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1. REGULATION AND LEGISLATION

France: Towards increased regulation of intermediation activities and of construction insurance?

The French Parliament is currently reviewing a draft law (PACTE "law"), which could impact the regulation of intermediation activities and that of construction insurance.

This law is being considered in the context of the French insurance market facing a range of regulatory non-compliance by brokers and financial failures of foreign construction insurers acting in France under a freedom of services passport.

The first proposed reform is to introduce a self-regulation system for insurance intermediaries through representative professional organisations approved by the French Prudential Supervision and Resolution Authority (ACPR). Brokers wanting to operate in France as French-licensed entities would be under an obligation to be members of such an organisation in order to be registered on the registry of insurance intermediaries and hold a French license.

The approved organisation would have the power to sanction its members, including by expelling them from the organisation, in case of a breach of the professional rules applicable to them.

The proposed legislation provides that brokers operating in France under a European passport may become members of such an organisation, and probably by doing so would voluntarily submit to its power, but this is not compulsory for them as this would be in contradiction with European rules on "home State" regulation.

The second proposed reform relates to decennial liability insurance and owner-insurance in the construction sector, in the wake of the defaulting of foreign companies such as Elite or Gable Insurance AG who undertook to insure long-term construction risks on the French market, but are now unable to meet their contractual obligations. As a matter of general background, French law makes it compulsory for project managers or building companies who face decennial liability (a ten year guarantee as to defects) to take out a relevant insurance cover. Similarly, project owners are bound to insure against certain risks under a "dommage-ouvrage" insurance policy.

According to one senator, there is a "real emergency" to "reinforce the current financial monitoring of foreign insurers, as some of them have been facing bankruptcy and have left many insureds with no cover over the last two years".

The proposed reform aims at strengthening the conditions under which foreign insurers with a registered office outside the European Economic Area (EEA) may operate in France, by requiring them to obtain a specific authorisation by the ACPR to be able to underwrite decennial liability or "dommage-ouvrage".

At the moment, foreign insurers can underwrite these risks as long as they are licensed for classes 13 (liability) or 9 (property damage).

However, underwriting such policies entails a specific management of the risk as the premium is paid in one instalment at the inception of the building project but losses are covered only from the moment the project is finished (which may be several years later), and over a period of 10 years from that same moment.

The requirement that foreign insurers hold a specific authorisation to cover such risks has the purpose of enabling the ACPR to control specifically the solvency and risk management policies of these insurers in relation to those risks, so as to improve the protection of policyholders and beneficiaries.

The proposed measure will not apply to insurers whose registered office is located in the EEA which remain subject to the financial supervision of the authority of their home state (Article 30 Directive Solvency II).

The Parliamentary process is still ongoing, but if adopted, the Pacte law should come into force no later than January 2020.

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EU: No-deal Brexit – EIOPA publishes guidance for EU insurance regulators

The European Insurance and Occupational Pensions Authority (EIOPA) has issued nine recommendations to EU insurance regulators dealing with a potential no-deal Brexit.

The looming prospect of a no-deal Brexit is causing much uncertainty in the insurance sector. If the UK leaves the EU on 30 March 2019 without a deal, the UK will become a "third country". UK insurers and distributors will then be unable to freely continue carrying out business in the EU. Many insurers have put in place contingency measures to deal with a potential no-deal scenario. However, EIOPA estimates that 124 UK insurance undertakings still have no or inadequate measures in place. These entities represent 9.1 million policyholders and have insurance liabilities of €7.4bn. EIOPA's latest recommendations are aimed principally at protecting such policyholders who have the benefit of cross-border insurance policies and at minimising the disruption that a no-deal Brexit could cause them.

The nine recommendations include provisions relating to orderly run-off, authorisation of third country branches, lapse of authorisation, portfolio transfers, change in the habitual residence or establishment of the policyholder, cooperation between competent authorities, communication to policyholders and beneficiaries, and distribution activities. Regulators are required to inform EIOPA within two months of the guidance being published in the relevant language about whether they intend to comply with the recommendations. Silence will be deemed as non-compliance.

