Carlo Isola

Legal expenses insurance: origins and development

From protection for motorists to access to law

This work was offered to RIAD by the author.
Legal expenses insurance (lei) has always been a special and particular branch of the insurance industry. Up until the Second World War, it developed slowly, keeping pace with the demands of society. Then, however, in certain countries at least, it experienced a period of spectacular growth. Lei is distinguished from other branches of insurance mainly by the fact that it covers not only a financial benefit but also the provision of services. It has been a long and arduous task to put this notion across to the public, to gain the acceptance of the traditional insurers and to obtain recognition from the legal profession and the judicial authorities.

It goes without saying that the environment in which lei developed has varied from country to country. Accordingly, different systems have evolved for the practice of this branch. Moreover, the process of regulation at the level of the European Community has also been long and difficult. From the time of the adoption of the first directive on damage insurance in 1973, RIAD, the international lei association established a few years earlier, has devoted itself to the defence of this specialised branch of insurance. It remained the interlocutor of the authorities in Brussels throughout the preparatory works on the lei directive that finally emerged in 1987.

Since the adoption of the directive and its transposition into the domestic laws of the Member States, many things have changed. Today, lei is not only acknowledged but has become well known, even if, by its very nature, it will never generate revenues comparable to those of the major branches of the insurance industry. If the new generation of executives and practitioners of the lei insurers are to practice this business properly, they need not only to be imbued with this indispensable spirit of wishing to render a service but also to know the history and evolution of lei.

After having been one of the initiators of the First International Meeting of Legal Defence Insurers held in Rome in 1969, Carlo Isola was the secretary general of RIAD up until 1993 and subsequently its vice-president. In short, he was at the head of the organisation throughout the period during which the directive was being prepared. Already a specialist, having practised in the field since 1955, he was to become, beyond any doubt, one of the greatest and most perceptive experts of lei in all its aspects, its specificities, its problems and its history.

The text now in the hands of the reader was written by Carlo Isola and offered to RIAD. It is a work of great value because, as far as I am aware, this is the first complete account of the history and development of lei. The author has carried out a considerable work of research, providing us with details that only a few veterans of the industry could now remember. And, above all, the book reads easily for Carlo Isola is not only an insurance historian and specialist but also a writer with the talent to engage the interest of the reader and a sense of humour to keep him amused.

It is a great pleasure for RIAD to publish this work. On the one hand, we would like to provide the present and future executives and staff of the lei companies with a pleasurable introduction to the origins of the business in which they are engaged. On the other, we are happy to have this opportunity express our gratitude and pay homage to the man who, more than anyone else, has been responsible for bringing our organisation into being and ensuring its development.
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Carlo Isola
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I. Forerunners and pioneers

At the 1st International Meeting of Legal Expenses Insurers in Rome on 8 May 1968 a leading German lawyer said: “Legal expenses insurance is a relatively young branch of insurance... for lawyers especially it has the very attractive bloom of youth ... by nature it is rich in problems, and places a number of difficulties in the way of those contemplating it.”
Fine words, fascinating to those sensitive to the bloom of youth and legal defence, but they prompt at least two questions. How young is this field of ours? What were the problems that lawyer referred to almost forty years ago? We are not going to provide any answers, but we will suggest some starting points which might be of use to those who would like to find their own.
First, let’s reverse the order of the questions and ask a third – what risk is it that is covered by legal expenses insurance (LEI)? Lawyers provide a great many answers, but without listing them all we will mention the one we feel to be most convincing: the risk covered by LEI is the need to receive assistance in a dispute. Contracts will flesh out this broad definition, specifying the nature of the assistance (information, advice, assistance in the strict sense, in or out of court) and the type of dispute to which the cover relates in particular circumstances. (In short we can identify disputes with loss).
If we accept this interpretation, then as regards the age of this type of business we can understand the point of view of people who see the germ of this type of contract in ancient Rome – in the relationship between a patron and his client, where there is an obligation to provide assistance. Others see it in feudal times, in a lord’s duty to protect his servants, both physically and in the courts. Others again would see it in the practices of the German and Scandinavian guilds in the Middle Ages. Here the group replaced the individual member when claiming compensation for wrongs, or defending him against claims in court (a primitive form of mutuality). We re we to delve into an even remoter past we would no doubt turn up other esoteric references. But as an answer to the question, all this is about as vague as saying, if asked about a baby’s age, that an ancestor attended Queen Victoria’s coronation.¹

1. Forerunners

Napoleon was one in fact. Would it be too much to imagine that the promulgation of his Code had anything to do with the idea of offering cover for an obscure “legal expenses risk”? Perhaps not, given that around 1820, while the great man was dying in Saint Helena, some insurance companies in France were actually offering contracts undertaking to handle possible proceedings on behalf of their clients when both plaintiffs and defendants. These included an option which would also guarantee payment of a lump sum indemnity should the outcome of the action be unfavourable. However all we know about them is that in 1824 the Cour de Cassation (Highest Court of Appeal) ruled that these contracts were not in the nature of insurance. There were also doubts about the very legality of the business, which was subsequently quickly abandoned.
Let’s now leap forward more than half a century to 1880 – again in France, after the deposition of Napoleon the third. Here we find an insurance broker providing legal protection for his customers in actions for compensation resulting from loss, for an annual premium, through a contract known as a contre-assurance générale. A company was even set up by the name of the Compagnie de Contre-réassurances générales. This perhaps helped to increase confusion in judges’ minds, and they held that the contract was not of an insurance nature, but not that it was unlawful. A short-lived and not very successful experiment – but isn’t the name given to the contract interesting? Doesn’t it suggest that the idea of contre-assurance – the provision of assistance to the insured in the context of his relationship with his insurers, or even against them – had been there from the outset somewhere in the DNA of LEI? And what about the fact that the idea of this contract was conceived in the mind of a broker - someone engaged in providing customers with services of this kind?

¹ Hans MÖLLER, a professor of Insurance Law at the University of Hamburg and co-founder of the International Association of Insurance Law (AIDA), gave the introductory report at the inaugural session of the Rome Meeting, which was attended by 32 companies representing eight countries. At the Meeting’s final session, a decision was taken to set up an organization of specialized companies, which subsequently took the name of RIAD, an acronym for Rencontres Internationales des Assureurs Défense.
A little later – in 1897 – a doctor in Paris was involved in a professional incident. A woman he had attended died in childbirth, a then quite frequent event. But the deceased’s husband hauled the doctor before the courts, where he was found guilty of negligence or incompetence and sentenced. An organisation providing mutual assistance for health professionals - Le Concours Médical – followed the case and its managers used it as a starting point for setting up a mutual company to protect members involved in similar occurrences. This company (still in business in the fields of LEI and professional liability) was called Le Sou Médical, because the membership fee was 5 centimes per day, or 18 Francs per year. At that time sensitivity to cases of malpractice in the health field was nothing like it is today, and far from being compulsory, professional liability insurance was almost prohibited. It is easy to understand why doctors, worried about both the civil and the criminal consequences of unfortunate events, welcomed this initiative favourably.

And now we come to the 20th century. In 1901 the Schutzverein deutscher Reeder (“The German Shipowners Protection Association”) was set up in Hamburg. This was a mutual between shipowners solely concerned with matters relating to chartering and insurance contracts, with aims similar to those of the P&I Clubs, which started in Britain. Because marine insurance has always been substantially foreign to the interests of professional operators of LEI, this initiative is not of great interest to us. However it would be nice to know more about the Garantie des Droits en Justice, (“The Guarantee for Legal rights”) founded in Nantes in 1905. We only know that it covered actions of all kinds, and that it ceased business in 1918, without being able to acquire recognition as an insurance company.

In the meantime some academics began to take an interest in this emerging business from the theoretical point of view, envisaging three different possible kinds of cover - one, general and all-embracing, for all costs deriving from actions of any kind (Garantie des Droits), another, associated with a single action, which in fact was more of a wager than a true insurance contract, and a third relating to specific situations associated with particular activities or qualities of the insured. This was the one which subsequently became confirmed by practice.

One example of the third kind is undoubtedly the Versicherungsverein der Haus- und Grundbesitzer e.V. (“The Householders’ and Landowners’ Insurance Association”) set up in Gelsenkirchen in 1910. This offered householders and landowners assistance with losses brought about as a result of mining. It would also seem to be an almost textbook example of an extremely subjective risk, one which professional insurers in Germany found undesirable, always excluding it from their general legal expenses policies. It was set up as such and was for a long time a niche market for that company. It was still in business in the 1970s under the even more specific name of Verband bergbaugeschädigter Haus- und Grundbesitzer e.V. (roughly translated as ‘The Union of householders and landowners harmed by mining’).

