HFW

INSURANCE BULLETIN
DECEMBER 2018 EDITION 1

Season's Greetings

HFW extends Season's Greetings to all of our readers with our best wishes for 2019. The Insurance Bulletin will return in January.

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1. REGULATION AND LEGISLATION

UK: The FCA's Brexit Impact Assessment

Following a request from the Treasury Select Committee, the FCA assessed the impact of the UK leaving the EU and, in a move that will no doubt be decried as "Project Fear" by the "people have had enough of experts" brigade, highlighted the uncertainties that remain in relation to the following three scenarios:

1. **Hard Brexit (either on 29 March or, after the transitional period, on 31 December 2020)**

The FCA stated that the impact of a no-deal scenario greatly depends on the extent to which the UK and EU can continue to cooperate and minimise disruption for businesses. While the UK Government, the FCA and the PRA have taken steps to mitigate the disruption, key uncertainties remain such as:

- the extent to which both private and public sector contingency plans can be executed smoothly and how any market disruption can be mitigated (this may be affected by the timing of a no-deal outcome);
- the extent to which the EU and UK are able to treat each other's regulations as equivalent;
- the extent of supervisory cooperation and how the separation of shared systems for market oversight would be managed; and
- the solutions the EU will put in place to ensure continuity of contracts and other cliff-edge risks.

2. **Withdrawal Agreement agreed and the Implementation Period runs until 31 December 2020**

The main impact the FCA identified if the Withdrawal Agreement is ratified is the possibility that EU law evolves during the Implementation Period. The issue is that, during this time, the UK will continue to be subject to EU law but will no longer be part of the EU decision-making structures and will not be represented in EU institutions, agencies and bodies. While some participation by the UK may be possible, the EU and UK have not yet agreed how it would work in practice. Therefore, the FCA's concern is that the UK will become subject to laws over which it has no formal input.

This risk would be increased if no agreement is reached during the Implementation Period and the Implementation Period is extended: more (and more significant) EU laws will be introduced with no formal UK input.

3. **Framework for the future relationship between the EU and UK commences following the Implementation Period**

A framework for the future relationship between the EU and UK is expected to be agreed by the EU and UK by the end of the Implementation Period. The UK and EU have agreed an outline of the political declaration setting out such a framework. In relation to financial services, this includes close and structured cooperation on regulatory and supervisory matters and commencement of equivalence assessments as soon as possible after UK withdrawal.

The FCA comments that leaving the EU creates risks for the UK regardless of the form of exit and, against such a backdrop, it views the approval of the Withdrawal Agreement and development of the outline political declaration as "preferable steps".

The FCA's full impact assessment can be found at https://fca.org.uk/publication/impact-assessments/eu-withdrawal-impact-assessment.pdf.

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UK: Covered Agreement announced between the UK and the US

As we have previously reported[1], in September 2017 the EU and the US signed a covered agreement on insurance and reinsurance prudential requirements, in order to enable better cooperation between the EU and the US

insurance markets. Following the UK's departure from the EU, it will no longer be able to benefit from this agreement. It has been announced that HM Treasury, the US Department of the Treasury, and the Office of the US Trade Representative have agreed the text of an agreement preserving the benefits of the EU-US covered agreement to take effect after the UK leaves the EU.

The EU-US covered agreement applies to EU-US cross-border reinsurance and regulates three areas of prudential insurance oversight: reinsurance, group supervision and exchange of information among supervisors. It means that reinsurers are not required to post collateral or have a local presence, confirms that groups will be subject to worldwide group supervise on only in their home jurisdiction and lays the foundations for the exchange of information among EU and US regulators.

The announcement of the UK-US agreement has been welcomed by the London market which was keen for a deal to be agreed to provide it with regulatory certainty in its dealings with the US market going forward.

