



ARIAS•U.S. 2018 Fall Conference
November 7–9, 2018
New York Marriott at Brooklyn Bridge

Insurance Business Transfer (IBT) Panel

UK Part VII Transfers Recognized in the USA?

By Robert A. Romano
Locke Lord LLP

UK Part VII Transfers

- Transfers of company assets & liabilities with UK Court approval as provided in Part VII of The Financial Services and Markets Act 2000 of the United Kingdom
 - Addresses peculiar absence of UK “merger” tradition
- Applies to UK insurers & with some EEA members
- Requirements
 - Expert opinion
 - UK regulatory review – Prudential Regulation Authority (“PRA”) & the Financial Conduct Authority (the “FCA”)
 - Notice to claimants

US Liabilities Affected by Part VII Transfers

- Theory
 - UK transfer could ignore US reaction
 - US claimants would make futile claims against a unresponsive or non-existent UK insurer
- Practice – quite different

US Liabilities Affected by Part VII Transfers

- Transfers with US liabilities handled with US regulatory “approvals”
- Known to us:
 1. Fairfax companies Sphere Drake to RiverStone (2004)
 2. Aviva companies to Ocean Marine (2005)
 3. St. Paul Re to Unionamerica (2007)
 4. Lloyd’s to Equitas (2009)
 5. London & Edinburgh to Aviva (2011)
 6. Zurich London to Swiss Re SE, U.K. Branch (2012)
 7. Aviva, Excess & Hartford UK branch to Hartford FPI (2015)
 8. Unionamerica to River Thames (2017)
 9. AIG Europe to AIG Europe SA (2018)

US Regulatory “Approvals”

- Current Practice
 - UK insurers wish to maintain reputation in US market
 - UK courts wish assurances of US recognition before approving Part VII transfers
 - UK insurers wish to avoid “orphaned” assets

US Regulatory “Approvals”

- US insurance liabilities – covered by trust funds
 - Surplus lines – under jurisdiction of the International Insurance Department (IID) of the NAIC and the states
 - IID capital requirements (\$45 million)
 - IID Trust
 - 30% of post-97 surplus lines liabilities, with reduced percentages above \$200 million
 - No additional funding usually required for pre-98 surplus lines liabilities
 - Minimum \$5.4 million to \$250 million

US Regulatory “Approvals”

- Reinsurance obligations to US cedents
 - Reinsurance – Accredited (trusteed) and Certified reinsurer status under jurisdiction of states
 - Trusts
 - Pure accredited (trusteed) – 100% covered assumptions
 - Certified status – reduced coverage of liabilities

• 0%	• 50%
• 10%	• 75%
• 20%	• 100%

US Regulatory “Approvals”

- Results
 - US regulators have become familiar with Part VII transfers
 - They are effectively participants in the UK transfer
 - Conduct their own review
 - Impose their own requirements

UK Court Comfort on US Law

- UK courts now routinely require opinions on US law when US claimants are affected
 - Recognition under US law of Part VII transfer
 - Effect on US claimants
 - US regulatory recognition

Issues in US opinions

- Issues of Recognition (Enforceability)
 - Full Faith & Credit Clause of US Constitution or Statutory Recognition
 - Contract Clause of US Constitution
 - Bankruptcy Code
 - Comity

Faith & Credit Clause

- “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.” Art. IV Sec.1
 - Applies to final judgments when courts have jurisdiction
 - Applies among the states, not foreign countries
- Uniform Foreign Money-Judgments Act adopted by some states is inapplicable
 - It applies only to the judgements “granting or denying a recovery of a sum of money.” See *Yahoo! Inc. v. La Ligue contre le Racisme et l’Antisemitism*, 433 F.3d 1199, 1213 (9th Cir. 2006).
 - It would not apply to a Part VII transfer

Contract Clause

- Contract Clause of the US Constitution provides that “no state shall...pass any bill of attainder, ex post facto law or law impairing the obligation of contracts.” U.S. Const. art. I, §10, cl. 1.
 - Despite this broad language it has been held that a legislative enactment will pass constitutional muster under the Contract Clause if it is reasonable and necessary to carry out a legitimate public purpose. *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 25-26 (1977).
- Bankruptcy Code
 - Routinely restructures contracts

Bankruptcy Code

- Attempts to Use the Code to Recognize Part VII Transfers
 - Sec. 304 of the Bankruptcy Code, 11 U.S.C. § 304 (now Chapter 15) permits bankruptcy “ancillary proceeding” to assist foreign proceedings & recognize a foreign “reorganization”
 - But a court denied recognition of a Part VII transfer as not an “insolvency.” In re Rose, 318 B.R. 771, 778 (Bankr. S.D.N.Y. 2004)
 - To our knowledge only one case has used Sec. 304 to recognize a Part VII transfer in the US, but on terms which deny it precedential value. In re petition of Catherine Geraldine Regan, as Foreign Representative of Riverstone Insurance (UK) Limited, Case. No 05-12678 (RDD)

Comity

- Comity
 - Soft concept subject to court discretion and common law principles (*Hilton v. Guyot*, 159 U.S. 113, 163 (1895)) under state law. See *Choi v. Kim*, 50 F.3d 244, 248 n.7 (3d Cir. 1995) (citing Restatement (Second) Of Conflicts of Laws § 98(c)).
- In Rem Jurisdiction of UK Court Over the Transferor vs. In Personam Over Claimants

Comity

- Factors considered in a Comity analysis are the following (Restatement (Third) of the Foreign Relations Law of the United States §§ 482 (Supp. 2010)), the first two below being mandatory bases for non-recognition:
 - Unfair Tribunal
 - Lack of Jurisdiction
 - Lack of Subject Matter Jurisdiction
 - Lack of Notice or Consent/Due Process
 - Fraud
 - Judgment Conflicts with Another Judgment Entitled to Recognition
 - Contrary to Contract Choice of Forum
 - Contrary to Public Policy

Relevance to US IBT

- The Good, the Bad & the Ugly
 - The Good
 - UK cases show success in UK
 - Acceptance (“approvals”) by US regulators
 - Many transfers accepted by US regulators in all 50 states & the IID
 - Concept & application have shown their value

Relevance to US IBT

- The Good, the Bad & the Ugly
 - The Bad
 - Concept has not yet been domesticated in US for application to US insurers on “admitted” business
 - Application to surplus lines or reinsurance is easier for US regulators
 - UK jurisdiction over UK insurer(s) not in question
 - Transferor clearly a UK insurer – whose corporate person is a creation of, & whose continuing existence is subject to, UK law
 - Number of US IBT laws do not operate exclusively with domestic insurers
 - US state jurisdiction over IBT transferor unclear

Relevance to US IBT

- The Good, the Bad & the Ugly
 - The Ugly
 - Digestion by 50 state system will take time
 - Legal & regulatory technical issues may obscure practical benefits of IBT's for some time
 - Risk that half-measures, such as quasi-contractual novations, may be a required part of IBT's in the meantime

UK Part VII Transfers Recognized in the USA?

Robert A. Romano
Locke Lord LLP
New York City
+1 (212) 812-8322
rromano@lockelord.com