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A Legal Year in Brief
2014-2015

In association with

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Insurance Day is the world's only daily newspaper for the international insurance and reinsurance and risk industries. Its primary focus is on the London market and what affects it, concentrating on the key areas of catastrophe, property and marine, aviation and transportation It is available in print, PDF, mobile and online versions and is read by more than 10,000 people in more than 70 countries worldwide.

First published in 1995, Insurance Day has become the favourite publication for the London market, which relies on its mix of news, analysis and data to keep in touch with this fast-moving and vitally important sector. Its experienced and highly skilled insurance writers are well known and respected in the market and their insight is both compelling and valuable.

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Introduction

In reading this annual snapshot from our weekly "Legal Brief" column from Insurance Day, I am struck by the variety of topics covered in the last year, reflective of the range of issues the global insurance industry is constantly challenged with.

In the UK, we have finally seen the Insurance Act 2015 make it to the statute books; globally, legal and regulatory reforms are ongoing themes, impacting across a number of business lines.

Insurers have to navigate the minefield of dealing with new and emerging risks such as those presented by cyber (see for example the cyber extortion article on page 6 and the social media article on page 14), in a constantly changing legal and regulatory context. Political unrest has far reaching consequences, and can also create unique challenges, such as those presented by the Ukrainian crisis for fine art insurers (see page 8). The dreadful scale of the Ebola epidemic has of course occupied a lot of headline space over the last year, insurers have been quick to address this (see page 5).

On a positive note, the indications are that we are finally looking beyond the impact of the global financial crisis, with the burgeoning growth in the construction sector and a positive indicator of better times ahead (see page 9).

It would be impossible to predict exactly what we will focus upon in the coming year, however, we expect that we will be writing about the implications of dealing with new technology risks, emerging and developing markets, increasingly complex regulation, the implications of legal reform, and the challenges the natural world can throw at us, throughout the year ahead.

We hope that you find this selection of articles useful and informative – and would welcome any feedback or views on anything contained in this booklet. ■

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[Published June12, 2014]

Weather or not?

Dominic How warns about the cost of rainy British summers

Following the wettest winter in almost 250 years, it would appear spring has finally arrived. However given recent British "summers", the possibility of further adverse weather remains a concern for summer outdoor events and festivals.

With tickets already on sale, organisers and promoters will be keen to ensure their events are insured against cancellation. 'Adverse weather' is usually listed as a standard exclusion in policies insuring events held in the open or in temporary structures, but cover can usually be added at additional cost. So what, precisely, does adverse weather mean?

Under standard LMA wording, it is defined as "extreme and ordinarily unexpected weather conditions" which occur during the policy period. It must prevent the event from being held either because of concerns for the health and safety of those attending or by making it physically impossible to set up the event.

The ground will be placed under a great deal of stress through a combination of the use of heavy machinery and vehicles to set up the venue and from being repeatedly trodden down by thousands of feet. The compression of the topsoil can force excess groundwater to soak up to the surface in certain soil types, thereby creating a sponge effect.

While March rainfall was slightly below average, the Environment Agency has reported groundwater levels, particularly in parts of southern and central Britain, are still 'notably or exceptionally high'. In such areas, it is possible heavy (but not unusual or "adverse") rainfall, could lead to the cancellation of an outdoor event.

Under most policies the burden of proving adverse weather has caused the cancellation falls on the insured. It would need to be shown the 'proximate cause' of the cancellation was adverse weather occurring during the policy period. Under English law this is said to be the underlying or dominant cause.

In other words; 'but for' the adverse weather the event would have gone ahead. This could be a potential area for dispute especially if elevated groundwater levels – as opposed to excess rainfall – were shown to have had a material impact on ground conditions.

To guard against this, insurers can protect themselves by including a warranty that the ground is in a fit state for the event to take place. However, insurers run the risk of a court construing any ambiguity in the warranty in the insured's favour so it may also be useful to define what 'fit' means.

Alternatively, insurers may prefer to remove some of this uncertainty by placing the onus on the insured to provide more information about the condition of the site. This can be achieved by requiring either the insured completes an outdoor event questionnaire or for a site survey. This will assist insurers in making a fully informed underwriting decision and hopefully leave less scope for dispute in the event of a claim. Ultimately, neither party will want to be left knee deep in mud. ■

[Published October 9, 2014]

Insuring the Ebola outbreak

Michelle Crorie and **Gabriella Coombe** consider the impact of the Ebola outbreak for the insurance market

The recent outbreak of Ebola in west Africa has caused widespread international concern. Approximately 3,000 people in countries across Liberia, Sierra Leone, Nigeria and Guinea have died from the disease to date.

As is often the case in crisis zones, non-nationals rush to be evacuated whereas aid agencies hurry in the opposite direction. As affected areas spread, so calls for emergency repatriation may continue, although there appears to be little reason why those not infected could not travel by standard transport. More difficult issues relate to NGOs travelling to provide medical and logistical assistance, particularly where they prefer not to do so uninsured.

As has been shown in the US and the UK, medical evacuation for an infected individual is very costly and highly specialised care is required. The numbers of Western medical staff dispatched to the impacted areas has increased significantly in recent weeks and it is our view standard medical cover may not extend to those travelling without specific underwriting.

As far as other cover such as personal accident insurance is concerned, the characteristics of the disease must be carefully considered. Ebola is known to spread through direct contact with the bodily fluids of an infected person, which appears to bear little in common with an "accident" as generally understood. Current evidence points to the outbreak having been originally caused by ingestion of contaminated fruit bat meat. Again whether this would usually be categorised as "accidental" is questionable.

Of course there are a variety of covers available with permanent total disablement (PTD) and temporary total disablement (TTD) cover for illness often incorporated with the personal accident cover, and relevant extensions sometimes purchased. Whether such wording extends to include Ebola will depend on the precise clauses.

Although Ebola is fatal in many cases, TTD and PTD claims are also a significant risk. An individual may recover but be left with devastating effects such as joint pain and eye swelling. It is not yet known how long such symptoms will last. In extreme cases, this may prevent the individual from returning to work.

As for certain business cover, it is common for most businesses operating in remote or dangerous locations to have contingency plans to address significant disasters. Business interruption which derives from disease outbreaks has been considered previously in the context of influenza, but the current Ebola outbreak, described by the World Health Organisation as an epidemic, may potentially also fulfil certain definitions of "pandemic".

