# THE INSURANCE DISPUTES LAW REVIEW

Fifth Edition

**Editors**
Joanna Page and Russell Butland

THE LAWREVIEWS

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This article was first published in November 2022
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Published in the United Kingdom
by Law Business Research Ltd
Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK

www.TheLawReviews.co.uk



ISBN 978-1-80449-128-7

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

# ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

AIYON ABOGADOS SLP

ALLEN & OVERY LLP

FGE EBRAHIM HOSAIN

HAVIARAS & PHILIPPOU LLC

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# PREFACE

We are delighted that this is now the fifth edition of *The Insurance Disputes Law Review*. It is a privilege to be the editors of this excellent and succinct overview of recent developments in insurance disputes across 18 important insurance jurisdictions.

Insurance is a vital part of the world's economy and critical to risk management in both the commercial and the private spheres. The law that has developed to govern the rights and obligations of those using this essential product can often be complex and challenging, with the legal system of each jurisdiction seeking to strike the right balance between the interests of insurer and insured, and also the regulator who seeks to police the market. Perhaps more than any other area of law, insurance law can represent a fusion of traditional concepts (concepts almost unique to this area of law) together with constant entrepreneurial development, as insurers strive to create new products to adapt to our changing world. This makes for a fast-developing area, with many traps for the unwary. Further, as this indispensable book shows, even where the concepts are similar in most jurisdictions, they can be implemented and interpreted with very important differences in different jurisdictions.

To be as user-friendly as possible, each chapter follows the same format – first providing an overview of the key framework for dealing with disputes – and then giving an update of recent developments in disputes.

As editors, we have been impressed by the erudition of each author and the enthusiasm shown for this fascinating area. It has also been particularly interesting to note the trends that are developing in each jurisdiction.

An evolving theme in almost every jurisdiction is the increase in protections for policyholders. Much of the special nature of insurance law has developed from an imbalance in knowledge between the policyholder (who had historically been blessed with much greater knowledge of the risk to be insured) and the insurer (who knew less and, therefore, had to rely on the duties of disclosure of the policyholder). With the increasing use of artificial intelligence to assess data and more detailed scope for analysis across risk portfolios, the balance of knowledge has shifted; it will often now be the insurer who is better placed to assess the risk. This shift has manifested itself in tighter rules requiring insurers to be specific in the questions to be answered by policyholders when they place insurance, and in remedies more targeted at the insurer if full information is not provided. Coupled with these trends, however, is the increasing desire by some jurisdictions to set limits on the questions that can be asked so that, for example, in relation to healthcare insurance, policyholders are not denied insurance for historical matters. In light of the ongoing scourge of covid-19, and the complexity of its effects across the world's economies, this issue continues to be at the forefront of debate.

We can expect that this tussle between the commercial imperative for insurers to price risk realistically and the need to balance consumer protection, government policy and privacy will increasingly be at the heart of insurance disputes.

The past year has been tumultuous. The conflict under way in Ukraine, together with its impact on energy security and global supply chains, comes as a further shock on top of climate events and continued disruption from covid-19. This conflict is having a substantial effect on the aviation insurance market, particularly in relation to providing cover for war and contingency coverage. Business interruption issues, meanwhile, continue to be worked through across the affected legal systems; key areas of coverage have been addressed, but there are now more bespoke issues to deal with; for example, relating to application of policy limits.

There has in the past year been particular focus on directors' and officers' policies. These are under increasing pressure as directors are in the spotlight following strategic climate change litigation being conducted, particularly relating to greenwashing and transparency in the process of the transition to net zero. Similarly, cyber risks are ever increasing and again place directors and officers under scrutiny.

No matter how carefully formulated, no legal system functions without effective mechanisms to hear and resolve disputes. Each chapter, therefore, also usefully considers the mechanisms for dispute resolution in each jurisdiction. Courts appear to remain the principal mechanism, but arbitration and less formal mechanisms (such as the Financial Ombudsman in the United Kingdom) can be a significant force for efficiency and change when functioning properly. The increasing development of class action mechanisms, particularly among consumer bodies (e.g., in France and Germany) is likely to be an important factor.

We would like to express our gratitude to all the contributing practitioners represented in *The Insurance Disputes Law Review*. Their biographies are to be found in the first appendix and highlight the wealth of experience and learning that the contributors bring to this volume. On a personal note, we must also thank Lucia Craft-Marquez at our firm, who has done much of the hard work in this edition.

Finally, we would also like to thank the whole team at Law Business Research, who have excelled at bringing the project to fruition and in ensuring both a professional look and consistency in the contributions.

**Joanna Page and Russell Butland**
Allen & Overy LLP
London
October 2022

**Chapter 6**

# ENGLAND AND WALES

*Joanna Page and Russell Butland*[1]

## I OVERVIEW

English insurance law has traditionally been perceived as insurer-friendly and, as a result, England and Wales has been viewed as an insurer-friendly jurisdiction for insurance disputes. To a large extent this is the product of English legal history, with many of the most significant developments in English insurance law taking place in the context of marine insurance or similar overseas risks.[2] Until as recently as 2015, the leading statute in English insurance law remained the Marine Insurance Act 1906 (much of which also applied to non-marine insurance). For those risks, during that period of history, the informational asymmetry between the insured and the insurer was especially acute. To resolve that asymmetry, English insurance law placed onerous duties of disclosure and compliance with warranties on the insured, with potentially drastic consequences for failure, even if entirely innocent.

