

Insurance Day

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Greater scrutiny will hasten broker M&As

THB's Frank Murphy warns smaller players need to fight global rivals not each other

Richard Banks

ADDITIONAL regulatory scrutiny on smaller brokers will increase the pressure for consolidation in the sector.

The UK's financial regulator is widely expected to treat the smaller intermediary sector as a priority in the remainder of this year, having largely ignored it in favour of more high-profile targets in recent times.

However, medium-sized brokers should avoid the temptation to engage in in-fighting and concentrate instead on combating the threat from the global brokers, according to the chief executive of one independent broker eyeing the mergers and acquisition (M&A) market with interest.

Frank Murphy (*pictured*), chief executive of THB, said his company would be prepared to engage in the M&A market if the right opportunity arose. Indeed, he stressed THB was serious about the prospects for corporate acquisitions and had engaged Deloitte to advise on its strategy.

"But we're very particular. We don't have a need that perhaps some others have to grow as quickly as possible because they are pumping the business up for IPO [initial public offering]," he said.

Still, Murphy was clear market conditions will drive further M&A activity. "We recognise some of the smaller brokers will not be able to survive this market, particularly the way margins are [being] squeezed and particularly in the face of the regulatory issues with the Financial Services Authority [FSA] – or son of FSA – and the European directives, which are going to hurt certain smaller brokers," Murphy said.

And he was adamant regulatory scrutiny of the sector will increase in the coming months. "We get the view from the FSA, with which we've engaged an awful lot over the past few years, that they – by their own admission – have not got to the smaller brokers yet. But that's one of their focuses for 2010. It will be

very interesting to see what happens there because with that and some of the succession issues some of those brokers have, they are going to have to sell."

However, according to Murphy, the growth strategies of brokers will have to change as the days of trying to pick off teams "vulture-like" after a deal is done are gone.

He pointed to restrictive covenants and added: "Anybody who's any good won't still be there if something fails. My view is you have two options: before it fails you try to tempt some of the teams, or you go and make a corporate acquisition and make it nice and clean. Often in a corporate acquisition, if you don't structure the team lift properly, you end up with one-third of the business, they keep one-third of the business and one-third drops in the street where everyone else picks it up."

And Murphy was adamant in-fighting will not benefit the smaller and medium-sized brokers in the long-term. He explained: "I'm very much an advocate for talking to the mid-market and the smaller brokers and talking about the fact it is the global brokers we should be fighting, not each other."

"There is enough out there and we have all got opportunities in the mid-market right now

to be taking advantage of some of the consolidations that have happened with the bigger brokers."

p2: Comment

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CEA voices fear over 'regulatory contamination'

EUROPEAN insurers are intensifying the pressure on politicians to differentiate between insurers and banks as concern about regulatory contamination increases.

In the latest move, the European insurance federation the Comité Européen des Assurances (CEA) has compiled and sent to leaders of the G20 member countries a report detailing the differences between insurers and banks and setting out a number of recommendations it feels would improve the regulation of insurers and the financial services sector generally. A letter accompanying the report warns the "read-across of regulation from sector to sector" threatens to promote "herd behaviour".

CEA president, Tommy Persson (*pictured*), wrote: "We observe with concern policy responses stemming from G20 commitments that do not give sufficient recognition to the differences between the insurance and banking business models. Moreover, there appears to be a worrying trend to impose regulation designed for one financial services sector to others."

The CEA told the G20 leaders the differences between sectors must be taken into account when designing regulatory regimes. "What is valid for banking is not necessarily valid for insurance," the CEA said. "The CEA is convinced some of the measures being proposed are inappropriate for the insurance sector."

The CEA recommends ensuring insurers are suitably represented in the financial stability debate, and urges the cumulative effect of macro- and microprudential measures, as well as tax measures, must be considered for each financial sector and between sectors.

The CEA's stance follows a similar one taken by the Geneva Association, which wrote to G20 leaders ahead of their Toronto meeting last weekend (*Insuranceday.com*, June 17).

Richard Banks

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Randall: 'inevitable there will be a capital standard' with Solvency II

R&Q forecasts Solvency II run-off boost

Christopher Munro

SOLVENCY II capital requirements will bring more run-off portfolios to market, the chairman and chief executive of Randall & Quilter (R&Q), Ken Randall has again insisted.

He told *Insurance Day*: "There is a lot of discontinued business in Europe", so when the minimum capital level is introduced, run-off companies could benefit from live insurers willing to divest

themselves of old legacy business.

A statement published after R&Q's annual general meeting earlier this week had reiterated: "Preliminary indications are the pressures of Solvency II will lead to additional opportunities in Europe from insurers looking to unlock trapped capital through the sale of non-core subsidiaries in run-off."

Yesterday, Randall added: "[It is] inevitable there will be a capital standard and people will have to come to terms with that the closer we get to the

implementation of Solvency II."

However, he warned it will not just be a case of run-off specialists marching in and snapping up whatever comes their way. "You have got to understand the culture and the way [the business is] written," he said, before adding: "There's also a language issue in Europe as well. We think that's important – if you're going to give proper client service then you've got to speak the language."

In April, R&Q revealed it had acquired the France-domiciled motor reinsurer La Licorne.

Speaking at the time, Randall said the company was on the lookout for further portfolios to acquire.

And yesterday Randall told *Insurance Day* he was confident the run-off market had "moved away from the ridiculous pricing" prevalent two years ago.

He insisted his firm was "pretty disciplined" in how it priced things.

And he said: "I think we've seen the end of that, [but] there is still some interest around [for acquisitions]."

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COMMENT

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Regulatory storm is brewing in Europe

UNTIL the wind blows it seems regulation will provide plenty to occupy the minds of insurance executive and leaders.

The clear-up operation in the Gulf of Mexico adds extra poignancy to this year's hurricane season, which is forecast to be more than averagely active.

As *Insurance Day* detailed yesterday, the meteorological conditions mean the emergence of a tropical storm could pose some very real threats to the Gulf.

But until that happens, a storm of a different nature is brewing in Europe.

Rumblings in response to regulatory developments are increasing in intensity, and regulators are showing no signs they are prepared to ease off the pedal.

In his presentation to the Financial Service Authority's (FSA) annual public meeting yesterday Hector Sants (*pictured*) insisted all major projects undertaken by the regulator would remain in place.

