AIDA – Association Internationale de Droit des Assurances
The International Insurance Law Association

Vth AIDA EUROPE CONFERENCE

"In the Beginning it is the Market**, In the End it is the Law"**

COPENHAGEN – 11/12 JUNE 2015

A Two-day International Insurance Law Conference at
SCANDIC COPENHAGEN HOTEL, VESTER SØGADE, DK-1601 COPENHAGEN

in association with the Danish AIDA Chapter

Det Danske Selskab for Forsikringsret

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THURSDAY 11 JUNE 2015

08.30 -12.00	**CONFERENCE REGISTRATION OPENS** **Location: Conference Foyer, Scandic Copenhagen Hotel, Vester Søgade, DK 1601 Copenhagen**
09.15 – 17.45	**AIDA WORKING PARTY MEETINGS AT SCANDIC COPENHAGEN HOTEL**
09.15 – 11.45	**Credit Insurance and Surety** – *Chairman, Louis Habib-Deloncle, Geneva – Christianborg Conference Room* **Marine Insurance** – *Chairman, Professor Robert Koch, Hamburg* **–** *Frederik Conference Room* (Presentation of prize winning paper on "Impacts of Economic Sanctions on Shipping Industry with a Special Focus on Marine Insurance", Mozhgan Momeni, Hamburg) **Motor Insurance** – *Chairman, Sara Landini, Florence – Christian Conference Room*
12.30 – 15.00	**Distribution of Insurance Products** – *Chairman, Professor Pierpaolo Marano, Milan – Christian Conference Room* (Presentation of prize winning paper on "Damages for Late Payment under English Law? An Opportunity Missed by the Law Commissions", Harriet Stokes, London) **Reinsurance** – *Chairman, Colin Croly, London – Christianborg Conference Room*
14.00 – 15.30	**CONFERENCE REGISTRATION** **Location: Conference Foyer, Scandic Copenhagen Hotel, Vester Søgade, DK 1601 Copenhagen**

15.15 – 17.45	**Consumer Protection and Dispute Resolution** – *Chairman, Dr Kyriaki Noussia, Athens – Christian Conference Room* **State Supervision** – *Chairman, Dr Gunne Baehr, Cologne – Christianborg Conference Room* (Presentation of prize winning award paper "Solvency II and its Impact on Discontinued Business in Non-Life Iinsurance", Oleksandr Khomenko, Helsinki) **Climate Change –** *Chairman, Tim Hardy, London – Frederik Conference Room*

18.30 – 20.00	**CONFERENCE REGISTRATION** **Copenhagen City Hall, DK-1599 Copenhagen**

18.30 – 20.00	**DRINKS RECEPTION HOSTED BY THE CITY OF COPENHAGEN IN THE HISTORIC CITY HALL** **DK-1599 Copenhagen**

All conference delegates and registered accompanying persons are welcome to attend

FRIDAY 12 JUNE 2015 – AIDA EUROPE CONFERENCE, SCANDIC COPENHAGEN HOTEL, VESTER SØGADE, DK-1601 COPENHAGEN

08.15 – 08.45	Registration and Coffee
08.45 – 09.00	Welcome Colin Croly, Chairman of the Conference and Chairman, AIDA Europe
09.00 – 10.00 Keynote Speeches	Lord Mance, Justice of the Supreme Court of the United Kingdom Inga Beale, CEO, Lloyd's of London
10.00 – 11.15	**Challenges for Umbrella and Global Programme Policies – How to Cope with the Changing Regulatory and Legal Requirements** Chairman: Christian Felderer, recently retired, General Counsel, CEO Hub Zurich & Hub General Counsel, SCOR Global P&C General Counsel. Member of the AIDA Presidential Council. • Global cover vs. local regulations: How to bridge the gap • Consumer protection interfering in business to business relationships • Claims handling in the light of emerging regulatory or compliance regulation • How to deal with new areas of liability incl. e.g. insurability of regulatory fines and cost: Confines of standard insurance products Speakers/Panellists: • David Gutteridge, Underwriting Manager, Professional Lines Department, ACE Bermuda International , Bermuda • David Nayler, Head of Legal & Claims Practice, Financial & Professional Services Group, Aon UK Limited, London • Martin Strnad, Head of Legal Global Corporate, Zurich Insurance Company Ltd, Zurich • Sandra Weinberger, Manager, Claims Department (Property, Construction, Specialty Lines), Munich Re UK General Branch, London
11.15 – 11.35	Coffee/Tea Break

11.35 – 12.50	**Causation – *"The Damned Event"*** Chairman: Jerome Kullmann, President, AIDA • Meaning of Event • Traditional Clauses and their Interpretation • The Choices – causa proxima: causa remotae • The Butterfly Effect • Actual Definition of the Event and Conflict between the Insurance and Reinsurance Wordings • The Rule (?) of the Unities Test Speakers/Panellists: • Jorge Angell, Partner, LC Rodrigo Abogados, Madrid • Christian Lang, Key Case Advisor, Swiss Re, Zurich • Michael Mendelowitz, Head of Legal, UK Branch, ERGO Versicherung AG • Prof. Dr. Samim Unan, University of Galatasaray, Istanbul
12.50 – 14.00	Lunch – Restaurant
14.00 – 15.15	**Class Actions and Legal Funding** Chairman: Torben Bondrop, Partner, Plesners, Copenhagen Speakers/Panellists: • Class Actions - 10 years of experience in Scandinavia - Dr Juris, Attorney at Law Eigil Lego Andersen, Copenhagen • New French Act on Class Actions - Alexis Valençon, BOPS Law Firm, Paris • Litigation Funding: An Option for Class Actions? – Wieger Wielinga, Managing Partner, Omni Bridgeway. Amsterdam • Panel Discussion
15.15 – 15.35	Tea Break

15.35 – 17.00 **Hot Topics**

Chairman: Professor Dr Herman Cousy, Member of AIDA Presidential Council and Vice-Chairman AIDA Scientific Council, Leuven

Speakers

- Sanctions –
  Louis Habib-Deloncle, Political Risks Expert, Senior Advisor to Stalis SA, Geneva
- Cyber Risks –
  Peter Backe-Hansen, Senior Product Manager of Allianz Australia, Sydney
- Damages for Anxiety –
  Jerome Kullmann, President, AIDA
- Privacy versus Fraud –
  Prof. dr. jur. Mads Bryde Andersen, University of Copenhagen
  - How does a company deal with doubtful claims?
  - Evidence of fraud – investigation.
  - The difficulties of investigation – privacy and data protection laws
  - The need to conform to standards of good practice for financial institutions

17.00 Conference Closes

ABOUT AIDA (ASSOCIATION INTERNATIONALE DE DROIT DES ASSURANCES - INTERNATIONAL INSURANCE LAW ASSOCIATION) EUROPE

AIDA Europe is the regional grouping of AIDA Chapters in Europe which was established in Rome in 2007 and held its inaugural conference in Hamburg in May 2008. Since then three further conferences have been held in Zurich, Amsterdam and London with the Vth conference now being in Copenhagen. The VIth AIDA Europe Conference will be in Istanbul in the autumn of 2016.

The present AIDA Europe Committee is comprised of the following:

Colin Croly	Chairman (UK Chapter)
Jerome Kullmann	Vice Chairman (French Chapter)
Torben Bondrop	(Danish Chapter)
Pierpaolo Marano	(Italian Chapter)
Otto Csurgo	(Hungarian Chapter)
Slobodan Jovanovic	(Serbian Chapter)
Robert Koch	(German Chapter)
Jose Maria Munoz Paredes	(Spanish Chapter)
Ioannis Rokas	(Greek Chapter)
Peggy Sharon	(Israeli Chapter)
Herman Cousy	(Belgian Chapter)
Christian Felderer	(Swiss Chapter)
Samim Unan	(Turkish Chapter)
Tim Hardy	Treasurer (UK Chapter)

The AIDA Europe Committee was assisted in the organisation of this conference by the local Danish AIDA Chapter (Det Danske Selskab for Forsikringsret).

V AIDA Europe Conference, Copenhagen – 11/12 June 2015

Delegate List by Country

Argentina	Carlos Estebenet	Estudio Bullo-Tassi-Estebenet-Lipera-Torassa y Asoc
Argentina	Daniel A Russo	Estudio Bullo-Tassi-Estebenet-Lipera-Torassa y Asoc
Australia	Peter Backe-Hansen	Allianz Australia
Australia	Michael Gill	DLA Piper
Australia	Campbell Anderson	Equity Adjusters
Australia	David McKenna	Jarman McKenna
Belgium	Herman Cousy	KU Leuven University
Belgium	Yann Deketelaere	National Bank of Belgium
Belgium	Anne Catteau	Lydian
Belgium	Sandra Lodewijckx	Lydian
Brazil	Gloria Faria	CNseg
Bulgaria	Yuliana Penova	BNP Paribas Cardif
Denmark	Allen Kvist-Kristensen	Advokatfirma Erritzoe
Denmark	Jesper Ravn	Advokatfirma Erritzoe
Denmark	Morten Erritzoe Christensen	Advokatfirma Erritzoe
Denmark	Martin Trier	Advokatfirma Erritzoe
Denmark	Soren Theilgaard	AIG
Denmark	Anne Buhl Bjelke	Bech-Bruun
Denmark	Jes Anker Mikkelsen	Bech-Bruun
Denmark	Henrik Valdorf-Hansen	Bech-Bruun
Denmark	Rikke Katrine Jensen	Danish Financial Supervisory Authority (FINANSTILSYNET)
Denmark	Ann-Sofie Leth	Forsikring & Pension
Denmark	Peter Appel	Gorrissen Federspiel
Denmark	Christina Neugebauer	Jensen Neugebauer
Denmark	Anders Tengvad	Lett Law Firm
Denmark	Jacob Thomsen	Lett Law Firm
Denmark	Pernille Sølling.	Lett Law Firm
Denmark	Eigil Lego Andersen	Nielsen Noerager Law Firm
Denmark	Dorte Christensen	Pensam
Denmark	Hanne Frederiksen	Pensam
Denmark	Dorthe Bundgaard	PFA Pension
Denmark	Torben Bondrop	Plesner Law Firm
Denmark	Mikael Delin	Plesner Law Firm
Denmark	Charlotte Hasseriis Iversen	Plesner Law Firm
Denmark	Sarah Louise Sabina Schæffer	Plesner Law Firm
Denmark	Soeren Vagner Nielsen	Plesner Law Firm

Denmark	Alan Wad	Topdanmark
Denmark	Prof. dr. jur. Mads Bryde Andersen	University of Copenhagen
Denmark	Mikael Rosenmejer	
DPR Korea	Pak Chun San	Korea National Insurance
DPR Korea	Sin Kyu Nam	Korea National Insurance
Finland	Oleksandr Khomenko	
Finland	Justus Könkkölä	Aurejärvi & Könkkölä Attorneys
Finland	Milla Mustamaki	Ministry of Social Affairs and Health
Finland	Antti Kolkka	Mutual Insurance Company Turva
France	Jerome Kullmann	AIDA
France	Pierre Charles	Arbitration & Mediation
France	Nicolas Bouckaert	BOPS
France	Alexis Valencon	BOPS
France	Yannis Samothrakis	Clyde & Co LLP
France	Pierre-Olivier Leblanc	Holman Fenwick & Willan
France	Marinka Schillings	Loyens & Loeff Selas
France	Valerie Judels	Loyens & Loeff Selas
France	Barthelemy Cousin	Stephenson Harwood
France	Nicolas Demigneux	Stephenson Harwood
Germany	Costanza Loser	Allianz SE
Germany	Andreas Schwepcke	ARIAS Europe
Germany	Prof Dr Schwampe	Dabelstein & Passehl
Germany	Dr Maximilian Guth, LLM	Dabelstein & Passehl
Germany	Gunne Baehr	DLA Piper UK LLP
Germany	Susanne Hill-Arning	Gen Re
Germany	Shivaun Moreno	Hannover Re
Germany	Dr Herbert Palmberger	Heuking Kühn Lüer & Wojtek
Germany	Markus Eichhorst	Ince & Co Germany LLP
Germany	Sebastian Petrack	Melchers Law Firm
Germany	Dr Andreas Decker	Melchers Law Firm
Germany	Dr Dennis Voigt	Melchers Law Firm
Germany	Gerhard Boß	Melchers Law Firm
Germany	Dr Oliver Sieg	Noerr LLP
Germany	Dr Peter Etzbach	Oppenhoff & Partner
Germany	Rupert Nebauer	Swiss Re
Germany	Prof. Dr. Oliver Brand	Universität Mannheim
Germany	Robert Koch	University of Hamburg
Germany	Mojgan Momeni	
Greece	Ioannis Rokas	I K Rokas & Partners
Greece	Dr Kyriaki Noussia	LEXARB
Hungary	Dr Otto Csurgo	Cseri & Partners Law Offices
Hungary	Dr Ferenc Kiss	

Iceland	Rurik Vatnarsson	
Ireland	April McClements	Matheson
Ireland	Darren Maher	Matheson
Israel	Harry Orad	Gross Orad Schlimoff
Israel	Ronit Diskin	Levitan, Sharon & Co
Israel	Peggy Sharon	Levitan, Sharon & Co
Israel	Meora Teitler	Teitler & Teitler Law Office
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Italy	Gianfranco Puopolo	PG Legal
Italy	Giovanna Aucone	PG Legal
Italy	Rosa Abbate	PG Legal
Italy	Professor Aurelio Anselmo	University of Palermo
Italy	Professor Lawyer Osvaldo Prosperi	
Montenegro	Nataśa Backović Biecić	Insurance Supervision Agency of Montenegro
Montenegro	Nataśa Raicević	Insurance Supervision Agency of Montenegro
Netherlands	Bas Baks	CMS
Netherlands	Prof Wansink	Erasmus University Rotterdam
Netherlands	Prof. Mop van Tiggele	Erasmus University Rotterdam & Radboud University Nijmegen
Netherlands	Berry Jonk van-Wijk	Houthoff Buruma
Netherlands	Wiebe de Haan	Houthoff Buruma
Netherlands	Hans Londonck Sluijk	Houthoff Buruma
Netherlands	Stijn Franken	Nauta Dutilh NV
Netherlands	Bianca van der Goes	Nauta Dutilh NV
Netherlands	Sjoerd Meijer	Nauta Dutilh NV
Netherlands	Arlette van Wessel	Nauta Dutilh NV
Netherlands	Jan Duyvensz	Norton Rose Fulbright LLP
Netherlands	Wieger Wielinga	Omni Bridgeway. Amsterdam
Netherlands	Natalie Vloemans	Ploum Lodder Princen
Netherlands	Maurits Kalff	Van Doorne
Netherlands	Martina Smit	Van Steenderen Mainportlawyers
Netherlands	Arnold Stendahl	Van Steenderen Mainportlawyers
Netherlands	Jacco van de Meent	Van Traa Advocaten
New Zealand	Michael Burrowes	Mahony Burrowes Horner
Poland	Julita Zimoch-Tucholka	Domanski Zakrzewski Palinka sp.k
Poland	Jakub Pokrzwyniak	WKB Wiercinski, Kwiecinski, Baehr Sp.

K

Portugal	Arnaldo Oliveira	Autoridade de Supervisão de Seguros e Fundos de Pensões
Portugal	Tatiana Matos Silva	Autoridade de Supervisão de Seguros e Fundos de Pensões
Portugal	Pedro Vasconcelos	Escritorio De Advogados
Portugal	Paulo Almeida	Kennedys
Portugal	Luis Caldas	L F Caldas Abvogados
Portugal	Andre Vicente	MDS
Portugal	Paula Rios	MDS
Portugal	Margarida Lima Rego	Moraia Leitao, Galvao Teles, Soares Da Silva
Russia	Leonid Zubarev	CMS Russia
Russia	Dina Dmitrieva	Ingosstrakh ONDD Credit Insurance LLC
Serbia	Nevena Nikolic	Postal Savings Bank j.s.c.
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Spain	David Diez	Rogers & Co Abogados
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Sweden	Johan Strömberg	Nordia Law
Sweden	Rose-Marie Lundström	Rose-Marie Lundström Advokat AB
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Sweden	Maria Keifer Lagerwall	Sirius International Insurance Corp
Sweden	Stefan Linder	Zurich Insurance plc
Switzerland	Christian Felderer	
Switzerland	Melissa Gautschi	Altenburger Ltd
Switzerland	Dr iur. Peter Hsu LLM	Bär & Karrer AG
Switzerland	Lars Gerspacher	gbf Attorneys-at-law
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Switzerland	Louis Habib-Deloncle	Stalis S.A
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Switzerland	Christian Lang	Swiss Re
Switzerland	Christian Lang	Swiss Re
Switzerland	Fabienne-Anne Rehulka	Swiss Reinsurance Company Ltd
Switzerland	Rolf Staub	Zurich Insurance
Switzerland	Pirmin Stalder	Zurich Insurance Company Ltd
Switzerland	Martin Strnad	Zurich Insurance Company Ltd
Taiwan	Kuan-Chun Johnny Chang	Financial Ombudsman Institution
Thailand	Michael Turnbull	Tilleke & Gibbins International Limited

Thailand	Aaron Le Marquer	Tilleke & Gibbins International Limited
Turkey	Pelin Baysal	Gun & Partners
Turkey	Samim Unan	Turkish AIDA
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UK	Dr Caroline Bell	Addleshaw Goddard LLP
UK	Mark Pring	Addleshaw Goddard LLP
UK	Tim Hardy	AIDA
UK	Colin Croly	AIDA Europe
UK	James Tapson	AMLIN
UK	David Nayler	Aon UK Limited
UK	Joanne Howie	Axa Corporate Solutions
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UK	Jan Heuvels	Ince & Co LLP
UK	Kiran Soar	Ince & Co LLP
UK	Bryan Lincoln	Jeffrey Green Russell Limited
UK	Lord Mance	Justice of the Supreme Court of the United Kingdom
UK	Rachel Moore	Kennedys
UK	Inga Beale	Lloyd's of London
UK	Erik Börjesson	Lloyd’s of London
UK	Henry Gardener	Markel International
UK	Garbhan Shanks	Michelmores LLP
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UK	Yves Hayaux	Nader, Hayaux & Goebel
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UK	Kathleen Leslie	Signature Litigation
UK	Professor Rhidian Thomas	University of Swansea
UK	Harriet Stokes	
USA	Andy Douglass	Morrison Mahoney LLP

Biographies

Inga Beale, Chief Executive Officer, Lloyd`s

Inga joined Lloyd's as the Chief Executive Officer in January 2014.

Prior to Lloyd's, Inga was the Group Chief Executive Officer at Canopius, a prominent Lloyd's managing agent, from 2012 – 2013.

Inga joined Zurich Insurance Group in 2008 as a member of the Group Management Board in Zurich with responsibility for Mergers & Acquisitions, Organisational Transformation and Internal Consulting, before becoming Global Chief Underwriting Officer in 2009.

In 2006, Inga was appointed Group Chief Executive Officer of Converium in Switzerland (now part of the SCOR Group) after 14 years at GE Insurance Solutions. Inga held various underwriting management roles at GE and gaining experience across London, the US, and France, before becoming President of GE Frankona and Head of Continental Europe, Middle East and Africa for GE Insurance Solutions based in Germany.

Inga began her career at the Prudential Assurance Company in London in 1982 and trained as an international treaty reinsurance underwriter.

Lord Mance, Justice of the Supreme Court, The Right Hon Lord Mance

Lord Mance became a judge in 1993, sitting in the Commercial Court and Queen's Bench Division (1993-1999), in the Court of Appeal (1999-2005) and in the UK's highest court - formerly the House of Lords, now its Supreme Court - since 2005.

Lord Mance read law at University College, Oxford, spent time with a Hamburg law firm (Stegemann, Sieveking, Lutteroth …) and then practiced at the bar and from 1982 as Queen's Counsel in the UK and overseas until 1993. At the bar, he specialised in commercial law, was a founder director of the Bar Mutual Insurance Association (1988-1994), and chair of various banking appeal tribunals.

He was president of the British Insurance Law Association (2000-2001). He represented the UK on the Council of Europe's Consultative Council of European Judges (2000-2011) and was its first chair (2000-2003). He was a member of the House of Lords European Union Select Committee (2006-2009), chairing its sub-committee scrutinizing proposals concerning European law and institutions.

He currently chairs the International Law Association, as well as the Lord Chancellor's Advisory Committee on Private International Law, and is a member of the Judicial Integrity Group (drafters of the Bangalore Principles of Judicial Conduct).

He is also a member of the seven-person panel established under article 255 of the Treaty on the Functioning of the European Union to report on candidates' suitability to serve as Judges and Advocates General of the European Court of Justice.

Lord Mance has written and spoken extensively on legal issues.

Jorge Angell, Partner L.C. Rodrigo Abogados

Jorge Angell is the senior partner of L.C. Rodrigo Abogados (Madrid, Spain), specialized in corporate and commercial law, insurance and reinsurance law, private international law, litigation, arbitration and mediation.

He has frequently acted as expert in Spanish law before foreign courts, especially English and US courts, and as arbitrator and party counsel in domestic and international arbitrations. He is listed in the arbitrators' roster of the Arbitration Court of the Chamber of Commerce and Industry of Madrid and of the Madrid Law Society. He is a member of the ICC Spanish National Committee and the London Court of International Arbitration.

He is a member of the following LPD Committees of the IBA: Business Organizations, Insurance, Litigation (Co-chair for the period 2006/2007) and Arbitration. He is also a member of the FDCC and former Chair of the International Practice and the Law Section, former Vice-President of the Reinsurance, Excess and Surplus Lines Section and former Vice President of the International Activities Committee. He is also a member of

Professional Liability Underwriting Society (PLUS), SEAIDA, the Reinsurance (Vice-President) and Credit Insurance Working Groups of AIDA Europe and the Spanish Arbitration Club.

He was nominated in the 2001 *Guide to the World's Leading Litigation Lawyers;* in *The International Who's Who of Commercial Litigators* (2004 and 2006) and the 2006 and 2013 *Guide of Experts in Commercial Arbitration*.

