Insurance/
Reinsurance

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INSURANCE BULLETIN

In this week's Insurance Bulletin:

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1. Regulation and legislation

Jurisdiction: Regulators' new rules on employment references

The Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) recently published new policy statements (PS16/22 and PS27/16 respectively) in order to strengthen accountability under the new senior insurance manager's regime, introduced in March 2016 for Solvency II firms and large non-Solvency II Directive firms.

The new rules relate to regulatory references, which are essential in allowing firms to share relevant information on individuals, to support firms' assessment of potential new recruits as fit and proper. The rules require firms to provide employment references containing all relevant information of which they are aware, as soon as reasonably practicable when this has been requested by other regulated firms. In addition, where they are considering hiring a candidate into a function subject to the regulatory reference rules, firms are required to take reasonable steps to obtain appropriate references covering at least the candidate's past six years of service, including from any organisations at which that person had served as, or was currently, a non-executive director.

The FCA's rules state that the obligation to provide a reference relates to candidates who will perform a pre-approved role, and candidates who hold certified roles and certain PRA-approved roles. Firms are still subject to the general obligation on employers to ensure that the references are fair, clear and accurate but are required to provide a factual description of breaches, including details of all serious breaches. For this purpose firms should be guided by the FCA SYSC Handbook 22.5.10G and SYSC 22.5.11G and the PRA's PS27/16, which gives examples of serious breaches. The regulators consider conduct involving breaches of the conduct rules and supervisory requirements, or conduct which results in enforcement action against the firm or involves dishonesty, to be of sufficient gravity. There is a standard template that firms can use in the Annex to the FCA's PS16/22, which lists certain mandatory information that must be disclosed.

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NAZIM ALOM, ASSOCIATE

Annex 3 of the FCA's PS16/22 contains a useful summary of the FCA and PRA's regulatory reference requirements. Firms are required to obtain references before submitting the application for regulatory approval but the FCA and the PRA note that this may not be possible in certain circumstances. Relevant firms will need to ensure that they are ready to implement the new regulatory reference rules from 7 March 2017.

To view the FCA's PS16/22 in full select this link and to view to PRA's PS27/16 select this link.

For more information, please contact Nazim Alom, Associate, London, on +44 (0)20 7264 8760, or nazim.alom@hfw.com, or your usual contact at HFW.

2. Court cases and arbitration

UK: WTC aggregation: PONY losses – *Simmonds v Gammell*[1]

This is another reinsurance aggregation case arising out of the 9/11 attacks on the World Trade Centre. It is an appeal from arbitration as to whether personal injury claims brought against the Port of New York (PONY) by rescue and clean-up workers should be aggregated, for XL reinsurance purposes, as losses arising from one event.

The tribunal had concluded, 2:1 in PONY's liability insurers' favour, that all such claims should be aggregated under their liability excess of loss programme, with the relevant event being the WTC attacks.

Reinsurers appealed, arguing there was insufficient causal connection between PONY liabilities and the WTC attacks.

Both arbitration tribunal and Court applied well-known authorities on "event" aggregation, including the "unities" test and the requirement that the causative link between losses and event must be significant, rather than weak. The panel had found that, regardless of any question of negligence on the part of PONY, the WTC attacks were a significant cause of the losses. The Court held there was no error of law in the approach they had taken, and that reinsurers' true complaint was that they disagreed with the arbitrators as to the degree of causal connection between the attacks and the PONY claims, which did not amount to grounds for an appeal. The appeal therefore failed and the one event approach was upheld.

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BEN ATKINSON, SENIOR ASSOCIATE

In *AIOI v Heraldglen* (see http://www.hfw.com/Twin-Towers-Feb-13), the Court previously upheld a different arbitration tribunal's conclusion that, under certain whole account catastrophe excess of loss reinsurance, there were two aggregating events, one per tower, from which the liabilities of both airlines and passenger security companies arose.

It is not unknown for different panels of arbitrators to quite legitimately reach different conclusions from each other. Moreover, the AIOI and PONY cases are not directly comparable for a number of reasons. One difference flows from the requirement that, in assessing the four "unities" of time, place, cause and intention, the facts should be assessed from the viewpoint of the insured: in the recent case this was PONY, and in the AIOI case the insureds were the two airlines/security companies. (In the PONY case neither party argued for two events.)

It will be interesting to see whether and how whole account liability retrocessionaires permit event-based aggregation of WTC airline liabilities with PONY liabilities. Some pragmatism may be called for, if further dispute is to be avoided.

For more information, please contact Ben Atkinson, Senior Associate, London, on +44 (0)20 7264 8238, or ben.atkinson@hfw.com, or your usual contact at HFW.

UK: HFW awarded indemnity costs against Scottish authorities in Rangers case

The Administrative Court has ruled that the actions of the Crown Office and Police Scotland in obtaining and executing a search warrant at HFW's London offices in December 2015 were "an abuse of state power". The Rangers FC investigators must now pay costs of injunctive and judicial review proceedings pursued by HFW on the indemnity basis.

The full article on the ruling – which explains the background to the matter, the outcome of the judicial review proceedings and the terms of the costs order against the Scottish authorities – can be found here: http://www.hfw.com/HFW-awarded-indemnity-costs-in-Rangers-case.

For more information please contact James Clibbon, Partner, London, on +44 (0)20 7264 8787 or james.clibbon@hfw.com, or Paul Wordley, Partner, London, on +44 (0)20 7264 8438 or paul.wordley@hfw.com or your usual contact at HFW.

1 [2016] EWHC 2515 (Comm)

3. HFW publications and events

HFW Partner Andrew Bandurka presents seminar on fraudulent devices

On Tuesday 1 November, HFW Partner Andrew Bandurka presented a seminar on fraudulent devices to Alesco.

HFW to attend ILS Bermuda Convergence 2016

HFW Partners Andrew Bandurka and Richard Spiller will be attending the ILS Bermuda Convergence 2016 and the World Rugby Classic on Wednesday 9 and Thursday 10 November.

HFW featured in Captive Review's Global Programmes Report 2017

HFW Partner Paul Wordley has contributed an article, "Captives: getting claims paid", to Captive Review's Global Programmes Report 2017. Paul's article explores the process of claiming from a captive and highlights the importance of seamless cooperation between the captive and fronting/reinsurance partners. Paul also advises on the best ways of avoiding conflicts of interest when making a claim to the captive, and analyses the advantages of using a captive to manage and settle claims.

Paul's article appears on page 32 of the full report, which can be found here: http://captivereview.com/features/global-programmes-report-2017/.

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