FI and D&O

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International review

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Keeping you in touch with international developments

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This edition of our Global Financial Institutions and D&O Review illustrates that the governance and regulatory frameworks applying to commercial and financial organisations continue to develop. At a time when the FCA's Enforcement Report reveals that it is running a record number of investigations, financial institutions are grappling with the implications of the Senior Managers Regime and asset managers will be examining the implications of the FCA's Final Report on their sector. Better news for banks comes in the form of the latest in a line of decisions relating to interest rate hedging product mis-selling concerned with whether a duty is owed to customers when entering into a statutory redress scheme. All companies will also have to review their processes in light of the corporate offence of failure to prevent the facilitation of tax evasion introduced by the Criminal Finances Act 2017.

Shortly before going to press, the appeal from the refusal by the Competition Appeal Tribunal to grant class certification in the Mastercard claim was rejected. It will be interesting to see what this means for the development of collective actions under the Consumer Rights Act 2015, and how litigation funders will take the news. Staying with collective actions, but moving beyond the United Kingdom, we look at the Australian courts' willingness to look at what arrangements have been made with litigation funders in class actions, and at the development of securities actions in China.

We also examine the implications for insurers of Hong Kong's new apology law and of the new D&O guidelines introduced in Brazil.

Court of Appeal holds that banks do not owe a duty of care in IRHP redress scheme

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In spring 2016, we examined the range of interest rate hedging product ("**IRHP**") misselling claims that were working their way through the courts following on from the redress scheme agreed between the banks and the Financial Conduct Authority ("**FCA**"). In this update, we revisit this IHRP litigation following a recent decision by the Court of Appeal around whether a duty of care is owed by those operating such a redress scheme. Had the claimants been successful in their arguments, it would have allowed them to re-open their claims against financial institutions, despite the fact that the underlying allegations of negligence were statute barred.

Background

In 2012, nine banks agreed to review their sales of IRHPs made to non-sophisticated customers since 2001. Once affected customers had been identified, their participation in the redress scheme depended on the type of product purchased. Those who had purchased structured collars were automatically included within the redress scheme, whereas those who had purchased cap products had to have proactively complained to their banks to be included. Purchasers of all other types of IRHPs would be invited to opt-in if assessed as non-sophisticated.

By the end of 2015, the redress scheme appeared to have been a success on paper with 92% of offers having been accepted, but this was only half the story. Some customers were aggrieved as they were left with little choice but to participate in the redress scheme as their legal claims would have been time-barred or they were not eligible to go to FOS given their size and others complained that the compensation was inadequate, or they were offered alternative hedging products instead, or otherwise excluded from the process on technicalities. A number of claims against the banks then followed by those dissatisfied by the redress received with claimants deploying various arguments, including that the banks owed them a duty of care in conducting the redress scheme.

Claimants in such actions had something of a bumpy ride, with some finding a way through and others meeting a dead end. There were also some potentially conflicting decisions with the High Court in *Suremime Limited v Barclays Bank plc* (2015) granting permission to amend the Particulars of Claim to plead that the defendant bank directly owed its customers a common law duty of care in connection with the conduct of the redress scheme. However, the Court in *CGL Group Limited v Royal Bank of Scotland* (2016) held that a similar proposed amendment was not arguable.

Court of Appeal judgment

Three linked appeals came before the Court of Appeal in June 2017[1] , one of which was the *CGL Group* appeal. The principal issue to be decided was whether reviews, conducted pursuant to an agreement between the banks and the FCA as part of a settlement to avoid enforcement proceedings by the FCA, which considered that there had been "serious failings" in the way the banks sold these products to small and medium sized businesses, gave rise to a duty of care by the banks to those businesses to carry out those reviews with reasonable care and skill.

Lord Justice Beatson gave the leading judgment, dismissing the appeals.

While Beatson LJ acknowledged that the difficulties of determining when a duty of care arises are well known, there are three general tests to be considered in the round: (1) whether the defendant assumed responsibility to the claimant; (2) the threefold test in *Caparo Industries plc v Dickman*

1. (1) CGL Group Limited (2) Jacqueline Bartels & Adrian Bartels (3) WW Property Investments Limited Appellants v (1) The Royal Bank of Scotland plc & National Westminster Bank plc (2) Barclays Bank plc (3) National Westminster Bank plc [2017] EWCA Civ 1073

(1990) (reasonable foreseeability, proximate relationship and fair, just and reasonable to impose a duty); and (3) whether the addition to existing categories of duty would be incremental rather than indefinable.

The appellants' primary case was that the banks owed them a duty of care because they had "voluntarily" assumed responsibility to them in carrying out the redress scheme by virtue of writing to the customer inviting them to opt-in. Beatson LJ thought the appellants had focussed too heavily on the assumption of responsibility test and that it was not the most appropriate one in this case.

Beatson LJ considered that the regulatory context clearly weighed against the imposition of a duty of care in these cases, stating that it would be *"unusual for the common law to impose a common law duty on a statutory regulatory framework"*. He noted that parliament had already decided that some breaches of the banks' regulatory duties are not to be actionable at all by customers, and others are only to be actionable by private persons. Here, the appellants did not have rights of action under s138D of the Financial Services and Markets Act 2000 ("**FSMA**") to seek damages for losses arising from breach of rules. Consequently the recognition of a common law duty of care to the appellants would be *"to drive a coach and horses through the intention of Parliament" and would "undermine a regulatory scheme which has carefully identified which class of customers are to have remedies for which kind of breach"*.

It was clear that Beatson LJ placed much weight on what parliament intended, namely that the FCA was to have broad powers, including the ability to require restitution under s384 or a scheme under s404 FSMA, and that no individual customer could enforce these powers or sue for breach as it would be for the FCA to bring enforcement proceedings. Although the banks and FCA had come to a contractual arrangement to carry out the review, he considered that the review was *"in practical terms thrust on them by the FCA rather than truly voluntary"* and this pointed against recognising a duty of care.

The fact that the review and redress process was also scrutinised by an independent reviewer (a 'skilled person' appointed under s166 FSMA) also appears to have been a factor relevant to the determination of whether a duty arose. Beatson LJ considered that the banks could not have "assumed responsibility" when they expressly informed customers that an independent reviewer would be examining the decisions. Though the point did not arise, he also commented that the independent reviewer could not have owed a duty of care to the customers either.

Beatson LJ also appeared to be concerned about the broader implications had the appeals been allowed. He noted that the complaint concerned not the provision of banking services, but the way in which complaints about banking services were handled. He considered it was possible to imagine a number of similar customer complaint schemes such that the imposition of a duty of care in respect of a complaint system could have *"far-reaching consequences"*.

Interestingly, Beatson LJ also referenced (or rather downplayed) the *Suremime v Barclays* decision, noting that the judge had permitted the amendment to the Particulars of Claim whilst expressly stating that he could not be confident that all the relevant facts had been deployed which would be relevant to determining whether a duty of care arose. It appears that the parties in *Suremime* may have settled before a substantive hearing of the facts took place.

Conclusion

The decision will have come as a welcome relief to financial institutions that had been engaged in such IRHP reviews. However, it does raise the question as to whether banks will be keen to agree to schemes outside of s404 in order to avoid owing a duty of care or otherwise being caught by actionable provisions of FSMA.

It also continues in the same direction as the April 2017 decision in *Mazarona Properties Ltd v Financial Ombudsman Service* (2017), where the High Court rejected an application for judicial review of a decision taken by a FOS ombudsman when faced with a complaint about a redress offer made (and later withdrawn) following the alleged misselling of IHRPs by a bank. The FOS decided that it could not hear the complaint as the bank's review process fell outside the scope of its compulsory jurisdiction. The High Court agreed, finding that the FOS is only permitted to consider a complaint under the compulsory jurisdiction if it relates to an act or omission by a firm in carrying out regulated activities, and a complaint about the handling of a complaint is not a complaint about the provision or failure to provide a financial service, though a s404 scheme would have come within FOS's jurisdiction pursuant to s404B FSMA.

We shall have to wait and see whether the Court of Appeal's decision in CGL is appealed, or if any other claimants try their luck with ever-more creative arguments as to why a duty does exist. Any claimant whose original claims are time-barred and therefore hoping to have another bite of the cherry by reworking their original allegations as breaches of duty will most likely have had any hopes dashed by this decision.

Criminal Finances Act 2017: The broadening of corporate accountability

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Tax evasion is already a criminal offence in the UK which has attracted considerable media attention since the notorious 'Panama Papers' scandal. Another notable example includes HSBC's Swiss banking arm that allegedly helped wealthy clients to evade taxes, albeit HSBC escaped action by the City regulator.

Up until now it has not been possible to hold the corporate body liable, where the evasion occurs. This has recently changed.

From 30 September 2017, the Criminal Finances Act 2017 (the "**Act**"), makes companies and partnerships criminally liable if they fail to prevent tax evasion by an associated person, even in circumstances where the corporate body was not involved in, or aware of, the criminal conduct.

The Act

Amongst other things, the Act introduces two new corporate criminal offences, namely failure of a corporate body to prevent the facilitation of both UK and offshore tax evasion by an associated person.

These offences have been introduced to combat the historic difficulties encountered in bringing businesses to account where their employees or external agents facilitate tax evasion. The legislation aims to oblige corporates to establish procedures to prevent those providing services for, or on its behalf, from dishonestly and deliberately facilitating criminal tax evasion.

The new offences can only be committed by a 'relevant body', being a body corporate or a partnership. The offences accordingly apply to all companies and partnerships (including LLPs).

The Offences

The new offences are modelled on the "failure to prevent" bribery offence contained in the Bribery Act 2010.

Similarly to the bribery offences, they impose strict liability and therefore require no proof of involvement by the 'directing mind' of the company, thus overcoming the difficulties previously faced when bringing businesses to account for corporate offences.

The offences require three elements:

1. Criminal evasion of tax by a taxpayer (either by an individual or a firm).
2. Criminal facilitation of the tax evasion by an associated person of the relevant body, acting in that capacity.
3. Failure by the relevant body to prevent its associated person committing the criminal facilitation.

