FERMA
Federation of European Risk Management Associations

European Insurance Law: When Theory Meets Practice

One Day Conference - Paris - June 03, 2013

Conference Report

When theory meets practice: the intersection of risk management and insurance law

FERMA and the insurance law association AIDA Europe welcomed leading jurists, risk managers and insurance practitioners from eight countries for a one day seminar in Paris on four topical issues: coinsurance, trade embargoes, serial claims and directors' and officers' coverage.

FERMA board member Günter Schlicht said: "Insurance coverage can become an enterprise-wide issue, so it's important for legal experts and risk managers to understand what happens when the law is applied in business."

This report summarises the panel sessions. The participants are listed with the individual topics after the executive summary.

EXECUTIVE SUMMARY

1. **Coinsurance**
   An efficient practice but with few harmonised definitions and regulations across Europe. It can be a complex issue with legal uncertainty for risk managers when it comes to claims.

2. **Serial Claims**
   The wording is key and will determine most of the time if a group of claims can be treated as one loss. Cases are very fact-specific and the court will be looking for the unifying factor.

3. **Embargo**
   Embargoes are quite unpredictable, and it is hard and costly to keep track and identify exposures to sanctions, especially when dealing with BRIC and other third countries.

4. **D&O**
   Public order and wrongful intent are the main boundaries of D&O insurance. Emerging risks like kidnap and ransom linked to piracy or terrorism are generating uncertainties.

1) Coinsurance: Who owes what, when and to whom?

Moderator: Professor Herman Cousy, Catholic University of Leuven, Belgium

Panellists: Professor Alberto Monti, Institute for Advanced Study IUSS, Pavia, Italy

Alexis Valencon, Partner SCP Bouchaert Ormen Passemar Sportes, France

Jo Willaert, board member FERMA, Corporate Risk Manager, Agfa-Gevaert, Belgium

The session addressed coinsurance from several perspectives:

Coinsurance is an effective way to create capacity for large risks. On this there was universal agreement. Loss of the Block Exemption Regulation would be damaging for businesses that need this capacity.

Transparency is the key, not switching relationships every year to try to get a better price. If the leader quotes too high a price for a risk, others will compete. If the quote is too low, the market will not support.

Despite its importance, there is, however, little European law on coinsurance so there is no unifying law across the member states. Two directives, one from 1978 and the other from 2009, deal with coinsurance. They give a simplistic definition based on three features: one single contract, large risks only and a leading insurer who sets the terms and conditions.

In the absence of more complete European law, there's a lack of harmonisation and not enough details to describe the numerous aspects of coinsurance today. Question is: Do we need to fill this empty box with EU legislation? Is there such a need for new regulation?

The EU has, instead, concentrated on the competition aspects to co-insurance through regular review of the Block Exemption Regulation.

Coinsurance can be divided into two configurations: vertical where the amount of risk is broken down into different levels of exposure, known as

excess layers, and horizontal where insurers accept some part of risk within a single layer.

Some programmes for large and complex programmes combine both structures with excess layers on top of percentage shares of the primary layer or layers(s).

The more complicated the structure, the more complicated the claims settlement process. Trust in the leader to strike a fair deal for the whole panel is important, but there is evidence that co-insurers increasingly want to take an active role in the management.

“The question whether coinsurance is useful for covering certain large risks has the answer yes.

Ask the question whether the legal framework is adequate in terms of clarity, certainty, contractual relationships and regulatory framework, and the answer is no.

What does coinsurance mean? That is the challenge and the charm!”

Professor Herman Cousy

For the risk manager, two important contract issues are 1: whether the coinsurance is treated as a single contract with a single premium or whether they are all separate contracts; 2: whether there is joint and several liability among the coinsurers or not.

The first makes the insurance buyer’s life easier. He has only to deal with the lead insurer and the broker or leader deals with the coinsurers. This is where the question of trust comes in.

Joint and several liability is important in the event of one party failing or refusing to pay. It will depend on national law whether this has to be expressly excluded from the contract. Again, it would give the buyer more certainty but few insurers will want to take on that exposure.

