Insurance/ Reinsurance

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MENA LAW FIRM OF THE YEAR

INSURANCE BULLETIN





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2nd Middle East Insurance Industry Awards 2015 LAW FIRM OF THE YEAR

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1. Regulation and legislation

UK: European regulators seeking to attract UK (re)insurers

Theresa May's confirmation in mid-January that the UK will leave the single market following its departure from the EU seems to signal that UK (re)insurers and intermediaries will lose their passporting rights, and with it the ability to access European markets without further authorisation. It is too early to say whether a bespoke deal might be agreed which will enable access to continue in one or both directions, or the form that this access might take, but European regulators have wasted no time in seeking to attract UK (re)insurers and intermediaries to their jurisdictions.

It is understood that the Maltese, Irish and German regulators have spoken to UK (re)insurers and/or intermediaries about redomiciling to their jurisdictions, although it is believed that at least some of the contact with the European regulators has been initiated by the (re)insurers and intermediaries in question. Representatives of the Malta Financial Services Authority visited London this month to meet with interested parties, the Central Bank of Ireland has confirmed that it is speaking to UK-based insurers about establishing subsidiaries in Ireland, and BaFin has launched a dedicated contact form for companies that are interested in moving to Germany. For as long as the UK remains part of the EU, UK (re)insurers can undertake an insurance business transfer, effect a cross-border merger or convert into a Societas Europaea (SE) and migrate the SE into another EU state. It is likely that these methods, which in many respects compare favourably to the process of establishing and obtaining authorisation for a subsidiary in another EU state, will be lost following the UK's final exit from the EU. It is therefore no surprise that some (re)insurers and intermediaries have decided to act now, and no surprise that European regulators are making an effort to attract their business.

Although many aspects of the UK's exit from the EU remain unclear, it would be wise for (re)insurers and intermediaries to consider contingency plans now.

WILLIAM REDDIE, ASSOCIATE

Although many aspects of the UK's exit from the EU remain unclear, it would be wise for (re)insurers and intermediaries to consider contingency plans now. Further information can be found in our briefing on preparing for Brexit, which can be found on hfw.com.

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UK: Unlicensed consumer credit lending – FCA takes first criminal action

The FCA has taken its first criminal action against an individual which it alleges operated as an unlicensed consumer credit lender. Since the FCA assumed responsibility for regulating consumer credit business on 1 April 2014, it has put in place several redress schemes, which have resulted in hundreds of millions of pounds of compensation being paid to consumers, but this is the first time it has opted to take criminal action under its consumer credit powers.

In a case which is due to be heard in Southwark Crown Court on 14 February 2017, the accused is alleged to have conducted regulated consumer credit activities without authorisation. He is believed to have lent over £1 million over the previous four years, acting as a lender of last resort to consumers in difficult circumstances. It is alleged that the accused registered charges against the homes of borrowers so that he could take possession if the borrower defaulted on his or her repayments.

The accused was disqualified as a director for 15 years in a separate action in May 2016 relating to the liquidation of one of his vehicles, Barons Finance Limited, which was investigated by the FCA as part of these proceedings.

Companies or individuals which undertake consumer credit activities will almost certainly need to be authorised by the FCA, and the FCA taking action against an individual who it considered was acting without the necessary authorisation is not particularly remarkable. The tough action which the FCA has taken in this particular case may be explained by the aggravating circumstances,



namely the involvement of vulnerable consumers and the lender's action in taking security over lenders' properties.

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Hong Kong: "Sorry seems to be the hardest word" – Hong Kong Apology Bill

Hong Kong has moved a significant step closer towards a "sorry law". If passed, it will be the first Asian jurisdiction to enact such laws. In November 2016, after two rounds of public consultation, the Department of Justice published the *"Enactment of Apology Legislation in Hong Kong: Final Report & Recommendations"* and the Apology Bill. On 8 February 2017, the Bill will be reviewed by the Legislative Council. The aim is to encourage apologies with a view to achieving early resolution or settlement of disputes but at the same time removing legal disincentives to apologise. The Bill lays down the legal consequences of making an apology in civil, disciplinary and regulatory proceedings. It specifically excludes criminal proceedings.

The key provisions are:

- An apology may be oral, written or by way of conduct. It will not be deemed to be an admission of fault or liability.
- An apology is not admissible in proceedings to determine fault or liability, save in excepted circumstances.
- In the context of insurance policies, there is an express provision that an apology does not render void or affect any insurance cover.
- It is not possible to contract out of the provisions once in force.
- For the purposes of limitation, an apology does not constitute an acknowledgement. Accordingly, it does not permit a fresh accrual of action to arise in respect to matters involving the recovery of land.

Only time will tell whether an early apology will in fact improve the prospects of earlier and more amicable settlement of disputes, but speedy resolution and reduced costs will be beneficial for all those involved, including insurers.

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UK: Automated vehicles: Government publishes insurance proposals

The Department for Transport has proposed amendments to the UK motor insurance framework to include provision for automated vehicles (AVs). This is one part of the UK Government's aim to develop an international transport technology revolution, which will include the development of driverless cars and the launch of a commercial spaceport. These initiatives were announced by the Queen in her May 2016 speech and will form key provisions of the Modern Transport Bill, which is expected to be published in early 2017.

Under the Government's proposals, the insurer will provide cover for both a driver's use of a vehicle and the car's AV technology. The insurance offered would be a unified product, covering the motorist whilst driving the vehicle conventionally and the vehicle whilst in autonomous mode.

