



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

**3rd AIDA CLIMATE CHANGE WORKING PARTY MEETING
AIDA PRESIDENTIAL COUNCIL MEETING – ISTANBUL
09:00hrs-11:00hrs
FRIDAY 4 MAY 2012
Marmara Hotel - Taksim
Taksim Meydani Istanbul 34437**

MINUTES OF MEETING

1. Welcome and introduction and apologies for absence

- 1.1 The Chairman welcomed everyone to the third meeting of the Climate Change Working Party (CCWP). He thanked AIDA Turkey for the splendid arrangements and the sponsors of the event for their support.
- 1.2 He introduced for the particular benefit of those attending their first CCWP meeting the fellow officers attending: Vice Chair, Marco Frigessi di Rattalma and Secretary, Stijn Franken. Also, Chris Rodd, who had come from Australia to speak to us again today, one of a number who had already made a mark for their energetic contribution to the WP.
- 1.3 As the WP was the youngest of all the AIDA Working Parties - this was only its third meeting – it was essential that additional willing members, with energy and resources, be recruited to continue the initial good work achieved. Not least: insurance market representatives; those from countries not yet represented; and younger members. By the very nature of Climate Change, many issues will become increasingly critical beyond the professional, even the natural, lives of many of us present!
- 1.4 A number of others who could not be at the meeting had not simply relayed apologies, but in many cases had additionally either arranged for a colleague to come in their place, to provide reports of various kinds on issues arising since we had last met and/or volunteered offers of help or made suggestions for topics to be covered at future meetings. This was all greatly appreciated and to be encouraged.
- 1.5 Many of those additional materials, together with copies of today's presentations, were to be posted on the CCWP page of the AIDA website, which all attending were encouraged to visit. This is designed to serve as the CCWP's noticeboard, as well as an important growing archive of assembled work to evolve into an important resource. The CCWP should strive to be much more than a meetings group, but a genuine working party, active between, as well as at, our meetings.



1.6 Among those sending apologies for today three were to be specifically mentioned with other news they had delivered.

- **Marcel Fontaine**, whose work at the Paris World Congress and his completion of the General Report (upon 23 or so National Chapter Questionnaire responses) had so effectively launched the CCWP, had reported that that General Report was due to be published in late April in a Belgian Insurance Law Journal, affording valuable exposure to the work which now served us in establishing our broad work categories upon which to focus our energies. In anticipation of this, over the last month or so Marcel and the Chairman had completed the outstanding task of fully footnoting and cross-referencing the Report ready for external publication. This fully completed text, together with all supporting National Chapter and other volunteered reports, had now been fully posted on the AIDA website. This was no small task, but an important one. This work merits referral on many future occasions as the CCWP proceeds with new work. It should provide an invaluable foundation upon which to build fresh materials.
- **Maria Kavanagh**, from Argentina, had delivered a 195-page report, prepared in conjunction with others from Mercosur countries of South America, following presentations she reported as having been made in Uruguay in April when CILA Chapters gathered to celebrate the Uruguayan Chapter's 50th Anniversary. With news also that CILA had appointed a Colombian academic lawyer to lead efforts to consider Climate Change issues, such extensive activity among the South American Chapters was to be applauded.
- **Cedric Wells**, from France, had also regretted his being prevented from attending, having been heavily engaged since our last meeting upon market issues arising from the heavy losses sustained in the wake of both the Japanese tsunami and the catastrophic Thai floods. He has volunteered to supply materials upon each for the benefit of the next meeting in London.

1.7 The Chairman further reported that last week in London, BILA, AIDA's British Chapter, had welcomed Craig Langstone, the President of the New Zealand Insurance Law Association, to deliver a very interesting presentation upon market issues arising out of the Christchurch earthquake losses of last year. It is hoped that this may also be posted on the CCWP website page shortly.

2. Minutes of Last Meeting

These had been previously circulated and remained posted on the website. No corrections were requested, nor were there any matters arising not otherwise addressed.



3. Consideration/update of impact of Climate Change-related events and measures and liability, causation and litigation issues around the world

3.1 The order of the meeting's presentations was again designed broadly to reflect those of the four main working areas where both legal and insurance issues had been identified by the CCWP as most pertinent: (1) The Impact of Climate Change and responses around the world; (2) Climate Change Liability and Litigation issues; (3) Carbon Insurance and "new" Insurance Products; and (4) Reinsurance and the role of alternative risk transfer.

