K&L GATES

GLOBAL BOARDROOM RISKS SOLUTIONS

July 2016 Newsletter

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KEY CONTACTS

John A. Bicks
New York
+1.212.536.3906
john.bicks@klgates.com

Tony Griffiths
London
+44.(0)20.7360.8195
tony.griffiths@klgates.com

Thomas M. Reiter
Pittsburgh
+1.412.355.8274
thomas.reiter@klgates.com

INTRODUCTION

"Risk is sexy?" - Anonymous GC

Not every Director or General Counsel (GC) is likely to describe risk analysis as "sexy" but there is little doubt that risk issues have demanded a board level focus which would have been unimaginable 10 years ago. The recent Brexit vote can only drive risk issues for boards even higher up their agenda.

That trend was also identified in PwC's 2015 Annual Corporate Directors' Survey which found that boards and management are looking at the strategic side of risk, and that any board evaluation of strategy involves integrated board level discussions of risk. As the report states, and in a direct echo of our newsletter in December 2014 quoting Albert Einstein, "with risk comes opportunity."

One role which has been particularly transformed by the increased focus on risk is the position of the GC. GCs now find themselves at the heart of important business decisions and organisational strategy. A departure from the more traditional legal advisory role that the GC would have typically been defined by 20 years ago, certainly, but this more business orientated GC role is evidently more valued by directors. According to a 2014 survey by Barker Gilmore (entitled GCs in the Boardroom and Beyond), directors place particular value on their GCs in relation to compliance and ethics (98%), risk oversight (86%) and discussions on M&A (85%). In addition, over 71% of respondents to this survey said that their GCs add value by actively contributing to business strategy discussions. Operating at the point where law, business and regulation meet, it is hardly surprising that the GC role is now seen as crucial in enabling organisations to navigate, reduce, manage and in some cases, capitalise upon risk.

Since formally launching our Global Boardroom Risk Solutions in 2014 we have in particular seen increased demand worldwide from GCs needing support in managing risk issues, governance, compliance and crisis management within their organisations. As a strategic partner of GCs and in-house legal teams, we provide international risk analysis and compliance advice, often involving industry and competitor specific comparative data, supporting the GC in meeting the demands of this very 21st century role.

CONTACT

Tony Griffiths
London
+44.(0)20.7360.8195
tony.griffiths@klgates.com

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INSOLVENCY

TACKLING THE CHALLENGES OF BREXIT

Jacob Ghanty

What steps can Boards take to manage the potential risks resulting from the UK's vote to leave the European Union (EU)?

The UK's historic vote to leave the EU will have significant consequences throughout the UK, the EU, and in the global economy. The referendum vote is expected to lead to a high degree of uncertainty and disruption as businesses come to terms with the new normal of a post-Brexit environment. Businesses, governments, and regulatory bodies will need to take measures to adjust to the legal, financial, regulatory and technical ramifications of the referendum.

We outline below certain steps that Boards should consider taking in order to manage the impacts of Brexit.

ANALYSE THE EFFECTS ON YOUR BUSINESS AND CUSTOMERS

The immediate issues affecting many businesses include currency volatility, volatility on major exchanges, potential moves in central bank interest rates and downgrades by ratings agencies.

Also consider how Brexit impacts specifically upon your business. For instance, does being part of the EU currently affect your business and would being outside the EU harm or benefit your business?

Firms with a significant international footprint should review and inventory any contracts that contain terms triggered by the vote to leave the EU (or by actual departure), for example, material adverse change clauses and other terms activated by market disruptions.

Possible actions for Boards to consider include: (i) establishing a steering team to manage your company's responses to Brexit; (ii) including Brexit as an item on Board meeting agendas; and (iii) considering how/whether Brexit is relevant from a corporate governance perspective, in terms, for example, of discussing its effects at AGMs and so on.

COMMUNICATING THE POSITION OF YOUR BUSINESS

Once you have established how Brexit will impact your business, customers, employees and counterparties, Boards should consider whether and how to communicate on the subject, both internally and externally.

Consider establishing internal lines of communication and responsibility, including initiatives to educate senior management about the impact of the UK's departure from the EU.

Certain types of firm may have legal duties to disclose impacts, for example in fund offering documents or filings with the FCA, SEC or other regulators.

Also consider whether it will benefit your company to join in with others active in industry associations focused on advocacy work. We are aware of the major industry associations around the world working with their memberships and addressing key issues.

Your staff are likely to have concerns over what the vote to leave the EU means for your company. You should therefore be prepared to reassure staff (and other parties such as investors) that there is a carefully considered, company-wide framework for handling Brexit-related disruptions.

Consider lobbying governments and regulators in order to make sure voices are heard in the debate about the withdrawal process and on the related issues. K&L Gates has leading policy groups based out of both Brussels and Washington, D.C., which can be reached via the K&L Gates Brexit Task Force (brexit@klgates.com).

DEVELOP LONGER-TERM STRATEGIC RESPONSES AND CREATE CONTINGENCY PLANS

Some companies may have structured their businesses around EU legal and regulatory frameworks. For example, if your business model has been dependent on "passporting" (including for non-EU financial institutions that have established subsidiaries in the UK), consider alternatives such as new regulatory registrations/operations in core EU countries.

Some companies may want to look for strategic opportunities to enter into joint ventures, strategic partnerships or acquisitions with other firms that have complementary interests or that are faced with similar challenges.

In terms of contingency planning, Boards should consider whether existing plans will remain appropriate once the UK moves into a leave "trajectory". Updating contingency plans may be a requirement of certain regulators.

K&L Gates Brexit Resources

AUTHOR

Jacob Ghanty
Partner
+44.(0)20.7360.8211
jacob.ghanty@klgates.com

OFFENCES UNDER THE BRIBERY ACT AND LEGAL PROFESSIONAL PRIVILEGE

Christine Braamskamp and James Millward

What lessons can Boards learn from the prosecution of Sweett Group, the UK's first prosecution and conviction for the corporate offence of failing to prevent bribery?

In December 2015 Sweett Group (Sweett) admitted to the section 7 Bribery Act offence of "failing to prevent the bribery of a person associated with the company". The person associated with the company was Cyril Sweett International (CSI), a wholly-owned subsidiary of Sweett. Sweett was sentenced on 19 February 2016 and fixed with a confiscation order of £851,152, a fine of £1.4 million, and instructed to pay £95,000 to cover the prosecution's legal costs. The £2.5 million total penalty represents more than the value of the corrupt contract. The penalty is significant and a major financial setback for a company with a market capitalisation of only £13.7m and which made a £1.1m loss last year on revenues of £88.3m. So, what could Sweett have done differently to mitigate the harm and what lessons can Boardrooms learn from this?

PROCEDURES MUST BE ADEQUATE

The case involved the payment by CSI to a businessman in the Middle East, by way of a collateral contract for fictional services, to ensure that the group secured work on a Dubai hotel project. Sweett did have anti-corruption procedures in place, but they were inadequate to prevent its subsidiary, CSI, from paying a bribe. In court, the sentencing judge dismissed Sweett's defence that the Middle East branch of the company was a "gangrenous limb" which operated in a manner inconsistent with the instructions and ethical approach of London.

The Bribery Act is designed to ensure that companies which operate in the UK have in place effective anti-corruption measures in all the jurisdictions in which they operate. Rogue elements can only operate if the business controls are defective. Boards should assess the operation of their organisations across the globe and implement anti-corruption practices and procedures proportionate to the differing geographical risks. The Transparency International corruptions perception index shows that the risk of corruption is higher in the Middle East.

