Insurance/ Reinsurance

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INSURANCE BULLETIN





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1. Market developments

UK: A storm is brewing for the cyber-insurance market

News reports about data breaches and other major hacking incidents are now a daily event. At the same time, the consequences of such events are becoming incrementally clearer.

In particular, the Information Commissioner's Office (ICO) has this month reported that it has issued a record fine to TalkTalk, £400,000, for failing to take basic steps to prevent attackers from obtaining sensitive customer data, "with ease".

The hacking threat is also coming into focus in other sectors. Lloyd's List reported this month on an emerging trend in the shipping industry of payments being made to fraudsters who trick charterers into transferring funds to their bank accounts by means of convincing looking emails, apparently emanating from the email addresses of legitimate agents, such as shipmanagers requesting payment of hire. A similar trend has been noted in other sectors, including law firms. Two features of this trend that stand out are the use of email addresses that appear similar but are slightly different to legitimate ones, coupled with a pattern of such emails being sent when the recipients' guard may be down – "Friday afternoon fraud", as Lloyd's list put it.

These trends are of course of interest to insurers, particularly those who issue polices that provide cover that is broad enough to cover "cyber-risks", such as email fraud, which lie in an often poorly defined grey area between "cyber risks" and conventional fraud.

In the light of all this, insurers and reinsurers who are exposed to cyber-risks (whether knowingly or otherwise) would do well to take stock of their exposures and to take time to think about the scope of cover that they are prepared to offer.

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The above developments come hot on the heels of recent HM Treasury guidance regarding the EU General Data Protection Regulation[1], which came into force earlier this year. Those in the cyber risks arena will know that this regulation not only provides for stringent controls on how personal data is to be protected, but that it also has teeth, in the form of fines of up to the greater of 4% of gross annual worldwide turnover or €20 million. This of course remains an issue for (re)insurers and their customers, notwithstanding Brexit. Companies that handle personal data, including insurers, have until May 2018 to ensure that the requirements of the regulation are in place.

In the light of all this, insurers and reinsurers who are exposed to cyber-risks (whether knowingly or otherwise) would do well to take stock of their exposures and to take time to think about the scope of cover that they are prepared to offer, together with the risks of accumulations and aggregation of losses, in order to ensure they are not caught off-guard when the inevitable deluge of claims arrives.

For more information, please contact Edward Rushton, Senior Associate, London, on +44 (0)20 7264 8346, or edward.rushton@hfw.com, or your usual contact at HFW.

England and Wales: LMA Guidance regarding damages for late payment of claims

In the light of the Enterprise Act 2016, dealing with late payment damages for policies placed or renewed from 4 May 2017, the LMA has published a suite of eight model clauses for use in insurance and reinsurance contracts. The LMA's guidance on these clauses, together with the clauses themselves can be found on the LMA website[1].

The suite includes an express statement of the contractual term that will be implied into policies

1 http://ec.europa.eu/justice/data-protection/reform/files/regulation_oj_en.pdf

1 See: http://www.lmalloyds.com/actclauses and http://www.lmalloyds.com/LMA/Underwriting/Non-Marine/wordings_forum/inurance_act_clauses_guidance_payment.aspx

from May next year. It also includes a range of other clauses by which the implied term providing for late payment damages may be partially or completely excluded, insofar as permissible. In addition, there are also clauses for use in contacts of reinsurance and retrocession, which either exclude the reassured's or the reinsurer's liability for late payment damages, depending on how the reinsurance allocates claims handling responsibility, such as a claims control clause, as compared with a follow the settlements clause.

The LMA clauses should prove helpful to insurers getting to grips with this aspect of the changing legal landscape. There are however still some grey areas and challenges for insurers and reinsurers. For example, since the Supreme Court determined in *Versloot Dredging* that lies told by assureds in order to promote payment of an otherwise honest and valid claim do not invalidate such claim, insurers and reinsurers should be careful to ensure that their investigation of claims remains focussed on whether or not a claim is valid. In the absence of an express "fraudulent means and devices" clause, investigations into dishonesty by the assured, after a valid claim has been incurred, may be pointless after the Act comes into force and, as such, any resultant delay occasioned thereby could result in damages for late payment.