Anyone who had hoped the regulatory scrutiny would lessen as the regulator prepares to hand over its powers to its replacement in three years' time is likely to be disappointed.

And rightly so.

As the Comité Européen des Assurances implies in its newly compiled report on regulation, the answer is not more or less regulation *per se*, but better targeted and more efficient supervision.

What we can certainly expect is greater scrutiny on the broking sector in the coming months.

The FSA has indicated this community will be a priority for it and that will have some fundamental implications.

Inevitably, that will include an increase in merger and acquisition activity in time.

Last week's *Insurance Day* Summit Bermuda included an

interesting debate on the extent to which deals would be accomplished. It was significant the underwriting participants in that debate were substantially less enthusiastic that transactions would come to fruition than their broking counterparts.

Exactly how the situation plays out remains to be seen, but of all the factors that provide an incentive for consolidation it is likely regulation will prove the most intransigent.

Richard Banks

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3 Namic's NFIP call

The National Association of Mutual Insurance Companies has called on members of the Senate to back legislation reauthorising the National Flood Insurance Programme. It has already won approval from the House

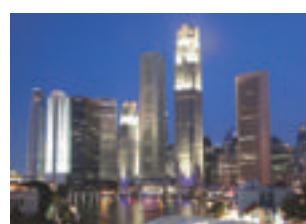


4 Resolution Axa deal

UK-listed financial services sector consolidator Resolution has agreed to buy the majority of the life assurance business of Axa UK. It will pay £2.25bn in cash, plus up to £500m in deferred consideration notes

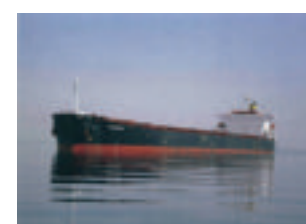
5 DirectAsia launch

Whittington Group, headquartered in Singapore, is to launch a direct online insurance company in the country next week. DirectAsia.com will offer motor, travel, home and personal accident insurance via its website



6 Vessel hijacking

In an important ruling for the maritime industry, the London Commercial Court has upheld the unanimous decision of an arbitration tribunal that a vessel seized by pirates remains on hire during a hijacking



7 Jurisdiction wars

Imagine for a moment you find yourself in a dispute with a foreign counterparty that has filed a lawsuit against you in the US seeking an exorbitant judgment. What do you do?



8 This Week...

Chancellor of the exchequer, George Osborne, was a popular name in the UK insurance industry this week after the sector emerged relatively content from the coalition government's emergency budget

Namic calls on US Senate to approve reauthorised NFIP

Jonathan Rest

THE NATIONAL Association of Mutual Insurance Companies (Namic) has called on members of the Senate to back legislation reauthorising the National Flood Insurance Programme (NFIP).

The programme has already won approval from the House.

"The American people cannot afford to wait any longer," Jimi Grande, senior vice-president of federal and political affairs at Namic, said. "With each day that passes, closings don't happen because the buyers cannot obtain flood insurance to satisfy their mortgage lender and the deadline

for the \$8,000 first-time home-buyers' tax credit is just a week from now."

It has been estimated for each day the NFIP remains in hiatus, around 1,400 closings for home purchases must be delayed. Such delays can add significant costs for buyers and sellers, and threaten the US housing economy, which has only just recently started showing signs of recovery.

Members of the House passed an extension through to the end of September with no objections, signalling the strong support for an extension. The NFIP had been allowed to lapse when budgetary concerns about other issues derailed a legislative extenders package that reauthorised several

other spending programmes in addition to the NFIP.

"To have gone more than three weeks into the 2010 hurricane season without the NFIP is almost unthinkable," Grande said. "It should not have taken Congress this long to address this problem."

The NFIP expired on June 1, the same day the Atlantic hurricane season began, with meteorological experts all agreeing an overly active season is upon us.

"Each of the four times since December the NFIP has lapsed it has been because of other political issues," Grande said. "We applaud the House for doing the right thing and addressing the issue. Now it is time for the Senate to step up and do their part."



Flooding in Nashville, Tennessee: Namic said the US 'cannot afford to wait any longer' to renew the NFIP

David Sampson, president and chief executive of the Property Casualty Insurers Association of America (PCI), said extending the

programme must be "a top priority" for Congress. "We need a long-term, sustainable solution to the flood programme," he said. "But

for now, we need to immediately help homeowners who are preparing for hurricane season and severe summer weather."

Judge gives WTC Captive settlement the go-ahead

A US judge has approved the amended settlement reached among the WTC Captive Insurance Company, the City of New York, the contractors the city hired, their subcontractors and attorneys for more than 10,000

plaintiffs alleging injuries from the World Trade Center site operations, writes Jonathan Rest.

Two weeks ago, WTC Captive agreed to increase its outlays to plaintiffs to \$712.5m after an earlier \$657.5m offer was rejected

as inadequate by US District Judge Alvin Hellerstein (*Insuranceday.com*, Jun 11).

At the conclusion of Wednesday's hearing, Hellerstein said: "I intend to approve this settlement and I now do so as a fair, adequate, and reasonable settlement reflecting hard work and a concern for fairness by all parties. It is fair in amount and fair in procedures."

Christine LaSala, president and chief executive of WTC Captive, said: "We are very pleased to have Hellerstein's support, and to have him recognise, by basing an individual's compensation on the severity of the injury and the strength of the legal claim, we achieved our goal of valuing each claim fairly."

"This settlement provides plaintiffs with closure and certainty, while also reserving some funds for future claims. We believe it is the best path forward for these plaintiffs, as their only other option right now is to proceed to lengthy and costly litigation with an uncertain outcome."

Under the settlement, all qualifying plaintiffs will be enrolled in a special insurance policy through MetLife to provide coverage for certain blood and respiratory cancers diagnosed during the coverage period, paying a benefit of up to \$100,000.

In addition to the concessions made by WTC Captive, plaintiffs' attorneys agreed to drop their fees to 25% of the settlement from the previous 33.33%, thereby increasing plaintiffs' net proceeds by \$50m.

YouTube Neal Bill battle heats up as domestic firms fight back

THE 13-STRONG group of US insurers dubbed the Coalition for a Domestic Insurance Industry (CDII) have hit back in the row over reinsurance taxation by also posting a video on YouTube, writes Jonathan Rest.

