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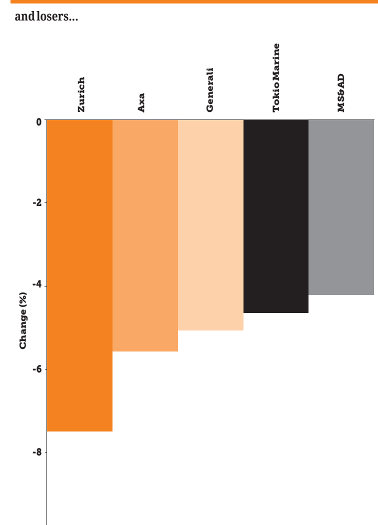

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NEWS

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First published in 1995, *Insurance Day* has become the favourite publication for the London market, which relies on its mix of news, analysis and data to keep in touch with this fast-moving and vitally important sector. Its experienced and highly skilled insurance writers are well known and respected in the market and their insight is both compelling and valuable.

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Insurance Day, 119 Farringdon Road, London EC1R 3DA

Editor: Richard Banks
+44 (0)20 7017 4155
richard.banks@informa.com

Deputy editor: Scott Vincent
+44 (0)20 7017 4131
scott.vincent@informa.com

Senior reporter: Christopher Munro
+44 (0)20 7017 5796
christopher.munro@informa.com

Global markets editor: Graham Village
+44 (0)20 7017 4020
graham.village@informa.com

Global markets editor: Rasaad Jamie
+44 (0)20 7017 4103
rasaad.jamie@informa.com

Managing editor: Greg Dobie
+44 (0)20 7017 4145
greg.dobie@informa.com

Commercial director: Andréa Pratt +44 (0)20 7017 4708
Sales director: Graeme Cathie +44 (0)20 7017 4070
Senior account manager: Sarah Dean +44 (0)20 7017 4122
Senior account manager: Sirach Yeboah +44 (0)20 7017 7670
Senior account manager: Andrew Stone +44 (0)20 7017 4027
Marketing director: Grant Attwell +44 (0)20 7017 4132
Key accounts manager: Verity Blair +44 (0)20 7017 4998
Subscriptions: Lisa Gambino +44 (0)20 3377 3873
Head of production: Maria Stewart +44 (0)20 7017 5819
Advertising production assistant: Emma Wix +44 (0)20 7017 5196
Production editor: Toby Huntington +44 (0)20 7017 5705
Subeditor: Jessica Hills +44 (0)20 7017 5161
Subeditor: Ali Masud +44 (0)20 7017 5161
Production executive: Claire Banks +44 (0)20 7017 5821
Events manager: Natalia Kay +44 (0)20 7017 5173

Editorial fax: +44 (0)20 7017 4554
Display/classified advertising fax: +44 (0)20 7017 4554
Subscriptions fax: +44 (0)20 7017 4097

All staff email: firstname.lastname@informa.com

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Platinum reveals Q1 tornado loss as Q2 industry total predicted to hit $500m

Greg Dobie
Managing editor

Bermudian carrier Platinum Underwriters expects to take a hit of close to $24.8m in its first-quarter results owing to last month's severe weather activity in the US, including the tornadoes and hailstorms in Kentucky and Tennessee.

Last year, catastrophe losses at Platinum were more than $510m, which prompted the group to scale back such exposures dramatically at the January 1 renewals.

During the course of 2011, Platinum was forced to increase its estimates for losses from the New Zealand and Japanese earthquakes. However, it said it did not expect further deterioration to affect its first-quarter 2012 bottom line.

Platinum's announcement comes at the same time as the first firm loss estimates begin to emerge in the wake of the more recent outbreak of tornado activity which caused devastation across the Dallas-Fort Worth area in north Texas on April 3. The Southwestern Insurance Information Service (SIIS) estimates insured losses from this latest event to be at least $300m to date, possibly rising to $500m. SIIS, which represents 85% of the property/casualty premiums in Texas and Oklahoma, said the initial figure did not include commercial business losses.

$24.8m
Platinum's expected loss after severe weather activity in the US last month

Platinum said its net negative impact from the first-quarter tornado events, which are referred to as Property Claim Services Catastrophes 66 and 67, includes preliminary estimates of losses and loss adjustment expenses, reinstatement premiums and taxes.

The carrier also said it does not anticipate any material impact to its first-quarter results from the major catastrophe events that have occurred over the past year.

170,000
Claims insurers have so far received from March's outbreak of tornadoes

Total insured losses relating to March's outbreak of tornadoes across the US Midwest, Tennessee Valley and Southeast regions are expected to exceed $1.1bn.

Insurers have so far received more than 170,000 insurance claims from this event, which happened during the first week of last month and left 41 people dead.

At the time, the US Storm Prediction Centre said there had been at least 65 tornado touchdowns, including two EF-4 tornadoes that caused extensive damage in parts of southern Indiana, Kentucky, Tennessee and southwest Ohio. Total economic losses have been estimated at close to $2bn.

41
People killed by the severe weather across US Midwest, Tennessee Valley and Southeast region

Through the first three months of 2012, the US has already sustained more than $1.8bn in insured losses from convective storm events as it enters the climatologically most active severe weather months of the year.

A couple look over the remains of their home after severe storms swept across the US last month

AP Photo/Michael Conroy

NEWS

Scott Vincent
Deputy editor

Trade credit demand rises 60% in Asia...

Singapore: Trade credit insurance rose 60% in Asia fuelled in part by fears over the eurozone

20%
General drop in rates across Asia during Q1

Demand for trade credit insurance was up by more than 60% in Asia during the first quarter of 2012, amid widespread increases in take-up across all regions as unease about creditworthiness in the eurozone continued to drive demand higher.

Marsh's quarterly insurance briefing report indicated this demand has been met by capacity with rates in Asia generally fell by as much as 20% during the quarter.

Rates also generally declined in Latin America and the Pacific, Marsh said, with certain economically-troubled countries in Europe seeing upward pressure. In Spain, this pressure led to increases of 10% to 20%.

There was an upwards trend in claims frequency in the eurozone for the fifth consecutive quarter, Marsh said, with claims also up in Australia and New Zealand. In the US and Latin America, claims frequency was steady.

The broker said trade credit insurers are generally being careful with credit limit approvals due to ongoing economic uncertainty and the increased claims volume from certain countries.