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Footnote

1 http://www.hfw.com/Insurance-Bulletin-October-2017-Edition-3

EU: EIOPA consults on the integration of sustainability risks and factors into Solvency II and IDD delegated acts

In May 2018, the European Commission published a package of measures on sustainable finance. In response to this, the European Insurance and Occupational Pensions Authority ('EIOPA') recently provided technical advice regarding possible amendments to the delegated acts under Solvency II and IDD for the integration of sustainability risks and factors in areas of underwriting and investments.

The proposed amendments under the IDD touch upon conflicts of interests and product oversight/governance. When identifying the types of conflicts of interest that might damage a customer's interests, insurance undertakings and intermediaries should consider risks that may arise in relation to sustainability. Insurance undertakings and intermediaries should have appropriate protocols in place to ensure that Environmental, Social and Governance ('ESG') preferences are included in the advisory process. ESG preferences are important to consider in various stages of the insurance product's lifecycle, in particular for customers specifically seeking insurance products with an ESG profile.

The Consultation, which is open until 31 January 2019, includes a series of questions directed at stakeholders. This encourages those most likely to be affected by the advice to analyse the coherency of the draft with current requirements, to review the matter of cross-sectoral consistency and to consider the issue of proportionality, which takes into account the size, nature, scale and complexity of insurers' activities to ensure compliance.

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2. COURT CASES AND ARBITRATION

England & Wales: Disclosure by arbitrators of other appointments – Supreme Court to hear appeal in Halliburton v Chubb

In May 2018, we reported[1] on the Court of Appeal decision in *Halliburton Company v Chubb Bermuda Insurance Ltd*[2] in which the Court held that:

- the appearance of an arbitrator in overlapping appointments with a common party did not constitute apparent bias; and
- "as a matter of good practice and... of law", the arbitrator ought to have disclosed the existence of

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SENIOR ASSOCIATE

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his other appointments, but he should not be removed as a result of his failure to do so, which did not give rise to genuine concerns about his impartiality.

It has now been reported that the Supreme Court has agreed to hear an appeal of the case and that several pre-eminent arbitration associations plan to intervene. The interveners (expected to be the ICC International Court of Arbitration, LCIA and Chartered Institute of Arbitrators) will support Halliburton in arguing that the arbitrator in question ought to have revealed his involvement in overlapping appointments and that as a result, the award made in favour of Chubb ought to be overturned. Their concern is to ensure that ethical standards are seen to be maintained in arbitration.

Impartiality of arbitrators, and the appearance thereof, are crucial elements of arbitration. Nevertheless, it is a practical reality that in specialist fields such as Bermuda Form arbitration, there is a limited pool of arbitrators with the necessary qualification and expertise. It is to be hoped the Supreme Court will help prospective arbitrators by providing a clearer roadmap on the types of information that needs to be disclosed to the parties, and the consequences of failing to do so.

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Footnote

1 http://www.hfw.com/downloads/HFW-Insurance-Bulletin-May-2018-Edition-1.pdf

2 [2018] EWCA Civ 817

England & Wales: Sanctions for late filing of costs budgets are robustly upheld by the Court

In the case of *BMCE Bank International plc v Phoenix Commodities pvt Ltd & Anor*[1] (BMCE v Phoenix), the Court has provided a stark reminder to solicitors to comply with deadlines for the production of costs budgets.

The defendant's solicitors filed their costs budget two weeks after the deadline for doing so. At a CMC on 19 October 2018 the Honourable Mr Justice Bryan decided that the defendant should face the sanctions laid down by the CPR, i.e. that the defendant would *"be treated as having filed a budget comprising only of the applicable court fees"*. The effect of this is that the party in breach would be incapable of recovering its costs (save for court fees) from the other party even if it were to be successful at trial. The practical effect is a potentially very significant claim against the solicitor in question and their PI insurers

The *Denton v White* test

The judge applied the three stage test set out in *Denton v White* which provides guidance for situations where relief from sanctions is being sought. The *Denton v White* relief from sanctions test can be summarised as follows:

1. Was the failure to comply serious or significant?
2. Was there a good reason for the failure occurring?
3. In considering the application, the court must consider all of the circumstances of the case, including whether the case has been dealt with justly, efficiently and at a proportionate cost, in line with the overriding objective of the CPR.

