WORLD CONGRESS PARIS 2010

Topic Proposed by the French Chapter

Mandatory Insurance
Legal and Economic Myths and Realities

PART ONE – PRESENTATION OF THE TOPIC

I. Spirit

The existence of insurance coverage presupposes the existence of an insurance contract.

An insurance contract may be taken out:

- of the policyholder's own free will and volition, or
- because of an obligation imposed:
  - by law, in connection with a specified situation:
    - activity
      - profession or occupation (e.g. lawyer, or insurance intermediary)
      - leisure activity (e.g. sport)
    - personal status
      - family situation (e.g. parent of a child or children)
      - future retiree
      - owner or user of property exposed to the risk of a natural or technological disaster or an act or terrorism; or
  - by a co-contracting party in connection with a contractual transaction:
    - loan: death and disability insurance imposed by the lender
    - lease of property: fire and/or other insurance imposed by the lessor.

The required insurance may cover a risk falling within the scope of:

- property insurance
- liability insurance
- personal insurance.

The coverage of a risk may be mandatory either:

- through a requirement to carry specific insurance (e.g. motor vehicle liability insurance), or
- through automatic inclusion, in a freely effected insurance contract (e.g. insurance of a flat against risks of fire, burglary, etc.), of coverage not elected by the parties – insurer and policyholder – (e.g. coverage of natural disasters).

We are therefore in the presence either:

- *in former case, of a mandatory insurance contract; or*
- *in the latter case, of mandatory coverage included in a freely effected contract.*

II. <u>Stakes</u>

1. <u>Financial Implications</u>

If coverage of a risk were not mandatory, would the risk be *economically insurable*? What would be the limit of cover and the amount of the premium?

In other words, does the mandatory nature of coverage of a risk

- enable the risk to be insured: if coverage were not mandatory, would it be available on the free market?
- make it possible to pay a premium lower than that which would have been charged if coverage were optional?

Mutualisation is obviously at the heart of the issue.

2. <u>Competition Implications</u>

Where insurance is mandatory, the basic components of the insurance contract are regulated (risks to be covered, amount of coverage, etc.). Some people take the view that there is no longer any competition because all the insurers operating in the relevant market must abide by the rules and, consequently, all the contracts become identical. Is that view really valid? Doesn't practice show that some insurers try to improve on state-mandated coverage?

Competition at an international level should also be considered. The European Union furnishes quite a few instances of distortion of competition: an architect from a country where professional liability insurance for architects is not mandatory is at an advantage if he or she works on a construction project in a country where such insurance is mandatory.

And if certain coverage (natural disaster, for example) is mandatory in one country, the coverage and the payment of the corresponding premium can be evaded by taking out an insurance contract in another country where the coverage is not mandatory.

3. <u>Reinsurance Situation</u>

It is sometimes said that insurers are ostensibly hostile to, but basically in favour of, mandatory insurance because it brings them premiums.

Is that also true of reinsurers? How do they react, in practical terms, in the presence of mandatory insurance?

III. Critical Assessment

In the normal course of events, each national chapter of AIDA has had the opportunity to read the other chapters' responses to the questionnaire. Please give your **personal** assessment (the reporter's or your national chapter's assessment), regardless of the legal system in your own country. This will make it possible to identify a majority opinion within AIDA, at a worldwide, continental or regional level (e.g. South America, Central America or the European Union). You may, and indeed should, approve or criticize each legal mechanism of each country, based on the responses sent to you by the national reporter.

If such a majority opinion is identified, AIDA could consider acting as a lobby group. To that end, it would be desirable to **gather the views of insurers, reinsurers, insurance intermediaries and policyholders (large risks and/or consumers' associations)** in order to present concurring or divergent opinions.

Below are a few considerations that resulted in the formulation of item 6 of the questionnaire ("Assessment and Recommendations").

1. Can one speak of "optional" (and hence non-mandatory) insurance only when the state in no way intervenes?

   It is legally correct and intellectually coherent to speak of "optional" insurance when the states at no time intervenes.

   That is obviously no longer the case if the state imposes an obligation to procure coverage or to take out an insurance contract.

   All modes of state intervention should be taken into consideration. Without imposing a requirement to take out insurance, the state may nevertheless financially help:

   - policyholders, by paying all or part of the premiums; or
   - insurers, by paying a portion of the losses; or
   - all concerned, including reinsurers, by acting as last-layer reinsurer (guarantee fund, reinsurance by a state body, etc.).

