

XIIIth AIDA WORLD CONGRESS, PARIS 17-20 MAY 2010
MINUTES OF THE SESSION OF THE WORKING PARTY “DISTRIBUTION
OF INSURANCE PRODUCTS”

Wednesday, 19th May 2010.

Present (Round Table):

Prof. Dr. Ioannis Rokas (presiding)
Prof. Dr. Pierpaolo Marano
Dr. Kyriaki Noussia
Dr. Christos Chryssanthis

Others (attending):

Caldas Luis Filipe Simoes
Castle Jacquetta
Cerini Diana
Christofilou Alkistis-Marina
Ciechowicz-Jaworska Aneta
Demirakou Maria
Dufwa Bill
Hayaux Du Tilly Yves
Konstantinou Anna
Ntontou Stamatia
Pais de Vasconcelos Pedro
Tarasiuk Anna
Pucci Ernesto
Vlasto Hedwige
Ramirez Alfonso
Rodriguez Vobano
Ramirez P. Juan C.
Benisch Gabriella
Berdi Erika
Wandt Manfred
Michael Jean.Luc
Coutin Stefan
Tuokko Kaija
Ong Ling
Foubert Terese-Francoise
Tarasiuk Anna
Cereijido Pablo
Hayanx
Haurie Mailys
Smith William
Pozo Humberto
Jones Michelle
Heilbron Carlo
Frigessi Marco

Sakellaridou Stella
Lundstrom Rose-Marie
Sexton Chenn
Chenn Caroline
Papachronopoulos Nikos
Unan Samim
Labudovic Jasmina
Jovanovic Bosan
Kabelis Marianne
Peggy Sharon

I. Welcoming of the Members and Attendees to the session of the WP “Distribution of Insurance Products”; Greeting to the French AIDA Chapter, for hosting the XIIIth AIDA World Congress as well as the present Working Party session; Reference to the - so far - activities of the WP “Distribution of Insurance Products”.

The President of the Working Party “Distribution of Insurance Products”, Prof. Dr. Ioannis Rokas, welcomed every one to the session of the Working Party “Distribution of Insurance Products” in terms of the XIIIth AIDA World Congress held in May 2010 in Paris, France. He referred to the activities of Working Party of Insurance Products so far. In doing so, he mentioned the publication of the book by himself, as Editor and contributor, with the following reference: Prof. Dr. I.K.Rokas (Ed.), *“Insurance Intermediaries, Distribution of Insurance Products, AIDA Working Party May 2007 – May 2010, A comparative Study”*, A.N.Sakkoulas & Bruylant Publishers, Athens, 2010, ISBN: 978-960-15-2369-9, which contained the papers / articles corresponding to the speeches made - under his Presidency - during the previous sessions of the Working Party (i.e. in the period from its formation in November 2006 up to May 2010). Not least he announced the appointment of Prof. Dr. Pierpaolo Marano and of Dr. Kyriaki Noussia respectively as Co-Chair and Secretary of the WP for the period 2010-2014.

II. Presentations, Reports & Discussions

1. Five-Minute Presentations

Speakers from various countries (including Poland, Mexico, Argentina, Israel, Italy, Australia, Portugal and Serbia) made short, i.e. up to a maximum of five minutes, presentations on issues arising within the insurance intermediary context. The short presentations were primarily focused on issues relating to the brokers’ liability as well as to cases giving rise to conflicts of interest.

2. Report

Prof. Dr. Pierpaolo Marano: “The Cross-Border Activities of Insurance Brokers. A Comparative Perspective (Doing Insurance Business in the EU)”

Prof. Dr. I. Rokas introduced Prof. P. Marano and the topic of his speech and invited him to deliver the said speech. Prof. P. Marano spoke on the topic of cross-border

activities of insurance brokers. At first, Prof. P. Marano made a reference to the definition of “insurance mediation” - contained in the European Insurance Mediation Directive.¹

With respect to insurance business pursued by intermediaries established in a non European Community country and operating on a Member State’s territory, under the FOS principle, the applicable law is that of the Member State. In view of this, Prof. P. Marano stressed out that an equal treatment should be guaranteed to all persons carrying out or authorized to carry out insurance mediation activities of the market. He then made certain proposals to be considered by the drafting of the amendment to the European Insurance Mediation Directive, which are expected to effect cases of identical conditions of granting insurance mediation service between third countries and the EU.

Moreover, Prof. P Marano elaborated on the function of Single European passport in the insurance intermediaries’ context.²

Prof. P. Marano concluded his presentation by mentioning that an insurer established in a Member State has recourse towards an independent person/ intermediary established in another Member State, under the following conditions: a) in case the independent intermediary is subject to the direction and control of the insurance company that it represents, and b) in case it is able to commit the insurance company and and c) in case it has received a permanent brief.

