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Representing Europe's lawyers

## **Report on the 18 November 2002 conference on professional indemnity insurance for European lawyers**

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## **Introduction**

Since May 2002, the CCBE has established a project which aims to facilitate, as far as professional indemnity insurance is concerned, cross-border practice by lawyers within the European Union and the European Economic Area.

The project arises out of the many difficulties which have come to light in particular since the implementation of the Establishment Directive 98/5/EC, which facilitated the practice of the profession of a lawyer on a permanent basis in a Member State other than that in which the qualification was obtained.

Several studies undertaken in 2001 and 2002 showed significant disparities in the various professional indemnity insurance schemes for lawyers existing in Europe.

The CCBE decided to bring together bars and law societies, and insurance brokers and companies, in a conference to discuss professional indemnity insurance issues faced by lawyers in cross-border practice.

The conference took place on November 18<sup>th</sup>, 2002, in Brussels, and had as its main theme professional indemnity insurance arising from various issues relating to lawyers' rights of establishment and free provision of services.

The conference was realised thanks to the support of AON and MARSH, two leading insurance brokers in the professional indemnity insurance market for lawyers in Europe.

67 participants attended the conference, including representatives from all Member States and two candidate countries. The European Commission DG Internal Market was also represented.

This document, realised by the CCBE with the co-operation of AON and MARSH, includes most of the debates held during the conference, i.e.:

- The CCBE presentation;
- The insurance brokers presentation;
- Three workshops reports;
- The conference conclusions.

For further information on the conference or on the project in 2003, please contact at the CCBE Agnès Masquin ([masquin@ccbe.org](mailto:masquin@ccbe.org)).

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## CONFERENCE PROGRAMME

### PROGRAMME DE LA CONFERENCE

<b>Morning – Matinée</b>
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- 09.30 - 09.45: **Opening speech by John Fish, President of the CCBE**  
*Discours d'ouverture par John FISH, Président du CCBE*
- 09.45 - 10.30: **Professional indemnity issues arising from the Establishment Directive as seen by Bars and Law Societies, by Jonathan Goldsmith, Secretary General of the CCBE and Agnès Masquin, lawyer CCBE**  
*Problèmes relatifs à l'assurance responsabilité professionnelle au regard de la directive Etablissement du point de vue des barreaux, par Jonathan Goldsmith Secrétaire Général du CCBE et Agnès Masquin Avocat CCBE*

#### **COFFEE BREAK - PAUSE CAFE**

- 10.45 - 12.00: **Professional indemnity issues arising from the Establishment Directive as seen by insurance brokers, by Jérôme Goy, Directeur Adjoint Grands Risques Professionnels AON France, Dominique Coppens, Finpro Practice Leader, Marsh Belgium, and Catherine Ramaekers, Senior Client Advisor, Marsh Belgium**  
*Problèmes relatifs à l'assurance responsabilité professionnelle au regard de la directive Etablissement du point de vue des courtiers d'assurance, par Jérôme GOY Directeur Adjoint Grands Risques Professionnels AON France, Dominique COPPENS Finpro Practice Leader MARSH Belgique, et Catherine RAMAEKERS Senior Client Advisor Marsh Belgique*
- 12.00 - 12.30: Questions

#### **LUNCH**

<b>Afternoon - Après-midi</b>
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13.30 - 15.45: **Workshops to discuss the following themes:**

*Groupes de travail autour des thèmes suivants*

**1/ Claims-made/occurrence** - *Fait générateur et base réclamation*

**2/ L'étendue territoriale de la couverture d'assurance** - *Applicable law and territoriality*

**3/ Scope of lawyers' practice** - *L'adaptation de la couverture d'assurance au regard des activités autorisées aux avocats dans les différents pays de l'Union*

**4/ Structure of insurance programmes** - *La structure des couvertures d'assurance / contrats individuels ou collectifs ?*

**COFFEE BREAK/PAUSE CAFE**

16.00 - 16.30: **Reports from the facilitators of the various workshops on the issues and possible solutions**

*Rapports émis par les rapporteurs des groupes de travail sur les problèmes rencontrés et les solutions évoquées*

16.30 - 17.00: **Conclusion by John Fish, President of the CCBE**

*Conclusion par John Fish, Président du CCBE*

17.00 - 17.30: **Cocktail reception given by AON**

*Cocktail offert par AON*

## **Opening speech**

John Fish, President of the CCBE, welcomes all the participants to the conference.

The genesis of the idea for a conference on professional indemnity insurance came a few years ago when the Establishment Directive was passed.

Two factors demonstrate the need for such a conference.

**a)** Over the last years, legal services in Europe were greatly liberalised further to the European Directives on free provision of services, recognition of diplomas and free establishment.

Nowadays, lawyers have the opportunity to practise and to provide their services in a reasonably unrestricted manner throughout the European Union, and as they do so, more and more questions are raised on the mobility of the professional insurance coverage. In the future, many more such questions will tend to arise. Therefore, it is necessary to focus on the issues and at finding solutions.

**b)** Furthermore, the regulation at the European institutions level is quite dense and 2002 in particular was a year full of legislation which had a more or less direct impact on European lawyers' practice, and especially on lawyers dealing with European Law. However, this impact also exists for lawyers who are not expert in European law and who are practising in their national law.

We are moving constantly towards the harmonisation of the internal market. Both mentioned factors are sufficient to justify, if it was necessary, the organisation of the conference.

The CCBE is happy to see that all the European countries are represented today in the Bars and Law Societies as well as in the insurance industry.

I will also take this opportunity to thank our sponsors AON and MARSH, not only for their financial support but also for their enthusiasm in the project led by the CCBE. The conference could not have taken place without this support. Special thanks to Jérôme Goy, AON, Dominique Coppens and Ray Brown, MARSH.

## **Intervention by the CCBE**

### ***“Professional indemnity issues arising from the Establishment Directive as seen by Bars and Law Societies”***

#### **I/ Introduction (Jonathan Goldsmith)**

The CCBE is the Council of the Bars and Law Societies of the European Union. Its members are Bars and Law Societies themselves and not individual lawyers.

The CCBE is composed of delegations made up from all the EU and the EEA Member states. There are also observer members, among others, countries from Central and Eastern Europe. We are very pleased to have with us, today, representatives from these countries which will join the EU in 2004.

It is also appropriate to note the presence of the European Commission, represented by the Directorate General Internal Market, which wished to participate in the conference.

The DG Internal Market published on 30 July 2002 a report on the current state of the internal market for services within the framework of the strategy to ensure that the markets are running effectively.

The question on insurance, and in particular the question on professional indemnity insurance for professionals, and notably lawyers, is mentioned as being one of the areas that need particular attention, as difficulties arise regularly.

As far as the conference is concerned, it is appropriate to evoke the history of the Directive which “governs” the European lawyers; this text, the provisions of which are not necessarily familiar to everyone, will be mentioned often during the day

The first Directive applicable to lawyers goes back to 1977 (Directive on the free provision of services) and allows lawyers to temporarily provide services in another Member State. Under this text, a lawyer can go to another Member State to practise his professional activity temporarily.

In 1989, a Directive instituted a general system of recognition of diplomas of higher education which applies to a great number of professionals and covers also lawyers. This text allows the recognition of the title of the lawyer when he wishes to qualify for the title of lawyer also in another Member State. Under this Directive, a German lawyer could decide to assert his title in order to become a lawyer in Italy. In all States, except Denmark, it is necessary that this lawyer take an exam called an aptitude test, which exists only to test the differences between local law and the law of others seeking to become local lawyers from elsewhere in the EU. (In Denmark, the candidate for a local title must undergo a period of adaptation before being able to acquire the local title.)

Then, in 1998, there was a much more radical change with the Establishment Directive whose provisions will be explained below by Agnès Masquin. Under this text, the German lawyer “Rechtsanwalt”, for example, can decide to go to Italy to establish himself there as a lawyer and practise permanently under his home title “Rechtsanwalt”. Once established, he can practise many activities since he can provide legal advice not only in his home State law or in European law, but also in host State law, i.e. Italian law in this case.

