ROUNDTABLE

Who's Who Legal brings together five leading experts to discuss issues facing insurance and reinsurance lawyers and their clients in the industry today.

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WWL: Have there been any major changes or developments in your jurisdiction over the past 12–18 months? How have these impacted your practice?

RAS: In August 2016, the Bermuda Monetary Authority (BMA) issued the Insurance Manager Code of Conduct requiring insurance managers to follow a set of procedures when carrying out their functions.

In September 2017, the Bribery Act 2016 became operative creating offences that apply to Bermuda individuals or corporate entities conducting business in or outside Bermuda and non-Bermuda individuals or corporate entities conducting business in Bermuda.

In March 2017, the AML/ATF Regulations were amended, expanding the duty on AML/ATF regulated financial institutions to act in circumstances where AML/ATF activity is suspected.

In July 2018, the BMA shall publish updates to the Bermuda Solvency Capital Requirement (BSCR) standard formula for commercial insurers. The adjustments to the BSCR model follows consultation with and market trials within the insurance industry.

The Personal Information Protection Act 2016 will become operative in 2018. The Act imposes obligations on commercial organisations when handling information about an identifiable individual in Bermuda.

ZH: China Insurance Regulatory Commission (CIRC) has intensified its overall regulation of Chinese insurance institutions and has arranged special campaigns to crack down on unlawful acts in the Chinese insurance industry.

With the impact of regulatory changes, Chinese insurance institutions

have strengthened their internal management. Before putting a new project into operation, they are tending to consult external counsel to evaluate the project from a legal compliance perspective; if they receive administrative penalties from CIRC, they will retain external counsel to initiate a hearing, administrative review or administrative litigation.

On 17 November 2017, CIRC and other regulatory authorities collectively released draft legislation on regulating the asset management business of financial institutions. In the past few years, the utilisation of insurance funds has developed tremendously, but there remain some issues, such as with the design of multi-layer embedded products, the promise of guaranteed redemption, and the circumvention of financial regulation, among others. This regulation signals more stringent regulation of the use of insurance funds. In the near future, we expect there will be more disputes arising out of fulfilment of investment contracts, asset management contracts and guarantee contracts, among others.

MAL: The Argentine Insurance Regulator (SSN) issued resolutions which introduced significant changes to the reinsurance regime in Argentina.

Resolution SSN No. 40,163 (11 November 2016) allowed insurers to place their risks directly with Admitted Reinsurers (foreign reinsurers) through a gradual opening of the local reinsurance market. Before this resolution was enacted, insurers can only have access to the international reinsurance markets through local reinsurers. This resolution was complemented with Resolution No. 40,422 (3 May 2017) whereby insurers are allowed to place their risks (facultative and treaties agreements) directly with Admitted Reinsurers (foreign reinsurers) according to the following contracting scheme: (i) reinsurance contracts beginning on 1 July 2017, not more than 50% of their ceded premiums per contract; (ii) reinsurance contracts beginning on 1 July 2018, not more than 60% of their ceded premiums per contract; and (iii) reinsurance contracts beginning on 1 July 2019, not more than 75% of their ceded premiums per contract. Consequently, such resolution amended the scheme of the gradual opening of the reinsurance market set forth in Resolution SSN No. 40,163 by increasing the percentage per year, and shortening the time frame. By 1 July 2019, the remaining 25% of the share of the market will be reinsured by Local Reinsurers that, eventually, could also retrocede risks to Admitted Reinsurers.

Through these amendments the SSN encourage foreign reinsurers to come and register as Admitted Reinsurers in Argentina and, in our opinion, discouraged local reinsurers to keep doing business as such.

We have been contacted by many foreign reinsurers from USA, Europe and Asia interested in coming to Argentina and getting the licence as Admitted Reinsurers.

CG: There have been no changes of law or other major developments as far as insurance contract law is concerned. A partial revision of the Insurance Contract Act is pending. The draft amended legal text and the dispatch, ie, the government's comments on the envisaged law revision, were published in June 2017, and the draft bill for revision will probably be addressed by the Swiss parliament in the second half of this year.

