



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.

In this week's bulletin:

1. Regulation and legislation

UK: Senior Insurance Managers Regime: LMA publishes updated guidance

2. Market developments

UK: Market sees increase in cyber security spend

UK: Governor of the Bank of England speech to Lloyd's of London

3. Court cases and arbitration

UK: contractual liability not displaced by joint names CAR policy: *SSE Generation Ltd v Hochtief Solutions AG and another*¹

4. HFW publications and events

HFW receives strong write up in Legal 500 rankings for Insurance and Reinsurance, and Professional Negligence

Volkswagen – errors and emissions

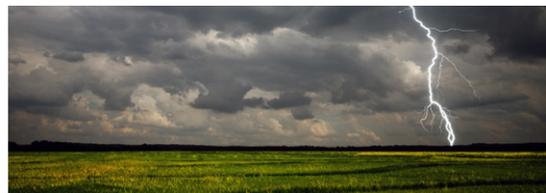
Recent HFW events

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] CSOH 92 (14 July 2015) (Scottish Courts and Tribunals)



hfw 1. Regulation and legislation

UK: Senior Insurance Managers Regime: LMA publishes updated guidance

On 25 September 2015, the Lloyd's Market Association (LMA) published an updated version of its guidance for managing agents on the Senior Insurance Managers Regime (SIMR). The purpose of the guidance is to provide a summary of the possible implications of SIMR on managing agencies' governance structures and required regulatory approvals.

SIMR is designed to cover those individuals who either effectively run the business or who have responsibility for important or critical areas of the business. SIMR applies to individuals holding a Senior Insurance Management Function, those deemed to be Key Function Holders, and those working within key functions. In respect of individuals holding a Senior Insurance Management Function, a regulatory pre-approval process will operate and the firm will have to provide the PRA with relevant information regarding the individual, including their skills and expertise, roles and responsibilities, and fitness and propriety. The PRA has identified a list of 'prescribed responsibilities' which all firms are required to allocate to one or more individuals who have been approved for a controlled function. Such responsibilities include ensuring that the firm has complied with its obligations to satisfy itself that every person who performs a key function is a fit and proper person, leading the development of the firm's culture and standards in relation to the carrying on of its business and the behaviours of its staff, and production and integrity of the firm's financial information and its regulatory reporting.



Under the new regime, it will be mandatory for a firm to compile and maintain a 'Governance Map', which must record the positions of those that effectively run the firm, the key functions within the firm, and the names of the individuals in each of those positions or with responsibility for a key function.

CIARA JACKSON, ASSOCIATE

Key functions must, as a minimum, include the risk management function, the actuarial function, the internal audit function and the compliance function, although key functions are not restricted to these four categories. There will be no regulatory pre-approval requirement for Key Function Holders, although the PRA will require notification of anyone performing such a role and will expect the firm to provide relevant information. Key Function Holders are expected to be fit and proper, and firms should review their internal processes and give consideration as to how they might evidence to the regulator that they had taken "reasonable steps" in the performance of such roles.

With regard to individuals working within key functions, there will be no regulatory pre-approval requirements or notification requirements (other than for Key Function Holders). However, where Key Function Holders delegate significant responsibility to individuals, it is expected that such individuals will be fit and proper to carry out the role and will adhere to certain conduct standards.

It will be the firm's obligation to demonstrate the fitness and propriety of all individuals who fall within the scope of the new regime. At the outset, consideration must be given to factors such as an individual's personal characteristics, their level of competence, knowledge and experience, their qualifications and their training. Consideration must also be given to business conduct and compliance with conduct standards on an ongoing basis. It will be the responsibility of the individual managing agents to decide how fitness and propriety is assessed. The PRA has, however, issued conduct requirements which include acting with integrity, acting with due skill, care and diligence, being open and cooperative with the regulators, taking reasonable steps to ensure that the business of the firm for which you are responsible, and taking reasonable steps to ensure that the business of the firm for which you are responsible complies with the relevant requirements and standards of the regulatory system.

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maintain a 'Governance Map', which must record the positions of those that effectively run the firm, the key functions within the firm, and the names of the individuals in each of those positions or with responsibility for a key function. The 'Governance Map' should also record the allocation of significant management responsibilities and reporting lines for each of these senior persons within the firm, and define the matters reserved for the Board.

