Insurance/ Reinsurance

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INSURANCE BULLETIN

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1. Regulation and legislation

UK: PRA consultation on Solvency II: National Specific Templates

Last month, the Prudential Regulation Authority (PRA) issued a consultation paper which proposes changes to the file type and reporting format of National Specific Templates. It also presents a number of reporting clarifications and technical corrections relating to the accompanying NST LOG files.

The consultation paper is relevant to all UK Solvency II firms required to submit NSTs and to Lloyd's.

The current regime is set out in Policy Statement (PS) 2/15 (Solvency II: a new regime for insurers) which requires the templates to be published in Excel format.

The NSTs and accompanying LOG files are published on the Regulatory reporting for Solvency II firms page of the Bank of England website and are in addition to the Solvency II annual and quarterly reporting.

The PRA proposes the following:

- Reporting for financial year-end 2017 onwards whereby firms submit NSTs in standard XBRL (eXtensible Business Reporting Language) format.
- Transitional arrangements for financial year-end 2016 whereby firms submit NSTs in XBRL-enabled format or standard XBRL. To enable firms to submit in XBRL or XBRL-enabled Excel format, on 25 October 2016 the PRA published a modification by consent to enable firms with a financial year ending on or after 30 June 2016, but before 19 December 2016, to have time to implement the proposed changes to the reporting format.
- Updates to the NST LOG files to reflect changes in cell references, reporting clarifications and technical corrections.

The rationale behind the proposed changes is to standardise the delivery of supervisory data using international data standards for the reporting of financial risk and supervisory information. This is with a view to improving the data quality, consistency and transparency of information submitted to the PRA.

The PRA has invited feedback on these proposals. The consultation closes on Tuesday 6 December 2016. Any comments or enquiries should be addressed to CP37_16@bankofengland.co.uk.

A copy of the consultation paper can be found here: http://www.bankofengland.co.uk/pra/Documents/publications/cp/2016/cp3716.pdf.

For more information, please contact Ben Atkinson, Senior Associate, London, on +44 (0)20 7264 8238, or ben.atkinson@hfw.com, or your usual contact at HFW.

2. Court cases and arbitration

England and Wales: Exclude me please – Supreme Court gives new guidance on interpreting "debts and trading liabilities" exclusion in Solicitors' Minimum Terms and Conditions

Professional indemnity (PI) insurers will welcome the recent Supreme Court (the Court) decision in *Impact Funding Solutions Limited v AIG Europe Insurance Ltd*,[1] which considers the interpretation of the "debts and trading liabilities" exclusion in the SRA Minimum Terms and Conditions of Professional Indemnity Insurance (Minimum Terms).

The Minimum Terms regulate PI insurance required to be taken out by all solicitors. Clause 6 of the Minimum Terms provides that the insurance must not exclude or limit the liability of the PI insurer except in very specific circumstances, one of which is debts and trading liabilities. These are essentially where a solicitors' firm enters into a contract for the supply of goods or services in relation to its business. This exclusion exists because the primary purpose of the Minimum Terms is to protect clients of solicitors, not to protect the business of the solicitors' firm itself.

This case concerned a solicitors' firm called Barrington Support Services Ltd (Barrington), who represented clients in various industrial deafness claims. AIG provided PI insurance to Barrington. In order to manage its cash flow, Barrington entered into agreements (the Agreements) in 2007 and 2008

1 [2016] UKSC 57

with Impact Funding Solutions Ltd (Impact). The Agreements provided that Impact would enter into loan agreements with Barrington's clients in order to provide Barrington with the funds necessary to pay disbursements in the conduct of its clients' litigation and "after the event" insurance premia. A market for funders such as Impact has arisen recently because of the significant reduction in state-funded legal aid for civil cases.

Barrington negligently breached its professional duties to its clients by failing to investigate the merits of its clients' claims and misapplying the funds advanced by Impact. In doing so Barrington had also breached the terms of the Agreements. Consequently, Barrington failed to recover significant sums from their clients' opponents in the various claims. Impact pursued Barrington for the outstanding sums and obtained a judgment for just over £580,000.

As a result of Barrington's subsequent insolvency, Impact brought a claim against AIG, as Barrington's PI insurers, under the Third Parties' (Rights Against Insurers) Act 1930.[2] Barrington's policy with AIG contained a so-called *"debts and trading liabilities"* exclusion for any claim or loss *"arising out of, based upon, or attributable to any: (i) trading or personal debt incurred by an Insured, (ii) breach by any Insured of terms of any contract or arrangement for the supply to, or use by, any Insured of goods or services in the course of providing legal services"*. This provision was broadly in line with Clause 6 of the 2009 version of the Minimum Terms.[3] The Court had to decide whether the Agreements fell within the exclusion, in which case AIG would have no liability to Impact. At

The Supreme Court stated that exclusions should not always be construed narrowly. Instead, the exclusion had to be read in the context of the contract as a whole and with regard to its purpose. The doctrine that exemption clauses should be construed narrowly had no application in this case.

