

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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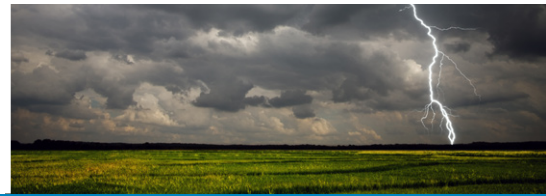
HFW gives seminar to Aon on underwriting Latin American risks and claims handling issues.

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hfw 1. Regulation and legislation

EU: Antitrust : The European Commission questions the renewal of the Insurance Block Exemption Regulation (IBER)

The IBER, which came into force on 1 April 2010, exempts certain types of cooperation in the insurance sector from EU antitrust rules, subject to certain conditions. These exemptions are limited to joint compilations, tables and studies, as well as to co-insurance and co-reinsurance pools. Such cooperation between insurers arises because of the need to exchange information in order to develop a better understanding of insured risks and to rate them more reliably. This explains the need for a specific exemption, so that such cooperation may not be targeted by the authorities as restrictive practices.

As the IBER will expire on 31 March 2017, the Commission started a public consultation in 2014 before deciding whether the Regulation should be renewed in its current form, modified or even be allowed to lapse. Presented on 17 March 2016, the Commission's preliminary findings from this review identify two main reasons why sector-specific block exemptions in the insurance sector may no longer be necessary.

The Commission finds that guidelines on horizontal cooperation adopted in December 2010 already offer the benefits of information exchange with greater flexibility with regard to joint compilations, tables and studies. The study undertaken by the Commission also reveals the limited use and the irrelevance of the Regulation with respect to co-(re) insurance pools intended to cover large scale terrorism



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and environmental risks. In reality, most of the potential beneficiaries of the exemption do not consider themselves within the scope of the IBER. Furthermore, they share risks in more varied and flexible forms than institutionalised pools, as referred to in the IBER.

A meeting will be organised in April 2016 with stakeholders to discuss the report's findings but the future appears bleak for the IBER.

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Research undertaken by Charlotte Gonon, Stagiaire

EU: EIOPA publishes feedback statement on its opinion on internet sales of insurance and pension products.

In furtherance of its role in building a common EU supervisory culture and consistent supervisory practices, in January 2015 EIOPA issued an opinion to the EU supervisory authorities concerning consumer protection issues related to insurance product sales via the internet.

The opinion stated that, in general, EIOPA expects customers to always receive the information they need, adapted proportionally to the product in question, and to always be treated fairly. It sees these as essential steps for ensuring customers get value for money and buy the right products for their needs. These standards are absolute, irrespective of the channel used by a customer to buy a product. The use of digital sales channels must not lead to lower expectations and standards, even if it does allow for fresh and innovative solutions.

In terms of direct supervisory activity, the feedback indicated that only limited actions have been reported at this stage. This may reflect the fact that sales via the internet are still at a relatively low volume in a number of jurisdictions. Some jurisdictions have taken some pre-emptive measures in this area, for instance in the form of 'soft law' such as supervisory guidelines and recommendations on insurance product management systems.

EIOPA concludes that supervisors are seeking to be vigilant regarding sales of insurance products via the internet. EIOPA notes that it will continue to monitor new and existing financial activities, including in the area of digital distribution. Given cross-sectoral aspects, important work is also being done under the Joint Committee of the

three European Supervisory Authorities (EIOPA, the European Securities and Markets Authority, and the European Banking Authority).

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UK: PRA speech on regulatory issues for insurers and PRA expectations in current market conditions

On 4 April, Chris Moulder (Director of General Insurance, Bank of England) gave a speech to the iNED Forum on current regulatory issues for insurers and the PRA's expectations of firms in the current soft market conditions.

The speech focussed on changes to regulation following the implementation



Mr Moulder encouraged boards to ensure the correct governance of any internal model changes and to ensure that the ORSA documentation is effective, highlighting key messages and metrics and in an accessible format.

RUTH HITE, SENIOR ASSOCIATE

of Solvency II and the implementation of the senior insurance managers regime (SIMR) and corporate governance. Mr Moulder noted that the PRA's fundamental objectives as a regulator and approach to supervision "remain unaltered" and that both regulators and directors should not lose sight of the basic principles of a sustainable insurance section, namely "disciplined underwriting, appropriate reserve setting and robust risk and capital management."

Mr Moulder encouraged boards to ensure the correct governance of any internal model changes and to ensure that the ORSA documentation is effective, highlighting key messages and metrics and in an accessible format. He also emphasised the PRA's expectation on the independent governance of significant PRA-regulated subsidiaries as set out in the recent "Corporate Governance – Board Responsibilities" Supervisory Statement (SS5/16)¹.

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UK: FCA case studies on opt-out selling and improved information for add-on buyers

Following the publication of PS15/22 on general insurance add-ons in September 2015, the FCA has recently published a number of case studies to help firms understand its expectations under the new rules and guidance.

