

THE EMERGING REGULATION OF REINSURANCE INTERMEDIARIES

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I. INTRODUCTION

The reinsurance intermediary¹ plays a vital role in many reinsurance transactions, including the placement of reinsurance, administration of the

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1. The terms "reinsurance intermediary," "intermediary," and "broker" are used interchangeably in this Article. The intended reference is, however, in the context of reinsurance. In some instances, the term "broker" may also be applicable to the placement of primary insurance.

reinsurance contract, and in some instances, the resolution of disputes between the contracting parties.² In carrying out these responsibilities, the intermediary acts as a conduit for underwriting, for claims and accounting information, as well as for the transfer of funds representing premium, commission, and loss payments.³

The financial duties owed by reinsurance intermediaries have been described as falling within three broad categories: security, care and loyalty, and accounting.⁴ Prior to engagement, an intermediary is typically required to provide security to ensure the performance of its obligations. That security may take the form of a license, a contract or letter of engagement, a fidelity bond, or errors and omissions coverage.⁵ Once the intermediary is engaged, the duties of care and loyalty are invoked, requiring the intermediary to place business with financially sound reinsurers—including an obligation to inquire into the financial strength of unauthorized reinsurers.⁶ Intermediaries must take care to disclose material facts in an accurate fashion as the reinsurance is placed, and to document adequately the transaction after agreement has been reached between the parties.⁷ The last category, accounting, imposes an obligation on the intermediary to handle funds it receives in a fiduciary capacity on its principal's behalf.⁸

Despite the broad spectrum of the intermediary's responsibilities and the potential for credit risk, error, and fraud, most countries do not regulate the activities of intermediaries. Although the United Kingdom began regulating the activities of intermediaries two decades ago, it was not until the last decade that the United States turned its attention to this substantial player in the reinsurance marketplace.⁹

2. John L. Baringer, *The Reinsurance Market: The Assuming Reinsurer*, in REINSURANCE 329, 334-36 (Robert Strain ed., 1980).

3. W.J. Gilmartin, *How Reinsurance is Marketed*, in REINSURANCE, *supra* note 2, at 419, 421-22.

4. Stephen W. Schwab et al., *Between Rocks and Hard Places: The Plight of Reinsurance Intermediaries* 4 (Oct. 22, 1992) (unpublished material, on file with the Reinsurance Congress and the *Drake Law Review*).

5. *Id.*

6. *Id.*

7. *Id.* at 5.

8. *Id.*

9. New York was the first state to regulate reinsurance intermediaries, enacting its Intermediary Licensing Law in 1976. *Advisory Committee Report on Licensing of Reinsurance Intermediaries*, 1 NAT'L ASS'N INS. COMM'RS PROC. 928, 928 (1989) [hereinafter *Advisory Committee Report*]. In 1982, the Insurance Department promulgated Regulation 98, which further delineated licensing requirements. *Report of Licensing for Reinsurance Intermediaries Working Group*, 1 NAT'L ASS'N INS. COMM'RS PROC. 929, 929 (1989). In 1984, New York presented a draft model law to the NAIC Subgroup on Reinsurance Intermediaries, MGAs and Syndicates. *Report to Reinsurance and Anti-Fraud Task Force by the Subgroup on Reinsurance Intermediaries, MGAs and Syndicates*, 2 NAT'L ASS'N INS. COMM'RS PROC. 846, 846 (1984) [hereinafter *Report to Reinsurance and Anti-Fraud Task Force*].

In a report entitled *Failed Promises: Insurance Company Insolvencies*, a United States Congressional Subcommittee, chaired by Representative John D. Dingell, described alleged abuses and lack of regulatory control over certain aspects of the insurance and reinsurance marketplace.¹⁰ The Subcommittee made the following allegations:

1. The crucial process of selecting dependable reinsurers is left to the unfettered discretion of insurance company managers.¹¹

2. No one seems to know where "the reinsurance chain goes or whether its links are all sound."¹²

3. Managing general agents are delegated many of the basic insurance functions including the placement of reinsurance.¹³

4. Reinsurance pool members are "dependent on [a] managing agency to determine the quality and amounts of business accepted by [the] reinsurance pool."¹⁴

5. The slow payment of insurance and reinsurance proceeds "threatens the fragile chain of financial stability in reinsurance relationships."¹⁵

6. A managing general agent's authority is difficult to terminate because contracts typically provide for 90 to 180 days prior notice with the agent continuing to write more under-priced business until the end of this notice period.¹⁶

7. Agents frequently appoint subagents with little or no control by the company.¹⁷

8. Reinsurance intermediaries and underwriters often fail to inquire into the combined ownership of the managing general agent (representing the primary insurer) and the reinsurer.¹⁸

For many years, the rights, duties, and obligations of reinsurance intermediaries remained unchanged and essentially unregulated. Recently, many states in the United States, however, have begun to address and improve reinsurance intermediary regulation, thereby changing and defining these rights, duties, and obligations. For example, the legislatures have adopted statutes and regulations that require disclosure of relationships between parties, maximum time periods for which intermediaries can with-

10. See generally SUBCOMMITTEE ON OVERSIGHT & INVESTIGATIONS, HOUSE COMM. ON ENERGY & COMMERCE, 101ST CONG., 2D SESS., *FAILED PROMISES: INS. CO. INSOLVENCIES* (Comm. Print 1990) [hereinafter *FAILED PROMISES*].

11. *Id.* at 4.

12. *Id.*

13. *Id.* at 10.

14. *Id.*

15. *Id.* at 61.

16. See *id.* at 30-31.

17. See *id.* at 33.

18. See *id.* at 33, 38-39.

hold funds, maintenance of records concerning reinsurance placements, contract provisions allowing immediate cancellation for cause, and suspension of authority to assume or cede business during any dispute regarding the cause for termination.¹⁹

Despite these improvements in the United States and similar changes in the United Kingdom, many countries impose little or no regulation on reinsurance intermediaries. With the growth in 1992 of a Common Market among European nations, and in light of the global nature of reinsurance generally, one can expect greater focus on this area in the future.

II. REGULATORY AUTHORITIES IN THE UNITED STATES AND THE UNITED KINGDOM

A. United States

The major source of insurance and reinsurance regulation in the United States is the National Association of Insurance Commissioners ("NAIC"). A substantial amount of legislation is initiated at the NAIC level, with individual states adopting model legislation or a modified version of NAIC model acts.

In June of 1990, the NAIC adopted the Reinsurance Intermediary Model Act ("NAIC Model Act").²⁰ Over two-thirds of the states have enacted this Act or a modified version.²¹ Although the NAIC has no direct regulatory

19. For a discussion of these requirements see *infra* parts IV.A-B.

20. See *Licensing Reinsurance Intermediaries Working Group of the Reinsurance (E) Task Force*, 2 NAT'L ASS'N INS. COMM'RS PROC. 768, 768 (1990). The original Reinsurance Intermediary Model Act was adopted in December 1989, but the current version was adopted in 1990 after technical amendments were made. See *Report of Licensing Reinsurance Intermediaries Working Group*, 1B NAT'L ASS'N INS. COMM'RS PROC. 872, 872 (1990).

