REINSURANCE ROUND-UP
September 2022

The UK's exit from the EU continues to impact legal developments in 2022. The Financial Services and Markets Bill, introduced to Parliament on 20 July 2022, aims to implement the outcome of the Future Regulatory Framework Review and to bolster the UK's position as a global financial centre.

The war in Ukraine and subsequent sanctions against Russia have had an impact on the insurance sector, including some significant aviation insurance claims (see below).

Traditionally, war-related risks have been widely excluded, but with an increased focus on cyber warfare, lines are increasingly blurred. We considered this in our May article, which can be found here. On 22 August 2022, Lloyd's issued a Market Bulletin *"To set out Lloyd's requirements for state backed cyber-attack exclusions in standalone cyber-attack policies"*.

Business Interruption caused by Covid-19 restrictions in 2020 and 2021 continues to give rise to litigation. Aggregation issues were heard by the Courts over the summer 2022. We consider this further below. Also, the Live Events Reinsurance Scheme was introduced to facilitate the insurance of live events, which had become problematic as a result of pandemic related cancellation risk.

The following is our annual review of some of the cases and legislation over the last year that may be of interest to insurers and reinsurers:

Damages for Late Payment of Claims

- ***Quadra Commodities S.A. v XL Insurance Company SE and Others [2022] EWHC 431 (Comm):*** The first reported case to consider section 13A of the Insurance Act 2015 (the "Act"), which introduced insurers' liability to pay damages in the event of their failure to indemnify the insured within a reasonable time. The insured, Quadra, brought a claim under a marine cargo policy, against its insurers, and asserted failure to indemnify with a reasonable time. The Court found in favour of the insured on the substance of the claim, but also found that the insurer's grounds for disputing the claim had not been unreasonable. In light of the nature and complexity of the claim, the Court found that a reasonable time properly to investigate it was not more than a year from the Notice of Loss. Therefore, the insurer was not in breach of the term implied by section 13A(1) of the Act, to pay within a reasonable time. For our full article on the judgment, please see this link.

  The Court also had to consider whether the insured had an insurable interest in the cargo, grain, which had been sold several times by its supplier, using falsified invoices. The Court held that there was an insurable interest as 1) a contract had been made and payments made under it; 2) the insured had an immediate right to possession as a matter of local law; and 3) although the goods had not been ascertained, the exception of "bulk" under the Sale of Goods Act 1979, S20A, applied so that property in the goods was capable of being transferred.

Ukraine War and Sanctions

- ***AerCap Ireland Limited v AIG Europe S.A and another [Claim no: CL-2022- 000294***]: Under Ukraine war related sanctions against Russia, aircraft lessors were required to end their loan agreements with Russian airlines. It is estimated that around 400 leased aircraft (worth an estimated US$10bn plus) remain stranded in Russia. One of the lessors, AerCap, has commenced proceedings against its insurers under Section 1 (Aircraft Equipment All Risks) and Section 5 (War & Allied Perils) of its policy, on the basis of wrongful deprivation of the aircraft. The claim is for US$3.5bn. Points of Claim have been served, but not yet a Defence. Reinsurers, and other lessors, will no doubt be following this closely.

- ***Sanctions Carve–Out:*** Transactions with certain "*publicly controlled or owned*" Russian entities were prohibited under EU sanctions from March 2022. As a result of concern around the impact of this prohibition on the administration of arbitrations involving sanctioned entities, a part of the latest package of EU sanctions against Russia expressly carved out transactions with sanctioned entities if they are "*… strictly necessary to ensure access to judicial, administrative or arbitral proceedings in a Member State, as well as for the recognition or enforcement of a judgment or an arbitration award rendered in a Member State …*". Transactions under this carve-out must be consistent with the objectives of the sanctions regime. The threshold of strict necessity for transactions to fall within the carve-out is not clear, so remains to be decided. It is also unclear whether the carve-out extends to transactions relating to potential disputes as well as active proceedings.

