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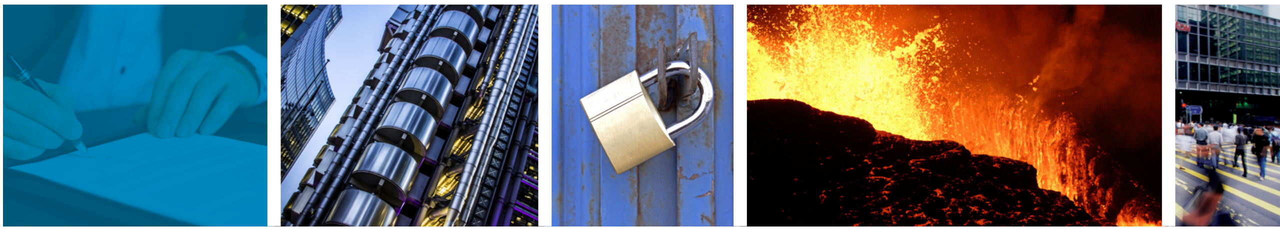
INSURANCE BULLETIN



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: Prudential Regulation Authority (**PRA**) update on legal entity identifiers for insurance firms, by Ben Atkinson, Associate
   Worldwide: Consultation on regulation and supervision of microtakaful, by Ben Atkinson, Associate

2. **Market developments**
   Worldwide: Aon report investigates the reasons behind a remarkably low 1% of captive owners funding cyber risk through their captives, by Josianne El Antoury, Associate

3. **Court cases and arbitration**
   England and Wales: *PA(GI) Ltd v GICL 2013 Limited* – to whom do liabilities for historical wrongdoings transfer under a Part VII transfer of insurance business? by Ruth Hite, Senior Associate
   Australia: Construction of major shareholder exclusion clause - *Oz Minerals Holdings Pty Ltd v AIG Australia Ltd*, by Hugh Gyles, Associate
   England and Wales: Court of Appeal considers when an insured and its liability insurer may be joined in the same proceedings under the 2001 Brussels Regulation, by Josianne El Antoury, Associate
   England and Wales: Notification clause does not require "rolling assessment" of claim likelihood, by Ben Atkinson, Associate

4. **HFW publications and events**

5. **News**

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: Prudential Regulation Authority update on legal entity identifiers for insurance firms

The Prudential Regulation Authority (PRA) has launched a new Solvency II webpage on legal entity identifiers (LEIs).

On the webpage, the PRA confirms that it intends to comply with the guidelines published by the European Insurance and Occupational Pensions Authority (**EIOPA**) in October 2014, in which Practical Law[1] recommends that LEI codes are used as unique identification codes for all institutions under the PRA's supervision.

LEI codes are allocated and maintained in the UK by the London Stock Exchange. The PRA webpage states that all firms within the scope of the Solvency II Directive (2009/138/EC) should have requested a LEI code by 30 June 2015. All other insurers should request a LEI code by 30 June 2016.

The PRA also requests that all entities within a group obtain a LEI code, including holding and dormant companies. Whilst acknowledging that this may prove burdensome for some firms, the PRA believes the advantages of using LEI codes for regulatory reporting across borders and the financial industry outweigh this. In the event that entities within a firm's group are unable to obtain LEI codes, the PRA suggests firms follow EIOPA's instructions in the guidelines to try to resolve this.

The PRA requests that all firms notify their usual supervisory contact to confirm that a LEI code has been requested, as appropriate.

The PRA's webpage on LEIs is http://www.bankofengland.co.uk/pra/Pages/solvency2/technical.aspx.

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

Worldwide: Consultation on regulation and supervision of microtakaful

The International Association of Insurance Supervisors (IAIS) and the Islamic Financial Services Board (IFSB) have published a consultation paper on the regulation and supervision of microtakaful.

Microtakaful is a Sharia-compliant mechanism for insuring certain losses, which is specifically aimed at those who are not eligible for participation in general takaful arrangements, due to their low income and/or other factors for example medical history or hazardous occupation.

