

INSURANCE BULLETIN



Welcome to HFW's Insurance Bulletin, which is a summary of the key insurance and reinsurance regulatory announcements, market developments, court cases and legislative changes of the week.

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Should you require any further information or assistance on any of the issues dealt with here, please do not hesitate to contact any of the contributors to this Bulletin, or your usual contact at HFW.

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hfw 1. Regulation and legislation

1.1. UK: European Commissioner discusses the recast Insurance Mediation Directive (2002/92/EC) (IMD2)

Lord Hill, Commissioner for the Directorate-General for Financial Stability, Financial Services and Capital Markets Union, recently delivered a speech about insurance distribution in the single market.

Lord Hill recognised the importance of the insurance market in creating “... *one of the foundations of the whole European economy*”, and praised the positive negotiations between the European Parliament, the Council of the EU and the Commission. Lord Hill believes that the recast Insurance Mediation Directive (known as IMD2) will strengthen the single market in insurance and was confident that the trialogue negotiations would be finalised during the first half of 2015 in light of the recent developments in negotiations.

Lord Hill identified some areas in which he felt there could be further development, including:

- Although the recent PRIIPS (packaged retail and insurance-based investment products) Regulation (Regulation 1286/2014) introduced a common standard of transparency, there is still a lack of transparency and comparability of other insurance products, such as home, motor and life policies, for consumers.
- Where consumers are unable to make use of insurance products which they have been paying for in their home Member State in another Member State due to certain geographical limitations relating to coverage, validity and availability.



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NAZIM ALOM, ASSOCIATE

- The current fragmentation of the consumer insurance market and the limited cross-border access to insurance products in light of the fact that consumers are only able to buy insurance products in their home Member State even though products offered in another Member State may be cheaper and better suited to them.

Notwithstanding these issues, Lord Hill recognised that the insurance industry plays a vital role in Europe, and employs two million people, but recognised that the insurance market is facing significant changes which will require it to continue to evolve.

A copy of the speech as delivered, can be found here: http://europa.eu/rapid/press-release_SPEECH-15-3981_en.htm

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1.2. UK: Developments on Solvency II

The European Commission recently responded to the letter from the Chair of the Parliament’s Committee on Economic and Monetary Affairs (ECON) relating to the European Commission’s Delegated Regulation supplementing the Solvency II Directive (2009/138/EC).

The European Commission was pleased to learn that the Parliament and the Council of the EU accepted the Delegated Regulation without requesting an extension of the scrutiny period and that there is a call for a review of the calibration of capital requirements on infrastructure investments.

With respect to the European Insurance and Occupational Pensions Authority (EIOPA), a report will be adopted on its resources in order to determine budgetary requirements and the issue of financing of the European Supervisory Authorities (ESAs) generally.

The delegated Regulation was published in the Official Journal of the EU (OJ) on 17 January 2015, and came into effect on 18 January 2015. A copy of the Delegated Regulation can be found here: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL_2015_012_R_0001&from=EN

A copy of the European Parliament’s letter can be found here: <http://www.polcms.europarl.europa.eu/cmsdata/upload/4909add7-436e-40b7-9648-a38aab2f1e4f/Solvency%20II%20DA%20-%20Response%20from%20COM%20-%202027.01.2015.pdf>

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1.3. India: India's Insurance Bill could open the door for Lloyd's

The Insurance Laws (Amendment) Bill (the Amendment Bill) in India allows foreign companies to establish reinsurance branches in India and to compete with the dominant domestic reinsurer GIC Re. The Amendment Bill is in its final stages of approval and needs only to be passed by the Indian Parliament within six weeks of the start of the next session on 23 February to be made permanent law.

It is Lloyd's intention to establish a reinsurance branch in India as part of its long term growth plan. The Amendment Bill will be key to this and could see a Lloyd's operation in India.

The Amendment Bill will also allow foreign brokers and insurers to increase investment levels in joint ventures with their Indian counterparts from 26% to 49%.

The Amendment Bill is one of a number of steps taken by the Indian Government in recent months to open the door to other industries and drive sustainable economic growth.

