



Welcome to HFW's Insurance Bulletin, which is a summary of the key insurance and reinsurance regulatory announcements, market developments, court cases and legislative developments of the week.

In this week's Bulletin:

1. Regulation and legislation

- 1.1. French insurers and brokers challenge the effect of ACPR's "recommendations" (France), by Pierre-Olivier Leblanc, Partner and Louis Cornut-Gentille, Associate.
- 1.2. Insurers face ban on paying ransoms (England and Wales), by Ben Atkinson, Associate.
- 1.3. Risk Based Capital (RBC) regime expected to be introduced in Hong Kong in three to four years (Hong Kong), by Caroline Thomas, Associate.

2. Market developments

- 2.1. Lloyd's authorises first Chinese syndicate (England and Wales, China), by Ben Atkinson, Associate.

3. Court cases and arbitration

- 3.1. Insurer satisfies burden and avoids policy (England and Wales), by Ben Atkinson, Associate.

4. HFW publications and events

- 4.1. HFW publishes Briefing on the Counter-Terrorism and Security Bill's implications for insurers (England and Wales), by James Gosling, Partner.

Should you require any further information or assistance on any of the issues dealt with here, please do not hesitate to contact any of the contributors to this Bulletin, or your usual contact at HFW.

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hfw 1. Regulation and legislation

1.1. French insurers and brokers challenge the effect of ACPR's "recommendations" (France)

Three major insurer and broker associations, including the French Federation of Insurance Companies (FFSA), have recently filed an action before the French *Conseil d'Etat* (the Supreme Court for administrative matters). These associations seek the annulment of a "recommendation" made by the French Prudential Authority (ACPR).

Last July, the ACPR issued a "recommendation", pursuant to the provisions of the French Monetary and Financial Code, relating to contracts between companies and intermediaries for the distribution of life assurance policies. Such contracts were already regulated by certain provisions of the Insurance Code. However, the ACPR considered that these provisions failed adequately to address the great diversity of situations in the context of life assurance distribution.

The ACPR therefore decided to issue a "recommendation" on good professional practices in this respect, to remedy the position.

The Market however, considered that this "recommendation" exceeded ACPR's powers, since this sought to impose changes in current practice, whereas recommendations are supposed to be merely interpretative and non-binding. For this reason, these associations seek the annulment of this "recommendation". The *Conseil d'Etat's* ruling is eagerly awaited, not only because it should address the question of the limits and legal effect of such a recommendation, but also



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1.2. Insurers face ban on paying ransoms (England and Wales)

The Counter-Terrorism and Security Bill, which was published on Wednesday 26 November 2014, includes measures which, if the Bill were to pass into law, would make it a criminal offence for a insurer to make a ransom payment

in response to a terrorist demand. Section 34(1) of the Bill will insert a new Section 17A into the Terrorism Act 2000, under which an insurer would commit an offence if it makes a payment under an insurance contract (or purportedly under it) in respect of any money or other property that has been, or is to be, handed over in response to a demand made wholly or partly for the purposes of terrorism.

Section 17A makes it clear that if an offence committed under it by a body corporate is proved to have been committed "with the consent or connivance of, or to be attributable to any neglect on the part of a director, manager, secretary or other similar officer of the body corporate" (or any person purporting to act in that capacity) then that individual, as well as the body corporate, is guilty of the offence and liable to prosecution and punishment accordingly. The Bill therefore opens up the possibility of individual as well as corporate criminal responsibility for ransom payments. The Bill expressly states however that these provisions will not apply to any insurance payment made in respect of money or other property handed over before 27 November 2014.

It of course remains to be seen whether the Bill will pass into law in its current form, or at all. Even if this were to happen, issues are likely to arise as to the Bill's interpretation, for example, as to the precise meaning of the phrase "wholly or partly for the purposes of terrorism", which brings a ransom within the scope of the proposed offence. However, the proposed ban on insuring ransom payments will of course be of significant interest to those currently underwriting, broking and purchasing kidnap and ransom insurance, of which reimbursement for ransom payments is a key feature.

Full text of the Bill can be found here: http://www.publications.parliament.uk/pa/bills/cbill/2014-2015/0127/cbill_2014-20150127_en_1.htm

A link to HFW's Briefing on the Bill is in the publications and events section of this Bulletin.