The debate concerns HR 3424, the so-called "Neal Bill", sponsored by Massachusetts Representative Richard Neal, which proposes to disallow tax deductions for direct writing insurance companies in the US that cede business to offshore affiliates.

The CDII's video is in direct response to the work of the Coalition for Competitive Insurance Rates (CCIR), which posted its own message on the popular video-sharing website earlier this month, warning insureds about the dangers of the bill, in

particular the annual cost to consumers would be between \$10bn and \$12bn (*Insuranceday.com*, Jun 14).

CDII's rebuttal states HR 3424 is "not a new tax on foreign reinsurers", rather legislation aimed at closing a loophole that allows US subsidiaries of foreign-owned insurance groups to avoid taxes that apply to all US companies.

Its video contends the Neal Bill would recapture an estimated \$17bn in revenue for the US Treasury and will not adversely impact pricing or capacity, as foreign-owned insurers collectively represent less than 2% of homeowners' insurance in all coastal states.

"Taxes are already built into the prices consumers pay – foreign-owned insurers just get

to pocket the extra profits," it argues. "At a time of burgeoning federal deficits, and as American consumers and businesses face tax increases, it is wrong to allow foreign-owned insurers to avoid US taxes on their US-based business."

The CDII consists of WR Berkley, Berkshire Hathaway, Chubb, Hartford, Liberty Mutual, Markel, Travelers, Ambac, American Financial Group, EMC Insurance Cos, MBIA, Scottsdale Insurance Co and Zenith Insurance Co.

Berkshire Hathaway's Warren Buffett is no stranger to YouTube. In March, a video emerged of the Sage of Omaha sporting an Axl Rose-style wig, bandana and fake tattoos, promoting his US motor insurance unit, Geico.

FSA will finish job, Sants says

Richard Banks

THE UK'S financial regulator intends to finish what it started over the next three years as the Financial Services Authority (FSA) winds down, Hector Sants has insisted.

Regulators will continue with the major initiatives taken on by the FSA, he said. And he warned the UK must continue to engage with European regulators.

Sants, who had signalled his intention to step down as chief executive of the FSA but changed his mind to stay on until its abolishment in 2013, was speaking at

the regulator's annual public meeting yesterday.

He insisted: "We will not be deflected from delivering much-needed policy reforms, such as the RDR [retail distribution review]. Furthermore, firms should recognise our intensive supervisory approach will continue into the new organisational framework."

Significantly, he also warned of challenges ahead. "First, we are entering a period of substantial change in the European regulatory environment and it is vitally important the UK fully engages with these changes," he said. "We must recognise, particularly in respect of supervision, the national entities will increasingly

become an arm of European policy and thus, effective engagement with the European agencies is absolutely critical."

And Sants had a message for those hoping the tough reaction to the crisis would quickly ease. "No doubt as we move out of this crisis there will be calls for regulators to revert to 'light-touch' regulation and senior management will be less willing to listen to a regulator that could be seen to be 'second-guessing' management. When this happens, it is vitally important regulators stand their ground and continue to be proactive, but this will require they are supported by government and society as a whole."



Construction cranes stand on the site of the former World Trade Center

NEWS

Resolution agrees £2.75bn Axa life deal

Peter Birks

UK-LISTED financial services sector consolidator Resolution has agreed to buy the majority of the life assurance business of Axa UK in a deal worth £2.75bn (\$4.12bn).

Resolution will pay £2.25bn in cash and up to £500m in deferred consideration notes.

Under UK listing rules, this is a reverse takeover, meaning Resolution's shares are suspended until the publication of the prospectus, expected before the end of June.

The deal will be funded by a rights issue of about £2.05bn, with leading shareholders already having sub-underwritten 52% of this, plus a "certain funds" acquisition finance facility of £400m.

Resolution is offering 17 new ordinary shares for every 30 existing ordinary shares – a theoretical 38% discount to the last prevailing ex-rights price. Resolution is also undertaking a one-for-30 consolidation of existing shares, meaning the rights issue is being made on the basis of 17 new ordinary shares for every one consolidated share. The acquisition is expected to close in September.

The purchase will be structured via Friends Provident Holdings, bought by Resolution in November last year.

Trevor Matthews, chief executive of Friends Provident, will lead the combined business, with Evelyn Bourke executive director of strategy, capital and risk. Resolution said it will now conduct a search for a new executive director of finance to succeed Bourke.

Paul McGahon and Graham Harvey will be managing directors of corporate and individual, respectively. Both are already with Axa UK. David Hynam has been appointed executive director of operations.

Friends Provident will be renamed Friends Life after the two businesses are integrated. A further 2,200 Axa UK employees will transfer to Friends Provident. Axa UK said "consolidation is necessary and inevitable in the UK market to offer improved value to shareholders, customers and distributors". Friends Provident has about 2.9 million customers, while Axa UK has about 3.7 million.

The Axa UK brand is not being bought by Resolution as part of the deal.

Resolution said it continues to plan further acquisitions "over roughly an 18-month period" beginning last

JASON ALDEN/
BLOOMBERG



Axa UK's headquarters, London: the company is selling most of its life business to Resolution

November, when the Friends Provident deal was announced.

And Martin Hepworth, managing director of Navigant Consulting's global financial services practice, believes the industry is ripe for consolidation. He said: "Over the years, life and pensions companies have evolved into amalgams of offerings that

have led to confusion for customers and headaches for executives as they try to balance strategic priorities. So many companies are wrestling with this dilemma, compounded by the forthcoming RDR [retail distribution review] and Solvency II regulations, it makes perfect sense to see this type of market consolidation.

"Whereas 2009 was more of a take-stock year, so far in 2010 we have experienced a greater demand for building for the future strategies than what would previously have been considered overly ambitious – now is the time to ask those challenging questions and this recent deal is the start of things to come."



Price Forbes & Partners launches treaty reinsurance unit to be led by Bumpstead

INDEPENDENT broker Price Forbes & Partners has launched a treaty reinsurance division and has lured the former head of HSBC's reinsurance broking arm, writes Jonathan Rest.

Effective from October 1, the newly formed division will be led by Paul Bumpstead as

managing director of reinsurance. Bumpstead, based in London, has more than 40 years' experience in property and liability reinsurance.

"Expanding our capabilities to include treaty reinsurance as part of our overall proposition to clients is a key priority for us and a major pillar of Price Forbes'

growth strategy," Michael Donegan, chief executive of Price Forbes & Partners, said. "Having someone of Bumpstead's calibre and experience is testament to the emphasis we are placing in this area and our clients will find him to be a valuable asset."