On the regulatory side, there were no legislative changes, either. However, the Swiss regulator, the Swiss Financial Market Supervisory Authority (FINMA), issued a number of amended circulars, eg, on outsourcing, business plans and corporate governance. In particular, FINMA has very much increased its requirements regarding the business management of Swiss branches of foreign insurers and has tightened its respective supervision. Accordingly, there is a clear necessity for foreign insurers to intensify their efforts to comply with regulatory requirements. Doing business in Switzerland has become more burdensome and more expensive. As a matter of fact, in the last 12 months a number of foreign insurers have decided to quit the Swiss market for this reason.

SS: Several insurance coverage decisions over the past year impact our practice. To illustrate, in *Rancosky*, the Pennsylvania Supreme Court weighed in for the first time on the elements of statutory bad faith. Although it rejected an "ill will" requirement, the court recognised an insurer must have acted unreasonably in denying benefits – merely being wrong or negligent does not constitute bad faith. The Washington Supreme Court demonstrated its contempt for the absolute pollution exclusion in the *Xia* case, while the Third Circuit, in *General Refractories*, addressed the scope of an asbestos exclusion. The South Carolina Supreme Court, in *Heritage Communities*, reminded insurers defending under a reservation of rights to make sure ROR letters connect the dots on how policy provisions apply to the specific claims so the policyholder has fair notice of the bases upon which coverage may be disclaimed. The California Court of Appeals, in *Actavis*, held there was no coverage for opioid claims because there was no accident. The California Supreme Court accepted review of this and another case to address what constitutes an "accident". We are awaiting decisions from the New Jersey Supreme Court in Honeywell on the "unavailability of insurance" exception to allocating to the policyholder under a *pro rata* allocation and on the New York Court of Appeals in KeySpan as to whether any such exception exists under New York law. The volume of coverage decisions on cyber and data claims is growing, but due to the variety of coverage forms clear trends have yet to emerge. Construction defect coverage decisions continue apace. In the reinsurance world, eyes are on the Second Circuit to see what it does in *Global Re* after New York's high court determined there is not a presumption that a per occurrence liability limitation in a facultative certificate caps all obligations including defence costs. US and EU regulators agreed to the so-called "covered agreement" to relax some collateral and regulatory requirements on transatlantic transactions. Policyholders are already citing to the American Law Institute's Restatement of the Law, Liability Insurance, which is expected to be released in 2018. Insurers will have to educate courts that this is a policyholder advocacy piece masquerading as a restatement – misstating the law on many significant points and replete with policyholder bias.

WWL: How would you describe clients' attitudes towards settlement versus formal dispute resolution?

RAS: There is no one set answer to this question as this varies from client to client. We have been in a soft market and experience now has been consistent with previous soft markets (to generalise somewhat). In soft market some insurance companies are often keen to get in more premium income, particularly if guaranteed at a higher rate over a period of years.

If this can be achieved, it can (although it shouldn't from a legal perspective) have an impact on clients' willingness to settle awkward claims.

Generally speaking, most clients will not want to pay a claim which they believe, as a matter of fact or law, is not covered by their policy. In those circumstances a formal dispute resolution will be preferred. Having said this, one often has to take a commercial approach to disputes and consider settlement, if the costs of defending/prosecuting the action will be too high (or high comparatively) and/or if the prospects of success are not sufficiently high. In Bermuda, like in England, there is costs penalty, if you fight

and lose, ie, the loser pays the legal costs of the winner. This is a good impetus to settle weak cases.

ZH: In China, parties in dispute are encouraged to resolve disputes by a diversified mechanism. Formal dispute resolution mainly refers to litigation and arbitration. Compared with settlement between disputing parties, litigation and arbitration are time-consuming. Also, disputing parties will consider various elements before deciding the dispute resolving mechanism, including the amount of the claim, court fees involved, precedents, the probability of winning the case, the amount of time it may take, and the cooperative relationship between the parties, etc. Based on our observation, clients tend to and are encouraged to resolve disputes through settlement if it is plausible. Moreover, more diversified dispute resolution mechanisms are being introduced in practice. On 30 September 2017, the Ministry of Justice and Supreme People's Court collectively released a regulation "Opinions on Implementing the Pilot Program of Lawyer Mediation". The term "lawyer mediation" refers to an activity where a lawyer, lawfully formed lawyer mediation office, or lawyer mediation centre presides over the mediation as an independent third party and assists all parties to disputes in reaching an agreement and resolving disputes through voluntary negotiation. This mechanism will take full advantage of the professional advantages, career advantages, and practice advantages of lawyers in the prevention and resolution of conflicts and disputes.

