

payments.<sup>6</sup> An opposite conclusion, though, was reached by the Nebraska Supreme Court on payments to an obligee on a performance bond under the same preference statute as enacted in Pennsylvania. The Nebraska Court concluded that the surety's payments were made during the preference period and refused to read into the state statute an exception for ordinary course payments since the legislature did not specifically include one in the Nebraska statute. *Wagner v Gilbane Building Co* [2008] 757 N.W.2d 194. Finally, four states currently have explicit statutory exceptions to a preference claim for ordinary course of business payments.<sup>7</sup>

## CONCLUSION

To conclude, let us look at our innocent insured who has no idea that its insurer is about to fall into the abyss of liquidation. If the insured received a payment during the preference period from an insurer domiciled in Pennsylvania, Utah, Texas, Illinois, or Ohio it could argue ordinary course of business payment in the face of a preference claim from a receiver. Nebraska, though, does not recognise the exception. For the rest of the jurisdictions in the United States, our insured would have no clear answer because the state insurance laws do not address the situation.

## ENDNOTES

1. Eight states authorise a rehabilitator to seek to avoid preferential payments. Ala. Code s.27-32-27; Ark. Code Ann. s.23-68-125; Del. Code Ann. tit. 18, s.5925; Md. Code Ann., Ins. s.9-221; Nev. Rev. Stat. s.696B.410; N.J. Rev. Stat. s.17:30C-25; N.Y. Ins. Law s.7425; Or. Rev. Stat. s.734.350; Va. Code. Ann. s.38.2-1513; Wyo. Stat. Ann. s.26-28-124. For convenience in this article, we will refer to an insurance company liquidator or rehabilitator as a receiver.
2. Three states do not have statutory preference provisions. See Mass. Gen. Laws Ann. ch.175, ss.6, 180A-180L; Okla. Stat. tit.36, s.1901-1920; Wash. Rev. Code. s.48.99.
3. Insurance companies in the United States are not subject to the United States Bankruptcy Code. 11 U.S.C. s.109(b) (insurance companies are excluded from being debtors). The rehabilitation or liquidation of an insurance company is subject to the state insurance law of the domicile of the insurance company. State law varies on preference requirements as well as other matters related to insurance company receiverships.
4. Insider dealings or non-arms length transactions may also be avoided as preferential. See e.g. 40 Pa. Cons. Stat. s.221.30(a)(iv).
5. A minority of states have a different provision which includes intent and knowledge elements. The New York provision is an example:  
"Any transfer of, or lien created upon, the property of an insurer within twelve months prior to the granting of an order to show cause under this article with the intent of giving the creditor or enabling [it] to obtain a greater percentage of [its] debt than any other creditor of the same class and which is accepted by such creditor having reasonable cause to believe that such a preference will occur, shall be voidable."
6. N.Y. Ins. Law s.7425(a). Generally, the minority provision does not include the element that the transfer be on account of an antecedent debt.
7. Subsequent to the *Covington* decision, Ohio revised its preference statute to include an ordinary course of business exception. Ohio Rev. Code. Ann. s.3903.28(A)(4)(a).
7. 215 Ill. Comp. Stat. Ann. s.5/204(m)(A); Texas Ins. Code. Ann. s.4443.204(c)(1)(A); Utah Code Ann. s.31A-27-321; and Ohio in 2004, Ohio Rev. Code Ann. s.3903.28(A)(4)(a).

# EU DIRECTIVE ON MARITIME LIABILITY INSURANCE

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The EU Parliament and the Council on April 23, 2009, issued a joint Directive requiring ships frequenting Member State ports to carry certificates showing that they have insurance for liabilities up to the limitation

provided by the Convention on Limitation of Liability for Maritime Claims 1976, as amended by the 1996 Protocol. The Directive forms part of the Third Maritime Safety Package, the continuation of

attempts by the European Union to achieve concerted action at Community level. The first package notably phased out single-hull oil tankers and by the second package,

among other results, the European Maritime Safety Agency was established.

The Directive 2009/20 on the insurance of ship-owners for maritime claims ([2009] OJ L131/128) entered into force on May 29, 2009, the day after its publication in the Official Journal. It must be implemented by each Member State by January 1, 2012.

