# (RE)INSURANCE ROUND UP 2018

## Carter Perry Bailey LLP, London, is the UK Insuralex member

### REGULATION

- The past year has seen the (re)insurance industry continue to tackle the difficulties and uncertainties arising out of Brexit. The **European Union (Withdrawal) Bill 2018** received Royal Assent on 26 June 2018 and many businesses have been restructuring whilst trying to predict the impact of any deal. The PRA has been actively seeking information from its regulated firms as to their post-Brexit plans. In case there is no deal, the Government has published guidance on the steps that it, along with the regulators, will take to protect EEA firms operating within the UK.

- The **Insurance Distribution Directive** replaced the Insurance Mediation Directive earlier this year. It is a minimum harmonising directive aimed at enhancing consumer protection when purchasing insurance. It clarifies which information should be given to consumers prior to entering into an insurance contract and imposes certain conduct of business and transparency rules on distributors. The rules, which include rules for cross-border business, apply to the sale of all insurance products from 1 October 2018.

### NOTIFICATION

- **Euro Pools plc (in administration) v Royal and Sun Alliance Insurance plc [2018] EWHC 46 (Comm)**

Euro Pools was insured under two claims-made policies (the first policy covering the period of 30 June 2006 – 29 June 2007; the second covering 30 June 2007 – 29 June 2008) which contained a mitigation works clause. When it became aware of problems with stainless-steel tanks in February 2007, Euro Pools informed RSA and installed inflatable bags to remedy the fault. In May 2008, Euro Pools identified issues with the bags and told RSA it would change the boom system to a hydraulic system. Euro Pools argued the relevant loss was the failure of the bags, which had been notified under the second policy; RSA contended that the notification was the one in February 2007 and fell under the first policy, limiting the amount the claimant could recover since the losses exceeded both policies' limits. The Judge concluded that there was "no causal link between the failures in the tanks and the decision to abandon an air drive system and move to hydraulics" and, in any event, Euro Pools "was not aware in February 2007 of problems with the air drive system such that it could not notify the circumstances which led to a claim for the expenses of the move to a hydraulic system". Euro Pools had therefore validly notified the claim under the second policy and the claim for mitigation works was within the policy period.

### ALLOCATION

- **Equitas v MMI Limited [2018] EWCA Civ 991**

This is an ongoing appeal as to whether reinsureds can choose under which reinsurance year to claim their mesothelioma losses (also known as 'spiking'). Judge-Arbitrator Flaux J held that MMI could 'spike' each reinsurance claim to any applicable year of cover. The Court of Appeal granted permission to Equitas to appeal pursuant to s.69 Arbitration Act 1996, which allows appeals from arbitration awards only on a point of law, only in very limited circumstances and only with leave from the Court. The Court of Appeal granted leave to appeal on the following issues: (a) Implied allocation - Flaux J had held that a reinsurer could be liable for the whole loss even when it had only been on risk for part of the period. The Court of Appeal has accepted that there is a "seriously arguable case for treating the insurance and reinsurance positions differently". (b) Good faith - Flaux J had considered a reinsured's duty of good faith to be only a duty not to act dishonestly. If this is held to be correct, it will mean that a reinsured has a choice as to how its losses are allocated to reinsurers. (c) Recoupment and contribution - Flaux J had concluded that contributions from other reinsurers should be apportioned on an 'independent liability' basis, i.e. the independent amount each reinsurer would have been liable to pay regardless of the existence of other reinsurers. These issues will be decided at a full Court of Appeal hearing, the judgment in respect of which is eagerly awaited.

### LIMITATION

- **RSA Insurance plc v Assicurazoni Generali SpA**

The High Court has ruled that insurers who are liable to pay asbestos claims under the Compensation Act 2006 ("CA") are only entitled to claim a contribution from other insurers within two years from settlement. The claimant in the underlying action had contracted mesothelioma and sought compensation from his employer, RSA's insured. Despite having insured the employer for only 6 months of the claimant's 10 year employment, RSA were liable for the entire claim by virtue of s.3, CA. RSA sought to recover from the other two insurers on risk during the Claimant's employment, Aviva and Generali. The Court held that liability arising out of an insurance contract is a 'Damages Indemnity Liability' and therefore such a claim would be a damages claim under the Civil Liability (Contribution) Act 1978, with a limitation of 2 years. Insurers will need quickly to identify other insurers on risk to avoid being time-barred.

### PROOF OF COVER / LIMITATION

- **R&Q (Malta) Limited and Others v Continental Insurance Company [2017] EWHC 3666 (Comm)**

