Insurance/
Reinsurance

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# INSURANCE BULLETIN





**In this week's Insurance Bulletin:**




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## 1. Regulation and legislation

### UK: The end of Solvency II? Treasury Committee launches inquiry into the Directive

**On 13 September, the Treasury Committee agreed the terms of reference[1] for its inquiry into Solvency II, signaling the launch of its inquiry into the Directive.**

The inquiry appears to be open to the possibility of replacing Solvency II, with the Chairman of the Treasury Committee, Rt Hon Andrew Tyrie MP, commenting:

*"Brexit provides an opportunity for the UK to assume greater control of insurance regulation...The Treasury Committee will now take a look…to see what improvements can be made in the interests of the consumer."*

The terms of reference state that the Treasury Committee is seeking to understand "the strengths and weaknesses of Solvency II in its existing form and its status in the context of insurance regulation internationally." In particular, the Treasury Committee is seeking to examine whether Solvency II impacts on the ability of insurance to meet the needs of UK customers and the UK economy, and whether Solvency II has any impact on the competitiveness of the UK insurance industry.

There is a clear suggestion that Solvency II can be improved upon – but what does this mean for the insurance market?

As we explained in our briefing "Preparing for Brexit: seven things that (re)insurance businesses can do now"[2], we would expect the UK to seek to maintain its equivalence under Solvency II for group supervision, group solvency and reinsurance in order to help UK insurers to continue to trade in Europe. By far the simplest way of doing this would be to maintain these aspects of Solvency II in its current form – departing from Solvency II may throw up hurdles for UK (re) insurers and intermediaries which wish to trade in Europe.

It is also far from certain that departing from Solvency II would lead to a relaxation of requirements, which was one of the arguments made in favour of Brexit. Experience shows that the UK regulators generally seek to impose higher standards than those set by European legislation, as demonstrated by the UK's transposition of the Insurance Mediation Directive. Indeed, it is our understanding that it was only the maximum-harmonising nature of Solvency II which prevented the UK regulators imposing a stricter regime than that which is contained in the Directive.

While the Treasury Committee may regard Brexit and the abolition of Solvency II as an opportunity to "improve" the UK's insurance regulatory regime, extricating the UK from Solvency II may prove complicated and carry as yet unforeseen drawbacks. We will continue to monitor the inquiry, and the submissions made by stakeholders, with great interest.

For more information, please contact Will Reddie, Associate, London, on +44 (0)20 7264 8758, or william.reddie@hfw.com, or your usual contact at HFW.

1 http://www.parliament.uk/documents/commons-committees/treasury/Terms%20of%20reference/EU-insurance-regulation-ToR-16-17.pdf

2 http://www.hfw.com/Preparing-for-Brexit-seven-things-that-re-insurance-businesses-can-do-now-July-2016

## 2. Court cases and arbitration

### England & Wales: Unreasonable behaviour prevents successful party recovering all costs: *Cooper and another v Thameside Construction Company Ltd*[1]

**This case offers a pertinent reminder of the importance of thoroughly investigating a claim before submitting a defence, after the High Court refused to award the successful party full costs because of the way it had handled the claim.**

Mr and Mrs Cooper (the claimants) suffered £6.5 million worth of damage to their luxury North London home after defective plumbing caused a severe flood. Their insurers filed a subrogated action claim against the defendant construction company. It was common ground that a faulty connector in the bathroom was the cause of the flood. The defendant admitted early in the correspondence that it was responsible for the defective plumbing and thus raised various arguments on causation.

However, it was only once the defence was filed that the defendant thoroughly investigated the claim and discovered it had not in actual fact been responsible for installing the faulty connector that caused the flood. As a result, the defendant filed an uncontested application to withdraw its earlier admission and subsequently obtained permission to resile. The claimants, however, did not abandon or review their position despite amendments to the claim being made.

