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Pollyanna Deane's insurance column: October 2021

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In her column for October 2021, Pollyanna consider a number of topics, including the impact of COVID-19 on the PI market, the implications of a recent ECJ judgment on the meaning of "goods" under the Commercial Agents (Council Directive) Regulations 1993 (*SI 1993/3053*) and Amazon's launch of insurance business in the UK.

After reading through various items of news and information in the insurance world, I can't say anything really jumped out at me, apart of course from the reference to a PLC note on Roll on Friday – commenting "It represents the first time an oligarch will have to wash standing up because of a PLC note". While relating to real estate, and to an unfortunate assistant who referenced a note in PLC under cross examination, I was more interested in the comments below the line, where respondents felt sorry for PLC, and secondly noted that there is no real suggestion that the note was wrong and more a suggestion that the assistant needed to dig deeper for her research. Commentary about the PI insurers and their obligation or otherwise to settle the claim was essentially the trigger for my thoughts.

Impact of COVID on PI market

Looking at the news, it seems that COVID will impact the PI market, just as it has all others. The Law Society has published a list of questions that insurers might raise on renewal:

> **What concerns have the COVID-19 pandemic and lockdowns raised for insurers?**
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> It's likely that insurers will be assessing business continuity and preparedness for any further COVID-19 (or other) disruptions more rigorously.
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> To assure themselves that firms have appropriate monitoring and management systems in place they could ask for additional details, such as:
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> - What advice, if any, are firms giving clients on coronavirus?
> - Has the firm given any undertakings, the discharge of which are now beyond their control?
> - Are there any expected major changes to the split of work and revenue of the firm?
> - How is the firm planning for or managing any potential solvency issues?
> - When was the business continuity plan last reviewed, and how is it being implemented?
> - Does the firm have adequate processes in place for any such period, such as on peer review, conflict checking, or to adequately action specific guidance and requests from the regulator?
> - Does the firm have adequate systems in place, which are accessible remotely, to make sure no missed deadlines occur, and risks are monitored?

However, there is little suggestion of COVID impact other than the frequent references to the hard market that is evident on renewals of PI cover and honestly, that has been a long time coming. When you look at the prices of PI cover for US firms, the UK firms have had it relatively easy. I think we are going to have to wait for the decisions made in the flow of cases arising from the BI test case and the advice given being challenged.

Meaning of "goods" under Commercial Agents Regulations

One of my partners, Steve Sidkin, drew my attention to (his) very recent ECJ case - *The Software Incubator Ltd v Computer Associates (UK) Ltd (Case C-410/19) EU:C:2021: 742 (16 September 2021)* - in which his client The Software

Incubator Limited (TSIL) had brought a successful claim against Computer Associates for compensation under the Commercial Agents (Council Directive) Regulations 1993 (*SI 1993/3053*) (the Regulations) following the termination by Computer Associates of TSIL's agency agreement with Computer Associates.

After an adverse judgment in the Court of Appeal, TSIL appeared before the UK Supreme Court in 2019 which asked two questions of the ECJ, namely whether:

- Bespoke software supplied electronically (and not on any tangible medium) constitutes "goods" for the purpose of the definition of a commercial agent?
- Bespoke software supplied to a principal's customer under a perpetual licence constitutes a sale of goods for the purpose of the definition of a commercial agent?

The ECJ has now ruled that a sale of electronically supplied software is a "sale of goods" within the meaning of the Regulations and, therefore, that Computer Associates wrongfully terminated its agreement with TSIL.

The moving status of what "goods" should mean is interesting, but even more interesting is its potential impact on brokers in respect of insurance distribution activities and potentially greater protection for them under the Regulations becoming available. Although the decision relates to the sale of software and attendant licences, the Court at paragraph 34 looked at what "goods" can mean:

> In the first place, as regards the term "goods", according to the Court's case-law, that term is to be understood as meaning products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions (see, to that effect, judgment of 26 October 2006, *Commission v Greece, C 65/05, EU:C:2006:673*, paragraph 23 and the case-law cited).

This new characterisation of what "goods" means now calls into question the decision from the ECJ on *Abbey Life Assurance Co Ltd v Kok Theam Yeap, Case C-449/01)*. In November 2001, the English Court of Appeal referred a question to the ECJ as to whether life assurance policies, annuities, health and pension business as well as various investment products offered by Abbey Life (Financial Products) were goods within the provisions of the Commercial Agent Regulations and Directive. The background to the case was that in 1988 Mr Yeap had become an agent for Abbey Life to sell its Financial Products. In 1997, Abbey Life terminated his agency and sought to recover a deficit of £9,377.68 on his commission account. Mr Yeap defended and counterclaimed by invoking the Regulations. His defence and counterclaim failed before the Central London County Court, which held that the Financial Products were not goods. Mr Yeap appealed to the Court of Appeal. In due course it referred two questions to the ECJ.

