REINSURANCE ROUND UP
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Our 2014 Round Up highlights a selection of decisions over the past year that we hope will be of interest to those involved in the reinsurance marketplace. They affect differing aspects of the business of reinsurance - preparation of slips and wordings, liability for claims and accounting by brokers. As ever, "follow the settlements" features and this year, "follow the leader" too. Jurisdictional issues have also arisen - a product of international business, especially if contracts do not include clear law and jurisdiction clauses. Finally, brokers' duties to maintain records, account and remit funds have been clarified.

FOLLOW THE SETTLEMENTS

◆ ***Tokio Marine Europe Insurance Limited v Novae Corporate Underwriting Limited [2013] EWHC 3362 (Comm)***

Claims arising from the Thai floods were made by Tesco under a local policy issued by ACE INA Overseas Insurance Company Ltd and a Master Policy issued by ACE European Group Ltd.

Tokio reinsured ACE European and the local ACE companies ("the Reinsurance") and, in turn, took out a retrocession ("the Retrocession") with Novae Corporate Underwriting Limited ("Novae"). The Retrocession, under which Tokio sought to recover from Novae, contained an unqualified follow the settlements clause. On hearing five preliminary issues, the Court found that:

(1) Although the Master Policy made no reference to local policies, the retrocession still covered liability under the local policy. Hamblen J considered that in the commercial circumstances of the policy, it would have made "little commercial sense" for Tokio to have bought cover in respect of the Master Policy only, and to leave itself vulnerable in relation to the same risks arising from the local policies.

(2) "Loss Occurrence" in the Retrocession should be given the same meaning as "Occurrence" in the Master Policy. Had the parties intended otherwise, they should have clearly spelt out the different meaning.

(3) *"Reinsurers agree to follow all settlements … made by original Insurers arising out of and in connection with the original insurance…"* meant that Novae had to follow the settlement of ACE under the original policies, not Tokio under the reinsurance.

(4) Tokio had to demonstrate only that the claim arguably fell within the terms of the Retrocession not that it did so on the "balance of probabilities" (the usual civil standard of proof). In so finding Hamblen J considered himself bound by the Court of Appeal's decision in *Assicurazioni Generali SpA v CGU International Insurance Plc*, although he stated that it was difficult to see why a lesser standard of proof than the balance of probabilities should apply.

(5) Novae was bound by a determination by the original insurer, ACE, as to the construction of the aggregation provisions in the Master Policy (again applying *Generali*).

Although the case confirms the burden of proof on a reinsured merely to show that the settlement was arguably within the reinsurance cover, it is unsurprising in the light of Hamlen J's express dissatisfaction with the Generali case, by which he considered himself bound, that Novae have appealed on the grounds that *Generali* was wrongly decided. The story is not over yet.

◆ *Tokio Marine Europe Insurance Ltd v Novae Corporate Underwriting Ltd [2014] EWHC 2105 (Comm)*

In the same case as above but at separate hearing, Novae asserted that ACE had not taken *"proper and businesslike steps"* in the settlement of the claim and that, in accordance with *Insurance Company of North Africa v SCOR (UK)* (Lord Goff's "second proviso"), Novae was not therefore bound by the "Follow the Settlements" clause. The Court found that, in circumstances where the settlement fell well below the projected final adjusted loss, ACE was entitled to conclude that nothing would have been gained by further investigation. As that aspect of Novae's defence had no real prospect of success, summary judgment was granted.

◆ *Amlin Corporate Member Ltd & others v Oriental Assurance Corporation [2014] EWCA Civ 1135*

In this reinsurance claim concerning the loss of a vessel in a typhoon, the Court applied Philippine law in construing the typhoon warranty, the same law as applied to the warranty in the original policy. Given that the typhoon warranty in the original policy was in almost identical terms to the warranty in the reinsurance policy, the court found that where there was a follow the settlements clause and it was common ground that there was no material difference between English law and Philippine law with respect to policy interpretation or the effect of a breach of warranty, the two clauses should be construed identically (applying *Vesta v Butcher [1989] 1 A.C. 852 and WASA International Insurance Co. v Lexington Insurance Co [2009] UKHL 40)*. In doing so, the court also observed that the Judge was entitled to look at the underlying factual evidence himself and did not need to accept the differing conclusions of Philippine tribunals.

◆ *AstraZeneca Insurance Company Ltd v (1) XL Insurance (Bermuda) Ltd (2) ACE Bermuda Insurance Ltd [2013] EWCA Civ 1660*

This was an appeal from the first instance decision of Mr Justice Flaux ([2013] Lloyd's Rep IR 290), on which we reported in last year's round-up. AstraZeneca Insurance Company ("AZIC") claimed under its reinsurance in respect of its settlement of inwards claims to the underlying policy. The underlying policy was a Bermuda Form contract, which is usually governed by New York law with London arbitration, but here there was an express choice of English law and the English Court.

The Court of Appeal upheld Flaux J's judgment that AZIC needed to demonstrate actual liability under the policy. It was not enough (absent suitable follow the settlements language) merely to show arguable liability. The court also upheld the decision that, on the basis of this particular wording, defence costs were not covered if there was no actual liability.

