

Run-off update

April 2008

Amendments to Part VII of the Financial Services and Markets Act 2000 ("FSMA")

In our recent update we referred to the Treasury consultation on proposed amendments to Part VII of FSMA. There are two aspects to the amendments.

First, to make clear that a court sanctioning an insurance business transfer scheme can order that the benefits of outwards reinsurance contracts transfer as part of the scheme and to provide for notice to be given to reinsurers whose contracts may be transferred.

Second, to enable all former Lloyd's Names to transfer their outstanding insurance liabilities (and not just those Names who resigned from Lloyd's on or after 24 December 1996).

We advised that a change to the legislation in these respects was expected imminently.

On 9 April 2008, the Treasury published a summary of responses to its consultation and explained how it intends to proceed with its "clarificatory" amendments. We set out below the main highlights from the Treasury's summary:

A. Clarification of the Court's powers in relation to the transfer of reinsurance and other contracts

Part VII, as currently drafted, gives the court wide powers to transfer property, including rights under contracts. But doubt has persisted over whether reinsurance contracts are personal contracts which are not transferable without the consent of both parties and are therefore outside the jurisdiction of the court to order transfer. Similar doubts existed where the reinsurance wording prohibits transfer or stipulates that the contract would terminate upon a transfer.

The court approved the transfer of outwards reinsurance in the WASA case, which has been followed on several occasions. But that judgment was a first instance decision where the application was not opposed on the issue of whether reinsurances were transferable. Doubt has remained as to what the position might be in the event that the court's jurisdiction to transfer reinsurance was challenged on an opposed application.

The Treasury has now decided to proceed with the approach which it outlined in the consultation paper. Accordingly, Part VII is to be amended to make it clear beyond all doubt that the court does have jurisdiction to transfer outwards reinsurance (and other related contracts) should the Court deem it appropriate in the circumstances of the particular case. It will also be clarified that the Court can, if it deems it appropriate, override contractual provisions that purport to modify or annul contracts that would otherwise be subject to transfer.

B. Notification of reinsurers whose reinsurance contracts are subject to a Part VII transfer

FSMA provides that anyone who believes that they would be adversely affected by a transfer scheme may be heard by the Court. However, to exercise this right, affected persons clearly need to be aware that a transfer is proposed and a hearing is to take place. At present, notice is published in the Gazette and two national newspapers, but direct notice is only given to policyholders. The Treasury therefore now intends to extend the requirement for direct notice to reinsurers. Helpfully, the amendments recognise the practice of including an intermediary clause in reinsurance wordings requiring communications to take place through the brokers responsible for placing the reinsurance. Where there is a person authorised by reinsurers to receive communications on their behalf notice may be given to those brokers, which may make the notification process easier in some instances.



It is intended that this change will help ensure that reinsurers' interests are given due weight in the design of transfer schemes.

It should be noted that the position of retrocessionaires will not be altered by the amendments, since their relationship is with the reinsurer, not the transferor.

C. Former Underwriting Members of the Lloyd's insurance market

Section 323 of FSMA grants authority to the Treasury to apply the Part VII transfer provisions to members of Lloyd's and to "former underwriting members" of Lloyd's. The latter is in turn defined in FSMA as "a person ceasing to be an underwriting member of the Society on, or at any time after, 24 December 1996". Accordingly, the current position is that any member who ceased underwriting prior to 24 December 1996 cannot transfer their insurance business. The Treasury noted in its consultation paper that there was no good reason for this distinction between former Names and felt that the date of a Name's resignation should not be a determining factor.

The Treasury therefore now intends to bring former underwriting members who resigned before 24 December 1996 within the scope of section 323 and, by order made under that section, the transfer provisions of Part VII. The Treasury notes the specific and practical consequence of this amendment in relation to Equitas (and its intention (announced in October 2006) to complete a deal with a subsidiary of the US group Berkshire Hathaway which will ultimately involve the transfer of its business). However, it has stressed that the changes are not being brought in solely to implement the proposed deal between Equitas and Berkshire Hathaway.

D. Timetable for reform

The Treasury intends to lay three statutory instruments before Parliament following the period of one month from 9 April. It is intended that these instruments would come into force 21 days thereafter. The statutory instrument relating to former Lloyd's Names can only be laid before Parliament after the amendment to section 323 has been made (again, the Treasury would intend the instrument to come into force 21 days after the date of laying).

Any wider review of the operation of transfers under Part VII (such as provisions to aid recognition in other jurisdictions and alternative models for authorising transfer) were outside the scope of the consultation.

Article for BILA

We have recently had an article on Part VII transfers published in the journal of the British Insurance Law Association (BILA). This article examined the various features of Part VII of FSMA, which distinguish the approach in the UK from other European states, the features which protect policyholders and looks at several decisions concerning the rights of parties to object to a transfer scheme. This article is now available to be viewed on our website:

<http://www.clydeco.com/knowledge/articles/part-vii-transfers-and-the-protection-of-policyholders.cfm>

Further information

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