THE 1987 LONDON COLLOQUIUM
A Report by Andrew Pincott, Chairman of BILA

It was only a matter of an hour or so before Judge Mathew O. Tobriner, the seminal reformer in the California Supreme Court was quoted to the effect that a country's civil liability system reflects the kind of society in which we live. Delegates from 25 countries had plenty of opportunity to assess the truth of that aphorism in their study of the three core insurance topics comprised in this year's Colloquium theme: Insurance as an instrument of social engineering. Whether any discernible logic or pattern emerged, however, was debatable – a point quickly made by the General Reporter, Prof. Ian Scott in the discussion session with which the Colloquium drew to a close. What did emerge rather was the diversity of ways in which the State and the individual – and in some jurisdictions even the judges – use insurance to achieve goals perceived to be for the general good of society.

Concern for the welfare of society in general is, of course, no new thing: venerable precedent was cited in the context of pollution control in the Royal Commission established by Edward I in 1285 to find ways of remedying the deleterious effects of coal burning in Nottingham – thought to be the cause of Queen Eleanor's prolonged illness! But the concerns of the Colloquium delegates were predominantly contemporary ones:

- Activist judges in the United States continually widening the scope of liability and undermining in the process some of the fundamental principles of civil liability in tort and even contract.

- The balance between compensation for accident victims through the civil liability system and "social insurance" in the form of State benefits systems and the role of first party insurance.

- "No fault" compensation schemes versus claims for damages against the wrongdoer.

- Harmonisation of remedies in the European context.

- The problems which typically beset State-controlled insurance schemes.

- The liability insurance crisis in the United States and the projected cost of the US scheme for cleaning up existing toxic waste sites and the problems this will generate for insurers.

The first session, entitled "Judicial attitudes to insurance", contrasted English judicial rectitude, as expounded by Sir Mark Saville, Judge in the Commercial Court in London, with aspects of American practice as explained by Andrew Miller, sometime Attorney General of the Commonwealth of Virginia and now practising with the Washington firm of Dickstein, Shapiro & Morin. An interesting side-light on the judicial process was provided by Gordon Hickmott, a well known London arbitrator.

Many of the delegates would have been familiar with the broad drift of American developments and the Federal-inspired reaction in a programme of tort reform but Andrew Miller provided many valuable insights to the attempt to create what he described as "a fail-safe society" and, however laudable the judicial aspirations may be, the essential unfairness of judicial activism was clearly apparent in his anecdote concerning the settlement of the Agent Orange class action where the judge approved a payment by the defendants of US$180,000,000 – subsequently admitting to the New York Times that there was no factual evidence of any substance to connect the product to the injuries of the plaintiffs. In this jurisdiction, we may count ourselves lucky that, whatever the de-merits of a system which requires proof of negligence, such a flouting of fundamental principles of civil liability is unlikely to occur. But it would be wrong to believe that American developments are mere aberrations. A study of awards of damages in Cook County showed an ingrained attitude in men and women who serve on juries in that, for comparable injuries, awards of damages were consistently higher against corporate defendants than against individuals. That proved to be an attitude prevalent elsewhere and the process of education away from it may prove to be a painful one. As a delegate from Eire, Antony Maverley, reported, imposition of government levies on motor insurance to meet liabilities of failed Irish insurance companies has brought home to the general public (and thence to Irish juries) the connection between awards of damages and the cost of insurance. This tends to support what many have been saying, namely that the bankruptcy of a major US insurance carrier will be required before that lesson is learned in the United States.

It would seem that the lesson has yet to be learned even in Federal circles, judging by what was said in the second session: "Insurance and the protection of the environment". James Morrow and Dr Malcolm Aickin both dwelt on the problems for the insurance industry created by American "superfund" legislation providing for the clean-up of toxic waste sites. Robert Insinger was, in contrast, able to give a measured account of the aims and objectives in Dutch pollution control and to set out clearly the thesis that the Dutch insurance industry has an essential role to play in compensating for damage by pollution – but only where the industrial sources of pollution are regulated within an effective framework and subject to the important proviso that the insurance industry is not there to pay for past pollution. It is this latter aspect which causes such concern on the American front since the projected cost of toxic site clean-ups amounts, on some estimates, to 25 times the gross national product of the entire United States. There seems every reason for liability underwriters of US risks to be pessimistic that CGL policies will be used (and mis-used) to underwrite the cost of a substantial part of the legislative programme. Pessimism also underscored the discussion of whether or not the insurance industry has a major role to play in prevention of pollution accidents by the "engineering away" of many of the technical risks. Few delegates thought that environmental pollution risks could be left to insurance; rather, there were strong advocates for close regulation and criminal sanctions against hazardous activities, even of the most ordinary and everyday kind.