The paper aims to provide an overview of the issues relating to microtakaful and its role in enhancing financial inclusion. Microtakaful is presented as having the potential to promote access to insurance in Islamic communities and regions.

The paper:

- Identifies the current practices and models used for offering microtakaful products, and the challenges and potential issues arising from microtakaful transactions.
- Reviews the current regulatory framework for the microtakaful sector in various jurisdictions and suggest initiatives to strengthen the framework and therefore enhance financial inclusion.
- Provides guidance to supervisors in creating an enabling environment for the overall development and growth of the microtakaful sector.

Microtakaful is presented as having the potential to promote access to insurance in Islamic communities and regions.

BEN ATKINSON, ASSOCIATE

A copy of the consultation paper can be found at http://iaisweb.org/index.cfm?event=getPage&nodeId=50177. The consultation closes for comments on 6 August 2015.

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

1 www.practicallaw.com/4-58



2. Market developments

Worldwide: Aon report investigates the reasons behind a remarkably low 1% of captive owners funding cyber risk through their captives

In a recent report, Aon has examined cyber liability cover as well as the approaches being taken and adopted to the increasing risk of cyber attacks and events as well as general risk management approaches concerning cyber risk.

The report suggests that the reluctance by owners to provide some form of cyber risk insurance through their captives derives from the difficulties associated with the estimation of cyber risk exposure and quantification of the consequences of cyber events. Equally, there appears to be a reluctance of organisations to purchase cyber insurance from the insurance market for the same reasons. This is illustrated in the large variance of policy limits in cyber insurance taken up which the report suggests ranges between US$50,000 per occurrence and US$50 million per occurrence. Furthermore, the report highlights that almost all captives writing cyber insurance are issuing standard policy wordings as opposed to bespoke wordings to meet a specific organisation's exposure.

The US healthcare industry forms the majority of the 1% of those captives writing cyber insurance. It is envisaged that proposed EU legislation which is focused on empowering national data commissioners by providing them with powers to fine companies who violate EU data rules up to 5% of global annual turnover, will spark interest for EU captives in the cyber risk market. In addition, Solvency II promotes the writing of additional insurance covers which it is considered will also prompt interest in writing cyber insurance.

The report highlights that the cyber reinsurance market, accessible through a captive, currently offers significantly greater capacity than the primary insurance market and is particularly relevant for the catastrophe type exposures.

The report also recommends some key first steps to assessing a company's cyber exposure and offers some guidance for captives in responding to cyber risk insurance challenges. The report can be found at http://www.aon.com/attachments/risk-services/cyber-captives-benchmarking-report.pdf.

For more information, please contact Josianne El Antoury, Associate, on +971 4 423 0555, or josianne.elantoury@hfw.com, or your usual contact at HFW.

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JOSIANNE EL ANTOURY, ASSOCIATE

3. Court cases and arbitration

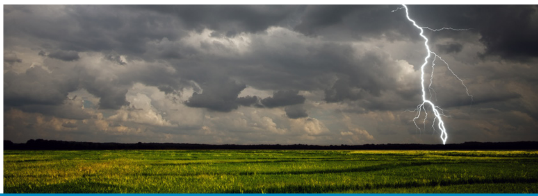
England and Wales: *PA(GI) Limited v GICL 2013 Limited*[1] – to whom do liabilities for historical wrongdoings transfer under a Part VII transfer of insurance business?

The recent decision by the High Court in *PA(GI) v GICL 2013 Limited and Cigna insurance Services (Europe) Limited* underlines the importance of identifying and dealing with insurance business liabilities in an insurance business transfer scheme and, crucially, ensuring that the scheme drafting adequately reflects the parties' intentions.

The case involved a dispute over whether liabilities for PPI mis-selling had been effectively transferred from PAGI to Groupama under the terms of a Part VII insurance business transfer scheme (**scheme**) sanctioned by the Court in 2006. The Scheme provided that "Transferred Liabilities" means *"all liabilities of the Transferor… under or attaching to the Transferred Policies"*. Cigna was made a party to the application because both PAGI and Groupama have provisional claims to be indemnified by Cigna in respect of any claims made against them for mis-selling. The court was not concerned with the detail of these indemnities but their existence was a material factor to be taken into account in the construction of the terms of the scheme.