PS15/22 set out three initiatives taken by the FCA in order to address the problem of opt-in selling as follows:



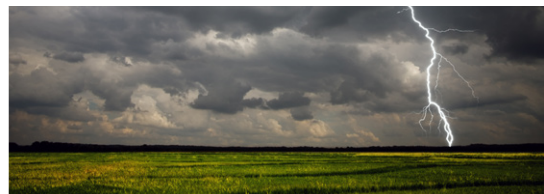
The case studies illustrate the different "customer journeys".

1. *A ban on selling "optional additional products" on an opt-out basis. (Additional rules inserted into various chapters of the FCA Handbook, including ICOBS).* This occurs when firms use sales methods such as pre-ticked boxes. The definition of an optional additional product, which includes both separate policies and optional extras, applies only to the ban on opt-out selling and should not be read across to other parts of the Handbook.
2. *Handbook Guidance (ICOBS 6.1.6AG).* This clarifies that the existing product information provision rule (ICOBS 6.1.5R) applies to any policy, regardless of whether it is sold on its own or with another policy, or other goods or services.
3. *Non-Handbook guidance (set out in policy statement PS15/22).* Suggesting ways that firms can support customers' informed decision making, in light of the findings of the market study. The non-Handbook guidance applies to policies and optional extras.

The case studies illustrate the different "customer journeys" and provide examples of where firms may be at risk of acting contrary to the FCA rules and guidance on the opt-in sale of add-on products.

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¹ <http://www.bankofengland.co.uk/pradocuments/publications/ss/2016/ss516.pdf>



hfw 2. Market developments

UK: New Insurance Act 2015 model clauses published by the Lloyd's Market Association (LMA)

On the 21 March 2016, the LMA published a suite of 18 generic model clauses, together with supporting guidance, for the Lloyd's market to use in connection with the Insurance Act 2015 (the Act).

The clauses provide managing agents, brokers and clients with the opportunity to update their existing policy wordings to ensure consistency with the Act before it comes into force this August.

The model clauses include wording for the duty of fair presentation under section 3 of the Act for use in proposal forms for non-consumer contracts, remedies for breach of the duty of fair presentation for contracts concluded before 12 August 2016 and a definition of the "insured's organisation", which can also be used for reinsurance contracts.

The LMA's Wordings & Contracts Forum¹ extensively reviewed the clauses prepared by an external law firm on behalf of the LMA.

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hfw 3. Court cases and arbitration

UK: Today – Court of Appeal: Aggregation of Solicitor PI claims – *AIG Europe Limited v OC320301*

We reported on the *AIG Europe Limited v OC320301* decision of Teare J in our bulletin of 24 September 2015¹. The claims aggregation language in the relevant policy, mirroring the Minimum Terms and Conditions for Solicitor's PI insurance, provided for aggregation of claims arising from similar acts or omissions "in a series of related matters or transactions". Teare J placed a narrow construction on this clause and determined that it required the matters or transactions to be "dependent" on each other, and since 214 claims were not so dependent, they were not to be aggregated.

Today, the Court of Appeal, in an expedited hearing, disagreed with Teare J (and adopted a broader construction which neither party had submitted as their primary case) and remitted the case back to the High Court for determination in the light of its decision. Based on submissions from the SRA, the Appeal Court has ruled instead that the matters or transactions must have an intrinsic relationship with each other, not an extrinsic relationship with a third factor (it would not be enough, for example, that the transactions were conducted by the same solicitor, or related to the same geographical area).

This case is the first to rule on these aggregation provisions and is of obviously great importance to the PI market.

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England & Wales: Insurers unable to rely on non disclosure clause to avoid policy – *Mutual Energy Ltd v (1) Starr Underwriting Agents Ltd (2) Travellers Syndicate Management Ltd*¹

The High Court (the Court) considered "deliberate" non-disclosure under an insurance policy and concluded that "deliberate" incorporates an element of dishonesty and cannot extend to an innocent but mistaken belief that information need not be disclosed.

The insured energy company owned and operated an undersea interconnector which provided a link between the electricity systems of Northern Ireland and Scotland. The interconnector was insured by the defendant insurers. The policy contained protection for the insured in that the insurer could only avoid the policy for non-disclosure if they could establish that there had been "deliberate or fraudulent non-disclosure or misrepresentation or breach" by the Insured.

In 2011, the insured suffered loss of power flow caused by failures with the interconnector and its cables and made a claim under the policy. The insurer had failed to disclose that there had been previous problems with its interconnector cables. The insurer sought to avoid the policy.

The Insurers agreed that the insured was aware of the information and

¹ http://www.lmalloyds.com/LMA/Underwriting/Wordings/Wordings_Forum/LMA/Underwriting/Non-Marine/wordings_forum/WordingsContractsForum.aspx

¹ <http://www.hfw.com/Insurance-Bulletin-24-September-2015>

¹ [2016] EWHC 590 (TCC)



aware that it was not being disclosed to insurers but held the honest but mistaken belief that it need not be disclosed. There was no question of fraud. Therefore the issue for the Court to decide was whether the disclosure had been “deliberate”. In other words, did “Deliberate non disclosure” have to contain an element of dishonesty?

