Insurance/ Reinsurance

30 July 2015

INSURANCE BULLETIN





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

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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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1. Regulation and legislation

UK: Prudential Regulation Authority (PRA) publishes Solvency II Directors' update

On 14 July 2015, the Prudential Regulation Authority (PRA) published a letter (http://www.bankofengland.co.uk/pra/Pages/solvency2/updates.aspx) from the PRA's insurance directors for all Solvency II-affected firms. The letter sets out the PRA's views on a number of matters as follows:

- **Internal model (IM) applications:** From the perspective of the PRA, applications for IMs appear to have gone smoothly. The PRA intends to communicate its decisions in respect of IM applications to all firms simultaneously and expects this to be in December 2015.
- **Implementing technical standards (ITS) and guidelines:** European Insurance and Occupational Pensions Authority (**EIOPA**) published its second set of ITS and guidelines for Solvency II on 6 July 2015. Once endorsed by the European Commission, it is expected that these will apply from 1 January 2016.
- **Output of general insurance (GI) technical workshop:** The PRA summarises the key areas discussed with a number of Association of British Insurers (**ABI**) representatives in relation to GI and Solvency II.
- **Segmentation of UK motor insurance policies:** Data the PRA has received from firms has demonstrated that motor insurance business is not being unbundled in accordance with Solvency II Delegated Regulation Article 55(6). This impacts on reporting and standard formula calculations and should be addressed.
- **Recognition of outwards reinsurance:** Firms have made a number of different interpretations of the Solvency II requirements around the recognition of outwards reinsurance. The PRA sets out the key principles to take into account when considering outwards reinsurance cash-flows and the EIOPA guidelines to follow when considering how future reinsurance purchases should be recognised.
- **Allocation of employers liability insurance policies:** Firms should take care to ensure they have assigned their employer's liability policies to the correct line of business and should be able to explain and justify the allocation decisions they make.
- **Pension scheme risk:** The PRA has reviewed the treatment of pension scheme risk for a number of Solvency II IMs and for some firms the treatment in relation to credit spread risk has fallen short of its expectations. Firms are referred to supervisory statement SS5/15 (http://uk.practicallaw.com/?view=cselement:IndividualIdentitySplash&displayHeader=false&pagename=PLCWrapper&wsrView=true) which sets out the PRA's expectations.
- **Senior Insurance Managers Regime (SIMR):** Firms are reminded of some practical steps to take in order to prepare for the SIMR implementation. These include a need to prepare a governance map, identify which existing controlled function (**CF**) roles will "grandfather" into the SIMR and consider whether individuals not currently approved as CFs will be performing a key function or significant influence management function under the SIMR.
- **Groups:** Firms are reminded that there are significant changes to groups under Solvency II and that they should consider as a matter of urgency whether they are part of a group, or groups, that fall within the scope of the Solvency II requirements and what approvals and/or waivers they might require in order to comply with such requirements, amongst other things.
- **A timetable of activity from July to September 2015:** Among other things, the PRA plans to issue a consultation paper on the Solvency II Set 2 ITS and guidelines, as well as a consultation paper on the PRA discretion in relation to regular quantitative reporting ITS, in August 2015.

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UK: Changing the rules – the Financial Ombudsman Service launches a new consultation paper

The Financial Ombudsman Service (the FOS) has recently launched a public consultation paper on the proposed amendments to the rules as set out in the Financial Conduct Authority's Dispute Resolution: Complaints Sourcebook (DISP) in relation to its consumer redress scheme and the complaint handling procedures relating to the jurisdiction of the FOS.

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Section 404B of the Financial Services and Markets Act 2000 (**FSMA**) has been amended by the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 which came into force earlier this month. The result is that businesses and consumers may now agree that complaints subject to a consumer redress scheme can be dealt with by the ombudsman by reference to what is fair and reasonable. In circumstances where the parties do not agree, complaints will constitute a "relevant complaint" and will be dealt with in accordance with the relevant consumer redress scheme. It has therefore been suggested that DISP 3 should be amended to reflect these changes and to refer to "relevant complaints" in place of "consumer redress schemes".