Underwriters would be well advised to consider carefully the adequacy of their exclusions and/or the scope of "pandemic" specific policies, as not all "pandemic" definitions will respond to this current crisis in the same way. While the insurance impact of Ebola remains lower than other disease epidemics due to the location of the outbreak, insurers should recognise the potential for losses and indeed the need for specific covers remains significant. ■

[Published July 24, 2014]

The growing risk of cyber extortion

Michelle Crorie considers the insurance response to cyber extortion

In the last six months alone, a number of high profile incidents have made the public and insurers ever more aware of the risks in relation to cyber-extortion. Insurers are responding by providing appropriate endorsements to traditional kidnap and ransom (K&R) policies, as well as to comprehensive cyber insurance cover.

One example is Cryptolocker which was first used to attack PCs owned by professionals, but was extended to target internet users at home. By mid-December 2013 around 250,000 computers were affected and, according to the US Justice Department, $27m in ransoms had been paid worldwide. In May 2014, a similar attack was experienced by users of Apple products in Australia. On 28 May a number of individuals reported they were unable to use their phones and were required to pay a ransom to access their devices.

Companies are also victims. On 16 June 2014 Domino's Pizza reported hackers had stolen data relating to more than 600,000 French and Belgian customers and were demanding payment. As companies have become steadily more dependent on their cyber systems, so cyber extortion becomes a greater threat to businesses. This had led to more and more insurers offering cyber insurance and those in the K&R market offering cyber extensions.

K&R insurance has always provided cover for extortion relating to interference with property but this has been extended to electronic data. Now specific cyber extensions are reasonably common. A standard K&R wording often extends "property" to include electronic data with extortion cover to reimburse ransoms paid in response to threats to introduce a computer virus designed to damage, destroy or corrupt the insured's electronic data. This does not necessarily cover the "shut out" issue which is becoming so common.

Thus questions about "denial of access" are being wrapped into specific cyber extensions. Such extensions can also include losses from the attack, together with investigation costs and response consultant assistance. Thus an overlap has developed with a standard cyber policy, which would include first party loss such as business interruption losses and investigation costs together with third party liability from a data breach, for example. Some such policies will also offer "cyber extortion" cover as an extension to a cyber policy.

Additional security as a result of cyber extortion threats is often costly and whether threat extensions on K&R policies include this depends on the specific wording. As those familiar with K&R risks will know, the quality of response consultants is particularly important in securing a swift and effective resolution of an extortion claim. How cyber policies will manage to offer the same quality of crisis management is unclear. Which policy would pay first if both have been purchased is another consideration.

It is clear cyber attacks continue to develop at a faster pace than the authorities can develop methods of preventing them, leaving businesses exposed and keen to obtain insurance protection. This is a considerable opportunity but also presents new underwriting and claims challenges. ■

[Published September 4, 2014]

Deferred prosecution agreements – what they could mean

James Roberts and **Laura Chicken** take a look at the new deferred prosecution agreements

Following the enactment of the Crime and Courts Act 2013, deferred prosecution agreements (DPA) became a feature of prosecutors' toolkits in England and Wales from February 24 2014.

A DPA is an agreement between a prosecutor and a corporate pursuant to which the corporate agrees to comply with requirements imposed on it and the prosecutor agrees, on approval of the DPA by the court, proceedings will be instituted for the alleged offence but are immediately and automatically suspended.

The DPA must contain a 'statement of facts', giving particulars relating to each offence and details of any financial gain or loss. The Act notes the statement may include admissions made, but the Code of Practice, published by the Serious Fraud Office and Crown Prosecution Service in February 2014, adds there is no requirement for formal admissions of guilt in respect of the offences charged, though it will be necessary for the corporate to admit the contents and meaning of key documents referred to in the statement.

An invitation to enter negotiations for a DPA does not, however, guarantee one will be agreed and there are circumstances in which information obtained by the prosecutor during the negotiation stage can be used in subsequent proceedings.

Depending on the circumstances, the requirements that a DPA may impose on the corporate can include payment of a financial penalty, compensation of the victim or disgorgement of profits. This contrasts to the previous criminal sentencing regime where remedies against corporates found guilty of criminal offences were limited to fines and orders to wind up.

As directors and officers cannot be parties to a DPA, separate proceedings could be brought against them if breaches or offences are identified through the DPA process. This is a concern where the DPA requires the corporate to 'co-operate in any investigation related to the alleged offence', as the job of answering questions will fall to the directors and officers, which may trigger a notification.

Directors and officers will also need to take care the statement of facts could not be construed as an admission of liability by them individually, thereby falling foul of the conduct exclusion should cover be available.

Furthermore, it seems likely DPAs could become a natural follow-on from internal investigations which result in the company self-reporting any issues identified. This creates a potential risk that DPAs may drive a wedge between the corporate and its directors and officers, particularly where it serves the corporate's interests to implicate its directors and officers to secure a lighter penalty. It may also trigger satellite litigation against the directors and officers.

Although public policy already dictates corporates cannot be indemnified by their insurance for many criminal fines and penalties, directors and officers wordings may require closer examination to assess how the scope of cover might be affected by the arrival of DPAs, particularly around the picking up of pre-investigation and investigation costs as well as public relations expenses and how broadly the conduct exclusion is drafted. ■

[Published September 25, 2014]

Crimean artefacts – uncertainty of ownership

Tony Baumgartner and **Gillian Waugh** report on some tough decisions for one Dutch museum

The Dutch Allard Pierson Museum got more than it bargained for after it borrowed a collection of ancient treasures from Ukraine for its exhibition: '*Crimea: Gold and Secrets of the Black Sea*'. Shortly after the loan agreements were concluded, the artefacts shipped and the exhibition commenced, Crimea declared independence from the Ukraine and acceded to Russia. Ownership of the artefacts is now disputed, with both Ukraine and Russia laying claim.

Russia's envoy for international cultural co-operation has insisted the situation be settled at an inter-museum level, which could lead to the pieces being returned to the individual contributing museums; four out of five of which are in Crimea. The Crimean Ministry of Culture, however, has insisted all the artefacts be returned to the main territory of Ukraine because they form part of the cultural heritage of Ukraine. Nineteen pieces were recently returned to their origin in Kiev, but a further 546 pieces remain the responsibility of the Museum.

