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1. REGULATION AND LEGISLATION

UK: EIOPA launches InsurTech insight survey

EIOPA has launched a survey on the use of InsurTech solutions to enable its InsurTech Taskforce (ITF) to identify and report on best practices regarding the supervision of InsurTech products and providers, and to identify possible regulatory barriers to financial innovation.

In particular, the survey focusses on potential gaps and issues in the existing regulatory framework, peer-to-peer insurance, licensing requirements, legal barriers to InsurTech, and ways in which regulators can facilitate the development of InsurTech products. We consider below four legal and regulatory challenges that all new InsurTech products face.

In launching the survey, EIOPA stated that InsurTech solutions could result in the creation of innovative business models, applications, processes or products that have a material effect on the supply of insurance products and services, but emphasised that consumer protection and the financial stability of the market are key priorities. EIOPA hopes that its ITF will enable it to take a balanced approach to InsurTech which allows it to achieve these priorities, while at the same time enabling the potential benefits of InsurTech for consumers and the insurance industry to be realised.

The survey closes on 12 August 2018, and can be found here: https://ec.europa.eu/eusurvey/runner/EIOPA_survey_licensing_barriers_to_InsurTech_InsurTech_facilitation

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Research by Rachel Boughton.

UK: InsurTech – four legal and regulatory challenges that all new products face

MarketMinds’ recent “Insurtech For A Digital London Market” conference saw eight innovators demonstrate their products on what was a fascinating evening. Presentations were given by the likes of Flock (the operator of a drone insurance platform), Cytora (designers of an AI engine which assists with the pricing of risk) and Shift Technology (which uses AI and machine learning to help insurers detect fraud).

Following the conference, our thoughts turned to the legal and regulatory challenges facing entrepreneurs who are looking to launch InsurTech products, and how HFW can help overcome those challenges.

Four challenges that new products are likely to face are:

1. **Getting the business off the ground** – several practical matters need to be considered to ensure that there is a solid business infrastructure supporting the product. This includes how the business will raise funds, whether the proposed jurisdiction of incorporation gives rise to tax issues, and how valuable IP can be protected.
2. **Lawyers v the MVP** – the fear when asking lawyers to review a product can be that the product will not be “signed off” unless every last t is crossed, and i is dotted, which can come at a considerable cost. We understand that this is difficult to balance with a business’s desire to launch a product rapidly to fill a gap in the market before someone else does, especially on the budget of a start-up. Our advice is always underpinned with solid legal expertise, but we think creatively and take a pragmatic approach to advice and to our fees to enable our clients to achieve their aims.
3. **Insurance regulation** – something that often gets left until last is checking whether a carefully designed products complies with the laws and regulations that apply to the heavily-regulated insurance sector. We encourage

businesses to collaborate with us at the design stage, so that issues can be resolved before the product reaches a stage where changes are more difficult to make.

4. **Compliance** – compliance with insurance laws and regulations is unfortunately just the start. Ensuring compliance with KYC/AML laws and with the GDPR are vital, especially in light of the potentially crippling penalties for breaches.

The InsurTech market seems to be closing the gap between it and the FinTech market, with high levels of interest both in designing and funding new products. Legal and regulatory issues may not be top of the list for innovators, but addressing potential hurdles at an early stage will reduce the risk of 11th hour headaches.

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UK: Disclosure of information to customers on the impact of Brexit – EIOPA Opinion

Following the European Insurance and Occupational Pensions Authority's (EIOPA) opinion on 21 December 2017 on service continuity in light of the UK's decision to leave the European Union (Brexit), EIOPA has published a further opinion on 28 June 2018 on the disclosure of information to customers on the impact of Brexit (EIOPA Opinion).

In its 21 December 2017 opinion EIOPA advised insurance undertakings to take adequate steps in order to ensure service continuity in relation to contracts concluded prior to the UK's withdrawal date. The aim of the EIOPA Opinion is to remind national supervisory authorities about the duty of insurance entities to inform their customers about the possible impact of Brexit on their contracts and of the relevant contingency measures taken by them. EIOPA advises insurance entities to provide clear and non-misleading information on the contingency measures taken or planned by them, including where no measures have been taken and the reasons for this.