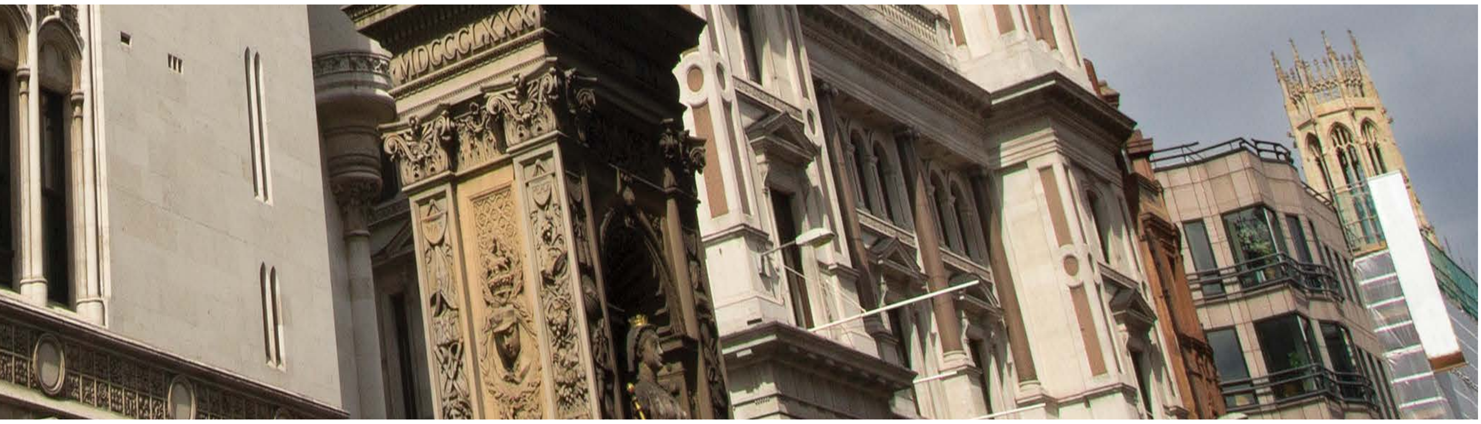
First, it will be necessary to show that tax evasion has occurred (either by an individual or firm) under existing laws. These include the offence of cheating the public revenue, or being knowingly involved in (or taking steps with a view to) fraudulent evasion of tax. Whilst an actual criminal conviction is not required to hold the corporate liable, where the underlying tax payer has not been prosecuted (and convicted), the prosecutors will need to prove tax evasion beyond all reasonable doubt.

Criminal facilitation includes being knowingly concerned in, or taking steps with a view to, the fraudulent evasion of tax by another person, or aiding, abetting, counselling or procuring the commission of a tax evasion offence. Negligent or reckless assistance will not typically be sufficient to constitute an offence.

An associated person can be employees or agents or *"any other person who performs services for or on behalf of"* the relevant body who is acting in that capacity when the facilitation occurs.

The second offence, the failure to prevent overseas tax evasion offence, contains the same elements but it also requires a UK nexus and dual criminality.

A UK nexus will be evident where the company is incorporated, or carries on business, in the UK. The concept of dual criminality requires the underlying actions of the taxpayer and the facilitator to be an offence in both the UK and the relevant overseas jurisdiction.



Defences

A complete statutory defence is available to corporate bodies, alleged to have committed one of the facilitation offences, if they can show that they implemented reasonable preventative procedures (expected in the circumstances) or where it would have been unreasonable or unrealistic, in the circumstances, to have expected such procedures to be implemented.

Punishment of corporate bodies

If a corporate body is found liable of committing one of these new offences they will face penalties, including an unlimited financial penalty, and possibly ancillary orders, including confiscation orders or serious crime prevention orders, in addition to suffering reputational damage. A successful prosecution may also prevent a corporate body from bidding for public contracts.

Implications for D&O Insurers

The Act essentially makes owners and managers responsible for preventing their staff and agents from committing tax evasion. The larger and more dynamic the business, the greater the risk that such activity might have occurred.

As such, the new offences may create the need for further internal investigations to be conducted by large companies, to ensure that appropriate prevention and detection measures are in place, which could also encourage whistle blowing and self-reporting. D&O insurers may wish to review their policies now to see if they will be expected to meet the costs of any such internal investigations, before a prosecution is initiated.

The Act also expressly permits the use of deferred prosecution agreements ("**DPA**") in relation to the corporate offence. This is likely to be an attractive prospect for the corporate body, and our previous articles have commented on the Serious Fraud Office's ("**SFO**") increased use of DPAs. Indeed, two considerable DPAs have already been used this year in respect of Rolls-Royce and Tesco Stores.

One concern with DPAs, from a D&O insurers' perspective, is that often the DPA will also contain a statement of facts which has been agreed between the corporate body and the prosecutor. This statement will list various facts relating to the alleged misconduct and, in some cases, may include admissions regarding the offences under investigation. Furthermore, the DPAs agreed in the UK to date have all involved (to a greater or lesser extent) an agreement on the part of the corporate body to assist and co-operate with the prosecutor's ongoing investigation into particular individuals.

These factors will all be adverse to the interests of the directors and officers. While a company guilty of facilitating tax evasion may therefore be spared conviction, this could well be at the expense of its individual directors and officers, which could lead to a greater number of requests for costs indemnity under D&O policies.

The cost of these types of investigations can be significant. We have previously suggested that Insurers may wish to consider including an exclusion in the policy, excluding Insurers' liability for claims that arise from an approved DPA. This could avoid a situation where Insurers are obliged to advance costs only to then seek to claw them back upon a subsequent conviction.

As the new offences also increase the risk of corporate bodies being prosecuted where they are unable to rely on the statutory defence, this may also lead to an increased chance of claims being brought against the directors and officers who committed the offence, and others who may be in breach of their duties owed to the company, for failing to have adequate procedures in place. D&O insurers may wish to review the criminal conduct and insured v insured exclusions with this increased risk in mind. This against a backdrop that brokers and insureds are likely to soon expressly seek confirmation that cover is extended to this particular named legislation (as they did following the introduction of the Bribery Act).

Given the types of exposures that the Act may bring, and the possibility of new offences being created in due course, insurers may also wish to consider offering stand-alone entity cover for these heightened risks.

The Act is another attempt to broaden vicarious liability for companies regarding criminal offences. It has been suggested that further "failure to prevent" offences, and other forms of economic crime, may also be introduced soon as the Government seeks to make it easier to hold corporate bodies, and their directors and officers, accountable. This ties in with the broader theme of the Government's aim to tighten corporate governance generally to increase trust in UK business.

FCA Annual Enforcement Report 2016/17

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On 5 July 2017, the Financial Conduct Authority ("FCA") published its Enforcement Annual Performance Account (the "Account") for the 2016/2017 year as part of its Annual Report and Accounts.[1]

The Account is the FCA's assessment as to whether it is operating fairly and effectively in investigating suspected misconduct and in bringing criminal, civil and administrative proceedings in appropriate cases. In this article, we look at some of the highlights arising from the Account.

The Account reveals that the FCA is running a record number of investigations. The number of open investigations has increased dramatically with 414 still open as of April 2017, as compared to 237 open at the same time in 2016. The increase in investigations may be explained by the FCA's new strategy of opening more investigations in light of the HBOS Report released in 2015 which criticised the FCA for being too cautious in it approach to commencing investigations.

However, while more investigations are being opened, a higher percentage of investigations are being concluded with no action being taken. In 2016/2017, 62% of cases were closed with no further action being taken, whereas in 2015/2016 only 24% of cases resulted in the FCA not taking any further action (in 2014/2015, the figure was 33%, so still significantly lower).

There has been a sharp fall in both the number and quantum of financial penalties imposed by the FCA for 2016/2017 (although the number of criminal convictions remained steady). In the 2016/2017 financial year, the FCA applied 15 financial penalties, totalling GBP 181 million. This represents a significant reduction compared to 2015/2016 where 34 fines equating to GBP 884.6 million were ordered (the figures for 2014/15 were 43 fines totalling nearly GBP 1.41 billion).

The majority of the GBP 181 million total fine sum imposed for 2016/2017 is comprised of the GBP 163 million fine imposed on Deutsche Bank for failing to maintain an adequate anti-money laundering control framework in relation to Russian 'mirror trades'. This is the biggest fine the FCA has levied in relation to money-laundering to date. 6 of the 15 fines were imposed on firms and the remaining 9 on individuals.

The FCA has also, for the first time, used its powers under section 384 of the Financial Services and Markets Act 2000 to require a listed company to pay compensation to those who have suffered loss as a result of market abuse. These powers have been used in relation to Tesco Plc following action taken by the SFO and FCA for market abuse. It is estimated that the amount that may need to be paid to the retail and institutional investors affected will be approximately GBP 85 million excluding interest.[2]

The most commonly investigated topics during 2016/2017 (with reference to cases opened during the year and remaining open) are insider dealing, unauthorised business, retail conduct and financial crime. Notably, the FCA's Annual Report and Accounts for 2016/17 disclosed that, during the year, the FCA had opened its first competition enforcement case.

As mentioned earlier, there were 9 fines levied on individuals during 2016/17, but these were relatively small, with a cumulative value of GBP 0.9million. The number of prohibition orders applied to individuals has remained fairly steady over the past three years (2016/17: 23; 2015/16: 24; 2014/15: 26).

1. The Account can be accessed via this web link: https://www.fca.org.uk/publication/annual-reports/enforcement-annual-performance-account-2016-17.pdf
2. The redress scheme launched on 31 August 2017 and further information can be found via this web link: https://home.kpmg.com/uk/en/home/services/advisory/tesco-scheme.html

The dramatic decline in penalties may indicate that the FCA is adopting a softer approach. However, the FCA states that they *"remain committed to investigating and holding firms and individuals accountable for misconduct and to ensure wrongdoers pay for the costs of remediation"*. They maintain that there has been no change in the approach to misconduct or financial penalties as taken in previous years. The FCA has explained the fall in financial penalties with reference to the aftermath of the Libor and forex rigging scandals. The FCA says that the "exceptional" punishments handed out in respect of these scandals had the effect of skewing the results of previous years.

In order to manage the increased number of investigations, the FCA has implemented a number of process changes in an effort to make investigations sharper and more efficient. It is said that feedback from those who have been investigated is encouraged and welcomed by the FCA. While the average cost (to the FCA) of an enforcement case has reduced from GBP 565,800 in 2015/16 to GBP 240,900, the Account reveals that enforcement investigations remain lengthy. The average case length for regulatory and civil cases is 17.6 months.