The artefacts arrived in the Netherlands under loan agreements concluded prior to the political upheaval in Ukraine. Those agreements are likely being scrutinised by lawyers on all sides to see whether their terms can assist in determining where the artefacts should be returned. Unsurprisingly, this is likely one of those scenarios that the individuals drafting the agreements did not consider. Consequently, the agreements will be interpreted in accordance with the standard rules of interpretation under the governing law of the contracts (presumably Ukrainian or Dutch law).

The Museum may also be considering its obligations to the Ukrainian Culture Ministry and the Crimean museums, which may not be compatible now Crimea is under the effective control of a foreign state.

Another factor is the uncertainty surrounding the legal effect of Russia's treaty of accession with Crimea. The controversial referendum in Crimea, held on 16 March 2014, saw a 96% vote in favour of joining the Russian Federation, but the validity is disputed under Ukrainian law. The referendum has also not been recognised by most nations or by the UN; the UN declared on 28 March 2014 it would continue to view Crimea as part of the Ukraine. Under Russian law, however, Crimea became part of Russia on 21 March 2014 and Russia has, to some extent, territorial control.

The Museum has said it will hold the pieces until the dispute has been decided by a court, arbitrator or agreement; an approach often taken by museums, auction houses or other professional institutions faced with competing claims. This is unsurprising as, to an extent, it alleviates the Museum from some responsibility for correctly determining the situation, although the difficulty of reaching a final conclusion in light of the complexities of the international situation remains. Still, a determination will, at some point, have to be made because failure to return the artefacts to their rightful owner(s) may have significant implications for the Museum and its insurers. ■

[Published October 2, 2014]

Boom time once again?

Jonathan Brown reports on good times returning to the construction sector

Dangerous as it can be to make predictions in the current climate, there are definite signs the UK's construction sector is returning to normality after the doldrums of the recession. The clouds began to lift last year, helped by low interest rates and government programmes to boost demand, as well as the broader economic recovery.

Against the backdrop of rising property prices, home building has lead the recovery, with this sector now growing at its fastest rate since 2003 (albeit the output is still far below the estimated 250,000 new homes required each year). Strong growth has also been evident in the fields of civil engineering and commercial construction, with the Director-General of the Confederation of British industry calling on the government to boost these areas yet further through infrastructure investment, with a particular focus on transport and power stations. As a result, it is perhaps no surprise pre-recession rates of job creation have returned; not just in London, but also in the regions.

The figures are certainly encouraging: in August, the construction sector grew at its quickest pace for seven months according to the Markit/CIPS construction Purchasing Managers' Index and data gathered by The Builders' Conference indicates a 45% year on year increase in the award of major construction contracts, with contracts worth a combined total of £3.899bn being awarded in August 2014, as against £2.64bn in August 2013. In spite of the above, the construction sector still remains around 10% below its pre-crisis peak.

Growth predictions for the remainder of the year are also being tempered by concerns of pressure on supplies and possible skills shortages, as companies struggle to attract bricklayers and other skilled workers. Nevertheless, there can be little doubt that confidence in the construction

market remains high, and growth is still likely to continue into next year and beyond, with suppliers scrambling to boost capacity and reopen plants mothballed during the recession.

Naturally an expanding construction sector presents opportunities throughout the insurance market. As construction businesses expand, they need to ensure they have adequate cover in place for all their needs. A greater number of employees may necessitate a review of employers' liability cover. Policy limits may need to be increased to account for higher levels of plant, equipment and stock being held. For large bespoke structures and buildings, construction businesses may require single project polices, tailored to the individual needs of the project.

Further, the opportunities in the construction sector are not confined to these shores. Latin America, China and India are all continuing to see substantial construction projects in the pipeline, all of which will require appropriate insurance arrangements.

Ultimately, whatever the size of the construction business, from the smallest builder to the largest multi-national, it will need to ensure it has the appropriate types and levels of cover for the work it is undertaking. And the insurance market will be there to support the industry as it continues its welcome return to the good times. ■

[Published October 29, 2014]

Global issues for FI and D&O

Class actions and regulatory issues on the increase, writes **James Cooper**

Canada The economy remains relatively flat but concerns about housing bubbles and market crashes have not materialised. It is closely interconnected with resource and natural extraction industries around the world, which can create inter-jurisdictional issues. Class actions remain common and case law continues to develop quickly. Concerns about corruption and bribery in industry have led to more activism from government agencies. Nevertheless, it tends to remain a less volatile litigation environment than its southern neighbour.

US The confluence of social media, on-line payment systems, the smart phone "wallet," and global cyber fraud changes the risk landscape dramatically for financial institutions and could result in massive exposures. Cutting edge technology poses serious challenges. The peril is even greater when cyber-attacks are part of a state-encouraged, co-ordinated campaign. This emerging threat presents a significant potential liability exposure for corporate boards and investment managers.

Spain While corporate insolvency remains a hot topic, the Spanish economy is showing signs of recovery. On the legislation side, the Commercial Code Bill, which is expected to be enacted within the current term, toughens directors' liability, but also incorporates into Spanish law for the first time the "business judgment rule" in respect of strategic and business decisions. The Bill also amends the regulation of the insurance contracts.

Latin America Since its inception in April 2011 the Pacific Alliance has rapidly promoted free trade and economic integration between its four member states - Colombia, Chile, Peru and Mexico. Aggregated, the GDP of the Alliance would constitute

the 6th largest economy globally. Perhaps most striking is the formation of the Mercado Integrado Latinoamericana (MILA) – the assimilation of the four stock exchanges into a common trading platform - and wider integration seems highly likely. While such integration represents an opportunity for insurers the legal and regulatory framework of each member state remains distinctive, providing a hurdle to cross-jurisdictional covers.

UK The arrival of the Alternative Investment Fund Managers Directive (AIFMD) in July 2013 has brought significant regulatory change for hedge fund managers, private equity funds and other alternative investment funds. It also requires them to hold appropriate PI insurance or additional capital to cover potential professional negligence liabilities. Recommendations from the Parliamentary Commission on Banking Standards report are progressing into legislation, impacting on banks and senior individuals alike. In October 2014 the Financial Conduct Authority will flex its product intervention muscles for the first time, by temporarily restricting the distribution of contingent convertible instruments to the mass retail market.