In general, there is a general lack of legal certainty on coinsurance contracts and many of legal dimensions. Disputes often leads to litigation before regular court (ie not arbitration) and in the absence of a specific solution, the court may look for parallels in other decisions dealing with syndication.

The question whether co(re) insurance is useful for covering certain large risks has the answer yes. Ask the question whether the legal framework is adequate in terms of clarity, certainty, contractual relationships and regulatory framework, and the answer is no. No because have we have a particular issue. We don’t know very well from a legal view standpoint what coinsurance is.

2) Serial claims: when fiction trumps reality

Fiction: globalised claims (aggregation)

Reality: (warranty exhaustion)

Moderator: Jérôme Kullmann, Director of the Institut des Assurances de Paris, France

Panellists: Frédérique Bannes, Head of Legal and Claims Department, Liberty Mutual Insurance Europe, France

David Kendall, Partner and Co-Chair of the international insurance and reinsurance department, Edwards Wildman Palmer UK

Nicholas Rönnenberg, Senior Executive Manager, Munich Re, Germany

Another insurance area where there is little legislation is on serial claims. There is provision in some laws but nothing specific to the issue. At what point does a group of claims become serial? This question is particularly relevant in the context of EU proposals for a system of collective redress.

The particular issue is what defines a group of claims to the extent that they are treated as one loss under the insurance policy. For risk managers there are advantages and disadvantages to both. In the absence of specific laws, it will depend heavily on the wording. English decisions can be influential in other European countries.

> ***"Why do insurers keep repeating words that they know will give rise to disputes?"***
>
> ***Professor Jérôme Kullmann***

- A series of claims treated as one loss will have only one deductible, but is also likely to exhaust the primary coverage and trigger excess layer(s) or reinsurance. Are the limits available likely to meet the claims?
- A group of similar claims not aggregated could be subject to a deductible for each and every, but have access to the whole policy limit.
- The difference will also have implications for claims notification time limits.
- The basis of aggregation may be different under primary, excess and reinsurance wordings.

- Among the issues that have been the subject of judgement are the definition of one event and one cause. The law also distinguishes between cause and consequences.
- In liability cases, the decision can affect how the policyholder settles claims with third parties – should it be first past the post or should there be a reasonable time allowed for most claims to be made and then a pro-rata apportionment?

David Kendall

"It all depends on the particular circumstances whether aggregation and treatment as one is in the best interest of the insured, insurer or even reinsured."

The unifying factor depends on the policy wording. A diversity of clauses, languages and jurisdictions add complications. Cases are very fact-specific, so it's very difficult to generalise the wording.

Reinsurance and retrocession claims as a result of the terrorist attack on the World Trade Center in 2001 were the subject of several cases and judgements turned on the definition of one event and one cause. Event is more narrowly construed than cause. It must happen at a particular time or place. Each plane going into the WTC was an event, but the conspiracy was not.

Another issue was pensions mis-selling. The UK court did not accept that a bank's failure to train its staff fully was a single event as the bank argued.

Frédérique Bannes mentioned a Feb 2013 case in the French Cour de Cassasation where the issue was one of fraud in asset management. (My note isn't clear but I think the CdC decided that this was not an aggregation of claims; the fraud was too wide to be considered an event.)

Nicholas Rönnenberg said that for companies working globally this was a big issue. Outside the US and UK, the reference tended to be to an event. He added that those liability policies may also be written on an occurrence, claims made or losses reported basis with different definitions, which could have a material effect.

"Why do insurers keep repeating words that they know will give rise to disputes?" asked Jérôme Kullmann rhetorically.

Pierre made a point about captives it would be nice to follow

3) Embargoes: the discordant music of European national public orders

Moderator: Harry Daugird, Senior Advisor Risk Management Insurance, ABB, Germany

Panellists:

Christian Felderer, CEO Hub Zurich & Hub General Counsel, SCOR Global P&C, General Legal Counsel, Switzerland

Robert Walsh, Group Financial Crime Officer, AXA Group Legal and Compliance, United States

Professor Manfred Wandt, Director of the Insurance Law Institute at the University of Frankfurt am Main.

“Discordant is the appropriate word,” Harry Daugird.