However, that historic imbalance has recently been partly redressed by the Insurance Act 2015, the most important development in English insurance law since the Marine Insurance Act 1906. The Insurance Act 2015 recasts the insured's duty of disclosure and the ability of insurers to convert pre-contractual representations into warranties, and sets out a new regime of proportionate remedies for insurers. At the time of writing, there have only been a limited number of disputes under the new law and so we are only beginning to see precisely how its provisions will be applied. There are also indications that insurers are seeking to contract out of many of the provisions of the Act where possible in commercial policies.

## II THE LEGAL FRAMEWORK

### i Sources of insurance law and regulation

English insurance law is a mixture of common law (drawn from cases before the courts) and statute. Many of the principles developed during early insurance disputes, including the duty of 'utmost good faith' were codified in the Marine Insurance Act 1906 (the 1906 Act), which continues to influence insurance law in the United Kingdom (UK), US and Commonwealth jurisdictions. Although the 1906 Act expressly governs marine insurance, many of its sections

1 Joanna Page is a partner and Russell Butland is a counsel at Allen & Overy LLP.

2 Lord Mansfield's celebrated judgment in *Carter v. Boehm* (1746) 3 Burr 1905, 96 ER 342, which established the concept of utmost good faith in English insurance law, concerned an insurance policy taken out on a fort in what is now Indonesia.

and principles are also applicable to non-marine insurance contracts and it was the most significant statute in English insurance law until the Insurance Act 2015 came into force on 12 August 2016.

Other key statutes regulate risk-specific insurance contracts. For example, the development of life and fire insurance contracts led to the Life Assurance Act 1774 and Fire Insurance Duty Act 1782, key parts of which remain in force today. General consumer legislation, such as the Consumer Rights Act 2015, also applies to consumer insurance contracts.

Firms providing insurance, reinsurance services or insurance intermediation must be authorised to do so under the Financial Services and Markets Act 2000 (FSMA). The Prudential Regulation Authority (PRA) is responsible for the authorisation of such firms. The Financial Conduct Authority (FCA) regulates the conduct of authorised firms and the FCA's Insurance Conduct of Business Sourcebook applies to the sale of general and protection insurance products, outlining expected standards for insurers such as the maintenance of suitable customer information, appropriate product disclosure and fair claims handling. Commercial parties are not required to take out insurance with local providers, although any entities wishing to sell insurance products in England and Wales must be FCA-authorised.

We cover the recent developments in the common law in Section III, but English insurance law has also seen substantial statutory revision (or restatement) in recent years. The four significant recent statutes are:

*a* the Enterprise Act 2016, which for the first time provides policyholders with a potential right to claim damages in the event of a late payment of a claim by an insurer. Prior to the Enterprise Act 2016, policyholders could not recover any additional losses they suffered as a result of undue delay in payment of a claim by an insurer;

*b* the Third Party (Rights against Insurers) Act 2010 (updating the 1930 legislation with the same name) updated and strengthened the regime whereby a third party with a claim against an insolvent insured can, following the insolvency, pursue that claim directly against the insolvent insured's insurers. The insurer continues to have any defences available to the insured in the third party's claim and any defences that the insurers may itself have under the terms of the relevant policy;

*c* the Consumer Insurance (Disclosure and Representations) Act 2012, which applies only to consumer insurance contracts, limits the consumer's duty of disclosure, establishing that an insurer must ask appropriate questions to which the consumer must answer honestly and carefully; and

*d* the Insurance Act 2015 applies to both consumer and business insurance contracts entered into from 12 August 2016. The most significant developments to English insurance law now codified in the Insurance Act 2015 are:

- The Insurance Act 2015 alters the policyholder's duty of disclosure in non-consumer insurance. Prior to the Insurance Act 2015, the insured was under an onerous duty to disclose all known material facts about the risk to be insured. A failure to disclose any material fact would entitle the insurer to avoid the policy (and so avoid paying any claims), if the insurer could show that, if that fact had been disclosed, it would not have written the policy on the terms it in fact did (or not written it all). The ability to avoid arose whether the non-disclosure was fraudulent, negligent or, indeed, innocent. As a result, insurance disputes in England were often characterised by searches for, and arguments over, alleged non-disclosures. The Insurance Act 2015 replaces that duty with a new duty on

the insured to make a fair presentation of the risk to be insured. The insured must now disclose all material circumstances that it knows or ought to know, or provide sufficient information to place a prudent insurer on notice to make further enquiries. Thus the burden is shifted in part onto the insurer. For policies entered into after 12 August 2016, it will be enough for an insured to disclose sufficient information to place a prudent insurer on notice to make further enquiries. If the prudent insurer's enquiries would have revealed a material circumstance that was not disclosed, but the actual insurer made no such enquiries, the insurer may no longer be able to avoid the policy for non-disclosure. Further, if the insurer can establish a breach of the duty to make a fair presentation of the risk that induced it to write the policy, it will no longer be automatically entitled to avoid the policy. To do so, the insurer will now need to show either that the breach was deliberate or reckless, or that it would not have insured the risk at all if a fair presentation had been made. If the breach is not deliberate or reckless and the insurer can only show that it would have insured the risk on different terms (e.g., for a higher premium), the insurer's remedy is to treat the policy as though it were written on those different terms.