One argument raised by the Insurers was that the use of “deliberate or fraudulent” suggested that dishonest acts were captured by “fraudulent” so “deliberate” was intended to mean something else and could encompass honest mistakes. Coulson J rejected this analysis and held that “deliberate” could mean something different from “fraudulent” but that it could still indicate dishonesty. He considered the situation of an insured knowing that what he said was inaccurate but believing that the inaccuracy did not matter. That would be a situation of deliberate and dishonest misrepresentation, but it would not be fraud because of the honest but mistaken belief that the inaccuracy did not matter. He held that the insured’s conduct in this case (where it knew that there had been non-disclosure but not that this was legally inadequate) did not amount to “deliberate” and so the policy could not be avoided.

This case is of interest in relation to the new Insurance Act 2015, which from 12 August 2016 will provide that insurers can only avoid a policy for breach of the duty of fair presentation if the breach was “deliberate or reckless”. Therefore, while this case turned upon a bespoke wording particular to an individual policy, the meaning of “deliberate” will be at the forefront of the parties’ minds in many disputes arising out of non-disclosure in relation to insurance contracts entered into after August. Coulson J commented that there were in his view no insurance authorities of any assistance on the construction of the

term; his own judgment may now serve as a road map into what was previously uncharted territory.

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England & Wales: Client monies held by insolvent brokers are subject to a trust for the purposes of CASS 5 - *Allanfield Property Insurance Services Ltd and Ors v Aviva Insurance Ltd and Anor*¹

An application by administrators of two insolvent insurance broking companies for directions to approve their proposal for a scheme of distribution has been granted by the High Court (the Court).

Allanfield Property Insurance Services Ltd (APIS) and Industrial & Commercial Property Insurance Consultants Limited (ICP) were insurance brokers who went into administration in December 2012 and January 2013 respectively. At the time of the companies’ administration, significant funds were held in client accounts; £760,000 in the case of APIS and £515,000 in the case of ICP. These funds represented insurance premiums received from clients yet to be sent on to insurers or other intermediaries. Both companies failed to maintain adequate records which would help the administrators to determine with certainty who might be entitled to the funds held in the accounts.

The administrators proposed creating a distribution scheme under which the client accounts were to be treated as consisting of trust funds subject to a pooling event as they believed the client accounts were subject to the



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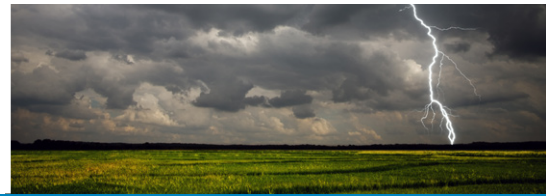
DAVINIA COLLINS, ASSOCIATE

statutory trust regime in Chapter 5 of the Client Assets Sourcebook (CASS 5) in the Financial Conduct Authority (FCA) Handbook. The Court agreed with this analysis. CASS 5 was inserted into the FCA Handbook to give effect to the Insurance Mediation Directive 2002/92/EC, which among other things, was aimed at ensuring the protection of client interests throughout the EU.

In granting the application, the Court considered a number of technical issues such as whether there was certainty that the accounts were held for no other purpose than to hold insurance premiums and the manner in which the funds should be distributed given there were no precise records to assist with reconciling the accounts.

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1 [2016] Lloyd’s Rep. IR Plus 14



hfw 4. HFW publications and events

HFW Associates host drinks reception

On Wednesday 6 April, HFW Associates [Will Reddie](#), [Tom Coombs](#), [Lucinda Rutter](#), [Andrew Spyrou](#), [Davinia Collins](#) and [Simon Banner](#) hosted an annual drinks reception at the Oyster Shed in London. Feedback from the event was positive.

New register for UK companies of persons with significant control

HFW has published a briefing¹ on the new legal requirements applying to all UK companies concerning their ultimate individual control. The briefing explains the new provisions, which include the requirement to maintain a register of persons with significant control, and advises on the next steps for UK companies and LLPs.

As EEA (re)insurers and intermediaries are already required to monitor and disclose who controls them, complying with these new requirements should be straightforward.

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HFW attending 12th International Risk Management Conference

HFW Partners [Paul Wordley](#) and [Sam Wakerley](#) are attending the 12th International Risk Management Conference in Almaty, Kazakhstan on Thursday 14 and Friday 15 April. The event is a platform for worldwide financial, commercial and industrial sector professionals in Central and Eastern Europe to discuss the main challenges and perspectives of risk management development and natural, technological and catastrophic risks.

HFW gives seminar to Aon on underwriting Latin American risks and claims handling issues

On 21 March, HFW Partner [Chris Cardona](#) gave a seminar to Aon's Latin American Claims team in London on underwriting Latin American risks and claims handling issues. The seminar covered topics such as local claims regulations, fronting, the choice of governing law and dispute resolution mechanism in a policy and the interaction of claims cooperation/claims control clauses with follow clauses.

1 <http://www.hfw.com/New-PSC-register-for-UK-companies-March-2016>

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