The FCA is continuing to build and strengthen its relationships with its international partners both in the Unites States and in Europe. The FCA is an active participant in the International Organisation of Securities Commission which has recently launched an Enhanced Multilateral Memorandum of Understanding ("EMMoU"). The EMMoU contains new enforcement co-operation powers and is said to represent a "significant milestone" for cross border co-operation. In 2015/17 the FCA received 998 requests for assistance from regulatory and law enforcement agencies across 59 different countries. It remains to be seen what impact Brexit and the trigger of Article 50 will have on the scope and scale of the FCA's international relations. However, the FCA has called for their European counterparts to continue cooperation with the UK after it leaves the European Union.

It must not be forgotten that the Prudential Regulatory Authority ("PRA") also undertakes investigations and enforcement action, albeit focused on issues concerning a firm's safety and soundness as opposed to conduct issues. During 2016/17, the PRA took enforcement action against three firms. These included:

- A UK-incorporated subsidiary bank of an overseas bank (QIB (UK) plc) which was fined GBP 1.38 million for failing to recognise that it had to comply with regulatory requirements relating to the assessment and maintenance of financial resources and capital;
- A London branch of an international bank (MUFG Securities EMEA plc) which was fined USD 8.925 million for failing to be open and co-operative with the PRA in relation to an enforcement action by US regulators against Bank of Tokyo-Mitsubishi UFJ Limited ("BTMU"). BTMU itself was also fined GBP 17.85 million

This represents a drop in the number and size of fines from the year prior, when the PRA imposed three fines of firms totalling GBP 125.87 million and also three fines on individuals, totalling nearly GBP 300,000.

Mastercard collective action not to proceed – implications

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Potentially the biggest and most complex claim in British legal history, according to some commentators, the Competition Appeal Tribunal ("CAT") declined to certify consumer claims against Mastercard as eligible for inclusion in opt-out collective proceedings. Permission to appeal the decision has recently been refused. The claim sought damages of approximately GBP 14 billion arising indirectly in relation to overcharging by Mastercard of multilateral interchange fees, which it was alleged were passed on by merchants to consumers, by charging higher prices for goods and services, from 1992 – 2008.

In this article we analyse the implications of this judgment.

Facts

Mastercard operates a four party card payment scheme. A cardholder presents a card to a merchant, and details of the transaction are passed by the merchant to its acquiring bank and then to the cardholder's issuing bank. The issuing bank transmits payment to the acquiring bank, less a transaction fee known as the interchange fee ("IF"). The acquiring bank deducts the IF, along with its own fee from the payment that it then makes to the merchant. In the absence of alternative agreement, the IF, between the acquiring and issuing bank, will default to the multilateral interchange fee ("MIF") set by Mastercard.

The EU Commission decided in December 2007 (which was upheld by the EU Court of Justice) that the setting of the EEA MIF (an MIF applying where a card is issued in one EEA Member State and used in another Member State) by Mastercard was in breach of competition law, and in effect set a minimum price that merchants had to pay their acquiring bank for accepting Mastercard branded cards.

In this case the applicant Walter Merricks (a former FOS chief ombudsman), who was seeking to be the class representative, claimed that the higher EEA MIF caused a higher UK MIF (where a card issued in the UK is used to pay a merchant in the UK), that the higher fee was fully passed to merchants (which was not in issue), and that the merchants passed through this increase in retail prices charged to customers. The class of claimants was defined as all those individuals who purchased goods or services from merchants that accepted Mastercard (not just those who used a Mastercard as it was said the pass-through of the charge would affect all of the merchants' products) but excluded those under 16 (on the basis they were unlikely to be spending their own money), those not resident in the UK for at least 3 months, and those no longer alive.

UK Competition Law Regime

The Consumer Rights Act 2015, in force from 1 October 2015, amended the Competition Act 1998, substituting a new s47A and s47B to give rights to individuals to bring private damages actions and to allow authorised class representatives to bring opt-in or opt-out collective actions on their behalf in the CAT. The question before Mr Justice Roth was whether a collective proceedings order should be made in the Mastercard case. An order can be made by the CAT under s47B Competition Act if:

1. the CAT considers that the person who brought the proceedings is a person who the Tribunal could authorise to act as a representative; and
2. the claims are eligible for inclusion in proceedings (i.e. that they raise *"the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings"*).

The Competition Appeal Tribunal Rules 2015 (the "CAT" rules) provide that the CAT may certify claims as eligible for collective proceedings where the claims:

a. are brought on behalf of an identifiable class of persons;

b. raise common issues; and

c. are suitable to be brought in collective proceedings.

In determining whether the claims are suitable the CAT can take into account all matters it thinks fit including: whether collective action is an appropriate means for the fair and efficient resolution of the common issues; the costs and benefits of continuing the collective proceedings; whether separate proceedings have been brought by members of the class; the size and nature of the class; whether it is possible to determine whether any person is a member of the class; and whether the claims are suitable for an aggregate award of damages.

In July 2017, the CAT held that the correct approach to apply when considering the expert evidence adduced in support of the stated common issues was that of the Canadian courts. In particular, the Canadian case *Pro-Sys Consultants Ltd v Microsoft Corp* (2013) was referred to. In that case, it was held that the expert methodology must offer a realistic prospect of establishing loss on a class-wide basis, so that if loss is established at a trial of the common issues there is a means by which to demonstrate that it is common to the class.

Suitability for collective action

The CAT found that, although there were a number of issues in the claim that were common to all claimants, two issues were very different: (i) how much each merchant passed through the overcharge to its customers; and (ii) the amount that each claimant spent at these merchants.

A key finding of the CAT was that there was no requirement that all significant issues in the claim should be common or that the common issues should predominate (in contrast to the position in the US). However, in view of the difficulty in determining the two issues in question, the CAT was not satisfied that the claims were suitable for an aggregate award of damages.

The claimant's submissions, that the expert evidence demonstrated that difficulties regarding the pass-through issue could be dealt with by applying a methodology to calculate the overcharge and a weighted average pass-through percentage, were rejected. The court also found that it was impossible to see how the payment of damages to an individual claimant from the aggregate damages could be determined on any reasonable basis. The individual's level of expenditure, merchants from whom they purchased and the mix of products purchased over the relevant period would all be relevant and there was no plausible way of reaching even a rough and ready approximation of loss suffered by an individual.

Authorisation of the class representative

Although it was not strictly necessary to decide this issue, the CAT went on to consider Mastercard's submissions that the applicant should not be authorised as the class representative. Mastercard argued that the litigation funding agreement that the applicant (Walter Merricks) had entered into meant that he would not be able to fund the litigation or pay Mastercard's costs if ordered to do so as the agreement could be terminated by the funder; the limit of GBP 10 million for funding Mastercard's costs was inadequate; and that the terms of the funding agreement gave rise to a conflict of interest.

The CAT rejected these arguments, following an amendment made to the funding agreement. The CAT found that a payment that has to be made to a third party funder in consequence of its funding commitment did constitute a cost or expense incurred in connection with proceedings. It found that commercial returns for the funder can be recovered from residual funds left unclaimed from the damages, and such funding returns were recoverable where the applicant's obligation to pay funding costs is contingent, provided the obligation was a direct liability on the applicant.

Also rejected were Mastercard's submissions that the applicant was subject to a conflict of interest, as there was an obligation to ensure there was a sufficient amount of unclaimed damages for the funder to receive its "Total Investment Return" in conflict with the interests of the class to maximise the amount of damages recovered and distributed. The CAT found that, although a term in the funding agreement requiring the applicant to use his best endeavours to distribute the proceeds to the class would have been desirable, given the powers of the CAT and the applicant's evidence that he would act in the best interests of the class there was no realistic prospect that the applicant would be constrained from acting.

Appeal

Permission to appeal the decision was refused by the CAT on 28 September 2017. The CAT found that the legislation provides no route of appeal from the refusal to certify the class. The CAT was of the view that this reflected a deliberate policy, on the basis that experience from other jurisdictions, in particular the United States and Canada, is that decisions refusing or allowing a class to be certified typically generate appeals. Therefore, the CAT was of the view that in order to craft an effective system of collective redress for the UK, the legislature had restricted the procedure to a specialist tribunal and confined the right of appeal to decisions on the substantive claims thus precluding prolonged litigation. Although not strictly necessary, the CAT also went on to comment that it would have refused permission in any case. This was for a number of reasons. In particular the CAT stated that its finding had not been that it was necessary for the applicant to assess the loss suffered by individual members of the class. The introduction of a collective proceedings regime had not changed the fundamental nature of damages for breach of competition law as being compensatory. The applicant had been unable to propose a method of distribution of the aggregate award of damages that, even on a rough and ready basis, would lead to payments on a compensatory basis.

Comment

The case was seen as a test of the class action regime, and is the second heard by the CAT since the rules were amended (the first, relating to mobility scooters, also failed to be certified as a collective action). The case also fits a trend we have seen in the UK for increasing involvement of US funders and lawyers in UK litigation, and the US plaintiff bar is of course much more familiar with a class action regime.

The outcome in the case is due to the particular difficulties that arose in assessing individual damages, and it is of interest that the CAT made reference to Canadian case law.

In Canadian class actions (subject to some nuances between provinces), plaintiffs must put forward a "credible or plausible" methodology for addressing class wide issues of loss, which is typically an expert methodology in consumer claims. This must establish "some basis in fact" to prove the existence of a common issue regarding loss on a class wide basis, a standard which is lower than the balance of probabilities. Although this cannot be purely theoretical or hypothetical if there is conflicting evidence, the matter is one that is suitable for trial, and certification is not generally held to be an obstacle to the claim proceeding. Courts in Canada are flexible about certification of class actions where damages may require individual assessment, as specifically contemplated in the legislation. Canadian class proceedings are generally interpreted purposefully to promote the efficient management of legal proceedings and access to justice. Where the courts are dealing with a large number of claims of modest value, which are unlikely to be suitable for individual litigation, access to justice tends to be strongly promoted.

In the Mastercard case, the CAT noted that it had been argued that as it was totally impractical for members of the class to bring individual claims without a collective proceedings order, a vast number of individuals who suffered loss would get no compensation. However, the CAT stated that this was the case in most cases of widespread consumer loss following competition infringements, and did not mean an application to bring collective proceedings would always be granted, as each case had to be considered on its own terms.

It will be interesting to see the effect of the decision, and whether it has a serious dampening effect on other claims following this route. Indeed the CAT collective action regime has been mooted as a potential option for dealing with foreign exchange rate benchmark manipulation cases. There is no doubt that funders and claimant lawyers will be scrutinizing potential claims very carefully, in light of the outcome in this case.

