Insurance/
Reinsurance

14 January 2015

INSURANCE BULLETIN

Happy New Year, and welcome to HFW's first Insurance Bulletin of 2015. This issue contains the usual summary of the key insurance and reinsurance regulatory announcements, market developments, court cases and legislative changes of the week, together with a summary of some developments that occurred over the festive period.

In this week's Bulletin:

Should you require any further information or assistance on any of the issues dealt with here, please do not hesitate to contact any of the contributors to this Bulletin, or your usual contact at HFW.

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1. Regulation and legislation

1.1. New rules on termination of insurance policies by the insured (France)

An important law dated 17 March 2014 (Loi Hamon) amended French law regarding the termination of insurance policies by the insured (physical persons for their personal needs only). Such insureds are now allowed to terminate their insurance policy at any time, once the policy has been in existence for one year (Article L113-15-2 of French Insurance Code). In other words, the insured is no longer required to wait for the renewal of his policy to terminate it. The government hopes that such a measure will facilitate competition for the benefit of consumers. The scope of this right is nevertheless relatively limited: it concerns only car and home insurance policies.

By Decree dated 26 December 2014, the government decided that these new rules would apply to policies concluded as from 1 January 2015; for pre-existing policies, the new rules apply as from the date of their next renewal.

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2. Market developments

2.1. Mexico opens its doors to private energy investment enhancing demand for specialist (re)insurance (Mexico)

Mexico's recent government liberalisation has fuelled predictions of a transformation in its energy sector, leading to increased demand for specialist (re)insurance. According to Lloyd's Mexico Desk Manager, Gabriel Anguiano, particular growth is expected in offshore energy - where the majority of the country's potential oil reserves are located. Recent years have seen a decline in production in shallow waters meaning that the industry will have to venture into deep waters. Observers believe this may have prompted the energy reform, ending the monopoly of the state-owned oil company Pemex. This allows Pemex to enter into joint ventures with private international or Mexican companies and gain access to technologies such as deep water drilling and shale gas extraction and consequently improve future production.

The new laws mean foreign and private domestic energy companies will be allowed to explore, produce and refine oil for the first time since 1938. International companies such as Japan's Mitsui and US-based Chevron Corp, have already indicated their interest in investing, whilst start-up exploration firm Sierra Oil & Gas has secured over US$500 million of commitments from three private equity firms.

Mexico's natural resources combined with global energy demand present considerable opportunities – it is believed that Mexico has the sixth largest shale gas reserves in the world and is the seventh largest oil producer.

Michael Gunther, Energy & Infrastructure Practice Leader, Mexico for Marsh, highlights that, although international insurance and reinsurance has covered Mexican energy risks for years, the introduction of private companies and joint ventures will offer new risk transfer requirements.

It is predicted that the international (re)insurance needs of the energy sector will expand extensively with the development of projects increasing in size and complexity. The Chief Executive of LatAm reinsurer Patris Re, Ingrid Carlou, says *"facultative covers are expected to be in high demand as technology adoption kick starts the investment dynamics and there will be a huge spill over to property and personal lines. New deep water exploration and more sophisticated distribution technologies will... make their way to the international reinsurance market."*

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Senior Vice President, Facultative Reinsurance for Mexico at Guy Carpenter believes that providing the markets with accurate and appropriate information for the assessment of risk, *"will likely increase the premium volume of our market"*; he predicts the insurance market in general stands to benefit.

We will look out for any future developments in this area.

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3. Court cases and arbitration

3.1. Insurer's onus in proving fraudulent non-disclosure (Australia)

The recent NSW Supreme Court case of *Poole v Chubb Insurance Company*[1] is illustrative of the difficulties faced by insurers in proving fraudulent non-disclosure.

Mr Poole was a director of Doyles Creek Mining P/L (DCM). DCM was granted a mining exploration license by the former NSW Minister of Mineral Resources. Mr Poole was subsequently investigated by the NSW Independent Commission Against Corruption (ICAC) regarding the granting of this license.

Mr Poole sought indemnity for his legal costs relating to the ICAC inquiry under a directors and officers liability policy issued by Chubb. Chubb sought to avoid the policy due to fraudulent non-disclosure (pursuant to s28(2) of the Insurance Contracts Act). Chubb's insurance proposal form required disclosure of any facts or circumstances known that might afford valid grounds for a future claim. Mr Poole did not make any disclosure. However, Chubb alleged that Mr Poole knew:

a. That DCM's submissions to the Minister (the Submissions) in applying for the mining license contained false or misleading statements.

b. Public controversy regarding the granting of the license had emerged.

c. These facts indicated that a public inquiry into Mr Poole's conduct was possible.

The Court disagreed and ordered Chubb to indemnify. In doing so, the

While the Court found the Submissions did include some misleading statements, Chubb could not prove that Mr Poole knew these statements were misleading at the time.

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Court noted that Chubb bore the onus of proof, and the test for fraud required that the Court have an *"actual persuasion of the mind"* that, on the balance of probabilities, Mr Poole subjectively knew that the information provided to Chubb was false. While the Court found the Submissions did include some misleading statements, Chubb could not prove that Mr Poole knew these statements were misleading at the time. Nor could Mr Poole (or any reasonable person) have known at the time that media reports into the granting of the license would lead to a public inquiry.

