REINSURANCE ROUND-UP

AUTUMN 2016

There have been a number of important legal developments in the last year, both out of and in the courts.

It has been a very active year for legislation**. The Insurance Act 2015** and the **Third Party (Rights against Insurers) Act 2010** both came into force. The UK government also published a **Consultation Paper** on reform of UK law to facilitate the issuing in London of insurance linked securities.

The Enterprise Act 2016 introduced into English law the possibility of a (re)insured claiming damages from its (re)insurer if a claim is not paid in a "*reasonable time*". Damages (not subject to policy limits) will be the actual loss caused by the delay. Issues arising may include reinsurers' liability for their reinsureds' own late payment of damages and the risk that following markets may seek to recover damages they have had to pay from the leader that handled the claim. Contract wordings can exclude liability, except in direct consumer insurance. It will be important to review wordings, claims processes and staff training.

Everyone will be aware of the referendum in which the UK voted to leave the EU. Much has been and will be written about the regulatory and other implications that this may have, but of course there is over 2 years before the UK actually leaves in which the new landscape will unfold. Meanwhile, we turn to our annual round-up of some of the cases over the last year that may affect reinsurers.

JURISDICTION

- **AXA Corporate Services v Weir Services Australia PTY [2016] EWHC 904 (Comm)**

Weir, an Australian subsidiary of a global group, was insured by AXA under a global group liability policy issued in England and a local policy issued in Australia. Coverage litigation was commenced by Weir in Australia in respect of both policies and by AXA in England in respect of the global policy. There was no English jurisdiction clause in the global policy. The English Court found England to be the appropriate forum, but refused an anti-suit injunction as, absent a jurisdiction clause, AXA had to show that pursuing proceedings before the foreign Court would be unconscionable, vexatious or oppressive. This could not be established so, despite the possibility of conflicting decisions, both actions could proceed. However, as coverage under the global policy depended on the position under the local policy, the English Court stayed the English proceedings pending the outcome of the Australian action.

- **Shipowners Mutual P&I v Containerships Denizcilik [2015] EWHC 258 (Comm)**

In Turkey, as in a number of jurisdictions, a claimant can sue a defendant's insurers direct (even if the defendant is not insolvent). A claimant did this in the Turkish courts, despite the policy concerned having a

London arbitration clause. The Turkish proceedings could also have circumvented other clauses in the policy, such as the choice of law and "pay to be paid" clauses. However, the English Court issued an anti-suit injunction restraining the Turkish action in favour of London arbitration on the basis that the direct rights against insurers must be subject to policy terms, including the arbitration clause.

FRAUDULENT CLAIMS

- **Hayward v Zurich Insurance [2016] UKSC 48**

Zurich did not wholly believe Hayward's evidence as to the extent of his injuries and settled his claim at a discount. Zurich later obtained evidence that Hayward had fully recovered at the time of settlement. On Zurich's application, the Supreme Court (reversing the Court of Appeal - see last year's round-up) set aside the settlement, finding the lies were fraudulent misrepresentations which, even though not wholly believed, had induced it.

- **Versloot Dredging BV & Another v HDI Gerling Industrie Versicherung & Ors [2016] UKSC 45**

Insurers have the right to repudiate a fraudulent claim and may terminate the policy from the date of the fraud ("the Fraudulent Claims Rule"). Since *"The Aegeon" [2002] EWCA 247* the use of a fraudulent device/collateral lie in support of a claim had, irrespective of its effect, fallen under the Fraudulent Claims Rule. The Supreme Court in Versloot held that if a claimant, with the intention of embellishing a claim, tells a lie that on the facts as they ultimately turn out to be would have made no difference to its recoverability, the claim is recoverable. Whether (re)insurers have a remedy therefore now depends on the true implications of the lie; it is no longer enough simply to establish that it was a lie. Care may be needed in striking a balance between time consuming investigations and the need to pay the claim in a "reasonable time" under the Enterprise Act 2016.

MEANING OF TERMS IN CONTRACTS

- **"Deliberate non-disclosure": Mutual Energy v Star Underwriting [2016] EWHC 590 (TCC)**

A policy which allowed avoidance only for *"deliberate non-disclosure"* did not allow avoidance in the event of a positive, but honest, decision not to disclose a document or fact. *"Deliberate"* non-disclosure must involve dishonesty.

- **"Arising from" and "in any way involving": ARC Capital Partners v Brit Syndicates Ltd & Ors [2016 EWHC 141 (Comm)**

The words *"arising from"* in a coverage clause equate to *"proximately caused by". T*he words *"in any way involving"* mean *"indirectly caused by"*, thus still requiring a causal connection, but a weaker one.

- **"In connection with" and "arising out of": Kanty-Mansiysk Recoveries Ltd v Forsters LLP [2016] EWHC 522 (Comm)**

A Settlement Agreement settled claims *"arising out of or in connection with the actions or invoice …"* A claim which did not *"arise out of"* the actions or the invoice, was held to arise *"in connection with"* it, as these words have a wider meaning.