The FOS is also proposing an amendment to DISP 3.2.2R as a result of a recent rule change by the FCA to DISP 2.8.1R which is due to take effect on 30 June 2016. The FCA's rule change means that where a complainant has received a summary resolution communication from the respondent the FOS may still be able to consider the complaint.

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Europe: Solvency II third country provisional equivalence decisions may not be determined until December

On 5 June 2015, the European Commission adopted its first third country equivalence decisions under Solvency II, granting Switzerland, Australia, Bermuda, Brazil, Canada, Mexico and the USA full or partial equivalence. These were done by way of two separate delegated acts: one for the full equivalence decision in relation to Switzerland and one for the provisional equivalence decision in relation to Australia, Bermuda, Brazil, Canada, Mexico and the USA. Like most commentators, we expected (http://www.hfw.com/Insurance-Bulletin-18-June-2015) these decisions to be scrutinised and confirmed by the European Parliament quickly. However, in a surprise turn of events, the European Parliament on 20 July 2015 published correspondence (https://polcms.secure.europarl.europa.eu/cmsdata/upload/b0f9a0c6-a751-47ef-8880-0c6e9b6b7235/D34841%20-%20Hill%20Solvency%20II%20-%20extending%20the%20deadline%20for%20objection%20to%20a%20DA.pdf) from Roberto Gualtieri, Chair of its Committee on Economic and Monetary Affairs (ECON), to Jonathan Hill, European Commissioner for Financial Stability, Financial Services and Capital Markets Union, which included a letter that on 16 July 2015 extended the time for scrutiny of the provisional equivalence decision by an additional three months, i.e. until 7 December 2015.

The European Parliament's letter to the European Commission does not give any reason for its decision to extend the scrutiny period. However, other correspondence also published on 20 July 2015 indicates that the European Parliament had previously requested (https://polcms.secure.europarl.europa.eu/cmsdata/upload/647b2ca0-558b-4309-afaa-435c0c280136/Solvency%20II%20DA%20-%20Letter%20to%20COM%20-%2001.04.2015.pdf) that the equivalence decisions be presented "in a separate manner, per third country and per area". If this had been done, the European Parliament would have been able to decide whether to object to each country and each area. As it is, they are only able to object to the decision as a whole. It is unclear whether in April 2015 the European Parliament was already considering that it would need to object to the

decision on the basis of certain third countries or certain equivalence areas. In any event, the European Parliament has decided that it needs more time to consider whether to object to the decision and we will need to wait and see what happens.

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Europe: Proposal for a Directive of the European Parliament and of the Council on insurance mediation (recast)

The European Council has published two notes relating to the proposed directive to amend and replace the Insurance Mediation Directive (2002/92/EC) (IMD) (referred to as the Insurance Distribution Directive (IDD), the Second Insurance Mediation Directive (IMD2) or the recast IMD). The main note (http://data.consilium.europa.eu/doc/document/ST-10747-2015-INIT/en/pdf) sets out the final compromise text of the IDD.

The directive seeks to improve regulation in the retail insurance market in an efficient manner. It aims at ensuring a level playing field between all participants involved in the selling of insurance products and at strengthening policyholder protection.

The European Council also published on 16 July 2015 an "I" item note (http://data.consilium.europa.eu/doc/document/ST-10745-2015-INIT/en/pdf) setting out the negotiation background to the compromise text and inviting the Permanent Representatives Committee (Part 2) of the European Parliament to:

- Approve the final compromise text regarding IDD.
- Confirm that the Presidency of the European Council can indicate to the European Parliament that, should the European Parliament adopt its position at first reading as regards IDD (subject, if necessary, to revision of that text by the legal linguists of both institutions) then the European Council would approve the European Parliament's position and the act shall be adopted in the wording which corresponds to the European Parliament's position.

