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In this week's Insurance Bulletin:

Costas Frangeskides, Partner, costas.frangeskides@hfw.com
Andrew Bandurka, Partner, andrew.bandurka@hfw.com

SIMON BANNER
ASSOCIATE

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1. REGULATION AND LEGISLATION

US: Flood Insurance market set for overhaul

This year's devastating floods have highlighted the issue of flood underinsurance in the US Hurricanes Harvey and Irma wrought havoc upon a number of US states in August and September, bringing huge volumes of rain to Texas, Florida, Georgia and South Carolina.

In one day in August, over 40 inches of rain fell in Texas during Hurricane Harvey. Flood insurance in the US is largely taken out through the US National Flood Insurance Program (NFIP), which is a scheme created by the US government which aims to reduce the impact of flooding on private and public structures, by providing affordable insurance to property owners and by encouraging communities to adopt and enforce floodplain management regulations. Despite the NFIP, only 12% of US homeowners have flood insurance and it is excluded from most standard homeowners' policies. Therefore in 2016, US$10 billion of flood losses were uninsured. The figure for 2017 is likely to be far higher. Estimates for the total insured and uninsured residential flood losses from Hurricane Harvey alone range from US$25-US$37 billion and a very significant proportion of this is expected to be uninsured. In these circumstances, efforts are increasing to improve the affordability of flood cover to all citizens.

New legislation designed to overhaul the NFIP is currently progressing through the US legislative bodies. On 14 November, the *21st Century Flood Reform Act* (HR 2874) bill passed the House of Representatives by 327 votes to 189 and has now proceeded to the Senate for approval. The Senate have referred it to the Committee on Banking, Housing and Urban Affairs for review. The purpose of the Act is to renew the existing NFIP program for an additional five years beyond its current termination date of 8 December 2017. There are five sections to the bill:

- Policyholder Protection and Information;
- Increasing Consumer Choice through Private Market Development;
- Mapping Fairness;
- Protecting Consumers and Individuals through Improved Mitigation; and
- Program Integrity.

Private insurers already increasingly participate in the US flood market to some extent, offering almost all commercial flood insurance (compared to only 10% of the residential flood market), writing insurance in excess of the fixed NFIP limits and offering some specialised products such as cover for condominium units and force-placed floor cover. Some private insurers are already competing with NFIP cover on a direct basis. Hiscox Re and ILS have launched a flood product called FloodXtra, which provides carriers with rates, rules, forms, and an underwriting portal and pricing system. Yet US insurers are *"deeply frustrated"* at the current state of the US flood insurance market are ready to step in to *"make a difference"*, according to comments made to Insurance Day by Mike McGavick, chief executive of XL Catlin.

Insurers are now closely following the progress of the new bill through the US legislative channels because it potentially increases the opportunities for the private insurance market to participate in insuring against flood peril. One source at Aon Benfield described the opportunity for flood cover to lower risk areas as *"an untapped $8bn-plus market"*. The new Act would change the way that risks are priced with the aim of increasing market competition. The draft bill reforms the current fixed national averages to up-to-date replacement values that are property-specific. This means that the premiums of wealthy homeowners will no longer be subsidised by lower-income families, but those higher-income homeowners will face higher premiums. The bill also allows the US government greater discretion to sponsor a catastrophe bond covering flood risk. These changes may at least in part address the common criticism of the NFIP program that its rules are too antiquated and inflexible. Another common criticism of the NFIP is its substantial cost to taxpayers and it is hoped that transferring risks to the capital markets will help protect US taxpayers.

Flood insurance is not straightforward, requiring highly sophisticated modelling software to understand and price for the risks involved. Indeed, the NFIP has run up substantial deficits in recent years to subsidise low insurance premiums in flood-prone areas and the bill proposes to enable federal government to deny coverage to the riskiest and costliest properties. It appears likely that the private insurance market might take over the provision of insurance to such properties. The market is likely to face a steep learning curve on new products, but the general consensus in the industry is that the potential advantages far outweigh the challenges. The demand for flood insurance is only going to increase. One recent study warned New York to brace itself for severe floods as often as every five years.

Issues surrounding the NFIP and Hurricanes Harvey and Irma were discussed at a panel discussion hosted by HFW's London office in October. Gerard Kimmitt and Sheshe Evans from HFW's Houston Office spoke about the impact of the hurricanes on their communities and Andrew Bandurka considered reinsurance aspects.

A link to our briefing note on the event can be found at http://www.hfw.com/Hurricanes-Harvey-Irma-and-Maria-October-2017. The progress of the 21st Century Flood Reform Act bill can be followed at https://www.govtrack.us/congress/bills/115/hr2874.

