



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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hfw 1. Regulation and legislation

UK: FCA publishes business plan for 2016/17

At the beginning of April, the FCA published its business plan for 2016/17. The business plan sets out the FCA's work programme for 2016/17 and its priorities for the coming year. The priorities for 2016/17 are stated as:

- Pensions
- Financial crime and Anti-Money Laundering
- Wholesale financial markets
- Advice
- Innovation and technology
- Firms' culture and governance
- Treatment of existing customers.

The foreword by John Griffith-Jones, Chairman of the FCA, explains that wholesale markets and the provision of advice are two new priorities, while the others continue to sit at the top of the FCA's list. In practice, this is likely to mean that the FCA's thematic reviews and market studies over the coming year will focus on these new areas, although they are not directly named in Annex A to the business plan as one of the forthcoming thematic reviews and market studies.

For each of the seven priorities, the FCA has set out what it considers would be a measure of success in a particular area. The measures of success for the wholesale markets priority relate to the reputation of and



Wholesale markets and the provision of advice are two new priorities

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confidence in the UK markets but, interestingly, there is no indication of how a Brexit¹ could affect this measure.

The measures of success for the advice priority are an improvement in consumer satisfaction scores about financial advice and an improvement in consumer complaints data about advice. Both of these measures suggest that the FCA will seek feedback from consumers about the advice they receive or will require firms to provide the FCA with complaints data (or possibly a combination of both). The measures appear slightly crude methods of identifying whether the FCA's objectives in this area have been achieved, given that the Business Plan states that the FCA is seeking to ensure that firms give good quality and suitable advice which meets the needs of the consumer. Ideally, the FCA might focus on improving the "front-end", i.e. the advice that firms give, rather than admonishing firms for the "back-end", i.e. the complaints that they receive in respect of this advice. However, the FCA's approach is perhaps understandable in light of the

regulatory principle for the FCA to use its resources proportionately.

The measures of success for the other five priorities indicate other issues which are giving the FCA a headache. Two other priorities state that a measure of success would be increased consumer awareness and understanding of scams and fraudsters' techniques, while another states that a measure of success would be increased customer awareness of the potential benefits of switching providers and prompt shopping around. This was clearly set with a recent Occasional Paper² and the ABI and BIBA's Code of Good Practice³ regarding support for potentially vulnerable motor and household customers in mind.

We will monitor the FCA's thematic reviews and market studies throughout the year and report on major developments.

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Europe: New EU data protection rules welcomed by cyber insurers; The International Association of Insurance Supervisors publish draft paper on cyber risk to the Insurance Sector

Following the European Parliament's adoption on 14 April of its EU Data Protection Reform package, aimed at strengthening EU citizens' fundamental rights in the digital age and facilitating business by simplifying rules for companies, it is reported that the reforms are being widely welcomed by the cyber insurance industry.

The two-year implementation period for the General Data Protection Regulation in Member States has now begun, the

1 http://www.hfw.com/Insurance-Bulletin-10-March-2016#page_1

2 <http://www.fca.org.uk/static/documents/occasional-papers/occasional-paper-8.pdf>

3 https://www.abi.org.uk/~/_/media/Files/Documents/Publications/Public/2016/Vulnerable%20customers/ABI%20BIBA%20Code%20Good%20Practice%20support%20potentially%20vulnerable%20motor%20household%20customers%20renewal.pdf

The IAIS highlights the important role that insurance supervisors worldwide have in enhancing cyber resilience.

reforms will likely see a further increase in the writing of such cover in the lead-up to implementation, especially as awareness is raised of the existence of cyber risk cover and the scope of such cover among European companies.

On the same day as the adoption of the reform package, the International Association of Insurance Supervisors (the IAIS) published a draft “Issues Paper” on cyber risk to the insurance sector itself. The paper notes that because insurers are reservoirs of confidential commercial data, they are “prime targets for cyber criminals who seek information that later can be used for financial gain through extortion, identity theft, or other criminal activities”. The IAIS highlights the important role that insurance supervisors worldwide have in enhancing cyber resilience and explains that it will itself monitor initiatives as they continue to evolve.

The draft Issues Paper can be located at <http://www.iaisweb.org/page/news/consultations/current-consultations/issues-paper-on-cyber-risks-to-the-insurance-sector/file/60062/issues-paper-on-cyber-risk-to-the-insurance-sector-public-consultation> and feedback is welcomed by the IAIS, by way of public consultation, until 13 May 2016.

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hfw 2. Market developments

Dubai: Lloyd's Dubai enters into framework for cooperation with the Dubai Financial Services Authority

To mark the first anniversary of the establishment of Lloyd's in the Dubai International Financial Centre (DIFC), the Society of Lloyd's (Lloyd's) has entered into a Framework for Cooperation (the Framework) with the DIFC financial services regulator, the Dubai Financial Services Authority (DFSA). The Framework ensures an efficient and effective flow of information between Lloyd's and the DFSA in relation to business undertaken by Lloyd's syndicate service companies and other coverholders who operate in the DIFC. Therefore, the Framework serves to ensure that Lloyd's business in the DIFC is more effectively supervised.

Although several Lloyd's coverholders have conducted business in the DIFC for several years, Lloyd's established its own subsidiary in the DIFC, Lloyd's



Since the opening of Lloyd's Dubai, Lloyd's has seen steady growth in the Middle East region and the Framework serves to confirm Lloyd's commitment to the region.