The recommendations are available at: https://eiopa.europa.eu/Publications/Standards/EIOPA-BoS-19-040_Recommendation_Brexit_final.pdf.

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2. COURT CASES AND ARBITRATION

England & Wales: Suing unidentified defendants: Cameron v Liverpool Victoria Insurance Co Ltd

This decision[1], handed down by the Supreme Court on 20 February 2019, concerns the ability of claimants to sue unidentified defendants and will be welcomed by insurers.

The claimant, Ms Cameron, was injured when her car collided with a Nissan Micra. The registration number was recorded but the driver (who was not the vehicle's owner) fled the scene and has not since been identified. The policy under which the Micra was insured, by Liverpool Victoria Insurance Co Ltd ("Liverpool Victoria"), appears to have been issued to a fictitious person.

Ms Cameron initially sued the vehicle's owner, a Mr Hussain, and Liverpool Victoria. However, when it became apparent that liability would not be established against Mr Hussain, Ms Cameron applied to amend the claim against Mr Hussain to *"the person unknown driving vehicle registration number KG03 ZJZ on 26 May 2013"*. This application was refused at first instance, but allowed by the Court of Appeal, relying upon *Bloomsbury Publishing v News Group* [2003], and the cases which followed it, as establishing that proceedings can be issued against unidentified parties where necessary and efficacious to obtain justice.

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"The nine recommendations include provisions relating to orderly run-off, authorisation of third country branches, lapse of authorisation, portfolio transfers, change in the habitual residence or establishment of the policyholder, cooperation between competent authorities, communication to policyholders and beneficiaries, and distribution activities"

1. [2019] UKSC 6

However, the Court of Appeal's decision has now been overturned by the Supreme Court. Lord Sumption, who gave the only judgment, took into account four particular factors:

1. The nature of motor insurance in the United Kingdom

Lord Sumption gave the pertinent reminder that victims of road accidents have no direct right against an insurer in respect of the underlying liability against an insured driver: victims can only require insurers to satisfy judgments against drivers. Further, it is individuals, not vehicles, to whom motor insurance is issued and an insurer is liable to no one but its insured.

2. The categories of unidentified defendants

Lord Sumption said that it is necessary to distinguish between two kinds of case involving unnamed defendants:

- Category (i): anonymous defendants whose names are unknown but who are nonetheless identifiable (Lord Sumption gave the example of squatters occupying a property who are identifiable by their location); and
- Category (ii): defendants, such as hit and run drivers, who are not only anonymous but cannot even be identified.

3. The claimant's ability to actually serve the proceedings they have issued

Following on from (2) above, the Court noted that although it is possible to issue a claim against both above-mentioned categories of defendant, it is service of that claim which is key: that is when an English court becomes "seised" of an action and, further, a person cannot be made subject to the jurisdiction of the court without having notice of the proceedings against them.

Service on Category (i) defendants is possible, if necessary by alternative service under CPR 6.15. In contrast, service on Category (ii) defendants such as the Micra driver, is impossible because neither are they known nor can they be found. Further, the Court held that service on Liverpool Victoria could not be expected to reach the driver of the Micra.

Lord Sumption did leave open the possible of dispensing with the requirement for service against Category (ii) defendants who had deliberately evaded service, but suggested that it might be difficult to prove that a hit and run driver had the requisite knowledge that proceedings had been or were likely to be brought.

4. The existence of an alternative remedy available to Ms Cameron

Lord Sumption also took into account the existence of the Untraced Drivers Agreement pursuant to which the Motor Insurers' Bureau would compensate claimants who found themselves in precisely the same situation as Ms Cameron (though the Court also suggested that the position vis-à-vis insurers might have been different if no statutory scheme of protection had been in place).

Accordingly, in light of this judgment it will now be extremely difficult to pursue claims against unidentified drivers following hit and run accidents. Moreover, it is now clear that claimants will be unable to proceed against insurers of vehicles driven by unidentified drivers in circumstances where the unidentified driver is not the person insured by the policy.

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