

## **AIDA IXth World Congress – Sydney (An Overview)**

Any Delegate who attended the AIDA Congress could not have failed to be impressed by the high standard of the organisation, venues and programme content. Certainly when the Australians tackle an event of this magnitude they put their heart and soul into it. Michael Gill and others such as Syd McDonald and John Hastings are to be congratulated on forming some years ago, and maintaining, a very vibrant Chapter of AIDA.

The Congress opened in the Sydney Opera House with an address by the Chief Justice of Australia, Anthony Mace, AC, KBE, and after an Australia Aboriginal Dance of Welcome, complete with didgeridoos and clapsticks. We were then entertained by the SBS Radio and Television Youth Orchestra with the Combined Choirs from Singers 2000 and Cheltenham (in Australia) Girls School. There then followed speeches from our own AIDA President, John Butler and Ross Hensman, President of the Australian Insurance Law Association, which incidentally has a Chairman in each State and a combined membership of over 1,500. The Congress Chairman, Syd McDonald, is a Loss Adjustor and Ross Hensman, their President, heads up the Sun Alliance/Royal operation, so who says that AIDA is run by Lawyers? After the opening of the Congress, a Cocktail Reception was held in the Sydney Opera House.

On the following day, Monday 15th August, the Congress began in earnest as the subject was Theme 1. "Freedom of Contract and Choice of Law in Insurance". Lunch was taken in the Conference Centre followed by an address by William L. Warren, Grandson of American Chief Justice, Carl Warren. In a very erudite address, Mr. Warren discussed the problems of US Litigation in a humorous yet authentic manner. At the end he took off his wig to reveal that it was all a big scam and the speaker was in fact an ex Solicitor who now made a professional living taking on the mantle of fictitious characters, backed up by a team of researchers. A really convincing performance which had most of us guessing right up to near the end. Another Cocktail Party in the evening, this time held at the National Maritime Museum.

Tuesday's programme consisted of a hypothetical Reinsurance Problem arising out of numerous claims for personal injury and clean-up costs and the discussions were Chaired by our own Colin Croly of B.L.G. I did not attend this session as it ran simultaneously with one on Insurance Disputes for the Consumer where we were

addressed by speakers from Australia, Finland, Norway, Denmark and our own Insurance Ombudsman, Dr. Julian Farrand (now to move on to be Pensions Ombudsman). I found the whole session fascinating and it was most interesting to discover how disputes are resolved in different Countries. We were to learn that the Ombudsman in Norway is now dealing with industrial disputes. During the same day, Working Parties on Motor, Pollution, Accumulation of Claims and Pensions also met. In the evening we were back at the Sydney Opera House for a superb performance of "The Gondoliers" by an Australian Company. The script had been changed in part to take in references to our own Royal Family and as you can imagine Australian Politicians did not escape from the dialogue.

Wednesday was Pensions day (Theme II) and I have to confess to leaving this one to the experts. Ruth Goldman will be reporting elsewhere on this session as will Ray Hodgkin on Theme I.

Wednesday evening found the Australians hosting dinner parties at their own homes and I was fortunate, with my wife Shirley, to be invited to Syd McDonald's (The Congress Chairman) lovely home overlooking Sydney Bay. It was a splendid evening sitting down to dinner with eight other international guests. All this had been preceded by a reception for the U.K. Delegates and the Conference Committee at the Consular General's Offices which overlooked Sydney Harbour Bridge, a simply wonderful setting. We were entertained at a Cocktail Party hosted by John Hillman, the Deputy Consul, as the Consul had been summoned that day with other Consuls to the Ambassador and as he told me on the telephone, when the boss calls you have to go!