MAL: As the market has been living in a "soft market" cycle in the last years and the insurers and reinsurers do a more rigorous control of the expenses, insurers and reinsurers prefer settlements rather than enter into formal dispute resolutions.

CG: The Swiss insurance market is still rather soft; ie, quite in favour of policyholders. The logical consequence is that coverage disputes are less often litigated than five or 10 years ago. Insurers tend to favour settlements over formal dispute resolution, not least in order to keep the customer and to maintain a good business relationship with the brokers who clearly try to exert pressure on insurers in the course of claims processing.

SS: Sophisticated insurers generally prefer reaching reasonable settlements rather than litigating coverage claims. Settlements allow insurers to avoid litigation costs and risks. But some claims are not payable. Often policyholders are not reasonable in their demands or forthcoming in providing information needed to evaluate coverage claims. Usually, policyholders institute coverage litigation, but in some circumstances an insurer may institute litigation to obtain the least hostile available forum or where required to avoid estoppel. Sometimes the parties need rulings to resolve a dispute. Often settlement is achieved – whether through private discussions or mediation – after discovery is exchanged or rulings are rendered. Modern coverage disputes often implicate portfolio interests of insurers that transcend particular claims and creative solutions are required.

Most reinsurance contracts require disputes be resolved by arbitration. Despite mediation initiatives, many companies still believe that mediation interposes an unnecessary layer of costs and proceed to arbitrate disputes that cannot be resolved through direct discussions between sophisticated companies.

WWL: How has an increased focus on compliance, reporting and governance affected your disputes practice?

RAS: These issues have significantly affected our practice. Being offshore, we are held to a higher standard than onshore firms (our KYC standards are higher than any US law firm practising only in the US). There is a cost to having the level of bureaucracy necessary to meet modern compliance regulations. For our disputes practice, focused as it is on large insurance and reinsurance disputes, involving reputable insurers, it should be very rare that we run into compliance issues, from a client on-boarding perspective.

Separate to the above, we do find ourselves giving more advice to clients and doing professional work relating to compliance issues.

ZH: In the disputes practice, some new types of cases are arising with an increased focus on compliance, reporting and governance, such as administrative litigations against regulatory authorities concerning information disclosure and administrative penalties.

The increased focus on compliance, reporting and governance is further regulating the operating behaviours of insurance institutions, which not only helps protect the interests of insurance consumers but also protects the interests of insurance institutions. In the past, many insurance institutions lost cases because they did not properly perform their legal duties. For instance, where insurance institutions failed to give sufficient warning to the policy holder of clauses in the insurance contract that exempt the insurer from liability, or did not expressly explain the contents of those clauses to the policy holder in writing or orally. With the increased focus on compliance, reporting and governance, some of these unlawful behaviours are avoided.

MAL: On the occasion of the recent entry into force of the Law on Criminal Liability of Legal Entities for crimes related to corruption of public officials (1 March 2018), the volume of consultations and work related to the preparation, review and implementation of integrity programmes has increased. More specifically, clients ask us to analyse if the internal rules and procedures they currently put in practice are according with the requirements of the new law.

In the case of inquiries that come from international clients whose shareholders are already exposed to anti-corruption laws in their respective countries of origin, our work consists of reviewing their current Codes of Ethics and Conduct, verifying if it is necessary to adjust their provisions to the regulations Argentina and formalise the adherence to the policies in force in the respective parent companies.

Regarding local companies, in some cases, it was necessary to design or complete their anti-corruption policies based on the specific risks of their respective economic activities. Those companies that have greater exposure to the public sector (for participating in bids, concessions or public projects) must necessarily have specific rules and procedures to prevent illicit activities in the area of contracts with the State.