- The Insurance Act 2015 includes new provisions relevant to breach of warranties in insurance policies. Whereas a breach of warranty previously discharged an insurer from liability under a policy from the date of breach, the Insurance Act 2015 introduces proportionate remedies, abolishing any rule of law that causes a breach of an express or implied warranty to result in automatic discharge of the insurer's liability. For example, if the breach is neither deliberate nor reckless and the insurer would still have entered the contract, the insurer is only able to reduce cover on a proportionate basis; if the breach is neither deliberate nor reckless but the insurer would not have contracted, the insurer is able to avoid the contract but must return the premiums to the insured. Any policy terms purporting to convert pre-contractual representations made by the insured into a warranty (known as 'basis of contract' clauses) will no longer have effect.
- The Insurance Act 2015 clarifies the remedies available to an insurer in the event an insured makes a fraudulent claim. If a fraudulent claim is made, the insurer is not liable for any part of that claim and can terminate the policy from the date of the fraud. However, the insurer cannot avoid the policy altogether and remains liable for genuine pre-fraud claims.

### ii Insurable interest

English law has historically maintained that, for an insurance contract to be valid, the insured must have an insurable interest in the subject matter of the policy. An insurable interest is a legal or equitable interest in the subject matter of the insurance, or some interest short of a legal or equitable interest that means the insured would suffer disadvantage or be deprived of an advantage should the risk manifest.

The historic centrality of insurable interest to the concept of insurance in English law means that certain types of derivative contracts, such as credit default swaps, which in many ways economically mirror an insurance arrangement, are not considered (or regulated) as insurance contracts in English law.

Following recent legislative reform, there is uncertainty as to whether an insurable interest is a common law requirement or an indirect statutory requirement. Prior to the

Gambling Act 2005, there was a clear statutory basis for insurable interest. The 1906 Act codified the general rule of law (for marine insurance) into a statutory requirement; the Life Assurance Act 1774 rendered life and contingent insurance contracts void without an insurable interest; and the Gaming Act 1845 created an indirect requirement for an insurable interest in all other contracts of insurance.

The Gambling Act 2005, which was intended to regulate new types of gambling activities, removed the 1845 Act's indirect requirement for insurable interest. As the Act did not intend to affect insurance, the impact of the 2005 Act on insurable interest may be limited. However, uncertainty now exists as to the exact legal basis of insurable interest and proposals by the Law Commission of England and Wales to include a statutory definition of insurable interest in the Insurance Act 2015 were rejected. Nevertheless, the English and Welsh and Scottish Law Commissions are continuing to consult on a draft Insurable Interest Bill, confined to life and life-related insurance, to introduce a statutory definition of insurable interest.

### iii Fora and dispute resolution mechanisms

Insurance disputes with a value greater than £100,000 will generally be heard at first instance in the High Court. The Commercial Court, a specialist court within the Business and Property division of the High Court, has specialist judges with insurance experience and will be the most common forum for large insurance disputes. If a claim is greater than £50 million and raises issues of general importance to financial markets, it may be heard on the 'Financial List', a specialist cross-jurisdictional list established to handle claims related to the financial markets. At first instance the dispute will be heard by a single judge.

The procedural rules of the Financial List also provide a specialist expedited procedure known as the Financial Markets Test Case Scheme for claims that raise issues of general importance in relation to which immediately relevant authoritative English law guidance is needed. Business interruption insurance claims arising out of the covid-19 pandemic were the first (and so far only) use of this specialist procedure.

Appeals from the High Court are heard in the Court of Appeal, usually by a panel of three Lord Justices of Appeal. To appeal to the Court of Appeal, the appellant will need to obtain the court's permission and to obtain this will need to show that, where the appeal is a first appeal (i.e., the decision being appealed is not itself an appeal from a lower court), the appeal would have a real prospect of success or there is some other compelling reason for it to be heard. Where the appeal to the Court of Appeal is a second appeal (i.e., the decision being appealed is itself an appeal from a lower court), the appellant will need to show that the appeal would have a real prospect of success and either it raises an important point of principle or practice, or there is some other compelling reason for it to be heard.

Appeals from decisions of the Court of Appeal are heard in the UK Supreme Court (the UK's highest court), usually by a panel of five Justices of the Supreme Court. Again, the appellant will need to obtain permission to appeal, which will only be granted if it can be shown that the appeal raises an arguable point of law of general public importance that ought to be considered by the Supreme Court.

Claims with a value less than £100,000 will be heard in the relevant county court (which is usually the local county court of the defendant). The Financial Ombudsman Service (FOS) can also independently review and settle non-contentious complaints between an insured and insurer. The FOS is primarily designed to deal with complaints by individual consumers, but complaints can also be brought by, or on behalf of, small businesses who, as

customers, use financial services. To qualify, the business making the complaint must have an annual turnover of less than £6.5 million and fewer than 50 employees or a balance sheet total of less than £5 million. Decisions of the FOS are binding on insurers and can only be challenged by judicial review.

The English courts encourage alternative dispute resolution (such as mediation) both before and during arbitral or litigation proceedings. An unreasonable failure to engage in alternative dispute resolution may lead to the refusing party being required by the court to pay more of the other party's legal and other costs of pursuing the claim (or receiving less of their own costs if successful). Mediation is the most widely used form of alternative dispute resolution in insurance disputes, but other alternatives include expert determination, adjudication and early neutral evaluation.

It is common for English law-governed insurance contracts to contain a London-seated arbitration clause. The QMUL 2021 International Arbitration Survey identified London as the most popular choice of seat for arbitration and the London Court of International Arbitration as one of the five most preferred arbitral institutions. London also remains a popular choice of seat for arbitrations arising out of Bermuda Form excess liability insurance policies. Bermuda Form policies often achieve a transatlantic balance between the perceived insurer-friendly laws of England and the perceived insured-friendly laws of New York by providing for the policy to be governed by New York law but for disputes to be resolved in London-seated arbitration (and, thus, in accordance with English procedural law).