Although PAGI accepted that any fine by the Financial Conduct Authority (**FCA**) for PPI mis-selling relating to the transferred policies was not included in the definition of "Transferred Liabilities", PAGI argued that "under or attaching to" included liabilities arising from Financial Ombudsman Service (**FOS**)

1 [2015] EWHC 1556 (Ch)

decisions in relation to such PPI mis-selling.

The court disagreed with PAGI and decided that the FOS liabilities did not arise "under" the transferred policies and that the natural interpretation of the phrase *"attaching to the Transferred Policies"* did not capture the FOS liabilities either. It concluded that this decision was aligned with the *"overall purpose of the 2006 scheme and business common sense"*. There was no commercial imperative that meant the court should adopt an unnatural interpretation of the scheme and it was "*inherently unlikely that if the parties did have an intention to transfer liability for mis-selling claims to Groupama, they would have kept quiet about it*". Therefore, the insurer responsible for mis-selling claims before the FOS was held to be PAGI and not Groupama.

The message is clear: the scheme document needs to spell out in express terms how the parties wish to deal with liabilities. These days, it is much more common for scheme documents to use a wider definition of "Transferred Liabilities" as meaning "liabilities relating to the Transferred Business" or similar which, as Cigna submitted, would have been wide enough to transfer the FOS liabilities. However, it is nonetheless incumbent upon the parties to ensure that the terms and definitions used are appropriate for the particular circumstances of the scheme. The UK regulators are, of course, sensitive to these issues as well, particularly given the potential risks and impact on policyholders.

Whether the parties to a new scheme intend liabilities to remain with the transferor or transfer to the transferee, they will need to ensure that the scheme is explicit on the matter, the position is clear to all of those affected and that the regulators and courts are satisfied that policyholders (including former policyholders and those whose policies are not transferring) are not unfairly disadvantaged by such approach to such an extent that the scheme should not go ahead. If there is a real possibility that policyholders might be adversely affected by this (for example, where there is any doubt about the transferor having sufficient resources to compensate former policyholders or where the potential burden of compensation impacts the security of the existing policyholders of the transferee), the risk of regulatory objection or a refusal by the court to sanction the scheme rises significantly. As well as ensuring that the drafting reflects the intentions of the parties, a robust communications strategy and a reasoned justification for the chosen strategy would be crucial in order to keep the transaction on track.

But perhaps the real lesson from this dispute is the one illustrated by the position of Ageas Insurance Ltd, which was not formally a party to the proceedings but agreed to be bound by the court's decision.

The message is clear: the scheme document needs to spell out in express terms how the parties wish to deal with liabilities.

RUTH HITE, SENIOR ASSOCIATE

In 2013, Groupama transferred the PAGI business by way of a further Part VII transfer to Ageas. It is not clear from the PAGI judgment how far the 2013 Ageas Part VII scheme mirrored the 2006 Groupama scheme and/or whether Ageas also obtained an indemnity from Cigna in relation to PPI mis-selling. In any event, we suspect that Ageas is pleased with the outcome in this case as it means it is not exposed to the PPI mis-selling liabilities in question and there is no need for Ageas to review the terms of the 2013 scheme. Ageas's position demonstrates the importance of conducting proper due diligence when acquiring a portfolio of insurance business, particularly where that business is already subject to an insurance business transfer scheme.

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Australia: Construction of major shareholder exclusion clause – *Oz Minerals Holdings Pty Ltd v AIG Australia Ltd*

The recent Victorian Supreme Court decision of *Oz Minerals Holdings Pty Ltd v AIG Australia Ltd*[1] highlights the importance for both insurers and insureds to consider carefully the scope of proposed exclusion clauses when their insurance policies are being negotiated and agreed. This decision reaffirms that exclusion clauses are to be construed objectively, according to their natural and ordinary meaning and with regard to the nature and commercial objects of the contract, but without straining to find ambiguity in the words used, if the meaning of those words is clear.

