International Reinsurance Group

CLYDE&CO

International newsletter

February 2015

Contents

Europe update: UK

2014 Highlights, 2015 Horizons

In this article we give a brief overview of the major cases and themes of 2014, together with a forecast for 2015.

Although a direct insurance case, the decision in *Ted Baker Plc v Axa Insurance UK Plc*[i], which considered a Claims Cooperation Clause, will be of interest to reinsurers too. Eder J approved textbook commentary to the effect that "full particulars" in such a clause means "the best particulars the assured can reasonably give" and further particulars can be supplied later on.

The judge also touched on the difficult issue of whether a (re)insured must comply with claims conditions if a (re)insurer wrongly rejects a claim (amounting to a repudiation of the policy). The clause in this case referred to information which was "reasonably required" but the insurer. It was held that the insurer could not reasonably require documents which would be costly and timely to produce if liability had been wrongly denied. By focusing attention on the policy wording, the judge therefore implied that a (re)insured is still bound to comply with a claims provision even though a claim has been rejected.

There were a number of cases concerning fraudulent claims in 2014. Most noteworthy amongst them was the Court of Appeal decision in *Versloot Dredging v HDI Gerling*[ii], in which it was confirmed (despite some doubt expressed at first instance) that the correct test is whether the fraudulent devices are related to a claim and intended to promote it and that, if believed, they will yield a significant improvement in the insured's prospects.

There were two interesting reinsurance cases in 2014:

In *Federal Mogul Asbestos Personal Injury Trust v Federal-Mogul Ltd*[iii], a claims control clause contained an express obligation that the reinsurer should act in a businesslike manner and in good faith. Eder J described this as a "very loose constraint", excluding only courses of conduct which no similar reinsurer could take. Thus it did not matter if the reinsurers' decisions end up increasing costs in the long run and that "best practice" had not been followed.

In *Tokio Marine Europe Insurance v Novae Corporate*[iv], a retrocession contract contained an unqualified "follow the settlements" clause and the issue was whether the reinsured had taken all proper and businesslike steps in reaching a settlement. Field J found that there was no prospect of success in arguing that the reinsured had not, even though it had not fully investigated the issue of aggregation under the local policy. That was because the settlement in question had been "undoubtedly a good settlement".

i [2014] EWHC 3548 (Comm)
ii [2014] EWCA Civ 1349
iii [2014] EWHC 2002 (Comm)
iv [2014] EWHC 2105 (Comm)

Looking forward to likely developments in 2015, the most important one is the passing of the new Insurance Act before Parliament is dissolved. Now that Royal Assent has been obtained, the new Act will come into force 18 months from now and will apply to every insurance policy and reinsurance contract written in England and Wales, Scotland and Northern Ireland. Certain clauses have now been omitted: most notably, damages for late payment. The key remaining changes are as follows:

1) Basis of the contract clauses will be prohibited (and it will not be possible to contract out of this change) and all warranties will become "suspensive conditions", capable of remedy (after which an insured can come back "on cover"). Broadly, insurers will no longer have a defence where the breach of a policy term designed to reduce the risk of loss of a particular kind would not have prevented the particular loss in question
2) The remedies for non-disclosure and utmost good faith will reflect those now in place for consumer insurance. The knowledge of the insured will be that of senior management or those responsible for the company's insurance
3) Insurers will have an option to terminate a policy with effect from the date of a fraudulent act, without return of premium (thus allowing insurers to refuse to pay any genuine claims thereafter)

The Insurance Act will represent only a default regime for business insurers. If (re)insurers intend to contract out and include a "disadvantageous term", sufficient steps must be taken to draw that to the (re)insured's attention before the contract is entered into. Furthermore, an alternative remedy or position will have to be specified, otherwise there will be a void (and the courts are likely to imply back into the contract the position set out in the Act).

One further feature of the Insurance Act is that it is intended to speed up the implementation of the Third Parties (Rights against Insurers) Act which received royal assent back in March 2010 but has never been brought into force. It is believed that the aim is to bring this 2010 Act into force sometime in 2015.

David Abbott
Partner, London
E: david.abbott@clydeco.com

Michelle Radom
Professional Support Lawyer, London
E: michelle.radom@clydeco.com

Europe update: UK

Scalability the new buzzword for 2015

We are well into the new year now and it is likely that scalability will be one of the buzzwords of 2015 for the reinsurance market. In an increasingly competitive market, participants are looking to access more and better quality business at lower cost – having scale (whether achieved by way of merger and acquisition or some other means) is one way of achieving this.

This is likely to drive a structural change in the market – if so, a key reason for this change will have been the availability of so-called alternative capital.

Alternative capital

Hedge funds, pension funds, sovereign wealth funds, private equity firms and other institutional investors have invested in the insurance market for a while, particularly the reinsurance market. This investment of alternative capital has typically been channelled into the market through the use of cat bonds, sidecars, collateralised reinsurance products and other insurance linked securities (ILS).

In some cases, the investors have invested directly into a (re)insurer. In fact, there has been an emergence over the past few years, and a spike in the recent past, of hedge fund backed reinsurers. These reinsurers tend to target low-volatility underwriting business (as opposed to the higher-volatility business usually targeted by ILS products).

