of the more controversial, where - in the true spirit of legal reform in a democratic and open society - the Commission has evinced a preparedness to communicate its ideas and to modify them in the light of criticism from the community it serves.

THE LONDON COLLOQUIUM - JULY 1989

Those members and foreign visitors who attended BILA's Colloquium at University College London between 12 - 14 July this year could not fail to have been impressed by the quality and content of the papers given as well as the high standard of the discussions that followed. Had they been present at the Moot on the last day they may have been forgiven for thinking that some members participating as witnesses should consider abandoning their own professions for an even more lucrative career in Acting.

The subject chosen for this Colloquium was 'The Making and Breaking of Insurance Contracts' and the first day was taken up by the study of the duties of disclosure in Common Law and Civil Jurisdictions. Michael Gill from Australia was first into bat and took us through the Insurance Contracts Act of 1984 which had the effect of introducing a statutory code that effectively replaces the Common Law on non-disclosure and misrepresentation. The Act, which does not apply to Marine, Workers Compensation or Motor Vechicle injury insurance, has a number of inovations as follows:-

(1) The test of materiality is radically different from the test at Common Law. What matters now is what *the insured knows* to be relevant to the insurer's decision in acceptance of the risk and at what terms and what a prudent insurer might consider.

(2) The 'prudent insurer' (often thought to be a mythical being) is now substituted by the 'particular insurer' test. This was thought to be more onerous where the insurer happened to have a high or unusual standard of underwriting.

(3) As to what the insured discloses, the Act states that it is limited to matters the insured knows or that which a reasonable person could be expected to know.

(4) Where the policy is avoided, the Court now has the power to disregard the avoidance if it would be harsh and unfair not to do so. Where the Court disregards the avoidance it can award the whole or such part as the Court thinks just and equitable.

As will be seen, the above provisions of the Act are but an example (amongst others) that shows an enlightened approach to the subject for which legislation in the U.K. may well be long overdue. Although there is insufficient case law as such clearly to establish the meaning of certain parts of the Act (i,e, how 'just and equitable' shall be interpreted) there is no doubt that this is a great step forward in Consumer Protection and the clarification of the common law precedents on the subject.

We then heard from Ray Hodgin of Birmingham University who explained the position in English Law which goes back some two hundred years to Lord Mansfield's remarks in the leading case Carter v Boehm. However, it was the Marine Insurance Act of 1906 which dealt with utmost good faith. (Sec. 17) (an obligation now applying to both sides as evidenced in a recent Irish case, although this is by no means clear in the famous Keyser Ullman case.) In section 18 the requirement is to declare every material circumstance which is known to the assured and the assured is deemed to know every circumstance which, in the ordinary course of business ought to be known by him. The section then goes on to refer to the 'prudent insurer' whose judgement is taken into account as to whether such fact would influence him. Although a marine Act, it is generally held to apply to non-marine insurances on the grounds that it was the codfication of Common Law principles relating to all insurance contracts. Ray also discussed what facts need not be advised to an insurer and the obligations on renewal. The ABI Statements of Insurance Practice 1977 and 1986 were also discussed and, not being legally enforceable, had their limitations, particularly as they applied only to policyholders who insure in their private capacity and who are resident in the U.K. Ray felt that the present rules of disclosure weigh heavily against the insured and with The Law Reform Committee Report of 1957 and The Law Commission Report in 1980 (the latter including a draft bill) both of which were gathering dust on the shelves (not like the Pearson Report) it was perhaps time to address the problem in a comprehensive way as had been achieved in Australia.

Graydon Staring, an Attorney from the USA, explained the problems in his country where some 50 states had their own separate jurisdictions. In general they followed the Common Law of the UK, providing it was not repugnant or inconsistent with the constitution of the United States. Louisiana is an exception where the French Civil Law forms the basis due to historical reasons. Proposal forms (or applications as they are called) in the vast majority of cases represent all of the information supplied and what is most important, if the materiality of a fact is arguable the failure of a question to call for it specifically may be argued as showing a lack of materiality or a waiver on the part of the insurer. The duty to disclose continues up to the point where the contract is confirmed. There was some discussion amongst the delegates as to when this took effect in each country and was not always clearly identified by each speaker.

