

Insurance/Reinsurance

AIRMIC Reservation of Rights

The Association of Insurance and Risk Managers (AIRMIC) and various insurers have recently issued a Statement of Principles to guide the usage of formal dispute resolution proceedings and Reservations of Rights ("RORs").

In essence, the Statement of Principles states that for the first 90 days post-notification of any loss reasonably anticipated to exceed £2.5m,

- insurer will not pre-emptively initiate any formal dispute resolution proceedings (including but not limited to Court proceedings or arbitration) or issue any ROR.
- After notification, insurer and insured will communicate on a "without prejudice" basis in relation to policy response, required claim information and timetable for resolution.
- If the above cannot be determined, insurer can proceed without reference to Statement of Principles.

The obvious benefit is that the lines of communication remain open during the initial stages of the claims process and investigation, reflecting the commercial sensibility in the decision of *Lexington v Multinacional de Seguros SA* [2008] EWHC 1170. This recognises that insureds and insurers are in a commercial relationship bound by a duty of good faith, and that the continued flow of information between the parties is desirable. Once the claim is referred to formal dispute resolution, channels of communication may become less open. If the parties are not placed in an adversarial position, the prospect of a commercial solution is more likely.

The restrictions on RORs may potentially be problematic. Historically, insurers have reserved their rights during the duration

of the claims investigation process where appropriate. This allowed a full and proper investigation to be conducted without the insurer being exposed to waiver/estoppel type arguments. The recent case of *Kosmar Villa Holidays v Trustees of Syndicate 1243* [2008] EWCA Civ 147 highlights the practical problem faced by insurers. A holidaymaker (H) was injured at property managed by K on 22 August 2002. H sued K on 14 August 2003. K notified its liability insurer on 4 September 2003. The insurer wrote to K requesting further information, without reserving their rights. Insurer also informed H's lawyers it was dealing with the claim. In October 2003 insurer repudiated liability under the policy, on the basis that K had not complied with the claims notification clause. K sought a declaration that insurer was estopped from repudiating the claim. The Court of Appeal rejected K's argument that there had been an unequivocal representation from insurer. In light of *Kosmar* setting a high factual burden to found an unequivocal representation, the prior need to issue a ROR during the initial investigative stage is less pertinent, though insurers should remain cautious when making representations to insureds.

The Statement of Principles also provides for the insurer, "to conclude at its absolute discretion", that the Statement of Principles is not appropriate for a particular loss. This flexibility is incorporated to ensure that more insurers will subscribe to it, though it is questionable what ultimate benefit will be derived if it contains an "opt-out" provision without sufficient notice provisions.

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Lloyd's Legislative Reform Order

The Legislative Reform (Lloyd's) Order 2008 has made some significant changes to regulation of the Lloyd's market. There are a total of eight changes to the Lloyd's Act 1982, in the following areas:

- The divestment provisions prohibiting prescribed associations between Lloyd's brokers and managing agents have ceased to have effect;
- The restriction that requires managing agents generally only to accept business from a Lloyd's broker has been removed;
- All references to, and provisions for, the Committee of Lloyd's have been removed;
- There has been a relaxation of restrictions on the composition of Disciplinary Committees;
- Rules governing the composition of the Council have been reviewed so that:
 - The posts of chairman and deputy chairman can now be filled by any member of the Council so long as one of them is a working member (as opposed to both, as was previously the case);
 - It is no longer a requirement that the Governor of the Bank of England approve appointments of nominated members of Council (this is an FSA approval);
 - There has been a removal of the restrictions on elections to the Council affecting working members to permit more flexibility and greater alignment with the Combined Code
- There has been modernisation and streamlining of the Council's delegation powers.

The headline change must be that insurance brokers will no longer need Lloyd's Broker status in order to place business in the Lloyd's market. Whilst the class of "Lloyd's broker" will remain for those that want it (and Lloyd's will continue to approve the applications for such title) it will no longer carry exclusive access to the Lloyd's market. According to the Treasury, the driver behind this change is that the exclusivity was seen as a barrier to Lloyd's position in the global market.

It is clear from market responses during consultation that these are changes the market has wanted for some time, bringing as they do the Lloyd's Act up to date with regulatory change since the FSA took over regulation of Lloyd's.

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Subrogated Claims Against Third Parties

A recent decision of the French Supreme Court may facilitate insurers' pursuit of subrogated claims against third parties.

Where insurers indemnify their insured's loss, they are entitled under French law to pursue a subrogated action against the third party liable for the loss. However defendants to such actions have increasingly contested insurers' title to sue on the grounds that the insurers may not properly be subrogated in their insured's rights.

Under French law, there are two principal methods of subrogation:

The first is by agreement. Such agreement must be simultaneous with payment of the indemnity otherwise the insured's rights will not validly be transferred to the insurer.

