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In this week's Insurance Bulletin:

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1. REGULATION AND LEGISLATION

UK: Brexit solutions for existing insurance contracts – Insurance Europe publishes updated paper

On 5 March 2018, Insurance Europe, the European (re)insurance federation, published an updated version of its paper which explains the consequences of Brexit on existing insurance contracts and proposes government-level solutions for dealing with these issues.

Many of the consequences of Brexit are now widely understood, such as the loss of passporting rights and the potential difficulty which a UK (re)insurer will have paying claims of European policyholders after Brexit (and vice versa). The updated paper therefore focusses on the solutions to these issues.

The paper's key messages are that:

1. a transition period is required to allow (re)insurers' Brexit plans to be completed, as the amount of work which is needed to prepare for Brexit is too great to be completed by March 2019.

2. "Grandfathering" is needed for certain types of business, particularly for portfolios where the UK assets and liabilities cannot easily be split from the EU assets and liabilities, and for long-term (re)insurance contracts where a portfolio transfer is not impossible or would be too expensive.

The paper also identifies that the European Council's negotiating directives require the European Commission to negotiate an agreement that allows any goods placed on the market before Brexit to continue to be available after that date, and calls for a similar treatment for cross-border services to be considered and agreed as soon as possible.

For more information on Brexit solutions for (re)insurers and intermediaries, see our briefing here: http://www.hfw.com/Insurance-and-reinsurance-Brexit-considerations

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EU: Council of Europe adopts directive postponing the application of the IDD

As we have previously reported[1], there has been much discussion over previous months about the proposal to delay the Insurance Distribution Directive. The IDD replaces the current Insurance Mediation Directive and seeks to strengthen policyholder protection, establish a fairer playing field for distributors of insurance products, and facilitate cross-border trade and market integration.

The original deadline for Member States to transpose and apply the IDD was 23 February 2018, but this was seen by many to be unrealistic, and so a delay was proposed to allow the insurance industry more time to prepare.

Following the European Parliament's agreement to the delay and its adoption of the proposed Directive on 1 March 2018, the Council of the EU confirmed in a press release on 9 March 2018 that it has also adopted the proposed Directive ((EU) 2016/97) (IDD) and the transposition date and application date will be delayed until 1 July 2018 and 1 October 2018 respectively.

1. http://www.hfw.com/downloads/HFW-Insurance-Weekly-November-2017-Edition-1.pdf; http://www.hfw.com/downloads/HFW-Insurance-Bulletin-January-2018-Ed-2.pdf; http://www.hfw.com/Insurance-Bulletin-February-2018-Edition-1; http://www.hfw.com/downloads/HFW-Insurance-Bulletin-February-2018-Ed-4.pdf

The legislative act will now be published in the Official Journal of the EU.

The Council of the EU's press release can be found here: http://www.consilium.europa.eu/en/press/press-releases/2018/03/09/insurance-distribution-council-delays-application-of-new-rules/.

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2. COURT CASES AND ARBITRATION

England and Wales: Appeal Court rules that lawyers may qualify as arbitrators under replaced JELC clauses

This Court of Appeal decision[1] overturns that of Teare J in which he followed the previous, unreported, decision of Morison J *(Company X v Company Y - 17 July 2000)*, in (reluctantly) finding that lawyers do not qualify as arbitrators under the previous set of JELC clauses. The JELC clauses were replaced on 1 January 2018 so as to remove scope for argument on this.

As we reported in November 2017's Edition 3 of our Insurance Bulletin[2], Tonicstar (the reinsured) applied pursuant to section 24 of the Arbitration Act 1996 for an order that the reinsurers' nominated arbitrator, Alistair Schaff QC, be disqualified as he did not meet the qualification required under the arbitration clause.

The contract of reinsurance was dated 12 February 2001 and incorporated the JELC Clauses from January 1997. The arbitration clause specified as follows:

"Unless the parties otherwise agree the arbitration tribunal shall consist of persons with not less than ten years' experience of insurance or reinsurance".

It was accepted that Mr Schaff QC had significantly more than ten years experience of insurance and reinsurance but that this experience had been as a lawyer and not within the business itself. Consequently, it was argued that he did not qualify and he should therefore be disqualified. Teare J reluctantly followed the previous, unreported, decision of Morison J and held that Mr Schaff QC did not meet the qualification.

In a unanimous decision, the Court of Appeal found that Morison J had been wrong to interpret the words *"ten years' experience of insurance or reinsurance"* to be restricted to insurance or reinsurance industry experience. The Court of Appeal noted that the clause did not impose any restriction on the way in which that experience has been acquired and nothing else within the JELC clauses indicated that what was intended by the clause was a "trade arbitration" as Morison J had previously found.