He speaks Spanish and English fluently.

Peter Backe-Hansen, Senior Product Manager of Allianz Australia, Sydney

Peter commenced working in the insurance industry with the South British Insurance Company in their Durban Branch in 1968. Peter has been a member of the insurance industry in South Africa and Australia since then, a period of some 46 years.

On arriving in Australia Peter has worked for both insurance and reinsurance companies, where for the last 38 years he has specialised in the underwriting of the "Casualty" classes, both the primary and reinsurance sides of the industry in Australia.

Peter Joined Munich Re in 1987 as Casualty Manager and later NAC Re and subsequently Employers Re in General Management positions with underwriting responsibilities.

In 2001, returned to the direct market in Allianz Australia's NSW Corporate Branch underwriting Corporate liability business. Subsequently promoted to Manager of the Financial Lines department.

Peter currently holds the position of Senior Product Manager – Casualty in the Technical Division of Allianz Australia being responsible for portfolio management of the Liability and Financial Lines classes of Allianz in Australia and New Zealand.

Peter is a Fellow of the Chartered Insurance Institute in London and is permitted to use the title of Chartered Insurer. Peter is also a Member of the Risk Management Institution of Australasia and a Fellow of the Australian and New Zealand Institute of Insurance and Finance.

Peter is a life member and past President of the Australian Insurance Law Association.

Torben Bondrop, Partner, Plesners, Copenhagen

Torben Bondrop is partner and head of the practice areas Dispute Resolution and Insurance and Tort Law at Plesner Law Firm in Copenhagen, Denmark (www.plesner.com). Since being admitted to the bar, Torben Bondrop has specialized in insurance and tort law in general, and in addition to all aspects of traditional insurance law he has worked with consultants' liability, product liability, commercial liability and reinsurance. In this connection, Torben Bondrop has conducted a larg, e number of court and arbitration proceedings within these areas.

Torben Bondrop is a highly experienced litigator and he therefore conducts litigation and arbitrations in other areas of the law. He has won his eleven most recent cases before the Danish Supreme Court. From time to time Torben Bondrop also acts as arbitrator. In May 2006 Torben Bondrop became a qualified arbitrator by the General Council of the Danish Bar and Law Society.

Education

Qualified Arbitrator, by the General Council of the Danish Bar and Law Society, May 2006.
Admitted to the Supreme Court, 1992.
Admitted to the bar, 1987.
Master of Laws, University of Copenhagen, 1984.

Prof. dr. jur. Mads Bryde Andersen, University of Copenhagen

Professor Mads Bryde Andersen (b. 1958) graduated from the University of Copenhagen in 1981. After military service he worked for a mid-size law firm in Copenhagen (1981-1986). In 1984 he was admitted to the High Courts of Denmark. He joined the University of Copenhagen Law Faculty in 1987 where he took the doctor juris degree in 1989 with a dissertation on contract and tort liability for computer malfunctions. In 1991 he became professor of private law at the same faculty.

Mads Bryde Andersen is the author, or editor, of several books and articles in his field of expertise which is the law of contracts and obligations, intellectual property law and computer and high technology law, including (*Contract Law in Practice*, 1995 3rd edition 2009), Ret og metode (*Legal Method,* 2002), Enkelte transaktioner

(*Commercial Transactions,* 3rd edition 2011), and Dansk Pensionsret (*Danish Pension Law*, 2013). He is editor-in-chief of the most prestigious Danish legal periodical, Ugeskrift for Retsvæsen, section B (*The Weekly Law Report*).

Among other positions, Professor Andersen is the chairman of the board of the Danish Financial Supervisory Authority and the Radio and Television Council.

Herman A Cousy, Member of the AIDA Presidential Council and Chairman of the AIDA Scientific Council, Leuven

Was professor ordinarius of commercial and insurance law and European insurance law at KU Leuven University (Belgium), where he was the Director of its Center for Risk and Insurance Studies until he became emeritus professor in 2011.

Throughout his career he occupied various official functions, e.g. as president of the Insurance Commission ("Commission des Assurances", advisory body to the Belgian government) for more than 18 years, and as Assessor of the "Legislation" Section of the Council of State of Belgium.

He was a member of the Tilburg-Vienna Group on Tort Law and he is presently member of the (Common Frame of Reference) Project Group for the Restatement of European Insurance Contract Law. He is member of the Presidential Council of AIDA-world and he is chairman of the Scientific Committee of AIDA Europe.

Colin Croly, Chairman, AIDA Europe

Acting for many of the leading insurance and reinsurance companies and syndicates, Colin Croly has advised for over 30 years on all areas of insurance, concentrating on reinsurance including contract wording and dispute resolution and issues relating to asbestos pollution and ART not only in London but in conjunction with overseas lawyers. Colin now acts as a Consultant, Arbitrator and Mediator.

Placed as one of the top 20 reinsurance lawyers in the world by Euromoney's Best of the Best survey Colin was again nominated by Who's Who Legal, the international Who's Who of business lawyers as the Insurance and Reinsurance Lawyer of the Year 2009, the fifth year running. He is also recommended in the *Legal 500* as a leading individual in reinsurance and *Chambers & Partners* identifies him as "basically Mr Reinsurance".

Colin is Secretary General of AIDA (Association Internationale de Droit des Assurances), Chairman of AIDA Europe and Chairman of AIDA's Reinsurance Working Party. An active member of the Federation of Defense and Corporate Counsel (FDCC) Colin was a member of the Board until 2008, being the only non-US member. A former government appointee to the IBRC (Insurance Brokers Registration Council) he has held numerous other offices. He lectures regularly at Hamburg University and throughout the world; Colin originated *Reinsurance Practice and the Law* (Informa) and was joint editor (1993 – 2009) and is also an author of many published articles on reinsurance.

Colin is an ARIAS UK certified Arbitrator, an ARIAS Europe certified Arbitrator as well as being on the Supervisory Board of ARIAS Europe (Germany and Eastern European Countries) and is a Founding Committee member of INREM, the Specialist Mediation Service to the UK Insurance/Reinsurance Market.

Christian Felderer - Recently retired, General Counsel, CEO Hub Zurich & Hub General Counsel, SCOR Global P&C General Counsel. Member of the AIDA Presidential Council.

Until his retirement in September 2014, Christian Felderer served as the General Counsel of SCOR's Swiss based operations and additionally, as General Counsel *for SCOR Global P&C* at the level of the SCOR Group, responsible for all of SCOR's P&C insurance and reinsurance transactional legal matters. He has some 35 years' of experience in the insurance and reinsurance industry, prior to those responsibilities at SCOR, as General Legal Counsel for the *Converium* Group, until 2007, and previously as Senior Legal Counsel for Zurich Re. Between 1990 and 1997 Mr. Felderer had various management responsibilities within the Zurich Group's International Division, including the establishment and management of the Captives and Financial Risk Management Department and the management of the Claims organization of the Zurich Group's International Division. He had started his business career with the Zurich Insurance Group as an underwriter in the International Division's Casualty Department.

David Gutteridge - Underwriting Manager Professional Lines Department, ACE Bermuda International, Bermuda

David Gutteridge is the Professional Lines Underwriting Manager of ACE Bermuda International and is responsible for managing a D&O, PI and W&I portfolio with a particular emphasis on the critical area of personal asset protection for directors and officers of European companies listed on European and US exchanges. Currently he is very involved with rolling out solutions for the boards of multinational companies as a result of a growing demand brought about by an increase in awareness of corporate governance issues in many countries. During the 2000s he worked in the Bermuda market place both in Marsh's FINPRO division having advisory and placement roles and more latterly as a Vice President with ACE Bermuda, underwriting and designing lead Side 'A' D&O Difference-In-Conditions products for the directors and officers of Fortune 500 companies. Prior to that he held various London market professional lines underwriting roles. He is an Associate of the Chartered Insurance Institute and holds a BA in Politics from the University of Portsmouth.

Louis Habib-Deloncle, Political Risks Expert, Senior Advisor to Stalis S.A., Geneva

Chairman of the credit insurance company GARANT from 2003 to 2014, Louis Habib-Deloncle has over 30 years' experience in international trade and insurance. He pioneered the private market for political risk insurance in Continental Europe. He founded and managed the P.A.R.I.S. underwriting pool and, in 1994, created Unistrat Assurances which he headed until April 2000.
Since the beginning of 2015, Louis Habib-Deloncle has been appointed as Senior Adviser of Stalis SA and joined the Board of Directors of BIC BRED in Geneva.

Louis Habib-Deloncle chairs the credit insurance committee of AIDA (International Insurance Law Association) since 2010. He has been also Chairman of the Single Risk Committee of the International Credit Insurance and

surety Association (ICISA) from 2009 until 2013. Highly involved in promoting development of credit insurance, he lectures regularly at University Paris Dauphine and other French Universities. He is also a member of the French Foreign Trade Advisors.

Graduated from Institut d'Etudes Politiques of Paris, he has a Master's degree in International Law of Sorbonne.

Jerome Kullman, President, AIDA and Vice Chairman AIDA Europe, Paris

Professor, University Paris Dauphine - Director of the *Institut des Assurances de Paris*, *Docteur d'Etat, mention droit* (PhD in Law)

Avocat at the Paris Bar - Consultant and arbitrator in cases relating to damage insurance and insurance of persons, on behalf of insurance companies, brokers, banks, industrial and commercial corporations.

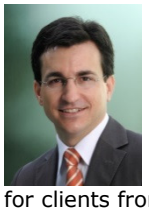
Association Internationale de Droit des Assurances (AIDA.) - International Association : Chairman - Member of the Presidential Council; - French Chapter (AIDA-France) : Chairman; AIDA-Europe : Vice Chairman.

Lamy Assurances (annual publication) : Chief Editor and author - *Revue Générale de Droit de l'Assurance:* Chief editor and author

French member of the Project Group *Restatement of European Insurance Contract Law.*

Member of the board of *Centre Français d'Arbitrage de l'Assurance et la Réassurance* (CEFAREA) : French association for arbitration in insurance and reinsurance.

Member of the scientific Committee of *Association pour le Management des Risques et des Assurances des Entreprises* (AMRAE).



Christian Lang, Key Case Advisor, Swiss Re, Zurich

Christian Lang is Swiss Re's Claims Key Case Advisor for EMEA and Asia/Pacific. In this capacity, he deals at group level with the largest exposures of Swiss Re's Property & Casualty business and supports the regional claims teams in legal matters.

Before joining Swiss Re in 2014, he was a partner in a well know Zurich law firm working mainly for clients from the insurance industry for more than a decade. Christian holds a law degree from the University of Zurich and from New York University. He is admitted to practice law in Switzerland and in New York. Christian is a member of Swiss Re's Key Case Committee and also serves in different functions in a number of professional associations. He is married with two children and lives near Zurich, Switzerland. In his leisure time, he likes to spend time in the mountains or joins friends to ride their motorcycles across Switzerland and beyond.

Dr Juris, Attorney at Law Eigil Lego Andersen, Copenhagen

Eigil Lego Andersen was born in 1950 and authorised as an attorney in 1978 and has practiced as such ever since. He is senior partner of Nielsen Nørager.

He obtained audience before the Supreme Court in 1983 and has conducted over 30 Supreme Court cases in addition to a large number of High Court cases. He is chairman of the Supreme Court Bar Association.

In 1988 he obtained the degree of Doctor Juris based on his thesis "The Concept of Gift".

His comprehensive authorship comprises, in addition to the thesis, in particular "Class Actions" (2007), five books on M&A and company law and several articles in legal periodicals on a diversity of subjects.

He is co-editor of the literary section of the leading Danish periodical *Ugeskrift for Retsvæsen* (Weekly Law Report).

He was appointed Adjunct Professor at Copenhagen Business School in 2009 and at Copenhagen University 2014.

He acted for the minority shareholders in the set of cases (including three class actions) following Sydbank's takeover in 2008 of bankTrelleborg, which after a succesful test case in the Supreme Court were settled securing compensation to thousands of minority shareholders totaling about 18 mill EUR.

Michael Mendelowitz – Head of Legal, UK Branch, ERGO Versicherung AG

Michael Mendelowitz is Head of Legal at the UK branch of ERGO Versicherung AG (part of the Munich Re Group). Qualified as a barrister in both South Africa and England and subsequently as an English solicitor, he was previously a partner in Barlow Lyde & Gilbert (1990-2007) and Norton Rose Fulbright (2007-2014).

His insurance and reinsurance experience covers a wide spectrum of classes of business, including property and casualty, aerospace and marine. While in private practice, he was highly regarded for disputes involving contract interpretation, materiality of underwriting information, long tail liability issues, and insolvency. He was also regularly involved in non-contentious work such as advising on alternative risk transfer and other complex agreements.

Michael has been appointed as an arbitrator on some dozen occasions to tribunals hearing international reinsurance disputes.

He was for 13 years the principal co-author and editor of a major loose-leaf textbook on reinsurance practice and the law; he has written articles for legal and trade journals; and he is a frequent conference speaker.

From 1990-2007 he was Assistant Secretary-General of AIDA and is now an honorary life member of the Association.

Michael is currently the Chairman of the British Insurance Law Association (BILA).

David Nayler – Head of Legal & Claims Practice, Financial & Professional Services Group, Aon UK Limited, London

David is an experienced lawyer who specialised in high value, complex multi-jurisdictional disputes for commercial and insurance clients, who joined Aon from Eversheds LLP in April 2005. David heads up the F&PS Legal & Claims practice, in Aon's Global Broking Centre in London, which is part of the global wording and claims offering for F&PS clients. David adds his extensive experience to the analysis, negotiation, broking and settlement of claims, and the drafting and development of wordings and coverages for Aon's FSG clients (which covers clients and claims in the following areas):

- Financial Institutions (PI, Directors & Officers ("D&O") and Bond/Crime)
- Commercial E&O
- Cyber Liability
- Professions (Accountants, Solicitors)
- Commercial (D&O and Fidelity)
- Transaction Liability (Warranty and Indemnity)
- Insurance Companies (PI, D&O and Fidelity)
- Fine Art & Specie.

Whilst in practice and at Aon, David has been involved in some of the largest losses that have affected Financial Institutions and the insurance market, including Fidelity, PI and D&O claims arising out of Film Finance litigation, Barings, Enron, Parmalat, Worldcom, Split Capital Investment Trusts, Endowment and Pension miss-selling, IPO laddering losses, Madoff, Lehmans, Al Ghosaibi, numerous regulatory investigations and the more 'routine' losses arising out of both internal and external fraud. As part of the teams specialism in PI and D&O for insurance companies own covers, David also both drafts and advises on insurance contract performance, internal reporting guidelines and insurers reserving philosophies.

David's team also carries out ICAAP insurance reviews, and carries out insurance gap analysis for both clients and in relation to M&A work. David is responsible for F&PS internal technical training on insurance, banking and executive liability issues and runs training seminars for Aon clients. David is also Deputy Chairman of the British Insurance Law Association and speaks regularly at international insurance, banking and executive liability conferences.

Martin Strnad - Head Legal Global Corporate, Zurich Insurance Company Ltd, Zurich

Martin Strnad is Head Legal for Zurich Global Corporate. His responsibilities include globally advising on all governance and legal matters associated with running Zurich Group's business with corporate & industrial customers. Martin and his global team provide legal support regarding all business structures written by Zurich in the corporate customer and industry insurance sector globally. Such advice frequently focusses on regulatory and legal matters related to the structuring of corporate customers' risk management and insurance solutions, global insurance programs and the respective IT and structuring tools, captive business, reinsurance solutions but also on claims scenarios across all lines of business.

Prior to assuming his present role in 2008, he served as senior counsel to the Zurich Group's European legal department. Until 2003, Martin was legal counsel to Zurich Insurance Group's subsidiary, Farmers Group, Inc. Los Angeles, on corporate legal matters, including E-Commerce & IT law, US insurance regulation, corporate governance (incl. Sarbanes Oxley Act), mergers & acquisitions, employment law, and life-insurance marketing contracts. In 2002, he worked as a legal counsel in the legal department of Centre Group LLC, New York, advising on international reinsurance and captive business matters, securities linked insurance deals and similar type of transactions. He joined Zurich Insurance Company Ltd. in 1999 in the corporate legal department. Prior to his professional career at Zurich he worked in private practice as an associate for two years.

Martin holds a law degree from the Basle University and a certificate from the New York University in Fundamentals of US Business Law. He is admitted to practice as a Swiss attorney at law.

Prof. Dr. Samim Unan, University of Galatasaray, Istanbul

Born in Ankara 1955.
Graduated in 1981 from Faculty of Law, University of Istanbul
LLM in 1982 (University of Istanbul)
Doctor in 1986 (University of Istanbul)
Assistant Associate Professor in 1988 (University of Istanbul)
Associate Professor in 1995 (University of Istanbul)
Professor in 2000 (University of Istanbul)

Teaching transport law and insurance law at the University of Galatasaray since 2002

Works as part time legal consultant for

- Anadolu Anonim Türk Sigorta Şirketi (Non Life)
- Ak Sigorta A.Ş. (Non Life)
- Coface Turkey (Credit insurances)
- Cygna Finans (Life and pensions)

Past President of the Turkish Insurance Law Association (TILA = Turkish AIDA)
President of the Turkish Maritime Law Association.

Member of the Presidential Council of AIDA (International Insurance Law Association)

Author of books, articles mainly about insurance law.

Alexis Valençon, Partner, BOPS Law, Paris

Alexis Valençon has extensive expertise in complex litigation and arbitration. He advises leading French and foreign insurance and reinsurance companies, brokers, major policyholders and industrial companies, in particular on matters of insurance and reinsurance litigation and arbitration, product liability, professional liability, medical liability and construction. He also assists his clients in complex expert-appraisals in relation with industrial risks, in setting up activities in France and in drafting insurance contracts in compliance with French law. He is recommended by *Legal 500*, *Chambers Europe*, *Who's Who Legal France* and *Best Lawyers – Insurance*. He regularly publishes articles on insurance & reinsurance law and commercial litigation in various professional publications. Before joining BOPS in 2005 and becoming a partner of the firm in 2010, he practiced in the area of business law disputes in an international law firm.

Sandra Weinberger – Manager Claims Department (Property, Construction, Specialty Lines), Munich Re UK General Branch, London

Sandra Weinberger is the Manager of Munich Re's UK General Branch Claims Department for Property/Construction Claims as well as Specialty Lines Claims, such as Marine, Aviation, Specie/Fine Arts and Agency Business. She also has years of experience handling Casualty Claims, in particular D&O and Professional Lines including large Financial Institutions Claims. Prior to assuming her role in Claims, Sandra worked as an underwriter (Global Liability Programmes and Property Single Line and Treaty Business) at Gerling (Cologne), Hannover Re (Stockholm) and Munich Re (Princeton). During her career Sandra has worked on a number of corporate governance projects as well as wording/clauses committees. She recently joined the International Underwriting Association of London Sub-Committee for Clauses.

Sandra holds a law degree from Queen Mary University of London and, having worked in the international insurance industry for many years, is familiar with the legal and regulatory insurance environments in various countries and the restrictions these may impose on both Underwriting and handling of Claims.

Wieger Wielinga - Managing Partner of Omni Bridgeway.

Since 1986, Omni Bridgeway has been funding and managing complex litigation and arbitration (ICSID, UNCITRAL, ICC, SCC) for governments, insurers and multinationals with a focus on enforcement and collective redress matters (cartel and securities cases). Omni Bridgeway seeks to invests in high value cases in which its multidisciplinary teams can add value with top legal, finance, intelligence and economic research.

Wieger began his career in 1992 as an attorney at Loeff Claeys Verbeke (now Allen & Overy), where he specialized in litigation and insolvency matters. He has extensive litigation and debt restructuring experience, including as court appointed receiver and advisor to the World Bank, the International Finance Corporation and international banks. He served in the Royal Dutch Army as an officer with the military intelligence service, where he received intensive Russian language training.

Mr Wielinga is a Dutch national. He holds an MBA from INSEAD, Fontainebleau, France, a Masters in Law from Leiden University and a post doctorate degree in Insolvency Law from the University of Nijmegen.

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11 June 2015

AIDA EUROPE CONFERENCE IN COPENHAGEN

Dear Delegate

We would like to extend a warm welcome to AIDA Europe's Conference in Copenhagen. DLA Piper, the global legal services provider with more than 4,200 lawyers worldwide, is a very keen supporter of AIDA Europe and we are delighted to be one of the sponsors of this event once again.

AIDA Europe's conferences are always highly topical and this one is no exception. The focus is on the key issues which concern lawyers in the insurance and reinsurance industries.

I am a Partner of the of DLA Piper's German Insurance and Reinsurance group and will, as in previous years, chair the State Supervision Working Party.

Across Europe, DLA Piper advises on insurance, corporate and commercial transaction, regulatory work, insurance intermediary and insurance contract issues. Our claims team handles high profile insurance coverage issues and the defence of claims across a wide range of insurance classes. Our prime focus in recent months has been on natural catastrophe and D&O/Financial Lines claims.

We think this conference is an excellent opportunity for you to share your views and ideas with fellow participants. I am sure that it will be an inspirational and stimulating event and look forward to meeting you in Copenhagen.

Yours sincerely

DR. GUNNE W BÄHR
Partner
DLA PIPER UK LLP
gunne.baehr@dlapiper.com

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DLA Piper UK LLP is a limited liability partnership registered in England and Wales (number OC307847) which is part of DLA Piper, a global law firm, operating through various separate and distinct legal entities.

A list of members is open for inspection at its registered office and principal place of business, 3 Noble Street, London, EC2V 7EE and at the address at the top of this letter. Partner denotes member of a limited liability partnership.

A list of offices and regulatory information can be found at www.dlapiper.com.

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INVESTOR IN PEOPLE

JENSEN NEUGEBAUER
ADVOKATER

To all participants in the
Vth Annual AIDA
Insurance Law Conference
Copenhagen 11-12 June 2015

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WELCOME TO COPENHAGEN

Jensen|Neugebauer welcomes all participants to the Vth Annual AIDA Insurance Law Conference in Copenhagen on 11-12 June 2015.