France Various tax-saving schemes were introduced to promote investments in construction or SMEs. As a result of the financial crisis, a number proved

unprofitable. Financial institutions continue to deal with aggrieved customers, whose main argument is generally that they were not sufficiently informed about the specific risks involved. The newly introduced consumer class action may reshape the litigation landscape in that area. First decisions are expected on coverage issues related to the aftermath of the Madoff fraud.

Hong Kong The Companies Ordinance took effect in March 2014, introducing measures to enhance corporate governance in Hong Kong. This includes codifying the directors' duty of care, skill and diligence; restricting corporate directorships; clarifying the rules on indemnification of directors; and ratification of directors' conduct. This follows recent amendments to the Listing Rules which now expressly refer to the active involvement expected of directors. It also sits with proposed changes to the Corporate Governance Code to emphasise listed companies' risk management and internal control systems. The new Independent Insurance Authority is expected to be operational in and will materially alter the current self-enforcement regime, introducing a contentious requirement that all insurers, agents and brokers act in the best interests of the insured or potential insured.

Singapore Cementing it's status as a top international legal and dispute resolution hub is the initiative to establish a Singapore International Commercial Court (SICC) and Singapore International Mediation Centre (SIMC).The SICC will be established as a division of the Singapore High Court at which international commercial disputes will be heard by a bench of eminent local and international jurists. The SIMC will be an independently run mediation centre comprising of international mediators and experts.

Middle East FI insurers should be aware of the increasing number of regulatory investigations being pursued in the financial centres (such as the DIFC, Bahrain and QFC) where regulators are becoming more aggressive and are increasingly looking to hold individuals as well as authorised firms to account. Defence and investigation costs borne by D&O insurers are on the increase as a result. The recent Bank Sarasin judgment has called into question the basis on which many FIs operate from the financial centres by using their DIFC entities simply as a referral point for financial services and advice to be provided from other jurisdictions. The frequency of fidelity claims pose challenges for Insurers, who also face risks in new areas as Middle East banks are targeted by fraudsters.

India The board of directors are responsible for directing and overseeing the business and management of a company. Given the prominent role of the board, D&O insurance has witnessed significant action with the enactment of the Companies Act, 2013. The Act implicitly recognises the right of a company to obtain D&O insurance on behalf of its directors and officers, with the premium only falling to be counted as part of a director's remuneration if he is found guilty of the conduct set out in and covered by the policy, with the premium otherwise being borne by the company. The Act also introduced higher responsibility and accountability on directors and stricter penalties for non-compliance, as well as the concept of class action.

Australia A key concern for insurers in Australia remains the increasing prevalence of class action litigation with the existence of insurance being an influential driver in many claims. The Australian courts are embracing class commonality and third party litigation funding is prevalent -particularly in shareholder class actions. There are a number of significant class action matters being litigated or foreshadowed with the possibility of new claims routinely being included in market announcements issued by litigation funders and plaintiff firms. ■

[Published November 13,2014]

Australian court confirms insurance contract law scope

Dean Carrigan and **Tim Searle** discuss the intricacies of law reform

The High Court of Australia's recent decision in *Maxwell v Highway Hauliers* [2014] confirms the broad scope of s54 of the *Insurance Contract Act* 1984 (Cth) (Section 54). Section 54, which limits the circumstances in which an insurer can refuse a claim, is one of the most important elements of Australian insurance law and is of perennial interest to English underwriters. The section focuses on the conduct of the insured after the contract of insurance is entered into.

An insurer can refuse to pay a claim where the insured's post-contractual act or omission "*could reasonably be regarded as being capable of causing or contributing to a loss*". However, where the conduct in question is not causative of the loss, an insurer cannot refuse to pay a claim outright, but can reduce its liability by an amount which "*fairly represents the extent to which its interests have been prejudiced.*" This is significantly different to English law, which does allow claims to be declined outright on the basis of non-causative breaches of warranties and conditions precedent, where no prejudice has been suffered.

The insured operated a freight transport business and had a policy which provided cover in respect of loss of or damage to its vehicles. The policy contained an endorsement stating no indemnity would be provided unless the driver had undergone approved psychological testing, focussing on safety. Two vehicles were involved in accidents driven by people who had not undergone this testing. However, both sides agreed this was not causative of the loss and the issue was, therefore, whether Section 54 was engaged.

The insurers argued the endorsement was a fundamental term which defined the scope of cover. The insured argued the effect was simply to allow the insurers to decline a claim, on the basis of the insured's post-contractual conduct. This distinction is important because, if compliance with the endorsement was a fundamental condition of cover, Section 54 would not be triggered and insurers would be entitled to decline the claim outright, without being subject to the limitations it imposes.

The Court came down, very firmly, on the side of the insured. It held the fact the vehicles were being operated by untested drivers constituted a post-contractual act or omission for the purposes of Section 54. As this was the only ground on which the insurer denied indemnity, it was not entitled to decline the claim. The dominant factor is whether the policy gives the insurer the right to decline a claim on the basis of the insured's post-contractual conduct.

While this decision does not in itself constitute a major shift in the landscape, it does confirm the broad approach which the Australian Courts will take to its application. It also makes clear Section 54 cannot easily be circumnavigated by means of drafting – it is the substance, and not the form, of the agreement that the Courts will consider. ■

[Published December 11, 2014]

Thoroughly modern; the development of the Chinese insurance market

Carrie Yang reviews the latest Opinion on the insurance market

Earlier this year the State Council of the People Republic of China promulgated "*Several Opinions for Accelerating the Development of Modern Insurance Industry*". The overall aim is for the Chinese insurance market to keep pace with the modern developed insurance market. The Opinion contains 10 main clauses each further divided into sub-clauses, covering various issues from strategies of the insurance and reinsurance industry, insurance intermediary services and plans for an insurance credit system and data system, to key insurance areas to develop such as medical, elder care, liability, catastrophe and agriculture insurance.