Why the *Denton v White* test did not provide relief in *BMCE v Phoenix*

The judge held that the failure to file a cost budget on time was a serious and significant breach of the relevant court order. The breach was serious because the cost budget was *"filed two weeks late, in the context of a time period of 21 days"*. The lost time would ordinarily have been used to try and agree costs budgets and the late filing cost the parties the opportunity to do so. The breach was also significant - aside from cost implications, there were other serious ramifications of the late filing, including the inconvenience caused to the court and other court users.

The defendant's solicitor explained that the budget was filed late because he was on a long business trip abroad – as the judge put it, he *"took his eye off the ball"*. The defendant did not argue that this

was a good excuse, only that the defendant's solicitor made a genuine mistake and the late filing was not deliberate. The judge concluded that the fact it was unintentional did not excuse the breach– solicitors are taken to know the CPR rules and understand the consequences of breaching them.

In making his decision, the judge also considered the following circumstances:

- On realising their mistake, the defendant's solicitors did not make a timely application for relief from sanctions.
- Even if the other party does not expressly argue that a late filed costs budget should not be accepted, this does not mean relief should be granted – the parties' solicitors are to be taken to know the rules and consequences of breach.
- Despite the defendant solicitor having provided an undertaking that any costs flowing from the late-filing of the costs budget would be paid by them, the court did not think that the consequences of late filing could be fully remedied in costs. Undertakings cannot be seen as any *"form of trump card"*, and they do not *"outweigh all other factors"*.
- Court resources are scarce and therefore actions that waste court time, and affect other court users are important considerations and frowned upon by the court.
- The court wanted to send out a *"clear and consistent message that there should be compliance with rules, practice direction and orders"* of the court.

Lessons to be learned from *BMCE v Phoenix*

The practical points that should be taken away from BMCE v Phoenix are:

- Costs budgets should always be filed on time.
- If for any reason a budget is filed late, an application for relief from sanctions must be made promptly and ideally straight after the late cost budget has been filed.
- If an application for relief from sanctions cannot be made promptly, the court and the other party or parties should be given sufficient notice that an application will be made so it can be dealt with efficiently at the CMC.

Given the very significant consequences of breach, solicitors filing costs budgets late should notify their PI insurers immediately.

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Footnote

1 [2018] EWHC 3380 (Comm)

3. HFW PUBLICATIONS AND EVENTS

HFW named Law Firm of the Year at the Middle East Insurance Industry Awards 2018

We are proud to have been named Law Firm of the Year at the Middle East Insurance Industry Awards 2018. The Middle East Insurance Review said that the award recognises our "many achievements" over the past 12 months, adding that our team is "one of the largest in the region". We continued to expand our fast-growing Middle East offering in 2018, launching a specialist insurance practice in Riyadh and opening a new office in Abu Dhabi. We now have 20 partners and more than 50 lawyers – including 28 Arabic speakers – in five offices across the Middle East, making ours one of the largest practices of any international law firm in the region. Our global insurance and reinsurance practice provides a comprehensive range of dispute resolution, transactional and regulatory legal services to clients across the sector. To find out more about our Middle East insurance practice, speak to Partners Samuel Wakerley or John Barlow.

Andrew Bandurka admitted as Fellow of the Chartered Institute of Arbitrators

We are delighted to announce that HFW Partner Andrew Bandurka has been admitted as a Fellow of the Chartered Institute of Arbitrators. Many congratulations, Andrew!

HFW has over 550 lawyers working in offices across the Americas, Europe, the Middle East and Asia Pacific. For further information about our Insurance/reinsurance capabilities, please visit http://www.hfw.com/Insurance-Reinsurance-Sectors

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