21. Debra J. Anderson, *International Regulation of Reinsurance Intermediaries* app. (Oct. 22, 1992) (unpublished material, on file with the Reinsurance Congress and the *Drake Law Review*); see, e.g., ALA. CODE §§ 27-5A-1 to -13 (Supp. 1993); ALASKA STAT. §§ 21.27.670-770 (1993); ARIZ. REV. STAT. ANN. §§ 20-486 to 20-486.11 (Supp. 1993); ARK. CODE ANN. §§ 23-62-401 to -413 (Michie Supp. 1993); CAL. INS. CODE §§ 1781.1-13 (West 1993); COLO. REV. STAT. §§ 10-2-301 to -312 (Supp. 1993); CONN. GEN. STAT. ANN. §§ 38-760 to 38a-760(i) (West Supp. 1993); DEL. CODE ANN. tit. 18, §§ 1601-1613 (Supp. 1992); FLA. STAT. ANN. § 626.7492 (West Supp. 1994); GA. CODE ANN. §§ 56-4701 to -4711 (Harrison Supp. 1993); HAWAII REV. STAT. §§ 431:9B-101 to -111 (Supp. 1992); IDAHO CODE §§ 41-5101 to -5111 (Supp. 1993); ILL. COMP. STAT. ANN. ch. 215, §§ 100/1 to /60 (West 1993) (formerly ILL. REV. STAT. ch. 73, para. 1601-1660 (1991)); IND. CODE ANN. §§ 27-6-9-1 to -26 (Burns 1992); IOWA CODE ANN. §§ 521C.1-12 (West Supp. 1993); KAN. STAT. ANN. §§ 40-4501 to -4513 (1993); KY. REV. STAT. ANN. §§ 304.9-700 to -759 (Michie Bobbs-Merrill Supp 1992); LA. REV. STAT. ANN. 22:1210.20-31 (West Supp. 1994); ME. REV. STAT. ANN. tit. 24-A §§ 741-754 (West Supp. 1993); MD. ANN. CODE art. 48A, §§ 714-733 (Supp. 1993); MINN. STAT. ANN. §§ 80A.70-756 (West Supp. 1994); MISS. CODE ANN. §§ 83-19-201 to -221 (Sup 1992); MO. ANN. STAT. §§ 375.1110-1140 (Vernon 1991); MONT. CODE ANN. §§ 33-2-1701 to -1709 (1993); NEB. REV. STAT. §§ 44-5602 TO -5611 (Supp. 1993); N.H.

authority over the states, the NAIC accreditation process has been successful in moving states toward adoption of NAIC model acts.²² At its December 1990 national meeting, the NAIC adopted the requirement that states enact the NAIC Model Act, or a substantially similar act, as a prerequisite for NAIC accreditation.²³

B. United Kingdom

In the late 1970s, Parliament passed legislation addressing insurance brokers—the Insurance Brokers (Registration) Act (“U.K. Act”).²⁴ One provision of this legislation established the Insurance Brokers Registration Council (“IBRC”), which was charged with the registration of insurance brokers and the regulation of their professional standards.²⁵ The regulation of intermediaries by the IBRC is accomplished through the adoption and implementation of a code of conduct.²⁶

Pursuant to the Lloyd’s Act of 1982, the Council of Lloyd’s has the power to regulate all Lloyd’s brokers.²⁷ The relevant Lloyd’s Byelaw provides for the authority to broke insurance by virtue of the registration of a Lloyd’s broker, as well as for the review, renewal, and withdrawal of a broker’s registration.²⁸ Subject to certain exceptions, the brokering of insurance business at Lloyd’s by any person who is not registered under the Lloyd’s Byelaw is prohibited.²⁹

REV. STAT. ANN. §§ 59A-12D-1 to -12 (Michie Supp. 1993); N.C. GEN. STAT. §§ 58-9-2 to -26 (Supp. 1993); N.D. CENT. CODE §§ 26.1-31.1-01 to -12 (Supp. 1993); OKLA. STAT. ANN. tit. 36, §§ 5101-5113 (West Supp. 1994); PA. STAT. ANN. tit. 40, §§ 321.1 to .10 (Supp. 1993); R.I. GEN. LAWS §§ 27-52-1 to -13 (Supp. 1993); S.C. CODE ANN. §§ 38-46-10 to -120 (Law Co-op. Supp. 1993); TENN. CODE ANN. §§ 56-6-801 to -812 (Supp. 1993); TEX. INS. CODE ANN. § 21.07-7 (West Supp. 1994); UTAH CODE ANN. §§ 31A-23-701 to -709 (Supp. 1993); VA. CODE ANN. §§ 38.2-1846 to -1857 (Michie Supp. 1993); W. VA. CODE §§ 33-38-1 to -13 (Supp. 1993); WYO. STAT. §§ 26-47-101 to -113 (Supp. 1993); *see also* OHIO ADMIN. CODE § 3901-3-09 (1993).

22. For example, as of January 1994 43 states and the District of Columbia have currently adopted the NAIC’s Credit for Reinsurance Model Act, 49 states and the District of Columbia have adopted the Managing General Agents Act, and 30 states and the District of Columbia have adopted the Rehabilitation and Liquidation Model Act (January lists on file with the *Drake Law Review*).

23. *See* SPECIAL INSURANCE ISSUES (E) COMMITTEE, 2 NAT’L ASS’N INS. COMM’RS PROC. 747, 747 (1990). At the same meeting, the NAIC adopted the requirement that states pass the NAIC Managing General Agents Model Act or a substantially similar act. *Id.* This Act is also instrumental in addressing the allegations made in FAILED PROMISES, *supra* note 10.

24. Insurance Brokers (Registration) Act ch. 46 (1977) (U.K.).

25. *Id.* § 1.

26. *See* INSURANCE BROKERS REGISTRATION COUNCIL, THE CODE OF CONDUCT (1978) [hereinafter CODE OF CONDUCT].

27. *See* Lloyd’s of London, Lloyd’s Brokers Byelaw, No. 5 (July 6, 1988) [hereinafter Lloyd’s Byelaw].

28. *Id.* pt. B.

29. *Id.* pt. B(4).

Although other statutory organizations in the United Kingdom exercise some degree of control over intermediaries³⁰ and at least one organization maintains a voluntary code of practice,³¹ this Article focuses on the IBRC and Lloyd's, which impose the most comprehensive regulatory requirements.³²

III. LICENSING AND REGISTRATION OF REINSURANCE INTERMEDIARIES

One of the main components of the regulation of intermediaries in both the United States and the United Kingdom's regulation of intermediaries is the requirement that intermediaries be licensed or registered with the appropriate regulatory body. This requirement relates to the intermediary's financial duty of security. Both jurisdictions require licensure or registration of intermediaries to ensure the financial soundness and integrity of the intermediary.

