BRIEFING NOTE

"Do you know what I mean?" Principles governing the interpretation of insurance policies.

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Introduction

Insurance policies are commercial contracts. Generally, upon payment of a premium, the Insurer promises to indemnify the Assured for loss resulting from an insured peril, subject to the terms and conditions of the policy. Many insurance policies are based on a standard industry wording which is then amended by adopting other standard wordings, such as the Design Exclusions 1 to 5 or the London Engineering Group Exclusions 1 to 3, or in manuscript.

Difficulties arise when large losses are presented for an indemnity under standard industry wordings which have not been tested before the Courts or pursuant to manuscript amendments which have not been properly drafted or reviewed by legal counsel. This gives rise to a dispute as to the indemnity provided by the policy before the Court has to consider whether the loss or damage suffered falls within the cover provided and the policy terms.

Intention

Many Insurers, and their defence counsel, argue for a policy interpretation based on what the Insurer says was the cover that it intended the policy wording to provide. For example, Insurers say that the Contagious and Infectious Disease Extension attached to many operational all risk policies sold to real estate and hospitality customers does not cover the financial loss resulting from closure of business premises in response to Covid-19. That is because that Extension was not intended to cover losses resulting from a global pandemic or national epidemic. Rather, it was intended to indemnify losses resulting from a targeted response to a localised outbreak of infectious disease. Disease yes. Widespread disease no.

Nonsense

Under the principles of English and Singapore law, this argument is nonsense. The Courts will ignore any evidence as to what the parties to the insurance policy intended the policy to cover. Why? Because both parties will produce evidence of their subjective intention, which will be diametrically opposite as to the cover that they each say the policy was intended to provide. As such, the Court will not be assisted in interpreting the policy by pages of witness evidence as to what was, or was not, intended by the Insurer, the Assured or its broker.

Case Law

The English case law setting out the principles governing policy interpretation includes *Rainy Sky SA v Kookmin Bank* [2001] UKSC 50; *Arnold v Britton* [2015] UKSC 36; *Wood v Capita Insurance Services Ltd.* [2017] UKSC 24; *Engelhart CTP (US) LLC v Lloyd's Syndicate 1221* [2018] EWHC 900 (Comm); and *ABN Amro Bank NV v Royal and Sun Alliance Insurance Plc and Others* [2021] EWHC 442 (Comm). The Singapore case law includes *Zurich Insurance (Singapore) Pte. Ltd. v B-Gold Interior Design and Construction Pte. Ltd.* [2008] SGCA 27.

Principles Governing Interpretation of Insurance Contracts

The principles governing the interpretation of insurance contracts are as follows.

In determining the meaning or interpretation of the policy, the Court should identify what the parties have agreed. In identifying what the parties have agreed, the Court must ascertain what a reasonable person, with access to the factual background and knowledge reasonably available to the parties when the policy incepted, would have considered was meant by the language used in the insurance policy. This is an objective, not subjective, test.

In applying this test, the Court will adopt the ordinary and natural meaning of the language of the policy if clear and unambiguous language has been used. If clear and unambiguous language has been adopted, commercial common sense will not outweigh the ordinary meaning of the words used. Put another way, the Court will not invoke commercial common sense to introduce ambiguity or rewrite clear wording to assist an unwise party, penalise an astute party or otherwise determine what, with hindsight, the parties should have agreed.

If the words used are not clear and unambiguous, in that there are two plausible meanings or the plain meaning of the words used would produce an absurd result, then the Court may consider the clause in the context of the policy as a whole and against the factual matrix, that is the background and knowledge, available to the parties at the time of the policy's inception. The Court may also consider the commercial consequences of the competing interpretations in determining objectively which interpretation was intended by the language used.

Industry Publications

Although the Courts will not look to the witness evidence as to the subjective intentions of the parties to the insurance contract when determining the meaning of ambiguous wording, it will have regard to publications as to the meaning adopted by the insurance industry with regard to standard wordings as well as the premium rates payable for such wordings.

For example, the Insurance Institute of London has published a number of reports from Advanced Study Groups populated by London based underwriters, loss adjusters and defence counsel explaining the evolution and application of the DE/LEG standard wording exclusions.

Such reports can be used as an aid to construction, as part of the background factual matrix available to the parties at inception, in circumstances in which London market underwriters

and their defence counsel argue that such standard exclusions are ambiguous and have a far wider application than that explained in the reports or suggested by the high premiums paid.

Way Forward

The principles of policy interpretation and the insurance response to Covid-19 claims were examined and tested before the English Courts in *Financial Conduct Authority v Arch Insurance (UK) Limited and Others* [2020] EWHC 2448 (Comm). Notwithstanding the guidance provided, Insurers continue to contest similar claims for an indemnity against losses resulting from Covid-19 now proceeding before the Courts and Arbitral Tribunals in Singapore.

Whether those Courts and Tribunals follow the English Courts has yet to be determined. But what is clear is that the subjective intention as to what any one Insurer intended to cover by including an Infectious and Contagious Disease Extension will be ignored.

The Courts and Tribunals will look to the language used. If it is clear and unambiguous, they will not re-write the policy or otherwise penalise the astute cover holder that purchased Contagious and Infectious Disease cover to protect against financial loss resulting the forced closure of its premises as a result of an outbreak or manifestation of Covid-19.

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