The EIOPA Opinion is addressed to national supervisory authorities, which are required to monitor whether insurance entities are fulfilling their obligations, and concerns contracts between the UK and the rest of the European Union.

EIOPA considers that insurance entities (particularly insurance undertakings) need to provide customers with a range of information in order to enable customers to make an informed decision before concluding or renewing a contract. Some examples of possible impacts that insurance entities (and their distribution channels) would be required to inform their customers of are:

- change of the contractual counterparty or the validity of insurance contracts
- change or loss of protection provided by any existing national compensation scheme
- change to tax implications
- change to the claims management procedure or to other customer services
- change of the applicable law

There is an expectation that customers be informed of any changes in "due time" so that they can make an informed decision during inception and renewals. EIOPA has extended its opinion to cover contractual counterparties as well as "beneficiaries", which would include any person who is entitled to a right under an insurance contract.

Together with national supervisory authorities, EIOPA will monitor how customers are informed about Brexit by working with national supervisory authorities and it expects national supervisory authorities to provide it with the necessary information to monitor developments in this area.

A copy of the EIOPA Opinion can be accessed at: <https://eiopa.europa.eu/Publications/Opinions/EIOPA-BoS-18-119-Opinion on Disclosure.pdf> and a copy of the related FAQs can be accessed at: <https://eiopa.europa.eu/Publications/Opinions/EIOPA-BoS-18-119-Frequently Asked Question Opinion on Disclosure.pdf>. You can access the EIOPA's opinion on service continuity published on 21 December



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“SM&CR aims to create a system that encourages staff to take personal responsibility for their actions, improves conduct at all levels, and makes sure firms and staff clearly understand, and can demonstrate, who does what.”

2017 at: https://eiopa.europa.eu/Publications/Opinions/2017-12-21%20EIOPA-BoS-17-389_Opinion_on_service_continuity.pdf.

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UK: Senior Managers and Certification Regime - Near final rules published for insurers

The Financial Conduct Authority (FCA) has published a policy statement setting out its near final rules on how it intends to extend the Senior Managers and Certification Regime (SM&CR) to insurers (Policy Statement). The FCA has also published a separate “SM&CR: Guide for insurers” which sets out the main features of the regime and provides an overview of how the SM&CR works and how the FCA will move firms and individuals to the new regime. The FCA is also extending the SM&CR to insurance intermediaries; the policy statement can be found at: <https://www.fca.org.uk/publication/policy/ps18-14.pdf>. We will be publishing a separate article on it in the next edition of our Insurance Bulletin.

What is the SM&CR?

The SM&CR is replacing the current Approved Persons Regime for insurers. The Policy Statement will be of interest to Solvency II firms (including managing agents and UK branches of non-UK firms), insurers outside the scope of Solvency II, and small run-off firms (i.e. insurers with less than £25m technical provisions that no longer have permission to write or acquire new business). The SM&CR will not apply to Appointed Representatives who will continue to be subject to the Approved Persons Regime.

SM&CR aims to create a system that encourages staff to take personal responsibility for their actions, improves conduct at all levels, and makes sure firms and staff clearly understand, and can demonstrate, who does what. The Senior Insurance Managers Regime (SIMR) already

incorporates some of the substantive ideas and principles underpinning the SM&CR and HM Treasury has previously stated that SIMR would “pave the way” to SM&CR¹. The SM&CR is due to commence for insurers on 10 December 2018 but will require substantial investment in preparation before then.

What are the key features of the SM&CR?

The SM&CR is made up of 3 key parts:

1. The Conduct Rules

This sets out the minimum standards of individual behaviour and will apply to almost all employees who perform financial services roles in a firm.

2. The Senior Managers Regime (SMR)

This new regime creates a new type of controlled function called a “senior management function”. The people who will hold such functions will be called “Senior Managers” and will be required to be PRA or FCA approved.

3. The Certification Regime

The Certification Regime is one of the biggest changes for insurers from the Senior Insurance Managers Regime and Approved Persons Regime. It will apply to people who are not senior managers but whose roles mean it is possible for them to cause significant harm to the firm or of its customers. Employees performing such functions, known as certification functions, will not need to be approved by the FCA but firms will need to certify at least once a year that they are fit and proper to perform their role.