The key points are:

- commercial insurance should become "an important pillar of the social security system". Commercial insurance will gradually become the main provider of the security plans for individuals and families and for enterprises launching elder care or medical insurance schemes.
- the importance of developing various health insurance products, including medical, illness, and health-related income loss insurance, and to connect these commercial medical insurance products with basic medical service provision under the social security system. Insurers are also encouraged to provide health management services and even to invest in or set up medical institutions.
- Elder care insurance is also mentioned, reflecting Chinese government concerns about the aging population in China. The Opinion encourages insurers to develop elder person bank deposit insurance products and elder person household reverse mortgage insurance products. Insurers are encouraged to invest in the elder care services industry. In addition, local governments should commit to sufficient provision of land for elder care and medical usage.
- China is also exploring a catastrophe and accident (CAT) system. CAT funds and CAT reinsurance mechanism will be established gradually and the ultimate purpose is to have a multi-layer CAT risk undertaking system. Local insurers are encouraged to develop effective coverage for risks from natural disasters such as typhoon, earthquake, landslides, mudslides, flood, and forest fire. Promulgation legislation regarding CAT is also listed.
- The Opinion mentions the State Council encouragement for development of the reinsurance market and regional reinsurance centres, as well as the increase of reinsurance market players. It also mentions reinsurance should provide protection for large risks and special risks arising from agriculture, transportation, energy, aviation, nuclear, and other major state projects, and also provide coverage for Chinese overseas entities.
- Insurance fund usage is also covered. Insurance funds are encouraged to invest in enterprise equity, bonds, securities investment funds, and asset plans, and also support large infrastructure projects and property developments through equity or bond investment plans. Insurance funds may also be invested in technical enterprises and new industries.

In summary, the Opinion has provided direction for the Chinese insurance industry going forward. It may also affect insurance market players both inside and outside China. ■

[Published January 15, 2015]

#socialmediacausedmyloss

David Abbott and **Gillian Waugh** considers the risks emanating from social media

"Twitter Revolutions", Facebook-riots and IM-Protests – major social and political events are increasingly driven by social media. Social media can increase the speed with which protests obtain support; allow for communication that might otherwise be oppressed; and rapidly generate an international platform for a cause. The use of social media is highly relevant to political risk and trade credit insurance market. Social media's impact on the nature of an event may directly affect political risk polices and trade credit policies may be affected when social media-driven events lead to losses not dependent on physical damage or loss.

For example, in 2001, anti-government protestors in the Philippines used messaging to gather more than a million people in just a few days, sealing the fate of President Joseph Estrada. More recently, high-profile social media-driven political events have included the Arab Spring, protests in Venezuela and riots in Thailand.

For those bringing or assessing claims, social media both facilitates and complicates an assessment of whether an event falls within an insured peril or an exclusion. It may also assist insurers in understanding what events are riots, civil commotions, uprisings or civil wars. However, social media itself can also speed developments, making it harder to distinguish between one covered peril and another.

Furthermore, not all social media data can be relied on and there will always be attempts to use it to influence or manipulate public and international perception of an event. In Venezuela, for example, protestors posting images of abuse by authorities raised an international outcry at first, but it seems from reports the credibility of this effort was damaged by the inclusion of some fictitious images.

Trade credit policies that do not require consequential losses flowing from damage to physical property focus less on the classification of the events and more on the end result – for example non-delivery of goods or failure to pay. And yet, social media-driven events can generate losses which could impact trade credit policies. Consider a terrorist group using social media to publicise its strategic objectives; ISIS has stoked tensions by threats portrayed through social media using a slick photo-shopped campaign with the words "Baghdad, we are coming". Threats like this may not come to fruition but business can be disrupted or production lost by threat alone. Or what if the owners of a factory are associated (rightly or wrongly) with a discredited regime, leading to a loss of business? Such reputational damage may be driven solely by perception created through social media.

For losses of today, the industry may have to consider social media in their claims handling both in terms of determining causation and cover. For the losses of tomorrow, social media will inevitably continue to play a major role making it advisable for insurers to consider how to use social media data and also how social media-created losses should be provided for in future products. ■

[Published January 22, 2015]

Excluded perils in war risk cover judgment

Drug smuggling case had wider implications, as **Tom Gorrard-Smith** reports

In the decision of *B Atlantic* [2014], the English Commercial Court ruled in favour of vessel owners on the construction of an exclusion clause in the Institute War and Strikes Clauses Hull 1/10/1983, which had been relied on by war risk underwriters who sought to avoid a claim for constructive total loss following the detention of a vessel as a result of a customs infringement.

In 2007, after the *B Atlantic* had completed loading of a cargo of coal in Venezuela for discharge in Italy, a customary underwater inspection of its hull was undertaken. Three bags strapped to the hull containing 132kg of cocaine were discovered and the vessel was immediately detained and the crew arrested. The court in Venezuela proceeded to charge the master and second officer with complicity in the drug smuggling and, pursuant to local law, ordered the continuation of the vessel's detention for an unspecified period.

The vessel was abandoned by its owners two years later and was confiscated by the Venezuelan authorities pursuant to a court order. The owners proceeded to claim against their war risks insurance policy, which incorporated the Institute War & Strikes Clauses as amended. However, while underwriters accepted the vessel was a constructive total loss, they rejected the claim on the basis the loss arose "*by reason of infringement of any customs…regulations reason*", an express excluded peril under clause 4.1.5 of the Institute War & Strikes Clauses.

Although the master and second officer were convicted, it was accepted by underwriters the owners and crew were not, in fact, involved in the attempt to smuggle drugs out of Venezuela. Further, underwriters accepted the acts of drug smugglers could, in principle, fall within the scope of clause 1.5 of Institute War & Strikes Clauses, which provides "loss or damage to the Vessel caused by…any person acting maliciously" is covered. However, underwriters argued the actions of the drug traffickers were not the proximate cause of the loss and instead asserted the proximate cause of the vessel's detention was the infringement of customs regulations, an express excluded peril.

Persuaded by the Court of Appeal's approach in *Handelsbanken v Dandridge* [2002] ("The Aliza Glacial"), when interpreting a different exclusion in the Institute War & Strikes Clauses, Flaux J held to apply clause 4.1.5 to every claim in which a customs infringement arose "would not accord with the spirit of the policy".

