

Run-off Update

July 2008

The following note on transfers of business in Ireland is the first in a series in which we will be setting out the results of our research through a number of European correspondents into how the Reinsurance Directive operates in their countries, with a particular focus on the process for transferring portfolios of business.

Transfers of reinsurance business in Ireland

The Reinsurance Directive was implemented in Ireland by the European Communities (Reinsurance) Regulations 2006 (the "Regulations"), which became effective on 15 July 2006.

The Regulations provide for the transfer of reinsurance business by pure reinsurers established in Ireland. However, where the reinsurer acquiring the business is a reinsurance undertaking established in Ireland, the transfer cannot take place unless a certificate has been obtained from the Irish Financial Services Regulatory Authority (the "Authority") confirming that the acquiring undertaking will meet the solvency margin required by the Reinsurance Directive once the transfer has taken effect.

The transfer process is much simpler than that involved in making a transfer of direct business. There is no requirement for a court application, for direct notification of parties affected by the transfer, or for publication of notice of the transfer in the official gazette, unlike the case with a transfer of direct business. Further, there are no express provisions dealing with the right of affected parties to object to the transfer, although, in practice, it is expected that the Authority would have regard to any objections received. The only procedural requirement is provision by the Authority of the necessary solvency certificate. The Regulations do not specify any process for applying for the certificate, or detail the supporting information required. In practice, an application would be made by letter to the Authority, and the Authority would be likely to require actuarial supporting evidence.

Although this process has obvious attractions in terms of cost and time, there is a drawback. There are no provisions in the Regulations giving the Authority power to transfer outwards retrocession contracts protecting the business being transferred. Outwards retrocessions would either have to be commuted prior to the transfer or novated across individually to the transferee, which could add considerably to the cost and timescale, and may not always be possible.

The provisions in the Regulations dealing with the transfer of reinsurance business relate only to pure reinsurers. However, reinsurers who also write direct business may well be able to make use of the procedure for transferring direct business to transfer their reinsurance business. The statute governing that process provides for the transfer of the whole or any part of the undertaking and of the property or liabilities of the transferor. Arguably, this would include inwards reinsurance liabilities, and potentially also the outwards contracts protecting the business.

Our thanks go to Paul Murray of the firm William Fry for his advice.

Temple Legal Protection v QBE: Effect of termination of underwriting agency agreement/conducting the run-off

Temple and QBE entered into an underwriting agency agreement ("the Binder"). Following a deterioration in the relationship between the parties, the Binder was terminated. In issue in this case was whether QBE was entitled to terminate Temple's authority to conduct the run-off (i.e. the business of dealing with and resolving claims arising out of business written during the currency of the Binder but not notified or resolved until after its termination). Beatson J ruled that QBE was so entitled (thus upholding an earlier award in an arbitration which had taken place between the parties).

It was noted that it is the normal procedure in the insurance market for the agent to conduct the run-off. However, in this case, neither the Binder, nor any other document, entitled the agent to do so. In particular, clause 10.2.2 of the Binder, which provided that "unless otherwise agreed in writing by QBE, Temple shall remain liable to perform its obligations...in respect of all insurances bound prior to Termination" imposed an obligation or duty on Temple, but no right. Such an interpretation did not "flout business commonsense". The judge also felt that it would be "striking" to say that QBE could not remove Temple as run-off agent even where Temple had acted dishonestly or with gross negligence in its conduct of the Binder and there was no distinction in the Binder between termination for fraud and termination on other grounds.

Nor did the judge find that the common law principles of agency preclude any right of QBE to revoke Temple's authority to manage the run-off or indicate that the Binder should be construed as entitling Temple to do so.

Transfers of insurance business and former Names

In our last update, we advised that legislation was expected imminently to:

- 1) clarify that a court sanctioning an insurance business transfer scheme can order that outwards reinsurance contracts transfer as part of the scheme (and can override contractual provisions that might have the effect of voiding or altering the effect of any contract included in the transfer); and
- 2) enable all former Lloyd's Names to transfer their outstanding insurance liabilities (and not just those Names who resigned from the Lloyd's market on or after 24 December 1996).

That legislation has now come into force (the legislation relating to 1) having come into force on 30 June 2008 and the legislation relating to 2) came into force on 23 July 2008).

Further information

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