Credit limit approvals deteriorated significantly in the quarter in the eurozone and Australia/New Zealand, with credit limit approvals most favourable in Latin America, largely due to ongoing insurer investment in underwriting infrastructure in the region.

Credit insurers enjoyed a profitable 2011, amid a relatively benign year for claims activity, but the sector has already provided a number of indicators 2012 is likely to be a more difficult year.

Robert Nijhout, executive director of the International Trade Credit Insurance and Surety Association (ICISA), recently told *Insurance Day* his members were expected a further increase in claims activity during the remainder of 2012.

Nijhout said ICISA's trade credit insurance members had expressed a negative outlook for trade in 2012, in line with concerns about a lack of adequate financing by banks and ongoing country downgrades.

The Berne Union reported an increase in claims which began during the fourth quarter of 2011, warning its members were now "prepared for a possible return of very difficult times".

Marsh said the increased claims volumes in certain countries, coupled with continued economic uncertainty, could have consequences for rates and the availability of coverage for the remainder of the year.

...as US casualty market shows signs of stress

Signs of stress remain evident in the US primary casualty insurance market, Marsh has warned in its global insurance market quarterly briefing, *writes Scott Vincent*.

The broker said it expected this stress to lead to an overall increase in rates in the market, within a tight range. Typically, flat to a 5% increase can be expected at the next renewal.

Clients with more difficult exposures or adverse loss experience may face more significant rate increases, the broker said.

Elsewhere, Marsh reported pricing in liability lines as generally remaining stable on a global basis, with most classes either flat or experiencing slight decreases at renewal as capacity remained plentiful.

Increases were seen in countries where there had been losses.

In China, rates for directors' and officers' insurance for companies with US exposures typically experienced significant increases during the first quarter.

Marsh said these rates were up by between 20% and 50%. Renewals were generally flat for Chinese companies with no US exposures.

28 largest reinsurers grew GWP by 11% in 2011

Property/casualty (p/c) gross written premiums (GWP) for 28 of the largest reinsurance companies increased by 11% in 2011, with the significant catastrophe activity and the associated reinstatement premiums important factors helping raise the total to $136bn, *writes Christopher Munro*.

Bermuda-based Maiden grew its p/c gross premiums written by close to 40% year on year, to just over $1.8bn. Alterra's full-year GWP hit $1.9bn, up $494.9m over the previous year, while Canada's Fairfax saw GWP grow by more than a quarter to $6.7bn in 2011.

But according to Aon Benfield's Aggregate (ABA) report, the majority of these increases in GWP are down to acquisitions rather than increased appetite for business.

Renaissance Re also saw GWP increase considerably, in this instance by 23.1% year on year to $1.4bn. Much of this increase was due to $160.1m of reinstatement premiums, principally in its catastrophe unit.

Asian solvency deals, acquisitions, reinstatement premiums and organic growth in certain primary insurance lines were all contributory factors in the 11% rise in the GWP from the ABA companies, the broker said.

While it would seem to make sense those companies with the largest exposure to last year's natural catastrophe claims would look to increase GWP in response, that has not necessarily happened.

As the ABA data shows, Platinum's net natural catastrophe loss estimate for 2011 as a percentage of shareholders' funds reached 27% – the second-highest in the group behind Flagstone with 38%. Looking at net natural catastrophe loss estimates as a percentage of net premiums earned, Platinum sees itself in third with 74%.

Platinum saw GWP fall by about 12% year on year during the same period, with only White Mountains reporting a greater reduction.

Looking at the data in wider terms, global reinsurer capital at the end of 2011 totalled $455bn, a 3% drop compared with the previous year.

But the reported shareholders' funds of the 28 ABA companies actually increased by 1.7% over the course of 2011 to $251bn, Aon Benfield reported.

Maiden
$1.8bn
GWP for 2011

Alterra
$1.9bn
GWP for 2011

Fairfax
$6.7bn
GWP for 2011

RenRe
$1.4bn
GWP for 2011

NEWS

Arch and Goldman Sachs complete Ariel Re acquisitions

Carriers finalise deals to buy operations from 'Class of 2005' Bermudian insurer

Greg Dobie, Sydney
Managing editor

Arch Capital and Goldman Sachs have completed their respective acquisitions from Ariel Re.

Last month saw both carriers reach agreements to buy operations from the "Class of 2005" Bermudian insurer.

Arch Re Europe has acquired Ariel Re's Zurich-based credit and surety reinsurance business.

The unit was excluded from the sale of Ariel Re's Bermudian insurance and reinsurance operations to banking group Goldman Sachs for an undisclosed sum. This latter deal had been officially announced just two days before Arch outlined details of its own Ariel acquisition.

Following completion of the deal, Goldman Sachs will merge the Bermudian insurance and reinsurance operations of Ariel Re with Lloyd's syndicate 1910.

The sale includes reinsurance of all in-force business and outstanding reserves associated with the property reinsurance, property insurance and specialty reinsurance business, as well as the Ariel Re brand and intellectual property.

The combined business will operate as part of Goldman Sachs Reinsurance Group (GSRG), with a single organisational structure overseeing three operating entities – Ariel Re Bermuda, Ariel Syndicate 1910 and Arrow Capital Re.

It is proposed the latter will be renamed Ariel Capital Re in the future, continuing its business as a collateralised reinsurer.

It has previously been announced on the closing of the deal Bermuda employees of Ariel Re will either become employees of an Arrow affiliate or the other Goldman affiliates.

Ariel Re, which started life in 2005 with a focus on catastrophe-exposed property, marine, aviation, credit and surety lines, will now be renamed Arden Re.

Its 2011 accounts, which were published last month, show it recorded a net profit of $59.1m from net written premium income of $451.2m. Shareholders' funds stood at $1.14bn at year-end, down from $1.34bn at the start of last year.

The accounts also note as a result of its sales to Goldman and Arch Capital, Ariel Re will exit all lines of business but continue to underwrite intragroup reinsurance of Atrium.

For the year ended December 31, 2011, the Atrium subsidiaries ceded $56.9m (in 2010 the figure was $68m) of premiums written and earned and losses of $47.7m (2010 figure was $33.6m) were incurred under these quota-share agreements.

Ariel Re assumed a 65% quota share of all insurance and reinsurance risks earned by the corporate member subsidiaries of Atrium during 2011 and 2010. In addition, it also assumed 65% of foreign exchange gains or losses, investment returns and operating expenses.

