Insurance/
Reinsurance

April
2012

# INSURANCE/ REINSURANCE BULLETIN

## Sanctions against Syria

Over the course of the last year, the EU has imposed a series of restrictive measures against Syria. The key restriction which affects insurance was included in Regulation 36/2012, which came into force on 19 January 2012, and which was considered in detail in our January 2012 Iran Sanctions Briefing (http://www.hfw.com/publications/client-briefings/iran-sanctions-update-the-eu-implements). The restriction on insurance in Regulation 36/2012 has not been affected by any of the three subsequent regulations, the most recent of which was published on 24 March 2012, which widen the scope of the other prohibitions and extend the list of prohibited persons.

Article 26 of Regulation 36/2012 prohibits the provision of insurance or reinsurance to the Syrian government or persons acting on its behalf. There is a carve out for compliance with existing insurance and reinsurance agreements, as in the EU sanctions against Iran. This means that existing insurance agreements can run their course, and activity pursuant to those pre-existing contracts (i.e. payment of claims) is permitted provided such activity complies with the other relevant provisions of the Regulation.

The extension or renewal of insurance and reinsurance agreements concluded before 19 January 2012 is prohibited, although there is a carve out where there is a prior contractual obligation on the part of the insurer to accept an extension or renewal of the policy. In this respect, the sanctions against Syria go less far than the sanctions against Iran which continue to prohibit all extensions or renewals. The carve out in Regulation 36/2012 reflects the central issue which was litigated in *Arash v Groupama*, as reported in our June 2011 Bulletin. The case considered in the impact of the EU sanctions against Iran in the context of a review clause which provided for an agreement to review in certain circumstances. The Court of Appeal held that the Iran sanctions specifically prohibited the extension

of a policy, and that the review clause, although contained within a policy, was a separate agreement, compliance with which would result in an extension of the policy and therefore a breach of the sanctions.

For more information, please contact Ciara Jackson, Associate, on +44 (0)20 7264 8423, or ciara.jackson@hfw.com, or Paul Wordley, Partner, on +44 (0)20 7264 8438, or paul.wordley@hfw.com, or your usual contact at HFW.

"The Court of Appeal held that the Iran sanctions specifically prohibited the extension of a policy, and that the review clause, although contained within a policy, was a separate agreement, compliance with which would result in an extension of the policy and therefore a breach of the sanctions."

## Insurance agreements should be evidenced in writing

In *Stephen Allen v (1) Michael Seaman and (2) MS PLC Trading as Miles Smith Insurance Brokers* [2011] EWHC 3526 (Ch), an account of commission claim, the Claimant alleged that he and the First Defendant (as agent for the Second Defendant) reached an oral agreement in a bar in the City to warehouse certain professional indemnity insurance business in consideration for the Claimant receiving a percentage of the brokerage earned.

The issues concerned whether:

1. The Claimant owned the insurance business in the first place?

2. An oral warehousing agreement was concluded?

3. The First Defendant had actual or ostensible authority to bind the Second Defendant to such an oral warehousing agreement?

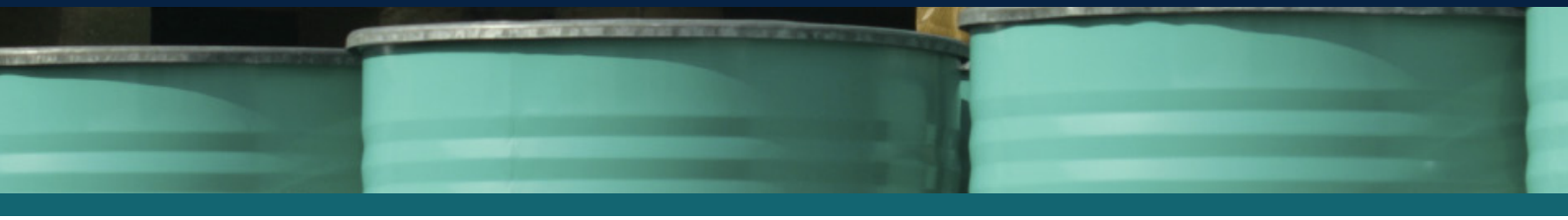
The judge was satisfied that the Claimant had *'no or no significant personal contact with approximately 165 (or 60%) of these assureds'* and that no oral warehousing agreement was concluded. The judge also held that the First Defendant, as a divisional director, did not have the authority, ostensible or express, to bind the Second Defendant to the alleged warehousing agreement. The Claimant did not pursue the ostensible authority argument at trial as he would have had to rely upon the Second Defendant holding the First Defendant out as having such authority but the Claimant accepted in cross examination that he did not do so. Instead the Claimant relied upon the First Defendant's job title (a divisional director) to argue that the First Defendant had the actual authority to enter into a commission sharing agreement on behalf of the Second Defendant. The judge accepted the Defendants' expert and witness evidence that a divisional director would not have such authority and this would be known in the insurance market.

