



In this week's Insurance Bulletin:

1. REGULATION AND LEGISLATION

UK: FCA consults on changes to FCA Handbook to implement the Insurance Distribution Directive

EU/US: Co-operation across the Atlantic - EU and US covered agreement signed

2. COURT CASES AND ARBITRATION

Australia: Third party claim against liability insurers

3. MARKET DEVELOPMENTS

UK: Lloyd's suspends profit distribution

4. HFW PUBLICATIONS AND EVENTS

UK: HFW wins the Law firm of the Year 2017 at European & UK Captive Services Awards

Latin America: HFW ranked in band 1 for Insurance in Chambers Latin America 2018

UK: HFW presentation and discussion on the impact of Hurricanes Harvey, Irma and Maria

Ireland: HFW at the International Marine Claims Conference in Dublin

France: HFW presenting at the SCOR Claims Conference

Singapore: HFW presenting at the AIDA Reinsurance Working Party



POPPY FRANKS
ASSOCIATE

“Firms should consider the need to evidence their work to the regulator and the Directive’s impact on other conduct of business rules and complaint handling processes.”

1. REGULATION AND LEGISLATION

UK: FCA consults on changes to FCA Handbook to implement the Insurance Distribution Directive

The Financial Conduct Authority (FCA) has published two consultation papers (CPI17/23) on proposed changes to the FCA Handbook, whereby the Insurance Distribution Directive (IDD) will repeal the Insurance Mediation Directive (IMD), and will be implemented by insurance and reinsurance distributors by the 23 February 2018.

The process of converting the IDD into UK domestic law will take effect by virtue of the Financial Services Authority’s rules, as well as amendments to the Financial Services and Markets Act 2000 (FSMA) and the FSMA (Regulated Activities) Order 2001 (RAO). The FCA proposes a number of changes to its rules for life insurance businesses in order to implement IDD obligations, including information provision requirements and additional requirements related to the distribution of insurance-based investment products. The paper also includes proposed changes to the FCA’s rules for life and non-investment insurance businesses, including provisions for product oversight and governance as well as professional and organisational requirements.

Moving forward, firms need to assess what changes need to be made, if any, to their internal processes. The enforcement of professional and organisational requirements requires thinking around any staff training that is needed. Firms should also consider the need to evidence their work to the regulator and the Directive’s impact on other conduct of business rules and complaint handling processes. In the coming years, the Directive will provide greater flexibility and security by building upon each firm’s general obligations to its clients.

POPPY FRANKS

Associate, London
T +44 (0)20 7264 8292
E poppy.franks@hfw.com

EU/US: Co-operation across the Atlantic – EU and US covered agreement signed

The EU and US covered agreement on insurance and reinsurance prudential requirements was finally signed on 22 September, eight months after it was agreed, following nearly two years of negotiation.

The aim of the agreement is to enable better co-operation between the EU and US markets, and it covers three areas:

- **Reinsurance:** the principle behind the provisions on reinsurance is that reinsurers domiciled in either the US or the EU should not, when operating in the other jurisdiction, be subject to collateral and local presence requirements which are more rigorous than those imposed on local reinsurers. Therefore, under the agreement the US has committed to encourage US states to reduce and eventually remove the requirement for EU reinsurers to post collateral when reinsuring US cedants; and the EU has committed to remove restrictions on EU cedants obtaining reinsurance from US firms domiciled in US states, where the regulatory requirements are not deemed to be equivalent to Solvency II.
- **Group supervision:** US and EU (re)insurers will only be subject to worldwide prudential supervision by their respective domestic supervisory authorities.
- **Exchange of information between supervisors:** the EU and the US will encourage their own supervisory authorities to share information on re/insurers operating in both markets.

In order to ensure the proper implementation of the agreement, a joint committee will be established and the agreement envisages a consultation process to deal with any differences which arise.

The next step is for the European Parliament and Council formally to give official consent to the agreement

as required by Article 218 of the Treaty on the Functioning of the European Union. The Covered Agreement itself provides that it will “enter into force seven days after the date the Parties exchange written notifications certifying that they have completed their respective internal requirements and procedures, or on such other date as the Parties may agree.” However, the agreement is now in a phase of provisional application where it is hoped that certain parts of the agreement, in particular those governing group supervision and the establishment of a joint committee, will be acted upon swiftly. It is acknowledged on both sides of the Atlantic that it will take time for all the provisions in the agreement to take effect and the aim is for it to be fully implemented, on both sides, five years after signature.

While the signing of the agreement has been widely welcomed in the insurance markets on both sides of the Atlantic, when the UK leaves the EU it would need to negotiate an agreement on similar terms with the US, if it wishes to enjoy these benefits.

The text of the covered agreement can be found here at https://www.treasury.gov/initiatives/fio/reports-and-notices/Documents/US_EU_Covered_Agreement_Signed_September_17.pdf and the joint statement at: https://ec.europa.eu/info/sites/info/files/170922-eu-us-joint-financial-regulatory-forum-joint-statement_en.pdf

REBECCA HUGGINS

Professional Support Lawyer, London

T +44 (0)20 7264 8120

E rebecca.huggins@hfw.com

2. COURT CASES AND ARBITRATION

Australia: Third party claim against liability insurers

Under s601AG of the Australian Corporations Act 2001, a third party may recover directly from the liability insurer of a deregistered company where the company was liable and the insurance contract covered the liability immediately before the deregistration.

