Insurance/ Reinsurance

1 October 2015

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.

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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

Europe: Solvency II equivalency decisions – an update on Swiss equivalence

On 18 June 2015[1] we reported on the European Commission's adoption of its first third country equivalence decisions under Solvency II, which granted Switzerland, Australia, Bermuda, Brazil, Canada, Mexico and the US full or partial equivalence.

Those decisions were delegated acts that required approval by both the Council of the EU, in its configuration as the European Economic and Financial Affairs Council (ECOFIN), and the European Parliament. That approval has now been given in respect of Switzerland and the delegated act can now be published in the Official Journal of the EU. It will enter into force 20 days after publication.

What does this mean?

For UK firms which have Swiss holding companies, sister companies or reinsurance contracts with Swiss authorised counterparties:

- Reinsurance with Swiss-regulated counterparties is to be treated in the same way as reinsurance with EU counterparties.
- There is no requirement to convert the Swiss capital requirements and capital resource calculations into Solvency II calculations.
- If the group supervisor is the Swiss regulator (FINMA) then the Prudential Regulation Authority (PRA) must rely on the group supervision by FINMA rather than conducting group supervision itself.

1 http://www.hfw.com/Insurance-Bulletin-18-June-2015

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In summary, this full equivalence decision means that navigating the interaction of Swiss and EU regulatory regimes is likely to be significantly easier than in other third country jurisdictions.

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England & Wales: Enterprise Bill proposes additions to the Insurance Act 2015 obliging insurers to make prompt payments or face claims for damages

Proposals by the English and Scottish Law Commissions to introduce statutory remedies for late payment of claims were not ultimately included in the final text of the Insurance Act 2015. However the Government has now launched a fresh attempt to change the current law, under which insurers are under no legal obligation (per *Sprung v Royal Insurance (UK) Ltd*)[1] to pay valid claims within a reasonable time.

1 [1999] Lloyd's Rep. I.R. 111

On 17 September 2015 the Enterprise Bill (the Bill) was published with the aim of addressing some of the most significant issues facing businesses today. Late payment of insurance claims has been identified by HM Treasury as one of these, described in a Government press release as *"a major problem"*. The proposed solution is to amend the Insurance Act 2015 (due to come into force in August 2016) to oblige insurers to make prompt payments of claims or face paying damages to policyholders.

The Bill seeks to make it an implied term of every insurance contract that insurers will pay claims within a reasonable time. *"Reasonable time"* is not conclusively defined in the Bill; it is said to be dependent on circumstances and to include *"a reasonable time to investigate and assess the claim"*, taking into account factors such as the type of insurance, the size and complexity of the claim and factors outside the insurer's control. The Bill makes clear that the implied term will give rise to a right to claim damages in addition to any right to enforce payment of the claim and any interest on the sum.

The Bill does propose to provide a defence in circumstances where payment is withheld pending resolution of a dispute with the policyholder, but it places the burden upon the insurer to show that there were reasonable grounds for disputing the claim. The draft wording also includes a clause which states that *"the conduct of the insurer in handling the claim may be a relevant factor in deciding whether that term was breached and, if so, when."*

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policyholder is not a consumer (though not when there has been deliberate or reckless breaches of the implied term).

The Insurance Bill, which resulted in the Insurance Act, followed the special procedure for uncontroversial Law Commission Bills. By contrast the Enterprise Bill must go through the full process of parliamentary debate in both Houses, beginning with the first debate in the House of Lords on 12 October 2015. It remains to be seen whether these proposals will survive intact and, if so, how long they will take to become law.

HFW has published a previous briefing on the most significant elements of the Insurance Act 2015. Please see here: http://www.hfw.com/The-UK-Insurance-Act-2015-June-2015

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United Arab Emirates: Deadline for composite insurers extended to 2016

Composite insurance companies operating in the United Arab Emirates (UAE) have been given a further year, starting from 28 August 2015, to separate their life and non-life businesses.

Pursuant to the UAE Insurance Law[1], UAE insurers are not permitted to carry on both life and non-life business. Composite insurers were originally required to separate their life and non-life insurance businesses within five years from 2007. However, this deadline was subsequently extended to 28 August 2015[2]. The recently issued Cabinet Resolution No. (28) of 2015[3] grants a further extension of this deadline to 28 August 2016.

We understand that there are currently 13 composite insurers in the UAE (from a total of around 60 insurers registered in the UAE). Therefore, these composite insurers will need to consider the scale of their life and non-life insurance operations and possibly transfer an aspect of these operations to other insurers.

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1 UAE Federal Law No. 6 of 2007, Article 25

2 Cabinet Resolution No. 15 of 2012 Concerning the extension of the five year period allowed for onshore Insurance Companies to adjust their status

3 Cabinet Resolution No. (28) of 2015 Extending the Additional Time Limit Granted to Insurance Companies in accordance with the Provisions of Article No. (25) of Federal law No. (6) of 2007 Establishing and Managing the Insurance Authority

2. Court cases and arbitration

England & Wales: High Court considers the duties of sub-brokers – *Involnert Management Inc v Aprilgrange Ltd & Ors*[1]

This case concerned an insurance claim arising out of a yacht fire. Insurers sought to avoid the policy on the basis that the insured had failed to disclose the true market value of the yacht. Alternatively, insurers contended that the insured had failed to comply with claims conditions in relation to the filing of a proof of loss within 90 days. The court found in favour of insurers. This placed the producing and placing brokers in the firing line.

The court addressed the failure of the producing broker to ensure that the insured was aware of, and understood, the duty of disclosure, and held that a broker cannot reasonably rely upon a standard clause printed in a cover note as a substitute for giving direct advice. Moreover, a broker should seek to elicit matters which ought to be disclosed, bearing in mind that an insured may not realise without assistance that a particular matter is or is arguably material.

The court also found that the producing broker had failed to take care to ensure that the proposal form was properly completed.

However, with regard to the claims position post loss, the court held that there is no rule of law which obliges a broker who has not been asked to assist the insured in dealing with a potential claim to volunteer advice on claims procedures, and so, on the facts, the hull and machinery claim failed as a matter of causation (although the increased value claim succeeded).

1 [2015] EWHC 2225 (Comm)

This is the latest case to address the difficult question of when a sub broker owes a duty of care in tort to avoid economic loss to the broker's principal.

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Considering the position of the placing broker, the court held that he did not owe any duty of care directly to the insured and did not commit any breach of the duty of care which he owed to the producing broker. With regard to the former, it is necessary to establish that there has been an assumption of responsibility so as to short circuit a contractual chain. In *BP v Aon*, Mr Justice Colman identified the essential question as being whether in all the circumstances, judged objectively, the placing broker's conduct amounts to a representation to the insured that the placing broker assumes responsibility for the services provided *"as explicitly as if he were personally contractually binding himself to provide ...the services"*. In that case, such a duty was held to exist in view of the close relationship between Aon and BP involving repeated direct contact.

On the facts of this case, as there had been no contact at all between insured and placing broker, or even knowledge of the placing broker's existence, it was held that there was no evidence of reliance by the insured upon the placing broker's expertise. The insured was entirely indifferent as to whether the producing broker undertook the tasks himself or sub-contracted them, and if the latter, to whom. It could not reasonably be inferred that the insured was looking to the placing broker to obtain the quotation or place the insurance; the insured was relying solely upon the producing broker for that purpose.

This is the latest case to address the difficult question of when a sub broker owes a duty of care in tort to avoid economic loss to the broker's principal. On the facts of the case, this question was relatively easy to resolve. However, this will always depend upon the nature of the instructions given to the placing broker and the nature of the responsibility taken on.

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