As well as HSBC brokers,

which was bought by Marsh at the end of last year, Bumpstead counts PWS as a former employer. He left PWS in 1998 to join Price Forbes.

Price Forbes & Partners was formed in 2006 following a management buyout from Marsh & McLennan Companies.

Carnegie-Brown joins Catlin board

Richard Banks

THE FORMER head of Marsh's UK and European operations Bruce Carnegie-Brown (pictured) is to join the board of Bermuda-domiciled insurer Catlin Group.

He will replace Michael Harper, who is due to step down on July 1 after five years as a Catlin director.

Harper's departure is "owing to the demands of his other commitments", a statement said. Harper is chairman of BBA Aviation and chairs the board of both imaging equipment firm Vitec Group plc and engineering consultancy Ricardo plc.

Carnegie-Brown will step up to the Catlin board on August 1. He served as chief executive of Marsh Ltd and head of Marsh's European operations between June 2003 and June 2006.

Having left Marsh, Carnegie-Brown was appointed managing partner of 3i Quoted Private Equity and a member of the 3i Group's executive committee in January 2007 and stayed in that post until June last year.

During his time at 3i, he served on the board of UK broker Jelf Group for 16 months.

In April, Carnegie-Brown was named a non-executive director of comparison website Money-supermarket.com.

Ace Global Markets unveils its political risk and credit offering in Los Angeles

Jonathan Rest

ACE Global Markets (AGM), the London market unit of Switzerland-incorporated Ace, has opened a US political risk and credit operation in Los Angeles.

The office will serve the West Coast region and is headed by Ray Tizabi as its vice-president of trade credit. He will work closely with AGM's teams in London, New York and Singapore.

Tizabi joins AGM from Pinebridge Investments, where he was a vice-president in its leveraged loans group. Before that, he was West Coast regional manager for AIG Global Trade Credit, a role he held for five years.

Julian Edwards, AGM's head of product line for political risk and credit, said: "Tizabi's appointment reinforces our strategic focus to build our capabilities in this region. This development is further evidence of Ace's commitment to the trade credit market and plans to grow our team and operations globally."

Los Angeles, where AGM's new unit will be based



Singapore, home to Whittington Group



Whittington unveils direct online insurer in Singapore

Jonathan Rest

WHITTINGTON GROUP, headquartered in Singapore, is to launch a direct online insurance company in the country next week.

DirectAsia.com, which Whittington describes as its "boldest initiative in Asia to date", will offer motor, travel, home and personal accident insurance through its website. Munich Re will provide reinsurance backing for the new venture, which has been licensed and regulated by the

Monetary Authority of Singapore.

"The introduction of direct insurance is long overdue in most Asian countries. We have already seen the success of the direct business model in many other markets around the world, including Japan and South Korea", Tony Hobrow, group chief executive of Whittington Group, said.

Whittington has been based in Singapore since 2006 and believes there is a real opportunity to bring the direct online insurance business model to Asia, where virtually all personal lines insurance is still sold through agents.

With these agents taking commissions ranging from 10% to 50%, Whittington said it had noted "significant disquiet" expressed by consumers about the service and premium levels charged by the local market.

"DirectAsia.com will offer consumers 24/7 convenience, great value for money and a range of transparently priced cover options that will transform the buying experience for Singapore consumers.

"Couple that with a claims service that will be far superior to any other local insurer and we

have the base to transform the insurance landscape in Singapore and thereafter in other Asian markets," Hobrow added.

Alexander Lay, head of casualty underwriting at Munich Re Singapore, said the deal with Whittington underscores the reinsurer's position "as a high-value solution provider in south-east Asia".

DirectAsia.com will be headed by chief executive, Andrew Byrne, who Whittington said has "a successful track record in Australia's personal lines insurance business".

S&P awards A rating to Ping An P&C

Richard Banks

CHINESE non-life giant Ping An Property & Casualty Insurance Company has won an A insurer financial strength rating from Standard & Poor's (S&P).

The rating agency acknowledged the insurer operates in a "highly competitive" marketplace, but noted Ping An P&C's strong competitive position,

good underwriting performance, and reasonably prudent investment philosophy, as well as the implicit support from the company's parent.

Ping An P/C is the second largest non-life insurer in China and S&P credit analyst Paul Clarkson explained: "We regard Ping An P&C as a core member of Ping An Group, which owns 99.13% of the company.

"The company benefits from the group in terms of a well-

known brand name, cross-selling opportunities and a centralised back office. We expect the group to give Ping An P&C firm financial support when needed."

Furthermore, Clarkson noted Ping An P&C had a solid market position and diversified distribution channels, with a market share of 12.86% in terms of premiums in 2009.

He added: "Ping An P&C appears to be ahead of the others in the market in diversifying its

distribution system into telemarketing and cross-selling, supported by its parent."

And he predicted the company's distribution system would support its growth momentum in the next two to three years.

An improvement in motor business – Ping An P&C's largest line – helped push the 209 combined ratio below the 100% mark and S&P expects its underwriting performance to strengthen gradually in the next two to three years.

Kiln launches Asian marine hull operation

LLOYD'S insurer Kiln is launching a marine hull operation in Asia for the first time, writes Richard Banks.

The managing agent, part of the Tokio Marine Group, has recruited Roman Reut from RSA Singapore to be its marine underwriter.

Reut will continue to operate out of Singapore, focusing on developing the marine hull account across the region.

Neil Wray, managing director Kiln's operations in Asia, welcomed the new appointment, noting: "Marine hull is a new class of business for Kiln in

Asia and to have someone of Reut's calibre helping to develop the business will be a huge advantage. The new marine hull account complements our existing marine cargo capabilities in the region and his knowledge of this market will be invaluable."

A 20-year veteran of the insurance and reinsurance markets, Reut spent three years as the leader of RSA's south-east Asian marine cargo team.

He is also an alumnus of Swiss Re working in Munich and Hong Kong while at the company.

Manulife plans for October board meeting in Beijing

CANADIAN giant Manulife Financial (pictured) intends to hold its October board meeting in Beijing, it has revealed.

The company co-owns Manulife-Sinochem, the largest Canadian financial services employer in China, and the first Chinese-foreign joint-venture life insurance company to have been established in the country.

