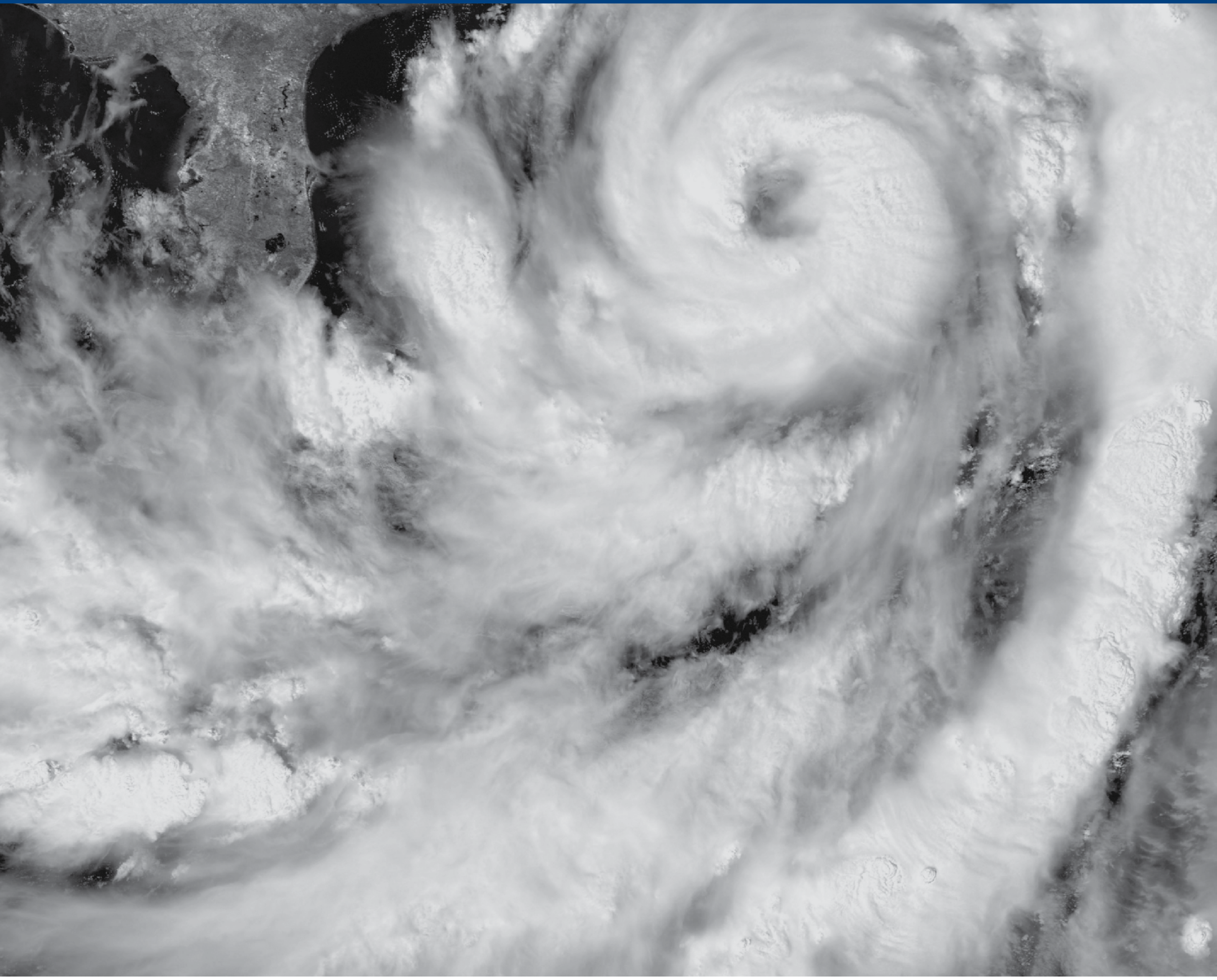

HURRICANES HARVEY, IRMA AND MARIA

On 4 October, HFW London hosted over 100 clients and press members for a presentation and panel discussion about the impact of the recent hurricanes which hit the US and the Caribbean.

HFW's Head of Insurance, Chris Cardona chaired the formal presentations, which were given by Gerard (Jerry) Kimmitt and Sheshe Taylor Evans from HFW's Houston office and by HFW London partner Andrew Bandurka. These were followed by a lively Q&A session.

