

# **Hot Topics in Run-Off**

## **Presentation to the Cavell/Global Re Cologne Rendez-Vous 2010**

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## Hot Topics in Run-Off

1. Schemes of Arrangement following the *Scottish Lion* decision
2. UK asbestos update
3. Proving your loss
4. The future of back to back reinsurance?
5. Getting your jurisdiction right
6. The future – current claims issues

# Schemes of Arrangement following the *Scottish Lion* decision

- **Background**

- The Proposed Scheme
- Companies Act 2006
- The Scottish Lion Scheme Meetings

- **Scottish Lion's petition before the Outer House (July 2009)**

- Solvent and insolvent schemes of arrangement distinguished: A scheme of arrangement for a solvent company requires a unanimous vote on behalf of its creditors before the scheme can be sanctioned by the Court (Lord Glennie)

- **Scottish Lion's Appeal to the Inner House of Sessions (January 2010)**

- Solvent schemes of arrangement to be treated the *same* as insolvent schemes: Unanimous vote not required and statutory majority approval of 75% in value of creditors present and voting is sufficient.

# Schemes of Arrangement following the *Scottish Lion* decision (cont.)

- An adverse situation facing both a company and its creditors is a factor, but not a precondition to the sanctioning of a scheme.
- No basis in the authorities for the view that creditor democracy operated only where failure to agree would be to the detriment of all parties.
- The fact that insureds with long tail policies may be required to accept current estimated values in lieu of their contingent claims in accordance with the terms of a scheme of arrangement, does not preclude the sanctioning of a scheme.
- Interpretation of fairness and reasonableness of schemes.

## ● Points to Note & Future Implications

- Burden of proof remains with administrators of solvent schemes to prove that all policy holders have been treated equally:
  - Administrators must demonstrate *“the positive benefits of the scheme, as well as the soundness and robustness of the procedures it has put in place for valuing claims”*.
- Implications: what does the future hold for solvent schemes of arrangement in light of the *Scottish Lion* decision?

# UK Asbestos Update

- Direct level – lots of activity in past year
  - “Trigger” litigation
    - *Implications for EL insurers*
    - *Appeal*
  - Pleural plaques
    - *Position in Scotland*
    - *UK Government response (for England & Wales)*
- Some things remain unresolved:
  - Reinsurance
  - Allocation issues

# Proving your Losses

- Issue that arises time and again in relation to run-off books of business
- Prove your loss in accordance with the terms of the reinsurance contract
- If no terms in the relevant contract the reinsured must prove the reinsurer is liable to pay (*Re London County Commercial Reinsurance Office*). This means strict proof of legal liability to the original assured, correctness of quantum and that the claim falls within the reinsurance contract
- This is almost unworkable in many reinsurance scenarios
- So often proving loss dictated by follow settlements clauses and claims co-operation/claims control
- ICA v Scor / full R/I clause
- Treaty XL clause: Loss Settlements Binding
- Standard wording: claim must comply with both the reinsurance and the original insurance

## Proving your Losses (cont.)

- This can cause problems for run-off books:
  - Contract may have been lost
  - Deals may have been struck
- Also a problem for spiral business
- LMX spiral ground to a halt, could not reconstruct the spiral after Kuwait Airways and Exxon Valdez losses taken out
- Actuarial model used to prove losses (on balance of probabilities) in recent Equitas v R&Q case
- Court allowed use of the model
- Use of actuarial models going forward?

# The Future of Back to Back Reinsurance?

- Some recent decisions indicate English Court's approach to proportional reinsurance
- Wasa v Lexington
  - Proportional reinsurance
  - "Period" clause in reinsurance was paramount
- Bonner v Cox (Aon 77)
  - Non - proportional reinsurance
  - Reinsurers argued that cedant owed implied duty to underwrite as if no reinsurance
  - No implied duty for one party to protect interests of the other
  - Same for proportional? Court described proportional reinsurance akin to a joint venture
- Presumption of back-to-back remains for proportional reinsurance
  - But principle is flexible where English law applies to the reinsurance

## Why is Jurisdiction Important?

- Perception of some jurisdictions as offering a substantive, procedural or tactical/commercial advantage in the dispute
- Relative experience of jurisdictions in hearing reinsurance disputes – experienced jurisdictions are more predictable which aids consensual dispute resolution
- Some jurisdictions might entirely ignore your choice of law (e.g. *Brotherton v Aseguradora Colseguros SA*)
- Availability/restriction of remedies
- Enforceability of the ultimate decision

# Determining Jurisdiction

## The Brussels 1 Regulation

- Regulation EC No. 44/2001 of 22 December 2000
- Has mandatory application in all EU courts in all cases that fall within its ambit and so an English court must apply the Regulation, even if none of the parties in front of it are domiciled in the EU
- Basic principle is that a defendant is generally entitled to be sued in the country in which he is domiciled
- That can be modified by contract – Article 23

# Determining Jurisdiction

## The Brussels 1 Regulation (cont.)

- The gateway to the regulation: Article 1
  - *“This regulation shall apply in **civil and commercial matters** whatever the nature of the court or tribunal...the regulation shall **not apply to...arbitration**”*
- Insurance and reinsurance are (obviously) civil and commercial matters
- So Regulation applies save where the parties have agreed to arbitration

# Determining Jurisdiction Jurisdiction Agreements

- Is there a jurisdiction agreement in writing in favour of the courts of a Member State? (Article 23)
- Allegations that the contract that contains the jurisdiction agreement is void do not stop it engaging this article (Case 269/95 *Benincasa* [1997] ECR I-3767)
- The difference between exclusive and non-exclusive jurisdiction clauses
  - Exclusive: deprive all other courts of jurisdiction
  - Non-exclusive: confer jurisdiction in addition to any other available court



## What if a Party Ignores the Rules and Starts Proceedings in their Favoured Jurisdiction?

- Traditionally, the English courts would issue an anti-suit injunction to restrain the foreign proceedings
- This is not possible under the Regulation because it offends the principle of comity – Member States must trust each other to get it right:
  - Jurisdiction agreements: *Gasser v Misat, Turner v Grovit*
  - Arbitration agreements: *West Tankers* – if the subject matter of the dispute falls within the Regulation, the arbitration exception does not apply
- This prohibition does not apply to Non-Member States
- So ASI's can still be used to stop proceedings outside the EU, importantly the US.

# How Do I Make Sure I Get the Claim Heard in my Favoured Jurisdiction?

- Only one way – get to the court door first!

# The Future – Current Claims Issues

1. The financial crisis
2. WTC – Respiratory and Aviation claims
3. Chinese drywall
4. Medicare
5. Law reform in the UK
6. The future of legal costs

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