The inauguration of EILI

On the 19th of December 2001 the inauguration of the European Insurance Law Institute, EILI, took place in "Juristernas Hus", Stockholm university.

NFT presents the speeches of the President of Stockholm university Professor Gustaf Lindencrona, Professor Bill W. Dufwa, Professor Jürgen Basedow, Hamburg and Professor Malcolm Clarke, Cambridge.

Inaugural speech

by Gustaf Lindencrona

Dear participants,
On behalf of Stockholm university I wish you all welcome to the inauguration of the European Insurance Law Institute.

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The insurance *industry* is one of the very biggest industrial activities of the world. The social importance of insurance is incomparable. Therefore it early become an urgent matter for the European Community to eliminate all kind of obstacles to a free European market. Mainly through six directives – three of them covering life insurance and three of them covering damage insurance – this goal was slowly fulfilled, and since 1993 we have an integrated European market, meaning that an insurance company can set up its activity wherever it wants in the Union without asking the country where the activity is done for a permission to work there. The system also means that the state control of the country is being done by the company's homeland.

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Stockholm university, since long, has realized the importance for the society with a well working insurance activity and has therefore stimulated *research* in this field. Together with a professorship in acturial mathematics a professorship in insurance law was created already half a century ago. The chair of insurance law is to a large part financed by the insurance companies. With exception for a chair in insurance law at the Erasmus university in Amsterdam, chair of insurance law of the Stockholm university is the only one in Europe and as far as we know, they are the only ones in the world. The three holders of this chair have been Jan Hellner, Carl-Martin Roos and Bill Dufwa. Hellner laid through his international approach and activity early made this chair known all over the world.

Bill Dufwa is a true European – at home as well in Hamburg, Brussels, Paris, and Cambridge as in Stockholm.

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Since long ago a creation of an insurance law institute has been discussed at Stockholm university. In January 1999 an international symposium concerning insurance law was held at our university. At this meeting the foundations of a closer collaboration between researchers in insurance law at a European level was laid. The prominent speakers that we now are

Professor ***Gustaf Lindencrona***, President of Stockholm university.

going to listen to – *Jürgen Basedow, Malcolm Clarke, Herman Cousy* and *Jérôme Kullman* – were all present at this meeting. They started a work with the aim of establishing general rules and principles for a European insurance contract law. This difficult work is still going on and is supposed to be finished in some years. We all look forward to listen to them.

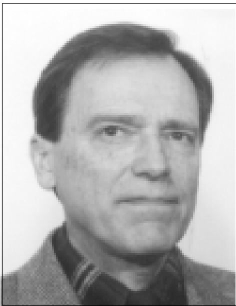
I give the floor to professor Bill Dufwa, director of the European Insurance Law Institute.

From isolation to an Institute

by Bill W. Dufwa

To work alone is the lot of persons doing research. "One sole thought. One sole passion. And the arms of suffering." This image of the process of creation, given by the French poet Paul Eluard, is hardly possible without some kind of spiritual isolation. All kind of creativity is carried out under the same conditions. To concentrate and to give full expression to your ideas, calls for solitude.

On the other hand it is clear that no creativity in reality takes place in complete solitude. On the contrary. Even if I am working alone, I do it together with the discoveries of others, with the ideas of others, with the dreams of others. As Isaac Newton put it: if I have been able to see further, this is so because I could stand on the shoulders of giants.



Bill W. Dufwa, Professor of Insurance law and Director of EILI.

Another kind of creativity takes place within the framework of a common project. Such a way of working provides stimulus, incentive and energy. And it does not prevent you from retaining your own ideas, your own cave experience to speak to Platon; it is still quite possible to develop your ideas in a personal way.

The scientific grouping is not necessarily only a question of exchanging ideas. The goal might be higher. At an international level it might be to reach a certain measure of solidarity between countries. The joint work might result in closer relations between the states. The cultures might approach each other in a fruitful way.

There is a long process behind the creation of EILI. Since the beginning of the nineties I was fascinated of the idea of finding a model of tort law that was international, in the sense that it should facilitate the studies of tort law in another country than your own. During this process I discussed with the insurers the founding of a group of persons doing tort law research at an international level. And the idea was realized so far that some foreign collegues became familiar with the idea and even liked it, among them American law professors Guido Calabresi och Jeffry O'Connell. But my efforts were broken by the big leap. Sweden became a member of the European Community. A new type of solidarity, where the need for a grouping was urgent, opened before my eyes.