Liability was the central pre-occupation of the third session too, "Liability – Which direction?" Pierre Thomas began the proceedings with a fascinating comparative analysis of the system for compensating motor accident victims in European countries. All still have a system based on fault of the wrongdoer but there were considerable differences in the workings of the systems by reason of the operation of legal presumptions (such as the Loi Badinter in France) and the level of social security benefits. In connection with the latter the operation of subrogation rights between State social insurance and liability insurers of wrongdoers provided much food for thought and, it has to be said, English delegates were left with the distinct impression that our system for compensating motor accident victims is badly in need of a radical overhaul. Whether or not that system should incorporate some form of "no fault" compensation scheme is rather more debatable – particularly in the light of the paper of Trevor Haines. His comparative analysis of the systems prevailing in the States of Australia was an object lesson in the pros and cons of legislated "no fault" compensation schemes. Like his New Zealand colleague, Trevor Roberts, he detected an expansion of the class of injured people whom society believes should be compensated and

the emergence of more sophisticated mechanisms for shifting financial responsibility to the community or a section of it. As Trevor Roberts identified, the problem was how to achieve this sort of social engineering objective without encrusting the delivery of insurance services with additional cost, whether from State bureaucracy or imposed levies.

The fourth session addressed the problems of State schemes in greater detail, more particularly in the field of pensions. It was entitled "Insurance as the alternative provider of services – a confusion of approaches." Stewart Lyon set out concisely the changes in UK retirement provisions and the particular problems associated with State and occupational pension schemes ending on the note that the individual in England now has greater freedom of choice than ever before but that "value for money" pensions nevertheless have their problems too. Henrik Kilsgaard analysed the problems from a Danish perspective, giving delegates an interesting over-view of the Danish social insurance benefits system in the process. Developments in an avowedly socialist system were set out by Dr Karoly Bard from Hungary who reminded delegates that the problems and pressures on State schemes were not confined to capitalist countries.

As ever, the Colloquium provided a useful occasion to exchange views on a diversity of insurance-related topics – a process helped this year by the inclusion of an Open Forum session. Many and valuable were the contributions from delegates, rather more thought-provoking than solution-providing but always broadening the knowledge of those who were listening.

Now all this might sound as though the London Colloquium were nothing but grief and hard work. Far from it. The London Colloquium had begun with a lunch for delegates at which the Insurance Ombudsman, James Haswell, had beguiled delegates with a less-than-serious sketch of typical less-than-honest claims on travel, household and motor insurances in the United Kingdom. The Association of British Insurers welcomed guests and delegates to London with a reception at Plaisterers Hall. Her Majesty's Government were also kind enough to give a reception in honour of the Presidential Council of AIDA and delegates to the Colloquium were entertained at Lancaster House where the host was the newly appointed Parliamentary Under Secretary for Consumer Affairs, Francis Maude, MP. The Reinsurance Offices Association also kindly sponsored a dinner for the AIDA Presidential Council and for speakers at the Naval and Military Club. The Colloquium was brought to a fitting conclusion with another reception, this time in the Tower Room at the offices of Willis Faber plc where the host was our old friend and colleague, Edward Gumbel.

As ever, those delegates for whom this was a first visit to the London Colloquium felt compelled to express their admiration for the way it was organised (thanks to Michael Cohen) and to remark upon the unique blend of high quality papers, knowledgeable speakers, lively debate and the general air of warmth and friendliness. For those of us who are regular visitors it proved, as ever, the opportunity to meet old friends and to make new ones.

THE 1987 A.G.M.

Minutes of the Annual General Meeting held at the School of Oriental and African Studies, University of London, Malet Street, London W.C.1. on Thursday 10th September, 1987 at 12 noon.

The Chair was taken by Mr. J.A. Pincott.

APOLOGIES

Apologies for absence were reported from Mr. S.M.F. Harris, Professor A. Diamond, Mr. J.C. Frangoulis, Mr. S.B. Salama and Mr. D. Sasserath.

MINUTES

The Minutes of the Annual General Meeting held on Tuesday 16th September, 1986 were approved and signed.

AUDITORS

The recommendation of the Committee that Messrs. Charles, Rippin and Turner should be re-elected was proposed by Bryan Lincoln, seconded by Derek Cole, and carried unanimously.

CHANGE IN CONSTITUTION

The Chairman read out the proposed changes in the Constitution relating to Membership as follows:

3. MEMBERSHIP

(1) The following shall be eligible for membership:

(a) any person with legal qualifications who in the opinion of the Committee is sufficiently connected with, or interested in, insurance.