INSURANCE BULLETIN
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In this week's Insurance Bulletin:

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1. REGULATION AND LEGISLATION

UK: Coronavirus – FCA implements temporary financial relief measures for impacted customers

The Financial Conduct Authority (FCA) has confirmed a package of targeted temporary measures to provide financial relief for coronavirus-impacted customers of some of the most commonly used consumer credit products[1].

The FCA has given firms the flexibility to provide temporary financial relief to customers facing payment difficulties during the coronavirus (Covid-19) pandemic.

The measures include:

- offering a temporary payment freeze on loans and credit cards for up to three months, for consumers impacted by coronavirus;
- allowing customers who are impacted by coronavirus and who already have an arranged overdraft on their main personal current account, up to £500 charged at zero interest for three months;
- making sure that all overdraft customers are no worse off on price when compared to the prices they were charged before the recent overdraft pricing changes came into force; and
- ensuring consumers using any of these temporary payment freeze measures will not have their credit file affected[2].

The relevant FCA rule changes have been in force since 9 April 2020 and the full range of measures is applicable from 14 April 2020, so all firms are now expected to be ready to receive such customer requests.

The FCA has stated that the temporary measures are not intended to have any relevance in circumstances other than those where customers are already experiencing or reasonably expect to experience temporary payment difficulties as a result of coronavirus. Where a customer is in pre-existing financial difficulty, the FCA's existing forbearance rules and guidance in CONC continue to apply. Further, customers should only make use of the temporary measures if they need immediate help. Where they can still afford to make payments, they should continue to do so.

That being said, the FCA has emphasised that the measures build on Principle 6 ("A firm must pay due regard to the interests of its customers and treat them fairly"). In this sense, when implementing the measures, firms should take account of the particular needs of their vulnerable customers. Indeed, there is nothing to prevent firms from offering more generous assistance to their customers and firms can consider other measures, such as reductions in monthly payments, if appropriate.

The FCA has also made clear that only certain products fall within the scope of the measures and guidance. For example, the measures do not apply to premium finance.

The FCA will review its measures and guidance in the next three months in light of developments regarding coronavirus and may revise them, and/or extend them to other products, if appropriate.

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1 The FCA's press release confirming such a package can be accessed at: https://www.fca.org.uk/news/press-releases/fca-confirms-temporary-financial-relief-customers-impacted-coronavirus

2 The FCA's finalised guidance for regulated firms who issue credit cards and retail revolving credit products can be accessed at: https://www.fca.org.uk/publications/finalised-guidance/credit-cards-retail-revolving-credit-coronavirus-temporary-guidance-firms

The FCA's finalised guidance for firms that issue personal loans can be accessed at: https://www.fca.org.uk/publications/finalised-guidance/personal-loans-coronavirus-temporary-guidance-firms

The FCA's finalised guidance for firms with permission to accept deposits and which provides a current account with an overdraft facility can be accessed at: https://www.fca.org.uk/publications/finalised-guidance/overdrafts-coronavirus-temporary-guidance-firms

2. COURT CASES AND ARBITRATION

England & Wales: Supreme Court considers assignment and jurisdiction clauses

For as long as the UK continues to adhere to the Brussels Regulation Recast (Regulation (EU) 1215/2012) the provisions of Section 3 of Chapter II thereof concerning jurisdiction in matters relating to insurance will be of relevance to those operating in the industry.

A recent Supreme Court judgment considered in particular the application and scope of article 14 of that section, which provides that an insurer may bring proceedings against the policyholder, the insured or a beneficiary only in the courts of the member state in which the defendant is domiciled. The Supreme Court also considered the question of whether, and if so in what circumstances, an assignee of the benefit of an insurance policy is bound by an exclusive jurisdiction clause therein.

Aspen Underwriters Ltd and others (the "Insurers") wrote a hull and machinery risks insurance policy (the "Policy") for the *Atlantik Confidence*. Credit Europe Bank NV (the "Bank") funded the re-financing of the vessel, the loan being secured by a first mortgage on the vessel and a deed of assignment of the insurance. The Policy was endorsed so as to identify the Bank as mortgagee, assignee and loss payee.

The *Atlantik Confidence* subsequently sank off Oman on 3 April 2013 after a fire broke out on board. The owners and managers of the vessel settled with the Insurers for $22 million in full and final settlement of their claim. However, the Admiralty Court later found (in a related limitation action[1]) that the master and chief engineer had sunk the vessel on the owners' instruction.

The Insurers therefore commenced proceedings against the owners, managers and the Bank to avoid the settlement agreement and obtain damages for misrepresentation and/or restitution. The Bank challenged the jurisdiction of the High Court to hear the Insurers' claims against it.

The court at first instance[2], and the Court of Appeal[3], held that the English court had jurisdiction over the claims for damages (under article 7(2) of the Regulation), but not in respect of any claims for restitution. The courts also stated that the exclusive English jurisdiction clauses in the Policy and the settlement agreement would not confer jurisdiction either.

Both the Insurers and the Bank appealed to the Supreme Court, the principal issues being:

- Did the High Court have jurisdiction pursuant to the exclusive jurisdiction clause in the Policy?
- Were the Insurers' claims against the Bank "matters related to insurance" (under section 3 of the Regulation) and, if so, could the Bank rely on this to challenge the High Court's jurisdiction?