A common general tort law in Europe will sooner or later be a reality. As we have heard from the speech of the President Gustaf Lindencrona, insurance law is already brought up to this level, although this is not yet the case with the traditionally most important part: insurance contract law. EILI will work with insurance law but, of course, also tort law will be paid attention to. The main object of EILI, however, will of course be insurance law.

Insurance law is a wide topic, mainly cove-

ring the legal conditions for the insurance activity, the insurance contract and the work of the intermediaries. The whole area is permeated by one strong endeavour. There is a passion for social justice. It is all a question of relieving the cup of tribulation. To contribute to this process will be the farthest goal of EILI:s work.

The first board meeting of EILI has taken place today. During this meeting I had a strong clear feeling that the decisions taken were not Swedish. They were European. The meeting gave me a strange feeling of sitting somewhere in the center of Europe.

I now call upon four participants of the board meeting to speak. They are all distinguished law professors and considered to be leading experts of insurance law in Europe. As Gustaf Lindencrona told us, they are: *Jürgen Basedow,* one of the three Directors of the Max-Planck Institute of Hamburg, *Malcolm Clarke,* Cambridge University, *Heman Cousy*, Leuven University and *Jérôme Kullmann*, Panthéon-Sorbonne, Paris I.

I ask professor Basedow to begin.

Why insurance contract law in Europe should be harmonised

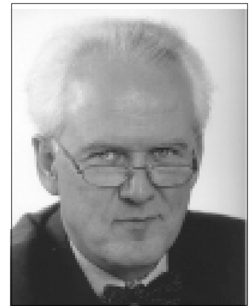
by Jürgen Basedow

1. A new institute and its mission

The foundation of the European Insurance Law Institute at the University of Stockholm appears to be a novelty in academic life. The traditional approach to insurance law as to many other sectors of business law has been essentially national: accordingly the activities of university institutes dealing with insurance usually focus on the national regulation of the industry in public law and private law. While some scholars specialising in this field have always been interested in a comparison of different national laws and in their interaction in transborder cases, this was not reflected by the institutional framework of the discipline so far. The establishment of a European insurance law institute departs from this tradition. It gives evidence of a need felt by the founders to focus research on the European dimension of insurance law. That need is not only felt in Sweden. The foundation of the institute is the appropriate occasion to take a close look at that demand. It is the purpose of the following remarks to discern its economic, its social, and its legal dimension.

2. The economic dimension

The industrial revolution has fostered the division of labour in an unprecedented way. It has thereby added to the dependence of the individual from goods and services beyond his control which in turn has increased all kinds of risks, both in an objective sense and in the subjective perception. This is the main reason for the extraordinary growth of the demand for risk spreading ever since the middle of the 19th century. While that demand was satisfied by local associations of mutual insurance at an early stage, it later turned out that the spreading of risk among a much greater number of individuals at the regional or even national level might be more efficient. Public stock corporations entered the insurance markets and became strong competitors which acquired the major



Professor ***Jürgen Basedow***, Director Max-Planck-Institut für ausländisches und internationales Privatrecht, Hamburg.

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part of the business in many sectors.

The growth of risk has not come to a standstill, it is a permanent process which continues at the European level and is reflected by the changes of the insurance markets. In 1999 there were about 3850 insurance undertakings in the European Union whose total premium income amounted to 750 billion Euro. While the total premium generated by the European insurers had risen by nearly 50 per cent in the period from 1995 to 1999 the number of companies had dropped by more than 10 per cent in the same timespan (see *Petra Sneijers*, Insurance Services Statistics, in: Eurostat, Statistics in focus – ISSN 1561-4840 – Theme 4 – 28/2001). Put in other words it can be said that fewer companies earned higher premiums. Given the big number of remaining insurers, this process can hardly be described as a potentially dangerous concentration. But it indicates the gains in terms of efficiency which can be achieved by the formation of larger risk pools.

