



THAILAND FLOODING INSURANCE RAMIFICATIONS

Thailand flooding

The devastating flooding across Thailand during the last four months has brought not only personal and national suffering to the Thai people but has also severely impacted its large manufacturing base. The main seven industrial estates in the central provinces around Bangkok have all been flooded.

Car and electronic manufacturing plants have been worst hit although all sectors of the economy will be directly affected by the flooding. According to Reuters¹, the Rojana Industrial Park expects certain factories in the estate to be up and running by December, and all by late January 2012 although some analysts expect it will take 6-12 months before the makers of electronics components could start producing normally again.

Global supply chains, still recovering from the impact of the Japan disaster of March 2011, have again been affected. Production is

suspended at Honda Automobile (Thailand), Thai Honda Manufacturing, Honda's motorcycle and power products production subsidiary, Toyota Motor Thailand Co., and Nissan Motor Thailand², and some manufacturing plants around the globe have had to suspend or slow-down production due to a shortage of parts. Electronics component manufacturers have similarly been impacted, with a significant impact on the global comm tech sector. The insured losses are currently estimated at around US\$20 billion.

Insurance issues

A significant number of issues arise when considering insurance claims resulting from natural catastrophes, whether the claims are household, commercial or industrial. These issues have arisen before, particularly in the commercial context, in relation to the events in Japan, Queensland, Philippines and Christchurch this year. The severity of these events impact upon a number of industries, for

1. Reuters online - Tue Nov 1, 2011 7:17am EDT.

2. SupplyChainStandard.com - 31 October 2011.



example, mining; energy (oil and gas); manufacturing; comm tech; utilities; leisure/travel; and agriculture. The result is often a substantial escalation in property damage insurance, business interruption insurance and contingent business interruption claims. There are a host of issues that can arise from the claims and notifications made under the various types of insurance.

Some of these issues will include:

Material damage/property damage

- Has the weather event/flooding triggered cover?
- Is there a relevant flood or other exclusion?
- Are there multiple events or occurrences and if so how will the loss be allocated between them? The problem can be exacerbated where there are complex multilayer programmes where the interests of different layers might diverge. Determination of the number of events, and their respective impact, can have similar financial consequences for policyholders and underwriters. Notwithstanding the presence of “hours clauses”, there are well known difficulties in breaking down periods of sustained heavy rainfall over many weeks and months into different “events” or “occurrences” (and the inter-relationship between different sequential weather patterns) to allocate and aggregate losses and to apply deductibles and policy limits.

- What are the opportunities to restore/reinstate damaged property?

Business interruption

Business interruption claims similarly can throw up complex issues. Indeed, it is often the business interruption insurance claims that lead to the largest, most complex and most contentious claims. This is primarily due to the many factors that impact upon the calculation of the loss. Policies often contain sub-limits which can have an important impact on coverage in relation to denial of access and suspension of regulatory permissions. Other issues include:

- The task of collecting and tracking information for the purpose of preparing or scrutinising a claim.
- The calculation and ascertainment of increased cost of working and additional increased cost of working claims.
- Analysis of the causation of lost production.
- The ability to make up production at the affected or other locations.
- The ability to sell the lost production “but for” the damage.
- The nature and length of the indemnity period as defined by the policy.
- Pricing effects, including the natural hedging effect brought about from price increases to commodities due to the disruption in production and supply.

- Basis of indemnity options, including Turnover v Output v Loss of Production Income wordings.

- The operation and effect of Adjustments Clauses and/or special circumstances clauses for wide-scale area effects.

In relation to CBI losses, given Thailand’s importance in the global manufacturing supply chain, there are likely to be a number of significant CBI claims. Unlike Japan where such claims were limited by location or earthquake sub-limits, these claims will impact global insurance programmes. Issues that arise include:

- Whether damage and/or denial of access are adequate triggers on a stand alone.
- Whether there is a requirement for property damage to be insured as if it was insured on the global programme.
- The nature and effect of any geographic sub-limits.
- The nature and effect of specific suppliers/customers extensions.

Liability insurance

There may be exposures to businesses and/or public authorities arising from inadequate precautionary steps or making incorrect decisions prior to or after the floods which could expose businesses/public authorities to liabilities. Examples might include:

- Liabilities for contaminants or pollutants which escape from premises as a result of the floods on to third parties’ property.



- Liabilities arising at a more general level for negligent acts or omissions before or after the floods which have caused third parties loss or damage.
- Liabilities arising from delay and disruption to the supply chain, particularly where there is no contractual protection available through force majeure clauses.

Already questions are being raised about the response of the Thai authorities to rising water levels in dams and possibly premature release of excess water, thereby exacerbating the flooding.

Reinsurance and retrocession

Similar issues to those facing the direct insurance sector will be relevant to the reinsurance sector. Due to the limited capacity in the Thailand domestic reinsurance market, it is inevitable that a large number of the claims will end up being dealt with in Singapore, London, Europe, Bermuda and other international reinsurance hubs. Reinsurers will be concerned that the claims at the insurance level are being handled effectively and efficiently.

Reinsurers may, in this respect, insist on control or cooperation in relation to the insurance claims (where there is a relevant provision in the reinsurance policy) or otherwise seek to participate in the investigation, adjustment and settlement of loss(es). Other issues might include:

- Triggers, aggregation, excess/attachment points, and reinstatements.
- Where there is a captive or fronting arrangement, the extent

to which the captive/front should play in claim investigation and negotiation.

- Cover may not be “back to back”, and involve the law of different jurisdictions.
- Payments on account and how these should be managed, particularly where there is a reinsurance programme with multiple layer and potentially non-aligned interests.

Thai insurance law issues

The Thai Civil and Commercial Code (“the Code”) contains the statutes relevant to insurance law and the Insurance Registrar of the Office of Insurance Commission (“OIC”) regulates the industry and approves those insurance wordings which are allowed to be written in Thailand.

Whilst the Thai principles of insurance are based on the general international insurance principles there are discrete issues of which a party to an insurance or reinsurance contract governed by Thai law needs to be aware. We set out below a sample of such issues:

- Where a clause used in a Thai policy has not been approved by the OIC the insured can elect whether to rely on it or not, and if it elects not to do so the equivalent OIC approved clause will apply.
- Grounds for avoidance must be exercised within one month of the insurer having knowledge, or within five years of the date of the policy.

- Insurance claims are subject to a two-year time limit from the date of loss within which the claimant must bring the claim and the parties cannot extend or reduce the time limit prescribed by law.
- For replacement of property the compensation payable under the Thai standard wording is expressly calculated depending on the extent of loss, i.e. total damage or partial damage.
- Expenses for valuation of the loss must be borne by the insurer.

Insurers and reinsurers with policies subject to Thai law should also be wary of procedural issues associated with litigation in Thailand. For example, Thai courts do not employ standard disclosure requirements, which can result in defendant insurers and/or reinsurers not having access to all relevant documents before a hearing.

Why Holman Fenwick Willan?

Our team includes insurance specialists who have managed large and complex insurance and reinsurance PD, BI and CBI claims in Thailand, including the 2004 Tsunami, Bangkok riots and complex industrial risk facultative reinsurance claims, and we have expertise in all of the major catastrophic losses globally. Our Thailand legal correspondent is considered one of the leading Thai lawyers on Thai insurance law.



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