Insurance/ Reinsurance

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INSURANCE BULLETIN





Welcome to HFW's Insurance Bulletin, which is a summary of the key insurance and reinsurance regulatory announcements, market developments, court cases and legislative changes of the week.

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2nd Middle East Insurance Industry Awards 2015
LAW FIRM OF THE YEAR

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1. Regulation and legislation

Future changes to Professional Indemnity Insurance: SRA consultation on changing the Minimum Terms and Conditions to bring them in line with the Insurance Act 2015.

The SRA requires all law firms it regulates to take out Professional Indemnity Insurance which complies with its Minimum Terms and Conditions (MTC). As the Insurance Act 2015 (the Act) is due to come into force on 12 August 2016, the SRA is proposing to update the MTC to bring them in line with the Act, and has started a consultation with its stakeholders including law firms, consumers and their representatives.

We note the changes to the wording of the MTC will not change its effect, and they simply update the language to ensure it is in line with the Act. However, the consultation also asks stakeholders for their views on the SRA's assessment of the impact of the Act, including whether to contract out of the Act to allow a more favourable standard of disclosure on a law firm obtaining insurance.

The SRA's proposed changes to the wording of the MTC

The current wording of the MTC ensures that insurers cannot avoid or repudiate cover for a non-disclosure (i.e. a failure to disclose facts that would influence a prudent insurer) or a misrepresentation (i.e. a false statement of fact inducing the other party to contract). Instead, the remedy provided for a non-disclosure or misrepresentation is for the insurer to seek reimbursement from the insured. The reason for the different remedy is to protect consumers and ensure that anyone with a successful claim for damages arising out of a law firm's negligence is compensated.

The proposed changes to the wording of the MTC (in question 2 and the annex of the consultation) do not affect the above position. The sole proposed amendment is to update the reference to a "non-disclosure" to refer to a failure to satisfy the new duty to make a fair presentation. This has no appreciable effect, as the remedy for both under the MTC is the same i.e. the insurer can only seek reimbursement from the insured.

New requirements on the insured's standard of disclosure introduced by the Act

The other two questions in the consultation deal with a more fundamental point. Although the Act has tipped the balance in favour of insureds in many respects, the SRA notes that the Act also increases the disclosure obligations of the law firms it regulates. These disclosure obligations now require the insured to present the information in a manner that is "clear and accessible" to a prudent insurer. The SRA considers that this is likely to require insureds to be more selective about information provided.

Question 1 considers contracting out of the Act in order to reduce the burden on those insureds, and question 3 asks for views about the impact of the proposed changes. The SRA's view is that it is fair to ask law firms to meet the higher standard as they are already benefitting from the fact that avoidance and repudiation are not possible under the MTC. The SRA recognises that the law has changed, and does not propose to increase the level of consumer protection.

What is the timeline for the consultation?

The changes proposed are included in the SRA's consultation which started on the 12 February 2016 and lasts for six weeks. The last day for stakeholders to submit a response is 24 March 2016. Although the SRA has asked for views, and these will be considered, it appears from the tone of the consultation that, in the absence of a convincing argument against their proposals, the SRA will proceed to implement them allowing the Act and the higher standards required of the insured law firms to apply.

Link to the consultation: http://www.sra.org.uk/documents/SRA/consultations/insurance-act-consultation.pdf

For more information, please contact Thomas Coombs, Associate, London on +44 (0)20 7264 8336, or thomas.coombs@hfw.com, or your usual contact at HFW.

The SRA recognises that the law has changed, and does not propose to increase the level of consumer protection.

THOMAS COOMBS, ASSOCIATE

Third Parties (Rights against Insurers) Act 2010 not in force before June 2016

There had been indications that the long-awaited Third Parties (Rights against Insurers) Act 2010 (the Act) would finally come into force in April of this year. However, we understand from the Law Commission that the revised estimate for commencement is now "summer"; October at the latest.

The purpose of the Act is to make it easier for claimants to pursue insurers directly in circumstances where a defendant insured has become insolvent:

- Where an insolvent person/company is covered by a liability policy, it removes the need for separate proceedings to establish the insured party's liability before suing the insurer, thereby reducing time and costs.
- Insurers will be under a duty to give full disclosure of detailed information about policy terms to claimants within 28 days of request. This will permit claimants to anticipate any coverage defences that the insurer might raise and make an early decision of the likelihood of success.

The Act did not come into force in 2010 because the government realised that it was defective regarding certain insolvency matters. These defects were partly rectified by Section 20 and Schedule 2 of the Insurance Act 2015 but subsidiary legislation adding certain insolvency events which will trigger the application of the Act is still required before it can come into force. The delay has been caused by difficulties in finding space in the legislative calendar for the proposed regulations to be debated and passed.