A. United States

The NAIC Reinsurance Intermediary Model Act recognizes two types of reinsurance intermediaries: reinsurance brokers and reinsurance managers. A reinsurance broker is defined as any person, firm, association, or corporation who "solicits, negotiates or places reinsurance cessions or retrocessions on behalf of a ceding insurer without the authority or power to bind reinsurance on behalf of such insurer."³³ A reinsurance manager, on the other hand, is defined as "any person, firm, association or corporation who has authority to bind or manages all or part of the assumed reinsurance business of a reinsurer (including the management of a separate division, department or underwriting office) and acts as an agent for such reinsurer . . ."³⁴

The NAIC Model Act places licensing obligations on reinsurance intermediaries that were previously beyond the scope of many states' producer licensing schemes.³⁵ In order to close those gaps, the NAIC Model Act was

30. These other organizations include the Securities and Investment Board (SIB), the Life Assurance and Unit Trusts Regulatory Organisation (LAUTRO), the Financial Intermediaries, Managers and Brokers Regulatory Association (FIMBRA), and the Investment Managers Regulatory Organisation (IMRO).

31. The Association of British Insurers.

32. In addition to the system of statutory and voluntary regulation, intermediaries are subject to regulations 67 to 69 of the Insurance Companies Regulation of 1981 and the "main agents" provision of the Insurance Companies Act of 1982.

33. NAIC REINSURANCE INTERMEDIARY MODEL ACT § 2(F) (1990) [hereinafter NAIC MODEL ACT].

34. *Id.* § 2(G). Notwithstanding this definition, the NAIC Model Act excludes from the definition of reinsurance manager any United States manager of a United States branch of an alien reinsurer and a pool manager of residual market mechanisms. *Id.*

35. See, e.g., ILL. REV. STAT. ch. 73, para. 1065.39-2 (1989).

drafted to require licensing by some regulatory authority.³⁶ Several options are available to accomplish this requirement. The Act requires a reinsurance broker who maintains an office in the enacting state be a licensed producer in that state.³⁷ Alternatively, if the reinsurance broker maintains an office in a state other than the enacting state, the broker must be a licensed producer in the enacting state or in another state that has a law substantially similar to the NAIC Model Act, or be licensed in the enacting state as a nonresident reinsurance intermediary.³⁸

With respect to reinsurance managers, the NAIC Model Act requires that, when acting on behalf of a reinsurer domiciled in the enacting state, the reinsurance manager be a licensed producer in that state.³⁹ Alternatively, when acting as a reinsurance manager in the enacting state and maintaining an office in the enacting state, the reinsurance manager must be a licensed producer in the enacting state.⁴⁰ The third option, available to a reinsurance manager acting in another state on behalf of a nondomestic insurer, requires the reinsurance manager to be licensed as a producer in the enacting state, to be licensed in a state that has a law substantially similar to the NAIC Model Act, or to be licensed in the enacting state as a nonresident reinsurance intermediary.⁴¹ The insurance commissioner may require the reinsurance manager to file a bond for the protection of the reinsurer and to maintain an errors and omissions policy in an amount acceptable to the commissioner.⁴²

Although the NAIC Model Act sets forth duties of the contracting parties, it contains few specifics for the criteria a commissioner should use to decide whether to license a reinsurance intermediary. The commissioner may refuse to issue a license, or may revoke or suspend a license if the applicant, anyone named on the application, or any member, principal, officer, or director of the applicant is deemed untrustworthy.⁴³ The NAIC Model Act extends the commissioner's discretion in this regard if, in the commissioner's judgment, any controlling person of the "applicant is not trustworthy to act as a reinsurance intermediary . . ."⁴⁴ In the event the commissioner refuses to

36. The Industry Advisory Committee to the Subgroup on Reinsurance Intermediaries, MGAs and Syndicates had proposed a voluntary registration program instead of licensing. *Report to Reinsurance and Anti-Fraud Task Force*, *supra* note 9, at 846.

37. NAIC MODEL ACT § 3(A)(1) (1990).

38. *Id.* § 3(A)(2).

39. *Id.* § 3(B)(1).

40. *Id.* § 3(B)(2).

41. *Id.* § 3(B)(3).

42. *Id.* § 3(C).

43. *Id.* § 3(E).

44. *Id.*

issue a license, the applicant can obtain a summary of the basis of such refusal.⁴⁵

In a report submitted by the Chairman of the NAIC Advisory Committee on June 14, 1988, industry representatives suggested that regulators distinguish between reinsurance brokers and reinsurance managers, the latter having the "underwriting authority to assume or cede reinsurance."⁴⁶ Although the Advisory Committee supported the proposal to license reinsurance managers, it urged the NAIC to refrain from licensing reinsurance brokers because it would serve no valid purpose.⁴⁷

In 1989, the NAIC Advisory Committee recommended the reinsurance brokerage business continue to operate on a self-regulating basis.⁴⁸ The Committee based its rationale for this recommendation on the sophisticated nature of the parties involved in reinsurance transactions and the need for flexibility in the reinsurance marketplace.⁴⁹ The Advisory Committee suggested if regulation of reinsurance intermediaries was inevitable, the NAIC Model Act should require an intermediary to become licensed in only one jurisdiction.⁵⁰ Broad and conflicting regulations would allegedly damage the ability of United States industry to compete in the worldwide market.⁵¹

B. *United Kingdom—IBRC*

The IBRC maintains a register of individual insurance brokers, both primary and reinsurance, who carry on business on their own account, as partners in an insurance brokering business, or as employees of an insurance brokering firm.⁵² The IBRC also maintains a list of corporations it has approved to conduct an insurance brokering business.⁵³ The list also includes both primary and reinsurance brokering corporations.⁵⁴ Finally, the IBRC maintains an Admissions Committee to which applications are submitted.⁵⁵ In the event an applicant is refused, the U.K. Act provides for a hearing before a Committee of the IBRC.⁵⁶

45. *Id.* Although the NAIC Model Act is not specific with reference to who may obtain the summary of the basis for refusal, the confidential nature of the document suggests it may only be made available to the applicant. *Id.*

46. *Report of the Reinsurance Industry Advisory Committee*, 2 NAT'L ASS'N INS. COMM'RS PROC. 809, 809 (1988).

47. *Id.*

48. *Advisory Committee Report*, *supra* note 9, at 928.

49. *Id.*

50. *Id.*

51. *Id.*

52. Insurance Brokers (Registration) Act ch. 46, § 2 (1977) (U.K.).

53. *Id.* § 4.

54. *Id.*

55. *Id.* § 3.

56. *Id.* § 5.

A broker applying to the IBRC must demonstrate possession of the Associateship of the Chartered Insurance Institute, or a period of five years of experience within the insurance industry (three years for an individual qualified by the Fellowship of the Chartered Insurance Institute).⁵⁷ The broker must also demonstrate adequate practical experience as an insurance broker and meet the character and suitability tests.⁵⁸

C. United Kingdom—Lloyd's

The registration of partnerships and corporations as Lloyd's brokers, including the renewal, review, and withdrawal of registration, is under the control of the Council of Lloyd's ("Council").⁵⁹ The Council maintains a register of brokers at the premises of Lloyd's, which is available for inspection at all reasonable times by any person.⁶⁰ The registration of a Lloyd's broker may either be for a specific period of time or for an indefinite period.⁶¹ When a Lloyd's broker is registered for an indefinite period, the Council has the power to place a finite termination on the broker's registration, but the finite termination shall not expire less than two years after the Council makes the decision to terminate.⁶²

The criteria for registration as a Lloyd's broker include the requirement that the corporation, or each partner of a partnership, be registered as an insurance broker under the U.K. Act and enrolled on the list maintained by the IBRC.⁶³ There must be no subsisting arrangement⁶⁴ that affects the applicant and the applicant must be "fit and proper" to be a Lloyd's broker.⁶⁵ The determination of whether an applicant is "fit and proper" to be a Lloyd's broker is based on various criteria, including the character and suitability of the applicant's directors, partners, and compliance officer,⁶⁶ and any person

57. *Id.* §§ 3, 5.