It now boasts licences in 42 cities in 11 provinces, with 12,000 employees and agents serving more than 500,000 customers across China.

Manulife's October board meeting will coincide with the 40th anniversary of the establishment of diplomatic ties between Canada and China and the company's chair, Gail Cook-Bennett, explained: "We felt that this autumn would be an excellent

time for our board to convene in China, one of Manulife's, and indeed the world's, most important and fastest-growing markets for financial services. As Canada's leading financial institution in China, we are also looking forward to celebrating the 40th anniversary of the establishment of diplomatic relations between Canada and China."

The group's president and chief executive, Donald Guloien, added: "Manulife's success in China stems from our deep roots there, our long-term partnerships and the unwavering support we have received from both the Canadian and Chinese governments. China is not only home to more than 1.5 million Manulife customers, it is increasingly important to our work in international wealth and asset-management solutions."



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LEGAL FOCUS



JASON ALDEN/BLOOMBERG NEWS

Court rules *Saldanha* was on hire during hijacking

IN AN important ruling for the maritime industry (*Cosco Bulk Carrier Co Ltd v Team-Up Owning Co Ltd* [2010] EWHC 1340 (Comm) *The Saldanha*), the London Commercial Court has upheld the unanimous decision of an arbitration tribunal that a vessel seized by pirates remains on hire during a hijacking, reports Stephen Askins, a partner at Ince & Co.

The Dry Ship-owned *Saldanha* (pictured) was seized in early 2008 in the Gulf of Aden. It was on charter to Cosco under a New York Produce Exchange (NYPE) charterparty with the familiar Clause 15 off-hire clause, which was “unamended” in the sense “any other cause” was not widened by the insertion of the word “whatsoever”.

The owners, represented by Ince & Co and supported by the UK Defence Club, argued the vessel remained on hire throughout the period of the hijacking. The charterers, represented by Holman Fenwick & Willan, argued the vessel was off hire because the hijacking was the result of “an average accident” to the ship or cargo and further it was caused by the “default of men”.

The judge was not able to accept a seizure could properly be described as an “accident” relying on the natural meaning of the word, saying a “... deliberate and violent attack is not described as an accident no matter how unexpected it may have been to the victim”. In terms of the crew the charterers argued “default of men” meant any failure to perform their duties. The court disagreed and confirmed the long-understood position this wording was included in the clause to meet the potential mischief of the crew refusing to perform duties whether or not amounting to a full-scale strike.

No decision has been made as to whether there will be an appeal. For the practitioners, the decision is perhaps unsurprising, confirming the construction and established understanding of clause 15. However, it gives some com-

mercial certainty as to how the clause should be applied to a situation where a vessel has been seized by pirates.

The wording of clause 15 has echoes in other standard off-hire clauses, so it has a wider effect than just in the dry market. That certainty will allow owners and charterers to focus on and know the risks they are taking on and ensuring where required, insurance is taken out.

Meanwhile, James Watthey, barrister at Hardwicke chambers, believes: “This is a judgment of immense importance, not least because it concerned the effect of piracy on those using the most popular standard-form contract for time charterparties.

“The charterparty contained the usual ‘off-hire’ provision in clause 15 of the NYPE Form, which allowed charterers to suspend payment of hire upon ‘detention by average accidents ... default and/or deficiency of means ... or by any other cause preventing the full working of the vessel’.

“The judge ruled the vessel was not off-hire owing to piracy.

“First, piracy was not an ‘average accident’. ‘Accident’ means something fortuitous, not a deliberate attack by pirates. To rule otherwise would have been a deeply questionable subversion of language.

“Second, while ‘default of men’ could encompass negligent failures to repel pirates, what the market means by it is deliberate refusals to fulfil duties. Arbitration (and less still court) is not the place to rewrite the bargain struck by commercial parties, so his Lordship was correct to uphold the market definition.

“Finally, ‘any other cause’ refers to matters ‘internal’ to the vessel, and is construed far more narrowly than ‘any other cause whatsoever’. An act of piracy is clearly an extraneous cause.

“While owners are pleased to have any profitable employment for their vessels, charterers may be better able to extract amendments that specifically make piracy an off-hire event or at least add the crucial ‘whatsoever’. Until this matter goes to the Court of Appeal, a charterer would be unwise to sign up to an NYPE charterparty that does not so provide.”



Firms must obey FSA rules to ensure client money is protected

THE UK Financial Services Authority’s (FSA) rules on client money require regulated entities to hold client money in trust accounts, reports Ben Hobby, a senior manager at RGL Forensics. This means in the event of insolvency, the client money is ring-fenced and does not form part of the funds available to be distributed to creditors.

The recent case of *Lehman Brothers International (Europe) v CRC Credit* highlighted the fact client money is only protected providing firms comply with the FSA’s rules.

At any point in time, a significant proportion of underwriters’ cash balances may be held by third parties, such as coverholders and third-party claims administrators (TPAs). However, the FSA does not have regulatory control over all these entities, particularly where they are located outside the UK.

Given this, underwriters may wish to ensure the following are implemented with all of their coverholders and TPAs to protect their position:

- The use of separate trust accounts to manage premium funds on behalf of each underwriter ensures funds for each underwriter are ring-fenced in the event of insolvency;
- Where loss funds are controlled by a third party, a separate trust account should be cre-

ated for each book of business and year of account. This is particularly relevant where there are co-insurers, whose share varies from year to year;

- Any reconciliation of premium prepared by the coverholder should start with the policy listing/bordereaux, trace the total premium received by the coverholder for each policy and then the total amount paid to underwriters for each policy to ensure a full audit trail;
- Similarly, a reconciliation of claims should reconcile to the claims bordereaux, the amount of funds provided by underwriters to date and funds paid to policyholders;
- Any agreement between underwriters and the coverholder/TPA should clearly state the accounting for commissions, bank interest and charges so that there is no ambiguity regarding these matters;
- Where a TPA holds loss funds on behalf of underwriters, a regular review of the adequacy of these funds should be performed to ensure there is no need for the TPA to use their own funds to settle claims.

In addition to the above, underwriters should perform periodic audits of balances held by third parties to ensure compliance with the FSA rules, as well as good practice, to reduce the risk of misappropriation.

Emergency budget a mixed bag for insurers

TUESDAY’S “emergency budget” in the UK had a mix of welcome and unwelcome news for insurers, reports Kassim Meghjee of Steptoe & Johnson.