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EIOPA announces work programme for 2016; Solvency II is top of the agenda

On 16 February 2016, the European Insurance and Occupational Pensions Authority (EIOPA) announced its work programme[1] for 2016.

Each year, EIOPA publishes a work programme setting out its priorities for the year ahead. The programme focusses on the areas in where there is the greatest need for its work and is devised based on EIOPA's strategic objectives.

The priorities that EIOPA has identified for 2016 are as follows:

Solvency II implementation

We have previously reported[2] on EIOPA's intention to monitor the implementation of Solvency II, and the 2016 work programme confirms that this is top of its agenda. EIOPA has identified that it will look at how the measures which implement Solvency II work in practice, and whether these measures achieve the underlying principles of Solvency II. As previously stated, we await with interest the extent to which EIOPA will look at "gold-plating" and whether it will take against member states who have "gold-plated" Solvency II.

Take a pro-active approach to international developments.

EIOPA has identified that it needs to continue to be involved in the development of international capital standards and to continue to engage with the International Association of Insurance Supervisors (IAIS). Although this area of work is not explicitly focussed on Solvency II, it is clear that the practical impact of Solvency II will be relevant when EIOPA and the IAIS consider further developments in capital standards.

Whole product life cycle-focused consumer protection with greater emphasis on preventive, risk-based regulation and supervision.

EIOPA intends to look at the entire life-cycle of a product, from its design phase to the role of insurance guarantee schemes (which will meet claims in the event that insurers are unable to do so). EIOPA has stated that it wants to strengthen the focus on preventing risks. Its work will include consideration of an EU-wide common language, together with measures that will help to identify potential problems for consumers as early as possible.

Constant quality cycle for regulation: remain clear on the underlying principles.

In order to ensure that regulation is sound and risk-based, EIOPA will consider how the underlying principles of regulation are achieved in practice. It will look at how national regulators supervise during challenging times, but will also focus on how "regular and usual" supervisory topics are handled.

We will monitor EIOPA's work during the course of the year and report on substantive developments.

For more information, please contact Will Reddie, Associate, London on +44 (0)20 7264 8758, or william.reddie@hfw.com, or your usual contact at HFW.

1 https://eiopa.europa.eu/Publications/Administrative/AWP_2016.pdf

2 http://www.hfw.com/Insurance-Bulletin-24-September-2015

2. Court cases and arbitration

England & Wales: Professional Indemnity Insurance – broker liability for failure to advise on block notification of "circumstances that may give rise to a claim" – PPI misselling – *Ocean Finance & Mortgages Ltd v Senior Wright Ltd*[1]

Lloyd's placing broker Senior Wright (SWIL) and producing broker Oval Insurance Brokers Limited (Oval) were each found partly responsible for failing to advise client Ocean Finance and Mortgages Limited (OFML) to make a "block notification" of "circumstances that may give rise to a claim", under its 2008/9 PII policy. This failure led to OFML suffering loss after its 2009/10 (i.e. renewal) excess. PII insurers rejected the block notification of such circumstances which was later made to that (renewal) policy, on the grounds that notification of circumstances was required "as soon as practicable" in order to engage cover for any claims which later arose out of those circumstances, and the block notification was a year late.

The claims were set against a complex background of PPI mis-selling by OFML, a finance broker, the rising tide of Financial Ombudsman findings upholding PPI mis-selling complaints, and the FSA's increasing focus on PPI sales. The possible existence of systemic defects in OFML's selling practices, the risks associated with a root cause analysis and of a full past business review being required, and the assessment of these factors against the comparatively low policy threshold of "circumstances that may give rise to a claim" were all considered in some detail by Mr. Justice Cooke.

The balancing of these risks can be a very difficult exercise involving complex questions of fact and law.

ANDREW BANDURKA, PARTNER

Both producing and placing brokers were experienced in PII but had little experience of PPI. OFML had sued Oval for failure to advise it to make a block notification before expiry of its 2008/9 excess policy, of the entirety of its 18,000 PPI sales. Shortly before trial, Oval settled OFML's claim (at a substantial discount) and admitted that a block notification should have been made (and that 2009/10 excess insurers were right to decline cover for the claims.) Oval claimed under CPR Part 20 and the Civil Liability (Contribution) Act against SWIL.