All in all, and as a conclusion to this first chapter, can it be said that the contracts featured in our gallop through the centuries, from the Restoration to the end of the belle époque in France and Germany, were forerunners or “pioneers”? (Indeed if we were to add America to the list we would find a company with the eloquent name of the Physicians’ Defense Company, founded in Fort Wayne, Indiana in 1899). Doubts which are very vague in the case of the earlier examples become stronger in the case of the founders of the Sou Médical. We cannot name them as the parents on LEI’s birth certificate because they were not only mutualist but also corporate, with strong links to their immediate precursors. They still relate to protection for a specific category with particular interests, not yet legal expenses insurance for everyone.

So they do have an honourable place among the forerunners, without any doubt, but we will still have to wait a few years to find the first of the pioneers.2

2 The oldest member of the P&I Club - Shipowners Mutual Protecting Society - was founded in England in 1855. Given that, according to INSEE, 1 1901 franc corresponds to € 3.27 today, the original premium levied by Le Sou Médical is equivalent to around € 60 today.

2. The Pioneers: The roots of LEI

And what years! We are now in December 1917 and the world has been at war for more than three years. In Saint Petersburg there has recently been a small revolution which afterwards came to be known as the October Revolution. However in Le Mans, the capital of the fruitful agricultural province of Sarthe, well known for its superlative cathedral, there was someone whose mind was not on the events of the war, or the Rising Sun in the East. That is not to say he was short-sighted. Georges Durand, an imaginative fifty year old entrepreneur, was an enthusiast for the vehicle of the future, the motor car. He had already organised a show (in 1905!), and promoted the setting up of the Automobile Club de l’Ouest, a few years before he created the famous 24 hours race, no less. He was aware that the object of his passion, and its users, had many enemies - a public which disparaged and hated machines as noisy, smelly unnecessary things, the costly playthings of a few eccentrics, dreaded policemen intent on displaying their zeal, and also – although collisions between vehicles were not so frequent, unlike those with cows and horses – the owners of other motor cars. He therefore organised a legal service for Club members which was ready to defend them from the complications that their sporting enthusiasm risked embroiling them in every day.

Unfortunately Durand’s clever idea was so successful that it threw the Club’s organisation and finances into crisis! From then on the service could no longer be provided for everyone, only those who paid a contribution to a mutual company set up for...
the purpose. This was La Défense Automobile et Sportive, or DAS, the name which the founders preferred to the others suggested: MAF - Mutuelle Automobile Française, and UAF - Union Automobile Française.

To illustrate and promote the new formula, Durand wrote: “Insure yourselves against accidents, fire and theft. Those who have taken out a contract with their Company to cover these risks should keep it in being, or increase it... This is our first advice. The second is aimed at all those users of locomotion... who need to be defended, encouraged and supported, so cover your liability for all the many other risks motorists run on the public highway... You will also need vigorous active protection to... look after your interests if are the victim of an incident on the highway for which you are not to blame, and which has only caused loss to your car and yourselves.”

Le Mans is a city of insurers, and it is likely that Durand and the other notables who assisted him in the venture had close links with that environment. The grounds for the first advice are quite clear; but as far as the second is concerned there is no mistake – it is without any doubt a manifesto for LEI, which in its essentials still applies ninety years later.

We should add that the new mutual was not called Sportive without good reason. Its contracts were not only intended for motorists but for those engaging in sport in general, and related to “proceedings and situations of all kinds deriving from... the practice of ballooning, aviation, cycling, hunting, fishing, shooting, gymnastics, football and all open air sports or exercises”, with fees running from 20 Francs for a car (10 for the second) to 3 Francs for a bicycle, 5 for hunting (including the hunting of foxes!) and fifty for an aircraft or balloon (and half again for the second vehicle).

Let’s take a step back to the forerunners, and see where we have got to.

a) Between 1897 and 1917 various companies in the business of legal expenses insurance were set up in France and Germany. Four which survived for a long time were in the form of mutual companies, as was conventional in the insurance field. At the same time they reflected membership of a particular category, with specific interests for which protection was required in ways that were more mutually supportive than purely entrepreneurial. In the case of the mutual companies of doctors, and the householders and landowners in Gelsenkirchen (and in Hamburg too), we talked about corporate interests, a feature not found in the aims of the DAS, aimed at an unspecified and heterogeneous range of users.

b) The mutuals in both Paris and Le Mans arose from the structured organic growth of a service intended for the members of a particular group, which was already provided in unspecified and ill-defined, and to some extent arbitrary, ways.

c) Although all were involved in legal expenses insurance, the three companies pursued different aims. Le Sou Médical was designed to protect its own members in a defensive or passive position against the claims of a harmed third party or the punitive intentions of the State; the party assisted was a defendant or an accused person. The members of the Verein in Gelsenkirchen were on the other hand plaintiffs who had to obtain compensation for a loss incurred. The contract offered by DAS was called one of Recours et Défense (Claim and Protection), a name which effectively expresses its dual content:
- Recours – the active aspect – for compensation for loss incurred – the insured is a plaintiff,
- Défense – the passive aspect – in actions for crimes or offences against traffic regulations (the insured is the accused or offender), as well as actions resulting from harm caused by the insured (in this case, the defendant), given that under a system in which motor vehicle third party liability insurance was optional he could very well not have – and often did not have – such cover.

By this stage the creature is almost fully formed. Like a chick hatching from an egg, it changes plumage and grows in size without any change in anatomy. In its simplicity the DAS policy is complete, and provided a stable model for the national and foreign imitators who were not slow to appear. And it is definitely a motorists’ legal expenses policy. The chosen field for the new branch of business has been made clear - motor vehicles - and it was to this that legal expenses insurers remained faithful for some decades.

However, although we don’t know to what extent the contracts offered up to 1917 included a service component, this was clearly a prominent feature of the DAS contracts. The policy conditions stated that “The company guarantees its clients that the costs of consulting and being represented by a lawyer and in court before any jurisdiction will be reimbursed”. But Durand wrote “You will need vigorous active protection”. This clearly suggests that someone would take the situation in hand and organise protection of the insured’s interests in the best way possible.

At the end of the day, DAS was created specialist and independent, but the conventional insurance market showed no interest in the new phenomenon. Perhaps it was unaware of it, leaving the field open to initiatives by new operators from outside the industry, allowing other companies of a similar kind to grow and become such a stable and characteristic feature of this business.3

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3 The French DAS, which for a long time belonged to the Groupe des Mutuelles du Mans, remains one of the most qualified companies on its market.

Automobile civil liability insurance only became compulsory in Belgium in 1956, in France in 1959 and later in the other European countries.
3. The Pioneers: Rivals and allies

So Durand was the "first pioneer" of LEI. He might even be called its prophet, because although motor cars are an obviously rich market now that there are 30 million of them in France, how many were there at that time? The war had certainly given motor vehicles a great boost, and the taxis of the Marne were famous throughout Europe. But it needed a long-term view, trust and faith to believe in the success of the enterprise – and this in fact was not slow in coming. The 1000 contracts signed by DAS in 1918 had multiplied to ten times as many only two years later.
And what about the others? They had the advantage of a trodden path, but not a smooth highway. Perhaps Cabot, Verrazzano, Magellan, Cabral and the others who crossed the Atlantic after Columbus didn't face the same risks as the leaders, or show the same boldness - and often had less success? So it was for our first pioneers. Those who like to remember them know the names of the more fortunate or brave who opened up new markets, or at least survived the Second World War, but know nothing of those who perished or gave up the struggle.

A rival to the founder DAS - La Défense Civile – was set up in Le Havre in 1922, almost on the doorstep. LEI quickly became international, first in Italy, in Milan, through ABA in 1924, and within two years through CAP and then DAS in Geneva in Switzerland.

Was it Durand the entrepreneur who wanted to export the name of his company, now established in its homeland, to the most French of Swiss cities? It might have been, but it seems more likely that he had merely been favourable to an approach by an entrepreneur from Geneva, allowing him to use the company name and logo, which was already well known in France. This was the germ of the creation of an international network, which spread to Belgium in 1927 and Germany in 1928. The plate – known as a macaron in French – with its white or gilded letters on a blue background, was then to be seen on the roads of four countries, but the companies distributing it had thoughts of further expansion. Early 1929 they signed a formal agreement, which those of a historical bent will consider reminiscent of Yalta, or the older Treaty of Tordesillas through which the Catholic Kings of Spain and João III of Portugal established rules for dividing up the New World. The four DAS – thinking big! – defined and shared out their corresponding zones of influence in Europe (including the already sovietised Russia) and Africa, while exclusively reserving the business of their own insured members to themselves.

Meanwhile a third Swiss company, Protektia de Berne, was born in 1928. This was followed by two Italian companies, SALDA in Milan in 1929, UCA in Turin in 1932. In that same year CAP of Geneva also played the international card, attempting to establish itself in Barcelona in Spain. The process continued and 1935 saw the birth of two offspring, Les Assurés Réunis in Brussels, and the second German company ARAG in Düsseldorf, followed by SFR in France in 1937 and the Swiss Schutz in Zurich in 1938.