To a certain extent, the transformation of the European insurance market is due to the profound changes of the regulatory framework which resulted from the internal market program of the European Community. The deregulation of premiums and conditions in particular allows competition to get more intense which in turn causes the market exit of some competitors. But the potential of the internal market has not been fully exploited so far. If efficiency gains are to be expected from the pooling of more risks, everything should be done in order to allow for the formation of all-European risk pools. While such risk pools can be managed by one and the same establishment of the insurer they are composed of similar risks originating in different Member States. At present such risk pools can be formed in many sectors of commercial insurance where the insurer can stipulate by an appropriate choice of law clause that a single national law governs the various insurance contracts irrespective of the location of the risk.

In consumer insurance, however, the conflict rules laid down by the European insurance directives of the second generation exclude the free choice of law and provide for the application of the law of the policyholder. Consequently, the risks originating from several European countries which the insurer wants to join in one and the same risk pool would be subject to very different legal rules which distort an otherwise homogeneous risk pool. Moreover, the insurance contract laws of many European countries are mandatory. They either provide for a binding minimum protection of the policyholder or do not admit any contractual modification whatsoever. It is therefore impossible to overcome the differences between the national legislations by the drafting of appropriate contracts. Thus, the attempt of a European car manufacturer has failed to sell its vehicles together with a policy of motor liability insurance which would be valid in all Member States. The formation of all-European risk pools of this kind is conditional upon a harmonisation or unification of insurance contract law in Europe. The same holds true with regard to those sectors of commercial insurance which are compulsory under the laws of a Member State. The European directives allow Member States to subject the respective contracts to their own national laws which again renders illusory any attempts to form all-European risk pools.

3. The social dimension

Insurance is a business which deals with the basic need of mankind for the spreading and shifting of risk. The insurance contract is characterised by asymmetric information of the parties and by an inherent danger of opportunistic behaviour on both sides. In most cases the policyholder is not able to fully

understand the terms of the contract without having legal advice, and in the light of the contingency of the insured event he is hardly ever sufficiently motivated to ask and pay for that advice. Given the expenditure in terms of time and money he would even act irrationally in most cases if he made the conclusion of the insurance contract dependent upon the prior consultation of a lawyer or independent broker. These shortcomings give a strong incentive to insurers to sell policies which, on closer inspection, do not keep what they appear to promise on their faces. Since the insured risk often amounts to an existential threat for the policyholder legislators and regulators all over Europe have felt the need to interfere with such practices by the adoption of a great number of mandatory rules. They give evidence of the social dimension of insurance law.

This social dimension is equally subject to changes which call for a European response. It is within the purview of the internal market that the demand for coverage crosses the intra-community borders and looks for favourable offers abroad. The common currency of the Euro and the communication by internet will definitely encourage and foster such a look for better bargains in the future. It can however be taken for granted that the applicants, whether consumers or professionals, are not aware of the intricate legal framework of such transborder operations. Take the example of a life assurance policy negotiated via the internet. One could argue that such an agreement should be compared with an insurance contract made by correspondence, i. e. a contract which is not subject to the law of the policyholder by the European directives. The cover under the policy as governed by the law of the insurer could therefore turn out to be very different from what the policyholder expected. It is easy to see that the resulting uncertainty is not liable to foster the use of the internet and of the internal market. In the long run it would rather foreclose the inherent advantages of both to possible applicants unless a harmonisation or unification of insurance contract law is carried out.

4. The legal dimension

While the previous remarks regard insurance law, in a functional perspective, as an instrument designed to pursue certain economic and social objectives the object of our study has also to be seen as part of the legal order in general. In particular, insurance contract law forms part of general contract law and must be explained by its interaction with general rules on aspects such as the conclusion of contracts, performance, remedies for breach of contract etc. It is well-known that those general rules are regarded by lawyers in many countries as the very essence of the respective national legal orders. In the more recent past, however, a strong trend towards eurofication of general contract law has developed in legal scholarship across Europe. Considerable progress has indeed been made by the Commission on European Contract Law chaired by the Danish professor Ole Lando and by the Academy of European Private Law which operates under the direction of the Italian professor Gandolfi. This progress and the recent communication on European contract law published by the European Commission have caused a certain euphoria among European scholars. Many of them appear to believe that the adoption of a European contract act or even a European civil code is a realistic perspective for the imminent future.