Such reinsurers will typically be sponsored by an asset manager who will manage the investments and have access to a free "float" (i.e. the premium income) which can then be invested in accordance with the asset manager's investment strategy (subject, of course, to any relevant restrictions on, for instance, what assets can be invested in for regulatory capital purposes). These asset managers will also have access to more permanent capital as reinsurer will be a regulated entity with certain capital requirements.

In each case, the institutional investors are attracted by the ability to invest in risks uncorrelated to the financial markets, allowing them to diversify their investment portfolios, establish a more tax efficient platform to manage assets, and potentially earn better returns than if they were to invest in more traditional asset classes.

The amount of capital coming into the market from these sources is pretty staggering. With the level of returns some investors have seen and the continued low interest rate environment, this level of investment will likely increase yet further. Goldman Sachs reported around 18 months ago that assets invested in reinsurance by non-industry investors have grown by over 800% in the past few years to around USD 45 billion. That is impressive growth by any standards. Since then, Guy Carpenter has estimated that the market has grown by a third to USD 60 billion.

Implications

A great deal of debate has revolved around the impact of this alternative capital on, in particular, the traditional reinsurance market.

The influx of this capital has undoubtedly resulted in a growing convergence of the insurance and capital markets. The alternative capital providers are making available products which effectively package insurance risk and allow it to be sold to capital market investors. In some cases these providers are adopting a familiar reinsurer model (albeit with a more aggressive investment strategy). There is also a sense amongst some reinsurers that "if you can't beat 'em, join 'em", resulting in new investment structures being developed to attract and manage third-party capital. This has generated a new income stream for them, as well as possible access to risks which they did not have the capacity to underwrite on their own and the ability to potentially cherry-pick the best risks for themselves.

Back to page 1

This new capital is putting downwards pressure on pricing with the consequence of taking the edge off the insurance cycle and smoothing some of the peaks of the pricing cycles. It would be premature to announce the death of the insurance cycle but it may be that, in certain business lines at least, the cycle may become less pronounced over time.

Some see alternative capital as a threat to the traditional reinsurance market. Indeed, some in the market have commented that there could be a mismatch between the risk being underwritten and the capital backing it as the focus of the new providers is on returns and they may not necessarily be ensuring that risk is properly assessed, priced and supervised.

It remains to be seen whether these concerns will come home to roost. However, as well as declining prices, the 1/1 renewal season has seen terms and conditions loosen, including in property casualty treaties, in order to mask softening rates by disguising the true cost of the risk. Unmodelled lines have been "thrown in" to cat programmes in return for better pricing, but which may result in a disproportionately greater risk. Given the cautious approach to risk, alternative capital providers may take an unfavourable view, particularly if the risk subscribed to is rather greater than they had understood it to be.

Final thought

However, there is an opportunity to be grasped here. This capital could be used to support new products covering emerging risks as well as to support the growth of emerging economies. The traditional market needs to make the case for this. In the meantime, what the traditional players do have is deep pools of underwriting expertise and this does set them apart from the alternative capital providers. In whatever form the alternative capital providers structure their investments, they will require underwriting expertise and this can be and is being provided in a number of cases by the traditional players.

Martin Mankabady
Partner, London
E: martin.mankabady@clydeco.com

Julie Tripp
Senior Associate, London
E: julie.tripp@clydeco.com

Bermuda update

Beware catastrophe reinsurers bearing gifts…

The possible downside of the collateralised reinsurance boom

Institutional investment in reinsurance risk has become part of the mainstream. Insurance-linked securities first appeared nearly 20 years ago, but by the end of 2012 the market for catastrophe bonds, industry loss warranties and collateralised reinsurance had soared to USD 28 billion.

Collateralised reinsurance, in particular, has become the structure du jour for (re)insurers seeking comprehensive non-life protection. An investor and insurer agree a contract with a defined limit, premium and loss trigger, as with traditional reinsurance. Collateral equal to the limit is posted to a special-purpose reinsurer to hold in trust either until maturity (when it is returned to investors) or on the occurrence of a pre-defined event (when it is paid out to the reinsured).

The wave of money into the sector and attractive structures (involving reduced counterparty risk, highly tailored coverage, and costs reduction) are clearly good news for the market, which has barely been able to contain its excitement. Whereas 'traditional' reinsurance was once the only option for (re)insurers seeking catastrophe coverage, they now have various options.

However, alongside the possibility that the rush toward collateralised reinsurance is artificially softening the market, should the market be wary? Some reinsureds think so and have scrutinised the differently constructed and negotiated transactions that comprise a collateralised reinsurance placement. Particular focus has fallen on how reinsurance wordings (often subject to English law) interact with Trust Agreements (generally subject to New York law), with the added complication that many reinsurers operate subject to Bermudian law and regulatory oversight.