HOW GOOD IS YOUR TRAINING?

An essential component of having adequate procedures is putting in place effective training for employees.

The Bribery Act is designed to ensure that companies which operate in the UK have in place effective anti-corruption measures in all the jurisdictions in which they operate.

Corrupt payments were made by Sweett's subsidiary for eighteen months and the collateral contract itself was a 'clear' bribe. The failure properly to train its Middle East employees allowed the judge in the Sweett case to conclude that bribery had become an acceptable way of doing business. An effective anti-corruption system would have alerted the company to the wrongdoing. This was an aggravating factor at sentencing.

WHAT DUE DILIGENCE DO YOU PERFORM?

Sweett argued that it had inherited a rotten relationship on the acquisition of another business and that the bribery occurred as a result of this. However, Sweett should have conducted meaningful due diligence on its target before acquisition, requesting appropriate information about anti-corruption measures. The fact that the inadequate procedures were inherited did not provide mitigation. Sweett's failure to implement adequate procedures to prevent bribery was compounded because it had overlooked reports from KPMG identifying "serious concerns" with the way that CSI was operating. KPMG also identified unsatisfactory controls in Sweett's Middle East business and recommended that Sweett implement effective systems and controls to identify and prevent bribery, all of which went unheeded. So if you are going to commission a report consider the scope and be aware of the dangers if its recommendations are not adopted.

CO-OPERATE, CO-OPERATE, CO-OPERATE

Although there was no deliberate policy of wrongdoing at Sweett, there were also no safeguards in place to combat the actual risk. As with the ICBC Standard Bank case, complacency lays at the heart of Sweett's undoing. It is not clear why the company failed to secure a Deferred Prosecution Agreement, but this may in part be attributable to its fraught relations with the SFO. Sweett announced in November 2014 that it was co-operating with the SFO investigation, but was contacted shortly after by the SFO to say that it was being un-cooperative. On sentencing, the judge characterised the company's failure to be upfront with the SFO, and an attempt by the company to secure a letter from the Middle East explaining that the bribe was a 'finder's fee', as a deliberate attempt to mislead.

HEADS MUST ROLL

Following sentencing, the new CEO of Sweett said: "We have strengthened our internal systems, controls and risk procedures, and refined our strategy, to ensure this company should never again fall victim to such conduct." As part of this, the company had also removed the previous management. Simply removing personnel may no longer be sufficient. Holding individuals to account for corporate acts of corruption is an increasing priority for prosecutors. In 2015, the US Deputy Attorney General, Sally Yates, issued a memorandum (the "Yates Memo") setting out that a corporate's

ability to attract credit for co-operation would rest on its willingness to offer "all relevant facts about the individuals involved" in the corporate wrongdoing.

One of the core principles to establishing an "adequate procedures" defence in the UK is that the top-level management of a company is committed to creating a culture of integrity where bribery is unacceptable. In virtually all cases where a company is found guilty of failing to prevent bribery, however, the positions of senior management and the board will be in jeopardy as their commitment or implementation of policies and training has been found to be defective. In Sweett's case, the judge highlighted the bribe as indicative of a culture of corruption. Removing senior personnel enables a company to demonstrate its renewed commitment to fostering a culture of carrying out business openly, honestly and fairly. This will enable it to receive credit on sentencing for the fact that the offending took place under previous directors and managers and, as in the US, to demonstrate full co-operation with the prosecutor.

CULTURE OF INTEGRITY

All companies should ensure that there is a clear reporting structure in the organisation whereby issues of corruption can be escalated to senior management and, where appropriate, external advice taken on making a report to the relevant authority. The courts give credit to corporates which voluntarily report offending and co-operate with investigations. Operating a 'nothing to hide' culture goes hand in hand with early reporting and being confident that your anti-corruption training and procedures are effective. Most importantly, senior management has to take the issue of corruption seriously and enforce a programme of effective compliance and training. The strong indication from prosecutors in the US and in the UK is that they will ramp up their investigations into individual liability. This will mean a more intense focus on directors, senior management and any other employee potentially involved or associated with the alleged wrongdoing. The only effective way for corporates to respond to this tougher approach is to implement a robust compliance regime, with which the Board must be completely engaged. This should be predicated upon a risk based approach to determine and mitigate the risks confronting the company. If not, directors and other employees may face not only disciplinary action but civil and criminal proceedings. The fine imposed on Sweett dwarfs the value of the contract which the bribe facilitated. Responsible Boards must assess the upfront costs of implementing an appropriate and proportionate compliance programme against the potential costs and damage of not having one.

AUTHORS

Christine Braamskamp
Partner
+44.(0)20.7360.8131
christine.braamskamp@klgates.com

James Millward
Associate
+44.(0)20.7360.8227
james.millward@klgates.com

HOW TO STRENGTHEN THE REGULATORY COMPLIANCE PROCESS TO REDUCE COMPLIANCE RISKS?

Grace Parke Fremlin, Diane Ambler, and Russ Abrams

Every industry is facing more regulations, more government enforcement, and more compliance risks.

In the automotive industry alone, regulatory compliance has been headline news. Late last year, regulators and consumers were shocked when VW revealed it had used a defeat device to circumvent U.S. emissions tests and those of other countries. It has been reported that the financial toll on VW could reach US$80 billion or more in criminal and civil fines, damage awards to consumers, and litigation costs. Also, late last year, General Motors settled criminal charges with the DOJ (US Department of Justice) for US$900 million dollars concerning charges for concealing a potentially deadly safety defect with their ignition switches from its U.S. regulator. In July 2015, Fiat Chrysler Automobiles acknowledged safety violations and agreed to pay US$105 million in civil penalties and to hire an independent monitor. Recently this year, it was announced that Takata recalled airbags totaling 100 million units, causing people to speculate on a Takata bankruptcy. In addition to the massive financial losses, the damage to a company's and an industry's reputation and brand equity is no less severe, and the loss in goodwill and trust are enormous. The reality is that the automotive industry is not the only industry confronted with increasing compliance risks.

GLOBAL COMPLIANCE RISK SOLUTIONS

Governments in multiple jurisdictions have heightened their oversight of regulatory compliance across many industries. In response to the VW scandal alone, European regulators have pledged to modify their emissions-testing protocols. Headlines such as in the cases cited above are a wake-up call, not just to the automotive industry but to senior management and corporate boards of every company in every industry, to review and reconsider their existing compliance processes. Assessing compliance risks is not a static process; hence, evaluating one's compliance program to ensure that it addresses the changing risk profile has to be a regular activity and one that a board is wise to monitor carefully.

As a fallout of the financial sector's collapse in 2008, the regulatory compliance requirements for financial institutions

greatly increased with the enactment of new laws. The financial services industry has made the management of compliance risks a top priority on par with other major strategic, financial, and operational risks. Automakers and companies in other industry sectors may want to embrace the same approach and make the management of compliance risks a top priority as well.

The fundamental elements of an effective compliance program are common across regulated industries and, although there are many differences among industries, a review of the conceptual elements used within the financial services industry in its compliance programs may be helpful to senior executives and boards of directors in other industries.

SAMPLE COMPLIANCE PROCESS

A template derived from laws governing financial institutions would suggest implementation of the following five elements to a compliance process:

1. Compliance Risk Assessment

Conduct a risk assessment to identify the laws, regulations, and industry standards applicable to the business of your company and industry (hereinafter referred to as Relevant Laws).