At Lloyd's it was said to be when the slip was initialled, but in other cases it could be when the premium was paid, the date when the risk incepted or perhaps when the policy was issued.

In the afternoon of the first day we heard delegates from Hungary, France, Netherlands, Germany and Denmark representing Civil Law Jurisdictions. It would be impossible to reflect here all the points raised but the following may be of interest:-

Hungary

The Civil Code came into exsistence in 1960 but with new competition from the private sector some adjustment may be required to deal with the new situation. Questions regarding previous insurance history with another insurer is, for example, a new situation.

France

An insured who has accurately responded to questions on a proposal form is considered generally by Franch Courts to have fulfilled his duty of disclosure. French Courts have shown a clear trend to consider the boundaries of the insured's duty of disclosure to be fixed by the questions asked in a proposal form. They only look beyond the form where the bad faith of the insured is at issue. Under a new draft bill, due to become law at the end of the year, there is also likely to be a duty to disclose during the life of the contract all new circumstances which render inaccurate or void such replies on the original proposal form. This was thought by one delegate to have repercussions in the realms of Life Assurance where, if there was at the time of completing the proposal form, no intention to take up for example. 'Hang Gliding', which later was reversed, there would now be a need to advise insurers if the new bill applies to Life Assurance.

Netherlands

Whilst the Dutch follow the test of a'prudent insurer', it is interesting that the Courts will consider that the insurer has waived its disclosure requirements if he fails to carry out an inspection should he be aware that this is necessary to assess the risk carefully. Where the facts of a private and sensitive nature such as a criminal record are required, it is necessary for the insurer to ask a specific question, otherwise he will be considered as waiving non disclosure of the information. As in many other countries ambiguous questions are answered to an understanding which a reasonable man might put upon the question.

Denmark

Having reached uniformity in insurance law in the past amongst Nordic countries, Denmark, being a member of the EEC, is now at variance with countries like Sweden where a new Act has recently been introduced. They are awaiting the harmonisation of the EEC Insurance Laws although the directive is still at the drafting stage. Norway is also about to enact an Insurance (Contracts of Indemnity) Act which will also make its insurance laws at variance with Denmark. Proposal forms in Denmark oblige the insured only to answer the questions. Where no proposal form exists the insured has a duty of disclosure that would influence the insurers' liability but the omission has to be grossly negligent, ordinarily negligent not being sufficient for the insurance contract to be invalidated.

Germany

German Insurance Law is in many ways similar to that in the UK other than the use of the expression 'prudent insurer'. In industrial risks the insured has a duty to disclose matters of importance which are not expressly asked for by *the insurer* on a pre-formulated sheet of inquiry (such as a proposal form). The insurer has to make every effort to obtain the information needed by him and if answers on the application form have not been made in a distinctive manner this will keep him from seeking avoidance at a later date. It is interesting that questions with regard to general living habits such as sporting activities, alcohol or smoking habits are of no relevance in Germany as long as the habit does not amount to a problem such as alcoholism.

Thursday morning consisted of a paper given by Professor Bernard Rudden on 'Disclosure in Insurance - A Comparative View'. His articulate and easy manner was much enjoyed by the delegates as he traced the origin of various civil and common law systems throughout the world. The problems would appear to be similar everywhere but there are great differences in the treatment. The duties of disclosure and of accuracy are found in all systems. The source of duty is not the contract but the law; initially custom and case law and then by statute (ie. in the UK, The Marine Insurance Act, 1906). Duty of disclosure is a strict duty: ; true answers are required and honest ones alone will not suffice; it is not just a queston of being honest and careful. Prof. Rudden also discussed the various remedies which he divided into two parts:-

(1) HARD LAW (enacted by legislation)
  (a) Ignored if the breach did not effect the loss (causal nexus test).
  (b) Proportionality e,g, if correct premium is double, half the loss paid.
  (c) Leave it to the Judge (as in Australia)
(2) SOFT LAW (enacted by self-regulation)

(a) Statement of Insurance Practice (ABI members)
(b) Ombudsman (member companies and insurers)

In the making of an insurance contract we were led through the duty of disclosure, materiality and then the Breaking of the Contract with unlimited sanctions and then limited sanctions. In respect of the completion of proposal forms Prof. Rudden explained the differences in the law of various countries such as Israel, where there is a limitation to the insurer's right to cancellation only to matters asked about, as compared with other countries such as Germany where rescission for non-disclosure of a fact is permitted under statute only if there is fraudulent concealment.

