



In this week's Insurance Bulletin:

1. Regulation and legislation

UK: The Bank of England reflects on the implementation of Solvency II

2. Court cases and arbitration

England and Wales: No rule preventing insurer from relying on insured's expert

3. HFW publications and events

France: HFW to sponsor French Moot Court Competition in insurance law/ALEA conference
29 and 30 March 2017

UK: HFW presenting at Advisen London Cyber Risk Insights Conference

Andrew Bandurka, Partner, andrew.bandurka@hfw.com

Will Reddie, Associate, william.reddie@hfw.com

MENAIR
INSURANCE
AWARDS 2017
WINNER

UKCAPTIVE
2017
SERVICES AWARDS
WINNER
LAW FIRM
HOLMAN FENWICK WILLAN



hfw 1. Regulation and legislation

UK: The Bank of England reflects on the implementation of Solvency II

On 21 February 2017, David Rule, Executive Director of Insurance Supervision at the Bank of England attended the Association of British Insurers to recap on how Solvency II was designed to work for the UK insurance industry, to look back at the Prudential Regulation Authority's (PRA) approach to implementation and experience of operating within a Solvency II framework one year in and to identify a few areas where the PRA knows that Solvency II needs improvement. The focus of the speech was life insurance but general insurance was touched upon.

Regulatory regime before Solvency II

Attendees were reminded that the primary aim of the regulatory regime for insurance prior to Solvency II arose from the near failure of the life insurance company, Equitable Life in 2000. Problems for that company materialised when it had insufficient funds to meet guaranteed rates on annuities, amounting to £1.5 billion. As a result, the Financial Services Authority sought to supplement the regulatory reporting framework with data that would indicate the present value of expected contractual and "fair" discretionary bonus payments as well as a realistic capital margin.

Internal models

Under Solvency II, UK firms are allowed to use internal models to calculate their solvency requirements. In his speech, David Rule recognised that although



Attendees were reminded that the primary aim of the regulatory regime for insurance prior to Solvency II arose from the near failure of the life insurance company, Equitable Life in 2000. Problems for that company materialised when it had insufficient funds to meet guaranteed rates on annuities, amounting to £1.5 billion.

DAVINIA COLLINS, ASSOCIATE

the Solvency II standard formula works for the variety of insurers in the UK, there is no standard formula that can work for all of them. It was because of this that the PRA has approved 22 partial or full internal models with more said to be in the pipeline.

PRA's implementation of Solvency II

The PRA considers its implementation of Solvency II to have been "robust but proportionate" and in line with its statutory objectives.

Whilst recognising that the PRA cannot set capital requirements beyond the rules of the European directive, it will be reviewing its approach to assessing a firm's internal model and identifying if its process can be streamlined "without compromising standards".

From the PRA's view, it seems as if the challenges faced by insurers by the new regime has not been as bad as may have been feared. Solvency II is recognised by the PRA as taking far

too long in the making and expensive to implement for regulators and market participants, sentiments which will be echoed by many in the industry, but generally thought to be working well.

For more information, please contact [Davinia Collins](mailto:davinia.collins@hfw.com), Associate, London on +44 (0)20 7264 8276 or davinia.collins@hfw.com, or your usual contact at HFW.



hfw 2. Court cases and arbitration

England and Wales: No rule preventing insurer from relying on insured's expert

***Wheeldon Brothers Waste Limited v Millennium Insurance Company Limited* [2017] EWHC 218 (TCC)**

In this case, the court considered whether certain work carried out for the Insured by an expert fire investigator should prohibit Insurers from being able to rely upon him as an expert witness in separate but connected coverage proceedings between Insured and Insurer.

Following a fire at the Insured's waste processing plant, a forensic expert (Mr B) was engaged by Insurers to visit the site and carry out the usual post-fire investigations. Having carried out such investigations, Mr B reported back to Insurers who, on the basis of Mr B's findings, declined cover in respect of the Insured's claim.

Cover having been declined, the Insured decided to explore the possibility of a claim against certain third parties. The Insured approached Mr B to see whether he could assist for these purposes. Insurer's loss adjusters having given their permission, the Insured engaged Mr B on the express basis that we was acting as a "technical advisor only" and not as an expert under part 35 of the CPR.