The Supreme Court stated that the exclusive jurisdiction clauses did not bind the Bank as it was not a party to the contract contained in the Policy, nor to the settlement agreement, but was merely an assignee of the benefit of the former. The Bank would not be bound unless and until it took steps to exercise or enforce its rights to the proceeds of the Policy Asserting its right to payment under the Policy as loss payee and assignee was not enough, and neither was issuing a letter of authority to allow the settlement to proceed. These actions did not create any inconsistency with the terms of the Policy, particularly the exclusive jurisdiction clause.

On the second issue, the Supreme Court confirmed that the Insurers' claims against the Bank were *"matters relating to insurance"*. Section 3 of the Regulation is titled *"Jurisdiction in matters relating to insurance"* such that a *"gloss"* would be needed in order to read in a requirement for matters to relate to an insurance **contract**. Section 3 therefore concerns not only the parties to the insurance contract, but also any beneficiaries of the

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1 [2016] EWHC 2412.

2 [2017] EWHC 1904 (Comm) and [2017] EWHC 3107 (Comm).

3 [2018] EWCA Civ 2590.

insurance and (in the context of liability insurance) any injured parties. In any event, the matters in issue were such that they would inevitably involve consideration of the rights and obligations under an insurance contract was:

Pursuant to article 14 of the Regulation:

"... an insurer may only bring proceedings in the courts of a member state where the defendant is domiciled, irrespective of whether he is a policyholder, the insured or a beneficiary".

The lower courts had decided that the Bank could not benefit from article 14 as they considered the protection to be available only to weaker parties, in circumstances of economic imbalance. However, Lord Hodge disagreed: *"there is no "weaker party" exception which removes a policyholder, an insured or beneficiary from the protection of article 14".* In support of this, Lord Hodge referred to several decisions of the Court of Justice of the European Union, which emphasise that any derogations from the principle of the jurisdiction of the defendant's domicile must be exceptional in nature and interpreted strictly.

As loss payee under the Policy, the Bank was a *"beneficiary"* and could therefore benefit from Article 14's protections. There was nothing exceptional to diverge from this so the Insurers' appeal was denied and the Banks' allowed. The English court did not, therefore, have jurisdiction to hear the Insurers' claims.

There are many important reasons (including, for example, variance in processes and degrees of judicial specialism between jurisdictions, as well as more practical considerations such as geographic convenience) why most if not all parties would prefer to have their disputes adjudicated in a jurisdiction of their choice. This case is an illustration of circumstances in which such matters may be taken out of the hands of insurers.

In particular, where there is an assignment of the benefit of a policy, insurers cannot assume that the assignee will necessarily be bound by any exclusive jurisdiction provisions therein. Insurers might seek to avoid such risks by either preventing assignment altogether, or by making it conditional upon any assignee expressly agreeing to be bound by the terms of the policy (including those concerning jurisdiction).

The case further demonstrates that, where there is no operative exclusive jurisdiction clause, the provisions of article 14 of Section 3, Chapter II of the Regulation will be applied relatively strictly in favour of the defendant policyholder, insured or beneficiary, and without regard to the actual balance of bargaining power between the parties, even in the case of a sophisticated assignee such as the Bank.

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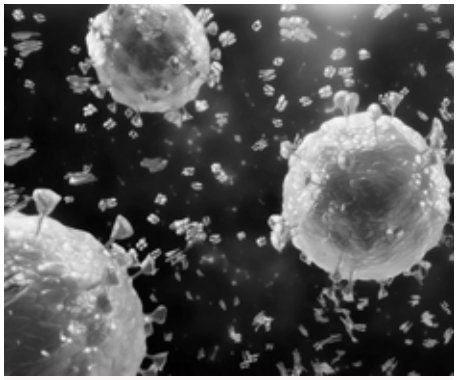
3. HFW PUBLICATIONS AND EVENTS

HFW welcomes you to join a free webinar on 'The Psychological impact of working in the world of COVID-19' on 30th April at either 7am(BST) or 4pm(BST). The 60 minute seminar will focus on how to manage the shift to working flexibly and will cover topics such as; creating a positive work space, achieving physical well-being in a limited space and for managers, tips on how to keep your team connected – find all the details of the seminar at https://www.hfw.com/downloads/HFW-Consulting-The-psychological-impact-of-working-in-the-world-of-Covid-19.pdf. If you would like to attend either session, please register at https://sites-hfw.vuturevx.com/32/3465/landing-pages/registration-form.asp.



We are working with clients across our international network to help them minimise the impact of COVID-19 on their business and to prepare for what's next. To find out more, visit our dedicated Covid-19 hub: **https://www.hfw.com/covid-19**.

We are aware that this is a challenging time for our clients, and we have a number of legal training sessions that we can deliver remotely to our clients. We have a flexible approach so we can provide appropriate content in a format that works for your team. Please get in touch with your usual HFW contact or with our Professional Support Lawyer, **Rebecca Huggins**, or our Client Training Partner, **Costas Frangeskides**, if you would like to see a list of topics or discuss a tailored session to look at issues relevant to your team.