Iordanou hails 'ideal transaction'

Arch Capital chairman and chief executive, Constantine "Dinos" Iordanou, told *Insurance Day* the company's acquisition of fellow Bermudian carrier Ariel Re's credit and surety reinsurance operations represents an ideal transaction, as it matches its preference for purchasing a successful team and book of business in the specialty arena, *writes Greg Dobie, Sydney*.

Speaking to *Insurance Day* during an exclusive interview to mark his upcoming Industry Leader of the Year award, which will be presented by the Bermuda Insurance Institute (BII) at a gala dinner in the island's capital, Hamilton next month, Iordanou said Arch was particularly excited about acquiring the "Class of 2005" carrier's credit and surety portfolio, which is based in Zurich.

"It is a type of business and a portfolio we have quite a bit of knowledge of and experience in," he said.

Ariel Re's Zurich-based team, which has underwritten credit and surety business from the branch since 2009, will transfer to Arch Re Europe's office in the same city, following the closure of the deal earlier this week.

The present head of credit and surety at Ariel Re, Thomas Rothenberger, will continue to lead the team upon its move to Arch.

Iordanou has been recognised as the BII's Industry Leader of the Year for his stewardship of Arch, which he helped found in 2001, over the past 12 months. During 2011, Arch recorded a net profit of $410.5m.

$410.5m
Arch Capital's net profit for 2011 – Iordanou is receiving an Industry Leader of the Year award for his performance at the company's helm over the past year

The BII is a registered charity and educational institution, funded by its insurance industry members. The institute facilitates insurance studies.

Insurance Day will be producing a special BII awards winners' publication featuring interviews with this year's victors to coincide with the awards ceremony on May 19.

Former PartnerRe chief executive Patrick Thiele (Lifetime Achievement Award) and Validus Re's Candace Roach (Young Industry Leader of the Year Award) will also be honoured at the awards ceremony.

Iordanou: said Arch was excited about acquiring Ariel Re's credit and surety portfolio

Ariel Re figures

$59.1m Ariel Re's net profit for 2011, from..

$451.2m Of net written premium income

$1.14bn Shareholders' funds at end of 2011, down from...

$1.34bn At the start of the year

Fraudulent superyacht claims on the increase

Christopher Munro
Senior reporter

A four-fold increase in fraudulent claims involving superyachts has been blamed on the impact of austerity measures on the bank accounts of the wealthy in countries such as Italy and Greece.

And insurers are not helping themselves by renewing policies with insured values agreed before the superyacht market dropped off.

There has been a slight uptick ever since 2008 and the onset of the financial crisis, explained Charles Taylor adjusting (CTa) director, Nick Smith, but it is in the past six to eight months where there has been a noticeable increase in incidents of arson and similar attacks.

"It has been a problem in Italy for several years but I expect the situation in Greece to escalate before long – and in any other country that faces a sudden burst of austerity," Smith said.

It is vessels valued in the £1m ($1.58m) to £2m range that are at particular threat.

"Those are the ones we are seeing as the most exposed and most likely to have something happen to them."

Many of the yachts have an insured value agreed at the time of policy inception. Because of the depressed market conditions, this fixed value is likely to be far higher than the yachts are worth today.

"The way marine insurance is set up, it's almost inviting them to make claims," Smith said.

Before the economic crisis, there was a burgeoning second-hand market for some classes of luxury yachts, especially as the governments in countries such as Greece and Italy had increased the taxation on these vessels and their owners. This sector has now disappeared, however.

Smith said there has been a spate of claims for damage to high-value yachts in the Mediterranean, particularly in Greece and Italy. These include seven yachts destroyed by a blaze in Piraeus and a fire that tore through a yacht dealership.

Police are apparently investigating these incidents, and at least two prosecutions are pending.

£1m to £2m
Vessels valued in this range are most at risk of arson and similar attacks

Human error drives supply chain claims

Human error is the main cause of supply chain claims, according to transport and logistics insurer TT Club, with research indicating nearly 80% of incidents resulting in a claim to the insurer during the past six years were avoidable, *writes Scott Vincent*.

80%
Proportion of supply chain claims in the past six years that are estimated to have been avoidable

Laurence Jones, TT Club's director of global risk assessment, said 45% of the cost of claims resulting from operational factors came from errors or faults in an operator's systems or processes, while straightforward theft accounted for 29% of operational claims.

"The Japanese earthquake and subsequent tsunami were a timely example of the widespread impact such an event can have on global supply chains away from the territory that suffered that catastrophe and this was a warning most companies heeded," he said.

"However, some operators are still not changing how they manage supply chain risk, instead concentrating on improving operating efficiency and reducing costs, when they need to prepare their supply chains to withstand future events and the impact of resultant disruptions across the globe."

The research was based on analysis of TT Club's claims during the past six years, with the overall breakdown of claims showing 63% resulted from operational causes, 33% from maintenance issues and just 4% were weather-related.

UK regulatory change means firms must "wise up" on Section 166 reviews

Philip Alexander, partner
Littlejohn LLP

Regulation in the UK is changing and, rather than the reactive approach formerly adopted by the Financial Services Authority (FSA), it will become forward-looking, proactive and judgement-based.

The Prudential Regulatory Authority (PRA), which will be responsible for the prudential regulation of insurers, is in the process of introducing a new framework for proactive intervention that will include a set of stages, or triggers, that represent points at which regulatory intervention would be required.

The Financial Conduct Authority (FCA), which will be responsible for monitoring business conduct within insurers and insurance intermediaries, is planning to adopt a more interventionist stance and this will be achieved through the benchmarking of operational and financial data collected from thematic reviews or as part of the retail mediation activities return (RMAR) process and identifying anomalies that require investigation.

In the first instance, the regulator is likely to carry out any investigatory work; however, where its enquiries are not resolved satisfactorily it has the power to commission a "skilled person" to conduct a Section 166 review on the particular area causing it concern.

This tool has been part of the FSA's regulatory toolkit since its inception in 2001 and while previously the regulator has only commissioned a handful of reviews each year, they are becoming increasingly more commonplace. In 2011, 74 reviews were commissioned, whereas the average for the previous three years was 58. The FSA is committed to the Section 166 review process and it is expected that greater use of this tool will be made in the future.

What does this mean to insurance entities?

Essentially, firms could find themselves being asked to commission a Section 166 review – the implications of this are significant in terms of both the financial cost and drawing management away from their day-to-day responsibilities.