While in a way completing the two previous Directives, this Directive introduces a change even more radical since it will really allow the integration of lawyer.

If we take the above example, the German lawyer will be able, after three years of practice, to become an Italian lawyer without being obliged to take the aptitude test; indeed, the Directive abolished the obligation of the aptitude test for a lawyer who is established and practising in local law for three years.

These three Directives usher in an extremely liberal market for legal services, a market which is one of the most liberal in the world and much more liberal than in the USA. In the USA, indeed, there are real barriers from one State to another, preventing or slowing down the professional practice from one State to another, even though these barriers are gradually being removed.

Consequently, it is not really surprising that this situation leads to difficulties, notably as far as insurance is concerned.

The Directive has provisions on professional indemnity insurance in case of cross-border professional practice.

This conference represents a unique opportunity to debate insurance issues faced by lawyers in their cross-border practice. For that reason, both the Bars and Law Societies of the European Union and the European Economic Area, and the insurance companies and brokers are represented here today

The purpose of this conference is to facilitate, as far as possible, professional indemnity insurance issues in cross-border practice.

## **II/ Further part of the intervention (Agnès Masquin)**

This intervention which aims to give the views from the standpoint of the legal profession can only be general. It will be the role of the brokers, Marsh and Aon, to explain the standpoints of the brokers and the insurance companies which will necessarily be more technical.

First, the content of the texts applicable to cross-border practice will be explained as regards the professional indemnity insurance issue.

Then, the reasons behind the professional indemnity insurance issues faced by European lawyers will be studied and concrete examples will be given, which will allow opening the discussion towards possible solutions.



## **A/ The legal framework applicable in case of cross-border practice**

These texts should be the necessary starting point for any debate, and the debate should develop in the framework set by the texts

It is therefore important to first explain some of their provisions relating to professional indemnity insurance.

The two European Directives applicable to lawyers in case of cross-border practice will then be studied, as well as the CCBE texts, i.e. the Code of Conduct and the Recommendations for the implementation of the Directive prepared by the CCBE for European Bars and Law Societies.

### **1. The European Directives:**

Cross-border practice can take two forms: temporary practice within the framework of free provision of services, and permanent practice within the framework of the right of establishment.

**1.1.** The Directive 77/249/EEC which aims to facilitate the effective free provision of services by lawyers does not contain any provision relating to professional indemnity insurance.

Article 4 provides that *“a lawyer [...] shall remain subject to the conditions and rules of professional conduct of the Member State from which he comes without prejudice to respect for the rules, whatever their source, which govern the profession in the host Member State”*.

The Directive deals in this article more with complying with ethical rules rather than with rules relating to taking out of professional indemnity insurance.

Therefore, it can be legitimately considered that the lawyer practising his activity temporarily in another Member State, will have to check, referring to these same rules, that he is covered for such an activity.

In practice, the question of professional indemnity insurance comes up in the case of permanent practice.

**1.2.** Under Directive 98/5/EC, intended 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, any lawyer from a Member State is entitled to practise the profession on a permanent basis in another Member State under his home professional title, as long as he is registered with the competent authority of the host Member State.

The lawyer must therefore comply with the professional and ethical rules of the host Member State in which he practises.

Consequently, in case the professional indemnity insurance is compulsory in the host Member State, the lawyer shall take out an insurance policy.

However, Article 6 paragraph 3 of the Directive provides that:

*“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.”*

This means that the lawyer already covered in his home Member State according to the rules applicable there, will not be subject to the primary obligation to be insured.

This insurance will nevertheless have to be *“equivalent in terms of the conditions and extent of cover”* of the host Member State.

This implies significant work for the host bar or law society supported, if necessary by insurance companies or brokers, in order to verify this equivalence.

Practically, it will not be easy due to the more or less great disparity existing between insurance schemes in the European States.

The difficulty represented by this disparity will necessarily lead to certain distrust for a scheme different from what is known and what is used.

Besides, it should be noted that the text first sets out the right for the host State to require the lawyer, who applies for registration, to take out a professional indemnity insurance according to rules applicable to his local colleagues, and only then, suggests a relaxing through more or less partial exemption of the insurance obligation when the insurance policy taken out in the home State provides an equivalent cover to the existing one in the host State.

The text thus tends to facilitate the right of establishment for lawyers by allowing, in case of partial equivalence, to only take out a supplementary insurance.

However, once again the issue will be to establish the needs for this additional insurance; this means that, practically, the host bar or law society should know precisely the conditions and extent of the Home cover in order to be able to establish precisely the extended cover required and allow for an appropriate supplementary coverage.

This problem will be made worse by the fact that under the Directive's Article 5, the lawyer can, under his home professional title, practise all the activities authorised to lawyers practising in the host Member State.

Thus, the lawyer coming from another Member State practising under his home professional title will be allowed, for instance, to give advice on the law of the host State.

However, paragraph 2 of the above-mentioned Article, allows the host State authorities to exclude lawyers coming from another Member State and who practise under their home professional title from certain activities which are reserved in their State to a fixed category of lawyers. The Directive expressly refers to the activity related to the creating or transferring of real estate rights or to the right to administer goods for a deceased person.

Finally paragraph 3 allows, under some conditions, the representation and defence in Courts.

## **2. Texts and recommendations adopted by the CCBE**

The Code of Conduct for lawyers of the European Union recommends lawyers to be insured at all times against claims based on professional negligence to the extent reasonable for the nature and extent of his practice.

This is in line with our opinion on the Directive on “free provision of services” in that taking out insurance against professional liability falls under professional ethics.

In its recommendations on the implementation of the Establishment Directive, (98/5/EC of 16 February 1998), the CCBE already referred to problems of double premiums or double insurance and, in order to avoid such problems, suggested to the appropriate authorities in each Member State to consult each other in order to assure that the home coverage is recognised as far as possible

The CCBE consequently recommended to the host Member States’ authorities to overcome their natural reluctance towards an insurance policy from another Member State, to accept that the practice by a lawyer on their territory might be covered by an insurance contract taken out in another Member State according to this State’s rules, and to indeed facilitate lawyers’ free establishment.

\*        \*  
\*

All these provisions, and in particular, the requirement for an equivalence in terms of the conditions and extent of cover, lead to mechanisms of double premium and double insurance.

However, difficulties arise out of disparities between the professional indemnity insurance schemes for lawyers in the different Member States.

## **B/ The disparities between the various insurance schemes in Europe**

These difficulties are the result of the diversity of schemes in existence in the Member States, hence the difficulty, or even impossibility, for a host Member State to check the “*equivalence*” of the home country cover with the host country requirements.

The report circulated by the CCBE at the conference (which can be consulted on the CCBE web site), is a comprehensive overview of the responses from our delegations (bars/law societies) to the 2001 and 2002 questionnaires. It provides an overview of the structure of existing professional indemnity insurance schemes for lawyers in the Member States.

It should be stressed that only national Bars and Law Societies of Member States were consulted within the framework of this survey. Thus, the situation can be different in Bars and Law Societies from other cities in the relevant States since the situation is not always the same in one single Member State.

The CCBE has been able to make the following synthesis of the main existing disparities:

- 1) The first disparity is the compulsory nature (or not) of professional indemnity insurance within the various Member States. The insurance is compulsory for most States, but there are significant differences in the compulsory minimum guarantee.
- 2) The second disparity lies in the manner in which to take out the insurance policy which is carried out either through the Bar, i.e. in a collective way, the subscription to the Bar comprising generally the insurance premium, or individually, the lawyer directly taking out an insurance from a company of his choice.
- 3) The way premiums are fixed varies from one State to the other but it is primarily the differences in the level of the premiums between different European countries that generates issues. The level of premiums generally increases in all these States, but it is more significant in the United Kingdom.
- 4) Different terms and conditions can be seen regarding the territorial extent of the cover:
  - A national cover, i.e. in national law or in a foreign law practised locally or in European law;
  - A European cover: cover to exercise a temporary practice or for establishment in another Member State;
  - An international cover in a country outside the European Union.
- 5) Significant differences exist from one State to the other regarding the material extent of the cover.  
The insurance contract depends on activities authorised to lawyers in the various Member States. However, the definition of these activities is far from being the same from one State to the other.

