



Association Internationale de Droit des Assurances
International Insurance Law Association
Associazione Internazionale di Diritto delle Assicurazioni
Internationale Vereinigung Versicherungsrecht
Asociacion Internacional de Derecho de Seguros

14th AIDA CLIMATE CHANGE WORKING PARTY MEETING

**10:00HRS AND 12:00HRS - THURSDAY 3 NOVEMBER 2016
LE MERIDIEN VIENNA, OPERNRING 13, VIENNA 1010, AUSTRIA**

***Climate Change - Current legal, insurance and environmental challenges
in adapting to Climate Change***

MINUTES OF MEETING

1. Welcome and Chairman's Introduction - Tim Hardy (UK)

1.1 Tim Hardy welcomed everyone to the meeting in what were undoubtedly "interesting times", not least from a UK perspective. China was being added to the list of countries ratifying the Paris Agreement. Meanwhile, the UK had seen both a Brexit vote commit them to leave the EU (creating inevitable uncertainty about the prospects for many UK and EU policies, including ones relating to Climate Change) and for the first time in a number of years cease to have a government department featuring the name Climate Change, with the previously merged Dept for Energy & Climate Change (DECC) now subsumed into the Dept for Business, Energy and Industrial Strategy (BEIS). An optimist would say that this was to encourage the implementation of progressive and "joined up" climate policy, not as others might fear a downgrading of its prioritisation.

1.2 Two more localised changes were to be announced. First, to the CCWP's name. After this meeting the WP would be known as the "AIDA Climate & Catastrophic Events WP" ("CCEWP"). Primarily, to reflect the WP's (and AIDA's) concern to keep abreast of legal and insurance developments affecting all natural disasters not confined to those directly attributable to Climate Change. From the outset the WP had considered these implications as there was much to learn from responses with the inevitable political, economic, social and legal upheaval brought about by such events as resources became increasingly stretched as Climate Change increasingly impacted many areas. The diversity of today's WP meeting agenda and tomorrow's plenary session on Climate Change again reflected this.

- 1.3 Second, in drawing attention to the two dates now set for the 2017 CCWEP meetings a change of date had arisen in both cases from dates originally announced.

The new/two dates for diaries are:

- **3 May 2017** in Santa Cruz, Bolivia during the XV CILA Congress (2-5 May 2017)
- **18 October 2017** in Singapore during the Asia Pacific Insurance Conference (17-20 October 2017)

2. Update on the aftermath of VW Dieselgate

First Presentation:

European Union Law Developments on Control of Polluting Emissions in the Aftermath of Dieselgate - Marco Frigessi, University of Brescia and Studio Legale Associato, Milan (Italy)

- 2.1 As the aftermath of the Dieselgate story continues to unfold amid wider concerns about the effectiveness of EU controls over vehicle emissions and air quality, it is timely to reflect on the background to the EU legal regime controlling polluting emissions. Since 1970 legislation at EU level has been directed towards harmonisation of the acceptable level of emissions permitted from motor vehicles. Emissions standards have been defined in a series of EU directives and have been provided to be progressively stringent.
- 2.2 One immediate effect of Dieselgate was to see a proposed and controversial relaxing (by an April 2016 Commission Regulation 646 of 20) of emissions limits by allowing a “temporary conformity factor” with the effect that permissible NOx emissions immediately rise by 110% of the current limit. Despite in early 2016 the European Parliamentary Committee on Environment, Public Health and Food Safety condemning the move as not a (re)setting of limits, but a derogation of responsibility to give effect to the earlier 2007 regulations, the European Parliament adopted the change.
- 2.3 The Ville de Paris lodged an action seeking an annulment of the regulation challenging its legality based upon its permitting an increase of emissions contrary to previously agreed thresholds and enshrined environmental protection rights. Challenges to the legality of the regulation appear capable of being countered by reference to the provisions which enable the Commission to establish tailpipe emission levels and to recalibrate particulate mass and so within its conferred powers. Arguments that the measure runs counter to environment protection charter rights potentially fail to recognise that the “temporary conformity factor” is indeed no more than a holding measure and in response to earlier provisions which were failing to be effective and so a proportionate response. This is particularly if at the same time vehicle manufacturers were being required to equip vehicles with emissions technology to ensure emissions were reduced under all operative conditions.
- 2.4 The Dieselgate saga highlighted not just the part played by “defeat devices” but also questioned the reliability of old laboratory testing. On 17.12.15 the EU Parliament set up a Committee of Enquiry for Emission Measurements in the Automotive Sector (EMIS). Composed of 45 members, alleged contraventions of and maladministration in the application of EU law were to be investigated and reported upon. Specifically, testing practices, cycles and