Section 166 reviews are a "forced purchase" and this is reflected in the hair-raising charges often levied for performing them – the average cost is £251,000 ($399,194). Accordingly, it is no surprise the requirement to commission a review has been seen as a kind of regulatory fine in the past.

The FSA are seeking to use Section 166 reviews as a lever to force change rather than a lever to find out what is not working and put the right things right. This may generate some value for the commissioning firm, but whether this compensates for having to commission the review in the first place is not certain. Being asked to commission a review is bad news.

So what can a firm do to minimise the chances of a review being commissioned? First, firms need to recognise regulation is going to become more intensive and gear up for this by making sure they can address any queries in a robust and timely manner.

Second, ensure there are appropriate governance arrangements in place and senior management play an active part in addressing the risks faced by the business, particularly those that may impinge on consumers.

As part of its proactive approach to regulation, the regulator is investing in teams of sector-skilled supervisors who are being charged with engaging with firms in a more purposeful manner so they can identify the likely causes of future problems. Firms will need to be able to demonstrate they have a strategy, which has been endorsed by both the board and senior manager, for addressing these.

Finally, where issues are identified, firms should take action to address them and not wait for the regulator to find them. Where remediation takes place, document what has been done such the regulator can see the efforts that have been expended to address areas where improvement is required and have confidence that effort will be applied if issues arise in the future.

Philip Alexander is a partner in the financial services team at Littlejohn LLP

WORLD LOSS INTELLIGENCE/LIABILITY

Regulatory fine: JP Morgan's Hannam fined for improper disclosure

UK: The Financial Services Authority (FSA) has fined Ian Hannam, chairman of capital markets at JP Morgan Cazenove, for market abuse by improper disclosure.

Hannam has referred the matter to the Upper Tribunal after he was fined £450,000 ($717,085).

The FSA said Hannam disclosed inside information relating to Heritage Oil Plc (Heritage), to a prospective client on two occasions.

It said Hannam's failings were serious in view of his experience and the seniority of his position, and this seriousness is reflected in the level of fine proposed.

£450,000 FSA fine imposed on Ian Hannam

Directors' and officers': MF Global executives can use D&O cover for legal defence

TEXAS: Former executives of collapsed broker-dealer MF Global can use insurance funds from directors' and officers' (D&O) liability policies to pay for their legal defence against shareholder class actions, US bankruptcy judge Martin Glenn ruled yesterday. The judge did not decide whether the proceeds of those policies belonged to the customers of MF Global brokerage or creditors of the holding company. Judge Glenn also said MF Global customers could object to the payment of the defence costs. He set a "soft" cap of $30m on payments from those policies, out of $375m in total possible insurance proceeds. Insurance funds come from MF Global's insurance unit MFG Assurance, with policies issued by US Specialty Insurance Co, a subsidiary of Houston-based HCC Holdings. The court was told by one insurer representative 33 individuals had so far sought reimbursement of $8.3m in defence costs. The MF Global brokerage unit has an estimated shortfall of $1.6bn.

$375m Total possible insurance proceeds, of which...

$30m ...Is the 'soft cap' set by Judge Glenn

$1.6bn MF Global brokerage unit shortfall

18,500 Policyholders who won the lawsuit

Hurricane Katrina: Louisiana Supreme Court overturns Citizens ruli

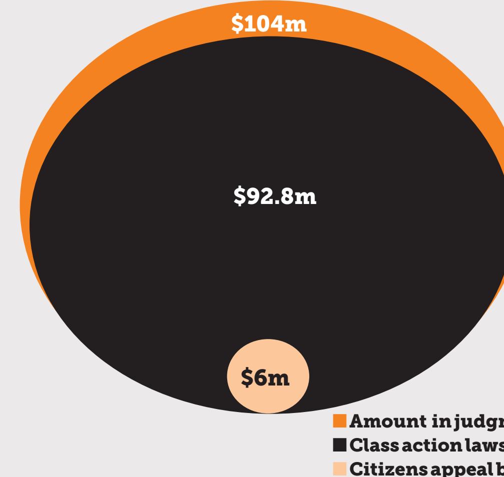
LOUISIANA: The Louisiana Supreme Court has overturned a state appellate court's recent ruling to block a $104m judgment against last-resort insurer Louisiana Citizens Property Insurance, for its failure to address claims from 2005's hurricanes Katrina and Rita in a timely fashion.

The bill relates to a $92.8m class-action lawsuit won by 18,500 policyholders who alleged Citizens did not start to adjust claims for Katrina and Rita within the 30 days required by state law. The bill has since grown to its existing figure with judicial interest.

Citizens is pursuing a possible US Supreme Court appeal, claiming $6m it put up for an appeal bond should cover a federal appeal.

The state's high court has said this money only covers state appeals, which Citizens has now exhausted.

Graph: Citizens Property Insurance judgment (



IN TOMORROW'S WORL
LIVES & LIV

Y & SETTLEMENTS

Compensation: £2m award for brain injury following trackside accident

K: A groundsman working at a Wiltshire motor acing circuit, has been awarded more than £2m 3.18m) in compensation after suffering a serious ccident at work.

He was travelling around the circuit on the back f a flat-bed truck, collecting advertising hoardings. s the hoardings were being loaded on the truck, he nd a colleague sat on them, to keep them in place as e truck continued on its way.

A gust of wind caught one of the advertising oards, blowing him off the back of the truck.

The groundsman suffered a head injury in the ll, which left him brain damaged and dependent n the care of others.

He will receive a lump sum payment of £2m, followed by one annual payment of £250,000 and en yearly index-linked payments of £205,000.

£2m Lump sum award

£250,000 One annual payment

£205,000 Yearly index-linked payments

Compensation: Medication overdose victim awarded £6.2m

UK: A man who sustained brain damage after being given an overdose of medication has received close to £6.2m ($9.87m) in compensation.

The man, who is now dependent on others and cannot use his arms or legs properly, was prescribed the wrong regimen of drugs by staff at the hospital.

The trust admitted liability. He will receive a lump sum of £2.1m followed by annual instalments of £205,000.