For more information, please contact any of the lawyers below, or your usual HFW contact:

SIMON BANNER
Associate, London
T +44 (0)20 7264 8289
E simon.banner@hfw.com

GERARD KIMMITT
Partner, Houston
T +1 (713) 706 1943
E jerry.kimmitt@hfw.com

SHESHE EVANS
Of Counsel, Houston
T +1 (713) 980 8951
E sheshe.evans@hfw.com

ANDREW BANDURKA
Partner, London
T +44 (0)20 7264 8404
E andrew.bandurka@hfw.com

CHRISTOPHER CARDONA
Partner, London
T +44 (0)20 7264 8554
E christopher.cardona@hfw.com

2. COURT CASES AND ARBITRATION

England & Wales: A reminder of the importance of securing valid notice of arbitration[1]

The Commercial Court set aside an arbitration award becausethe Claimant's emailed arbitration notice to an individual employee at the Respondent did not constitute valid service under the Arbitration Act 1996.

The employee in question had been involved in the performance of the contract before the dispute had arisen but was described as a junior back office employee in the operations department. The Court found that he did not have authority (actual or ostensible) to accept service of an arbitration notice and the notice had not therefore been validly served. The arbitration never came to the attention of the anyone with such authority, and the Respondent did not participate in the arbitration.

The case serves as a reminder of the importance of considering how best to effect service, including identifying who within an organisation is authorised to accept service, in particular when attempting to serve by email in circumstances when this has not been agreed with the other party.

REBECCA HUGGINS
Professional Support Lawyer, London
T +44 (0)20 7264 8120
E rebecca.huggins@hfw.com

REBECCA HUGGINS
PROFESSIONAL SUPPORT LAWYER

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1 *Glencore Agriculture BV v Conqueror Holdings Limited* [2017] EWHC 2893 (Comm)

Spain: The Prestige: Spanish Court holds London Club liable despite its 2015 victory in the English Court of Appeal

The oil tanker "Prestige" sunk off the coast of northern Spain in 2002, after being denied safe harbour during a storm. It broke in half, resulting in widespread contamination of the French and Spanish coastline. This led to legal action against the vessel owner and its insurer, the London Club, in respect of clean up costs, brought by the French and Spanish governments. The total cost of the damage is estimated to be over €4.4bn.

The ensuing litigation has thrown up a myriad of complex cross-border legal issues. A recent decision by a Spanish court, however, has deepened concerns in the London market regarding inconsistent decisions as between the courts of different European jurisdictions. This is because the Spanish court's decision, holding the London Club liable to pay £760m, comes in the wake of a 2015 English Court of Appeal ruling that the claims against the London Club were subject to English law and London arbitration. In a matter of this gravity and political sensitivity the forum is of considerable importance to all the parties concerned.

The London Club has indicated its concern about the direction that the Spanish court has taken generally, but it remains to be seen where and how the conflict between the English courts and the Spanish courts will be resolved.

Further details can be found on the London Club's website: https://www.steamshipmutual.com/publications/Articles/theprestigecoadecision.htm

EDWARD RUSHTON
Senior Associate, London
T +44 (0)20 7264 8346
E edward.rushton@hfw.com

3. MARKET DEVELOPMENTS

UK: London Market Group sets out proposals for EU-UK trading relationship post-Brexit

On 29 November, the London Market Group published a paper containing detailed proposals for the trading relationship between the EU and the UK post-Brexit, with the aim of maintaining mutual market access. The proposals also include mutual recognition for prudential regimes and a framework for supervisory cooperation.

For further details on the proposals, please read the press release and the report at https://www.londonmarketgroup.co.uk/lmg-proposal-resolves-access-vs-control-brexit-dilemma

REBECCA HUGGINS
Professional Support Lawyer, London
T +44 (0)20 7264 8120
E rebecca.huggins@hfw.com

4. HFW PUBLICATIONS AND EVENTS

Cologne: HFW presentation on catastrophe losses at Technical Meeting of InTap (the International Alliance of Asbestos and Pollution Reinsurers)

Partner **Andrew Bandurka** has been invited to speak at the Technical Meeting of InTap (the International Alliance of Asbestos and Pollution Reinsurers) on 6th December, at the offices of Gen Re in Cologne, regarding recent catastrophe losses.

UK: HFW seminar - How well do you know the French legal system?

Partners **Olivier Purcell**, **Pierre-Olivier Leblanc** and **Pauline Arroyo** are hosting a seminar in the London office on Thursday 7 December on the French legal system. If you would like to attend please contact events@hfw.com.

HFW has over 500 lawyers working in offices across Australia, Asia, the Middle East, Europe and the Americas. For further information about our Insurance/reinsurance capabilities, please visit http://www.hfw.com/Insurance-Reinsurance-Sectors

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