Insurance/ Reinsurance

14 May 2015

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.

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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

UK: Chartered Insurance Institute (CII) launches Best Practice Guide on section 29(3) Data Protection Act requests

The CII has launched a Best Practice Guide relating to requests made under section 29(3) of the Data Protection Act. Section 29(3) allows entities to share data with a third party to prevent and detect financial crime within the insurance industry. The Best Practice Guide sets out industry best practice for making and responding to requests made under section 29(3). Issuance of the guidance follows two years of work with the Insurance Fraud Bureau (IFB), and the IFB will administer the guidelines going forward.

Alongside the Best Practice Guide, the CII has issued a press release which sets out certain things which entities agreeing to embrace the model must do. In particular, entities must ensure that requests are made by employees only where necessary and appropriate, ensure that due consideration is given to requests received, provide a detailed response to the requestor in circumstances where the entity is unwilling to disclose personal data, ensure that staff are appropriately trained in respect of section 29(3), and ensure that a representative attends and participates regular forums to be held by the IFB.

A copy of the Best Practice Guide can be found here: https://www.insurancefraudbureau.org/media/1091/best-practice-guidance-version-5-0.pdf.

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CIARA JACKSON, ASSOCIATE

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2. Market developments

UK: Completion of Hyperion/RK Harrison deal

Following receipt of regulatory and legal approvals, the acquisition of RK Harrison by Hyperion completed on 30 April 2015. The result of the acquisition is the formation of the world's largest independent insurance broker.

For more information, please contact Ciara Jackson, Associate, on +44 (0)20 7264 8423, or ciara.jackson@hfw.com, or your usual contact at HFW.

Japan: Japanese government plans to require companies bidding for projects related to the 2020 Tokyo Olympics and Paralympics to have cyber insurance

It has recently been reported that the Japanese government intends to require private-sector companies to have cyber insurance when they bid for projects related to the 2020 Tokyo Olympics and Paralympics.

There are also reported plans by the Japanese government to require companies and other organisations (involved in critical infrastructure e.g. information and communications, financial services and electric power) to report any serious cyber attack to the government – currently the reporting is only voluntary. This follows the Cyber Security Basic Act which was passed in Japan in November 2014 that required the Japanese national and local governments to take measures to boost cyber security.

There are also reported plans by the Japanese government to require companies and other organisations (involved in critical infrastructure e.g. information and communications, financial services and electric power) to report any serious cyber attack to the government – currently the reporting is only voluntary.

THOMAS COOMBS, ASSOCIATE

A local article can be found here: http://the-japan-news.com/news/article/0002123478.

In regard to cyber insurance in Japan, HFW has experience drafting the first ever cyber insurance policy for the Japanese online security houses.

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3. Court cases and arbitration

Australia: An insurer's obligation to inform insureds of their duty of disclosure

In *O'Farrell v Allianz Australia Insurance Ltd*[1], Australia's New South Wales Court of Appeal decided that an insurer could not, under a motor vehicle policy, refuse to cover an insured for the insured's stolen motor vehicle on the basis that the insured did not comply with his duty of disclosure under Australia's Insurance Contracts Act 1984 (by not disclosing to the insurer two sets of convictions for offences arising out of brawls).

Section 21 of Australia's Insurance Contracts Act 1984 (Cth) (Act) provides that an insured has a duty of disclosure, as follows:

"an insured has a duty to disclose to the insurer, before the relevant contract of insurance is entered into, every matter that is known to the insured, being a matter that —

(a) the insured knows to be a matter relevant to the decision of the insurer whether to accept the risk and, if so, on what terms; or

(b) a reasonable person in the circumstances could be expected to know to be a matter so relevant."

The Act also provides, however, that, with respect to *"eligible contracts of insurance"* (including motor vehicle policies):

- An insurer is taken to have waived the requirement to comply with the duty of disclosure unless, amongst other things, it requests the insured to answer one or more specific questions relevant to its decision whether or not to accept the risk and, if so, on what terms (section 21A).
- The insurer must clearly inform the insured in writing, before the contract of insurance is entered into, of the general nature and effect of this duty of disclosure (section 22(1)).
- If an insurer does not comply with section 22(1), the insurer may not exercise a right in respect of a failure to comply with the duty of disclosure, unless that failure was fraudulent (section 22(3)).

In this case, there was no allegation that the insured had been fraudulent. The insured had signed a document that the insurer provided to him that stated, amongst other things, that he declared that he had read *"the information concerning the Duty of Disclosure"* and that he realised that if he had *"not complied with [his] Duty of Disclosure, [his] claim may not be met"*. The insured also signed a "Motor Insurance Proposal", which contained a number of "Important Notices", including a paragraph headed "Your Duty of Disclosure".

Notwithstanding these circumstances, the Court decided that it was open to the lower administrative tribunal to find that the insurer could not rely upon a breach of the insured's duty of disclosure to refuse cover because the insurer did not clearly inform the insured of the matters identified in section 22(1) and section 21A of the Act before entering into the contract. This was because:

1 [2015] NSWCA 48.