Funders will note the acceptance of the funding arrangements in this case. The CAT considered debate in the House of Lords on whether funding should be permitted in collective actions, noting that the Government clearly intended many collective actions would be dependent on funding, and this could not be achieved unless the class representative incurred a conditional liability for the funder's costs that could be discharged from unclaimed damages. There are some lessons as to relevant terms that funders might wish to include in agreements, including the criticism of the convoluted terms of a funding agreement concerning consumers.

Assens Havn v Navigators: Court of Justice of the European Union holds that third party bringing a direct action against a marine insurer is not bound by a jurisdiction/choice of law agreement between the insurer and insured

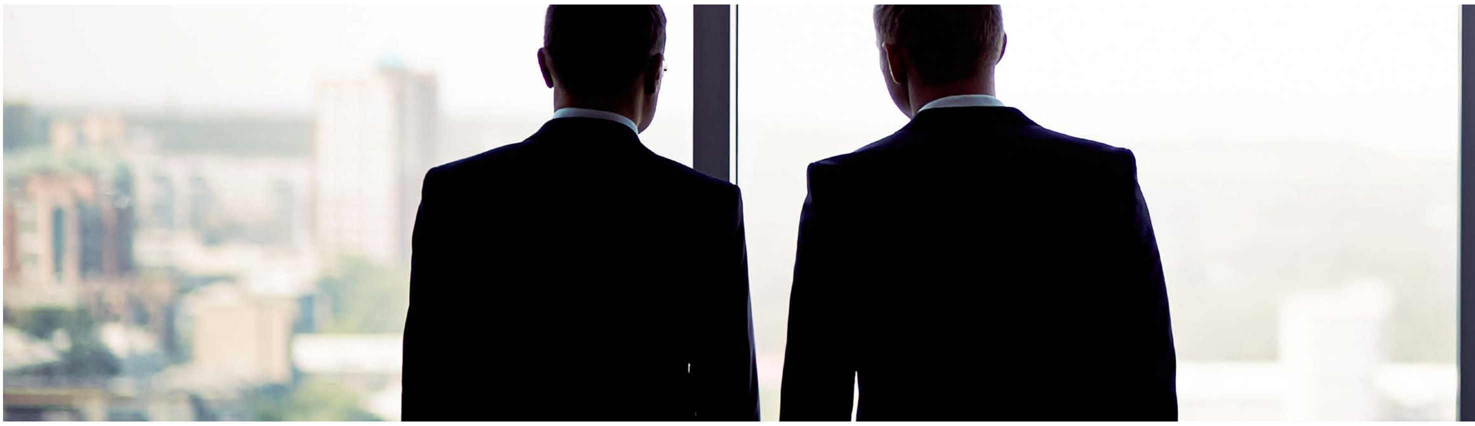
Under Regulation 44/2001 (which has since been replaced by Regulation 1215/2012, but the relevant provisions in this case have remained the same), special jurisdiction rules apply to insurance (but not reinsurance) contracts. Broadly, an insured can only be sued in the place of his domicile. However, the insured can sue its insurers in its own domicile, or that of the insurers, or in the place of the loss (usually that position applies even if there is a valid jurisdiction clause, but there are some exceptions, one of which is referred to further below).

The Regulation further provides that an injured third party which is allowed under local law to bring a direct action against an insurer is also permitted to sue the insurers, in his own domicile, or that of the insurers or in the place of the loss. Of issue in this case was whether a valid jurisdiction clause in the insurance contract could override that position in respect of the injured third party. The Court of Justice of the European Union has now held that it cannot.

The facts of the case are that a Swedish charterer took out liability insurance with a UK insurer. The vessel caused damage to the Port of Assens in Denmark, which sought to bring a subrogated claim against the insurer under Danish law when the Swedish charterer/insured went into liquidation. The insurance policy contained an English choice of law and jurisdiction clause and the issue was whether the Danish courts nevertheless could hear the claim brought by the Port of Assens.

The fall-back provisions regarding jurisdiction and insurance referred to above can be departed from by (amongst other things) a jurisdiction agreement which relates to a policy which covers risks set out in Article 14 of Regulation 44/2001 (which includes *"any liability…. arising out of the use or operation of ships…"*). However, it was held that that article does not apply to direct action claims brought by an injured third party – it only applies to actions between the insurer and the insured. Hence the third party was not bound by the English jurisdiction clause: *"The view must therefore be taken that an agreement on jurisdiction made between an insurer and an insured party cannot be invoked against a victim of insured damage who wishes to bring an action directly against the insurer before the courts for the place where the harmful event occurred… or before the courts for the place where the victim is domiciled"*.

The Third Parties (Rights against Insurers) Act 2010 is the UK equivalent of the Danish Act which gave rise to the third party direct action against insurers in this case. It applies where the insolvency procedure takes place under the law of one of the parts of the UK. However, jurisdictional issues regarding where that claim should be brought are governed by Regulation 44/2001 or, now, Regulation 1215/2012. Although marine and aviation and "large risks" insurers can in certain circumstances contract out of the jurisdictional rules laid down by the Regulations in their policies, this case confirms that that contracting out will not affect the ability of an injured third party, which can bring a direct action against insurers to rely on those jurisdictional rules. Whilst (as the Court pointed out) the third party never directly contracted out of jurisdiction in the first place, the decision is noteworthy because the third party's claim is still a subrogated/assigned claim and usually third parties can have no better rights than the insured into whose shoes they step. Nor will insurers be able to protect themselves against this risk, in the absence of the third party's agreement.



Asset Management under the spotlight

Publication of the FCA Asset Management Market Study, Final Report

Laura Cooke, Partner, London
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On 28 June 2017, the Financial Conduct Authority ("**FCA**") published the findings of its market study into the UK asset management sector (the "**Final Report**"), together with a consultation paper ("**CP17/18**").

The FCA launched its market study in November 2015 (the "**Market Study**"). The Terms of Reference identified particularly the need to understand whether competition is working effectively, to enable both institutional and retail investors to obtain value for money when purchasing asset management services. (This reflects the additional objective of the FCA, introduced by the Financial Services Act 2012, to promote "effective competition in the interests of consumers in the markets for regulated financial services".)

The FCA has confirmed a number of highly critical findings within its Interim Report (published in November 2016) but the "package of remedies" now proposed stops short of imposing on the industry the sea-change anticipated. Instead it ushers in a period of further consultation. High on that list (with industry responses due by 28 September 2017) are the proposals to strengthen the duties of fund managers and to introduce a requirement that they consider whether or not they are providing value for money. In whatever form these proposals emerge from consultation there are likely to be practical implications for both the asset management industry and its insurers.

The FCA's findings

The Final Report confirmed the following key findings identified in the Interim Report:

(i) Weak **price competition** within the asset management industry: of the firms sampled, active charges have remained broadly stable over the past decade, with average profit margins of 36%

(ii) Substantial variation in fund **performance** and no clear correlation between charges and the gross performance of retail active funds in the UK (indeed evidence suggests that, on average, both actively managed and passively managed funds did not outperform benchmarks after fees)

(iii) A lack of clarity in the communication of **fund objectives and charges**

(iv) Reliance by smaller institutional investors, typically pension funds and their trustees, on largely unregulated **investment consultants**

Proposed remedies

The Final Report proposes a package of ten remedies intended to address those findings, as set out in the table [below].

The headline-grabbing proposal (for its potential impact on consumers) is the introduction of an "all-in" fee, intended to ensure clearer communication of charges. This promises to fulfil two of the FCA's stated aims; both in protecting investors by enabling them to better understand and compare funds, and, thereby, driving competition between those funds.

There is also much in the Final Report that will be of concern to investment consultants, who play a significant role in advising pension funds and trustees on asset allocation. The FCA recommends that HM Treasury consider bringing investment consultants under FCA regulation. The FCA also proposed to reject undertakings given by the three largest investment consultants (Aon Hewitt, Mercer and Willis Towers Watson, which together have at least 56%

of investment consultancy revenues) proposing reforms intended to head off a referral to the Competition and Markets Authority ("**CMA**"). The FCA has since, on 14 September, issued its **Final Decision**, which confirmed that it would indeed be rejecting the proposed undertakings in favour of a Market Investigation Reference on investment consultancy services and fiduciary management services to the CMA and very shortly thereafter, on 21 September, the CMA published an **Issues Statement**, which sets out the three main areas of the CMA's investigation. In particular, the CMA will be looking at whether harm is caused by: (1) the difficulties customers face in assessing, comparing and switching investment consultants; (2) potential conflicts of interest between investment consultants and the clients; and (3) barriers to other firms entering, or expanding within, the market. Should it find an adverse effect on competition, it will have to consider what, if any, remedial action (which could include financial penalties) would be appropriate. The CMA has invited interested parties to set out their views on the potential issues and potential remedies by 12 October 2017 for further discussion, as appropriate.

We now turn to focus on the FCA's proposals in relation to fund managers and the governance of investment funds:

Strengthening the duty on fund managers

Under existing FCA rules, fund managers are required to act in the best interest of their investors and prevent undue costs being charged to the scheme or unit holders. These obligations are overseen by the board of directors, although boards are not currently required to appoint any independent members.

The FCA found that boards generally do not consider value for money on behalf of investors, do not always take timely steps to address underperformance, and can lack authority within group structures to challenge commercial strategy.

In the Interim Report, the FCA set out a number of ways in which these issues might be addressed. In particular, the FCA asked whether the duty on fund managers was best strengthened through regulatory reform or through the introduction of a fiduciary duty. (The Law Commission had previously considered this same question and concluded in its report on "Fiduciary Duties of Investment Intermediaries", published in June 2013, that the law did not need substantive change but rather better communication and understanding.)

Following consultation, the FCA took the view that statutory change, which would inevitably take time to come into effect, was not the most effective way to strengthen the duties of fund managers or to provide clarity around the FCA's expectations.