[Chris Rodd: Implications of the Published Reports into the 2011 Queensland Floods and the Australian Federal Government Enquiry – Natural Disaster Insurance Review](#)

3.2 In the first presentation delivered at the meeting, Chris Rodd returned to the theme he first addressed at the first CCWP meeting in Amsterdam, namely the impact and aftermath of the Australian floods of 2011. This time he concentrated upon the insurance and legal implications of, and market and other responses to, the published reports investigating the Queensland floods and the Australian Federal Government Enquiry reviewing Natural Disaster Insurance more widely.

3.3 The reports upon the Queensland floods were concerned to identify the causes of the floods, including the role played by huge amounts of water needing to be released from reservoirs served by dams situated close to the City of Brisbane. Also, the consequences in terms of massive uninsured losses, with flood cover existing in approximately 50% of cases, but also flood exclusions. The Commission of Enquiry had made 170 recommendations about flood risk, public safety and awareness and steps required of the multiagency involvement in both flood risk and flood mitigation strategies. The State Government had readily agreed to implement all recommendations made, which included buy-backs of properties, flood mapping, revised planning approaches etc.

3.4 The second part of the Enquiry addressed the insurance aspects and in particular a reinvestigation of water releases especially from the Wivenhoe and Somerset Dams. Releases from Wivenhoe had unquestionably increased levels of floodwater. Harder to establish were causation questions concerning what losses would have been sustained anyway with lower levels of inundation. Satisfying proof of loss and tests to attribute losses to mismanagement by the water company and others would continue to be of great concern as funders were stepping up to finance prospective class action litigation. The few recommendations made concerning insurers have already been readily accepted into the General Insurance Industry Code of Practice.

3.5 An Issues Paper issued in conjunction with the Federal Government Enquiry reviewing Natural Disaster Insurance explored the alternative approaches of providing automatic flood cover or an opt out approach for homeowners. Premium discounts and funding shortfalls in



reinsurance being guaranteed by Commonwealth Government were both addressed. Other recommendations included a standard definition of “flood”. The insurance market’s responses have been critical of proposals to render flood insurance compulsory. Concern has also been expressed that a flood pool will raise the cost of living. Constructive measures to be adopted in response to other recommendations are argued to be sufficient to help private market insurers deliver affordable flood insurance in most cases.

- 3.6 Finally, it was reported that the Federal Government had also specifically addressed the threat to affordable cover being no longer available for insuring apartments in coastal areas (more specifically Northern Queensland) exposed to cyclone and storm risk in the wake of the most recent natural disasters. Their key recommendations included enquiring into the extent to which insurers’ increases were well-founded or the result of improper anti-competitive activities.
- 3.7 In summary, with flood risk not widespread, but some homeowners in coastal areas plainly exposed to risks proving commercially unacceptable to insurers, action is required, but the extent and exact form of this remains to be seen. Compulsory flood cover appears politically undeliverable and some government buy-back of properties appears likely, together with a series of measures still to be fought over concerning risk mitigation and stricter controls over where new properties may be built. Debate about the adoption of any standard definition of “flood” also continues.
- 3.8 The presentation generated a series of interesting questions and answers, raising issues of interest beyond Australia. So as not to curtail such discussion, the Chairman volunteered to confine the delivery of the second presentation, his own, to the first part concerned with an update of the leading Climate Change liability cases in the US Supreme Ct. The slides concerning the second part, addressing the wider perspective and what’s in store could be reviewed on the website and would hopefully be full enough to be of benefit in that form.
- [Tim Hardy: Update on Climate Change Liability cases in the US Supreme Court and issues elsewhere](#)
- 3.9 With 200 or so Climate Change cases filed in the US alone in 2011 it was natural that interest in litigation should be directed there. Still more so, when, as in the last year, some of the longest running cases had finally reached Supreme Ct level.
- 3.10 The two broad categories of cases of greatest interest to insurers were distinguished: i) those for injunctive relief, usually brought against public authorities or companies, by government agencies and NGOs, for the application or enforcement of existing regulatory schemes addressing Climate Change, financed by budgeted government resources or NGO fund-raising; and ii) those for damages, brought against auto manufacturers, power or utility companies and the like, by individuals (often by class action) or community organisations, for compensation for injury, damage or economic loss, financed by many different law firms



acting on a contingency basis (following the pattern of earlier mass tort litigation models for asbestos or tobacco).