The risk assessment would include a risk-based approach to identifying laws that pose material compliance risks. Some of these laws with significant risks may be strictly industry-specific or product-specific and some, such as antitrust and anti-bribery laws, may be of general applicability. To take the automotive industry as an example, those laws that regulate vehicle safety and environment clearly carry high compliance risks for automakers. In the United States, they are the Motor Vehicle Safety Act, the TREAD Act, the Clean Air Act, and the regulations of NHTSA and the EPA. In the EU, they include the Product Safety Act, Road Traffic Licensing Regulation, Federal Emission Control Act, Vehicle Regulations of the United Nations Economic Commission for Europe (UNECE Regulations) and European Regulations, in particular the Euro 5 and Euro 6-Regulation on emissions.

A compliance risk assessment can be expected to change with changes in the laws, the company's business, the business environment, and government enforcement focus and initiatives. Thus, a risk assessment will benefit from regular monitoring and periodic updates to ensure that the compliance program continues to address the company's significant compliance risks.

2. Policies and Procedures

Adopt and implement written policies and procedures reasonably designed to prevent violation of Relevant Laws.

Policies and procedures are most effective when crafted to the specific business model and dynamics of the company. General, off-the-shelf versions of policies and procedures lack the rigor and detail necessary to anticipate specific company needs and structures. In addition, the process of developing policies and procedures engages all

stakeholders in assuring a complete, robust, and dynamic program that fits within the company's operations.

Written policies and procedures, even well-drafted and updated ones, may be ineffective without proper and periodic training of personnel and audits of the process. An internal compliance risk office can help facilitate the training and audits with the help of internal and outside counsel and consultants.

3. Board Approval

Obtain the approval of the company's policies and procedures by the company's board of directors, including, where relevant, a majority of directors who are not interested persons of the company based on a finding by the board that the policies and procedures are reasonably designed to prevent violations of Relevant Laws.

Board involvement, particularly by the independent directors, helps ensure impartiality and company conduct consistent with the best interests of the company and its shareholders.

4. Chief Compliance Officer (CCO)

Designate an individual responsible for administering the company's policies and procedures who is impartial and not subject to undue influence.

A CCO reporting directly to the board of directors would generally provide an annual written report to the board.

5. Annual Review

Review, at least annually, the adequacy of the policies and procedures of the company and the effectiveness of their implementation, training, and audits.

Typically, an annual written report would address the operation of the policies and procedures of the company, any material changes made to those policies and procedures since the date of the last report, and any material changes to the policies and procedures recommended as a result of the annual review, as well as any material compliance matter that occurred since the date of the last report about which the company's board of directors would reasonably need to know to oversee company compliance.

A risk assessment will benefit from regular monitoring and periodic updates to ensure that the compliance program continues to address the company's significant compliance risks.

A material compliance matter could include, for example:

- a violation or potential violation of a Relevant Law by the company or its officers, directors, employees, or agents,
- a violation or potential violation of the policies and procedures of the company, or
- a weakness in the design, implementation, training, or audit of the policies and procedures of the company.

CONCLUSION

Implicit and explicit in the sample compliance process are three goals converted into outcomes:

- implement clear, streamlined, focused compliance policies and procedures;
- appoint a senior management person who can be impartial to report to the board of directors; and
- report material compliance matters to the board of directors.

In sum, this sample process is not a universal “one size fits all” solution, and each company must custom tailor its solution to its own structure and its existing internal processes and operations. However, incorporating the five elements of the sample process establishes a strong foundation that can support a robust compliance-based culture within the organization. An up-to-date review of current practices and a coherent plan for making necessary changes will position each company to deal with any government scrutiny or liability claims in the best manner possible.

A compliance program needs to address preexisting as well as new compliance risks in an adequate and appropriate manner. In doing so, what is adequate and appropriate may exceed the legal standard of what may be reasonable under law or prevalent in an industry at that time. Honesty, integrity, and doing the right thing are what build trust. The legal standard of reasonable compliance, often measured by what is accepted and prevalent in an industry, is the starting point for any compliance program. At its optimum, a compliance program can be most effective where a company, including active board of directors oversight, strives to build trust with its regulators, enforcers, and consumers by doing the right thing even if doing so is not required by law.

AUTHORS

Grace Parke Fremlin
Partner
+1.202.778.9229
grace.fremlin@klgates.com

Diane Ambler
Partner
+1.202.778.9886
diane.ambler@klgates.com

Russ Abrams
Partner
+1.843.579.5674
russ.abrams@klgates.com

CONSIDERATIONS FOR BUSINESS IN THE LOW OIL PRICE ENVIRONMENT

John Gilbert

In January 2016, crude oil prices dipped below US$30 per barrel. Although they have now increased over that mark, prices are still at their lowest level since 2009 and still are less than half what they were in the summer of 2014.

The current view from the industry is that they are unlikely to return to the levels of 2014 in the foreseeable future (if ever) and the focus is on being profitable at US$50 per barrel. Natural gas prices also have fallen significantly over the same period. The impact of the fall and sustained lower prices on the oil and gas industry and more broadly are considered in this article. Consequences for business are potentially both positive and negative.

Recommendations, which are further elaborated on below include:

- Buyers and sellers under long-term natural gas sale and purchase agreements should assess the need to revisit price formulas to reflect the market shifts and the agreed allocation of risks and should initiate negotiations and dispute resolutions, as appropriate.
- Businesses operating within the sector should consider their organisation's relative position of strength and build this into the corporate or acquisition strategy.
- Business consumers of energy should ensure that they are receiving best value from their suppliers, investigate whether other savings can be made in their supply chain as a result of reduced costs for suppliers, and consider what steps could be taken to prepare for growth in the economic output that may emerge.
- Investors, suppliers, creditors, and buyers from the oil and gas industry should remain on their guard for concerns over the long-term viability of the companies that they deal with. Mechanisms should be put in place to protect themselves in the event of default by those companies.

OIL AND GAS INDUSTRY

For the oil and gas industry, the fall in prices has had significant consequences. The marginal price at which projects are profitable varies greatly from as low as US$20 per barrel to over US$100.[1] Where it sits will depend on many factors, including the location of the project, the type of hydrocarbons produced and the challenges of exploiting the field. By weight of numbers, average projects are around US$55–US$65 per barrel. However, the World Bank's forecast for

average oil price in 2016 is US$41 per barrel.[2] The immediate impact of the price fall has been to stop new projects moving forward. Industry experts report that this has led to 68 proposed projects being put on hold, representing around US$380 billion of investment.[3]

In addition to reducing capital expenditure, oil companies have looked to reduce their operating costs by one-half to two-thirds. This has been achieved by renegotiation of rates with suppliers, reduction in scope of work, greater standardization, and through job cuts. Globally, it is estimated that over 250,000 jobs were lost in the industry in 2015.[4]

In some cases, the impact has been even more fundamental. Some public companies have taken the step of cutting their dividend.[5] Others, which have not done this, have been criticized for not maintaining cash to make new investments.[6] There have also been insolvencies, particularly in oil service companies.[7] Some commentators have questioned whether the business model for major oil companies can be sustained as it is based on designing, implementing, and managing exactly the big projects that have been put on hold.