Instead, responding to industry feedback, the FCA proposes the following:

1. **Introducing a new rule requiring fund managers to assess whether value for money has been provided to investors**

Following industry feedback around the precise meaning of "value for money" the FCA has clarified that this includes:

i) Identification of economies of scale (when funds reach certain levels of assets under management) and consideration of whether any such savings should be shared with investors;

ii) Assessment of whether charges are reasonable in relation to costs incurred, quality of service and market rates;

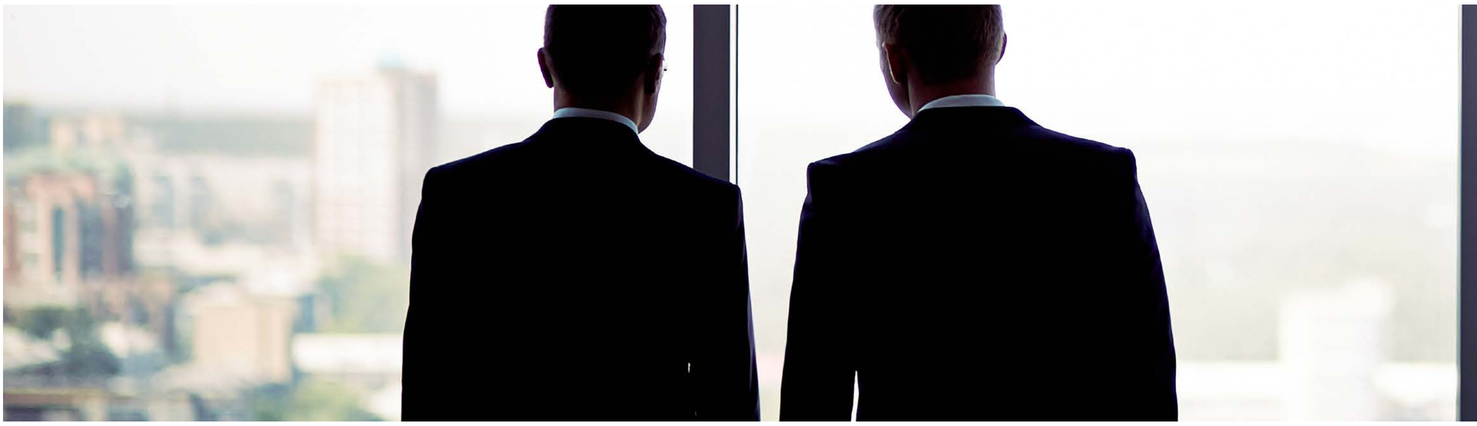
iii) Consideration of different share classes available to investors and, where multiple share classes are available for a given fund, the fund manager must explain why some investors are in those more expensive classes;

iv) Assessment of quality of services (including delegated services); and

v) Publication of a report, at least annually, setting out the findings of the assessment, and the actions taken or to be taken to discharge the obligation to provide value for money (for example, renegotiation of contracts). This report can form part of the Annual Report or stand alone.

2. **Introducing a new Prescribed Responsibility under the Senior Managers and Certification Regime ("SMCR"), which is to be extended to asset managers in 2018, to act in the best interests of investors**

Broadly, the SMCR aims to reduce harm to customers by making senior managers personally accountable for Prescribed Responsibilities. The FCA proposes that the chair of the fund manager board (who will be a Senior Manager under the SMCR regime and will therefore need to be approved as fit and proper to do so) be allocated the Prescribed Responsibility of assessing value for money. The chair would be responsible for taking



reasonable steps to ensure the board adheres to the current and proposed rules. Further consultation on this proposal will form part of the FCA's consultation on the extension of the SMCR to all financial services firms later this year.

3. **Requiring fund managers to appoint independent directors to their boards**

The FCA proposes that fund managers be required to appoint a minimum of two (and at least 25% of their total board membership) independent directors to increase scrutiny at board level. In practice, the FCA estimates that this will mean the appointment of approximately 480 directors, each of whom will need to have sufficient experience and expertise.

The FCA proposes that each fund manager assess whether or not its chair (allocated the Prescribed Responsibility of assessing value for money as discussed at (2) above) should be an independent director or an executive director. They note that while an independent director may be more robust in challenging commercial interests where these compete with the interests of investors, an executive director will have better day-to-day knowledge of the company and potentially be better placed to make changes to firm culture and values.

The FCA proposes that (1) and (3) above take effect 12 months after the rules are finalised.

Comment

On one view, the current requirement on fund managers to act in the best interest of their investors probably already encompasses an obligation to assess "value for money". What the FCA is now proposing is to make that express. The FCA is shining a spotlight on a huge industry (the UK asset management industry is described in the consultation paper as being the second biggest in the world with GBP 6.9 trillion of assets under management) it sees as opaque and perhaps complacent, having become used to sustained high-profit margins in the context of variable fund performance. Fund managers will no doubt be considering what this means for them commercially; what level of profit margin is compatible with value for money? From the consumer perspective, the FCA has highlighted that even relatively modest changes to asset management charging structures could have a significantly positive impact on savings and pensions pots.

Although the FCA stopped short of recommending that the Government introduce a new fiduciary duty, the proposed additional Prescribed Responsibility to ensure value for money exposes the individual appointed as chair to individual sanctions under the SMCR regime if they cannot satisfy the regulator that they took "reasonable steps" to prevent, stop, or remedy a breach. Many D&O Insurers will already be considering the investigations cover offered to fund managers in line with the extension of the SMCR in 2018 and this proposal points to one area in which the regulator will be looking.

The recruitment of nearly 500 independent directors with the necessary expertise to the boards of fund managers may well present a challenge for the industry. Those independent directors will of course face the possibility of claims against them in their capacity as directors. We expect that few independent directors would wish to take on the additional role of chair (being the Senior Manager responsible for assessing value for money).

Although the Final Report seeks to assure the industry that the FCA does not favour passive funds over active funds (in response to concerns raised in relation to the Interim Report), clearly those funds that do not outperform benchmarks after fees will be in the spotlight. This comes in the context of concerns about "closet index tracker funds" that closely mirror the benchmarks, and which have been identified by some commentators as a source of potential investor claims.

With many of the FCA's 10 proposed remedies awaiting further consultation or taking the form of recommendations to other bodies (including HM Treasury and the Department of Work and Pensions), we can expect the consideration and implementation of the Final Report to be gradual. This may come as a relief to those who expressed alarm at the severity of the findings set out in the Interim Report. Fund managers and their insurers are, however, likely to be looking the proposals set out in CP17/18 closely from a governance and risk perspective.

AIM:	Better protection for investors
PROPOSALS:	1. Strengthening the duty on asset managers to act in the best interests of investors (who are often not themselves well placed to find better value) through: • Introducing as an additional Prescribed Responsibility under the SMCR, a responsibility on fund managers to consider whether value for money has been provided to investors; • Requiring fund managers to appoint at least two independent directors with experience to assess whether the assets are being managed in the best interests of investors. 2. Making it easier for fund managers to switch retail investors from products permitting payment of commissions to financial advisers from management fees (prior to the Retail Distribution Review) to cheaper share classes, without those investors' explicit permission, and potentially introducing sunset provisions ending such payments altogether. 3. Requiring disclosure of "box profits", which arise from differences between the price at which investors leaving the fund sell units to the fund manager, and the price at which the units are then sold to a different investor. Where the fund manager holds those funds, and is exposed to market risk and changes to valuation, the fund manager is "at risk". Where a buyer and seller have been "matched" in the same period, the manager is "risk-free" and it is proposed that any profits arising should be returned to investors.
AIM:	**Driving competition**
PROPOSALS:	4. Requiring clearer communication of fund charges, including disclosure of a single "all-in" fee to investors (to include asset management charges, transaction costs and intermediary charges). 5. Supporting improved disclosure of costs and charges information, including by introducing a standardised template of costs and charges for institutional investors. 6. Chairing a working group tasked with considering how fund objectives could be made clearer and more useful and further consulting on how benchmarks are used and performance is presented. 7. Recommending the Department for Work & Pensions remove barriers to pension scheme consolidation and the pooling of assets.
AIM:	**Improving the effectiveness of investment consultants and intermediaries**
PROPOSALS:	8. Making a referral to the Competition and Markets Authority to further investigate the investment consultancy industry, and rejecting undertakings given by the three largest investment consultants (Aon Hewitt, Mercer and Willis Towers Watson) aimed at avoiding such a referral. 9. Subject to 8, recommending to HM Treasury that investment consultants be brought under FCA regulation. 10. Launching a market study into investment platforms to determine whether retail investors benefit from economies of scale when pooling funds.

Shifting the blame: the Senior Managers Regime

Laura Cooke, Partner, London
Rebecca Lowe, Senior Associate, London

The Senior Managers and Certification Regime ("**SMCR**") and the Senior Insurance Managers Regime ("**SIMR**") are a range of policy and rule changes introduced by the Financial Conduct Authority ("**FCA**") and the Prudential Regulation Authority ("**PRA**"), to increase the accountability of senior individuals within the banking and insurance sectors respectively.

Background to the SMCR

The SMCR was introduced to address a strong perception, following the financial crisis, that the legal framework around the identification and allocation of responsibilities to Senior Managers in the banking sector was inadequate. The UK Parliamentary Commission's 2013 report on Banking Standards found that *"the public are angry that senior executives have managed to evade responsibility. They want those at the highest levels of the banks held accountable for the mis-selling and poor practice"*.

To address this, that report recommended introducing a *"new Senior Persons Regime, replacing the Approved Persons Regime, to ensure that the most important responsibilities within banks are assigned to specific, senior individuals so they can be held fully accountable for their decisions and the standards of their banks in these areas"*.

Implementing the Senior Managers Regime

Implementing the SMCR requires firms to identify all individuals performing Senior Management Functions ("**SMFs**"). SMFs can be carried out by both executive and non-executive directors. The SMCR also lists a number of Prescribed Responsibilities and key functions to be allocated to the appropriate Senior Managers. Firms also need to satisfy themselves that the relevant candidate is a "fit and proper" person to perform the function.

Then, similarly to the former Approved Persons scheme, firms need to obtain prior FCA approval for each person being appointed to perform one or more SMFs. When applying for approval, firms are required to provide a Statement of Responsibilities for each Senior Manager and a management responsibilities map, documenting the senior management responsibilities for the firm as a whole.

Timeline for Implementation

Over the past eighteen months the SMCR and SIMR regimes have been brought into force in stages. The majority of the SMCR and SIMR regimes came in to effect on 7 March 2016 for firms that accept deposits and dual regulated investment firms (i.e. banks and building societies). As such, it currently applies to banks, building societies, credit unions, the largest investment banks regulated by the PRA and branches of foreign banks operating in the UK.

Then, following new rules on whistleblowing coming into force on 7 September 2016, the Conduct Rules were widened to apply to all firm staff (save for purely ancillary staff) on 7 March 2017. This was also the deadline for firms to issue certificates to staff in the Certification Regime.

Expanding the SMCR

The FCA's 2017/2018 Business Plan and other FCA speeches have emphasised that the implementation and expansion of the SMCR is a key regulatory priority.