penalties for breaches were all to be considered. On 2 March 2016 the Committee was given one year to conduct its work. Evidence has been gathered during its year so far with testimonies received not being confined to those with first-hand knowledge of past failed or bad practices, but from institutional and political spheres also. Its Report will be awaited with interest.

Second Presentation:

Dieselgate and D&O implications - Adolfo Paolini, University of Buckingham and DAC Beachcroft LLP, London (UK)

- 2.5 Even those who had heard the earlier presentation delivered in Paris in Dec 2015 to the joint CCWP/CLWP/MIWP meeting may benefit from being reminded first of some needs that D&O was/not intended to meet. Major features were that it was not a form of company protection, nor one to protect companies against its own wilful misconduct/fraud, nor the cost of regulatory investigations, with pollution also commonly excluded altogether.
- 2.6 Some uncontested facts helped paint the picture of VW being in trouble. These included their own admissions of guilt, the fact that investors had lost more than 1/3 of their share value in the VW stock and that the EPA had issued proceedings with VW facing several \$bn fines. Although VW senior officers have denied liability and knowledge of misconduct, they have admitted the use of defeat devices and the number of vehicles in question/drivers seeking recompense is considerable (2.8m vehicles are involved based on some German sources). Proceedings in US, Germany and elsewhere have progressed and settlements made.
- 2.7 D&O implications arise at direct and reinsurance levels. Apart from the exclusion of any fraud/wilful misconduct, issues which may be contested in German proceedings (and possibly elsewhere) include: any alleged failures to monitor or inappropriate delegation of duties; allocation/illegality/costs issues all subject of German Insurance Code; the effects of composite or joint cover; need for proven not simply alleged liability. In Germany, a two-tier system applies for treatment of conduct of main board/non-exec or other directors and scope for insured v insured issues and exclusion/quantum disputes.
- 2.8 Obligations of company to meet pollution clean-up costs can lead to tricky D&O issues with some case law illustrating how directors and officers may be held liable for clean-up on strict liability basis even where no evidence of malicious or negligent conduct and where D&O indemnity may be excluded. This may apply even where directors and officers had no knowledge/wrongdoing. Policy wordings may also dictate who is ultimately answerable for payment of defence costs. UK view recognises that unless express exclusion applies defence costs may be recoverable where with insurers' consent.
- 2.10 Reinsurance on facultative basis may be assumed to be back to back, with reinsurers likely to seek to prove that directors were liable for intended or wilful misconduct. German rules in place regarding the test of company conduct was based on "business judgment", joint and several liability and statutory provision for deductibles. In contrast to the UK where the possibility is limited, Germany does recognise creditors could directly claim losses suffered.