Under the Arbitration Act 1996, an arbitral award issued by a London-seated tribunal can only be challenged in the English courts on the basis:

*a* that the arbitral tribunal did not have substantive jurisdiction;[3]

*b* of a serious irregularity affecting the tribunal, the proceedings or the award and that has caused or will cause substantial injustice.[4] The types of serious irregularity are set out in Section 68(2) and range from the tribunal exceeding its powers to the failure of the tribunal to deal with the issues that were put to it; and

*c* of a question of law.[5] To challenge an award on this basis requires leave to appeal from the court (which is not required for a challenge under Section 67 or Section 68), which will only be given if the decision of the tribunal on the question of law is obviously wrong or the question is one of general public importance and the decision of the tribunal is at least open to serious doubt.

While it is common for London-seated arbitral agreements to exclude appeals on the grounds of a question of law, it is not possible to exclude appeals regarding substantive jurisdiction or serious irregularity.

## III RECENT CASES

There have been a number of significant cases in the English courts since the previous edition. The covid-19 business interruption litigation has given rise to further judgments on issues not resolved by the Supreme Court's judgment in January 2021, and at least two further judgments are imminent at the time of writing. Insurance disputes have not troubled the

3 Section 67.

4 Section 68.

5 Section 69.

Supreme Court in the past year to the same extent as in preceding years, but the Court of Appeal has given two judgments on the meaning of commonly used forms of aggregation wording, and the first reported case on the new law on damages for late payment of claims under Section 13A of the Insurance Act 2015 is also covered below.

Two recent decisions of the English courts also illustrate the importance of consistency in policies within a tower of insurance when it comes to dispute resolution clauses, and Brexit continues to drive the use of the insurance business transfer regime in Part VII of the FSMA.

These and other key recent cases are summarised below, including important decisions in such areas as non-disclosure and fair presentation of the risk, notification, subrogation and the Third Parties (Rights against Insurers) Act 2010.

### i Business interruption and covid-19

While business interruption cover is typically bought by policyholders as an extension to property damage policies, and primarily responds in cases of property damage, non-damage extensions to cover also exist in the market providing cover for losses caused by disease or the response of public authorities to disease. There has been a deluge of claims against such policies as a result of covid-19 and the national lockdowns in the UK, and considerable uncertainty as to whether such policies respond. The key coverage issues that arose on the most commonly used forms of policy were addressed by the Supreme Court in January 2021 in the first-ever case using the Financial Markets Test Case Scheme (the Test Case) under the Civil Procedure Rules (CPRs). The Test Case was brought by the regulator, the Financial Conduct Authority, on behalf of policyholders and with the consent and cooperation of eight insurers seeking to promote greater clarity on the legal issues.

We covered the outcome of both the Divisional Court and the Supreme Court judgments in the Test Case in the third and fourth editions. Since the Supreme Court's judgment in the Test Case, there have been two further significant decisions in this area.

The first is the arbitration award in *Various Policyholders v. China Taiping Insurance (UK) Co Ltd*[6] (which the parties agreed be published, notwithstanding the confidential nature of the arbitral process). The relevant policy provided cover for interruption as a consequence of 'instructions issued by the Police or other competent local authority'. Lord Mance, sitting as a sole arbitrator, held that the UK government's orders and advice issued during the covid-19 pandemic did not engage the relevant insuring clause, as the UK government was not a competent local authority but, rather, a central or countrywide authority. Although an arbitral award does not have precedential value, as a former Supreme Court justice, Lord Mance's reasoning is likely to be highly persuasive in any case before the English courts considering the same question.

*Corbin and King Limited & Ors v. Axa Insurance UK PLC*[7] concerned the interpretation of a non-damage denial of access (NDDA) clause similar, but not identical, to clauses considered by the Divisional Court in the Test Case. In the Test Case, the Divisional Court had held that those NDDA clauses did not provide cover as their wording concerned specific local occurrences of disease only, and not a national response to a pandemic. Those findings of the Divisional Court were not appealed to the Supreme Court. In *Corbin and King*, the High Court held that it was not bound to apply the Divisional Court's judgment regarding the relevant NDDA clauses in the Test Case to the similar clauses in issue in *Corbin and King*.

6 Ad hoc arbitration under the Arbitration Act 1996 (10 September 2021).

7 [2022] EWHC 409 (Comm).

The High Court considered that the NDDA clauses at issue were not materially identical to those in the Test Case, and that the Supreme Court's subsequent judgment on the correct approach to the causation analysis meant that the arguments before it were different from those made to the Divisional Court in the Test Case. The High Court held that the NDDA clauses at issue in *Corbin and King* insured specific local occurrences of disease but, in light of the Supreme Court's approach to causation, also encompassed national disease events provided that they encroached on the relevant locality. The High Court also held that the limits of liability in the policy applied individually to each restaurant premises and for each lockdown, and not as an aggregate limit across all premises and lockdowns.

At the time of writing, judgments in two further cases before the High Court are expected imminently.[8] Those judgments are expected to address further important issues, including the application of the policy limits provisions in the widely used *Marsh Resilience* wording to multiple premises and lockdowns, and the issue whether payments received by policyholders under the UK government's furlough scheme should, or should not, be taken into account in quantifying claims.

### ii Part VII transfers and Brexit

Part VII of the FSMA provides a court-sanctioned procedure for the legal transfer of insurance policies between insurers. The court is required to consider a report on the viability of the transfer by an independent expert, along with submissions from the FCA and PRA and any objections made by policyholders (or any other person who alleges they are adversely affected by the proposed transfer).

