BRITISH INSURANCE LAW ASSOCIATION

BULLETIN

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THE INSURANCE COMPANIES AMENDMENT ACT 1973

The new Act received the Royal Assent on 25 July and by now many members will have had a chance to study its provisions. Some of these will come into effect only when the necessary regulations have been made so that it will be a little while before the Act's full impact is felt. To give members ample opportunity of appreciating all facets of the new legislation, during the coming Session we shall devote one of our meetings to the Act. Also we hope to include an informed article on the subject in a subsequent edition of the Bulletin.

No doubt members will be pleased to learn that BILA was consulted on a number of points on the drafting of the Act by the Department of Trade and Industry, commencing with a general submission of the Association's views during the period after the V & G collapse in 1971. During the progress of the Bill through Parliament the Department's Solicitor asked the advice of BILA on some detailed points, especially with regard to those provisions dealing with persons who invite others to enter into contracts of insurance.

BILA will continue to co-operate with the DTI during the preparation of the ensuing regulations.

ANGLO-FRENCH LEGAL SEMINAR

British insurers have had to make elaborate provision for discussions of legal problems in Europe generally and the European Community in general. There have been innumerable official meetings at international level. But can one always be sure that the participants understand one another's legal systems or even their vocabularies? What is the difference between French droit commun and English common law? If a Frenchman speaks of l'auto-assurance is there a danger that the Englishman will think he is talking of automobile insurance when in fact self-insurance is meant? Is it possible that European countries have already

solved some legal problems that still baffle British lawyers and can put their points very persuasively. British businessmen sometimes work with a less solid basis of theory for their undoubted practical skills.

The British Insurance Law Association believes that informal discussions among individuals interested in legal problems will help those concerned on both sides to appreciate better various points of view and so ensure that those to whom the business negotiations eventually fall are well informed of the various systems of law and practice. To this end members of the Association have in the past few months visited Ghent, Cologne and Paris for informal talks and will shortly be meeting Dutch lawyers at Rotterdam. Those taking part have certainly added to their own knowledge and hope that they have contributed to dispelling some unnecessary misunderstandings on both sides.

The Paris Colloquium on May 17 and 18 was organised by Professor Andre Besson of the Law University of Paris, and Chairman of the French Section of the International Insurance Law Association (A.I.D.A.). Among those taking part on the French side were M. Nolla, Chairman and General Manager of the Languedoc, M. Monin, Director of Legal and Financial Affairs at the French Federation of Insurance Companies, M. Granier, Counsellor at the Court of Cassation, and Professor Bigot, University of Orleans, who will shortly be succeeding Professor Besson in Paris. The seven British members included Mr Gordon Shaw, Hogg, Robinson and Gardner Mountain (Life and Pensions) Ltd., Mr Alan Teale, Director, Lloyd's Insurance Brokers' Association and Mr John S Bryce, Lloyd's Underwriter. It was regretted that no insurance company employee could be present.

The first day was devoted to legal liabilities. Two papers had been prepared by Mr K. S. Cannar on general principles of responsibility in motor insurance law and on rules governing the assessment of damages for bodily and mental injury. These were presented, in Mr Cannar's absence, by Mr David Sasserath and Mr Andrew McCrindell. Corresponding papers on the French side were given by M. Delestree (la Fonciere), in the absence through illness of M. Bedour, and M. Margeat (Union des Assurances de Paris). M. Margeat dealt in particular with non-economic losses. He had some interesting statistics. Between 1960 and 1970 in France the proportion of all damages attributable to non-economic losses (pain and suffering and the like) fell steadily from 9.5% of the total to 6.3%. They represent 11.4% of the damages awarded for death and bodily injury, excluding claims for damage to property. They form a higher proportion of claims

for temporary disablement than of claims for permanent disablement or death. French courts are increasingly chary of giving damages for loss of the pleasures of life.

It appears that in France as in Britain a kind of tariff for general damages has emerged.

There are some striking differences in the legal systems of the two countries. In France the criminal courts can award damages to the injured third party as an alternative to his remedy before the civil courts. One speaker well qualified to know expressed the opinion that criminal courts tended to be more generous with damages in bad cases, for example, where the offending driver was drunk. It appeared that damages were not normally interfered with on appeal. The French system of the court appointing an expert on, say, a medical question, and of placing considerable weight on the expert's report, appeared to have much to commend it. In France there is a presumption of liability against a person in charge of a vehicle. Thus, where two cars collide and the degree of negligence on either side cannot be established, each motorist will find himself paying for the damage sustained by the other. In fatal accidents, claims for moral prejudice (damage to one's affections) can be made by relations. Even a mistress has a right of action arising from a fatal accident. Fees for medical and hospital treatment figure much more prominently in claims in France, where the health service does not relieve the defendant of most of the liability as in Britain. The British system whereby a claimant can receive damages for loss of earnings with a deduction of only half his national insurance benefits, was considered curious. The British were equally surprised to learn that it was common for French courts to include in damages for temporary disablement on the part of a non-earner a sum corresponding to a notional loss of earnings.