As part of this process, on 3 May 2017, the FCA published a series of policy statements addressing outstanding aspects of the SMCR for banks and insurers and also finalising the rules on remuneration and on whistleblowing in branches of overseas firms. Following on from an earlier consultation paper (CP 16/27), this included extending most of the Code of Conduct sourcebook (COCON) to apply to "standard" **non-executive directors** in the banking and insurance sectors with effect from 3 July 2017.[1]

Clearly the FCA is trying to avoid the general election and Brexit negotiations delaying implementation of the expanded regime. This means that all non-bank (and non-insurer) FCA authorised firms will need to start focusing on the SMCR in anticipation of its implementation and providing appropriate training.

Then, on 26 July 2017, the FCA and PRA published a consultation on extending the SMCR to **all** FSMA regulated firms (such as investment firms, mortgage brokers and consumer credit firms) and further developing the SIMR for insurers. Implementation of the expanded regime is expected for early in 2018.

Details of the proposals contained in the July 2017 consultation paper are summarised in this article.

On the same day, the PRA and FCA also published consultation papers on extending the SMCR to insurers (effectively replacing the SIMR). A summary of the proposals contained in this consultation can be found here.

The impact of the SMCR

According to the FCA, it appears that implementing the SMCR has already assisted firms to identify overlapping or unclear corporate structures or inappropriate delegation of responsibilities. In a speech on 13 July 2016 Jonathan Davidson, Director of Supervision at the FCA said that "*…for a number of firms, the process of applying the regime helped clarify their own management accountability and governance structures, or highlighted improvements that were or are now being made*".

Clarifying the responsibilities and key functions of Senior Managers at the outset should avoid responsibilities falling between managers or being duplicated. In theory, this should make it more straightforward for the FCA to identify a breach by a Senior Manager and to take the appropriate enforcement action.

The SMCR also has a role to play in achieving cultural change throughout firms. The FCA reported earlier this year that it has already "*…seen strong progress in relation to firms adopting a culture of individual accountability through their implementation of the regime*".

Embedding an appropriate culture within firms will help Senior Managers to be more comfortable that they, and their teams, are acting reasonably. It should also help to identify earlier where further changes might be needed to improve the culture, for example, if a firm's pay structure encourages inappropriate risk taking.

Following the implementation of the SMCR, firms are required to report conduct rule breaches and disciplinary actions to the FCA on an annual basis. The FCA's Annual Report and Accounts for 2016/2017 disclosed that as of the first reporting date (31 October 2016), of those covered by the regime 32 firms reported 75 conduct rule breaches and 89 disciplinary actions for the period 7 March to 31 October 2016. However, it will be some time before the FCA publishes a full year's breach statistics for all staff who are subject to the conduct rules.

1. https://www.fca.org.uk/publication/policy/ps17-08.pdf

Will Senior Managers now be in the firing line for every corporate breach?

Senior Managers and their insurers might be concerned that under the SMCR they will be liable for every corporate breach.

However, a Senior Manager is not automatically liable just because the firm is liable. This is because a senior manager's liability arises under the Conduct Rules if he or she failed to take "reasonable steps" for a person in his or her position to prevent a regulatory breach by the firm occurring, and the burden of proof to demonstrate this lies with the regulator. Clearly the breach by the Senior Manager must be related to or a factor in the firm's breach but the Senior Manager cannot be liable without the firm also being in breach. It must also be remembered that the FCA still continues to have the ability to take enforcement action against a Senior Manager who (i) has failed to comply with rules applicable to them and/or (ii) has been knowingly concerned in a contravention by a firm of a requirement imposed on it by or under FSMA (see section 66 and 66A).

In a speech on 31 March 2017, Mark Steward, Director of Enforcement and Market Oversight at the FCA explained that *"corporate fiduciary duties of care and diligence imposed on company directors are probably the closest statutory precedent for senior management liability"*. He also confirmed that the SMCR is not intended to be a means for firms to shift their corporate liability onto senior management, *"there is no free pass for firms…the [SMCR] does not mean there will be an end to action against firms, including heavy penalties"*.

This is helpful, although the real test for the SMCR will be when the FCA exercises its powers of enforcement.

This process is only just beginning; the FCA has started investigations into two individuals who are Senior Managers.[2] Once the outcomes of these investigations are published, Senior Managers, their firms and the public will see if the regime does ensure that blame is allocated appropriately. This also comes against a backdrop of the announcement by Mark Steward, Director of Enforcement and Market Oversight at the FCA in a speech on 20 September that there has been a 75% increase in the number of FCA investigations over the past year (a large proportion of which will be investigations of individuals). We now also have the benefit of the Policy Statement published in May 2017 which set out the amendment to the FCA's Decision Procedure and Penalties Manual (DEPP) to explain how the FCA intends to enforce the SMCR duty of responsibility. Importantly, this guidance has confirmed that standards will not be applied retrospectively and a long list of factors which will be taken into account when determining whether the senior manager has taken such steps as a person in their position could reasonably be expected to take to avoid contravention.

In the meantime, it is promising to hear that the implementation of the regime might be helping to clarify responsibilities and identify corporate misconduct at an early stage, as this might reduce the largescale banking scandals seen over the past decade.

The consultation period for the current round of consultation papers closes on 3 November 2017 and it is anticipated that the regulators will publish policy statements together with final rules and implementation proposals during 2018.

2. To 27 February 2017 see https://www.fca.org.uk/publication/foi/foi4965.pdf

The Financial Conduct Authority makes market investigation reference for investment consultancy and fiduciary management services

The FCA has the power, under section 131 of the Enterprise Act 2002, to make a market investigation reference when it has "reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom." In the case of investment consultancy and fiduciary management, the FCA considers those features are:

- A weak demand side with pension trustees relying heavily on investment consultants but having limited ability to assess the quality of their advice or compare services with resulting low switching rates
- Relatively high levels of concentration and relatively stable market shares with the largest three firms together holding between 50-80% market share
- Barriers to expansion restricting smaller, newer consultants from developing their business
- Vertically integrated business models creating conflicts of interest

(FCA Press Release, 14/9/17)

In the first use of these powers and the latest attempt by the FCA to show that it is serious in its aim to improve practices in the fund industry, the FCA has therefore decided to make a Market Investigation Reference (MIR) to the Competition and Markets Authority in relation to the supply and acquisition of investment consultancy services and fiduciary management services to and by institutional investors and employers in the UK.

This follows a wholesale markets review carried out by the FCA in 2014, which identified the market as an issue and the launch of a formal market study into asset management in 2015 which produced interim findings. In June 2017 the FCA published its final report on the study in which the FCA highlighted a number of concerns, including high profits generated by firms, the lack of understanding by investors as to the objectives of various funds, the lack of an appropriate benchmark against which to measure a fund's performance and concerns about the operation and processes of some funds.

The CMA will now conduct a full investigation as to whether there are any adverse effects on competition in the market, and determine what measures, if any, need to be taken to address these.

The statutory deadline for the CMA to complete the market investigation reference is 13 March 2019.

Exploring the frontier in securities litigation in China - Key factors in ascertaining misrepresentation in the Chinese securities market

Victor Yang, Legal Director, Shanghai

Following the rapid development of the Shanghai / Shenzhen Stock Exchange Market ("**SSE / SZSE**") and the ChiNext Market ("**ChiNext**") in China over recent years, an increasing number of judgments on the issue of misrepresentation relating to securities (e.g. fraudulent listing, fictitious profit etc.) have been reported. Meanwhile, as of 2016, after the "Provisions of the Supreme People's Court on the Trial of Cases of Civil Compensation Arising out of False Presentation in Securities Markets" ("**Misrepresentation Provisions**") entered into force in 2003, more than 110 cases regarding securities misrepresentations have been filed before competent courts in China, of which more than 40 have resulted in judgments. In 2017, the Xintai Electric fraudulent listing case has blazed the trail for securities misrepresentation claims regarding ChiNext listed companies. In this article, we will illustrate the key factors in disputes arising out of securities misrepresentation claims in the Chinese market.

According to the Misrepresentation Provisions, there are three key issues in respect of securities misrepresentation disputes in China:

(1) Whether the misrepresentation in question is material ("**Materiality Test**");

(2) Whether there is a causal relationship between the misrepresentation and the losses claimed by investors ("**Causation Test**"); and

(3) Whether there is any exemption from liability available for defendants ("**Exemption**").

Materiality Test

Article 6 of the Misrepresentation Provisions provides that "Where an investor files a lawsuit for civil compensation arising from misrepresentation in relation to securities, he shall submit the decision or announcement issued by the regulatory authorities…" In practice, this means that an administrative punishment decision issued by the China Securities Regulatory Commission ("**CSRC**") should be enclosed in the Statement of Claim filed before the courts.[1] Certain courts have held that the CSRC punishment decision may also be regarded as substantive evidence in ascertaining materiality. In other words, the courts would in principle conclude that the misrepresentation at issue is material if the relevant parties have been punished by the CSRC.

1. Although it is stated in the minute entitled "Certain specific issues regarding current commercial trials" issued by the Supreme People's Court in 2015, that the relevant administrative punishment decision should not be regarded as a prerequisite for filing a claim, the minute is not an absolutely binding judicial interpretation and to date the administrative punishment decision issued by the CSRC is still widely regarded as a mandatory legal document for filing a claim.