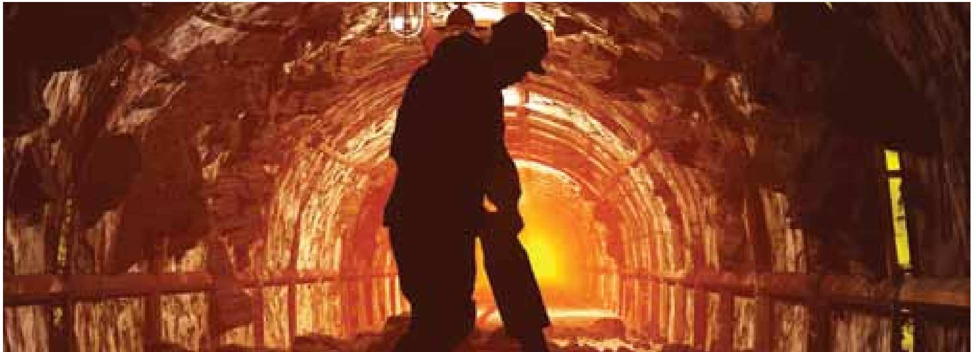
The Commercial Court concluded, as a matter of construction, the customs infringement exclusion could not be applied where it is brought about by the malicious act of a third party. Accordingly, underwriters were not therefore entitled to reject the owner's claim.

The Commercial Court's decision not to apply the exclusion clause to this situation is significant and follows a pattern by the English Courts to adopt a holistic approach when applying exclusion wordings. It remains to be seen whether underwriters will seek to appeal the judgment. ■

[Published February 19, 2015]

Silicosis claims in the South African mining industry

Max Ebrahim and **Daniel le Roux** warn of a new round of legacy claims



The South African gold mining industry faces a number of challenges including falling gold prices; sticky labour pricing; the increasing costs of production; inconsistent energy supply and policy dithering on the part of the ANC-led government, to name but a few. This notwithstanding, the industry seems to be weathering the storm; South Africa remains a significant producer of gold and the industry remains an important cog in the South African economy.

However, a new threat, which up until 2011 was merely nascent, is bubbling under the surface: the industry is under fire from tens of thousands of current and former mine-workers (or their families) who allege they contracted silicosis while working on the gold mines. At between US$1.5bn and $10bn, the potential exposure is staggering, if not potentially crippling for some of the producers.

Silicosis is a well-known occupational lung disease caused by the inhalation of silica dust produced, typically, during blasting operations. Silicosis is characterised by inflammation and scarring of the upper lobes of the lungs. It is incurable and symptoms include shortness of breath, coughing and chest pain. When combined with tuberculosis, to which sufferers are susceptible, it can lead to a slow and painful death.

Being an occupational disease, compensation for affected employees has traditionally been regulated by a compulsory workmen's compensation scheme. As a matter of fact, a specific legislative framework, most recently codified in terms of the Occupational Diseases in Mines and Works Act 78 of 1973, (ODIMWA), was developed and operated for the benefit of mineworkers.

Although mine-worker specific, traditionally ODIMWA was read together with the overarching workmen's compensation legislation, most recently codified as the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA), in force at the time. COIDA specifically precludes claims in tort for damages against an employer, at all or over and above any compensation received under the compensation legislation.

However, in a seminal judgment, the South African Constitutional Court, which is the apex

court, ruled in the case of *Mankayi v AngloGold Ashanti Ltd* 2011 that the two pieces of legislation create two separate systems of compensation and that because ODIMWA does not carry the same bar to a damages claim, that such claim can, in principle, be pursued against an employer. In doing so, the court overturned the carefully considered majority judgment of the Supreme Court of Appeal. This appears to be a demonstration of the political sensitivity of the issue. It is, of course, not unusual for claims of this nature to become politically charged. There is precedent for this in other countries (for example, claims relating to coal-mining illnesses in the UK).

What followed in its wake has been nothing short of extraordinary: by 2012, three separate firms of attorneys – supported by class action lawyers based in the US, representing applicants in potential class action proceedings, launched applications for certification of three separate class actions. Certification is a pre-requisite for launching a class action and requires the applicant(s) to demonstrate good cause for the allowing the class action to proceed. Some of the key requirements include:

- Whether the class is defined with sufficient precision
- Whether the members have a prima facie case
- Whether there are common issues of fact or law that are capable of class-wide determination
- Whether allowing a class action is appropriate in the circumstances

Cumulatively, the applicants claim to represent 27,000 affected mine workers (or their families). These claimants may represent a mere 10% of the total number of silicosis sufferers in South Africa. The three applications have since been consolidated and the combined application for certification will be argued on October 5, 2015 in the South Gauteng High Court in Johannesburg.

However, in a parallel process, an additional 6000 mine workers, represented by a fourth set of attorneys supported by a UK based law firm, have instituted damages claims against Anglo American SA (and against AngloGold Ashanti Ltd) in South Africa. This followed on from a failed attempt to pursue the damages claims in the UK against its parent company, Anglo American PLC (*Young v Anglo American South Africa Ltd and others [2014]*). These claims are proceeding by way of public arbitrations and are in advanced state of readiness. Even though the miners have fought hard up to now, the pressure appears to be building and the settlement of 23 test cases by Anglo American SA in October 2013 would certainly have encouraged the claimants.

It goes without saying that these developments cannot be ignored by the market, in particular the liability market and its reinsurers. Accepting that coverage is complicated by factors like timeous notification; whether policies have been issued on a claims made or losses occurring basis (and therefore the potential effect of retroactive dates) and potential exclusions based on occupational injury, much will depend on the specific wordings.

One can almost certainly not discount the inadvertent consequence of the Mankayi judgment which distinguishes between ODIMWA and COIDA (traditional workmen's compensation) claims.

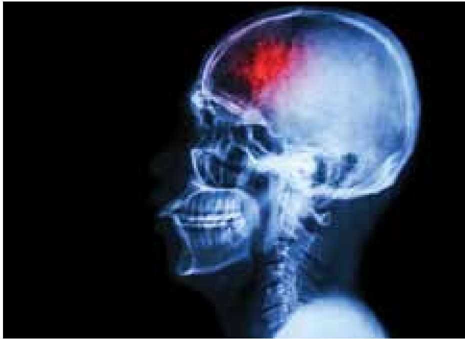
There is a further factor which may impact on coverage: since the 1990's, labour sub-contracting in the mining industry has been relatively common-place. The result is that notwithstanding potential contractual protections that may have been negotiated by the mine-owners, many claims may in fact be framed against the mine-owner as a third party responsible for complying with mining safety legislation and not as employer.

