

PART VII FSMA

CURRENT ISSUES AND THE ROLE OF THE STATUTORY GATEKEEPERS

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PART VII

- Allows an insurer to transfer insurance business
- To another insurer
- Without the consent of the policyholders

PART VII

- Requires the sanction of the Court
- A report from an Independent Expert
- The FSA and other interested parties have a right to object

DRAMATIS PERSONAE

- Transferor
- Transferee
- FSA
- Foreign Regulators
- Independent Expert
- Court
- Reinsurers
- Objectors
- Foreign Courts

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SOURCES

- FSMA 2000
- FSA Guidance: SUP18
<http://fsahandbook.info/FSA/html/handbook/SUP/18/2>
- HMT Consultation November 2006: http://www.hm-treasury.gov.uk/media/D/2/consult_fsma031006.pdf
- Wasa v Wasa
- Sompo v Transfercom [2007] EWHC 146 (Ch)

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TRANSFEROR

- Authorised in UK – UK and EEA insurance AND reinsurance may be transferred
- Authorised in EEA (not UK) – UK reinsurance only may be transferred
- Non-EEA but permitted to carry on business in UK – UK business only

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TRANSFeree

- Must be an insurance company established in an EEA state
- NB Gibraltar anomaly

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FSA

- Role is not of decision-maker (cf. Court)
- But of regulator
- Principles: TCF, information, openness and conflicts
- Approve the IE's appointment
- Report to the Court (NB consultation)

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INDEPENDENT EXPERT

- Possessing necessary skills
- Nominated or approved by FSA
- Life: an actuary
- Non-life: competent at assessing technical provisions
- And the uncertainties of the liabilities they represent
- SUCH AS an actuary

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ROLE OF IE

- Report to Court
- As an expert
- Summarise scheme
- Likely effects on policyholders – of both firms

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Content of Report

- Reinsurance or guarantees (NB consultation)
- Effect of scheme if implemented – or not
- Alternatives
- SUP 18.2.33 et seq

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FSA Approval

- Purpose of scheme
- Effect on policyholder security and rights
- Compensation for modifications
- IE report and opinions
- Adequacy of Information

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COURT – DIRECTIONS HEARING

- Initial hearing
- Policyholder circular
- Dispensations from the rules
- Notification and publicity

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FOREIGN REGULATORS

- EEA risks
- Three months to object
- FSA assistance

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FSA

- Final report to Court
- Certificates of solvency
- Form and content
- Consultation of August 2007

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COURT – SANCTION HEARING

- Compliance with directions order
- Review of IE report
- Views of FSA
- Objections from interested parties
- Fairness as between classes of affected parties

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CHALLENGES

- Once comfortable regime is under threat
- Non-life practice is getting contentious
- Policyholder activism on the increase
- Independent Expert under attack

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SI VIS PACEM, PARA BELLUM

- Status of Expert Witness
- Basis of challenges
- Court's approach
- Winterthur v Tennecom
- Tighter link with lawyers

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ENFORCEMENT

- In UK – publication
- Overseas – issues
- Sompo v Transfercom case study

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REINSURERS

- Current position
- Proposed amendments – consultation
- Transfer generally
- Transfer in face of contract prohibition
- Notification and objections

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CASE STUDY – SOMPO V TRANSFERCOM [2007] EWHC 146 (Ch)

- Japanese company
- Business written in Japan
- Reinsurance and insurance
- Transferred to UK branch (see s.111(1)(a) and (2))
- Transfer from UK branch to UK Transfercom

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SOMPO

- 35,000 policies
- APH and 9/11 liabilities
- USD 183mio
- Berkshire reinsurance of USD 500+mio
- 3 times gross estimates
- Objections

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SOMPO

- Sompo: USD 12bio – T-com: USD 43mio
- Adequacy and terms of reinsurance
- Capacity of IE to evaluate liabilities
- Regulatory risk of US reinsurer
- No connection of portfolio with UK

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SOMPO

- Reinsurance disclosed – and “non-cancellable”
- Berkshire Hathaway not a regulatory risk
- IE perfectly competent
- Jurisdictional issues and the UK connection

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SOMPO

- Court will not “act in vain”
- Enforcement of scheme overseas in doubt
- 27% UK law policies
- 30% EEA
- 21% USA

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SOMPO – FOREIGN COURTS

- Japanese court – evidence
- US laws – evidence
- “may be effective in Japan and US”
- “27% English law – substantial purpose achieved”
- Sanction granted

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IMPLICATIONS OF SOMPO

- Non-UK books of business may be imported
- Query use of s.425 schemes on imported book
- London Market skills and UK plc benefit
- Exit solutions developed in UK: exportable

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REINSURANCE

- Old law
- S.112(2) – “order ...may transfer property...”
- Wasa case
- HM Treasury Consultation of Nov 2006
- Societas Europeae – a new tool in the box?

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REINSURANCE – TREASURY PROPOSALS

- Reinsurance to be freely transferable by Court
- Even if reinsurance contract prohibits transfer
- Court may vary or override term
- Notice to reinsurers
- Right to object

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REINSURANCE DIRECTIVE – 10 DECEMBER 2007

- Will enable reinsurance transfer with EEA
- Pure reinsurers regulated
- Part VII distinctions will go
- Home state responsibility for reinsurance transfer
- Part VII – lite proposal
- Gibraltar – again

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Lloyd's

- Former members (pre 31.12.96)
- Different regulatory regime
- Berkshire Hathaway and Equitas
- Outcome uncertain – “watch this space”

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CONCLUSIONS

- Part VII is a key re-structuring tool
- Reinsurance is on the move
- Objections are on the increase
- Importing business to UK
- Good news for UK plc

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