The contract provisions are also different from one State to the other as relates to the definition of the insured or the structure of the insured law firm: lawyer/partner, principal lawyer/employed lawyer or legal assistant/non-lawyer employee.

The content of the contract also varies according to the way the mistake or the loss is defined in the named State's law; as each Member State has its own specificity regarding insurance law and civil liability.

For instance, according to the German law governing insurance contracts (*Gesetz über den Versicherungsvertrag, VVG*), the insurer of the responsible lawyer cannot use the following arguments against the client who suffered a loss, provided the amount in question does not exceed the maximum compulsory insurance (€ 250,000 for each individual case, at most 4 x €250,000 per year):

- The lawyer's claim against the insurer is barred by lapse of time.
- The lawyer has violated certain obligations vis-à-vis the insurer after the damage was caused (e.g. by failing to notify the damage or notifying too late).
- The lawyer made false statements when the insurance contract was concluded and thus the insurer could contest or terminate the contract, or withdraw from the contract.

The insurer can use these arguments only against the insured lawyer and not against his client. But first of all, the insurer has to pay the client and only then can he possibly claim back the money from the insured lawyer.

If the sums involved exceed compulsory insurance coverage, we are entering the field of voluntary insurance.

It should however be pointed out that no other creditor of the lawyer concerned has access to the amount payable by the insurer to the client who has suffered a loss (seizure of property or insolvency proceedings); and neither can the lawyer make any agreements with his insurer which would be to the detriment of the client.

These provisions are not specific to Germany and also exist in Austria or in different forms in some other European States.

This example gives the opportunity to assess the range of problems which might arise when a lawyer wishes to establish in Germany and claims the "equivalence" of his home insurance cover.

These various points, which are fairly technical, will be examined in further detail by our experts from Aon and Marsh.

### **C/ Concrete examples of difficulties:**

Finally, it is interesting to study three real cases to illustrate this presentation and better get to the heart of the matter. The CCBE became aware of the following cases, none of which has been resolved so far.

**1/ First case:** a Dutch lawyer wishes to establish in France and seeks registration with a local French Bar. The Bar demands the payment of the subscription fees. Inasmuch as in France, the Bar takes out, for all its members, a collective insurance policy, the subscription fees also comprise the insurance premium, the level of which depends on the turnover of the lawyer. The lawyer refers to the fact he has taken out an insurance policy in his home State; the requested registration to the Bar and subsequent payment of the subscription fees leads him to take out two insurance policies and therefore, to pay double premiums.

**2/ Second case:** a German lawyer wishes to establish in Brussels and wishes to be part of the collective policy negotiated by the Bar; it is the same scheme as in France, as the subscription

fees comprise the premium. However, as he is practising under his home professional title, he is still subject to his State rules and to his home bar rules. His Bar requires that he takes out professional indemnity insurance since it is mandatory. The lawyer must therefore take out an individual insurance (obligation for all lawyers practising in Germany) which must comply with the German minimum standards present in the law. This lawyer claims in vain the equivalence of the Belgian insurance cover and the fact that he does not practise in Germany nor has an office there.

**3/ Third case:** a French law firm registered in Paris wishes to establish in London. There, the scheme is a bit particular as, even if the insurance is not organised collectively by the Law Society of England and Wales, there are very strict requirements in that matter as well as a list of insurers agreed by the Law Society that propose policies in accordance with these requirements. At the registration, the Law Society asks the law firm to fill in a very precise questionnaire which will allow them to check the equivalence of the policy taken out by the home Bar and notably the existence of a policy covering their activities as solicitors. This is the crux of the problem since some activities carried out by a solicitor related to the creation and the transfer of real estate rights can not be practised by a French lawyer because of the fact they are reserved in France to another profession, i.e. the notaries. The Paris Bar insurer indicates that the cover cannot be extended to such activities. The Law Society suggests the firm to take out an additional insurance policy as no equivalence between the Home and the Host covers can be found. Then the issue of the payment of the premiums is raised, as there is no possible comparison between the level of the premiums between the United-Kingdom and France. The issue of the payment of the premiums is raised, as the differences in the level of premiums between the United-Kingdom and France is beyond comparison.

The amount of the premium, just as the fact to be obliged to pay two premiums, are real obstacles to the establishment in another Member State; the same can be said when problems are encountered due to the way insurance is organised either individually or collectively, or due to the activities authorised to lawyers in each of the Member States and to the territorial extent of cover.

These problems relate to themes that will be discussed in depth during the afternoons' workshops sessions, i.e.:

- The claims-made/occurrence issue which illustrates two different legal schemes; this concerns the following question: what is the basis of the claim, the claim itself or the mistake? It is related to civil liability law.
- The issue of the territorial extent of the insurance cover which also comprises the problem of the law applicable to the insurance contract and the jurisdiction;
- The issue of the material extent of the insurance cover: what are the authorised activities for lawyers in the various Member States?
- And finally, the issue of the structure of contracts or insurance programmes: collective contracts/individual contracts; cover of different members in law firms.

Hence, the significance of such a conference which should focus on exploring different possible solutions that could solve the existing issues.

### **III/ The possible solutions (Jonathan Goldsmith)**

It may seem a little bit premature at this stage of the discussions to mention solutions. However, the main outlines of the kind of solutions which may be envisaged can already be generally described.

Further details of the possible solutions to the mentioned difficulties will be given by the insurance brokers.

There are three possible solutions.

1/ The first, which at the moment is only a dream, is the harmonisation of insurance cover around the EU.

The extent of disparities between the existing professional indemnity insurance schemes in Europe revealed by our survey, shows that it is too early to envisage any harmonisation.

However, at the European level, we move towards harmonisation of laws and legal procedures and in that context, it is still possible to envisage the harmonisation of insurance cover. For this reason, harmonisation remains a solution which should be kept in mind.

2/ The second solution already exists, since it was developed further to discussion which has been going on for 2 or 3 years between the Paris Bar and the Law Society of England and Wales, discussion relating to the equivalence of insurance cover existing on both sides for lawyers.

One of the solutions could be to allow lawyers to take out an insurance policy which would cover the difference in terms and conditions of the policies they have. There is already an insurance policy of this kind.

3/ The third solution which is of course the easiest one, and on which the CCBE would like to work, would be to create a permanent dialogue between bars and insurers.

This conference is the first step towards the establishment of such a dialogue and we hope that there will be some fruitful discussions.

Most probably, all the existing difficulties will not be resolved today and there will certainly be other problems in the future.

It is hoped that it will be possible to make efficient the dialogue which started today and that everybody will share the idea of wishing that this dialogue will be in a way institutionalised or will rather take the form of a meeting or a conference once a year with the aim of discussing the existing problems.

It is likely that there are other solutions than those which were just mentioned and the CCBE is open to listen to the solutions which might be suggested by the participants to the conference.

## **Intervention by AON and MARSH**

### *Professional indemnity issues arising from the Establishment Directive as seen by insurance brokers*

#### **First part (Jérôme Goy, Aon)**

Due to an argument, or rather a discussion on the scope of texts relating to the legal profession between two European Union Member States, I have learnt, for several years now, about the application of the 1998 Directive on free establishment of lawyers in the European Union.

As an insurance broker for professional institutions of lawyers in the European Union, Aon had, at a very early stage, to look at the outcomes from this still new text. A new text, but which partly covers a pre-existing issue, i.e. the guarantee of professional acts of a lawyer, or a law firm, out of his home country.

The Directive 1998/5/EC of 16/02/1998 “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” deals naturally with issues on professional indemnity insurance.

In article 6.3., the Directive provides:

*“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.”*

This means, in simple terms, that the insurance is very logically submitted to local rules which govern professional indemnity insurance, and that if the lawyer already benefits from an insurance in his home country, the insurance policy in the host country will only cover what is not covered by the home country contract but which must be covered according to the host country requirements.