58. *Id.* § 3.

59. Lloyd's Byelaw, *supra* note 27, pt. B(2).

60. *Id.* pt. B(3).

61. *Id.* pt. B(6)(2).

62. *Id.*

63. *Id.* pt. B(7)(1)(a) & (b).

64. *Id.* pt. B(7)(1)(c). A subsisting arrangement is one that "might enable a Lloyd's broker to influence the policy or business of a managing agent" or vice versa. *Id.* pt. B(8)(1)(a). This definition includes the situation in which a Lloyd's broker has a right to receive or expectation of receiving any amount of the general profits or earnings of a managing agent or vice versa. *Id.* pt. B(8)(1)(b). An arrangement that is considered a normal commercial arrangement is excluded from this prohibition. *Id.* pt. B(8)(1)(a). A normal commercial arrangement is one that would be expected to exist between independent persons dealing at arm's length and in the opinion of the Council does not involve an unacceptable conflict of interest on the part of either party. *Id.* pt. B(8)(2).

65. *Id.* pt. B(7)(1)(d).

66. *Id.* pt. B(7)(2)(a), (d). Every Lloyd's officer is required to appoint a person responsible for compliance by the Lloyd's broker with Lloyd's Acts 1871 to 1982, byelaws, regulations,

who controls the applicant.⁶⁷ The Council also reviews the number of directors or partners who have experience in the business of Lloyd's and the adequacy of the applicant's capital.⁶⁸ Additionally, consideration is given to whether the applicant's business is or is likely to become overly dependent on a particular insurer, or on a particular source, type, or class of business.⁶⁹

The applicant must be able and willing to supervise and service its activities and responsibilities and remain accountable for those obligations.⁷⁰ The Council may review the location, adequacy, and suitability of the applicant's staff and records, and any other matters the Council believes should be taken into account.⁷¹

In registering an applicant as a Lloyd's broker, the Council may impose certain conditions, which include the execution of certain documents such as an agreement that the individual or entity that controls a Lloyd's broker ("controller") not interfere with the conduct of the broker's business.⁷² The Council may require a written commitment that sufficient resources will be maintained to comply with the Lloyd's Byelaw, or a guarantee by the controller that it will discharge the liabilities of the Lloyd's broker.⁷³

The Council may also require execution of a document ensuring that the applicant or the Lloyd's broker will, after removal of its name from the register, provide to the Council information, explanation, documents, or other material as the Council may require relating to the business conducted by the applicant or the Lloyd's broker prior to removal from the register.⁷⁴ Notice of adverse decisions denying or withdrawing an application for registration are given to the applicant,⁷⁵ who is provided with a right of appeal.⁷⁶

IV. CONDUCT OF BUSINESS BY REINSURANCE INTERMEDIARIES

Although the NAIC Model Act is vague with respect to the criteria a state insurance commissioner uses in determining whether to grant an intermediary a license, it is detailed in terms of the duties and responsibilities imposed upon the contracting parties. In many instances, these

and other requirements imposed upon the broker. *Id.* pt. D(18)(a). Unless otherwise approved by the Council, the compliance officer must be a director or partner of the Lloyd's broker. *Id.* pt. D(18).

67. *Id.* pt. B(7)(2)(c).

68. *Id.* pt. B(7)(2)(b), (e).

69. *Id.* pt. B(7)(2)(f)(i)-(iv).

70. *Id.* pt. B(7)(2)(g).

71. *Id.* pt. B(7)(2)(h)-(k).

72. *Id.* pt. B(9)(2)(a).

73. *Id.* pt. B(9)(2)(b)-(c).

74. *Id.* pt. B(9)(3).

75. *Id.* pt. B(11)(7).

76. *Id.* pt. B(12)(1) (citing Lloyd's of London, Lloyd's Appeal Tribunal Byelaw, No. 5 (1983)).

mandates are directly responsive to the criticisms contained in *Failed Promises*.⁷⁷

A. United States—Reinsurance Brokers

Transactions between a reinsurance broker and an insurer it represents may only be entered into pursuant to a written authorization that must contain provisions addressing certain minimum requirements.⁷⁸ Some of these requirements represent a codification of the intermediary's financial duties of care and loyalty, while others relate to the duty of accounting.

The NAIC Model Act requires that the reinsurance broker comply with all written standards established by the insurer for the cession or retrocession of all risks.⁷⁹ The broker must also disclose to the insurer any relationships it has with reinsurers to which business is ceded or retroceded by the broker.⁸⁰ With respect to the duty of accounting, the reinsurance broker must render detailed, accurate accounts of all material transactions and remit all funds due the insurer within thirty days of the broker's receipt.⁸¹ This requirement addresses the allegation in *Failed Promises* that slow payment of reinsurance proceeds threatens the financial stability of reinsurance relationships.⁸² All funds collected on behalf of the insurer must be held by the broker in a fiduciary capacity and deposited in a qualified United States financial institution.⁸³

To ensure accountability and the right of recourse, the written authorization must provide the insurer with the right to terminate the broker's authority at any time.⁸⁴ Furthermore, the reinsurance broker must maintain books and records in accordance with the NAIC Model Act and provide the insurer access and the right to copy all accounts and records.⁸⁵ Among the books and records the reinsurance broker is required to maintain are placing documents,⁸⁶ which were the subject of criticism in *Failed Promises*. Chairman Dingell's Subcommittee found insurers and intermediaries often do not know where reinsurance is placed.⁸⁷ The NAIC Model Act requires the maintenance and retention of documentation regarding the identity of the assuming reinsurers, proof of placement and details regarding any retroces-

77. See *FAILED PROMISES*, *supra* note 10.

78. NAIC MODEL ACT § 4 (1990).

79. *Id.* § 4(E).

80. *Id.* § 4(F).

81. *Id.* § 4(B).

82. *FAILED PROMISES*, *supra* note 10, at 61.

83. NAIC MODEL ACT § 4(C) (1990).

84. *Id.* § 4(A).

85. *Id.* §§ 4(D), (5).

86. *Id.* § 5(A)(8).