This conference is of particular interest to Jensen|Neugebauer as a niche firm with a strong focus on and presence in the field of insurance law. Originally conceived as a dedicated insurance and maritime law firm by three of its now six partners in 2011, the firm has grown within these fields on the philosophy that the insurance market today requires high level specialist advice, but at a competitive price. Accordingly, we focus on legal advice tailored to the insurance and marine market with the ever more cost conscious approach of these industries.

Partners Christina Neugebauer, Hanne Markussen, Nicolai Mailund Clan and Mads Poulsen have in depth knowledge of a broad range of most fields of insurance, including Personal injury, workman's compensation, professional liability across a broad range of professions, D&O and other financial lines, product liability, motor liability, CAR, property and construction, regulatory issues, life insurance and pensions, as well as all fields of marine insurance.

We derive our experience from a combination of extensive work experience in the insurance industry itself including the English market, work in Common Law countries, and a strong foundation in Danish insurance law. We are all seasoned litigators, though with a keen eye for settlement and resolution of all disputes in the best and most viable way.

Partners Klaus Jensen and Marianne Bremer have a wide portfolio of commercial, criminal, property and family law clients, and provide useful experience where a dispute is not limited to insurance law and practice. Similarly, close cooperation with Vistisen Skatteadvokater and Advokat Christine Ulrich Andersen, with whom we share our office, provide us with an edge where tax law and IP issues form aspects of an insurance issue.

Some of you will find the time to see the royal palace located centrally in Copenhagen. We are located next door and would be happy to tell you more about us – and to hear more about you – over a cup of coffee.

Welcome to Copenhagen and enjoy your stay!

Yours sincerely

JENSEN | NEUGEBAUER

DEFENSE LAWYERS. DEFENSE LEADERS.

WELCOME FROM THE FDCC

The Federation of Defense & Corporate Counsel (the "FDCC") welcomes the opportunity to again be a sponsor for the AIDA Europe Conference.

Our affiliation with AIDA grows stronger each year. As before, the Federation is honoured to have one of its own, Colin Croly, serving as Chairman of AIDA Europe, as well as Secretary-General of AIDA. In addition, Christian Lang, a long time member of the Federation, now heads the AIDA-US chapter and looks forward to revitalizing that group. I was honoured to attend and present at the World Congress in Rome last September. We continue to have very productive discussions about how the Federation and AIDA can work together.

The Federation of Defense & Corporate Counsel (FDCC) has approximately 1,200 attorneys in private practice in the United States and throughout the world. In addition, we have over 200 corporate counsel and insurance industry executives as members. Our international members include representatives from Australia, Bermuda, Canada, England, France, Germany, Hong Kong, Ireland, Israel, Mexico, Switzerland, Taiwan, Thailand, and Venezuela.

Within the FDCC, we have 24 substantive law sections, including, but not limited to, class action and multi-district litigation, commercial litigation, transportation, drug device and biotechnology, insurance coverage, intellectual property, energy & utilities, and trial tactics among many others. We also have a corporate counsel initiatives committee, an insurance industry initiatives committee, and an international activities committee.

We have two annual meetings, with our next two taking place at the Fairmont Banff Springs Hotel in Calgary, Alberta, Canada in July, and the Winter Meeting, next March, 2016, at the Hotel del Coronado in San Diego, California. We also have a Corporate Counsel Symposium in the fall of each year, and an Insurance Industry Symposium every two years. The Litigation Management College and Graduate School, held in June of each year at Emory University in Atlanta, Georgia, is designed to enhance the capabilities of claim adjusters who wish to hone their skills in managing and directing litigation. Our deposition boot camps allow young practitioners to develop better skills through this "hands on" learning workshop taught by some of the best defense trial attorneys.

If you are interested in membership, please contact Richard Traub (rtraub@traublieberman.com) or me (vroberts@centurysurety.com) and learn more about the FDCC at www.thefederation.org.

I wish I could be enjoying your fellowship in Copenhagen but know you will enjoy a wonderful conference.

Cordially,

Victoria H. Roberts

Victoria H. Roberts
President
Federation of Defense & Corporate Counsel

INCE & CO | INTERNATIONAL LAW FIRM

AIDA EUROPE CONFERENCE 2015
WELCOME

Dear Delegates

We welcome you to Copenhagen and the AIDA Europe Conference 2015.

The Ince & Co network includes offices in London, Beijing, Dubai, Hamburg, Hong Kong, Le Havre, Monaco, Paris, Piraeus, Shanghai and Singapore. The firm practises English, French, German, Greek, Hong Kong and PRC law. The Ince Law Alliance, with local law practice Incisive Law LLC, provides Singapore law advice.

Ince & Co has worked with the insurance and reinsurance markets for over 100 years and has been involved in most of the leading cases in the evolution of insurance and reinsurance law. We have a global team of specialist lawyers, handling issues, disputes and corporate and regulatory matters across a wide range of classes.

"THEY ARE MARKET LEADERS IN THIS AREA AND HAVE BEEN FOR MANY YEARS."
CHAMBERS 2014

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PLESNER

Welcome

Dear Delegate

As a member of the board of AIDA Europe and a partner in Plesner Law Firm it is a great pleasure for me to welcome you to Copenhagen and the Vth AIDA Europe Conference.

Plesner Law Firm is very proud to be one of the sponsors of this significant event. We trust that you will enjoy your visit to the beautiful capital of Denmark.

This year the title of the conference is "In the Beginning it is the Market, In the End it is the Law". At this conference the programme also focuses on the key issues that concern lawyers in the insurance and reinsurance industries.

Plesner is delighted to be a part of this conference once again and we look forward to meeting you.

Plesner is a leading law firm in Denmark providing assistance to Danish and foreign insurance companies with claims handling, dispute resolution and advice on all regulatory issues. Our team is also advising businesses on insurance and liability issues, providing assistance in cases involving damage/injury and assessing the risk profile. Read more about our services on our website www.plesner.com and do not hesitate to contact us during your visit to Copenhagen.

We hope that you will enjoy the conference and that you will find time to network and catch up with your colleagues from all over Europe and elsewhere.

Best regards

Torben Bondrop
Attorney-at-Law, Partner
Plesner Law Firm

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www.gbf-legal.ch

Dear Delegate

We warmly welcome you to the AIDA Europe Conference 2015 in Copenhagen. **gbf Attorneys-at-law** is a Zurich and Geneva based specialist law firm particularly focusing on insurance and reinsurance matters.

Our services include:

- Underwriting and claims support
- Assisting in coverage disputes
- Defending claims and recoveries
- Advising on and drafting of contract and policy wordings
- Structuring solutions for complex risks
- Helping our clients with regulatory and similar issues
- Advising on the establishment of insurance companies, branches and captives
- Providing run-off services and portfolio transfer
- Advising on the distribution of insurance products

Our aim is to provide support and advice to our clients of the highest level in every aspect of insurance and reinsurance law. We focus on commercial risk insurance, such as inland and ocean marine insurance, including the general law of transport and aviation, credit insurance, on investment products, such as with profits policies or unit linked insurances, on supervisory law, on national and international aspects of distribution as well as on corporate and competition law.

We wish you a successful conference and a pleasant time in Copenhagen.

Sara Andrea Behrend
Christopher L. Bell
Laurent Chassot
Lars Gerspacher
Helmut Heiss
Ulrike Mönnich
Marco Novoselac
Vesna Polić Foglar
Nando Stauffer von May
Roger Thalmann

PRAGER DREIFUSS
ATTORNEYS AT LAW

Prager Dreifuss has more than two decades of experience in Swiss and international insurance and reinsurance law and is one of Switzerland's first addresses for legal services in this field. We advise insurers and reinsurers in contentious and non-contentious matters. One of our main areas of expertise is the handling of complex claims, inter alia in the sectors of professional indemnity, D&O, fidelity, product liability, aviation, transport, and construction risks, from the investigation of the claims, the assessment of coverage questions to representing clients before state courts and arbitral tribunals. We also advise our clients in regulatory matters and represent them vis-à-vis the regulator FINMA.

The lawyers of Prager Dreifuss' insurance and reinsurance team are active in a number of professional organizations, including the International Bar Association (IBA), the Federation of Defense and Corporate Counsel (FDCC), the British Insurance Law Association (BILA), and of the Organizing Committee of the Swiss Chapter of AIDA.

Prager Dreifuss Ltd. is proud to be again one of the sponsors of an AIDA Europe conference and is dedicated to continue to be actively involved.

Your main contact at Prager Dreifuss for insurance and reinsurance law is:

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The Swiss Re Group is a leading wholesale provider of reinsurance, insurance and other insurance-based forms of risk transfer.

Dealing direct and working through brokers, our global client base consists of insurance companies, mid-to-large-sized corporations and public sector clients.

From standard products to tailor-made coverage across all lines of business, we deploy our capital strength, expertise and innovation power to enable the risk-taking upon which enterprise and progress in society depend.

In 2014, premiums earned and fee income were USD 31.2 bn; net income attributable to common shareholders was USD 3.5 bn. As of 31 December 2014, Swiss Re Group employed 12 224 regular staff worldwide.

Bulló - Tassi - Estebenet - Lipera - Torassa Abogados, founded in 1925, is one of the most prestigious law firms in Argentina and holds a leading position in the world of business, insurance, reinsurance and banking based on its knowledge, expertise and reliability.

More than 150 lawyers and correspondents all over the country and overseas deliver high quality services customized to support the law firm's clients in the full achievement of their objectives.

Vth AIDA Europe Conference Representatives

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The Danish Insurance Association

The Danish Insurance Association is the trade organization of the insurance and pension industry in Denmark. Its objectives are to promote the interests of the entire insurance and pension industry, to contribute to raising the public awareness of the industry, to stimulate appropriate trade practices and to ensure that the insurance and pension business is carried on in such a way that the industry solves its societal task.

The Danish Insurance Association focuses on climate adaptation of Denmark, and we guide the municipalities on how to best manage the consequences of heavy rainfall.

Our 2020 goals

- Solutions to the challenges of the welfare society: We work to create good framework conditions, allowing our members to develop their cooperation with the public sector and thus to continually develop the industry's services which supplement and add to the public service, following the demands of the citizens - e.g. in the fields of health and prevention.

- Focus on growth and the investor role: We work to ensure that the industry's ever growing role as investor and growth creator is recognized and that on this basis, we are actively included in the shaping of framework conditions and policies in the field of investment.

- The World's best consumer tools: We aim to always have the best, most valuable and reliable consumer tools and to further develop our high international standard.

- From more to consumer relevant regulation: On both national and European levels, we work to ensure that the implemented regulation is always simple and long-term and that it balances the consideration for consumer protection with the costs.

2015.05.06

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PenSam Bank A/S
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PenSam Forsikring A/S
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Company Profile

PenSam manages occupational pension schemes for approximately 340,000 wage-earners employed in Danish municipalities, regions and in private organisations.

PenSam was founded in 1986 with the purpose of supplying pension schemes designed specifically to the members of the trade union organisation FOA. PenSam's utmost aim is to generate the best possible ROI to its customers, enabling these to have a healthy pension upon retirement. Also, through the demographic make-up of its customers PenSam can develop its insurance products to fit its customers in the best possible way.

PenSam acquires the majority of its customers through trade union agreements. In these agreements it is stated that PenSam is first choice pension provider for the FOA members.

FOA's members primarily work in the public health care sector as nursing home assistants, hospital porters, cleaners and nursery assistants. Furthermore, PenSam's customers include fire fighters, bus drivers and lifeguards.

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HEUKING KÜHN LÜER WOJTEK

Company Profile Heuking Kühn Lüer Wojtek for the AIDA Europe London Conference

Heuking Kühn Lüer Wojtek is a name which is synonymous with legal competence. The firm is one of the largest commercial law firms in Germany, with more than 300 specialised lawyers and tax advisers, representing the interests of national and international clients. Included in the client list are large and medium-sized German and international companies in all areas of the manufacturing industry, as well as trade and service industries, associations, governmental and public sector organisations and private clients and trusts.

Heuking Kühn Lüer Wojtek was founded in Düsseldorf, Germany, in 1971. Since then, the firm has expanded geographically, and Heuking Kühn now has eight significant offices in Germany, as well as an office in Brussels and in Zurich.

Heuking Kühn Lüer Wojtek has an international advisory capacity in Insurance law represented by 20 highly specialized and experienced lawyers. The firm represents insurance, reinsurance and industrial companies out of court, in court and in arbitration. Heuking Kühn Lüer Wojtek is well known among German and foreign insurance companies, direct insurers as well as reinsurers. The insurance practice of the firm complements all other legal areas in which the firm specializes, particularly in Corporation law and M&A, Labour law, Unfair competition and IT-law as well as Real Estate, Construction and Taxes.

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Challenges for Umbrella and Global Programme Policies – How to Cope with the Changing Regulatory and Legal Requirements

Challenges for Umbrella and Global Program Policies

"How to Cope with the Changing Regulatory and Legal Requirements"

Structure of Session

Introduction to topic and speakers

Presentations

- International Insurance Programs - Legal Topics and Solution Approaches (Martin Strnad)
- Practical Application of Master/Umbrella Concept in the area of Specialty Lines – Directors & Officers Liability (David Gutteridge)
- International Insurance Programmes – Claims Issues (Sandra Weinberger)
- Current trends and issues from a broker's perspective (David Nayler)

Discussion – Q&A's

Appendix

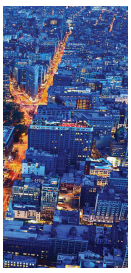
International Insurance Programs
Legal Topics and Solution Approaches

AIDA Europe Conference
Copenhagen
12 June 2015

Martin Strnad

Agenda

- Introduction into Global Programs
  - Buyer's needs
  - Structures
- Legal & Tax Topics in Global Programs
- Solution Approaches
  - Current market approach
  - Suggested way forward

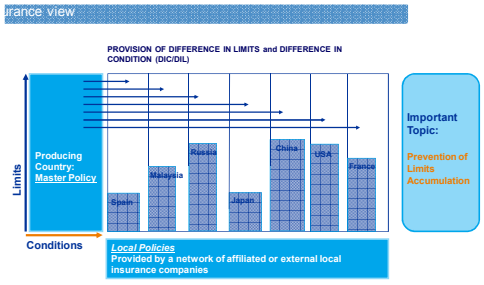


Introduction

What is it that multinational insureds want?

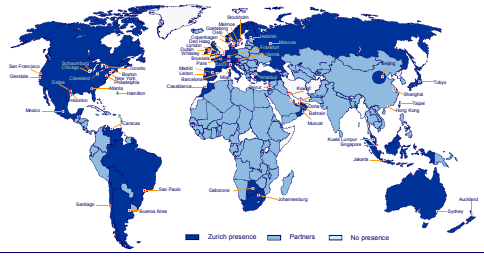
Introduction

How multinational insureds insurance needs are met



Introduction

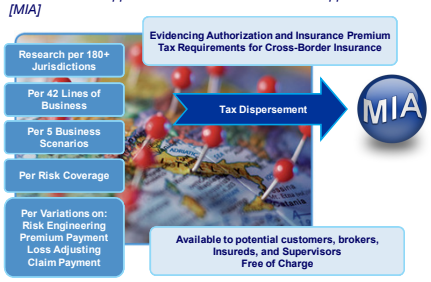
An extensive global network is needed to meet global and local requirements



* Counted according to GIO definition

Approach

Current Market Approach – Multinational Insurance Application [MIA]

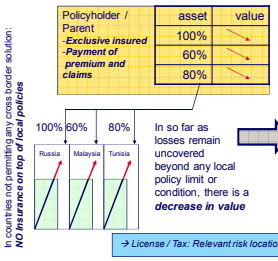


Choice of Legal Solution Tools

- **Local Policies where required**
  Not only legal but also business practical requirements need to be considered (e.g. claims management)
- **DIC/DIL** where permitted and structured to the respective local country requirements (premium invoicing/claim payment etc.)
- **Freedom of Services in the EEA**
  Insurer requirement to be established in the EEA, Licenses / notifications by LoB, reasonable and fair allocation and payment of premium and other taxes
- **US Insurance & Tax Laws**
  Vary State by State - provide opportunities as well as complex challenges
  FET and individual State taxes
- **Correct Definition of Insurable Interest**
  (What is insured? The customer's central balance sheet or local operations?)
  Depending on Jurisdiction and LoB, it is possible to distinguish between the central, parent company's interest in it's global investments and the local subsidiary's insurable interest. Accordingly, regulatory & tax requirements may vary.

Financial Interest Cover

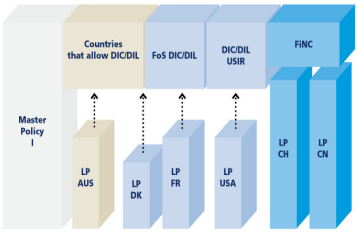
Basic Concept of the Financial Interest Cover



- It is accepted today that the parent company has an interest in safeguarding its investments, participation and other financial stakes in its subs.
- Where such subs can suffer any decrease in value, such decrease is reflected on the parents balance and it presents an *insurable financial interest.*
- Key question of measuring the loss: Deeming Provisions as e.g. Valued Policy, Summenversicherung, Taxe etc.

→ *License / Tax: Relevant risk location is domicile of Policyholder exclusively*

Sample Solution Structure



Proposal submitted to the International Association of Insurance Supervisors

Suggested Way Forward for Discussion

- Proposed solution is a global solution
  - IAIS Standard / Insurance Core Principle
  - Negotiated multi-lateral trade agreement, e.g. Trade in Services Agreement (TISA)
- Proposed Agreement for Acceptance of DIC/DIL, subject to Conditions
- Global Conditions (Proposal for Consistent Approach):
  - *Sophistication of insurance buyer (multinational corporation), as e.g. professional risk management department, number of employees globally, counsel provided by adequate global broking firm etc.;*
  - *Financial strength of insurance carrier;*
  - *Payment of applicable taxes in countries of risk location;*
  - *Stipulation of global standard in appropriate treaty or other body of law, etc.*

DIRECTORS & OFFICERS LIABILITY

AIDA Europe
Conference
Copenhagen
12 June 2015

David Gutteridge

insured.

ACE Bermuda International

D&O LIABILITY – WHY AN ISSUE?

- Restrictions even where non-admitted *is* permitted
- "Financial Interest" not for Side "A" (non-indemnified)
- FoS e.g. US clients with European boardroom exposure
- Lloyd's of London license
- …Local policies

insured.

ACE Bermuda International

LOCAL D&O POLICIES: ADVANTAGES

- Greater contract certainty with fully admitted
- Side "A" (non-indemnified) claims
- Compliance with local coverage requirements
- Tax treatment on claim payment
- FX - matches currency of loss with policy limits
- Local language/interpretation avoiding translation issues
- Matches limits with exposures v master policy
- Speed of payment "cash flow" policy (defence costs)

insured.

ACE Bermuda International

insured.

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LOCAL D&O POLICIES: PRACTICAL CONSIDERATIONS

- Inconsistent coverage between local policies
- Local policy not as broad as master policy (liberalisation / filings)
- Tie-in of limits between local policy and master policy
- More than one insurer may be needed to achieve desired local limits
- Tough choices: client relationship v multinational footprint
- Exportability restrictions
- Requirement for local broker
- "Cash before cover"

insured.

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THE NON-INDEMNIFIED RISK

- Country D&O indemnification laws: silence / restrictive
- Even where indemnification is permitted it's NOT guaranteed:
  - Financial inability to indemnify at the time of the settlement/award
  - Companies may choose not to indemnify (maybe for PR reasons)
  - Companies' by-laws/deeds may not indemnify to the fullest extent permitted by law
- In these non-indemnified cases the D&O is bare without insurance
- Even where there is a global master D&O policy, loss may become PERSONAL

insured.

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GROWING AWARENESS

- Corporate governance is spreading
- Greater importance of overseas subsidiaries
- Main board directors sitting on local boards
- Peers' purchasing habits
- Claims

insured.

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International Insurance Programmes - CLAIMS

AIDA Europe Conference Copenhagen

11th/12th June 2015
Sandra Weinberger

Munich RE

International Insurance Programmes
Theory & Practice....

Munich RE

International Insurance Programmes
Advantages Claims

Munich RE

Local Services

- Local Adjustment - Local Experts - Local Insurers - Local Brokers
- Local Knowledge
- Personal Contacts (Language, Culture, Local Custom)

→ Better & Faster Loss Adjustment & Settlement

International Insurance Programmes
Claims Issues arising...

Munich RE

Interplay Insured, Parent, Local Services, Master Insurer

→ Complexity of Programme Structure
→ Complexity of Company Structure and Insurer Structure
→ Interplay Insured, Local Insurers / Fronters and Master Cover
→ Reporting Tools
→ Cultural Awareness and Communication
→ Different Regulatory and Market Requirements

International Insurance Programmes
Claims Issues arising...

Munich RE

I **Complexity of Programme Structure**

US$ 1bn each and every occurrence and in the annual aggregate in excess of :

50 different local policy limits and deductibles
50 different currencies, coverage extensions, exclusions, reporting thresholds, policy periods

→ Disclosure
→ Reporting
→ Transparency
→ Control

International Insurance Programmes
Claims Issues arising...

Munich RE

II **Complexity of Company Structure and IT Systems**

- Claims Data Reporting Discipline
- Claims Data Reporting Tools & Format – Bordereaux?
- Claims Data Quantity
- Claims Data Quality

International Insurance Programmes
Claims Issues arising..

Munich RE

Data Quality

- Accuracy Claims Reserves
- Verification and Determination of Coverage
- Reporting Trigger
- Delays Notification & Reporting & Reserving
- Confidentiality Agreements / Attorney Client Privilege
- Willingness to share information
- Who is in control of Claims and Compromise Settlements?
- Duplication of costs, effort, second expert opinions to satisfy market requirements

International Insurance Programmes
Claims Issues arising...

Munich RE

III **Cultural Awareness & Communication**

- Different Languages
- Different Cultures & Markets
- Local Interests & Relationships v Financial Interests
- Different Legal Systems
- Different Broker Interests
- Relationship Parent Company – Local Subsidiary
- Relationship Master Cover Insurers – Local Insurers – Local Brokers

International Insurance Programmes
Claims Issues arising..