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hfw 2. Court cases and arbitration

2.1. UK: Queen's Bench Division of the Commercial Court considers justification for transfer of proceedings from Chancery Division to the Commercial Court in London

The Commercial Court in London held that the subject matter of three sets of proceedings did not warrant their transfer from the Chancery Division in Bristol to the Commercial Court in London, as although they were set in an insurance context, there was nothing that required the expertise of judges in the Commercial Court.

The applicant group companies applied to transfer three related sets of proceedings that they had commenced against the respondents from the Chancery Division in Bristol to the Commercial Court in London. The proceedings had concerned three separate claims: an intellectual property claim, a money claim, and a third claim in which there was a dispute over the division of profits made from loans made to policy holders to finance the payment of insurance premiums.

The Judge held that the court should not take account of the relative advantages of London or Bristol in so far as London could be said to be favoured as there was nothing to prevent the proceedings being moved to London while remaining in the Chancery Division. Accordingly, showing London to be more appropriate could not be a reason for a transfer. The Court's focus was

therefore on whether the Chancery Division or the Commercial Court was the more suitable venue. The Judge held that the test was whether it appeared that the Commercial Court was a significantly more suitable court for the proceedings to be tried in than the Chancery Division; the word "significantly" was included as it was a matter of commonsense that if the position was balanced, then the proceedings ought to be left where they were given the disruption and costs that would be involved in a transfer. In deciding which court was more suitable, by far the most important consideration was the subject matter of the proceedings and whether the matters could benefit from the expertise of judges in the Commercial Court, although relative expedition and costs were factors that were to be secondarily taken into account. Although the court accepted that the context of the money claim was the insurance industry, it was not part of the insurance industry that required the specialist knowledge of the Commercial Court. However, there was no doubt that if the proceedings had been commenced in the Commercial Court they would not have been expelled given the considerable overlap in some areas between the Chancery Division and the Commercial Court.

The case demonstrates that the courts are reluctant to move proceedings unless the circumstances warrant.

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ALISON PROCTOR, ASSOCIATE



2.2. Australia: Victorian Court of Appeal considers the characteristics of a non-executive director

In the case of *AIG Australia v Jaques 2014 VSCA 332*, Australia's Victorian Court of Appeal decided that a respondent was a non-executive (rather than an executive) director of an insured. The respondent was, therefore, entitled to extended cover under a policy (by way of a special excess or additional limit of AUS\$1 million for each non-executive director).

The respondent:

- Was a director of the insured.
- Upon being appointed the general manager of a company owned and managed by the insured's managing director, ceased to receive directors' fees.
- Tabled reports at the insured's board meetings, apparently within the scope of this general manager role.



...the Victorian Court of Appeal decided that the respondent was not one of the insured's executive directors. This is because the respondent was, in fact, performing insufficient executive functions in the management and administration of the insured.

MIKAELA STAFRACE, SPECIAL COUNSEL

- Was named as one of the insured's executive directors in two of the insured's product disclosure statements (although the respondent gave evidence that at least the first reference to him being an executive director was a mistake).
- Was described in the insured's directors' meeting minutes as an executive director.

However, the Victorian Court of Appeal decided that the respondent was not one of the insured's executive directors. This is because the respondent was, in fact, performing insufficient executive functions in the management and administration of the insured. Accordingly, the respondent was a non-executive director of the insured under the policy. The respondent was, therefore, entitled to extended cover (by way of the special excess limit) of an additional AUS\$1 million.

This case demonstrates the importance of avoiding uncertainty as to which individuals are entitled to access additional cover.

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3. HFW publications

3.1. Europe: What would be the consequences of Greece leaving the Eurozone?

With Greece's withdrawal from the Eurozone looking increasingly likely, HFW has published a briefing on the potential legal consequences of the exit and a re-denomination into a replacement local currency.

A copy of the briefing can be found here: <http://www.hfw.com/Eurozone-crisis>

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4. News

In other news:

- The PRA updated its webpage on Solvency II internal model applications to state that all firms intending to submit an application to the PRA from 1 April 2015 should use EIOPA's self-assessment template, which is part of the common application package.
- In a press release, EIOPA states that, although Solvency II remains its highest priority, cuts to its budget in 2015 will impact on Solvency II.

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