In answer to the argument put by Tonicstar that Mr Schaff QC did not have any experience of insurance or reinsurance "itself" as distinct from experience of insurance and reinsurance law, the Court of Appeal said that no distinction can be drawn between the two. Interestingly, Lord Justice Leggatt, who gave the leading judgment, said that *"Unlike sports, engineering and telecommunications, which are clearly distinct from the law regulating those activities, no similar distinction can be drawn between insurance and reinsurance law and*

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1. Allianz Insurance PLC & Others v Tonicstar Limited [2018] EWCA Civ 434
2. http://www.hfw.com/downloads/HFW-Insurance-Weekly-November-2017-Edition-3.pdf

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insurance and reinsurance "itself"." He went on to say that insurance contracts create legal rights and obligations and those whose business it is to negotiate and draft insurance contracts, whether as underwriters or brokers, need to have some understanding of insurance law.

Lord Justice Leggatt found that if the intention were to restrict the parties' freedom of choice by excluding lawyers from eligibility then a clear expression of that intention would be needed. The JELC clauses in question did not contain that and so he rejected Tonicstar's arguments and overturned the previous decisions of Morison J and Teare J.

Whilst the Court of Appeal was not bound by the same precedent constraints as Teare J as regards the Morison J decision, Lord Justice Leggatt did give consideration as to whether it was right to overturn the earlier decision. The two justifications for not overturning the decision, notwithstanding the fact it was felt to be wrong, were that (1) the decision may have formed part of the background against which the parties had contracted (the contract of reinsurance was entered into after the Morison J decision) and (2) adhering to an established interpretation assists in providing certainty in commercial law. However, in the end neither of these justifications were sufficient to override the Court of Appeal's desire to correct what they perceived to be the previous error. In addressing the legal certainty point, Lord Justice Leggatt said *"if a decision is untenable, it should not in any case be allowed to stand"*.

As previously reported, the failure of the previous JELC clauses to make it clear that legal experience of insurance and reinsurance was sufficient to meet the qualification threshold set by the previous clauses has now been corrected in the new JELC clauses. These came into effect on 1 January 2018. That being said, on the basis that legal disputes at the reinsurance level often take quite some time to come to fruition, the previous JELC clauses will remain relevant for quite some time to come. This decision provides welcome clarification and means that parties arbitrating under the previous JELC clauses now have greater freedom of choice as regards party appointed arbitrators (and the chairperson) so as to include suitably experienced solicitors and barristers.

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Australia: Failure to provide professional services or property damage?

The decision in *Metricon Homes Pty Ltd v Great Lakes Insurance*[1] emphasises the importance of building and construction companies having sufficient cover for liabilities arising from professional services.

Metricon (the insured) operated a business of building homes and offering home and land packages in Australia. Great Lakes Insurance (the insurer) was the successor to a construction insurance policy issued by Calliden Insurance (the policy).

In 2007, the insured entered into a design and construction contract for a residential dwelling. The residence was delivered in mid-2008, but by January 2011 the owners complained about damage to the house. The owners subsequently commenced proceedings in the Victorian Civil and Administrative Tribunal, seeking damages for the cost of rectification and transitory rent from the insured, and the claim was settled in January 2015.

1. [2017] VSC 749.

The insured subsequently sought indemnity under the policy for amounts it paid towards settlement of the owners' claim, on the basis that the damage to the house was *"damage to property"*. The insurer denied liability, arguing that, even if the claim was captured by the insuring clause, the liability arose out of *"the rendering of or failure to render professional advice or service"* and was therefore excluded under the policy.

The insured commenced proceedings in the Supreme Court of Victoria and the following issues were considered:

1. Whether the damage for which the insured was liable to the owners was *"damage to property"* and therefore covered under the policy; and if so
2. Whether the insured's liability arose out of its failure to render *"professional service"* such that it was excluded under the policy.

The Court determined that, given its ordinary meaning, *"damage to property"* included damage resulting from building defects during construction and the claim fell within cover.

However, the Court also found that, as the damage was caused by defective design of the foundations and timber roof trusses by two professional engineering and design subcontractors (for which the insured was responsible), the claim arose out of a failure to render *"professional service"* and was therefore excluded from cover under the policy.

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3. HFW PUBLICATIONS AND EVENTS

France: HFW team ranked as Band 1 in Chambers Europe

We are delighted to announce that our Paris Insurance team, led by partners Olivier Purcell and Pauline Arroyo, has received a Band 1 Ranking in Chambers Europe. We congratulate our Paris team on the hard work and market-leading expertise which this ranking recognizes.

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ASSOCIATE

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HFW has over 500 lawyers working in offices across Australia, Asia, the Middle East, Europe and the Americas. For further information about our Insurance/reinsurance capabilities, please visit http://www.hfw.com/Insurance-Reinsurance-Sectors

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