FOLLOW THE LEADER

◆ *San Evans Maritime Inc & others v Aigaion Insurance Co SA [2014] EWHC 163 (Comm)*

A "follow the leader" clause in a marine hull and machinery policy required Aigaion to follow lead insurers under a parallel policy, covering a different proportion of the risk, in the settlement of claims.

The "follow the leader" clause provided:

"Agreed to follow London's Catlin and Brit Syndicate in claims excluding ex-gratia payments".

Catlin and Brit settled a disputed claim with the insured. The settlement agreement stated:

"The settlement and release pursuant to the terms of this Agreement is made by each Underwriter for their respective participations in the Policy only and none of the Underwriters that are party to this Agreement participate in the capacity of a Leading Underwriter under the Policy and do not bind any other insurer providing hull and machinery cover in respect of the St. Efrem."

Nevertheless, the Court held that the insured could still rely on the "follow the leader" clause in claiming from Aigaion its share of the loss under its policy. Aigaion had entered into the "follow the leader" agreement with the insured. Although the insured's settlement agreement with the syndicates stated that it was not binding on other insurers, the Lloyd's syndicates were not settling on behalf of Aigaion. Aigaion was held to its agreement in its contract with the insured that it would follow a settlement entered into between the insured and the syndicates.

BROKERS' DUTIES

◆ *Equitas Limited v Walsham Bros [2013] EWHC 3264*

The broker had made various reinsurance collections on behalf of Lloyd's syndicates over a number of years, but had not remitted the funds, either to the syndicates prior to September 1996 or to Equitas thereafter.

The Court held that the broker owed an absolute duty to its principal, Equitas, to remit funds reasonably promptly – a higher standard of care than merely exercising reasonable diligence. It is a general principle of the law of agency that an agent who holds or receives money for his principal is bound to pay it over and account for it.

The Court also found that a broker owes a duty to take reasonable care to maintain proper and adequate records (which would allow the syndicates at any stage to ascertain the true state of the account with them and what sums were owed to them by their reinsurers), as well as to preserve and produce such records on request. The duty to account and maintain records was held to be a continuing duty, so the broker could not rely on time-bar in defence to a claim for funds collected by it more than 6 years prior to the commencement of proceedings (although such a defence may apply to claims for interest and loss of investment income on those funds). The Judge found that interest is payable on the funds held by the broker and that such interest should be compounded on a basis reflecting the commercial terms that would have been available, unless that would produce an unfair result in a specific case. The entitlement of the broker to retain interest on funds held in its Insurance Broking Account ("IBA") under the Lloyd's 1998 Code of Practice for Lloyd's Brokers was found to apply only to the relatively short period until the broker was obliged to remit the funds to the client.

Equitas also claimed by way of damages its loss of investment income on the funds withheld for the period from September 1996. The Court found that, in principle, such damages could be claimed if within the contemplation of the parties in a particular case.

The case established important principles that a broker owes continuing duties to account and maintain adequate records, and that the duty to remit funds reasonably promptly is absolute. If the broker fails to do so, it may be liable to pay compound interest, or possibly damages for loss of investment income, on funds remitted late.

JURISDICTION

◆ *Starlight Shipping Company v Allianz Marine & Aviation and others (The Alexandros T) [2014] EWCA Civ 1010*

Insurers settled a claim brought by the insured in the English Court. The settlement agreement was expressly subject to English law and the exclusive jurisdiction of the English Court. Nevertheless, the insured brought proceedings against insurers and others in the Greek Courts claiming damages in tort for alleged defamation and malicious falsehood. Insurers sought damages in the English Court for breach of the exclusive jurisdiction clause.

The insured relied on Articles 27 and 28 of EU Civil Regulation 44/2001, the effect of which is that, if the same cause of action arises in two parallel cases in different jurisdictions, the Court first seised must hear the application first. The Supreme Court concluded that the cause of action in tort in the Greek Courts was not the same as the claims for breach of contract in the English Courts, so a claim for damages for breach of the exclusive jurisdiction clause was permissible. Hence, the English Court had discretion not to stay the English proceedings. On remission to the Court of Appeal, summary judgment against the insured for damages to be assessed for breach of the exclusive jurisdiction clause was confirmed. The case is an important one in upholding the enforceability in England of settlement agreements that are subject to English law and jurisdiction.

◆ *The Insurance Company of the State of Pennsylvania ("ICSP") v Equitas Insurance Ltd [2013] EWHC 3713 (Comm)*

The case concerned reinsurance contracts which did not contain clear jurisdiction provisions. ICSP commenced proceedings against Equitas in both England and New York. In the English Courts, ICSP issued an application for a stay of its own English proceedings in favour of the New York proceedings and Equitas made an application for an anti-suit injunction restraining ICSP from proceeding in New York.

The Court refused to grant either application.

The Court considered that ICSP had acted in a "most unsatisfactory" manner by issuing in New York having given the impression, which Equitas relied on, that it was only contemplating English proceedings. However, Equitas had not been sufficiently prejudiced by this to render it unjust for ICSP to proceed in New York.

On the other hand, the Court also held that this was not one of those special or rare circumstances in which a claimant should be granted a stay of its own proceedings.

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