Insurance/ Reinsurance

24 September 2015





Welcome to HFW's Insurance Bulletin, which is a summary of the key insurance and reinsurance regulatory announcements, market developments, court cases and legislative changes of the week.

In this week's bulletin:

Should you require any further information or assistance on any of the issues dealt with here, please do not hesitate to contact any of the contributors to this bulletin, or your usual contact at HFW.

Costas Frangeskides, Partner, costas.frangeskides@hfw.com
Andrew Bandurka, Partner, andrew.bandurka@hfw.com
Will Reddie, Associate, william.reddie@hfw.com

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1. Regulation and legislation

Europe: Solvency II implementation and EIOPA's eagle eye

On 2 September, Gabriel Bernardino, Chairman of EIOPA, gave a speech[1] on the "dos and don'ts" of implementing Solvency II. He expressed his hope that, overall, Solvency II will lead to *"intelligent and effective regulation which does not stifle innovation"* and his belief that it is a *"solid step towards financial stability, better transparency and enhanced consumer protection".*

One of Mr Bernardino's most interesting comments is that EIOPA will be "very attentive" to any material unintended consequences of the implementation of Solvency II, in particular those that have a negative impact on consumers. He gave the following examples of issues that EIOPA intends to monitor:

- The investment behaviour of insurers: Mr Bernadino stated that Solvency II should create *"the right approach to investment by insurers"* and that it *"recognises asset diversification as a key prudential element"*. He explained that EIOPA will review relevant data as it becomes available.
- The impact of Solvency II on insurance product availability, particularly in the current low interest rate environment: Although insurers will be expected to take *"more conscious decisions on the risks that they are running"*, Mr Bernadino was clear that Solvency II should not *"unduly penalise specific products"*.
- Own Solvency Risk Assessment (ORSA) and risk culture: Mr Bernadino emphasised that the ORSA was a *"cultural change"* and that change in insurance companies would need to start from the top, rather than the ORSA being regarded as a secondary priority behind ensuring that capital requirements are met. Mr Bernadino expressed his view that the implementation of the ORSA should further embed a strong risk culture in the day to day operations of firms.

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WILL REDDIE, ASSOCIATE

Although Mr Bernadino stated that EIOPA will closely monitor the way that the Solvency II system of governance is implemented in each member state, including each member state's use of due proportionality, it will be interesting to see whether, and what type of, action is taken against member states whose implementing legislation is regarded as having "gold-plated" Solvency II. With a strong, active stance on gold-plating, EIOPA may be able to achieve the aim of equivalent prudential regulation across the EEA.

For more information, please contact Will Reddie, Associate, on +44 (0)20 7264 8758, or william.reddie@hfw.com, or your usual contact at HFW.

1 A copy of Mr Bernardino's speech can be found here: https://eiopa.europa.eu/Publications/Speeches%20and%20presentations/2015-09-02%20Solvency%20II%20Conference%20Slovenia.pdf

2. Market developments

China: Fears of cyanide contamination as a result of the Tianjin chemical warehouse explosion

On 10 September[1] we reported that broker Guy Carpenter had predicted total insured losses following the Tianjin chemical warehouse explosion of between US$1.64 billion and US$ 3.25 billion. This figure is climbing further with (according to Lloyd's List) more recent estimates of between US$5 and 6 billion, some four times as much as initial estimates.

It has been reported in the media that excessive levels of cyanide have been detected in surface wastewater at the site of the blast. In some places levels of 27 times the acceptable limit of cyanide have been detected. Many containers have been opened following the explosion and there have been reports of an odour thought to be cyanide. If cyanide contamination has damaged the containerised cargo, this is likely to trigger difference-in-conditions and difference-in-limits policies, which broaden coverage by providing additional limits for specific perils. Logistics specialist mutual, TT Club, which insures four boxes out of five in the world's container fleet, will take the biggest hit.

HFW has published two detailed briefings on some of the potential consequences of the explosion. These briefings can be found here: http://www.hfw.com/Tianjin-Port-explosion-August-2015 and here: http://www.hfw.com/Tianjin-port-update-following-the-blast-on-12-August-2015.

For more information, please contact Alison Proctor, Senior Associate, on +44 (0)20 7264 8292, or alison.proctor@hfw.com, or your usual contact at HFW.

1 http://www.hfw.com/Insurance-Bulletin-10-September-2015#page_4

3. Court cases and arbitration

USA: 9/11: US Federal Appeal Court permits further property damage recoveries for World Trade Center lessees (Silverstein)

The lessees of several World Trade Centre buildings have persuaded the US Court of Appeals for the Second Circuit to remand two damages issues back to the New York Southern District Court.

The defendants, including American Airlines, United Airlines and various airport security firms are being pursued for allegedly negligently maintaining airport security checkpoints on the morning of 11 September 2001, thus enabling terrorists to hijack flights AA11 and UA175 and to fly the aeroplanes into the Twin Towers. The Appeal Court held that the diminution in the plaintiffs' leasehold interests had been improperly valued by the lower court, and that interest on the resulting damages had been under calculated: these issues are now referred back to Circuit Judge Hellerstein for reconsideration, thus (subject to any appeal) possibly paving the way for further recoveries from the defendants.

Large parts of the lower court's judgment were upheld, including its ruling that New York Civil Practice Rules required the plaintiffs to offset their property damage insurance recoveries against the recovery from the defendants so as to reduce the corresponding damages award (and in this respect New York differs from the many jurisdictions where damages in tort are not diminished by the injured's party's insurance indemnity.)