In preparation for the new regime, the LMA suggests that managing agents should consider taking certain steps:

- Review governance arrangements.
- Assign Senior Insurance Management Functions.
- Assign prescribed responsibilities to such individuals.
- Identify current approved persons who can be grandfathered, such as individuals who are currently approved under the pre-SIMR regime and who can move to a controlled function under the new regime without applying for fresh approval.
- Review relevant job descriptions.
- Create a 'Governance Map'.
- Review governance processes.
- Raise awareness of the reasonable expectations of regulators and the importance of consistent and accurate record keeping.

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hfw 2. Market developments

UK: Market sees increase in cyber security spend

The risk of cyber threat and cyber losses has long been on the rise and, as a result, the market is seeing an increase in the spend by UK insurers on cyber security. According to a survey carried out by PWC and the Confederation of British Industry, 40% of UK insurers are expected to spend more on protecting their business against cyber threats in the coming year.

According to the survey, there has been a significant increase in the frequency with which incidents related to cyber security occur, and the research conducted by PWC suggests that the number of incidents to which companies are being exposed is rising. As a result, the market is seeing an increase in expenditure in the area of cyber risk management. An emphasis is being put on establishing the nature of the data held by companies, properly classifying the data, and protecting the data where necessary.

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UK: Governor of the Bank of England speech to Lloyd's of London

The Governor of the Bank of England, Mark Carney, recently gave a speech¹ at Lloyd's of London covering the risks posed to financial stability by climate change. The speech focused on the current exposures, and lessons

that can be learnt from how the insurance industry assesses and responds to risks.

The speech acknowledged the growing consensus that climate change is unequivocal, and considered how the increase in weather-related events has affected the frequency and size of insurance claims. Physical, third party and transitional risks were identified, with a particular focus on transition risks - the financial risks which could result from the process of adjustment towards a lower-carbon economy. Carney highlighted how a carbon budget imposed on the natural resource and extraction sectors had the potential to render existing energy reserves "stranded" and unusable without expensive carbon capture technology. The exposure of UK investors, including insurance companies, to these shifts is potentially huge.

The impact of climate change on physical risks faced by insurers has affected the market. Notwithstanding insurers' capacity to model and adapt, their response can pose acute public policy problems, such as the unavailability of cover in some flood-prone parts of the Caribbean, resulting in collapse of property values and abandonment of entire neighbourhoods. Carney cited Flood Re, the publicly-backed UK insurer of flood risks as an example of how such issues have been addressed by government.

But what about third party liability risks mentioned? These arise where losses are suffered as a result of the effects of climate change and compensation is sought from others held responsible for damaging the environment, or not complying with regulations. Is there a real risk that liability policies such as public, D&O or professional liability insurance will be impacted?

In our view, it seems cases on climate change litigation have been most noticeable in the US, but as the speech

¹ <http://www.bankofengland.co.uk/publications/Pages/speeches/2015/844.aspx>



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accepts, these have been unsuccessful so far. It seems the US has been the focus for such private class actions, due to the lack of regulation in comparison to other jurisdictions. Claims have been based on nuisance, negligence, product liability, breach of fiduciary duty and even human rights (breach of Article 8(1), right to respect private and family life).

However, we would expect there are a host of difficulties with succeeding with such claims in English Courts which include for example, determining the appropriate court, lack of evidence and establishing a causal link. Due to these difficulties, and without US style rules for class actions (recent reform of group litigation in England is confined to competition law), it seems insurers and policyholders need not worry about a real impact from these liability risks, yet.

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hfw 3. Court cases and arbitration

UK: Contractual liability not displaced by joint names CAR policy: *SSE Generation Ltd v Hochtief Solutions AG and another*¹

This case, which was heard by the Outer House of the Scottish Court of Session, but which involved detailed consideration of the English authorities, arose out of a dispute between a power generation company, SSE Generation Ltd (S) and its contractor Hochtief Solutions AG (H) over the impact, if any, on the position as regards liability as between them of their joint names construction all risks policy (the policy). The court held that the parties' liability to each other was not displaced by a clause in the contract between them providing for such joint names insurance. Because the case turned on the interpretation of the commonly used NEC2 ECC form of contract, the case will be of particular interest to those involved in the engineering and construction industry, their insurers and their advisors.

