Kluwer Arbitration Blog

LIDW 2025: Shifting Trends in Complex Insurance Disputes – From Court to Arbitration

Marcos Orofino (Queen Mary University of London) · Thursday, June 12th, 2025

On 4 June 2025, Herbert Smith Freehills Kramer hosted a panel titled “Insurance Disputes in the Face of Global Change and Challenges” at London International Disputes Week (“LIDW”) 2025, examining how insurance law responds to Covid-related losses and emerging risks like war, climate change, M&A activity, and cyber-attacks.

The panel also explored the role of the courts in the development of insurance law and addressed how key features of arbitration, such as confidentiality, can offer both benefits and potential complications. Moderated by Sarah McNally (Herbert Smith Freehills Kramer), the session featured insights from David Edwards KC (7KBW), Rebecca Sabben-Clare KC (7KBW), and Edward Bird (Solomonic).

Insurance Litigation Statistics: Rising Claims and Longer Resolution Times

Edward Bird opened the session with data on litigation trends, noting that insurance disputes are the second most litigated in the English High Court. He highlighted a steady increase in claims between 2014 and 2024, with a spike in 2023 due to Covid-19 business interruption cases and aviation disputes arising from the Russo-Ukrainian war. While 2025 appears quieter, claims are expected to rise again, particularly with the expiration of the six-year limitation period for lockdown-related claims and the ongoing war in Ukraine. Bird also emphasised that claims are taking longer to resolve, a development that has become a critical consideration for parties weighing their dispute resolution options.

Using Test Cases to Prevent Repetitive Claims

Sarah McNally provided an overview of the *FCA v. Arch Insurance* case, where the UK Supreme Court (“SC”) fast-tracked the interpretation of policy clauses to resolve coverage issues from the pandemic, easing the burden of repetitive claims on the courts. Beyond clause-specific findings, causation, and the interpretation of trends clauses (aimed at identifying what the financial results of a business would have been if the insured peril had not occurred) were addressed.

On causation, the SC held that policyholders did not need to prove “but for” causation; it was

sufficient that Covid-19 was a proximate cause of the loss. On trends clauses in business interruption cases, the SC decided that a trend must be completely dissociated from the insured event, overruling its decision in *Orient-Express.*

Arbitral Awards and Appeals: A Test Case in Reinsurance

Rebecca Sabben-Clare addressed the reinsurance angle, focusing on *Unipol Sai Assicurazioni v. Covéa Insurance Plc*. The case concerned whether insurers could aggregate Covid-related claims when seeking reinsurance recoveries. The Commercial Court, acting as the adjudicating body, treated the matter as a point of law, allowing an appeal against an arbitral award that had favoured *Covéa*. On this, Sabben-Clare noted the significant step of the court intervening in the arbitration sphere, effectively treating the case as a test for reinsurance arbitrations.

The case revolved around the "Hours Clause", a standard provision in reinsurance contracts since the 1960s, which had not previously been directly interpreted, and which triggered a wave of Covid-related arbitrations. Two questions arose: 1) was Covid-19 a catastrophe? (yes); and 2) could financial losses incurred outside of the relevant period of the "*Hours Clause*" be indemnified if resulting from a loss first occurring within the relevant period? (yes). The court ultimately upheld the arbitral award.

Arbitration's Expanding Role in Liability Insurance

David Edwards, speaking on climate change, commented on the *Lliuya v. RWE* case, which was analysed by the Hamm Higher Regional Court in Germany. He also addressed two key areas of insurance exposure: weather-related catastrophes (see *Swiss RE* reports on natural catastrophes) and claims against corporations involved in fossil fuel extraction, production, or distribution (e.g., *Aloha Petroleum Ltd. v. National Union Fire Insurance Co. of Pittsburgh*, before the Hawaii Supreme Court).