The second day's proceedings opened with a discussion on problems of harmonisation of insurance law relating to disclosure and notification of loss. Britain differs from the other countries of the European Community in that it has no law on insurance contracts except in relation to marine insurance and, to a lesser extent, motor and industrial life insurance. In my paper I had therefore to set out the relevant English law on disclosure of material facts, observing that the practice was a good deal less rigorous than the law. Similarly, in relation to notification of loss there is little statutory law applicable. British insurers enjoy a freedom to contract that is hardly limited by statute.

It is a freedom that they are obviously not keen to lose.

Professor Besson's paper compared the preliminary draft Community directive of 1969 with French law. In France the insured is obliged to disclose all material facts at the time of effecting an insurance and to notify subsequent changes in the risk. If he fails to do so through bad faith the insurance is voided. If the non-disclosure or misrepresentation is innocent and is discovered before a loss the insurers may either cancel the insurance or agree to its continuance subject to payment of an additional premium. If the irregularity is discovered only after a loss the claim is reduced in the proportion that the premium which should have been paid bears to the premium actually paid. The preliminary draft project visualises much the same solution but adds (and Professor Besson approves) that if the insurers prove that had they known the true facts they would not have insured the risk at any price, then the insurers can escape liability altogether.

Disappointment at the slowness of progress towards freedom of services and freedom of establishment in non-life insurance has given rise to the proposal that substantial industrial and transport risks should be dealt with separately from other insurances such as those effected by individuals, and that freedom be applied in the first place to the former, industries being given the right to agree with insurers as to the country whose law should govern the contract. In Professor Besson's opinion this made the need for harmonisation of insurance law all the more urgent, though it would equally be possible to argue that the need was lessened by the proposed separation. It was stated that French insurers saw grave difficulties in a separation between personal and industrial insurances: the wealthy individual was in less need of protection by national legislation than the small trader. And if a distinction was to be made on the ground of size, how large was "large"?

The discussion proved inconclusive. The British participants did not appear to regard the need for harmonisation of insurance law as incontestably established, and were reluctant to agree that English law on disclosure and the like had perforce to be altered to the detriment of insurers, despite the 1957 recommendations of the Law Reform Commission which have not so far been implemented. The prospects for harmonisation are not made easier by adding a common law country to the original Six, all of which have statutes governing the insurance contract.

One interesting point emerged. It was said that if an insurance contract made subject to English law was litigated on in French courts the courts would apply their own rules of construction and not the English ones. Does France have the ejusdem generis rule, for example? Time did not permit an enquiry.

The fourth session was devoted to insurance intermediaries, with a paper by Mr Gordon Shaw on their position in Britain and a series of fourteen points submitted for discussion by M. Deschamps of the Centre for Insurance Documentation and Information. Not all could be discussed in the time available.

For the French, the principal intermediaries are still the general agents who represent a given insurance company in a particular area. Brokers have a much smaller share of the market than in Britain but there is one category, the sworn broker, who has a monopoly of marine hull insurance in certain ports and towns. Some general agents, it appears, now act as brokers in respect of types of business not covered by their main mandate. Reference was made to the French insurance exchange held every morning in Paris where brokers meet insurers for the placing of co-insurance risks and the like. Mail order insurance has so far had little success in France. There is licensing of general agents and insurance representatives but no special legislation for brokers. Enterprises were free to set up their own brokerage business but the manager must fulfil the professional requirements of the law for those who sell insurance.

Apart from the strength in the French market of general agents and the existence of licensing, it did not appear that the French law of agency differed markedly from the British law. The discussion however served to provide a clearer picture of existing practices on both sides and no fundamental differences on points of law emerged. Some misunderstandings were removed. A questioner who spoke of "the privileged position of Lloyd's" was reminded by Mr Teale that there is no privilege; French law expressly recognises the status of associations of underwriters, no doubt with Lloyd's in mind, and Lloyd's conforms to the legal requirements.

BILA is not the only body to interest itself in European insurance law. The Social Science University of Grenoble has recently appointed M. Francois Bizet as permanent scientific delegate at its University Centre for European and International Research. M. Bizet has a special responsibility for studies of European insurance law and its harmonisation. The University is holding an international colloquim in October on harmonisation of insurance law within the European Community when two days will be devoted to the subject, with special reference to contract law and investment control. The United Kingdom's point of view should be clearly put there. The need is for well informed discussion.

Hugh Cockerell