3. Third Presentation:

Role of Insurance and the Law in search for Climate Justice as well as Change – Michael Parker, Parker Cowan, Queenstown (NZ)

- 3.1 Addressing the concept of Climate Justice is seen, especially by many developing countries, as being as important as grappling with Climate Change. In essence, it reflects opposition to the role which might otherwise be played by transnational corporations shaping unsustainable consumption patterns and lifestyles and unduly influencing inter/national decision-making. This is in the knowledge that some of those disproportionately facing the most immediate and extreme impacts of Climate Change are situated in small, often coastal and financially-under-resourced, environments and that curbs on economic development etc, were not previously faced by some of those countries now seeking to curb activities by others.
- 3.2 “Climate Justice” has found a place in the Preamble to the Paris Agreement (COP 21, Dec 2015) as something needing to be observed when resolving upon action to be taken to address Climate Change. It featured in the Bali Principles of Climate Justice as far back as August 2002, calling for recognition of the principle of ecological debt that was owed by many industrialised countries on account of their appropriation of the planet’s capacity to absorb GHGs. Accordingly, the cost of solutions to Climate Change should not be “externalised” to those now most severely and immediately at risk.
- 3.3 The insurance industry in turn has endeavoured to be seen as part of the solution to, rather than the problem of, Climate Change. In addressing the challenges faced by the developing world, insurance initiatives have included: data research and analysis; cat modelling and resilience projects; the development of industry bodies such as Climate Wise, individual company initiatives such as Munich Re’s NatCatSERVICE and support for and collaboration with the World Bank’s Social Resilience Cluster.
- 3.4 Beyond collaboration at COP summits, experience/know-how in developed countries is transferred to developing countries via a range of public/private initiatives to help devise insurance (and new forms of risk transfer/management) as a more effective tool for disaster risk prevention and mitigation.
- 3.5 Many illustrations exist of such initiatives in transferring know-how within and between developed and developing worlds. In case of flood insurance, these include bundling of disaster protection with more general products; compulsory flood provision; government-backed flood insurance schemes and/or subsidised rating programmes; and management/regulation of both insurer and planning/building regulation.
- 3.6 To meet the full needs of all and especially developing countries and demands for Climate Justice there is need to address a wide range of challenges. These include the low market penetration in many countries (even within the EU) for disaster insurance products. To address the low awareness of the nature of risk or economic or regulatory infrastructure

necessary to enable provision to function appropriately. The scope for novel forms of relief which may prove more apposite and affordable: microinsurance, parametric index-based weather insurance and so on, as well as ancillary meteorological services/linked financing, data and research of various kinds, all to help tackle familiar issues of uninsurability, moral hazard, lack of conformity with agreed terms and conditions, for sustainable long-term protection to help secure long-term economic investment and development.

4. Fourth Presentation:

An Update on the Aftermath of Rupture of Fundão Dam in Brazil (Nov 2015) and Legal Perspective upon Environmental Insurance in Brazil – Pery Saraiva Neto (Brazil)

- 4.1 Since 2009 the Brazilian National Section of AIDA has had a working group, which Pery chairs, dedicated to environmental issues, the “National Working Group for the Environment, Climate Change and Sustainability”. Two distinct issues emerge, the subject also now of his personal doctoral studies being pursued presently within Europe: i) damage to the environment/natural resources (pollution)/third parties; and ii) social and economic impacts of Climate Change. Great care is needed not to confuse the two as does arise in Brazil. Disaster may loom from both, but any legal response is different and so, too, the role of insurance and the law.
- 4.2 A third facet is also important: taking responsibility for harmful waste generated from insurance operations. This is not an issue which may be discussed today, but the CNSeg (the National Confederation of Insurance Companies in Brazil) has conducted studies upon this – upon which Gloria Faria has previously reported to the CCWP, especially upon the subject of the shared responsibility of insurers, their partners and providers to comply with recycling and observe waste management best practices for the disposal/recycling of car parts and in conducting car repairs etc.
- 4.3 Finally, [**NB:** *as was discussed more fully at the most recent CCWP meeting in Lima*] of critical importance to Brazil are both the impact of Climate Change (especially to southern parts) from agriculture to the infrastructure of major cities, as well as Brazil’s adaptation policies, including the development of parametric insurance towards the great goal of all interested parties of establishing sustainable insurance over the longer term.
- 4.4 As requested, the remainder of the time today will be directed to providing an update upon the aftermath of the rupture of Fundão Dam. Two elements: i) providing an update on the episode and developments; and ii) considering the prospects for adopting (mandatory) environmental insurance for pollution/environmental damage.
- 4.5 First, an observation. So much information and misinformation has been generated about the rupture since the first occurrence that establishing reliable facts and/or foreseeing an end to the matter in sight are both made difficult. So, too, even discussing the issues comfortably because of this. There are innumerable class action suits pending with a variety of purposes. Thousands of individual actions for victims. A conduct adjustment agreement providing for