Munich RE

IV Different Regulatory and Market Requirements

- Prescribed Timelines and Service Standards
- Applicable Sanctions & permissible Sanction Clauses
- Statutory Rights and Remedies
- Inconsistent Definitions
- Inconsistent Triggers in Local Policies v. Master Cover (claims made, occurrence)
- Inconsistent Batch / Series of Claims Clauses in Local Policies v Master Cover
  - Event Language v. Cause Language
  - Differing Hours Clauses
  - Inconsistent Claims Aggregation (policy year basis or across policy years?)
- Inconsistent Coverage and Exclusions
  - Reverse DIC v. Exclusions in Master Cover
  - Hidden Reverse DIC Coverage (Drop Down)

International Insurance Programmes
Claims Issues leading to...

Munich RE

Lack of Transparency & Control
Data Systems, Organisational Structure, Data Quantity and Quality, Reporting Delays

Lack of Cultural Awareness and Communication
Delays, Different Interests, Approaches, Expectations, Duplication Loss Investigations and Legal Analysis (Time, Cost, Effort...)

Different Market / Regulatory Requirements
Coverage Inconsistencies / Gap of Cover

→ **Disputes & Coverage Litigation**
→ **Delays in Claims Process**
(Reporting, Communication, Adjustment, Payments, Reserving)
→ **Reputational Issues**

International Insurance Programmes
Claims Issues leading to...

Munich RE

Delays in Claims Process:

→ Late Notifications / Reserving = financial consequences for Insurers
→ Delay in Adjustment and Payment = financial consequences for Insured
→ Breach Regulatory Compliance / Statutory Requirements
→ Complaints, Lawsuits, Bad Faith Allegations, Fines & Penalties
→ Reputational Issues
→ Insurance Costs
→ Business Interruption, Insolvency

"In the beginning it is the Market, In the End it is the Law."

International Insurance Programmes

Munich RE

WHAT TO DO.....??

Be Prepared...

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1) Internationally Operating Insurance Organisation
- Local Branches v. Fronting Partners
- Reporting Lines
- Global IT Systems

2) Policy Holder Global Risk Management
- Local Branches
- Reporting Lines
- Gobal IT Systems

3) Local & Master Policy Wordings & Programme Structure
- Review Coverage to avoid coverage gaps and inconsistent wordings (Tower Programme, Triggers, Interface Clauses, Event Language, Sublimits...)
- Professional Advice (Outside Legal Counsel)
- Be aware of applicable regulatory requirements, legal environment and sanctions

4) Central Claims & Litigation Monitoring

5) Invest in Relationships

Munich RE

CONCLUSIONS.....?

Panel Discussion

Appendix

Additional slide material

Cross Border Business is Complex

Many variations and considerations

ZURICH

- 240+ jurisdictions
- Sometimes multiple provinces per country
- Licensing requirements
- Premium tax requirements
- Varying definitions for
  - Non-admitted business
  - Cross-border business
  - Lines of Business
- Conflicts of laws
- Insurer, Broker and other Regulations
- Varying business practices

- Increased attention to corporate governance issues around the world
- Increased shareholder demands to demonstrate good corporate governance standards
- Increased awareness of prohibited nature of non-admitted business in many territories
- Increased scrutiny and tax audits on foreign corporations and insurers
- Reputation of Insurer, Broker and Customer

Considering all the fundamentals of multinational insurance

ZURICH

- Conduct of Insurance business elements are broader than purely "risk coverage".

What does 'conduct of insurance business' mean?

The answer may vary country by country!

Marketing? | Negotiation? | Claim payment? | Risk coverage? | Loss adjustment? | Risk engineering? | Premium payment?

- It is key to understand the foreign country's requirements - not only for "risk coverage" but also for all other relevant insurance activities.
- Where do insurance regulation and tax requirements attach?

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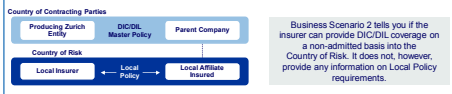
What are MIA Business Scenarios?

A Defined Factual Background removing uncertainty

ZURICH

MIA describes five different Business Scenarios that reflect the factual backgrounds of the business written, helping us to understand whether the insurer is permitted to provide **Risk Coverage** in the Country of Risk on a non-admitted basis

Example Non-admitted DIC/DIL (Business Scenario 2)



Business Scenario 2 tells you if the insurer can provide DIC/DIL coverage on a non-admitted basis into the Country of Risk. It does not, however, provide any information on Local Policy requirements.

DIC/DIL Master Policy
- negotiated and concluded in the Country of Contracting Parties
- Contracting Parties to the Master Policy are in the same country

Policyholder
- Parent Company

Insureds
- Parent Company
- Local Affiliate Insured

Insurance activities
- Do not take place in the Country of Risk

Local Policy
- Local Affiliate Insured concluded a Local Policy with a Local Insured

Appendix: Sample "Tie-In" of Limits language

In consideration of the payment of the premium, it is hereby understood and agreed that the following Clause is added to the POLICY:

GLOBAL TIE-IN OF LIMITS

This POLICY is part of a global program. This global program is a compilation of different policies consisting of this POLICY, and the policies listed in paragraph X below (the "LOCAL POLICIES"), which all have one common goal, to cover the Insureds of this POLICY and the LOCAL POLICIES worldwide on terms, conditions and limitations agreed to by the applicable insurers and insureds. The INSURER, INSUREDS, and COMPANY have agreed to special terms and conditions in this POLICY related to, among other things, the limits in this POLICY and the LOCAL POLICIES, the tie-in of those limits, and the indemnification obligations of the COMPANY, which reflects the overall intent of parties for the entire global program.

Accordingly, the limits of liability under this POLICY will be reduced and may be exhausted by any amounts paid under this POLICY, and/or the LOCAL POLICIES. Such reduction or exhaustion may occur at any time without any payment under this POLICY.

The maximum aggregate liability of the INSURER under this POLICY shall be the amounts set forth in Items III and IV of the Declarations, provided, however, that any payment under this POLICY, and/or the LOCAL POLICIES (together, "PAYMENTS"), shall reduce or exhaust the Limit of Liability under this POLICY and shall also reduce or exhaust the Limit of Liability of each of the LOCAL POLICIES.

If the PAYMENTS exceed, or an obligation to make PAYMENTS exceeds, any of the applicable limits set forth in Items III and IV of the Declarations, then the COMPANY shall indemnify the INSURER for all such amounts in excess of the applicable limits set forth in Items III and IV of the Declarations as a payment obligation directly due from the COMPANY to the INSURER, within thirty (30) days from the INSURERS written demand.

All amounts due from the COMPANY under this Clause shall be paid in full, without dispute, set-off, defense, cross-claim or counterclaim and free and clear of any tax, duty or other type of deductions or withholdings. If the COMPANY is required by law to make any deduction or withholding, then the amount due from the COMPANY shall be increased accordingly.

Any disputes arising under this Clause shall be subject to the process set forth in Clause 5 of the POLICY. The sole remedy of the INSURER and the COMPANY for breach of the obligations in this Clause shall be an action for breach of only those contractual obligations and appropriate relief therefore. Any breach of the obligations in this Clause shall not be grounds for any Group Company (including the INSURER), the COMPANY or any INSURED to claim a breach of the POLICY, as a whole, or to alter, avoid, withhold or delay performance of, or to deny the duty to perform, any other obligations in this POLICY or the LOCAL POLICIES.

If any provision of this Clause is held to be invalid or unenforceable to any extent in any context or any jurisdiction, it shall nevertheless be enforced to the fullest extent allowed by law in that and other contexts and jurisdictions.

Schedule of LOCAL POLICIES:-

Nothing herein shall be held to vary, alter, waive or extend any of the terms, conditions, exclusions or limitations of this POLICY, except as expressly stated herein. This endorsement is part of such POLICY and is incorporated therein.

insured.

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Causation – "The Damned Event"

Introduction to Causation in Insurance and Reinsurance

AIDA EUROPE CONFERENCE
CAUSATION – "The Damned Event"
Copenhagen, 12 June 2015

Jorge Angell
Madrid, SPAIN

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ABOGADOS

Introduction to Causation in Insurance and Reinsurance

1. CAUSATION: Pre-juridical concept which is common to all natural sciences.
2. Causation in the law: causation issues arise because every consequence is normally the result of a plurality of causes. It is rare that there is only one single cause.
3. Causation in criminal and civil liability, mainly tort, is a two-step process under Spanish law.
   a) Physical or material causality: established by the application of the "conditio sine qua non" or equivalence of conditions theory.
   b) Assignment of blame, both objectively and subjectively. Adequate or efficient cause.

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Introduction to Causation in Insurance and Reinsurance

3.a) The Latin maxim ***"Conditio sine qua non"*** is the basis of the equivalence of conditions theory.

All conditions without which the result would not have happened are said to be equally essential since all of them are condition or cause of the result.

Example: individual slightly wounded by another individual in car accident, is taken to hospital, and while there a fire breaks out, and individual dies. The tortfeasor would be liable.

Conclusion: If the agent contributed with one condition his action or omission would be a cause of the result. Hence, the agent would be responsible.

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Introduction to Causation in Insurance and Reinsurance

3.b) Assignment of blame.

Complex legal process requiring assignment of blame on objective and subjective basis, as a result of which the individual is made liable for the harmful result.

Courts take into account the adequate or relevant cause, probability forecasts, remaining causal antecedents, interference of other chains of events, and other criteria, among others, the consideration of the values protected by the breached rule of law.

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Introduction to Causation in Insurance and Reinsurance

4. Application of foregoing causation rules to insurance and reinsurance
   Are they adequate?

5. Why causation matters in insurance and reinsurance?
   It is key to resolve coverage issues involving concurrences of covered and excluded risks.

6. Coverage issues:
   a) How did the loss happen?
   b) One or multiple causes of loss
   c) Different insurance policies

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Introduction to Causation in Insurance and Reinsurance

7. Causation.
   a) Property and liability insurance.
   b) Backdrop: concurrence of two or more perils.
   c) Perils covered and perils excluded.
   d) Different rules:
      d.1) Tort proximate cause: unlimited causal chain
      d.2) Immediate cause: peril closest in time or place is proximate cause of loss ("causa proxima remota spectatur")
      d.3) Efficient proximate cause: dominant cause – prevailing rule.

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Introduction to Causation in Insurance and Reinsurance

8. Causation in reinsurance.

- Similar rules.
- No case law guidance in Spain.

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Introduction to Causation in Insurance and Reinsurance

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Vth AIDA Europe Conference

**"In the Beginning it is the Market;
In the End it is the Law"**

Causation – "the Damned Event"

Michael Mendelowitz
Head of Legal, ERGO Versicherung AG – UK Branch
Copenhagen, 12th June 2015

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The problem of definition

- What is an event?
- Is it synonymous with:
  - An accident?
  - An occurrence?
  - A catastrophe?
  - A disaster?
  - A cause?
  - An "originating cause"?
- Purpose of definition is key: allocation of financial consequences of insured loss between insured and insurer (and/or reinsurers where applicable)

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Incentive to aggregate losses

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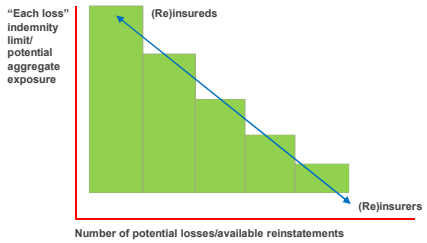

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Whose definition rules?

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- Is tension between the insurance market and the law inevitable?
- If so, is the conflict capable of resolution?
- Would such resolution require –
  - the insurance market's aligning its expectations to match the effects of the law;
  - or vice versa?

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The legal view

ERGO

- "The three requirements … are … a common factor that can properly be described as an event , which satisfied the test of causation *and which was not too remote ….*" [Emphasis added] (Evans LJ in *Caudle v Sharp*, 1995)
- "[A]n event is something which happens at a particular time, at a particular place, in a particular way. A cause is … something altogether less constricted. It can be a continuing state of affairs; it can be the absence of something happening." (Lord Mustill in *AXA Re v Field*, 1996)
- "[O]ne occurrence may embrace a plurality of losses. Nevertheless, the losses' circumstances must be scrutinised to see whether they involve such a degree of unity as to justify their being described as, or arising out of, one occurrence. …. In assessing the degree of unity regard may be had to such factors as cause, locality and time and the intentions of the human agents." (Rix J in *Kuwait Airways Corporation v Kuwait Insurance Co SAK*, 1997)

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The legal view (continued)

ERGO

- All three definitions above emphasise practical common sense, but has the law tended to overlook the requirement of "non-remoteness", i.e. what the parties themselves reasonably anticipated as the basis for aggregation of losses?
- Compare Lord Hoffmann's approach in *Investors Compensation Scheme v West Bromwich Building Society* (House of Lords, 1998):

"Almost all the old intellectual baggage of 'legal' interpretation has been discarded. …. Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. …. [T]he background may include … ***absolutely anything*** which would have affected the way in which the language of the document would have been understood by a reasonable man." [Emphasis added]

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The underwriter's view?

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"When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean – neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master – that's all."

(Lewis Carroll: *Alice Through the Looking-Glass*)

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What's sauce for the goose … or is it?

ERGO

- May an insurer adopt inconsistent positions on aggregation issues vis-à-vis its policyholders and reinsurers, e.g.:
  - (1) settling a series of losses sustained by policyholders as multiple events, but presenting the losses to reinsurers as one event for purposes of reinsurance recovery;
  - (2) or vice versa?
- (1) is commonplace – this is the function of catastrophe reinsurance
- (2) is more problematic
  - Contract wordings may permit it
  - But regulators are likely to be concerned about potential mismatch of reinsurance programme to risk profile
- Potential estoppel issue
  - Is there a representation and detrimental reliance?
  - More likely consequence of inconsistency is reputational damage

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Discussion

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"Versichern heißt verstehen"

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Insured event partly caused by a covered peril

Samim UNAN (AIDA Turkey)

Introduction

- Several causes may have been effective for the materialisation of the risk
- If all are covered- normally no problem
- What if a covered cause together with an uncovered (or expressly excluded) cause? In this context different possibilities:
  - No connection between the covered and uncovered (or excluded) causes or covered and uncovered (or excluded) causes are interdependent
  - Uncovered (or excluded) cause triggers covered cause
  - Covered cause triggers uncovered (or excluded) cause

Equivalence theory – Conditio sine qua non

- How to evaluate whether a loss/damage is caused by a covered risk?
- At first glance the "equivalence" test ("conditio sine qua non"): If a risk would not materialize in the absence of a factor, that factor is "causal"
- If several factors were effective together the equivalence theorie is completed by the assertion that each were "equally" effective (factors deemed to be "equivalent")

Limitation of the equivalence theorie

- Equivalence test (too wide) may lead to unhappy results. Need to restict:
- by agreement of the parties
- by application of "adequateness test" + "goal of the norm"

Agreement of the parties

- Insurers may provide restrictions in their general conditions of business (GCI):
  - Which cause(s) of loss/damage they will cover
  - To what extent.
- The liability of the insurer is "contractual".
  - Therefore the express agreement of the parties is decisive.
  - The agreement of the parties will be completed by "interpretation" (mainly of the general conditions of insurance).
  - The aim of the interpretation is to enlighten the goal pursued by the contract terms.

Agreement of the parties

- Contract freedom may force an insurer to indemnify loss or damage caused by facors that are not "adequate" (as this may be the case in all risks insurances)
- But frequently contract freedom allows the insurer to restrict its liability in a broader extent than the adequateness principle.

Combined insurances

- Where several perils are covered (combined insurance): the materialisation of only one cause is in principle sufficient (insurers pay)
- The parties even in the absence of a special agreement will be considered to have agreed that the insurers will effect payment upon materialisation of one of the perils insured against (normal case).

Covered cause + another (neither excluded nor included) cause

- Where a covered cause together with another (neither excluded nor included) cause provokes the loss/damage, the agreement of the parties will be decisive.
- If no special agreement, the insurers pay

Covered cause + excluded cause

- One of the causes is covered and the other is expressely excluded:
  - If the GCI provide that the insurers would not be liable for loss/damage caused by an excluded peril (without having regard to the other causes that were effective): no cover

    Example: Building damaged by storm (covered) and by its defective condition
  - If there is no such an express agreement, the purpose of the norm would be relevant (mostly no cover)
  - Degree of the causation (predomination): taken into account if the wording of the policy expressly so provides

Cause triggering another cause

- Covered cause triggers an excluded cause: Unless otherwise agreed insurers pay
- Excluded cause triggers a covered cause: Unless otherwise agreed insurers dont pay

Interdependent causes

- Two causes (one covered the other uncovered) provoked the loss/damage together but none of them was sufficient alone

  Example: Earthquake (covered) + defective construction
- In the absence of agreement by the parties: Goal of the norm may be relevant.

(Other) contractual restrictions

- Direct impact: If cover is restricted to the "direct" effects of the covered cause, the covered cause must be the "last" cause in time (last ring of the chain)
- However where the policy wording is silent (no "directly caused by" clause) an "adequate" connection is sufficient even not "directly effective".
- Exclusion to the exclusion: Where an exclusion is so drafted that the direct consequences of another (covered) cause are included in the cover, that another cause must be the last in time

(Other) contractual restrictions

- Predominant cause (insurers pay the loss/damage caused by adequate factors only when those factors are predominant on causes not covered)
- Pro-rata liability (insurers pay only that portion of the loss/damage attributable to the covered cause)
- Causa proxima (in marine insurances: insurers pay the loss/damage provoked by the effective cause even if it is not the last one in time)

Adequateness

- Not every "equivalent" factor but only those that are "generally" and "in the ordinary course of life" (according to experience) suitable for causing the materialisation of the risk would be taken into account.
- Factors that would cause the peril only in extraordinary and unlikely conditions would not be considered.
- Test to evaluate the adequateness: objective retrospective pronostic

Goal of the norm

- The liability of the insurer (the causes for which it will effect payment) will be determined by considering the goal of the norm (insuring clause or the exclusion clause).
- Unless express agreement otherwise, the insurers will be deemed to have assumed the obligation to indemnify losses/damages that are adequate consequences of a covered caused

Hypothetic causation

- Each of the causes would be sufficient to cause the insured event
- The cause which was not effective not taken into account.
- Except where the policy wording otherwise stipulates or where the ineffective cause has nevertheless diminished the value of the subject matter insured before the materialisation of the risk.

Hypothetic causation

- Fire after theft
- Fire after alleged but not proved theft
- Heavy damage caused by fire to a building subject to a demolition order (value problem)
- In marine insurances:
  - Vessel damaged before confiscation
  - Fire (covered) before bombardment (excluded)= insurers pay
  - Inherent vice (uncovered) before sinking (covered)= insurers don't pay

Causation in the all risks insurance

- One of the causes of the insured event is excluded: covered or uncovered?
- Different views
- Is it a problem of causality? Or is the aim of the norm decisive?
- Example: Driving without license

Driver without licence

- GCI may provide that accidents caused as a result of the intentional violation of a penal provision.
- Driving without license: penally sanctioned and normally an adequate cause of accident
- Adequation exists even if the accident is provoked by the fault of a third person.
- But should the insurer be liable in the latter case?

Driver without license

- What is the aim of the exclusion?
- If the exclusion is based on the assertion that the risk of accident is high when committing an intentional crime: the insurer to pay if the materialisation of the risk cannot be attributed to this high risk.
- If the exclusion is provided because the insurer as a general politic, refuses to cover accidents occurring during perpetration of crimes (as it considers that such cover would be against the "moral values") insurer not to pay.

Toxicomania case

- Toxicomania clause in the health insurance: Exclusion of medical treatment expenses related to toxicomania.
- The insured needed morphinomania treatment because he had become morhine dependent as aresult of a previous medical treatment.
- Held that no cover had to be granted (BGHZ 65, 142)
- Nothing to do with causality = Exclusion provided taken into account the high expenses of the toxicomania treatment. Regard is not given to the cause.

Causation in the marine insurances

- Causation rule in the marine insurances: causa proxima
- If there are several adequate causes, only one of them will be considered as legally relevant.
- Legally relevant: not the last cause in time but the cause which stands "closest" (the effect of which the loss/damage is the unavoidable consequence).

Causation in the marine insurances

- Tobacco insured- Sea water ingress as a result of storm- Damage (putrefaction) to other goods carried in the same hatch- Tobacco rotten = inherent vice is the nearest cause in time but is the unavoidable consequence of a covered peril (seawater ingress) Insurers pay.
- Vessel ordered to stay close to the shore by fear of U-boat attack. Vessel hit a reef (The Coxwold) = proximate cause was judged to be a (uncovered) war risk (House of Lords). Prof. Schwampe underlines that today the approach would be different (taking into account the radar systems and satellite navigations systems = covered peril)

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Class Actions and Legal Funding

CLASS ACTIONS IN SCANDINAVIA
AIDA Conference 12th June 2015

Attorney, adj.professor, dr.jur.
Eigil Lego Andersen

NIELSEN NØRAGER

Scandinavia

Sweden

Norway

Denmark – copycat, but clearly no improvement

NIELSEN NØRAGER

Denmark

Rules = Article 254 a – 254 k of The Administration of Justice Code

Came into force 1st January 2008

First DK Class Action instigated Valentine's Day 2008 ("Bank Trelleborg 1")

Not yet 10 admitted class actions

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The essence of DK Class Actions

The Answer to Kraka's* Fourth Riddle:

Several Persons should have their claims tried in court and be bound by and able to enforce its decision, yet cannot be parties in the court case

Kraka: Legendary viking queen of infinite wisdom and beauty, triple-riddled by king Ragnar Lodbrog: Meet me at the beach, neither alone nor accompanied by any person, neither having eaten nor fasted and neither naked nor dressed

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Kraka's solution

The procedural powers are vested in a Group Representative, who is the procedural party acting for the claim-havers (rather than claimants) who

(i) benefit from his actions
(ii) are bound by his dispositions (which sometimes require court approval)
(iii) can not individually give binding instructions to the group rep
(iv) retain ownership of their claims and may settle individually

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Special conditions for a DK Class Action

1. **Uniform** claims from members of Class
2. Possible to identify and **notify** Class members ("as a minimum by far the largest part of the group members")
3. Class Action **best way** to deal woth claims
4. Possible to appoint **Group Rep**

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The notification requirement

Makes no sense

Could kill almost any potential class action

If not for the solution: The ad hoc association

Not: "Persons who have purchased in 2014 a ACME Lawn King AC30 lawncutter" but "Members of the Class Action Against ACME Association who have etc".