On the positive side, lower corporation tax rates and lower employment tax deductions are welcome news. The rise in the rate of value-added tax (VAT), much of which is not recoverable by insurers, is not so.

Also of significance, insurance premium tax (IPT) rates will rise from January 4, 2011. The standard rate (which applies to most general insurance, including property, motor and medical) will increase from 5% to 6%.

The higher rate (which applies to travel insurance and certain insurance products sold alongside motor vehicles and some consumer goods) will increase from 17.5% to 20%. The higher rate was introduced in 1997 to prevent the possibility of buyers evading VAT by reclassifying part of the sale price as insurance (previously such sales had been subject to VAT at 17.5%, whereas related insurance

had been subject to IPT at only 5%).

Given the chancellor’s decision to raise VAT to 20%, the increase in the higher rate of IPT is to be expected. Life assurance and other long-term insurance products remain exempt from IPT (and VAT).

It is anticipated £500m (\$749.4m) per year will be raised as a result of the rise in the IPT rates. That is presumably on the assumption that consumers will continue to buy insurance products at the same rate as before, notwithstanding the rising costs.

* Meanwhile, looking back at last week’s Mansion House speech by the UK chancellor, Bruno Geiringer, a partner in the insurance group at Pinsent Masons, says: “Scraping the Financial Services Authority [FSA] for banks is right but the case is not made for insurers.

“Regulators always say no one size fits all but here the Bank of England’s [BoE] new prudential regulator would appear to be just that and there is a danger this one-stop-shop regulator will focus too much on banking.

“In many respects, these changes for insurers are cosmetic as the European Union [EU] Solvency II Directive will set out the required system of prudential regulation for UK and EU insurers. The new regulator will have to implement Solvency II just as the FSA has been doing.

“What might be interesting is if the Consumer Protection and Markets Authority starts to change the conduct-of-business rules again and insurers are caught up in having to budget for redesigning products and systems.

“Insurers have, in the main, survived the financial crisis largely intact and without the scary threat of widespread meltdown like the banks. Insurers have anti-contagion rules and less inter-dependencies than the banking industry, in which they are so prevalent.

“From 2013, Solvency II, which was drafted to benefit from the lessons learned from previous financial crises to strengthen insurers’ capital base, will mandate the capital requirements for UK insurers.

“But for insurers, there has been great concern, from the general election onwards, they have been lumped together with the banks and the BoE will be unable, possibly through a lack of understanding about insurance or by being too fixated on the banks in future, to ensure a system of prudential regulation will be appropriately applied to the insurers.

“Changing the regulatory structure does not automatically bring better regulation and insurers must make good use of the consultation phase before these changes are implemented to put their case forward.

“Insurance is a good product and works well for most people. Insurers pay substantial taxes to the Exchequer. If the system of regulation for insurers in the UK is too aggressive, delivered at more cost and the tax regime is too high, the UK insurance industry will move abroad.

“We may then have a very fine regulatory system but very little of the insurance industry left in the UK to regulate.”



When can the US usurp the UK?

JACQUELINE ZALAPA wonders whether a US court is likely to respect an English jurisdiction clause?

- 2) Will the plaintiff be deprived of its day in court because of the chosen forum's inconvenience or unfairness;
- 3) Will the English jurisdiction clause deprive the plaintiff of a remedy; or
- 4) Will the English jurisdiction clause's enforcement contravene a strong US public policy?

The Bremen test

The Bremen test (*M/S Bremen and Unterweser Reederei GmbH v Zapata Off-Shore Co*) arose about four decades ago, shortly after a German corporation – Unterweser – entered into an agreement with a US corporation – Zapata Off-Shore Co – to tow Zapata's self-elevating oil rig from Louisiana to Italy.

The agreement contained an English jurisdiction clause. During transit, a storm in the Gulf of Mexico damaged the rig, which was taken to the nearest port of refuge in Tampa. Zapata commenced a lawsuit in Florida against Unterweser, which in turn moved for dismissal based on the agreement's English jurisdiction clause.

At first instance, the District Court held the English jurisdiction clause was unenforceable because it was considered contrary to US public policy and an attempt to oust the court's

jurisdiction (historically, forum-selection clauses were not favoured by some US courts, owing in part to the US Supreme Court's decision in *Carbon Black Export Inc v The Monrosa*).

Although we can conclude with good reason today significant doctrinal error in this approach, enforcing international agreements' exclusive jurisdiction clauses encountered judicial resistance in the US up until the 1970s.

On appeal, the Court of Appeals for the Fifth Circuit affirmed the District Court's judgment. Fortunately for Unterweser and the expansion of US trade and commerce, the US Supreme Court vacated the Court of Appeals' judgment declining to enforce the English jurisdiction clause.

In vacating the judgment, the US Supreme Court squarely held exclusive jurisdiction clauses are presumptively valid and enforceable in admiralty and international transactions unless a "strong showing" is made arguing enforcement would be "unreasonable under the circumstances".

In plain language, chief justice Burger explained the Supreme Court's reasons, which perhaps are more relevant today than at the time they were given: "The barrier of distance that once

tended to confine a business concern to a modest territory no longer does so... We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws and resolved by our courts."

What does the Bremen test mean for someone in the maritime industry who is or may find themselves named as a defendant in a US lawsuit in circumstances where the governing contract contains an English jurisdiction clause?

Four questions

As noted at the outset, four questions must be considered.

First, was the agreement induced by fraud or overreaching? It is not enough that the dispute is based upon an allegation of fraud. Rather, the English jurisdiction clause contained in the contract must be "the product of fraud or coercion" (*Lipcon v Underwriters at Lloyd's, citing Scherk v Alberto-Culver Co* [1974]).

Second, will the plaintiff be deprived of its day in court because of the inconvenience or unfairness of having its dispute resolved by an English court? Again, it is not enough that the remedies available in England may be less favourable than the remedies available in the US.

Instead, the second element under the Bremen test requires one to show the chosen forum's remedies are "inherently unfair" (*Riley v Kingsley Underwriting Agencies Ltd* (1992)).

Convincing a US court English law is "inherently unfair" presents a considerable challenge. The writer is unaware of binding US precedent that has held an English court or tribunal is biased or inherently unfair.