A year later war broke out, and perhaps this time the clash of arms would be too loud to allow anyone to think about legal expenses as Durand had done in 1917.

It was the end of an era - and it brings our incomplete and imperfect list of pioneers to an end. But boldness and entrepreneurship, which none of them lacked, are not of themselves enough without ability and good fortune, and only those helped by the latter will succeed. Strength of will too, because we must not forget that these companies, still vulnerable because of their short history, and exposed to trials today unimaginable – civil wars, occupation, destruction of offices, loss of personnel, the wiping out of portfolios – nevertheless resisted and rose again from the ashes once the tempest had passed.\(^4\)

\(^4\) La Défense Civile, which long operated as an independent company, joined the Groupe de Paris, then the Axa Group, and celebrated the 75th anniversary of its founding before becoming a part of the merger that gave rise to JURIDICA; its slogan was "La Défense Civile défend ses assurés" ("la Défense Civile sticks up for its policyholders), and took pleasure for a while in calling itself "the nasty company" to underscore just how intransient it was when it came to safeguarding its clients' interests.

ABA [Argentum Beneficiis Addo, or: "I add money to profits" – in other words, "I pay, in addition to the services I render"], which was founded with ambitious goals by a well-known Milanese figure, Senator Puricelli, but never really expanded and soon turned into a small family-run business. When it was taken over by ACI – the Automobile Club of Italy – it changed its name to ALA up until 1992, when it was taken over by SARA, an ACI multi-brand insurance company, of which it became a division.

CAP – Compagnie d’assistance et de protection juridique des usagers de la route, founded by Francis Hodel, a lawyer, and Charles Philippossian, a businessman, was a long-standing leader on the Swiss market; it was sold in the 80s to HELVETIA Unfall and now forms part of the ALLIANZ Group (it appears that when it was founded, in the historic canton of Uri, there was only a single car in circulation.) The expression protection juridique, which was seen to the first time in the company's name, was officially adopted by the Swiss authorities and then taken up for all French-speaking countries in the European directive.

The Swiss DAS, which was founded by Baron Henry de Blonay, who also headed up the company, was purchased after the war by a member of the Gerling family of German insurers. The Swiss DAS, which competed with CAP for decades for supremacy on the Swiss market, experienced some ups and downs in the 90s, following which the German DAS took over its portfolio, name and logo.

The Belgian DAS, which was founded by a French businessman, had Félix DEVAX as its first President. It soon lost the No. 1 slot in its country, then was taken over by Belgians. Subsequently, during the 70s, it came under the control of the German DAS, and has recently become a market leader.

The German DAS, which was founded by shareholders from the Swiss DAS and which Germanized its name to Deutscher Automobil Schutz ("German Automobile Protection"), had Fritz Luebben as its first director. After the war, as the head office in Berlin had been destroyed and all of the archives lost, the company was moved to Munich and the share capital passed into German hands. Subsidiaries were set up in several Western European countries, then, after the fall of the Wall, in Eastern Europe. The German DAS is one of the biggest companies in the sector, and is part of the ERGO insurance group. (It should be noted that in 1925, the Vereinigte Kraftfahrzeug-
4. The Pioneers' business

Although the word "pioneer" is often thought of in the same breath as "adventurer", this description did not apply to these people. They were provincial notables, lawyers, insurers, wealthy and esteemed businessmen, people “who mattered” in a particular world. Lovers of adventure perhaps, or rather lovers of new things, explorers, seekers - the first people to feel that fascination which half a century later still attracted a serious lawyer known for his learning and wisdom. These men also had the sense to approach a quality customer base, the elite represented by car owners between the wars – people who were demanding, willing to spend, but only for an absolutely reliable service. Was insurance this service, or something else? It is impossible to give a straight answer.

The first DAS was a mutual insurance company, and in the previously mentioned 1929 agreement with its sisters of the same name it described itself as “the French DAS, engaging in the new form of insurance known as “DAS”, conceived by G. Durand, its Director and Founder.” But “new form" is not strong enough – it would be truer to say “very new", or even better “innovative". Apart from identifying a new object of cover – the costs associated with an action or a dispute – it introduced the principle that insurance could cover not only pecuniary loss but also services. Of course policies through which the insurer provides directly for repair of damage (to glass, for example), restoring the existing situation prior to the loss, had already been known for a long time. This is a form of payment in kind, as an alternative to payment of a sum of money, which the insurer might for its own reasons prefer as most convenient for itself, it being all the same to the insured. A discretionary option, whereas in the "new form" direct provision became an obligation, with no alternative for the insurer but to effect a payment in kind, as an alternative to payment of a sum of money, which the insurer might for its own reasons prefer as most convenient for itself, it being all the same to the insured. A discretionary option, whereas in the "new form" direct provision became an obligation, with no alternative for the insurer but to effect a performance through providing the promised service.

This is quite clear from the statutes of the second DAS (Geneva), described as a “joint stock insurance company". According to its objects of association it was not providing one or more forms of insurance, but was “a legal claims office operating on a fixed subscription designed to act in favour of its members in the event of difficulties, disputes or legal proceedings which might arise as a result of incidents or other specific events.”

Understandably the scope of the innovation was not grasped by everyone, neither did it please all those who did grasp it, especially some lawyers. To some the idea that these were true insurance contracts was unacceptable, others saw

Interessessen-Schutzgesellschaft, which is no longer in existence, was set up in Wuppertal. The company never expanded past a modest, purely regional dimension).

PROTEKTA – Société pour la protection des assurés, was founded in 1928, perhaps on the Italian model or on that of the first French organismes, and PROTEKTA – SA d’assurance de frais de procès, founded in 1933, merged in 1944 into PROTEKTA – Assurance de protection juridique SA. It was taken over by the MOBILIAR Insurance Group in 1989 and remains one of the biggest LEIs in Switzerland. SALDA (Società Anonima Liquidazione Danni Automobilistici), founded by Count Elvio Della Torre, never really got off the ground. After it was bought up in the 50s by UCA shareholders, it was taken over by other owners, who turned it into a multi-branch insurance company. UCA (Ubique Consilium Adjuvat – that is, “Advice helps everywhere” or, more modestly, Ufficio Consulenza Automobilistica), which was created at the initiative of Luigi Gidardi and by family tradition was the agent for a historic Turin-based insurance company, was a company leader on the Italian market up until the 60s. It has remained independent and has always been under the control of the founder’s descendants.

Durst y Cía. – CAP was founded in Spain by the founders of the Swiss CAP as a joint-venture with a fellow countryman living in Barcelona. As the initial results were disappointing, a decision was taken to wind up the experiment rapidly. To handle commitments towards clients, all outstanding files were entrusted to a young lawyer, Enrique Massé Aparicio. He was enthralled by the idea and, together with a Catalan gentleman, Ignacio Sanchez de Lamadrid y San Prim, proposed to take over the business. An agreement was reached for a modest sum, and the s.a.r.l. C.A.P. – Lamadrid C., which subsequently became CAP Internacional s.a., started doing business in 1934. For many decades the company was an absolute leader on the extremely competitive Spanish market. Today it belongs to the ARAG group, and took their name after having kept the name of CAP – ARAG for several years.

Les Assurés Réunis, founded by Fernand CASSART, a lawyer, and Ben GALANTER, an insurer, who got to know each other while they were developing a new fire policy, became a leader on the Belgian market, a position it kept a long time, and also operated in the Netherlands through a branch. Since the 90s, it has belonged to the French group Les Mutuelles du Mans.

ARAG (Auto-Rechtsschutz – “auto legal protection”) – Aktiengesellschaft, soon changed to Allgemeine-Rechtsschutz – “general legal protection” – Aktiengesellschaft, founded by Heinrich Fassbender, a notary and lawyer, whose son Walter, who passed away in the 50s, turned the company into one of the biggest firms in the entire sector, is still controlled by his direct descendants. ARAG traditionally vied with DAS for leadership of the German market. It developed a vast network of branches and subsidiaries in Europe, and even tried to penetrate the US market, in the 70s/80s.

SCHUTZ AG, which was independent until it was taken over in the early 70s by the German group ARAG, became ARAG Switzerland in 1973. In 1998, it merged with Winterthur-Rechtsschutz, took the name of Winterthur-ARAG, and has remained one of the major Swiss LEIs.

SFR (Société Française de Recours), founded by Jean-Pierre WALLERAND, an insurance agent in Valenciennes as an organisme de défense, transferred its head office in 1955 to Beausoleil and its management to Monaco. As it developed considerably at the national level, once France adopted the new EC regulations which led to the suppression of the organismes, the company became an insurance company in 1979. In the early 1990s it joined the Athena group, and has since 1990 been controlled by the AGF and indirectly by the ALLIANZ group.