This text is closer to legal theory than to insurance practice for lawyers. Indeed, it assumes that the host country’s competent authorities analyse the home country insurance guarantees in order to identify the only cases which would need to be covered.

This analysis multiplied by the number of lawyers and host countries would clutter all by itself a Bar and an insurance broker; indeed, and as will be illustrated in this intervention, lawyers:



- are submitted to various legal requirements as far as professional indemnity insurance is concerned, going from the complete lack of insurance obligation to the respect of a master policy of forty pages;
- are authorised to lead activities which definition varies considerably from one country to another, which has as many consequences on the guarantees from which they benefit;
- fulfil the need for an insurance in different ways, favouring either the regional collective contract taken out by the Bar, or the professional mutual fund, or the contract negotiated by each law firm, or a mixture of these three solutions.

In order to offer a global and consistent overview, we will therefore outline on the one hand, the legal insurance requirements and the means to satisfy them and on the other hand, the content of professional indemnity insurance guarantees of lawyers in the EU and finally, the solutions which can be foreseen in the light of practice and of the Directive.

As to me, I will address the first item and first aspects of the second one, and will leave Mrs Coppens and Mrs Ramaekers to finalise this introduction.

## **I. Legal obligations to insure and means to fulfil them**

### **A. Legal, regulatory or ethical obligations to insure in the European Union: the principle of consumer protection.**

Professional indemnity insurance for lawyers is governed according to the country, either by a legal or regulatory obligation to insure, or by an professional obligation, or by a lack of obligation.

There are ten countries where lawyers are subject to a legal or regulatory obligation to insure (i.e. Austria, France, Germany, Iceland, Ireland, Liechtenstein, Luxembourg, the Netherlands, Norway and the United-Kingdom). There are five countries where there is an ethical obligation (i.e. Belgium, Finland, Italy, Spain, Sweden). Finally, there are two countries where there is no obligation to insure (Greece and Portugal).

It can reasonably be thought that through the extension of the principle of consumer protection, all the lawyers will be submitted to an obligation, if this is not yet the case, which would be either regulatory or professional, that does not matter.

On the other hand, even if the principle seems to be unanimously admitted, the content of these obligations considerably varies. For instance, Spanish texts do not provide for minimum cover as to the amount, which leaves the Bar free to determine it.

At the opposite extreme, the German text very precisely provides for a minimum cover of 250,000 € for each individual case and at most 4 x €250,000 per year.

Other example:

As far as the content of covers is concerned, the French texts provide for an obligation to insure in civil liability without more details, whereas England and Wales provides a very detailed text.

Some countries leave the insured and the insurer free to negotiate the content of the cover whereas others give to the Bar a pre-eminent role. It is the same for the excess provided by these contracts, ruled and framed in some countries, whereas completely free in others. The item relating to excess should not be neglected as the excess of some policies can be higher than the amount of the cover of others.

### **B. Means chosen by the profession and insurers to fulfil needs for professional indemnity insurance.**

If, as we have seen, the source of professional indemnity insurance is varied, means to implement it, i.e. the way contracts are negotiated and taken out, show even more disparities. Indeed, if the rule is most of the time national, the way of subscription and negotiation is not always, and even is rarely, national.

Two main ways of subscription stand out further to a study led country by country:

#### **1. The group contract**

The group contract is a contract by which the Bar takes out an insurance for all its members. A distinction must be made between mandatory and only optional group contract. The mandatory collective contract is the rule in Austria, Belgium, France, Luxembourg, Norway and Spain. Some group contracts are optional, as in the Netherlands.

The group contract holder is not always, far from it, a national body; it is most of the time the Bar, i.e. generally a local body, in France up to 182 local Bars.

#### **2. The individual insurance**

Some other countries would rather leave the law firm free to negotiate individually their insurance contract. Briefly, it is the case either in countries where the professional indemnity insurance is not mandatory or is subject to a professional obligation (Portugal, Italy, Greece) or in countries which deliberately choose to have individual insurance (Germany, the United-Kingdom).

In countries where the insurance is not mandatory, the insured law firms are most of the time local offices of law firms from other European Union States or from the USA.

#### **3. Consequences of each scheme**

The individual insurance is, as we have seen previously, either chosen or imposed.

Here, the term “imposed” means the countries where the professional indemnity insurance will follow the establishment of a law firm subsidiary in another EU country.

The term “chosen” means that the individual guarantee results from a political choice by the profession, like in England further to the dismantling of the solicitors’ mutual insurance society, or from the structure of insurance market, like in Germany where brokerage is historically more limited than in the other European countries.

Both systems are not excluding: individual covers can be completed by collective covers. Anyway, when there is no collective cover and the insurance is not mandatory, the Bar must check the existence and, theoretically, the content, of individual covers. That is how the master policy (“minimum terms and conditions”) dictated by the Law Society of England and Wales works.

In order to avoid this tedious control and to ensure that all lawyers are insured, many Bars prefer a mandatory collective insurance. It is also a way to facilitate the good continuation of cover in time (continuation of cover in case of lawyer’s death etc.).

The argument between collective and individual insurance is linked to the control of insurance policy content and, indeed, the scope of covered activities is worthy of being addressed.

## **II. The content of professional indemnity insurance of lawyers in the EU**

### **A. Covered activities:**

Most professional indemnity insurance are written according to the formula “all except” (“*tout sauf*”), i.e. all activities authorised to lawyers according to the texts are insured, except activities exhaustively excluded by the insurance policy.

#### **1. The lawyers’ activities:**

The content of the insurance policy refers to the lawyer’s activity in each country. I do not claim to relate the lawyer’s activities in each country from the European Union. It will be useful to recall that a “*barrister*” in United-Kingdom will not have the same scope of activity as a “*avocat*” before the Court in France and a “*rechtsanwalt*” is not allowed to act in the same way as a Spanish “*solicitador*”.

I will only cite the essential differences which have consequences on the insurance policy:

- The existence or not in some countries of different professions whether the lawyer is representing his client in court or taking procedural steps on behalf of a client.
- The existence in some countries of specialised Bar before some courts.
- The existence of notaries in some countries.
- The notion of barrister which is difficult to understand in civil law countries.

- The possibility in some countries, to be partner, in the same firm, while being from different legal professions.
- The title of lawyer granted or refused to in-house counsel.

From these main differences in the profession of lawyer come as many differences in the insurance policies' content.

Moreover, to the activity of lawyer is superposed the system of these activities, and especially the legal scheme of liability and the associated statute of limitation:

- The statutes of limitation can vary from 6 months to 30 years according to the activity or the country concerned.
- Jurisprudence can either give the duty to the lawyer of proving that he did advise the client correctly, or totally ignore this notion.

To the various activities of lawyer and the various lawyers' liability systems are added differences linked to the content itself of insurance policies.

## **2. Differences related to the content of insurance policies:**

Civil liability for lawyers is not an isolated matter in the middle of law in each Member State. It falls within the scope of civil liability and insurance law and gathers specific provisions proper to each country.

For instance, the cover of consequences, in civil liability law, of a deliberate action by an employee of a lawyer or a law firm is very logically part of some insurance policies whereas it is completely excluded from others.

Some countries consider the notion of civil liability with the law firm as a legal entity, some others as an individual liability of the lawyer.

Finally, insurance policies exclude some activities which are authorised to lawyers and which other insurance policies expressly cover, for instance, missions ordered by Courts, arbitration, giving legal advice in foreign law, or fiduciary activity.

### **2nd part of the intervention (Dominique Coppens and Catherine Ramaekers, Marsh)**

My intervention will try to analyse the main provisions in professional liability insurance policies in order to show the main differences which might exist according to the countries where these contracts are established and which law is applicable there.

After addressing these divergences, Cathy Ramaekers will talk about the possible solutions for a harmonious cover within the framework of the Establishment Directive, i.e. how is it possible to cover in the best way a lawyer's cross-border activities.