£6.2m Total award

£2.1m Lump sum award

£205,000 In annual instalments

Court ruling: Ageas to appeal following Amsterdam ruling

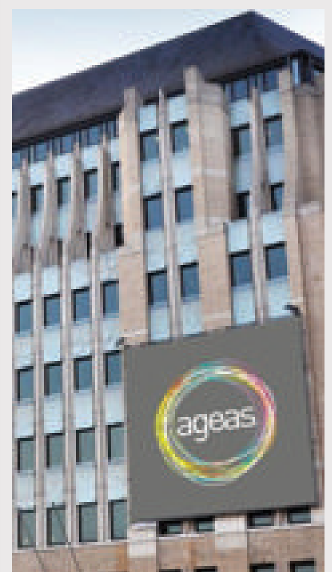
NETHERLANDS: Ageas, the successor to the insurance interests of the now-defunct Dutch-Belgian financial services group Fortis, is to appeal to the Dutch Supreme Court following a decision by the Ondernemingskamer in Amsterdam (the Dutch companies and business court) Fortis NV had been subject to mismanagement during 2007 and 2008.

On the basis of a report issued by the court in June 2010, the Dutch shareholders' association, VEB, asked the court to rule there had been mismanagement and to nullify the decision of the general shareholders' meeting of Fortis NV to discharge the board of directors for its management during 2007.

Ageas said the Ondernemingskamer rejected the claim there had been mismanagement in respect of the decision in 2007 to bid for ABN Amro, in the decision not to invoke the material adverse change clause with respect to that bid and to the structured credit portfolio impairments communicated on September 29, 2008.

However, the court found there had been mismanagement in seven other areas, including the information provided by Fortis in its September 2007 trading update, communication during May and June 2008 on the progress of the Fortis solvency plan, information on September 19, 2008 involving the eventually cancelled deal with Chinese insurer Ping An and the publication of information on the Fortis financial position on September 26, 2008.

"Pending the judgment of the Supreme Court, the decision of the Ondernemingskamer is not final," Ageas said, noting claims for damages were not a matter for the Ondernemingskamer and it had not been ordered to pay any damages to former shareholders of Fortis.



LD LOSS INTELLIGENCE: VELIHOODS

Trouble-free triggers

Employers' liability policy trigger is exposure not injury

Mark Burton
Partner and head of London liability
Kennedys

The UK's Supreme Court judgment in the employers' liability (EL) policy triggers test litigation reinstates the long-standing market practice policy cover for mesothelioma claims is triggered by the date of exposure to asbestos and not by the deemed date of injury many years later.

Sustained and contracted

In the leading judgment, Lord Justice Mance said the courts should avoid over-concentration on the meaning of single words and phrases viewed in isolation and look at the insurance contracts more broadly.

The Supreme Court was unanimous both "sustained" and "contracted" means caused or initiated by exposure to asbestos during the policy period. The main reasons were:

- Mance LJ identified "five points" of policy construction applicable to a "sustained" wording:

1. The wordings require injury to be sustained during employment;
2. They demonstrate a close link between the business activities at the time and the calculation of the premium payable, which makes it improbable the policy would cover historic activities when risks might have been quite different;
3. Any formulation leading to gaps in cover where exposure occurs in one policy period and injury or disease in another should be avoided;
4. Employers should not be left vulnerable to any insurer decision not to renew, especially when this might arise from disclosure of past exposure not yet resulting in manifestation of asbestos-related disease; and
5. The territorial limits of the policies could produce curious effects if "sustained" means the date of injury, including that injury or disease would not be covered if first experienced while abroad;

- The Employers Liability (Compulsory Insurance) Act 1969 requires a causation wording triggered by exposure, because only this guarantees future injury or disease will be covered and avoids the risks of employer insolvency or non-compliance with the compulsory insurance provisions; and
- The EL and PL regimes are different. The Supreme Court was therefore not obliged to follow the PL judgment in *Bolton MBC v Municipal Mutual Insurance & Or* (2006) or to consider the question of PL triggers.

Causation

Lord Phillips said the "special rule" of asbestos causation – as in the cases of *Fairchild v Glenhaven Funeral Services* (2002) and *Barker v Corus UK* (2006) and modified by the Compensation Act 2006 – was not sufficient to establish mesothelioma was initiated in a particular insurance period and policy indemnity was therefore not engaged.

UK Supreme Court: judgment on mesothelioma

However, the four-to-one majority found asbestos exposure created a sufficiently "weak" or "broad" causal link, having regard to the overall context that the purpose of the policy was to cover liability for disease flowing from negligent exposure during the insurance period.

Claims handling

In the High Court, the judge decided both the "sustained" and "contracted" wordings meant "caused" and were consequently triggered by the date of asbestos exposure and not injury.

In the Court of Appeal, there was a mixed result because the judgment provided "sustained" was triggered by injury whereas "contracted" was triggered by exposure. This left an unsatisfactory situation as policy indemnity often depended on case-specific analysis of wordings and facts in the underlying claims.

The Supreme Court judgment restores the straightforward High Court position.

The practical implications for claims handling are as follows:

- The judgment aligns the meaning and effect of "caused", "sustained" and "contracted" and avoids different treatment of similar EL policies;
- The exposure date is a relatively straightforward benchmark for establishing which EL insurer was on risk;
- The judgment closes the previous loophole for ex-employees who did not sustain injury during the course of their employment;
- The backlog of stayed claims can now at last be cleared;
- The exposure trigger applies equally to other asbestos and occupational diseases where there is a latency period between exposure and injury, and therefore averts significant market disruption from prospective challenges along similar lines in relation to other diseases;
- The date of injury has no practical application in EL cases because the policy trigger is exposure and this question will not arise; and
- *Bolton MBC v Municipal Mutual Insurance* still governs PL cases, which means that a "sustained" policy wording is triggered by the date of injury and the back-calculation remains 10 years.

Conclusions

The parties in the test litigation can be divided into two groups according to their standpoint.

The first group was the run-off insurers – BAI (Run Off), Excess Insurance Company, Independent Insurance Company, and Municipal Mutual Insurance – seeking to challenge the status quo and switch the EL policy trigger from historic exposure to present-day injury.

The second group contained various stakeholders affected by this challenge, including asbestos victims left uncompensated, solvent employers forced to self-fund mesothelioma liabilities, insolvent employers bringing indemnity claims under the Third Party (Rights Against Insurers) Act, and Zurich Insurance representing the live market.

From their different perspectives, the victims and their employers have now secured insurance funding of claims payments, Zurich has validated the long-standing market practices for payment of mesothelioma claims and the run-off insurers have clarified their outstanding liabilities.

