

1) Can Employers' Liabilities Policies be included in Schemes of Arrangement or commutations?

Re T&N Ltd (No. 4)

This is one of the many cases arising out of the insolvency of Turner & Newall after it faced a huge number of asbestos personal injury claims by employees and others.

Employer liability ("EL") insurers who had provided cover to T&N between 1965 and 1969 believed that they had grounds to avoid the policies but agreed to settle and that settlement was to be included in a proposed scheme of arrangement for T&N under section 425 of the Companies Act 1985. Under the scheme, the insurers agreed to create a trust fund for the current and future claimants in return for T&N's agreement that it would not claim under its EL policies. The rights of the EL claimants against the EL insurers in respect of EL claims would be assigned to the trustees of the fund, who would evaluate claims and future claimants would have up to 40 years to bring claims.

One of the issues involved in this case was whether the proposal contravened the Employers' Liability (Compulsory Insurance) Act 1969. That act makes it an offence for an employer not to "insure and maintain insurance" covering it against liability for bodily injury or disease sustained by his employees and arising out of the course of their employment.

The EL policies in question were not issued on a claims made basis. Instead, the policies covered injuries which arose from or were caused during the period of insurance. Accordingly, the employees of T&N argued that it would be a breach of the act to commute or reduce the scope of cover of the EL policies.

Mr Justice David Richards of the Chancery Court concluded that the administrators of T&N were entitled to reach the agreement with the EL insurers outlined above. Employers are not in breach of the act if an EL policy is validly avoided by the insurer and they can no longer buy any alternative cover from another insurer. The act does not distinguish between avoidance and commutation and hence the court accepted that, given the facts of this case, the commutation would not result in a breach of the act.

However, the court was swayed by the fact that the commutation involved in this case arose out of "a genuine compromise of a genuine dispute...even if that involved an amendment of the policy as that proposed in this case as regards future dependants". In such circumstances, the employer commits no offence by not having a replacement policy to provide against possible liability to future dependants and EL insurers will not be guilty of an offence as accessories by entering into a genuine compromise, having in good faith asserted a right to limit the coverage. So, to this limited extent, it is possible to scheme or commute liabilities under EL policies.

2) Reinsurance Recoveries in Romania

We regularly pursue reinsurance recoveries in jurisdictions around the world utilizing our network of 18 international offices and over 100 correspondent law firms. One example of our success has been the recovery of claims for our clients from the former state owned reinsurance company in Romania Administratia Asigurarilor de Stat (ADAS), now known as Astra SA.

The first step is to obtain an arbitration award in London, which is usually not problematic as the claims are usually routine London market losses. The second stage is to enforce the award in Romania, which we have now achieved on several occasions.

Romania is a signatory to the New Convention on the Recognition and Enforcement of Foreign Arbitration Awards, the European Convention on International Commercial Arbitration concluded in Geneva in 1961 and the ICSID Convention concluded in Washington in 1965. Enforcement of an award in Romania requires an application to Courts of Romania for leave to recognise the arbitration award, and an application to enforce the award in Romania. Recognition involves a decision by the Romanian court that the award is final and binding, whereas enforcement is a factor of the Romanian court's ability to implement the award.

Although Astra typically take such steps as they can to avoid the enforcement of arbitration awards, we have had consistent success in pursuing proceedings against Astra and in successfully obtaining enforcement of such awards together with orders for the payment of interest and costs.

One typical approach by Astra is to resist enforcement on the basis that separate applications should be made to the Court, firstly to recognise the award and secondly to enforce it. The High Court of Cassation and Justice has now ruled that this is not necessary and that the two applications can be made together in one set of proceedings. In that case Astra were obliged to indemnify the reinsured in full together with all costs of the enforcement proceedings.

Enquiries concerning the pursuit of reinsurance recoveries generally or in Romania in particular should be made to Paul Bugden (paul.bugden@clydeco.com) or Joanna Talbot (joanna.talbot@clydeco.com)

3) Role of the FSA in applications to court to sanction schemes of transfer

Re: Alba Life Limited and others

This case, heard in the Chancery Division of the High Court, involved an application to the court to sanction a scheme for the transfer of long term business from Alba Life Limited and others to Phoenix Life Limited, following a merger of Britannic Group Plc and Resolution Life Group Limited.

The application was supported by, inter alia, an Independent Expert's Report which had been approved for the purpose by the FSA (as required under the Financial Services and Markets Act 2000 ("the FSMA")). The FSA did not attend the hearing of the application.

On the facts of the case, the court accepted that it was, in all the circumstances, appropriate to sanction the scheme.

The case is noteworthy because of comments made in relation to the FSA by the judge (who in this case was the Chancellor and therefore the effective head of the Chancery Division). He referred to Mr Justice Briggs's observation in the case of *Re Pearl Assurance* (2006) (reported in our October 2006 update) that the court's sanction of a scheme under section 111 of the FSMA was not a "rubber stamp jurisdiction".

Although the court is assisted by legislative provision for independent experts, and counsel have a duty to impartially bring relevant matters to the attention of the court, that was no substitute for the "appearance of a party with the requisite expertise and experience, and the interest or duty critically to examine the scheme being propounded". The Chancellor concluded that Parliament had intended that the FSA should perform that role. He therefore "invited" the FSA to reconsider its apparent policy of not appearing on applications such as the one involved in this case.

4) Forthcoming talks

Mealey's 2nd Annual Solvent Scheme of Arrangement Conference takes place in New York on 12 and 13 March 2007. Juliette Stevens will be chairing the conference and Paul Bugden will be giving a speech on "Alternatives to Solvent Schemes of Arrangement". Further details will be circulated to you nearer the time.

Paul will also be giving a talk on recent developments in Part VII transfers on 21 March at our Eastcheap offices. Admission is by invitation only and on a "first come, first served" basis. Invitations will be sent out shortly and you are encouraged to respond as soon as possible if you wish to attend.

Further information

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