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CONFERENCE

FACILITATING PROFESSIONAL INDEMNITY INSURANCE FOR EUROPEAN LAWYERS

vendredi 30 janvier 2004

MAISON DU BARREAU • 2, RUE DE HARLAY • 75001 PARIS

MARSH

AON

Conseil des Barreaux de l'Union européenne – Council of the Bars and Law Societies of the European Union
Association internationale sans but lucratif
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Programme

09.30 - 09.45 **Welcome and opening of the conference**
Hans-Juergen Hellwig, President of the CCBE and Chairperson of the conference
Jean-Marie Burguburu, President of the Paris Bar

09.45 - 10.15 **CCBE Professional indemnity insurance project for European lawyers: context, conclusions and work in progress**
Hans-Juergen Hellwig, President of the CCBE

COFFEE BREAK

10.30 - 12.00 **Presentation of the three projects facilitating cross-border practice for European lawyers:**

1. **The common questionnaire**
2. **The minimum standards for European Practice Indemnity Insurance**
3. **The "difference in conditions" policy (DIC)**

Denis Vivant et Jérôme Tajan, Aon France
Sandra Neilson, Marsh UK, William Bouvier, Marsh France and Nathalie Caes, Marsh Belgium

12.00 - 12.10 **Address by Margot Fröhlinger - Head of Unit "Services" - Internal Market DG - European Commission**

12.10 – 12.30 **Questions**

LUNCH

13.30 - 15.30 **Workshops to discuss the three projects**

1. **The common questionnaire**
   Chairman: Daan de Snoo, Dutch delegation
   Facilitator: Andrew Darby, Law Society of England & Wales
2. **The minimum standards for European Practice Indemnity Insurance**
   Chairman: Robin Healey, UK delegation
   Facilitator: Silvestre Tandeau de Marsac, French delegation
3. **The "difference in conditions" policy (DIC)**
   Chairman: Holger Sassenbach, Allianz, Germany
   Facilitator: Steve Abrahams, Royal and SunAlliance, UK

15.45 - 16.15 **Reports from the facilitators of the workshops on the various projects**

COFFEE BREAK

16.30 - 17.00 **Synthesis**
Pierre Mathieu, Avocat et Ancien Bâtonnier d'Aix-en-Provence

17.00 - 17.30 **Closing remarks**
Hans-Juergen Hellwig, President of the CCBE and Chairperson of the Conference

17.30 - 18.30 **Cocktail reception given by Aon and Marsh**

Welcome and opening of the conference, by Hans-Juergen Hellwig, President of the CCBE

The CCBE is happy to welcome all the participants to this second conference on professional indemnity insurance for lawyers taking place in the beautiful premises of the Paris bar.

We are happy to be facilitating a second conference on the subject of insurance which is another opportunity to bring together the bars and law societies on one side, and the insurance industry on the other. This time, we are in fact able to present you with some concrete solutions to facilitate lawyers' cross-border practice as far as PI insurance is concerned.

If you remember, and I know most of you will, as most of you attended the conference in Brussels in November 2002, we discussed mainly during the first conference the difficulties encountered by lawyers when using their right to establish freely within the EU in the context of the Establishment Directive of 1998; we discussed also the reasons for such difficulties related to insurance, and we presented you with the results of the CCBE survey undertaken in 2001 and 2002. This survey showed the great disparities between the different PI insurance national schemes within the EEA, hence the difficulties faced by lawyers going abroad to practise.

You will remember also that some ideas for solutions were proposed on this occasion; today, we are in fact delivering to you three outcomes of the last conference.

We really hope that our conference today will allow us to discuss these projects and to finalise them, so that they can be put into practice as soon as possible.

Before giving the floor to my colleague, Jean-Marie Burguburu, I would like to thank him and the Paris Bar for letting us organise this second conference on PI insurance for European lawyers in their premises.

I will also take this opportunity to thank our sponsors Aon and Marsh not only for their financial support but also for their support in kind from the beginning on the technical aspects of this project. Special thanks go to Denis Vivant, Jérôme Tajan from Aon and to Jérôme Goy who just left Aon to join the bar and to Nathalie Caes, Catherine Ramaekers, and Sandra Neilson from Marsh. Special thanks also go to the Société de Courtage des Barreaux who joined the team of the sponsors more recently. We would not have been able to organise this conference without this excellent partnership with all three of our sponsors.

Opening speech by Jean-Marie Burguburu, President of the Paris Bar

I wish that I could have stayed longer with you because the theme you will address this morning is very important for two reasons. On the one hand, the issue regarding the insurance of liberal professionals is crucial; it is the counterpart of our freedom and of our independence. Unfortunately, this insurance is necessary to cover possible claims against our activity, and as we are our own masters regarding the service which we provide to our clients, this insurance is necessary so that our clients know that we are covered. This is an essential point. On the other hand - and it is precisely the point you are dealing with - is the question of the finding of solutions to disparities between insurance schemes in our different countries.

You know that some of our colleagues meet difficulties to register with the Bar in another country than their home State because the insurance requirements are greater in the host State than in their home State and that this distortion is an obstacle to free establishment of colleagues within the European Union. I think that the work led by the CCBE in this respect could establish a connection between the various points of view, and to find a base in the items already examined during the conference in November 2002 on an insurance scheme which would be equivalent or identical in the various countries. These are technical, dry and difficult subjects but they will be well studied by the speakers who will talk today and I am sure that you will find constructive solutions.

I wish you all a good working day within the “House of the Bar”, which is your house. This is the Paris lawyers’ House, French lawyers’ house, and European Union lawyers’ house.

The CCBE project on professional indemnity insurance for European lawyers: background, conclusions and ongoing work, by Hans-Juergen Hellwig

I/ Background

The CCBE is the Council of the Bars and Law Societies of the European Union.

The CCBE is composed of delegations from all the European Union and the European Economic Area. Besides, it includes representatives from Bars of Central and Eastern Europe.

Our members are Bars and Law Societies themselves, through which we represent indirectly lawyers, i.e. more than 700,000 lawyers.

Our mission is to defend the whole profession and notably its core values. Therefore, we are the spokesperson of the profession before countries and governments, European institutions and all international organisations.

We also help Bars, hence lawyers, to comply with the developments arising out of the European construction. In this context, we work to facilitate the free movement of lawyers within the EU pursuant to the objectives of the Rome Treaty and Directives applicable to lawyers. Within this framework, we organised the present conference in order to address the ways to facilitate the establishment of lawyers in another Member State as regards professional indemnity insurance.

We are pleased to welcome today representatives from all EU Member States and also some representatives from acceding countries on 1st of May 2004 (Poland, Czech Republic). We are also pleased to welcome representatives from Turkey and FYROM.

The European Commission is also well represented by Mrs Margot Froehlinger from DG Internal Market who we warmly thank for her attendance and her interest in our work on insurance and in the CCBE in general. Mrs Froehlinger has kindly agreed to make a speech during the morning to address briefly the Commission’s point of view on our professional indemnity insurance project.

We also note the attendance of two representatives from the European Committee for Standardisation which works on the establishment of norms not only for products but also for services.

Before leaving the floor to the brokers who will be presenting you with our three projects, I will focus on the description of the legal framework applicable to lawyers’ cross-border practice, notably the provisions on professional indemnity insurance.

There are European directives which are applicable to lawyers and which allowed to achieve one of the most liberalised market in the world. Lawyers are free to practise their services and to establish in a territory which will become wider with the future enlargements.

II/ Background of the project

There are mainly three Directives (1977, 1989, and 1998) and also the proposal for a directive on Services in the Internal Market which was issued by the European Commission on 13 January 2004.

A/ The three Directives applicable to lawyer

The first Directive applicable to lawyers (77/249/EEC Directive on free provision of services) allows lawyers to temporary provide their services in another Member State. So, the lawyer can go to another Member State to temporary practise his professional activity.

In 1989, a second directive provides for a general system of recognition of higher education diplomas which applies to a great deal of professions, notably to lawyers. This text allows also the recognition of the title and the professional qualification of a lawyer who wishes to go and practise his professional activity in another country. Pursuant to this Directive, a Belgian lawyer could decide to practise in Italy and have his title recognised in order to become a lawyer in Italy. In most countries, except in Denmark, the lawyer was required to pass an exam called the ability test.

Then, in 1998, the Establishment Directive brought a more radical change. According to it, a Belgian lawyer can decide to go in Italy to practise as a lawyer and establish there on a permanent basis under his Home title. Once established, he can practise many activities since he can give legal advice not only on the Home law or European law, but also in the Host law, in this case the Italian law.

While complementing the two Directives mentioned before, this last Directive introduces a more important change as it will really allow the integration of the lawyer.

If we use the example above, a Belgian lawyer could, after three years of effective practice, become an Italian lawyer without taking the exam. The Directive removed the obligation to take an aptitude test for an established lawyer practising the local law for three years.

This Directive also allows a lawyer from another Member State to practice in another State than the one where he qualified and to provide legal advice non only on his national law, but also on the local and European law.

It is important to note that during the first three years of his establishment and while the lawyer has not formally applied to acquire the Host title, he is registered with his Home and Host Bars. This means that he is still subject to professional rules which apply in his Home State and to possible disciplinary sanctions if he infringes the rules. This also implies that he has, due to his registration with the Host bar, to comply with the provisions and rules applicable in that State. The Host Bar can expressly forbid him to practise some activities and it can also deny him the right to work under an employment contract although it might be authorised in his Home country.

These provisions have some effects as regards professional indemnity insurance which is the insurance taken out by the lawyer against the risks arising out of his professional activity.

Indeed, a lawyer is subject both to rules on professional indemnity insurance of his Home Bar and also to that of the Host Bar where he practises under the 1998 Directive, also called the “Establishment Directive”.

We now better understand the difficulties encountered as regards insurance for cross-border practice since most of the time, the insurance rules vary from one State to the other.

The greatest difficulty could come from the way the insurance policy is taken out by lawyers. The insurance policy is taken out on an individual basis, by the lawyer himself, in Germany for instance, but its content should comply with some legal provisions, notably regarding minimum insurance cover.

In other States, in France or Belgium for example, the Bar takes out insurance for all its members, on a collective basis, and the registration with the Bar implies the obligation to pay the premium.

Between those two systems, there are mixed systems where in the Netherlands for instance, the lawyer is free to choose between the insurance policy taken out by the Bar or for the individual policy of its own choice. In the United Kingdom, the system is in principle free. The lawyer can choose the insurer among a list of qualified insurers drawn by the Law Society of England and Wales; those qualified insurers propose insurance policies complying with the very detailed and precise requirements of the Law Society.