- 3.11 Cases of both types have finally reached the US Supreme Ct, between three and seven years since being commenced. Strikingly the issues being decided remain the threshold technical issues in which the cases have been mired while the parties have been battling over motions to dismiss: issues of justiciability (is tackling Climate Change a task for the courts or the legislators/politicians?); legal standing to sue (can the particular plaintiff(s) show a specific enough cause of action against the defendants for provable loss/damage?); and pre-emption (have later statutory provisions now removed the basis for a claim founded in common law?).
- 3.12 The first case - ***Connecticut v American Electric Power*** – was an example of the first category of case. Various US States called for a major power company to abate emissions considered a public nuisance. After outlining the history of how since the commencement of the case the Supreme Ct had elsewhere ruled that the Environment Protection Agency had powers under the Clean Air Act to assess whether GHGs were an environmental hazard (which in turn it had then so ruled), the Court in this instance had now frustrated the claimants (and probably comforted insurers) by declining to address issues of justiciability or legal standing, but overturning the lower court in declaring that the issue rested solely with the EPA, subject only to the remedy of judicial review in the event of any improper action on the EPA's part. With the EPA's own ruling already subject to litigious challenge and with neither further regulation, nor legislation in prospect pending the Presidential elections in November, further litigation nonetheless remained foreseeable.
- 3.13 Neither the ***Comer v Murphy Oil***, nor the ***Kivalina v Exxon Mobil*** case (examples of the second category of damages case to come before the US Supreme Ct) was found in favour of the Claimants either, each in part thwarted by the overriding principle that the Clean Air Act empowered the EPA to have responsibility for any action. Other grounds were more particularly described, but each case is again being made the subject of an appeal.
- 3.14 The fourth case – ***Steadfast Ins Co v AES Corp*** - of perhaps most direct interest to insurers, concerned whether the CGL insurers in the *Kivalina* case owed any duty to defend, i.e. pay the defence costs of AES, sued for *deliberately* emitting GHGs, knowing them to contribute to global warming. The Court ruled that the allegations did not concern any question of an accident occurring, for which insurers were to provide an indemnity, so no such duty arose. While inevitably turning strictly on the specific policy wording issued and particular allegations made in any case, and so many more cases may yet be expected, insurers may, in many similar instances, be spared of any obligation to finance - or expensively contribute to the settlement of - Climate Change litigation.
- 3.15 The Chairman said that issues which may yet later emerge, either in later stages of such actions or in ones brought elsewhere in the world, naturally remained to a large extent a



matter of conjecture, as the slides to the second part of his presentation which could be reviewed on the website would attempt to illustrate. What was worthy of immediate notice, perhaps, was the fact that the task of surveying the different prospects of claims being pursued around the world had greatly benefited from a book very recently published in the UK: *“Climate Change Liability – Transnational Law and Practice”* (2012), Cambridge University Press.

- 3.16 From an idea promoted by Prof Jaap Spier of Maastricht University, who had expressed great interest in the work of the CCWP when paying a visit to the Chairman to discuss it last year, the book, written by a team of many distinguished lawyers, contrasted over 700 or so pages the legal regimes and prospects for Climate Change claims in seventeen individual countries and from an EU perspective. Importantly, these countries included each of Brazil, Russia, India and China (which neither AIDA nor the CCWP can yet claim). Interestingly, while recognising that the role of insurers to how things evolve was “pivotal”, no more than two or three paragraphs were expressly devoted to the insurance perspective, concentrating instead on liability issues. This rather reinforced the need for the CCWP to pursue its work which would complement, and be complemented by, studies of this kind.
- 3.17 All CCWP participants were encouraged to look at the book and to relay and exchange comments upon the sections devoted to their own jurisdictions. If any of the contributors might be approached with view to attending or contributing to the meetings or work of the CCWP, this, too, might be beneficial, not least from important countries where the CCWP as yet received little or no input.