To be exact, it should be recalled that two other companies were set up in Switzerland, SPA (Société d’Assurance de Protection Juridique) in Geneva in 1934 and DIPSIA (Défense des Intérêts Privés s. à r.l) in Lausanne in 1942. Both companies only experienced modest development at the regional level. After being purchased in the early 70s by the German group ARAG, they were merged into ARAG Switzerland.
something unlawful in them, while others again held that such activities should be subject to strict control which only the authorities responsible for supervising insurance companies were able to exercise. The legal arguments and case law from this period would fill many pages.

The fact is that unbridled competition was quick to thrive among our pioneers, who sometimes offered both services – reimbursement or payment of costs and the provision of services – or in some cases only the latter. Usually known for prudence and balance, the Swiss authorities did not show much sign of either when they decreed – in the early 30s – that only the existence of cover for court costs would bring these contracts within the scope of insurance. This had the consequence that “subscriptions” for mere services “in legal matters”, which were not subject to supervision by the Federal Insurance Office, could be freely offered by anyone. It was not until 1944, following many abuses and many complaints, that they recognised their error and put it right, stating that companies which for a fee accepted the risk of having to provide legal services were engaging in insurance.

In Italy the situation was somewhat different. At the outset, and for at least ten years, there was no mention of insurance. ABA and later SALDA and UCA were set up with a commercial aim, and became insurance companies only between 1933 and 1935. Organisations of various kinds offering assistance for insured persons against companies for the enforcement of insurance contracts were very active during this time. Declaring the business to be subject to government supervision, a law of 1934 regulated it, making it mandatory for organisations to be in the form of a company or association subject to “approval” by the appropriate Minister, with prior examination of their general conditions. (This differed from the proper “authorisation” of insurers in its less vigorous application). What with insurance for legal costs, subscription for the protection of motorists and sportsmen, assistance and protection for motorists, and other picturesque names, some lawyers created confusion and others shared the Swiss authorities’ initial opinion, making a distinction between contracts of assistance for motorists and true insurance contracts for legal costs only. That it was possible to insure for the provision of a service was still an idea that was difficult to digest.

Even strict Germany initially found it difficult to follow a straight path from the outset. Before they set up the company the founders of DAS took the trouble to contact the German supervisory office, which replied that the intended activity did not fall within its jurisdiction (that is, it did not constitute insurance). As a result the contracts didn’t refer to insured persons, but to members or contributors, who had the right to free representation in legal proceedings resulting from road accidents and offences against traffic regulations in general. The legislation was amended in 1932, and in 1935 the company came under the jurisdiction of the supervisory authority for insurance. However it only became an insurance company for all purposes in 1941, after some changes to its statutes.

And what happened in France, the birthplace of all LEI? The pioneers’ success unleashed competition and the new market was invaded by cabinets d’affaires and above all sociétés de défense or organismes de contentieux, which sold subscriptions of similar content to the policies offered by insurers. These subscriptions always included the provision of services, and often coverage of costs, sometimes guaranteed by an appropriate contract with an insurance company. Many of these organisms operated with modest ambitions, on a local basis, but some became of national scope, reaching a wholly respectable size, without the authorities feeling a need to intervene in any way.

An old Belgian saying has it that “When it rains in Paris, it drizzles in Brussels”. Here the situation was reversed – rain in France, but for our pioneers of LEI in Belgium, a cloudburst. This is not surprising given that the law only provided for government control in a few areas – life, accidents at work, and later motor vehicle third party liability. There was nothing to prevent brokers, the ones really in charge of the market, from organising themselves to offer legal protection for their own customers, sometimes guaranteeing the cost through cover with Lloyd’s.

The last market for the pioneers, chronologically, was Spain, where the ink on the deed constituting CAP (a limited liability company, not an insurance company) was hardly dry when one of the bloodiest and most destructive civil wars in history broke out. Law and right counted for little, authority was uncertain, the country was split and on its knees. If the thought that this limited liability company ought instead to be a joint stock company had occurred to anyone at the time, given that it intended to provide LEI, no record of any such eccentricity has come down to us.5

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5 The authors who cover the era of the pioneers in Germany wish to point out that the archives of the DAS in Berlin were completely destroyed. The documentation available at the Office for Oversight also features a great many gaps, and information on this period primarily comes from directors who were active at that time. Widespread oversight of the insurance sector was only introduced in Belgium in 1978, following the adoption and the transposition of the EEC’s first directive on damage.
II. Developments

No-one knows how big the LEI phenomenon was in the pioneers’ time, and no-one probably ever will because the confused and uncertain situation allowed uncontrolled competition, although without specific legislation it couldn’t be said to be unlawful. France, where it originated, was probably the only market where the new form – not yet the new branch – was really successful and showed significant growth during this time. In a publicity leaflet of 1927 or 1928 DAS states that it had 195,000 clients, with 240,000 vehicles insured - more than substantial figures for the time! Such a promising market stimulated competition not only from the organismes, as already mentioned, but also from "conventional" insurers, some of whom included a Claim and Protection clause modelled on the DAS contract in their motor policies - despite vain but vigorous protests from the latter that “it’s not possible to be judge and party to a case at the same time”. No-one in Paris listened to these complaints, even though they were well-founded, but a few years later the complaints put forward in Le Mans found an echo in an office in Berlin. This had the - now to us rather disturbing - name of the Reichsaufsichtamt für Privatversicherung (“Reich Office for the Supervision of Private Insurance”), but it was staffed with worthy and conscientious officials educated in the strict school of good Germanic law. France’s licentious example had long since reached the Rhine at Cologne, where in 1936 an otherwise respectable insurance company wanted to offer legal expenses insurance for the victims of accidents resulting in death or injury. No way, said the Reichsaufsichtamt – the company was already engaged in third party liability insurance, to which LEI is inherently opposed. The danger of conflict of interests was therefore obvious, and activities of this kind could also fall foul of the Rechtsberatungs-Missbrauchsgesetz (“Law on the abuse of legal advice”). This principle would obviously apply to everyone, and so those who wished to offer LEI would have to resign themselves to doing nothing else – at least in Germany.

The problem of Spartentrennung (“separation of branches”) or specialisation, which was resolved in this way on German territory, became a European question after the war.6

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6 The 1935 “Law on the Misuse of Legal Advice” – more precisely Gesetz zur Verhütung von Missbräuchen auf dem Gebiete der Rechtsberatung (“Law to avoid abuses in the field of legal advice”) reserves counselling activities for lawyers and those who have obtained the specific title of Rechtsberater (“Legal advisor”).
5. The explosion

The economic upturn in Europe after the devastations of the war was, as is well known, surprising and rapid. Motor cars, which had been nothing more than a plaything for the affluent since the 30s, now became everyone’s tool, and a popular symbol of unexpected wellbeing which all aspired to possess. Road transport, which was essential for the needs of reconstruction and industrial development, grew markedly in volume in comparison with the railways, and the growth in the number of vehicles was too fast for improvement and extension of the road system to keep up with it. The number of road accidents increased considerably, and third party motor insurance became compulsory in many countries.

This is not to say that victims found it easy to obtain compensation, quite the opposite. Not even insurance companies were equipped to deal with the tumultuous assault of the motor age. Up to then motor insurance had been regarded as a secondary branch to more well-established ones such as transport, fire and hail. The culture of a relationship with the other party was lacking, and loss adjusters grasped every opportunity to raise any trivial objection to drag things out and drive those suffering loss to exhaustion and despair. In addition to this, attracted by a market promising long term growth, there appeared a number of new upstart insurers, of whom it could be said, to turn the biblical phrase, that they who sow in joy reap in woe.

“You will need vigorous active protection”. Once again Durand’s prophetic words were confirmed by harsh reality, and can be translated thus: “If you want to receive equitable indemnity in the event of an accident, take out a legal expenses insurance policy”. Facts were more eloquent than any advertising, and LEI, now recognised everywhere as a branch of insurance, took its place.

6. Other players, new markets

The provision of a new product or service is governed by strict economic rules. A pioneer opens up the market, and if it is promising competitors try to profit from it before it becomes crowded out and less profitable when it reaches maturity. LEI was no exception to this rule, as will be seen – with some reservations as to reliability – in the table below.

<table>
<thead>
<tr>
<th>Companies</th>
<th>Turnover 7</th>
<th>Growth index</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1947</td>
<td>1957</td>
</tr>
<tr>
<td>France</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>Italy</td>
<td>5</td>
<td>9</td>
</tr>
<tr>
<td>Switzerland</td>
<td>3</td>
<td>7</td>
</tr>
<tr>
<td>Belgium</td>
<td>2</td>
<td>10</td>
</tr>
<tr>
<td>Germany</td>
<td>2</td>
<td>8</td>
</tr>
<tr>
<td>Spain</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Austria</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Netherlands</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>15</td>
<td>46</td>
</tr>
</tbody>
</table>

Obviously there are no reliable data for numbers of contracts, and even less for risks insured or average premium levels. In addition to this, although the nature of the market is substantially reflected by the data in the table for Italy, Switzerland, Germany and Spain, where there were mainly specialist companies, this does not apply to the other countries.