Expanding AV technology presents insurers with a wide array of questions and uncertainties:

- It is very difficult to assess the level of risk involved in such a new technology as there is currently an extremely limited amount of data modeling on the subject. Each individual driver may, for example, use the AV technology for different amounts of time or make different modifications to their AVs.
- It is also unclear to what extent cyber hackers or terrorists may be able to "hijack" AVs. Two major terrorist attacks in Europe in 2016, the Bastille Day attack in Nice in July 2016 and the Berlin Christmas market attack, were both caused by hijacked lorries.
- It is not yet known how attractive AVs will prove to insurance fraudsters.

These difficulties are heightened by the fact that the AV insurance market is expected to become extremely competitive, since according to some

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estimates, the majority of vehicles on UK roads will be autonomous within 15 to 20 years.

The government is doing its best to allay the concerns of organisations representing victims of motor accidents. Under the proposals, insurers would be entitled to recover from the vehicle manufacturers if the accident were caused by an AV fault. In its January 2017 publication *"Pathways to driverless cars"* (available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/581577/pathway-to-driverless-cars-consultation-response.pdf), the Government responded to its latest consultation on the subject and stated that the victim will have a *"direct right against the motor insurer, and the insurer in turn will have a right of recovery against the responsible party, to the extent there is a liability under existing laws, including product liability laws."*

The UK insurance industry has also formed the Automated Driving Insurance Group (ADIG), headed by the Association of British Insurers, to determine guidelines for which party should be responsible in crashes of AVs: the drivers, or the vehicle manufacturers.

The eventual impact on insurers is not yet clear, but it seems beyond doubt that the AV revolution will force motor insurers to change the way they assess risk and set premiums.

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2. Court cases and arbitration

England and Wales: *WR Berkley Insurance (Europe) Limited v Teal Assurance Company Limited*

In the recent case of *WR Berkley Insurance (Europe) Limited v Teal Assurance Company Limited*[1], the Court of Appeal delivered the latest in a series of rulings in a long-running reinsurance dispute. The dispute concerns the order in which a series of losses eroded a programme of excess professional liability insurance, provided by T (a captive insurer) to the original insured, B.

The appellants in this case (W) reinsured T in respect of the "top and drop" layer of the programme, the four underlying layers of which each had aggregate limits. Importantly, cover under the underlying policies was broad, covering risks on a worldwide basis. Cover under the top and drop layer and its reinsurance was narrower, excluding US and Canadian claims.

Previously, T had argued against W that B's losses eroded the liability tower in the order in which they were settled by T, and that it was therefore open to T to order B's losses however it chose for reinsurance recovery purposes. If correct, this would have allowed T to collect US losses from the lower layers of the tower, and non-US losses from the top and drop layer, giving T access to W's reinsurance of that layer.

However, in his Commercial Court judgment (which was subsequently upheld by both the Court of Appeal and the Supreme Court) Mr Justice Andrew Smith held that it was not open to T to order the losses in this

One particular non-US loss had been settled by way of an agreement providing for payment by B into escrow and subsequent draw down upon the escrow funds by the third party claimant, upon certain conditions being fulfilled.

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way and that those losses instead eroded the liability tower in the order in which B's liability to third party claimants was established and ascertained. For further details of the previous arguments and the various rulings upon them, see our October 2013 bulletin[2].

T subsequently revised its case, so that, instead of arguing that it was entitled to order B's losses howsoever it chose to settle them, T argued that, on the facts, B's liability to third party claimants was established and ascertained in an order which meant that the non-US losses impacted the top and drop layer.

One particular non-US loss had been settled by way of an agreement

1 [2017] EWCA Civ 25

2 http://www.hfw.com/Insurance-Bulletin-October-2013


providing for payment by B into escrow and subsequent draw down upon the escrow funds by the third party claimant, upon certain conditions being fulfilled. T's revised argument was that B's liability was established and ascertained at the (relatively late) point at which the escrow funds were drawn down upon by the third party claimant. Against this, W argued that B's liability was instead established and ascertained on an earlier date at which the payment into escrow was made.

As we reported in our 7 May 2015 bulletin[3], at first instance Mr Justice Eder preferred T's arguments on this preliminary issue, holding that B suffered a loss for the purposes of its professional liability programme as and when the third party claimant drew down on the escrow funds. The programme provided an indemnity in respect of sums which B became "legally obligated to pay as damages". Central to this conclusion was the determination that the agreement by B to pay money into escrow was not an agreement to pay damages; such damages were only payable as and when the third party became entitled to draw down upon the funds. Following, an appeal by W, the Court of Appeal has now upheld this ruling, on the basis of essentially the same reasoning.

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3 http://www.hfw.com/Insurance-Bulletin-7-May-2015

3. HFW publications and events

Dubai: MENA Insurance Awards – HFW wins Law Firm of the Year

We are delighted to announce that HFW has won Law Firm of the Year for the second year in a row at the MENA Insurance Awards. Sam Wakerley (Partner, Dubai), John Barlow (Partner, Dubai) and Wissam Hachem (Partner, Riyadh) attended the Awards Dinner on 1 February at the Ritz Carlton DIFC and accepted the award on behalf of the firm.

UK: MENA Presentation with IUA on the Saudi Arabian insurance market

On 8 February, Wissam Hachem (Partner, Riyadh), Sam Wakerley, (Partner, Dubai) and John Barlow, (Partner, Dubai) will give a presentation exploring the Saudi Arabian insurance market considering key regulatory and claims handling issues in the Kingdom.

UK: Captive Services Awards

HFW is delighted to announce that we have been shortlisted for UK Captive Services Law Firm of the Year.