Insurance/
Reinsurance

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INSURANCE/ REINSURANCE BULLETIN

European Commission publishes final version of Insurance Mediation Directive 2 proposal

The European Commission has recently published the final version of proposed legislation to amend the Insurance Mediation Directive (IMD), which regulates the sale and administration of insurance products. Member states have implemented IMD in different ways so the new legislation, IMD2, aims to harmonise these rules and give equal protection to consumers across the EU.

Unlike IMD, which applies only to agents and brokers, IMD2 has a much wider scope and will apply to all sellers of insurance products including insurance companies that sell directly to customers. This will not change the position in the UK, where IMD had been gold-plated by the implementing legislation and the provisions already applied to all sellers of insurance products.

A major change in IMD2 is the requirement for sellers to disclose certain information, in particular their remuneration arrangements, when dealing with customers. Again, the UK currently requires such disclosure in respect of some policy types, but it is one of few member states that does. IMD2 will require sellers to disclose:

- The capacity in which they are acting - are they an agent, broker or direct writer?
- The nature and structure of their remuneration - are they being paid a salary, a fee or on commission?
- What services the buyer's premium includes - does it include claims handling, advice and policy administration?

Different disclosure regimes will apply to life and non-life products. Full disclosure of remuneration will be mandatory for life products, while for non-life products a seller will need to disclose only the information he is asked. After a transitional period of five years, the non-life

"on request" regime will become a mandatory disclosure regime.

The Commission currently expects IMD2 to be adopted by the Parliament and Council in 2013 and to enter into force in 2015.

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Designing the pillars of the new UK regulatory architecture

The Financial Services Authority (FSA) will cease to be responsible for regulating the financial services industry during the first quarter of 2013. Under the new regulatory regime, the prudential regulator and primary regulator of banks, insurers and other systemically important firms will be the Prudential Regulation Authority (PRA). The Financial Conduct Authority (FCA) will regulate the conduct of these firms. For all other firms, the FCA will be responsible for both prudential and conduct of business regulation.

The FSA is currently consulting on new rulebooks for the PRA and FCA. The proposal is for the provisions of the existing FSA Handbook to be adopted by either, neither or both the PRA or the FCA, as appropriate. Although some substantive changes will be needed to enable the new authorities to achieve their respective objectives, the FSA published Consultation Paper CP12/24 on 12 September inviting responses to these amendments, which are largely based on identifying the "appropriate regulator" for various functions, such as Part VII transfers, notification of incidents and passporting in or out of the UK.

The consultation's other key proposals are:

- Firms are currently permitted to use the FSA's logo in communications but they will not be permitted to use the FCA's and PRA's logos in the future.
- The variation of permission procedure will become separate to the procedure for varying or cancelling a requirement imposed on a firm.
    - If a firm is dual-regulated, applications to vary the firm's permissions will be made to the PRA but applications to vary its requirements may be made to either the PRA or the FCA. Where the PRA is determining any application, it must consult the FCA.
    - If an FCA-authorised firm applies to vary its permissions or requirements, the PRA's input will be necessary only where the firm is a member of a group which contains a PRA-authorised firm or where the firm's activities are, or will, following a successful application, become PRA-regulated.
- Similarly, the FCA alone will determine an application for a change of control of a firm unless the firm's group contains, or the proposed controller is, a dual-regulated firm.

The consultation closes on 12 December 2012. The FSA is expected to publish a draft mark-up of the Handbook to illustrate how it will be split into the FCA and PRA Handbooks.

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Asbestos claims and jurisdiction

ACE European Limited v Howden Group Limited [2012] EWHC 2427 (Comm)

The case is an illustration of the issues that can arise when policies do not include governing law and jurisdiction provisions. It also underlines the importance of such provisions in policies responding to perils such as third-party asbestos claims, where the courts of different jurisdictions can adopt differing approaches to the issues, with potentially serious consequences for insurers and reinsurers.

Several London Market Insurers (Insurers) insured a US-based engineering company (H) under various excess layers of a public and products liability programme for the 1995-2002 years. H notified Insurers of asbestos-related claims brought by third parties. Insurers sought negative declaratory relief in England against H as to the meaning and effect of their policies, including declarations that: (i) the polices were governed by English law; and (ii) Insurers were not liable

for asbestos-related claims where a third-party claimant had not suffered actionable personal injury or loss of or damage to material property which happened or occurred within the policy period or where a claim arising out of faulty materials was not made or notified within the policy period.

Insurers obtained permission to serve the Claim Form and Particulars of Claim on H outside the jurisdiction, but H applied to set this aside. H had commenced related proceedings before the Pennsylvania court and argued that, in view of this, Insurers' claim for negative declaratory relief was not of sufficient utility to justify service out and that England was not the proper forum.

The issue of jurisdiction was crucial because of fundamental differences between the views of the English and Pennsylvania courts as to what triggers liability under such policies. In Pennsylvania, exposure to a hazardous condition is sufficient to trigger liability, whereas this is not so under English law. Similarly, under English law, the relevant trigger must occur within the policy period, but this is not the case in Pennsylvania.

In holding that the declarations would be of sufficient utility, Mr Justice Field determined that: (i) there remained a real prospect that the policies under consideration in the Pennsylvania court would be found to be subject to English law, in which case the Pennsylvania court would find the English court's judgment of considerable assistance; and (ii) if made, the declarations sought would be useful in resisting any judgment of the Pennsylvania court which ignored the express or implied choice of law of the parties. Mr Justice Field also held that England was clearly the appropriate forum on the basis that the policies in question were either expressly or impliedly governed by English law and the general principle is that a court applies its own law more reliably than does a foreign court. H's application therefore failed.

With a view to avoiding disputes of this kind, the London Market Group has identified governing law and jurisdiction as being one of the key areas to be dealt with in order to achieve contract certainty. In considering such issues, re/insurers should work with their advisors to ensure that they understand not only the implications of a choice of a particular governing law and jurisdiction, but also any features of the jurisdiction in which the original risk is situated which may affect their exposure.

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"Similarly, under English law, the relevant trigger must occur within the policy period, but this is not the case in Pennsylvania."

John Barlow joins HFW

We are delighted to welcome John Barlow, a specialist in financial institution insurance and reinsurance, to the firm's London office.

John advises insurers and reinsurers of financial institutions in connection with their fidelity, computer crime, D&O, PI/civil liability and cyber liability programmes, and on claims that arise under these products. He has handled and settled many of the most significant claims to find their way into the London insurance and reinsurance market over the last two decades.

In addition to his claims handling and dispute resolution experience, John has considerable experience in the development of leading financial institution insurance products that encompass the coverage of exposures of IFAs, banks, investment banks and sovereign financial institutions. John has also developed products which have addressed issues arising from Basel II and III and the financial crisis, as well as designing bespoke programmes for financial institutions, trading houses and hedge funds.

Conferences & Events

London Market Claims Conference
London
(18 October 2012)
Peter Schwartz and Andrew Bandurka

Melbourne Marine Insurance Forum Lunch
Melbourne
(16 November 2012)

If you are interested in receiving more information about these events, please contact events@hfw.com

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