

Insurance/
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hfw 1. Regulation and legislation

UK: HM Treasury launches consultation on insurance linked security framework

HM Treasury has published a consultation paper¹ which contains draft legislation for the government's proposed insurance linked securities (ILS) framework for the UK and addresses the proposed corporate, tax and regulatory aspects of the regime.

We had previously reported, in our Bulletin of 20 November 2015², that the House of Lords had considered legislation to give HM Treasury power to make regulations for creating and regulating structures for ILS business. These regulations follow HM Treasury's initial consultation in March this year, in which HM Treasury consulted on overall approach to the ILS framework.

HM Treasury's proposed regulations would introduce a protected cell company (PCC) regime in the UK to cater for multi-arrangement insurance special purpose vehicles, i.e. insurance special purpose vehicles (ISPVs) which take on multiple contracts for risk transfer. UK PCCs would be private companies limited by shares and would comprise the cells (to which assets and liabilities would be assigned) and the core (the administrative function, which would manage the cells and enter into transactions on behalf of the cells). The proposals regarding UK PCCs have been designed to meet Solvency II requirements by ensuring that the assets and liabilities of each cell of the PCC are ring-fenced.

Prior to the publication of the consultation paper, concern had been expressed as to how the UK's ILS framework could compete with existing low tax ILS domiciles. The draft regulations address these concerns by outlining a bespoke tax regime for ILS in the UK, which the consultation paper expressly states is "*not [designed] to create an opportunity for aggressive tax planning or tax avoidance*".

However, the regulations do contain a change from HM Treasury's initial consultation, which had suggested that a withholding tax might be imposed at the level of the ISPV. The regulations would grant a complete withholding tax exemption for foreign investors but would tax UK investors as normal according to their facts and circumstance. The rationale behind this seems to be that the government believed that imposing withholding tax would make the UK less competitive than jurisdictions where ISPVs are already established.

The PRA and FCA have also published a joint consultation paper³ alongside HM Treasury's draft regulations, which focusses on the authorisation and supervision of PCCs. The PRA and FCA consultation paper contains a supervisory statement issued by both the PRA and FCA and sets out the proposed amendments to the PRA Rulebook and draft application forms for ISPVs wishing to become authorised.

The deadline for responses to HM Treasury's consultation paper is 18 January 2017. The deadline for the PRA and FCA's consultation paper is 23 February 2017. The government has expressed an intention to place the draft regulations (as amended following

the consultation) before Parliament early in 2017 but its ability to do this will depend on the response to this latest consultation.

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Research by Alex Walley, Trainee Solicitor, London.

IAIS publishes draft Stakeholder Engagement Plan

The International Association of Insurance Supervisors (IAIS) is requesting feedback on a draft Stakeholder Engagement Plan, which it launched on 23 November 2016.

The IAIS Member Handbook defines "stakeholders" to mean "all groups and individuals who have an interest in insurance supervision and regulation or who are affected by the activities of the IAIS and shall be interpreted as broadly as possible." The draft Plan is aimed at enhancing effective stakeholder engagement, that is: ensuring that stakeholders are properly consulted in the development of IAIS policy and that the opportunity for timely, substantive and high quality contributions from all stakeholders is maximised.

The launch of the draft plan is the latest in a series of developments in this area. In March 2013, the IAIS began a review of its strategic goals, financial outlook and resources with the goal of developing proposals to improve its structures, operations and the allocation of resources. One key goal was to improve the process of obtaining quality stakeholder input.

1 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/571091/Insurance_Linked_Securities_final_web.pdf

2 <http://www.hfw.com/Insurance-Bulletin-20-November-2015>

3 <http://www.bankofengland.co.uk/prd/Documents/publications/cp/2016/cp4216.pdf>



In July 2014, the IAIS developed new draft policies and procedures and issued these for public consultation. In October 2014, the IAIS adopted the 2015-19 Strategic Plan and Financial Outlook which identified the development of an effective stakeholder engagement plan as one of four strategies for achieving effective stakeholder engagement. The IAIS General Membership also approved IAIS Executive Committee proposals, including for an enhanced stakeholder engagement process covering a broader scope of interested parties.

In January 2015, the IAIS adopted new stakeholder engagement procedures and the Executive Committee subsequently approved the development of a “*comprehensive, formal stakeholder engagement plan to promote, on a continuous basis, the interest of the Association with relevant stakeholders, including global bodies.*”

In January 2016, the Executive Committee created the Stakeholder Engagement Task Force to develop the draft plan. The draft plan includes new commitments, policies and strategies for enhancing stakeholder engagement, including a set of recommendations specific to consumers and the academic community and professional organisations.

Comments on the draft plan are invited by the IAIS and should be submitted in writing to the IAIS Secretariat at IAISConsultation@bis.org by 31 December 2016, using the template published at: <http://www.iaisweb.org/page/consultations/current-consultations/draft-stakeholder-engagement-plan/file/63521/draft-stakeholder-engagement-plan-for-request-for-feedback>.

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hfw 2. Court cases and arbitration

England and Wales: UK Court of Appeal gives new guidance for solicitors and insurers on sanctions for failure to meet case management directions

The recent Court of Appeal case of *Clearway Drainage Systems Ltd v Miles Smith Ltd* (8/11/2016) is a reminder for both solicitors and their professional indemnity (PI) insurers that failure to comply with case management directions will be dealt with severely.