The claimants, R&Q (Malta) Limited, Aviva Assurances UK Branch and Societa Reale Mutua di Assicurazioni, contended that they had entered into four reinsurance contracts with Continental in respect of underlying policies for an Australian building company. The insured Australian company became the subject of a mesothelioma claim due to its products containing asbestos. The claimants paid several of the claims and sought to recover from Continental. However, the original reinsurance cover notes, slips and policies could not be produced by the claimants; Continental denied it was a party to the reinsurance. The Court accepted the claimants' evidence that despite extensive efforts, the documentation could not be found. The Court was then prepared to look beyond the missing contractual documents, to other evidence establishing that there was a contract. In this respect, the Court was persuaded by the broker's, PWS, evidence that the

reinsurance had been placed in the relevant PWS pool and that Continental had reinsured a 20% share. Further, it was found that from 1983 Continental had agreed to front the whole pool, assuming 100% of the risk placed with the pool (but would then have recourse against other reinsurers). The claimants argued that fronting was a basic feature of PWS' pool management strategy and that Continental's fronting role was well-known in the market. Continental failed to produce evidence to the contrary. The Court then was asked to decide an issue under s.29 Limitation Act 1980 which provided that where any right of action has accrued to recover any debt or other pecuniary claim, and the person liable or accountable for the claim acknowledges the claim or makes any payment in respect of the claim, the said right of action shall be treated as having accrued on and not before the date of that acknowledgement or payment. The Court held that there is no particular format for an acknowledgement; a general acknowledgement would suffice if quantum could be ascertained by extrinsic evidence.

## ARBITRATION

### ❖ Allianz v Tonic Star [2018] EWCA Civ 434

In the first instance hearing of this case in 2017, Allianz wished to appoint a well-known QC, with over 10 years' insurance and reinsurance experience, as arbitrator. Tonicstar objected. Mr Justice Teare followed the precedent set by Mr Justice Morrison in the 2002 case of Company X v Company Y (unreported) in which Mr Justice Morrison had held that any arbitrator needed to have been employed in the (re)insurance industry, such that a lawyer would not qualify. In Allianz v Tonicstar, Mr Justice Teare considered himself bound by that precedent such that he had no option but to hold that the proposed QC did not qualify. The matter went to the Court of Appeal which overruled Company X v Company Y and allowed the appeal. It held that although the clause was drafted by the "trade body" this did not mean that only members of the trade could be appointed. The fact that, in default of agreement, arbitrators were to be appointed by the Chairman of the London Underwriting Association, did not mean that the Chairman could not appoint a lawyer. Giving the tribunal the ability to dispense with the strict rules of evidence was not found to be a significant consideration, especially as compared to the more important fact that the contract was subject to English law. In short, the clear and unambiguous clause did not expressly confine the appointment to trade arbitrators and a lawyer would qualify.

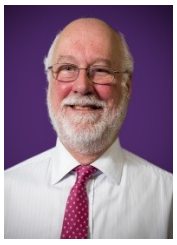
### ❖ Halliburton Company v Chubb Bermuda Insurance Limited [2018] EWCA Civ 817

The underlying case involved a Bermuda Form insurance policy. Before being appointed arbitrator in the 'Halliburton/Chubb arbitration', 'M' disclosed that he had previously been appointed in other arbitrations involving Chubb. Following the 'Halliburton/Chubb arbitration' appointment, M accepted two further appointments in arbitral proceedings in which the subject matter overlapped with the 'Halliburton/Chubb arbitration'. This, however, was not disclosed. When Halliburton discovered this, it applied to have M removed as arbitrator of the 'Halliburton/Chubb arbitration' under s24(1)(a) Arbitration Act 1996. The Court held that, whilst inside information and knowledge could be a legitimate concern in overlapping arbitrations, it was not in itself an inference of apparent bias. Arbitrators are "assumed to be trustworthy and to understand that they should approach every case with an open mind." To conclude that an open mind and objective judgment would not be brought by the tribunal required "something of substance". However, disclosure should have been made to Halliburton of the circumstances which might have given rise to justifiable doubts about M's impartiality. Such disclosure depends on what the arbitrator knew at the time of his appointment, and should not be viewed in hindsight. In the circumstances, the Court found that the non-disclosure did not give rise to justifiable doubts as to M's impartiality. Halliburton's appeal was accordingly dismissed.

## SANCTIONS

### ❖ Mamancochet Mining Limited v Aegis Managing Agency Ltd & Others [2018] EWHC 2643 (Comm)

The claimant was assignee of the benefit of a cargo insurance policy. Insurers included US owned or controlled entities (USFCEs). A claim arose when cargo was stolen. At that time and at the time the policy attached, there were no applicable sanctions. However, following USA's withdrawal from the Joint Comprehensive Plan of Action, its re-imposed sanctions against Iran would apply to the Insurers that were USCFEs. The policy included the Joint Cargo Committee Sanctions Clause, which provides that Insurers are deemed not to provide cover and shall not be liable to pay a claim to the extent that doing so would *"expose that (re)insurer to any sanction, prohibition or restriction"* under UN, EU or UK trade or economic sanctions, laws, or regulations. Insurers argued the clause applied on the basis that there was a risk that a national authority might conclude the payment under the policy was prohibited. The Court held that Insurers had to go further and show that payment would actually be prohibited conduct and would expose them to sanctions, which would not be the case as the re-imposed sanctions were to become effective on 5 November 2018. The Court therefore ordered Insurers to pay the claims by that date. Importantly, the Court also held that the Clause does not extinguish Insurers' liability to pay the claim, but suspends it while the sanctions apply. If meanwhile time bar might arise, the Court suggested proceedings be commenced and a stay sought. Finally, as the Clause is suspensory, the Court found that the EU Blocking Regulation (on which Insurers also sought to rely) was inapplicable in this case.

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