

INSURANCE UPDATE

Issue 1

Loss of Earnings arising from Terrorism

Background

Silversea owned and operated a fleet of four ultra luxury cruise ships. Following the terrorist attacks of 11 September, 2001, Silversea's business was badly affected by a combination of passenger cancellations, a decline in future bookings and the necessity to compensate passengers by way of cruise credits.

Policy

Silversea claimed under its "Loss of Income and Extraordinary Costs" policy, underwritten by IF P&C Insurance Limited. The policy had three separate covers; Ai, Aii and B.

Covers Ai and B provided cover in respect of loss of income arising from interference with the operations of a particular vessel triggered by one of the listed perils, which included terrorism, acts of war and armed conflict, on terms incorporating Chapter 16 of the Norwegian Plan 1996, with amendments.

Cover Aii provided cover in respect of loss of anticipated income, meaning future passenger bookings, arising from US Government warnings and leading to a negative impact on bookings and/or changes to scheduled cruise itineraries. Claims under cover Aii had a limit of coverage of "US\$ 5,000,000 in the annual aggregate and in all". There was an annual rate of premium for covers Ai and B; but a lump sum premium payable for cover Aii.

The Claim

Silversea claimed under all three covers:-

- Under cover Ai, for cancellations of bookings which, it claimed, amounted to an interference with the scheduled itinerary of the vessel;
- Under cover B, for cruise credits issued as a result of customer cancellations; and
- Under cover Aii, for loss of projected revenue in respect of all cruises departing in 2002.

The Court of Appeal, in the recent case of **IF P&C Insurance Limited v Silversea Cruises Limited and Others "the Silver Cloud"**, has dismissed the major part of a claim brought by a cruise ship operator to recover from its insurers substantial losses caused by the impact on the cruise market of the 11 September WTC terrorist attacks.

In the leading judgement, Rix L.J. addresses nine specific questions raised by the appeal. Broadly, however, the core issues were:

1. Was cover Aii subject to a US\$ 5 million limit per vessel or across the whole fleet? Silversea contended it was a limit per vessel, whilst the Insurers maintained that it was a limit across the fleet.
2. Could Silversea could seek an indemnity for passenger and cruise cancellations under covers A1 and B?. Insurers denied liability on the basis that cancellations of bookings did not amount to physical interference with scheduled itineraries.

The **Commercial Court** found in favour of Insurers on both issues. Silversea's claims under Ai and B were dismissed and its claim under Aii was limited to a maximum of US\$ 5 million.

The **Court of Appeal** allowed Silversea's appeal in part, although it found in favour of Insurers on the above core issues.

The Ruling

Certain key findings of the Court of Appeal are:

- Cover Aii required not so much acts of war, armed conflict or terrorist activities, but a Government warning regarding such events. The question was whether market losses due to 9/11 were themselves excluded, even though they were also due to government warnings.
- Insurers argued that Silversea's claim under Aii was uninsured because it was in respect of losses resulting directly from terrorist activities rather than directly from government warnings themselves. The Court of Appeal rejected this argument, holding that Cover Aii was premised on acts of war, armed conflict or terrorist activities provided that they generated the relevant State warnings. If they did, and those warnings caused a loss of income as a direct result, those losses would be covered. The underlying causes of the warnings (acts of war etc) were not excluded perils; they were simply not covered under cover Aii as perils in themselves as "something extra was required", still they were "an insured event" for the purpose of the policy as a whole.

The overall limit under cover Aii was US\$ 5 million across the whole fleet as maintained by Insurers.

- In respect of cover Ai, the question was whether loss of passenger bookings, whether or not accompanied by voyage cancellations, was indeed within cover Ai at all.

The Court of Appeal held that it was not. Cover Ai was not designed to provide cover for claims premised on loss of market but rather for claims premised on some interference with the scheduled itinerary of the vessel. "Interference" in this sense referred to operational as opposed to market factors. On the findings, there had been no cruise cancellations due to safety concerns, only (allegedly) due to market conditions. Silversea's claim under cover Ai was therefore dismissed as misconceived.

Did 9/11 amount to "acts of war" or "armed conflict"?

The Court of Appeal's findings were largely restricted to the facts of the case.

One issue of wider significance for the insurance market, particularly in the current climate of terrorist threats and activities, was whether the events of 11 September 2001 amounted to "acts of war" or "armed conflict". Although the

Court found it unnecessary to deal with the point to decide this case some brief comments were made. It was common ground that the meaning of "war" did not depend on whether an event had been recognised by a government or in international law as being an act of war, but rather the word should be construed in a common sense way. It seems probable that such issues will be the subject of future litigation.

The contents of this Bulletin are not intended to be a substitute for specific legal advice on individual matters. If you wish to discuss any issues raised in this bulletin, or for further information please contact:

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