Recent insolvencies among upstream producers have highlighted concerns about the level of debt being carried and the ability of those companies to service it at crude prices of US$45.[8] Ratings agencies have reported very high levels of default among commodity-linked industries. Any suggestion that the increase in price since January 2016 has solved those problems is misplaced. It has helped to mask the problems, but the underlying issue remains.

It is not all so bleak for the oil and gas sector. Companies focused on the downstream generally have fared better. In the United States, for example, they have benefited from higher refining margins arising from lower crude prices combined with steady demand for fuel.

GAS PRICE RENEGOTIATIONS

The price for natural gas sold under many long-term gas sales agreements is indexed to oil (in whole or in part). Low oil prices will, therefore, have an impact on the price of gas under those agreements. Such a fundamental shift in the oil price also will cause buyers and sellers under those agreements to start price renegotiations as they seek to agree amendments to the price formula or, failing that, have changes imposed through arbitration.

The current view from the industry is that they are unlikely to return to the levels of 2014 in the foreseeable future (if ever) and the focus is on being profitable at US$50 per barrel.

Although spot gas prices are also currently low, many parties will use renegotiations to argue that the indexation to oil in the contract should be replaced with an indexation to a gas market hub. If the amendment of the price formula is left to an arbitral tribunal, this can give rise to very significant risk for the parties, as contracts often involve the sale of high volumes of gas over long periods.[9]

All of this has an impact beyond the oil and gas sector because of the uses to which gas is put, such as power generation, heating, and as a feedstock for the chemical and fertilizer industries. Moreover, the growing global supply of liquefied natural gas (LNG) and the price of gas have geopolitical impacts through their effect on energy security and commitments to reduce carbon emissions.

OTHER SECTORS

Immediately beyond oil and gas companies, there will be an impact on suppliers to and businesses that are dependent on them. Lower activity levels and a focus on price have and will continue to give rise to difficult markets for those suppliers, consultants, and other related businesses. In addition, there will be an impact on investors relying on capital growth and income from dividends from oil and gas companies.

Many have suggested that reduced prices for energy from hydrocarbons will have a negative impact on renewable sources of energy. Just as the cost of generating power from renewables had reached a level where it was thought that it could compete without subsidies with more traditional sources, the drop in crude price has moved the goal posts. Even if this is the case, it has not curbed investment into renewables, and that has continued to remain strong.[10]

More broadly, the conventional wisdom has been that a reduction in oil prices should lead to growth in economic output. However, commentators have suggested that this has not been the case as a result of the recent more severe fall. Rather, the fall in oil prices has been so significant that it has been a macroeconomic factor in the current uncertainty and pessimism on economic conditions. It has not just been that economies that are heavily dependent on oil and gas (such as Russia, Saudi Arabia, and Nigeria) have suffered, but the fall has had a chilling factor on the global economy as a whole. It is not yet clear whether this will continue in the long term or whether lower oil prices will act to stimulate growth.

OPPORTUNITIES

Many predict a period of consolidation in the oil and gas sector, as companies look to reduce costs and stronger companies are able to target the assets of struggling ones for acquisition. In addition, it is anticipated that there will be new entrants into the industry, bringing with them capital from other sectors. This is more heavily predicted than observed at the moment as potential players wait to see whether the bottom of the market has been reached and, if so, to watch its impact being played out. More positively, with necessity being the mother of invention, this may be a period of exciting innovation

It is not all so bleak for the oil and gas sector. Companies focused on the downstream generally have fared better. In the United States, for example, they have benefited from higher refining margins arising from lower crude prices combined with steady demand for fuel.

as companies look for technology to help them be profitable at US$50 per barrel.

Beyond the oil and gas sector, most businesses will benefit from reduced fuel and other input costs resulting from lower oil prices, particularly in agriculture and transport. However, it may take some time for that to work through to them and, at the same time, they may be suffering from reduced output because of the impact on the global economy.

To make the most of the current lower crude price, businesses should: (i) check that their fuel and energy supply contracts reflect the lower prices available; (ii) investigate whether other savings can be made in their supply chain as a result of reduced costs for suppliers; and (iii) consider what steps could be taken to prepare for growth in the economic output that may emerge.

RISK MITIGATION

Despite the increase in prices since January, businesses should remain wary and ensure that they have put in place steps to mitigate the risk of oil and gas companies becoming insolvent. The recovery in prices from below US$30 to around US$45 has avoided strategic insolvencies, but it has had the effect of masking underlying problems. The result is that there remains the significant risk of unexpected and sudden insolvencies. Robust credit control should be effected and any defaults acted upon quickly.

Further, buyers and sellers under long-term natural gas agreements should assess the need to revise the price formulas and initiate negotiations and dispute resolution, as appropriate.

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[1] See http://www.woodmac.com/analysis/PreFID-oil-projects-global-breakeven-analysis.

[2] World Bank Commodity Markets Outlook, April 2016.

[3] See http://www.woodmac.com/media-centre/12530462.

[4] See http://www.usatoday.com/story/money/2015/12/31/energy-oil-gas-us-jobs/78066610/ .

[5] For example, Repsol, ENI and ConocoPhillips, see http://www.ft.com/cms/s/0/e1a243ec-dba6-11e5-a72f-1e7744c66818.html#axzz42b270yox .

[6] See http://www.ft.com/cms/s/0/3a22e926-d30b-11e5-829b-8564e7528e54.html#axzz42b270yox.

[7] See http://www.moorestephens.co.uk/news-views/january-2016/insolvencies-of-uk-oil-and-gas-service-companies-a.

[8] http://www.ft.com/cms/s/0/7cf397ba-109a-11e6-91da-096d89bd2173.html#axzz47bAbNoVE.

[9] See “Taming Price Review Clauses: Lessons from the Transactional and Arbitration Battlefields”, a paper presented by K&L Gates at LNG 18.

[10] See http://www.bloomberg.com/news/articles/2016-01-14/renewables-drew-record-329-billion-in-year-oil-prices-crashed.

AUTHOR

John Gilbert
Partner
+44.(0)20.7360.8122
john.gilbert@klgates.com

NEW UK INSURANCE ACT COMING INTO FORCE IN AUGUST 2016

Some Practical Tips for Policyholders in Anticipation of the Changes

Sarah Turpin, Frank Thompson, and Sarah G. Emerson

As reported in our earlier alert the new Insurance Act (which will govern insurance policies placed, amended or renewed from 12 August 2016) is designed to provide a more up to date framework for commercial insurance in England and Wales and will replace certain provisions of the Marine Insurance Act 1906, which has been applied to commercial policies in a marine and non-marine context.

The Act aims to address the perceived imbalance under English law in favour of insurers, but it is important that policyholders fully understand its implications, not least because there are certain changes which impose additional obligations on insureds in terms of pre-contract disclosure.

There are a number of steps policyholders ought to be considering in advance of the changes coming into effect to ensure compliance with the new duty of fair presentation which replaces (but in certain respects is more onerous than) the existing duty of disclosure. A pro-active approach is needed for insureds to avoid falling foul of the new requirements.

THE DUTY OF FAIR PRESENTATION

Under the new regime, a fair presentation of the risk is one which requires the insured to:

- Disclose, without misrepresentation, every material circumstance which the insured knows or ought to know; or
- Failing that, give sufficient information to put a prudent insurer on notice to make further enquiries; and
- In either of the above cases, present the information in a manner which would be reasonably clear and accessible to a prudent insurer.