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Ltd (Lloyd's Dubai), in 2015. At this stage, Lloyd's service companies and coverholders undertaking business in and from the DIFC are generally established as subsidiary companies and required to be licensed and regulated by the DFSA. Located on two floors in the DIFC, Lloyd's Dubai currently serves as a “platform” for nine service companies. An additional service company, XL Catlin, operates nearby within the DIFC along with two Lloyd's coverholders, Antarah and Elseco. It is anticipated that in the near future, Lloyd's Dubai will also provide a number of services to Lloyd's coverholders operating within the DIFC platform.

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hfw 3. Court cases and arbitration

England & Wales: Claimants found to be “fundamentally dishonest” in first trial of new rule

Almost exactly one year ago on 13 April 2015, a new rule on “fundamental dishonesty” in personal injury actions was implemented: under s57 of the Criminal Justice and Courts Act 2015 (CJCA 2015), where a court finds that a claimant has been fundamentally dishonest in relation to “*the primary claim or a related claim*”, the court “*must dismiss the primary claim, unless it is satisfied that the claimant would suffer substantial injustice*”. It has now been reported that the first finding of fundamental dishonesty since the rule came into force has been secured.

In *Hughes, Kindon and Jones v KGM*¹, heard on 1 April at Taunton County Court, all three claimants alleged they had suffered injuries lasting 12 months, despite what was a very minor incident involving the insurer’s policyholder. Several inconsistencies in the claimants’ evidence were demonstrated in that hearing, including the nature of injuries suffered, failure to seek medical attention and, in the case of one claimant, failing to mention the incident and injuries to their GP several months after the incident.

Deputy District Judge Eaton-Hart found that the impact was sufficient to have caused injury to Hughes and Kindon, but only for a period of two weeks, rather than the 12 months claimed. It was further demonstrated by the defendant insurer that during a medical examination six weeks after the accident the claimants had stated they were still suffering from injuries arising from the incident. Given that it

This is a significant finding for the insurance industry and practitioners in general dealing with personal injury matters, which will provide precedent for decisions to come.

had already been determined that the injury period lasted just two weeks, it was argued that the claimants had lied during their medical examination and stated by the Judge that they had presented a “*deliberate inaccurate position... for financial gain*”. The claims were thereby struck out in their entirety, losing the protection of qualified one-way costs shifting, with costs awarded in favour of the insurer.

This is a significant finding for the insurance industry and practitioners in general dealing with personal injury matters, which will provide precedent for decisions to come. In this case it was ruled that the claimants would not suffer substantial injustice from the decision (ruling out the exception set out in s57(2) of the CJCA 2015) and permission to appeal was refused. However, it remains to be seen how the concept of “substantial injustice” will be examined in subsequent decisions.

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hfw 4. HFW publications and events

Data protection has new teeth: seven ways to prepare now for the EU General Data Protection Regulation to avoid being bitten

HFW has published a briefing¹ on the new EU General Data Protection Regulation, which was approved by the European Parliament on Thursday 14 April. The Regulation makes some significant changes to the EU data protection regime which, perhaps most importantly, will now apply extra-territorially to data controllers and data processors alike.

The briefing considers seven of the main changes which will require action, and some immediate steps which businesses should take in order to deal with them. A brief overview of some of the main provisions of the Regulation are set out in our client alert of December 2015².

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1 <http://www.hfw.com/Data-protection-has-new-teeth-April-2016>

2 <http://www.hfw.com/New-General-Data-Protection-Regulation-December-2015>

1 Currently unreported.



A victory for insurers: the **YUSUF CEPNIOGLU**

HFW has published a briefing¹ on the Court of Appeal decision in *Ship-owners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat Ve Ticaret AS²*, in which the Court of Appeal clarified the test to be applied in determining whether a P&I club must defend claims in the relevant foreign jurisdiction in which they are brought, or whether the club can rely upon the choice of law and jurisdiction within the club rules and seek an anti-suit injunction preventing any action from being prosecuted abroad.

The decision follows a number of recent cases in which P&I clubs have been sued directly on the basis of "direct action statutes", i.e. legislation in other countries which grants a victim the right to sue a defendant's insurer directly and without first suing the insured. Such claims potentially circumvent the choice of law and jurisdiction within the contract of insurance, and contractual defences, most notably the pay to be paid rule, can often be declared unenforceable by the local courts.

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1 <http://www.hfw.com/A-victory-for-insurers-the-YUSUF-CEPNIOGLU-April-2016>

2 [2016] EWCA Civ 386

The Brexit question - in or out?

On Tuesday 26 April, HFW hosted a panel discussion on the forthcoming referendum on the UK's membership of the European Union. The discussion was chaired by John Humphrys. The members of the panel were the Rt Hon John Redwood MP, Anthony Hilton (London Evening Standard), Andrew Lilico (Economists for Britain), Professor Derrick Wyatt QC and HFW Partner **Anthony Woolich.**

Much of the lively discussion focussed on sovereignty, 'Britishness' versus 'Europeanness', and the impact on business. With a final show of hands from the audience at the end of the evening, John Humphrys concluded that *"the 'ins' have it, but by the time you add the 'don't knows' it's an open contest!"* Anthony Woolich echoed the sentiments of all panel members imploring the public to seek out information from a range of views and *"to trust that our great nation will make the right decision"*.

For the latest thinking across sectors and the challenges around the EU referendum for Aviation, Commodities, Energy, Insurance, Construction and Shipping, please see the resources available at: <http://www.hfw.com/brexit>. The Insurance resources consider the implications for (re) insurers and intermediaries which have passported into or out of the UK, the changes to the EU law on insurance intermediaries which will be made by the Insurance Distribution Directive, and the position of the Council Lloyd's and its Franchise Board regarding the EU referendum.

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