compensation to a value of 20bn reais (approx. 5.71bn euros) which in turn is suspended for alleged lack of competence in its approval...

- 4.6 The undisputed facts about the physical rupture on 5.11.15 and immediate effects are more easily recounted – as appear in the past slides produced by Gloria Faria and in notes of this presentation to be posted. Where there is much more debate and controversy is about demarcating responsibilities for many resulting circumstances. A polluted river after the rupture does not mean that it was unpolluted before it, especially given a widespread pre-existing lack of sanitation.
- 4.7 At the same time, in Brazil there exists a system of triple responsibility for any environmental damage: criminal, administrative and civil liability. Civil liability remedies are concerned in turn with resulting death/personal injury, with damage to/loss of natural resources and wider impact on civil society/environmental quality. Administrative responsibility potentially attracts penalties and fines (in this case in range of 250m reais/69.8m euros) but again there has been an embargo on these being imposed and are commonly left unpaid. Criminal responsibility can attach to both people and corporations and corporate officers. At present, actions have cited 21 people answerable for corporate homicide, 1 of the crime of making false environmental reports and mining company, Samarco and 14 employees for environmental crimes. To help insurers prepare for the impact which this legal action may have on claims many reports have been produced, including one by the company represented by Brazilian colleague present at the CCWP meeting, Dr Beatriz Amerizano, that of Terra Brasis Reinsurance.
- 4.8 There has been call for the government to be obliged in future to insist upon financial guarantees to be in place whenever activities are conducted which may harm the environment. Legislative proposals have been created for mandatory pollution insurance, but the reality is that low levels of insurance prevail in Brazil, in part owing to the lack of legislative provision and uncertainty about legal liabilities owed. Much is still to be resolved about what levels and types of risk or coverage products might be successfully marketed. Even if pollution cover could be thus widely instituted this would still fail to provide for many occasions where environmental damage arises. There remains very much to do.
- 4.9 At the AIDA World Congress in Rio between 10-13 October 2018 the host country has chosen as its theme, “Pollution Insurance – Methods, Coverage and Beneficiaries”. All are invited to join that event and in the research and exchange of information and know-how in the interim.

5. Report of the role of technology in regulation of Climate Change mitigation and adaptation – MERCOSUR Group

- 5.1 Before closing the meeting, Tim Hardy thanked all presenters for the time they had devoted to providing interesting materials for the CCWP session and reminded everyone that the presentations both from today, as well as the CCWP meeting in Lima, would be posted with Minutes of the meetings on the CCWP page of the AIDA website, which would also be updated to reflect the WP’s new name. The posted materials would include the materials so kindly

prepared once again by the MERCOSUR Group, including Pery, and co-ordinated by Maria Kavanagh, in the form this time of a 23-page Report by the title of “Technology-Climate Regulation in the Mercosur Region”.

5.2 All new registering attendees would receive email details of activities between our meetings. Everyone was also reminded of the further Climate Change-related session taking place the following day as part of the AIDA Europe Conference plenary session between 14:00hrs and 15:15hrs devoted to: “*Insurance in Times of Climate Change*”.

6. Looking forward to CCEWP Meetings 2017 in Bolivia (3 May) and Singapore (18 October)

The meeting closed with a reminder again of the 2017 dates for the CCEWP meetings.