On the contrary, a long line of US authorities have consistently held English courts to be fair and neutral (*British Midland Airways Ltd v International Travel* (1974); *Syndicate 420 at Lloyd's London v Early American Ins Co* [1986]; *Riley*).

Third, will the English jurisdiction clause deprive the plaintiff of a remedy? Here, the issue appears to be not whether English law treats a particular claim differently, or even precludes it, but whether the plaintiff would be left without any remedy under English law.

The fact the laws of England may treat a particular claim in a different way from or less favourably than US law does not appear to be a valid basis to deny enforcement. In this regard, the Second Circuit has made it clear enforcement should not be denied where the plaintiff claims are recognised

under US law yet not cognisable under English law: "It defies reason to suggest a plaintiff may circumvent forum selection and arbitration clauses merely by stating claims under laws not recognised by the forum selected in the agreement. A plaintiff would simply have to allege violations of his country's torts law or his country's statutory law or his country's property law in order to render nugatory any forum-selection clause that implicitly or explicitly required the application of the law of another jurisdiction. We refuse to allow a party's solemn promise to be defeated by artful pleading..." (*Roby v Corporation of Lloyd's* (1993)).

This may be relevant for classification societies, particularly in the wake of *The Morning Watch* [1990] and *The Nicholas H* [1995] where recovery under a negligence or negligent misrepresentation theory may present certain challenges under English law that may not be as challenging under US law.

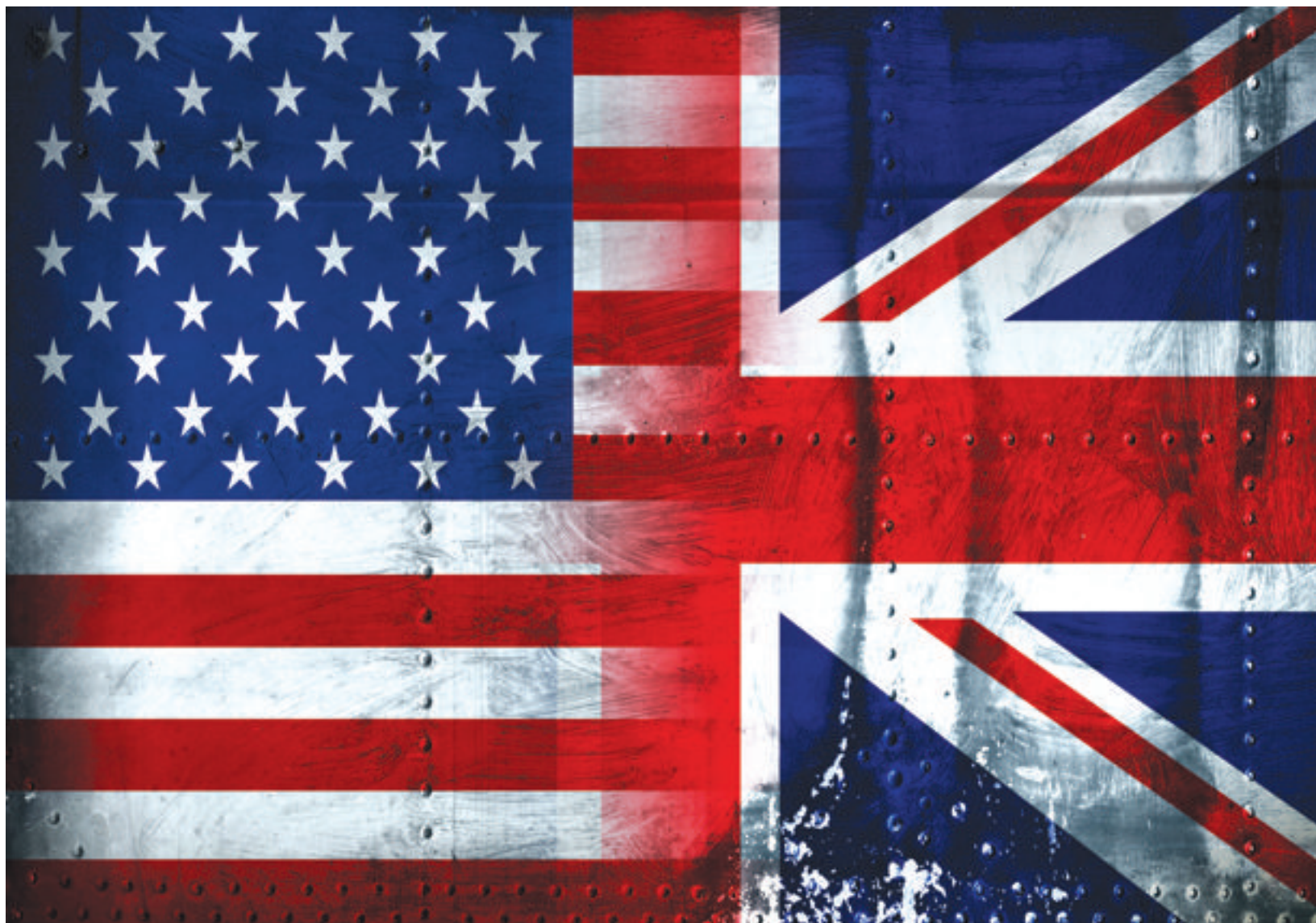
Finally, will the English jurisdiction clause's enforcement contravene a strong US public policy? Whether US public policy has been subverted is a factual inquiry that will be weighed against concerns of international comity and maintaining predictability in the resolution of disputes.

To illustrate, argument has been made certain British issuers contained English jurisdiction clauses in their contracts that operated as an impermissible waiver of US securities laws. The 11th Circuit considered, but did not accept, this argument. Chief justice Meskill explained: "We are cognisant of the important reasons for enforcing such clauses in Lloyd's agreements. Lloyd's is a British concern, which raises capital in more than 80 nations. Its operations are clearly international in scope. There can be no doubt the contract clauses mitigate the uncertainty regarding choice of law and forum inherent in the multinational affairs of Lloyd's..." (*Lipcon*).

In conclusion, an English jurisdiction clause is likely to be considered presumptively valid and enforceable under US law unless the clause can be said to be the product of fraud, inherently unfair, provides no remedy or contravenes a strong US policy.

The Bremen test may not prevent a signatory under an English jurisdiction clause seeking redress from an US court. But the Bremen test may present considerable difficulties to continuing the action, which should provide some comfort for those who find themselves named as an unsuspecting defendant in a US lawsuit.

