

# (RE)INSURANCE ALERT

## Commercial Court clarifies the position on follow settlement clauses for retrocessionaires

On 6 November 2013, the Commercial Court handed down its judgment in *Tokio Marine Europe Insurance Ltd v Novae Corporate Underwriting Ltd* [2013] EWHC 3362 (Comm). Mr Justice Hamblen held that the defendant retrocessionaire had agreed to follow the insurer's settlements in respect of the underlying claims provided that those claims arguably fell within the terms of the insurance, and that it was bound by the insurer's construction and interpretation of those terms.

The claims in question arose from the floods that devastated large areas of Thailand in 2011, including significant damage and business interruption cost to a subsidiary of Tesco plc, EK Chai Distribution System Co Ltd ("**Insured**"). The Insured had arranged worldwide insurance coverage with ACE European Group Ltd and local ACE entities (together "**ACE**") including in Thailand.

The claimant provided reinsurance cover for 12.5% of the losses from the claimant, and acquired facultative excess of loss reinsurance from the defendant. The reinsurance and retrocession were on the same terms as the original policy and included an unqualified follow the settlements clause.

ACE settled a number of claims with the Insured arising from the flooding for a total of £82.5m. The claimant paid their proportion to ACE and sought to be indemnified under the terms of the retrocession.

The defendant challenged the indemnity on the grounds that the claims did not arise from a single event, with the result that they did not fall to be aggregated and were therefore of insufficient value to trigger a retrocession claim.

The court was asked to decide on a number of preliminary issues, including the comparative construction of the insurance, reinsurance and retrocession policies and the threshold for determining whether the retrocessionaire was bound by the settlement.

Mr Justice Hamblen found that as the retrocession included an unqualified 'follow the settlement' clause and was on materially identical terms to the original policy, the claimant only had to show that the claims "*arguably*" fell within the terms of the retrocession. Further, he stated that the retrocessionaire would be bound by ACE's determination as to the construction and application of the common terms of the (re) insurance policies, including, specifically, the aggregation provisions which were in issue.

Ultimately, the judge found that it was arguable that the claims all arose from a single event, namely the heavy rainfall during the monsoon season, and that ACE had been entitled to settle the claims on that basis, provided they had acted honestly and had taken all proper and business-like steps in making the settlements. The defendant was therefore bound by the

settlements by virtue of the unqualified follow the settlements clauses.

This decision emphasises the need for reinsurers and retrocessionaires to qualify their follow settlement clauses to allow them to challenge the basis on which the insurer is settling claims. However, the judge, while following the Court of Appeal decision in *Assicurazioni Generali SpA v CGU International Insurance plc*, expressed doubts as to the desirability of the arguability threshold, providing scope for Novae to appeal.

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