Experience shows that the reinsurance contracts adopt a 'slip plus standard wording' configuration and are generally sound. Similarly, the trust agreements (while not so standardised) tend to be valid and enforceable under New York law. However, potential issues arise from the interaction between reinsurance contracts and trust agreements, which should be reviewed carefully. In outline:

- The use of standard 'loss settlements binding' wording means that reinsurers are obliged to follow settlements made by reinsureds, subject to losses falling both within the cover of the underlying policies and within the cover created by the reinsurances
- There is, however, a tension between trust agreements permitting withdrawals without reinsurers' consent and loss settlements wording which requires "reasonable evidence of the amount paid". That tension is lessened where the trust agreements leave reinsureds free to withdraw assets from trust at any time without notice. The tension is heightened where the contracts require a reinsurer payment default before the reinsured is entitled to withdraw, thereby affording scope to delay payments and rendering the trust a fall-back rather than a fund against which a reinsured can, in the first instance, withdraw funds relating to its losses
- Similarly, provisions defining reinsurers' payment obligations vary between reinsurance contracts. We have seen three main variables:
  - Contracts where it is clear that reinsureds can draw down from the trust at any time without notice
  - Contracts which are less explicit regarding the basis for withdrawal but where the trust agreement leaves reinsureds free to withdraw assets from the trust at any time without notice
  - Contracts which are silent in relation to withdrawals but where the trust agreement provides that withdrawals have to be made on notice

Back to page 1

It is important from a reinsured's perspective that any reinsurance contract and related trust agreement permit it to withdraw assets from the trust at any time without notice (thereby reducing counterparty risk). In any event, parties should beware the different structures.

Parties should also note the provision made in reinsurance contracts for when reinsurers are subject to solvency issues or otherwise unable to meet their obligations:

- Many wordings limit the means by which reinsureds can enforce the contracts simply to the recovery of funds remaining in trust. Where monies are not paid under reinsurance contracts, the threat of petitioning for receivership/winding-up is often an effective means of forcing payment. Some collateralised reinsurance wordings remove that option and reinsureds may wish to reject any wording that limits enforcement methods
- By contrast, the benefit of the same provisions (and trust accounts operating as segregated accounts under the relevant Bermudian legislation) is that, in the event of reinsurer insolvency, trust assets are ring-fenced from claims by company creditors or creditors of other segregated accounts
- Many reinsurance contracts also include Special Cancellation Clauses which protect reinsureds, allowing them to cancel a reinsurer's participation if its ability to meet its obligations is in doubt and/or if there is a material failure to comply with the reinsurance contract terms. The obvious limitation is that, upon cancellation, the reinsurer's liability will be limited only to losses occurring pre-cancellation

Contracting parties to collateralised reinsurance should beware the differing structures and the potential pitfalls. Failing to review and understand a collateralised transaction (particularly the interplay between the contracts) may lead to unintended consequences; the level of review becomes more important as collateralised reinsurance becomes ever more prevalent.

Ian Plumley
Partner, London
E: ian.plumley@clydeco.com

Middle East update: Dubai

Cross-border challenges for Middle East reinsurance coverage and claims issues – Part 2

In Part 2 of this 3-part series we look at further challenges which arise from typical reinsurance arrangements in the Middle East involving cross-border transactions, with the cedant based locally, and the reinsurer located in one of the traditional reinsurance centres of London, Munich, Zurich or Paris.

Our focus in this article is on the problems in relation to the operation of a claims control clause in a Kuwaiti energy reinsurance risk.

Compliance with Claims Control Clauses: the 'reinsurance pizza'

In March 2013, the English Commercial Court handed down a judgment in *Beazley and others v Al Ahleia and others*. It involved the reinsurance of a risk in Kuwait, which is typical of the type of re/insurance arrangements that are put in place on a daily basis in the region.

The original policy involved a Construction All Risks policy issued to Kuwait Oil Company ("KOC") to cover risks associated with the construction of 15 new crude oil storage tanks as part of an onshore crude export facility.

The original risk was underwritten by a consortium of Kuwaiti insurers, led by Al Ahleia. Facultative reinsurance was placed with the London market on a subscription basis, led by AIG (20%) and Beazley. AON were brokers on the direct and reinsurance policies. The reinsurance policy contained a Claims Control Clause (giving reinsurers the right to control all settlements) which was a condition precedent to liability.

Partial settlement

Notice of alleged damage was given under the re/insurance policies in March 2007. Cover for the claim was initially declined on grounds of a design defect. Reinsurers were at first united in this stance until May 2009 when the KOC account came up for tender, and AON contacted AIG to see whether AIG would be prepared to take a fresh look at the claim. Unbeknown to the rest of the market, AON and AIG arranged for a further engineering report to be undertaken.

In December 2009, AON and AIG agreed with KPC that AIG would settle its 20% share of the loss based on a reduced 100% loss figure of USD 19 million. It was only after these developments that Beazley and the following reinsurers were informed of the deal.

Beazley and the following market notified Al Ahleia that they were declining cover because of a breach of the Claims Control Clause. They then initiated proceedings in London seeking a declaration that they were not liable.

Decision of the English Commercial Court

In finding that the Claims Control Clause had not been breached, Mr Justice Eder referred to the following factors as the basis for his decision:

1) The settlement that was reached did not constitute a 'settlement', because "in accordance with business common sense … [Al Ahleia] should, if they so wish, be entitled to settle, ..at least if such settlement… is not in respect … any loss … that might give rise to a claim under the Reinsurance Contract …". (AIG's 20% share was also not such a settlement)
2) The settlement was made "without prejudice" in circumstances where "the effect of a without prejudice settlement as a matter of Kuwaiti law would be far from certain"
3) There was no admission of liability by Al Ahleia; instead, it was "at best simply an offer to pay money"

Back to page 1

The decision has not been appealed and is thus final. The English Court's decision, in our view, represents a significant setback to following market reinsurers seeking to rely on the cedant's responsibility to involve its reinsurer in the negotiation of a loss. The judge's ruling also effectively confirms Al Ahleia's arguments that the settlement was akin to a slice of a pizza, with the rest of 'the pizza' continuing to remain open for individual negotiation.