Although I have myself actively cooperated in paving the way for such a development it appears very doubtful whether the Community will actually embark upon that road within the next couple of years. Community action in the field of contract law has almost entirely been limited to pointillist directives which deal with fragmentary issues of consu-

mer law so far. Apart from the directive on self-employed commercial agents there is not a single Community act which deals with a specific contract type in a comprehensive way. It would appear much more realistic and promising if the Community, instead of dealing with general contract law, tried to codify the law relating to specific types of contract at a first stage. In particular, the insurance contract would lend itself to such a Community action. Given the great number of mandatory provisions in national laws and the former attempts to deal with insurance contract law, the legislative power of the Community cannot be denied in this field. The deficits of the single insurance market give additional and strong support to a Community initiative. Moreover, the close link between insurance contract law and general contract law would bring the latter into focus and stress the need for a progressive harmonisation of general contract law. Thus, the work on insurance contract law would on the one hand be fostered by the expectation of obvious and direct economic gains. It could on the other hand be a first step towards a farther reaching harmonisation of general contract law which in turn appears to be a key element for the formation of a truly European legal order, i. e. a legal order which reaches beyond the trivia of many secondary Community acts.

It is this perspective which should inspire the work of the European Insurance Law Institute.

Reform, resistance and risk

by Malcolm Clarke

For an enterprise such as the EILI the time has surely come. In a Communication to the European Parliament (07.02.01; COM (2001) 66, p. 10) the Commission of the European Communities stated:

"Consumers have access to the providers of services throughout the Community, however, on-line supply and demand for cross-border financial services will only develop in an environment of legal clarity and certainty that fully safeguards the interests of consumers and investor."

To produce such an environment the Commission announced its intention of launching a three-strand policy. The first is to be a strategy of high level harmonisation, the second, steps to further convergence in sector-specific or service-specific rules; and the thirdly a review of national rules relating to retail financial services contracts.

In a subsequent Resolution of the European Parliament (15 November 2001, COM(2001) 398 – C5-0471/2001 – 2001/2187(COS) para 12 and 14) the Communication from the Commission was criticised as not being broad enough. The Parliament urged the Commission "to present proposals to revise the existing consumer protection directives relating to contract law in particular to remove minimal harmonisation clauses which have prevented the establishment of uniform level at EU level"; and, moreover, "to take the next step towards achieving approximation of the civil and commercial law of the Member States and, on the basis of detailed expert advice, to submit an action plan …" As regards this plan the Parliament exhorted the Commission inter alia as follows:

Malcolm Clarke, Professor of Commercial law,
St Johns College, Cambridge.

First, by the end of 2004 to compile a database "of national legislation and case law in the field of contract law, and to promote, on the basis of such a database, comparative law and research and co-operation between interested parties, academics and legal practitioners". The aim of the co-operation should be "to find common legal concepts and solutions … notably in the following fields: general contract law, the law on sales contracts, the law governing service contracts including financial services and insurance contracts".

Second, by the end of 2004 "to put forward legislative proposals aimed at consolidation" of such law; and

Third, from 2010 to ensure the establishment and adoption of a body of rules on contract law in the European Union.

To this end the Parliament also advocated (para 15) the setting up by the end of 2002 a 'European Legal Institute' "in which legal policy-makers, the administrative authorities, the judiciary and those responsible for applying the law cooperate on a scientific basis in the drawing-up of the principles of the above mentioned reforms". All this, I cannot resist pointing out, is to be achieved (para 16) "while maintaining a balance between civil law and common law traditions"!

Most evidently, the foundation of the European Insurance Law Institute here in Stockholm is a timely act of wisdom. This is true not least because its constitution tells us that the EILI "is charged with the task of promoting research and education within European insurance law…. in particular … a study of the harmonisation of European insurance law". It is a timely act of wisdom which, I regret to say, is unlikely to be imitated in a certain offshore island of 'common law tradition' and is no less significant a development as a result.

Certainly, there is work to be done. We enjoy a free market in footballs, footballers and even, I am happy to admit to this audience, in football coaches; but not fire insurers. Footballers want a level playing field, so do insurers. Footballers want to be seen and seen clearly by as many people as possible; so do insurers, who wish to parade their wares on a field of transparency that stretches across the borders of Europe. All this is obvious but please allow me two more personal and particular observations.

