Insurance/
Reinsurance

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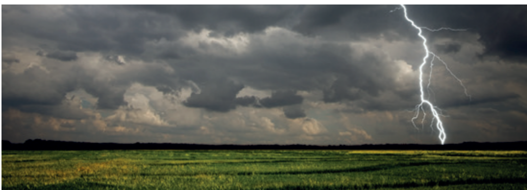
Should you require any further information or assistance on any of the issues dealt with here, please do not hesitate to contact any of the contributors to this bulletin, or your usual contact at HFW.

Andrew Bandurka, Partner, andrew.bandurka@hfw.com
Will Reddie, Associate, william.reddie@hfw.com



1. Regulation and legislation

Europe: Joint committee of ESAs consult on the prudential assessment of acquisitions and increases of qualifying holdings

The joint committee of the three European Supervisory Authorities (ESAs) has launched a public consultation paper on draft updated guidelines for the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector. Together, the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority, reviewed and updated the existing guidelines drawn up in December 2008 by the three former EU financial committees (CEBS, CESR and CEIOPS).

The guidelines are intended to bring into line the supervisory practices in the financial sector throughout the EU and further clarify the position of proposed acquirers in relation to notifying the competent supervisory authorities that they are responsible for the prudential supervision of the undertaking. Common procedures are defined to assist supervisory authorities in the assessment process as laid out in EU legislation.

The guidelines are intended to bring into line the supervisory practices in the financial sector throughout the EU.

LUCINDA RUTTER, ASSOCIATE

Details of the changes to the 2008 guidelines have not been provided. However, there is some suggestion that the ESAs have attempted to clarify the concept of indirect acquisitions of qualifying holdings and the meaning of "acting in concert".

A public hearing on the draft guidelines will be held by the ESAs in London on the 20 August 2015 at the premises of the European Banking Authority. The deadline for responses to the consultation is the 2 October 2015.

For more information, please contact Lucinda Rutter, Associate, on +44 (0)20 7264 8226, or lucinda.rutter@hfw.com, or your usual contact at HFW.

Hong Kong: Insurance Companies (Amendment) Bill 2014 has passed into law

The Insurance Companies (Amendment) Bill 2014 (Bill) was passed by the Hong Kong Legislative Council on 10 July 2015. The Bill amends the Insurance Companies Ordinance, and renames it the Insurance Ordinance. The Insurance Ordinance will launch in three stages, over two to three years, to allow for a transition from regulation by the Commissioner of Insurance (OCI) and the existing self-regulatory regime for insurance intermediaries to regulation by the independent Insurance Authority.

As stage 1, the government plans to form the Provisional Insurance Authority (**PIA**) by the end of this year. The PIA will hire staff and lease offices etc. In stage 2, which is likely to take place in 2016, the PIA will be renamed Insurance Authority and will take up the existing duties of the OCI such as the prudential and conduct regulation of insurers and enforcing the anti-money laundering regulatory regime. During stage 2, the self-regulation of insurance intermediaries will continue but preparations will be carried out for stage 3 in which the independent Insurance Authority will take over these functions. Stage 3 is a major shift - a statutory licensing regime for insurance intermediaries will replace the existing self-regulatory regime (administered by the Insurance Agents Registration Board, the Confederation of Insurance Brokers and the Professional Insurance Brokers Association).

A statutory licensing regime for insurance intermediaries will replace the existing self-regulatory regime

CAROLINE THOMAS, SENIOR ASSOCIATE

We have previously written about the Bill[1] and the most recent amendments thereto (all of which were adopted)[2].

For more information, please contact Caroline Thomas, Senior Associate, on +852 3983 7664, or caroline.thomas@hfw.com, or your usual contact at HFW.

1 http://www.hfw.com/Insurance-regulation-in-HK-April-2014

2 http://www.hfw.com/Hong-Kongs-Insurance-Companies-Amendment-Bill-2014-may-soon-pass-June-2015

2. Market developments

Australia: Launch of a taskforce to consider improvements to general insurance product disclosures

The Insurance Council of Australia (ICA) has recently established an Effective Disclosure Taskforce (EDT) to scrutinise product disclosure in the general insurance industry.

According to ICA CEO Rob Whelan *"the insurance industry, governments and consumer groups all perceive the current disclosure regime as being lengthy, often complex and not always helpful in ensuring consumers understand the product they are buying…the taskforce will advise the ICA Board on initiatives to increase the effectiveness of insurance disclosure documents."*

As part of its mandate, the EDT will consider recommendations contained in the Financial System Inquiry's Final Report handed down in December 2014. Those recommendations included that the general insurance industry should:

1. Guide consumers as to the likely replacement value for home building and contents for the purpose of insurance.
2. Enhance existing tools and calculators for home insurance, including providing up-to-date information about building costs.
3. Improve disclosure in insurance product disclosure documents, including consumer testing, and provide information at the appropriate point in the sales process.

The EDT findings should be of great interest, particularly to those insurers, it would seem, offering home building and contents policies to consumers.

SUSANNAH FRICKE, ASSOCIATE

It is expected that the EDT will present its findings and recommendations to the ICA Board in November 2015. The EDT findings should be of great interest, particularly to those insurers, it would seem, offering home building and contents policies to consumers.