Now you can boast a 100% reach of the group.

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The Ad Hoc Association solution

First used in the bankTrelleborg 1 class action and accepted by the High Court.

Used in every DK Class action since

Wonderful solution because:
Solves the notification problem
Natural group members need only join the assoc
Solves financing of case (registration and membership dues)
Secures democratic control of group rep
All members are truly interested (unlikely with a pre-existing assoc)

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The Group Rep

The star of the show – no class action without a Group Rep
Has full procedural powers
Needs court approval for settlement (but any non-discriminatory and reasonably sane settlement will be approved). Settlement power gives strong negotiating powers.
No remuneration (but ad hos assoc handles that aspect too)
Cannot quit
May appeal
Must defend every group member against counter claims (effectively excluding any class action with a risk of counter claims)

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Opt in or opt put?

In practise: Opt In

Theory: Opt-out in cases where the Forbrugerombudsman is Group Rep. But he has more effective means that are much simpler

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The process

Writ with statement of claim and suggestion for group rep (in practise the plaintiff)

Approval (or disapproval) and appointment of group rep

Definition of "The frame" (= class definition and claims demarcation) (may later be amended with court approval)

Opening Notification to class

Opt-in period

End of Opt-in period (may be prolonged) – participants a finite group

Pleadings may be exchanged in parallel

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Costs and security

Unlike normal suits where a party should not post security for costs (except certain foreigners when no convention or treaty provides otherwise) the Group Rep should post security (but not covering the costs of any appeal)

The participants may be ordered to post security and to pay costs to the defendant and/or Group Rep but not beyond what is stated in the Opening Notification.

In bankTrelleborg 1 the Supreme Court approved a solution where participants could chose between paying 8 DKK per share in special membership due to the Group Rep Assoc OR post security of 12 DKK per share.

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Example of combinations of class actions and standard action

The bankTrelleborg case:

Small savings bank going public in summer 2007. Shares trading at 220 kr. per share Friday 18. January 2008 are redeemed at 59 per share Monday the 21st January by majority shareholder to be sold on to major bank, who solves liquidity crisis. Requires at least 70 per cent shareholding. 70 per cent requirement only met if treasury shares are disregarded. Liquidity problems rooted in facts existing at time of IPO but not disclosed in prospectus

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The bankTrelleborg actions

Bank Trelleborg class action 1: Redemption unlawful – increased compensation,
(Supreme Court upholding High Court: Unlawful (6-3) No increase (9-0))

bankTrelleborg test case: three primary market investors. Prospectus liability against issuer (now merged into large bank)
(Supreme Court reversing High Court: Prospectus liability (5-0).
Damages = presciption price of 250 DKK per share minus redemption amount)

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The bankTrelleborg actions II

bankTrelleborg class action 2: Prospectus liability – primary market only
(Admitted by the High Court, admission appealed – case settled after the decision in the test case)

Bank Trelleborg class action 3: Prospectus liability – secondary market
(Disapproved due to insufficeint similarity of claims by High Court, disapproval appealed – case settled after the test case)

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bops AVOCATS

NEW FRENCH LEGISLATION ON CLASS ACTIONS

Alexis Valençon
Partner - BOPS

AIDA Europe, Copenhagen, 12 June 2015

www.bopslaw.com

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OVERVIEW

1. A long-awaited introduction into French law
2. The key points of the French class action regimen:
   a. Who can act?
   b. Against whom?
   c. In what circumstances?
   d. Regarding what types of damage?
   e. According to which procedure?
   f. Is mediation possible?
3. Proceedings to date

1. A LONG-AWAITED INTRODUCTION INTO FRENCH LAW

The forms of collective actions previously available under French law were considered unsatisfactory:

a. Joint representation actions ("*procédure en représentation conjointe*")

b. Defense of the collective interests of consumers actions ("*action d'intérêt collectif*")

2. THE KEY POINTS OF THE FRENCH CLASS ACTION REGIMEN

a. Who can act?

- Only accredited, nationally representative consumer associations.

b. Against whom?

- Professionals.

2. THE KEY POINTS OF THE FRENCH CLASS ACTION REGIMEN

c. In what circumstances?

- Regarding damage:
  - suffered by individual consumers resulting from identical or similar situations,
  - due to the same breach of contract or statutory duty by the same professional:
    - in connection with the sale of goods or the supply of services or
    - as a result of anti-competitive practices prohibited under French or European law.

2. THE KEY POINTS OF THE FRENCH CLASS ACTION REGIMEN

d. Regarding what types of damage?

- Only economic losses sustained by consumers.
- Compensation for bodily injury and/or pain and suffering are excluded.

2. THE KEY POINTS OF THE FRENCH CLASS ACTION REGIMEN

e. According to which procedure?

- The standard procedure:
  - Ruling on liability
  - Opt-in phase
  - Compensation
- The simplified procedure:
  - Identity and number of consumers known
  - Amount of individual awards identical for all claimants

2. THE KEY POINTS OF THE FRENCH CLASS ACTION

f. Is mediation possible?

- Mediation can take place at any time during the procedure.
- Any agreement must be submitted to the Court for ratification.

3. PROCEEDINGS TO DATE

- UFC Que Choisir *v.* Foncia
- SLC-CSF *v.* Paris Habitat OPH
- CLCV *v.* Axa and Agipi
- CNF *v.* 3F

- NEXT STEP: A SPECIFIC CLASS ACTION REGIMEN FOR PUBLIC-HEALTH AND ENVIRONMENTAL ISSUES?

THANK YOU FOR YOUR ATTENTION.

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Hot Topics

AIDA EUROPE CONFERENCE - COPENHAGEN

Peter Backe-Hansen Allianz Australia June 2015

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CYBER RISK

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Aggregation in Cyber Risk – Some Background

- **NOBODY IS IMMUNE - it is a dynamic risk**
- The first Cyber policy by Lloyds 1980 – rapid development since then
- Cyber is a fast moving and very dynamic environment
- Ponemon Institute survey - average total cost of a breach in the U S was $5.9 million
- Cyber crime cost estimated to reach $2.1 trillion by 2019 (Allianz/Juniper Research)
- Systemic loss scenario could be a “pandemic” type loss scenario is real
- U.K. Power Grid Under Cyber-Attack Every Minute (Jan 15, Bloomberg)
- Verizon Communications Inc. report found that more than two-thirds of the 290 electronic espionage cases in 2014 involved phishing
- Up to 100 banks and financial institutions worldwide have been attacked in an "unprecedented cyber robbery", claims a BBC report

SETTING THE SCENE – The Cloud

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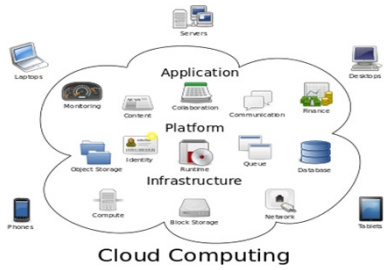

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SETTING THE SCENE – The Cloud - Continued

- Use of the Cloud may achieve greater security for SME's
- Down side for insurance – one cloud breach could result in a multiple policy affect
- Cloud aggregation - multiple territories being affected for one or many insurers
- Cloud and Y2K "scenario" - Cyber exposure is similar
- The Y2K "scenario" translated to Cyber? Is it same or worse?
- The growth and development of cloud computing creates an exposure to many insurers and hence their reinsurers
- Cyber risk business interruption without property damage
- Privacy Breach, Regulatory cover for both breach and defence Cost etc.)
- Underwriter experience (lack of) with engineering and technical exposure aspects of both Cloud and Cyber

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SETTING THE SCENE - 2

- TERRORISM

- Would Government sponsored action be considered Terrorism?
- The degree of proof needed to establish a terrorism claim e.g. SONY
- Would the Australian and UK Governments Terrorism pools respond to a cyber terrorist act that brought down the power supply across any country?
- Cyber-attacks on critical infrastructure are an increasing threat across the globe (Kaspersky Lab)
- Very much an open question

SETTING THE SCENE - 2

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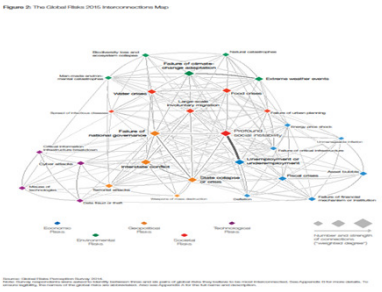
- The recent World Economic Forum report shows the interconnectivity of the cyber risk exposure faced by all segments of industry, including the insurance industry possible pandemic exposure



A Swiss Re presentation in Australia, Juerg Busenhart, demonstrated the possible range of exposures with the following table:

Allianz

	Scenario	Description	Main insured losses	Example
Interruption (1st Party)	Denial of Service interruption of operations	Non-Physical damage Denial of service; interruption of operations or data corruption	Mainly first-party losses i.e. Information Systems Business Interruption and data corruption cover. Remote third-party exposure e.g. Technology E&O or D&O	Coordinated attack that puts down on-line sales portal e.g. amazon server
Property (1st Party)	Critical infrastructure	Physical damage Material consequence of IT failure or cyber attack	Mainly first-party losses i.e. property, engineering covers. Third-party losses to lesser extent.	Virus blocks cooling system of power plant which cause overheating / fire
Breach (3rd Party)	Privacy/Data loss	Non-Physical damage Data privacy breach on personal or financial data	Mainly third-party e.g. cyber liability or Technology E&O. Remote first-party exposure. Costs to notify. Data restoration.	Personal data and credit card information stolen from retailer e.g. TARGET
Property (3rd Party)	Intellectual Property	Non-Physical damage Electronic theft of intellectual property	Only third party e.g. Technology E&O, cyber liability.	Hackers steal software code from Microsoft and sells to competitors

REINSURANCE - AGGREGATION

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- The insurance industry is highly exposed to significant aggregation arising from Cyber exposures
- The contingent business interruption exposure to all segments
- Lack of historical data both as to risk profile as well as to insurance loss history to determine exposure
- The development of the cyber risk or cyber liability cover has added to the “accumulation” exposure - some say significantly
- Not only where the original insured has made use of the cloud for their data storage
- The reinsurers are arguably exposed to significant aggregation exposures arising from cyber risk
- The Cyber insurance product is a relatively new class bringing with it significant risk of aggregation
- The aggregation is seen by some as a pandemic type exposure

REINSURANCE – CATASTROPHE EXPOSURE

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- Traditional catastrophe models used by reinsurers almost all rely on historical data
- Risk managers also rely on historical data but do need to understand the impact of a cyber event on their business
- A traditional "catastrophe" definition is an infrequently happening but severe event – this may/may not apply to cyber exposure
- Catastrophe reinsurance carries time restrictions (hours clause) as natural catastrophes may occur over several days
- Cyber risk does not have any such restraints
- Insurer's aggregation exposure from cyber cover to the retail sector, e.g. the Target event

LEGAL 1

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General: Comments are mostly in relation to the Australian experience

- Privacy and data laws are being strengthened in most developed jurisdictions; See the Australian Government's law changes on "Metadata"
- Privacy - mandatory reporting is expected in Australia before the end of 2015
- Standing: there is/are questions in regard to standing to bring a class action
- Standing: in the recent Target case "A U.S. judge in December cleared the way for consumers to sue the retailer over the breach, rejecting Target's argument that the consumers lacked standing to sue because they could not establish any injury'"
- Standing: Class Action Commencement Requirements Relaxed
- Standing: to commence a Class Action in the Federal Court, Sect 33C(1)(a) of the Federal Court of Australia Act 1976 (Cth) (FCA) provides that "7 or more persons" must "have claims against the same person"

LEGAL 2

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- Standing: This provision had been subject to competing interpretations for more than 10 years, especially where the class action was brought against multiple respondents
- Standing: The recent decision in Cash Converters International Limited v Gray [2014] FCAFC 111 establishes that each member of a group does not need to have a claim against each respondent
- Causation in Shareholder Class Actions Still Uncertain
- The provisions that allow shareholders to seek compensation for contravention of the continuous disclosure regime and prohibitions on misleading conduct, Corporations Act 2001 (Cth) ss 1041I, 1317HA and 1325, **require proof of causation, even in Class Actions**
- The requirements for causation will remain unsettled until subject to a trial and judgment

LEGAL 3

- Multi party action against one or many original insured in reinsurer portfolio
- Fred Hawke and Mark Waller of Clayton Utz in a recent article observed:
- "It is possible for a successful class action to turn out to be almost worthless, according to a new Federal Court decision (Morgan, in the matter of Brighton Hall Pty Ltd (in liq) [2013] FCA 970).
- The Court held that, where damages were payable out of a defendant's insurance, each class action plaintiff's claim was a separate claim. This meant that each claim was subject to the claim excess under the policy."

LEGAL 4

- Reinsurance legal and dispute aspects
- At this time there do not appear to be any judicial or arbitration decisions that have been made specifically in regard to disputes between insurers and reinsurers in regard to the cyber risk or liability

Conclusion

Reinsurers may be considering some or all of the following points in the context of aggregation exposure:

- what accumulation or aggregation of risks may arise as a result of breaches of privacy from a single event
- directors being sued for breach of duty in respect of loss of data as well as cyber risk management
- crime and terrorism exposures if data used to cause financial loss
- regulatory action in respect of licensee financial industry compliance
- accumulation of risks arising from a systemic loss events - the downstream BI aspect
- accumulation of risks arising from an "industry" perspective - e.g. a cloud provider failure - the pandemic loss scenario

"Cyber" risk is likely to be a constant concern for insurers and reinsurers not only in aggregation or accumulation terms for some time to come.

Privacy vs Fraud
the limits of private investigation of insurance fraud

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University of Copenhagen – Faculty of Law
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"Investigation", is …

The *study of facts*, used to identify, locate and prove something, e.g.

- Internet searching,
- "Trash investigations" (dust pins etc.)
- Interviews and interrogations,
- Evidence collection by electronic means
- Surveillance by eye and ear
- Photo and sound recordings

It may lead to the following types of evidence

- Documents
- Expert reports (e.g. on medical issues):
- Sound files, videos and photos
- Witness evidence
- DNA evidence

And it is often necessary to conduct by insurance companies suspecting fraud, because police authorities generally require "smoking guns"

Legal limits

- Private investigation may collide with:
  - *data protection rules* under the 1995 EU Directive Rules on *personal privacy*
  - criminal *codes on the privacy*
  - rules on *good practice* for financial institutions

Blurred lines

The limits are often blurred – and when balancing pros and cons, it comes into play, who is the perceived as

- ”Big brother”
- ”Victim”
- ”Public watchdog”

Other negative consequences may include

- Collected evidence may be held **invalid as evidence** in subsequent civil or criminal court proceedings;
- The company involved may suffer m**arket badwill**;
- Employed investigators may face **criminal penalties**

Challenges caused by the 1995 directive

General issues

Under Article 2(b) 'processing of personal data' shall mean

- any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;

Article 11(1) of the Directive:

Where the data have not been obtained from the data subject, Member States shall provide that the controller or his representative must **at the time of undertaking the recording** of personal data or if a disclosure to a third party is envisaged, no later than the time when the data are first disclosed provide the data subject with **at least the following information**, except where he already has it:

(a) the identity of the controller and of his representative ..;

(b) the purposes of the processing

…

Issues to be determined:

- How to comply with this when the data subject is under suspicion
- Is it possible to obtain consent in advance?
- How to handle borderline cases by the investigating **company** and by the **insurance industry** at large

However, under 11(2) …

This does not apply where, **in particular** for processing for statistical purposes or for the purposes of historical or scientific research, the provision of such information **proves impossible** or would involve a **disproportionate effort** or if recording or disclosure is expressly **laid down by law**. In these cases Member States shall provide appropriate safeguards.

How to apply for consent

- **Consent** from the data subject makes any surveillance legitimate;
- But under Article 2(h) of the Directive, 'consent' requires a **freely given specific and informed indication** of his wishes by which the data subject signifies his agreement to personal data relating to him being processed.

In addition, under Article 8

- the processing of data concerning e.g. health is also prohibited, unless (a) the data subject has given his **explicit consent** to the processing of those data … (if legitimate under domestic laws)

And furthermore, under Article 11(1) …

Where the data have not been obtained from the data subject, Member States shall provide that the controller or his representative must at the time of undertaking the recording of personal data or if a disclosure to a third party is envisaged, no later than the time when the data are first disclosed **provide the data subject with at least the following information**, …. except where he already has it: (identity, purpose, categories etc.)

Issues under domestic Danish laws

- Under Section 264a of the Danish Criminal Code, individuals on freely accessible locations may be photographed;
- Example: It is prohibited to take photos of individuals in **private homes** or **gardens**.
- What is then "public domain"? The entrance hall of an apartment building?
- Furthermore, specific prohibitions apply in regard to **automated video recordings**

Therefore, under the Danish criminal code

Investigators may

- *Observe* the subject in public environments using his own eyes and ears;
- Make *sound recordings;*
- *Approach* private individuals in writing, by telephone or orally to ask clarifying questions.
- *Appear* in the roll of an ”agent”, e.g. posing as costumer , colleague or potential ”Facebook friend” with a view to conduct investigation

Conclusions

Summing up:

- The company may face a challenge in regard to obtaining the necessary **consent** from the data subject and with subsequent **information**
- And even if such consent is obtained, ***”good practice”*** rules may apply under the financial regulatory law

*The answer to many these borderline question may be found in **an open public debate** on what is actually good practice and fairness when it comes to surveillance vs. fraud.*

France 2014
Some new compensable prejudices

Part 1
Prejudice of Anxiety
Prejudice of Anguish

Part 2
Prejudice of Sorrow

Part 3
Prejudice of … something special
For adults only

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Part I - Prejudice of anxiety

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Prejudice of anxiety

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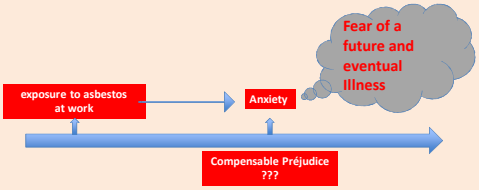
Prejudice of anxiety



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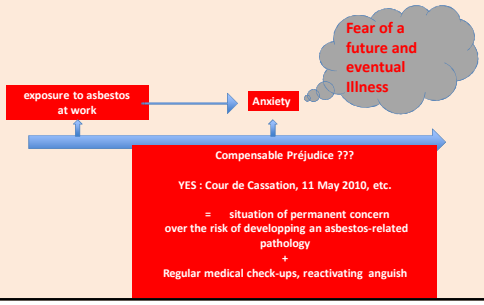
Prejudice of anxiety



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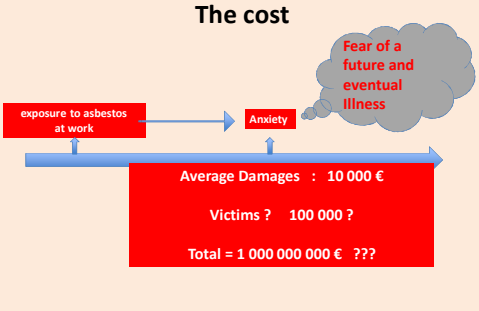
Prejudice of anxiety
The cost



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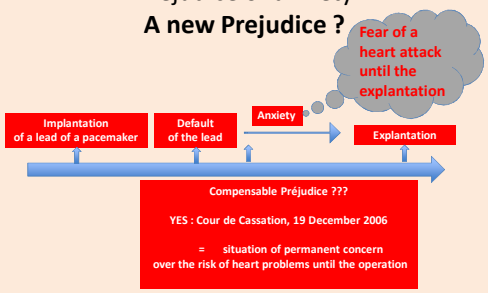
Prejudice of anxiety
A new Prejudice ?



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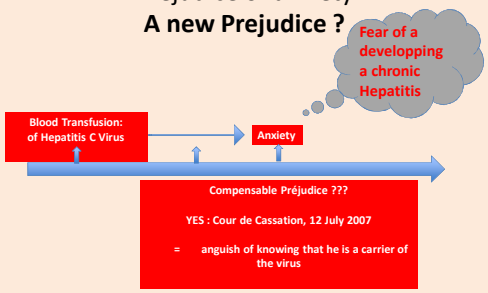
Prejudice of anxiety
A new Prejudice ?



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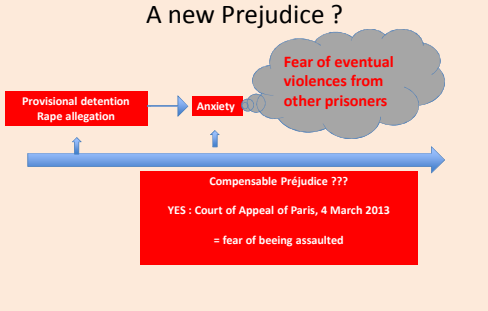
Prejudice of anxiety
A new Prejudice ?



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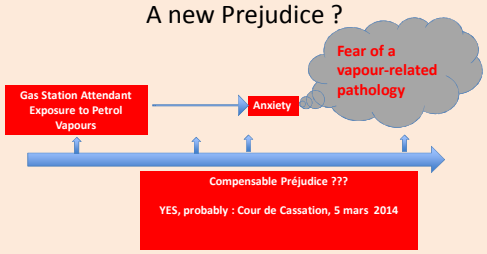
Prejudice of anxiety
A new Prejudice ?



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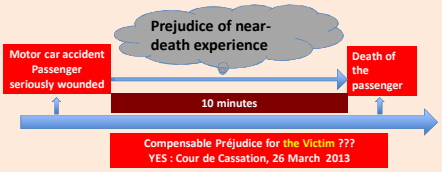
Prejudice of **anguish**
A new Prejudice ?