The overall effect of the judgment is to return the market to the calmer waters of the claims handling protocols that had served insurers well for many years previously.

After five years of test litigation, the treatment of EL triggers is once again trouble-free. ■

Asbestos trigger decision – another view

Leon Taylor
Partner, insurance and reinsurance team
DLA Piper

Hundreds of millions of pounds of liabilities are expected to turn on the outcome of this case, described as the most important landmark decision affecting UK asbestos liabilities.

While the result will disappoint some in the run-off insurance markets, the court has reintroduced certainty for disease victims, their families, employers and insurers alike.

The litigation was brought as a group of co-ordinated test cases with the intention of ensuring a comprehensive answer to the trigger issue and to avoid the risk of the same issue in hundreds of case all over the country being decided differently by different judges.

Lord Justice Mance's clear leading judgment should draw a line under the problem in a way which the earlier Court of Appeal decision failed to do.

It is also to be hoped the court has done enough now to avoid the prospect of satellite litigation on similar insurance trigger issues, particularly in the context of long-tail liabilities, although cases concerning the allocation of losses between, for example, insured and uninsured periods of asbestos exposure, remain before the courts.

The judgment also has important implications for the legal approach to the interpretation of commercial contracts, including insurance policies, generally.

It is another example of the court placing a "purposive" approach to contractual interpretation – looking at the parties' perceived commercial purpose behind their transaction – above the strict natural meaning of the actual words used.

The courts are increasingly expressing their own view as to what "business common-sense" would dictate. Insurers and insureds need to be aware of this increasing judicial trend. ■

Appeals Court strengthens US discovery in aid of foreign proceedings

Eric Lewis and Mark Leimkuhler
Lewis Baach PLLC, Washington DC

A US appeals court in New York has reaffirmed the wide reach of a federal statute making US discovery available to parties litigating disputes in the UK and other countries.

The statute, Section 1782, allows non-US litigants to pursue broad discovery of witnesses and documents in the US. The appeals court ruled Section 1782 can be used to pursue evidence in the US even if it is unlikely to be admissible in the foreign proceedings.

Section 1782 can be an important tool for insurers, reinsurers and others litigating disputes in tribunals outside the US.

For example, an insurer involved in a coverage dispute in an English or European court could use Section 1782 to subpoena US broker files or documents of an insured's affiliate located in the US, or to take the deposition (an oral examination under oath) of a US-based witness. The emerging view is Section 1782 may also be used in aid of arbitrations.

The recently decided appeal, *Brandi-Dohrn v IKB Deutsche Industriebank AG*, involved a request to a US trial court under Section 1782 to subpoena evidence in aid of a German proceeding.

The trial court rejected the subpoenas because the German proceeding was on appeal and the evidence was therefore unlikely to be admissible in the German court.

The appeals court reversed that decision, holding "there is no statutory basis for any admissibility requirement," and such a condition would thwart Section 1782's objective of facilitating international judicial co-operation.

The US Supreme Court has previously held evidence sought under Section 1782 need not be subject to discovery in the foreign proceeding.

The appeals court ruling is consistent with other lower courts that have also found evidence does not need to be admissible in the foreign trial. Indeed, the court went so far as to say inadmissibility of the evidence sought should not even be considered in permitting discovery.

While the scope of Section 1782 is broad, its use is bounded by discretionary factors. For instance, discovery will not be permitted for improper reasons such as harassment or circumvention of foreign proof-gathering restrictions, or other clear policies of the foreign tribunal.

But separate from these factors, Section 1782 offers insurers and others engaged in disputes outside the US a powerful tool to pursue relevant documents or testimony of knowledgeable witnesses located within the US. ■

FSA cracks down on financial crime

The UK's Financial Services Authority (FSA) conducted more than 20 police dawn raids last year (2011), according to data obtained by (Reynolds Porter Chamberlain LLP (RPC).

RPC points out the high number of dawn raids is evidence of the FSA's increased focus on more conspicuous and heavy-handed enforcement exercises since the start of the credit crunch.

According to RPC, the FSA averaged more than six dawn raids each calendar year from 2005 to 2007, increasing after the credit crunch to an average of 29 raids a year from 2008 to 2011.

Steven Francis, regulatory partner at RPC, said: "This shift in enforcement activity moves the FSA closer to the Securities and Exchange Commission in the US, where enforcement of white-collar criminal activity involves a heavy and very visible police presence.

"Most FSA dawn raids relate to suspected insider dealing, which the FSA has been clamping down on following criticism for allowing too much criminal activity to continue unchecked.

"A lot of time, preparation and money goes into every dawn raid so this is a really significant increase in activity by the FSA"

Steven Francis
RPC

"The raids are also designed to send a very powerful message to the broader market. A lot of time, preparation and money goes into every dawn raid so this is a really significant increase in activity by the FSA," he added.

RPC pointed out the number of dawn raids fell slightly last year from 36 raids in 2010 to 21 in 2011.

RPC said the decrease probably follows a fall in the number of incidents of suspicious trading activity in the run up to a takeover announcement. This could either signal the dawn raids are having their desired deterrent effect or insider dealers are getting better at covering their tracks.

RPC explained exercises such as dawn raids can prove far more expensive than more conservative enforcement policies as the FSA will have to pay staff for additional overtime they have accrued.

Francis said: "The regulated firms that fund the FSA will also want to be certain the regulator is getting the best possible value for money from its enforcement activity.

"The gain from a dawn raid needs to be significant to justify the cost. The FSA has had some significant high-profile successes with its raids. Increasingly, the regulator's data retrieval techniques rival the best that exists in the private sector. I expect raid activity will remain significant.

"The image of suits in handcuffs still resonates and did more than anything else to mark the reputation of the US Department of Justice as hawkish and unforgiving. The dawn raid is the nearest thing we have to that at present," he added. ■

Eurozone crisis and the possible impact on insurers

The recent loan bailout of Greece appears to have averted, at least for now, the prospect of one or more eurozone countries leaving the euro.

However insurers can usefully consider the implications of this happening at some stage, because many of these can be addressed in advance.

This could have implications for the insurer's assets including sovereign debt but this piece focuses on insurance policies.

Assume an insurer outside the country concerned has issued a policy to a local insured, denominated in euros.

Without previous warning, the country announces its departure from the euro and converts local euro-denominated deposits and contractual obligations into new currency at a specified rate. In the next few months there is a sharp decline in the market rate of new currency against the euro.