This latter requirement imposes an additional obligation on insureds which is aimed primarily at preventing "data dumping" whereby insureds provide excessive amounts of information to insurers in the hope of avoiding any

The Act aims to address the perceived imbalance under English law in favour of insurers, but it is important that policyholders fully understand its implications...

non-disclosure arguments. Insureds will now need to take positive steps to structure and present their disclosures in a clear and accessible manner. Even if the correct information is provided, an insured who provides excessive amounts of data or presents information in an unclear or cryptic manner could find themselves in breach of its duty to provide a fair presentation of the risk.

The Act specifies that a circumstance is material for disclosure purposes if it "would influence the judgment of a prudent insurer in determining whether to take the risk and, if so, on what terms". This mirrors the existing law but the Act does provide some specific examples of things which may be regarded as material, namely special or unusual facts relating to the risk; any particular concerns which led the insured to seek Insurance cover for the risk; and "*anything which those concerned with the class of insurance and field of activity in question would generally understand as being something that should be dealt with in a fair presentation of risks of the type in question*". This potentially very broad category is designed to encourage insurers to produce protocols for particular classes of insurance which identify those matters which should be disclosed as a matter of common practice. It is recommended that going forward, insureds make enquiries (usually through their broker) as to whether relevant insurers have particular disclosure protocols.

STEPS TO ENSURE COMPLIANCE

There are a number of key components built into the duty of fair presentation which insureds must comply with:

Circumstances Known To The Insured

In the case of corporate insureds, this includes information known to senior management which is described by the Act as "those individuals who play a significant role in the making of decisions about how the insured's activities are to be managed and organised". In the case of large corporations, this could potentially include a large number of individuals in a number of different countries.

Corporate insureds are required to disclose information known to those individuals who participate "in the process of procuring the insured's insurance, whether the individual does so as the insured's employee or agent, as an employee of the insured's agent or in any other capacity". The number of employees involved in procuring the insurance is likely to vary depending on the size of the organisation. Even if the company has a dedicated insurance or risk manager, there may be additional employees involved in collecting relevant data and in liaising with the brokers. As for agents, this will include any broker or other agent responsible for arranging the insurance, including individuals at the broker involved with placing different product lines and those involved in claims handling.

Companies should therefore take steps to:

- Identify the individuals and positions which make up senior management which will most likely include members of the Board of Directors and others on senior management committees.
- Seek to agree with their brokers and insurers a narrower list of positions which fall within senior management, with a view to avoiding potential disputes over whose knowledge is relevant for disclosure purposes.
- Identify relevant positions and individuals both within the organisation and that of any agents/ brokers and seek to agree with the broker and insurer a specific list of individuals who are "responsible for the insured's insurance", so as to restrict those with actual knowledge that must be disclosed.

Circumstances Which Ought To Be Known

The Act refers to this as information which "should reasonably be revealed by a reasonable search of information available to the insured". This could potentially include not only information held within the organisation but by persons covered by the insurance (including insureds who are not part of the organisation e.g. former employees/directors, tenants or subcontractors) and by brokers or agents involved in procuring the insurance (but not necessarily limited to those involved in placing the insurance). The requirement to undertake a "reasonable search" involves what could potentially be an onerous obligation on insureds, given that what is reasonable in this context is very much open to interpretation.

Organisations should therefore:

- Engage with their brokers and insurers to agree what constitutes a "reasonable search" and what steps need to be taken in their particular circumstances.
- Ensure that steps are taken to complete the search and that the process is properly documented to provide a suitable audit trail.
- Agree a process with their brokers in terms of how material information relevant to their organisation is collated and disclosed.

DISCLOSURE IN A MANNER WHICH WOULD BE REASONABLY CLEAR AND ACCESSIBLE TO A PRUDENT INSURER

This imposes additional obligations on insureds to present information in an ordered and user friendly manner.

Insureds should consider:

- How this requirement impacts their existing data collection processes, and systems for collecting and disclosing material information.
- What changes may be required to ensure disclosure is made in a clear and accessible manner taking

- account of the volume of information and the need to properly record what information is being provided e.g. the use of indexing, signposting and sub-sections.
- Seeking guidance from insurers as to what information they are particularly concerned about and whether that needs to be highlighted in a particular manner.

MATTERS WHICH NEED NOT BE DISCLOSED

The Act specifies certain matters which the insured is not required to disclose to the insurer in the absence of enquiry, namely circumstances which diminish the risk or which the insurer knows, ought to know or is presumed to know. Similarly, there is no need to disclose matters in respect of which the insurer has waived any disclosure requirement.

The Act specifies what constitutes insurer knowledge for this purpose. This includes:

Matters of common knowledge.

- Matters which an insurer underwriting the risk in question would be presumed to know.
- Information which is known to the insurer and readily available to the individual underwriting the risk.
- Information which is known to an employee or agent of the insurer who ought reasonably to have passed such information on to the individual underwriter.

In practice, insureds should not rely on this to limit their disclosure unless they have sought specific confirmation from insurers as to information they already hold about the business (e.g. from previous renewals or in the claims context) and which does not therefore require specific disclosure. Even if an insurer is

underwriting more than one class of risk, it would be unwise to assume that relevant information is being shared between individual underwriters. Full disclosure should be given to each underwriter unless the insurer specifically confirms that information is being shared. Similarly, when changing insurers, insureds should discuss with their brokers what information provided at previous renewals (e.g. in relation to past claims, risk assessments, surveys, valuations etc.) will be passed on.

POTENTIAL CONSEQUENCES OF BREACH OF DUTY

Under the existing law, the only remedy available to insurers for breach of the duty of material disclosure was the avoidance of the policy from the date of inception. This draconian remedy has been the subject of much criticism, particularly in circumstances where the non-disclosure was unintentional.

The Act introduces a series of "proportionate remedies" whereby, if the breach is not considered deliberate or reckless, the insurer can:

- Avoid the policy and return the premium, where the insurer can prove that it would not have entered into the contract;
- Treat the policy as if it included different terms, where the insurer can prove that it would have entered into the contract, but on different terms; and/or
- Reduce proportionately the amount payable in respect of any claims, where the insurer can prove that it would have entered into the contract but at a higher premium.

As with certain other provisions, it is open to parties to contract out of the provisions of the Act relating to the duty of fair presentation and proportionate remedies, although any provision which puts the insured in a worse position than under the Act must be brought to the insured's attention before the contract is entered into.

Policyholders may want to consider whether the provisions in their existing policies e.g. innocent non-disclosure clauses might actually be more favourable than the provisions of the Act. Alternatively, if the Act is to apply, policyholders should consider whether to negotiate with insurers in relation to the proportionate remedies, particularly the remedy providing for the proportionate reduction in claims.

AUTHORS

Sarah Turpin
Partner
+44.(0)20.7360.8285
sarah.turpin@klgates.com

Frank Thompson
Partner
+44.(0)20.7360.8183
frank.thompson@klgates.com

Sarah G. Emerson
Senior Associate
+44.(0)20.7360.8268
sarah.emerson@klgates.com

EUROPEAN UNION AND UNITED KINGDOM SANCTIONS UPDATE

Raminta Dereskeviciute, Alessandro Di Mario, and Philip Torbøl

Below is a summary of key developments relating to European Union ("EU") sanctions on Iran, North Korea and other jurisdictions as well as highlights of recent changes to the sanctions regime in the United Kingdom.