Aggregation – Professional Liability

- ***Spire Healthcare Ltd v Royal & Sun Alliance Insurance Ltd [2022] EWCA Civ 17*:** The claim arose out of the misconduct of a single breast surgeon, who on several occasions had performed

operations without the informed consent of the patients. In some cases he had misreported test results and in others he had performed mastectomies without this being clinically indicated. Insurers admitted liability but successfully argued that all claims were to be aggregated, as they were all attributable to *"one source or original cause"*. The Court of Appeal held that this need not be a proximate cause, but connotes a *"considerably looser causal connection"*. The Court further held that it was plain that "*any or all of (i) [the surgeon], (ii) his dishonesty, (iii) his practice of operating on patients without their informed consent, and (iv) his disregard for his patients' welfare can be identified either singly or collectively as a unifying factor in the history of the claims for which Spire were liable in negligence".* None of these causes could be described as incidental or remote causes that provided no meaningful explanation as to what happened.

Aggregation – Covid-19

- ***Stonegate Pub Company v MS Amlin, Greggs Plc v Zurich Insurance, and Various Eateries Trading Ltd v Allianz:*** These three cases were heard over the summer. They involved issues of aggregation of Covid-19 claims. The cases are not consolidated, but were heard by the same Judge. The judgments are awaited and it is to be expected that they will be handed down together.

- ***Star Entertainment Group Limited v Chubb Insurance Australia Ltd [2022] FCAFC 16:*** This Australian appeal case considered whether an aggregation clause, whereby claims arising from the same "catastrophe" could be aggregated, enabled aggregation of Covid-19 losses. The policy provided cover for losses arising from governmental actions to '*retard a conflagration or other catastrophe*'. The Court considered whether Covid-19 constituted a 'catastrophe'. While upon an ordinary understanding of the word this might encompass Covid-19 in the context of the policy this was not the case. The use of the word *"conflagration"* indicated that the policy was aimed at physical steps taken during catastrophic events caused by a physical phenomenon in order to restrain their progress. This did not include the spread of a virus. Similar issues were considered in *LCA Marrickville Pty Limited v Swiss Re International SE [2022] FCAFC 17.*

Business Interruption – Covid-19

- ***Corbin & King v Axa [2022] EWHC 409 (Comm):*** The Court considered whether the Non-Damage Denial of Access (NDDA) clause provided effective cover for losses resulting from restriction to access as a result of regulation imposed by the government in response to the Covid-19 pandemic. The Court found that Covid-19 was capable of being a danger within a 1-mile radius of the insured premises. Although the regulations were also imposed in response to the wider spread of Covid-19, this was a danger which was not excluded from the policy wording. On this basis, the NDDA clause was triggered. Arguments were also heard as to whether the £250,000 policy limit was intended to be in respect of each premises or to cover all premises covered under the policy. The Court found that the word *"premises"* indicated that individual venues were intended to be covered. The premises were in different locations and could be differently affected by an incident triggering cover. It was not therefore an aggregate limit.

Jurisdiction

- ***Simon v Taché [2022] EWHC 1674 (Comm):*** EU Regulation 1215/2012 (known as "Brussels Recast") deals with jurisdiction and enforcement of judgments. Article 67 of the EU-UK Withdrawal Agreement provides that the Brussels Recast continues to apply to proceedings instituted prior to the end of the transition period on 31 December 2020 "*and in respect of proceedings or actions that are related to such legal proceedings pursuant to Articles 29, 30 and 31 of [Brussels Recast]".* The Claimant submitted that for this provision to apply, such actions must have been related on the 31 December 2021, as this would otherwise enable a party to better its position by subsequently amending its case. The Court found this interpretation would have rendered the second part of Article 67 superfluous. The fact that proceedings only became related after the end of the Brexit transition period did not prevent application of Article 67, and hence the Brussels Recast jurisdictional rules.

