Insurance/
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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.

In this week's bulletin:

1. **Regulation and legislation**
   - UK: Brokers beware the Insurance Act 2015
   - UK: The PRA consults on remuneration requirements under Solvency II
2. **Court cases and arbitration**
   - Australia: Are you still a 'professional'?
   - England and Wales: Hidden conflicts in arbitration – *W Limited v M SDN BHD*
3. **HFW publications and events**
   - North Korea sanctions update
   - Saudi Arabia: Changes to the Saudi Arabian labor laws
   - HFW attends RIMS Annual Conference and Exhibition in San Diego

Andrew Bandurka, Partner, andrew.bandurka@hfw.com
Ruth Hite, Senior Associate, ruth.hite@hfw.com
Will Reddie, Associate, william.reddie@hfw.com

1. Regulation and legislation

UK: Brokers beware the Insurance Act 2015

The Insurance Act 2015 (the IA) is due to come into force on 12 August this year and will make significant changes to the commercial insurance market. For an in-depth briefing on these changes, please see our June 2015 IA publication[1].

The British Insurance Brokers Association (BIBA) has commissioned an in-depth guide to the IA in order to help brokers navigate the changes. The BIBA guide is due to be launched and made available to members at the BIBA conference in May.

Three aspects of the IA that warrant special consideration by brokers are as follows:

- The policyholder duty of disclosure must be a "fair presentation" of the risk. For brokers, this will mean the risk investigations and descriptions of the risk must comply with additional guidelines set out in the IA in order to meet the new standard.
- The ability to contract out of certain aspects of the IA must be explained fully to the policyholder. This is necessary both: (a) for the opt-out to be effective; and (b) for the broker to comply with its professional and legal duties and regulatory obligations.
- The IA impacts on the operation of certain policy terms, for example there are different remedies under the IA for breach of a contractual term not relevant to the loss. Brokers should ensure that they understand fully the impact the IA has on their client's policies in order to ensure they do not misrepresent the policy terms or otherwise provide negligent advice.

The IA applies only to new contracts of insurance entered into on or after 12 August 2016, including any renewals. This means that there will be a transitional period where pre-IA contracts are still in the market. Brokers should also be careful to ensure that any advice in respect of policies that were entered into pre-IA is correct, namely that the pre-IA position continues to apply.

For more information, please contact Ruth Hite, Senior Associate, on +44 (0)20 7264 8453, or ruth.hite@hfw.com, or your usual contact at HFW.

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RUTH HITE, SENIOR ASSOCIATE

1 http://www.hfw.com/The-UK-Insurance-Act-2015-June-2015

UK: The PRA consults on remuneration requirements under Solvency II

Solvency II firms, which includes Lloyd's and managing agents, have been required to comply with Solvency II from 1 January 2016. Article 275 (Remuneration policy) of the directly applicable Solvency II Delegated Regulation (EU 2015/35, (the Regulation)) requires that Solvency II firms comply with various requirements in respect of their remuneration policy. These requirements include the deferral of variable pay and the requirement to include financial and non-financial performance measurements as a basis for variable remuneration.

As part of the Solvency II implementation programme undertaken by the Prudential Regulation Authority (PRA) in 2015, the PRA identified that, in respect of significant PRA-regulated insurers: (a) market participants would welcome guidance on the identification of "risk takers" in order to prevent inconsistencies; and (b) there were significant discrepancies in the variable remuneration thresholds to which the deferrals might apply and the proportion of deferral applied. Therefore, the PRA considers that further guidance is necessary in order to ensure that firms adopt "a broadly consistent approach" to the Regulation requirements and recently published consultation paper CP13/16 entitled "Solvency II: Remuneration requirements", setting out the proposed PRA supervisory statement in respect of article 275 of the Regulation.

The consultation paper includes key factors to consider when determining which staff are within the scope of the article 274 requirements and also a reporting template intended to be used by category 1 and 2 firms if they

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chose to do so, this template may also be of use to smaller Solvency II firms. All Solvency II firms are expected to comply with the Regulation and the PRA intends to monitor compliance.

Once the PRA supervisory statement is published, firms will need to consider the following legislation, guidance and regulation when setting remuneration policies:

1. The PRA Rulebook, in particular the Group Supervision part.
2. The Regulation.
3. EIOPA's "Guidelines on system of governance" finalised on 14 September 2015.
4. The PRA's supervisory statement.

The consultation closes on Thursday 2 June 2016.