Our work also covers the review of the contracts that customers sign with their main suppliers, to ensure that they have specific clauses that allow them to terminate the commercial relationship immediately and without compensation, if a breach or deviation from the counterpart to the anti-corruption policies implemented by customers.

In the same way, we are also providing to our clients training sessions aimed at their managers, employees and strategic suppliers, in order to reinforce knowledge about internal anti-corruption policies, explaining the scope and practical effects of the new law, and generating greater awareness about the importance and benefits of developing their businesses in an integral and transparent manner.

CG: Generally speaking, the need of insurance clients for legal advice on the regulatory front has constantly increased over the last 10 years. As a consequence of the change in FINMA's approach to Swiss branches of foreign insurers, there was an additional increase of workload

in this area. In addition, there have been Brexit-related re-domiciliations of UK insurers, which, of course, also affect their Swiss branches and have generated quite a lot of work as well.

SS: Compliance has the most direct impact on lawyers representing insurers in regulatory matters, but may be at issue in coverage matters as policyholders often attempt to inject perceived regulatory violations into coverage actions. At another level, most insurers have litigation management guidelines that contain reporting and billing requirements. Lawyers need to be conversant with the requirements. Coverage lawyers must communicate in a manner that makes the jobs of the claims personnel easier and recognise the impact on various constituencies that may receive the reports. A lawyer may be handling a particular claim, but must appreciate the company's internal procedures and portfolio interests. Lawyers must be able to add value and work collaboratively with engaged, talented in-house people who are facing pressure to minimise rates and reduce their overall legal spend. Companies have become more sophisticated in using analytics to evaluate counsel, but the metrics often do not adequately capture quality of lawyering. We must add value.

WWL: How has consolidation in the insurance industry impacted your practice?

RAS: On the one hand very positively as we have acted as counsel for one of the parties (mostly buyers) in almost all the major insurance company acquisitions in the Bermuda market in the last few years. This has led to an increase of corporate work as well as disputes work. Following the acquisitions we have generally had more work from the merged entities.

Having said the above, there has been some negative impact of consolidations, where an existing client was acquired by a third party. It remains to be seen what the long-term impact of consolidations is for the Bermuda market. It has led to some job losses, which is a negative for the market, however, stronger more stable companies are a positive, in terms of the long-term view of the market.

ZH: With the implementation of the Belt and Road Initiative, the Chinese insurance industry is embracing some new changes. On one hand, Chinese insurance institutions are extending their global networks, and taking over some influential insurance institutions in Western Europe, East Asia and Russia, etc. Qianhai Life Insurance, Anbang Insurance Group and Taiping Insurance Group are active in this area. On the other hand, some overseas insurance institutions are vigorously making investment in Chinese insurance institutions.

Both Chinese insurance institutions and overseas insurance institutions have to meet the requirements of CIRC and other regulatory authorities. Chinese lawyers play an important role in assisting with the above transactions. Chinese insurance institutions which intend to invest in overseas insurance institutions have to comply with the regulatory requirements of CIRC, State Administration of Foreign Exchange (SAFE) and other regulatory authorities, such as Measures for the Administration of the Establishment of Overseas Insurance Institutions by Insurance Companies, promulgated by CIRC. Overseas insurance institutions which intend to invest in Chinese insurance institutions, also have to comply with the regulatory requirements of CIRC, SAFE and other regulatory authorities, such as Notice of the CIRC on Printing and Distributing Insurance-related Contents of Legal Documents Concerning China's Accession to WTO.

MAL: To tell the truth, the Argentine insurance industry has more than 125 insurance companies so there's no such consolidation per se. With all the new changes that are being introduced by the SSN this situation is improving and business is certainly starting to flow.

At the same time, the Argentine government is planning to take new measures in order to develop the insurance and reinsurance market in Argentina by focusing on agricultural insurance, micro insurance, infrastructure insurance, energy and cyber risk.

CG: In my perception, the consolidation in the insurance industry has led to more and multi-layered reporting and decision-making obligations which has an impact on the work of an external counsel who is expected to assist in discharging these duties.