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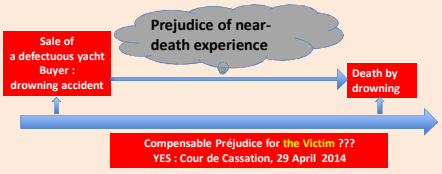
Prejudice of **anguish**



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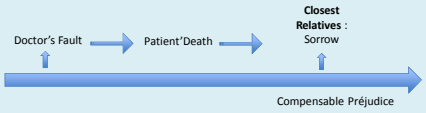
Part 2 - Prejudice of sorrow

Who is the victim?



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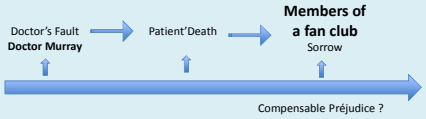
Part 2 - Prejudice of sorrow

Who is the victim?



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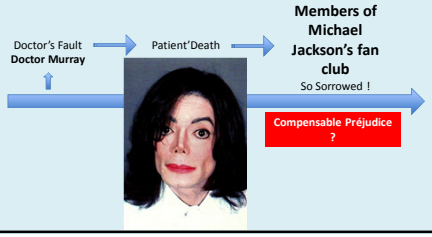
Part 2 - Prejudice of sorrow

Who is the victim?



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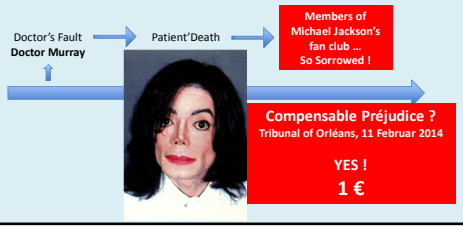
Part 2 - Prejudice of sorrow

Who is the victim?



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Part 3 - Prejudice of ... a very french feeling

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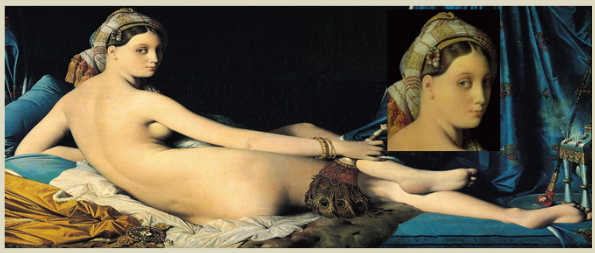
La grande Odalisque

Jean-Auguste-Dominique Ingres (1814)



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Saint Jérôme

Simon Vouet 1622

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Saint Jérôme

Pieter Coecke van Aelst (1502-1550)

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COUR D'APPEL D'AIX EN PROVENCE 6e Chambre B –
03 MAI 2011- N°2011/292 - Rôle N° 09/05752

« Elisabeth B. a obtenu (…) des **dommages et intérêts** de **10000 euros** (…) **pour absence de relations sexuelles pendant plusieurs années.**

(…) les attentes de l'épouse étaient légitimes dans la mesure où **les rapports sexuels entre époux sont notamment l'expression de l'affection qu'ils se portent mutuellement**, tandis qu'ils s'inscrivent dans la continuité les **devoirs découlant du mariage** ».

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DIRECTIVE 95/46/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 24 October 1995

on the protection of individuals with regard to the processing of personal data and on the free movement of such data

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 100a thereof,

Having regard to the proposal from the Commission [1],

Having regard to the opinion of the Economic and Social Committee [2],

Acting in accordance with the procedure referred to in Article 189b of the Treaty [3],

(1) Whereas the objectives of the Community, as laid down in the Treaty, as amended by the Treaty on European Union, include creating an ever closer union among the peoples of Europe, fostering closer relations between the States belonging to the Community, ensuring economic and social progress by common action to eliminate the barriers which divide Europe, encouraging the constant improvement of the living conditions of its peoples, preserving and strengthening peace and liberty and promoting democracy on the basis of the fundamental rights recognized in the constitution and laws of the Member States and in the European Convention for the Protection of Human Rights and Fundamental Freedoms;

(2) Whereas data-processing systems are designed to serve man; whereas they must, whatever the nationality or residence of natural persons, respect their fundamental rights and freedoms, notably the right to privacy, and contribute to economic and social progress, trade expansion and the well-being of individuals;

(3) Whereas the establishment and functioning of an internal market in which, in accordance with Article 7a of the Treaty, the free movement of goods, persons, services and capital is ensured require not only that personal data should be able to flow freely from one Member State to another, but also that the fundamental rights of individuals should be safeguarded;

(4) Whereas increasingly frequent recourse is being had in the Community to the processing of personal data in the various spheres of economic and social activity; whereas the progress made in information technology is making the processing and exchange of such data considerably easier;

(5) Whereas the economic and social integration resulting from the establishment and functioning of the internal market within the meaning of Article 7a of the Treaty will necessarily lead to a substantial increase in cross-border flows of personal data between all those involved in a private or public capacity in economic and social activity in the Member States; whereas the exchange of personal data between undertakings in different Member States is set to increase; whereas the national authorities in the various Member States are being called upon by virtue of Community law to collaborate and exchange personal data so as to be able to perform their duties or carry out tasks on behalf of an authority in another Member State within the context of the area without internal frontiers as constituted by the internal market;

(6) Whereas, furthermore, the increase in scientific and technical cooperation and the coordinated introduction of new telecommunications networks in the Community necessitate and facilitate cross-border flows of personal data;

(7) Whereas the difference in levels of protection of the rights and freedoms of individuals, notably the right to privacy, with regard to the processing of personal data afforded in the Member States may prevent the transmission of such data from the territory of one Member State to that of another Member State; whereas this difference may therefore constitute an obstacle to the pursuit of a number of economic activities at Community level,

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[1] OJ No C 277, 5. 11. 1990, p. 3 and OJ No C 311, 27. 11. 1992, p. 30.

[2] OJ No C 159, 17. 6. 1991, p 38.

[3] Opinion of the European Parliament of 11 March 1992 (OJ No C 94, 13. 4. 1992, p. 198), confirmed on 2 December 1993 (OJ No C 342, 20. 12. 1993, p. 30); Council common position of 20 February 1995 (OJ No C 93, 13. 4. 1995, p. 1) and Decision of the European Parliament of 15 June 1995 (OJ No C 166, 3. 7. 1995).

distort competition and impede authorities in the discharge of their responsibilities under Community law; whereas this difference in levels of protection is due to the existence of a wide variety of national laws, regulations and administrative provisions;

(8) Whereas, in order to remove the obstacles to flows of personal data, the level of protection of the rights and freedoms of individuals with regard to the processing of such data must be equivalent in all Member States; whereas this objective is vital to the internal market but cannot be achieved by the Member States alone, especially in view of the scale of the divergences which currently exist between the relevant laws in the Member States and the need to coordinate the laws of the Member States so as to ensure that the cross-border flow of personal data is regulated in a consistent manner that is in keeping with the objective of the internal market as provided for in Article 7a of the Treaty; whereas Community action to approximate those laws is therefore needed;

(9) Whereas, given the equivalent protection resulting from the approximation of national laws, the Member States will no longer be able to inhibit the free movement between them of personal data on grounds relating to protection of the rights and freedoms of individuals, and in particular the right to privacy; whereas Member States will be left a margin for manoeuvre, which may, in the context of implementation of the Directive, also be exercised by the business and social partners; whereas Member States will therefore be able to specify in their national law the general conditions governing the lawfulness of data processing; whereas in doing so the Member States shall strive to improve the protection currently provided by their legislation; whereas, within the limits of this margin for manoeuvre and in accordance with Community law, disparities could arise in the implementation of the Directive, and this could have an effect on the movement of data within a Member State as well as within the Community;

(10) Whereas the object of the national laws on the processing of personal data is to protect fundamental rights and freedoms, notably the right to privacy, which is recognized both in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the general principles of Community law; whereas, for that reason, the approximation of those laws must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the Community;

(11) Whereas the principles of the protection of the rights and freedoms of individuals, notably the right to privacy, which are contained in this Directive, give substance to and amplify those contained in the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data;

(12) Whereas the protection principles must apply to all processing of personal data by any person whose activities are governed by Community law; whereas there should be excluded the processing of data carried out by a natural person in the exercise of activities which are exclusively personal or domestic, such as correspondence and the holding of records of addresses;

(13) Whereas the acitivities referred to in Titles V and VI of the Treaty on European Union regarding public safety, defence, State security or the acitivities of the State in the area of criminal laws fall outside the scope of Community law, without prejudice to the obligations incumbent upon Member States under Article 56 (2), Article 57 or Article 100a of the Treaty establishing the European Community; whereas the processing of personal data that is necessary to safeguard the economic well-being of the State does not fall within the scope of this Directive where such processing relates to State security matters;

(14) Whereas, given the importance of the developments under way, in the framework of the information society, of the techniques used to capture, transmit, manipulate, record, store or communicate sound and image data relating to natural persons, this Directive should be applicable to processing involving such data;

(15) Whereas the processing of such data is covered by this Directive only if it is automated or if the data processed are contained or are intended to be contained in a filing system structured according to specific criteria relating to individuals, so as to permit easy access to the personal data in question;

(16) Whereas the processing of sound and image data, such as in cases of video surveillance, does not come within the scope of this Directive if it is carried out for the purposes of public security, defence, national security or in the course of State activities relating to the area of criminal law or of other activities which do not come within the scope of Community law;

(17) Whereas, as far as the processing of sound and image data carried out for purposes of journalism

or the purposes of literary or artistic expression is concerned, in particular in the audiovisual field, the principles of the Directive are to apply in a restricted manner according to the provisions laid down in Article 9;

(18) Whereas, in order to ensure that individuals are not deprived of the protection to which they are entitled under this Directive, any processing of personal data in the Community must be carried out in accordance with the law of one of the Member States; whereas, in this connection, processing carried out under the responsibility of a controller who is established in a Member State should be governed by the law of that State;

(19) Whereas establishment on the territory of a Member State implies the effective and real exercise of activity through stable arrangements; whereas the legal form of such an establishment, whether simply branch or a subsidiary with a legal personality, is not the determining factor in this respect; whereas, when a single controller is established on the territory of several Member States, particularly by means of subsidiaries, he must ensure, in order to avoid any circumvention of national rules, that each of the establishments fulfils the obligations imposed by the national law applicable to its activities;

(20) Whereas the fact that the processing of data is carried out by a person established in a third country must not stand in the way of the protection of individuals provided for in this Directive; whereas in these cases, the processing should be governed by the law of the Member State in which the means used are located, and there should be guarantees to ensure that the rights and obligations provided for in this Directive are respected in practice;

(21) Whereas this Directive is without prejudice to the rules of territoriality applicable in criminal matters;

(22) Whereas Member States shall more precisely define in the laws they enact or when bringing into force the measures taken under this Directive the general circumstances in which processing is lawful; whereas in particular Article 5, in conjunction with Articles 7 and 8, allows Member States, independently of general rules, to provide for special processing conditions for specific sectors and for the various categories of data covered by Article 8;

(23) Whereas Member States are empowered to ensure the implementation of the protection of individuals both by means of a general law on the protection of individuals as regards the processing of personal data and by sectorial laws such as those relating, for example, to statistical institutes;

(24) Whereas the legislation concerning the protection of legal persons with regard to the processing data which concerns them is not affected by this Directive;

(25) Whereas the principles of protection must be reflected, on the one hand, in the obligations imposed on persons, public authorities, enterprises, agencies or other bodies responsible for processing, in particular regarding data quality, technical security, notification to the supervisory authority, and the circumstances under which processing can be carried out, and, on the other hand, in the right conferred on individuals, the data on whom are the subject of processing, to be informed that processing is taking place, to consult the data, to request corrections and even to object to processing in certain circumstances;

(26) Whereas the principles of protection must apply to any information concerning an identified or identifiable person; whereas, to determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify the said person; whereas the principles of protection shall not apply to data rendered anonymous in such a way that the data subject is no longer identifiable; whereas codes of conduct within the meaning of Article 27 may be a useful instrument for providing guidance as to the ways in which data may be rendered anonymous and retained in a form in which identification of the data subject is no longer possible;

(27) Whereas the protection of individuals must apply as much to automatic processing of data as to manual processing; whereas the scope of this protection must not in effect depend on the techniques used, otherwise this would create a serious risk of circumvention; whereas, nonetheless, as regards manual processing, this Directive covers only filing systems, not unstructured files; whereas, in particular, the content of a filing system must be structured according to specific criteria relating to individuals allowing easy access to the personal data; whereas, in line with the definition in Article 2 (c), the different criteria for determining the constituents of a structured set of personal data, and the different criteria governing access to such a set,

may be laid down by each Member State; whereas files or sets of files as well as their cover pages, which are not structured according to specific criteria, shall under no circumstances fall within the scope of this Directive;

(28) Whereas any processing of personal data must be lawful and fair to the individuals concerned; whereas, in particular, the data must be adequate, relevant and not excessive in relation to the purposes for which they are processed; whereas such purposes must be explicit and legitimate and must be determined at the time of collection of the data; whereas the purposes of processing further to collection shall not be incompatible with the purposes as they were originally specified;

(29) Whereas the further processing of personal data for historical, statistical or scientific purposes is not generally to be considered incompatible with the purposes for which the data have previously been collected provided that Member States furnish suitable safeguards; whereas these safeguards must in particular rule out the use of the data in support of measures or decisions regarding any particular individual;

(30) Whereas, in order to be lawful, the processing of personal data must in addition be carried out with the consent of the data subject or be necessary for the conclusion or performance of a contract binding on the data subject, or as a legal requirement, or for the performance of a task carried out in the public interest or in the exercise of official authority, or in the legitimate interests of a natural or legal person, provided that the interests or the rights and freedoms of the data subject are not overriding; whereas, in particular, in order to maintain a balance between the interests involved while guaranteeing effective competition, Member States may determine the circumstances in which personal data may be used or disclosed to a third party in the context of the legitimate ordinary business activities of companies and other bodies; whereas Member States may similarly specify the conditions under which personal data may be disclosed to a third party for the purposes of marketing whether carried out commercially or by a charitable organization or by any other association or foundation, of a political nature for example, subject to the provisions allowing a data subject to object to the processing of data regarding him, at no cost and without having to state his reasons;

(31) Whereas the processing of personal data must equally be regarded as lawful where it is carried out in order to protect an interest which is essential for the data subject's life;

(32) Whereas it is for national legislation to determine whether the controller performing a task carried out in the public interest or in the exercise of official authority should be a public administration or another natural or legal person governed by public law, or by private law such as a professional association;

(33) Whereas data which are capable by their nature of infringing fundamental freedoms or privacy should not be processed unless the data subject gives his explicit consent; whereas, however, derogations from this prohibition must be explicitly provided for in respect of specific needs, in particular where the processing of these data is carried out for certain health-related purposes by persons subject to a legal obligation of professional secrecy or in the course of legitimate activities by certain associations or foundations the purpose of which is to permit the exercise of fundamental freedoms;

(34) Whereas Member States must also be authorized, when justified by grounds of important public interest, to derogate from the prohibition on processing sensitive categories of data where important reasons of public interest so justify in areas such as public health and social protection - especially in order to ensure the quality and cost-effectiveness of the procedures used for settling claims for benefits and services in the health insurance system - scientific research and government statistics; whereas it is incumbent on them, however, to provide specific and suitable safeguards so as to protect the fundamental rights and the privacy of individuals;

(35) Whereas, moreover, the processing of personal data by official authorities for achieving aims, laid down in constitutional law or international public law, of officially recognized religious associations is carried out on important grounds of public interest;

(36) Whereas where, in the course of electoral activities, the operation of the democratic system requires in certain Member States that political parties compile data on people's political opinion, the processing of such data may be permitted for reasons of important public interest, provided that appropriate safeguards are established;

(37) Whereas the processing of personal data for purposes of journalism or for purposes of literary of artistic expression, in particular in the audiovisual field, should qualify for exemption from the requirements of certain provisions of this Directive in so far as this is necessary to reconcile

the fundamental rights of individuals with freedom of information and notably the right to receive and impart information, as guaranteed in particular in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; whereas Member States should therefore lay down exemptions and derogations necessary for the purpose of balance between fundamental rights as regards general measures on the legitimacy of data processing, measures on the transfer of data to third countries and the power of the supervisory authority; whereas this should not, however, lead Member States to lay down exemptions from the measures to ensure security of processing; whereas at least the supervisory authority responsible for this sector should also be provided with certain ex-post powers, e.g. to publish a regular report or to refer matters to the judicial authorities;

(38) Whereas, if the processing of data is to be fair, the data subject must be in a position to learn of the existence of a processing operation and, where data are collected from him, must be given accurate and full information, bearing in mind the circumstances of the collection;

(39) Whereas certain processing operations involve data which the controller has not collected directly from the data subject; whereas, furthermore, data can be legitimately disclosed to a third party, even if the disclosure was not anticipated at the time the data were collected from the data subject; whereas, in all these cases, the data subject should be informed when the data are recorded or at the latest when the data are first disclosed to a third party;

(40) Whereas, however, it is not necessary to impose this obligation of the data subject already has the information; whereas, moreover, there will be no such obligation if the recording or disclosure are expressly provided for by law or if the provision of information to the data subject proves impossible or would involve disproportionate efforts, which could be the case where processing is for historical, statistical or scientific purposes; whereas, in this regard, the number of data subjects, the age of the data, and any compensatory measures adopted may be taken into consideration;

(41) Whereas any person must be able to exercise the right of access to data relating to him which are being processed, in order to verify in particular the accuracy of the data and the lawfulness of the processing; whereas, for the same reasons, every data subject must also have the right to know the logic involved in the automatic processing of data concerning him, at least in the case of the automated decisions referred to in Article 15 (1); whereas this right must not adversely affect trade secrets or intellectual property and in particular the copyright protecting the software; whereas these considerations must not, however, result in the data subject being refused all information;

(42) Whereas Member States may, in the interest of the data subject or so as to protect the rights and freedoms of others, restrict rights of access and information; whereas they may, for example, specify that access to medical data may be obtained only through a health professional;

(43) Whereas restrictions on the rights of access and information and on certain obligations of the controller may similarly be imposed by Member States in so far as they are necessary to safeguard, for example, national security, defence, public safety, or important economic or financial interests of a Member State or the Union, as well as criminal investigations and prosecutions and action in respect of breaches of ethics in the regulated professions; whereas the list of exceptions and limitations should include the tasks of monitoring, inspection or regulation necessary in the three last-mentioned areas concerning public security, economic or financial interests and crime prevention; whereas the listing of tasks in these three areas does not affect the legitimacy of exceptions or restrictions for reasons of State security or defence;

(44) Whereas Member States may also be led, by virtue of the provisions of Community law, to derogate from the provisions of this Directive concerning the right of access, the obligation to inform individuals, and the quality of data, in order to secure certain of the purposes referred to above;

(45) Whereas, in cases where data might lawfully be processed on grounds of public interest, official authority or the legitimate interests of a natural or legal person, any data subject should nevertheless be entitled, on legitimate and compelling grounds relating to his particular situation, to object to the processing of any data relating to himself; whereas Member States may nevertheless lay down national provisions to the contrary;

(46) Whereas the protection of the rights and freedoms of data subjects with regard to the processing of personal data requires that appropriate technical

and organizational measures be taken, both at the time of the design of the processing system and at the time of the processing itself, particularly in order to maintain security and thereby to prevent any unauthorized processing; whereas it is incumbent on the Member States to ensure that controllers comply with these measures; whereas these measures must ensure an appropriate level of security, taking into account the state of the art and the costs of their implementation in relation to the risks inherent in the processing and the nature of the data to be protected;

(47) Whereas where a message containing personal data is transmitted by means of a telecommunications or electronic mail service, the sole purpose of which is the transmission of such messages, the controller in respect of the personal data contained in the message will normally be considered to be the person from whom the message originates, rather than the person offering the transmission services; whereas, nevertheless, those offering such services will normally be considered controllers in respect of the processing of the additional personal data necessary for the operation of the service;

(48) Whereas the procedures for notifying the supervisory authority are designed to ensure disclosure of the purposes and main features of any processing operation for the purpose of verification that the operation is in accordance with the national measures taken under this Directive;

(49) Whereas, in order to avoid unsuitable administrative formalities, exemptions from the obligation to notify and simplification of the notification required may be provided for by Member States in cases where processing is unlikely adversely to affect the rights and freedoms of data subjects, provided that it is in accordance with a measure taken by a Member State specifying its limits; whereas exemption or simplification may similarly be provided for by Member States where a person appointed by the controller ensures that the processing carried out is not likely adversely to affect the rights and freedoms of data subjects; whereas such a data protection official, whether or not an employee of the controller, must be in a position to exercise his functions in complete independence;

(50) Whereas exemption or simplification could be provided for in cases of processing operations whose sole purpose is the keeping of a register intended, according to national law, to provide information to the public and open to consultation by the public or by any person demonstrating a legitimate interest;

(51) Whereas, nevertheless, simplification or exemption from the obligation to notify shall not release the controller from any of the other obligations resulting from this Directive;

(52) Whereas, in this context, *ex post facto* verification by the competent authorities must in general be considered a sufficient measure;

(53) Whereas, however, certain processing operation are likely to pose specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes, such as that of excluding individuals from a right, benefit or a contract, or by virtue of the specific use of new technologies; whereas it is for Member States, if they so wish, to specify such risks in their legislation;

(54) Whereas with regard to all the processing undertaken in society, the amount posing such specific risks should be very limited; whereas Member States must provide that the supervisory authority, or the data protection official in cooperation with the authority, check such processing prior to it being carried out; whereas following this prior check, the supervisory authority may, according to its national law, give an opinion or an authorization regarding the processing; whereas such checking may equally take place in the course of the preparation either of a measure of the national parliament or of a measure based on such a legislative measure, which defines the nature of the processing and lays down appropriate safeguards;