IRAN

We have written previously about the terms of the Joint Comprehensive Plan of Action ("JCPOA"), which you can read more about on the K&L Gates Hub web page (www.klgateshub.com). From 16 January 2016 ("Implementation Day"), most of the financial and nuclear-related sanctions imposed on Iran by the European Union were lifted. However, although Iran is now a viable destination for many European investment and trade activities, businesses that want to invest in the Iranian market still face practical obstacles.

One such obstacle is that although the US has lifted most secondary sanctions on Iran, the principal embargo restrictions relating to US persons and US-origin items and some secondary sanctions remain. As part of the continuing US embargo, US dollar transactions involving Iran, even by non-US persons, are still barred because such transactions involve clearance through US banks. Additionally, the US has reserved the right to penalize non-US parties that deal with certain designated Iranian entities, including the Islamic Revolutionary Guard Corps, and their agents and affiliates. There are also EU sanctions still in place, such as financial restrictions against five Iranian banks. Businesses and financial institutions must continue to comply with these restrictions when carrying out activities in Iran.

As a result of the continued US embargo and these EU restrictions, there have been reported concerns that financial institutions are maintaining risk-averse compliance policies and that banks will not facilitate financial transfers where Iranian parties are involved.

Governments publish JCPOA statement

In response to the various concerns raised by banks, businesses, and the Iranian Government, on 2 June 2016, the US, EU, UK, France and Germany jointly published a statement relating to the JCPOA, stating their support for permitted business activity in Iran, and

recognising the opportunities for global business to invest there. The statement recognised that the due diligence necessary for sanctions compliance when exploring business opportunities is "by no means unique to Iran" and encouraged the Iranian government to work towards a market which is friendly to international investment.

Human rights related sanctions extended for a year

Sanctions relating to human rights and an embargo on military equipment remain in force against Iran, and have not been affected by the changes which came into force on Implementation Day. On 12 April 2016, the EU passed Implementing Regulation 2016/556 and Decision (CFSP) 2016/565, renewing asset freezes and travel bans against a number of Iranian persons and entities responsible for human rights violations for a year until 13 April 2017. The restrictive measures also ban exports to Iran of goods for internal repression and monitoring telecommunications and amend or delete the listings for 24 individuals.

Three Iranian Banks remain on EU sanctions lists

The Central Bank of Iran ("CBI") remains subject to an asset freeze under the EU's sanctions regime in spite of having appealed to the General Court of the European Union (the "General Court") and Court of Justice of the European Union (the "CJEU") for an annulment. The Bank of Industry and Mine continues to be designated under anti-nuclear proliferation sanctions, following its unsuccessful appeal to the CJEU.

Bank Saderat also remains subject to an asset freeze in spite of the CJEU upholding its challenge to the EU Council's decision to list it. It is now subject to a separate listing by a decision of the EU Council for violations of UN sanctions in 2009. This will apply until 22 October 2016.

NORTH KOREA

EU adopts UN sanctions on North Korea

In March, the EU revised its sanctions currently imposed against North Korea, implementing the restrictive measures imposed by UN Security Council Resolution 2270. The strengthened sanctions regime is a response to Pyongyang's purported detonation of nuclear weapons in January 2016.

The revised sanctions regime adds 16 individuals and 12 entities to the list of those subject to EU sanctions. It also includes a number of additional bans and prohibitions, including an obligation on EU Member States to expel North Korean diplomats who attempt to evade sanctions or violate UN Security Council resolutions. The restrictive measures introduce new prohibitions relating to mining and metals, shipping and banking.

The EU Council has also updated the list of restricted persons and entities by removing the entry imposing sanctions on the Korea National Insurance Company and instead placing the Korea National Insurance Corporation on the list of restricted entities.

Following these changes, the EU Council passed further sanctions in May which prohibit the import to the EU of petroleum products and luxury goods from North Korea, impose restrictions on transferring money, prohibit investment in certain sectors (including mining, refining and chemicals) and also contain restrictions on North Korean aircraft and ships.

France considering unilateral sanctions on North Korea

France is considering imposing its own sanctions regime on North Korea, in addition to the sanctions currently imposed by the EU. The Director-General of the Asia and Oceania directorate of France's Ministry of Foreign Affairs has suggested that such sanctions may be wider, subjecting more individuals to a travel ban, and stronger, with the intention of targeting the North Korean economy. France has been particularly vocal in calling for the EU to adopt even more stringent sanctions, following North Korea's testing of its ballistic missiles. It was announced on 15 June 2016 that representatives from the French and South Korean governments will meet to discuss collaborative efforts in this regard.

OTHER EU SANCTIONS

Syria

On 27 May 2016, the EU Council renewed the restrictions on Syria for one year, to 1 June 2017. The sanctions regime comprises an embargo on arms and oil, financial restrictions, and targeted travel bans and assets freezes.

With respect to the targeted asset freezes imposed by the Syria sanction, prior to the renewal of the sanctions regime, on 7 April 2016, the CJEU rejected the appeal for annulment of sanctions designation of Tarif Akhras, a Syrian businessman who has close ties to President Bashar al-Assad (Case C-193/15). The CJEU held that the Council was right to presume that Mr Akhras, as a prominent businessman in Syria benefitted from or supported the regime, unless he could prove otherwise. The CJEU ruled that the evidence against Mr Akhras was "sufficiently specific, precise and consistent" to justify finding that he had provided support to President Assad's regime and/or benefited from it.

However, on 6 June 2016, the General Court in Case T-723/14 held that the Council could not assume a businessman supported President Assad's regime. The Court reached this decision on the grounds that although the applicant (who was granted anonymity) was a businessman, the Council had provided no evidence to support his listing.

Libya

On 6 May 2016, the EU Council amended the listing entries for two individuals, Mutassim Qadhafi and Safia Farkash Al-Barassi, both of whom are subject to asset freezes and travel bans (Council Implementing Regulation (EU) 2016/690).

Myanmar

The EU also extended its arms embargo and human rights-related sanctions on Myanmar until 30 April 2017 (Decision (CFSP) 2016/627). Sanctions of varying kinds have been imposed on Myanmar consistently since 1991. Trade, financial and targeted sanctions were temporarily suspended for one year in May 2012, and were lifted entirely in April 2013 as a result of political reform. Now, only the arms embargo and human rights-related sanctions remain.

Central African Republic

The EU Council has revised its sanctions regime affecting the Central African Republic ("CAR") (Regulation 2016/555 and Decision (CFSP) 2016/564). It has amended the designation criteria, which must be met to subject individuals and entities to targeted asset freezes and travel bans, to include only persons designated by the Council who have been involved with specific activities.

It has also amended and expanded the possible derogations which may be relied upon to bypass lawfully the restrictions imposed by the EU's arms embargo on the CAR.

Côte d'Ivoire

The EU has lifted its remaining sanctions against the Côte d'Ivoire, implementing a decision by the UN taken in April 2016. The sanctions had previously comprised an arms, diamond and human rights-related embargo, targeted asset freezes and travel bans.

Bosnia Sanctions Renewed for a Year

The EU has extended its existing sanctions regime on Bosnia and Herzegovina for one year, to 31 March 2017 (Decision 2016/477). The sanctions include asset freezes and a travel ban on individuals and associated entities deemed to be undermining the Dayton/Paris Agreement and the sovereign integrity of Bosnia, and threatening the state's national security.

The Panama Papers

We have written previously about the Panama Papers, in particular about how companies and their compliance obligations may be affected. You can view that update on the K&L Gates Hub web page here. It now appears that the Panama Papers may result in EU sanctions being imposed in respect of places considered "non-cooperative".