In this situation, the local insured's ability to discharge its foreign obligations, particularly those that remain payable in "hard" currencies, would be impaired – all the more so if, as is likely, the country were to introduce foreign exchange control.

The following questions could arise:

1. In what currency is the loss assessed and payable? This could depend on the type of cover. The insured would very likely "feel" a local property loss in new currency, since its own assets would probably have been converted and the cost of repair or replacement would be incurred locally. By contrast, liability incurred to a foreign claimant might have to be discharged in "hard" currency;
2. Do the premium, excess and limit continue to be payable/applied in euros, or are they converted into new currency? There could be room for argument because the euro would continue to exist alongside new currency (by contrast, the position was clear when countries joined the eurozone because their former national currencies soon ceased to be legal tender). If the policy also covers insureds in eurozone countries this could influence the outcome. Choice of law and the place of payment are important factors here, as well as the place where the issue is decided – the courts in the country concerned are more likely to apply the new laws. To address this issue the insurer could negotiate for a clause that squarely addresses a potential change of currency;
3. If the premium etc. are to be converted, is this at the official rate? If at the market rate, as at which date? Again, governing law, jurisdiction and place of payment could be important, and a currency conversion clause could prove useful;
4. If conversion is mandatory, and this affects the commercial viability of the policy, is it nonetheless enforceable? Under English law the answer is almost certainly "yes", because under the lex monetae principle (which is broadly applied around the world) the courts recognise a country's power to alter its national currency. But a suitably worded force majeure clause could make a difference; and
5. Can the parties readily enforce premium and claims obligations? Timing is an important factor because delays here could make a significant difference to the value of payments in "hard currency" terms and interest is very unlikely to make up for this.

Insurers could also usefully consider set-off and insolvency clauses. ■

Nigel Brook is a partner at Clyde & Co

The local insured's ability to discharge its foreign obligations, particularly those that remain payable in "hard" currencies, would be impaired – all the more so if, as is likely, the country were to introduce foreign exchange control

Sovereign debt worries hit eurozone stocks

Spain crisis sees euro fall to three-week low

Brokers talk inside the stock exchange in Madrid on Tuesday as worries about Spain's finances intensified

AP Photo/Paul White

Christopher Munro
Senior reporter

64¢
Fall in Axa's share price, the biggest this week

The stocks of eurozone insurers and reinsurers have responded to the latest round of sovereign debt worries by dropping in value in the seven days leading up to April 5.

Suggestions of a double-dip recession have had a significant impact across the eurozone, and insurers have not emerged unscathed, despite few of these businesses actually having much exposure to the sovereign debt itself.

In monetary terms, Axa reported the biggest fall in its share price in the week leading up to Thursday, April 5, dropping 64¢ compared with the previous week, equal to a 4.1% reduction.

But it is Generali that saw the biggest decrease in terms of percentage, with the closing share price of €11.06 on April 5, 2012 representing a 5.1% reduction compared with the previous Thursday.

Crisis in Spain

Of particular concern has been the sovereign debt of Spain, whose perilous economic outlook intensified towards the end of last week as investors looked to remove the euro and some of the more risky government bonds from their portfolios before the Easter weekend.

In addition, the euro fell to a three-week low compared with the dollar, mainly in response to the concerns over Spain's economy, which is the fourth largest in the eurozone behind Germany, France and Italy.

The immediate future does not look particularly bright either, with the eurozone crisis well and truly returning last Tuesday following a period of panic selling.

US and Bermuda stocks

The biggest increase of the week was posted by AIG, which saw its share price rise by 9.9% to $32.89 at

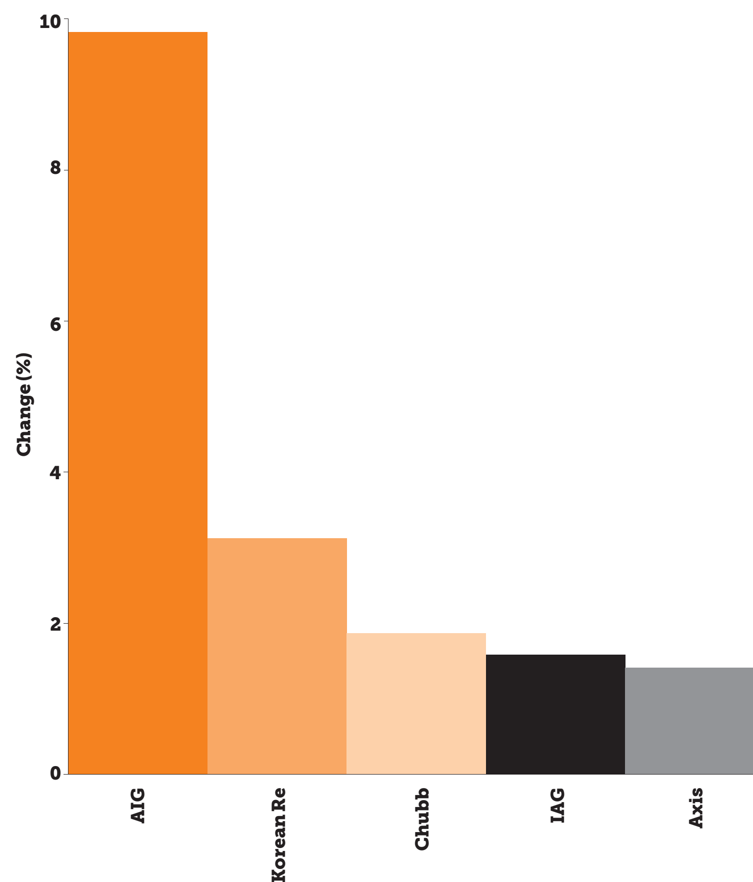
Table: Share prices as at April 5, 2012

Company/group	Currency
Ace	US dollar
AIG	US dollar
Alleghany Corporation	US dollar
Allianz	Euro
Allstate	US dollar
Alterra	US dollar
Amlin	Pence
Arch Capital	US dollar
Aspen	US dollar
Aviva	Pence
Axa	Euro
Axis Capital	US dollar
Berkshire Hathaway (A)	US dollar
Catlin	Pence
Chubb	US dollar
CNA Financial	US dollar
Endurance Specialty	US dollar
Everest Re	US dollar
Generali	Euro
Hannover Re	Euro
Hiscox	Pence
Insurance Australia Group	Australian dollar
Korean Re	Korean won
Montpelier Re	US dollar
MS&AD Insurance Group	Yen
Munich Re	Euro
NKSJ Holdings	Yen
PartnerRe	US dollar
Platinum	US dollar
QBE Insurance Group	Australian dollar
RenaissanceRe	US dollar
RSA	Pence
Scor Paris	Euro
Scor Zurich	Swiss franc
Swiss Re	Swiss franc
Travelers Companies	US dollar
Tokio Marine Holdings	Yen
XL Group	US dollar
Zurich Insurance Group	Swiss franc

