Insurance/
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INSURANCE BULLETIN

In this week's Insurance Bulletin:

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1. Regulation and legislation

UK: Ministry of Justice postpones personal injury reform

It has been reported that the Ministry of Justice (MoJ) does not intend to proceed with its proposed reform of personal injury claims at the current time. The reforms, on which we reported in our bulletin of 3 December 2015[1], were aimed at making it more difficult for people to claim compensation for exaggerated or fraudulent whiplash claims.

However, the MoJ has stated that it *"remain[s] committed to tackling"* the high cost and number of whiplash claims and the resultant effect on premiums for ordinary motorists.

The proposed reforms, announced in the Government's Spending Review and Autumn Statement to the House of Commons of November 2015, were to increase the limit for personal injury claims in the Small Claims Court from £1,000 to £5,000 and to prohibit courts from awarding general damages for pain, suffering and loss of amenity in minor soft tissue injuries. It is unclear whether these proposals have simply been delayed and will be introduced at a later date, or whether the MoJ will look at different methods of tackling the issue.

The Association of British Insurers (the ABI) has issued a statement which strongly urges the government to *"press ahead with its reforms"*, which the ABI estimates *"will save motorists up to £50 a year on average"* and will leave *"millions of honest customers… better off"*. The ABI's statement was

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also critical of claims management companies and so-called "ambulance chasers", which it considers are a major cause of fraudulent and exaggerated claims.

We will continue to monitor this issue and report on any further developments if (or hopefully when) they occur.

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1 http://www.hfw.com/Insurance-Bulletin-3-December-2015

2. Court cases and arbitration

Turkey: Jurisdiction clauses in contracts between Turkish and non-Turkish counterparties

The 11th Civil Law Chamber of the Turkish Court of Appeal has recently ruled that jurisdiction clauses which provide that disputes between Turkish and foreign counterparties are to be submitted to the English Courts or the Courts of England are invalid. In order for a jurisdiction clause to be valid and enforceable, the name of the English court must be set out.

This judgment is likely to have a wider application, to jurisdiction clauses favouring courts in other jurisdictions, as well as in England.

The decision is based upon Article 47 of the Turkish Act on International Private Law and Procedural Law and Articles 17 and 18 of the Turkish Civil Procedure Code. Article 47 provides that where the jurisdiction of a Turkish court is not determined according to exclusive jurisdiction principles, the parties' choice of jurisdiction of a foreign court in a dispute which contains a foreign element shall be binding as a matter of Turkish law, providing the contract is concluded in writing and the dispute contains a foreign element. Articles 17 and 18 require the name of the foreign court to be stipulated. According to these Articles, the reference to a foreign court must be "precise". The Turkish Court of Appeal found that reference to the English Courts or the Courts of England is not sufficiently precise to satisfy the requirements of Articles 17 and 18.

When contracting with Turkish counterparties, non-Turkish entities who wish disputes to be submitted to the jurisdiction of non-Turkish courts will need to specify the name of the court they wish to hear the dispute, in order for it to be enforceable as a matter of Turkish law.

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Australia: Taking risks with accidental overload clauses

The case of *Matton Developments Pty Ltd v CGU Insurance Limited*[1] considered the construction of an accidental overload clause under a Contractors Plant and Machinery insurance policy.

The decision highlights that taking known risks which ultimately result in damage may nevertheless be *"accidental"* for the purposes of specific accidental cover extensions.

Background

The background facts as found by the primary judge were as follows:

1. Matton Developments Pty Ltd (Matton) owned a mobile crane and contracted Mr Sprecak of G & M Panel Constructions Pty Ltd for the hire and operation of the crane. Matton's related company supplied the crane operator, Mr Hitaua.
2. Prior to operating the crane, Mr Hitaua created a ramp using construction rubble which was expected to compress and create a level gradient for the crane.
3. The crane was loaded with a 39 tonne concrete panel and Mr Hitaua began climbing the crane up the ramp at a seven degree incline, which he knew was in clear breach of the manufacturer's guidelines and the Australian Standards.
4. As Mr Hitaua crawled the crane up the ramp for about 12 seconds, it failed to compress as he and Mr Sprecak expected, and while attempting to slew the boom and lower the panel into place, the boom collapsed damaging the crane beyond repair.
5. Mr Hitaua had about 12 seconds to appreciate the ramp was not compressing and, had he been looking at the spirit level, he would have known the crane was not being operated on level ground. The primary judge rejected Mr Hitaua's evidence that he was *"always looking at the spirit level"* but also found, however, that he must have appreciated the ramp was not compressing from looking at the spirit level.