- **Al Mana Lifestyle Trading LLC & Ors v United Fidelity Insurance Company PSC & Ors *[2022] EWHC 2049 (Comm):*** The Claimant, an enterprise of businesses operating in the Middle East and Gulf region, issued proceedings in England against insurers operating within Gulf Cooperation Council countries. The Defendants disputed jurisdiction. The relevant clause read: "*In accordance with the jurisdiction, local laws and practices of the country in which the policy is issued. Otherwise England and Wales UK Jurisdiction shall be applied."* On an overall construction, the Court accepted that the clause was odd, and found that a "*non-exclusive jurisdiction clause best harmonises the wording and the commercialities of the clause in the context of the wider factual matrix".* The Defendants further submitted that jurisdiction should be declined on grounds of forum non conveniens, but there were not strong reasons to conclude that this was the case.

Arbitration

- ***National Iranian Oil Co v Crescent Petroleum Co International Ltd [2022] EWHC 1645 (Comm):*** The Claimant applied for permission to appeal against an award pursuant to s.69 of the Arbitration Act 1996. This provides that, in very limited circumstances, a party to arbitral proceedings may appeal to the Court on a question of law, *unless otherwise agreed.* The Defendant argued that the parties had waived the right to appeal by incorporating the ICC Rules, which provide in Art.28.6, that: *"Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made."* The Court held that the parties did not waive their right to appeal a point of law merely by referring to the ICC Rules in their agreement; a waiver must be made explicitly.

- ***QBE Europe SA/NV and QBE (UK) Ltd v Generali Espaa de Seguros y Reaseguros [2022] EWHC 2062 (Comm):*** Generali brought a subrogated claim in the Spanish Courts against QBE, the liability insurer of a yacht that had caused damage to underwater cables in Spain. QBE applied to the English Commercial Court for an anti-suit injunction to restrain Generali from pursuing the Spanish action in breach of an arbitration clause in its liability policy with its insured (to whose position Generali was subrogated). Under Spanish legislation, Generali had a right to make a direct claim against QBE and argued that it could, therefore, bring a direct claim in Spain, notwithstanding the arbitration clause. The Court found that the right Generali had under Spanish law was "*directly to enforce the contractual promise of indemnity which the Policy creates*". Therefore, Generali's claim was contractual in nature and subject to the arbitration clause. The circumstance that Spanish legislation denies the insurer some defences when a claim is brought directly against it by the Claimant (which would have been available to the insurer had the claim been brought against it by the policyholder), did not change the overall contractual nature of the claim. The Court therefore granted the anti-suit injunction.

- ***ZF Automotive US, Inc., v. Luxshare, Ltd., Nos. 21-401, 21-518 (Jun. 13, 2022):*** In two consolidated cases the US Supreme Court considered 28 U. S. C. §1782(a), a provision which allows district Courts to order production of evidence *"for use in a proceeding in a foreign or international tribunal."* Both cases arose from parties involved in in foreign arbitration proceedings seeking discovery in the US, a process that had been followed before. The Supreme Court found that *"only a governmental or intergovernmental adjudicative body constitutes a "foreign or international tribunal" under §1782."* As such, the provision is not applicable to private commercial arbitral panels, or *ad hoc* arbitration panels.

Costs Implications of Refusing Mediation

- ***Richards v Speechly Bircham LLP [2022] EWHC 1512 (Comm):*** The judgment considers whether costs should be awarded on the indemnity basis (as opposed to the standard basis) in circumstances where the paying party has refused to mediate. On the facts, the Court was not prepared to make a costs order on the indemnity basis solely on account of the Defendant having failed to engage in mediation, holding that "t*o make such an order would involve elevating that factor over others which weigh in [the Defendant's] favour."* In particular, the Defendant had resisted a significant part of the claim and achieved a significantly better result than any Part 36 offers made by the Claimant. Therefore, it had not been unreasonable to defend the claim.