Implications

The decision in the case leaves following market reinsurers in a very difficult position where one of their number breaks ranks and seeks to cut a deal.

The problems that arose in this case could conceivably have been avoided by:

1) Avoiding having the broker involved in placing both the direct insurance policy and the reinsurance placement, which can give rise to a significant conflict of interest
2) Prroperly delineating the role of the local insurer/s in risks which are heavily reinsured by the international reinsurance markets
3) Those advising the local insurer and the reinsurance market being able to show that a settlement of any part of the loss by the local insurer would be regarded under local law as an admission of liability, and that the risk could never be 'sliced up' under local law
4) The duties and responsibilities required of the leaders (AIG and Beazley) on the reinsurance risk being further clarified

As we have indicated above, reinsurance placements are effected in this manner in the Middle East region on a regular basis. The participants in these placements need to recognise the nature of the contractual arrangements that are put in place and to take steps to safeguard themselves effectively against the types of problems that arose here.

To read part 1 of this series please visit our website here

Wayne Jones
Partner, Dubai
E: wayne.jones@clydeco.com

North America update: New York

Recent developments for reinsurance collateral requirements in the United States

As a general matter, non-US reinsurers must post 100% collateral for reinsurance assumed from a US ceding company in order for the ceding company to receive credit for reinsurance on its statutory financial statements. In recent years, various US states have amended their credit for reinsurance requirements to allow "certified" non-US reinsurers to post less than 100% collateral while still allowing US ceding companies to receive full credit for reinsurance ceded to such reinsurers. However, the revised reinsurance collateral requirements have not been adopted across all the states, and states that have adopted such changes have not done so uniformly. As a result, the US federal government may adopt a more active role on this issue.

State developments

Insurance is regulated almost exclusively at the state level in the United States, and each state has its own laws and regulations including regarding credit for reinsurance. States' insurance laws and regulations are usually similar on most issues as they tend to be based on or are similar to the "model" laws and regulations of the US National Association of Insurance Commissioners (NAIC), which is the association of insurance regulators from the US states and territories. However, NAIC model laws and regulations do not apply in a state unless adopted, and a state may make changes to the NAIC models when adopting them.

With respect to reduced collateral requirements for certain non-US reinsurers, the NAIC considered the issue for many years before adopting revisions in 2011 to the NAIC Credit for Reinsurance Model Law and Regulation. Under the revised models, non-US reinsurers from "qualified jurisdictions" that are rated by recognized rating agencies and meet other criteria can apply to become "certified reinsurers" and be eligible to post less than 100% collateral for reinsurance assumed from US ceding companies (75%, 50%, 20%, 10% or 0% collateral depending on the reinsurer's financial strength ratings). The revised NAIC models have already been adopted by 23 states (representing more than 60% of US direct insurance premiums), and five more states are expected to adopt them in 2015.

The NAIC has approved Bermuda, France, Germany, Ireland, Japan, Switzerland and United Kingdom as qualified jurisdictions as of January 1, 2015, such that reinsurers from those jurisdictions can apply to become certified. Separately, the NAIC (through its working groups) is continuing to make progress on "passporting" to allow non-US reinsurers that become certified in one US state to obtain certification from other states under a faster and less complex process than applying for certification in each state.

Federal developments

Although insurance is regulated almost exclusively by the US states, the US federal government plays a role in certain aspects of insurance regulation. Specifically with respect to reinsurance, the Nonadmitted and Reinsurance Reform Act (NRRA) within the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) prohibits a US state from denying credit for reinsurance to a US ceding company if credit is allowed by that company's state of domicile (provided it is an NAIC-accredited state). Prior to NRRA, a ceding company licensed in various states had to comply with credit for reinsurance requirements for all those states even if the requirements were different or more onerous than those of its state of domicile. Moreover, under NRRA, only a US reinsurer's state of domicile may regulate the reinsurer's financial solvency, provided that the state of domicile is NAIC-accredited or has solvency requirements similar to those required for NAIC accreditation.

Back to page 1

The Dodd-Frank Act also created the Federal Insurance Office (FIO) of the US Department of the Treasury. Instead of being an insurance regulator, FIO's role is to advise the US federal government on insurance regulation matters, monitor the US insurance sector, and represent the United States in international insurance matters. As part of its mandate, on December 31, 2014, FIO issued its report regarding the global reinsurance market and that market's relationship with the domestic US insurance industry (Report).

The Report includes a detailed description of the global reinsurance market and players, the role and importance of reinsurance for the US insurance industry, regulation of reinsurance in the United States, and current regulatory proposals and ongoing market changes for reinsurance. The United States remains the world's largest single country insurance market, and the Report notes that a majority of unaffiliated reinsurance purchased by US insurers is obtained from non-US reinsurers.