4. Variable Impact of Climate Change/extreme weather events upon existing covers in different countries and regions and measures adopted by insurers and others in response

- 4.1 The Chairman said that he had already expressed the thanks due to Maria Kavanagh for her delivery of the report prepared with colleagues in South America, addressing aspects of the impact of Climate Change in those regions. These included effects of major weather disasters especially upon agricultural business and insurance. This greatly helped the CCWP to maintain a wide perspective on issues of greatest current significance in different parts of the world.

[Prof Marco Frigessi di Rattalma: Catastrophe Damages and Insurance within the EU framework](#)

- 4.2 Prof Marco Frigessi di Rattalma next delivered a presentation upon the findings of an EU Joint Research Centre (JRC) report published in 2012 following an in-depth consideration of insurance schemes within the EU covering natural catastrophes, the first of its kind by the EU.



- 4.3 The EC had previously commissioned a number of examinations of natural catastrophe issues, primarily because of an awareness of the likely negative impact of Climate Change. These had addressed issues such as how the use of insurance and other financial services products could be optimised and whether compulsory standard weather-related insurance was required. Where insurance was not available, such as for buildings located in flood plains, the question raised was whether public supported insurance schemes were required, perhaps at an EU level, rather than at national or regional level, as at present.
- 4.4 The focus of the JRC Report was on flood, storm, earthquake and drought, gathering information from every Member State (MS) to identify where similar problems were being encountered. Data gathered reflected important issues such as the extent to which losses sustained from a natural catastrophe had been insured at the time of loss. The results, peril to peril and MS to MS varied markedly. Other practices compared included whether these perils could be insured against as an extension to a base policy or bundled with standard fire or household covers.
- 4.5 Further features considered were the limits and deductibles generally adopted and whether cover was sold on a risk based or flat priced basis, and if the latter how this was calculated. The role of the government was also found to vary markedly between different MS.
- 4.6 The Report concluded that the approach adopted in different MS for flood, storm and earthquake remained heterogeneous, with little information available for drought, considered to date to have less of an impact in most MS. Penetration rates were low in most MS, save for storm where the NatCat insurance market had developed cover successfully. Penetration levels for flood tended only to be high where this was bundled with another standard policy.
- 4.7 Government payments to compensate uninsured losses after major disasters might be thought to impede more widespread sales of cover, but conclusions were difficult to draw too readily. Risk-based schemes when implemented were commonly favoured as raising awareness of risk and reducing moral hazard issues.
- 4.8 In response to the JRC Report the CEA had encouraged due weight to be given to two important issues. First, risk perception still naturally depended to a large degree upon the prevailing traditions and cultures of an individual MS. This should not be underestimated. Second, levels of risk exposure depended upon factors such as how rigorously prevention measures (such as land-use planning and building codes for resilience to NatCats) were enforced. In sum, the Report rather underlined how no “one size fits all” solution across the EU was achievable. National insurance markets and complementary schemes needed to evolve in accordance with prevailing risk exposures and levels of national government intervention in place.



- 4.9 Although the solution to the insurability of NatCats rested not with insurers alone (but required the co-operation of public authorities, the private sector and the public at large), insurers would doubtless benefit from improved levels of data which might be achieved at an EU level by the sharing of NatCat loss information and investment in risk-modelling tools to help identify zones at greatest risk.
- 4.10 An interesting legal issue was identified. How compatible with EU law was compulsory insurance based on bundling? Recognition of the fact that higher penetration levels were often associated with bundling had seen many encourage the “French Model” being adopted in other MS. Since 1982 a compulsory catastrophe extension of voluntarily subscribed property insurance contracts had operated in France whereby houses and cars of those taking out first party property cover are automatically covered against NatCats, financed by an additional flat 12% premium irrespective of location, reinsured by a government-controlled scheme.
- 4.11 The Italian Anti-Trust Authority has twice objected to a similar scheme being imported into Italian law, taking issue with such premiums being made the subject of legislation at all, as well as the forced participation of insurers in a co-reinsurance consortium as breaching previously agreed insurance exemptions. It was proposed that the time had perhaps come for it to be formally recognized that provided national schemes benefitted consumers and reflected necessary proportionality they should be considered compatible with EU law.

