

VOICE NEWSLETTER

June 2022 Issue

The IBG, a non-profit organization under the auspices of the Dubai Chamber of Commerce & Industry, is releasing the third publication of its Voice Newsletter. The contents of this release cover thought provoking market risk and insurance issues.



Once a commitment has been made to enter into an insurance contract, it may become very difficult to alter the provisions of such agreement mid-term. As such, it is important to ensure that an agreement is reached by all parties before inception of cover regarding law and jurisdiction. Clearly, there is a need to ensure that the legal environment operating in a particular jurisdiction should be understood, transparent, independent and experienced. Whilst it is always hoped that insurance disputes will be resolved in a fair and independent manner this is not always the case.

Reinsurance agreements in the Middle East invariably involve international transactions, with the cedant based in the region, and the reinsurance markets based in one of the traditional reinsurance centers of London, Paris, Zurich, Singapore and Munich. This can create disputes in determining coverage when handling challenging coverage matters and claims.

LAW AND JURISDICTION

It should not be presumed that a reinsurance contract written on terms as original is subject to the same law and jurisdiction as the original policy in every respects. Such assumption can cause significant risk to:

- the local cedant, who is responsible for 100% of the risk whether or not the reinsurance protection responds; and
- reinsurers, who rely on the cedant in its local jurisdiction on their knowledge of the risks and handling of claims.

The default position in relation to UAE risks, no matter what the policy wording might say, is that the contract is almost always subject to local law and jurisdiction.

Comprehending risks caused by law and jurisdiction differences between contracts is often over-looked or under evaluated and may lead to significant problems in the event of an insurance claim or dispute. As such, underwriters need to make themselves aware of the variety of risks from a law and jurisdiction standpoint and their effect and impact on (re)insurance contracts.

There is a general absence of (re)insurance jurisprudence in the local courts of most of Middle East countries. There are very few laws or regulations specifically dealing with reinsurance. As a result, most reinsurance specialists will be reticent of prosecuting in local courts. However, a number of recent English court cases have also created concerns for both cedants and reinsurers on the body of jurisprudence.

In choosing a jurisdiction it is prudent to determine to what degree the courts of that jurisdiction will accept and apply specific terms, exclusions and conditions contained both in the insurance and reinsurance policies, where they are subject to the same law. Engineering risks, for example, have a tendency to be some of the most complex, technical and dynamic in nature and jurisdictions which have relevant experience of dealing with Engineering disputes are better suited to resolving such disputes. This is important not just in the manner in which matters of technical and expert evidence are handled but also as to whether there is advanced insurance jurisprudence to deal with the policy coverage issues that may arise.

In common law jurisdictions, the procedure is for each party to call for its own expert evidence and for the court to decide between two competing expert interpretations. Large-scale construction disputes often see each party appoint not one but several experts to give evidence in a variety of technical fields. This system has both positive and negative attributes. It ensures a detailed analysis of the expert technical issues; on the one hand, but it can also allow the possibility for a misinterpretation by the court.

Generally, in civil jurisdictions, the court will assign the evaluation of the technical questions to an independent expert(s) chosen by the court for that purpose. Where the court is able to appoint an expert in consultation with the parties who has sufficient knowledge and expertise, this approach has several advantages. However, at times in some jurisdictions, the expert is appointed from a panel of experts retained by the court and there is no guarantee that the chosen expert has any experience of the technical nature of the particular claim.

Within the UAE's court system, the DIFC Courts are an independent English language common law judiciary, with jurisdiction governing civil and commercial disputes nationally, regionally and worldwide. Their unique legal and regulatory framework is based on international standards and principles of common law that is tailored to the region's unique requirements creating an optimal framework for the insurance industry.

It is acknowledged that different insurance companies, brokers and claim experts will have their own views on how risks posed from a law and jurisdiction standpoint should be considered. This paper does however, attempt to serve as a platform and foundation from which individual approaches can be developed and evolved.

PREMIUM BEFORE COVER

IFRS 17 obliges insurance companies to measure insurance contracts using revised estimates and assumptions that reflect the timing of cash flows and any uncertainty relating to insurance contracts. The requirement is designed to provide transparent reporting about a company's financial position and risks which could affect its solvency.

Some insurers, particularly those with weak solvency positions to start with may, when implementing IFRS 17, will face additional significant challenges derived from late or doubtful premium receivables and bad debts.