The background to the dispute was the collapse of a major tunnel forming part of a new hydro-electric scheme which S had engaged H to construct. Disagreement arose between S and H as to which of them bore the risk of the collapse. Ultimately, S engaged a third party contractor to perform the necessary remedial works and pursued H for damages in breach of contract. H denied liability and counterclaimed for the profit which it would have made if it had been engaged to undertake the repairs – it being a term of the contract between S and H that S would be obliged to so instruct H in certain circumstances.

As part of its defence H argued that, in providing for joint names insurance, the parties had contractually excluded

claims against one another for losses covered by the policy. In particular, the express waiver of subrogation rights in the policy demonstrated, so H argued, the parties' intention that they should not be able to claim against each other for the losses it covered. Against this, S argued that the wording of the policy was irrelevant to rights as between the parties, which were set out in the contract. There was nothing in the contract excluding claims for the losses covered by the policy and if anything the terms of the contract appeared to contemplate the possibility of such claims.

Having considered the English law authorities, the court concluded that the "thrust" of those authorities favoured joint names insurance displacing contractual liability. However, the court went on to say that care must be taken not to merge the law of insurance with the law of contractual interpretation, and that the primary focus in each case should be on the words used by the parties in the contract, set in their context.

On the wording of the contract between S and H, the court concluded that the parties' intention had not been for the provision for joint names insurance to displace the parties' liability to each other under the contract. This was largely due to the fact that the contract included a clause expressly providing for the liability of the parties to one another, and nothing in the policy suggested that the intention was for this to be overridden by the clause providing for joint names insurance. The court also placed reliance upon the fact that certain express waivers, for example of subrogation rights against directors and employees, were provided for in the contract, concluding that one would expect a much more significant waiver of the kind argued for by H to be set out in similarly express terms.

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BEN ATKINSON, ASSOCIATE

Whilst the case ultimately turned on its facts and in particular upon the particular contractual wording agreed between S and H, it is likely to be of wider application because S and H had contracted on the commonly used NEC2 ECC form. The case also provides a useful analysis of the case law in this area and an important reminder that, in the words of the court, “this is a difficult area of the law”.

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hfw 4. HFW news, publications and events

HFW receives strong write up in Legal 500 rankings for Insurance and Reinsurance, and Professional Negligence

Legal 500 recently published their rankings for 2015, and HFW received a strong write up for insurance and reinsurance. For Insurance and Reinsurance Litigation, we are noted to have *‘particular strength in the Lloyd’s and reinsurance markets, supplemented by solid experience in the shipping, aviation, international trade and logistics sectors’*. The write up also stated that *“Group head Paul Wordley focuses on natural resource and energy-related disputes, Andrew Bandurka specialises in insurance, reinsurance and professional indemnity claims, and Costas Frangeskides handles high-value claims arising from reinsurance disputes, legacy and run-off business. Since going to press, Christopher Cardona arrived from Chadbourne & Parke LLP.”* Andrew Bandurka is listed as a leading individual.

Within the editorial for Corporate and Regulatory, we are described as providing *‘high-quality, prompt and relevant’* advice to our diverse client base. The editorial stated that *“Nick Hutton acted for Alsford Page & Gems Holdings in its sale of a 72% stake to PSC Capital Group. Richard Spiller heads the department, which also includes corporate finance transaction specialist James Lewis.”* Nick Hutton and James Lewis were named as leading individuals.

HFW also moved up in the rankings for Professional Negligence, with clients saying we possess a *‘common-sense approach’*. Team head James Clibbon



is described as having *‘an excellent commercial brain’*; David Robinson is *‘a very experienced operator’*; Nigel Wick has *‘excellent technical understanding’*; and Andrew Bandurka is *‘quick, practical and commercial’*.

Volkswagen – errors and emissions

HFW has published a briefing¹ on the Volkswagen emissions scandal which sets out the implications of the scandal and how HFW can help.

The briefing contains details of the implications for Volkswagen’s shareholders/investors, insurers and distributors, for other car manufacturers and for consumers. It also explains how HFW can assist with handling the legal issues arising from the incident, advise on the impact of social media and reputation protection for both companies and individuals, and act for affected directors and insurers.

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Recent HFW events

HFW attended the following recent events:

- Partners Andrew Bandurka and Pierre-Olivier Leblanc attended the SCOR Global P&C Annual Conference in Paris on Thursday 1 October and Friday 2 October.
- Senior Associate Pauline Arroyo presented a sanctions seminar in Paris on Tuesday 22 September.

¹ <http://www.hfw.com/Volkswagen-errors-and-emissions-October-2015>



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