In France there are no statistics on the income received by organismes, or the premiums originating from the Claim and Protection clauses included in the motor policies of multi-branch companies. This quite powerful twofold competition led the specialists to seek out new resources and offer customers cover for material damage, that is casco cover (in the two forms of tierce collision - restricted to situations involving impacts with other vehicles - and tierce pure, fully comprehensive). For some specialists the income from this is greater than that from LEI, and can amount to up to 70% of the total.

The 1937 decision of the Reichsaufsichtsamts (concerning the Nordstem Allgemeine Versicherungs AG), which was upheld in 1957 by the Bundesaufsichtsamts ("Federal Office for Oversight"), states the following: “the danger of conflicts of interest is becoming increasingly frequent with the growth of LEI and civil liability portfolios within a single company. Consequently, this Office will not authorize, even in the future, companies that already offer civil liability insurance to operate in the LEI branch.”
In Belgium, as mentioned, rather permissive legislation allowed many intermediaries to offer legal expenses cover directly. Like French companies, the multiples offered customers a clause called rather improperly contre-assurance spéciale (it being rather odd that an insurer should offer "counter-insurance"), or C.A.S., which is curiously reminiscent of the name of one of its main competitors. The specialists in turn took pains to widen their range, providing cover for "material damage", or enriching LEI policies with accessory clauses known as "third party insolvency" or "advance of repair costs" clauses. What can be said with certainty is that over some twenty years the number of specialist companies in Europe tripled, and the explosion of LEI during this period had disruptive effects in two countries which were poles apart in every way – Germany, "of the miracle", which rose from the ashes to become the leading economic power in Europe, the driving force for the continent, and Spain, still poor, backward and partly isolated, having received less advantage from trans-Atlantic aid than the former warring states.

It was in fact German companies which then imparted particular drive to the renewed process of internationalising LEI in Austria, Luxembourg, Holland and Greece. The two oldest companies were then effectively operating a duopoly system in their home country, where they had already reached a considerable size. Encouraged by significant tax incentives for investments abroad and wishing to provide an efficient assistance network for their customers in other European countries, they established themselves there, creating new companies or buying up those already in existence. Not however in the United Kingdom. LEI failed to cross the Channel, probably for a number of reasons, including the persistence of some archaic centuries-old rules of common law, which penalised the crimes of barratry (incitation to trivial lawsuits), maintenance (assistance provided to others in the form of cash or other means to support legal proceedings to which they are not a party), champerty (assistance provided to others in the course of legal proceedings against a promise of a share in the benefits of the proceedings). In fact only maintenance could in any way be likened to LEI, and this was in any event an anachronism in a country where legal aid provided by the State was beginning to develop. All three crimes were repealed by the Criminal Law Act of 1967, and a few years later LEI was introduced into the British Isles with notable success, partly due to innovative marketing.\(^7\)

7 The figures for the table only concern specialists. The figures for turnover, in millions of the currency of each country, are taken from information provided directly by the companies at the Rome Meeting; for Belgium, however, the amounts are estimated, as some companies did not provide such figures. For France, only the figures provided by the DAS (around 80% and respectively 50% of the country's total for 1957 and 1967) clearly come under LEI, whereas it is not clear if and to what extent other companies offer additional guarantees.

With a view to accurately assessing the importance of growth indices, the impact of inflation should be factored in: for example, the indices for Switzerland, where the Swiss franc, as is well known, retained much of its purchasing power (and the branch posted very regular growth) are not comparable with those for Italy, where the lira lost much of its value during the same period. There were already a great many organisations in France before the war. The Argus Yearbook lists 45 in 1941 and 74 in 1951. The Direction des Assurances wrote the following in 1967: "Alongside insurance companies, there are a number of organismes de défense et recours, set up freely. The guarantee for coverage of court costs, contained in the contracts of these organismes – which constitutes an insurance operation, the cost of which cannot be borne directly by them – is provided by an insurance company (which in general is not a company specialized in this field) with which the organismes has signed a collective insurance policy for the benefit of its subscribers. The organismes which operate under such arrangements are, in this respect, acting as mere middlemen between their clients and an insurance company..."  

With regard to the overall sum collected by the insurers via défense et recours clauses, it will be recalled that the additional premium applied – often in a compulsory or a quasi-compulsory form - was in the neighbourhood of 5% of the civil liability premium. As there was no widespread oversight of the insurance sector in Belgium prior to 1978 (see footnote 5), any joint stock or cooperative company, and any natural person – but not a limited liability company – could freely subscribe to insurance contracts in most branches. Already back in 1936, a Charter broker was offering LEI via a contract called Full Cover Office (with coverage at Lloyd's), and his turnover in the immediate post-war period, solely in the province of Hainaut, was equivalent to that of the two other companies operating nationwide.

On the two new and relatively small markets, the rare specialists immediately found themselves facing a strong front of multi-branch insurers: in 1967, in the LEI field, there were 16 companies operating in Austria and 29 in the Netherlands, 29 of which were grouped together in the Schaderegelingsbureau voor de Rechtsbijstandsverzekering ("Office for the settlement of LEI claims"), an independent body in charge of handling files with a view to avoiding conflicts of interest.

The first real legal protection contract was sold in England by a broker from Lloyd's, Mr. Strover, who marketed it in 1974 as a tool designed "to meet the legal needs of Mr Average".
In fact it was a Belgian company, with motor nowhere in its name, which was probably the first to take tentative steps along a rather different path. In the late 30s the local market for motor protection was rather dull, perhaps too restricted – despite lively competition – and it came up with the idea of a policy providing Défense après Incendie (Post-fire Protection), to provide protection against post-claim disputes with a fire risk insurance company. This was well received, became widespread and undoubtedly helped the pioneers survive during the difficult wartime years when few vehicles were on the road. But the first real experiments in the non-motor field occurred after the war.

It is impossible to establish a precise chronology, even though attempts were made in all countries where LEI was available, generally using the scheme already known and tested for motor vehicles. Cover remained linked to situations arising from accidents, or at least situations not directly dependent on the will of the insured. From the operators’ point of view this prudence is quite understandable, given that they were aware of how many vague and suggestive factors abounded in the concept of loss in LEI. It was a wise precaution for them to tie themselves to a particular events which could be specifically determined with coordinates in time and space, where the origin of an event could be referred to in order to establish whether cover should or should not be provided.

LEI specialists thus entered the initially unexplored fields of private life, employment relationships, the professions and business, with various degrees of enthusiasm. A leap forward sometimes led to abandonment of that relatively secure base. Sometimes a leap in the dark led to precipitate retreat, often because insurers have the same reactions as the proverbial cat, and the theory of cycles is based not on abstraction but practical experience. This is not the place for the full story of this development, out of which the new up-to-date image of LEI has evolved over the last twenty years. We will just mention it here as an introduction to the subject which that are now going to discuss.

8. The conflict with the Bar

The success of the first DAS quite naturally gave rise to imitation and sometimes rather unfair competition between multi-branch companies, organisms and intermediaries – but the very fact that appropriate regulations were late in being formulated demonstrates that throughout the pioneers’ time the main attitude towards the “new form” was one of indifference, scepticism and curiosity, but not outright hostility. LEI policies, under various names, often ended up before the courts, which sometimes failed to understand them and sometimes censured them as being contrary to law. There can be no doubt they included clauses which specialists have long considered unacceptable because they are inconsistent with the concept of the partnership between the insured and the insurer on which our contract and ethics are based.

This applied in particular to the clauses relating to the insurers’ powers over handling a case, starting with the choice of lawyer, which gave the most combative insured persons and their lawyers good grounds for challenging them in the courts. But these were isolated episodes, and those interested in legal defences will obviously savour them in memory, even though they were infrequent drops in the ocean of prewar case law. Now at the same time as motoring became a mass phenomenon, the profession of lawyer, which had been elitist, engaged in by lawyers who kept their distance from what was going on on the roads, in turn began to develop and become more proletarian. The "market" for motorists’ cover, which made LEI specialists prosperous, was quite a tempting one for the mass of young lawyers in search of clients. And what’s more, those infernal discontented self-styled insurers were threatening to trample over the finest flowers of the law. The conflict thus broke out suddenly and violently, starting in two countries, Germany and Spain, where for quite different reasons LEI had experienced extraordinary growth.