A number of recent applications for sanction of a Part VII transfer have also had to consider issues raised by Brexit. Courts have frequently found themselves in the situation of having to balance:

> *the inevitable prejudice to a large body of EEA policyholders of their policies not being able to be serviced or paid after the end of 2020 if the sche`me were not to be sanctioned, against any potential risk of prejudice to individual policyholders or reinsurers under the scheme's terms.*[9]

While the courts have still been careful to consider the interests of policyholders, they have shown that they are prepared to approve a scheme despite some elements of prejudice to policyholders where the transfer is in response to an external circumstance, such as Brexit.[10]

In *Re Mercantile Indemnity Co Ltd*,[11] the High Court sanctioned three Part VII transfers where UK insurance and reinsurance companies sought to transfer policies to another group company domiciled in Belgium, to allow their business to be conducted in the European Economic Area (EEA) following Brexit. The Court considered that it was appropriate to sanction the schemes because they were not intended to serve a commercial purpose but, rather, were intended to ensure that, following Brexit, a proper level of service could be provided to policyholders.

8 *Stonegate Pub Company Limited v. MS Amlin Corporate Member Limited, Liberty Mutual Insurance Europe SE and Zurich Insurance PLC*, case number CL-2021-000161, and *Greggs PLC v. Zurich Insurance PLC*, case number CL-2021-000622.

9 Snowden J in *Re AIG Europe Ltd and another* ([2018] EWHC 2818).

10 *Rothesay Life Plc, Re* at paragraph 23.

11 [2022] EWHC 2223 (Ch).

In *Phoenix Life Ltd, Re*[12] the High Court gave guidance on the legislation permitting the English courts to continue to make orders sanctioning insurance business transfer schemes that included business carried on in an EEA state for two years after Brexit.[13] The High Court held that the legislation only required the order sanctioning the scheme to be made by 31 December 2022, and not that the transfer itself be effected by that date.

### iii Non-disclosure and fair presentation of the risk

In *Ristorante Ltd (t/a Bar Massimo) v. Zurich Insurance Plc*[14] the High Court held that a question in a proposal form that asked whether specific individuals within the business had been the subject of an insolvency process was limited to those individuals. It did not require the policyholder to disclose information regarding any insolvency process in which any other connected person or company had been involved. Further, by asking that question in the proposal form, the insurer had waived its entitlement to disclosure of the requisite information regarding other connected persons or companies. Therefore, the policyholder's failure to disclose that certain directors and shareholders had previously been directors of a company that entered liquidation did not entitle the insurer to avoid the policy for material non-disclosure or for failure to make a fair presentation of the risk.

This case concerned a policy that was entered into prior to the Insurance Act 2015 coming into force but was then renewed after the Act had come into force and materially changed English law on non-disclosure. However, in this case, the policyholder accepted that if its arguments as to the meaning of the question in the proposal form had failed, there would have been both a material non-disclosure and an unfair presentation of the risk, such that the insurer would have been entitled to avoid the policy. Therefore, the Court was not required to consider whether the changes to the law following the Insurance Act 2015 affected the outcome.

### iv Notification

In *Arch Insurance (UK) Ltd v. McCullough*,[15] the insured's public liability policy made it a condition precedent to cover to provide notification of any circumstance that could give rise to a claim 'as soon as reasonably practicable'. The insured failed to notify the insurer of an incident at his outdoor motorbike track until 11 months after the accident, in which a child fell from her bike and sustained serious injuries. The High Court held that the accident itself was a circumstance that a reasonable insured would have realised made a risk of a claim more than fanciful, and, therefore, required notification as soon as reasonably practicable. The 11-month period taken to notify was not as soon as reasonably practicable and, therefore, the condition precedent to the insurer's liability was not satisfied and the insurer had no obligation to indemnify the insured for the claim by the child's parents.

12 [2022] EWHC 1796 (Ch).

13 Financial Services (Miscellaneous) (Amendment) (EU Exit) Regulations 2019.

14 [2021] EWHC 2538 (Ch).

15 [2021] EWHC 2798 (Comm).

### v Aggregation

The Court of Appeal has recently given two judgments that starkly illustrate the importance of the specific wording used in aggregation clauses. Both cases concern sustained misconduct by professionals impacting multiple clients over a long period, linked by the professionals' habitual malpractice or dishonesty. However, on the basis of one form of aggregation language, the Court of Appeal held that the claims concerned aggregated and, on another form, it held that the claims concerned did not.

In *Spire Healthcare Ltd v. Royal and Sun Alliance Insurance Ltd*[16] the Court of Appeal considered the meaning of the phrase 'consequent on or attributable to one source or original cause' that commonly appears in aggregation clauses, in the context of a series of clinical negligence claims against the same surgeon. Those claims had been categorised by the insured healthcare provider into two groups – the first where surgery had been performed and the second where it had not. The High Court had held that the two groups of claims were attributable to two separate original causes and, therefore, should not be aggregated together for the purposes of the application of the policy limits. However, the Court of Appeal reached the opposite conclusion. It held that the relevant phrase was a traditional and well-known formula in insurance policies intended to achieve the widest possible search for a unifying factor, that there was no distinction between 'source' and 'original cause', and that 'original cause' connoted a 'considerably looser causal connection' than proximate cause (though not every 'but for' cause would amount to an 'original cause'). In this case, the unifying factor was the surgeon who habitually acted in breach of duty, and, therefore, both groups of claims were attributable to the same source or original cause.