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Flag friction: there are four questions a US court must answer in the negative to support an English jurisdiction clause – potential defendants would also do well to consider them

Insurance Day

FRIDAY 25 JUNE 2010

This Week...



GEORGE OSBORNE was a popular name in the UK insurance industry this week after the sector emerged relatively content from the coalition government's emergency budget. The chancellor of the exchequer's announcements on UK competitiveness – the taxation of foreign profits, the controlled foreign companies (CFC) rules and the UK rate of corporation tax – were the main areas of interest for the UK corporate insurance sector and all delivered relatively good news.

He pledged to agree with business a long-term approach to the taxation of foreign profits, with a consultation to follow this summer on options for retaining foreign branch loss relief as part of this. New CFC rules will be legislated in spring 2012, while the rate of corporation tax will be cut by 1% each year for the next four years, falling to 24% by 2014. Aside from the increase in VAT to 20%, the biggest blow for the sector was the rise in insurance premium tax by 1%, although even this was less than the expected 2.5% increase.

In Toronto, the G20 received a letter ahead of their meeting calling on politicians to listen to the message from the International Association of Insurance Supervisors (IAIS). The Geneva Association wrote to G20 finance ministers, reiterating the message insurance activities do not pose systemic risk and as a result should be regulated differently from banking. Speaking to *Insurance Day*, the association's secretary-general, Patrick Liedtke, described the IAIS paper on systemic risk in the insurance sector, published earlier this month, as an "important step ahead" but said the next step was to ensure supervisors outside the insurance sector shared this thinking.

The IAIS's Multilateral Memorandum of Understanding is now one stronger after Mexico's insurance regulator joined. The understanding, a framework for the exchange of information to bolster the supervision of cross-border insurance contracts, now has nine signatories.

Three large insurers this week signalled their intent to *Insurance Day* to make acquisitions in the near future. Forecasts of a surge in mergers and acquisition activity in the insurance sector in 2010 have so far yielded more failed mergers than completed deals, despite high levels of consolidation speculation. But Markel, QBE and Torus are looking to change that. Tony Markel said the former was looking to grow internationally given the saturated conditions in the US market. Frank O'Halloran, chief executive of QBE, said his firm was looking at the US "in selected segments" and Latin America, but prices "are too high" at the moment in Asia. Torus, which is on the verge of closing its Glacier Insurance purchase, is already eyeing up as many as three more deals. Clive Tobin, chief executive of the 2008 start-up, said: "When you start a company like this you have to execute really, really quickly to cover your expense base. We have got two or three other businesses we are looking at right now that represent something very similar [to Glacier]."

Finally, XL Re Ltd was celebrating this week after becoming the first Bermudian firm to receive "eligible reinsurer" status in Florida since the rules changed there three years ago. "This is good news for XL Re, the Bermuda market and Florida," James Veghte, chief executive of XL's reinsurance operations, said. The change to Florida law permits financially strong unaccredited foreign reinsurers to operate in the state without posting collateral equal to 100% of their liabilities. Moody's called XL Re's accreditation a win-win situation: "Florida is better able to attract reinsurance capital to its hurricane-exposed insurance market, while foreign reinsurers reduce their cost of doing business."

Jonathan Rest

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WARREN BUFFETT has raised his stake in British supermarket group Tesco to more than 3%, according to a regulatory filing. Buffett's Berkshire Hathaway group has bought around two million shares in the world's third-biggest retailer to take its stake to 242 million shares, or 3.02% of the total. Tesco's shares were up 0.84% at slightly less than £4 (\$5.99) each on the London Stock Exchange at midday trading.



MARK PINDER/BLOOMBERG NEWS

NEWS IN BRIEF

Intesa merger plans

ITALIAN bank Intesa Sanpaolo has sent the Italian antitrust authorities a letter detailing its planned restructuring of its insurance operations, according to Antonio Catricala, head of the Autorità Garante della Concorrenza e del Mercato. The bank's boards last year approved plans to merge the Intesa Vita, Eurizon, Centrovita and Sud Polo Vita operations into a single company. Catricala told reporters on the sidelines of an event Intesa Sanpaolo had "presented a letter with quite complex proposals, which we are studying and that also regard governance issues".

FMCSA axes freight forwarders cover limit

FOR-HIRE carriers and freight forwarders in the US will no longer have to maintain a minimum in cargo insurance as of March 21, 2011, according to a final ruling from the Federal Motor Carrier Safety Administration (FMCSA).

They will also not have to file evidence of this insurance with the administration. The new rule does not apply to household goods carriers and freight forwarders. The FMCSA gained jurisdiction over motor carrier and freight forwarder cargo insurance through the enactment of the Motor Carrier Safety Improvement Act of 1999.



Offshore rates to rise

OFFSHORE energy insurance rates will inevitably rise as a result of the *Deepwater Horizon* drilling rig disaster, Lloyd's chief executive, Richard Ward, has said in an interview with Bloomberg Television. "Rates had fallen to quite a low level in the Gulf of Mexico for offshore energy. We'd been questioning the profitability of insurance in that region for quite some time", he said. He expects more capital to enter the offshore energy market in response to the increased rates – up about 50% in some cases according to a Moody's report earlier this month. Ward commented on Lloyd's legal action against BP, one of many suits and countersuits in progress. Lloyd's has not insured BP, which self-insures, but covers Transocean, the owner of the rig. Lloyd's suit seeks to eliminate any liability as a result of pollution-related claims, on the grounds the pollution is from below the surface. "Policies are not as clear-cut as you might expect; there's always a bit of ambiguity", Ward said, adding it would only be when the cause of the disaster was fully established liability could be allocated.

AGCS appoints Martino global product leader of aviation division

FERDINANDO MARTINO, the former head of Zurich Insurance's aviation centre of excellence, has joined Allianz Global Corporate & Specialty (AGCS). In his new position as global product leader for major risks in AGCS's aviation division, Martino will oversee the group's business in airlines, large airports, manufacturing and special risks, with a core focus on global product management, including pricing strategy, underwriting appetite, product development, and underwriting compliance. Martino has 22 years' aviation insurance and reinsurance experience, and has held important management positions for a number of risk carriers. Before joining Zurich Insurance, Martino worked for Swiss Re as managing director and senior aviation underwriter, with responsibility for a portfolio of more than 300 international clients.