LEGAL RISK LLP
SOLICITORS

Risk Update

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International sanctions

These have become a significant issue with events in the Middle East and Ukraine.

The Times of 19 May 2014 reported that HSBC was expecting to close its Victoria Street branch in Westminster within days, because the landlord to whom it was paying rent was an Iranian state corporation, subject to US sanctions. We have previously seen an international law firm with a landlord connected to Colonel Gaddafi's regime in Libya. These examples serve as a reminder that sanctions compliance is not only a client-facing issue.

Bribery

The British Bankers' Association ("BBA") has updated its anti-bribery and corruption guidance for the banking sector, in order to meet the legal and regulatory requirements for preventing bribery and corruption, particularly under the Bribery Act 2010.

Attendance notes

The need for lawyers to keep attendance notes is well known but honoured in the breach by many lawyers, particularly corporate practitioners.

If any reminder were needed, the recent observation by Rimer LJ in the Court of Appeal may help – '[The solicitor] made no attendance note (an unprofessional omission that was a feature of all his dealings with [the client]).'

Consumer contracts regulations

The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 come into force on 13 June 2014.

Firms dealing with consumers need to review their terms and procedures and may need to take action in relation to off-premises and distance contracts.

This potentially applies to most firms, as even larger firms may act for an individual on, for example, an employment claim, whether employee or perhaps a senior manager.
We have advised many firms on their terms and engagement letters.

Why the PII Consultation is not just a small firm issue

The Solicitors Regulation Authority's recent consultation paper on professional indemnity insurance proposes a reduction in the Minimum Terms and Conditions ("MTC"). The aim is to reduce the regulatory burden, provide targeted regulation and increase competition – in other words, to make it easier for firms, particularly small firms, to obtain cover.

It follows the decision not to ban firms from obtaining cover from unrated insurers, for the present at least.

We have for a long time called for debate on the breadth of the MTC, because it is the reason that so many firms have obtained insurance from unrated insurers, due to lack of an available or affordable market with rated carriers.

The key proposals are –

- Reduce the level of mandatory PI cover to £500,000;
- Introduce an aggregate limit on claims;
- Require compulsory cover for claims by individuals, small and medium sized enterprises, trusts and charities;
- Reduce run off cover to a minimum of three years;
- Require firms to assess the level of cover appropriate to their firm beyond the minimum.

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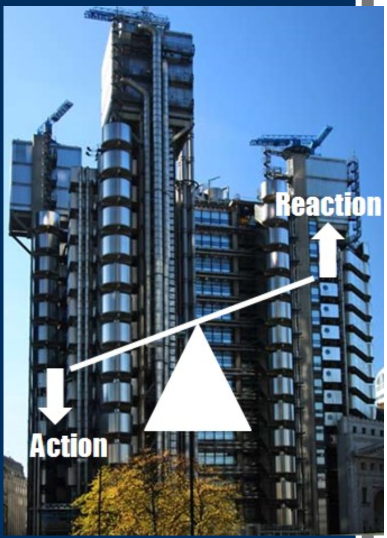

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The consultation will be seen by most as a small firm issue. However, from our experience, if the proposals are accepted, they do have wider significance for the following reasons -

- They will impact directly on partners in firms which close, whether solvent or insolvent, reducing their personal protection. This will particularly concern partners who take personal appointments, as trustee, executor or otherwise, and members of firms which have not incorporated;
- It will increase the incidence and impact of coverage disputes, of which we are seeing an increasing number;
- Some of these changes will alter the market generally and influence the scope of cover which firms can buy;
- The delay which the consultation will introduce into the renewal process for firms renewing on 1 October 2014 will cause a bottleneck for all firms of the type we hoped to avoid after last year's chaos.

The last point means that insurers will be unable to offer terms until they know what cover they are offering, and this will push back the renewal season until some time in August. Firms which anticipate renewal difficulties due to claims experience or other events should start preparing now. We have advised many firms on block notifications, provided professional risk reports to assist in putting their case to the insurance market, and provided legal advice in relation to a variety of other insurance issues. We also have unrivalled experience and expertise in relation to successor practice issues.

The most significant proposal relates to aggregate cover, referring to the provision under which insurers may treat multiple claims arising from related acts or a series of related acts as one claim with one policy limit and one excess.

Aggregate limits are in the spotlight in the pending case of **Godiva Mortgages v Travelers Insurance**, the outcome of which could be a game-changer for the whole insurance industry, not just those involved in solicitors professional indemnity. Change could be forced on the profession in any event.

US firms typically will have an aggregate limit of cover with one or perhaps two reinstatements, rather than the unlimited sideways cover provided by the MTC's Any One Claim provision.

It is for the insurance industry to comment on the impact the reforms might have, but we suspect the reduction in cover to £500,000 will have little impact. It is also worth noting in this context that the 2013 accounts of SIMIA, the top up insurer which is in run off, noted that –

> "For many years the Company considered itself to be an Insurer of a "quasi-catastrophe" nature. This was because it generally insured the layers above £2m or £3m and very few claims resulted in payments in excess of £1m or £2m from the ground up.
> The Company's more recent claims experience however suggests that the layers of insurance above £2m or £3m have become working layers."

Firms should review their terms limiting liability, on which we have advised many of the largest UK firms and some overseas firms. Those who have not incorporated should address the issue, both in view of the proposed reduction in cover and the changes to run off cover.

Restricting compulsory MTC cover to a restricted class of claimants may have the unintended effect of making it harder for solicitors to remain on lender panels: recent experience of three lenders excluding firms with unrated cover bears witness to that.

The reduction in run off cover to three years will leave firms which have closed to find their own run off cover in the open market – that may be an unwelcome expense at that stage, so long after closure, and it may not be easy to obtain. Perhaps it would be preferable to keep six years with the proviso that cover would only be triggered if the run off premium were paid. That would be a significant shift from the current position, where firms fold, leaving insurers providing the cover without receiving the premium.

Requiring firms to assess the level of cover which is appropriate is all very well, but if they are in difficulty, they are unlikely to buy more than the minimum, whatever they may truly need.

Other provisions which may benefit from review are the restrictions on insurers' right to avoid a claim or the policy for fraud, and the excess 'drop down', under which insurers have to pay the excess if the insured has failed to do so.

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