AIDA EUROPE

**“Insurance and Reinsurance Law:**

**Present Questions & Future Challenges”**

NH Barbizon Palace Hotel, Prins Hendrikkade, 59-72, 1012AD Amsterdam

**CIVIL LIABILITY WORKING PARTY**

Vice-Chair: Dr Sheila Dziobon

**MEETING THURSDAY 26 MAY 2011**

15.15 – 17.45 hrs

Henry Hudson II

**MINUTES**

1. SD welcomed the participants and explained the absence of the Chair of the Working Party. It was noted that the agenda had been posted on the website prior to the meeting and participants could see that this meeting built on discussions at the Paris Congress on the role of mandatory insurance. In addition, it opened a discussion on the relationship between establishing civil liability and the existence (or non-existence) of liability insurance.
2. PRESENTATIONS: The following presentations were made and copies of the powerpoints for a) and c) are on our website.
3. 'Should there be mandatory liability insurance covering marine pollution?' *Presented by Kyriaki Noussia, Athens, Greece.*

Dr Kyriaki Noussia put forward an argument, based on the current regulatory regime, to persuade the participants that liability insurance should be mandatory when the impact of a major disaster (such as the BP spillage) is so grave. During her very interesting presentation she drew the audience’s attention to difficult issues such as the ‘incommensurability of environmental damage’ and consequently the assessment of damages and the assessment of risk. She concluded that on present evidence it seemed unlikely that sufficient insurance coverage would be obtained on a voluntary basis and, because of the global nature of the potential harm, international regulation must be discussed. Reflecting the overall theme of the conference clearly this presents a ‘future challenge’.

This gave the participants plenty to think about. A point raised was the extent of the mandatory insurance regime suggested. With complex drilling operations it was apparent that there may be any number of sub-contractors associated with a project. Should the mandatory element apply to them also? In response it was felt that it should but it was accepted that the introduction of mandatory insurance needs to be debated.

1. 'Should judges take into account, or, on the contrary, disregard the availability of insurance when deciding a civil liability claim?' *Presented by Natalie Vloemans, Rotterdam, Netherlands.*

Natalie Vloemans gave a detailed analysis of the question. In accord with many of the delegates she gave evidence to support the importance of insurance in pursuing a claim initially. It was clear that without the expectance that a defendant could realise any award made if the claim was successful there was little point encouraging the claim. She explained that in the Netherlands (as in other civil law jurisdictions) the ‘irrelevancy principle’ applied to the insurance question when the case was before the court to decide the question of liability. Ms Vloemans presented cases to the participants to illustrate her points and this paper gave rise to much discussion.

The discussion which followed was interesting and many participants contributed giving a wider perspective on the issues raised. In the majority of cases it was apparent that the position in the Netherlands reflected practice elsewhere. An exception was Israel where the claimant would always have a third party claim (a direct claim against the insurer) and here the question of whether, and to what extent, the defendant had insurance to cover the claim was one which was answered prior to the civil liability action. This seemed to be an exception. It was noted however that although unstated the presumed existence of insurance (in a motoring case perhaps) might be a ‘makeweight’ in deciding for the claimant in a difficult case. This view was put forward by Ms Vloemans in her paper and supported by a member of the judiciary from the audience.

1. ‘Compulsory employers’ liability insurance and civil liability for mesolethioma in the English courts’ *Presented by Rob Merkin and Sheila Dziobon.*

The final paper was presented by Professor Merkin and Dr Dziobon and looked at the difficulties encountered by some claimants in the English courts even though they are making the claim within an environment where insurance is compulsory. The slides for this presentation are on our website. Attention was drawn to the many difficulties which the employees, harmed by exposure to asbestos at work causing mesolethioma, have had in realising their claims. It was noted that these difficulties are still present even though parliament has offered support to claimants by statute. It is expected that in December 2011 the Supreme Court will give its opinion on the difficulties which have arisen over the wording of insurance contracts concluded many years ago, the interpretation of the contract terms having been used to deny liability in some of these cases. The paper tied together the difficulties which still persist even when a mandatory insurance regime does exist (picking up on Dr Noussia’s paper), and both the ‘irrelevancy principle’ and the ‘makeweight’ arguments presented by Ms Vloemans.

An interesting discussion followed with many questions on both the tortious claim and subsequent attempts to enforce a successful judgment. Attention was drawn to the apparent societal objective (as evidenced by the intervention of the legislature) that these claims ought to be satisfied and that the proper route for compensation was through the insurance regime. It was noted that there was a strong public interest here as compensation was being paid through the social security system at the moment.

1. Date and venue of next meeting

SD brought the meeting to a close as we had run out of time and thanked the presenters and the participants for engaging with the topics and raising many questions for further discussion.

The next meeting of AIDA Europe is in London, September/October 2012.