SS: Insurance industry consolidation often results in consolidation of legal work. Practices may be enhanced or reduced substantially (and sometimes quickly). Consolidation, portfolio transfers and joint management arrangements may create business intake challenges for law firms associated with both ethical and business conflicts. Lawyers and claims representatives can be placed in the position of representing insurers located in different positions on the coverage chart with competing interests (eg, representing both primary and excess insurers in the same case or insurers in years with and without particular exclusions). The reinsurance industry has experienced consolidation and several financial products have invaded space traditionally held by reinsurance. There also have been several new insurers and reinsurers entering the market. No question that there have been winners and losers among firms, lawyers and company personnel, but market forces control and cream generally rises.

WWL: What do you see being the biggest challenges facing insurance and reinsurance lawyers in your jurisdiction over the next few years?

RAS: There are a series of potential problems for lawyers in the insurance industry in Bermuda, not all of them directly related to changes in insurance law or changes in the insurance market. Problems include:

i. Brexit. Bermuda had no vote on this, but the UK pulling out of Europe prejudices Bermuda's interests significantly. Bermuda has lost its best friend in the EU. Some countries in the EU do not understand Bermuda and as a result are highly sceptical or even hostile towards Bermuda. We need to address this.

   There is a silver lining to Brexit. The UK will have to negotiate Solvency II equivalence, which may take years. Bermuda negotiated this with the EU already and has it, which has led to some movement of companies to Bermuda.

ii. European Union Grey List. Bermuda and most offshore jurisdictions are having a debate with the EU on the use of and restrictions imposed on the use of offshore companies, with little perceived local economic substance. This does not impact the insurance industry directly as insurance companies are locally regulated and so considered to have sufficient economic substance. However, this could indirectly affect the insurance industry if the reputation of the jurisdiction is damaged generally.

iii. US tax changes. These are now done and the general view is that the changes are unwelcome. However, there is also a view that things could have been a lot worse and that the industry will easily survive this, with some changes (in particular to the use of related entity quota share agreements).

ZH: Compared with other legal areas, insurance and reinsurance is complex and special, especially with the innovation and in-depth development of the Chinese insurance industry. Based on our observations, the biggest challenges facing insurance and reinsurance lawyers in China come from the following two aspects:

i. The insurance and reinsurance law system is incomplete. Some areas are blank, and some remain obscure. Addressing this will rest on the joint efforts of the legislative branch and judicial branch.
ii. Different judges sometimes have different and even opposite judgments on the same case. Also, in some cases, the judges do not have an accurate understanding of insurance and reinsurance law, which results in the incorrect application of insurance and reinsurance law.

MAL: As we are currently facing a "soft market" in the insurance industry, insurers and reinsurers are starting to do a more rigorous control of the expenses and one of the first measures taken to do so is to reduce the amount of lawsuits against them. It is also common practice for the companies to carry claims internally.

All of this is aggravated in Latin America due to the lack of profitability of the insurance market given the depreciation of local currencies and the lack of penetration in the region of the insurance and reinsurance industry.

In order to navigate this situation, lawyers must innovate and look for new legal niches.

CG: I would name (i) InsurTech and its impact on the industry and on insurance regulation, (ii) a continuing increase of the quantity and the complexity of regulatory requirements, and (iii) the implementation of the amended Insurance Contract Act, which will probably liberalise the law as far as industrial risks (ie, non consumer-related matters) are concerned and which will therefore offer new opportunities (and risks!) to insurance clients.

SS: Our fundamental focus remains on providing world-class representation and advice to our clients. A premium remains on superior knowledge of the law, formulating sound strategy, and delivering creative solutions and good results. Fortunately, the increased focus on performance, results and cost-effectiveness has made our group shine even brighter. We use talent and technology for the advantage of our clients. Attracting and retaining top talent is challenging. Our experience provides perspective for the benefit of our clients. But we are not prisoners to past victories – new claims and dynamics require new solutions. We are broadly engaged on issues of interest to our clients, not merely on particular matters they entrust us to handle. Clients demand prompt (almost immediate) responses and it is important for clients to know that we are accessible at any time. I have had the privilege of working with some of the finest counsel and claims professionals in the world. The professional rewards of representing companies in complex, precedent-setting matters make navigating business challenges exciting and worthwhile.