REINSURANCE ROUND-UP
September 2024

The previous year has seen a number of issues arise in relation to war and political risk wordings. Notably, the Russian/Ukrainian war has given rise to a large amount of litigation in London in relation to aircraft leased by Western companies to Russian operators. This has led to two significant judgments on the effect of military conflicts on Exclusive Jurisdiction Clauses, which we discuss below.

Four years after the events, the disruption caused by the Covid-19 pandemic continues to play out in the Courts of England and Wales; at this point, predominantly at appellate level.

In addition to the above, the year has also seen a number of decisions decided under the Insurance Act 2015. Whilst the Act remains relatively young, it has taken longer than expected for the impact to follow through into jurisprudence.

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:

War and political risk

- ***University of Exeter v Allianz 2023 EWCA Civ 1484:*** The Court of Appeal considered a war exclusion in the context of damage caused during the controlled detonation of a WW2 bomb that had been left unexploded for nearly 80 years. The question, which the Court affirmed, was whether causation could be established between the act of war which caused the bomb to be placed at the relevant site, and the damage to buildings on the bombs removal 8 decades later. It rejected the Appellant's argument that the damage had not been *inevitable* in the ordinary cause of events. For a full analysis, see our article at this link.

- ***Delos Shipholding SA v Allianz Global Corporate and Specialty SE [2024] EWHC 719 (Comm):*** The Claim was brought under a marine war risks insurance policy. Having been detained for more than six months, the Claimants averred that the insured vessel had been a constructive total lost and claimed against the insurer. The insurer declined payment, arguing that the Claimants knew or ought to have known that the vessel had anchored in Indonesian territorial waters at the risk of detention, wherefore the loss was not fortuitous. Whilst detention was a permissible and possible consequence of the Claimant's choice of anchorage and even foreseeable had the Claimant investigated Indonesian law, it was not an inevitable or ordinary consequence in the circumstances. Therefore, the Court considered the loss fortuitous. The Claimant further claimed pursuant to s.13A of the Insurance Act 2015 for late payment by the insurer, arguing that had the claim been settled sooner they would have purchased a replacement vessel and mitigated their loss of profit. Irrespective of whether it had been reasonable for the insurer to defend the claim, they failed to prove the alleged loss of profit on the facts.

- ***Hamilton Corporate Member Limited v Afghan Global Insurance Limited & Ors [2024] EWHC 1426 (Comm):*** Applying for summary judgment, reinsurers claimed for declarations of non-liability under a political violence reinsurance policy. The reinsurance was in respect of an Afghan warehouse used by the US military to distribute foodstuffs. Following the US withdrawal from Afghanistan in 2021, the warehouse was seized by the Taliban. The reinsurance contract contained an exclusion for "*Loss or damage directly or indirectly caused by seizure, confiscation, […], nor loss or damage to the Buildings and/or Contents by law, order, decree or regulation of any governing authority, nor for loss or damage arising from acts of contraband or illegal transportation or illegal trade".* The Court held it is settled by authority that the natural and ordinary meaning of the word *"seizure"* is that it is not limited to acts of a legitimate government or a sovereign power. The Court rejected the reinsured's argument that the wording *"by law, order, decree, or regulation of any governing authority"* must be taken to qualify all of the wording which precedes it. The Court also rejected the reinsured's '*noscitur a sociis'* argument that the word takes its meaning from where it appears in the clause, namely next to words like "*confiscation and nationalisation"* which suggests the term is concerned with acts of a governing authority. The principle of *noscitur a sociis* is only relevant when the wording being interpreted is ambiguous.

Insurance – Fraud Exclusion and Aggregation

- ***Axis Specialty Europe S.E v Discovery Land Company LLC & Ors [2024] EWCA Civ 7:*** The Court of Appeal considered issues of (1) an insurance exclusion under the SRA Minimum Terms and Conditions for dishonesty or fraudulent acts or omissions condoned by the insured, and (2) issues of aggregation. The insured was a partnership of two. Partner A was instructed to act for Discovery Land Company LLC ("DLC") in connection with a property transaction. In the course of his instructions, he conducted a number of acts of fraud. At A's request, DLC transferred some $14million to the firm's client account, intended for the purchase of the property. Instead, however, A misappropriated $9.3million. Further, he persuaded DLC to agree to interpose a separate company (owned and controlled by himself) as a front for the property purchase. In addition to this, he