Besides the way in which the taking out of the insurance policy is organised, there are disparities in the civil liability and insurance laws of the Member States (the definition of the term “fault” and “damages” may vary from State to State. The provisions in a policy aiming to restrict or cancel civil liability and any rights at law aiming to avoid the insurance cover might be assessed differently in the Member States. There may also be differences between the States regarding the activities of the lawyers themselves).

Although the European Commission is working on ways to harmonise contract law or at least to define some norms shared by the Members states and albeit there is work on the definition of rules used to determine the law applicable to cross-border contracts, this work will take some time and the disparities will therefore remain for a while.

In this context, and fortunately for professional indemnity insurance, there are provisions aiming to settle the difficulties which might be encountered by lawyers.

There is no provision on insurance in the first two Directives (1977 and 1989).

This is not the case for the Establishment Directive which states in Article 6 that even though a Host State can require the lawyer practising on its territory under his Home title to comply with the same insurance rules applicable to his Host State colleagues, the lawyer can apply for exemption to the obligation to take out an insurance in the Host State.

However, he has to prove that he is effectively covered by for his activity in the Home State, and that the cover is equivalent as regards terms and conditions as well as the scope of his cover.

If there is a partial equivalence, the Host Bar can require the lawyer to take out an additional insurance to make up for the shortcomings of the Home insurance policy. This additional insurance will complement the Home one in order to comply with the Host insurance requirements.

These provisions are aimed to facilitate issues that might arise in the insurance area since bars are encouraged to recognise insurance policies which may have been taken out in Home States and not to require all lawyers coming from another Member State to take out insurance on their territory.

The CCBE took identical measures in after the adoption of the Directive so that the *“bodies responsible in each Member State for arranging and/or providing professional indemnity insurance as mentioned in Article 6.3 of the Directive shall liaise with corresponding bodies in other Member States to ensure that, so far as possible, insurance arrangements made by a lawyer in one Member State are respected and recognised in another Member State both before and after integration under Article 10 of the Directive, to avoid problems relating to double premiums and double insurance*”.

Unfortunately, these provisions have not solved the difficulties encountered and the assessment of the equivalence of insurance policies often leads the Bar to require in the end, because this is such a burden and a difficult task and maybe also for understandable concerns regarding security, to take out an insurance complying with the local rules.

It is also true that the insurance market does not always answer the lawyers’ needs in terms of cross-border practice and establishment and that the insurers can be reluctant with regards the risk of being sued before foreign Courts. It might also be difficult for them to assess the risk when a lawyer practises, through various law firms, in several Member States.

In that context, the CCBE, aware of the problems encountered by the lawyers, wished to address this issue in order to find solutions allowing to move forward. We will come back to these solutions later.

B/ The proposal for a Directive of the European Parliament and the European Council on Services in the Internal Market

The European Commission has just issued a new proposal for a framework Directive to be applied horizontally to all services with, however, some exceptions such as financial services. It is also aimed to be applicable to the legal profession. This Directive complements the three above mentioned Directives and does not intend to challenge them.

The Commission issued on 30 July 2002 a report on "the State of the Internal Market for Services" within the framework of its strategy allowing to ensure an effective functioning of this market.

In this report, the insurance issue, more specifically professional indemnity insurance for professionals, and notably lawyers was already mentioned as one of the areas to which a particular attention must be paid due to repeated difficulties.

The aim of this Directive is to set up a legal framework allowing to remove obstacles not only to free establishment of service providers, but also to free movement of services in the Member States.

As far as free establishment is concerned, it aims, amongst others, to facilitate the establishment through simplified procedures and the implementation of single points of contact where a service provider could accomplish administrative procedures regarding his activity with the possibility of registering on line. This single point of contact will transmit all the necessary information on the practice of this activity. Therefore, and it is important for the Bars, it is not imposed to have only one Bar per country which gathers all information and which will serve as single point of contact. Each bar of the Member State concerned may fulfil this role of single point of contact.

Within this framework, Article 5 forbids a Bar to require that a document from another Member State be produced in its original form, or as a certified copy or as a certified translation, "*save in the cases provided for in other Community instruments or where such a requirement is objectively justified by an overriding reason relating to the public interest.*"

This provision has an impact on our work and notably on the assessment of the existence of a policy insurance taken out in the Home State and mainly of its equivalence pursuant to Article 6 of the Establishment Directive.

According to the draft proposal, any document proving the compliance with the insurance obligation should be sufficient. Now, we will have to see to what extent a Bar could ask for the original version of the insurance policy and for its certified translation into the language of the Host country. Ascertaining the existence of an insurance policy covering the professional activity practised in another Member State remains crucial for the lawyer and mainly for his client who benefits from his legal services. Could such a requirement be an objective exception justified by the overriding reason related to the public interest which is mentioned in the proposal? This issue is to be clarified, but I let you already assess it.

In this proposal for a directive, which I remind is only a proposal which still needs to be examined by the European Parliament and then adopted by the Council of Ministers, there are specific provisions on professional indemnity insurance.

As for the free establishment, Article 14(7) expressly states that some requirements are forbidden and have to be repealed, such as "*the obligation to provide or participate in a*

financial guarantee or to take out insurance from a service-provider or body established in their territory".

A Bar could not, pursuant to the provisions, require a services provider to take out insurance in the Host State before granting access to the profession. Therefore, some Bars which require to take of a local insurance notably through the registration with the Bar (cases where insurance policies are collectively taken out by the Bar) or those who systematically require it regardless the existence of a policy taken out in the Home State, could no continue to keep such requirements.

As far as the freedom to provide services on a temporary basis is concerned, there is no specific provision on insurance. A simple rule is provided, i.e. the 'country of origin' principle applies to service providers. Lawyers, who are governed by the 1977 Directive, are excluded from this principle.

Finally, the draft Directive includes a chapter addressing the quality of services and including, amongst others, information which should be given to clients regarding the provider and the services he provides.

In the same chapter, the Article 27 only deals with the insurance issues and professional guarantees.

This Article states the following:

"Member States shall ensure that providers whose services present a particular risk to the health or safety of the recipient, or a particular financial risk to the recipient, are covered by professional indemnity insurance appropriate to the nature and extent of the risk, or by any other guarantee or compensatory provision which is equivalent or essentially comparable as regards its purpose."

Besides, the provisions of Article 6 of the Establishment Directive are included in paragraph 3 as it is said that professional insurance is only to be required in the Host state if the provider is not already covered "*by a guarantee which is equivalent, or essentially comparable as regards its purpose, in another Member State in which the provider is already established.*"

Being covered against risk linked to one's activity becomes mandatory and a lawyer already covered for his activity in a Member State can ask for exemption to this obligation in the Host State. He only has to check if he is effectively and adequately covered and if his insurance cover will extend to his practice in another Member State.

This Directive is therefore essential for our ongoing work and we can note that this work will not have to be modified since the CCBE has kind of anticipated the Commission's work on that issue. Mrs Froehlinger will give the Commission's point of view later in the day after the speeches of the insurance brokers.

III/ Presentation of the work of the Steering Committee

The working group "Steering Committee", which is composed of lawyers and insurers/brokers, was set up by the CCBE in February 2003 and has been working on three projects arising out of the previous conference, i.e. a common questionnaire, the establishment of minimum standards for professional indemnity insurance, and a difference in conditions policy or DIC.

It has already begun to work on the handling of funds by a lawyer and the cover of the risk linked to this handling since this issue has been raised during the work of the groups on a common questionnaire and on minimum standards.

On that purpose, I invite you to refer to the small comparative study made on that issue, which is in your briefcase, as I will not address further this issue.

The work, achieved by the Steering Committee in one year will be presented to you today. This Committee was composed of representatives of the legal profession and also external people, i.e. brokers and insurers, which is quite unique within the CCBE.

This working group gathered several times in 2003 in Brussels to work on three projects which will be presented to you today by our experts from Aon and Marsh.

These are: a common questionnaire, the minimum standards for professional indemnity insurance and a difference in conditions policy.

The aim of a common questionnaire is to help the Bars and their brokers or insurers in their assessment of the equivalence of insurance policies and to promote the recognition of policies taken out in the Home State.

This questionnaire is also a way to harmonise the treatment of the application for registration under the Establishment Directive, so as to harmonise the way these applications are to be dealt with especially as regards PI insurance. The aim is to facilitate, not to make the establishment more difficult in another Member State.

We therefore ask today the Bar representatives, helped by their brokers or insurers, to give us their comments on the idea of such a questionnaire, its use, and its content. We hope that the afternoon workshop, chaired by Daan de Snoo with Andrew Darby as a facilitator, will help to answer these questions.

William Bouvier from Marsh will come back to this questionnaire and give a more detailed presentation later.

In the same way, the CCBE imagined, through its Steering Committee, to write some recommendations on minimum standards which would be applicable to lawyer for the professional indemnity insurance and also applicable in any case and not only in case of cross-border practice. This is an attempt to, in the long term, remove difficulties due to existing disparities in that area. The first concern for the CCBE is undoubtedly to create a general obligation to be insured against risks linked to the lawyer's practice. This concern is already included in the CCBE Code of Conduct which has been adopted by the States where there is no insurance obligation (Italy, Spain; as for Greece, the Code is applicable except for the provision on insurance).

This project will be presented to you by Nathalie Caes from Marsh and Jérôme Tajan from Aon France and will later be discussed within the workshop chaired by my colleague of the UK delegation, Robin Healey and my colleague from the French Delegation, Silvestre Tandeau de Marsac acting as a facilitator. Robin Healey expects your answers to the small questionnaire which is the agenda of the workshop and which has been circulated.

Finally, the Steering Committee has begun to work on a difference in conditions policy which might be used by the Host Bar when the Home insurance is not sufficient and the shortcomings should made up for in order to comply with the Host requirements. For this ambitious and very technical issue, I will give the floor to Denis Vivant from Aon France and Sandra Neilson from Marsh UK who will explain to you the underlying ideas of this project. Both the chairman and the facilitator for the corresponding workshop come from the insurance industry, i.e. Steve Abrahams from Royal and Sun Alliance UK, and Holger Sassenbach from Allianz Germany.

We will really appreciate your active participation during the workshops in the afternoon so that we can improve these draft projects.

The aim of this conference is to collect your comments on the three projects which will be presented to you as to possibly finalise them and implement them as soon as possible.

