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Equitas Insurance Business Transfer

Implications for Part VII Transfers

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On Tuesday the High Court handed down its judgment setting out the grounds on which it had, on 25 June 2009, sanctioned the transfer of the general insurance business of the Lloyd's Names for 1992 and prior years of account to a special purpose vehicle in the Berkshire Hathaway group which had been renamed Equitas Insurance Limited (the "Transferee"). This newsflash flags the points to note from the judgment which are relevant to those considering schemes under Part VII of the Financial Services and Markets Act 2000 (the "FSMA").

Who determines the independence of the independent expert?

The role of the independent expert in an insurance business transfer is to assist the Court in its deliberations by reporting on the likely effect of the scheme. One of the preconditions to the court sanctioning a scheme is that the independent expert has been approved for the purpose by the FSA.

One objector had questioned the independence of the independent expert, alleging a conflict of interest.

The Court held that even if there were a conflict, it was doubtful whether this was a matter for the court (except, possibly, in considering how to exercise its overall discretion to sanction the scheme) - the question of the independent expert's independence being primarily a matter for the FSA. In this case the FSA had had the potential conflict disclosed to it and had satisfied itself of the suitability of the independent expert.

Overseas recognition of the scheme

In accordance with the approach it had taken in the 2007 Part VII transfer from Sompo Japan Insurance Inc. to Transfercom Limited, the Court was prepared to sanction the scheme in which a large proportion of the transferring contracts were governed by a law other than English law.

The principal overseas jurisdiction in which policyholders were domiciled was the US, which accounted for 72% of the unpaid claims estimates in respect of the transferring business. The evidence given to the Court was that there was no certainty that the scheme would be recognised under the laws of individual US states or under US federal law.

Notwithstanding this, the Court accepted that the scheme was within the Court's jurisdiction, and so could be sanctioned under Part VII of the FSMA, and the Court was prepared to exercise its discretion to sanction the scheme.

Credit for reinsurance

The transferring policyholders included overseas cedants permitted by their regulators to take credit for reinsurance with the Lloyd's Names.

The cedants' ability to take credit for reinsurance was often linked to the existence of trust arrangements established to support the obligations of the Lloyd's Names.

It was noted that such cedants might be adversely affected if their ability to take credit for reinsurance were lost.

While a new trust had been established to support the obligations of the transferee in the US, it was not certain whether this would permit US cedants to continue to take credit for reinsurance, if the transfer were not recognised in the US.

The Court was satisfied on the evidence put before it that pending recognition, cedants would not be disadvantaged, as they would continue to be able to take credit for reinsurance as a result of further trust arrangements.

Accordingly, the Court was satisfied that it should not exercise its discretion to refuse to sanction the scheme on this ground.



Contacts

Christian Wells

christian.wells@lovells.com
+44 (0)207 296 2455

Tim Goggin

tim.goggin@lovells.com
+44 (0)207 296 5917

Charles Rix

charles.rix@lovells.com
+44 (0)207 296 5425

David Sullivan

david.sullivan@lovells.com
+44 (0)207 296 5313

John Young

john.young@lovells.com
+44 (0)207 296 2605

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Possible future solvent scheme of arrangement

Some transferring policyholders had expressed their concern over the possibility that the scheme was a precursor to a solvent scheme of arrangement to be proposed by the transferee.

The Court did not consider this to be a factor it should include when determining whether or not to sanction the scheme, as:

- the transferee had no current intention to promote a solvent scheme of arrangement (and there was no reason why it should have to bar itself from doing so in future); and
- any future proposed solvent scheme would be subject to its own safeguards for policyholders, including the Court's sanction.

This is a welcome approach and consistent with the Court's decision in the 2006 transfer from Royal & Sun Alliance to British Engine that the duties and powers of the FSA on a change of control meant that the prospect of a sale of a transferee should not prevent the Court from sanctioning the scheme.

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