In *Clearway*, the claimant brought an action for negligence against the defendant, its former insurance broker, in relation to a rejected claim under its motor fleet policy. The court ordered signed witness statements to be exchanged by 8 April 2016, but the claimant’s solicitor failed to meet this deadline and the defendant applied to strike out the claim. The claimant’s solicitor applied for relief from sanctions in relation to his failure to serve the witness statements, pursuant to Civil Procedure Rule (CPR) 3.9(1). The solicitor then served the statement two months late, on 13 June, in an encrypted form which could not be read. The claimant also wished to rely on the witness summary of a further witness, which had also not been exchanged. This prompted the claimant’s solicitor to make a second application for relief from sanctions.

At first instance, Her Honour Judge (HHJ) Moulder refused the two applications. The court followed the three-stage test which had been laid out in the earlier case of *Denton v TH White*¹ to determine whether relief from sanctions should be granted when a

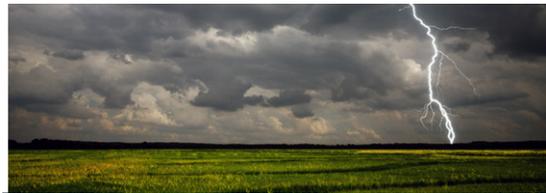


The Court of Appeal remarked that it would only intervene in matters such as this if the first instance decision was wholly wrong.

SIMON BANNER, ASSOCIATE

rule, direction or court order has been breached. The first stage of this test is to ascertain whether the breach was serious and significant. The second stage is to determine why the default occurred. The third is to consider all of the individual circumstances of the case. The solicitor’s default had not prevented the trial proceeding on the date originally scheduled. The breach had, however, interfered with case management as it caused three pre-trial reviews to be necessary, rather than one. On these facts, HHJ Moulder applied the *Denton* test rigorously and refused the solicitor’s two applications for relief, even though this effectively ended the case for the (blameless) claimant. The solicitor contended that his workload had been very heavy, but the court did not sympathise with this argument. The case was appealed, but the Court of Appeal upheld HHJ Moulder’s judgment, commending it as “*conscientious and impeccable*”. The Court of Appeal remarked that it would only intervene in matters such as this

1 [2014] EWCA Civ 906



if the first instance decision was wholly wrong.

This decision serves as a reminder that breaches of case management directions and the Civil Procedure Rules will be dealt with rigorously and confirms that the test applied in *Denton* is good law. Previously, such breaches were typically penalised by costs orders, but this no longer appears to be the case. It suggests particularly that lower courts will be less likely to grant relief from sanctions. Those in the business of PI insurance should therefore take note that this decision has potential to increase the number of claims that will be made against solicitors' firms, if it can be shown that the solicitor was at fault for breaching a direction. It also has broader implications for any insurers dealing with claims and suggests that anyone dealing with litigation could potentially face such sanctions and that ignoring court directions can have very serious ramifications indeed.

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hfw 2. HFW publications and events

HFW attend first meeting of the UK-Brazil Insurance and Reinsurance Taskforce

On Tuesday 29 November, [Geoffrey Conlin](#), partner in HFW's Sao Paulo office, attended the first official meeting of the UK-Brazil Insurance and Reinsurance Taskforce at the headquarters of the Brazilian regulator, SUSEP, in Rio de Janeiro. Terms of Reference officialising the initiative were signed by the Prime Minister's Representative for Trade and Commerce with Brazil, Mark Prisk MP and SUSEP's Superintendent, Joaquim Mendanha de Ataides. The meeting provided the opportunity for round-table discussions with market leaders on the current regulatory barriers in the Brazilian market and the opportunity for innovation.

HFW attend first UK-Brazil Mining Forum in Belo Horizonte, Minas Gerais, Brazil

On Wednesday 30 November, [Geoffrey Conlin](#) attended the first UK Brazil Mining Forum in Belo Horizonte, Minas Gerais, Brazil: "*Challenges and Opportunities Facing the Industry*". The Forum was opened by Mark Prisk MP and was attended representatives from various governmental agencies, mining companies and service providers. Various topical issues were addressed including challenges and innovation, research and development, reducing costs and increasing productivity, the role of service providers, environmental recovery and remediation, safety and risk management.

HFW Partners to present at RIMS Risk Forum Middle East

On Tuesday 13 and Wednesday 14 December 2016, HFW Partners [Paul Wordley](#) and [Sam Wakerley](#) will

be attending the RIMS Risk Forum Middle East in Dubai. On Tuesday 13 December, Paul and Sam will present a seminar titled "*Insurance & Reinsurance Procurement in the Middle East*", which will provide an overview of contract and claim certainty in the Middle East.

Insurance Partners at HFW pleased to announce merger with Legge, Farrow, Kimmitt, McGrath & Brown LLP

The insurance partners at HFW are pleased to announce that as of 3 January 2017 the firm will be merging with 18 lawyer Houston, Texas firm, Legge, Farrow, Kimmitt, McGrath & Brown LLP. Legge Farrow is a leading energy and marine practice and is already well-known to many insurance and broker clients in the London and international insurance markets. With the establishment of an office in Houston, HFW now has a presence in all the major offshore energy centres in the world.

[Richard Crump](#), HFW's Global Senior Partner said: "*This is an exciting development for the firm and we are pleased to be taking such a significant step with friends and colleagues at Legge Farrow with whom we have worked so successfully for so many years. Houston represents a major business hub for us and this merger will bring us closer to our existing clients in the region enabling us to offer a greater level of on the ground service and capability.*"

[Glenn Legge](#), one of the founding Partners of Legge Farrow said: "*We are extremely pleased to be formalising our long-standing relationship with HFW. Through the merger we are able to provide our multinational clients with access to an established and well recognised international network, while HFW broadens its geographical reach and extends its capability in the USA.*"



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