I will now give the floor to our experts.

Presentation of the three projects facilitating cross-border practice for European lawyers

I/ The common questionnaire on professional indemnity insurance, by William Bouvier, Marsh France

Good morning to everyone, and thank you for such a good attendance at this CCBE conference.

My name is William Bouvier, and I work on professional indemnity insurance for lawyers in Marsh France.

First of all, I would like to present to you my colleagues of Marsh and Aon with whom I will be reporting the work which has been carried out since the 2002 conference, and in which we have participated as representative of the industry of professional indemnity insurance for lawyers.

Several working groups have been set up for that purpose during the meetings of the Steering Committee gathering CCBE representatives, insurers, and brokers.

Jerôme Tajan from Aon France and Nathalie Caes will talk to you about the establishment of common standards for professional indemnity insurance. Sandra Neilson from Marsh UK and Denis Vivant from Aon France will then speak about the difference in conditions policy, explaining its goals.

I will address the conclusions of the working group on the establishment of a common questionnaire on professional indemnity insurance.

Having regard to the important disparity between the various professional indemnity insurance systems in Europe, a first working group worked on the drafting of a common questionnaire to facilitate the assessment by the Host Bar of the possible equivalence of a professional indemnity insurance taken out in the Home Bar. This assessment aims to grant a partial or a full exemption to take out insurance.

Indeed the Establishment Directive states that a lawyer has to comply with professional rules of the Host State and that, subsequently, if the professional indemnity insurance is mandatory, he has to be insured.

The Directive also provides that if a lawyer has an equivalent insurance, he can ask the Bar for an exemption of the obligation to take out insurance in the Host State. If this is only a partial equivalence, the Host Bar can have the lawyer take out an additional insurance to be in accordance with the rules of the Host State.

Of course, this provision undoubtedly brings a very important administrative burden for the Host Bar which will be held in that case by its broker / insurer to check the equivalence of the different insurance policies.

This task will also be difficult as regards existing disparities between the different systems and the usual mistrust against a system that is different from the one to which we are used to.

As I have already mentioned, if this equivalence is not full, the Host Bar would need to assess the terms and conditions as well as the scope of the existing insurance in order to allow the taking out, if possible, of an adequate additional insurance policy.

To facilitate this assessment and to harmonise the approach, it was decided to draft a common questionnaire to be used by the Bars so that they would have an overall and accurate view of the way in which the lawyer is insured in his Home State and of the benefits of this insurance for the activities practised in the Host State.

After having considered the possibility of having this questionnaire in each national language, we finally decided to have it circulated in English and French with the possible support of the CCBE if problems arise out of their translation.

It is important that the terminology used should be checked for its accuracy so that the questions continue to be relevant.

The common questionnaire will be filled in by a lawyer wishing to establish in a Host State. During our working sessions, we noted that it would not be easy for a lawyer to fill it in but that he might need the help of his broker and/or insurer.

We have started to build our questionnaire by looking at the one made by the Law Society of England and Wales for the registration of lawyers from other Member States. As this questionnaire was specific to the British situation, we only considered it as a basis for our work since it had the same purpose as our common questionnaire.

For your information, you may want to note there has been a similar questionnaire, albeit less detailed, for three years in the Brussels Bar for the registration of lawyers on the roll of European lawyers.

I do no see the point of reading the common questionnaire which was approved by the CCBE Standing Committee since you have all received and read it already.

However, I will explain to you the structure which was adopted.

It seemed important to start with an introduction stating the goals and the use of this questionnaire within the framework of a request for registration under the Establishment Directive with the Host Bar.

We also mentioned the persons likely to help the lawyers in this task and the documents which are possibly worth enclosing with the questionnaire.

Then, there is a part on the personal details of the lawyer and the description of the way in which the lawyer practises in his Home State and the way in which he would like to practise in the Host State.

We finally come to the crucial point of the common questionnaire: the description of the existing insurance in the Home State, including the scope of the guarantees, the amount of the cover, the deductible, the exclusions, etc.

In order to take account of the disparities as regards professional indemnity insurance systems in the various Member States, we found it necessary to include a part in the questionnaire where every Bar could give more details on several specific questions linked with the specific local requirements in the Host State.

We also discussed the possibility of having a questionnaire different for each country but it was not in line with the aim of the questionnaire, which is to come to some harmonisation of the approach to the equivalence of the professional indemnity insurance.

As a conclusion, it the lawyer is asked to mention if he is applying for a partial or total exemption of the obligation to take out professional indemnity insurance in the Host State.

During the working group dealing with the common questionnaire this afternoon, we will address the changes and improvements which might be made to the questionnaire.

In our view, it seemed necessary to know the views of people coming from all Member States, people who never had a chance to take part in the various Steering Committees and in the reflection to date.

Without starting now the debates, here are two points which might be discussed later:

- the questions specific to each country due for very different insurance systems
- the possibility of having the Home broker / insurer countersign the questionnaire to give it a more formal value.

I will now give the floor to Jérôme Tajan who will talk about common standards for professional indemnity insurance.

II/ Minimum standards for European Practice Indemnity Insurance, by Jérôme Tajan, Aon France and Nathalie Caes, Marsh Belgium

The CCBE conference organised on 18 November 2002 in Brussels on professional indemnity insurance for lawyers came to the conclusion that a common questionnaire should be prepared and sent to the European bars. That is what William Bouvier has just talked to you about. It was also decided that the implementation of minimum standards and minimum clauses in professional indemnity insurance for European lawyers should be looked at. That was the purpose of Mr Robin Healey's working group, which on the basis of the conclusions of the former CCBE conference underlined the need to define minimum rules common to all European lawyers in order to facilitate their professional practice in Europe as regards professional indemnity insurance.

These conditions do not consist in a common insurance policy, but in a list of "minimum" conditions which should be included in every professional indemnity insurance policy for European lawyers.

First, I will explain the reasons for laying down these clauses, the core reasons linked to professional practice and the technical reasons due to the insurance market.

Then, I will present the scope of application of these minimal insurance clauses; their content will be further addressed by Nathalie Caes.

A. The reasons of the setting up of minimum insurance clauses for professional indemnity insurance for European lawyers.

1. *The establishment of minimum insurance clauses for professional indemnity insurance for European lawyers: the financial reasons*

- The first reason, which is not new but still at stake, is the necessary protection of consumers and clients.

  We usually say in France that the mandatory professional indemnity insurance is aimed at substituting for the legal solidarity of the professions which do not have such solidarity or which do not have it anymore.

  Indeed, the solidarity of notaries, solicitors before the Appeal Court, for instance, represents for a third party the best guarantees possible in case of an error or a fault committed by one of these professionals.

  We must keep in mind that professional indemnity insurance is aimed, for lawyers, and at least on the public mind, to cover the consequences of a damage encountered by a client who suffered from an error or a fault of the professional who defends his interests.

  This growing need of the consumer was further developed in the European Services Directive in the Internal Market. This draft Directive provides for in Article 27 « *Member States shall ensure that providers whose services present a particular risk to the health or safety of or a particular financial risk to the recipient are covered by appropriate professional indemnity insurance in view of the nature and extent of the risk, or by any other guarantee or compensatory provision which are equivalent or essentially comparable as regards their purpose* ». This implies notably that the provider shall be insured adequately for the service he provides in one or several Member States of the European Union other than his Home Member State. In this respect, this proposal for a directive is in accordance with Article 6 of the 98/5/EC Directive of 16 February 1998, providing for the conditions in which a European lawyer should be insured for his activity in a Member State of the European Union other than his Home Member State.

- The protection of the lawyer's interest

It is more frequent now to note the existence of the high-cost claim of concerned lawyers. These claims can affect classical legal areas and law firms which are not international. Usually the defence costs can be very high, even if the claim is finally declared unfounded.

The lawyer has to make sure that the insurance covers him for any claim which might lead him to bankruptcy, or for any costs due to the defence in case of claims which would not succeed but which might be dangerous if there is no defence at all. That is what Mr. Robin Healey noted in his report.

Besides, it is advisable to look after the specific interests of lawyers and also to preserve the reputation of the legal profession. In this view, adapted and harmonised covers are necessary. Minimum insurance clauses might help to achieve this goal.

- The protection of consumers and of the interest of lawyers also lead us to address the cover of funds held by lawyers on behalf of their clients and which, for some reasons, he could not give back (e.g. misappropriation of funds).

  All these above mentioned reasons:

  - Third parties' protection
  - Reputation of the profession
  - Protection of the money of colleagues

  should lead us to pay more attention to the cover of misappropriated funds.

  Nevertheless, the difficulties due to insurance and guarantee techniques led to specific work which is, as of today, not completed yet. However, they may be part of a future communication.

2. *The reasons due to insurance techniques and to the way the legal profession is organised.*

- We have to say that the project of minimum clauses was initiated in 2002 by the will of the Law Society of England and Wales to benchmark the system implemented by it in its country in 2001. The end of the mutual insurance fund for solicitors gave place to an accurate and mandatory text on a minimum contract.

  The insurers, which are chosen by the insured, have to comply with this text.

  Another example is the mandatory group insurance taken out by the Austrian, Belgian, Spanish or French Bars which imposes an insurance policy specific to the profession.

  The drafting of a reference text including common minimum guarantees would be the safest way, for any supervising authority, to check the insurance terms and conditions applicable to European lawyers.

  The aim of this project on minimum clauses is not only that one but also to propose several minimum conditions and a standardised and exhaustive text.

- The difference in conditions and limits policy, which would further be developed in the other speeches, is, as we will note, a very sensitive issue. If all European lawyers benefited from cover in accordance with the minimum standards, the implementation of a difference in conditions and limits policy would be easier.

B. Scope of application of the minimum clauses

The minimum clauses which we wish to adopt would be applicable, first, to assess the minimum insurance policies for sole Community lawyers.

However, as Mr. Robin Healey said in his report, those minimum clauses are to be implemented by 2008 if the CCBE obtains agreement from all European Bars.

Indeed, it would not be logical that the insurance for Community lawyers be governed by minimum clauses, while the one for national lawyers would not.

The points concerned for the implementation of minimum rules are the following:

- obligation for every Community lawyer to take out a professional indemnity insurance;
- setting of a minimum amount of the insurance cover;
- defence costs to be included in the minimum amount of guarantee;
- definition of the persons who are considered as insured;
- implementation of a subsequent guarantee and setting of its amount.