(55) Whereas, if the controller fails to respect the rights of data subjects, national legislation must provide for a judicial remedy; whereas any damage which a person may suffer as a result of unlawful processing must be compensated for by the controller, who may be exempted from liability if he proves that he is not responsible for the damage, in particular in cases where he establishes fault on the part of the data subject or in case of *force majeure*; whereas sanctions must be imposed on any person, whether governed by private of public law, who fails to comply with the national measures taken under this Directive;

(56) Whereas cross-border flows of personal data are necessary to the expansion of international trade; whereas the protection of individuals guaranteed in the Community by this Directive does not stand in the way of transfers of personal data to third

countries which ensure an adequate level of protection; whereas the adequacy of the level of protection afforded by a third country must be assessed in the light of all the circumstances surrounding the transfer operation or set of transfer operations;

(57) Whereas, on the other hand, the transfer of personal data to a third country which does not ensure an adequate level of protection must be prohibited;

(58) Whereas provisions should be made for exemptions from this prohibition in certain circumstances where the data subject has given his consent, where the transfer is necessary in relation to a contract or a legal claim, where protection of an important public interest so requires, for example in cases of international transfers of data between tax or customs administrations or between services competent for social security matters, or where the transfer is made from a register established by law and intended for consultation by the public or persons having a legitimate interest; whereas in this case such a transfer should not involve the entirety of the data or entire categories of the data contained in the register and, when the register is intended for consultation by persons having a legitimate interest, the transfer should be made only at the request of those persons or if they are to be the recipients;

(59) Whereas particular measures may be taken to compensate for the lack of protection in a third country in cases where the controller offers appropriate safeguards; whereas, moreover, provision must be made for procedures for negotiations between the Community and such third countries;

(60) Whereas, in any event, transfers to third countries may be effected only in full compliance with the provisions adopted by the Member States pursuant to this Directive, and in particular Article 8 thereof;

(61) Whereas Member States and the Commission, in their respective spheres of competence, must encourage the trade associations and other representative organizations concerned to draw up codes of conduct so as to facilitate the application of this Directive, taking account of the specific characteristics of the processing carried out in certain sectors, and respecting the national provisions adopted for its implementation;

(62) Whereas the establishment in Member States of supervisory authorities, exercising their functions with complete independence, is an essential component of the protection of individuals with regard to the processing of personal data;

(63) Whereas such authorities must have the necessary means to perform their duties, including powers of investigation and intervention, particularly in cases of complaints from individuals, and powers to engage in legal proceedings; whereas such authorities must help to ensure transparency of processing in the Member States within whose jurisdiction they fall;

(64) Whereas the authorities in the different Member States will need to assist one another in performing their duties so as to ensure that the rules of protection are properly respected throughout the European Union;

(65) Whereas, at Community level, a Working Party on the Protection of Individuals with regard to the Processing of Personal Data must be set up and be completely independent in the performance of its functions; whereas, having regard to its specific nature, it must advise the Commission and, in particular, contribute to the uniform application of the national rules adopted pursuant to this Directive;

(66) Whereas, with regard to the transfer of data to third countries, the application of this Directive calls for the conferment of powers of implementation on the Commission and the establishment of a procedure as laid down in Council Decision 87/373/EEC [1];

(67) Whereas an agreement on a *modus vivendi* between the European Parliament, the Council and the Commission concerning the implementing measures for acts adopted in accordance with the procedure laid down in Article 189b of the EC Treaty was reached on 20 December 1994;

(68) Whereas the principles set out in this Directive regarding the protection of the rights and freedoms of individuals, notably their right to privacy, with regard to the processing of personal data may be supplemented or clarified, in particular as far as certain sectors are concerned, by specific rules based on those principles;

(69) Whereas Member States should be allowed a period of not more than three years from the entry into force of the national measures transposing this Directive in which to apply such new national rules progressively to all processing operations already under way; whereas, in order to facilitate their cost-effective implementation, a further period

[1] OJ No L 197, 18. 7. 1987, p. 33.

expiring 12 years after the date on which this Directive is adopted will be allowed to Member States to ensure the conformity of existing manual filing systems with certain of the Directive's provisions; whereas, where data contained in such filing systems are manually processed during this extended transition period, those systems must be brought into conformity with these provisions at the time of such processing;

(70) Whereas it is not necessary for the data subject to give his consent again so as to allow the controller to continue to process, after the national provisions taken pursuant to this Directive enter into force, any sensitive data necessary for the performance of a contract concluded on the basis of free and informed consent before the entry into force of these provisions;

(71) Whereas this Directive does not stand in the way of a Member State's regulating marketing activities aimed at consumers residing in territory in so far as such regulation does not concern the protection of individuals with regard to the processing of personal data;

(72) Whereas this Directive allows the principle of public access to official documents to be taken into account when implementing the principles set out in this Directive,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Object of the Directive

1. In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.

2. Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded under paragraph 1.

Article 2

Definitions

For the purposes of this Directive:

(a) 'personal data' shall mean any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;

(b) 'processing of personal data' ('processing') shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;

(c) 'personal data filing system' ('filing system') shall mean any structured set of personal data which are accessible according to specific criteria, whether centralized, decentralized or dispersed on a functional or geographical basis;

(d) 'controller' shall mean the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by national or Community laws or regulations, the controller or the specific criteria for his nomination may be designated by national or Community law;

(e) 'processor' shall mean a natural or legal person, public authority, agency or any other body which processes personal data on behalf of the controller;

(f) 'third party' shall mean any natural or legal person, public authority, agency or any other body other than the data subject, the controller, the processor and the persons who, under the direct authority of the controller or the processor, are authorized to process the data;

(g) 'recipient' shall mean a natural or legal person, public authority, agency or any other body to whom data are disclosed, whether a third party or not; however, authorities which may receive data in the framework of a particular inquiry shall not be regarded as recipients;

(h) 'the data subject's consent' shall mean any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed.

Article 3

Scope

1. This Directive shall apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system.

2. This Directive shall not apply to the processing of personal data:

— in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and in any case to processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law,

— by a natural person in the course of a purely personal or household activity.

Article 4

National law applicable

1. Each Member State shall apply the national provisions it adopts pursuant to this Directive to the processing of personal data where:

(a) the processing is carried out in the context of the activities of an establishment of the controller on the territory of the Member State; when the same controller is established on the territory of several Member States, he must take the necessary measures to ensure that each of these establishments complies with the obligations laid down by the national law applicable;

(b) the controller is not established on the Member State's territory, but in a place where its national law applies by virtue of international public law;

(c) the controller is not established on Community territory and, for purposes of processing personal data makes use of equipment, automated or otherwise, situated on the territory of the said Member State, unless such equipment is used only for purposes of transit through the territory of the Community.

2. In the circumstances referred to in paragraph 1 (c), the controller must designate a representative established in the territory of that Member State, without prejudice to legal actions which could be initiated against the controller himself.

CHAPTER II

GENERAL RULES ON THE LAWFULNESS OF THE PROCESSING OF PERSONAL DATA

Article 5

Member States shall, within the limits of the provisions of this Chapter, determine more precisely the conditions under which the processing of personal data is lawful.

SECTION I

PRINCIPLES RELATING TO DATA QUALITY

Article 6

1. Member States shall provide that personal data must be:

(a) processed fairly and lawfully;

(b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States provide appropriate safeguards;

(c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;

(d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified;

(e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. Member States shall lay down appropriate safeguards for personal data stored for longer periods for historical, statistical or scientific use.

2. It shall be for the controller to ensure that paragraph 1 is complied with.

SECTION II

CRITERIA FOR MAKING DATA PROCESSING LEGITIMATE

Article 7

Member States shall provide that personal data may be processed only if:

(a) the data subject has unambiguously given his consent; or

(b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; or

(c) processing is necessary for compliance with a legal obligation to which the controller is subject; or

(d) processing is necessary in order to protect the vital interests of the data subject; or

(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed; or

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Article 1 (1).

SECTION III

SPECIAL CATEGORIES OF PROCESSING

Article 8

The processing of special categories of data

1. Member States shall prohibit the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life.

2. Paragraph 1 shall not apply where:

(a) the data subject has given his explicit consent to the processing of those data, except where the laws of the Member State provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject's giving his consent; or

(b) processing is necessary for the purposes of carrying out the obligations and specific rights of the controller in the field of employment law in so far as it is authorized by national law providing for adequate safeguards; or

(c) processing is necessary to protect the vital interests of the data subject or of another person where the data subject is physically or legally incapable of giving his consent; or

(d) processing is carried out in the course of its legitimate activities with appropriate guarantees by a foundation, association or any other non-profit-seeking body with a political, philosophical, religious or trade-union aim and on condition that the processing relates solely to the members of the body or to persons who have regular

contact with it in connection with its purposes and that the data are not disclosed to a third party without the consent of the data subjects; or

(e) the processing relates to data which are manifestly made public by the data subject or is necessary for the establishment, exercise or defence of legal claims.

3. Paragraph 1 shall not apply where processing of the data is required for the purposes of preventive medicine, medical diagnosis, the provision of care or treatment or the management of health-care services, and where those data are processed by a health professional subject under national law or rules established by national competent bodies to the obligation of professional secrecy or by another person also subject to an equivalent obligation of secrecy.

4. Subject to the provision of suitable safeguards, Member States may, for reasons of substantial public interest, lay down exemptions in addition to those laid down in paragraph 2 either by national law or by decision of the supervisory authority.

5. Processing of data relating to offences, criminal convictions or security measures may be carried out only under the control of official authority, or if suitable specific safeguards are provided under national law, subject to derogations which may be granted by the Member State under national provisions providing suitable specific safeguards. However, a complete register of criminal convictions may be kept only under the control of official authority.

Member States may provide that data relating to administrative sanctions or judgements in civil cases shall also be processed under the control of official authority.

6. Derogations from paragraph 1 provided for in paragraphs 4 and 5 shall be notified to the Commission.

7. Member States shall determine the conditions under which a national identification number or any other identifier of general application may be processed.

Article 9

Processing of personal data and freedom of expression

Member States shall provide for exemptions or derogations from the provisions of this Chapter, Chapter IV and Chapter VI for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression.

SECTION IV

INFORMATION TO BE GIVEN TO THE DATA SUBJECT

Article 10

Information in cases of collection of data from the data subject

Member States shall provide that the controller or his representative must provide a data subject from whom data relating to himself are collected with at least the following information, except where he already has it:

(a) the identity of the controller and of his representative, if any;

(b) the purposes of the processing for which the data are intended;

(c) any further information such as

— the recipients or categories of recipients of the data,

— whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply,

— the existence of the right of access to and the right to rectify the data concerning him

in so far as such further information is necessary, having regard to the specific circumstances in which the data are collected, to guarantee fair processing in respect of the data subject.

Article 11

Information where the data have not been obtained from the data subject

1. Where the data have not been obtained from the data subject, Member States shall provide that the controller or his representative must at the time of undertaking the recording of personal data or if a disclosure to a third party is envisaged, no later than the time when the data are first disclosed provide the data subject with at least the following information, except where he already has it:

(a) the identity of the controller and of his representative, if any;

(b) the purposes of the processing;

(c) any further information such as

— the categories of data concerned,

— the recipients or categories of recipients,

— the existence of the right of access to and the right to rectify the data concerning him

in so far as such further information is necessary, having regard to the specific circumstances in which the data are processed, to guarantee fair processing in respect of the data subject.

2. Paragraph 1 shall not apply where, in particular for processing for statistical purposes or for the purposes of historical or scientific research, the provision of such information proves impossible or would involve a disproportionate effort or if recording or disclosure is expressly laid down by law. In these cases Member States shall provide appropriate safeguards.

SECTION V

THE DATA SUBJECT'S RIGHT OF ACCESS TO DATA

Article 12

Right of access

Member States shall guarantee every data subject the right to obtain from the controller:

(a) without constraint at reasonable intervals and without excessive delay or expense:

— confirmation as to whether or not data relating to him are being processed and information at least as to the purposes of the processing, the categories of data concerned, and the recipients or categories of recipients to whom the data are disclosed,

— communication to him in an intelligible form of the data undergoing processing and of any available information as to their source,

— knowledge of the logic involved in any automatic processing of data concerning him at least in the case of the automated decisions referred to in Article 15 (1);

(b) as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data;

(c) notification to third parties to whom the data have been disclosed of any rectification, erasure or blocking carried out in compliance with (b), unless this proves impossible or involves a disproportionate effort.

SECTION VI

EXEMPTIONS AND RESTRICTIONS

Article 13

Exemptions and restrictions

1. Member States may adopt legislative measures to restrict the scope of the obligations and rights provided for in Articles 6 (1), 10, 11 (1), 12 and 21 when such a restriction constitutes a necessary measures to safeguard:

(a) national security;

(b) defence;

(c) public security;

(d) the prevention, investigation, detection and prosecution of criminal offences, or of breaches of ethics for regulated professions;

(e) an important economic or financial interest of a Member State or of the European Union, including monetary, budgetary and taxation matters;

(f) a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority in cases referred to in (c), (d) and (e);

(g) the protection of the data subject or of the rights and freedoms of others.

2. Subject to adequate legal safeguards, in particular that the data are not used for taking measures or decisions regarding any particular individual, Member States may, where there is clearly no risk of breaching the privacy of the data subject, restrict by a legislative measure the rights provided for in Article 12 when data are processed solely for purposes of scientific research or are kept in personal form for a period which does not exceed the period necessary for the sole purpose of creating statistics.

SECTION VII

THE DATA SUBJECT'S RIGHT TO OBJECT

Article 14

The data subject's right to object

Member States shall grant the data subject the right:

(a) at least in the cases referred to in Article 7 (e) and (f), to object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him, save where

otherwise provided by national legislation. Where there is a justified objection, the processing instigated by the controller may no longer involve those data;

(b) to object, on request and free of charge, to the processing of personal data relating to him which the controller anticipates being processed for the purposes of direct marketing, or to be informed before personal data are disclosed for the first time to third parties or used on their behalf for the purposes of direct marketing, and to be expressly offered the right to object free of charge to such disclosures or uses.

Member States shall take the necessary measures to ensure that data subjects are aware of the existence of the right referred to in the first subparagraph of (b).

Article 15

Automated individual decisions

1. Member States shall grant the right to every person not to be subject to a decision which produces legal effects concerning him or significantly affects him and which is based solely on automated processing of data intended to evaluate certain personal aspects relating to him, such as his performance at work, creditworthiness, reliability, conduct, etc.

2. Subject to the other Articles of this Directive, Member States shall provide that a person may be subjected to a decision of the kind referred to in paragraph 1 if that decision:

(a) is taken in the course of the entering into or performance of a contract, provided the request for the entering into or the performance of the contract, lodged by the data subject, has been satisfied or that there are suitable measures to safeguard his legitimate interests, such as arrangements allowing him to put his point of view; or

(b) is authorized by a law which also lays down measures to safeguard the data subject's legitimate interests.

SECTION VIII

CONFIDENTIALITY AND SECURITY OF PROCESSING

Article 16

Confidentiality of processing

Any person acting under the authority of the controller or of the processor, including the processor himself, who has access to personal data must not process them except on instructions from the controller, unless he is required to do so by law.

Article 17

Security of processing

1. Member States shall provide that the controller must implement appropriate technical and organizational measures to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorized disclosure or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing.

Having regard to the state of the art and the cost of their implementation, such measures shall ensure a level of security appropriate to the risks represented by the processing and the nature of the data to be protected.

2. The Member States shall provide that the controller must, where processing is carried out on his behalf, choose a processor providing sufficient guarantees in respect of the technical security measures and organizational measures governing the processing to be carried out, and must ensure compliance with those measures.

3. The carrying out of processing by way of a processor must be governed by a contract or legal act binding the processor to the controller and stipulating in particular that:

— the processor shall act only on instructions from the controller,

— the obligations set out in paragraph 1, as defined by the law of the Member State in which the processor is established, shall also be incumbent on the processor.

4. For the purposes of keeping proof, the parts of the contract or the legal act relating to data protection and the requirements relating to the measures referred to in paragraph 1 shall be in writing or in another equivalent form.

SECTION IX

NOTIFICATION

Article 18

Obligation to notify the supervisory authority

1. Member States shall provide that the controller or his representative, if any, must notify the supervisory

authority referred to in Article 28 before carrying out any wholly or partly automatic processing operation or set of such operations intended to serve a single purpose or several related purposes.

2. Member States may provide for the simplification of or exemption from notification only in the following cases and under the following conditions:

— where, for categories of processing operations which are unlikely, taking account of the data to be processed, to affect adversely the rights and freedoms of data subjects, they specify the purposes of the processing, the data or categories of data undergoing processing, the category or categories of data subject, the recipients or categories of recipient to whom the data are to be disclosed and the length of time the data are to be stored, and/or

— where the controller, in compliance with the national law which governs him, appoints a personal data protection official, responsible in particular:

  — for ensuring in an independent manner the internal application of the national provisions taken pursuant to this Directive

  — for keeping the register of processing operations carried out by the controller, containing the items of information referred to in Article 21 (2),

  thereby ensuring that the rights and freedoms of the data subjects are unlikely to be adversely affected by the processing operations.

3. Member States may provide that paragraph 1 does not apply to processing whose sole purpose is the keeping of a register which according to laws or regulations is intended to provide information to the public and which is open to consultation either by the public in general or by any person demonstrating a legitimate interest.

4. Member States may provide for an exemption from the obligation to notify or a simplification of the notification in the case of processing operations referred to in Article 8 (2) (d).

5. Member States may stipulate that certain or all non-automatic processing operations involving personal data shall be notified, or provide for these processing operations to be subject to simplified notification.

Article 19

Contents of notification

1. Member States shall specify the information to be given in the notification. It shall include at least:

(a) the name and address of the controller and of his representative, if any;

(b) the purpose or purposes of the processing;

(c) a description of the category or categories of data subject and of the data or categories of data relating to them;

(d) the recipients or categories of recipient to whom the data might be disclosed;

(e) proposed transfers of data to third countries;

(f) a general description allowing a preliminary assessment to be made of the appropriateness of the measures taken pursuant to Article 17 to ensure security of processing.

2. Member States shall specify the procedures under which any change affecting the information referred to in paragraph 1 must be notified to the supervisory authority.

Article 20

Prior checking

1. Member States shall determine the processing operations likely to present specific risks to the rights and freedoms of data subjects and shall check that these processing operations are examined prior to the start thereof.

2. Such prior checks shall be carried out by the supervisory authority following receipt of a notification from the controller or by the data protection official, who, in cases of doubt, must consult the supervisory authority.

3. Member States may also carry out such checks in the context of preparation either of a measure of the national parliament or of a measure based on such a legislative measure, which define the nature of the processing and lay down appropriate safeguards.

Article 21

Publicizing of processing operations

1. Member States shall take measures to ensure that processing operations are publicized.

2. Member States shall provide that a register of processing operations notified in accordance with Article 18 shall be kept by the supervisory authority.

The register shall contain at least the information listed in Article 19 (1) (a) to (e).

The register may be inspected by any person.

3. Member States shall provide, in relation to processing operations not subject to notification, that controllers or another body appointed by the Member States make available at least the information referred to in Article 19 (1) (a) to (e) in an appropriate form to any person on request.

Member States may provide that this provision does not apply to processing whose sole purpose is the keeping of a register which according to laws or regulations is intended to provide information to the public and which is open to consultation either by the public in general or by any person who can provide proof of a legitimate interest.

CHAPTER III

JUDICIAL REMEDIES, LIABILITY AND SANCTIONS

Article 22

Remedies

Without prejudice to any administrative remedy for which provision may be made, *inter alia* before the supervisory authority referred to in Article 28, prior to referral to the judicial authority, Member States shall provide for the right of every person to a judicial remedy for any breach of the rights guaranteed him by the national law applicable to the processing in question.

Article 23

Liability

1. Member States shall provide that any person who has suffered damage as a result of an unlawful processing operation or of any act incompatible with the national provisions adopted pursuant to this Directive is entitled to receive compensation from the controller for the damage suffered.

2. The controller may be exempted from this liability, in whole or in part, if he proves that he is not responsible for the event giving rise to the damage.

Article 24

Sanctions

The Member States shall adopt suitable measures to ensure the full implementation of the provisions of this Directive and shall in particular lay down the sanctions to be imposed in case of infringement of the provisions adopted pursuant to this Directive.

CHAPTER IV

TRANSFER OF PERSONAL DATA TO THIRD COUNTRIES

Article 25

Principles

1. The Member States shall provide that the transfer to a third country of personal data which are undergoing processing or are intended for processing after transfer may take place only if, without prejudice to compliance with the national provisions adopted pursuant to the other provisions of this Directive, the third country in question ensures an adequate level of protection.

2. The adequacy of the level of protection afforded by a third country shall be assessed in the light of all the circumstances surrounding a data transfer operation or set of data transfer operations; particular consideration

shall be given to the nature of the data, the purpose and duration of the proposed processing operation or operations, the country of origin and country of final destination, the rules of law, both general and sectoral, in force in the third country in question and the professional rules and security measures which are complied with in that country.

3. The Member States and the Commission shall inform each other of cases where they consider that a third country does not ensure an adequate level of protection within the meaning of paragraph 2.

4. Where the Commission finds, under the procedure provided for in Article 31 (2), that a third country does not ensure an adequate level of protection within the meaning of paragraph 2 of this Article, Member States shall take the measures necessary to prevent any transfer of data of the same type to the third country in question.

5. At the appropriate time, the Commission shall enter into negotiations with a view to remedying the situation resulting from the finding made pursuant to paragraph 4.

6. The Commission may find, in accordance with the procedure referred to in Article 31 (2), that a third country ensures an adequate level of protection within the meaning of paragraph 2 of this Article, by reason of its domestic law or of the international commitments it has entered into, particularly upon conclusion of the negotiations referred to in paragraph 5, for the protection of the private lives and basic freedoms and rights of individuals.

Member States shall take the measures necessary to comply with the Commission's decision.