Subsequently, and separately, proceedings were commenced by the Insured against Insurers in respect of their insurance claim. In those proceedings, the Insured argued that Insurers were precluded from relying upon Mr B's expert evidence, as a consequence of his engagement by the Insured. The Insured essentially argued, by reference to previous authorities, that the Insurers were



The Insured essentially argued, by reference to previous authorities, that the Insurers were so precluded because discussions between Mr B and the Insured regarding the proposed third party claim had "necessarily involved privileged and confidential matters".

BEN ATKINSON, SENIOR ASSOCIATE

so precluded because discussions between Mr B and the Insured regarding the proposed third party claim had "necessarily involved privileged and confidential matters".

The court rejected the Insured's argument. It did so for four principal reasons:

First, Mr B was in the best possible position to assist the court on many of the background issues surrounding the fire and it would be contrary to the interests of justice if the court's enquiry were to be carried out without his assistance.

Secondly, the court did not see any overlap or conflict between Mr B's instruction by the Insured and instruction by Insurers. Mr B had agreed to assist and loss adjusters had provided their permission on the express basis that these were separate areas of investigation.

Thirdly, Mr B was instructed by Insurers under CPR Part 35. This meant that his overriding duty was to the court, which "trumped everything else".

Fourthly, there was no evidence to suggest that any privileged or confidential matters had in fact been raised by the Insured with Mr B, "much less any which (or could have had) an impact on his opinion as to the cause of the fire".

As the court noted, whilst it had no doubt that what had transpired in this case was inadvertent, if the Insured's argument was right then, "with other parties and in other circumstances, a request by a claimant to use a defendant's expert, ostensibly for good reason might later be used as a vehicle to prevent that expert giving evidence at all."

For more information, please contact [Ben Atkinson](#), Senior Associate, London, on +44 (0)20 7264 8238, or ben.atkinson@hfw.com, or your usual contact at HFW.



hfw 3. HFW publications and events

France: HFW to sponsor French Moot Court Competition in insurance law/ALEA conference 29 and 30 March 2017

The HFW Paris office is pleased to announce its sponsorship of the 4th edition of the French national moot court competition organised by the Association for Eloquence and Insurance law (ALEA). Charlotte Gonon (Associate, Paris) is a founding member.

The Association aims to gather together masters students majoring in insurance law from all over the country to discuss a subject involving insurance issues and organizing conferences for professionals and students on current topics that affect the insurance industry and the market.

This new edition is presided over by the French Insurance Ombudsman, Philippe Baillot and will involve several members of the Paris office insurance team, including Pierre-Olivier Leblanc and Pauline Arroyo (Partners, Paris), to be part of the selection board for the first round of the pleadings which will be held at the office of the French Federation of Insurance in Paris on the 29th March 2017.

The final of the pleading stage will take place on the 30th of March

at the Arpège Paris Kléber Center and it will be preceded by the ALEA conference held in French by a panel of distinguished insurance professionals under the following themes:

Europe

Regulatory aspects

- The impacts of the Brexit
- The PRIIPs regulation
- The Insurance Distribution Directive

Contractual aspects

- The European definition of the insurance contract
- The law applicable to the insurance contract
- The competent court

Africa

- The CIMA Code
- Insurance intermediation in Africa
- Political risks insurance in Africa
- The safety of employees abroad

Pauline Arroyo, (Partner, Paris), will take the role of moderator on the contractual aspects panel. Please see the full programme of the conference here: <https://associationalea.jimdo.com/la-conference/edition-2017/>.

The day will end with the awards ceremony and a cocktail reception.

UK: HFW presenting at Advisen London Cyber Risk Insights Conference

On 7 March, Peter Schwartz (Consultant, London) will be speaking at the Advisen London Cyber Risks Conference.

Lawyers for international commerce

hfw.com

© 2017 Holman Fenwick Willan LLP. All rights reserved

Whilst every care has been taken to ensure the accuracy of this information at the time of publication, the information is intended as guidance only. It should not be considered as legal advice.

Holman Fenwick Willan LLP is the Data Controller for any data that it holds about you. To correct your personal details or change your mailing preferences please contact Craig Martin on +44 (0)20 7264 8109 or email craig.martin@hfw.com

Houston São Paulo London Paris Brussels Geneva Piraeus Beirut Riyadh Kuwait Dubai
Singapore Hong Kong Shanghai Perth Melbourne Sydney