1 [2015] VSC 185

Background

The dispute followed a court approved scheme of arrangement on 20 June 2008 and the merger of two companies which became Oz Minerals Ltd (**Oz Minerals**) and Oz Minerals Holdings Pty Ltd (**Oz Minerals Holdings**). As a result of the merger, Oz Minerals acquired all issued shares in Oz Mineral Holdings.

In February 2014, a representative proceeding was commenced in the Federal Court of Australia against Oz Minerals alleging breach of continuous disclosure requirements under the Corporations Act 2001 (Cth) and a series of misrepresentations. All of the wrongful conduct was alleged to have occurred prior to the merger.

In response to the representative proceeding, Oz Minerals commenced contribution proceedings against Oz Mineral Holdings on 19 June 2014. Consequently, Oz Mineral Holdings claimed upon its D&O insurer to indemnify it against any liability arising from the contribution claims.

Exclusion

The insurer denied liability to indemnify on the basis that the contribution claims were excluded by a Major Shareholder and Board Position Exclusion clause in the policy, which provided as follows:

"The Insurer shall not be liable to make any payment under this policy in connection with any Claim brought by any past or present shareholder or stockholder who had or has:

(i) direct or indirect ownership of or control over 15% [or] more of the voting shares or rights of the Company or of any Subsidiary; and

(ii) a representative individual or individuals holding a board position(s) with the Company." [emphasis added]

The court preferred the insurer's construction of the exclusion clause on the basis that it was grammatical and accorded with the structure of the policy and that the commercial rationale suggested by the insurer was objectively reasonable.

HUGH GYLES, ASSOCIATE

Neither of the conditions for operation of the exclusion clause were satisfied as at the date of the merger.

Both conditions for the operation of the exclusion clause were satisfied as at the time the contribution claims were brought.

Arguments

Oz Minerals Holdings argued that:

- The exclusion clause was only intended to exclude claims by claimants who satisfied the conditions at the time of the alleged wrongful acts, which in this case was before the merger.
- It made no commercial sense to assess the conditions for the operation of the exclusion clause as at the time the claims were brought, because such an interpretation was inconsistent with the purpose of the policy – being to provide cover against liability for wrongful acts.

The insurer argued that:

- The words of the exclusion clause (taking into account the "claims made" structure of the policy and the use of both present and past tense words ("present shareholder… who.. has" and "past shareholder…who had")) unambiguously indicate an intention that it should operate at both the time of the alleged wrongful acts and the time the contribution claims were brought.
- There was no commercial nonsense or inconvenience attaching to the insurer's construction which could justify a departure from the unambiguous meaning of the words. To the contrary, the exclusion clause served the commercial purpose of protecting the insurer from the risk of misuse of confidential information and the forensic advantages that an arms-length claimant would not enjoy.

1 [2015] EWCA Civ 598

The decision

The court preferred the insurer's construction of the exclusion clause on the basis that it was grammatical and accorded with the structure of the policy and that the commercial rationale suggested by the insurer was objectively reasonable. The court found that the insured's construction was contrary to authority because it required a strained approach to find ambiguity in the exclusion clause.

Accordingly, the court held that the exclusion clause applied to exclude claims where the conditions of the clause were satisfied either at the time of the wrongful acts or the time the claims were brought.

For more information, please contact Hugh Gyles, Associate, on +44 (0)20 7264 8453, or hugh.gyles@hfw.com, or your usual contact at HFW.

England and Wales: Court of Appeal considers when an insured and its liability insurer may be joined in the same proceedings under the 2001 Brussels Regulation

Mapfre Mutualidad Compania De Seguros Y Reaseguros SA Hoteles Pinero Canarias SL v Godfrey Keefe[1]

The Court of Appeal has unanimously upheld the claimant's right to claim damages in England against a tortfeasor, the Spanish domiciled owner of a hotel (the **insured**) and the insured's Spanish liability Insurer, under article 11(3) of the 2001 Brussels Regulation on jurisdiction.