The full text of this decision can be found at: http://www.caselaw.nsw.gov.au/decision/54a640003004de94513dcace

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1 [2014] NSWCA 1832

3.2. Conflict of laws: competing jurisdiction clauses (England and Wales)

In *AmTrust Europe Ltd* (A) *v Trust Risk Group SpA* (T), (A) applied for a mandatory injunction against (T) requiring payment of approximately €32 million into a bank account, an amount which (A) claimed (T) had misappropriated. (T) denied misappropriating money and challenged the Court's jurisdiction, arguing that the dispute between the parties should be heard in an Italian arbitration.

In determining the above, Blair J had to consider competing jurisdiction and arbitration clauses in different agreements between the parties. In 2010, (A) and (T) had entered into a Terms of Business Agreement (TOBA) which was subject to English law and jurisdiction. In 2011, the parties and (A)'s parent company entered into a Framework Agreement which included the TOBA as a schedule. The Framework Agreement contained an Italian law and jurisdiction clause.

Blair J noted that where there are competing law and jurisdiction clauses, the "one-stop" presumption set out by Lord Hoffman (obiter) in *Fiona Trust & Holding Corp v Privalov & ors* would carry considerable weight. That is, that unless there was some rational reason for disputes to be determined by different tribunals, it was more likely that both parties intended one set of jurisdiction and dispute resolution provisions to govern the agreement between them.

Blair J accepted (A)'s claim that the two agreements were dealing with different subject matters: the TOBA dealt with premium whereas the Framework Agreement dealt with exclusivity. As such different choices of law and jurisdiction clauses might be expected. Further, he distinguished the case from the *Fiona Trust* "one-stop" presumption because the agreements had been entered into at different times. He decided that the arbitration clause applied only to the Framework Agreement and that the English court had jurisdiction in accordance with the TOBA. (T) has appealed the decision.

The case is a useful guide to the principles the English court will apply in determining jurisdiction where there are competing law and jurisdiction clauses.

The full judgment can be found here: http://www.bailii.org/ew/cases/EWHC/Comm/2014/4169.html

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JONATHAN GOULDING, ASSOCIATE

3.3. Allianz Vie fined €50 million (France)

By decision of 19 December 2014, the French Prudential Control Authority ("Autorité de contrôle prudentiel et de resolution", ACPR) imposed a heavy fine on Allianz Vie for not having set up an effective system to find beneficiaries of unclaimed life insurance policies. The decision is mainly based on the finding that Allianz Vie had not, until recently, organised itself in order to properly implement the law of 17 December 2007 (the law) which imposes a duty on insurance companies to search for beneficiaries of life insurance contracts who have not declared themselves after the death of the insured.

Allianz Vie has criticised the decision which, according to the insurer, does not take into account the substantial financial and human efforts which have been made to implement the law.

Before Allianz Vie, two other insurers, BNP Paribas Cardiff and CNP Assurances, had already been sentenced in 2014 on the same grounds (with fines of €10 million and €40 million respectively).

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4. HFW publications

4.1. Latin America: set for the long haul (Latin America)

An analysis by HFW's Geoffrey Conlin of the outlook of the Latin American insurance market for 2015 was recently published in Insurance Day. In summary, he considers that the market remains attractive for insurers that intend to stay for the long term.

A copy of Geoffrey's article can be found here: https://www.insuranceday.com/news_analysis/special_reports/latin-america-set-for-the-long-haul.htm (an Insurance Day subscription will be required to view the article in full).

For more information, please contact Geoffrey Conlin, Senior Associate, on +55 (11) 3179 2902, or geoffrey.conlin@hfw.com, or your usual contact at HFW.

4.2. The UK fight against corruption (UK)

HFW has published a Briefing on three important developments in the UK's fight against corruption: first, the announcement of a UK Anti-corruption Plan; secondly, successful prosecutions under the UK Bribery Act and, thirdly, new disclosure obligations in the extractive and logging industries.

A copy of the Briefing can be found here: http://www.hfw.com/The-UK-fight-against-corruption-December-2014

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4.3. EU sanctions against Russia and Iran (EU)

Shortly after the final Insurance Bulletin of 2014, HFW published a Briefing on amendments to the EU's sanctions against Russia and the status of the sanctions against Iran.

A copy of the Briefing can be found here: http://www.hfw.com/EU-sanctions-against-Russia-and-Iran-December-2014

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5. News

5.1. HFW strengthens employment capability

HFW is delighted to announce the recruitment of Neil Adams, an employment law Partner, who joined the firm's London office on 5 January 2015.

Neil advises on all aspects of employment counselling and complex litigation for clients across a range of sectors, including financial services, commodities and technology. He has significant experience of advising on both individual and team moves, breach of contract and duty, the enforcement of restrictive covenants and board disputes. His work involves advice in relation to M&A and restructuring, and litigation in the High Court and employment tribunals where he has successfully represented clients on significant breach of contract, unfair dismissal and discrimination claims.

The full press release can be found here: http://www.hfw.com/HFW-strengthens-employment-capability-Jan-2015

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