*   *
*

Thank you, Jérôme, for having explained to us the work undertaken by the group on minimum standards and the drivers influencing these standards.

I would like to address the following points:

- first, the conclusions of the working group and its recommendations as regards the content of the minimum standards;
- the issues on which the members of the group reached an agreement and the recommendations linked to them;
- and also important, the points on which a recommendation cannot be made and on which a consensus cannot be reached due to disparities of local conditions of the professional indemnity insurance.

Although it may look simple to establish minimum standards applicable to all the Member States, the working group was well conscious of the difficulty of implementing these standards.

First of all, which cover must be taken out in the various Member States? By the term cover, we mean both the amount of the guarantee necessary as a minimum in every Member States and also the type of activities and the scope of the liability for which a lawyer should be covered in every Member State.

The following questions were raised:

- What is the criterion to determine if a lawyer is responsible for a specific claim lodged by a client? This will vary from States to States and the minimum standard for cover should comply with it in each of them;

- What is the period during which proceedings can be lodged against the lawyer? In some Member States and for some proceedings it varies greatly;

- Is it possible for a lawyer to limit his liability? Is there any possibility legally provided or is it possible to establish it through a contract?

The answers to these questions will then have an impact on the final decision regarding the conditions of the cover which would be taken out to have a standard that works. So,

- Which minimum limit of the cover seems reasonable?

- During which period is it necessary to cover the deeds committed in the past?

- What exclusions seem acceptable or not?

Although these different points still need to be further discussed, the working group came to the conclusion that despite these differences, there were enough common points to agree about minimum standards to satisfy regulating bodies in each Member State.

Then, we will have to know how insurers will approach these minimum standards and how their assessment of the risk in each Member State will have an impact on the prices of this minimum cover.

The differences as regards the potential liability (hence regarding the minimum necessary cover) will be identified by the insurers and will probably have an impact as it already has now, on the premiums required. They will also depend upon the country where the lawyer practises and the country where he can be sued for his deeds.

Subsequently, the working group came to the conclusion that these minimum common standards will not imply an identical price to take them out.

The insurers are likely to continue to consider differences of risks which are inherent to the different activities of the legal profession (e.g. insurers usually think that Criminal Law practices have less risk that Commercial Law ones).

Maybe, in the future, a common approach will be adopted for the setting of prices for similar risks. However, the working group was not entrusted with the task of the future setting of prices for minimum standards.

It was however pointed out that it was really important that insurers who are now the main players in the professional indemnity insurance market for lawyers take part in our efforts to establish minimum standards in order to make sure that one can have an insurance corresponding to them.

Another crucial point which will need to be discussed in the future is that the minimum standards should include common terms and conditions which may be included in every Member State. If there are already terms and conditions used in most Member States, there will also be some which will need a lot of work to be accepted in all these countries, even if the concepts used in the insurance industry are in general well understood by everyone.

As a conclusion of this work, the working group is proposing for the future the following recommendations:

- There be mandatory requirements for all EU lawyers to be insured against civil or public legal liability arising out of their legal practice.

- The minimum amount of such cover to be euros 500,000, any one claim, with an aggregate level of euros 1,000,000 a year.

This means that every year an insurer will pay up to euros 1,000,000. The debates lasted long on that point. Indeed, the question is still pending. Will this amount be accepted by all Member States? It may be considered as very high in some countries and very low in others, depending upon the existing requirements in each of them.

As I have already mentioned, the differences in the various countries made the definition of a widely accepted standard very complicated but not impossible in the members' view.

- Defence costs to be covered, in addition to what I have just mentioned.

  In practice, this means that the costs paid by a lawyer to be defended when a claim against him is lodged should be covered and paid in addition to the indemnity limit which is provided for the claim in itself.

  For instance, for a claim of euros 500,000 with defence costs of euros 25,000, an amount of euros 525,000 will be paid by the insurer.

- The cover to be extended, where appropriate, to lawyers practising individually, to all partners, ,or former partners, principals, trainees and employees of any law firm practising in any Member State.

- That if we are in the "claims-made" system (which covers claims made during the validity period of the policy whatever the time the act was committed), the policy still provides run-off cover for 6 years if a firm ceases to practise for acts committed during the practice.

  On the insurance side, there must be a posterity period of 6 years if a firm ceases to practise.

- Minimum standards to be applied to any lawyer's practices or law firms and not only to cross-border practices.

- The deadline for these minimum standards to be kept for 2008 bearing in mind that the Commission might anticipate this date.

  Indeed, the proposal for a European Services Directive in the Internal Market which has just been issued provides for the harmonisation of laws to provide for an equal protection of the general interest on crucial issues such as consumer protection and in particular professional indemnity insurance.

  This proposal provides for a progressive implementation to achieve, for 2010, a real Internal Market of Services.

  It also provides the possibility that the Commission takes implementing measures for some provisions, including the one on professional indemnity insurance. It might establish common criteria in order to define the appropriate character of the insurance as regards the nature and the scope of the risk.

I have already mentioned earlier in my presentation that for several important areas, it seemed impossible for the working group to take a decision due to the following points:

- social and economic considerations;
- differences among national laws;
- existing differences of insurance practices in every Member State;
- different reactions of the insurance market according to the moment where the insurance policy is negotiated.

Therefore, in the following areas, it seemed impossible for the working group to define a minimum standard:

- How far claims arising from the same act or omission or from one series of related acts or omissions may be regarded as "one claim".

  This point is very important for the setting of the excess supported by the lawyer in case of claim and also for the amount of the guarantee. If these claims are to be considered as only one claim, one guarantee limit will be applied.

- How far underwriters' rights at law, if any, to avoid, repudiate, adjust, cancel, set-off and other similar matters are to be prohibited or curtailed by agreement?

- How far exclusions from underwriters' liability under the policy are to be allowed?

  Indeed, some exclusions have become inevitable during the evolution of the insurance market such as pollution, terrorism, etc. There are also some reserves on the insurer's side as regards claims arisen before court in the United States or Canada or arising out of acts committed in these countries.

  Do minimum standards have to apply to all claims lodged against a lawyer, whether the acts happened in any place and regardless the country in which they are judged or do we have to limit them to the European Union?

- In some Member States, the automatic renewal is used. This means that the cover goes on till it is cancelled. The working group has not taken any decision on whether this element should be part of the minimum standards.

The working group has decided not to address several issues on the basis that a local decision specific to each Member States should be taken. These are the following:

- the way the insurance is taken out, i.e.
  - through a mutual insurance company made out of contributions of its members;
  - through a collective insurance programme in which an insurer or a pool of insurers insure all lawyers against professional indemnity insurance in the concerned Member State;
  - through an open market in which the lawyer is free to take out an insurance from a possible qualified insurer by the Bars and Law Societies.

- the period of the cover, i.e. the element according to which the cover is granted. This may be:
  - the moment when the act leading to a claim is committed (on the occurrence basis);
  - the moment when the damages leading to a claim occurred (what is called the loss occurrence by the insurers);
  - the moment when the claim is made against the lawyer (on the basis of the claims-made system).

Others issues, which seem less important, could also be taken into account such as:

- How will litigation between insured lawyers and insurers be managed? Which constraints could be imposed upon insurers? For instance, insurers could be made to pay for the claim in any case and then start the proceedings against the insured lawyer?

- How will the claim be dealt with and by whom? Does that issue have to be a minimum standard or subject to a collective decision or a decision from each individual lawyer and insurer?

- What insurance period has to be covered? Are yearly policies satisfactory?

The working group has not addressed the problems of the protection of funds given to a lawyer. In most Member States, this protection is required separately or sometimes as part of the professional indemnity insurance.

This issue is now being considered by another working group.

We will have time to further discuss these points this afternoon and I now give the floor to my colleague, Sandra Neilson, who will talk to you about the work of the working group dealing with the Difference in Conditions Policy.

III/ The "difference in conditions" policy (DIC), by Sandra Neilson, Marsh UK and Denis Vivant, Aon France

Good morning. My name is Sandra Neilson and I am with Marsh in London.

You may notice that I do not sound very English in fact, so I will satisfy anyone who might be curious by telling you all that I am a Canadian, but one who has lived in England and worked in London for 10 years now.

It is my pleasure to be here today and to speak to you about the efforts of Workshop Three during the last year.

Denis Vivant of Aon will speak about the future plans of this group, while I will tell you about their original goals, and where they have reached at this point.

During my talk with you today, I will first review the general background of why Workshop Three was given their specific task. Then, I will outline the issues that the Workshop participants specifically addressed and the conclusions that they reached

For your general information, the participants in this Workshop included:

- Andrew Darby from The Law Society of England and Wales
- Nicholas Decker from the Luxembourg delegation of the CCBE
- Jerome Goy from Aon
- Giles Bentley from Marsh
- Agnes Masquin from the CCBE
- Mark Casady of the insurer QBE
- Steve Abrahams of the insurer Royal Sun Alliance
- Dave Coughlan of the insurer Zurich

and a number of others as well.

The background issues that led to the task of Workshop Three are no doubt familiar to many of you from our discussions at last year's conference.

As we know, the majority of Member States in the European Union require providers of legal services in their countries to carry professional indemnity insurance.

The stated purpose of such mandatory insurance is to ensure that consumers in that country are protected from damage as a result of these services.

And, as we also know, there are often Minimum Terms and Conditions applied to such cover. These are developed by the Regulatory Authority in the particular Member State and therefore are different from Member State to Member State.

For a lawyer from one Member State (The Home State) to practice in a Member State that has a requirement for mandatory protection (The Host State), that lawyer must (in accordance with Article 6, paragraph 3 of the Establishment Directive) either:

(a) purchase a separate policy of insurance in accordance with the requirements of the Host State, or
(b) obtain an exemption by proving to the satisfaction of "a competent authority in the Host State" that the lawyer's Home State policy terms and conditions are sufficient to satisfy the requirements of the Host State

As you can easily imagine, in some jurisdictions exemptions are difficult to obtain.

The requirements of the Host State may be very specific and therefore difficult to match with any certainty.

And of course, the "competent authority" in the Host State has a duty to ensure that the consumers in the Host State are correctly protected.

And the easiest way to be sure of this is for such authority to require the purchase of a separate policy with Host State terms to cover the lawyer's activities in the Host State.

In days past, purchasing the insurance from a Host State insurance company was also a desirable outcome.

It is generally felt that in many cases the Home State policy is nearly, but not quite, good enough to provide the necessary protection.