In 1958 lawyers were invited to a congress by their two most important world organisations, the International Bar Association (I.B.A), and the Union Internationale des Avocats (U.I.A). In both cases the "LEI problem" was considered in weighty papers, with the same conclusions - it is a harmful activity, fundamentally contrary to the universal principles of law and it should therefore be wholly prohibited. If this could not be fully achieved, the insurers’ contribution should be restricted to the financial aspect only, that is payment for the loss and lawyers’ fees, the latter freely chosen and appointed by the insured without any interference by the insurer in the handling of the dispute.

Probably no-one gave more weight to such concepts than the Madrid lawyer Luis Benitez de Lugo y Reimundo, when he wrote that LEI threatened "the high aims of the legal profession, professional freedom and the functioning of justice, professional secrecy, the inalienable rights of the party, and the prestige of the profession". And this was the opinion of no extremist, no Taliban of the Bar. Since the mid 50s the major Spanish professional organisations had acted vigorously, among other things challenging government acts through which new companies were licensed to engage in LEI. When their appeals were rejected they reacted on a disciplinary level with internal circulars prohibiting registered lawyers from cooperating 'in any way' with companies active in the field.

Similar decisions were taken or proposed by some local Bar associations in Belgium and France, but without a doubt it was too late for them to be received and accepted by the membership. LEI had now become customary, was well-accepted by

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8 Back in the early 30s, in France, la Défense Fiscale – société d'assurance mutuelle had a dispute with the finance administration, which wanted to tax income as the product of commercial, not insurance operations. The affair came before at the Council of State and the Court of Cassation, which agreed with the tax authorities, noting that the company had a discretionary right to decide if and how it was appropriate to take action on its customers’ files, which removed from the contract any element of risk, an essential element for it to qualify as an insurance policy.
the public, and very many lawyers maintained regular mutually satisfactory relationships with specialists. Sense prevailed on both sides, as was appropriate. The companies gradually adapted their policies to the legitimate requirements of the Bar, and lawyers in turn softened their polemical tones, instead placing emphasis on factors encouraging fair and active cooperation. A dialogue was opened up at all levels, and it fell to Brangsch to express the final word of reconciliation in his contribution to the VIth RIAD Congress (Athens 1975) in the name of German lawyers. After recalling his own and Reyes Morales’ harsh statements in 1958, he said: “(There is) a vast field of common business for yourselves and for ourselves. We have measured our strengths. We have learnt to respect each other. “We have become partners.”

9. Inter-company agreements and the défense générale

Who does not remember May 1968? Students on the streets, l’imagination au pouvoir, the contemptuous words of Generale De Gaulle, the Prague Spring… Along the Vltava things soon became worse than they had been before, for another twenty years. But things were different in western Europe, and of course in France, where everything had started. It was there that something also changed for LEI, and the founder, the doyenne, the grandmother of the companies – as its managers were pleased to call it – felt that it was in imminent danger of its life. It was on the 1st of May of that fateful year that the I.D.A. Agreement, to which almost all insurance companies subscribed, came into force. Its mechanism is well known. In cases of accident where there was only material damage, of an amount not exceeding a particular limit, the injured party could claim against his own insurer (directly) instead of the responsible party’s insurer, and his insurer would pay compensation determining the level of blame on the basis of a particular agreed scheme. DAS, and all French LEI specialists (including the organisms, which were engaged in more or less the same business) felt that this new measure had deprived their product of most of its attraction for the public, particularly because it was based on the difficulty of usefully maintaining a dialogue with third party liability insurers – to put it plainly, obtaining compensation from them. The specialists’ motor legal expenses insurance was robbed, so to speak, of its daily bread, and what remained – cover in criminal cases and for more serious and rarer accidents – would not be sufficient to encourage motorists to buy the additional policy.

Developments in subsequent years proved that these concerns were excessive. The spread of Agreements in Europe – with varying success from one country to another, however – and the progressive expansion of their scope of application, did not mark the end of motor legal expenses insurance. The figures prove the contrary. However this measure in ’68 shook the specialists, not only in France, and drove them to speed up the process already begun through which they cut the umbilical cord with motor vehicles and offered increasingly wider-ranging and more comprehensive products.

In France the change from défense auto to défense générale was drastic and radical, and is evidence of the specialists’ professionalism, their ability to adjust their market policies to environmental requirements. Elsewhere those working in the LEI field continued to broaden their range with new services, in line with developments in society, and to adopt new marketing techniques – in particular standard policies – designed to avoid the traps of negative selection in those fields where efforts were being made to be adventurous. Above all there came to be specialists in products intended for a specific category, placing their experience and skill at the disposal of all, turning themselves into tools for access to justice, a fundamental right recognised to all citizens, but one in reality still denied to many.10

9 The I.B.A. held its Congress in July 1958 in Cologne, where the Spaniard Roberto Reyes Morales spoke on Insurance Protection against Any and All Types of Lawsuits – The Propriety and Legality; the U.I.A. Congress took place in September in Milan, and Heinz Brangsch, who was the head of the Association of German Lawyers, gave a report entitled Die Problematik der Rechtsschutzversicherung. The book “El riesgo juridico: Los seguros de gastos de procesos y de litigios”; was published in 1961 in Madrid, at the expense of the author, who explains in the introduction that he hopes that his book will contribute to a total ban on the “so-called insurance” in his country.

In Spain, unlike the majority of countries, the trade of professional lawyer is not incompatible with the existence of an employment relationship. LEI companies generally rely on the services of salaried lawyers to represent their policyholders in court.

In the early 70s, a steady, productive relationship was developed between RIAD and the CCBE – Comission Consultative des Barreaux de la Communauté Européenne, of which the Secretary General at the time was the Belgian lawyer Jean-Régnier THYS. During the work done on the LEI directive, the CCBE intervened several times in favour of the specialization of companies, while taking a firm stance, albeit with a few wobbles, on the principle of the free choice of a lawyer by the policyholder at all stages of the claims process. Accordingly, the U.I.A. adopted, at its 1977 Zagreb Congress, a firm resolution to the effect that “legal protection insurance companies must refrain from offering any other form of insurance, particularly civil liability insurance.”

10 The Convention I.D.A. – Indemnisation Directe de l’Assuré served as a model, in the years that followed, for the R.D.R. – Règlement Direct-Direkte Regeling in Belgium (1972), for the C.I.D. – Convenzione di Indennizzo Diretto in Italy (1978), for the C.I.D.E. – Convenio para la Indemnización Directa de daños materiales a vehículos en Spain (1988); its constat amiable was taken over as such at the European level and incorporated into some legislation (for example, the Italian law 990/69, which made civil liability insurance obligatory). The aim of the I.D.A., to simplify the reimbursement of damages for lesser claims, was commendable as such but it had a much less praiseworthy side, because it imposed a relatively expensive Recours et Défense clause de facto on policyholders whereby the insurer entered into obligations totally opposed to the commitments he was bound to respect under the convention he had signed. This was a perfect paradigm of a conflict of interest.
From left to right:

- Prof. A. Donati, Chairman AIDA
- Prof. H. Müller, Chairman AIDA
- André Carabeuf, CEO DAS France
- C. Isola, Secretary General Comitato Italiano Assicurazione Spese Legali
- V. Lattanzio, Secretary of State
- Prof. A. Duni, President at the High Court
- E. Artom, President of ANIA (association of the Italian insurers)
- Prof. Enrico Allorio, speaker
- G. Angela, Head of the Inspectorate of Insurances

10. **The Legal Expenses Insurance Directive**

In the early 60s the EEC Commission had just ventured into the European insurance labyrinth to launch the first directives to coordinate regulations in the insurance field. One of the first problems facing it was the desirability of separating life and non-life branches according to the formula already in use in France, Germany and Holland, where the intention was to prevent poor performance of a company in the loss business prejudicing the interests of insured parties holding life policies with the same company – socially considered to more properly merit protection. In the general programme adopted by the Council in December 1961 the system of separate management was therefore suggested as a preferred solution to so-called major specialisation. In this system a company, although remaining a single company, would have to draw up a separate balance sheet for the life branch and provide specific cover in favour of insured parties in this branch. Having begun work on the first non-life directive, representatives of 5 of the then 6 member states were probably surprised to discover that the sixth, Germany, had saved up another problem, the Spartentrennung system applying to health, credit and securities, and legal defence insurances. “Let’s leave illness aside, someone may have thought, as these policies too have high social aims. And it’s also true that the credit branch is quite risky, and can give rise to enormous losses if things go badly for the economy, bringing a company to bankruptcy. But legal expenses insurance, Good God, what sort of a devil is that? Why did that ever have to become separate from the rest, and specialised?” And perhaps in Paris someone would
have exclaimed: “But isn’t this what the organisms are doing? Well, they will all disappear with the new law, and the problem will resolve itself.” (Didn’t the French representative at the first meeting of government experts in Brussels say that “there were no specialist companies in France”?).