Discussion

Prof. Sexton commented that with respect to said condition a clarification should be performed where reference is made to the insurer. Furthermore, he examined the possibility that the said condition applies to reinsurance intermediaries. An attendee, originating from Australia, referred to Australia’s intent to ban commissions in the context of risk-bearing insurance (investment) products and to obtain fees directly from the client. Prof. Marano commented, in this respect, that there is a debate at EU-level whether the MiFID Directive’s rules could apply in the insurance context. An

¹ According to this definition, all activities of introducing, proposing or carrying out other work preparatory to the conclusion of contracts of insurance, or of concluding such contract, or of assisting in the administration and performance of such contracts, in particular in the event of a claim, are regarded as insurance mediation, whereas an insurance intermediary is a natural or legal person who takes up or pursues insurance mediation for remuneration. The European Directive does not apply to: a) insurance mediation services provided in relation to risks and commitments located outside the European Community, b) insurance mediation activities carried out in third countries and c) activities of European Community insurance or reinsurance undertakings carried out through insurance intermediaries in third countries.

² By this, he stated that the home Member State will inform the host Member State of the intermediaries’ intent to conduct its business at a cross-border level or to establish a branch operation. Specially, with regard to the “freedom to provide services” system, he referred to the Commission’s Interpretative Communication entitled “*Freedom to provide services and the general good in the insurance sector*” and also made the following remarks: a) the freedom to provide services has a temporary character, b) insurers/intermediaries shall inform competent authorities of the home Member State of their intention to provide services on FOS system, c) the host Member State shall, within one month of said notification, inform the host Member State thereof, d) the host Member State is entitled to prevent a service provider from improperly exercising FOS to circumvent the rules which would otherwise be applicable to it, in the case of its establishment in the territory of that host Member State.

attendee originating from Portugal commented that one of the most important issues with respect to commissions is the duty of disclosure that the insurance intermediaries have towards the insureds. Other attendees from Spain and Brazil commented also in this respect.

3. Report

Dr. Christos Chryssanthis: "Insurance Intermediaries duties and liabilities"

Prof. Dr. I. Rokas introduced Dr. Ch. Chrissanthis and the topic of his speech and invited him to deliver the said speech. Dr. Ch. Chrissanthis spoke on the topic of the duties and liabilities of insurance intermediaries. Dr. Ch. Chrissanthis started his presentation with a reference to the various types of insurance intermediaries.³

After a reference to the European Insurance Mediation Directive's purposes, i.e. market integration, transparency, reinforcement of insured protection, reinforcement of quality of services and limitation of non regulated intermediation, all of which should be kept in mind, Dr. Ch. Chrissanthis proceeded in making the remark that the level of liability of each intermediary depends on the type of intermediation which is each time performed. As a matter of fact, he went on and pointed out that the higher the level of independence and expertise of the insurance intermediary, the higher also its liability should be.

It was stated also that the liability of tied intermediary is limited/restricted due to its limited role, whereas the liability of insurance brokers/ agents is stricter. The same pattern applies as regards the expertise.⁴

Dr. Ch. Chrissanthis also referred to factors which typically increase the level of diligence required by the intermediary.⁵

He then examined the brokers' duties towards the insured. In this context, he categorized the duties into duties arising out of contract, those occurring during the inception of the risk and those arising after the inception of the risk. More specifically, he mentioned the insurance broker's obligation to obtain coverage as well as its duty to provide information and advice to the insured. As regards the question if the broker is obliged to assist the claim's handling or litigation, Dr. Ch. Chrissanthis stated that such a duty is usually affirmed.

In conclusion, Dr. Ch. Chrissanthis noted the tendency towards a more increased level of liability and finally remarked that although, on the one hand, the rigorousness of

³ Brokers/agents according to the traditional distinction; independent/tied intermediaries according to the European Insurance Mediation Directive

⁴ In other words, the "licensed status" of insurance intermediary creates expectations about the expertise, professionalism, experience, skill, diligence and organization of the intermediary. The higher those expectations are, the stricter the liability is.

⁵ These are the following: the administration of foreign interest leads to an increase in the required level of diligence, the duration of existing cooperation and the type of insurance. With respect to the latter, Dr. Ch. Chrissanthis pointed out that the more specialized the insurance is, the more liability the insurance intermediary has.

liability could help the efficiency of the market as a whole, nevertheless, at the same time it could increase the level of litigation.

Discussion

Dr. I. Rokas made the remark that, at least from a European market perspective, the more expertise the insurance intermediary has, the more rigorous its liability will be. An attendee from Italy pointed out the establishment of a warranty fund in Italy with respect to non-registered brokers or brokers in bankruptcy. Finally, Prof. B. Duwfa stated - given the fact that the liability becomes more and more severe - that it might be useful to adopt an economic approach in national law, which in its turn will help identify the exact percentage of liability and effect a respective apportionment of liability.

4. Report

Dr. Kyriaki Noussia: "Obligation Of the Broker vis-à-vis The Insurer"

Prof. Dr. I. Rokas introduced Dr. Kyriaki Noussia and the topic of her speech and invited her to deliver the said speech. Dr. K. Noussia spoke on the topic of the brokers' obligations towards the insurers. Dr. K. Noussia's initial remark was that the insurance broker is basically an agent of the insured, but that – at times - the insurance broker owes various duties to the insurer. Thus, the agency relationship has a double character. In this respect, she cited and elaborated on the case of *Excess Life Ass. Co. Ltd. v. Fireman's Fund Ins. Co of Newark NJ* which states the cases in which a broker owes an unquestionable agency duty to the insurer regarding the functions performed by him.