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Hong Kong: Competition Ordinance will come into full effect on 14 December 2015

Hong Kong's Competition Ordinance will come into full effect on 14 December 2015. Until then, decision and block exemption applications will not be accepted, but the Competition Commission (the commission) will enter into preliminary discussions with potential applicants.

The Competition Ordinance (Commencement) (No.2) Notice 2015 (**Commencement Notice**) was published in the Hong Kong Government Gazette on 17 July 2015. The Commencement Notice appointed 14 December 2015 as the commencement date for the Competition Ordinance (Cap. 619) (**ordinance**) to come into full effect. This means that the first conduct rule (against anti-competitive agreements and concerted practices), second conduct rule (against market power) and merger rule (currently applicable only to telecoms companies) will be effective from that date.

Dr. Stanley Wong, Chief Executive Officer of the Commission, has underlined: *"The Government's announcement of a date for full commencement of the Ordinance should serve as a reminder to businesses, trade associations and others to review their practices and conduct to ensure that they do not contravene the ordinance".*

Furthermore, on 21 July 2015, the Commission issued a press statement entitled *"Handling competition matters before full commencement of the Competition Ordinance"*. This press statement makes two points:

1. *"The Commission will not accept before the date of full commencement, applications for a decision under sections 9 and 24 of the ordinance or for a block exemption order. However, if parties intend to apply for a decision or block exemption order after commencement, the Commission is prepared, subject to available*

The directive seeks to improve regulation in the retail insurance market in an efficient manner.

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resources, to enter into preliminary discussions with the parties in respect of those applications in advance of the date of full commencement".

2. *"As the date of full commencement approaches, the Commission will, in appropriate cases, contact businesses and other relevant parties directly if the Commission considers that their conduct or practice may be considered anti-competitive and, therefore, likely to contravene the ordinance after full commencement".*

It seems that the aim of the press statement is to give some comfort to industries and companies that would already like the certainty of a block exemption or decision but find that the commission will not accept applications before 14 December 2015. Thus the procedure outlined above might help bridge the gap between 14 December 2915 and the date on which applications are decided and thus reduce uncertainty.

According to an earlier commission press release, dated 17 July 2015, the final version of the six guidelines (which reflect the commission's interpretation of the ordinance) will be published shortly and its leniency policy and a statement of enforcement priorities will be released before the ordinance comes into full operation. These publications should further assist companies in preparing for the new competition law regime.

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2. Market developments

Latin America: Lloyd's to open representative office in Colombia

Lloyd's has recently announced that it will be launching a representative office in Bogotá, Colombia having received the requisite approval and licence from the Colombian authorities. Lloyd's first General Representative will be Juan Carlos Realphe, who has 28 years' experience in the Colombian insurance and reinsurance market.

HFW's recent IUA market briefing on the perils of underwriting Latin American risks and handling claims in Latin America, details of which can be found here: http://www.hfw.com/Insurance-Bulletin-23-July-2015#page_7, addressed some of the issues that may arise for international insurers operating in Colombia.

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3. Court cases and arbitration

"Anti-arbitration" injunctions - *AmTrust Europe Limited* (ATEL) *v Trust Risk Group SpA* (TRG)[1]

This decision marks another chapter in the dispute between TRG (a broker), and ATEL (an insurer). The two parties had agreed a non-exclusive Terms of Business Agreement (ToBA), dealing with premiums and commission, and a framework agreement dealing with their exclusive relationship for placement of medical malpractice insurance by TRG in Italy. The dispute arose when TRG retained premium (on the basis commission was owed to TRG) that led to a decision by the Court of Appeal, upholding an earlier decision by the Commercial Court in ATEL's favour, that the ToBA, and its English jurisdiction provision, covered the dispute over premium. We reported on the Court of Appeal decision in May[2].