Thursday morning consisted of more meetings of the various Working Parties and a Mock Insurance Dispute Resolution which I attended. The mock ADR on this the last day of the Congress, showed that in Australia, at least, the law book is thrown out the window and commercial considerations take over completely. This of course only works where all the parties are in a settling mood. In the case in question the insured had failed to advise his broker or his insurers of an increase in the fire risk during the currency of the policy which was required by a condition. The broker had failed to properly advise his client of the clause in the policy requiring him to disclose the change and the insurer was saying that due to the increase in risk and breach of the condition he should not pay. In the end the insurer paid 75% and the broker's P/I insurers 25% on the understanding that the insured did not take his business away from the broker or the insurer for three years. This

was based on an actual case that went to Court where the insurer was made to pay 100% of the loss but was permitted to increase the fire rate by 25%. I doubt if that is justice but as I say commercial considerations in the mock ADR overcame all legal ones.

The Congress was wound up in the final session in the afternoon, Chaired by President John Butler and various alterations to the Constitution were agreed.

The final Gala Dinner in the evening was held at the recently restored Victorian Sydney Town Hall, a truly magnificent building. We danced to The James Morrison Big Band and feasted on Tasmanian salmon, Cowra Lamb plus superb wines from Australia, of course!

It was time to say goodbye to the many friends we had made, old friends that we had seen again and some we had hardly had a chance to exchange but a few words. With over 650 (delegates and partners) present how could one talk to everyone!

Many of us left either to return home, visit the Blues Mountains or the Hunter Valley as we did and then journey to Ayres Rock, Alice Springs and Cairns, or to Darwin as some did. What a Country! (no Continent). We were so impressed by the warmth of our welcome and the genuine friendliness of the Australian People and this applied equally to those we met outside the Congress. My lasting impression was of a vibrant multi-racial community that are proud to call themselves Australians. They are not without their problems, every large hotel, except one in Cairns is owned by the Japanese. Foreign capital is welcome, but no one race as part of the immigrant population should become dominant if a balanced society is to be achieved. The Aboriginal Community now receive a large income from land rights without having to work for it. Although education is compulsory for their Children it is not enforced but it has produced one Aboriginal Queens Counsel.

The AIDA Congress saw representatives from forty two different countries and it was a very personal pleasure for me that I was supported by some thirty U.K. delegates including our Deputy President Sir Alexander Graham (now our President) and many accompanied by their wives or guests. I know our Australian colleagues were delighted with the U.K. support as well as that from other countries.

The next Congress is in May 1998 in Marrakesh in Morocco and my final comment

is that the Australians have set a hard act to follow. The hospitality may be different but judging by the number of Moroccan Delegates present in Sydney, I am certain it will be just as sincere.

Derek Cole.  
Immediate Past Chairman.

## **THEME I**

### **AIDA IXth World Congress 1994**

Theme I of the IX World Insurance Law Congress in Sydney was devoted to the topic of Freedom of Contract and choice of law in Insurance. Twenty two countries submitted written reports and the General Reporter was David StL Kelly from Australia. As for past Congresses the procedure was to supply the various member organisations with a general questionnaire. However, as in previous years, although this may help to concentrate the minds of the national reporters in the final analysis it is often necessary to depart from the questionnaire in order to accommodate national divergencies.

Mr Kelly addressed a number of broad issues in his Report.

#### **1. Substantive Restrictions (excluding compulsory insurance)**

The most obvious example of restriction of freedom of contract is the standard form approach used by many insurers, certainly in the area of mass produced insurance. In terms of standard forms set down in legislation only the USA appeared to have such an example, the State of New York Standard Fire Insurance Policy 1943 which has been used as the basis of such policies almost throughout the United States.

Another method used to restrict freedom of contract is by declaring certain terms to be unenforceable. Some countries reported 'absolutely and relatively mandatory rules'. This phrase describes rules which cannot be modified even in the insured's favour (absolute) and those which can be modified but only in the insured's favour (relative). Switzerland provided a long list of examples of both categories. In the former category, for example, were 'terms providing

for insurance in favour of another person's life, without the agreement of the insured; and 'the insured is not bound if the policy holder is consciously over-insured'. Examples of the latter category included: 'transformation and surrender of a life policy; the insurer's lack of a right to reduce benefits if the policy holder brought about a claim in a slightly negligent way'.

The Netherlands talk in terms of 'black' and 'grey' terms. The former are deemed to be unduly onerous while the latter are presumed to be unduly onerous.