5. Carbon Insurance and the evolution of other “new” insurance products/Reinsurance and ART

[Prof. Paolo Rainelli: Weather derivatives’ regulation: open issues and new opportunities for risk coverage products](#)

- 5.1 The final presentation of the meeting considered a financial product which had been extensively developed to help tackle the threat of Climate Change, but which has also raised a number of important legal and regulatory issues: weather derivatives.
- 5.2 The story behind both customized and standardized (tradable) weather derivatives is quite a short and remarkable one. From a small US energy product developed by the energy market in 1997 by 2011 it had become a US\$11.8bn market which had survived both a slump during the financial meltdown and origins with Enron.
- 5.3 Of potential benefit to a range of end-users (in the sectors of energy/other utilities, agriculture, travel, manufacturers of weather-driven products and insurance), the traditional use of derivatives in the insurance market has been the hedging of currency risks or interest



rates, but weather derivatives have been utilized in conjunction with catastrophe bonds to serve insurers with an alternative risk transfer product better to cope with the impact of Climate Change, especially when reinsurance capacity may be limited or prohibitively expensive.

- 5.4 The benefits may be diverse: ranging from assuring smooth revenues and compensating any loss of demand to covering exceptional costs or lost opportunity depletion of revenues. Different types afford protection using different structures: *floors* - downside protection; *caps* - exceeding designated weather variable levels; *collars and swaps*- exchange of purchased floors/caps risks: and *futures* – protection against variation in price at which agreement has been reached to deliver or receive a commodity in the future.
- 5.5 Controversy first emerged in the US in 2003 over the use of weather derivatives when the risk-shifting instruments began to be seen by the insurance market as a threat and rival, rather than a support, to traditional, more heavily regulated insurance products, affording new, unregulated providers with a perceived unfair trading advantage. Any functional equivalence fails to disguise the clear legal distinction between insurance policies and derivatives, which means they remain distinguishable. The characteristics of an insurance policy alone include: the existence of an insurable risk of a fortuitous event occurring, capable of financial estimate; a risk of loss is transferred in return for a specified premium to the insurer, forming part of a wider spread or pool of similar risks so assumed; and an actual loss must be proved and quantified, the limit of any recovery being the lesser of the loss itself or the amount for which cover was obtained.
- 5.6 Issues do persist, however, about a number of features of weather derivatives. These include: *enforceability* issues in some jurisdictions (where unenforceable if considered no more than gambling provisions); *prohibition* issues where insurers are precluded from being authorised to “sell” a non-insurance product; *“disclosure”* issues concerning what level of pre-contractual disclosure is to be expected (akin to insurance?); and *tax/accounting treatments* may vary from jurisdiction to jurisdiction.
- 5.7 In prospect, insurance companies *are* expected to continue to use weather derivatives as ART /reinsurance products, given their now established place in the market. Insurers are also expected in many cases also to start to issue or to increase their past issuing of customized weather derivatives (subject to appropriate regulatory changes or safeguards being implemented). A “weather derivative component” may also be seen to be increasingly incorporated into traditional policies of insurance, all creating new opportunities for non-catastrophic risk coverage products.



6. Future Business of the Working Party

6.1 After such a full agenda, time only permitted a few brief points to be raised.

6.2 First, three important future dates were announced:

- the next meeting of the CCWP will take place in London on Thursday 13 September 2012 (12:00hrs -14:30hrs) on the occasion of the IVth AIDA Europe Conference;
- the AIDA Presidential Council meeting for the first part of 2013 was to take place in Lisbon between 8-10 May when a further CCWP meeting is expected to be arranged; and
- the AIDA Presidential Council meeting for the second half of 2013 is to take place in Sydney between 18-20 September when a further CCWP meeting is expected to be arranged.

6.3 The AIDA Civil Liability Working Party had considered the CCWP's invitation to consider a joint session in London, but had yesterday declined as they wished to complete planned sessions dedicated to D&O liability issues arising from the financial crisis. A joint session was potentially to be considered, concentrating upon overlapping liability issues of importance, for the Sydney meeting in late 2013.

6.4 All attending a CCWP meeting for the first time in Istanbul who had left details of their email address would be included in all future mailings and encouraged to volunteer any contributions or suggestions at any stage. All should look out for the updates of the CCWP page of the AIDA website, including copies of all of today's presentations and other reports which had been mentioned. Every effort should be made to expand our growing group of interested parties and active participants, especially from countries or sectors as yet not represented.

7. Any other business

There being no other business, the meeting closed with thanks being extended to all who made presentations or had otherwise contributed to the meeting.