The case went to trial and, having dropped its causation defences on

1 [2016] EWHC 1694 (TCC)

The claimants sought costs incurred up to the point of the removal of admission, and argued for a reduction in costs based on the defendant's handling of the case.

SIMON BANNER, ASSOCIATE

the Court steps, the defendant was successful on nearly every point. The issue of costs was then dealt with by the Court.

The claimants sought costs incurred up to the point of the removal of admission, and argued for a reduction in costs based on the defendant's handling of the case. The defendant resisted these points and sought costs on a standard basis. Whilst Carr J accepted the claimants' argument that costs should be considered in two phases (pre and post-amendment), he held that there was no reason to derogate from the normal rule that the loser pays the winner's costs. However, in deciding on a costs order, Carr J did consider the late timing of the amendment, as well as that the claimants did not re-evaluate their stance once the amendment had been made.

As such, Carr J found that the defendant should be entitled to the costs of the proceedings assessed on a standard basis, by virtue of winning, but that a reduction of around 10% should be made as a result of its poor handling of the case.

Two lessons are borne out of these proceedings. Firstly, thorough investigation of claims against should be made from the outset and especially before offering a position, since a subsequent altered position may taint any judgments for/against you. And secondly, for those facing any amendments within a case, re-evaluation of both positions before returning to proceedings is a necessity; otherwise what previously seemed like a resounding win could, rather quickly, turn into a loss and an order to remunerate the opponent for costs.

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Research conducted by Louie Basso

## 3. HFW news, publications and events

### Chambers' Latin America 2017 rankings: HFW ranked Band 1 for Insurance; Latin America wide and Band 2 for Insurance; Locally Based Counsel

As last year, HFW are ranked in Band 1 for Insurance; Latin America wide in Chambers' Latin America 2017 rankings, with clients saying, *"the team is meticulous, it is capable of analysing technical issues and gathering the appropriate evidence to support a case."* Both Christopher Cardona and Jonathan Bruce are ranked in Band 1, and Jeremy Shebson in Band 3. We are also ranked in Band 2 for Insurance; Locally Based Counsel, with clients saying, *"the team has in-depth knowledge of Brazilian law, trends, procedures and market practices."*

### Legal 500 UK 2016 rankings: HFW ranked Tier 2 for Insurance and Reinsurance, and Insurance: Corporate and Regulatory, and ranked Tier 4 for Insurance: Professional Negligence

HFW are ranked in Tier 2 for both Insurance and Reinsurance and Insurance: Corporate and Regulatory. We are also ranked in Tier 4 for Insurance; Professional Negligence, with clients commending the *"diverse practice which provides a seamless service on negligence cases concerning brokers, lawyers, accountants and surveyors".*

### HFW's Graham Denny and Tunde Adesokan participate in African round table discussion

HFW Partner Graham Denny and Associate Tunde Adesokan recently participated in a round table discussion hosted by Commercial Risk Africa in order to discuss and debate "misunderstandings and wrong


perceptions still hampering business investment in Africa". Commercial Risk Africa covered the discussions in an article for their September briefing which can be found at: http://www.commercialriskeurope.com/cre/5585/15/Misunderstanding-and-wrong-perceptions-still-hampering-business-investment-in-Africa/

## HFW attend IRLA Young Professionals Group seminar on insurance law reform

On Thursday 22 September 2016, HFW Senior Associate Ed Rushton spoke at IRLA's Young Professionals Group's seminar *'All Change: Everything you need to know about Insurance Law Reform but were afraid to ask'*. The seminar focussed on the Insurance Act 2015, the Enterprise Act 2016 and the Supreme Court's decision in *Versloot Dredging*.

## HFW to present seminars on fraudulent insurance claims

HFW Partner Andrew Bandurka will present a seminar on fraudulent insurance claims to the London & International Insurance Brokers' Association (LIIBA) on Monday 26 September 2016 and to the London Reinsurance Group on Tuesday 27 September.

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