Matton sought indemnity under an accidental overload clause which covered *"insured damage caused by or resulting from accidental overloading which is non-deliberate and clearly unintentional…"* in respect of the damage and loss of the crane.

Decision at first instance

The primary judge held, amongst other things, that Matton was not entitled to cover as the word *"overloading"* was not intended to include a situation where the crane was *"overloaded because it was operated on a slope"*[2] rather than initially overloaded but otherwise operated in the manner in which it was designed to be used.

Appeal

On appeal, the Supreme Court of Queensland, Court of Appeal, considered three primary questions:

1. Did the primary judge err by construing the word *"overloading"* as not comprehending the *"structural overloading"* which caused damage to the crane?
2. Did the primary judge err in finding that:
   - The overloading was not *"accidental"* overloading within the meaning of the accidental overload clause.
   - The damage to the crane was not *"accidental, sudden and unforeseen"*.

The Court of Appeal held that the primary judge erred in construing the word *"overloading"* so as to exclude *"structural overloading"* caused by operating the crane on a slope. However, on the questions of *"accidental"* overloading and *"accidental, sudden and unforeseen"* damage their Honours found as follows:

1. Fraser JA accepted there was no reliable evidence to prove, subjectively or objectively, that overloading of the crane was *"accidental"* from Matton's or Mr Hitaua's perspective. Fraser JA considered that Mr Hitaua's knowledge and acceptance of the risk of collapse could not amount to an *"accident"* under the policy.
2. McMurdo P held that preparing the ramp with the expectation that

1 [2016] QCA 208.

2 [2015] QSC 72 at [186].


it would compress *"was not so hazardous and culpable that the subsequent overloading and the resulting damage could not be called an accident."* McMurdo P considered that whilst Mr Hitaua *"deliberately took the risk, he was by no means inviting the disaster which ensued."*[3]

3. Morrison JA held that in light of Mr Hitaua's and Mr Sprecak's expectations that the ramp would compress, the failure to realise did not amount to *"courting, inviting or wooing" the risk"*[4] or *"deliberately incurring the risk"."*[5]

The 2:1 majority of the Court of Appeal therefore held that cover was available to Matton in respect of the damage and loss of the crane.

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3 [2016] QCA 208 at [10].

4 *Hurley Contractors Ltd v Farmers Mutual Association* (1991) 6 ANZ Insurance Cases 61-076.

5 *Mount Albert City Council v New Zealand Municipalities Co-operative Insurance Co Ltd* [1983] NZLR 190, 194 per Cooke J.

3. HFW publications and events

HFW attend Kuwait Health Insurance and Investment Conference

On Tuesday 18 and Wednesday 19 October, HFW Associates Salma Achour Khouaja and Julian Awwad attended the Kuwait Health Insurance and Investment Conference in Kuwait. The Conference brought together influential Middle Eastern decision makers, including investors, healthcare providers, pharmaceuticals and other industry stakeholders.

Commercial Risk Africa's "Risk Frontiers" Conference, Lagos

On 20 October, Graham Denny (Partner) was a panelist at Commercial Risk Africa's conference in Lagos. The conference focussed on political risk, on which Graham spoke with Mikir Shah, CEO of AXA Africa Specialty Risks, and operational risks, on which Graham gave a presentation titled "The Rise of the Drones", with Delphine Maidou, CEO of Allianz Global Corporate & Specialty. Graham was also involved in moderating two round table discussions on political risk insurance. The other issues discussed at the conference included financial and banking sector risk. HFW were pleased to sponsor the conference.

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