However, despite ATEL's initial success ensuring English jurisdiction applies to that dispute under the ToBA, the conflict continues. TRG continued their arbitration proceedings in Italy (in accordance with the jurisdiction clause in the framework agreement). ATEL applied for an "anti-arbitration" injunction in the Commercial Court, to prevent the arbitration in Italy from proceeding, arguing that:

- It had already been decided in the English Courts that the parties had agreed in the ToBA that English courts had exclusive jurisdiction.

1 [2015] EWHC 1927 (Comm)

2 http://www.hfw.com/Insurance-Bulletin-14-May-2015

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- TRG was advancing arguments already rejected in the Court of Appeal.
- TRG's conduct was vexatious (as TRG had not paid a costs order by the Court of Appeal).

In reply, TRG's main arguments concerned ATEL's delay in seeking relief, and ATEL's counterclaim in the arbitration.

The Judge commented that although it was not disputed that the English Court had personal jurisdiction over TRG, and jurisdiction under section 37 of the Senior Courts Act 1981 to grant an injunction restraining the arbitration proceedings (notwithstanding that it has a seat in a different jurisdiction), the ultimate question before the court was whether it was "just and convenient" to grant an injunction. It was not usually the case that an injunction would be allowed, and it was particularly important that any such decision would be exercised with great caution, when it was not disputed that the parties had agreed to arbitrate in a foreign seat (as they had in the framework agreement): this was not a case where TRG had pursued arbitration without an arbitration agreement being in place.

The injunction was denied. In response to ATEL's arguments, The Judge concluded that just because jurisdiction for claims under the ToBA had been decided by the English Courts, it did not necessarily follow that this applied to TRG's claims in the arbitration under the framework agreement. The English courts had no supervisory jurisdiction to dismiss unarguable claims in any arbitration, nor could they determine the jurisdiction of the arbitration which was, according to the Italian Code of Civil Procedure to be decided by the tribunal (or by application to the Milan Court of Appeal). Neither did the Judge agree that TRG's arguments regarding the applicable agreement for the premium dispute had already been rejected in earlier English court decisions. The previous decisions did not examine whether the arbitration provision in the framework agreement covered the disputes in arbitration; they were only concerned with whether ATEL had made a case for interlocutory purposes and there were no findings on the balance of probabilities.

This decision demonstrates the principles relevant to an application for "anti-arbitration" injunction, and the extreme caution that will be exercised when deciding whether it is "just and convenient" to grant it.

The judgment can be found here: http://www.bailii.org/ew/cases/EWHC/Comm/2015/1927.html

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England and Wales: Co-insurer could not prevent rectification of policy: *Equity Syndicate Management Limited v GlaxoSmithKline Plc*[1]

This case involved an attempt by a co-insurer to prevent the rectification of a policy, in circumstances in which evidence from representatives of both the insurer and the insured was unanimous that the wording of the policy did not reflect their common intention at the time of its agreement. The case is a useful reminder of the requirements of rectification and of the kinds of factors which will be held to evidence the parties' intentions at the time of concluding their agreement. It is also interesting for the fact that it was a third party and not either of the parties to the agreement who sought to resist rectification.

GlaxoSmithKline Plc (**G**) ran an "Employee Car Ownership Scheme", which Equity Syndicate Management Limited (**E**) insured. During the relevant

1 [2015] EWHC 2163 (Comm)

period, G separately provided its employee (**B**) with a temporary vehicle for the purposes of her employment.

The provision was not part of the scheme and was insured separately by (**A**).

B was involved in a serious accident giving rise to a claim against B which A handled and settled for a significant sum. A subsequently sought a 50%

co-insurance contribution from E, on the basis that, although the vehicle had not been provided as part of the scheme insured by E, the loss was nonetheless covered under E's policy wording, by virtue of the wide description of the insured vehicles in the relevant insurance certificate.