87. See *FAILED PROMISES*, *supra* note 10, at 4.

sions handled by the reinsurance broker, the identity of the retrocessionaires, and the percentage of each contract assumed.⁸⁸

B. *United States—Reinsurance Managers*

Similar to a reinsurance broker, transactions between a reinsurance manager and the reinsurer it represents may only be conducted pursuant to a written agreement, which specifies the responsibilities of each party and is approved by the reinsurer's Board of Directors.⁸⁹ The agreement must be filed with the state insurance commissioner for approval at least thirty days before the reinsurer assumes or cedes business through the intermediary.⁹⁰

The NAIC Model Act mandates specific contract provisions addressing certain minimum requirements, some of which are similar to those imposed upon reinsurance brokers, but a number of which go beyond those requirements. Like the reinsurance broker, the reinsurance manager must comply with written underwriting and rating standards established by the insurer⁹¹ and must disclose to the reinsurer any relationship it has with any insurer prior to ceding or assuming any business with that insurer pursuant to the contract.⁹² The agreement between the reinsurance manager and the reinsurer must set forth the rates, terms, and other fees that the reinsurance manager can charge the reinsurer.⁹³ The agreement is not assignable by the reinsurance manager.⁹⁴

Like the reinsurance broker, the reinsurance manager must render detailed, accurate accounts and remit all funds due the reinsurer on a monthly basis.⁹⁵ All funds collected on behalf of the reinsurer must be held by the reinsurance manager in a fiduciary capacity in a qualified United States financial institution.⁹⁶ Unlike the reinsurance broker, the reinsurance manager is permitted to withhold up to three months of estimated claim payments and allocated loss adjustment expenses.⁹⁷ To prevent the commingling of client funds, however, the reinsurance manager is required to maintain a separate bank account for each reinsurer it represents.⁹⁸

Unique to the reinsurance manager is the obligation to make timely reports and copies of relevant information available to the reinsurer if the

88. NAIC MODEL ACT § 7(D) (1990).

89. *Id.* § 7.

90. *Id.*

91. *Id.* § 7(G).

92. *Id.* § 7(M).

93. *Id.* § 7(F).

94. *Id.* § 7(H).

95. *Id.* § 7(B).

96. *Id.* § 7(C).

97. *Id.*

98. *Id.*

contract allows the reinsurance manager to settle claims on behalf of the reinsurer.⁹⁹ In addition, the agreement must also provide for joint ownership of the claim files.¹⁰⁰

To ensure the reinsurer is able to respond promptly to a possible violation of the agreement, it must provide that both settlement authority and the authority to assume or cede business may be immediately suspended by the reinsurer during the pendency of any dispute regarding the cause for termination of the contract.¹⁰¹ In this way, the NAIC Model Act addresses the problem cited by Chairman Dingell's Subcommittee concerning extended termination periods and the inability of a company to suspend an agent's authority during that interim period.¹⁰²

Consistent with the obligation of a reinsurance broker, a reinsurance manager must comply with the record retention requirements of the NAIC Model Act¹⁰³ and provide the reinsurer the right to access and copy all accounts and records.¹⁰⁴ Consistent with the obligations of a reinsurance broker, a reinsurance manager is required to maintain placing information.¹⁰⁵

The reinsurance manager is required to provide the reinsurer annually with a statement of its financial condition prepared by an independent certified accountant.¹⁰⁶ At the same time, the reinsurer is required to conduct at least semi-annual, on-site reviews of the underwriting and claims processing operations of the reinsurance manager.¹⁰⁷ Under the NAIC Model Act, when a contract provides for a sharing of interim profits by the reinsurance manager, the profits shall not be paid "until one year after the end of each underwriting period for property business and five (5) years after the end of each underwriting period for casualty business" (unless the Commissioner requires a later period for specified lines of business), "and not until the adequacy of reserves on the remaining claims has been verified."¹⁰⁸

The agreement between the reinsurer and the reinsurance manager must further provide that within the scope of its actual or apparent authority, the acts of the reinsurance manager shall be deemed to be the acts of the reinsurer on whose behalf the reinsurance manager is acting.¹⁰⁹

The NAIC Model Act contains a number of prohibited acts with regard to reinsurance managers intended to force a reinsurer to maintain control

99. *Id.* § 7(I).

100. *Id.* § 7(I)(3).

101. *Id.* § 7(A).

102. FAILED PROMISES, *supra* note 10, at 30.

103. NAIC MODEL ACT § 7(D) (1990).

104. *Id.* § 7(E).

105. *Id.* § 7(D).

106. *Id.* § 7(K).

107. *Id.* § 7(L).

108. *Id.* § 7(J).

109. *Id.* § 7(N).

over the reinsurance manager. For example, the reinsurance manager is prohibited from committing the reinsurer to participation in a reinsurance syndicate,¹¹⁰ or from placing retrocessions on behalf of the reinsurer except pursuant to obligatory facultative agreements for which the reinsurer has established sufficient guidelines.¹¹¹ Chairman Dingell's Subcommittee denounced the reinsurer's loss of control over both reinsurance pools and the selection and placement of reinsurance as defects in the current system.¹¹² Additionally, the reinsurance manager is prohibited from appointing an unlicensed producer or a subreinsurance manager.¹¹³ Again, one of the criticisms made by Chairman Dingell's Subcommittee was directed at the practice of agents appointing subagents, with little or no control reserved by the company.¹¹⁴

With respect to retrocessions, the reinsurer maintains control because the NAIC Model Act prohibits the reinsurance manager from collecting from or settling with a retrocessionaire without the prior approval of the reinsurer.¹¹⁵ Commitment of the reinsurer to pay a claim can only be done by the reinsurance manager within certain parameters.¹¹⁶ Additionally, the reinsurer is prohibited from employing an individual who is employed by the reinsurance manager unless the reinsurance manager is under common control with the reinsurer.¹¹⁷

C. United Kingdom—IBRC

The Code of Conduct of the IBRC sets forth three fundamental principles of professional conduct:

[1.] Insurance brokers shall at all times conduct their business with utmost good faith and integrity.

[2.] Insurance brokers shall do everything possible to satisfy the insurance requirements of their clients and shall place the interests of those clients before all other considerations. Subject to these requirements and interests, insurance brokers shall have proper regard for all others.

[3.] Statements made by or on behalf of insurance brokers when advertising shall not be misleading or extravagant.¹¹⁸

110. *Id.* § 8(B).

111. *Id.* § 8(A).

112. FAILED PROMISES, *supra* note 10, at 4.

113. NAIC MODEL ACT § 8(G) (1990).

114. FAILED PROMISES, *supra* note 10, at 3-4.

115. NAIC MODEL ACT § 8(E) (1990).

116. *Id.* § 8(D).

117. *Id.* § 8(F).

118. CODE OF CONDUCT, *supra* note 26, § 3(A)-(C).

The Code of Conduct then sets forth nineteen examples of the application of these principles, the majority of which fall within the broker's financial duty of care and loyalty.

The insurance broker is required to provide objective, independent advice to its client, explain (upon request) relative costs and types of insurance available to the client, use a sufficient number of insurers to satisfy the needs of its clients, and use objective skills in choosing an insurer that best meets its clients needs.¹¹⁹ In dealing with a client, the broker should not withhold any documentation, must obtain prior consent of the client before disclosing information, inform the client of the client's ultimate responsibilities, and have proper regard for a client wishing to terminate the broker agreement.¹²⁰

Several of the examples relate to disclosure and advertising by the broker. Among other matters, prior to commencement of the broker's work, an insurance broker must disclose the amounts of commissions and other fees received, the identities of all insurers with whom a contract is placed, and the amount of fees due from the client.¹²¹ The Code of Conduct also requires that advertising by brokers conform with the Code of Advertising Practice published by the Advertising Standards Authority. All advertisements must distinguish between contractual and noncontractual benefits, and must not be restricted to the policies of one insurer.¹²² A broker must disclose its identity and other vital information when advertising, and must display the Code of Conduct and make available, upon demand, information sufficient to enable a client to file a complaint with the IBRC.¹²³

D. United Kingdom—Lloyd's

In addition to the requirement of naming a compliance officer, imposing conditions of registration, and issuing from time to time codes of practice relating to the conduct by Lloyd's brokers of their business, the Lloyd's Byelaw provides a broker shall not act as a managing agent unless the Council consents.¹²⁴ No person is permitted to act as a director-operator of a Lloyd's broker unless that person is an underwriting member or an annual subscriber.¹²⁵

The Council may require a director or partner to execute a document in favor of the Council, including terms specifying that such person shall submit to the jurisdiction of the Council and provide to the Council such information,

119. *Id.* § 3.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. Lloyd's Byelaw, *supra* note 27, pt. C(14).

