or punitive damages are not covered, nor criminal, dishonest or fraudulent acts. Liability for bodily injury and property damage suffered by third parties is not protected by the policy.

The market for this insurance was explained in an overview by Mr. Davidson, and Mr. Brown and Mr. Maters, in the countries of Great Britain and the Netherlands, respectively. Topics covered included the liabilities that Directors and Officers face, the limits of cover normally provided, the capacities that exist in certain geographical locations and the social implications of provision of the insurance.

It was said that the market is still small qua the potentialities that exist, but growth is still possible. It was suggested that greater awareness is necessary on the part of the broking community. Recent EEC Directives may lead to an increased liability for Directors and Officers during the course of liquidations.

It was reported that problems exist in placing insurance for Directors and Officers of private companies.

In discussion it was suggested that special consideration might be required for professionals in tax havens.

Mindful that the policy usually provides cover for both the Company and the Directors and Officers, the question of who pays the premium was discussed. In the U.K. the question hinges on Section 205 of the Companies Act 1948. Mr. Brown gave an interpretation of the Section and an insight into its usage. Briefly, it was held that agreements to seek protection for Directors and Officers by the Company with third parties (ie insurers), are not enforceable by the courts, but are not illegal or unlawful.

In the closing discussion it was concluded that the general tendency for aggrieved parties to seek redress by process of law is leading to an ever-growing need for Directors and Officers to obtain protection by insurance.

AIDA NEWS

Presidential Council

Professor Jan Hellner of Sweden has been co-opted as Honorary President to replace Professor Witold Warkallo of Poland who died on 1st August 1983.