For more information, please contact Ruth Hite, Senior Associate, on +44 (0)20 7264 8453, or ruth.hite@hfw.com, or your usual contact at HFW.

2. Court cases and arbitration

Australia: Are you still a 'professional'?

The recent Full Federal Court of Australia decision in *Chubb Insurance Company of Australia Limited v Robinson*[1] considered the application of a *'professional services'* exclusion in a Directors and Officers (D&O) insurance policy.

The decision highlights that routine acts performed by directors and officers will not necessarily be construed as 'professional services' so as to exclude cover in D&O policies.

Background

Reed Constructions Australia Pty Limited (Reed) entered into a design and construct contract with 470 St Kilda Road Pty Limited (St Kilda) in October 2011 for the redevelopment and construction of a residential apartment and office building in Melbourne, Australia. The contract required Reed to, amongst other things, verify all claims for progress payments with statutory declarations.

On 12 December 2011, Reed's Chief Operating Officer, Mr G Robinson, made a progress payments claim and provided a statutory declaration in support.

Reed was subsequently placed into liquidation. St Kilda took the view that Reed had sought payments of amounts to which it was not lawfully entitled. St Kilda commenced proceedings against Mr Robinson in the Federal Court claiming damages for misleading and deceptive conduct and negligence on the part of Mr Robinson. St Kilda alleged that Mr Robinson did not have reasonable grounds for asserting that all charges, costs and expenses claimed by Reed were properly due at the time he made his statutory declaration.

Mr Robinson sought indemnity under Reed's D&O policy in respect of St Kilda's claim. The insurer relied on an exclusion clause to decline indemnity on the basis that Mr Robinson was 'rendering a professional service to a third party' at the time he provided the statutory declaration to St Kilda.

Mr Robinson subsequently commenced proceedings against the insurer in the Federal Court claiming indemnity under the D&O policy. At first instance, the primary judge held that the professional services exclusion did not apply and ordered that the insurer indemnify Mr Robinson. For a full analysis of the primary judgment, please see our briefing[2] of January 2014.

Appeal

The insurer appealed the decision to the Full Federal Court. In essence, the insurer took issue with the primary judge's application of the accepted relevant principles for construing exclusion clauses. The insurer argued that the primary judge:

1. Erred by focusing on the specific conduct of Mr Robinson rather than on the overall activity of Reed in the context in which Mr Robinson's conduct occurred.
2. Applied the *contra proferentem* rule (a rule 'of last resort' which requires ambiguous clauses to be read against the relying party) even though no ambiguity in the wording of the exclusion had been demonstrated by Mr Robinson.
3. Took an unduly narrow view of the professional services exclusion in contrast to the liberal approach adopted when courts construe similar wording in insuring clauses.

1 [2016] FCAFC 17

2 http://www.hfw.com/Are-you-a-professional-January-2014


Mr Robinson argued that the professional services exclusion must relate to a narrower band of activity than general delivery of building and construction activities by Reed. Mr Robinson contended that a broader approach would inappropriately circumscribe the cover provided by the D&O policy.

Decision

The Full Federal Court, in dismissing the insurer's appeal, held that:

1. It is not a requirement, in every case, that the scope of an exclusion in respect of professional services in a D&O policy must correspond with the scope of cover provided by the common insuring clause in professional indemnity policies.
2. The expression 'professional services' in the relevant exclusion clause means services of a professional nature involving the application of skill within the scope of a vocational discipline which is generally regarded as a profession.
3. The primary judge was correct in finding that the insurer did not establish that project management was generally regarded as a profession at the relevant time, and that Mr Robinson's conduct did not involve the rendering of project management services in any event.
4. The making and provision of the statutory declaration by Mr Robinson did not constitute the rendering of any service to St Kilda by Reed or Mr Robinson. Rather, the act was done on behalf of Reed in the proper discharge of its contractual obligations and amounted to routine compilation of factual material in order to secure a contractual payment.

For more information, please contact Phil Kusiak, Senior Associate, on +61 (0)3 8601 4509, or phil.kusiak@hfw.com, or your usual contact at HFW.

England and Wales: Hidden conflicts in arbitration – *W Limited v M SDN BHD*

The subject of arbitrators' independence arises frequently, both in domestic and international arbitrations. Nevertheless, it remains an area where considerable uncertainty persists in borderline cases.

In the context of insurance and reinsurance arbitrations, the issue can be particularly vexed because, relative to other sectors, there is a small pool of willing individuals with the requisite experience. Moreover, the arbitration clauses used by the industry, particularly in reinsurance, often impose stringent qualification requirements, such as having a certain number of years experience in the industry and/or presently holding a "senior position" in it. Furthermore, experienced legal advisors will usually have their own requirements or wishes in respect of a potential arbitrator's experience, professional background or languages spoken.