But the German government would not budge from its position, and the draft first non-life directive submitted to the Council in June 1966 let Germany keep the prohibition on simultaneous undertakings in branches, which had come to be a sticking point, until further coordination. The final text of Directive 73/239 provided for coordination within a term of 4 years which, according to the adoption report by the Council, it had to bring about in the legal expenses insurance branch “in order to avoid any possible conflict of interests.”

The Commission’s departments put the new directive back on the stocks in 1975, suddenly bringing in the specialists’ organisation RIAD on the same footing as the more authoritative C.E.A. (which was not happy with it). From a logical and legal point of view they were not insensitive to the arguments invoked in favour of the German system, but they regarded the exception granted to Germany as a departure from the principle of the uniformity of rules, essential for achieving orderly competition in the Common Market. Furthermore they did not believe that it would be realistic to imagine that other member states – strengthened by a powerful new ally, the United Kingdom, the champion of a deregulation policy, which joined the Community in 1973 – would end up accepting a system in force in only one. The battle was long, and lasted twelve years. Those with an interest in knowing its outlines will find a brief summary of the most salient episodes in the note. We will now conclude this modest work with a few considerations, some twenty years after adoption of the directive.11

11 The system of separate management for life insurance branches was already in force in Italy. However, directive 79/267 prescribed the more severe regime of specialization for newly founded companies, using the other formula as a minimum system for existing companies while leaving States the option of introducing a ban on combining both forms.

In 1975, the LEI specialists had the lion’s share of the market – around 80% - throughout the EC, without taking into account such non-member countries as Spain and Switzerland, where specialization also predominated. There were three different systems in force in Europe: the compulsory Spartenrennung in Germany (see footnote 6) – by far the largest market with 85% of overall turnover for the continent – and in Switzerland; the Schaderegelungs-Bureau (or Kantoor – see footnote 7), optional but widespread in the Netherlands; and a mixed system elsewhere.

As the majority of German LEI companies were controlled by multi-branch companies, with a view to guaranteeing independence they were obliged to maintain separate structures, and members of the management and the boards of administration were forbidden to hold offices in both the parent company and its subsidiary. As it was originally conceived, the Dutch system provided for a Foundation, managed by independent administrators, which would come between the Kantoor and the companies that used its services: subsequently, however, this efficacious formula – that was also tried out in France and Belgium – was distorted by several companies which set up satellite structures that were entirely and directly controlled. The mixed system, also due to the spread of inter-company Conventions (see footnote 10), gave rise to grave abuses, which came in for sharp criticism by the Commission’s departments, particularly by the Frenchman Gérard IMBERT (Head of the Insurance Division, then Director of Financial Institutions), at the VIth RIAD Congress (Knokke-le-Zoute, 1977).

A first proposed directive, in July 1979, imposed the free choice of a lawyer by the insured person, an arbitration clause to settle differences of opinion between the insured person and the insurer, the obligation for multi-branch companies to maintain separate management and accounting systems as well as a separation of contracts or at least the guarantees granted in a single contract; and left it up to States (in fact, to Germany) to decide whether or not to introduce a compulsory system like the Dutch one for settling claims. It was referred to Parliament for an opinion – compulsory but non-binding – and for an opinion – optional - to the Economic and Social Committee (ESC). This body commenced with the reading of the text in January 1980 and ended it in October, after lively debates and the drafting of numerous alternative solutions, with a proposal to introduce the Dutch system on a widespread basis. In Parliament, the Consumer Protection Commission handed down a very critical opinion on the proposal, which it suggested should be either withdrawn or be left to the discretion of each State to introduce a system of specialization. It was then referred to the Legal Commission, which appointed as a rapporteur Karel DE GUCHT, a Belgium liberal and a lawyer who subsequently became minister. In March 1981, DE GUCHT proposed a resolution calling for the withdrawal of the Commission’s text or, alternatively, the adoption of compulsory specialization, the lightening of the German system with a ban preventing multi-branch companies from taking majority holdings in LEI companies, the automatic cancellation, at the first possible opportunity, of current policies with the said companies, the free choice of a lawyer and an expert, and the establishment of an ad hoc oversight body. These measures went well beyond the wishes expressed by partisans of specialization: however, the resolution received 10 votes in favour and 10 against and was rejected solely by virtue of a strict set of rules, whereas another text, which was broadly favourable to the proposal, obtained 8 votes in favour, 8 against and two abstentions. Although he was obliged as a rapporteur to present this latter text to the Plenary Assembly, DE GUCHT did not forego proposing his amendments on a personal basis, and the Consumers Commission also adopted a text requiring States to choose between specialization and the Dutch system. On 17 September 1981, Parliament adopted a resolution of the Legal Commission, by 65 votes in favour, 49 against and one abstention, rejecting all the other proposals.

According to the treaties in force at the time, Parliament was handing down a purely advisory opinion but the Commission would not have dared to insist on a text that had been rejected, nor would it have agreed to retract itself by accepting the radical amendments proposed by DE GUCHT or the Consumers Commission: it would have preferred to withdraw its proposal. Now, the departments in Brussels were able to present, in February 1982, an amended text which confirmed the obligation for separate management, broadened somewhat the possibility for a Member State to impose the Dutch system, and took up some suggestions that had been made in the debates within the ESC in Parliament, such as the obligation for the insurer working under a system of simple separate management to advise the insured person of the possibility of a conflict of interest, the ban on combining posts in both systems in accordance with practice in Germany, the option for the insured person of appointing an expert or counter expert of his or her choice, the establishment of an ad hoc oversight body. This text set 1 July 1984 as the deadline by which time national legislations had to adapt to the directive: however, that was overly optimistic and underestimated the perseverance of the German authorities, which had been strengthened somewhat by the favourable
11. A few modest considerations

Like so many other Community measures, Directive 87/344 of the 22 June 1987 is a compromise text, by definition much open to criticism and indeed much criticised. Anyone who examines it today alongside the national incorporation measures will have great difficulty in finding in it any echo of the floods of words poured out over twelve years about conflict of interests and the rights of the insured, and the most suitable ways of ensuring these. It could be regarded as a wasted opportunity, and it might be thought that it would be better if it had never existed. Had there been just one more vote on the Parliament's Legal Committee that would have been the case. Nothing more would have been heard of it, and because the qualified majority rule has made opting-out clauses fashionable, even the exception granted to Germany in 1973 could still be in place and everything would be as it had been before. There is also doubt whether the supervisory offices in some countries are very zealous in ensuring compliance with the rather bland rules in force. Despite this, and even though the directive has perhaps more defects than merits, it is our opinion that its advantages prevail over the disadvantages. This is why.

In the early 70s, in most European countries – with the significant exceptions of Germany and some adjacent states – LEI was something mysterious. Its nature, purpose, and image were still obscure by the theoretical and practical legal uncertainties and confusions of the pioneers' time. The public at large knew nothing about it. The most widespread attitude in the "conventional" insurance field and the legal profession was one of distrust, even suspicion or intolerance towards it. Conflicts of interest were nothing more than illusions created by the paranoid imagination of a few fanatics of a self-styled specialisation.

The work on the directive provided LEI specialists with a showcase for their professional skills. The European authorities accepted and appreciated the input from their organisations, frequently praising its "intellectual honesty". Adversaries in high level discussions became partners and friends. Are the provisions in the texts confusing, contradictory? In some cases yes, but there have been gains over which there is no longer any dispute:

- legal expenses insurance is a branch of insurance, in which the insurer undertakes an obligation to grant services – directly, within certain limits – and the reimbursement of costs. No more cavilling over the finer points.
- the risks of conflict are present, in fact they are inherent in some ways of operating in the business,
- the measures forged by the attitudes and experience of three generations of specialists (prophets, pioneers, adventurous entrepreneurs and their successors) – freedom to choose a lawyer, the objectivity clause – are necessary to limit harmful consequences for the insured,
- in short, legal expenses insurance is a special branch of insurance which requires special rules; and because of this it is the responsibility of the specialists to give the market direction.

These rules are now in existence. They began with discussions to apply them in a market of 6 countries; now they apply in 25. It is thanks to this that specialists have been able to set up in Poland, Hungary and the former Czechoslovakia without the local authorities asking: "What is LEI?". And, above all, the work done for the directive and the change of climate resulting from it have and will serve specialists, who must now every day face competition acting on rules similar to theirs which they can now only overcome through higher quality. This has forced them to learn the difference between the separation of branches, which can be achieved by simple administrative means, and true specialisation, the fruit of skill, efficiency and, above all, an authentic spirit of service.
Our Code of Practice – adopted in 1993, a few years after the directive – states that the legal expenses insurer shall carry out its activity for the benefit of the policyholder and shall assume the defence of the rights and legitimate interest of the latter, as though it were a matter concerning its own interests. This is what is needed so that from being the champion of the weak and undefended and then the means to give those who need it access to justice, LEI can over time become an instrument for access to law for everyone.