Edwards emphasised that these claims, particularly those under casualty and liability policies written under the so-called Bermuda Form, are often resolved through arbitration. He expressed concern over the lack of available statistics on the volume of insurance disputes being handled through arbitration. In Edwards' view, there has been an exponential rise in such cases over the past five, possibly ten, years, which highlights a significant but largely opaque area of insurance litigation.

McNally agreed that this lip in insurance-related arbitration is highly significant, as these cases are rarely discussed further in appeals, thus remaining private. Edwards again cited Bermuda Form policies as an example, as these policies prohibit appeals except in cases of mistake of foreign law, creating a closed box authority on significant insurance issues.

Other Key Issues in Insurance Litigation: Aviation, M&A, War, and Cyber Risks

On aviation, Sabben-Clare highlighted the crisis caused by leased aircraft not being returned from

Russia after sanctions were imposed. Aviation insurance, she noted, has received little judicial attention, and its peculiarities, such as the relationship between operators' own policies and the compulsory policies under leasing agreements, introduce complexities not typically found in other markets.

McNally also highlighted M&A disputes as a key area in commercial court litigation, particularly those involving valuation of loss. She noted the growth of warranty and indemnity (W&I) insurance over the past 10 to 20 years.

Regarding war and conflict, Sabben-Clare discussed *Hamilton Corporate Member Ltd v. Afghan Global Insurance & Others*, a case involving political violence cover. The policy covered physical damage but excluded loss by "seizure". Seeking a declaration of non-liability, the reinsurers argued that seizure did not need to occur under government orders. The court ruled in favour of the reinsurers, interpreting "seizure", a key theme in the London Market, in a broad sense.

Edwards briefly discussed the rise in cyber-related claims, including ransomware and data breaches, such as the *Cartier* and *North Face* cases, which were recently reported in *The Times*. Artificial Intelligence (AI) poses a double-edged challenge: it may trigger data privacy claims under liability policies, while also aiding in threat detection. Insurers and policyholders are actively negotiating policy terms, focusing on insurability of General Data Protection Regulation fines, accumulation risks, "silent cyber", and the scope of cyber war exclusions, especially in state-sponsored attacks.

Final Perspectives: The Silent Impact of Arbitration

McNally pointed out that insurance cases are shaping law with wider application due to the value at stake, the complexity, and, most importantly, the evolving nature of global risks and losses. Edwards agreed, emphasising that high-value insurance cases are often dealt with in confidential arbitration, which may hinder the development of insurance law before the courts, though he also acknowledged the importance of respecting the parties' interest in confidentiality. Edwards also noted that, while some bodies publish anonymised arbitration awards, this does not fully address the lack of information on key insurance debates.

Bird noted that even complex disputes are becoming more predictable, which will impact litigation decision-making in insurance cases, in terms of how those matters are decided and what that means for the selection between arbitration and litigation.

The panel opened the floor for questions, with an ex-Lloyd's Political Risk and Trade Credit Underwriter suggesting that statistics likely reflect less than half of the full picture. He pointed out that both clients and insurers often avoid non-confidential procedures due to reputational concerns, preferring arbitration over court. Consequently, the lack of data on the volume of insurance disputes handled through arbitration is not accidental. Edwards agreed, noting that certain types of insurance business, such as political risks, high-level casualty, and M&A, have historically been handled through arbitration. He also observed that, in the past, insurance professionals were often appointed as arbitrators, a practice that has become rare today. While he emphasised that shift is not necessarily a negative development, he acknowledged the huge volume of insurance claims resolved through arbitration.

Conclusion

The panel provided a substantive overview of key insurance-related matters and explored current trends in the market. It was emphasised that while parties often rely on arbitration to resolve disputes confidentially, this practice raises important questions about how to balance party autonomy with the broader development of insurance law. Finally, although court intervention on appeal can support legal development and improve data transparency, such involvement should remain cautious and limited.

This post is part of Kluwer Arbitration Blog's coverage of London International Disputes Week 2025.

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This entry was posted on Thursday, June 12th, 2025 at 7:59 am and is filed under Insurance, LIDW 2025
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