

Aviation Insurance Clauses Group
Third Statement of Activities - October 2007/September 2008

Overview

AICG operates under formal Terms of Reference (ToR) agreed between the International Underwriting Association ("IUA") and the Lloyd's Market Association ("LMA") with the European Commission in March 2005. Under the ToR, the Chairman is required to produce an Annual Statement of Activities, "summarising the key developments relating to the AICG and the wordings, clauses and variants considered by the AICG during the course of the preceding year."

I took over from Ken Walder as Chairman of AICG on 1st October 2007 and the following represents a report of AICG's activities since that date. The Group has met monthly during this period, except for November 2007 and August 2008. There have also been meetings of a number of AICG Working Groups (WG), consisting of nominated AICG members and others, as provided for in AICG's ToR.

Activities

All AICG agendas, detailed minutes, and Consultation Drafts have been made publicly available on the AICG website. Accordingly, this report gives only a summary of the Clauses considered and published during the review period.

AVN 67C

Although most of the work on this was conducted before my arrival, an AVN 67C "package" was published in November 2007. AVN 67C is an update of the existing AVN 67B Airline Finance/Lease Contract Endorsement. This update addresses concerns relating to termination provisions, raised by the Aviation Working Group (AWG), representing finance and airline interests, and the insurance market's concerns relating to the issue of potential "theft by a named insured". Also included in the package is a Tail Cover Endorsement (now AVN 99) requested by AWG membership, and two proforma Notices drafted by the London Insurance Market Brokers' Committee (LMBC). Also published was an update of the existing AVN 67B Airline Finance/Lease Contract Endorsement (Hull War). This simply reflects, where appropriate, the changes agreed for AVN 67C.

AVN 52P Products Liability

My predecessor referred in his last report to efforts by AICG to produce a suite of clauses designed for use in product manufacturers' policies. Work on this continues. AICG Consultation Drafts (CDs) 14, 15 and 16 were published for consultation in November 2007 and a number of comments were received. An AICG Working Group (WG) has been working on amended versions of these AICG Consultation Drafts to take into account the comments received during the consultation period, as well as a new AVN 48G based on AVN48C and a new AVN 52P(A), which will seek to address a number of shortcomings in the previously published AVN 52P. It is hoped that these drafts can be published either as AVN clauses or, where appropriate, as further AICG Consultation Drafts in the near future.

AVN 1C (France)

This remains on AICG's Agenda. Although good progress was made it has however now been delayed through the absence following an accident of the Chairman of the AICG Working Group of French speakers dealing with this. The

WG Chairman has however now returned to work and it is hoped that this can soon be published for consultation in the near future.

Major Airport and Fuellers' Liability Wordings

Following a request from IUA, AICG agreed that the production of model AVN wordings for these coverages would be timely. Although there are a number of broker and other market wordings currently in use, there are currently no wordings in existence which completely meet current market needs.

An AICG Working Group (WG) has therefore been working to produce draft forms and these are being published for Consultation as AICG Consultation Drafts 20 and 21.

AVS Clauses

Following a question as to why AVS clauses do not appear in any of the market wordings repositories or the Aviation Policy & Clauses Book (Blue Book), the LMA Aviation Committee suggested that these clauses should be referred to AICG for review and possible publication on the AICG website.

AICG's view was that, of the five AVS clauses currently in use, only AVS 103 (50/50 Provisional Claims Settlement Clause) would lend itself to conversion to an AVN Clause. It was agreed however that while it was within AICG's terms of reference to address any drafting issues relating to AVS 103, AICG could not undertake a more fundamental review of how AVS actually worked.

I have therefore assumed the Chairmanship of an AICG WG to undertake this work.

Fraudulent Claims Wordings

The Lloyd's Franchise Performance Department (FPD) introduced at the beginning of this year a new check to the Open Market Quality Assurance (QA) tool that, unless the intent is otherwise or local legislation forbids it, both reinsurance and original contracts should include a suitable clause voiding the contract in the event of false or fraudulent claims. The LMA Aviation Committee suggested that AICG be invited to consider whether a new aviation form (AVN) should be drafted for this purpose.

In considering this, AICG heard from its legal representatives that the current Fraudulent Claims clauses used in most aviation wordings were no longer fit for purpose. In particular, English law had developed, in looking at the problem of fraudulent claims and the remedy available to an Insurer, from one of a situation which affected the validity of the policy to one that looked to the validity of the (fraudulent) claim. AICG also noted that in aviation policies there were often multiple Insureds, and whereas previously English law had traditionally provided that the fraud of one insured would affect the rights of the ("innocent") joint insured(s), the law has developed so that today the innocent such co-insured may not in fact lose the cover or the claim unless and to the extent that somehow a benefit would thereby derive to the fraudulent co-insured.