Mr. Justice Cooke outlined the familiar risks of block notification of circumstance under PII policies. On the one hand, that delaying notification/ disclosure until after a renewal might amount to a non-disclosure of material facts, thus impairing the validity of the renewal and the possibility of rejection of future related claims under the "prior knowledge" exclusion or late notification provisions in the renewal policy. On the other hand, that premature notification might (if too vague or remote) be invalid and rejected as such by current underwriters (who it was noted were generally unwilling to accept block notifications) and might simultaneously deter underwriters from offering renewal terms, especially in connection with hotly topical activities such as PPI sales. The balancing of these risks can be a very difficult exercise involving complex questions of fact and law (and sometimes, as here, involving vexed questions of whether individual claims are likely to aggregate and exceed a policy notification threshold.) Given that the viability of OFML's business required it to maintain PI insurance, the stakes were high in this case.

SWIL had taken it upon itself (without instructions from Oval or OFML) to make a limited notification of certain PPI-related "circumstances" under the 2008/9 policy, and had thus assumed a duty in contract and tort to Oval (and potentially a duty in tort to OFML, although the Judge did not rule on the duties owed by and the liability of a sub-broker to an insured) in relation to making appropriate notification to the 2008/9 insurers, and to act with due care and skill in making any notification that was required.

The Judge recognised that, in its discussions with SWIL, Oval may have downplayed certain risks regarding systemic defects in OFML's selling practices, which leaned in favour of earlier block notification of circumstances. Notwithstanding this, he held that had SWIL acted as any reasonably competent broker should and its personnel would, in the light of the systemic causes of which they should have been aware, have seen the risk of non-notification of circumstances as greater than any risk involved in notification. He said that, whatever difficulties surrounded the making of such a notification and the decision taken to make it, no

1 [2016] EWHC 160 (Comm)

competent broker would have failed to consider notifying and recommend to the insured that they should, subject to taking legal advice, take such action.

The reasonableness of Oval's pre-trial settlement with OFML was not contested by SWIL, save for an element of OFML's costs which Oval had paid, since SWIL argued that the settlement with Oval should have been achieved earlier, with a correspondingly smaller contribution to costs. The judge said it was not appropriate to consider the constituent parts (i.e. the costs element) of Oval's settlement "in the absence of some extraordinary feature", and it was right to look only at the "global figures" in deciding that a settlement of £2.55 million was reasonable in the context of a claim exceeding £6 million. Apportioning liability for this sum in a "broad brush" way, he found that Oval were 70% and SWIL were 30% responsible for OFML's loss, which reflected Oval's superior knowledge of the facts which should have led to an earlier block notification of circumstances.

See the judgment at: http://www.bailii.org/ew/cases/EWHC/Comm/2016/160.html

For more information, please contact Andrew Bandurka, Partner, London on +44 (0)20 7264 8404, or andrew.bandurka@hfw.com, or your usual contact at HFW.

3. HFW publications and events

HFW Partners to speak at Anglo-Brazilian Insurance and Reinsurance Summit

HFW Partners Christopher Cardona, Paul Wordley and Geoffrey Conlin will be speaking at the 2nd Anglo-Brazilian Insurance and Reinsurance Summit at the British Council in São Paulo on Wednesday 16 March 2016.

The seminar will examine the current issues facing the Brazilian insurance and reinsurance market and its interaction with the international markets. It will be of particular interest to those participating in the Brazilian market including local and international cedants, reinsurers, brokers and policyholders.

For further details, including the full agenda and how to register, please go to: http://bit.ly/1LFZywD

HFW Partners Paul Wordley, Costas Frangeskides, Sam Wakerley, Wissam Hachem and Consultant, Carol-Ann Burton will be attending Multaqa 2016, Doha, Qatar (13-15 March)

Hosted by the Qatar Central Bank (QCB), the Qatar Financial Centre (QFC) and co-organised by Global Reinsurance media, Multaqa Qatar is the leading risk and insurance/reinsurance conference in the MENA region. HFW is a sponsor and long standing supporter with representatives from HFW's London MENA desk, and HFW's local MENA offices (Dubai, Riyadh, Beirut, Kuwait and Abu Dhabi) attending this year.

Full details can be found at http://www.multaqa.com.qa/multaqa

Iran sanctions: guidance for insurers, reinsurers and brokers

HFW has published a briefing[1] on the headline points for insurers, reinsurers and brokers to consider following the latest Iran sanctions developments. The briefing sets out the good news and the bad news for the market, together with some guidance on what insurers, reinsurers and brokers should do.

For more information, please contact Daniel Martin, Partner, on +44 (0)20 7264 8189 or daniel.martin@hfw.com or your usual contact at HFW.

1 http://www.hfw.com/Iran-sanctions-guidance-for-insurers-reinsurers-and-brokers-February-2016

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