mortgaged the property against a loan with Dragonfly Finance Sarl in the sum of c. £5million ("the Dragonfly Loan"). To cover for shortfalls, prior to completion of transactions, A asked DLC to transfer to his client account an additional $9.3million purportedly pending completing compliance/AML checks. He undertook to refund this money within two working days of completion of the checks ("the Surplus Funds"). When DLC became aware of the misconduct, the firm had become insolvent. DLC therefore turned to its professional indemnity insurers for recovery. Partner B claimed to have been unaware of A's misconduct, but insurers sought to rely on the SRA Minimum Terms and Conditions under which *"the insurance may exclude liability of the insurer to indemnify any particular person to the extent that any civil liability or related defence costs arise from dishonesty or a fraudulent act or omission committed or condoned by that person …".* Insurers argued that B had had "blind eye" knowledge of A's fraud, and had, therefore, condoned it by failing to intervene. Whilst the trial was unpersuaded by B's evidence at trial, and found that a more astute Partner would likely have become aware of A's misconduct, it did not on balance consider it proven that B had knowledge of the fraud at the relevant time, therefore he could not be said to have condoned it. The Court of Appeal found this was a rational conclusion which the Trial Judge was entitled to reach.

On the issue of aggregation, the Court of Appeal found that this is a fact sensitive test, but ultimately endorsed the Trial Judge's findings on aggregation: whilst there were similarities between the two claims, the transactions were not part of a sequence of interconnected transactions where the misappropriation of funds led to the Dragonfly Loan. Therefore, the Appeal was dismissed.

Non-Assignment Clause

- ***Dassault Aviation SA v Mitsui Sumitomo Insurance Co Ltd [2024] EWCA Civ 5:*** The Court of Appeal considered the interpretation of a non-assignment clause in the sales contract in respect of the sale of aircraft from Dassault Aviation SA ("DA") to the Japanese company Mitsui Bussan Aerospace Co Ltd ("MBA") under which the contract was not to "*be assigned or transferred in whole or in part by any Party to any third party, for any reason whatsoever, without the prior written consent of the other Party".* The aircraft was intended for redistribution to the Japanese coastguard, and MBA had taken out insurance with the Mitsui Sumitomo Insurance Co Ltd ("MSI") in respect of the risk of any liability for late delivery. When the delivery from DA was delayed, MBA claimed under the policy which MSI settled. By operation of Japanese Insurance Law, MBA's claim then transferred to MSI. The Court of Appeal found that the transfer of the rights under the contract had occurred by operation of Japanese law, not as a result of MBA assigning its rights. The non-assignment clause did not prevent this.

Warranty & Indemnity Insurance

- ***Project Angel Bidco Ltd (in Administration) v Axis Managing Agency Ltd [2023] EWHC 2649 (Comm):*** This Commercial Court judgment adds to a limited number of case law in the area of Warranty and Indemnity Insurance Policy Products. The full facts were confidential to the parties, but essentially involved allegations against the vendor of criminal conduct contravening anti-bribery legislation. The preliminary issue in dispute between the parties was more trivial, namely whether the exclusion cited below contained a misprint. This excluded "*any liability or actual or alleged non-compliance by any member of the Target Group or any agent, affiliate or other third party in respect of Anti-Bribery and Anti-Corruption Laws"* (our emphasis). The Claimant said that the word *"or"* was meant to have read *"for".* This Court found firmly in favour of the insurer, rejecting the Claimant's submission that the clause was inherently absurd or obvious nonsense in the absence of the Claimant's suggested solution being adopted.

Charterers Liability – "Pay as may be Paid"

- ***MS Amlin Marine NV on behalf of MS Amlin Syndicate AML/2001 v King Trader Limited & Ors. [2024] EWHC 1813 (Comm):*** Insurers sought to secure a determination that a *"pay as may be paid"* clause ("the Clause") in a policy of charterers' liability insurance ("the Policy") has the effect that no indemnity is payable under the Policy to the extent that the policyholder has not discharged their legal liability for which indemnity was sought in the context of a claim brought under the Third Parties (Rights against Insurers) Act 2010. In circumstances where the wrongdoer was unable to pay the claim due to insolvency, King Trader Limited ("KTL") argued that the Clause is repugnant to or inconsistent with that main purpose of the policy and inconsistent with the clauses creating the obligation to indemnify. Placed below the indemnity clause in the contractual hierarchy, KTL argued, the subsidiary clause should not be incorporated into the contract, alternatively should be read down to ensure that it does not nullify the indemnity clause. The Court, however, found the wording of the Clause "*wholly unambiguous".* Therefore, there was no legitimate process of contractual construction under which it could be set aside.