The second is by operation of law. Where the indemnity is paid pursuant to a valid contractual obligation, the insured's rights will automatically be transferred to the insurer.

Many disputes have arisen over the years where the transmission of rights appears to be flawed, either because the subrogation agreement was not concluded at the same time as the indemnity was paid, or because insurers were not bound to pay the indemnity under the policy. In such situations, third parties who would otherwise have been liable to the insured have been able validly to challenge the subrogated insurers' action.

The *Cour de Cassation*, in a judgment dated 10th July 2008 (n° 07-15870 - Helvetia et al v. Groupama Transports), held that the French doctrine of unjust enrichment provided a means of circumventing the standard rules on subrogation summarised above.

In that case, Bollere Technologies signed a storage contract with TECL. While the goods (plastic film) were in TECL's custody, they were damaged. Bollere was indemnified by its insurers under its insurance policy even though the latter only covered storage incidental to transport. Bollere's insurers pursued an action against TECL, who objected that the insurers were not properly subrogated in Bollere's rights, since they had been under no legal obligation under the policy to indemnify their insured.

The courts found that, pursuant to the doctrine of unjust enrichment, TECL was not entitled to object to an imperfect transmission of rights between insured and insurer, and was thus found liable.



This judgment raises a whole number of issues, but the first practical implication may be that defendants may have a harder time challenging subrogated insurers' title to sue.

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Allianz v Aigaion - Broker's liability for premium - s.53(1) MIA 1906

HFW represented Allianz of Egypt in proceedings pursued in the English courts against Greek reinsurer, Aigaion, for unpaid reinsurance balances following the 2005 sinking of the tug, "Ocean Dirk".

Following favourable judgments in the lower court and in the Court of Appeal, the Court held in favour of HFW's client that Aigaion could not avoid liability for this loss. Contrary to Aigaion's assertions, the court held that a reinsurance contract had indeed been concluded between Allianz and Aigaion and, significantly, without the incorporation of any Premium Payment Warranty ("PPW"), the alleged breach of which Aigaion had asserted entitled them to avoid cover. Aigaion was held liable to settle the outstanding balances in full.

An important point which was addressed by the first instance judge, Mr Justice Chambers, related to the role of Allianz's broker in respect of premium payment and whether such role extended, under s. 53 (1) of the Marine Insurance Act 1906, to the broker being deemed to have paid premium to Aigaion. It had been asserted that it did and that Allianz could rely on this in answer to any alleged breach of PPW for non payment of premium.

Section 53(1) of the Marine Insurance Act ("MIA") 1906 states that:

"Unless otherwise agreed, where a marine policy is effected on behalf of the assured by a broker, the broker is directly responsible to the insurer for the premium..."

The MIA codified the pre-1906 common law. While it is accepted that this provision renders a broker personally liable to insurers for premium payment in marine insurance / facultative marine reinsurance policies, there has long been debate (currently the subject of the Law Commission's review into English insurance law) as to whether s.53(1) also enacted an old 19th century "legal fiction" whereby premium is treated as having been paid by the broker to the insurer.

The fiction operates on the basis that a broker is deemed to have paid the premium to insurers which is in turn loaned back to the

broker making the broker personally liable to insurers in respect of the premium debt. If such fiction exists, via s.53(1), it could render PPWs ineffective. The issue was, therefore, whether Allianz was discharged of any duty to pay the premium to Aigaion by, amongst other things, the application of s. 53(1), whether or not a PPW had been incorporated into the reinsurance contract (as Aigaion had (wrongly) contended).

In his judgement Mr Justice Chambers held that *"the wording of section 53(1) is clear. It only procures a situation in which, absent agreement to the contrary, the insurer may look to the broker for payment of the premium....I find that section 53(1) means what it says and no more."* The Judge found that s.53(1) had not codified the 19th century "fiction" meaning that premiums could not be treated as having been deemed paid by a broker. In the Judge's view, s.53(1) could not therefore be used as a means of circumventing the effect of PPWs.

In short, it is of paramount importance to ensure compliance with any PPWs or similar terms since it is now more difficult for an insured/reinsurer to argue that premiums are deemed paid by the broker as a result of the old common law fiction.

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Conferences and Events

Global Risk Management Forum

Mandarin Oriental Hotel, San Francisco (10 February 2009)

[Paul Wordley](#)

Forensic Investigation of Fire Claims

HFW, London (3 March 2009)

Denying Coverage for Illegitimate Claims Conference

Grange City Hotel, London (18-19 March 2009)

[Andrew Bandurka](#), [Paul Wordley](#), [Nigel Wick](#)

12th Annual D&O Liability Insurance Conference

Grange City Hotel, London (24-25 March 2009)

[Costas Frangeskides](#), [Nick Hutton](#)

JLT CommTech Forum

Schlosshotel Fuschl, Salzburg, Austria (5 - 8 May 2009)

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