Nevertheless, a lawyer seeking to practice in the Host State is forced to purchase a separate policy to cover his or her activities in the Host State.

This obviously leads to duplicate insurance – at least in part – and to duplication of premium.

In the event of a claim also, there could be difficulties if both the Home State and Host State policies technically cover the matter.

Most policies contain exclusions of claims covered under other valid insurance. In even the best-case scenario, there might be a "discussion" between the two insurers as to which policy should apply.

This obviously leads to confusion and uncertainty – an unsatisfactory result.

Workshop Three was therefore formed to address the possibility that a "fits all" Difference in Conditions policy might be designed for universal use by lawyers of Home States.

Such a policy would have the purpose of supplementing the Home State cover so that it would respond to any claim as required by the Host State, but without the necessity of purchasing a separate Host State policy.

As the Workshop participants began their work, they quickly reached the conclusion that the Difference in Conditions (DIC) language would not need to be lengthy.

This is because the purpose of the DIC cover is simply to ensure application of Host State terms to any claim not already covered by the Home State policy.

The Workshop participants felt that ideally each Member State would approve the language for this DIC cover and it would have universal acceptance.

After this, if a lawyer seeking to practice in any Member State is able to purchase cover with the necessary language, the requirements outlined in Article 6, paragraph 3 of the Establishment Directive would be satisfied.

It would not matter if the lawyer had the DIC cover as an endorsement to his or her Home State policy, or purchased it from a separate insurer.

If such a cover could be obtained, nothing else would be required.

The Workshop participants concluded that:

- Since only differences in conditions would be covered in addition to the cover provided by the Home State policy, there would be no duplication of cover and, hopefully, no duplication in premium.

- The plan for the DIC cover would be that not only would it broaden the Home State policy as necessary to provide the Host State minimum terms of cover, but it would also "top up"

the limits of the Home State policy – if necessary – in order to provide the minimum amount of cover as required by the Host State.

- The insurer providing the DIC cover would base its premium (one supposes) on its assessment of the additional cover it was granting. That is to say, on its assessment of the differences between what is covered by the Host State required cover compared to what is actually provided by the Home State cover.

The Workshop participants addressed a number of additional issues and reached certain conclusions about them:

- For example, what law should apply to the DIC contract? Should it be the law of the Home State, the Host State, or even the State in which the DIC insurer (if different from these) is located?

  - The consensus of the Workshop participants was that the applicable law of the contract should be the law of the Host State and not that of the Home State or anywhere else

    This seems sensible, given that what the DIC cover is trying to accomplish is a harmonisation between what is available to Host State lawyers naturally in their market and what protection the Home State policy itself provides to consumers of the incoming lawyers services.

- Also, should the DIC cover be "claims made" or "occurrence based"?

  Other speakers have explained that a "claims made" policy is one that provides cover for claims made against the insured lawyer during the time the policy is in force, regardless of when the act giving rise to the claim actually occurred. An "occurrence based" policy on the other hand is one that provides cover for claims arising out of acts and occurrences that took place while the policy was in force, regardless of when the claim is actually made.

  The subject is a constant source of spirited discussion since there are arguments for and against both.

  - The consensus of the Workshop participants on this issue was that the DIC cover should be on a claims-made basis. The claims-made basis is the preference of many professional indemnity insurers. This would mean however that the DIC cover, once purchased, would have to continue to be purchased, so long as the liability of the lawyer existed and there remains a possibility of claims being made.

- Claims settlement and payment issues were also discussed; for example, in the event of a claim, who pays first – the Home State insurer or the DIC insurer?

  - The Workshop participants believed in this case that there would probably need to be a "follow form" or "follow the settlements" clause, detailing who would pay first and how disputed claims would be settled.

    This is because the DIC insurer might believe that the claim should in fact be covered by the Home State policy, whereas the Home State insurer might wish the DIC insurer to respond.

    This problem could of course be solved by having the Home State insurer endorse the Home State policy to provide the DIC cover, rather than going to a separate insurer for it.

- Occasionally, there are no local minimum terms set or compulsory programme provided by the Law Society or Bar Association in a particular Host State. Would there

then be a necessity to add the DIC endorsement to the Home State policy to gain approval of insurance for practice in the Host State?

- In such circumstances, the Workshop participants believe that no DIC cover would be necessary.

  Where there are no minimum terms or compulsory programme offered by the Law Society or Association in the Host State and assuming that the Home State lawyer has professional indemnity insurance, any requirement of the Host State for mandatory insurance would probably be satisfied by the Home State cover.

  If not, the Workshop participants felt that DIC cover could reference a professional indemnity insurance policy used regularly in the Host State, in order to satisfy Host State requirements.

➢ The question of exclusions was also addressed. The market for professional indemnity insurance is very hard at this moment. Would additional exclusions that are now in vogue (such as asbestos, terrorism and toxic mould) have to be accepted for the DIC cover in order to successfully achieve a universal DIC cover?

- For the moment at least, the participants in the Workshop believe that the ideal situation, would be to have the DIC cover with only those exclusions applicable to the Host State policy. Otherwise, would the requirements of the Host State actually be met sufficiently to satisfy a "competent authority" in the Host State?

➢ There is also an issue of minimum deductibles. In some Member States there might be specific restrictions regarding what can be retained by the lawyer and what, on the other hand, is required to be insured – according to the particular rules of that Member State.

- The Workshop participants have not yet been able to deal with this nuance. In his presentation, Denis Vivant of Aon will deal with the future plans of this Workshop.

Needless to say, the goal of such a cover is easier to discuss than it is to craft the actual words to meet that goal.

The Workshop participants have conceived a draft language, which has been distributed to the attendees of this conference for their review. We will welcome any comments that you may have about this draft language.

As Denis Vivant will tell you, the future of the DIC solution may be overtaken by the developments in connection with the Minimum Terms that you have already heard about. But, I will leave that for him to tell you.

In conclusion, the DIC cover is seen to be very much a cover to "top-up" or supplement the Home State cover so that it can satisfy the requirements of the Host State.

There may be many situations where (as a practical matter) the Home State insurance is truly sufficient to meet the requirement of the Host State.

However, it may very well be that no appropriate "competent authority" in that Host State is willing to agree that this is so in order that an exemption as allowed in the Establishment Directive may be granted.

The DIC cover is one way to solve this problem, but the state of the market at this moment may make this difficult to accomplish.

I will leave this also for Denis to address.

I thank you for your attention and I will welcome any questions that you may have during the Question Period following this presentation of the work of the various Workshops.

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My name is Denis Vivant and I work with Aon in Paris. Although it is difficult to act as facilitator of a workshop in which I did not participate personally, I am honoured to take the floor today in place of Jérôme Goy, my former colleague who is a lawyer today and who took part in the workshop on the “difference in conditions” policy.

As Nathalie Caes and Jérôme Tajan already mentioned, the application of minimum terms and conditions is planned for 2008 in every European Union Member State.

Setting these minimum terms and conditions will leave little room to establish a difference in conditions guarantee.

However, and waiting for the integration planned for 2008, the European lawyers wishing to practise within the European Union must be able to meet the requirements of their host country as far as insurance is concerned and the difference in conditions policy or difference in conditions clause is one of the means proposed by Article 6.3 of EC Directive of February 16th, 1998: *“Where the equivalence is only partial, the competent authority in the Host Member State may require that additional insurance or an additional guarantee be contracted to cover the elements which are not already covered by the insurance or guarantee contracted in accordance with the rules of the home Member State.”*

Sandra Neilson informed you on the workshop’s progress on DIC policy or clause. I will now present you the current state of questions and reflections regarding the drafting of a DIC policy, which is linked to the Home policy, by any lawyer who is a member of a bar in the European Union and who wishes to practise, through a permanent structure, within another bar in a different host country which is also a European Union Member State.

A number of issues are still pending. Their clarification is necessary to allow the CCBE work to go further. This could be one of the main lines for the workshop n°3 of this afternoon.

<u>I. The form of the difference in conditions guarantee:</u>

a. a difference in conditions policy
b. a difference in conditions clause

a. The DIC policy could take the form of an insurance policy independent from the lawyer’s insurance policy in his home Member State.

   Therefore, in this case, the lawyer would have at the same time two insurance policies: one covering him for his activity in his home Member State and for a part of his activity in his host Member State; the second one covering him for the part of activity in his host Member State which would not be covered by his home Member State.
   It must be noted that insurers would not favour this solution as such a policy being in addition of the home Member State policy, it should necessarily have a lower price than the policy from the home Member State.
   And yet, the risk of a loss would remain the same at least in terms of amounts, which would certainly create a real economical imbalance.

b. The difference in conditions clause would have a particular form. Indeed, it would be necessary to insert in the contract of the home country a clause providing that, for a part of insured risks corresponding to the terms and conditions of the host country, a local insurer would intervene for previously decided cases and amounts.

The workshop's members, of course, prefer the establishment of such a clause. This would be the easiest solution to settle.

However, there are still some issues.

II. The language of the clause's contract:

In which language the DIC contract or clause should be worded?

- The home country language?
- The host country language?

If for the DIC clause, the language used could be the same language as in the home country contract, what about the DIC contract? Should the language used be the language of the host country or the language used in the contract with which the DIC policy is linked?

For your information, if it is a French contract, at least one French version will be necessary.

The question remains open. The clause which is presented to you among the documents you received is worded in French and in English.

III. The applicable law

What about the law applicable to a DIC contract or to a DIC clause?

- Home contract law?
- Host country law?
- Law fixed by the insurer?

This question should be settled taking into account the particularities of every respective law of the Home country. For instance in France, the insurance cover is necessarily questioned if there has been false declaration or omission when taking out.

This is not that obvious in the United Kingdom.

IV. The competent court

Consequent to the law applicable to the contract or to the clause is also raised the question of the court which would be competent to deal with any dispute due to the application of the contract or clause and in particular in case of a claim.

Arbitration, which might be the universal solution, also raises some difficulties. Indeed, in France, it can not be used to rule a dispute between a professional and an individual.

V. The "basis" of work for the guarantee

Two big principles exist:

- claims-made
- claims occurrence.

⇨ Definitions

In France, the basis used in most cases is claims-made.

The solution fixed in most insurance contracts in the European Union countries is the claims-made basis. However, in Germany the insurance contracts work on the claims-occurrence basis.

How can guarantees work when established on different bases?

The solution proposed by the workshop members would be to apply to the DIC clause or contract the claims-made basis.