Causation Test

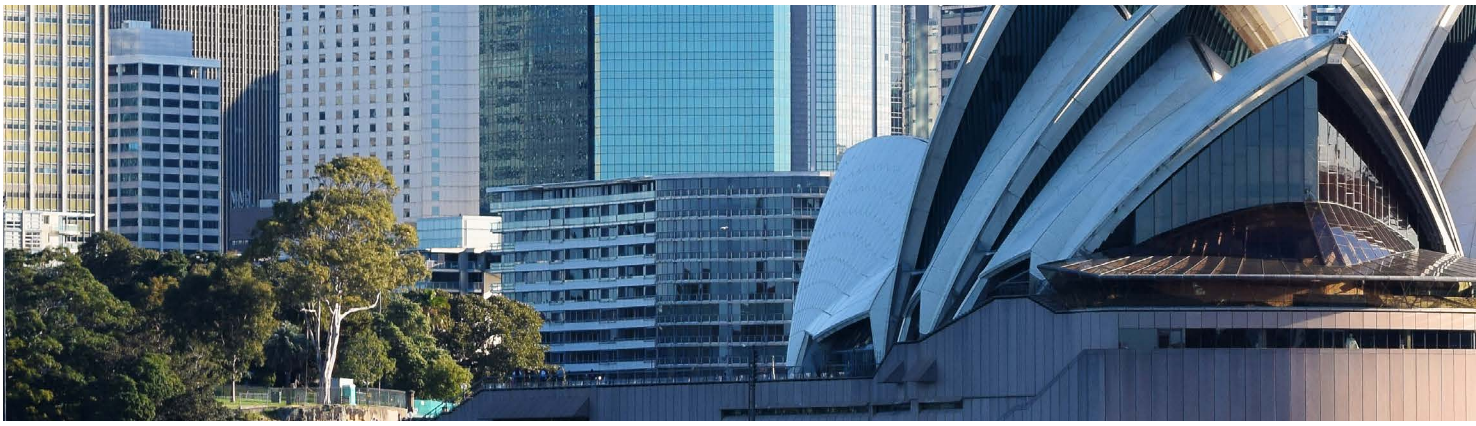
In China, it is widely agreed by the academia and held in various precedent cases that in order to prove securities misrepresentation, the claimant must prove both: (i) that it relied upon the defendant's allegedly fraudulent conduct in purchasing or selling securities ("**transaction causation**"); and (ii) that defendant's conduct caused, at least in part, the claimant's loss ("**loss causation**"). The "fraud on the market theory" adopted by the legislators entitles claimants to a rebuttable presumption of the existence of transaction causation, even where they were unaware of the misrepresentation at the time of their purchase or sale. Article 18 of the Misrepresentation Provisions clearly sets out the standards for determining transaction causation. However, the criteria for ascertaining loss causation are yet to be further clarified under Chinese law.

Exemption – systemic risks

The defendants will often attempt to reduce their liability, or successfully defend the claim altogether, by relying on the exemption for systemic risks, as provided under Article 19.4 of the Misrepresentation Provisions. However, no specific qualitative analysis of the provisions has been provided under Chinese law. Therefore, the standards and methods adopted in judicial practice in relation to the provision, vary significantly from court to court, resulting in intense debates on how to ascertain the systemic risks of the securities market and determine the deductible amount on the same basis. In the circumstances, the "systemic advance/decline" of the relevant indices of the securities market (such as the composite index and/or the industrial index of the relevant securities market) and the existence of any "systemic events" of the securities market (such as a global/regional financial crisis or a material change of the domestic policy regarding the relevant industry etc.) are usually regarded as key evidence.

Conclusion

Although the past few years have witnessed an increasing number of cases regarding misrepresentation in relation to securities filed before various Chinese Courts, and certain listed companies and financial institutions have been punished or held liable for misrepresentation, it should be noted that the Chinese securities market is still not as mature as that of certain developed countries, and whether a claim against the party committing securities misrepresentation will be successful largely depends on the factual matrix and the discretion of competent Courts in China.



Attempts to constrain the 'free riders': common fund and equalisation orders in Australian class actions

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Litigation funders have recently sought to improve their financial recoveries by applying to Australian Courts for 'common fund orders' in class actions. Common fund orders require all class members who seek to benefit from the proceeds of settlement or judgment to contribute equally to the cost of legal representation and litigation funding costs, regardless of whether or not they had entered into a funding agreement.

Despite initial reluctance to make such orders,[1] a litigation funder finally achieved success in the Full Federal Court decision of *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* (***Money Max***)[2] in late 2016. You can read more about our commentary on that case here.

Since then, there have been at least two important decisions, being *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and mgrs apptd) (in liq) (No 3)*,[3] ***(Allco)*** in which another common fund order was made and *Earglow Pty Ltd v Newcrest Mining Ltd*[4] ***(Newcrest)*** in which an equalisation order was made. These decisions demonstrate the willingness of Australian Courts to modify and interfere with litigation funding arrangements.

The Opt-Out Model

Australia has an opt-out procedure in representative proceedings, such that every group member that falls within the class description is automatically part of the proceedings unless they affirmatively exclude themselves.[5]

The adoption of an opt-out model encourages "free-riding", whereby group members may intentionally refrain from entering into a litigation funding agreement and wait until a successful outcome before coming forward to collect a proportion of the proceeds without having reimbursed the funder.

Funders have sought to prevent "free riders" from sharing in litigation proceeds by restricting class actions to a 'closed class' group[6], typically only brought on behalf of a subset of group members who contractually enter into a funding agreement.[7] The existence of closed classes has resulted in multiple class action proceedings financed by different litigation funders against the same respondents. This has been criticised by commentators as it gives rise to difficult case management considerations and creates uncertainty over the finality of the subject matter of proceedings.

Common fund orders

Given that funders want to maximise their profits from litigation, funders have instead sought to reduce "free-riding" and increase access to justice by applying the United States common fund approach to funding fees.[8]

In *Money Max*,[9] the Full Federal Court of Australia held for the first time that the funder in that particular case could be the beneficiary of a common order fund without needing to privately contract with all group members. This means that the entire class in that case will be liable to pay the funder a commission out of any proceeds recovered in the litigation through either a settlement or a judgment. Some uncertainty still remains for the funder, as the 2016 decision provides that it is the Court, and not the funder, that will set the commission rate; and that the rate will only be set later, at the end of the proceedings.

1. Blairgowrie Trading Ltd v Allco Finance Group Ltd [2015] FCA 811. 2. [2016] FCAFC 148. 3. [2017] FCA 330. 4. [2016] FCA 1433.
5. See s33J Federal Court of Australia Act 1976 (Cth). 6. *See Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd (2007) 164 FCR 275.*
7. See s33C Federal Court of Australia Act 1976 (Cth).

Since that decision, a single judge of the Federal Court in *Allco* also made a common fund order on 31 March 2017,[10] identifying how the Court may set a commission rate as a necessary consequence of approving a class action settlement. The Court was invited to approve a settlement distribution scheme which provided the funder with 30% of the net settlement sum (i.e. after deduction of the Class Applicants' legal costs) which in reality equated to 22% of the gross settlement sum of $40 million (being $8.85 million).

In approving the settlement, his Honour Justice Beach observed that generally speaking the percentage a funder will receive varies from case to case in Australia, but most commonly falls within a range of 25% to 40% and this was at the lower end of that range.[11] Had the gross settlement sum been substantially higher, Beach J would have applied a "sliding scale" to the commission rate and accordingly set a lower rate "so that the amount paid to the funder would have remained proportionate to the investment and risk undertaken by the funder."[12] His Honour considered that the Court was empowered to "modify any contractual bargain dealing with the funding commission payable out of any settlement proceeds".[13]

Equalisation orders

As an alternative, Courts have sought to address the perceived unfairness which exists between funded and unfunded members by making 'equalisation orders' following settlement or judgment. An equalisation order is when the Court orders unfunded group members to have their recovery deducted by an amount equivalent to the funding commission that would otherwise have been payable under a funding agreement. This amount is then redistributed back pro rata amongst the funded members.[14]

The *Newcrest* decision delivered on 28 November 2016 provides one recent example of a Court approved 'equalisation order', which operated as a redistribution recovery mechanism to all funded members. In approving the order, the Court observed:[15]

> *'This mechanism is fair and reasonable because it achieves equality of treatment between class members. I can see no good reason why funded RCMs should carry the litigation funding costs of the proceeding alone and unfunded RCMs should be permitted to take the benefit of the proposed settlement...'*

Whilst the approval of an equalisation order ensures equality between all group members, it generally does not affect or increase the amount of a litigation funder's fee (subject to the "Court's power to reduce the funding commission to be deducted pursuant to the terms of the settlement")[16]. This means that all group members share equally in the balance of the settlement sum, but the funder's recovery is capped at their contractual entitlement to commission fees.[17]

Implications for insurers

Together the cases of *Money Max, Allco* and *Newcrest* confirm the willingness of Australian Courts to modify and interfere with litigation funding arrangements where it is fair and reasonable to do so. The decisions are significant, but they are not of general application to all current and future class actions which will always be determined on the particular facts.

Whilst the potential availability of common fund and equalisation orders may give funders comfort that proceedings are commercially worthwhile in the absence of a requisite pool of signed up group members at the outset of a matter, there also remains uncertainty for the funder as to the commission rate that they will ultimately receive. This typically will not be determined until the Court approval process at the end of the proceedings. Moreover, the decisions do not extinguish or reduce the need for funders to do appropriate due diligence before commencing proceedings, nor do they otherwise turn cases with limited prospects of success into attractive funding propositions.

8. Michael Legg, 'Reconciling Litigation Funding and the Opt Out Group Definition in Federal Court of Australia Class Actions – The Need for a Legislative Common Fund Approach' (2011) 30 Civil Justice Quarterly 52, 63.

9. Ibid. 10. [2017] FCA 330. 11. Ibid at [125] . 12. Ibid at [157]-[160]. 13. Ibid at [101]. 14. See P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd [No 4] [2010] FCA 1029 at [26]-[29]. 15. [2016] FCA 1452.at [157] per Murphy J. 16. Ibid at [101]. 17. See *Re Banksia Securities Limited (Rec & Mgr Apptd)* [2017] VSC 148 at [100].

Insurers and financial institutions should be cognisant that these developments may result in more open class actions being brought in Australia, which could reduce multiplicity of actions and create certainty of outcome. It is equally worth noting that even if a common fund or equalisation order is made, this does not affect a respondent's liability, nor will it affect the quantum of damage which an insurer may be required to indemnify the respondent for in satisfaction of a judgment (in the event that an insurance policy responds to the claim). Rather, these orders go to how settlement monies are to be distributed among class members and litigation funders.

[18] See *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* [2016] FCAFC 148 at [69].

Tesco Update

Further to the March 2017 announcement that the SFO had agreed a deferred prosecution agreement (DPA) with Tesco and the FCA would be requiring Tesco to pay compensation to affected shareholders stemming from its 2014 profit overstatement, the redress scheme is now underway.

KPMG opened the scheme on 23 August 2017, inviting those who bought Tesco shares or bonds between 29 August and 19 September 2014 to lodge a claim before 22 February 2018.

The amounts to be paid per net share purchase and per net bond purchase have been determined by the FCA. Where KPMG accepts a claim, each net purchaser of shares shall be entitled to compensation of 24.5p per share purchased. It has been reported in the press that Tesco is therefore expected to pay out an average of GBP 400 to more than 10,000 shareholders.