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1.3. Risk Based Capital (RBC) regime expected to be introduced in Hong Kong in three to four years (Hong Kong)

In line with the International Association of Insurance Supervisor's (IAIS)'s Insurance Core Principals (ICPs) 16 and 17, the Hong Kong government is looking to introduce an RBC regime. To this end, a government consultation is currently underway, which closes in mid-December.

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awareness, in addition to being necessary to ensure regulatory equivalence. However, some details, such as how group wide supervision will work in practice (including how foreign insurer's authorised in Hong Kong as branches will be treated), how captives will be treated and how RBC decisions by the regulator (including requiring add-ons or more capital) can be challenged, have yet to be ironed out.

The RBC regime foresees three pillars: quantitative requirements; qualitative requirements and disclosure (regarding the insurer's capital, to the public). It is thought that international insurers who have already invested in preparing for Solvency II, especially those who have also addressed Pillar II, should be in a good position, but the process is still at an early stage.

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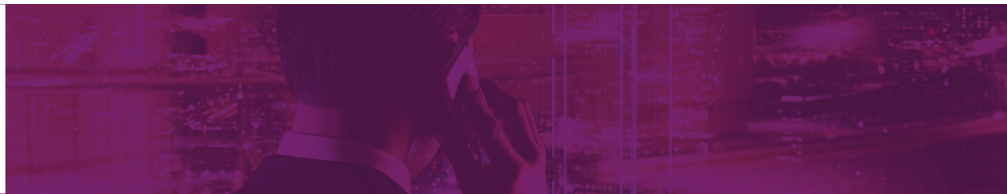
hfw 2. Market developments

2.1. Lloyd's authorises first Chinese syndicate (England and Wales, China)

Lloyd's of London has granted China Re the right to own an underwriting syndicate, making it the first Chinese firm to hold this right in the Market's 326-year history. China Re has previously run a special purpose syndicate (Syndicate 2088) jointly with Catlin, writing a whole account quota share of Syndicate 2003. This will be converted into a full syndicate with effect from 1 January 2014, allowing China Re to itself write insurance in the Lloyd's market. It is understood that the relationship between China Re and Catlin will continue, with Catlin acting as managing agent for the China Re Syndicate.

Increasing its international focus and reach is a key part of the Lloyd's Vision 2025 project. The China Re approval is the latest of a number of recent steps taken to advance this goal. Other such moves have included acquisitions involving Latin American and Middle Eastern interests, as well as the creation of special purpose syndicates backed by Indian and Malaysian insurers.

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hfw 3. Court cases and arbitration

3.1. Insurer satisfies burden and avoids policy (England and Wales)

In the case of *Genesisuk.net v Allianz Insurance Limited*¹, the claimant (G) sought to recover from the insurer (A) losses arising from a fire at its premises. A sought to avoid the policy on the basis (which G denied) that the fire had been deliberately set or procured by a Director of G. The precise legal basis of the policy avoidance is not apparent from the judgment, although a policy (rather than simply a claim) may be avoided in cases of fraud, either pursuant to a policy term, by operation of the common law rule to this effect, or by virtue of a breach of the continuing duty of utmost good faith.

The court held that A bore the burden of proof and that the test was the balance of probabilities “commensurate with the gravity of the charge”. Proof of motive is not a conclusive factor, but will be

persuasive. It is not necessary to produce a seamless proof or “*smoking gun*”. Inferences will be used to fill gaps, so long as there is some credible evidence and ambiguities are not fatal. If there is sufficient unambiguous evidence against him, the insured’s previous reputation and respectability will not save him from adverse judgment.

Applying these principles and on the basis of the evidence before it, the court was satisfied that overall A had shown to the required high standard that G’s Director, or someone acting on his behalf, had deliberately caused the fire. A was therefore entitled to avoid the policy. The case is a useful reminder of the principles that the courts will apply in deciding such questions.

The full judgment can be found here: <http://www.baillii.org/ew/cases/EWHC/QB/2014/3676.htm>

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hfw 4. HFW publications and events

4.1. HFW publishes Briefing on the Counter-Terrorism and Security Bill’s implications for insurers (UK)

HFW has published a Briefing on the Government’s new Counter-Terrorism and Security Bill, which was announced at the end of November. The provisions of the Bill, which are of particular relevance to the insurance market, are those which aim to prevent insurers from covering or reimbursing ransoms paid to terrorists by assureds.

Further information can be found here: <http://www.hfw.com/Counter-Terrorism-and-Security-Bill-ransom-payments-November-2014>

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1 [2014] EWHC 3676 (QB)



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