Finally, it should be noted that even if underwriters are to be called on to carry only the costs of defending these claims, this will of itself be significant. To illustrate the point: the test cases referred to above, involving a mere 23 claimants, were scheduled to run for six months and the bundle of documents disclosed by Anglo American SA ran to one million pages. ■

[Published April 23, 2015]

Heading for trouble?

Ian Plumley warns of a new wave of claims from sporting injuries



It is an observation often ascribed to Mark Twain but "*denial ain't just a river in Egypt*" has been the traditional response of many sports governing bodies when confronted with the looming menace of concussion in sport.

Increased concussion awareness has arisen from ongoing research by the UK's Sports Legacy Institute and Glasgow University into the link between head trauma and Chronic Traumatic Encephalopathy (CTE), a progressive degenerative disease of the brain found in athletes and others with a history of repetitive brain trauma. The horrible reality is that the sporting world was warned about CTE in 1928, when Dr. Harrison Martland wrote "*Not only is there actual cerebral injury in cases of concussion but in a few instances complete resolution does not occur and there is a strong likelihood that secondary degenerative changes develop*".

Little progress was made by 2009 when certain sporting bodies maintained there was no evidence of long-term problems. The negligent failure to warn and, worse still, the knowing concealment of the dangers of concussion have serious implications for sports clubs, governing bodies and their insurers.

Existing and future claims have been spoken of in hushed tones as having the potential to generate a tidal wave of litigation. As ever, the US plaintiff bar has led the charge with a particular focus on American football and, latterly, association football. In August 2013, a $765m settlement was tentatively agreed in a class action brought by 4,500 former NFL players. That was followed by the 'Soccer Moms' case where a group of US footballers and their parents sued FIFA and the US Soccer Federation for alleged negligence in not protecting players, particularly children, from concussion.

Belatedly, the UK is catching up, with a focus on rugby union (the recent, repeated concussions suffered by Wales and Northampton winger, George North, are a timely reminder), although the FA's reported failure to keep its commitment to fund independent research into head injury issues (following the death of West Brom striker, Jeff Astle) has recently brought football's concussion problems into the limelight.

The risk of litigation and its complexion will vary from sport to sport but there remains a real possibility the UK will see similar litigation to the US. Given the media's focus on professional sport, it is sobering to remember the vast majority of sportspeople in the UK are not professionals but enthusiastic amateurs and, more worryingly, children. Accordingly, the concern for insurers should be the multiplicity of insurance covers that might be implicated, ranging from the general through to more specific/bespoke coverage.

The risk of litigation is not, of course, the primary consideration in understanding concussion risks in sport and it is hoped media attention on CTE issues and studies supported by the likes of the Scottish RFU, Saracens RFC and now the FA, will prompt improvements to player welfare, thereby diminishing the threat of claims and costly litigation. ■

[Published March 12, 2015]

How and when an insurer can raise a successful defence using suit limitation provisions

Jane Warring and **Nneka Egwuatu** warn against assuming one size fits all

Limitation in the US is a variable beast, with contractual provisions frequently at odds with state legislation. Suit limitation provisions in policies address the period in which an action may be brought pursuant to the policy and thereby limit the insurer's exposure to liability. The enforceability of such provisions is primarily affected by governing state law and the wording.

Perhaps the most important factor in determining their validity is the applicable state law. If the policy does not contain a choice of law provision, the choice of law rules of the state in which the lawsuit is filed will govern. Some states' choice of law rules provide the court should apply the law of the jurisdiction where the insurance contract was formed. Other states will apply the law of the state in which the insured risk is located.

The next step is to determine whether there is a statute prohibiting the suit limitation provision. US courts will not interfere with the contractual rights of parties to an insurance contract unless

- there is an express statutory restriction,
- there is controlling case law rejecting a provision, or
- the provision otherwise violates public policy.

In Georgia, for example, there are no statutory restrictions against suit limitation provisions in property insurance policies and these provisions are enforced unless there is an issue of waiver, estoppel, or impossibility (*Encompass Ins Co of Am v Friedman*).

Several states have statutes establishing a minimum time period in which a policyholder may file suit and prohibiting any contractual provision that sets a shorter period. For example, Arkansas bars limitation periods in property or life insurance policies shorter than the five-year statute of limitations for promises in writing (See ARK. CODE ANN. § 23-79-202 West 2014). Other states, such as Minnesota, do not specify a minimum time period, but merely require the period be reasonable in light of the circumstances (*Michael Foods, Inc v Allianz Ins Co*).

Once the controlling state law and any potentially applicable statute has been identified, the next stage is to determine whether the statute applies to the particular policy at issue. For example, many states have standard fire insurance statutes addressing suit limitation provisions, but these statutes may not apply to an all-risk policy.

Finally, even if a suit limitation provision is valid and enforceable under the controlling state law, the policyholder may contend the provision has been waived by the insurer. The standard for waiver varies from state to state. Courts in some jurisdictions find waiver based on an insurer's conduct in continuing to investigate the claim, while others require evidence of an affirmative promise not to enforce it. Insurers operating in the US need to be aware of the different limitation provisions across the country and to beware the assumption that one size fits all. ■

[Published April 2, 2015]

Ageing North Sea infrastructure presents new risks

Simon Jackson and **Flavia Solimano** warn there is no generally accepted standard insurance coverage for the removal and dismantling of ageing offshore oil rigs

In the next 30 years in the North Sea alone more than 400 platforms, 10,000 km of pipelines and 5,000 wells are expected to be decommissioned at an anticipated cost of more than £30bn ($44.25bn). This infrastructure will, however, require insurance coverage as it approaches the end of its operation life and during the decommissioning process. That gives rise to a two broad questions: do ageing structures require a different insurance approach? And does decommissioning entail the same risks as construction/operation or is a bespoke insurance solution required?

More than 50% of North Sea platforms are beyond their original design life, with many operators looking to get another 20 to 30 years out of ageing installations before decommissioning. That is perhaps unsurprising, given the state of the market at present, but does mean a reappraisal of the North Sea risk profile may be appropriate. While operational policies generally do not cover the costs of ageing, there is a continuing trend to provide coverage on a "new for old" basis, notwithstanding the fact the insured infrastructure is well past its original intended lifespan.