It was also affirmed that United Airlines had no liability in respect of flight AA11 and its destruction of 7 World Trade Centre. The two terrorists who had flown from Portland International Airport to Boston (Logan), before boarding flight AA11, had passed through the Portland security checkpoint where Delta Airlines (and not United Airlines) had responsibility for passenger screening. They had obtained boarding passes for flight AA11 at the American Airlines desk at Logan and passed through a further security screening checkpoint, operated by Globe Aviation Services under a contract with American Airlines. United Airlines therefore had no connection to flight AA11 or its hijackers.

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ANDREW BANDURKA, PARTNER

The case is *In re: September 11 Litigation, 2nd U.S. Circuit Court of Appeals, Nos. 13-3619, 13-3782.*

For more information, please contact Andrew Bandurka, Partner, on +44 (0)20 7264 8404, or andrew.bandurka@hfw.com, or your usual contact at HFW.

England and Wales: High Court decision on aggregation of claims against solicitors: *AIG Europe Limited v OC320301 LLP*

The High Court has supplied the first judicial determination on the claims aggregation clause (clause 2.5) of the solicitors' professional indemnity insurance Minimum Terms and Conditions, namely:

"The insurance may provide that, when considering what may be regarded as one claim for the purposes of the limits contemplated....

(a) all claims against any one or more insured arising from:

i. one act or omission;

ii. one series of related acts or omissions;

iii. the same act or omission in a series of related matters or transactions;

iv. similar acts or omissions in a series of related matters or transactions

and

(b) all claims against one or more insured arising from one matter or transaction will be regarded as one claim."

The case concerned claims made by over 200 investors who had lost money as a consequence of failed holiday property schemes abroad. They alleged negligence on the part of a now defunct firm of solicitors for having paid funds out of an escrow account without adequately checking that sufficient security was in place. The insurer argued that the claims should be regarded as one claim, with a single limit of indemnity payable, aggregated in accordance with 2.5 (a)(iv) above on the basis that they arose from *"similar acts or omissions in a series of related matters or transactions"*. This was opposed by the trustees representing the investors, who submitted that:

In construing what was meant by the term *"series of related matters or transactions"*, the court held that to consider that independent transactions might be related simply because they were of a similar kind would render the scope of the aggregation clause *"very wide with no clear limit"* and *"vague, uncertain and soft-edged"*.

LUCINDA RUTTER, ASSOCIATE

1. Since the land purchases failed for diverse reasons, the relevant acts or omissions were not "similar".
2. Each person's investment was separate and independent, rather than part of a *"series of related matters or transactions"*.

The judge held that the claims did arise out of similar acts or omissions, namely the failure to provide effective security which meant that the funds were improperly paid out. As regards what was meant by similar, the court held, *"the requisite degree of similarity must be a real or substantial degree of similarity as opposed to a fanciful or insubstantial degree of similarity"*.

However, the arguments in favour of aggregation failed because those acts or omissions were not in *"a series of related transactions"* for the purposes of the insurance since the terms of the transactions were not "conditional" or "dependent" on one another.

In construing what was meant by the term *"series of related matters or transactions"*, the court held that to consider that independent transactions might be related simply because they were of a similar kind would render the scope of the aggregation clause *"very wide with no clear limit"* and *"vague, uncertain and soft-edged"*.

Leave to appeal has been granted.

For more information, please contact Lucinda Rutter, Associate, on +44 (0)20 7264 8226, or lucinda.rutter@hfw.com, or your usual contact at HFW.

4. HFW publications and events

HFW welcomes Partner Christopher Cardona

We are delighted to welcome Partner Christopher Cardona to the firm's insurance and reinsurance practice based in London, effective 29 August.

Christopher specialises in dispute resolution in the insurance and reinsurance sector and international financial institutions and professional indemnity work. He has a recognised reputation for handling high-value complex litigation and arbitration especially in the Latin America region. He is bi-lingual in English and Spanish.

A press release can be read in full here: http://www.hfw.com/HFW-extends-insurance-capability-with-Partner-hire

HFW hosts inaugural meeting of the Mining Insurance Group (MIG) EMEA chapter

Last week HFW hosted the inaugural meeting of the MIG EMEA chapter. The meeting was attended by 50 representatives of insureds, brokers, service providers and insurers who are active in the mining sector.

HFW is a founder member of MIG which now boasts 70 members. MIG is a non-commercial entity organised by a committee of professionals who have extensive experience of mining risks and claims and is a cooperative forum enabling the ongoing improvements in the underwriting, risk management and claims processes, along with the exchange of views, experiences and dissemination of knowledge. MIG was set up on 12 February 2014 as a result of a perceived need to establish a forum for the discussion of key issues in the mining insurance sector. This followed several years of very significant property/business interruption claims which coincided

with the top of the commodities market cycle and led to significant complex claims.

MIG has already produced a claims protocol for use in large complex mining property/business interruption claims and is working on a specialist Mining Wording and Suite of Clauses for use with existing wordings or as a stand alone mining form.

The EMEA chapter mirrors other chapters that are active in Australia, Latin America and North America and mirrors the initiatives with which those chapters have been running. As a result of the meeting, MIG EMEA is setting up a technical committee and a wording committee to further advance knowledge and understanding of key issues within the mining community. It is modelled on the successful forums that are well established in the offshore energy, construction and power generation sectors.

For more information, please contact Paul Wordley, Partner, on paul.wordley@hfw.com, or +44 (0)20 7264 8438 or your usual contact at HFW.

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