Furthermore, Dr. K. Noussia referred to relevant case-law which elaborates on the said agency.⁶

Dr. K. Noussia went on to examine the issue from a continental European perspective (Germany, Greece) whereby she noticed that post-contractual information duties were regulated in complex of insurance contract law.

She concluded her presentation by stating that broker is typically an agent of the assured; exceptionally, broker may have obligations towards insurers, when no conflict of interest is entailed of where the insured has consented with this obligation. With respect to the cited case-law, Dr. K. Noussia drew, among others, the following

⁶ Specifically, in *Pryke v. Gibbs Hartley Cooper*, it was ruled that broker does owe any general duty of care to underwriters, but it has such a duty when undertaking investigations. Furthermore, in *Northern Mutual Insurance v. O' Brien*, the insurance broker which had undertaken to cancel policy on insurer's behalf was held liable in tort to the insurer for failing to do so. Not least, in *SAIL v Farex Gie*, while it was held on appeal, that SAIL was not liable to Farex for failing to disclose that there was no valid retrocession, Saville J. stated that "a broker carrying out instructions on behalf of an intending assured may have to undertake obligations to other in order to perform its mandate". In *Goshawk Dedicated Ltd v Tyser & Co Ltd* the Court of Appeal overturned the decision of Commercial Court and stated that there is always an implied term in Lloyd's market that placing & claims document shown to underwriters and retained by the insured's Lloyd's brokers should be available to underwriters if reasonably required. In this respect, Dr. K. Noussia said that there is now authority for the proposition that in certain appropriate circumstances a broker acts as a "common agent". Last but not least, Dr. K. Noussia cited and discussed *HIH Casualty & General Ins. Co. vs. JLT Risk Solutions*.

conclusions, i.e. that the obligation of the broker towards the insurer does not presuppose a general duty of care towards the insurer, but that, however, a particular duty of care may arise giving rise to tortious liability towards the insurers.

Discussion

Dr. Ch. Crissanthis elaborated further on the issue from a continental European perspective (mainly with regard to Greece but also generally from an EU perspective)

5. Report

Prof. Dr. Ioannis Rokas: "Bankassurance & Consumer Protection"

Dr. I. Rokas held his speech on "Bankassurance & Consumer Protection". In this respect he examined two issues: a) the duty of care owed to a client by banks acting in sales and promotions of life insurance products in comparison to that owed to the insured by insurance intermediaries, and b) the protection level of a bank's client who buys life insurance products from the bank in comparison to the consumer who buys life insurance from another type of insurance intermediary. In this respect, Dr. I. Rokas mentioned that in the insurance intermediary context the main risk is the conflicts of interest, whereas in the context of the bankassurance the existing risk is that of a bank taking undue advantage of consumer confidence.

Dr. I. Rokas questioned whether the fact that banks are the most regulated entities within the financial sector and usually work under the responsibility of the insurer in selling life insurance products, suffices to prevent the misleading of the consumer. To this question he gave a negative answer which was justified via the use: a) of an example of a client who relies on the advice of the bank employee acting as his investment consultant for quite a long period of time and where the following risks arise, i.e. a. although the client does not have sufficient knowledge of some proposals, the client trusts the bank and especially the bank employee and b) of a bank employee which could not be familiar with selling insurance products and therefore could fail to explore the specific insurance need of and to inform the client of the risks entailed in the insurance. In the opinion of Dr. I. Rokas, such case entails a high probability that the clients could be misled. Furthermore, Dr. I. Rokas noticed that the bank's tendency to equate life insurance and bank investment products, especially when the premium is paid once and the consumer is not provided with documents classified as "policy", could lead to the fact that the bank's client who buys several investment products can easily end up being insured without realizing this.

Given the fact that in terms of bankassurance the consumer's interest may be harmed owing to the facts that the consumer is not sufficiently cautious and the seller does not have an in-depth knowledge of the product, Dr. I. Rokas mentioned that there is indeed no reason for bank employees who sell insurance products to be less qualified in doing so than those of intermediaries whose main job is insurance intermediation. Thus, in conclusion, in the opinion of Dr. I. Rokas, the regulator/supervisor should pay more attention to the risk that banks could take, as a result of the potential undue advantage of the consumers' confidence in them.

6. Presentations

Finally, additional short speeches of representatives from all over the world were contributed.

III. Closing Remarks

Prof. Dr. I. Rokas expressed his thanks to all the WP attendants and made suggestions for future topics of discussion for the forthcoming sessions (eg in Lisbon in Nov. 2010 and in Amsterdam in May 2011).

In conclusion, he referred to the WP's intention to draft and send to the EU Commission comments as well as a proposal with regard to the pending amendment of the Insurance Mediation Directive.

Minutes prepared by Ms Maria Demirakou, LL.M Harvard, Attorney at Law