CITY OF LONDON LAW SOCIETY

INSURANCE LAW COMMITEEE

Minutes of the meeting that took place at the offices of Clifford Chance LLP, 4 Coleman Street, London EC2R 5AR on Tuesday 7 March 2017 from 17:00 to 18:15.

Present:

Philip Hill – Clifford Chance LLP ("**PH**") (Chair)

Andrew Barton – Macfarlanes LLP ("**AB**")

George Belcher – Skadden Arps Slate Meagher & Flom (UK) LLP ("**GB**")

Beth Dobson – Slaughter and May ("**BD**")

Victor Fornasier (as alternate for Helen Chapman) – Hogan Lovells International LLP ("**VF**")

Bob Haken – Norton Rose Fulbright LLP ("**BH**")

Chris Jefferis – Ince & Co International LLP ("**CJ**")

Mathew Rutter (as alternate for Ken McKenzie) – DAC Beachcroft LLP ("**MR**")

Victoria Sander – Linklaters LLP ("**VS**")

Richard Spiller – Holman Fenwick Willan LLP ("**RS**")

Luke Streatfeild (as alternate for Joanna Page) – Allen & Overy LLP ("**LS**")

George Swan – Freshfields Bruckhaus Deringer LLP ("**GS**")

David Wilkinson – Kennedys Law LLP ("**DW**")

Michael Mendelowitz ("**MM**")

Terry O'Neill ("**TO**")

In attendance:

Eilidh Brown – Clifford Chance LLP ("**EB**")

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1. **Apologies for absence**

   Apologies were received from Simon Brooks (Eversheds LLP), Helen Chapman (Hogan Lovells International LLP), Simon Garrett (CMS Cameron McKenna LLP), Francis Mackie (Weightmans LLP), Martin Mankabady (Dentons UKMEA), Ken McKenzie (DAC Beachcroft LLP), Joanna Page (Allen & Overy LLP), Jonathan Teacher and David Webster (Reynolds Porter Chamberlain LLP).

2. **Continuing Discussion Topics**

(a) The practical consequences of the Insurance Act 2015 coming into force, and the approach of insurers, reinsurers, brokers, policyholders and others.

PH introduced the topic, noting that he had been seeing more of the same with respect to the Insurance Act 2015 (the "**Act**"), namely brokers and some insurers trying to avoid the Act by either excluding it from policies or be opting to use New York law instead as they viewed it as more favourable.

MM noted that he had seen a reinsurer contracting out of section 13A of the Act (*Implied term about payment of claims*).

VS noted that on the bulk annuities side in particular, she had seen providers agreeing to contract out; where they did not, VS had found it was difficult to advise e.g. pension scheme trustees on the extent to which underlying data should be disclosed, particularly being able to advise them on what they ought to know. VS noted that this was due to the Act being so broadly drafted and subjective; they would be continuing to push hard for the duty of fair presentation to be contracted out of.

PH asked the Committee whether anybody had yet to grapple with a disputed claim. The Committee generally said there had been very little so far.

RS noted the *Arig* case (*AXA Versicherung AG (successor to Albingia) v. Arab Insurance Group*), a case relating to disclosure and inducement decided prior to the Insurance Act 2015 in which the first instance judge had explicitly stated that he would have decided it the same way under the Act. In addition, RS noted he had been provided with a policy by a major company which had not been adapted to the Act in any way. In respect of another client, it was of interest that although the client had been advised that SMEs would be treated as consumers and the Act therefore did not apply to policies with SMEs. The client, however, wanted to treat SMEs as commercial customers which would mean the Act would apply.

PH noted that this would be kept as a continuing item on the agenda.

(b) The ongoing inquiry launched by the Treasury Committee into Solvency II.

PH noted that a number of pieces of written and oral evidence had been heard by the Treasury Committee since the previous meeting. BD noted that the PRA had provided evidence where they gave a steer that they were looking at reporting requirements again. VS added that the PRA had agreed to do a Cost/Benefit analysis on the reporting requirements, which were roughly five times greater than under the pre-Solvency II regime – one large insurer submitted 1000 line items of data per quarter.

VS referred to the ABI's evidence, noting that the ABI had provided a list of 23 things that the PRA could do to make firms' obligations easier to comply with without amending Solvency II. The PRA noted whether they agreed or disagreed with each item, or whether it was a grey area. VS noted that the list

itself had not been published. PH noted that the ABI had now posted on the Treasury Committee website further written evidence, which includes the list of 23 items plus legal advice relating to the risk margin.

