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In this week's Insurance Bulletin:

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1. COURT CASES AND ARBITRATION

England & Wales: Making sense of jurisdiction clauses

Catlin Syndicate Ltd & Ors v Weyerhaeuser Company[1]

In this case, the court considered the meaning and effect of a number of seemingly contradictory dispute resolution provisions in an excess insurance policy ("the Excess Policy"). The apparent inconsistency arose due to incorporation of terms from an underlying policy, and illustrates the difficulties that may arise when terms are incorporated (either, as here, from an underlying layer, or from the original policy in a reinsurance context) without due consideration being given to whether or not those terms are appropriate for the policy into which they are incorporated.

Here, the Excess Policy incorporated by reference a Service of Suit Clause from an underlying policy, providing that, in the event of the failure of the Underwriters to pay a claim under the Excess Policy, the Underwriters would submit to the jurisdiction of a competent US Court.

However, the Excess Policy also contained endorsements providing:

- for "any dispute, controversy or claim" to be determined in London under the Arbitration Act 1996;
- for the construction and interpretation of the policy to be governed by the laws of the State of Washington; and
- that "Solely for the purpose of effectuating arbitration, in the event of the failure of the Company to pay any amount claimed to be due hereunder, the Company, at the request of the Insured, will submit to the jurisdiction of any court of competent jurisdiction within the United States."

The court construed these provisions as together having the following effect:

- any disputes under the Excess Policy would be determined in London under the Arbitration Act 1996.
- Underwriters had submitted to the jurisdiction of any competent US court in the event of their failure to pay any claim, but this was "solely for the purpose of effectuating arbitration".
- under the Service of Suit clause, Underwriters had certain rights to commence or otherwise pursue an action before a competent US court.
- in view of the conclusion set out in the first bullet point above, the circumstances contemplated at the second and third bullet points above would involve the enforcement of an arbitration award (or establishing jurisdiction in the event that the parties agreed to dispense with arbitration).

The court expressly adopted this analysis in part because it "recognises that there is no conflict in the drafting". A conclusion that there was a conflict would not be one that could or should lightly be attributed to commercial parties.

The court was also influenced by its view that its construction "works commercially".

The court did not consider that the same could be said of the opposing construction advanced on behalf of the insured, which was that the parties' choice of arbitration in London was only in respect of disputes not involving money claims. The court regarded this construction as not only uncommercial, but also "potentially chaotic".

A further factor influencing the court was that the Excess Policy sat within a number of layers, at least two of which contained arbitration agreements providing for mandatory arbitration in London. Against this background, the unlikelihood of the parties having intended the Insured's construction increased further still.

Having reached this conclusion, the court made an order restraining the

1 [2018] EWHC 3609 (Comm) (21 December 2018)

Insured from pursuing proceedings before the District Court in the State of Washington. The English courts will ordinarily restrain overseas proceedings commenced in breach of a London arbitration agreement, unless there is "a good reason" or "strong reason" not to do so (The Angelic Grace [1995] 1 Lloyd's Rep. 87 at 96).

As well as illustrating the point made above regarding incorporation, the case also demonstrates the more general point that parties to re/insurance contracts should strive to make their contracts clear and unambiguous. This applies with great force to dispute resolution provisions. If these are not clear then an unnecessary dispute over jurisdiction has to be resolved before the main dispute can be resolved, often resulting in duplicated proceedings, unwarranted delays and unnecessary costs. Whilst the court in this case was able to find that there was no conflict between the various clauses, there was certainly scope for an ordinary reader of the contract to be very confused by it.

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2. MARKET DEVELOPMENTS

UK: Pool Re withdraws terror attack event cover

On 8 January 2019, Pool Re's chief executive announced that, as a result of there now being sufficient other capacity within the commercial insurance and reinsurance markets, it will cease to reinsure Members for contingency risks arising from acts of terrorism.

Pool Re is a government-backed reinsurance scheme that began writing such contingent risks in the lead up to London's Olympic Games in 2012, when the commercial market determined it had a lack of capacity to provide sufficient cover.

Traditionally, Pool Re was restricted to providing commercial property with cover against terrorism risk, but has been adapted at various times in response to changing circumstances within the insurance market. A notable change has been the extension of cover to include business interruption losses that are not contingent on damage to commercial property (as we have previously reported[1]).

This most recent change to Pool Re's guarantee will take effect after Q1 2019, following which it will no longer be possible for Members to cede their contingency liability policies to Pool Re. Instead, they will purchase cover within the commercial reinsurance market. The majority of risks formerly ceded to Pool Re consisted of terrorist cover for sporting events and music concerts.

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1 http://www.hfw.com/Insurance-Bulletin-April-2018-Edition-1

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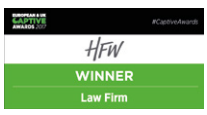

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