Whilst proposal forms asked the majority of the questions required by Underwriters it was felt by one delegate that to increase the number of questions would only present greater difficulties in getting the forms completed. Many delegates expressed horror at the size of some proposal forms.
Prof. Rudden further pointed out that:-

(1) Older rules on disclosure are still widespread and favour the insurer (UK,Germany etc.)

(2) Dissatisfaction with the traditional rules has led to some systems introducing a more benevolent approach to the definition of materiality and to limiting the effect of non-disclosure by the concept of causality and proportionality (ie. Australia, Sweden etc.)

(3) A large number of studies have been done and reforms proposed which may see enactment (France, Norway etc.)

(4) In line with trends in other fields, reform tends to be presented in terms of status categories ie. business is left to fend for itself while the consumer is to be protected by mandatory rules. (UK Statements of Insurance Practice ABI)

(NOTE: - the comments in brackets in 1, 2, 3, and 4 are my own)

Finally Prof. Rudden asked a question, "Why should insurers care?"

If the rules favoured insurers, premiums would be lower, if not they will be higher. Provided all insurers, in a given market, are subject to the same rules it should make no difference to the successful conduct of their business. Perhaps the objective should be

as stated in the 1984 Australian Act which (Prof. Rudden reminded us) stated:- ....
its desire to reform the law:-

> "so that a fair balance is struck between the interest of insurers and other members of the Public."

Thursday afternoon was spent discussing the various ways of resolving disputes with special emphasis on Non-Judicial determination:-

Peter Madge spoke about Arbitration and in particular the Personal Insurance Arbitration Scheme (PIAS) the rules of which were later circulated to delegates. He did not approve of advertisements by insurers for instant and cheaper cover where the marketing side of the business had taken over from the underwriting. Due allowance had to be made for soft and hard marketing. The costs of PIAS to the insured are literally his own costs. The scheme did not apply to commercial insurances and one delegate pointed out that small businesses often lacked resources and had to be legally aided. Perhaps a scheme could be devised to fill the gap between the private insured and the larger or plc company who could afford the best legal advice from their own adequate financial resources.

Richard Scheffer of International Dispute Resolution Ltd. described his independent method of settling disputes and emphasised that there must be a desire on the part of both sides to reach a settlement. The procedures are similar to that of ACAS where the parties are, for the most part, kept in separate rooms. The conciliator or mediator, who remains impartial and does not express an opinion, passes between the parties to avoid full confrontation. The main difference from ACAS is that the final settlement is binding on both parites. The cost of a case could be in the region of £2,000 subject to any complications. Rocketing legal costs and speed of settlement has made this method of settling disputes very attractive and we may well see an increasing use of this formula. A system originating in Vancouver, Canada, of arranging a meting between the claimant and the claims manager was described by a delegate as being very successful and had been adopted in some areas of the United States. The thought of the claims manager actually having to face the insured when saying 'no' does suggest great possibilities of working out a settlement over a cup of coffee and seems to work in a high proportion of cases, particualarly where the claims manager discovers the insured is quite human and respectable.

The Deputy Insurance Ombudsman, Laurie Slade, who incidentally was the former legal adviser to the Chartered Institute of Arbitrators, discussed methods of dispute resolution which in the case of the IOB scheme were restricted to insurances in the

private sector. Whilst awards are binding on insurers the insured has the right to take the matter further. The PIAS scheme is subject to the awards being binding on both parties. Some delegates were surprised to find that proportionality settlements were quite common in awards by the Ombudsman when in our present legal system this is not permissible although if we follow other countries, future legislation may well provide for this. The advantage of the IOB type of dispute settlement is that the parties can take into account any considerations they please and such disputes can be resolved by 'extra - legal' means and of course the costs are much cheaper. In the Ombudman's scheme the costs are borne by insurers.