VI. Applicable deductibles

In Germany, a deductible can amount to more than 1 % of the minimum insured amount, i.e. 2,500 €.

In Ireland, the minimum deductible amounts to 1,500 €.

In Luxembourg, the deductible amounts to 25 % of the claim with a minimum of 248 € and a maximum of around 2,479 €.

In France, the deductible amounts to 110 % of the claim with a maximum of 3,050 € without any applicable minimum.

As we can see, each European Union country has specific deductibles.

How could we insert this particularity in a DIC contract? Should we take into account the home country deductible or the host country one?

As we can see, setting a DIC contract or clause is complex and leads to many questions.

However, this project which was already discussed during the conference in November 2002, should become more and more necessary as Article 27.3 of the draft Directive relating to services in the Internal Market, currently discussed in Brussels, provides that *"Where equivalence is only partial, Member States may require a supplementary guarantee to cover those aspects not already covered."*

Workshop III on this item would allow to settle a big part of these difficulties during its work this afternoon.

Address by Margot Froehlinger, Head of Unit "Services", Internal Market DG, European Commission

It is a great pleasure to be with you here today to discuss how problems surrounding insurance for cross-border activities for the legal profession could be resolved in the future. Let me first congratulate the CCBE for this very important work which will become - we are absolutely convinced - more important over time.

The number of migrant lawyers is today still very limited and I would recall the statistics which are very useful and which were produced by the CCBE.

However, we think although the number of lawyers who establish in other Member States is limited, there are many cross-border activities in terms of temporary service provision in the Member State. On those unfortunately, we do not have statistics. But these activities, I would like to recall, cause also problems concerning insurance. It is not a secondary establishment which is concerned here, it is also the temporary service provision. We think temporary service provision and also secondary establishment will become more important over time to the extent that we will have more economic integration in Europe. The more companies we have which will engage in cross-border activities, the more opportunities for the legal profession to follow their client into other Member States and to engage in cross-border business.

Therefore, this work on insurance will become even more important. But I want to congratulate the CCBE not only for its work on the legal profession. Moreover we think at the European Commission that this work of the CCBE could be a pioneer work which could serve as a model for a number of other economic activities and a number of other regulated professions.

The CCBE has in other areas already assumed a pioneer role. The CCBE was the first regulated profession to have a code for cross-border activities and it is only logical that the CCBE is in the forefront of this work on professional indemnity insurance for cross-border activities.

Now, I have to warn you that I am no expert on indemnity insurance and I have certainly no views about the advantages of claims-made insurance against ex-ante committed insurance. Therefore, do not expect any technical expertise and any comments from me. In that respect, I have rather to learn from all of you and certainly from the members of the workshop.

I can only contribute here in terms of some general comments about your work and I will try to situate this work in the European context.

Now, Article 27 of the new Directive for Services in the Internal Market has been already mentioned. I am not sure whether I am the mother of this new Directive but I have certainly contributed to it.

Article 27 of this new Directive will considerably change the context of your work and will also further enhance its importance.

First of all, Article 27 does not interfere with the existing Lawyers' Establishment Directive of 1998. So this Directive will fully continue to apply. This Directive already requires that for secondary establishment, you have to take out professional indemnity insurance if the host country requires it.

However, the Lawyers' Establishment Directive does not require mandatory insurance for lawyers and this will change now with the new Services Directive which will implement the Lawyers' Establishment Directive in that this new Directive requires all regulated professions which cause a particular risk, in particular financial risk, for the client, to take out appropriate insurance, and that means that those countries, which despite the long-standing

recommendation from the CCBE, have not yet introduced mandatory insurance for lawyers will have to do so with the Directive and once the Directive is adopted.

Second, the new Article 27 also provides that in the case of cross-border activities, this insurance will also have to cover cross-border activities.

I want to stress, following a short remark by Mr. Hellwig, the coverage for cross-border activities is of course meant for Europe. It is not meant for third countries. The whole Directive only applies to Europe with the Single Market. So it will require no change there.

But, cross-border activity will require professional indemnity insurance. I have to recall that the 1977 Lawyers' Directive which is dealing with cross-border provision of the legal profession does not address this issue. It provides that lawyers in the case of cross-border provision have to comply with the deontological rules of the host country. I agree with the interpretation of the CCBE that since insurance is a question of professional ethics, this means also that professional indemnity insurance must be taken out.

With the Services Directive, it is now entirely clear that professional indemnity insurance has to cover cross-border activities.

Third, the professional indemnity insurance has to be appropriate and that means that it has to cover the range of activities which can legally be carried out by the lawyer in the country in which he is established and in those countries where he provides services on a temporary basis.

The Directive's limits are here. It does not go into any detail. It leaves it to Member States, competent authorities, legislators but also professional bodies or chambers, etc. to further determine the necessary coverage, in terms of minimum or maximum thresholds, in terms of activities covered, in terms of exclusions.

The only thing that the Directive foresees is that, when and if necessary, the Commission could on the basis of Comitology proceed with more detailed goals.

But let me express the hope that at least, as far as the legal profession is concerned, you are very much advanced at the time the Directive will come into force and the Commission at least for the legal profession will not have to resort to Comitology.

However, it is absolutely clear that without more detailed goals, there will be problems in the case of cross-border insurance. There will be problems in terms of a lack of level playing field between the professional practitioners themselves. There will be a lack of protection of clients. I want to stress not only for individual consumers which are often mentioned here but also for your business clients. That is absolutely evident. In order to remedy this, the Directive foresees very detailed information requirements concerning the insurance coverage, possible exclusions, etc. But that does not address for instance the lack of a level playing field.

Therefore your work in particular on minimum standards is so important. We have noted with much interest the progress you have reached. The recommendations of the working group seem to us very well balanced and they seem to address the most important questions. It is clear that some of the trickiest questions have not been resolved to date. But we very much hope that over time you can further refine the work and resolve more of the questions which are still left open.

Let me also stress, and to follow on a remark by Mr. Hellwig, it is not conceivable we think that in this area as in many other areas, full harmonisation can be achieved. The systems are very different, they reflect national traditions, different economic and social conditions and the differences and discrepancies will not decrease, and they will rather further increase with enlargement.

So we think therefore that it is totally appropriate but also sufficient to try to establish minimum standards and not to go for full harmonisation for maximum standards which could not require four years as you envisage now but forty years to do.

Therefore, we are very much pleased to see the progress which has been reached and we are looking forward to further progress to be reached in the coming years. We would certainly recommend the work achieved to date by the CCBE as a model to professions and other economic sectors.

We have the big task ahead to solve this question of insurance for a number of the professions which face, believe it or not, even greater dfficulties than you do. There are sectors such as the medical profession, the architects, and the building sector that are very much less hopeful than you are.

So to conclude, we think you have achieved much progress and we can only congratulate you and will recommend your work as a model for other regulated professions across Europe.

I thank you for your attention.

Programme of the workshops

- **Workshop 1: The Common Questionnaire**

President: Daan de Snoo (Dutch Delegation)

Facilitator: Andrew Darby (Law Society of England & Wales)

AGENDA

1. Opening

2. Objective of the workshop

3. Discussion on the role and function of the questionnaire
Introduction Andrew Darby

4. Discussion on the text of the draft questionnaire

5. Conclusion

➢ **Workshop 2: Minimum Standard for European Practice Indemnity insurance**

Chairman: Robin Healey (UK Delegation)

Facilitator: Silvestre Tandeau de Marsac (French Delegation)

AGENDA

1. Is change now inevitable	Yes / No
2. Do you agree mandatory minimum standards are now necessary?	Yes / No
3. Do you think the proposed level of EUROS 500,000 is too high?	Yes / No
or	
too low ?	Yes / No
4. Are the exceptions & exclusions fair & reasonable	Yes / No
5. Can 500,000 lawyers negotiate better terms with insurers collectively?	Yes / No
6. Should Insurers be "approved" by Bars?	Yes / No
7. Is 2008 a realistic date for implementation too soon?	Yes / No
or	
too late ?	Yes / No

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please circle your response -O-

NAME……………………………………………...

ORGANISATION…………………………………..

- **Workshop 3: Difference in Conditions Policy**

President: Holger Sassenbach (Allianz Versicherungs AG)
Facilitator: Steve Abrahams (Royal & Sun Alliance)

AGENDA

A. INTRODUCTION

Chairperson, Facilitator

B. CONTEXT

I. Background
  a. Last year's conference: DIC policy aiming at simplifying a current very complex market
  b. Legal provisions: Art. 6 III Establishment Directive (98/5/EC)

II. Reasons for the DIC
  a. Avoidance of double insurance = double premium = discussions with the insurers in claims?
  b. Consumer protection?
  c. DIC policy idea a temporary measure to ensure harmonisation across the EU states until such time as minimum standards can be introduced

C. OBJECTIVES

I. to extend coverage i.r.o. terms of cover and limits to comply with Host State requirements
II. to enable Host State authorities to compare Home State coverage with Host State coverage easily

D. CONTENT OF THE DRAFT

I. Wording
  a. Coverage provider: Home or Host State carrier?
  b. Insured event: claims made or occurrence or act committed? Subject to national coverage requirements => no general definition possible
  c. Interaction between DIC-policy and basic coverage in case of different insured events
  d. Claims coordination clause in case of different insurers
  e. Exclusions
  f. Deductible

II. Applicable Law: Home State or Host State?
III. Adoption of the wording?
IV. If not, which additional work is needed?

E. RISK ASSESSMENT

I. Knowledge about Host Insurance or innocent capacity?
II. Premium

F. ACCEPTANCE BY LOCAL AUTHORITIES

G. CONCLUSIONS AND RECOMMENDATIONS

Report on workshop 1: The common questionnaire

Chairperson: Daan De Snoo, Dutch Delegation
Facilitator: Andrew Darby, UK Delegation

Is it a good idea?

The purpose of the questionnaire was discussed. It was suggested that an alternative would be for the Law Society or Bar in each member state to carry out an exercise of comparing the policies in each of the other member states in order to make an assessment as to equivalence. This was rejected as being too difficult given the large number of regional Bars in certain member states coupled with the variation in policy wordings within individual member states.

On balance it was felt that the common questionnaire was a good idea and would assist the host Law Society or Bar to compare the home cover with the host requirements. It would also serve to highlight to lawyers that significant differences existed between various policy wordings and local requirements.

Who will fill it out?

The discussion centred on whether the questionnaire should be filled out by the lawyer, the broker/insurer or a combination of the lawyer and the broker/insurer.

