INSURANCE BULLETIN
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1. REGULATION AND LEGISLATION

UK: The Roadmap for Sanctions post-Brexit - Sanctions and Anti Money Laundering Bill published

The Sanctions and Anti Money Laundering Bill (the Bill), which seeks to create a post-Brexit legislative framework for the imposition and enforcement of sanctions in the UK, was published on 19 October 2017. The Bill is expected to enter the Committee stage on 21 November 2017. The Bill provides the Government with broad discretionary powers in respect of the following types of sanctions: financial, trade, aircraft, immigration, shipping and other sanctions for the purpose of upholding UN obligations. The details of such sanctions will be set out in secondary legislation. In addition, the Bill gives the Government broad powers to amend the UK's existing anti-money laundering (AML) regime, although the Bill itself does not implement any new AML requirements.

The Bill reflects the Government's stated intention to allow for a flexible approach to sanctions and provides for the creation of exceptions and the granting of licences in relation to any sanctions, including a new power for the Government to issue general licenses to permit particular types of conduct. This a more flexible approach by comparison to underlying European Union (EU) legislation.

The Bill is not designed to introduce any substantive changes to policies with regards to the current sanctions regime. Rather, its central purpose is to make it easier to impose sanctions and to achieve consistency post-Brexit. This will allow the UK to continue to implement and maintain EU law imposed by sanctions regimes but will also give the UK independence to decide how to respond to future events.

The Bill includes certain rights for individuals and entities, including the right to challenge their inclusion on sanctions lists by making an application to the High Court in England. The Bill also gives powers to "appropriate authorities" to impose restrictions on the disclosure of information and to inspect documents.

The Bill is necessary given the number of EU sanctions that will no longer apply to the UK post-Brexit. However, it is yet to be seen how the UK will utilise the broad powers provided by the Bill. The current position indicated by the Government is that the UK will not look to diverge from EU policy and it is expected that the UK will continue to collaborate with the EU to achieve a coordinated approach.

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2. COURT CASES AND ARBITRATION

England and Wales: Lawyers do not qualify as arbitrators under soon to be replaced JELC clauses

This was an application to the High Court arising out of a reinsurance arbitration concerning the liabilities of the Port Authority of New York following the tragic events of 9/11[1]. Tonicstar (the reinsured) applied pursuant to section 24 of the Arbitration Act 1996 for an order that the reinsurers' nominated arbitrator, Alistair Schaff QC, be disqualified as he did not meet the qualification required under the arbitration clause.

The contract of reinsurance was dated 12 February 2001 and incorporated the Joint Excess Loss Committee, Excess Loss Clauses (JELC Clauses). These had been published in January 1997. The arbitration clause specified as follows:

"Unless the parties otherwise agree the arbitration tribunal shall consist of persons with not less than ten years' experience of insurance or reinsurance".

1 *Tonicstar Limited v Allianz Insurance PLC & Others* [2017] EWHC 2753 (Comm)

It was accepted that Mr Schaff QC had significantly more than ten years experience of insurance and reinsurance but that this experience had been as a lawyer and not within business. Consequently, it was argued that he did not qualify and he should therefore be disqualified.

With some evident reluctance the judge, Mr Justice Teare, granted the order sought by the reinsured and disqualified Mr Schaff QC. The reason he did so was because he felt that he was bound by a previous, unreported, decision of Mr Justice Morison in Company X v Company Y dated 17 July 2000 on an application that had looked at the very same issue.

Teare J said that had he not been inhibited by the previous decision he may well have reached a different decision but in order to do so now he would have to find that there was a powerful reason not to follow the previous decision. He also noted that the phrase in question "experience of insurance and reinsurance" had not been altered by the Excess of Loss Committee when the JELC Clauses had last been amended in 2003, and accepted the submission that the unreported case of Company X v Company Y was fairly well known in the reinsurance market and had stood unchallenged for 17 years. Consequently, Mr Schaff QC was disqualified and the reinsurers had 30 days within which to appoint a new arbitrator who met the criteria.

The case is interesting as it confirms the previous, unreported, authority that in order to meet the qualification under the JELC Clauses prospective arbitrators are required to have a minimum of ten years business experience. Legal experience is not sufficient.

The new JELC clauses that were published earlier this year and take effect from 1 January 2018 take a different approach. In the new clauses the ARIAS arbitration clause has been adopted and this specifies that the qualification is "not less than 10 years' experience of insurance or reinsurance within the industry or as lawyers or other professional advisers serving the industry".

Consequently, legal experience does qualify. However, in view of how long it takes for reinsurance disputes to come about, it is going to be a number of years before the new JELC clauses become relevant in this regard. In the meantime, absent an agreement between the parties, the reinsured or reinsurer is going to be able to successfully challenge the appointment of any arbitrator who does not have the required business experience. The same is technically true as regards any chair, albeit a legally qualified chair is often agreed by the parties in any event.

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3. HFW PUBLICATIONS AND EVENTS

UK: HFW at the Mining Insurance Group Conference

Senior Associate **Alison Proctor** is speaking at the Mining Insurance Group conference on 20 & 21 November on "C-Suite Considerations".

Argentina: HFW at BIMCO

Partners **Geoffrey Conlin** and **Paul Dean** are presenting on 21 & 22 November at the BIMCO Supplytime and Bills of Lading seminars taking place in Buenos Aires and Rio.

Dubai: HFW at Lloyd's Middle East Meet the Market

Partner **John Barlow** is speaking on "bank risks" at the Lloyd's Meet the Market on 21 November. **Sam Wakerley** is also attending the conference.

UK: HFW seminar - How well do you know the French legal system?

Partners **Olivier Purcell**, **Pierre-Olivier Leblanc** and **Pauline Arroyo** are hosting a seminar in the London office on Thursday 7 December on the French legal system. If you would like to attend please contact events@hfw.com.

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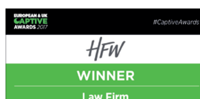

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