The Report describes changes to reinsurance collateral requirements based on the revised NAIC Credit for Reinsurance Model Law and Regulation. However, the Report stresses that changes have not been adopted yet by all the states or have not been adopted or implemented uniformly in those states that have made the changes. The Report identifies this as a significant issue for the US insurance industry. Non-US reinsurers have long argued that reinsurance collateral requirements imposed by state regulators restrict the ability to manage risk globally, restrict reinsurance capacity in the United States generally, and thus increase insurance costs for US consumers.

At this time, the US Treasury, together with the US Trade Representative, is considering whether to conclude "covered agreements" with one or more foreign governments, authorities and/or regulatory entities providing for uniform reinsurance collateral standards when US insurers reinsure risks with non-US reinsurers regulated by those foreign signatories to such agreements. Such a move is generally opposed by the NAIC and most state insurance regulators in favor of ongoing state reinsurance collateral changes. However, it is an approach that is favored by many non-US reinsurers and non-US regulators. If the United States enters into such covered agreements, state laws that are inconsistent with the covered agreements would likely be superseded. This would be a further "federalization" of insurance regulation in the United States.

Vikram Sidhu
Partner, New York
E: vikram.sidhu@clydeco.us

Africa update: Johannesburg

South African reinsurance: proposed future regulatory framework

The Financial Services Board (**"FSB"**), the authority that regulates the activities of insurers and reinsurers in South Africa, is looking at proposals to alter the regulatory framework under which reinsurance business will be carried out in South Africa in future. This may have an impact on foreign reinsurers and Lloyd's underwriters that do write or intend writing reinsurance business in South Africa.

Currently, in order to carry out reinsurance business, a person or entity must be registered to do so. The Short-term Insurance Act, 1998[1] (**"STIA"**), prohibits any person from carrying our short-term insurance business (i.e. indemnity insurance) unless that person is licensed to do so. The FSB cannot issue a license unless the applicant is a public company incorporated in South Africa. There are also ongoing requirements for a registered insurer or reinsurer, in order to maintain its license, to ensure that its business is in a financially sound condition and that it possesses sufficient assets; can provide for its liabilities so as to ensure that these can be met of any given day. The only exception to the above requirements is Lloyds's underwriters who do not have to obtain a license. This is part of a dispensation granted to Lloyds in the STIA.[2] Thus the ability to carry out reinsurance business in South Africa is an onerous process with excessive reporting requirements.

The current framework is about to change probably for the better

The actual impact of the FSB's intended proposals remains uncertain at this stage. The FSB, in keeping with its usual practice of engaging with the industry, is expected to publish a *"position paper"*, for comment, imminently that will set out what it intends doing and how it will go about implementing the proposals. The relooking at the reinsurance framework is a part of the FSB's gradual implementation of the "twin peaks" model and the proposals are part of the Solvency Assessment and Management Project that is seeking to introduce a risk-based solvency regime for insurers based on Solvency II. In November 2014, the FSB published a "high level" newsletter setting out briefly the "initial policy proposals".[3]

The FSB has stated[4] that the following principles informed its initial policy proposals:

- An appropriate and effective regulatory and supervisory framework that affords the necessary protection for insurers and policyholders
- Minimising/avoiding regulatory arbitrage
- Alignment with international standards and meeting of international trade obligations
- Level playing fields and a competitive reinsurance market
- Maintenance and enhancement of current skill levels
- Ongoing development of the local reinsurance industry as a hub for reinsurance business into Africa

1 The Long-term Insurance Act, 1998, deals with life insurance.

2 Although Lloyd's underwriters are required to maintain sufficient assets in trust.

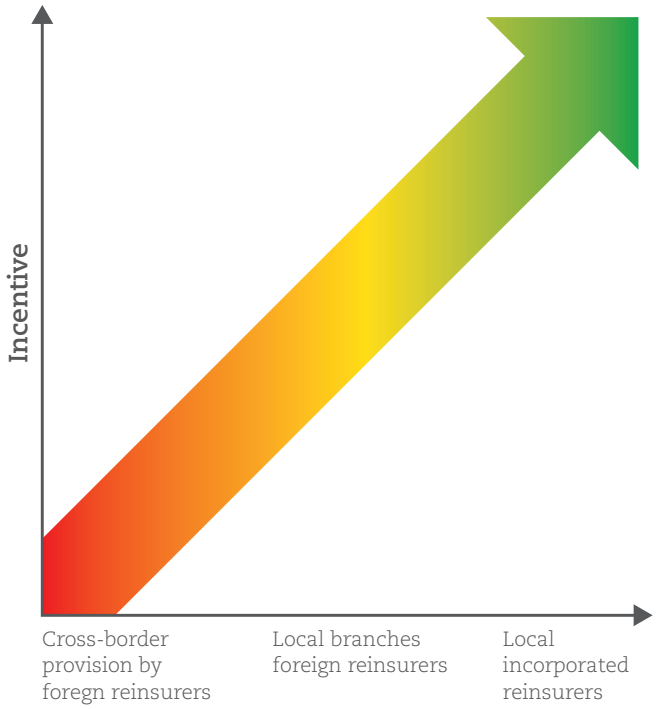
3 FSB Newsletter, 7 November 2014

4 Insurance Regulatory Seminar, Johannesburg, 14 November 2014

Back to page 1

The high-level proposals are:

- Allowing foreign reinsurers to operate in South Africa through a branch:
  - It is hoped that this will increase the supply of reinsurance in the South African market
- The treatment of reinsurers in the solvency calculation for direct insurers:
  - Designed so that foreign reinsurers and cross border business do not receive an undue advantage compared to local insurers
  - By either downgrading the cedant's credit rating or notionally capping its reinsurance assets



Insurance Regulatory Seminar, Johannesburg, 14 November 2014

- Some of the limitations that will be placed on reinsurance business:
  - No composite licenses[5] will be allowed
  - The amount of outwards retrocession that locally incorporated reinsurers and direct insurers may place with foreign insurers on a cross-border basis will be limited – to prevent fronting by foreign insurers
  - Locally incorporated direct insurers will not be permitted to accept inwards retrocession business from other local (re)insurers without formal regulatory approval (temporary & reviewable at discretion of regulator) – to prevent market spirals that may threaten financial stability
  - Acceptance of intra-group and related party reinsurance will not be permitted without formal regulatory approval – to prevent contagion risk
  - Reinsurers may not write direct insurance
- Different options are being explored in relation to Lloyds:
  - Continue to operate under the existing dispensation
  - Continue to operate under the existing dispensation, but with additional governance and reporting requirements
  - Require Lloyds to establish either a local branch or a locally incorporated subsidiary

The above proposals, whilst still in its early stages of development, will no doubt when implemented, entirely change the face of reinsurance in South Africa. Whether this will have the desired effect remains to be seen. It also remains to be seen what content is given to the above initial policy proposals when the "position paper" is published and also how this will change after the intended consultation process, particularly with local reinsurers. Despite the solvency incentives being mooted for placing reinsurance business locally, seemingly the protection of local reinsurers by the FSB appears to be coming to an end. This may open up South Africa as a hub for reinsurance business, particularly foor reinsurance business into the rest of Africa.

Rashad Ismail
Partner, Johannesburg
E: rashad.ismail@clydeco.com

5 Reinsurers registered under both the STIA and LTIA.

Back to page 1

Asia Pacific update: Singapore

The Singapore International Commercial Court: Singapore a new hub for international dispute resolution

On 5 January 2015, the Singapore International Commercial Court ("SICC") was officially opened at the commencement of Singapore's legal year. The establishment of the SICC compliments Singapore's pre-existing ADR institutions (the Singapore International Mediation Centre (opened in November 2014) and the Singapore International Arbitration Centre). The country now provides a full suite of dispute resolution options for commercial parties, not just from Asia, but worldwide.

Singapore has amended its legislation, including its constitution, to provide the SICC with jurisdiction and standing for foreign lawyers to appear before the Court in certain circumstances. The legislative framework provides that the SICC is a division of the Singapore High Court and that it will hear cases which are both international and commercial in nature. Proceedings in the SICC are governed by the pre-existing Rules of Court ("**the Rules**"), as modified, and procedural guidelines are contained within the SICC Practice Direction ("**PD**"). The amended Rules and new PD are intended to follow international best practice for commercial dispute resolution.

The SICC has jurisdiction to hear a claim if: (i) it is of an international and commercial nature; (ii) the parties have submitted to the SICC's jurisdiction pursuant to a written jurisdiction agreement (although third or subsequent parties may be joined to an action once the SICC has assumed jurisdiction); and (iii) the parties do not seek any relief in the form of, or connected with, a prerogative order (i.e. an order against a public body seeking the enforcement of specific rights). The SICC may also hear cases which are transferred from the High Court at its discretion.

Subject to certain conditions, the Rules and PD now permit foreign counsel (i.e. those not called to the Singaporean Bar) to appear before the SICC and Court of Appeal on appeals from the SICC. They also allow the SICC to determine questions of foreign law based on submissions made by appropriately qualified foreign counsel, rather than being proved by way of expert evidence in the traditional manner.

The Chief Justice of Singapore, Senior Judge, Judges of Appeal of the Singapore Court of Appeal, Justices of the Singapore High Court and eleven international jurists have all been appointed as the first Judges of the SICC.

The international jurists appointed are eminent in particular areas of law and possess substantial expertise in their home jurisdictions. The first set of international jurists appointed as International Judges of the SICC includes Mr. Dyson Heydon AC QC (former Judge of the High Court of Australia), Sir Bernard Rix (former Lord Justice of Appeal of England & Wales) and Sir Vivian Ramsey (former High Court Judge of England & Wales).

Observations

Singapore's business friendly legal system and "trusted hub" status have long attracted counterparties operating in South East Asia and beyond to Singapore for the resolution of their disputes. They now have greater choice in determining how they do so.

The jurisdiction and proceedings of the SICC are clearly distinguishable from those in arbitration. SICC proceedings will generally be heard in open court and all SICC matters will be heard by either one or three Judges, although unlike in arbitration proceedings, the parties will not be able to nominate the SICC Judge(s) to hear their matter nor propose whether the Judge is a Judge of the Singapore High Court or an International Judge. This is distinct from arbitration where parties can agree to nominate their preferred arbitrator.