Third Party (Rights Against Insurers) Act 2010

- ***Scotland Gas Networks Plc v QBE UK Ltd (formerly QBE Insurance (Europe) Ltd) [2024] CSOH 15:*** The Scottish Court of Session (Outer House) considered the impact of the Third Parties (Rights against Insurers) Act 2010 s.6(2)(d) and s.6A ("the Act") in circumstances where liability is established by way of a Decree by Default (Scottish equivalent to Default Judgment). The Court rejected the insurers' argument that some consideration of

merits was required in order to *"establish"* liability for the purpose of the Act.

Insurance Act 2015 ("IA")

- ***Scotbeef Ltd v D&S Storage Ltd (In Liquidation) [2024] EWHC 341 (TCC):*** The parties had (via a third party) entered into a contract under which D&S was to freeze and store meet for Scotbeef. In 2019, D&S delivered contaminated meat to Scotbeef, who consequentially claimed damages. D&S sought to rely on the incorporation of the Food Storage and Distribution Federation's terms (FSDF terms) which it thought had been incorporated. As it turned out, they had not. When D&S became insolvent, its insurer was added as a Defendant. The insurer sought to rely on a purported condition precedent headed Duty of Assured, under which the Assured was to (i) make a full declaration of all current trading conditions; (ii) continuously trade under the conditions declared and approved by Underwriters; and (iii) take all reasonable and practicable steps to ensure that their trading conditions were incorporated in all contracts. Whilst D&S had misrepresented its trading terms, the misrepresentation was not deliberate or reckless. In order to avoid the contract, therefore, the insurer would have to prove that it would not have entered the contract. Insurers argued that the requirement under sub-section (i) was not a representation, rather that it simply *provides an obligation to make a declaration.* This, the Court rejected, finding that this was plainly a representation. Therefore, the Court held, the IA s.9(2) prevented the representation from being converted into a warranty.

- ***Mok Petro Energy FZC v Argo (NO. 604) Limited & ors. [2024] EWHC 1935 (Comm):*** The claim concerned a defective oil cargo which had been produced by way of mixing gasoline and methanol. On the evidence, the Court found the oil to have become defective due to the proportions used in the mixing process. As such, no physical damage had been caused to the cargo, which had only ever existed in the defective state. The Court obiter considered sections 10 and 11 of the IA. These stipulate that if a loss occurs, and the term has not been complied with, the insurer may not rely on the non-compliance to exclude, limit or discharge its liability under the contract for the loss if the non-compliance did not increase the risk of the loss that actually occurred. The contract contained an express warranty under which the insured was to arrange "*inspection/certification of the cleanliness of the vessel tanks".* Conducting the inspection was the critical feature of the warranty and the failure to properly record and certify that this had been done might not strictly increase the risk of the oil being contaminated. Whilst the Court conceded there may have been a question mark as to whether the intention was for the insured to lose all cover, simply because an otherwise satisfactory inspection had not been certified, the Judge held that the certification had independent value for evidential purposes. In any event, the parties expressly provided for the warranty to cover both inspection and certification, hence they could not have intended the warranty to be satisfied by the compliance with only one condition or the other. Therefore, the natural reading of the warranty is that it stipulates for both. The Claimant, argued that IA s.11(4) prevented the insurers from relying on the warranty as failure to produce the certificate did not increase the risk of the loss that actually occurred. The Court rejected this argument, finding that for the purposes of applying s.11, it is necessary to look to the relevant term as a whole - it is concerned with the compliance with the entire term.

Covid-19 Litigation - Aggregation

- ***Various Eateries Trading Limited v Allianz Insurance Plc [2024] EWCA Civ 10:*** Amongst the notable Covid-19 BI cases, in Various Eateries, the Court of Appeal was asked to consider the issue of aggregation. Allianz argued that the full scale interruption of business was caused by one single event, namely the initial human infection in Wuhan. The Appeal was dismissed. The Trial Judge had been right to conclude that the initial human infection(s) did amount to a single occurrence. The Trial Judge was right that the number of intermediate steps from the first human infection(s) were too remote to be considered the proximate cause of the business interruption losses suffered in the UK.