Submissions to the ECJ were made by Abbey Life, the UK government and the European Commission. Mr Yeap did not make a submission. The UK government drew attention to the travaux préparatoires for the Directive. It pointed out that the first Commission proposal for the Directive had covered all "commercial transactions", that is goods and services. In addition, the first Commission proposal had excluded intermediaries who carried on their activities in the insurance or credit fields.

The ECJ pointed out that when the Directive had been made by the European Council all references to services had been deleted. Furthermore, the exemption of the above intermediaries had been removed as it had become otiose. It also pointed to the Commission's proposed directive to replace Directive 77/92/EEC (the Insurance Agents Directive). The Commission expressed the view that the raison d'être of the Insurance Agents Directive would be doubtful if "that class of persons was already covered by the directive on commercial agents".

It also accepted the UK submission in respect of the process of production not being equivalent to the provision of "services" within the meaning of the Treaty since it results directly in the manufacture of a material object (as decided by the ECJ in an earlier case.) Similarly, the ECJ had decided in another case that the fact that an activity may have some physical manifestation, does not mean it entails the supply of goods rather than, or as well as, services.

The ECJ further pointed to the UK submission that the whole of Community legislation adopted in the fields of insurance and financial services is based on the applicability of the Community rules of freedom to provide services or capital and not on the applicability of the rules on free movement of goods.

As such, the ECJ had no difficulty finding that an agent involved in the sale of Financial Products did not come within the Directive (and, therefore, the Regulations.)

Now it is worth wondering whether this will remain the case given TSIL's judgment. Could Financial Products fall within the meaning of "goods"? See below an extract from the judgment – paragraphs 32 to 36:

> It is in the light of those considerations that it must be determined whether the concept of "sale of goods" in Article 1(2) of Directive 86/653 can cover the supply, in return for payment of a fee, of computer software to a customer by electronic means where that supply is accompanied by the grant of a perpetual licence to use that software.

> As regards the wording of that provision, it should be noted that that provision refers in general terms to the concept of "sale of goods" without defining the terms "sale" or "goods", which are not, moreover, defined in any other provision of that directive.
>
> In the first place, as regards the term "goods", according to the Court's case-law, that term is to be understood as meaning products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions (see, to that effect, judgment of 26 October 2006, *Commission v Greece, C 65/05, EU:C:2006:673*, paragraph 23 and the case-law cited).
>
> It follows that that term, as a result of its general definition, can cover computer software, such as the software at issue, since computer software has a commercial value and is capable of forming the subject of a commercial transaction.
>
> Furthermore, it must be stated that software can be classified as "goods" irrespective of whether it is supplied on a tangible medium or, as in the present case, by electronic download.

Whether or not an insurance distributor offering Financial Products would now come within the Regulations as there is a restatement of the definition of "goods" in my view remains arguable. Although under *Abbey Life v Yeap* Financial Products were not deemed to be "goods" that may now be open to challenge. Financial Products could be deemed to fall within the definition at paragraph 34, being products which can be valued in money and which are capable of forming commercial transactions.

The Insurance Distribution Directive (*(EU) 2016/97*) (IDD) and its attendant regulations now govern distribution of insurance-based Financial Products. Insurance was, from the outset, not intended to be covered under the Commercial Agents legislation and regulation and it may well be that the distinction afforded to Financial Products being separately regulated might still hold. However, given that the Regulations offer further protection which is not otherwise available to insurance brokers and given that it is quite possible to see Financial Products as having a monetary value and capable of forming the subject of commercial transactions, no doubt, twenty or so years later, it might be worth exploring to see whether *Abbey Life* remains appropriate.

Amazon offering insurance to SMEs in UK

Finally, and something that we have had on the radar, Amazon has started offering insurance to SME's as its first business insurance offering (see Reuters news, Amazon to start offering insurance to UK businesses-broker). It has taken longer than might have been thought and involves major UK insurers as the underwriters. Crucially, we observe that the policyholders will be part of Business Prime and clearly it is Amazon which will be perceived as having the relationship with the underlying customer. This is perhaps the biggest danger for the industry and it would be complacent to ignore that. While it may herald some shaking up of the market, for the moment, insurance insiders see this as more likely to mean partnerships are formed with existing players, with experience of operations in the regulated financial sector. We shall see.