The Offshore Island

In my purely personal opinion, the reaction of UK insurers (not to the EILI but to moves From Brussells) is likely be largely negative. In the third 'strand' the Commission specified banking and insurance services, noting that the "contractual terms and conditions determine, along with the price, what makes a product more (or less) attractive to consumers and investors" and spoke of "further convergence of consumer protection measures". However, my guess is that the UK insurance market is likely to reply that consumers are not interested in terms and conditions but only in price: and that that is not the business of Brussels but should be left to the market. The market will not welcome the work of convergence until it can see a commercial gain in the compromise required.

In a prestigious public lecture in 2001, Professor Sir Roy Goode QC argued for a commercial code in the UK. In his lecture, which was subsequently published, he pointed out that the success in the UK "of the carriage of goods conventions provides a striking illustration of the advantages of uniform rules in cross-border commerce" ((2001) 50 ICLQ 751, 752). Undeniably true but the carriage conventions were ratified by the UK only after the relevant section of commerce was convinced it absolutely had to come into line in order to maintain commercial competitiveness.

Professor Goode also observed that in the

UK our "commercial legislation like our water pipes, our railways and our [London] underground suffers from under investment and patchwork adjustments which in the end cost more than if we had done a proper job". This too is true but his words, addressed to the Commercial Bar in London, were met with but polite applause and little enthusiasm. Barristers like these are brilliant in their work, applying minds like lasers to fine points. The last thing they want to have to do is to lift their eyes from the small print of the next brief or the GAFTA contract to wider and less familiar legal horizons. As people say, it is not easy 'to teach old dog new tricks'; nor younger dogs either once they have got teeth into a juicily lucrative bone. London is unlikely to reform insurance law unless that bone is under threat or unless London is directed to do so by Brussels.

Scholars and academicians from the vantage point of the ivory tower have wider horizons – no doubt; but they should nonetheless recall the comment of Professor Kronke, the Secretary-General of Unidroit, that many international conventions containing uniform law have never seen the light of day because States have failed to ratify them; and that one reason for failure has been that "the subject was chosen by academics and/or intellectual leaders in decision making centres such as Government and international Organisations" (Unif. L Rev 2000.13, 17). If any reform of insurance law it to be effective the insurance industry, whether in London or Stockholm, must be 'on board'.

Education and Risk

In its constitution the EILI "is charged with the task of promoting research and *education* within European insurance *law*". Of course that is right and proper, but I would respectfully advocate a wide interpretation of this mission. One pf the functions of codes or restatements and the law they contain is said to be education of the citizen. My plea is that education of the citizen might go a bit beyond the law of insurance to the purposes of insurance, which often affects interpretation of the law, and the underlying notion of risk.

Once my wife and I went with other tourists on a jungle walk in Malaysia. We knew that there are well over 100 different kinds of snake in Malaysia, many dangerous, so we spent much of the time looking down at the path in front of our feet. 'Wrong' said the army doctor later. We should have been looking up above our heads. The risk of being bitten by a snake, he told us, was less than the risk of being hit by a falling coconut ! A more common mistake perhaps is that of the person afflicted by fear of flying who forgets that the risk of death is greater in the car to the airport.

Indeed, risk on the roads is a risk that people prefer not to think about. In England a current concern, fuelled and focussed by two spectacular fatal accidents and newspaper response, is rail safely. Our politicians, concerned to be seen to do something that will gain approval from the electorate, are planning to spend £2 billion on an advanced train protection system, whereas risk data ('The Economist' 8 December 2001 p 34) shows (what civil servants if not also the politicians already know) that more lives (by a factor of 20 or more) would be saved by spending that amount of money on road safety. This, however, is something which the citizen motorist, convinced of his skill as a driver and the safety of his machine, does not want to hear.

In the UK insurance is seen by most citizens as a tedious necessity; many are underinsured or not insured at all. Education about risk, I contend, would lead not only to more business for insurers but also better decisions – not only by citizens but, faced with an educated electorate, by those who govern them. Be that as it may, I am honoured to be here and to be associated with this venture.