In contrast, in *Baines v. Dixon Coles & Gill*,[17] the Court of Appeal held that multiple claims brought against a solicitors' firm after a partner's theft of client funds over a long period could not be aggregated for the purposes of a claim under a policy on the Solicitors' Regulation Authority's Indemnity Insurance Rules 2013 minimum terms and conditions. The aggregation clause in that policy required claims to 'arise from one act or omission, or a series of related acts or omissions'. The Court of Appeal held that each theft was a separate act and the partner's dishonest treatment of clients' money was not a sufficient unifying factor for each theft to be considered part of a series of related acts or omissions, and, therefore, the aggregation clause did not apply.

### vi Late payment of claims

*Quadra Commodities SA v. XL Insurance Company SE and Others*[18] is the first judgment to consider the term implied by Section 13A of the Insurance Act 2015 that insurance claims must be paid within a reasonable time, which includes a reasonable time for the insurer to investigate and assess the claim. Section 13A(4) of that Act also provides that, where an insurer can show that there were reasonable grounds for disputing a claim, it will not breach the implied term merely by failing to pay, but its conduct in handling the claim may still be a relevant factor.

In *Quadra Commodities* the insured argued that the insurer's failure to pay a marine cargo claim for a period of 15 months from notification was a breach of the implied term, and

16 [2022] EWCA Civ 17.

17 [2021] EWCA Civ 1211.

18 [2022] EWHC 431 (Comm).

claimed losses calculated by reference to the return on its shareholders' equity. Butcher J held that the burden of proof to establish that payment was made only after a reasonable time was on the insured, as the party alleging breach, but that the insurer had the burden of proving that there were reasonable grounds for disputing the claim. On the specific circumstances of the claim, which included the complexity of the underlying issues and certain factors beyond the insurers' control, Butcher J concluded that a reasonable time was about a year from notice. However, he held that the insurer had reasonable grounds for disputing the claim – even though those grounds were ultimately unsuccessful at trial – and, therefore, there was no breach of the implied term.

### vii Subrogation

Subrogation enables an insurer to recoup all or some of the money from a third party that caused or contributed to a loss for which the insurer has indemnified the insured. Commercial insurance commonly involves multiple insurers underwriting part of the relevant risk, often across multiple excess layers, and, therefore, each having a partial, several, subrogated interest in any third-party recoveries. In *Royal and Sun Alliance Insurance Plc v. Textainer Group Holdings Ltd*,[19] an insurer successfully applied for an order under Rule 19.6(1)(b) of the English Civil Procedure Rules to act as a representative for other insurers in a subrogated claim for recoveries from a shipping container leasing business. The High Court held that the insurer had the same interest in the claim as those insurers whom it sought to represent, and it was appropriate for it to be granted permission to do so under Rule 19.6.

### viii Jurisdiction

Two recent decisions of the English courts illustrate the importance of consistency in policies within a tower of insurance when it comes to dispute resolution clauses.

In *AIG Europe SA v. John Wood Group Plc*[20] the primary policy in a tower of insurance policies did not contain a choice of law or jurisdiction clause. The excess policies then contained clauses that both purported to follow the choice of law and jurisdiction in the primary policy and separately provided for either the jurisdiction of the English courts or for London-seated arbitration. The insured was a defendant to a claim in the Canadian courts and commenced proceedings against the primary and excess insurers in the Canadian courts. The primary insurer did not dispute the Canadian court's jurisdiction, but the English Court of Appeal upheld the High Court's granting of an anti-suit injunction against those proceedings in the excess insurers' favour. The Court of Appeal held that had the primary policy contained a jurisdiction clause, the follow-form clause in the excess policies would have superseded any separate jurisdiction clauses in those policies. However, as there was no jurisdiction clause in the primary policy, the follow-form clause did not apply, and the various different jurisdiction clauses in the excess policies prevailed.

This case is a salutary reminder of the importance of ensuring consistency and coherence of dispute resolution clauses across any tower of insurance. The outcome of this case left the insured pursuing substantially the same insurance claim against the primary insurer in the Canadian courts, against certain of the excess insurers in the English courts, and against one excess insurer in separate English arbitration proceedings.

19 [2021] EWHC 2102.

20 [2022] EWCA Civ 781.

The English court also bifurcated the determination of a dispute that impacted multiple layers in *Axis Corporate Capital UK II Limited v. ABSA Group Ltd & Ors*,[21] in which it held that, in the context of reinsurance claims, where there are differing jurisdiction clauses in the primary and excess layers, there could be different proceedings in different jurisdictions. The High Court held that the primary reinsurance policy contained only a non-exclusive jurisdiction clause in favour of the English courts, whereas the excess reinsurance policies contained exclusive English court jurisdiction clauses. Therefore, the insured was able to continue claim proceedings commenced in the South African courts against the primary reinsurers but was required to discontinue those proceedings against the excess insurers and pursue any such claims in England. The insured subsequently sought a stay of the English proceedings on case management grounds pending the conclusion of the South African proceedings, as both proceedings concerned substantially the same issues. However, the High Court held that to grant such a stay would be 'to do by the back door what cannot be achieved by the front door', as it would be in substance a stay on *forum non conveniens*, rather than case management, grounds. It held, therefore, that it would be contrary to principle for the stay application to be granted, leaving the insured to pursue substantially same claim in two different fora.