It was agreed that as it was the lawyer that was making the application for exemption it should be the lawyer who has responsibility for filling in the questionnaire with input from the home broker/insurer.

Which language should be used?

The comment was made that following the accession of the ten new member states in May 2004 there will be 21 languages in use in Europe. Consideration was given as to what language should be used for the following:

- The questions.
- The answers supplied.
- The Home policy wording supplied by the applicant lawyer.

The view was that the questionnaire would be supplied by the host Law Society/Bar and should be in the host language. The answers supplied by the lawyer should also be written in the host language (subject to answers to certain specific questions identified on the attached form). It was felt that this would not necessarily be an onerous requirement as it was likely that the lawyer who wished to practice in the host state would probably be able to speak the language of the host state.

In terms of the policy wording there were particular difficulties in translation of technical terms so it was felt that the policy wording should be supplied both in the host language and the home language for reference.

A unified application form

Reference was made to the pro-forma application for registration as a lawyer established under the European Establishment Directive that was issued by the CCBE in November 2001 as part of its guidelines on the implementation of the Directive. It was suggested that the form and the Common Questionnaire could be combined into one document, albeit in two separate parts to enable the indemnity insurance part to be sent to insurers and brokers.

Specific comments

The workshop went through the draft questionnaire and made a number of suggested amendments that are marked up on the attached version.

Andrew Darby
12 February 2004

CCBE questionnaire on professional indemnity insurance for lawyers requesting registration under the Establishment directive *(Amended 12.02.04 v 2)*

INTRODUCTION

This questionnaire assumes that the lawyer requesting registration under the Establishment Directive (98/5/EC) is required to take out professional indemnity insurance through either law or professional regulation in his/her Member State. If that is the case, Article 6 §3 of the Directive permits the lawyer to have existing home professional indemnity insurance taken into account in the host state.

If there is no such obligation, the lawyer will have to follow host State rules alone regarding insurance for professional activities pursued in its territory.

The following questions might be useful for the host Bar or Law Society when examining the situation of the applicant regarding equivalence of the existing insurance policy in his/her home state in terms of the conditions and extent of cover.

It should help them to liaise with corresponding bodies in the home state of the applicant and to take a decision regarding Article 6 §3 of the directive in relation to:

- exemption of the obligation to take out a PI insurance equivalent in the host State or not;

- if so, full or partial exemption of this obligation.

These questions will need to be answered with the help of the insurer and/or broker from the home State as each answer should refer precisely to provisions in the existing insurance policy.

As well as evidence of existing professional indemnity insurance, the host bar or law society might also request certain extracts from home rules requiring professional indemnity cover, or requiring compliance with the CCBE Code, as well as the insurance policy, plus an authenticated translation of it into the language of the host Member State.

Please find in the annex the text of Article 6§3 of the Directive, plus CCBE Guidelines. The text of the Directive can be found on the CCBE website (www.ccbe.org).

I/Personal data

First Name: ____________________

Last Name: ____________________

Address in Host country: ____________________

Address in Home country: ____________________

Date of Birth: ____________________

Nationality/Nationalities ____________________

Home Bar or Law Society (contact details) ____________________

____

II/ Structure of practice

A/ In your home state

- Individual in private practice? Yes/No
- Firm? Yes/No
- Under what legal entity? *(Please refer to the type of legal entity in the language of your home state).*
  Comment: The working group recognised that in certain states lawyers can practise through a wide range of legal entities (in France for example there are 10 different ones) for which their may be no equivalent in the host state.
- In partnership with non-lawyers? If so, what kind of non-lawyers?

B/ In the host state

- Individual in private practice? Yes/No
- Firm? Yes/No
- Under what legal entity do you propose to practice? *(Please refer to the type of legal entity in the language of the host state).*
- In partnership with non-lawyers? If so, what kind of non-lawyers?

III/ Existing insurance in home state

- Existence of professional indemnity cover? Yes/No
- *What is the basis for cover, for example is it negligence, civil liability or some other basis?*
- What is the sum insured in Professional Indemnity?
- Is it for each and every claim, or is it on an annual *(aggregate)* basis, *or is there both a limit for each and every claim and an annual aggregate limit*?

- Is there cover for defence costs? If so, is this within the limit of indemnity?

- What is the level of *self-insured retention*? Does it apply to defence costs?

- Is the insurance on the basis of Claims-made / occurrence or acts committed?
  Comment: This wording is quite technical and need to be looked at. Either it is simplified or lawyers should be directed to seek help from their insurer/broker.

- For how long does cover continue after the practice ceases?

- What is the position of a claimant if the lawyer has breached a condition of the cover?

- Does the insurance cover misappropriation of funds? Yes/No; if yes, by lawyers? Yes/No; if yes, by non lawyers? Yes/No
  Comment: This is a closed question which does not provide for the situation where the insurance does not cover misappropriation of funds because it is covered by a separate mechanism in the home state. Input is required from the Handling of Funds Working Group. Consideration should be given to using a more open style of question.

- Will the cover extend to the individual in private practice in the host Member State? Yes/No

- Will the cover extend to the firm's practice in the host Member State? Yes/No

- Does the cover extend to all legal entities through which the firm is practicing in the host Member State? Yes/No

- Does the cover extend to all activities permitted under Article 5 of the Establishment Directive to a lawyer from your Member State who is established in another Member State (practice of International law, European law, home and host law)? Yes/No

- Are there any *restrictions or* limitations *on the scope of coverage* if a claim is brought in host Member State courts?

- What are the key exclusions in your home cover?
  Comment It was felt that this was a difficult question to answer as what is a key exclusion is subjective. The wording of this question needs to be looked at. The alternative is to require a copy of the home policy or at least the exclusions in the host and home languages to avoid any misunderstanding. Reference was made to some prohibition on requiring documents to be supplied with translations, is that right?

IV/ Specific questions related to host country requirements in law or professional regulation

This part is specific to each bar and should be filled in by the bar with questions in relation to specific host requirements if any.

V/ Other comments

VI/ Conclusion: Do you wish to claim exemption or partial exemption of host country requirements on PI insurance?

VII/ Declaration: To the best of my knowledge, information and belief the information contained in this questionnaire is true in all material respects and has been checked with the home state insurer/underwriter/broker*.

* Delete as appropriate

Comment: Some form of declaration is required along the lines set out above.

Signature:
Full Name of Signatory:
Date:

ANNEX

1. Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained :

Article 6 paragraph 3: "*The host Member State may require a lawyer practising under his home-country professional title either to take out professional indemnity insurance or to become a member of a professional guarantee fund in accordance with the rules which that State lays down for professional activities pursued in its territory. Nevertheless, a lawyer practising under his home-country professional title shall be exempted from that requirement if he can prove that he is covered by insurance taken out or a guarantee provided in accordance with the rules of his home Member State, insofar as such insurance or guarantee is equivalent in terms of the conditions and extent of cover. Where the equivalence is only partial, the competent authority in the host Member State may require that additional insurance or an additional guarantee be contracted to cover the elements which are not already covered by the insurance or guarantee contracted in accordance with the rules of the home Member State.* »

2. Guidelines on the implementation of the Establishment directive (98/5/EC of 16th February 1998) issued by the CCBE for Bars and Law Societies in the European Union

« *Article 7 Professional liability insurance*

The bodies responsible in each Member State for arranging and/or providing professional indemnity insurance as mentioned in Article 6.3 of the Directive shall liaise with corresponding bodies in other Member States to ensure that, so far as possible, insurance arrangements made by a lawyer in one Member State are respected and recognised in another Member State both before and after integration under Article 10 of the Directive, to avoid problems relating to double premiums and double insurance. »

Report on Workshop 2: The minimum standards for European Practice Indemnity Insurance

Chairperson: Robin Healey, UK Delegation
Facilitator: Silvestre Tandeau de Marsac, French Delegation

The workshop, chaired by Robin Healey, gathered many representatives from Bars of different EU countries and from the insurance industry.

The participants discussed the following agenda:

- Is change now inevitable?
- Do you agree mandatory minimum standards are now necessary?
- Do you think the proposed level of EUROS 500,000 is too high?
  or
  too low?
- Are the exemptions and exclusions fair & reasonable?
- Can 500,000 lawyers negotiate better terms with insurers collectively?
- Should insurers be « approved » by Bars?
- Is 2008 a realistic date for implementation? too soon?
  or
  too late?

1° - <u>Is change now inevitable</u>?
The participants unanimously admitted that change was now inevitable in order to take account of the following elements:

- The need to protect consumers;
- The will to protect lawyers themselves in case of a liability case;
- The will to protect lawyers' image.

By the way, article 27 of the proposal for a Directive on services foresees an obligation to be insured.

2° - <u>Do you think minimum standards are now necessary</u>?
The answers varied from one country to another.
In Spain, pursuant to the code of conduct of lawyers, the insurance is mandatory. However, the law does not make it compulsory.
In practice, the registration subscriptions with the Bar include the premium.
There are different insurance thresholds, the maximum one being euros 600,000.
Above it, the lawyer has to indemnify himself the claimant.
Representatives from Bars and insurers claimed that minimum standards are necessary only for cross-border practice and not for practice in one single country.

3° - **<u>Do you think the proposed level of euros 500,000 is too high?</u>**
The answers depended upon the countries.
The Polish delegation notes that in Poland the insurance is mandatory, but that the minimum set out for this year is euros 50,000. Many lawyers take out an additional insurance.
A representative form the French delegation claimed that an adequacy between the risk and the cost should be found. In his view, the efficiency, the real guarantee taken out and the solvency of the insurer should be looked at.
In this respect, the taking out of a collective insurance policy has an advantage. For instance, the Paris Bar offers its members a euros 3,250,000 cover.
Generally speaking, representatives from insurers thought that euros 500,000 was not enough for cross-border practice.
However, representatives from Bars where the minimum cover is less than euros 500,000, think that most lawyers who practise cross-border take out an insurance on a voluntary basis for higher amounts. It depends upon the size of the law firm and the activity of the lawyer.
The Greek delegation thought this proposed amount is too high.
So did the Czech delegation.
It would like to know the meaning of the term "minimum standards".

Which losses or damages are covered? Which risks must be covered? What is cross-border practice?
The Swedish delegation said that its lawyers who did not practise cross-border did not want to pay for those who did practise cross-border.
Some participants said that the market should regulate this issue.
On that point, the European Commission's representative mentioned that it was difficult to think about a complete harmonisation. In this field, laws of the various countries apply. She quoted an example from the E-Commerce Directive which provided that the law of the country where the provider was established should apply, except if there was a better agreement between the two parties.
One of the Paris Bar's representatives indicated that to assess the minimum amount, one should distinguish between civil and criminal risks.