The evidence revealed in the Panama Papers suggests that shell companies may have been used to commit fraud, to evade tax and to breach international sanctions regimes.

Pierre Moscovici, the EU's Commissioner for Economics and Financial Affairs, Taxation and Customs has suggested that the EU is contemplating implementing new sanctions regimes against tax havens which help individuals and entities to evade taxes and breach sanctions regimes.

Sanctions on persons connected with Al-Qaida and Islamic State in Iraq and the Levant ("ISIL")

The EU Council has added five more individuals to the list of people subject to financial sanctions (Commission Implementing Regulation 2016/647). They are all listed as having been involved with ISIL. These include the 'head of religious compliance police' and the 'lead oil and gas division official'. This Regulation implements a decision of the UN Security Council.

Forthcoming Changes to Sanctions Regimes

The EU Council is considering imposing targeted financial sanctions and travel bans on Macedonian individuals responsible for blocking or obstructing the 'Przino Agreement'. This agreement was reached last summer as a way of resolving the ongoing political turmoil in Macedonia.

The EU sanctions against Russia, which impose an arms- and human rights-related embargo and sectoral sanctions (particularly against the oil industry) are due to expire on 31 July 2016. It is likely that these sanctions will be extended by six months (targeted financial sanctions against Russian individuals and entities were extended by six months shortly before they were due to expire in March earlier this year).

UK SANCTIONS

UK launches Office of Financial Sanctions Investigations ("OFSI")

On 31 March 2016, the UK Government officially established the Office of Financial Sanctions Investigations ("OFSI"). The new authority, which has been compared with the US Government's sanctions-enforcement body, OFAC, is intended to increase awareness of sanctions regimes; to aid compliance; to detect breaches and take enforcement action where necessary; and generally to provide a professional service to businesses and individuals which may be affected by sanctions.

OFSI will be responsible for applying the new Policing and Crime Bill, which had its third reading in the House of Commons on 13 June 2016.

Shortly after being launched, OFSI published updated guidance on the operation of the financial sanctions framework in the UK. In particular, it sets out the process for obtaining an export licence and it provides a number of practical, worked examples of common scenarios which may be affected by sanctions regimes.

UK publishes new Iran Guidance and passes Iran Sanctions Order

On 26 April 2016 the UK Government updated its guidance on doing business with Iran. This document is maintained by the Foreign Office. The guidance provides a useful summary of key challenges to consider and sets out when obtaining a licence is a legal requirement prior to doing business in Iran. It should be noted that the EU has not yet produced its own guidance on dealing with Iran.

Following the JCPOA, the UK has passed the Export Control (Iran Sanctions) Order 2016. The statutory instrument lays down the maximum sentence for breaches of the remaining sanctions on Iran to ten years' imprisonment and an unlimited fine. The Order is due to come into force on 16 May 2016.

New FCA Guide to Financial Crime published

The UK's Financial Conduct Authority published a new two-part guide on compliance and governance issues presented by financial crime. This guidance includes a section on international sanctions, particularly relating to risk-management internal policies.

AUTHORS

Raminta Dereskeviciute
Senior Associate
+44.(0)20.7360.8264
raminta.dereskeviciute@klgates.com

Alessandro Di Mario
Associate
+32(0)2.336.1938
alessandro.dimario@klgates.com

Philip Torbøl
Partner
+32.(0)2.336.1903
philip.torbol@klgates.com

FIVE TIPS FOR SUCCESS IN CYBER INSURANCE LITIGATION

Roberta Anderson

Many insurance coverage disputes can be, should be, and are settled without the need for litigation and its attendant costs and distractions.

However, some disputes cannot be settled, and organizations are compelled to resort to courts or other tribunals in order to obtain the coverage they paid for, or, with increasing frequency, they are pulled into proceedings by insurers seeking to preemptively avoid coverage. As illustrated by CNA's recently filed coverage action against its insured in Columbia Casualty Company v. Cottage Health System,[1] in which CNA[2] seeks to avoid coverage for a data breach class action lawsuit and related regulatory investigation,[3] cyber insurance coverage litigation is coming. And in the wake of a data breach or other privacy, cybersecurity, or data protection-related incident, organizations regrettably should anticipate that their cyber insurer may deny coverage for a resulting claim against the policy.

Before a claim arises, organizations are encouraged to proactively negotiate and place the best possible coverage in order to decrease the likelihood of a coverage denial and litigation. In contrast to many other types of commercial insurance policies, cyber insurance policies are extremely negotiable and the insurers' off-the-shelf forms typically can be significantly negotiated and improved for no increase in premium. A well-drafted policy will reduce the likelihood that an insurer will be able to successfully avoid or limit insurance coverage in the event of a claim.

Even where a solid insurance policy is in place, however, and there is a good claim for coverage under the policy language and applicable law, insurers can and do deny coverage. In these and other instances, litigation presents the only method of obtaining or maximizing coverage for a claim.

When facing coverage litigation, organizations are advised to consider the following five strategies for success:

1 TELL A CONCISE, COMPELLING STORY

In complex insurance coverage litigation, there are many moving parts and the issues are typically nuanced and complex. It is critical, however, that these nuanced, complex issues come across to a judge, jury, or arbitrator as relatively simple and straightforward. Getting overly caught up in the weeds of policy interpretive and legal issues, particularly at the outset, risks losing the organization's critical audience and obfuscating a winningly concise, compelling story that is easy to understand, follow, and sympathize with. Boiled down to its essence, the story may be—and in this context often is—something as simple as:

"They promised to protect us from a cyber breach if we paid the insurance premium. We paid the premium. They broke their promise."

2 PLACE THE STORY IN THE RIGHT CONTEXT

It is critical to place the story in the proper context because, unfortunately, many insurers in this space, whether by negligent deficit or deliberate design, are selling products that do not reflect the reality of e-commerce and its risks. Many off-the-shelf cyber insurance policies, for example, limit the scope of coverage to only the insured's own acts and omissions, or only to incidents that impact the insured's network. Others contain broadly worded, open-ended exclusions like the one at issue in the Columbia Casualty case, which insurers may argue, as CNA argues, vaporize the coverage ostensibly provided under the policy. These types of exclusions invite litigation and, if enforced literally, can be acutely problematic and flat-out impracticable in this context. There are myriad other traps in cyber insurance policies—even more in those that are not carefully negotiated—that may allow insurers to avoid coverage if the language were applied literally.

If the context is carefully framed and explained, however, judges, juries, and arbitrators should be inhospitable to the various "gotcha" traps in these policies. Taking the Columbia Casualty case as an example, the insurer, CNA, relies principally upon an exclusion, entitled "Failure to Follow Minimum Required Practices," which, as quoted by CNA in its complaint, purports to void coverage if the insured fails to "continuously implement" certain aspects of computer security. In this context, however, comprised of the extremely complex areas of cybersecurity and data protection, any insured can reasonably be expected to make mistakes in implementing security and this reality is, in fact, a principal reason for purchasing cyber liability coverage in the first place.

Indeed, CNA represents in its marketing materials that the policy at issue in Columbia Casualty offers "exceptional first- and third-party cyber liability coverage to address a broad range of exposures," including "security breaches" and "mistakes":

Cyber Liability and CNA NetProtect Products

CNA NetProtect fills the gaps by offering exceptional first- and third-party cyber liability coverage to address a broad range of exposures. CNA NetProtect covers insureds for exposures that include security breaches, mistakes and unauthorized employee acts, virus attacks, hacking, identity theft or private information loss, and infringing or disparaging content. CNA NetProtect coverage is worldwide, claims-made with limits up to $10 million.

