INSURANCE ISSUES FOR MINERS BLOTS EXTRADITION AND A NEW DAWN

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Legal Briefings – By **Sarah McNally** and **Rachelle Waxman**

Mining operations afford great opportunities but necessarily entail managing a range of risks, including the health and safety risks to employees, the risk of property damage, management liability risks and political and counterparty credit risks.

The majority of entities use insurance to some extent as a risk-management tool. Even those entities which largely self-insure may well access commercial markets through the reinsurance of risks insured by their captive.

Accordingly, by one route or another, entities will almost certainly be paying premiums into the commercial market. It therefore makes sense to ensure that wordings are robust and up to date and there is as little scope as possible for disputes in the event of a claim. Larger claims (such as those in this sector) will inevitably result in greater scrutiny by insurers.

In this article we highlight two areas of particular interest and focus as 2015 draws to a close, namely the new Insurance Act 2015 and protecting yourself through Directors and Officers liability insurance.

THE INSURANCE ACT 2015

The Insurance Act 2015 applies to all policies which are subject to the laws of England, Wales and Scotland and which incept after 12 August 2016 (save where the parties have contracted out of the new law). This law applies wherever the policies are underwritten and the changes will apply to both insurance and reinsurance contracts and to fronting arrangements where the risk is reinsured under an English law policy. The changes are undoubtedly beneficial to policyholders, but those policyholders who are prepared for the changes are likely to both obtain the greatest benefit and avoid traps which may befall the unwary.

DISCLOSURE – A BLOT REMOVED?

Under the current law the insured has a duty to disclose every material circumstance which it knows (or is deemed to know). The law does not specify precisely whose knowledge is relevant (the test being essentially who is the directing mind and will of the company) or how such disclosure is to be made. This can result in uncertainty as to what needs to be disclosed and how it should be disclosed. This can result in "data-dumping" by the insured, whereby a large volume of material is made available to insurers, but is poorly signposted and presented. This in turn can result in 'passive underwriting' whereby the insurers only really grapple with the information (and whether all matters were properly disclosed) at the time of assessment of any claim. By that point it is of course too late for the insured to put his house in order.

The problems this can cause for insureds are compounded by the inflexible remedy of avoidance which applies where there has been a breach of the insured's duty of disclosure. Failure to comply with this duty allows the insurer to avoid the policy in its entirety. In a case earlier this year *Involnert Management Inc v AIS Insurance Services Limited* [2015] EWHC 2225 (Comm), insurers were entitled to avoid a policy entirely because of a non-disclosure by the policy-holder in the placement of cover for a yacht. Mr Justice Leggatt described the fact that an insurer should be allowed to avoid the policy altogether in such circumstances as 'a blot on English insurance law'.

Under the new law the insured has a duty of fair presentation. There are three parts to this. First, the insured must disclose every material circumstance which the insured knows. This is the knowledge of the senior management (intended to be more or less limited to the board) and those responsible for the insurance (internally and at the insured's broker). Second, it must disclose those facts which the insured ought to know. This includes the information which should reasonably have been revealed to the insured by a reasonable search, and includes the information held by their broker and other parties covered by the insurance. As an alternative (not recommended) the insured can provide the insurer with sufficient information to put him on notice to make further enquiries. Third, the insured will have to present the information in a clear and accessible manner, for example, by providing organised, signposted presentations and an index and/or executive summary. In addition to guarding against non-disclosures, every material representation as to a matter of fact must be substantially correct, and every material representation as to a matter of expectation or belief must be made in good faith.

There may be scope for the informed insured to seek insurer agreement to key questions, such as whose actual knowledge is relevant (for example by limiting this category to the board, or the risk manager, or both) and what scope of search is 'reasonable'. Up-front agreement, where possible, will reduce the risk of future disputes.

If the insured breaches the duty of fair presentation, a range of proportionate remedies will be available to insurers, depending on what the insurer would have done if the duty had been complied with and the nature of the insured's breach.

In the event of deliberate / reckless breaches, insurers are entitled to avoid the policy in its entirety and retain the premium. However, for other types of breach:

- if the insurer would not have entered into the contract, it is entitled to avoid the policy in its entirety but must return the premium,
- if the insurer would have entered into the contract but on different terms, the contract may be treated as if it included those terms from the outset, and
- if the insurer would have entered into the contract but would have charged a higher premium, the amount paid on claim may be 'reduced proportionately'.

This is a radical change in the law (albeit not dissimilar to the contractual position that may be reached through innocent non-disclosure clauses). Although automatic avoidance will no longer apply, the remedies are still capable of significantly restricting the cover for claims. If insurers were able to argue that they would have incorporated an exclusion clause which would have precluded a successful claim then the insured will be unable to recover. Equally, if the premium charged would have been double then, potentially, the insured recovery will be halved. All of these possible remedies mean that there is a greater risk of disputes (especially while the new regime beds down) so the message must be to try to avoid any breach in the first place.

The priority for risk managers and legal teams is therefore to:

- Understand the changes and discuss any amendments to process with brokers/advisers/insurers,
- Consider whose information is relevant in their business,
- Make sure this is properly captured,
- Consider what a reasonable search looks like and capture the information obtained,
- Make sure there is an effective audit trail demonstrating what steps have been taken (and why) and that this audit trial is maintained – disputes can arise many years down the line when employees have left and information has been lost,
- Consider seeking insurer sign-off as to key issues (e.g. whose knowledge constitutes actual knowledge and what constitutes a reasonable search), and

- Consider how the information should be presented and signposted.