The main points which we will look at, are the following:

1. The definition of the claim or "trigger of the cover" – claims-made vs. occurrence;
2. The territorial extent of the insurance policy and the applicable law;
3. The object of the contract: civil liability – fraud.
4. Limit, excess and premium.

### 1. Definition of the claim

Two principles are opposed:

- The mistake is the basis of the claim
  - The claim is based on the filing of a claim
- *The claim is defined as the mistake base of the claim or “occurrence”*

Are covered by the insurance policy all the liability claims which occurred during the period of validity of the contract.

Therefore, the scheme implies that there is no coverage of claims made which took place before the enforcement of the contract.

On the contrary, the insured person benefits from coverage of claims filed against him/her after the validity period of the contract as soon as these claims are based on facts committed during the validity period of the contract.

Therefore, the period after is automatically covered.

This scheme is not very much accepted when dealing with the coverage of professional civil liability’s risks, on the one hand for reasons proper of the risk itself, and on the other hand for reasons related to the insurance market.

The reasons linked to the risk are easy to understand: if there is a relatively long period of time between the moment when the mistake is committed and the filing of the claim, the policy in force at the time of the mistake is known, could not be adapted anymore to the situation at the time when the claim is judged as far as conditions and guarantees are concerned.

The reason proper to the insurance market is rather in the fact that the insurer of an “occurrence” contract can only definitively close their accounts after definitive extension of the statute of limitation in force for the kind of liability they cover.

As far as we know, Germany is one of the few countries which covers the civil liability of its lawyers in "occurrence basis".

- *The claim is defined as the filing of a claim introduced against the insured - "Claims-made"*

Are covered by the policy all the claims introduced against the insured during the validity period of the contract for the negligence committed during or before that same period.

In this case, preceding period is totally covered except for disputes prior to or ongoing when the contract is taken out, and for any fact which the insured is aware of as in a position to generate a claim.

On the contrary, the contract legitimately stops its effects at the end of the validity period.

In practice, to avoid leaving the insured powerless when facing his cover's end, the insurance policies provide for the possibility to extend the coverage during a period to determine, for any claim introduced after the validity period of the contract and based on negligence committed during or prior to that same period.

In some countries of continental Europe, laws in force relating to insurance policies impose a minimum period of time to cover automatically and freely. Nothing contractually prevents the parties to go beyond what is provided for by law, provided there is a sole premium to cover the whole period after.

For these various reasons, the system "claims-made", more flexible, seems to us to be corresponding the most properly to the parties' concerns.

## **2. The territorial extent of the contract and applicable right**

The situation is considerably different from one state to another.

It seems that in Iceland, Sweden, Finland and Belgium, the insurance contract covers the professional activities in another Member State.

However, a distinction must be made between the activities carried out from a law firm of the home country and the activities carried out within the framework of the Establishment Directive from a host country.

In Germany and France, the insurance contract applies only if the lawyer practises in his national law or in European law.

In France, an extension is provided regarding subsidiary law firms abroad.

The situation is different in Ireland since the lawyer established in another Member State is covered by his insurance if he practises mainly in Ireland.

As said previously, the law to be applied by the court where the claim is introduced against the lawyer, places us in front of a diversity of the liability laws in the various European Union States.

Therefore, it is important to know what the necessary conditions are to successfully bring an action against a lawyer and to obtain compensation.

Is it absolutely necessary to prove a mistake or could the lawyer's liability be put at stake as soon as a loss exists?

If it is necessary to prove the existence of a mistake, what kind of mistake shall it be?

As far as the insurance contract is concerned, does it cover the lawyer's practice in his national law, in European law, or does it also cover losses due to a mistake committed while practising in host country law?

Facing this complex disparity, harmonisation would impose a minimum common denominator in all professional indemnity insurance policies in the European Union.

The workshop "Applicable Law" of the afternoon could try to draw some principal guidelines so all the enforced insurance policies have a minimum common basis concerning the geographical scope and applicable law.

As you may understand, it does not deal with law applicable to the insurance policy itself which is always governed by the national law of the country where the contract is taken out and which rules the disputes between the insured and the insurer relating to the terms and conditions of the contract.

This poses an additional problem but it would be illusory to think that this question could be solved today. Indeed, we do not see well how all the insurance policies of the EU could be ruled by the same law in order to avoid disparities in the interpretation. For that reason, I therefore propose not to go further in this matter.

### **3. The object of the contract**

In this matter, there is a common point between all the insurance policies: their aim is to cover the professional civil liability, i.e. pecuniary consequences towards third parties due to a mistake committed while exercising the profession of lawyer.

Unfortunately, this is the point where similarity stops since, as already said, the liability law is different from one Member State to another.

Beside this, a further difference is to be added: some insurance policies only cover the sole civil liability of the lawyer, i.e. the consequences of a mistake committed without intention.

Other policies provide for a complementary guarantee which covers losses suffered by clients due to fraud, theft or misappropriation of funds committed by the lawyer.

This yet does not seem major inasmuch as these guarantees are easily negotiable and could easily be part of the whole cover proposed to lawyers as soon as the insurance buyer can not be mixed up with the insured.

4. We will now deal with the most basic consideration which is however not the least important: **the premium**, and secondarily the **limit and excess of the insurance policy**.

As far as limits are concerned, when the insurance coverage is imposed either by a law or by a Bar regulation, the minimum required amount is  $\pm$  €20,000 for Austria, €450,000 for the Netherlands,  $\pm$  €1,500,000 for Belgium, England, Ireland,  $\pm$  €3,000,000 for Northern Ireland and €3,800,000 for France.

Excesses are, as far as they are concerned, generally very little, of some hundreds of Euro.

The premiums vary from 1 to 100 according to the way the premium is calculated. We can say that the minimum premiums start from €250 for some lawyers to several thousands Euros for others.

I will finish my intervention with this point which shows really well the substantial differences regarding the contracts and potential problems that their harmonisation could raise among lawyers themselves. Which lawyer would agree to see his premium substantially increase so his insurance contract would be harmonised with contracts of his colleagues from the European Union whereas, maybe, he does not envisage at all to practise his activity abroad?

Why these disparities?

For two main reasons: the first is due to the insurance market and its practice. The insurers, when they studied the insurance programmes addressed today, did it taking into account law applicable in the countries in question, and the development of their own jurisprudence. The insurer therefore took into account local considerations rather than cross border considerations to forward its conditions in terms of coverage and premium.

The second reason comes from the Directive.

We can here be reminded again about Article 6.3 of the Directive of 16 February 1998 which provides that *“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.”*

According to the provisions from the same Directive, a lawyer who requests his registration in a host country must provide some documents:

- a completed application form for the registration;
- a certificate of attestation from the home bar or law society;



- evidence of existing professional indemnity insurance.

In order to avoid disguised protectionism, it is however provided that in any case, the requirements of the host bar should not exceed those provided when a lawyer from the host country changes and registers to another bar within a same country.

The recommendations for the implementation of the Establishment Directive are clear: *“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.”*

As insurance broker leader on the insurance market of professional indemnity insurance for lawyers in Europe, we analysed in collaboration with the CCBE the various solutions which are presented to cross-border lawyers regarding the coverage of his professional liability:

## **1. Uniformity within the European Union**

This solution which still seems idealist at the current stage of the CCBE deontology, should allow all the lawyers from the European Union to benefit from an identical insurance coverage.

Why is this solution utopian? There are various reasons:

- (a) All the bars of the European Union have not implemented the provisions of the Directive into their national law.
- (b) All the bars of the European Union do not provide for the same coverage, there are still too many disparities, as explained by my colleague.

Our solution would lead some bars to make a real sacrifice regarding the premium. It would not be realistic for a Belgian insurer to cover activities pursued by a Belgian lawyer in England, where the insurance premium is very different to the Belgian premium under similar conditions.

Some lawyers would therefore make an important sacrifice at the pecuniary level.

The contract is taken out according to the principles of liability in the country and according to its jurisprudence.

It is therefore difficult to extend this national coverage to the coverage of other rights.