It was common ground between the parties that E's policy wording was wide enough to include cover for B, even though she was not a member of the scheme. However, E's case was that this was not what was intended or agreed and that the policy wording should be rectified accordingly. A, as co-insurer, resisted such rectification, whilst G (although named as a defendant) played no part in the proceedings.

A argued that the parties' only intention had been to contract on the terms which they actually agreed and which had been the subject of careful negotiation. A also argued that there was no outward manifestation of an intention to limit cover to vehicles within the scheme. Finally, A argued that even if there had been such an intention at the time of the original placement, there had been so such intention at the time of renewal (which had been effected by a different underwriter), the only intention at that stage being to renew the policy on its existing terms.

The case is a useful reminder of the requirements of rectification and of the kinds of factors which will be held to evidence the parties' intentions at the time of concluding their agreement.

BEN ATKINSON, ASSOCIATE

The court held that the parties did intend to limit cover to vehicles within the scheme and that this was evidenced by several matters, including:

- The method of calculating premium on E's policy by reference to the number of vehicles in the scheme.
- The fact that G paid a separate premium to A and to another insurer for separate insurance of other vehicles, which would have been unnecessary if the intention had been for these vehicles to be covered under E's policy.
- The headings and definitions within the policy, which provided a strong indication that this was the intention.

Equally, despite being post-contractual matters, certain features of the way in which the scheme was in fact administered had evidential value in making clear that this was the intention.

The court also rejected A's renewal argument on the basis that, although a different underwriter handled matters, it remained the parties' intention to provide insurance only for vehicles in the scheme, and the new underwriter acted on that clear understanding, albeit he had not been involved in the original placement.

The court accordingly held that E was entitled to the rectification sought. A argued against this that rectification is an equitable remedy and that the court should not exercise its discretion in circumstances in which:

- G had no interest in the rectification sought.
- Rights had accrued many years before the possibility of rectification was raised.
- The contract created rights for third parties.

However, the court determined that there was no unfairness in permitting rectification, which merely ensures that effect is given to what the parties actually agreed and what all parties concerned understood to be the position. To refuse rectification would in fact be unfair to E as it would render it liable to contribute B's liability, which it never intended or agreed to insure and for which it has received no premium. Rectification would also provide A with a windfall claim to contribution when it was the only insurer to have received premium for insuring B.

The case is a useful reminder of the requirements of rectification and the factors that the court will take into account in deciding whether or not there is evidence of the parties' intentions at the time of concluding an insurance contract. It also provides an interesting perspective on the factors


that the court will take into account in deciding whether to exercise its discretion to order rectification. Finally, the case illustrates the importance of making sure that policy wordings are sufficiently and carefully drafted and in particular that the wording reflects (and goes no further than) what the parties intended to agree. Had E been unable to adduce persuasive evidence in support of its rectification argument, it would, as noted above, have been faced with having to make a 50% contribution to a loss which it never intended to insure and for which it received no premium.

Although there is no suggestion that the broker in this case was at fault, this raises issues for brokers just as much as for the parties to insurance contracts. In circumstances in which an insurer is faced with an expectedly liability of this kind, the likelihood is that it will seek to recoup its loss from the broker who has produced and/or relied upon the wording in question.

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4. HFW publications and events

Sanctions: a snapshot of current and future developments as at 15 July 2015

HFW has published a briefing on the recent flurry of activity in respect of international sanctions. The briefing states the position as of 15 July 2015 in respect of the long awaited deal between Iran and major powers, and also on current key restrictions against Russia and Cuba.

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HFW Sanctions Update Seminar (as part of London International Shipping Week)

HFW London
8 September 2015

HFW Partners Daniel Martin and Anthony Woolich will discuss the impact on ship owners, operators and other companies engaged in international commerce and will provide an analysis of the practical measures which businesses can take to mitigate the risk of a sanctions violation.

If you have any queries regarding this event, or to register your interest in attending, please contact us at events@hfw.com.

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