Insurance/ Reinsurance

23 July 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 [2015] WLR(D) 275

1. Regulation and legislation

France: France requested to comply with EU law in the field of construction insurance

On 18 June 2015, the European Commission issued a reasoned opinion inviting France to amend its insurance law which discriminates against insurance companies established in other Member States. A formal notice was sent to France in July 2014.

In France, an Insurance Guarantee Fund (*Fond de garantie des assurances obligatoires de dommages* - **FGAO**) has been created to cover damages in cases of insolvent insurers in the field of compulsory insurance.

However, the FGAO denies cover for insurance companies established outside France which provide insurance services in France, although this activity is allowed within the framework of the free provision of services across the EU.

FGAO's position is based on the fact that:

- Such insurers depend on the external control of an authority whose assessment of solvency may differ from rules applicable in France.
- Such insurers are not familiar with compulsory insurances in French construction law.

By means of such provisions under French law, construction companies are indirectly obliged to take out policies with insurers established in France, notably if they want to bid for public contracts.

Pursuant to the European Commission, this situation constitutes an infringement of the freedom of

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establishment in the EU (article 49 and 56 of the Treaty of Functioning of the EU). It has requested France to notify measures taken to remedy this situation within two months. Otherwise, France faces sanctions from the EU Court of Justice.

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2. Market developments

UK: Changes proposed to minimum solicitors' professional indemnity insurance cover

The current minimum level for solicitors' professional indemnity insurance (PII) cover is £2 million and insurers are required to cover firms for six years after they close even if they are unable to collect any premium due. Under proposals made by the Solicitors Regulation Authority (SRA), the idea of abolishing a minimum level of cover has been suggested as has a reduction in run-off cover from six years to three years. Further, the creation of a "hardship fund" for smaller firms deterred from closing by the cost of maintaining premiums has been proposed.

Similar proposals made by the SRA last year to cut the level of compulsory cover from £2 million to £500,000 were blocked by the Legal Service Board due to concerns about client protection. However, the SRA has reportedly undertaken new research and has confirmed in its discussion paper that its view remains that the limit should be lowered in order to reduce costs and increase flexibility.

The suggestion to abolish the minimum level of cover would, according to the SRA, allow firms to assess their needs and purchase appropriate PII cover. This would allow firms to negotiate limits appropriate to their business activities, resulting in a reduction in costs for firms. According to the SRA, it has been advised by insurers that reducing the minimum level will result in a reduction in premiums.

The SRA has reported that the default in run-off premium is around 50%, which means that the costs of providing the required six years of run-off cover is factored into premium

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rates. In addition, the SRA has received reports of cases involving sole practitioners who have been forced to keep their businesses going simply because they cannot afford the run-off premium. This has resulted in the SRA's suggestion to reduce the requirement for run-off cover to three years, and to establish a centralised fund, which would be paid for by the legal profession, to which firms in difficulty could apply for help with meeting payments.

The Law Society is due to consult solicitors on the SRA's proposals.

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3. Court cases and arbitration

England and Wales: Taking part in arbitration: *Frontier Agriculture v Bratt Brothers* (a firm)[1]

This was an appeal by a farmer (Bratt Brothers) to the Court of Appeal against an order by the Commercial Court that an arbitration award be enforced against him. The award was in favour of a company (Frontier Agriculture) which, it alleged, entered into two contracts for the sale of wheat. However, Bratt Brothers denied entering into the second contract and did not participate in the arbitration proceedings. Bratt Brothers was appealing to contest the arbitrator's jurisdiction on the basis that Frontier Agriculture had not provided the relevant documents in respect of the arbitration within the applicable time limits.

The two contracts were considered by the Court of Appeal. In respect of the first contract, it was accepted that Bratt Brothers had in correspondence engaged in appointing the arbitrator (and said *"in principle [the Arbitrator] is acceptable to me"*). Participating in the appointment of an arbitrator, without qualification, was considered to be taking part in the arbitration for the purposes of section 73 of the Arbitration Act 1996 (the **Act**) (which governs the loss of a party's right to object to the arbitrator's jurisdiction).

The decision of the second contract was less clear to the Court of Appeal. However, viewing the correspondence objectively, the court held (and Bratt Brothers agreed), that by disputing the existence of the second contract, Bratt Brothers was not accepting the jurisdiction of an arbitration in respect of that contract. The acceptance of the arbitrator addressed the first contract, not the second and did not abandon Bratt Brothers' objection under the second contract. The right to challenge the arbitrator's jurisdiction had not been lost. However, it is not sufficient alone to deny existence of an agreement to arbitrate since it must also be shown that there is a *"real prospect of success, a triable issue"*. On the facts, there was no witness statement nor oral evidence to show an oral contract confirmed in writing and as such, a real prospect of success had been demonstrated by Bratt Brothers.

Accordingly, the appeal was allowed, setting aside the order and the matter was remitted to the Commercial Court for directions and determination of the issue as to the validity of the second contract.

This judgment demonstrates that clear acceptance of an arbitrator's appointment amounts to taking part in the proceedings within the meaning of section 73 of the Act. However, if a party raises (at the earliest opportunity) an objection to jurisdiction and maintains that objection throughout, that party may still have input into the arbitrator's appointment without losing its right to object to jurisdiction. It is therefore possible, in the situation where one arbitration concerns two contracts with identical arbitration clauses, that a party may be deemed to participate in relation to one contract whilst remaining a non-participant in respect of the other contract, provided that there is a reasonable prospect of showing that other contract was not agreed. As such, an arbitration award relating to both contracts may be vulnerable to challenge. However, if parties are in doubt, greater certainty may be achieved by commencing separate arbitrations in respect of each contract.

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To view the judgment, click here: http://www.bailii.org/ew/cases/EWCA/Civ/2015/611.html.

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4. HFW publications and events

Latin America: HFW present IUA market briefing on the perils of underwriting Latin American risks and handling claims in Latin America

On 7 July 2015, HFW Partners Jonathan Bruce and Geoffrey Conlin presented a second IUA market briefing on the perils of writing Latin American business and handling claims in Latin America. As with the first briefing, this briefing set out problems that HFW have encountered in relation to Latin American risks, the issues which underwriters and claims handlers should consider, and some tips for risk control and damage limitation. The briefing was well-received, with clients commenting that it was *"very interesting" and "eye-opening"*.

For more information on the issues that may arise for international insurers operating in the Latin American market, please contact Jonathan Bruce, Partner, on +44 (0)20 7264 8773, or jonathan.bruce@hfw.com, or Geoffrey Conlin, Partner, on +55 (11) 3179 2902, or geoffrey.conlin@hfw.com, or your usual contact at HFW.

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