WARRANTIES - A BREACH MAY NO LONGER BE THE END OF THE STORY

Terminology in insurance contracts is different to that under other contracts.

Under the current law, if the insured fails to comply with a warranty in an insurance policy, the risk automatically ends as soon as the warranty is breached (regardless of the absence of any causal effect between the breach and any loss). Under the Insurance Act 2015, warranties will operate as suspensive conditions, such that if the breach of warranty is capable of being remedied (and is remedied) then the insurer will come back on risk. This may give rise to nice questions as to whether a breach is in fact capable of being remedied (and has been remedied).

The key point to be aware of is that, to take advantage of this change, there needs to a strong and effective connection between the legal/risk side of the business and the operations side of the business. If the operations team do not know what warranties exist, and do not monitor compliance with them, then breach of warranties will go un-checked and the change of law will not avail the insured.

The practical points are therefore:

- know your obligations and know when you need to take steps to achieve full compliance, do so promptly and document this, and
- look out for increased use of condition precedents to the attachment of coverage or to liability to pay claims by insurers (which are unaffected by the change in law to warranties)

An additional benefit is that basis clauses (which convert all pre-contract representations and statements into warranties without each clause expressly stating this) will no longer be enforceable. This is the only provision which was considered to be of sufficient importance that the parties cannot contract out of it. The parties are free to contract out of the remainder of the Act.

SECTION 11 CLAUSES – A NEW WORLD OF CAUSATION?

If a clause does not go the risk as a whole, but rather is a clause compliance with which would tend to reduce the risk of loss of a particular type, time or location then section 11 of the new Act may apply. Under this section, an insurer will not be able to rely on the breach if it could not have increased the risk of loss in the circumstances in which it occurred.

By way of example:

- if an insured agreed to undertake safety checks to equipment every week, but failed to do so, and
- the machinery was damaged by a wholly unrelated flood the risk of which would not have been identified or avoided by compliance with the safety checks,
- the insured should still be able to recover.

This is perhaps the most uncertain of the changes and the one that an insured can do the least to prepare for, although there may be some advantage in reviewing policy wordings to ensure that clauses of this nature are restricted to specific risks and locations. The key (and helpful) point is that it may preclude an insurer from relying on a breach which had nothing at all to do with the loss.

DIRECTORS & OFFICERS LIABILITY INSURANCE – LOOKING AFTER YOUR BACK

D&O insurance is always a priority for all businesses (and their directors and officers) and rightly so, particularly for those in the natural resources and extractives sectors facing increasing resource nationalism. In the current D&O insurance market, steps can be taken to obtain policy enhancements and safeguards which may prove critical in the event of a major problem.

Risks which are never too far from anyone's mind include regulatory investigations and proceedings, the long reach of the Bribery Act 2010, shareholder activism arising from M&A or fundraising (such as derivative claims for breach of fiduciary duty or shareholder claims/class actions for prospectus liability), environmental liabilities and extradition proceedings.

Of course if these risks materialised then insurance would not be a cure-all, but it could be critical in assisting with the immediate costs and challenges to protect the most senior executives of the company. In many cases, senior managers will look to corporate indemnities as a starting point, but that is not necessarily safe: corporate indemnification strategies and contract terms vary and in any event there are likely to be some gaps in what the company is able to indemnify as a matter of law that can potentially be plugged, to some extent, by D&O insurance.

Companies would benefit from a careful review of their policy wordings in light of recent market innovations, ideally in conjunction with their corporate approach to director indemnification. We have seen that matters which were historically off-limits can now be covered in appropriate cases. These include losses arising from insured vs insured claims and "best in class" pre-investigation costs coverage. It is also important to ensure that defence costs cover for criminal investigations/proceedings is as wide as possible to cover claims under the Bribery Act, FCPA etc up to final adjudication. Exclusions should be narrowed so far as possible (e.g. to ensure that investigation costs cover is not impacted by the professional services exclusion).

In the mining context there are some additional points which should be considered, including:

- cover if an insured is arrested or charged abroad,
- cover if there are attempts to extradite the insured or freeze his assets,
- costs of defending criminal proceedings,
- whether, in the event of M&A activity, the policy cover a new subsidiary, and
- in the event of acquisition, whether cover for claims relating to wrongful acts prior to acquisition could reduce current group cover.

As with all insurance policies, D&O policies will only provide cover if the policy-holder complies with the provisions (including claims provisions) in the policy. Insureds should seek to build as much tolerance as possible into the policy wording to ensure that they are able to comply with their policy obligations. An obligation for an insured to notify "within 30 days of a board member becoming aware of a claim" is so much easier to comply with than an obligation "that the insured must notify the insurer of any claim immediately". The small print can make all the difference in the event of a major claim.

CONCLUSION

Ultimately, all policies are contracts capable of negotiation, subject to market forces. The effect of the Insurance Act 2015 can be introduced into policies contractually before next year, and indeed some insureds have better protection than that afforded by the Act in their policies at the moment. They will be looking to make sure that they maintain their contractual protection next year. In this market, getting the best cover in place may just prove to be a prudent investment.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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