The wise professor Möller was right. Legal expenses insurance radiates the bloom of youth and is highly attractive, with a wealth of problems and raising many difficulties for those who practice it. But isn't this the spice of life?\(^{12}\)

**BIBLIOGRAPHIC NOTE**

The minutes of the 1969 Rome Meeting, which were published in Milan that same year, contain the main presentations by Hans MÖLLER (see footnote 1) on the "Position of the LEI in relation to the other insurance branches", and by Enrico ALLORIO on "Problems of the LEI in civil proceedings and in the organization of the Bar".

In 1974, RIAD asked MÖLLER to coordinate the collection Studien zur Rechtsschutzversicherung, published the following year in Karlsruhe. Practitioners from the branch and 10 eminent jurists from 14 countries worked together on the book, which remains extremely useful. In relation to the subjects dealt with in our text, note should be taken of the contributions from:

- Götz LANDWEHR, Genossenschaftliche Rechtsverfolgung im Mittelalter
- Günther RIDDER, Rechtsschutzversicherung in der Bundesrepublik Deutschland
- Paul BELLAMY, Le recours et l’assurance défense et recours en France
- Bernard VIRET, L’assurance de la protection juridique en Suisse
- Fernando Sanchez CALERO, El seguro de defensa jurídica en España
- Guy LEVIE, La coordination de l’assurance “Protection Juridique” dans les Communautés Européennes. The author of this last text, the Main Administrator in the Insurance Division of the EC Commission, was one of the drafters of the LEI directive.

To honour the memory of Hans MÖLLER, who passed away in 1979, RIAD, together with A.I.D.A., established a prize bearing his name for an unpublished work on the LEI, which was awarded to Jürgen WERNER, who went on to become director of a specialized company, for his study entitled *Die Rechtsschutzversicherung in Europa*, published in Karlsruhe in 1985.

Both the *Studien* and the work of J. WERNER, as well as the book by Werner PFENNIGSTORF, *Legal Expenses Insurance*, Chicago 1975, contain references to a very vast bibliography. PFENNIGSTORF, a jurist of German origin, was the head of the American Bar Foundation, and was very active in the field of Prepaid Legal Services, North America’s “interpretation” of LEI.

Between 1972 and 1992, RIAD published the multilingual review *L’Assurance défense en Europe - Rechtsschutz in Europa*, that was printed in Brussels. The review contained articles by practitioners and experts, minutes from RIAD Congresses, as well as a wealth of information on work done on the directive and, in general, on current applications of LEI. Raymond H. WERY, the first Belgian delegate elected to the RIAD Board of Directors, long served as Editor-in-Chief: he was succeeded by Paul FIASSE and Emmanuel CASSART, both Belgians. They received extremely valuable assistance from Jean-Luc d’AMMAN, a long-serving Swiss delegate and Treasurer of the association, and from Wolfgang SCHULER and Klaus POTTHOFF, employees of German companies. The author delved into the article written by BELLAMY – who up until the late 70s was Deputy Director General of DAS and France’s delegate on RIAD’s Committee - entitled *Une naissance au Mans en 1917*, published in the 1/73 issue of the review.

From Emmanuel CASSART, the son of and successor to one of the founders of *Les Assurés Réunis*, and from Jacques OBERSON, a long-standing Director of the DAS in Lausanne, the Author received a great deal of information on the markets of the respective countries, which he could not have obtained otherwise.

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\(^{12}\) Switzerland, having accepted the body of European insurance legislation, can be likened from this standpoint to a 26th member of the EU.
l’Assurance défense en Europe

Rechtsschutz in Europa

15 - 2 - 1972 - n° 1

First issue of the review published by RIAD until 1992
When Max Plattner, the former president of RIAD and publisher of the present work, asked me to send him my curriculum vitae for publication, I had no choice but to write it up myself. That's not being pretentious. It's just that I can't think of anyone else who would want to take the trouble to pore over my biography. And there's a second reason that I'll mention below.

I was born in 1932 at Santa Margherita Ligure, a small coastal town to the east of Genoa - names that recall memories of the 10th RIAD Congress in 1986. It was there that I did my studies and have lived for the whole of my life except for a break of four years in the Veneto countryside during the War.

My first experience of work took me to Paris in 1951 to the Société Navale de l'Ouest, whose liners, named after the Evangelists, used to ply the ferry routes between the Atlantic coasts of France and Africa. I was supposed to take the same passage to rejoin my father and his business in Liberia but fate decided otherwise.

In 1955, just as I finished my law studies at the University of Genoa, I entered, somewhat by chance, a company offering insurance for legal expenses - or spese legali as they were called in Italy - an activity virtually unknown in the country at that time. It was as a representative of this company - called ATLANS and long since disappeared - that I was to take part ten years later with colleagues from other specialist enterprises in setting up the COMITATO ITALIANO ASSICURAZIONE SPESE LEGAL, of which I would become secretary general. With the temerity of youth, we embarked in 1968 on organising the "First International Meeting of Legal Defence Insurers" which was held in Rome the following year and - audaces fortuna juvat – proved to be a success. I should like to recall at this point our friend Rodolfo Veith, long-time chairman of the Comitato, who managed to obtain the adhesion of the major German insurance companies, a support that was indispensable for the initiative.

At the end of the Meeting, it was resolved to organise further Congresses and, if possible, to establish an international association of specialists. Our European colleagues did me the honour of appointing me coordinator of the committee responsible for dealing with these projects. In 1972, the committee was made permanent and laid down its first set of "Rules". I was elected secretary general for a term of three years that was subsequently renewed a number of times up to 1993. In this capacity, I became acquainted with people of great professional and human qualities, including some of our pioneers and their descendants and successors, and made friends with several of them. Looking back, I consider this to have been one of the most enriching experiences in my life.

The second reason which has led me to write this account in the first person and to offer this little work to the RIAD is precisely the wish to pay homage to these men – many of whom have now passed away – by recording their names in a work devoted to the history of our fascinating profession.

In the meantime, wishing to extend my knowledge (and to earn some money because the words of Petrarch - "Naked and poor thou goest, Philosophy" – were well suited to the legal expenses business of the time in Italy), I had become and remained for the next 25 years the agent of a young and dynamic multibranch company, the LATINA. In 1973, having left my first company, I took part in the establishment of LA DIFESA, of which I was the managing director until 1990. From 1992 to 1999, I collaborated on the PROTEXIA project launched by AGF and CFDP, a Franco-French joint venture with an international flavour and, before the millennium drew to a close, had stepped down from all operational functions, as well as the vice-presidency of the new RIAD-IALEX. This reference gives me the opportunity to recall the names of friends who succeeded so brilliantly at the head of our association: Bernard Cerveau, Georges van Lancker and, of course, Max Plattner.

To the current president, Eric Pouw, I wish every success for the future.

I have always been a compulsive writer and during my career have committed to print hundreds of pages of articles for various insurance journals. In 2001, I published a Dictionary of Insurance that I mention in passing for those who might like to improve their knowledge of Italian but find Dante heavy going or for those curious to know, for example, what connection there is between insurance and the Loch Ness monster.

Since 1968 – a decisive year in many respects – I have been married to Elisabetta Carcassi, a specialist in communication and their descendants and successors, and made friends with several of them. Looking back, I consider this to have been one of the most enriching experiences in my life.

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Since 1968 – a decisive year in many respects – I have been married to Elisabetta Carcassi, a specialist in communication who will be familiar to anyone who has taken part in at least one RIAD Congress. And anyone who was at Vouliagmeni in 2004 will have seen her dance an exalted sirtaki. We have four children, two grandchildren and two dogs.

Carlo Isola
Honorary President of RIAD

P.S.
This is not a pipe is the title of a famous painting by the surrealist genius Magritte. Without any claim to genius myself, I would like to point out that this is not the legal work that I might perhaps – immodestly – have wanted to write. Unfortunately, that would have required five times as many pages and as many years if only to take up the debate on such complex and controversial issues as conflict of interest, the triangular relationship between insured, lawyer and insurer, the similarities and differences between legal expenses insurance and the even younger branch of the industry, assistance, not to mention a host of others, all confirming the rich diversity of the unique and fascinating business in which we are engaged.
Nor is this a work of history. That would have demanded far closer and more painstaking research and, once again, far more time and pages. I must also confess that I have not been entirely faithful to my title because, after elaborating on the origins of the profession, I passed quickly on to its development without even touching on, for example, the relationship between specialisation and independence, two aspects of legal expenses insurance that were inseparable in the age of our pioneers but which have today both undergone a sea change.

So, in the end, how shall I describe it? I would say perhaps an aide-mémoire, an overview of a past that is both near and far removed, a reminder of where we came from and of the roots that we must continue to cherish.