There are two key transitional arrangements to help firms move to the new regime:

1. Firms will have to identify the staff performing certification functions ahead of 10 December but will have 12 months from the commencement date to complete the initial certification process.
2. Senior Managers and employees performing certification functions will need to have been trained

¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/468328/SMCR_policy_paper_final_15102015.pdf

and abide by the Conduct Rules by 10 December 2018. Other staff will need to be trained within 12 months of the commencement date.

The Policy Statement can be found at: <https://www.fca.org.uk/publication/policy/ps18-15.pdf> and the SM&CR: Guide for insurers can be found at: <https://www.fca.org.uk/publication/policy/guide-for-insurers.pdf>.

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Global: IAIS cyber security consultation

The International Association of Insurance Supervisors (IAIS) has issued for consultation a draft application paper on the supervision of insurer cyber security.

The draft application paper provides insurance supervisors with guidance for updating their regulatory regimes and supervisory practices, as they apply to cyber security.

The paper takes as its starting point the October 2016 G7 fundamental elements of cyber security (G7FE). These elements include:

- establishing and maintaining a cyber security strategy and framework;
- responding to cyber incidents in a timely manner; and
- regularly reviewing the strategy and framework.

For each element, the IAIS draft paper:

- maps that element to individual insurance core principles (ICPs);
- provides recommendations for supervisors;
- gives examples of current practice; and
- assesses the desirable outcomes for that element.

The draft application paper can be viewed at: <https://www.iaisweb.org/page/consultations/current-consultations/application-paper-on-cyber-security/file/75304/>

draft-application-paper-on-supervision-of-insurer-cybersecurity

The deadline for comments on the draft paper is 13 August 2018.

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2. COURT CASES AND ARBITRATION

England & Wales: Insurer Successfully Pursues Exemplary Damages

The Court of Appeal has handed down its judgment in the case of *AXA Insurance UK Plc v Financial Claims Solutions Limited Mohammed Aurangzaib Hakim Mohammed (MD) Abdul*¹ and took the relatively unusual step of awarding exemplary damages.

The Respondents committed serious frauds in relation to two fictitious motor accidents. In both cases, the respondents fabricated accidents, purported to bring proceedings against the driver in question (in each case, an insured of AXA), obtained default judgment and sought to enforce those judgments. They did so via an entity called Coelum Legal, which fraudulently held itself out as a law firm.

AXA, having been faced with enforcement proceedings, managed to unravel the frauds and have the judgments struck out. It also pursued a claim for damages from the respondent. The judge at first instance awarded compensatory damages (the cost of unravelling the fraud and dealing with the judgments) but not exemplary damages finding, among other things that the fraud had been discovered before the Respondents had profited. Thus, they were not left “up on the deal” following the award of compensatory damages.

AXA appealed on the availability of exemplary damages and the leading judgment was given by Lord Justice Flaux. Flaux LJ held this to be a paradigm case of when exemplary



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¹ [2018] EWCA Civ 1330



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“The relevant factor was that the aim of the fraudsters was to obtain profit significantly in excess of the compensatory damages available.”

damages should be awarded. He found it to be a *“a sophisticated and sustained fraud involving deceit and fraudulent misrepresentation from the outset”* and one where the *“object was to extract large sums from the insurers through fraudulent insurance claims”*. In the view of the Court, it was not relevant that the fraud was unwound before such money had been extracted, and therefore that the Respondent’s profit was, in fact limited to the cost of unwinding the fraud. The relevant factor was that the aim of the fraudsters was to obtain profit significantly in excess of the compensatory damages available.

The Court also found that the first instance judge had erred in attaching weight to the availability of criminal and contempt proceedings as alternatives to a claim for exemplary damages.

The Court has not rewritten the law on the availability of exemplary damages, but has provided some clarity to a difficult area.

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Australia: New South Wales Supreme Court considers meaning of “in respect of”

A recent NSW Supreme Court decision¹ suggests that Australian courts may interpret the phrase “in respect of” property damage in the insuring clause of a liability policy as expanding the scope of cover to include claims for economic loss that are causally connected to property damage. UK courts may take a narrower approach.

The Rail Corporation of New South Wales (Rail Corp) contracted the design and construction of a maintenance centre on its land, through a series of subcontracts, to John Holland Pty Ltd (John Holland).