An AICG WG was therefore established to draft a new aviation Fraudulent claims clause to address the shortcomings identified. The resulting draft was published by AICG as AICG Consultation Draft 17 in May 2008. This draft was generally well received and following a number of helpful comments from Lloyd's Legal Department and the LMA's Wordings Forum and US Property Panels, a revised Aviation Fraudulent Claims Clauses was published as AVN 100 in July 2008.

Manufacturer as Additional Insured and Waiver of Subrogation Endorsements

A member of AICG reported that he had been asked by a broker about the need - mainly in the General Aviation (GA) area - for new clauses in circumstances where underwriters are requested to add as an Additional Insured and/or waive rights of subrogation against an entity which, while not being the owner in whole or in part of the insured Aircraft, has been or is involved in the manufacture, repair or maintenance of the Aircraft. Current market practice when faced with such requests is for underwriters to add AVN 29 and/or AVN 53 but neither of these clauses is actually appropriate and both are routinely amended.

AICG has debated this issue at some length but decided eventually to publish two draft clauses for consultation as AICG Consultation Drafts CDs 18 and 19. Only limited feedback was received as a result and AICG are currently considering whether any clauses based on CDs 18 and 19 are likely to be used. AICG has noted that AICG's ToR require it to consider, and where appropriate, draft, non-binding standard wordings and clauses which command support from insurers and re-insurers, brokers and clients of aviation insurance underwritten in the London market. If CD's 18 and 19 were not likely to command such support, it might be better not to publish these as AVN clauses. This is still under consideration.

Cut-Through Clauses

AICG has received a request to review "cut-through" clauses currently being used in the market. The aviation version of this is felt to be acceptable but not ideal. AICG recognises that this is a difficult area. While there is a clearly a commercial demand for such clauses, there is also a distinct lack of case law on the application of such clauses, and there are also a number of inherent risks in their use. AICG has therefore agreed that while it would not be able to draft clauses which would contravene local legislation, AICG might be able to improve the clauses currently being used in order to avoid the most obvious pitfalls. An AICG Working Group (WG) has therefore been established to look at this, with input being sought from brokers, reinsurers and from lawyers, to consider whether a model clause, perhaps with UK jurisdiction as a default, could be produced.

AICG Membership

During the last year, membership of AICG has remained relatively stable. One new member has joined by application, while two members, including one IUA representative, have resigned as a result of changes in their employment status. IUA are currently seeking a replacement. Details of current membership are attached.

Commentary

AICG has been very active over the past twelve months, due to the aviation insurance market, brokers and clients identifying AICG as a useful forum for comment on a variety of matters related to aviation policy wordings. Aviation insurance being of such a specialised nature, AICG continues to provide the expert body of system to develop the policy wordings the aviation insurance market, brokers and clients require. All concerned find this a very useful forum and deserving of support.

The AICG system of using specialist working groups has been very successful and has had a considerable input when clauses are being considered, not only from AICG members who volunteer for the various tasks but also from brokers, insureds and when required legal and industry representation. The review of clauses has proven to work better in these smaller working groups, reporting back to the full AICG, rather than the whole of the committee being involved in the detailed drafting. This has led to our good response in time and detail on the many items we have been asked to look at over the past twelve months.

I also believe the AICG process of issuing AICG Consultation Drafts has achieved the balance required by the ToR, as we have no control over proposals submitted to AICG. It has helped that market participants, including brokers and clients, have the opportunity to offer comments on the proposed wordings, clauses and variants being drafted. Changes which have been proposed and made following this consultation period have given great benefit.

Having completed my first year as AICG Chairman I think the whole process works extremely well. A considerable amount of this is due to the individual members of AICG who give up a large part of their working day to participate in the drafting of very complex wordings and clauses. My observations into the membership of AICG are that this is made up of a fairly large number of representatives of various UK and other EC insurers. The members are dedicated and hard working but due to busy schedules plus their own job requirements it is sometimes impossible for them to attend meetings for long periods of time, particularly in various AICG working groups which, as noted above, have become very important in the ability of AICG to deal with the very complex subject matters before it. My thoughts on this are that making a full commitment to AICG the committee is required both at the monthly meetings, and in particular participation in the Working Groups.

The AICG ToR provide in Article 3.2 for an annual review of AICG membership. I therefore plan to ask all AICG members that if for any reason other than ill health a member is unable to attend for a period of time say a consecutive three months or more, owing to their own employment restrictions, they should consider stepping down and making way for a new member to be considered as a replacement, who is more able to attend and participate more fully in the workings of AICG.

Having completed my year I would like to thank the secretariat plus the committee for all the help and assistance they have given to me.

The AICG is a very worthwhile committee and it has been a pleasure in chairing such a group of Market professionals.