For instance, according to the application of the general principle of equality of treatment, the host State will be allowed to forbid the migrant lawyer to pursue activities reserved to other professions than the legal profession, even if he is authorised to pursue these activities in his

home State. It would be the case for instance for acts which in Belgium are reserved to notaries or lawyers before the Court of Cassation whereas in the UK, a barrister or solicitor can pursue these activities.

In order to be effective, the insurer should ideally have an international vision of the risk to cover, be present in the various Member States and choose a fixed and active policy at the European level.

## **2. A second approach would be the coverage by the home country of activities pursued in the host country.**

In this approach also, as in the above solution, the lack of knowledge of the insurer from the home country about specificity linked to the host country is a real difficulty. The conditions of coverage could be inadequate with the principles which govern the professional liability and its pecuniary consequences, as the specificity is linked to insurance law.

This approach however offers to cross-border lawyers some advantages: there will be neither double coverage nor double premium and the lawyer will choose freely his insurance company which will cover his activities.

The insurance contract of the home country can also provide for an extension of cover in difference in limits and conditions in order to be adequate with the local requirements of the host bar.

In this case again, the stumbling block would be the unavoidable rise of the premium in the host State; it would be asked from the cross-border lawyer an additional premium corresponding to the coverage by the local insurer of the risk constituted by the practice in the host country.

## **3. The last possibility of coverage is the coverage granted by the host country on the basis of their local requirements.**

Belgium, due to its geographical situation and the presence of the European Communities for long years, was aware of this established fact and created, following a Brussels Bar initiative, first the B list for foreign lawyers and, since 2001, the E list, gathering all the lawyers called to the roll of Community lawyers of the Brussels Bar.

The registration with the E list allows the foreign lawyer to automatically benefit through the payment of his subscription to the Bar of the minimal coverage provided by the Bar within the framework of the collective contract taken out for national lawyers.

The lawyer who establishes in Belgium can possibly be exempted from paying the local insurance premium if he provides a certificate of cover by his insurer from his home State.

In this assumption, the home State provides an insurance certificate intended to check that the insurance policy in the home State is equivalent to the policy in the host country.

It is also worth noting that our French neighbours integrate totally and without any formality the Community lawyers in the policies of the various bars under the same conditions as the local lawyers.

Besides the examples above mentioned, this approach could have negative effects such as the possibility of double insurance coverage through the payment of a second insurance premium. The migrant lawyer is limited to the local market for the choice of his insurer.

This solution nevertheless offers the certainty to have an appropriate and sufficient insurance coverage. The lawyer will pay a premium for coverage thanks to a correct assessment of the risk.

It can be concluded by saying that an ideal solution for the insurance coverage of lawyers practising in countries of the European Union is difficult to find. It would consist of conditions of insurance coverage identical everywhere in Europe.

However, the limits of this coverage in terms of insured amounts, premium or excess should be adjustable according to the host country's needs.

We have for a long time talked about the divergences which might exist at the level of different contracts of professional indemnity insurance regarding the coverage as well as financially.

Being realistic, it can be said that today, the E list of Community lawyers set up in Belgium is an embryonic solution.

Belgium is a land of welcome for European lawyers for whom a solution of insurance exists and at a reasonable cost.

This minimalist solution is not yet adopted by all the Member States but moreover, it does not solve the question of the cost of insurance and principle of liability proper to each country.

Therefore, what is the solution?

Thanks to the CCBE, a first step was operated through the Establishment Directive. The CCBE became aware that the problem of insurance could be an obstacle to a practical implementation of the Directive.

The solution is in line with a harmonisation. The way will be long and will start this afternoon with the different working groups.

## Programmes des groupes de travail

### Workshop 1: Claims-made / occurrence

*Chairman: Rembert Brieske (DAV Germany)*  
*Facilitator: Steve Abrahams (Royal and SunAlliance UK)*

#### **I.**

A lawyer makes a mistake in May 2001; he has been admitted to the Bar since 2000.  
 The lawyer becomes aware of the mistake in December 2001.  
 The client becomes aware of the mistake and the resulting damage in March 2002.  
 The client files a claim against the lawyer in 2003.

When does the lawyer have to be covered by insurance and when does the respective insurance contract have to be concluded in order to be able to claim protection under this insurance contract and – if necessary – be able to make the payments to the client?

What is the situation in “claims made” and “claims occurrence”? What is the client’s position in these cases?

#### **II.**

A lawyer working in a law firm with offices in Frankfurt and London makes a mistake in May 2001; all lawyers apart from one lawyer have been admitted to the Bar since 2000; one lawyer has only been admitted since August 2001.  
 The lawyer becomes aware of the mistake in December 2001.  
 The client becomes aware of the mistake and the resulting damage in March 2002.  
 The client files a claim against the lawyer in 2003.

When must the new lawyer have to be covered by insurance and when does the respective insurance contract have to be concluded in order to be able to claim protection under this insurance contract and – if necessary – be able to make the payments to the client?

What is the situation in “claims made” and “claims occurrence”? What is the client’s position in these cases?

#### **III.**

A lawyer working in a big law firm with offices in Frankfurt and London makes a mistake in May 2001; all lawyers have been admitted to the Bar since 2000; at the beginning of the case in December 2000 one of the lawyers was admitted to the Bar, but he renounces his admission per 31 December 2000.  
 The lawyer becomes aware of the mistake in December 2001.  
 The client becomes aware of the mistake and the resulting damage in March 2002.

The client files a claim against the lawyer in 2003.

When must the former lawyer have to be covered by insurance and when does the respective insurance contract have to be concluded in order to be able to claim protection under this insurance contract and – if necessary – be able to make the payments to the client? Until when must the contract be valid?

What is the situation in “claims made” and “claims occurrence”? What is the client’s position in these cases?

#### **IV.**

Cases II and III could be modified in the following way:

1. 2 law firms merge
2. One firm splits up into two separate firms

#### **V.**

A lawyer working in the London office of the aforementioned law firm established in Frankfurt/London leaves London to work in the Frankfurt office. How does this affect cases II and III?

#### **VI.**

A lawyer working in the Frankfurt office of the law firm established in Frankfurt/London leaves Frankfurt to work in the London office. What are the consequences for cases II and III?

#### **VII.**

When is insurance coverage necessary?

How can this be achieved with “claims made” and “claims occurrence”?

#### **VIII.**

What are the national requirements regarding insurance coverage as to

- the point of time of the mistake, i.e.
- the moment when the mistake is known and
- the moment when the mistake is made and
- the moment when the claim is made and
- the moment when the lawyer has to pay, as well as
- concerning maximum coverage

## **Workshop 2 : Applicable law / territoriality**

*Chairman: Frits van der Woude (Aon the Netherlands)*

*Facilitator: Nicolas Decker (Luxembourg Bar)*

### **Introduction**

1. The 98/5/EC Directive
2. Territorial exposures
3. Scope of the professional business

### **Case study**

A Luxembourg lawyer is with five other lawyers partner in a “law firm” with its office in Luxembourg (Home Member State). One of the partners starts a lawyers practice on a permanent basis in the Netherlands (Host Member State).

The lawyer commits a wrongful act in the Netherlands.

- a. Practising Netherlands law
- b. Practising Luxembourg law
- c. Practising international (EC) law

For discussion:

1. Which Court could the claim be brought for?
2. What law would be applicable?
3. Which persons can be held liable?

### **Conclusions that should be reported by the facilitator**

Some “guidelines”

1. What should the scope of a Professional Liability Insurance be in respect of the applicable law and territoriality.
2. Is the insurance market capable and willing to provide coverage on the required basis.

### **Workshop 3 : Scope of practice - Adaptation de la couverture d'assurance au regard des activités autorisées aux avocats dans les différents pays de l'Union**

*Chairman: Andrew Darby (Law Society England and Wales)*  
*Facilitator: Tommy Forsberg (Länsförsäkringar, Broker Service, Sweden)*

#### **AIMS**

To identify and assess various models of indemnity insurance for intended to deliver the following:

- uniform compulsory minimum cover for all practices within a member state to ensure clients are properly protected whichever practice they instruct
- all activities undertaken as part of a practice to be within the scope of cover
- a level playing field for all practices within a member state.