125. *Id.* pt. C(15)(1).

explanations, documents, and other materials as the Council may require.¹²⁶ No person may be a director or partner of a Lloyd's broker if the individual is also a director or partner in an insurance company or entity that underwrites insurance business as agent for an insurance company, unless the Council consents.¹²⁷

V. OBLIGATION OF THE CLIENT

In addition to the obligations imposed directly on reinsurance intermediaries, the NAIC has adopted various model provisions addressing the obligations of ceding company clients or reinsurer clients.

In the absence of a contract clause to the contrary, the intermediary is generally treated as the agent of the ceding company.¹²⁸ An exception to this traditional agency rule is incorporated in the standard intermediary clause recommended by the NAIC and used throughout the industry.¹²⁹ This clause deems the intermediary the agent of the reinsurer for purposes of handling funds in transit.¹³⁰ As a result, the ceding company does not bear the credit risk for funds in the possession of the reinsurance intermediary.¹³¹ The standard clause provides, in part: "Payments by the Company [reinsured] to the Intermediary shall be deemed to constitute payment to the Reinsurers. Payments by the Reinsurers to the Intermediary shall be deemed only to constitute payment to the Company to the extent that such payments are actually received by the Company."¹³²

Many states have adopted laws or regulations incorporating this language. Although these laws do not mandate the use of the intermediary clause, they condition the ceding company's ability to take credit for reinsurance on inclusion of the clause in the contract.¹³³ The standard intermediary clause appears in nearly all contracts placed through reinsurance intermediaries involving parties subject to United States examination.¹³⁴

126. *Id.* pt. C(15)(2)(a)-(b).

127. *Id.* pt. C(16).

128. NAC Reinsurance Corp., Reinsurance Contracts: Content and Regulation 31 (1991) (unpublished material, available from NAC Reinsurance Corp., One Greenwich Plaza, Greenwich, CT 06836) [hereinafter Reinsurance Contracts].

129. *Advisory Committee Report supra* note 9, at 928. "The NAIC Examiners Handbook recommends that credit for reinsurance should not be granted unless the reinsurance contract provides that the reinsurer '... assumes all credit risks of the intermediary related to payment to the intermediary.'" *Id.* Most reinsurance brokers had used the Standard Intermediary Clause prior to the NAIC recommendation, which became effective on January 1, 1988. *Id.*

130. *Id.*

131. *Id.*

132. 1 BERNARD L. WEBB ET AL., PRINCIPLES OF REINSURANCE 26 (1990).

133. Reinsurance Contracts, *supra* note 128, at 31.

134. *Id.*

The NAIC Model Act imposes certain conditions on an insurer and reinsurer using the services of a reinsurance broker-manager. These include a prohibition against using a reinsurance broker-manager that is not licensed in accordance with the act; a prohibition against employing an individual who is employed by a reinsurance broker-manager with which the insurer-reinsurer transacts business (unless the reinsurance broker-manager is under common control with the insurer-reinsurer); and a requirement that the insurer-reinsurer obtain a copy of the reinsurance broker-manager's annual financial statement.¹³⁵ In addition to the obligations imposed upon an insurer, a reinsurer is prohibited from appointing to its board of directors any officer, director, employee, controlling shareholder, or subproducer of the reinsurance manager.¹³⁶

If the reinsurance manager establishes loss reserves, the reinsurer must obtain the opinion of an actuary certifying the accuracy of reserves for losses incurred and outstanding on business produced by the reinsurance manager.¹³⁷ Binding authority for all retrocessional contracts or participation in reinsurance syndicates must rest with an officer of the reinsurer that is not affiliated with the reinsurance manager.¹³⁸

Because contracts between a reinsurer and reinsurance manager are subject to approval by the state insurance commissioner, the NAIC Model Act requires that if the agreement is terminated, the reinsurer must notify the commissioner in writing within thirty days of the termination.¹³⁹

VI. EUROPE 1992 AND EC DIRECTIVES

A discussion of the international regulation of reinsurance intermediaries would not be complete without an analysis of the impact that the European Community (EC) will have on the way in which the industry is regulated and the business is conducted.

The 1957 Treaty Establishing the European Economic Community ("Treaty of Rome")¹⁴⁰ provided for the establishment of a Common Market within a twelve year period. As early as 1961, the EC announced that the achievement of a Common Market would require substantial harmonization of insurance laws in five areas, specifically non-life direct insurance, life insurance, reinsurance, co-insurance, and insurance intermediaries.¹⁴¹

135. NAIC MODEL ACT § 6 (1990).

136. *Id.* § 9(F).

137. *Id.* § 9(C).

138. *Id.* § 9(D).

139. *Id.* § 9(E).

140. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 4 [hereinafter Treaty of Rome].

141. NICHOLAS PAUL & RICHARD CROLY, EC INSURANCE LAW 3 (1991) (quoting Treaty of Rome).

"The harmonization of national laws was intended to be the main method of securing a single market in the EC."¹⁴² This objective was to be achieved through the issuance of a series of directives.¹⁴³ EC Directives are general in nature and instruct individual countries to conform their laws to comply with the Directive. Failure of an EC country to amend its laws can result in another EC country initiating judicial action to force the adoption of appropriate legislation in compliance with the Directive.

Although the process of establishing a Common Market has taken longer than anticipated, new momentum was gathered in 1985. With the passage of The Single European Act in 1986,¹⁴⁴ the Treaty of Rome was amended by providing for the progressive establishment of a single market "over a period expiring on 31 December 1992."¹⁴⁵

As applied to the financial sector, the opening of trade among EC member countries involves three mechanisms: the freedom of establishment, the freedom to provide services, and the free movement of capital.¹⁴⁶ The right of establishment enables an individual or company to set up business in another Member State under the conditions established by the law of that state with respect to its own nationals.¹⁴⁷ The right of establishment includes the right to establish a permanent presence in another Member State, not only as a subsidiary or branch but also through the actual presence of an office or an individual with power to bind the company in that Member State.¹⁴⁸

In the context of insurance, the second mechanism, freedom to provide services, means the right of a company established in one Member State to cover risks and policyholders in another Member State without having to establish a branch, agency, or subsidiary in that state.¹⁴⁹ In order to achieve a true common market, an insurance company must be free to operate in other Member States under the exclusive regulatory control of its home state.¹⁵⁰ This concept is referred to as "home country control."¹⁵¹

Historically, these freedoms have remained subject to compliance with the domestic requirements of the local Member State.¹⁵² Once the system of providing for a single license is adopted, however, these freedoms will be

142. CLIFFORD CHANCE, *INSURANCE REGULATION IN EUROPE* 1 (Apr. 1993) (on file with the *Drake Law Review*).

143. *Id.*

144. Single European Act of 1986, Feb. 28, 1987, 25 I.L.M. 506.

145. CLIFFORD CHANCE, *supra* note 142, at 1 (quoting Treaty of Rome art. 8(a)).

146. PAUL & CROLY, *supra* note 141, at 6-7.

147. *See id.* at 20.