- **"series of related matters or transactions": AIG Europe v. OC320301 LLP & Ors [2016] EWCA Civ 367)**

A professional indemnity policy provided for aggregation of claims arising from *"a series of related matters or transactions"*. The Court of Appeal found that to be *"related"* they must be inter-connected, but need not be dependant on each other. It held that an *"intrinsic relationship"* is required; an *"extrinsic relationship"* would not suffice.

- **"Variation only in writing": C&S Associates UK Ltd v Enterprise Ins [2015] EWHC 3757 (Comm); and Globe Motors Inc v TRW Lucas [2016] EWCA Civ 396**

In *C&S* an exchange of emails satisfied the provision of a Claims Handling Agreement that variations must be in writing signed by the parties. *Globe Motors* went further in establishing that parties to such a contract can still agree to vary it in any manner they choose. However, such a term heightens the burden of proving the parties' intent to vary the contract by other means.

ASBESTOS-INDUCED LUNG CANCER CLAIMS

- **Heneghan v Manchester Dry Dock [2016] EWCA Civ 86**

In English law a claimant must show on the balance of probabilities that, but for the defendant's negligence, the claimant would not have suffered injury. Mesothelioma claims caused by asbestos are an exception (known as "the Fairchild Exception") - proof that an employer had contributed to the risk of contracting the disease is sufficient to establish liability. Each employer defendant (hence its respective insurers) was liable only for its proportionate contribution to that risk, until the Compensation Act 2016 allowed mesothelioma victims to recover in full from any employer (whose insurers then have to seek contribution from any other known employers/insurers). In *Heneghan*, the Court extended the Fairchild Exception to victims of lung cancer caused by asbestos. However, as the Compensation Act is specific to mesothelioma only, a lung cancer claimant is (at least until further legislation) restricted to recovering from each defendant/insurer only its proportionate contribution to the risk.

CLAIMS HANDLING AGREEMENTS

- **C&S Associates UK v Enterprise Ins [2015] EWHC 3757**

Enterprise terminated C&S claims handling agreement on inadequate grounds. Enterprise then added further grounds of defective performance which would, if proved, amount to a repudiatory breach by C&S of the contract. The court found that Enterprise could rely on the new grounds if they in fact existed at the time of termination, provided that the position could not then have been put right. This proviso applies to

anticipatory breaches or to situations where steps could have been taken to avoid the party being in breach, either by giving it an opportunity to perform its obligation in time or by enabling it to perform in some other valid way. However, in this case it was found that the breaches had already occurred and could not be remedied.

ARBITRATION

Importance of acting expeditiously:

- **Essar Shipping v Bank of China [2015] EWHC 3266 (Comm)**

Essar's unsuccessful challenge to jurisdiction in the Chinese courts, where Bank of China had sued despite a London arbitration clause, took nine months. The English Commercial Court then refused an anti-suit injunction to restrain the Chinese proceedings, finding that Essar had not been obliged to challenge the jurisdiction in China first, that there is a strong public interest in acting promptly and that, in opposing an anti-suit injunction on the grounds of delay, the respondent does not always have to show that the delay caused it prejudice.

- **Ecobank Transnational v Tanoh [2015] EWCA Civ 1309**

Tanoh commenced litigation in Ivory Coast and Togo despite a London arbitration clause. Tanoh prevailed on both jurisdiction and the merits, which the local court heard at the same time, and sought to enforce its judgment. The English Court refused an anti-enforcement injunction as Ecobank should have applied for an anti-suit injunction at the outset.

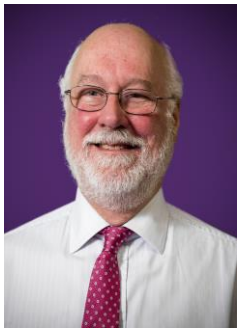
- **S v A&B [2016] EWHC 846 (Comm)**

The Arbitration Act 1996 Section 70 provides that applications to appeal an award must be made *"within 28 days of the date of the award"*. The award was dated 27 March. The arbitrator did not release it until all his fees were paid. The claimant paid promptly but the defendant did not pay until 29 May. The Court refused to exercise its discretion to extend the claimant's time for appeal. The claimant should have paid the arbitrator's fees in full within the time limit for appeal and sought recovery from the defendant.

Meaning of *"may arbitrate"*:

- **Anzen Ltd v Hermes One [2016] UKPC 1**

An arbitration clause provided that *"any party may submit the dispute to binding arbitration"*. Hermes One commenced court proceedings, which Anzen sought to stay in favour of arbitration. The Privy Council, on appeal from the BVI Courts, decided that the word *"may"* submit to arbitration gave either party the option to require arbitration. Hence, although Hermes One had validly gone to Court, it remained open to Anzen Ltd to refer the matter to arbitration and the court proceedings were stayed.



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