2005 Insurance Law Review

A number of interesting legal decisions in 2005 highlight challenges facing both risk carriers and insurance buyers in the coming 12 months.

THE ERA OF CONTRACT CERTAINTY

In the first instance, 2005 witnessed a judicial move toward a need for parties to an insurance agreement to be specific where they desire a particular contractual effect. This leads us to briefly consider contract certainty, a topic that is currently the subject of much discussion within the London Market.

The Financial Services Authority (FSA) clearly prioritises contract certainty and has set a deadline that by the end of 2006 the insurance industry is expected to be able to demonstrate that 85% of contracts by volume are "certain", meaning the complete and final agreement of all terms between the insured and insurers prior to contract inception. What are the implications of this?

As this article was being prepared the FSA's chief executive, Mr. John Tiner, stated[1] that that in his view the benefits of contract certainty will be:

(i) greater certainty for buyers about the product they have purchased;

(ii) insurers being more aware of the risks they are covering; and

(iii) reduced broking risks.

Mr. Tiner went on to say that the FSA intends to intervene (meaning increasing its regulatory powers) in the event that the London insurance market is not perceived to continue progressing satisfactorily toward contract certainty but that in light of the market-led progress achieved to date the FSA's plans to intervene are currently "on the backburner". Nonetheless, Mr. Tiner's statement emphasises the pressure on the Market to adopt a demonstrably proactive approach to contract certainty to satisfy the regulator's demands;

However the FSA chooses to wield its powers the direction is clear: the trend of increasing insurers' costs will continue, even in light of the FSA's current attitude, as is demonstrated by the emergence of the following legal trends in 2005.

One area where, in 2005, judicial decisions have appeared to support a move to greater contractual certainty concerns claims notification.

Claims notification clauses place obligations on the insured in terms of notifying a claim in a timely manner once they become aware of it. In this respect the *Friends Provident v Sirius International Insurance*[2] case reverses the earlier position of *Alfred McAlpine Plc v BAI*[3] in which Wallace LJ had ruled that the court should not have to choose to construe a claims notification clause as being either:

(i) a condition (in this instance a condition precedent), in which case the insurer may avoid the contract in its entirety, or

[1] In John Tiner's speech,"Principles-based regulation and what it means for insurers" given to the Insurance Sector Conference, 20 March 2006, (http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2006/0320_jt.shtml).
[2] Friends Provident Life and Pensions Ltd v Sirius International Insurance [2005] EWCA Civ 601.
[3] Alfred McAlpine plc v BAI (Run Off) Ltd [2000] EWCA Civ 40 (11 Feb 2000).

(ii) a warranty, in which case the insurer is entitled only to damages in the event of a breach.

Wallace LJ felt that a third option, referred to as an innominate term, would enable an insurer to avoid a claim without the breach being deemed sufficiently serious to be construed as a contractual condition.

However, the 2005 case of *Friends Provident* judgment represents a return to the conventional analysis of insurance contract terms being categorised as either conditions or warranties. In this case the Court accepted the argument that innominate terms should be construed as warranties owed by an insured, in effect dispensing with this third category.

The judgment highlights the need for insurers to make it clear that performance of an obligation that they perceive to be fundamental is indeed to be a condition precedent to liability if they wish to rely on such a provision to contend that they are not liable to pay a particular claim (by avoiding the contract).

Similarly in the case of *Bonner v Cox*[4] the Court of Appeal judgment highlighted the need for reinsurers to provide expressly for control over a reinsured's underwriting where they require such control.

The case involved the placing of the Aon 77 Energy Cover with reinsurers, including the active underwriter at Syndicate 1688.

Following reinsurers' assertions the judge accepted that terms imposing some duties on the reinsureds were implied, namely that:

(i) a risk would be the subject of an underwriting judgment (by the ceding insurer), and

(ii) the risks to be accepted would be those which, in the ordinary course of business, the reinsured would write taking into account the reinsurance.

Nonetheless, it was clear from the judge's decision that these implied duties were not onerous. Certainly they did not impose a significant burden on the reinsured (i.e. the ceding insurer), and the Court was easily satisfied that they had discharged these duties.

Clearly if a reinsurer wishes to have greater legal protection then we consider that it would be wise, whatever the type of reinsurance (whether proportional or non-proportional) to ensure that the reinsurance contract includes express terms providing the desired protection.

In the event that contractual clarity is not achieved, and parties end up in dispute, there is an increasingly a move toward arbitration and other forms of Alternative Dispute Resolution (ADR). In terms of the former, in 2005 Courts have been called upon to clearly define the role and jurisdiction of such hearings.

ARBITRATION

Arbitration is often used in the insurance and reinsurance market, where there are often numerous parties involved in transactions e.g. insurers, insureds, reinsurers, brokers etc. Nonetheless, arbitration is intended to be less formal than litigation and therefore, although an issue may be determined during an arbitration it may not have been fully argued (i.e. to the degree that it would have been in a court of law). For instance, rules of evidence might not have been strictly adhered to nor full reasons for an award published. The Court's

[4] Bonner v Cox [2005] EWCA Civ 1512.

decision in the *Lincoln National Life Insurance Co. v Sun Life Assurance Co. of Canada*[5] case affirms the view that an arbitration finding should not be binding on parties who are ***not*** involved in the hearing. In other words, arbitration awards are binding only on parties to the award.

However, in 2005 the Courts have proved flexible in relation to decisions involving arbitrations, in an effort to give efficacy to such proceedings. A few cases highlight this.

In *King v Brandywine Reinsurance Co.*[6] the principal point of interest was the Court of Appeal's ruling that the policy's governing law was New York law. Significantly, this decision was based on the fact that clauses within the policy provided for disputes to be resolved, in the first instance, by arbitration in New York.

In *West Tankers Inc v Ras Riunione Adriatica di Sicurta ("The Front Comor")*[7] the grant of an anti-suit injunction was considered by the Court to be appropriate where proceedings brought in a foreign court were inconsistent with an agreement to arbitrate.

CONCLUSION

These developments demonstrate that stakeholders in the insurance process need to be aware of developments in the ever-changing legal and regulatory environment. In our experience organisations are requiring professional assistance at many stages including the following:

- At the underwriting stage for insurers;
- At the planning and procurement / negotiation stage for insurance buyers;
- Chartered loss adjusting services.
- In the event of a policy coverage or quantum dispute, by providing advice to either or both parties.
- Our aim is to minimise areas of dispute. Where they occur we promote effective resolution mechanisms and facilitate these in a manner that safeguards increasingly important existing commercial relations. In this way we can advise on, provide representation and/or manage a variety of mediation and expert determination procedures tailored to achieve the best outcome for the parties concerned.

We trust the above is of interest and that it highlights a few issues arising in 2005 that we consider will continue to be of importance in 2006 and beyond.

Should you require any more specific advice on the issues raised in this article place contact adam.humphrey@concordiaconsultancy.com.

[5] Lincoln National Life Insurance Co v Sun Life Assurance Co of Canada [2004] EWCA Civ 1660.
[6] King v Brandywine Reinsurance Company [2005] EWCA Civ 235.
[7] Front Comor [2005] EWHC 454.