The claimant, Mr Keefe, suffered serious injuries whilst at the hotel in Tenerife. Spanish law applied to the claim but, as at 2006, when the injuries were suffered, the law which preceded the 2007 Rome II Regulation meant that English procedural law would apply so as to entitle Mr Keefe to significantly more damages (possibly up to £5 million as compared to €600,000-€800,000 under Spanish law). Thus, in 2011, he commenced proceedings in England against the insurer under article 11(2) of the Brussels Regulation, since Spanish law recognises a direct right of action against liability insurers.

Due to a policy cap on the insurer's liability which came to light after proceedings were commenced, Mr Keefe sought to join the insured in order to recover the uninsured loss. Article 11 of the 2001 Brussels Regulation is part of the special rules on jurisdiction "in matters relating to insurance" which form exceptions to the general rule that a defendant must be sued in the court of its domicile. Article 11(3) permits the addition of an insured defendant to proceedings if (as is the case under Spanish law) this is permitted by the law governing the direct action against the insurer.

The insured's challenge to the jurisdiction of the English Court failed before the Judge and was appealed to the Court of Appeal on the basis that:

- Article 11(3) should be given a narrow interpretation - the cause of action against the insured was tortious comprising a claim for the uninsured excess rather than a matter relating to insurance, which in effect required a "policy dispute".
- The risk of irreconcilable judgments which article 11(3) sought to avoid did not exist because the causes of action against the insured and insurer were entirely different, and so this type of "forum shopping" should not be allowed.

The Court of Appeal held that the 2001 Brussels Regulation had to be interpreted purposively, with a view to guaranteeing the protection of the weaker party and in doing so, there was no justification in limiting the application of article 11 to disputes relating to the meaning or effect of the policy. Further, the insurer's liability depended on the same legal and factual basis as that of the insured, and so there was a risk of irreconcilable judgments if the insured had to be sued in Spain.

The 2007 Rome II Regulation means that if Mr Keefe's accident had occurred after 11 January 2009 he would be entitled only to Spanish levels of damages in England, and so the case is of limited interest in this respect. Nevertheless, the judgment is of practical importance as to when an insured and its liability insurer may be joined in the same proceedings in England and will result in cost efficiency for parties by reducing the risk of multiple proceedings. It is envisaged that this judgment will also provide guidance on articles 13(2) and 13(3) of the Recast Brussels Regulation which mirror articles 11(2) and (3) respectively.

For more information, please contact Josianne El Antoury, Associate, on +971 4 423 0555, or josianne.elantoury@hfw.com, or your usual contact at HFW.

England and Wales: Notification clause does not require "rolling assessment" of claim likelihood

MacCaferri Ltd v Zurich Insurance plc

In this case the Commercial Court considered the meaning of the words "as soon as possible" in the notification clause of a liability policy. In particular, the court considered whether these words created a duty of inquiry, so as to in effect require the assured to undertake a "rolling assessment" of claims likelihood, or whether they simply referred to the promptness with which notice must be given.

The liability policy in question included a clause beginning with the following sentence:

"The Insured shall give notice in writing to the Insurer as soon as possible after

the occurrence of any event likely to give rise to a claim with full particulars thereof."

It was argued by the insurer, Zurich Insurance plc (**Z**), that the words "as soon as possible" indicated that the obligation to notify arises when an insured could with reasonable diligence discover that an event was likely to give rise to a claim. Z argued that this interpretation was supported by the obligation to provide "full particulars", which (Z argued) imports an obligation on the part of the assured to be "proactive" or implied a duty of inquiry.

Against this, the assured MacCaferri Ltd (**M**) argued that the words "as soon as possible" simply referred to the promptness with which notice in writing is to be given if there has been an event likely to give rise to a claim.

The court declined to accept Z's argument as to the extended meaning of the words in question, preferring instead the simple interpretation proposed by M. In doing so, it concluded that there was no room for a continuing or "rolling assessment" of claim likelihood to be required of a policyholder when the policy does not provide for it.

Applying this conclusion to the facts, the court went on to hold that the occurrence of the accident giving rise to the liability was not in itself an event "likely to give rise to a claim". This was on the basis that, when the accident occurred, there was not, in the court's view, at least a 50% chance that a claim against M would eventuate.