The judge heavily criticised the Claimant for forging or causing documents to be forged and colluding with others to produce untrue evidence to support his case and following the judgment, the court ordered that the Claimant pay the Defendants' costs on an indemnity basis, with an order for a substantial payment on account.

The case is a reminder to the insurance industry that agreements should be evidenced in writing and FSA requirements adhered to in respect of introducer agreements where relevant. Furthermore, parties should always ensure that the parties with whom they are concluding agreements have the actual authority to conclude them. Where necessary, this should include checking with the employers and requesting confirmation in writing.

HFW successfully defended both the First and Second Defendants.

For more information, please contact Graham Denny, Associate, on +44 (0)20 7264 8387, or graham.denny@hfw.com, or Paul Wordley, Partner, on +44 (0)20 7264 8438, or paul.wordley@hfw.com, or your usual contact at HFW.



## CA upholds decision on order of erosion of insurance layers

In *Teal Assurance v W R Berkley and others* [2011] EWCA Civ 1570 the Respondent, R, reinsured a "top-and-drop" layer of a programme of excess professional liability insurances provided by the Appellant, A, to the original insured, B. The excess programme written by A sat on top of an original policy written by L. Importantly, cover under the layers beneath the top-and-drop layer was broad, covering risks on a worldwide basis. Cover under the top-and-drop layer itself and its reinsurance was narrower, excluding US and Canadian claims.

A dispute arose between A and R as to the order in which three large claims (one US, two non-US) eroded B's insurances. At first instance, the Court held that B's losses eroded the policies in the order in which they were suffered by B, and not the order in which claims were settled by insurers.

In upholding this decision, the Court of Appeal focused upon a provision in the top-and-drop layer that, upon exhaustion of the underlying policies, the top-and-drop layer would drop and "continue in force as Underlying policy". A similar provision appeared in the intermediate policies also written by A. The Court held that the original policy written by L was exhausted in the order in which the liability of B was established (by admission, judgment or award). Once the original policy had been exhausted, the next policy (ie the first intermediate layer written by A) would drop down and replace it on the same terms. The excess insurances written by A would accordingly be eroded (in the same way that the policy written by L had been) in the order in which the liability of B was established, and so on up the tower.

The Court considered the argument made by A to the effect that, by virtue of a provision in the policies written by A that there would be no liability on A under each policy until the liability of insurers on the underlying layers had been established, it was open to A to choose the order in which claims were settled and thus the order in which losses eroded B's insurances.

The court rejected A's argument as not leading to a commercially sensible result and noted that, if correct, it would mean that A could, by determining when it accepted liability in relation to claims, organise the lower layers to pay American claims, leaving reinsurers to face non-American claims when those claims should otherwise have exhausted the tower. The Court held that such an ability to manipulate liabilities was unlikely to have been the intention of the parties.

This is an important point because the order in which insurance cover is eroded could, as in this case, determine whether and/or to what extent the limits of cover available under higher excess layers and their corresponding reinsurances can be triggered.

For more information, please contact Ben Atkinson, Associate, on +44 (0)20 7264 8238, or ben.atkinson@hfw.com, or Andrew Bandurka, Partner, on +44 (0)20 7264 8404, or andrew.bandurka@hfw.com, or your usual contact at HFW.