### ix Third Parties (Rights against Insurers) Act 2010

In *Irwell Insurance Co Ltd v. Neil Watson & Ors*,[22] the Court of Appeal held that an employment tribunal was a 'court' for the purposes of Section 2(6) of the Third Parties (Rights against Insurers) Act 2010. Therefore, it was within its remit to deal with the question of an insurer's liability to a claimant under the Act for a claim for unfair dismissal against the employer, following the employer's insolvency. The tribunal's statutory exclusive jurisdiction to deal with the employee's unfair dismissal claim also overrode the arbitration clause in the insurance policy. Therefore, that clause did not prevent the employee pursuing its claim against the insurer before the employment tribunal.

## IV THE INTERNATIONAL ARENA

The rules that will be applied by the English courts to determine where insurance disputes between international parties are heard depend on where the insurer and the insured are domiciled. Prior to Brexit, if both were domiciled in EU Member States, jurisdiction was determined in accordance with the Recast Brussels Regulation. If one party was domiciled in an EU Member State and another in an EEA Member State, then jurisdiction was determined in accordance with the Lugano Convention. After 31 December 2020 (Brexit Transition Day), the Recast Brussels Regulation and the Lugano Convention no longer apply where English courts have been selected in commercial contracts, unless the claim form in the dispute was issued before Brexit Transition Day, in which case, and in any case where the defendant is domiciled outside the EEA, the jurisdiction of the English courts is determined by Part 6 of the CPRs. Domicile is determined as at the date of issue of the proceedings.

At the time of writing, the UK is seeking, but has not been permitted, to accede to the Lugano Convention, which in relation to insurance disputes is materially the same as the

21 [2021] EWHC 861 (Comm).

22 [2021] EWCA Civ 67.

Recast Brussels Regulation. The Recast Brussels Regulation contains specific, insured-friendly rules (in Articles 10 to 16) on the determination of jurisdiction over insurance disputes (although these rules do not also apply to reinsurance disputes or contribution claims). Those rules provide that:

*a* the insured has the option of suing in the jurisdiction where they are domiciled[23] or in the jurisdiction where the insurer is domiciled;[24] but

*b* insurers are restricted to suing an insured in its country of domicile.[25] However, Article 14.2 clarifies that this rule does not affect the insurer's ability to bring a counterclaim if sued by the insured in a country other than that of its domicile.

There are also specific rules for insurance of real property and liability insurance,[26] which allow the insured also to sue in the place where the harmful event to the property occurred or the harmful act resulting in liability occurred. Articles 15 and 16 of the Recast Brussels Regulation restrict the ability of insurers to remove the benefit of the rules in Articles 10 to 14 by including exclusive jurisdiction clauses in policies. However, those restrictions do not apply to large commercial risks, which encompass most risks insured by any company with a balance sheet total of at least €6.2 million, a net turnover of at least €12.8 million and an average 250 or more employees. For any company that equals or exceeds these metrics, an exclusive jurisdiction clause in an insurance policy will still be effective to determine where any disputes are heard.

The UK is also party to the Hague Convention on Choice of Court Agreements 2005 (the Hague Convention). The Hague Convention requires contracting state courts (including all EU Member State courts) to respect exclusive jurisdiction clauses in favour of other contracting state courts and to enforce related judgments.

Where the defendant (which in insurance disputes is usually, although not always, the insurer) is domiciled outside the EEA (or is domiciled within the EEA but proceedings are commenced after Brexit Transition Day and prior to any accession of the UK to the Lugano Convention), Part 6 of the CPRs provides that the English court will have jurisdiction over a dispute if the claimant has the right to serve the claim form on the defendant and the English court is satisfied that it is appropriate for the case to be heard in England. A claimant will have the right to serve the claim form on a defendant without the court's permission if the defendant is present in England (even if only temporarily and habitually resident overseas) or has nominated a solicitor or process agent in England who is authorised to receive service. Often in insurance policies with an English jurisdiction clause, the broker will be nominated as the process agent for service for all the insurers and so service issues are relatively uncommon in insurance disputes.

However, if the defendant cannot be served in the jurisdiction, then the permission of the English court is needed to serve proceedings on the defendant where it is domiciled out of the jurisdiction. To obtain permission, the claimant needs to satisfy the court that: (1) it has a good arguable case that one of the jurisdictional 'gateways' in CPRs Practice Direction 6B apply; (2) there is a serious issue to be tried; and (3) England is the forum where the case should properly be tried. The jurisdictional gateways of most relevance to insurance disputes

23 Article 11(1)(b).

24 Article 10.

25 Article 14.

26 Article 12.

are the gateway for a claim for an injunction (which is the relevant gateway for commencing proceedings for an anti-suit injunction if one party is threatening or commences proceedings in breach of the policy's jurisdiction or arbitration clause) and the gateway for a claim made in respect of a contract that is governed by English law or contains a jurisdiction clause in favour of the English courts. In practice, where an insurance policy contains an English court jurisdiction clause, the English courts are highly likely to assert jurisdiction. Conversely, if an insurance policy contains a jurisdiction clause in favour of another jurisdiction, the English courts are likely to respect that choice and decline jurisdiction.

The English courts will also respect the parties' choice of arbitration as their chosen dispute resolution mechanism and decline jurisdiction where there is a validly incorporated arbitration clause in a policy. It is not uncommon for an insurance policy to contain both an English court jurisdiction clause and a London-seated arbitration clause. Although those clauses are on their face inconsistent, the settled approach of the English courts is to interpret the clauses as providing for disputes to be resolved by arbitration, subject only to the supervisory jurisdiction of the English court.