However, varying amounts are payable in respect of each relevant bond issue. Interest will also be payable at 1.25% per annum to institutional investors and 4% to retail investors on a simple basis from 19 September 2014 to 21 December 2017.

In relation to the other streams of litigation and investigations which have spawned from the profit overstatement, the DPA received court approval but its terms remain confidential while the prosecution of three senior Tesco individuals charged with fraud by abuse of position and fraud by false accounting continues.

The viability of the Tesco shareholder collective action headed by Bentham Europe and Stewarts Law also looked uncertain in the aftermath of the redress scheme's announcement. However, in April, Stewarts Law confirmed that they were pressing ahead, commenting that *"the untrue or misleading financial information published by Tesco is not limited to the 29 August trading update referred to in the FCA announcement, nor are the damages claimed by our clients limited to the period of the compensation scheme (29 August to 19 September 2014). Tesco must address the wider period of admitted overstatement in the civil proceedings."* The claim's value is estimated to be in the region of GBP 177 million and the claimants are working towards securing a group litigation order.

However, the Financial Reporting Council dropped its investigation into Tesco's auditor at the time of the overstatement, PwC, in June 2017, determining that there was "not a realistic prospect" that a tribunal would find PwC guilty of misconduct.

What does it mean to say sorry? Hong Kong's Apology Law

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Following the passing of the Apology Bill on 13 July this year, Hong Kong has become the first jurisdiction in Asia to enact apology legislation.

The objective of the new Apology Ordinance ("the Law"), first considered in the wake of Hong Kong's Lamma Ferry disaster in 2012, is to "promote and encourage the making of apologies with a view to preventing the escalation of disputes and facilitating their amicable resolution". Importantly, the effect is that an apology will not "constitute an express or implied admission of the person's fault or liability in connection with the matter, and must not be taken into account in determining fault, liability or any other issue in connection with the matter to the prejudice of the person". This is very different from the current position where an apology may be admissible as evidence in civil proceedings for establishing legal liability.

An apology is an expression (whether oral, written or by conduct) of the person's regret, sympathy or benevolence in connection with the matter. For example:

- In a mobile phone product recall, directors and senior management would be able to apologise and provide refunds to the customers in a timely manner as a gesture of goodwill
- Directors and senior management of a company can offer an apology in a timely manner for any mis-selling of a financial product
- If a lawyer negligently provides a wrong legal advice, the lawyer can apologise almost immediately to the client and suggest remedies for the problem

The Law applies to an apology made by a person on or after the commencement date of the Law (1 December 2017) regardless of whether the matter arose before, on or after that date, or applicable proceedings concerning the matter began before, on or after that date. Thus, the Law does not have retrospective effect in relation to apologies made before its commencement date.

Applicable proceedings include judicial, arbitral, administrative, disciplinary and regulatory proceedings. The Law does not extend to criminal proceedings, the rationale being that criminal proceedings are not private proceedings and cannot be settled between parties; they are proceedings commenced by law enforcement authorities for the protection of the public.

The Law does not apply to:

- An apology made by a person in a document filed or submitted in applicable proceedings;
- An apology made by a person in a testimony, submission, or similar oral statement, given at a hearing of applicable proceedings; or
- An apology adduced as evidence in applicable proceedings by, or with consent of, the person who made it

These exclusions acknowledge that a party may choose to make an apology in court documents intending that apology to be considered in the proceedings, or agree to admit as evidence an apology made outside of the proceedings.

However, a decision maker (i.e. a person in authority to decide in a court, tribunal, disciplinary, regulatory or arbitral proceeding) may admit a statement of fact containing an apology as evidence in proceedings only if he/she is satisfied that it is "just and equitable to do so, having regard to the public interest or the interests of the administration of justice".

A disincentive to making an apology may be the potential implications for insurance cover. The Law aims at removing such disincentive in apologising, by expressly providing that an apology does not void or affect any insurance cover, or in any way affect compensation under an insurance contract or indemnity, regardless of whether the insurance contract or indemnity was entered into before, on or after the commencement date of the Bill. Insurers cannot contract out of the Law.

The Law is intended to reduce general reluctance to apologise for fear that it will be an admission of liability. Under the protection that apologies cannot be used in civil and disciplinary proceedings, subject to the "just and equitable" exception, it is likely to promote negotiation and dialogue between parties following the expression of an apology to affected persons. Thus a party will be able to convey condolences or sympathy to the other party, without being solely focused on whether an apology amounts legally to an admission of fault or liability.

Latin America

The Uncertain Future of D&O Insurance in Brazil

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The Superintendence of Private Insurance ("Susep") exercises regulatory and supervisory authority over some segments of insurance, open private pension funds and capital markets in Brazil. Susep issued Circular 541/2016, which came into force on 17 October 2016, establishing new general guidelines applicable to Directors' and Officers' ("D&O") insurance in Brazil. Circular 541/2016 was met with some criticism from the local market and Susep was asked to reconsider its terms. As a result, on 23 February 2017, its application was suspended by Susep via Circular 546/2017. In May 2017, Circular 553/2017 ("the new Circular") was issued, superseding Circulars 541/2016 and 546/2017. For the purposes of this article we consider the wording of the new Circular and its potential impact on D&O insurance in Brazil, comparing it also to Circular 541/2016.

The new Circular came into force on 24 May 2017, from which insurers have 180 days to submit new compliant policies to Susep, should they wish to continue to be licensed to sell D&O insurance. All existing registered D&O products that are not compliant with the new rule by this deadline will be automatically closed and archived. Any existing policies already issued that are due to expire before the 180-day deadline, can be renewed for one year. However, any that expire after the 180-day deadline cannot be renewed and insurers would need to instead sell one of the new policies, assuming it has been duly registered with Susep.

The new Circular (as did Circular 541/2016) establishes on a firmer footing that D&O insurance is on a claims-made basis, as any D&O policy must be issued as such - insurers are explicitly prohibited from issuing occurrence/event based D&O policies. It is worth noting here that the concept of claims-made is still relatively recent in Brazil, particularly amongst individuals whose only experience of insurance will have come from events/occurrence based policies in personal lines. Accordingly, it is still relatively common, particularly when it comes to issues such as notice and attachment, that D&Os seek to notify a claim based on the date that the alleged acts took place. It is unclear whether the new Circular will have any impact on this, as local insurers have in any event steadily become much more familiar with the claims-made basis, and the new Circular is aimed at insurers, such that insureds will not necessarily be aware of the rule. That said, if there are no more occurrence/events based D&O policies, the potential for confusion amongst policyholders and insureds might be reduced.

D&O policies are to be divided into three sections: general conditions, special conditions and additional (or particular) conditions. Many D&O policies in Brazil are already structured in this way, so the changes here will be limited. The new Circular allows D&O insurance to be contracted directly by an individual (as well as by a company), in the event the individual's company does not purchase such a policy.

Perhaps the most surprising element of Circular 541/2016 (and that which had caused much of the debate), was that it stated that D&O insurance does not cover attorney fees and defence costs incurred by an insured and that defence costs cover must be offered by insurers under the additional conditions. Understandably, much of the criticism towards this Circular was focused on this change, which appeared to miss one of the, if not the central, key reasons for D&O cover – the advancement of defence costs to individuals, who might not have the resources of a company to support such costs.

The new Circular changes this and reverts back to the previous position, where such costs can be part of the basic D&O cover.

D&O policies must provide insurers with the right to claim costs back from an insured whenever the damages are the result of wilful misconduct; or the insured acknowledges his or her liability.

Another interesting outcome is that Susep have confirmed that the new rule allows coverage of civil and administrative fines and penalties, provided they relate to non-intentional acts. This in fact does not alter the previous legal position, but does overturn recent guidelines issued by Susep suggesting that such fines should not be covered by D&O insurance (the reasoning for that previous guidance being that fines lose their deterrent effect if not borne by those being punished). This is notable as typically the most common claims to Brazilian D&O policies are those relating to regulatory investigations (partly due to the increasing number of administrative fines and penalties imposed by Brazilian Regulators, such as the Securities and Exchange Commission of Brazil (the CVM), where coverage of a fine is sought.)

In addition to matters excluded from cover by law, the new Circular, (as did Circular 541/2016) states that D&O insurance shall not cover the following liabilities: (i) general liability (e.g. any losses incurred by a third party due to an insured's act that was not committed in his/her D&O capacity); (ii) professional indemnity; and (iii) environmental risk liability. The latter has typically been included in cover in Brazil by way of extensions. Although Susep has not explained the reasoning for this, it would seem the new Circular is an attempt to cut back D&O cover to its most basic coverage, with other add-ons, such as environmental liability, restricted to policies specific to that line. However, given that there may be overlaps in such areas, and insurers may not wish to offer and insureds wish to purchase, multiple policies that might offer more coverage than required, rather than a single policy that provides the bespoke coverage sought, this aspect of the new Circular has been met with some resistance from the local market.

The new Circular also excludes from basic cover, company liability for third party losses caused by the non-intentional misconduct of D&Os. If insurers wish to sell such coverage as part of basic cover, it should be done by way of general liability policies. This would suggest that D&O cover will be limited to Side A and B. However, the new Circular does seem to allow parties to contract such coverage in a D&O policy by way of additional cover. Consequently, some believe that Side C will be permitted under D&O policies, despite neither Circular specifically referring to Side C and also stating that D&O insurance is to benefit individual insureds. It is important to note that the company cover referred to by the new Circular is broader than traditional Side C in some respects, as it is not limited to securities actions, although it must be connected to the misconduct of a D&O. It is anticipated that clarity will be obtained on these issues when insurers submit their new wordings to Susep.

Finally, the new Circular only allows reference to foreign law in D&O policies that have their geographical scope of coverage extended globally. However, the use of foreign expressions related to D&O insurance is permitted if they are commonly used by the Brazilian insurance market and provided that they are locally translated or translated in the policy.

In July 2017, a new Brazilian provisory act ("Act") came into force allowing the CVM and the Brazilian Central Bank ("BC") to apply more than one penalty to an offence, such as: fines, restriction of rights, and other penalties. The Act has also increased the CVM's fines from **BRL 500,000 to BRL 500 million (approximately USD 158 million on current rates)** and the BC's fines from **BRL 250,000 to BRL 2 billion (approximately USD 632 million)** - although it should be noted there are other measurements for the levels of fines, which are unchanged. The Act is in force, albeit on a temporary basis. To become final it requires the approval of Brazilian Congress. On 10 August 2017, the Act's effect was extended for another 60 days.

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