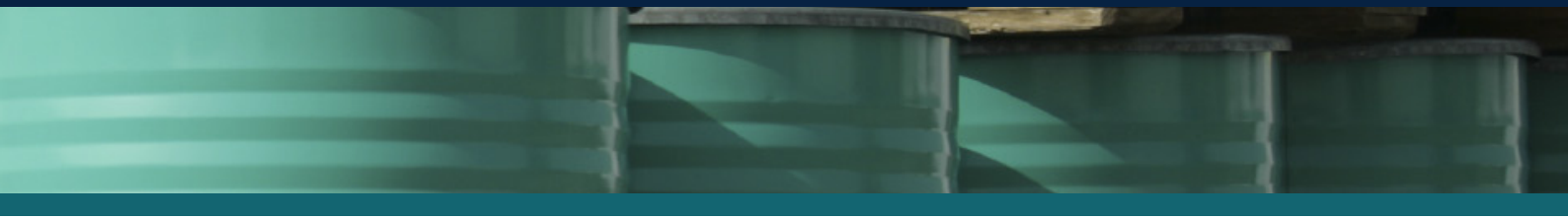
## Solvency II - FSA Internal Model pre application update

On 27 February, the Financial Services Authority (FSA) updated its Solvency II website for firms looking to utilise an internal model to calculate their Solvency Capital Requirement. The update follows the allocation of submission slots by the FSA in October 2011 and the circulation of draft Level 2 implementing measures by the European Commission in November 2011.

The updated website provides firms with internal model materials and supporting information to assist with their submissions for the pre-application phase of the FSA's internal model approval process (IMAP) (http://www.fsa.gov.uk/about/what/international/solvency/implementation/solvency-submissions).

The materials and supporting information include:

- A submission checklist, together with questions and answers on the process to be undertaken by the FSA.
- A new self-assessment template, which sets out the latest FSA categorisation of the internal model requirements set out in the Solvency II Directive and the draft Level 2 text, to be completed and provided with the submission.
- A timeline of the FSA's assumptions as at 27 February 2012, detailing the current estimated deadlines for Solvency II and the IMAP pre application process.



- An explanation of the FSA's approach to the pre application IMAP process, which indicates that the FSA will look to provide a preliminary view on their proposed internal models approximately six months after the date that the FSA receives the submissions. The preliminary view by the FSA is likely to provide one of the three following outcomes for firms in respect of their internal models: (i) they have met the requirements available at the time of the FSA review; (ii) more work or information is needed; or (iii) the submission does not adequately evidence that the requirements have been met and are unlikely to be met prior to implementation of the Solvency II requirements.

In addition to the above information, the updated website indicates that Groups, who are undertaking the IMAP, may also apply for the following approvals at the same time:

- Approval to use a single Group Solvency & Financial Condition Report.

- Approval to use a single Group Own Solvency and Risk Assessment.

"A submission checklist, together with questions and answers on the process to be undertaken by the FSA."

The updated website provides firms with useful guidance for their internal model submissions, however, there is still uncertainty in terms of the final requirements to be imposed under the Level 2 text and the date the FSA will be given the legal power to formally approve firms' internal models.

For more information, please contact Andrew Samuel, Associate, on +44 (0)20 7264 8450, or andrew.samuel@hfw.com, or Costas Frangeskides, Partner, on +44 (0)20 7264 8244, or costas.frangeskides@hfw.com, or your usual contact at HFW.

## Insurance coverage issues affecting the financial services industry

The last few years have seen a considerable amount of upheaval in the financial services sector: the collapse of Lehman Brothers in September 2008; the discovery of the Bernard Madoff fraud in December 2008; rogue trading at Société Générale and UBS; the liabilities arising from the sale of Payment Protection Insurance, not to mention the effect of the worldwide economic downturn and its impact on the financial services sector. Whilst these (and there are many more not mentioned) are high profile events, there are far more lower profile events that regularly lead to insurance claims and insurance coverage disputes.

It is only once coverage disputes arise in insurance claims that policy wordings are truly tested and a significant amount can be learnt both by buyers and sellers of insurance from a review of such disputes and the arguments taken by both sides. Certain clauses which may appear innocuous on the purchase of an insurance policy can prove, later on down the line, to cause substantial hurdles when an insured attempts to secure an indemnity; whilst for insurers, clauses in the policy wording may not have the effect that they were intended to have.

The various scandals and events, some of which are mentioned above, have led over the years to an influx of insurance notifications and claims, primarily on bankers blanket bond (BBB)/crime; directors' and officers' (D&O); errors and omissions (E&O) and professional indemnity (PI) policies.