It is important to use the discovery phase to fully flesh out the context of the insurance and the entire insurance transaction in addition to the meaning, intent, and interpretation of the policy terms and conditions, claims handling, and other matters of importance depending on the particular circumstances of the coverage action.

3 SECURE THE BEST POTENTIAL VENUE AND CHOICE OF LAW

One of the first and most critical decisions that an organization contemplating insurance coverage litigation must make is the appropriate forum for the litigation. This decision, which may be affected by whether the policy contains a forum selection clause, can be critical to potential success, among other reasons, because the choice of forum may have a significant impact on the related choice-of-law issue, which in some cases is outcome-determinative. Insurance contracts are interpreted according to state law, and the various state courts diverge widely on issues surrounding insurance coverage. Until the governing law applicable to an insurance contract is established, the policy can be, in a figurative and yet a very real sense, a blank piece of paper. The different interpretations given the same language from one state to the next can mean the difference between a coverage victory and a loss. It is therefore critical to undertake a careful choice of law analysis before initiating coverage litigation, selecting a venue, or, where the insurer files first, taking a choice of law position or deciding whether to challenge the insurer's selected forum.

4 CONSIDER BRINGING IN OTHER CARRIERS

Often when there is a cybersecurity, privacy, or data protection-related issue, more than one insurance policy may be triggered. For example, a data breach like the Target breach may implicate an organization's cyber insurance, commercial general liability (CGL) insurance, and Directors' and Officers' Liability insurance. To the extent that insurers on different lines of coverage have denied coverage, it

may be beneficial for the organization to have those insurance carriers pointing the finger at each other throughout the insurance coverage proceedings. Again, considering the context, a judge, arbitrator, or jury may find it offensive if an organization's CGL insurer is arguing, on the one hand, that a data breach is not covered because of a new exclusion in the CGL policy and the organization's cyber insurer also is arguing that the breach is not covered under the cyber policy that was purchased to fill the "gap" in coverage created by the CGL policy exclusion. Relatedly, it is important to carefully consider the best strategy for pursing coverage in a manner that will most effectively and efficiently maximize the potentially available coverage across the insured's entire insurance portfolio and each triggered policy.

5 RETAIN COUNSEL WITH CYBER INSURANCE EXPERTISE

Cyber insurance is unlike any other line of coverage. There is no standardization. Each of the hundreds of products in the marketplace has its own insurer-drafted terms and conditions that vary dramatically from insurer to insurer—and even between policies underwritten by the same insurer. Obtaining coverage litigation counsel with substantial cyber insurance expertise will assist an organization on a number of fronts. Importantly, it will give the organization unique access to compelling arguments based upon the context, history, evolution, and intent of this line of insurance product. Likewise, during the discovery phase, coverage counsel with unique knowledge and experience is positioned to ask for and obtain the particular information and evidence that can make or break the case—and will be able to do so in a relatively efficient, streamlined manner. In addition to creating solid ammunition for trial, effective discovery often leads to successful summary judgment rulings, which, at a minimum, streamline the case in a cost-effective manner and limit the issues that ultimately go to a jury. Likewise, counsel familiar with all of the many different insurer-drafted forms as they have evolved over time will give the organization key access to arguments based upon both obvious and subtle differences between and among the many different policy wordings, including the particular language in the organization's policy. Often in coverage disputes, the multimillion dollar result comes down to a few words, the sequence of a few words, or even the position of a comma or other punctuation.

Following these strategies and refusing to take "no" for an answer will increase the odds of securing valuable coverage.

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[1] No. 2:15-cv-03432 (C.D. Cal.) (filed May 7, 2015).

[2] The named plaintiff is CNA's non-admitted insurer, Columbia Casualty Company.

[3] CNA's preemptory suit was dismissed without prejudice by order dated July 17, 2015 because CNA failed to exhaust alternative dispute resolution procedure in its policy.

AUTHOR

Roberta Anderson
Partner
+1.412.355.6222
roberta.anderson@klgates.com

EXPOSING THE CONTROLLER

Tony Griffiths

The new register of persons with significant control legislation introduced by the Small Business Enterprise and Employment Act 2016, is designed to create transparency of corporate ownership and direction as part of the UK Government's focus on combating money laundering, terrorist financing and tax evasion.

At first sight from a foreign parent company director's point of view, the legislation seems to do little more than recognise the ownership of non-listed UK subsidiaries by non UK parent companies. However, the legislation goes further than recognising control through shareholding. It also captures anyone who controls the majority of board appointments and removals and anyone who has the right to exercise or actively exercises significant influence or control over a company. This might involve rights granted through contractual arrangements, but is not limited to the exercise of those contractual rights. There appears to be no recognition of the exercise of control functions, through corporate governance mechanisms enshrined in the companies and parents constitutional documentation.

Conceivably therefore a CEO or other director or officer of a parent company, who is not also a director of the UK's subsidiary, but who exercises a de facto control function over the operating subsidiary, or exercises significant influence over the subsidiary decision making process, would be registerable as a person with significant control in addition to the parent company itself. That would expose the non UK director to the UK regulatory and statutory regimes which, in a number of instances, involve potential personal civil and criminal liability, e.g. health and safety at work legislation, environmental legislation, insolvency and director disqualification.

Each register will be open to public inspection, and from the 30th June 2016 the information will be required to be held at UK Companies House. Failure to comply is a criminal offence, and no doubt exposing failure to comply or register will be a tactic employed in litigation as well as regulatory investigation. This may then expose the directors of the parent company to criminal liabilities if they had not been registered, and indeed may expose the directors of the UK subsidiary to criminal liability if they fail to investigate whether the directors of the parent company should have been registered.

Every company has a duty to take reasonable steps to identify the people it knows or suspects to have significant

control over it. The Act requires notices to be sent to these people asking for information from the registrable people themselves or from anyone else who it thinks has the necessary information.

If a person does not provide the information when requested, they could be committing a criminal offence and their interest in the company could be frozen. "Interest" is defined to include any rights which are exercisable in respect of an interest. Again therefore, conceivably management rights exercisable by directors of a parent company over a subsidiary may be frozen if the individual director refuses to provide details for the purposes of inclusion in the register. This may not present an issue if the right to control and direct the affairs of the UK subsidiary are enshrined in the UK's subsidiary constitutional documents. But if they are not, and the controller exercised de facto control or influence without reference to constitutional rights, this may well lead to dysfunction between the parent and the UK subsidiary and potentially a suspension of control by the non UK parent.

As ever the law of unintended consequences, may mean that the unwary parent company director may fall foul of this new legislation, which is really aimed at money launderers and terrorists.

AUTHOR

Tony Griffiths
London
+44.(0)20.7360.8195
tony.griffiths@klgates.com

K&L GATES

GLOBAL LEGAL COUNSEL ACROSS FIVE CONTINENTS

Anchorage
Austin
Boston
Charleston
Charlotte
Chicago
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TO REQUEST ADDITIONAL INFORMATION, PLEASE CONTACT:

John A. Bicks
New York
+1.212.536.3906
john.bicks@klgates.com

Tony Griffiths
London
+44.(0)20.7360.8195
tony.griffiths@klgates.com

Thomas M. Reiter
Pittsburgh
+1.412.355.8274
thomas.reiter@klgates.com

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