#### **ISSUES**

- To identify the scope of practice in member countries.
  - What activities can be done only as part of a practice?
  - What activities can be done either as part of a practice or as part of a separate business?
  - What activities cannot be carried out as part of a practice?
- How is the scope of practice prescribed by each member state?
- What mechanisms are there for determining whether a new activity falls within the scope of practice?
- How is the scope of practice in a host state affected by the Establishment Directive (Article 5.1)?
- Does the full range of activities falling within the scope of practice always fall within the scope of cover?
- What are the territorial limits to (a) the scope of practice; (b) the scope of cover?

#### **POSSIBLE MODELS**

1. Home cover is sufficient.
2. Home cover is sufficient if equivalent to host cover, if not equivalent then additional cover required to bring up to equivalence.

**Host cover must be effected in all cases.**

## ADVANTAGES AND DISADVANTAGES OF THE THREE MODELS

### 1. Home Cover

#### Advantages:

- ◆ Simple to administer.
- ◆ Avoids duplication of cover.
- ◆ Cheaper for practices.

#### Disadvantages:

- ◆ Some countries either have no compulsory scheme or low-level cover.
- ◆ Does not achieve a level playing field.
- ◆ May not cover all activities permitted in host state.

### 2. Home with Additional Cover

#### Advantages:

- ◆ Achieves a level playing field between all practices.
- ◆ Clients afforded the same minimum levels of cover by each practice.
- ◆ Account can be taken of the extent of any home cover using difference in conditions (DIC) policies.

#### Disadvantages:

- ◆ Requires assessment of policies of other member states to establish if they are equivalent to home member states compulsory cover.
- ◆ Reluctance of some insurers to issue DIC policies.
- ◆ Can be costly to effect DIC cover.

### 3. Host Cover

#### Advantages:

- ◆ Simple to administer.
- ◆ Achieves level playing field.
- ◆ Cheaper for practices.

#### Disadvantages:

- ◆ Contrary to Article 6.3 the Establishment Directive.
- ◆ Cumbersome and costly as multinational practices will require a separate policy for each member state in which they have offices.



## **Workshop 4 : Structure of insurance programmes**

*Chairman: Olivier de Marguerye ( Axa Corporate solutions France )*

*Facilitator: Tom Mac Grath ( Marsh UK )*

### **Introduction :**

Quick summary of the current structure of insurance programmes in the different European Countries. First observation = diversity.

#### **1. Individual policies or Group policies ?**

- Advantages or disadvantages of individual policies underwritten for each lawyer. It is normal to have an agreed wording and limit.
- Advantages or disadvantages of collective agreement compulsory or not: wide form of wording and capacity. Pricing may not reflect the individual profile of the firm.
- Should PI insurance be limited in amount i.e.: per claim, per year, per Law Firm and/or for all members of a Bar?

#### **2. What could or should be shared on a National basis?**

- Overall spread of risk – claims prevention measure available through Group Claims Experience
- Good level of aggregation: law firm, bar or national bar association?
- Group Insurance experiences to cover compulsory insurance limit (compulsory first layer per bar): best tool to mutualise, but also to prevent claims? (Affinity Group Concept).
- “XS Layers”: how a Group programme could provide high capacities – some information about the current prices of those capacities – role of the reinsurance market.
- Pool solutions: the UK example of the ARP (Assigned Risks Pool).
- Create a Professional Mutual Insurance Company?

#### **3. What could or should be shared on an International basis ?**

- Is it realistic to imagine a European Insurance contract for lawyers nowadays?
- Why not for excess of loss layers? (Difference In Limit covers).
- Why not for some items like :
- Cover in respect of assistance in congresses and international meetings (example of the Spanish Bars’ Junta de Gobierno world wide cover)?
- Lawyers travelling abroad to advise a client?
- “Cabinets secondaires” abroad?
- European pool in order to cover (reinsure?) a lack or an insufficiency of the coverage for a member? How would the cost be borne?

**Conclusion:**

Diversity may be limited or adapted to needs and changes in law through Group programme solutions. The “principle of subsidiary” may be useful to determine which item should be handled at Law firm level, at regional or national bar association level or at international level. We may recommend some items (overseas rules...) that should find solutions through European insurance programmes.

## Reports on working groups n°1, 2 and 4

### ❖ Report on workshop 1 : Claims-made / acts committed « occurrence »

#### **Introduction**

These notes were taken at the workshop. It should be noted that they have not been vetted or agreed by the participants; therefore all facts should be checked before any action is taken based upon them.

Firstly let's clarify what we mean by the terms Claims-Made and Occurrence:

#### *Occurrence – Germany, Austria, Czech Republic*

Although the title refers to 'Occurrence' it would be better be described as 'Acts Committed' as it is triggered by the making of the error

#### Example:

- Error made in 2000
- Client discovers in 2001
- Client claims against the Insured in 2002
- Claim made against the Insurer in 2002

#### Outcome

The 2000 policy applies, this is the year the act was committed. Hence 'Acts Committed'.

#### **Claims Made - UK, Ireland, France, Belgium**

We say 'Claims Made', but we need to be sure what we are talking about.

1. Generally policies will say that the claim has to be made against the Insured and notified to the Insurer in the Policy Period;
2. Some policies only state that the Claim has to be made against the Insured in the policy period. Some will have a time limit on notification to the Insurer (say 90 days), others will not;
3. Many policies provide for circumstances that have the potential to lead to a claim to be notified and even though the Claim has not been made against the Insured the claim will be accepted into an earlier period.

Examples using the above:

1. Made and notified:
- Error made in 2000
  - Client discovers in 2001
  - Claim made against the Insured in 2002
  - Insured notifies to Insurer in 2002
- Outcome – covered under 2002 policy

2. Made against Insured in Period only:
- Error made in 2000
  - Client discovers in 2001
  - Claim made against the Insured in 2002
  - Insured notifies to Insurer in 2003
- Outcome - covered under 2002 policy

3. Circumstances notification
- Error made in 2000
  - Insured discovers error has been made and informs Insurer of circumstance in 2002
  - Claim made against the Insured in 2003
- Outcome – Covered under 2002 policy

### **Problems and possible Solutions**

#### **Occurrence/Acts Committed**

- Payment under these policies depends on the insurer being around to pay the claim. If the insurer has become insolvent, cannot be traced or otherwise is unable to pay, then no cover;
- A policy limit set many years ago may not be sufficient to pay a claim made now;
- Regulatory bodies may not be happy to accept policies as protecting the public.

#### **Solution:**

- The only possible solution is to top-up the limit with Claims Made cover.

#### **Claims made**

- The policy needs to be in existence for the claims to be made;
- Insured's with a bad claims record may not be able to obtain cover;
- Run off cover may be difficult to purchase;
- The price of cover may exceed the amount set aside for ruin off cover.

#### **Solutions:**

The following solutions have successfully been used to overcome the shortcomings of Claims Made:

- Assigned Risks pools e.g. England and Wales;
- Master policy covers all practices (e.g. Scotland, Northern Ireland, France);
- Automatic run-off cover (e.g. Scotland, France, England and Wales, Northern Ireland).

### **Individual liability v. liability of the firm**

This is an issue which has an impact on the coverage:

Individual/firm: Some countries issue policies which cover individuals (e.g. Belgium, Czech Republic, Greece, and Germany) and others firms (e.g. England and Wales, Austria and France). There are differences in the law itself, with individual lawyers having personal liability in a number of countries and in others the exposure lies with the firm; a number of countries have both.

This difference will affect the impact that the Claims Made or occurrence basis makes on the coverage. Where a partner is personally liable the Claims Made, policy issued to his current practice may provide cover. Under Occurrence/Acts Committed the policy issued sometime ago may very well operate.