- ***Unipolsai Assicurazioni SPA v Covéa Insurance PLC and Markel International Insurance Company Limited v General Reinsurance AG [2024] EWHC 253 (Comm):*** This appeal brought under s.69 of the Arbitration Act 1996, considered whether on the proper construction of the relevant reinsurance contracts, Covid-19 BI claims constituted *one catastrophe.* Loss occurrence was defined as "*losses arising out of and directly occasioned by one catastrophe".* It was common grounds that there is not a common market-wide understanding or definition of what constitutes a catastrophe. Although the Judge was not able to provide a definition capable of demarcating all distinct scenarios that might be constitute a catastrophe. He noted that the answer will in likelihood turn on the commercial and contractual context in which the claim arises. However, in this specific context, he found *(i) catastrophe must be something capable of directly causing individual losses: (ii) it must be something which can fairly be regarded as a coherent, particular and readily identifiable happening; (iii) it ought to be possible, in a broad sense, to identify when the catastrophe comes into existence and ceases to be; and (iv) it will involve an adverse change on a significant scale from that which preceded it.* On this basis, the Judge endorsed the Arbitration Tribunal's finding that "*the outbreak of Covid-19 in the United Kingdom, reflected in an exponential increase in the number of infections during a period up to and including 18 March 2020, was a 'catastrophe' within the*

meaning of the condition". Hence, the losses aggregated under the policy.

Covid-19 Litigation – Causation

- ***London International Exhibition Centre plc v. Allianz Insurance plc & others [2024] EWCA Civ 1026:*** The Court of Appeal considered the wording of a Business Interruption insurance policy following the Covid-19. The wording differed from language previously tested, in that it provided cover for disease occurring "at the premises" of the policyholder – as opposed to within a specific radius as has previously considered by the Supreme Court in *FCA v Arch [2021] UKSC 1*. Finding the difference in the wording immaterial, the Court of Appeal found that: "*those differences do not materially affect the nature of the causal link which must be proved, save that in the case of 'at the premises' clauses the occurrence of disease must be at the premises themselves and not within a specified distance from them."* Finding that the parties had contemplated cover for "diseases that spread rapidly and widely and therefore contemplated that the response of the government would be generalised in nature", the Court of Appeal found that occurrence of the disease at the premise was a proximate cause, and found in favour of the policyholder.

Jurisdiction

- ***Zephyrus Capital Aviation Partners 1d Limited v Fidelis Underwriting Limited [2024] EWHC 734 (Comm) and Aercap Ireland Capital Designated Activity Company v PJSC Insurance Company Universalna [2024] EWHC 1365 (Comm):*** In March and June this year, the Commercial Court considered exclusive jurisdiction clauses in two similar catalogues of claims, namely the claims for damages for non-return of Western owned aircraft leased to Russian or Ukrainian operators. Both cases concerned applications for stays in respect of proceedings brought in London, but subject to Exclusive Jurisdiction Clauses ("ECJ") in the respective jurisdictions of the operators (Russia or Ukraine). Mr Justice Henshaw gave judgment in both cases, but reached very different conclusions. In respect of the contracts subject to Russian jurisdiction, the Court declined the Defendants' application for a stay of proceedings, and allowed the matter to progress in England. Mr Justice Henshaw emphasised the concern that a trial in Russia would not be fair. On the other hand, he did not consider there to be strong reasons not to give effect to the ECJ in Ukraine. Whilst the war may cause physical disruptions, Mr Justice Henshaw was satisfied that appropriate measures are available to accommodate a trial in Ukraine. By way of example, witnesses would be able to give evidence remotely via video-link.

- ***Tyson International Company Limited v Partner Reinsurance Europe SE [2023] EWHC 3243 (Comm):*** The parties had entered into two separate reinsurance contracts. The first, a Market Reform Contract (MRC) was entered on 30 June 2021 which contained an English jurisdiction clause; the second, a Market Uniform Reinsurance Agreement (MURA) was entered on 8 July 2021, which provided New York arbitration. When reinsurers avoided a claim, Tyson International Company Limited (TICL) commenced proceedings in England which were challenged by the reinsurer relying on the MURA. The Judge was satisfied that the English jurisdiction clause in the MRC was replaced by the Arbitration Agreement in the MURA. The MURA was "*expressly contemplated by the parties through their brokers at the time of execution of the former contract. The MURA was proffered for consideration and agreement, and separately signed and agreed on both sides. It describes itself and defines itself as an "Agreement". It contains all the operative terms to be a contract of reinsurance, albeit one governed by New York law".* The Judge did not consider it relevant that reinsurance contracts in the London and New York markets are habitually entered in the form of a slip policy and subsequent certificate which he said "*cannot dictate the contractual effect of the MRC and MURA as used by the parties in this specific instance."*