Although companies have to consider the direct exposure of their activities to regulations enforcing international sanctions, there are also indirect impacts such as the ability to insure. Starting primarily in 2010/2011 the UN and EU started imposing sanctions against Iran, and individual countries, especially the US, passed regulations to enforce the sanctions.

Insurers felt obliged to include sanctions clauses in policies even though it seemed contradictory, as policies already had wording saying that if the coverage was contrary to public policy, it would be null and void. Insurers, however, are very anxious about the risk of sanctions from the US which might mean they could not use US dollars or deal with US banks. “It would be a corporate death penalty if a company could not work in US dollars or work with US banks. I don’t know how you could stay in business.” Bob Walsh

The risk of criminal penalties as also concentrates the mind of the board.

Embargoes have been continually shifting as the US, the UN and European Union try to shape the behaviour of certain countries, most specifically Iran. It’s impossible for all the parties to keep track of all the running developments all the time.

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Trade contracts may be long term; insurance policies are normally at least 12 months. New regulations can take effect during the contract period. (What are the implications for the existing contract?)

> ***The Buffer Approach***
>
> ***"Say no when a deal comes close to the edge of an embargo area, even if it can be legally done now."***
>
> ***Bob Walsh, AXA***

The risks for corporate insurance buyers are:

- Cover unavailable from suitable security for business which they are already contracted to do or new business which they can legally do.
- Trouble getting claims paid because of the locus of the loss
- Global compliance

There can be a difference between what risks insurers are able to insure and what contracts European businesses are able to enter into. However, a buffer approach can help manage the risks. "Say no when a deal comes close to the edge of an embargo area, even if it can be legally done now." Bob Walsh

It is very difficult to identify all third parties who could be affected by a deal, especially since other countries may be less committed to the sanctions than the western powers, and there is no prohibition on dealing with these countries. Brazil, Russian, India and China (BRIC) are, for example, developing their own international banking networks (SWIFT and IBAN) which will make US extraterritorial threats less potent on them.

Companies should not feel they have to go beyond what is asked. More extreme due diligence is very expensive.

The great confusion of many different sanctions clauses makes it very difficult to achieve any certainty in global policies. There was widespread confusion between insureds and insurers because of the high level of complexity of the embargo regulations, the interpretation by courts and authorities is unprecedented.

Insurers maintain they needed the critical regulations in the interests of transparency, contract certainty and compliance.

4) Directors' and officers' liability: Phantasm on forbidden Guarantees

Moderator: Emmanuel Silvestre, Vice President – Speciality Casualty Underwriting Manager Liberal Mutual Europe, France

Panellists:

Jorge Angell, Senior Partner LC Rodrigo Abogados, Spain

Ottó Csurgó, Chief Executive Officer, CIG Pannónia EMABIT

John Curran, Partner DLA Piper

In terms of civil law, the boundary of D&O insurance is the concept of wrongful intent. In the absence of fraud or wilful misconduct, companies may generally indemnify their directors and senior officers for damages awarded as a result of negligent acts or omissions, and D&O insurers may cover them.

Fraudulent and wilful misconduct are likely to be excluded, but an insurer who wants to refuse a claim on those grounds may have to prove it (unless there has been a court judgement.) This isn't necessarily easy.

When it comes to administrative fines and penalties, the key notion is public order, but with the expanding range of fines companies and the directors and officers face, some leeway is creeping into the outright bans on reimbursement of fines. "It depends on how bad you've been." John Curran DLA Piper

> ***Reimbursement of Fines***
>
> ***"It depends on how bad you've been."***
>
> ***John Curran, DLA Piper***

The employer has always a duty to preserve the safety of the employees. D&O insurance cannot be used to cover employer's negligence to fulfil such duties.

Second, although in theory some policies could claw back money advanced for defence costs if the individual is found guilty, this doesn't happen much... "It could be just throwing good money after bad," said Jorge Angell. "Or knocking a man when he's down," said John Curran of DLA Piper.

There are circumstances in some jurisdictions when D&O policies can be rescinded, normally in case of fraud, failure to disclose material facts or serious misrepresentation. Om some jurisdictions, the insurer may be able to cancel for non-payment.

D&O policy can cover payment of ransom regarding piracy acts but there are serious uncertainties if the kidnapping is linked to terrorist organisations.