We discuss a number of recent coverage issues and considerations resulting in relation to these policies more fully in http://www.hfw.com/publications/article/insurance-coverage-issues-affecting-the-financial-services-industry, which first appeared in the March 2012 issue of British Insurance Law Association (BILA) Journal issue 124, and in http://www.hfw.com/publications/article/madoff-and-insurance-coverage, which first appeared in Insurance Day in December 2011.

For more information, please contact Graham Denny, Associate, on +44 (0)20 7264 8387, or graham.denny@hfw.com, or your usual contact at HFW.

## Asia-Pacific natural catastrophes: issues for the (re)insurance markets

Andrew Dunn and Richard Jowett from HFW's Sydney and Melbourne offices respectively, visited London in early March to give a series of presentations to the London Insurance and Reinsurance markets with Paul Wordley, Andrew Bandurka and Rebecca Hopkirk from our London office. The presentations, to the LMA and to reinsurance claims groups at Lloyd's and in the companies' market, covered issues relating to Thai flood losses, the Japanese and NZ earthquakes, natural catastrophe/disaster responses and developments in Australian financial lines.

For more information, please contact Andrew Dunn, Partner, on +61 (0)2 9320 4603, or andrew.dunn@hfw.com, or Richard Jowett, Partner, on +61 (0)3 8601 4521, or richard.jowett@hfw.com, or Paul Wordley, Partner, on +44 (0)20 7264 8438, or paul.wordley@hfw.com, or Andrew Bandurka, Partner, on +44 (0)20 7264 8404, or andrew.bandurka@hfw.com, or Rebecca Hopkirk, Partner, on +44 (0)20 7264 8204 or rebecca.hopkirk@hfw.com, or your usual contact at HFW.

## News

### Heavy Transport & Lifting 2012 conference

At the Heavy Transport & Lifting 2012 conference, held in Perth in March, Paul Aston from HFW's Singapore office presented on the topic of "Understanding and Assessing the Potential Insurance Challenges with Heavy Modular Projects", and he, along with Hazel Brewer of HFW's Perth office presented a workshop on "Best Practice in Risk Assessment and Management". For more information, please contact Paul Aston, Partner, on +65 6305 9538, or paul.aston@hfw.com, or Hazel Brewer, Partner, on +61 (0)8 9422 4702, or hazel.brewer@hfw.com, or your usual contact at HFW.

### C5 Forum on D&O Liability Insurance

Costas Frangeskides and Graham Denny recently presented at the 21st C5 Forum on D&O Liability Insurance in London, which HFW was pleased to sponsor. Costas hosted a workshop that focused on the most contentious D&O Insurance issues in 2011 and how they should be reflected in insurance policy structures and wording in 2012 and beyond. Graham spoke on the key policy amendments and coverage issues to be aware of to provide profitable coverage in a turbulent market. For more information, please contact Costas Frangeskides, Partner, on +44 (0)20 7264 8244, costas.frangeskides@hfw.com, or Graham Denny, Associate, on +44 (0)20 7264 8387, or graham.denny@hfw.com, or your usual contact at HFW.

### HFW promotes three to Partner

The firm is delighted to announce three internal promotions (effective 1 April 2012) across core sectors of focus, including aviation, insurance and logistics. The firm's Dubai office is boosted with the promotion of Sam Wakerley, specialising in shipping, trade and insurance (marine and non-marine), while in London, Edward Spencer, an aviation insurance specialist, and Justin Reynolds, who focuses on logistics and multimodal transport, are welcomed to the partnership.

## Conferences & Events

RIMS Annual Conference & Exhibition
Philadelphia
(15-18 April 2012)
Paul Wordley

ACI Reinsurance Disputes in Litigation and Arbitration
New York
(30 April to 1 May 2012)
Costas Frangeskides and Andrew Bandurka

Airmic Annual Conference & Exhibition
Liverpool
(11-13 June 2012)
Paul Wordley, Costas Frangeskides and Graham Denny

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

Lawyers for international commerce

HOLMAN FENWICK WILLAN LLP
Friary Court, 65 Crutched Friars
London EC3N 2AE
T: +44 (0)20 7264 8000
F: +44 (0)20 7264 8888



hfw.com