WFI insurance denied the Plaintiff’s claim¹, which arose out of negligent shopfitting work undertaken by the (by now deregistered) insured, on the grounds that the insured was not liable for the alleged loss and damage, that the insured had been in breach of a policy condition (precedent) requiring compliance with plumbing standards Regulations, and that the claim fell foul of a Products exclusion and/or a Workmanship exclusion in the policy. The insured was found to be liable, the first two policy defences failed wholly and the workmanship defence partially succeeded.

Reviewing the principles applying to construction of an insurance contract, the Judge ruled that the plumbing standards condition was not clear enough to amount to a condition precedent to liability, and further that it must be construed as a “take reasonable care to” obligation (rather than a strict obligation), which required the insurer to demonstrate recklessness on the part of the insured, in order to be discharged from liability. On the facts, recklessness was not made out.

Further, the insured’s failure to properly carry out the plumbing work was not a “failure of products sold or supplied” by the insured, so the Products exclusion was of no use, and the Workmanship exclusion applied only to eliminate the cost of re-doing or correcting poor workmanship, and not the consequential damage which this had occasioned, including water damage.

ANDREW BANDURKA

Partner, London

T +44 (0)20 7264 8404

E andrew.bandurka@hfw.com



ANDREW BANDURKA
PARTNER

“The insured’s failure to properly carry out the plumbing work was not a “failure of products sold or supplied” by the insured, so the Products exclusion was of no use, and the Workmanship exclusion applied only to eliminate the cost of re-doing or correcting poor workmanship, and not the consequential damage which this had occasioned, including water damage.”

¹ In *Manitowog Platinum Pty Ltd & Anor v WFI Insurance Ltd* [2017] WADC 32 (17 March 2017)

3. MARKET DEVELOPMENTS

UK: Lloyd's suspends profit distribution

In the wake of this year's catastrophic hurricanes, Lloyd's has taken the step of postponing the distribution of profits by syndicates. The extent of the losses caused as a result of Hurricanes Harvey, Irma and Maria is being assessed but these could impact syndicates' capital levels. There is debate about the scale of the losses, with Lloyd's publishing early preliminary an estimate of £4.5 billion for Hurricanes Harvey and Irma alone, but some modelling firms estimate losses of around US\$50 billion. Taking the earthquakes in Mexico and Hurricane Maria together, analysts at Jeffries have estimated another US\$1 billion of losses. According to Jeffries, the market has enough capital to withstand the losses without calling on its Central Reserves – member's funds at Lloyd's are in excess of US\$29.81 billion.

LUCINDA RUTTER

Associate, London

T +44 (0)20 7264 8404

E andrew.bandurka@hfw.com

4. HFW PUBLICATIONS AND EVENTS

UK: HFW wins the Law firm of the Year 2017 at European & UK Captive Services Awards

The European & UK Captive Services Award series recognises and rewards those captive insurance service providers that have demonstrated exceptional customer service and innovative product development.

The Law Firm of the Year award was collected by Insurance Partners **Jonathan Bruce** and **Nigel Wick** at yesterday's awards ceremony held at Plaisterers' Hall, London. This is the third year in a row HFW has collected this accolade, and the fourth time within the six years that the awards have been running.

Latin America: HFW ranked in band 1 for Insurance in Chambers Latin America 2018

We are delighted to announce that HFW has been ranked in band 1 for Insurance work in Chambers Latin America 2018 with Partners **Jonathan Bruce**, **Chris Cardona** and **Jeremy Shebson** all individually ranked in Band 1 too.

UK: HFW presentation and discussion on the impact of Hurricanes Harvey, Irma and Maria

On 4 October, HFW London hosted a presentation and panel discussion about the impact of the recent hurricanes which hit the US and the Caribbean. For our briefing on the issues, please see <http://www.hfw.com/Hurricanes-Harvey-Irma-and-Maria-October-2017>

Ireland: HFW at the International Marine Claims Conference in Dublin

Partner **Jonathan Bruce** attended the International Marine Claims Conference in Dublin from 27 to 29 September.

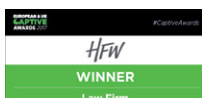
France: HFW presenting at the SCOR Claims Conference

Partner **Christopher Foster** gave a presentation at the SCOR Claims Conference in Paris on 5 October 2017.

Singapore: HFW presenting at the AIDA Reinsurance Working Party

Rosie Ng, **Jean Cao** and **James Jordan** are giving an overview of significant insurance regulatory developments in HK, the PRC and Singapore at the AIDA Reinsurance Working Party in Singapore on 18 October.

HFW has over 450 lawyers working in offices across Australia, Asia, the Middle East, Europe and the Americas. For further information about our Insurance/reinsurance capabilities, please visit <http://www.hfw.com/Insurance-Reinsurance-Sectors>



hfw.com

© 2017 Holman Fenwick Willan LLP. All rights reserved.

Whilst every care has been taken to ensure the accuracy of this information at the time of publication, the information is intended as guidance only. It should not be considered as legal advice. Holman Fenwick Willan LLP is the Data Controller for any data that it holds about you. To correct your personal details or change your mailing preferences please contact Souhir Jemai on +44 (0)20 7264 8415 or email souhir.jemai@hfw.com

Beirut Brussels Dubai Geneva Hong Kong Houston Kuwait London Melbourne Paris Perth Piraeus Riyadh São Paulo Shanghai Singapore Sydney