There are several examples of cash before cover requirements from local regulators, especially in those countries where local market payment terms were lax, impacting company receivables and their solvency ratios.

Cash before cover is mandatory in India, Japan, South Korea, China and several other countries. In other words, an insurance policy cover will only incept once premium payment is received by the insurance company. This signifies, of course, that the insurer will not guarantee any commitment to insurance cover, nor can coverage be confirmed until the insurer receives related premium payments from the insured. This is applicable whether it is at policy inception or renewal. Renewal premiums must therefore be paid before the policy expiry date.

In 2008, the China Insurance Regulatory Commission's (CIRC) Beijing and Shanghai offices implemented a local requirement that "cash before cover" should be adopted for motor insurance business. The CIRC also circulated a "notice on matters regarding strengthening the management of premiums receivables of insurance companies" encouraging insurance companies throughout China to embrace the "cash before cover" mechanism to control premium receivable risks.

Following the rules on motor insurance, "cash before cover" was extended in many parts of China to apply to corporate property, engineering, liability, hull, family business and other property, accident, health and agriculture insurance. The two lines of insurance business that were explicitly excluded from the application are transport insurance and export credit insurance. Any insurance product where the premium is payable in foreign currency is also excluded.

Under the rules, “cash before cover” applies to all insurance acquired by individuals no matter what the amount of the premium. However, for corporates or family businesses it applies only when the premium is RMB50,000 (AED1 = RMB 1.7) or less under a single policy for one type of insurance. The rules allow for premium instalments where the premium exceeds RMB50,000 under a single policy, in which case, the premium can be paid in three instalments with the first instalment not lower than 40% of the total premium. The last instalment must be paid three months before the policy expiry. The insurance company can only print and deliver the policy after the first instalment of premium has been paid.

In India, the provisions of Section 64VB of the Insurance Act provide that an insurance company will not assume any risk unless the insurance premium is received or is guaranteed to be paid or until deposited as may be decided. Accordingly, the insurer will only issue the policy of insurance after payment of premium by the insured.

Post privatization of the insurance industry in India, Section 64VB provided greater stability and solvency within the Industry, in a market which is as competitive as the UAE.

The Government gave exemptions to some entities and circumstances in which policies are issued without having to adhere to section 64VB of the Insurance Act. A few examples are provided below:

- Policies issued to government and semi-government bodies : Premium must be received within 30 days of inception.
- Policies issued on the basis of adjustable or deposit premium - Risk in respect of policies issued on the basis of adjustable premium such as workmen's compensation, cash in transit etc., may be assumed on receipt of the provisional premium based on fair estimates.
- Annual insurances connected with aircraft hulls, other aviation risks and marine hulls

The “cash before cover” requirements may impact an insurance company's business and the market in various ways but it is a subject that merits further study to fully understand the benefits and detriments in a market with lax market payment terms.

THE PROS AND CONS OF THE DIFC COURTS JURISDICTIONAL CLAUSES IN (RE) INSURANCE

The IBG held an interactive Hybrid event with the DIFC Courts on May 19th, 2022. The event titled: “THE PROS AND CONS OF THE DIFC COURTS' JURISDICTIONAL CLAUSES IN (RE)INSURANCE” was held with in-person participation at Swissotel Al Murooj, Dubai along with insurance members from the region attending virtually.

Chief Justice Zaki Azmi of the DIFC Courts was the Keynote Speaker and the following speakers were the panelists: Peter Englund – CEO of Zurich Middle East and Board Member of IBG, Rajesh Sethi – Board Member of IBG, Peter Ellingham – Partner at Kennedys, Simon Isgar – Partner at BSA. The event was moderated by George Kabban – CEO of UIB (DIFC) Ltd and Board Member of IBG.

The participants learned about the DIFC Courts' ecosystem with the Chief Justice presenting for the benefit of the audience along with an open dialog and an engaging Q&A session with the panelists. The Q&A session presented the insurance community with a platform to directly interact with the speakers on insurance policy matters. The insurance community found the event to be very informative with over 100 participants from underwriting, compliance, legal and C-level management.

Dr. Abdulla Zahra Ali, Chairman of the IBG stated “The event was a milestone to the new IBG vision: Working for a better Insurance Industry. This event will be the beginning of many more informative events that the IBG plans to carry out over the next 12 months”



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