2. Trend in Mandatory Insurance

   Once a country has made insurance or coverage mandatory, e.g. for motor vehicle liability, what are the reasons for extending, or, on the contrary, refusing to extend, the system to other risks? Historically, does a state make insurance mandatory only in the wake of a disaster, or when public opinion clamours for it, or when pressured to do so by insurers or other industry players?

   Can one perceive, on the contrary, any political, economic or other movements towards abolishing existant mandatory insurance?

PART TWO – QUESTIONNAIRE

1. Basic Factors

1.1. The mandatory insurance contract or coverage requirement is laid down

1.1.1. By law
1.1.1.1. National law
1.1.1.2. International law

1.1.2. Systematically by a co-contracting party
1.1.2.1. Bank in connection with a loan
1.1.2.2. Lessor in connection with a lease
1.1.2.3. Other

1.2. Context in which a mandatory insurance requirement was laid down

1.2.1. Insurance was made mandatory
1.2.1.1. Without haste
1.2.1.2. In haste

1.3. Nature of the risk

1.3.1. Property insurance

1.3.2. Liability insurance
1.3.2.1. Professional or business liability
1.3.2.2. Liability in private life

1.3.3. Personal insurance
1.3.3.1 Life insurance
1.3.3.2. Health and/or accident insurance

1.4. Exclusions

1.4.1. Permitted exclusions

1.4.2. Prohibited exclusions

1.4.3. Imposed exclusions

1.5. Penalties for lack of insurance

1.5.1. Criminal penalties

1.5.2. Administrative penalties
1.5.2.1. Disqualification from practising or carrying on a profession, occupation, trade or business
1.5.2.2. Other penalties

1.5.3. Civil penalties

2. Methods of Effecting Mandatory Insurance

2.1. Taking out of a contract covering the risk

2.1.1. No

2.1.2. Yes
2.1.2.1. Under an individual contract
2.1.2.2. Under a group contract

2.1.3. Selection of the risk by the insurer: Given that the insurance is mandatory for the insured, is there any way of compelling the insurer to contract?
2.1.3.1. No. Consequences?
2.1.3.2. Yes:

2.2. Coverage automatically included in a freely effected contract

2.2.1. No

2.2.2. Yes

3. Financial Aspects

3.1. Amount of cover

3.1.1. Limit of cover
3.1.1.1. Unlimited cover
3.1.1.2. Legally required minimum cover

3.1.2. Deductible
3.1.2.1. Prohibited
3.1.2.2. Mandatory
3.1.2.3. Optional

3.2. Amount of the premium

3.2.1. Fixed by the state
3.2.1.1. No, never
3.2.1.2. Yes
3.2.1.2.1. Percentage of another premium
3.2.1.2.2. Same amount for all policyholders

3.2.2. Freely fixed by the parties
3.2.2.1. No, never
3.2.2.2. Yes

3.2.3. Bonus-Malus system (premium reduction or increase according to the policyholder's individual claim history during the previous year)
3.2.3.1. Unregulated

3.2.3.2. Regulated

3.2.4. Do policyholders consider the premiums charged for mandatory insurance

3.2.4.1. Acceptable?

3.2.4.2. Unacceptable?

3.2.5. If the insurance were not mandatory, would the premium charged for it be

3.2.5.1. The same?

3.2.5.2. Significantly higher?

3.3. <u>Financial data: Are there studies making it possible to know:</u>

3.3.1. The profit or loss generated by mandatory insurance (premiums received/claims paid)?

3.3.1.1. Profit

3.3.1.2. Loss

3.3.2. Whether the risk in question would be insurable if it were not mandatory?

3.3.2.1. Insurable

3.3.2.2. Uninsurable

3.3.2.3. Insurable, but at a higher premium or with less extensive cover

3.3.3. Whether persons exposed to a given risk (e.g. hurricane, flood or other natural disaster) would voluntarily take out insurance against it if it were not mandatory?

3.3.3.1. Few persons would take out the insurance

3.3.3.2. Many persons would take out the insurance

4. Reinsurance

4.1. <u>Mandatory reinsurance</u>

4.1.1. Obligation for a private reinsurer

4.1.2. Obligation for a public reinsurer

4.1.2.1. In the form of classic reinsurance

4.1.2.2. In the form of a state guarantee fund

4.2. <u>Attitude adopted by private insurers in your country</u>

4.2.1. Refusal to reinsure mandatory insurance

4.2.2. Agreement to reinsure mandatory insurance

4.2.2.1. With domestic insurers

4.2.2.2. With foreign insurers

4.3. <u>Economic aspects</u>

5. International Aspects

In order to simplify an extremely complex issue, please find below a few practical questions.