For all insurance policies entered into after 17 December 2009, the English courts will continue to determine the applicable law in accordance with European Parliament and Council Regulation 593/2008, as it forms part of English law by virtue of the European Union (Withdrawal) Act (2018) (the UK Rome I Regulation).

In addition to where the dispute will be heard, and under what law, one further issue of importance for the arbitration of international insurance disputes is which arbitrators will hear the dispute. This is a matter of choice for the parties, with a mechanism usually provided by either the arbitration clause or a set of institutional rules to appoint a sole or third arbitrator in the event of disagreement. In *Halliburton v. Chubb*,[27] the Supreme Court recently considered whether an arbitrator may accept appointment in multiple arbitration proceedings in relation to the same subject matter but with only one common party, or whether doing so gave rise to an appearance of bias. Both Halliburton Company and Transocean Holdings LLC commenced separate arbitration proceedings against Chubb Bermuda Insurance Limited to recover losses arising out of the explosion on the Deepwater Horizon oil rig in the Gulf of Mexico. The same arbitrator was appointed to both tribunals, but the appointment in the Transocean arbitration was not disclosed to Halliburton. Under the Arbitration Act 1996, an arbitrator can be removed by the court for a lack of independence if it gives rise to justifiable doubts of impartiality. The test for whether justifiable doubts of impartiality are present is the same as the test for apparent bias in a judge in the English courts, namely whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias. The Supreme Court held that the courts should apply that objective test to the facts of the particular case and with regard to the particular characteristics of international arbitration, including its (typically) private nature and any customs and practice in the relevant field of arbitration. Arbitrators have a legal duty under English law to disclose matters that might reasonably give rise to justifiable doubts about the arbitrator's impartiality and a failure to disclose relevant matters is a factor to be taken into account in considering apparent bias. The Supreme Court concluded that the arbitrators had breached

27 [2020] UKSC 48.

their duty of disclosure in failing to disclose their appointment in the Transocean arbitration. However, on the facts of this case, non-disclosure would not have led the fair-minded and informed observer to conclude that there was a real possibility of bias.

## V TRENDS AND OUTLOOK

As in last year's edition, covid-19 and the challenges deriving from the pandemic have been a dominant theme in insurance disputes this year. England and Wales was one of the first jurisdictions to examine, at speed, the issues of recovery of losses for business interruption as a result of the covid-19 pandemic. The first use of the Financial Markets Test Case Scheme by the regulator, the Financial Conduct Authority, for this purpose has meant that precedential clarity was obtained swiftly from the UK's highest court on the most common forms of policy in the market, meaning that in 2022 insurers have continued to focus on resolving the large volume of claims against such policies resulting from covid-19 and the national lockdowns in the UK. However, inevitably, the Test Case did not resolve all issues, or deal with all policy wording variants and, as we have covered above, the follow-on litigation on issues not resolved by the Test Case has now reached the High Court and arbitral tribunals, and further important judgments have been handed down or are imminent.

The major global event of 2022 has undoubtedly been the conflict in Ukraine. Its effects on global markets have been widely felt and the insurance market is no exception. We are already seeing filed in courts around the world the first claims against aviation insurers in relation to aircraft leased to Russian airlines that have not been permitted to leave and have been re-registered in Russia. The first case of this kind in England and Wales is Aercap Ireland Limited's US$3.4 billion claim against both its all risks and its war risks insurers, which was issued in June 2022, and many more are anticipated.

Although the Insurance Act 2015 has now been in force for over five years, it remains to be seen precisely how certain provisions of the Act will be applied. The Act potentially represents a major rebalancing of rights and obligations between insureds and insurers (in favour of insureds), but early indications are that insurers are seeking to contract out of many of the provisions of the Act where possible in commercial policies. The recent judgment on Section 13A covered above gives the first important indication as to how damages for late payment of insurance claims will be approached by the courts.

Warranty and indemnity insurance and cyber insurance are two of the fastest developing policy markets in England and the terms of both types of policy are becoming increasingly standardised. There have only been a limited number of significant disputes in relation to these types of policies, although we anticipate that will change in the next few years, especially with the increasing importance of private capital in global mergers and acquisitions markets, and as cyberattacks are becoming an increasingly common experience for businesses.

The coming into force of the General Data Protection Regulation has also generated interest in the extent to which the risks of failing to comply with the Regulation are insurable. The position is likely to be that insurance will not be available for any fines imposed under the Regulation or under the related Data Protection Act 2018 (either because English law prohibits the insurance of fines or because policies will specifically exclude them). However, insurance may be available for the costs of participating in an investigation by the Information Commissioner's Office and defending any subsequent proceedings. Insurance disputes arising

out of data protection breaches may also be a developing area in the coming years. Disputes relating to a failure to appreciate the effect of artificial intelligence also look likely to be a developing area.

The use of after the event insurance to cover costs risks in English litigation has also increased significantly in recent years, both as a result of reduction in availability of legal aid at one end of the scale and the increased importance of litigation funding in English disputes at the other end.

In addition to these areas of potential development, climate change remains an area where claims must surely begin to rise. There appear to be no insurance claims before the English courts in this area as yet, but all eyes are on that space. Individual directors or officers that find themselves targeted by third-party claims or by regulators may also have cover under directors' and officers' insurance policies. It is particularly noteworthy that the results of the Bank of England's 2021 Climate Biennial Exploratory Scenario[28] considered that directors' and officers' insurance policies were the most likely to pay out on climate change claims.

28 https://www.bankofengland.co.uk/stress-testing/2022/results-of-the-2021-climate-biennial-exploratory-scenario.

**Appendix 1**

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ISBN 978-1-80449-128-7