Article 26

Derogations

1. By way of derogation from Article 25 and save where otherwise provided by domestic law governing particular cases, Member States shall provide that a transfer or a set of transfers of personal data to a third country which does not ensure an adequate level of protection within the meaning of Article 25 (2) may take place on condition that:

(a) the data subject has given his consent unambiguously to the proposed transfer; or

(b) the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of precontractual measures taken in response to the data subject's request; or

(c) the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and a third party; or

(d) the transfer is necessary or legally required on important public interest grounds, or for the establishment, exercise or defence of legal claims; or

(e) the transfer is necessary in order to protect the vital interests of the data subject; or

(f) the transfer is made from a register which according to laws or regulations is intended to provide information to the public and which is open to consultation either by the public in general or by any person who can demonstrate legitimate interest, to the extent that the conditions laid down in law for consultation are fulfilled in the particular case.

2. Without prejudice to paragraph 1, a Member State may authorize a transfer or a set of transfers of personal data to a third country which does not ensure an adequate level of protection within the meaning of Article 25 (2), where the controller adduces adequate safeguards with respect to the protection of the privacy and fundamental rights and freedoms of individuals and as regards the exercise of the corresponding rights; such safeguards may in particular result from appropriate contractual clauses.

3. The Member State shall inform the Commission and the other Member States of the authorizations it grants pursuant to paragraph 2.

If a Member State or the Commission objects on justified grounds involving the protection of the privacy and fundamental rights and freedoms of individuals, the Commission shall take appropriate measures in accordance with the procedure laid down in Article 31 (2).

Member States shall take the necessary measures to comply with the Commission's decision.

4. Where the Commission decides, in accordance with the procedure referred to in Article 31 (2), that certain standard contractual clauses offer sufficient safeguards as required by paragraph 2, Member States shall take the necessary measures to comply with the Commission's decision.

CHAPTER V

CODES OF CONDUCT

Article 27

1. The Member States and the Commission shall encourage the drawing up of codes of conduct intended to contribute to the proper implementation of the national provisions adopted by the Member States pursuant to this Directive, taking account of the specific features of the various sectors.

2. Member States shall make provision for trade associations and other bodies representing other categories of controllers which have drawn up draft national codes or which have the intention of amending or extending existing national codes to be able to submit them to the opinion of the national authority.

Member States shall make provision for this authority to ascertain, among other things, whether the drafts submitted to it are in accordance with the national provisions adopted pursuant to this Directive. If it sees fit, the authority shall seek the views of data subjects or their representatives.

3. Draft Community codes, and amendments or extensions to existing Community codes, may be submitted to the Working Party referred to in Article 29. This Working Party shall determine, among other things, whether the drafts submitted to it are in accordance with the national provisions adopted pursuant to this Directive. If it sees fit, the authority shall seek the views of data subjects or their representatives. The Commission may ensure appropriate publicity for the codes which have been approved by the Working Party.

CHAPTER VI

SUPERVISORY AUTHORITY AND WORKING PARTY ON THE PROTECTION OF INDIVIDUALS WITH REGARD TO THE PROCESSING OF PERSONAL DATA

Article 28

Supervisory authority

1. Each Member State shall provide that one or more public authorities are responsible for monitoring the application within its territory of the provisions adopted by the Member States pursuant to this Directive.

These authorities shall act with complete independence in exercising the functions entrusted to them.

2. Each Member State shall provide that the supervisory authorities are consulted when drawing up administrative measures or regulations relating to the protection of individuals' rights and freedoms with regard to the processing of personal data.

3. Each authority shall in particular be endowed with:

— investigative powers, such as powers of access to data forming the subject-matter of processing operations and powers to collect all the information necessary for the performance of its supervisory duties,

— effective powers of intervention, such as, for example, that of delivering opinions before processing operations are carried out, in accordance with Article 20, and ensuring appropriate publication of such opinions, of ordering the blocking, erasure or destruction of data, of imposing a temporary or definitive ban on processing, of warning or admonishing the controller, or that of referring the matter to national parliaments or other political institutions,

— the power to engage in legal proceedings where the national provisions adopted pursuant to this Directive have been violated or to bring these violations to the attention of the judicial authorities.

Decisions by the supervisory authority which give rise to complaints may be appealed against through the courts.

4. Each supervisory authority shall hear claims lodged by any person, or by an association representing that person, concerning the protection of his rights and freedoms in regard to the processing of personal data. The person concerned shall be informed of the outcome of the claim.

Each supervisory authority shall, in particular, hear claims for checks on the lawfulness of data processing lodged by any person when the national provisions adopted pursuant to Article 13 of this Directive apply. The person shall at any rate be informed that a check has taken place.

5. Each supervisory authority shall draw up a report on its activities at regular intervals. The report shall be made public.

6. Each supervisory authority is competent, whatever the national law applicable to the processing in question, to exercise, on the territory of its own Member State, the powers conferred on it in accordance with paragraph 3. Each authority may be requested to exercise its powers by an authority of another Member State.

The supervisory authorities shall cooperate with one another to the extent necessary for the performance of their duties, in particular by exchanging all useful information.

7. Member States shall provide that the members and staff of the supervisory authority, even after their employment has ended, are to be subject to a duty of professional secrecy with regard to confidential information to which they have access.

Article 29

Working Party on the Protection of Individuals with regard to the Processing of Personal Data

1. A Working Party on the Protection of Individuals with regard to the Processing of Personal Data, hereinafter referred to as 'the Working Party', is hereby set up.

It shall have advisory status and act independently.

2. The Working Party shall be composed of a representative of the supervisory authority or authorities designated by each Member State and of a representative of the authority or authorities established for the Community institutions and bodies, and of a representative of the Commission.

Each member of the Working Party shall be designated by the institution, authority or authorities which he represents. Where a Member State has designated more than one supervisory authority, they shall nominate a joint representative. The same shall apply to the authorities established for Community institutions and bodies.

3. The Working Party shall take decisions by a simple majority of the representatives of the supervisory authorities.

4. The Working Party shall elect its chairman. The chairman's term of office shall be two years. His appointment shall be renewable.

5. The Working Party's secretariat shall be provided by the Commission.

6. The Working Party shall adopt its own rules of procedure.

7. The Working Party shall consider items placed on its agenda by its chairman, either on his own initiative or at the request of a representative of the supervisory authorities or at the Commission's request.

Article 30

1. The Working Party shall:

(a) examine any question covering the application of the national measures adopted under this Directive in order to contribute to the uniform application of such measures;

(b) give the Commission an opinion on the level of protection in the Community and in third countries;

(c) advise the Commission on any proposed amendment of this Directive, on any additional or specific measures to safeguard the rights and freedoms of natural persons with regard to the processing of personal data and on any other proposed Community measures affecting such rights and freedoms;

(d) give an opinion on codes of conduct drawn up at Community level.

2. If the Working Party finds that divergences likely to affect the equivalence of protection for persons with regard to the processing of personal data in the Community are arising between the laws or practices of Member States, it shall inform the Commission accordingly.

3. The Working Party may, on its own initiative, make recommendations on all matters relating to the protection of persons with regard to the processing of personal data in the Community.

4. The Working Party's opinions and recommendations shall be forwarded to the Commission and to the committee referred to in Article 31.

5. The Commission shall inform the Working Party of the action it has taken in response to its opinions and recommendations. It shall do so in a report which shall

also be forwarded to the European Parliament and the Council. The report shall be made public.

6. The Working Party shall draw up an annual report on the situation regarding the protection of natural persons with regard to the processing of personal data in the Community and in third countries, which it shall transmit to the Commission, the European Parliament and the Council. The report shall be made public.

CHAPTER VII

COMMUNITY IMPLEMENTING MEASURES

Article 31

The Committee

1. The Commission shall be assisted by a committee composed of the representatives of the Member States and chaired by the representative of the Commission.

2. The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft within a time limit which the chairman may lay down according to the urgency of the matter.

The opinion shall be delivered by the majority laid down in Article 148 (2) of the Treaty. The votes of the representatives of the Member States within the committee shall be weighted in the manner set out in that Article. The chairman shall not vote.

The Commission shall adopt measures which shall apply immediately. However, if these measures are not in accordance with the opinion of the committee, they shall be communicated by the Commission to the Council forthwith. It that event:

— the Commission shall defer application of the measures which it has decided for a period of three months from the date of communication,

— the Council, acting by a qualified majority, may take a different decision within the time limit referred to in the first indent.

FINAL PROVISIONS

Article 32

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive at the latest at the end of a period of three years from the date of its adoption.

When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

2. Member States shall ensure that processing already under way on the date the national provisions adopted pursuant to this Directive enter into force, is brought into conformity with these provisions within three years of this date.

By way of derogation from the preceding subparagraph, Member States may provide that the processing of data already held in manual filing systems on the date of entry into force of the national provisions adopted in implementation of this Directive shall be brought into conformity with Articles 6, 7 and 8 of this Directive within 12 years of the date on which it is adopted. Member States shall, however, grant the data subject the right to obtain, at his request and in particular at the time of exercising his right of access, the rectification, erasure or blocking of data which are incomplete, inaccurate or stored in a way incompatible with the legitimate purposes pursued by the controller.

3. By way of derogation from paragraph 2, Member States may provide, subject to suitable safeguards, that data kept for the sole purpose of historical research need

not be brought into conformity with Articles 6, 7 and 8 of this Directive.

4. Member States shall communicate to the Commission the text of the provisions of domestic law which they adopt in the field covered by this Directive.

Article 33

The Commission shall report to the Council and the European Parliament at regular intervals, starting not later than three years after the date referred to in Article 32 (1), on the implementation of this Directive, attaching to its report, if necessary, suitable proposals for amendments. The report shall be made public.

The Commission shall examine, in particular, the application of this Directive to the data processing of sound and image data relating to natural persons and shall submit any appropriate proposals which prove to be necessary, taking account of developments in information technology and in the light of the state of progress in the information society.

Article 34

This Directive is addressed to the Member States.

Done at Luxembourg, 24 October 1995.

For the European Parliament	*For the Council*
The President	*The President*
K. HÄNSCH	L. ATIENZA SERNA

AIDA Europe

Copenhagen, June 11th / 12th 2015

Plenary Session : Hot Topics

SANCTIONS

The proliferation of economic and financial sanctions – and the way they are decided and implemented -- as a tool to cater with international crisis is reaching a point which triggers a wide number of questions as to their conformity with general principles of law and, more specifically, with the law of contracts, whether commercial, financial or insurance related.

Sanctions can be dictated by sovereign authorities only and normally fall under the privilege of sovereignty of central governments of a country. They may also be decided by multilateral or regional institutions such as the UN or the EU. But sanctions voted by such entities have generally to be translated into national laws by the national Parliament of each country participating to such sanctions.

However, even under sovereign privilege, government acts may be legal or, if contrary to laws, arbitrary and thus subject to challenges and recourses in the concerned jurisdictions.

-A) Legal status of international sanctions

It is essential to point out first what is the status of sanctions in international public law.

Embargoes and economic sanctions have developed after World war II and the creation of the United Nations as an alternative action to traditional wars.

UN resolution 2625 (October 24th 1970) states :

No State may apply or encourage the use of economic, political or any other measures in order to constrain another state to subordinate its sovereign rights and to obtain from such State any advantage of any kind.

Anyway, embargoes and economic sanctions are not recognized as acts of war which would dictate the immediate cessation of any commercial, financial or economic relation between the countries involved in the war.

The United Nations Chart in its article 45 recognizes the possibility to take international coercitive action but considers sanctions can only be decided by international institutions as a consequence of a violation of another international obligation. It is clearly stated that sanctions can be decided by international institutions only, which, as far as United Nations are concerned, proves being difficult with the veto power of the five permanent members of the Security Council.

Thus, in reality, embargoes and economic or financial sanctions have been mainly decided by Western countries over the past fifty years despite the Manila declaration adopted on November

15th 1982 which excludes any method of settlement of a crisis that involves the use of threat or force.

. Many specialists of international law consider them as a « fait du prince » act and an action of violence.

The sanctions track record over the past 40 years show that multilateral sanctions (UN or assimilated) rather represent an exception and, when they exist, generally bear on limited and targeted activities. The vast majority of sanctions have been decided by national or regional entities, which normally limit the scope and extent of their implementation to their own jurisdictions.

Such geographical limits naturally create discriminations between the nationals of a country enforcing sanctions and those of other countries which are not bound by them.

- **B) Implementation of sanctions in today's world**

Why has it become a major issue nowadays ? Because of globalization. Private or corporate actors more and more intervene from various operational bases while, according to principles of law, national regulations or legislations apply only within the territory of each country.

Let us thus try and list the main legal issues triggered by sanctions in the past two or three decades .

1) **Sanctions against physical or moral persons.**
   It is a general principle of law of nations that no physical or moral person can be sentenced without having been given the chance to defend its viewpoint ina fair and equitable trial.
   Under the privilege of sovereignty, governments would be allowed to take sanction against a country. It would be a government to government issue, which would impose omn all private entities from the sanctioning country.

   But are such governments exceeding their authority when they decide targeted sanctions against individuals or corporate entities without the latter having been sentenced by a court ?

Some qualified and respected voices , in the political field, such as former French President Giscard d'Estaing or ex German chancellor Gerhardt Schroeder, or business leaders in industry or finance consider decisions made outside the UN as illegal. Would the community of law, lawyers,judges, law professors or academics share the same view ?

Indeed, even in a case where a government takes the decision to pronounce sanctions against individual persons or entities of another country, wouldn't they have at least a duty to clearly qualify who is or is not subject to such sanctions ?

In the recent occurrences, governments have been unable to provide a comprehensive list of sanctioned persons or entities, using vague formulations such as « related person « or « directly or indirectly » owned by a sanctioned person.

Is it legal according to law of nations to require private players to decide who is directly or indirectly owned by a sanctioned person or entity ?

Some cases have already occurred where a corporate firm was quoted as not under sanction by a given private player of a Western country while another financial company of the same Western country considered it as under sanctions. Who decides ? Who has the duty- and the right to decide whether such firm is under sanctions?

Of course, the matter could be referred to governments of the sanctioning country. But, as they have no obligation to give answer, and even less in a timely manner, by the time the answer comes, if it ever comes, the underlying business opportunity is gone.

Even worse, as it happened few months ago with sanctions on Russia, some among the listed corporations or banks have gone to trial at the European Court of Justice to ask judges to withdraw them ab initio from the list.

Would the Court decide that these entities should never have appeared on the list or have been qualified as sanctioned while there was no evidence that they should, how would be treated those who unilaterally quoted such entities as banned? Would they be exposed to indemnifying the prejudice of reputation they caused to these firms? And what about the responsibility of the government which would have abusively decided to list such names as sanctioned?

The issue is particularly complex when it comes to corporate entities because they may easily change ownership and trade registers which keep record of changes in by laws or transfer of shares may not easily disclose the necessary nformation in due course. Rules of majority are sometimes unclear and it may reveal extremely difficult to discern an effective shareholder from a nominee or bearer.

For the international insurance industry, consequences are potentially heavy with the direct insurer being either constrained to conduct long investigations to check the identity of the final beneficiary of the insurance coverage, while again the data base may not be accessible or accurate. In addition to it, the time lag to conduct large investigations may not be compatible with the necessity to keep the applicant covered at due date. The consequence will be that many international insurers will withdraw from the geographic area, even if the scope of sanctions is limited. Furthermore, in countries where insurance operates under a declarative mechanism - where the false declaration is sanctioned by the voidance of the policy- it is questionable whether an in depth investigation of the beneficiaries may help improving the implementation of sanctions.

The matter is even more complicated for insurance groups having subsidiaries in the sanctioned country. They are obviously caught in a conflict of jurisdiction unless it is internationally recognized that their local entity is subect to local laws only and sanctions free. They are as well vulnerable to retaliation by the sanctioned country which may decide to withdraw their license locally or worse confiscate their assets.

The complexity is even worse for international reinsurers.

Either they are required to proceed to full investigation of all potential final beneficiaries of an insurance policy and have to acknowledge it is not practically and contractually possible because a)

they cannot have direct information on all insured, their relatives or the beneficiaries and depend on the willingness of the ceding company to acquire them and b) because the time lag necessary to check all the information would not be compatible with the time constraint of the treaty placement.

The alternative is that they rely upon the declaration of the ceding company, if the latter accepts and incur the risk of wrongful assessment of the beneficiaries (which by the way, keep changing regularly), at least as far as corporate signatures are concerned.

This is even more a reason to require governments to produce clear and exhaustive lists of the persons or entities they intend to sanction. Anyway, any person or entity potentially targeted by sanctions should have the right to receive information on the grounds for sanctions to apply to them and be offered a possibility to challenge the decision in court.

2) **Who is deemed to apply sanctions ?**

Here again, governments – Western in the first instance – seem to try and go beyond their authority. The sanction decrees state that sanctions must be implemented by all citizens as well as by all foreing residents in the sanctioning country.

It is important to remind that embargoes and sanctions being not qualified as acts of war, the rule by which any citizen of the belligerent party is held by its government decision and can be sued for high treason to the homeland if breaching them.

When addressing sanctions and embargoes, governments should have to make a choice: either they consider that all foreigners residing in their countries are held by their sanctions, and then all their nationals residing abroad would be held by the laws of their country of residence; or governments consider that all their national citizens are held by their sanctions , which thus would not apply to citizens of other nations, themselves held by their national rules.

In international law, only the first alternative should be considered as it is clearly established that non resident nationals are held by the laws and regulations of the countries where they reside, not by those of their motherland.

The issue is even more complex when it comes to corporate entities.

For many years now, sanction makers have decided that sanctions should apply to any corporate where one of their nationals holds an interest (shares, loans….).

But, until now, international corporate rules clearly state that the nationality of a cmpany is fixed by the location of its registered head office.

One can easily guess how puzzled would be the CEO of the local subsidiary in a sanctioned country of a company headquartered in a sanctioning country.

The conflict of jurisdiction may even occur outside the sanctioned country. Many among western countries have passed laws forbidding their resident corporations to apply sanctions decided by other countries.

Let us then imagine the case of the German fully owned subsidiary of a US firm.

According to US law, the subsidiary would be held by US sanctions but, following German law, the same entity would be forbidden to apply them.

The attempt to impose transnational rules goes even beyond the issue of nationality of the actor.

Many europeans players for instance have decided to go beyond Europeans sanctions and to apply as well the wider and taugher US sanctions.The US authorities have decided that the use of USdollar reference in an international contact was submitting the said contract to US law. Is such a statement valid in international law or is it still possible for contracting parties to choose the law of the contract the way they like ? Typical cases are the ones where banks have decided to freeze all liquidities of a sanctioned person, not only in the US but worldwide, not only in US Dollar but in all currencies, while the said person was only partly sanctioned by the US but not by the EU or other European countries. The decision were dictated by the fact that the given banks were scared of possible difficulties on their US business.

Is there any other word than « arbitrary » to qualify such a decision ?

Some other still go beyond it and simply decide to stop any business relation directly or indirectly in relation with a sanctioned country, even if sanctions are partial and limited.The reasons for it are ignorance on one hand, fear and uncertainties about sanctioning authorities reactions.

Sanctions as they are presently written put on private companies the onus of ascertaining they are not supporting directly or indirectly a sanctioned person or entity. It becomes so extreme that financial institutions are nowadays feeling that they are constrained to go beyond the prudential principle « KYC » (Know Your Client) and to try and know as well the clients of their client, their relatives, associated de jure or de facto parties under threat of severe sanctions if sanctioning authorities end up deciding that they helped a forbidden entity. Such an interpretation is of course abusive. A global climate of general suspicion leads a large number of economic actors to limit if not stop thier business activities only because rulers are unable to list a comprehensive but limitative list of sanctioned persons or entities and unable to limit the implementation of sanctions to persons and entities under their jurisdiction, i.e.residents.

The principle should be that residents should be held to best efforts to try and identify their counterparties and liable in case of obvious breach of sanctions but should not be held liable in case they have done their best efforts but pertinent informations would not be available or accessible.

Here again the consequences for the insurance industry may be heavy.

. On reinsurance for instance, it is advisable to wonder whether the sanctions requirements are not challenging the principle of the reinsurance contract itself. It has been constantly recognized that a contract has to be compliant with laws and regulations in force at the time of its signature. In the reinsurance field, quota share treaties are covering all risks bound during a given underwriting

period until expiry of such risks. In the construction, engineering, liability or trade branches, among others, the time life of covered risks widely exceed a calendar year.

If it is admitted that sanctions should apply immediately to all existing exposures in the treaty, the « follow the fortune » principle which has been historically ruling relations between insurers and reinsurers is just dead.
How could possibly the management of a direct insurer go to its board of directors, or to rating agencies or security committees and claim that he has bought a sufficient and reliable reinsurance protection to protect its balance sheet. If the reinsurer is given the right – or is constrained -to make a different assessment from the ceding company about sanctions, who will bridge the reinsurance gap and secure the creditworthiness of the direct insurer ? Here again, it may happen that a European reinsurer having a big book of business in the US will extend its list of sanctions to persons and entities not hit by EU sanctions. Furthermore, no one can predict which country is next on the list of sanctions

In the absence of international conventions ruling these situations, governments – the governments which day after day praise the state of law and respect of human rights – give the impression that there is a big gap between words and acts. And here again, private persons or entities will be tempted to « find » a court which shall decide which rules they should observe. Moreover, while Western nations have been promoting globalization and free trade during the past three decades and encouraging their entreprises to invest in other countries, trying to impose their national rules beyond their borders could only result in a major prejudice caused to their foreign trade and investment operators. Such an inconsistent attitude would simply result in a contraction of international trade and investment flows and a possible global recession.

But beyond political and economic consequences, lawmakers and the law professionnals are now faced with a major challenge : Is the world entering in an era where arbitrary attitude or decisions will end up prevailing against state of law or will the international community re-affirm the predominance of law against unilateralism and violation of The United Nations rules ?

It is maybe time for judges and lawpeoples to step in the « sanctions game » and to fix the extent and limits of their compatibility with international laws and regulations. Governments will doubtless moderate their abuses if they start being held financially liable for the prejudice they cause to their economic residents and to persons or entities which were illegitimately sanctioned by them.