Jerry and Sheshe gave first-hand details about the personal impact of Hurricane Harvey on them, their family and friends and on business, before explaining the legal and insurance consequences for insurers resulting from Harvey and Irma.

“B.I. claims usually require a physical damage trigger and are giving rise to some complex issues e.g. a refinery closed down for a number of reasons, including power outage, inability of vessels to access the refinery, flooding around the facility, inability of workers to reach the refinery, raising difficult coverage and causation issues.”

So far as casualty claims are concerned, only 17% of the population purchased flood cover. Many who thought they were covered have discovered they were not, and they feel let down by their insurance companies and brokers. Many lawsuits have already been commenced against intermediaries.

There are also six class action lawsuits against the government, in Harris County, Texas, due to the flooding caused by release of water from the Addicks and Barker Reservoirs. We were reminded that, following Hurricane Katrina, residents were unsuccessful in a similar lawsuit regarding broken levees, due to state immunity protecting the relevant agencies.

Property damage claims arising from storm surge, wind damage and flooding are being pursued, together with business interruption (B.I.) claims. B.I. claims usually require a physical damage trigger and are giving rise to some complex issues e.g. a refinery closed down for a number of reasons, including power outage, inability of vessels to access the refinery, flooding around the facility, inability of workers to reach the refinery, raising difficult coverage and causation issues. Contingent B.I. claims are expected due to supply chain disruption, including hundreds of petrol stations which could not receive gasoline due to the shutdown of oil refineries. Other issues discussed included:

- **Timely adjustment of claims –** Texas has a 45-day time limit to complete investigations or to ask the insured for more information as necessary – but many properties were underwater and could not be accessed. Non-compliance can lead to penalties. Similar issues and timescales arise in Florida following Hurricane Irma.
- **Adjuster resources –** A severe lack of competent adjusters, who are overworked and many are unable to complete proper adjustments. Fees for good adjusters are rocketing due to “demand surge”.
- **Concurrent causation –** Many property losses, particularly in south west Texas, are caused by both storm surge/wind and flood. Yet most policies cover wind damage but exclude flood damage. Where loss is concurrently caused by a covered peril and an excluded peril, in Texas, the burden is on the insured to prove the damage was caused by the covered cause, otherwise the claim fails. The reverse applies in Florida, Louisiana and Mississippi.
- **Applicable law –** Primary cover under the Nation Flood Insurance Program (NFIP) is always subject to federal law and jurisdiction, but any additional excess cover is subject to state law. Unlike under Federal law, Texas and Florida state laws and jurisdictions are claimant-friendly and provide for “bad faith” sanctions on insurers such as treble damages, penalty interest, attorneys’ fees.

Andrew Bandurka addressed reinsurance issues:

- **Cash calls –** Reinsurers are under significant pressure to meet early cash calls, typically requests of up to 25% or 33% of the cedant’s UNL estimate. The information provided to reinsurers is often lacking in detail, but there is commercial and competitive pressure to provide cash urgently to where it is needed. Reinsurers should take protective measures to ensure e.g. that funds paid are clearly earmarked for covered losses only and put into designated or trust accounts. Cash call requests have been made in respect of Hurricane Maria where damage caused to the same property by Hurricane Irma had not yet been repaired (or even adjusted). Agreeing these

cash calls without verification risks depriving reinsurers of Reinstatement Premium and complicates aggregation and retention issues.

- **Demand surge –** "Cat surge" or price gouging and loss inflation are expected to increase claims on reinsurers", with reports of increases as high as 20%.
- **Bad faith –** ECO exclusions will eliminate obvious claims but the presence of ECO payments is not always clear.
- **Follow the Settlements –** Compromises of casualty claims where there is a duty to defend but no right to indemnity may be subject to valid challenges under reinsurance on JELC terms but this is more difficult with full follow clauses.
- **Loss aggregation –** Harvey wind damage occurred over seven days and flood damage up to 14 days in certain areas, giving scope for the application of Hours clauses, and particular issues where flood is excluded. The casualty claims (mentioned above) and any Florida looting claims should not, in general, aggregate with the elemental losses, whether under Hours clauses or occurrence/event language.

The audience raised questions regarding issues such as the likelihood of mould claims and the operation of policy exclusions, the adequacy of current loss estimates, and the operation of the Federal Emergency Management Agency (FEMA) and the Nation Flood Insurance Program (NFIP).

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