A copy of the ICA's media release regarding the EDT can be found here:

http://www.insurancecouncil.com.au/assets/media_release/2015/020715%20ICA%20launches%20Effective%20Disclosure%20Taskforce.pdf

For more information, please contact Susannah Fricke, Associate, on +61 (0)2 9320 4617, or susannah.fricke@hfw.com, or your usual contact at HFW.

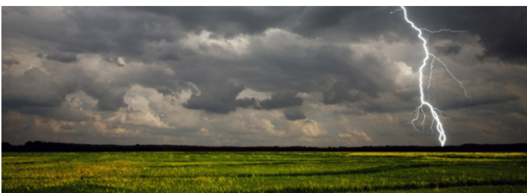
3. Court cases and arbitration

England & Wales: Conditions precedent: relevant terms under the Insurance Act 2015? *Milton Furniture Ltd v Brit Insurance Ltd [2015] EWCA Civ 671*

The effect of warranties and conditions precedent to liability has recently been the subject of great scrutiny and will be reformed when the Insurance Act 2015 (the Act) comes into force in 2016. The recent Court of Appeal decision, that Milton Furniture Ltd (M) was not entitled to an indemnity under its property insurance policy because it had breached conditions precedent that required M to use a burglar alarm at all times when the premises were left unattended and/or out of business hours, is a case that was decided on the current law, of course, but it provides a useful opportunity to test the application of sections 10 and 11 of the Act, and show that the judge's decision would not have changed on the basis of these sections.

In April 2005, while two of M's employees slept on M's premises, the majority of M's stock held there was destroyed by a fire which was started deliberately by unknown persons. The stock was insured under M's policy with Brit Insurance Ltd (**B**). The employees were woken by the fire alarm and were unharmed. The relevant terms considered by the judge at first instance were the "PW1 Intruder Alarm Warranty" (**PW1**) and "General Condition 7" (**GC7**).

PW1 stated that it was a condition precedent to liability in respect of loss or damage caused by theft or attempted theft that the burglar



alarm was put into full and proper operation when the premises were left unattended.

GC7 provided that all protections including any burglar alarm shall be in use at all times out of business hours or when the premises were left unattended, and the protections could only be withdrawn or varied to underwriters' detriment with their consent.

At first instance the judge found that GC7 was a condition precedent to B's liability, but that it was qualified by PW1 in that M was only required to set the burglar alarm if the premises had been left unattended, which he said they had not been. However, the judge held that M had breached the second limb of GC7 because the company responsible for monitoring the burglar alarm had stopped doing so as a result of M failing to pay its invoices.

M appealed on four issues:

1. That GC7 was not a condition precedent.
2. That PW1 did not qualify GC7.
3. That the presence of two of M's employees on the premises meant they were attended.
4. That M did not breach GC7 by causing or permitting the withdrawal of the burglar alarm monitoring service.

Appeal dismissed

The Court of Appeal dismissed the appeal. In her leading judgment, Lady Justice Gloster said that on issue (1) while the language of GC7 and PW1 overlapped to some extent, GC7 was a condition precedent and the two clauses were not inconsistent. GC7 applied to all claims whilst PW1 applied only to claims of theft or attempted theft. On issue (2), GC7 was clear: it required the whole of the protections provided by the burglar alarm to be in place at all times out of business hours and/or when the premises were left unattended. With respect to (3), the premises could not be considered as being "attended" because M's employees were asleep in separate areas of the premises and were not able to observe an attempt by anyone to interfere with the premises. Because M had been obliged to set the burglar alarm, it was not necessary to determine issue (4), and Lady Justice Gloster said that GC7 imposed a strict obligation on M.

The Insurance Act 2015

It is interesting to assess whether the court would have reached the same conclusion had these facts applied under a policy issued after the Insurance Act 2015 comes into force. Section 11 of the Act ensures that an insurer will not be discharged from liability by breach of condition precedent to liability where the insured can show that breach of the term could not have increased the risk of the loss which actually occurred in the circumstances in which it did occur.

However, any such arguments by the claimant would likely have failed. At first instance the judge had found that the fire was started by someone either hiding within the building prior to it being secured, or by someone with legitimate access to the premises. The judge noted that the burglar alarm had a wider protective function than protecting against risk of intrusion, and cited section 9(2) of the Theft Act 1968, defining the criminal offence of burglary, which refers to the doing of any damage to the building or to property within it. The judge also found that activation of the burglar alarm would likely have prevented the fire because the arsonist would have set it off long before the fire alarm went off, and the burglar alarm would also have detected smoke before the fire alarm did. For these reasons, it is unlikely that section 11 of the Act would have saved the insured, since he could not have shown that breach of PW1 and GC7 could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred.

Section 10 of the Act makes a breach of warranty suspend the insurer's liability until the breach is remedied, rather than discharging it automatically. Since the losses occurred during the breaches of GC7 and PW1, the insured would not have benefitted from this provision.

For further information about the Insurance Act 2015 see http://www.hfw.com/The-UK-Insurance-Act-2015-June-2015.

For more information, please contact Jonathan Goulding, Associate, on +44 (0)20 7264 8573, or jonathan.goulding@hfw.com, or your usual contact at HFW.

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