148. *Id.* at 23.

149. *Id.* at 7.

150. *See id.*

151. *See id.* at 6.

152. *Id.* at 7.

exercised by the member state where the home office of the financial institution is located.¹⁵³

The free movement of capital was one of the cornerstones of the Treaty of Rome.¹⁵⁴ Although the United Kingdom abolished exchange controls in 1979, other restrictions on the free movement of capital remained in the Member States.¹⁵⁵ The Treaty of Rome brought an end to restrictions on the movement of capital as a result of discrimination because of nationality, place of residence, or place of investment.¹⁵⁶

The first EC legislation concerning insurance was the Liberalizing Reinsurance and Retrocession Act of 1964. This Directive was limited to identifying specific restrictive provisions in the laws of the Member States and was not intended to establish a common scheme for regulating reinsurance and retrocession in those jurisdictions.¹⁵⁷ The 1964 Directive abolished all restrictions on the establishment and provision of services relating to reinsurance in the EC.¹⁵⁸ In practice, reinsurance continues to be indirectly regulated through the controls placed on ceding companies. Apparently, the EC has no current plans to adopt further legislation addressing reinsurance, although other directives aimed at primary insurance companies may be applicable to reinsurance companies as well.¹⁵⁹

The First Non-Life Directive¹⁶⁰ created a legal framework within which EC insurance companies can establish branches, agencies, or subsidiaries throughout the EC.¹⁶¹ This Directive applies to the establishment of companies having their principal office within the EC as well as to branches or subsidiaries within the EC of third country insurers.¹⁶²

The Second Non-Life Directive¹⁶³ was designed to liberalize cross-border insurance. It permits an insurance company underwriting insurance contracts in the EC to cover commercial and industrial risks without having to create an establishment in any other Member State.¹⁶⁴ The benefit conferred by this Directive is not granted to insurance companies that have their prin-

153. *Id.*

154. Treaty of Rome, *supra* note 140, art. 67.

155. PAUL & CROLY, *supra* note 141, at 7.

156. *Id.* at 8.

157. *See id.* at 11.

158. CLIFFORD CHANCE, *supra* note 142, at 12.

159. *See id.* at 65.

160. Council Directive 73/239, 1973 O.J. (L 228), available in LEXIS, Europe Library, Legis. File.

161. *Id.*

162. *Id.*

163. Council Directive 88/357, 1988 O.J. (L 172), available in LEXIS, Europe Library, Legis. File.

164. *Id.*

cipal offices outside the EC or to branches or agencies of third country insurers.¹⁶⁵

The third generation of directives recently adopted by the EC Commission will liberalize the traditionally well-protected national insurance markets of the EC. The Third Non-Life Directive¹⁶⁶ is intended to allow companies not only to set up branches in Member States, but also to sell their products on the basis of a single license.¹⁶⁷ Supervision would be exclusively controlled by the country where the insurance company's principal office is located.¹⁶⁸ Implementation of this Directive must be completed by July 1, 1994.¹⁶⁹

In 1976,¹⁷⁰ the Insurance Agents and Brokers Directive was adopted to coordinate the wide variations in regulation of insurance brokering activities in the Member States, including those of reinsurance intermediaries.¹⁷¹ This Directive was reportedly adopted as a transitional measure with limited scope.¹⁷² Under this Directive, "practical experience in brokering in one Member State for a time specified in the Directive must be accepted in other Member States as equivalent to any formal qualification requirements in those other Member States."¹⁷³ Member States may, however, impose requirements evidencing good reputation and financial standing.¹⁷⁴ These additional requirements may only be imposed if they are equally applicable to a Member State's own nationals.¹⁷⁵ Despite the adoption of this Directive, there remain substantial differences in the various rules and practices of intermediaries throughout the EC countries.¹⁷⁶

165. *Id.*

166. Council Directive 92/49, 1992 O.J. (L 228), available in LEXIS, Europe Library, Legis. File.

167. *Id.*

168. *Id.*

169. *See id.*

170. PAUL & CROLY, *supra* note 141, at 124.

171. *See* CLIFFORD CHANCE, *supra* note 142, at 76.

172. PAUL & CROLY, *supra* note 141, at 121.

173. CLIFFORD CHANCE, *supra* note 142, at 76.

174. *Id.*

175. *Id.*

176. There has been a wide range of disparity in the insurance laws in other EC countries, reflecting differences in market structure, regulation, and cultural attitudes. *See generally* CLIFFORD CHANCE, *supra* note 142. As the insurance directives aimed at harmonization of the EC laws are being implemented, these differences are undergoing significant changes. By way of example, the regulation, or lack thereof, of reinsurance intermediaries in some European countries is summarized. The summary is useful only as an indicator of how those individual countries have been or will be affected by the implementation of EC Directives in this area.

Denmark: Intermediaries need not be licensed. *Id.* at 97.

France: Although any insurance business in France must obtain Ministry of Economy authorization, those companies having reinsurance as their exclusive line of

Although Member States have implemented the Agents and Brokers Directive, it is reported the EC Commission considers it to have been incorrectly implemented in some Member States.¹⁷⁷ Criticism of the Directive has come from different areas including the Bureau International des Producteurs d'Assurances et de Reassurances (BIPAR), which submitted a paper to the EC Commission in 1989 advocating minimum standards and a system of compulsory registration for intermediaries.¹⁷⁸ Officials of the EC Commission have indicated legal action will be brought against Member States that do not fully implement the Agents and Brokers Directive.¹⁷⁹

On December 18, 1991, the EC Commission adopted a Commission Recommendation to further clarify the practices of intermediaries.¹⁸⁰ Accompanied by lengthy resolution language, the Commission recommended that Member States ensure that intermediaries will be subject to certain professional standards and registration requirements.¹⁸¹ Member States were

business do not fall under the control of the government. Code Civil XIV, art. L. 321-1 (Fr.).

- Greece:* Intermediaries must be registered; commission rates are regulated by ministerial order. CLIFFORD CHANCE, *supra* note 142, at 108-09.
- Ireland:* There are new supervisory arrangements and regulation of insurance intermediaries and their commissions pursuant to the Insurance Act of 1989. Insurance Act 1989, pt. IV, § 44 (Ir.). However, the new guidelines are specifically made inapplicable to "the business of effecting contracts of reinsurance." *Id.* § 57.
- Italy:* Law 792 of 28 November 1984 relates to insurance and reinsurance brokers who are required to register with the ministry of Industry, Trade and Crafts. CLIFFORD CHANCE, *supra* note 142, at 116, 117. Registration is dependent upon the broker meeting several conditions, which include compliance with citizenship requirements and participation in a fund guaranteeing indemnification to policy holders and insurance companies who are damaged by the broker's activities. *Id.* at 117.
- Luxembourg:* "A licence to carry on insurance or reinsurance is required from the Ministry of Finance. A licence may be requested by an individual or undertaking, Luxembourg or foreign, acting in his/its own capacity or as an agent for a third party. *Id.* at 119.
- Netherlands:* Independent intermediaries have a significant role in the market; major Dutch brokers are expected to expand their activities in the rest of the EC. Intermediaries are required to register and to satisfy standards of competence and solvency. *Id.* at 124. The law governing intermediaries is the Act on the Supervision of Insurance Intermediaries of 1991. *Id.*
- Portugal:* Intermediaries must be qualified and licensed. *See id.* at 127. Their activities are governed by a specific legal regime and must be authorized by the regulatory authority Instituto de Seguros de Portugal (ISP). *See id.* at 126-27.