The maintenance centre required a stormwater detention system which comprised of a large detention tank under a carpark. The drainage

for the detention tank was to be provided by plastic cells. John Holland sub-contracted the design of the detention system to Kellogg Brown & Root Pty Ltd (KBR) and the manufacture of the plastic cells to Atlantis Corporation (Atlantis). In early 2013, the carpark collapsed following work undertaken on an adjoining site. The detention tank was subsequently removed and replaced with a concrete tank.

Downer commenced proceedings against Atlantis, KBR and John Holland to recover the costs of replacing the detention tank. Downer alleged the defects in the detention system were the result of poor design and construction, especially in relation to the plastic cells provided by Atlantis.

Atlantis was in administration and its public liability insurer, QBE, was joined to the proceedings in its place. John Holland argued that if it had any liability to Downer, it was entitled to pass this liability on to KBR and Atlantis. KBR pursued a similar claim against Atlantis on that basis that Atlantis would be liable to either John Holland or Downer.

Stevenson J of the NSW Supreme Court held that Atlantis was not liable to any party and the proceedings were dismissed.

The QBE policy

Although it was not necessary to determine the claim against QBE, Stevenson J nevertheless considered whether QBE’s policy would have responded had Atlantis been liable.

The relevant insuring clause was as follows:

“We agree...to pay to You... all amounts which You shall become legally liable to pay as Compensation in respect of...Property Damage...happening during the Period of Cover...and caused by or arising out of an Occurrence in connection with Your Business.”

The term *“Compensation”* was defined in the policy to mean *“monies paid or...to be paid by judgment...for...Property Damage”*.

¹ *Kellogg Brown & Root Pty Ltd v John Holland Pty Ltd* (No 4) [2018] NSWSC 326.

Issue

Did the phrase “*in respect of*” cover claims against Atlantis by Downer, John Holland and KBR to recover the economic loss they would suffer if liable to compensate Rail Corp for property damage?

Stevenson J noted that there was:

- English authority² in which the expression “*in respect of*” property damage in a liability policy was held to be equivalent to “*for*” property damage, with the result that the policies were construed to be limited to a liability to the owner of the property alleged to be damaged.
- Australian authority³ to the opposite effect, where the full Federal Court accepted that a claim for economic loss under a similar insuring clause could be a claim “*in respect of*” property damage, provided that the economic loss was sufficiently causally connected to property damage.

Stevenson J held that, had it been necessary to express an opinion on the question he would have followed the Australian authority as he considered it “*more persuasive*”.

He held that the issue did not arise, however, because the definition of “*Compensation*” meant that the insuring clause covered only legal liability Atlantis may have:

- By reason of a judgment “*for*” property damage;
- Which judgment is “*in respect of*” property damage which;
- Happened during the relevant Period of Cover; and
- Was caused by or arises out of an unintended and unexpected event.

As it was common ground that the claims were not “*for*” property damage the QBE policy would not have responded.

Key take-aways

Insurers and policyholders should ensure that the wording of an insuring clause reflects their understanding and intention regarding the scope of cover provided. It is a good idea to check the meaning of an insuring clause by inserting the full definition of defined terms and reading it as a whole.

In the context of liability policies that cover property damage claims, consider whether the intention is to cover claims for economic loss that are causally connected to property damage. If not, care should be given to the use of the phrase “*in respect of*”.

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3. HFW PUBLICATIONS AND EVENTS

HFW Partner admitted as Civil Mediation Society mediator

We are delighted to announce that Partner Andrew Bandurka (London) has been admitted as a registered mediator by the Civil Mediation Society. Congratulations, Andrew!



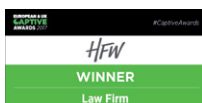
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2. *Tesco Stores Ltd v Constable* [2008] EWCA Civ 362

3. *Siegwerk Australia Pty Ltd (in liq) v Nuplex Industries (Aust) Pty Ltd*

HFW has over 500 lawyers working in offices across Australia, Asia, the Middle East, Europe and the Americas. For further information about our Insurance/reinsurance capabilities, please visit <http://www.hfw.com/Insurance-Reinsurance-Sectors>



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