Vicarious liability

- ***Chell v Tarmac and Lime Ltd [2022] EWCA Civ 7 (12 January 2022):*** The Claimant was employed by a sub-contractor, working on a site operated by the Defendant. One of the Defendant's employees played a practical joke on the Claimant, which caused him injury. On the basis that there was not a sufficiently close connection between the act which caused the Claimant's injury and the work which the employee was authorised by his employer to do, the Court found that it was not *'fair, just and reasonable'* to impose vicarious liability on the Defendant. The direct claim also failed on the basis that the Defendant's duty to implement preventative and protective measures under the Management of Health and Safety at Work Regulations 1999 did not impose a duty to prevent this injury: the Court held "i*t would be unreasonable and unrealistic to expect an employer to have in place a system to ensure that their employees did not engage in horseplay".*

- ***Ali v Luton Borough Council [2022] EWHC 132 (QB):*** This judgment adds further guidance to principles on vicarious liability set out in the 2020 Supreme Court judgment in *Morrison v Various Claimants* (see our article on the case here) The Claimant brought proceedings against the Council after an employee (who was romantically involved with the Claimant's ex-husband) employed as a Contact Assessment Worker for the social services, shared with the Claimant's ex-husband, records, including a complaint made to Bedford Police. The police had shared the highly sensitive records with social services due to safeguarding concerns in respect of the couple's children. A claim based on vicarious liability was not made out as the employee was in no way engaged in furthering the business of her employer. The Court did not follow

the approach laid out in various sexual abuse cases (vicarious liability has been found in circumstances where there is a close connection between the perpetrators' duties or functions, and the relationship with the Claimant), as the specific employee did not have any element of responsibility or trust over the Claimant.

Professional indemnity

- ***Philipp v Barclays Bank UK plc [2022]***: This judgment considered the duty upon bankers not to action a payment instruction if put on notice that the instruction might be fraudulent (known as the Quincecare duty). In this case, the Claimant had been conned by someone fraudulently claiming to be from the FCA; who had persuaded the Claimant to transfer a substantial sum of money to an overseas bank account. Previously, Quincecare duties had only been applied in cases where a transaction was authorised by a fraudulent agent, as opposed to the account holder personally actioning the payment. The Court of Appeal, however, held that there is no logical reason why Quincecare could not apply simply because payment instructions were issued directly by the account holder. The first instance Court had erred in dismissing the claim summarily, as it would turn on the evidence at trial whether the claim should succeed. For full details, see our article on the case here.

- ***Percy v Merriman White [2022] EWCA Civ 493:*** The Claimant made a claim against his former solicitors (D1) and Counsel (D2). When the Claimant reached a settlement with D1, he discontinued against D2. D1, however, maintained their contribution claim against the barrister, which went to trial. The first instance Judge held that the wording of the Civil Liability (Contribution) Act 1978 s.1(4) which reads: *"without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established"* meant that when a bona fide settlement agreement has been reached between the Claimant and D1, D1 did not need to prove liability against D2. The Court of Appeal clarified that the appropriate construction of s.14 is that, if D1 has made a settlement payment, there is no question as to whether D1 was in fact liable. However, D1 would still need to prove that D2 was also liable to the Claimant, for a contribution claim to succeed.

Regulation

- ***Solvency II - PS6/22:*** On 7 July 2022, the Prudential Regulation Authority published a Policy Statement in response to its Consultation Paper 17/21 - Solvency II: definition of an insurance holding company. This provides updates to terminology and references to reflect the UK's withdrawal from the EU.

- **FCA Developments:** Following a consultation process commenced in 2021, the FCA introduced new Consumer Duty Rules on 27 July 2022. We considered the anticipated consequences of the new rules in our February article which can be seen here. The FCA further published its Policy Statement on *"Improvements to the Appointed Representative Regime"* (PS22/11) in August 2022. This discusses feedback received in response to its recent consultation, and concludes that changes to the regime are required. The FCA will implement changes, including in respect of notification to the FCA ahead of appointment of an Appointed Representative (AR), information on the AR's business which must be provided to the FCA etc. The new rules are set to come into force on 8 December 2022.

If you have any questions regarding any of the issues referred to in this Round-Up, please get in touch with us.

You can also review a range of articles on insurance and reinsurance topics in the Publications section of our website.

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