5.1. Does your country have any law that deals with the issue of mandatory insurance in an international context?

5.1.1. National legislation

5.1.2. International treaty

5.2. Where insurance is mandatory in your country for a given activity, are foreign persons required to carry such insurance in order to engage in that activity in your country ?

5.2.2. Yes, and they must take out the insurance locally

5.2.3. Yes, but they may carry the insurance by taking it out in their home country

5.2.4. No, they do not need to carry the insurance to engage in the activity

5.3. Is it legal to take out mandatory insurance with a foreign insurer?

5.3.1. No

5.3.2. Yes

5.3.2.1. In the event of litigation between the insurer and the policyholder, what law would the court apply?

5.3.2.1.1. The law of the insurer

5.3.2.1.2. The law of the policyholder

5.4. Particular case of mandatory coverage included in an optional contract: Where the optional contract is taken out abroad,

5.4.1. The mandatory coverage

5.4.1.1. Is included in the contract by the foreign insurer

5.4.1.2. Is not included in the contract by the foreign insurer

5.4.2. The premium (or fee or charge) for the mandatory coverage, which is to be paid to the body in charge of collecting it (insurer, guarantee fund, etc.),

5.4.2.1. Is nevertheless paid to this body

5.4.2.2. Is not paid to this body

6. Assessment and Recommendations

Do you think:

6.1. The system of mandatory insurance (or coverage) should be prohibited?

6.1.1. As a matter of principle: No coverage should be mandatory. Reasons:
- 6.1.1.1. Violation of the freedom to contract
- 6.1.1.2. Lack of selection of the risk
- 6.1.1.3. Interference with competition
  - 6.1.1.3.1. Among insurers
  - 6.1.1.3.2. Among policyholders
  - 6.1.1.3.3. At an international level (see 5.2)
- 6.1.1.4. Other

6.1.2. For practical reasons
- 6.1.2.1. In the event of refusal, problem of compelling an insurer to provide coverage
- 6.1.2.2. Reluctance on the part of reinsurers
- 6.1.2.3. Other

6.2. The current mandatory insurance should be repealed?

6.2.1. Property insurance

6.2.2. Liability insurance

6.2.3. Personal insurance

6.3. Mandatory insurance should be confined to certain specific risks?

6.3.1. Civil liability: motor vehicle, medical malpractice, etc.

6.3.2. Property damage: disasters, main residence, business interruption, etc.

6.3.3. Personal injury: through individual or group insurance, for children, etc.

6.3.4. Death insurance: for borrowers, etc.

6.3.5. Life insurance: retirement, etc.

6.3.6. Dependency insurance

6.4. Some types of mandatory insurance should be developed?

6.4.1. Which ones? Disaster risks, risks to the vulnerable and those in a weak situation (the elderly, children, victims of loss or injury caused by liable third parties), etc.

6.4.2. At a national, international (European Union, Mercosur, etc.) or worldwide level

6.4.3. For moral reasons: solidarity, protection of victims, etc.

6.4.4. For reasons of efficacy:

6.4.4.1. Access to insurance facilitated by mutualisation: lower premiums

6.4.4.2. Need to compel those who do not concern themselves with precaution, prevention, contingencies, etc.

6.5. <u>If you agree with the principle of mandatory insurance, do you think</u>:

6.5.1. Mandatory insurance should be effected

6.5.1.1. By taking out a specific insurance contract?

6.5.1.2. By automatic inclusion in an existing insurance contract?

6.5.1.3 By developing group insurance contracts?

6.5.1.4. By obliging insurers to provide insurance?

6.5.2. A rate of premium should be

6.5.2.1. Fixed by law ?

6.5.2.2. Fixed freely ?

6.5.3. A Bonus-Malus system (premium reduction or increase according to the policyholder’s loss experience) should apply ?

6.5.4. The limit of cover should be

6.5.4.1. The same for everyone?

6.5.4.2. Subject to a minimum?

6.5.4.3. Freely determined by the parties?

6.5.5. Clauses defining the risks covered and the exclusions should be imposed by law ?

6.5.6. Reinsurers operating in the relevant domestic market should be required to provide reinsurance?

6.5.7. The state should act as last-layer reinsurer?

6.5.8. A Guarantee Fund system should be established?