...the Court decided that it was open to the lower administrative tribunal to find that the insurer could not rely upon a breach of the insured's duty of disclosure to refuse cover because the insurer did not clearly inform the insured of the matters identified in section 22(1) and section 21A of the Act before entering into the contract.

ELIZABETH WROE, SPECIAL COUNSEL

- From the Court's judgment, it appears that the insurer's broker did not specifically ask the insured about his criminal convictions when the insured purchased the policy.
- The insurer did not direct the insured to the language on the first page of the "Motor Insurance Proposal" at the time he was asked to sign the final page, or at any previous point in time.

The Court further observed that it is doubtful whether, unless expressly so informed, reasonable car owners would treat criminal convictions arising out of a brawl as relevant to the risk insured under a comprehensive motor vehicle policy.

This case is a good example of the extent of an insurer's obligation to inform insureds of their duty of disclosure and the importance of asking all potentially relevant questions and drawing the insured's attention to all relevant information relating to that obligation.

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England and Wales: Avoiding confusion with ToBAs – *AmTrust Europe Limited v Trust Risk Group SpA*[1]

This case demonstrates the problems that can arise when multiple agreements govern the relationship between insurer and broker. It concerns an appeal by a broker, Trust Risk Group SpA (TRG), on whether a Terms of Business Agreement (ToBA) with an insurer, AmTrust Europe Limited (ATEL), and the jurisdiction clause applied to a dispute between them.

Background

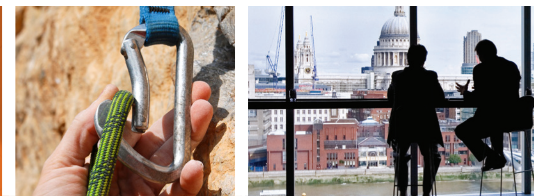
TRG agreed a non-exclusive ToBA with ATEL that dealt with premiums and payment of commission and, six months later, a Framework Agreement (appending the ToBA) for an exclusive relationship for placement of medical malpractice insurance in Italy. A dispute arose when TRG withheld premium due to ATEL, as TRG claimed it was due a large sum from ATEL for advance commission. ATEL alleged by doing so TRG had breached the ToBA governed by an English law and jurisdiction clause. TRG argued the Framework Agreement superseded the ToBA, and its Italian law and arbitration provisions applied instead. ATEL successfully claimed relief in the High Court and it ruled ATEL had a good arguable case and the English Court had jurisdiction. TRG then appealed on the correct construction of the Framework Agreement to determine jurisdiction.

The critical question that fell to the Court of Appeal to decide was whether there was one overarching agreement, or two separate agreements.

Fiona Trust & Holding Corporation v Primalov[2]

In the analysis Beatson LJ considered the "one-stop"/"one-jurisdiction" principle in Fiona Trust in the House of Lords that when an arbitration clause is included in an agreement it is presumed the parties intended that any dispute arising out of their relationship will be decided by the same tribunal. However the presumption had limited application when there were two or more different express choices of jurisdiction and/or law in different agreements, and instead the analysis

1 [2015] EWCA Civ 437.
2 [2007] UKHL 40.



required a careful and commercially minded construction of the agreements providing for resolution of disputes. Beatson LJ commented that where contracts are *"not part of one package"*, in this case separated by six months, it was easier to conclude the parties chose to have different jurisdictions deal with different aspects of the relationship.

ATEL successfully claimed relief in the High Court and it ruled ATEL had a good arguable case and the English Court had jurisdiction. TRG then appealed on the correct construction of the Framework Agreement to determine jurisdiction.

THOMAS COOMBS, ASSOCIATE

Decision

The Court of Appeal held the two agreements were separate, and that the ToBA's English law and jurisdiction clause applied to the dispute.

Beatson LJ opined that as the Framework Agreement was not drafted well there was more scope to resort to the apparent commercial purpose, than a detailed linguistic analysis, and the Court had to *"discern the parties' intentions, objectively speaking, from the words used, in the relevant context and against the factual background in which the documents were created"*. It was observed that the business arising under the ToBA was a separate and distinct stream of business and TRG's construction would have allowed the Framework Agreement to substantially change the foundation of the parties' relationship to business pre-dating it. Beatson LJ did not prefer TRG's "radical" interpretation, and his analysis of the wording concluded that it would be inconsistent not to interpret the ToBA as a separate agreement dealing with different aspects of the parties' relationship.

This case demonstrates the importance of ensuring parties to a ToBA to use clear wording to detail its scope and application, in particular if it is appended to, or included in a package with, other closely connected contracts. It also highlights the benefit of ensuring, if possible, that dispute resolution clauses included in closely connected contracts are the same.

The judgment can be found here: http://www.bailii.org/ew/cases/EWCA/Civ/2015/437.html.

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hfw 4. HFW events

UK: HFW attend the IRLA Congress

HFW Partners Andrew Bandurka and Costas Frangeskides attended the Insurance & Reinsurance Legacy Association (IRLA) Congress in Brighton on 6-8 May 2015.

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