Now the decision of Knowles J. in *W Limited v M SDN BHD*[1] last month has sparked fresh controversy in this area. In particular, the decision criticises the widely accepted International Bar Association Guidelines.

The case concerned an appeal of an award in an LCIA arbitration award, in which a Canadian QC had been appointed as sole arbitrator. Unbeknownst to the arbitrator, the law firm in which he was a partner provided substantial legal services to a company that was owned by the same parent company as the defendant in the arbitration.

The judge held that there was *"no doubt that the present case falls within the description given in Paragraph 1.4 of the 2014 IBA guidelines."* This states that a non-waivable conflict of interest exists where *"the arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom"*. The judge held, however, that it was equally clear that the present case would not have fallen with Paragraph 1.4 of the IBA guidelines before they were amended, in 2014, to add the words "or his or her firm" before the words "regularly advises".

Whilst important, the IBA Guidelines do not have the force of law and, as such, the judge applied the common law test, concluding that: *"On considering the facts the fair minded and informed observer would not... conclude that there was a real possibility that the tribunal was biased, or lacked independence or impartiality. I reach that view without hesitation."* Accordingly, the defendant's appeal of the arbitration award was not allowed. The judge's finding that the arbitrator was unaware of his firm's relationship to the defendant and that he would have disclosed it, had he known, was an important consideration in reaching this conclusion, as was the fact that the arbitrator rarely provided legal advice, his practise being limited mainly to sitting as an arbitrator.

This decision is a reminder of the importance of ensuring that potential arbitrators should carry out conflict checks carefully and disclose any matters that may cast doubt on their independence. It may also herald a revision to Paragraph 1.4 of the 2014

1 [2016] EWHC 422 (Comm)

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EDWARD RUSHTON, SENIOR ASSOCIATE

IBA guidelines, which it is suggested ought to permit the appointment an arbitrator whose firm provides services to an "affiliated party", if, in the relevant circumstances, there were no reasonable apprehension that the relationship would cause the tribunal to be biased or lacking in independence or impartiality.

For more information, please contact Edward Rushton, Senior Associate, on +44 (0)20 7264 8346, or edward.rushton@hfw.com, or your usual contact at HFW.

3. HFW publications and events

North Korea sanctions update

Following the nuclear test conducted by North Korea on 6 January 2016 and the rocket launch conducted on 7 February 2016, the UN, the US and EU have significantly expanded the scope of sanctions against North Korea. HFW has published an update[1] on these sanctions, which sets out the increased scope of the sanctions and the impact on sectors such as the insurance sector.

For more information, please contact Daniel Martin, Partner, on +44 (0)20 7264 8189 or daniel.martin@hfw.com, or Anthony Woolich, Partner, on +44 (0)20 7264 8033 or anthony.woolich@hfw.com, or Elena Kumashova, Associate, on +32 (0) 2643 3413 or elena.kumashova@hfw.com, or your usual contact at HFW.

Saudi Arabia: Changes to the Saudi Arabian labor laws

HFW has published a briefing[2] on the new amendments to the Saudi Arabian labor laws, which came into force in late 2015. The reforms follow the Saudi Ministry of Labor's ongoing efforts to strike a balance between the creation of a dynamic marketplace for foreign businesses and protection and development of the local workforce.

The briefing sets out some of the key areas that have undergone amendments and analyses what the amendments may mean in practice.

For more information, please contact Wissam Hachem, Partner, on +966 11 276 7372 or wissam.hachem@hfw.com, or Mohammed Alkhliwi, Associate, on +966 11 276 7372 or mohammed.alkhliwi@hfw.com, or Philippa English, Associate, +971 4 423 0522 or philippa.english@hfw.com, or your usual contact at HFW.

HFW attends RIMS Annual Conference and Exhibition in San Diego

HFW Partner Richard Jowett attended the RIMS Annual Conference and Exhibition in San Diego from 10 to 13 April. The Conference hosted sessions on topics such as the challenges of doing business in Africa, how to handle complex business interruption claims and how to manage claims involving multiple lines in a way that avoids conflicts between insurers, multiple deductibles and multiple self-insured retentions.

1 http://www.hfw.com/North-Korea-sanctions-update-April-2016

2 http://www.hfw.com/Changes-to-the-Saudi-Arabian-labor-laws-April-2016

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