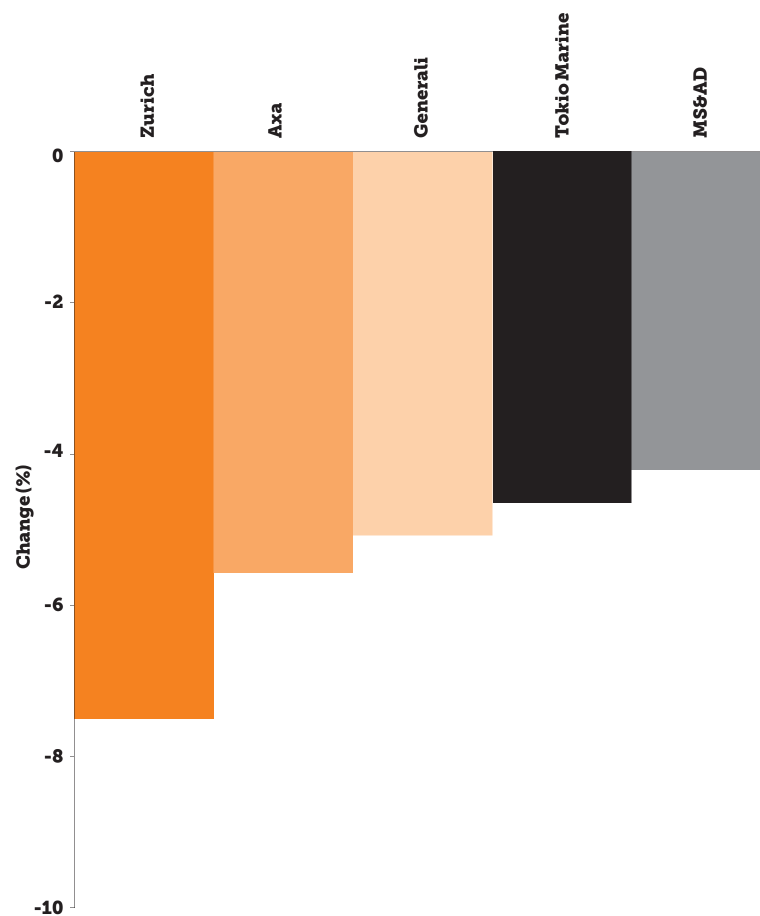
Source: Insurance Day Global Markets
*Denotes closing price on April 4, 2012

Dec 31. 2011	Mar 29, 2012	Apr 5. 2012	Change from Mar 29 (%)	Capitalisation ($m)
70.12	73.10	73.18	0.1	24,646
23.20	29.94	32.89	9.9	56,792
285.29	331.14	334.83	1.1	5,605
73.43	89.65	86.01	(4.1)	54,146
27.41	32.90	32.75	(0.5)	16,394
23.63	23.23	23.10	(0.6)	2,345
313.90	327.90	316.37	(3.5)	2,592
37.23	37.26	37.39	0.3	5,000
26.50	28.14	28.03	(0.4)	1,991
300.80	325.10	312.30	(3.9)	14,533
10.05	12.36	11.68	(5.5)	37,613
31.96	33.27	33.81	1.6	4,353
114,755.00	122,490.00	121,295.00	(1.0)	114,406
398.70	407.10	410.52	0.8	2,329
69.22	68.87	70.16	1.9	18,623
26.75	29.35	29.36	0.0	7,906
38.25	40.57	39.69	(2.2)	1,748
84.09	93.33	93.94	0.7	5,015
11.63	11.65	11.06	(5.1)	23,957
38.30	43.99	43.81	(0.4)	7,050
373.50	390.90	391.01	0.0	2,370
2.98	3.45	3.51	1.7	7,397
15,000.00	13,350.00	13,750.00	3.0	1,337
17.75	19.42	19.59	0.9	1,152
1,426.00	1,710.00	1,638.00	(4.2)	8,745
94.59	114.00	111.27	(2.4)	29,904
1,510.00	1,834.00	1,758.00	(4.1)	35,174
64.21	67.63	67.61	0.0	4,423
34.11	37.09	36.57	(1.4)	1,322
12.95	14.15	14.10	(0.4)	15,096
74.37	75.51	75.26	(0.03)	3,889
105.20	105.40	104.39	(1.0)	5,793
18.06	20.23	19.64	(2.9)	4,950
21.50	24.60	23.80*	(3.3)	5,091
47.87	57.20	57.05	(0.3)	23,376
59.17	58.65	58.88	0.4	23,054
1,705.00	2,296.00	2,187.00	(4.7)	21,953
19.77	21.40	21.66	1.2	6,750
212.50	238.90	220.70	(7.6)	38,817

Graph: This week's winners...



and losers...



the close of the New York Stock Exchange on April 5, 2012.

On April 4, AIG's share price reached $32.99, the highest since April 2011. This was followed a day later by AIG's stock hitting $33.39 per share, up more than 43.9% since the start of 2012. This will surely benefit the US Treasury, which continues to hold a significant amount of AIG's common stock following its bail-out at the onset of the financial crisis.

Other US and Bermudian stocks reported mixed results, reflecting the continued uncertainty in the financial markets, although the US economy was handed a boost last week with news of a fall in the number of people filing for unemployment benefits, beating economists' predictions.

Japan shares drop

The situation is not so rosy in Japan however, with the shares of MS&AD Insurance Group, NKSJ Holdings and Tokio Marine Holdings all shedding more than 4% in value in the week leading up to the close of play on April 5, 2012.

Indeed, the week ending April 6, 2012 represented the worst weekly loss for the Nikkei share average in eight months, responding to fading hopes of further US stimulus and eurozone worries. ■

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+44 (0)20 7017 7670
sirach.yeboah@informa.com

For all other enquiries, contact

Natalia Kay
+44 (0)20 7017 5173
natalia.kay@informa.com