Should an insured peril operate, the insured may benefit from the replacement of insured property with a very limited remaining lifespan with brand new property, a result which might be considered a windfall in the insured's hands. While operational standards in the North Sea are generally considered to be excellent, logically ageing infrastructure must present an increased risk of the operation of an insured peril, especially given the North Sea's hostile marine environment.

In these circumstances, it might be argued an adjustment would be necessary adequately to share the increased risk inherent in older infrastructure. That might not necessarily be a pricing adjustment; a reappraisal of the basis of recovery might achieve the same objective, as might a reappraisal of the scheduled limits for particular aspects of the insured property.

Another alternative might be a more dedicated "end of field life" policy to cover ageing installations through the decommissioning process.

Decommissioning

Decommissioning is regulated by both international and national legislation. The Department of Energy and Climate Change (DECC) regulates the decommissioning of offshore oil and gas installations and pipelines in the North Sea and is responsible for ensuring decommissioning approaches comply with OSPAR Decision 98/3, which prohibits leaving any offshore installations in place unless specific derogations are granted.

The DECC provides guidance notes but there is no standardised procedure. Instead, decommissioning is largely influenced by the original installation design and choice of dismantling strategy

implemented by an operator. The method used is often subject to assessment whereby technical feasibility, environmental and social impacts, economic and health and safety implications must be taken into consideration. Operators must also seek DECC approval before commencement of any dismantling works.

How might decommissioning risk be insured? The problem is the majority of the platforms in the North Sea are not designed for removal. As a multi-year, multi-phased and extremely technical procedure there are various insurance risks to take into account and these may be different to the types of risk encountered while the platform is operating.

For example, the decommissioning process will be akin the construction process as there will be many contractors involved all with different roles and bound contractually to the project. In that sense, the decommissioning phase resembles "construction" more than "operation".

However, in a construction all-risks (CAR) policy a key component is the insurance and replacement of the project works as the insured seeks to protect physical damage to an installation which is intended to be a profit making asset.

Decommissioning is different: leaving salvage values to one side, the result at the end of the project will be to leave the site in the condition it was in before construction started, so there are no insured works as such. Rather, the risks of more importance to the operator will be damage to third-party property and liability exposures.

It is perhaps the latter that have the most potential for significant claims. The operator will face an appreciable risk of exposure to residual liabilities (including abandonment and environmental pollution) stemming from seepage, pollution and/or contamination as the platform is dismantled and removed. Additional risks both an insurer and operator should consider therefore might include:

- liabilities under UK law and international conventions;
- removal of wreck or debris;
- damage to lost property and/or damage to property being removed (in particular where that property might have a salvage value);
- damage to existing property not intended for decommissioning and/or third party property adjacent to the structures to be dismantled; and
- risks during heavy lifts.

There is at present no generally accepted standard insurance coverage for the removal and dismantling of ageing structures encompassing all the above risks (in contrast, for example, to the WELCAR form for offshore construction). Instead, operators and contractors are often presented with modified versions of CAR cover (for physical damage, third-party liabilities and consequential loss) and operators' extra expense cover (for control of well, pollution, seepage and/or leaks).

The concept of decommissioning coverage for platforms remains relatively new and gives rise to an unusual combination of insurance risks, which suggest bespoke coverage might be appropriate. That said, the starting point would appear logically to be a CAR-type policy rather than an operational policy, given the nature of the works, number of contracts involved and the exposure of liabilities. This structure has the advantage of reflecting the nature of the decommissioning process and will be able to accommodate contractors and operators as co-insureds in support of the usual contractual terms that would be expected to be found in their contractual arrangements (for example, "knock for knock" agreements).

In summary, ageing structures and decommissioning represent a new mix of property and liability risks; and a significant insurance opportunity. If that opportunity is to be realised, however, careful thought must be given to the structure of the coverage provided in order that effective and economically viable cover is provided to the offshore industry. ■

[Published April 9, 2015]

The lender, the borrower, the valuer and his disclaimer

Louisa Robbins and **Vicky Hardy** suggest valuers check their disclaimers

In some respects, the UK law on third party reliance in valuation claims is pretty clear-cut.

The valuer of a modest residential property will almost certainly owe a duty of care to both lender and borrower; see *Smith v Bush*, in which the House of Lords held a duty was owed to the borrower where the valuer knew the borrower was likely to be shown his report and rely on it.

The valuer of a modest buy-to-let property, however, is unlikely to owe a duty of care to the borrower. The Court of Appeal in *Scullion v Bank of Scotland* focussed on the commercial nature of the transaction; the lack of evidence that investor borrowers tend to rely on valuations obtained by lenders; and the fact that investors tend to seek independent advice on such purchases. For high value residential properties and for industrial properties a borrower will tend to seek independent advice too.

The position is not, of course, that black and white and a valuer may find he owes a duty to a borrower even on a commercial transaction. Consider, for example, the purchase of a smallholding, where there is a commercial element, but the value may not justify independent advice. There are a number of factors the court may take into account, including whether the borrower pays the fee for the valuation and whether the valuer sends multiple copies of the report to the lender.

Discussions between valuer and borrower about the value of the property, whether face to face during an inspection or subsequently on the telephone, may also result in an assertion that a duty was owed. Valuers should take care in such situations to minimise the risk of anything said being construed as advice and avoid using wording within a report which could be perceived as an express assumption of responsibility to a borrower.

The most influential factor in determining whether a duty of care is owed in this uncharted territory is, however, likely to be the presence or absence of a disclaimer. The report in *Smith v Bush* contained a disclaimer, but it was held to be unreasonable under the Unfair Contract Terms Act 1977. The judge did however reserve his position in respect of different types of property such as industrial property or very expensive houses.

A disclaimer should therefore be included in all reports – it may be the determining factor for a borderline case. Disclaimer wordings should be clear and specific and preferably in bold type so they are obvious to the reader.

Both valuers and their insurers should be aware of the potential benefits of disclaimers in valuation reports. A disclaimer (or lack thereof) could be the deciding factor in whether or not a borrower claim ends up being costly for all concerned. ■

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