4° - Are the exceptions and exclusions fair & reasonable?
Actually, the exemptions and exclusions depended upon the country.
For instance, fraud or dishonesty are not always excluded in all countries.
In England, it is possible to take out an insurance against a voluntary fault committed by one's employee.

5° - Can 500,000 lawyers negotiate better terms with insurers collectively?
The answer was not so obvious as the problem depends upon the claims against these 500,000 lawyers.

6° - Should insurers be approved by the Bars?
The situation depends upon countries. The Paris Bar has taken out a collective insurance. The « Law Society » has some insurers qualified, but policies are taken out individually.

7° - Is 2008 a realistic date for implementation or is it too soon?
This date seems generally realistic.

Report from Workshop 3: The Difference in Conditions Policy

Chairperson: Holger Sassenbach, Allianz (Germany)
Facilitator: Steve Abrahams, Royal and SunAlliance (UK)

Introduction

Aim of the DIC wording:
- Simplify the current complex market;
- Ensure compliance with the provisions of Article 6 III of the Establishment Directive (98/5/EC).

Reasons for the introduction:
- Avoidance of double insurance (and increased cost);
- Consumer protection;
- As a temporary harmonisation measure until minimum standards can be introduced.

Objectives of the wording:
- Extend coverage to comply with Host State requirements;
- Enable Host State authorities to ensure comparable coverage in place.

Considerations for the Workshop

The Workshop set out to consider the following:

I. The Wording:
   a) Coverage provider – Home or Host State?
   b) Insured event – Occurrence or Acts committed?
   c) Interaction between DIC cover and basic policy
   d) Claims co-ordination between different insurers
   e) Exclusions
   f) Deductible

II. Applicable law – Home or State?

III. Can the wording be adopted as it stands?

IV. Additional work required if cannot be adopted.

Report of the Workshop Discussion

We considered the above and the main points were:

1. The general consensus was that it did not matter who the coverage provider was, as long as there was cover. However, the simplest method (and perhaps cheapest for the lawyers) might be to extend the Home policy. But many Home insurers may not wish to provide the cover and for this reason the cover should also be available separately. The Workshop members considered that this was a matter best left to market forces. It could be that an enterprising insurer or broker may wish to create a market for such DIC cover and offer this throughout the CCBE territories.
2. There was some discussion on Claims Made v Acts Committed. In some countries (e.g. Germany and Austria) cover must be on an Acts Committed basis – whereas in most of the CCBE countries cover is only offered on a Claims Made basis. This difference may mean that Home insurers may not wish to extend cover to Acts Committed countries leaving only Host insurers to write the DIC cover – this could restrict competition.
3. The Interaction between different policies and insurers is dealt with in the DIC draft. However, the local laws in the different territories involved may override the principles set out in the draft.
4. The terminology of the draft DIC clause was discussed at length:

- It was pointed out that the English and French versions of the wording actually contain different meanings. If we have such differences between only two languages then it will be extremely difficult to arrive at acceptable translations between all the CCBE territories.
- The inclusion of words such as 'indemnity' cause problems as some countries do not use this basis of cover.
- Insurance terminology and local laws will affect the way the wording is interpreted and applied in each country.

Conclusion

The Workshop concluded that there were too many problems with having a wording that has to be used in so many different countries (somebody calculated that this could mean 612 different versions!!) and the matter should be approached in a different way.
The recommendation of the Workshop is the adoption of a statement outlining the cover to be provided. This would leave insurers (in the Home, Host or other state) able to issue a wording that complies with local legal and linguistic standards whilst providing cover for differences between the Home and Host cover. Insurers would guarantee that their cover meets the requirements laid down in the clause. This idea will mean there are no arguments over conditions, phraseology or language.
The Workshop presented a clause designed to achieve this. This clause will need refinement as it was drafted in only a few minutes.

The Draft Clause

Required Terms and Conditions for Difference in Conditions Cover:

1. Difference in Conditions Cover is issued to a lawyer admitted in a Home State in order to comply with the insurance requirements of a Host State as defined in Article 6.
2. In order to comply with Article 6 the Difference In Conditions Cover must provide that in respect of the practice of the lawyer in the Host State the cover provided must be no less than the cover required by the Host State.
3. The DIC cover must not provide that the liability of the insurer is reduced or excluded by the existence or availability of any other insurance.
4. The DIC cover must provide that:
   (a) the insurance is to be construed or amended so as to comply with the requirements of these Required Terms and Conditions and
   (b) any provision which is inconsistent with these Required Terms and Conditions is to be severed or amended so as to comply.

Steve Abrahams (26 February 2004)

Closing remarks, by Hans-Juergen Hellwig

I think we will continue the work. The CCBE has at least two reasons to do so. First, the CCBE must continue the work very simply because of Article 27 of the new draft directive, as explained by Ms Froehlinger. We have been put under a burden of work and we will shoulder it. I think today has given testimony to that. We do count on the representatives of the insurance industry and of the broker industry that they continue their support to help us to deal with this problem. The second reason why we have to continue is because the work has not been finished yet. So the working groups will have to get together to finish up what they have done on the questionnaire that can now be finalised. We will discuss it within the CCBE and we will then send it out to the Bars and Law Societies because it is eventually they who will use the draft questionnaire, and we will ask for their comments.

The second working group is on minimum standards. That is a more complicated issue because it involves not only cross-border but also aspects of purely domestic work. I could imagine that in the CCBE where we are going to discuss this in the free movement of lawyers Committee and then in the Standing Committee, it is going to be a lively discussion.

I have noted with great interest what I have heard, namely that there has been discussion in the working group 2 about the possibility to have different levels of coverage: country to country, in particular the accession countries are maybe looking at this issue from a completely different angle than very industrialised countries; and second the possible distinction between domestic work and cross-border work. We have to look at that but I have some doubts and hesitations in that respect because you must be careful not to run into the trap of discrimination against cross-border work. That is a question to be looked into.

DIC, the third working group: I think we have witnessed there a very interesting change of procedural approach, away from a quite detailed paper, we have moved toward some rather short and general required terms and conditions. That is a very technical issue if you want to implement such a short and general paper. That is a task for the experts from the insurance industry but we should not forget that in the end, the product that comes out of that work should be accepted by the national Bars or local Bars and Law Societies of the respective host countries. We should reflect on the maximum number of 576 possible supplementary insurance policies. That is an impossible task. One uniform supplementary insurance contract is out of the question. And maybe we should in the further work try to figure out which are really the most relevant jurisdictions where we could work on a bilateral basis. For instance, start with the drafting of such supplementary insurance contracts as between France and Germany or Austria and England and Wales just to give two extremes. The differences that exist in this field are really quite significant. These differences do exist. We have the claims-made and the occurrence system. We have the system where it is the individual lawyer who concludes the contract or the Bar or Law Society that does it. Now these differences present difficulties but I think it is fair to assume that it is easier to overcome the practical consequences of the systematic differences in the way we are tackling it here rather than taking really a very broad approach of full harmonisation across the border. These systematic differences are such that none of us will see day when that full harmonisation is going to happen.

So, let's be pragmatic and let's continue the work in the direction in which we have been moving so far. We should not lose courage. If you do not aim for the impossible, you will not reach the maximum possible and I think therefore we should be aspiring to do a good job on this. In the end, I think like a city like Rome of which the words were said "Rome was not built in one day". So it has taken time to build a city like Rome and so it will take some time to build a system that we are aiming at the moment, and I am absolutely convinced that it will not take as long as it has taken to build Rome.

Finally, I once again would like to thank our sponsors Aon and Marsh and the Société de Courtage des Barreaux. I would like to thank the working groups and the chairpersons, facilitators, all of you who have participated in the workshops. I would like to thank the Paris Bar for the hospitality. I also would like to thank Agnès Masquin in the CCBE for the great work she has done.

I also invite you to join us for the cocktail kindly offered in the reception rooms by Aon and Marsh.

Thank you very much.

Press release

Brussels, 4 February 2004

"Facilitating professional indemnity insurance for European Lawyers"
Conclusions of the CCBE Conference of 30 January 2004 in Paris

The Council of Bars and Law Societies of the European Union (CCBE), which represents, through its member bars, over 500,000 lawyers, held its second professional indemnity insurance conference in the Maison du Barreau in Paris on 30 January 2004, gathering representatives of the bars on one side, and European brokers and insurance companies on the other side.

The event was sponsored by Aon and Marsh, two leading brokers in the professional indemnity insurance market, and also by the Société de Courtage des Barreaux, a brokerage firm recently created on the initiative of several French bars.

More than 100 participants took part, including representatives from all Member States, two candidate countries, the European Committee for Standardisation, and the Internal Market Directorate-General of the European Commission.

The Conference discussed three draft projects aimed at facilitating the free movement of lawyers as regards professional indemnity insurance within the context of the three European Directives applicable to lawyers and the recent Draft Framework Services Directive in the Internal Market issued by the European Commission on 13 January 2004.

The first project, the draft common questionnaire was, except for a few terminological issues, adopted in principle. It will be used by bars to harmonise the treatment of establishment enquiries from lawyers of other Member States, and in particular to facilitate the recognition in the host Member State of the equivalence of insurance policies taken out in the home Member State.

The second project, the draft on minimum standards for European lawyers in the area of professional indemnity insurance, has not been finalised due to existing divergences regarding the minimum amount of the cover, but all the participants agreed that such minimum standards, including the obligation to be insured against risks arising out of a professional activity, whether cross-border or not, were necessary. Before issuing the minimum standards, it would be best to finish the third project, which is the creation of a policy or a clause which might be used as an additional policy to the home insurance in order to solve current difficulties in the host state (the so-called 'Difference in Conditions' policy). The work will continue on these two projects.

Hans-Jürgen Hellwig, CCBE President, said today: "The CCBE will continue to work on professional indemnity insurance issues, with the help of European brokers and insurers, both to complete the projects it has already started, and also pursuant to the insurance provisions of the new draft Framework Services Directive. We will try to overcome the inherent difficulties of the disparities in our systems with a pragmatic approach, not aiming to arrive at any price at harmonisation."

For more information on the conference and on our continuing work on PI insurance, please contact at the CCBE: Agnès Masquin (masquin@ccbe.org).