177. PAUL & CROLY, *supra* note 141, at 121.

178. *Id.* at 124.

179. *Id.*

180. Commission Recommendation of 18 December 1991 on Insurance Intermediaries, 1992 O.J. (L 19), available in LEXIS, Europe Library, Legis. File.

181. *Id.*

given thirty-six months to notify the Commission of their compliance with this recommendation.¹⁸² Some countries, including Italy, Spain, and Denmark, are introducing legislation gradually.¹⁸³

Rather than attempt to distinguish between dependent and independent intermediaries, the Commission requires intermediaries to disclose to clients their direct or economic ties to the insurance transaction, or the entity with which insurance or reinsurance is placed.¹⁸⁴ Additionally, the intermediary must disclose to a designated entity the spread of business with different insurers over the previous year.¹⁸⁵

The Commission's recommendation requires that Member States establish norms for determining professional competence, covering such areas as the intermediary's knowledge and abilities, the maintenance of professional indemnity insurance, the requirement that the intermediary be of good repute (not previously declared bankrupt), and a determination of sufficient financial capacity.¹⁸⁶ In addition, the recommendation provides for compulsory registration in the intermediary Member State.¹⁸⁷ Each Member State is required to appoint a competent entity to carry out the registration, and to make records available to the appropriate authorities.¹⁸⁸ The Commission requires registered intermediaries to identify themselves as either dependent or independent, and to inform the public of their registered status.¹⁸⁹ Each Member State must also establish adequate sanctions for those persons who act as intermediaries without prior registration, and for those who violate any of the professional competence standards.¹⁹⁰

VII. PENALTIES

Countries vary considerably with respect to the penalties against, and liabilities of, a reinsurance intermediary who violates the regulatory acts or applicable codes of conduct.

182. *Id.*

183. Aline Sullivan, *Single EC Insurance Market Still Just a Dream*, BUS. INS., Jan. 25, 1993, at 4.

184. Commission Recommendation of 18 December 1991 on Insurance Intermediaries, 1992 O.J. (L 19), available in LEXIS, Europe Library, Legis. File.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

A. United States

The NAIC Model Act applies penalties not only to the reinsurance intermediary but also to any insurer or reinsurer who violates the provisions of the Act.¹⁹¹ If, after notice and an opportunity to be heard, the state insurance commissioner finds a party has violated the Act, the party shall pay a fine not exceeding \$5000 for each separate violation,¹⁹² and be subject to revocation or suspension of its license;¹⁹³ and if a violation was committed by a reinsurance intermediary, the intermediary shall make restitution to the insurer, reinsurer, or receiver for the net losses incurred as a result of the violation.¹⁹⁴ The decision of the state insurance commissioner is subject to judicial review,¹⁹⁵ and the Act preserves to the commissioner any other penalties available in the insurance law.¹⁹⁶

B. United Kingdom—IBRC

Pursuant to the Insurance Brokers (Registration) Act,¹⁹⁷ the IBRC is required to establish an Investigating Committee to conduct preliminary investigations into allegations of a broker's unprofessional conduct or violations of the rules under sections 11 and 12 of the Act.¹⁹⁸ If the Investigating Committee determines the matter is of a serious nature, the IBRC instructs its solicitors to issue a charge and to conduct a hearing before the Disciplinary Committee, which considers whether a broker will be removed from the register or list.¹⁹⁹

The IBRC supplies information regarding brokers it removes from the register or list to other regulatory bodies, the Association of British Insurers, and the press, when necessary.²⁰⁰

191. NAIC MODEL ACT § 11(A) (1990).

192. *Id.* § 11(A)(1).

193. *Id.* § 11(A)(2).

194. *Id.* § 11(A)(3).

195. *Id.* § 11(B).

196. *Id.* § 11(C).

197. Insurance Brokers (Registration) Act ch. 46, § 13 (1977) (U.K.).

198. *Id.*

199. *Id.* The Disciplinary Committee was established pursuant to the IBRC Rules in 1978. The Disciplinary Committee consists of not more than 11 members, five of whom are appointed by the Council. At least one member of the Committee must not be an insurance broker and at least two-thirds must be members of the Council.

200. *Id.* § 15.

C. United Kingdom—Lloyd's

The Council of Lloyd's may conduct a review of a Lloyd's broker to determine whether or not the broker is complying with the various requirements of the Lloyd's Byelaw.²⁰¹

In connection with that review, the Council may require production of documents and information as the Council may specify and compliance with any other requirements to facilitate the Council's review.²⁰² The Council of Lloyd's may remove the name of a Lloyd's broker from the register if, after review, the broker is found to have violated paragraph 14 of the Lloyd's Byelaw regarding divestment (no Lloyd's broker shall be a managing agent without the consent of the Council), or the broker has failed for a period of three months to be registered with the IBRC.²⁰³

The Council may remove the name of a Lloyd's broker if the Council finds the broker: (1) Ceased to comply with any requirement of the Lloyd's Byelaw; (2) was affected by an arrangement; (3) is not fit and proper to be a Lloyd's broker; (4) "cease[d] to broke insurance business at Lloyd's"; (5) failed or ceased to comply with a condition imposed by the Council; or (6) requests removal.²⁰⁴

In the event that a controller of the Lloyd's broker was required to execute an agreement or guarantee of the broker's liabilities, the Council may remove a Lloyd's broker from the register if "the controller fails in a material respect to perform" or abide by the terms of the agreement or guarantee.²⁰⁵ An appeal of an adverse decision is available under the Appeal Tribunal.²⁰⁶ Unlike United States law, the penalties of the IABC and Lloyd's do not extend to the contracting principals.

VIII. CONCLUSION

In light of the significant attention brought about by insurance company insolvencies and threatened federal intervention in the United States, it appears increased regulation of reinsurers and intermediaries is inevitable. Likewise, with the establishment of a single European market underway, there will be increased pressure to examine the way in which business is conducted, and to harmonize the laws and regulations that relate to the insurance and reinsurance marketplace.

201. Lloyd's Byelaw, *supra* note 27, pt. B(10).

202. *Id.* pt. B(10)(2).

203. *Id.* pt. B(11)(1).

204. *Id.* pt. B(11)(3)(a)-(c).

205. *Id.* pt. B(11)(4).

206. *Id.* pt. B(12).

Although there are differences in the regulation of reinsurance intermediaries in the United States and the United Kingdom, many of the regulations appear to be directed toward common goals. As reinsurance becomes increasingly more global in nature, it is reasonable to expect there will be more similarities in the international regulation of reinsurance intermediaries in the future.