3. **New issues for discussion**

(a) Spire Healthcare Ltd v Royal & Sun Alliance Insurance Plc

PH informed the Committee that this was a High Court case regarding aggregation provisions in the context of a medical negligence clause in an insurance policy. It was held that it did not follow that where linked claims were aggregated, excesses would also be aggregated – instead, the insured would have to pay the excess on each claim, regardless of the fact that they were aggregated for liability purposes. PH noted that this was an argument that he thought had been defeated a long time ago.

(b) Brexit Committee

PH informed the Committee that a committee had been established consisting of representatives from the Judiciary, the Bar, the Law Society, the CLLS, City UK and GC100 to (i) formulate Government strategies for Brexit and (ii) provide a single source of legal advice to the Government on wider Brexit issues. CLLS had requested a point of contact from each committee, including the Insurance Law Committee. PH informed the Committee that GB had been put forward as this point of contact and would act as a liaison between the Insurance Law Committee and the CLLS representative of the Brexit Committee.

On the topic of Brexit, MM informed the Committee that he would be attending a Brexit Roadmap presentation by the IUA on Thursday 9 March and that he would feed back anything the Committee might be interested in.

BH informed the Committee that a letter from the FCA to the Treasury on transitional had been published, in which Andrew Bailey of the FCA said that the ability to continue to pay claims on European policies post-Brexit had to form part of any transitional provisions. At a recent event hosted by Matheson on the UK-Ireland Relationship Post-Brexit, Lord Hill and Minister Eoghan Murphy had spoken, both agreeing that transitionals could not be left until the last minute as the industry needs certainty – BH noted that it was positive that the need for transitional provisions was being raised as an issue. RS noted that the issue of mutual recognition would be particularly important to Ireland, as otherwise they would lose a large percentage of business overnight. GB noted that according to a letter from Andrew Bailey of the FCA to Andrew Tyrie MP (Chairman of the Treasury Committee), roughly 8,000 firms passport into the UK compared to 5,500 firms that passport out of the UK (although it was noted that this applies to all passporting firms, not just insurers). BD noted that although the UK regulations were fairly flexible, meaning activities outside of the UK would not necessarily be caught by UK regulations, other EEA jurisdictions were not all as flexible.

(c) Update by ILS Sub-Committee

PH noted that the ILS Sub-Committee had submitted responses to the FCA and Treasury ILS consultations and asked whether there was anything further to report, and in particular whether there was anything from topic 4(d) on the agenda (the FCA consultation paper on its proposals for the changes required to the FCA Handbook to incorporate the new regulated activity of insurance risk transformation, reflecting the new regulatory framework for Insurance Linked Securities) that the Committee should respond to. BD answered that the ILS Sub-Committee had briefly looked at the FCA consultation paper but did not think there was anything particularly worth noting about it.

RS suggested that the consultation responses be sent to the Financial Law Committee, which the Committee agreed was a good idea.

4. **Monitoring of sector developments**

(a) Discount Rate Review

PH introduced the topic of the discount rate review, noting that a change in the rate from 2.5% to minus 0.75% had been announced on 27 February 2017. PH also noted that it was likely that there would be a consultation on changing the law, which would probably occur before the next meeting of the Committee.

BH noted that the change was significant to the Claims department, but that he did not think there was particularly a legal question to be discussed. RS noted that he had already seen a client which had review clauses in a large financial reinsurance contract that may be triggered, for example clauses which allowed review and, if no agreement was reached, potential termination in the event of a significant change in law or the interpretation of the law. BH noted that this was seen particularly in casualty excess of loss treaties, which reinsurers will definitely want to review.

In response to a question on whether the review could be construed as interfering with Solvency II due to its effect on reserves, MM noted that the effect on reserves may actually be only marginal, as it only affects personal injury claims.

TO questioned whether any risk committees has previously identified this as a risk; BH noted that it was the scale of the change that was unexpected, rather than the fact of the change itself.

RS noted that a review clause that would be triggered by the rate change seemed to be the exception rather than the rule. MM noted that clauses relating to a "material effect on economic understanding" were quite common; DW noted that a client had already asked about the effect of such a clause, possibly in order to support review or termination.

MR noted that the real problem was retrospectivity, as the change would affect claims already made. This would affect reinsurers just as much as direct insurers. TO noted that insurers were likely to try and recover additional amounts at the next renewal.

The Committee agreed that as the change was not asking a particularly legal question, it would not feel competent to give a response.

(b) Government consultation on its proposals for implementation of the Insurance Distribution Directive

PH noted that the Government had published a consultation on 27 February 2017, seeking views on its proposals for implementing the Insurance Distribution Directive (2016/97/EU) ("**IDD**") into UK law. The consultation closes on 22 May 2017.