Another example of interference with freedom of contract is where the law requires insurers, on an individual basis, to seek prior approval of their standard forms from a regulatory body. Thirteen reporters gave examples in their country of such a requirement, including eight from Europe. An additional three countries reported that there was a power to intervene at a later stage. The EU members who are subject to pre-approval will have to change their regulations in the light of the latest Directives. These changes herald a radical change towards greater freedom of contract. The Swiss comment however to these changes is worthy of special note. It argues that what is happening under the Directives is a move from comprehensive a priori control to primarily a posteriori activity, namely the monitoring of solvency, and thus "the question remains open as to what effect the change from material supervision to an activity which primarily monitors capital requirements will have on the granting and maintenance of individual freedom of contract".

## **2. Formal Restrictions on Freedom of Contract**

Under this heading the General Reporter had in mind two situations. The first was where there were found requirements in relation to the contract itself, such as, that it should be in writing; and second, those which were related to particular terms, such as, that exclusion clauses be brought to the attention of the insured.

The most extensive example of the first situation above was provided by the United States where for life assurance the policy, a policy summary and a Buyer's Guide must be supplied before premiums can be received. Many reporters gave examples of clear, legible and intelligible terms as being a

basic requirement. Again the United States provided examples of the greatest obligations on insurers in that exceptions or limitation clauses must be given equal prominence with benefits clauses.

### **3. Overriding General Criteria**

Under this heading the General Reporter considered various concepts adopted by the courts in various countries whereby freedom of contract was thwarted to a greater or lesser degree. Such matters as public policy, unconscionability, unfairness and utmost good faith come to mind.

Various countries talked in terms of their courts being able to refuse insurance contract terms on the grounds of unfairness. Particular reference was made to the EU Directive on Unfair Terms in Consumer Contract.

Good faith requirements were reported in most national reports. Australia pointed out that since the Insurance Contracts Act 1984 the insured's duty of disclosure had become less onerous. In the United States courts the duty had been placed on the shoulder of the insurers in that they must not be seen to have frustrated the contractual rights of the insured.

### **4. Choice of Law**

In terms of the general reference of Theme 1 to freedom of contract it is the subject of choice of law that presents the greatest interference.

Thus in Japan only in the case of marine cargo insurance and reinsurance would it be possible to exercise freedom of choice of contract. Morocco also reported a very narrow choice of law.

The Report refers to the complex rules of EU application to be found in Art. 7 of Second Council Directive 88/357/EEC. These provisions are very detailed and are not dealt with here in great detail to avoid throwing an imbalance in presentation.

My own feeling is the same as it was at Copenhagen (1990) and Budapest (1986) that the papers in the main, only scratch the surface of their subject

matter. One is given a glimpse of national divergencies but no more. Of greater interest are those occasions when BILA arranges or participates in conferences in greater depth and with fewer legal systems for comparison.

Ray Hodgkin  
Senior Lecturer in Law – Birmingham University

**BRITISH INSURANCE LAW ASSOCIATION  
MINUTES OF THE ANNUAL GENERAL MEETING HELD  
AT GLAZIERS' HALL, MONTAGUE CLOSE, LONDON  
BRIDGE, LONDON SE1  
on Tuesday 13 September 1994 at 12.00 noon**

**1. APOLOGIES FOR ABSENCE**

Apologies for absence were received from Lord Justice Steyn, The Rt Hon Lord Justice Saville, Mr Robert Merkin, Mr David Drew, Mr Reg Brown, Mr Aubrey Diamond, Mr Derek Hammond-Giles, Mr Barry G Howard, Mr Peter Fergie, Mr Francis Patterson, Professor Hugh A L Cockerell, Mr Mark Griffiths, Sir Sidney Lipworth and Mr Michael Cohen.

**2. MINUTES**

The Minutes of the Annual General Meeting held on Tuesday 14 September 1993 were approved.

**3. MATTERS ARISING**

There were no matters arising.

**4. ANNUAL REPORTS**

Copies of the Chairman's Report had previously been circulated, there were no matters arising.