Back to page 1

A judgment of the SICC will be a judgment of the Singapore High Court. Singapore is a signatory to few reciprocal agreements with other nations in respect of the enforceability of judgments in each other's jurisdiction. The question of enforceability will likely be a significant factor in determining the popularity of the SICC. It is therefore no surprise that Singapore is considering reciprocal agreements with other ASEAN nations and becoming a signatory to international conventions which would allow for greater enforceability overseas. However, for the time being, the enforceability overseas of Singapore judgments is more limited than arbitral awards issued in Singapore which are enforceable in 149 countries worldwide pursuant to the New York Convention.

Ian Roberts
Partner, Singapore
E: ian.roberts@clydeco.com

Nicholas Sykes
Senior Associate, Singapore
E: nicholas.sykes@clydeco.com

Asia Pacific update: Australia

Insurance cover for terrorism-related losses

The Australian Government has declared the siege at the Lindt Café in Martin Place, Sydney, a "terrorist incident" for the purpose of the Terrorism Insurance Act 2003 (Cth). This has the effect of nullifying terrorism exclusions in eligible property, public liability and business interruption insurance contracts.

In December 2014, an armed man held hostages captive at the Lindt Café in Martin Place, Sydney, for 16 hours. The siege, in the centre of the CBD, forced the evacuation or lockdown of a number of neighbouring buildings, some remaining closed for days after the event. This incident has brought the operation of the *Terrorism Insurance Act 2003* (Cth) (**the Act**) into focus as business owners' deal with losses caused by the siege.

The Terrorism Insurance Act 2003 (Cth)

The Act came into existence in direct response to the withdrawal of insurance, particularly for commercial property, following the terrorist attacks in the United States in September 2001. There was a concern that the dearth of insurance would impact investment in the sector and the Government stepped in to assist businesses and reinforce the market.

Under the terms of the Act, the Australian Government's Australian Reinsurance Pool Corporation (**ARPC**) was established to operate a reinsurance scheme for terrorism-related losses. Subscribing insurers would, for a premium, be compensated for payments made due to the non-effect of the terrorism exclusion in eligible insurance contracts, subject to an applicable retention.

The general effect of the Act is to nullify terrorism exclusions in eligible insurance contracts, being those which indemnify an insured for:

- Loss of or damage to property
- Business interruption and consequential loss arising from loss of or damage to property or inability to use property
- Liability that arises out of the insured being the owner or occupier of eligible property

As the Act is intended to provide relief under commercial property insurance and related business interruption or public liability policies, the *Terrorism Insurance Regulations 2003* (Cth) expressly excludes an extensive list of other types of insurance contracts from the scheme set up by the Act. These include home and contents insurance, product liability insurance, professional liability, life and car insurance.

"Declared terrorist incident"

The scheme relies upon a declaration by the Treasurer, after consultation with the Attorney-General, that a terrorist act in Australia is a *"declared terrorist incident"*. The Act does not define *"terrorist act"*, but refers to section 100.1 of the *Criminal Code Act 1995* (Cth), which broadly defines it as an action or threat of action where:

- The action causes serious physical harm to a person or serious damage to property, endangers a person's life, creates a serious risk to the health or safety of the public or seriously interferes with, disrupts or destroys an electronic system
- The action is done or the threat is made with the intention of advancing a political, religious or ideological cause
- The action is done or the threat is made with the intention of:
  - Coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country
  - Intimidating the public or a section of the public

Back to page 1

Protests or industrial action are generally excluded, as is an act of war. Further, a threat of terrorist action can only form the basis of a declared terrorist incident if that threat resulted in economic loss to a person and the threatened action would take place in Australia.

On 15 January 2015, the Australian Treasurer made a declaration that the siege at the Lindt Café is a declared terrorist incident for the purposes of the Act, which means that terrorism exclusions in eligible insurance contracts will be inoperable. While the ARPC has advised that the siege was estimated to have cost business owners approximately AUD 600,000, losses are not expected to exceed insurer retentions and the ARPC does not intend to make any payments in relation to this incident.