- ***Graham v Fidelidade – Companhia De Seguros S.A. [2024] EWHC 2010 (KB):*** This case adds to the growing number of authorities on the issue of establishing jurisdiction in England and Wales in respect of personal injuries that have occurred out of the jurisdiction. This has become of significant interest after Brexit, as Claimants can no longer rely on Brussels I Recast (1215/2012) for permission to serve out of jurisdiction in EU member countries. Following a road traffic accident in Portugal, the Claimant had suffered life changing injuries. The case conveniently lists the issues which the Court will consider under the question of forum convenience. On the facts, the Claimant was permitted to serve out of jurisdiction, and the position generally appears to be that the English Courts will tend to accommodate claims for personal injury claims that occurred overseas.

Construction

- ***Bellini (N/E) Ltd (t/a Bellini) v. Brit UW Ltd* [2024] EWCA Civ 435:** The Court of Appeal considered the limit of correction of mistakes by construction in relation to the proper interpretation of a clause in a licensed premises insurance policy. The Claimant appealed against a High Court decision that it had no cover in the absence of *"damage"*, which was defined in the policy as *"physical loss, physical damage and physical destruction"*. The Claimant submitted that the policy should be read as providing cover as this was the *"only way to make sense of the policy"*. Further, it was submitted that this was consistent with the interpretation of the trends clause in the FCA Test Case. The Court considered and applied the principles set out in *East v Pantiles (Plant Hire) Ltd* [1982] 2 EGLR 111. These provide that, firstly, there must be a clear mistake on the face of the policy. Secondly, it must

be clear what correction ought to be made to fix the mistake. The Court found that the Claimant had tried to push the boundaries of the principles. The Court found no clear mistake in the clause in question. Accordingly, the Appeal was dismissed.

- ***Technip Saudi Arabia Limited v The Mediterranean & Gulf Insurance and Reinsurance Co. [2024] EWCA Civ 481:*** In this case, the Court of Appeal considered the construction of an exclusion under a composite offshore construction insurance policy ("the Policy"). Technip Saudi Arabia Limited ("TSA") was contracted by an unincorporated joint venture in Saudia Arabia ("KJO"). Both were Principal Assureds under the Policy. In the course of its work, TSA collided a vessel into a platform owned by KJO. The parties settled, and TSA sought an indemnity from insurers, who declined cover relying on the exclusion for "*damage to or loss of use of any property for which the Principal Assured: owns that is not otherwise provided for in this policy…".* Throughout the policy, the terms, *"Principal Insured"* and *"Principal Assured"* had been used interchangeably, but a definition was only provided in respect of the term Principal Insured (which KJO would fall under). Sir Geoffrey Vos giving leading judgment conceded that the exclusion wording was unclear and could be understood to exclude cover for (1) in respect of damage to property to any of the insureds falling under the Principal Insured definition, or (2) *"Principal Assured"* referring only to the one of the insureds which was making the claim under the policy. However, the former reading required less *"violence"* to the ordinary meaning of the wording and the Judge had been right to prefer it. Sir Geoffrey Vos also rejected TSA's submission that the policy being a composite policy expressly *"deemed to be a separate insurance in respect of each Principal Insured"* meant the policy was a separate insurance for TSA (from that aspect of it covering KJO (and others)).

Professional Liability

- ***Miller v Irwin Mitchell LLP [2024] EWCA Civ 53:*** The Court of Appeal considered the duty owed by a solicitor to a prospective client prior to the retainer being agreed, when the solicitor offers general advice via a telephone "legal help line". This duty might for instance extend to advising on issues of limitation. However, it did not include a duty to advise on steps to take to ensure the potential Defendant notified its insurers. For a full analysis see our article at this link.

- ***Norman Hay plc v Marsh Ltd [2024] EWHC 1039 (Comm):*** In the context of a summary judgment application, the High Court considered the correct approach when determining a claim against insurance brokers in circumstances where it is alleged that, due to the broker's negligence, the claimant does not have the benefit of liability insurance cover to respond to a claim. It was held that the effect of the broker's alleged negligence was to deprive the client of the opportunity of bringing an insurance claim at all. The case therefore involved the consideration of the counterfactual with a hypothetical policy of insurance. In such circumstances, there is scope for a broader inquiry as to what, had the broker not been negligent, would have happened in the event that the claimant had presented a claim to its putative insurer. That necessarily requires there to be an assessment of the chance that the claim under the putative policy would have been met. For a full analysis see our article at this link.

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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