The advantage of the IOB annual report giving considerable details of settlements made compares very favourably with PIAS where no report is published. The fact that 80% of insurers' s decisions are upheld, has no doubt resulted in an increased membership of the IOB scheme. This formula, now eight years old, enables insurers to become increasingly aware of their own shortcomings in dealing with their policy holders.

Mr. Slade referred to the criticism of the Director General of Fair Trading who commented that in the long term it may not be a good thing that one man should have so much influence across one industry, but as all awards are confirmed by the IOB Council, the membership of which is is broadly based, there may well be adequate safeguards.

Whilst the PIAS scheme is basically adversarial compared with IOB, which is more inquisitorial, in both cases most decisions are on the basis of documents only. The arbitrator in the PIAS scheme weighs up the relative merits of the submissions of both parties but the Ombudsman, whilst considering the policyholder's submission, also sees all the Company's papers including confidential memos.

Finally, the last day consisted of a Moot with Counsel acting for each party and hearing evidence from witnesses. The script was written by Andrew Pincott (the Immediate Past Chairman of BILA) who was congratulated on a stimulating case which in the end resulted in four different decisions from the four adjudicators, which was probably his intention. We were privileged to have with us Lord Mackenzie Stewart, President of The British Academy of Experts, acting in a judicial capacity, who found in favour of the insured: Peter Madge acting as arbitrator applying English Law to a French risk and finding in favour of insurers whereas Laurie Slade (acting ultra-vires as Ombudsman, this being a commercial case) operated a porportionality settlement. Professor Erwin Deutsch from Germany also found in favour of a proportionality settlement on a somewhat different basis to Mr. Slade. The witnesses which

included Reg Brown as the Expert Witness, Ken Davidson as the insurance underwriter together with Guy Cottam as the Production Manager, all entered into the spirit of the occasion. Counsel for both parties, Richard Aikens QC and Christian Bouckaert, ably assisted by George Leggart helped to bring reality to the case with their cross examinations and final speeches.

Finally I would be failing in my duty if mention was not made of the three excellent receptions held at Lancaster House, The Guildhall (complete with Lord Mayor, Aldermen etc.) and finally the ABi. The large number of delegates attending the final reception at ABI (when they might have been on their way home) was in the opinion of many a reflection on their appreciation of the support given by the ABI to BILA and the Colloquium as well as their satisfaction at what many felt to be the best colloquium BILA have held so far on a subject that had both instructive and practical applications. The last word must go to Michael Cohen and his staff whose Company ARA Conference Services handled all the adminstration with the usual efficiency. All we have to do now is to think of a worthy subject for 1991!

BROKER MANAGED FUNDS
Mark L Dawbarn - Company Secretary - Cannon Lincoln Group

Broker Managed Funds have been receiving attention from a variety of authorities ever since the Financial Services Act started to be implemented, and perhaps before. Those who have so far pronounced or regulated on the subject include the Department of Trade and Industry, the Inland Revenue, the Securities and Investments Board, LAUTRO, IMRO and FIMBRA.

Until 1987 the position seemed at least on the surface to be quite simple. An insurance intermediary would gather together a number of clients who were willing to put their trust in his investment expertise. He would find a life company willing to issue those clients with policies whose benefits would be linked to a fund managed by him. He would receive normal commission as an intermediary and in addition he would receive a management fee which in accordance with the policy terms would be paid out of the fund. He would be allowed to "cold-call" the arrangement if that was his chosen method of doing business.

In April 1987 the SIB published a paper on the subject in which they raised a number of points where they considered reform might be necessary. They saw for instance an "obfuscation" of the relationship between the various parties. It was not always clear in their view for whom the broker fund manager was acting or to whom he was responsible. Furthermore, the arrangements for paying management fees were not