The future of the ARPC

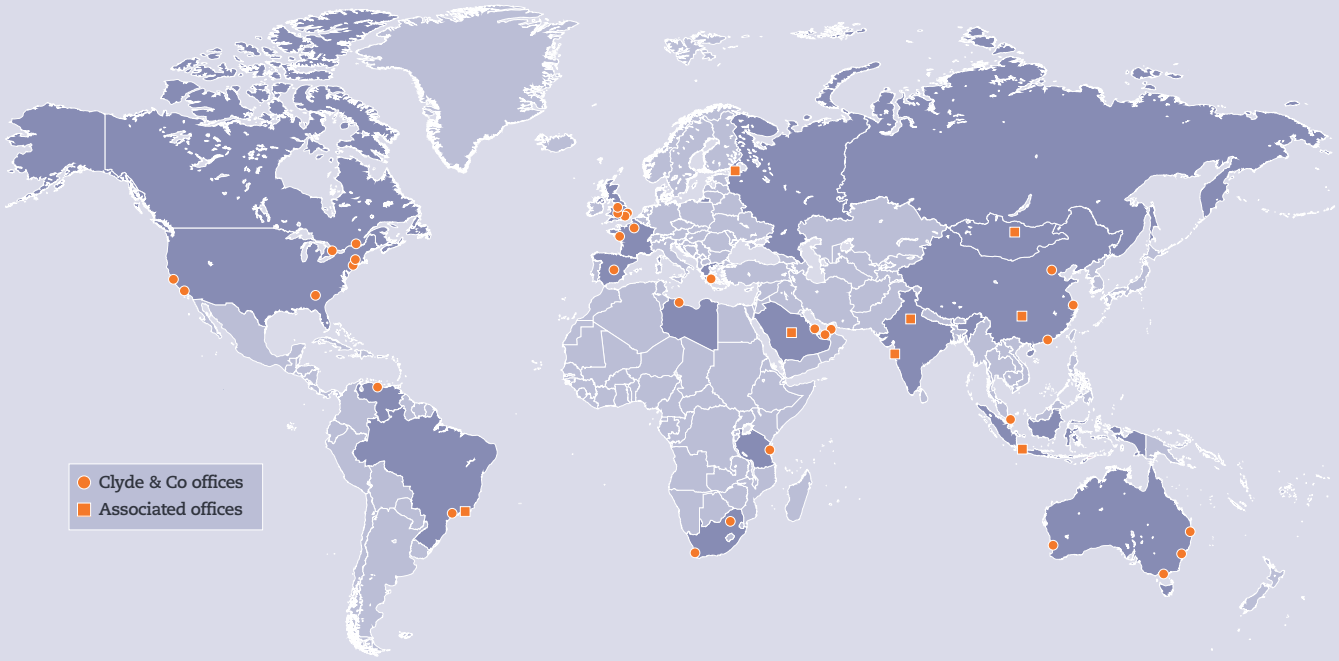
The decision to classify the siege at the Lindt café a declared terrorist incident demonstrates the willingness of the Australian Government to use the mechanisms provided by the Act, while also reinforcing the role of the ARPC.

The ARPC was originally established as only a temporary measure until the market regained its appetite for offering insurance for terrorism-related losses on reasonable terms. The need for the Act is reviewed every three years to evaluate whether commercial market capacity for terrorism insurance is sufficient to meet demand. The last review, in 2012, concluded that the Act should continue. A further review is to be held this year, but it appears likely that the ARPC will endure.

Jenni Priestley
Partner, Sydney
E: jenni.priestley@clydeco.com

Leah Hewish
Associate, Sydney
E: leah.hewish@clydeco.com

Our offices



40
Offices across
6 continents

300
Partners,
over **1,500** fee earners
and **2,500** staff

For full office details please refer to the Clyde & Co website
www.clydeco.com/offices/global

Asia Pacific
Beijing
Brisbane
Chongqing*
Hong Kong
Jakarta*
Melbourne
Mumbai*
New Delhi*
Perth
Shanghai
Singapore
Sydney
Ulaanbaatar*

Europe
Guildford
London
Madrid
Manchester
Nantes
Oxford
Paris
Piraeus
St Petersburg*

Americas
Atlanta
Caracas
Montreal
New Jersey
New York
Rio de Janeiro*
São Paulo
San Francisco
Toronto

Middle East/ Africa
Abu Dhabi
Cape Town
Dar es Salaam
Doha
Dubai
Johannesburg
Riyadh*
Tripoli

*Associated offices

Back to page 1

International Reinsurance Group: Key contacts

Europe

David Abbott
London
E: david.abbott@clydeco.com

Ignacio Figuerol
Madrid
E: ignacio.figuerol@clydeco.com

Ian Plumley
London
E: ian.plumley@clydeco.com

Nigel Brook
London
E: nigel.brook@clydeco.com

David Meheut
Paris
E: david.meheut@clydeco.fr

Simon Schindler
London
E: simon.schindler@clydeco.com

John David
London
E: john.david@clydeco.com

Garrett Moore
London
E: garrett.moore@clydeco.com

Africa

Daniel Le Roux
Johannesburg
E: daniel.leroux@clydeco.com

Maurice Kenton
London
E: maurice.kenton@clydeco.com

Americas

Stephen Kennedy
New York
E: stephen.kennedy@clydeco.us

Peter Hirst
Latin America
E: peter.hirst@clydeco.com

Michael Knoerzer
New York
E: michael.knoerzer@clydeco.us

Andrew Wanger
San Francisco
E: andrew.wanger@clydeco.com

John Nicholl
Toronto
E: john.nicholl@clydeco.ca

Middle East

Mark Beswetherick
Dubai
E: mark.beswetherick@clydeco.com

Peter Hodgins
Dubai
E: peter.hodgins@clydeco.com

Wayne Jones
Dubai
E: wayne.jones@clydeco.com

Asia Pacific

Ik Wei Chong
Shanghai
E: ikwei.chong@clydeco.com

Ian Roberts
Singapore
E: ian.roberts@clydeco.com

John Edmond
Sydney
E: john.edmond@clydeco.com

Simon McConnell
Hong Kong
E: simon.mcconnell@clydeco.com

40 offices across **6** continents **300** Partners **1,500** lawyers worldwide

Clyde & Co LLP

www.clydeco.com

CC006813 - February 2015