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first instance, AIG successfully argued that the Agreements fell within the exclusion but this was overruled in the Court of Appeal.

Upon appeal by AIG, by a majority of four to one,[4] the Supreme Court ruled in AIG's favour and concluded that the Agreements fell within the exclusion. The Court stated that the exclusion had to be construed against its factual matrix and in the context of the whole insurance contract. The exclusion also had to be construed in a manner consistent with the principal purpose of the Minimum Terms, which is to protect the lay public and also third parties such as Impact. In this case, however, the Court ruled that Impact did not fall within any category which would grant it special protection. Although Impact's loans were ultimately made to Barrington's clients rather than Barrington itself, the Court ruled that the Agreements were nevertheless a service that Impact provided to Barrington. This was because:

- Barrington contracted as principal, not as agent for its clients.
- Barrington derived a benefit from the funding of disbursements because without the Agreements, Barrington may have funded the disbursements themselves at their own risk if their clients could not afford to pay them.
- The Agreements were part of a wider arrangement by which Barrington was able to take up claims which its clients could not otherwise afford, which allowed Barrington to earn fees.
- Barrington paid an administration fee and undertook repayment obligations under the Agreements.

The Supreme Court stated that exclusions should not always be construed narrowly. Instead, the exclusion had to be read in the context of the contract as a whole and with regard to its purpose. The doctrine

2 The claim would now have to be brought under the Third Parties' (Rights against Insurers) Act 2010, which came into force on 1 August 2016.

3 The 2009 Minimum Terms, which were considered in this case, have now been replaced by the 2013 Minimum Terms, but this provision is virtually unchanged.

4 By Lord Toulson, Lord Mance, Lord Sumption and Lord Hodge, with Lord Carnwath dissenting.

that exemption clauses should be construed narrowly had no application in this case. The Court reiterated that a term would be implied into a contract only if it were necessary to give the contract business efficacy or was so obvious that it went without saying. The Court considered the exclusion and held that there was no basis for limiting its scope.

This decision is highly relevant for all PI insurers and provides much needed clarification on the interpretation of the debts and trading liabilities exclusion clause in the Minimum Terms. It is clear that liabilities to non-clients arising from a business model such as in this case involving funders, can be validly excluded from the Minimum Terms. The decision may also have a wider impact not only on solicitors' PI insurance, but on all PI insurance which contains similar wordings. The effect of the judgment is that litigation funders will find that any claims against solicitors will be treated as uninsured losses.

The judgment can be read in full here. A video of the Supreme Court's morning session is available here and the afternoon session is available here.

For more information, please contact Simon Banner, Associate, London, on +44 (0)20 72648289, or simon.banner@hfw.com, or your usual contact at HFW.

3. Market developments

UK: BIBA issues letter setting out Autumn Statement demands

The British Insurance Brokers' Association (BIBA) has issued a letter in advance of November's Autumn Statement, calling upon the Chancellor of the Exchequer to take account of a number of issues that affect brokers and their customers, including:

- Recent rises in Insurance Premium Tax (IPT).
- Flood defences.
- Insurance fraud.
- Regulation as a barrier to innovation.
- Provision of financial advice.
- The proposed exit of the United Kingdom from the European Union.

In its letter, BIBA also asked the Chancellor to take account of various points raised in relation to autonomous vehicles, apprenticeships, and a number of other matters relating to EU Exit.

Further details of the demands set out in BIBA's letter can be found here: https://www.biba.org.uk/press-releases/biba-autumn-statement-demands/.

For more information, please contact Ben Atkinson, Senior Associate, London, on +44 (0)20 7264 8238, or ben.atkinson@hfw.com, or your usual contact at HFW.

4. HFW publications and events

HFW maintain high rankings in Chambers UK 2017

HFW continue to be highly ranked by Chambers UK. In the 2017 rankings, HFW are listed in Band 2 for Insurance: contentious claims and Reinsurance and Band 4 for Insurance: Non-Contentious.

In the Contentious section, the team was praised as *"strong and effective"* and commended for being *"co-operative, approachable, and [listening] well to [clients'] input."* Andrew Bandurka (Band 2), Chris Cardona (Band 3), Paul Wordley (Band 3), Peter Schwartz (Band 5) and Chris Foster (Band 2 and 3) were listed as notable practitioners. In the Non-Contentious section, Richard Spiller (Band 2) received recognition as a notable practitioner, with the team as a whole described as *"excellent"* and *"very knowledgeable."*

For the full details, click here.

HFW attend Dubai Rendezvous 2016

On Monday 7 and Tuesday 8 November, Partner John Barlow and Senior Associate Tanya Janfada attended the Dubai Rendezvous 2016. The theme of this year's event was "Reinsurance as the Game Changer". The Rendezvous considered what reinsurance can do for the market to ensure sustainable profitability and greater professionalism in the insurance industry.

HFW present on Iran sanctions relief at DIFC Insurance Association Event

On Wednesday 9 November, HFW Partner Daniel Martin gave a presentation on Iran sanctions relief at a conference organised by the Dubai International Financial Centre (DIFC) Insurance Association.

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