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2. Court cases and arbitration

England and Wales: Location, location, location – *R&V Versicherung AG v Robertson and Co SA*[1]

This case emphasised the principle that the courts will seek to enforce agreements between parties as to jurisdiction, but also reinforces the importance of making sure such agreements are clearly evidenced in writing.

In this case, the court considered the application of the Lugano Convention to a dispute about jurisdiction between a reinsurer and a loss adjuster. Cases of this type turn on the precise terms of the agreement between the parties so are necessarily very fact specific. Nevertheless, the judge gave a useful summary of the general principles set out in the authorities.

The claimant (R&V), a German reinsurance company, participated in a quota share reinsurance contract led by another reinsurer. The reinsurance faced a number of claims arising from the New Zealand earthquakes which occurred between September 2010 and June 2011 and the lead reinsurer and R&V agreed to instruct the defendant (Robertson) jointly to adjust the claims on their behalf. The long-running relationship between the lead reinsurer and Robertson was governed by a Master Agreement containing a English law and jurisdiction clause. There was no formal written agreement between R&V and Robertson for the instant loss adjusting services.

When a dispute arose about the standard of Robertson's performance,

1 [2016] EWHC 1243 (QB)

The question for the court in this case was whether or not their relationship was subject to the terms of the Master Agreement and therefore the agreement on applicable jurisdiction.

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R&V argued that its agreement with Robertson was on the terms of a Master Agreement with the lead reinsurer, and therefore governed by English jurisdiction, in accordance with Article 23 of the Lugano Convention. Robertson argued that the terms of the Master Agreement did not govern its relationship with R&V.

The Lugano Convention deals with issues of cross-border jurisdiction between EU member states, plus Iceland, Norway and Switzerland. Article 23 provides that where the parties have agreed that the courts of a particular contracting state shall have jurisdiction, that agreement is binding. Article 23 also provides that any agreement must be in writing or evidenced in writing. The question for the court in this case was whether or not their relationship was subject to the terms of the Master Agreement and therefore the agreement on applicable jurisdiction.


In his judgment, the judge set out the general principles derived from case law, and applying those to these facts found there was a good arguable case that, other than in relation to certain financial terms, R&V, the lead reinsurer and Robertson agreed to proceed in accordance with the Master Agreement, and that such agreement was recorded in writing. He based this finding on contemporaneous documents, which showed R&V had requested a copy of the agreement leading to a reasonable assumption that it would join the agreement as part of joining the instruction, and strongly implied that the parties were proceeding on this basis.

He rejected an argument from Robertson that the Master Agreement was plainly not intended to apply since a number of its clauses were irrelevant to the instruction by R&V. He also referred to the principle that an agreement as to jurisdiction for the purposes of the Lugano Convention was an independent concept of EU law, so even if the agreement as a whole had been void or invalid as a whole as a matter of English law, this would have been irrelevant to the question of the agreement on jurisdiction. In effect, it was severable from the rest of the agreement.

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3. HFW publications and events

ATLANTIK CONFIDENCE: Cargo insurers "break limits" in unprecedented judgment

HFW have published a briefing[1] on the *ATLANTIK CONFIDENCE* judgment. In this case, the vessel owner made an application to limit its liability under the Convention on Limitation of Liability for Maritime Claims 1976, which the cargo insurers sought to defend on the basis that the loss of the vessel along with her cargo was caused by the "personal act or omission" of the owners. The briefing sets out the factual background to the case, examines the legal arguments which were made and analyses the judgment.

HFW Partner John Barlow presents seminar on Commodities Document Fraud Insurance

On Tuesday 11 October, HFW Partner John Barlow presented a seminar in Geneva on Commodities Document Fraud Insurance.

1 http://www.hfw.com/ATLANTIK-CONFIDENCE-Cargo-Insurers-break-limits-in-unprecedented-judgment-October-2016

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