The accident was very serious, but that seriousness did not increase the likelihood that an allegation of wrongdoing would be made against M in particular. In the context of this case, the likelihood of a claim could not simply be inferred from the happening of an accident. Accordingly, on the facts, M had not breached the notification provisions in waiting until it received a solicitors' letter informing it that a claim was to be made against it before advising Z.

The case provides useful clarification on the meaning of a phrase which is often encountered in notification provisions. It is also interesting in emphasizing that it is the likelihood of a claim against the assured, rather than the seriousness of the incident, which is key to assessing whether or not a circumstance should be notified to insurers.

Proper compliance with notification clauses is of the utmost importance, as failure to do so risks jeopardising the payment of an otherwise good claim. However, the need to make appropriate notifications must be balanced against the need to avoid making notifications which are, out of an abundance of caution, overly broad, speculative and/or insufficiently specific. If in doubt as to how to proceed, assureds should seek guidance from their insurance, and where necessary legal, advisors.

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

4. HFW publications and events

HFW partners recommended in Who's Who Legal 2015

We are pleased to announce that the following HFW Partners are recommended in the Insurance & Reinsurance category of Who's Who Legal 2015: Fernando Albino (Sao Paulo), Andrew Bandurka (London), Guillaume Brajeux (Paris), Geoffrey Conlin (Sao Paulo), Mert Hifzi (Singapore), Jeremy Shebson (Sao Paulo), Richard Spiller (London), Sam Wakerley (Dubai) and Paul Wordley (London).

HFW partners recommended in Expert Guides to Insurance and Reinsurance "The World's Leading Lawyers Chosen By Their Peers"

We congratulate the following Partners, who have been named in Expert Guides to Insurance and Reinsurance "The World's Leading Lawyers Chosen By Their Peers": Guillaume Brajeux (Paris), Olivier Purcell (Paris), Andrew Bandurka (London), Jonathan Bruce (London), Costas Frangeskides (London), Nick Hughes (London), Giles Kavanagh (London), Edward Newitt (London), Richard Spiller (London) and Paul Wordley (London).

Common cross-border insurance and reinsurance issues and our experience of recent natural catastrophes, as an example

An article by HFW's Costas Frangeskides was recently published in the Expert Guides to Insurance and Reinsurance "The World's Leading Lawyers Chosen By Their Peers". The article examines some of the cross-border insurance and reinsurance issues which HFW have been closely involved with and which arise in the context of natural catastrophe claims, in particular in a facultative context, including where fronting arrangements are in place.

A copy of the article can be found at https://beta.expertguides.com/articles/common-cross-border-insurance-and-reinsurance-issues-and-our-experience-of-recent-natural-catastrophes-as-an-example/arhowxsw.

For more information, please contact Costas Frangeskides, Partner on +44 (0)20 7264 8244, or your usual contact at HFW.

HFW attends the 3rd Geneva Trade & Shipping Forum

On Wednesday 17 June 2015, HFW Partners Paul Wordley, Brian Perrott and Graham Denny and Associate Ciara Jackson from HFW's London office and Partner Michael Buisset, and Associates Patrick Myers and Kathryn Martin from HFW's Geneva office attended the 3rd Geneva Trade & Shipping Forum. Graham Denny spoke on trade credit and political risk insurance issues and Brian Perrott provided an update on legal hot topics concerning the commodities industry.

News

HFW is delighted to announce the recruitment of Simon Clark as a full time Consultant in its employment practice. Simon joins the London office effective 1 July 2015. He was formerly General Counsel and Executive Committee Member at a leading City financial services company.

Simon specialises in complex commercial and employment disputes worldwide, as well as advising on corporate and regulatory investigations and crisis management. His advice covers not only the legal issues but also negotiations with regulators, reputation management and press/investor relations in respect of those issues.

Simon also advises on complex employment issues, including the hiring of high value teams and individuals, grievances, terminations, redundancy and restructuring, TUPE, post termination restrictions, deferred compensation schemes and remuneration practices.

To read more, please visit http://www.hfw.com/HFW-strengthens-complex-commercial-and-employment-disputes-capability-July-2015.