RS noted that there was an FCA consultation as well as the Treasury consultation. The Treasury consultation would close on 22 May 2017 and related to add-on product regulation, exemptions for connected contracts and motor warranties. The FCA consultation (the first of two planned consultations) would close on 5 June 2017 and related to professional and organisational requirements, complaints handling, conduct of business and regulation where distribution is an ancillary activity.

BD noted that the Treasury consultation mainly related to adjustments around the edges. MR noted that this included changing the rules around introducing in certain circumstances, which BD confirmed would mean widening the scope of allowed activities. RS and BD noted that there were not many changes required in the UK to implement IDD, as the UK had already lobbied to ensure it was not maximum harmonisation.

In terms of IDD post-Brexit, GB noted that the UK would still be interested in IDD as distribution would still be relevant around the EU. RS noted that it was assumed that major UK brokers would want to operate on a consistent basis across Europe following Brexit.

PH noted that the consultation period for both consultations would close before the next meeting of the Committee and asked for volunteers for a sub-group to respond to the consultations. BD, RS, BH and MR all confirmed they would participate in the sub-group.

(c) HM Treasury consultation on the definition of "advice"

RS noted that this topic was connected to the topic of IDD, as IDD defines "advice" more narrowly than the RAO, limiting it to personal recommendations. The dialogue from MiFID seemed to be that if one could advise but not make personal recommendations, it was more open to fraud by scammers. The outcome was that a wider definition of "advice" would apply to unregulated entities, whereas regulated entities would only need to receive permission to "advise" if they wanted to make personal recommendations. RS noted that the consultation had been launched on 27 February 2017, but did not think that the Committee needed to review it unless anyone had a particular interest. RS further noted that it may be of more interest to the Financial Regulation Committee.

BD explained that the consultation arose from the Financial Advice Market Review which found there was distortion in the market; the FCA was therefore keen to address this from a policy objective, allowing more scope to provide guidance without providing advice. It was suggested that this attempt to fix this issue may have gone too far the other way. MR noted that it also arose out of the pensions reforms, where people were nervous of setting out customers' options in case this constituted advice.

TO suggested that this could be seen as relaxing the requirements for corporates. BD noted that it was unlikely to be seen that way from a conduct perspective, and that the FCA was likely to monitor how it was being put into practice.

(d) FCA Consultation paper on proposals for changes required to FCA Handbook to incorporate new regulated activity of insurance risk transformation

PH noted that this topic had been discussed already as part of the update from the ILS sub-committee.

(e) Joint statement on EU/US covered agreement

GB noted that it seemed likely that Donald Trump's appointment would mean that the EU/US covered agreement would not be put into place, despite having now been agreed.

(f) Department for Transport technical consultation on motor insurance

PH introduced the topic, noting that the Department for Transport had launched a consultation on motor insurance following the ECJ judgment in Damijan Vnuk v Zavarovalnica Triglav (C-162/13). In this case, the ECJ had said that every vehicle being used in the normal course of its usage should be insured for that use. PH noted that the consultation closed at the end of March, but the Committee did not think that it was worth responding to it.

5. **Membership**

The Committee agreed that Francis Mackie, formerly of Weightmans LLP, would continue as a Committee member following his move to Browne Jacobson LLP.

PH noted that there had been applications from Geoffrey Maddock (Herbert Smith Freehills, to replace Chris Foster) and Matthew Griffith (Reynolds Porter Chamberlain LLP, to replace David Webster) but that CVs had not yet been received. PH noted that the places would be advertised and that both Geoffrey Maddock and Matthew Griffith would be contacted to make them aware of the advertisements.

DW informed the Committee that he would no longer be able to attend meetings, but that Kennedys would still like to send a representative. PH asked DW to provide the name of an appropriate candidate and the situation would be discussed with CLLS.

RS noted that he intended to alternate as the Holman Fenwick Willan representative, with Chris Foster (having moved from Herbert Smith Freehills) attending on alternate weeks. PH noted that a practical approach to use of alternates was sensible.

PH noted that there was still no Clyde & Co representative on the Committee. RS had made an approach to the Head of Insurance but had not received a response. PH agreed to follow up.

6. **Any other business**

(a) AB informed the Committee that he was the editor of the Butterworths Insurance Law Handbook and that the publishers had decided to produce another version. AB noted that he was open to suggestions from the Committee as to what should be included, to be received by the end of June.

RS requested that AB produce an outline by the next meeting of the Committee. AB agreed, informing the Committee that he was currently gathering together information. AB noted that he was keen not to produce a hard copy this year as it would get out of date so quickly.

(b) VS informed the Committee that there had been no further communications from the Law Commission on the draft Insurable Interests Bill.

(c) PH reminded the Committee that the next meeting would take place on 6 June at the offices of Allen & Overy.