### Conclusion

The group reached the conclusion that the differences between Claims Made and Occurrence/Acts Committed did not restrict the ability for lawyers to operate within Europe. However, the differences must be taken into consideration when mergers or take-overs occur in order to ensure continuity of cover. For instance, a German firm taking over a UK based practice will need to ensure that Claims Made coverage is continued for the UK firm. Alternatively a UK firm taking on a German practice may wish to take out Claims Made top- up cover to ensure the whole practice has the same level of protection.

In practice, the Insurance market sees a number of mergers of law firms and lawyers working outside of their home country. The nature of the market is that in most cases the professional indemnity requirements can be satisfied as long as everyone is aware of the limitations of the relevant policies and the legal climate of each country.

### Additional notes

Some notes taken freely during the discussion on some differences between various countries:

Country	Comments
Austria	<ul style="list-style-type: none"> <li>➤ Acts Committed – usually a limited reporting period of 7 years.</li> <li>➤ Excess layers sometimes Claims Made excess of Acts Committed</li> <li>➤ 30 year absolute discovery period.</li> </ul>
Belgium	<ul style="list-style-type: none"> <li>➤ Claims Made</li> <li>➤ Personal liability</li> <li>➤ At the time of the meeting negotiations for renewal were underway</li> <li>➤ Reporting Period 3 years</li> </ul>
Czech Republic	<ul style="list-style-type: none"> <li>➤ Occurrence – trigger is the committing of the act</li> <li>➤ Personal responsibility – others in practice not liable if no</li> </ul>

	<ul style="list-style-type: none"> <li>➤ involvement</li> <li>➤ Civil code</li> <li>➤ 1 Insurance company issues policy to the bar association</li> <li>➤ Cover for Czech Republic only</li> </ul>
France	<ul style="list-style-type: none"> <li>➤ Claims Made</li> <li>➤ Individual liability</li> <li>➤ Controversy on jurisdiction regarding legality of Claims Made policies. Supreme Court does not validate Claims Made even though the law says it is OK. Insurers ignore the Supreme Court and this does not cause problems. A recent change in the law has allowed Claims Made for medical malpractice, the view was expressed that this should move to policies for the legal profession eventually</li> <li>➤ Discovery 3/5 years.</li> </ul>
Germany	<ul style="list-style-type: none"> <li>➤ Acts Committed</li> <li>➤ Claim should be notified when Insured have knowledge of problem – sometimes notification disputes.</li> <li>➤ Individual liability</li> <li>➤ Only 10% of disputes go to court</li> <li>➤ Compulsory insurance from 1994</li> <li>➤ Defended by bar</li> <li>➤ Currently heavy increases in premiums and insurers cancelling contracts, may lead to lawyers not being able to work</li> <li>➤ 3 years discovery</li> </ul>
Greece	<ul style="list-style-type: none"> <li>➤ Claims Made (6 months retroactive exposure only)</li> <li>➤ No legal framework for PI</li> <li>➤ Few cases</li> <li>➤ Negotiating cover at present</li> <li>➤ No real PI experience in the insurance market</li> </ul>
England & Wales	<ul style="list-style-type: none"> <li>➤ Claims Made</li> <li>➤ Joint and several liability – all partners liable for the errors of the others, usual to cover the firm and all the partners</li> <li>➤ Master policy</li> <li>➤ Compulsory run off cover</li> <li>➤ Discovery up to 15 years</li> </ul>
Scotland	<ul style="list-style-type: none"> <li>➤ Claims Made</li> <li>➤ Joint and several liability – all partners liable for the errors of the others, usual to cover the firm and all the partners</li> <li>➤ Master policy</li> <li>➤ Free run off cover provided</li> </ul>

Northern Ireland	<ul style="list-style-type: none"><li>➤ Claims Made</li><li>➤ Joint and several liability – all partners liable for the Eros of the others, usual to sever the firm and all the partners</li><li>➤ Master policy</li></ul>
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## ❖ Report on workshop 2: Applicable law and territoriality

**Introduction:** notes taken during an oral report by Nicolas DECKER (Information Officer of the Luxembourg delegation to the CCBE) during the conference

### **1<sup>st</sup> comment:**

To take out an insurance policy, either individually or collectively for the Bar, varies from country to country. Therefore different regimes exist.

In order to overcome these differences, a recommendation might be drafted, i.e. which would draw up a list of minimum standards based on consumer protection. The idea would be that every lawyer practising in another Member State could have European cover issued by his insurer in his home country. The problem is that this might not be compatible with low levels of premiums.

### **2<sup>nd</sup> comment:**

Which insurance company would cover a professional activity led within the framework of the Establishment Directive? The insurance company of the host country or the insurance company of the home country?

I think that we can arrive to a compromise which would include the company of the host country and the one of the home country.

During the first three years, it might be the insurance company of the home country, and then after the inclusion of the lawyer in the same category as the lawyer from the host country, the insurance company of the host country. The latter might be in a better position to assess the risk.

### **Conclusion:**

This last idea arising from the discussions does not result from an agreement. It would need to be discussed further.

In any case, from the lawyers' perspective, the local Bars as authorities should be respected, and from the insurers' perspective, the insurance risk management should be preserved.



## ❖ Workshop 4: Structure of insurance programmes

**Introduction:** report made by Tom Mc Grath, Marsh under all reserves.

### **I/ Collective Compulsory Professional Indemnity (taken out by the bar for its members)**

#### **Advantages**

- Continuity of Insurers
- Interest of the Bar Association in Risk Management
- Some claims role for the Bar Association
- Access to information
- Claims prevention resulting from claims information
- Economy of scale
- Wide form of policy wording
- All are insured - the Insurers cannot control the Profession
- Easier to confirm the existence of cover
- Input into claims procedure
- Opportunity for a Bar Association Mutual

#### **Disadvantages**

- Unwieldy
- Little cognisance of individual firms
- Some Lawyers do not like being told where to insure
- Less scientific rating methods used

### **II/ Individual Policies**

#### **Advantages**

- Encourages good firms to be better
- Encourages bad firms to improve
- Lawyers like going to the Market
- Individual rating of firms

#### **Disadvantages**

- Some have difficulty getting insurance
- The Bar Association is less in control
- More exposed to the vagueness of the Market
- Lack of Bar statistics
- More difficult to confirm the existence of insurance

We then turn towards solutions to territorial problems.

We came to the view that in the end, the following headlines might help: there could be a single wording for the CCBE in minimum terms and conditions, or perhaps, a DIC policy; one suggestion had been made that it might be only problem is that we may not find enough insurers to cover the business but nevertheless.

**Press release:**

Brussels, 20 November 2002,

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**Conclusions of CCBE conference on professional indemnity insurance  
for European lawyers  
Brussels, 18 November 2002**

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The Council of Bars and Law Societies of the European Union (CCBE), which represents through its member bars over 500,000 European lawyers, held a conference in Brussels on 18 November 2002, gathering together experts in professional indemnity insurance from the Bars and Law Societies on one side, and brokers and insurance companies on the other.

Aon and Marsh, two leading insurance brokers, sponsored the event.

67 participants attended, including representatives from all Member States and two candidate countries. The European Commission DG Internal Market was also represented.

The main theme of the conference was the airing and resolution of professional indemnity insurance problems arising from lawyers' rights of establishment and free provision of services in the single market.

There was universal agreement that the conference was just the beginning of work which needed to be done to ensure a smoother operation of the insurance market in cross-border establishment and services. The following specific outcomes were agreed:

- the CCBE to look at how to ensure uniform ways for dealing with lawyers coming from another Member State, for example by establishing a common questionnaire to be used by the bars and insurance industry to help them check equivalence in policies;
- the CCBE to investigate the possibility both of minimum terms and conditions for European lawyers' insurance, and also of a 'difference in conditions' policy, with the aim of simplifying a currently very complex market;
- the CCBE to continue to host dialogues between the insurance industry and the bars to take forward these and other issues which arise.

John Fish, President of the CCBE, said: 'This was an outstandingly successful conference, with the bars and the insurance industry learning much from each other. Considerable progress was made in isolating the main issues which need to be dealt with, and in identifying ways of taking them forward. The CCBE looks forward to continuing to work with both sides in formulating the solutions identified.'