The persons on whom the obligations under the Directive are imposed are the registered owners and bareboat charterers of seagoing ships (together referred to in the following as "shipowners"; Directive 2009/20, art.3). The Directive applies to ships flying any flag. It lays down rules governing the obligations of shipowners in relation to insurance for maritime claims. The Directive applies to seagoing ships of a gross tonnage of 300mt or more—a relatively small size of ship. It does not apply to warships or other State owned or operated ships used for a non-commercial public service (Directive 2009/20, art.2).

#### LIMITATION OF LIABILITY

Vessels that meet these specifications will have to carry insurers' certificates detailing their liability insurance. The Directive ties in with the *Convention on Limitation of Liability for Maritime Claims, 1976, as amended by the 1996 Protocol* (LLMC 1996). That Protocol is to date (Oct 22, 2009) in force for 15 EU Member States following endorsement by the European Union on October 9, 2008. The plan is that the remaining Member States should ratify the Protocol by January 1, 2012.

Shipowners must ensure that they have insurance for all and any claims for which they are entitled to limit liability under LLMC 1996, and up to the limit set by the 1996 Protocol. The limits are set in IMF Special Drawing Rights based on the tonnage of the ship. The 1996 Protocol raised the limits compared to the 1976 Convention. From this direct link with LLMC, it may be seen that the insurance at issue under the Directive is shipowners' marine

liability insurance, not for instance hull and machinery or marine cargo insurance.

Where a shipowner is entitled to limit liability under the 1976 Convention and 1996 Protocol, he will therefore now also be obliged to possess insurance up to that same limit. Those claims are: i) claims in respect of loss of life or personal injury occurring on board or in direct connection with operations, including consequential losses of such occurrences; ii) claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage; iii) claims in respect of other loss resulting from infringement of rights other than contractual rights occurring in direct connection with the operation of the ship or salvage operations; iv) claims in respect of the destruction or removal of stranded, wrecked and sunk vessels; v) claims in respect of the destruction or removal of the cargo of the ship; and vi) claims of a person other than the person liable in respect of measures taken in order to avert or minimise limitable loss (art.2, LLMC 1976).

Claims expressly exempted from LLMC 1996 and therefore also from the insurance obligation of the Directive are claims for salvage (including SCOPIC claims) or contribution in general average, claims for nuclear damage and claims against a shipowner or salvor by its employees, where the employment contract does not permit limitation (art.3, LLMC 1976 as amended by art.2, LLMC 1996).

Further narrowing the scope of the Directive, its Annex lists certain instruments whose regimes take precedence over the Directive regime, if the Member States have ratified and are applying them. These are the International Convention on Civil Liability for Oil Pollution Damage, 1992; the International Convention on Liability and Compensation in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (HNS Convention); the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001; the Nairobi International Convention on the Removal of Wrecks, 2007 and Regulation 392/2009 of the European

Parliament and of the Council of April 23, 2009, on the liability of carriers of passengers by sea in the event of accidents (which implements and extends the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974 and its Protocol of 2002). All of these provide for compulsory insurance and alternative insurance certificate regimes—the intention in making way for them is evidently to avoid confusion of separate regimes. Ships will need to carry separate certificates for, e.g. the regime of the Civil Liability for Oil Pollution Convention, 1992, for passenger liabilities under the Athens Convention and for the Directive's LLMC 1996 regime.

#### INSURANCE CERTIFICATES

Shipowners can fulfil their obligations by procuring regular insurance or P&I insurance. As an alternative to insurance, shipowners may also provide satisfactory evidence of self-insurance. The Directive does not set any restrictions at all on what insurance providers may be used; there is no obligation to use, e.g. recognised or European insurers. P&I insurance does not need to be with an International Group P&I Club, but may be with any P&I insurer.

The insurer's certificate must be displayed on board and must contain the following information (art.6): i) the name of the ship, its IMO number and the port of registry; ii) the shipowner's name and contact details; iii) the type and duration of the insurance; and iv) the name and contact details of the insurer. The certificate must be translated to English, French or Spanish. There is no Annex containing the form of the certificate so it may be in any relevant form.

#### ENFORCEMENT

As for enforcement of the Directive, this is to take place under the supervision of each of the Member States for vessels flying their flag (Directive 2009/20, art.4). The shipowner must ensure that a certificate is carried on board at all times and Member

States must ensure that their port state inspections include verification that the ship carries a certificate on board.

Member States also have port State responsibility to ensure that vessels entering their ports carry certificates. The remedy is draconian: a Member State conducting a port State inspection at which the certificate is found to be missing is entitled to issue a Europe-wide expulsion order against the ship (Directive 2009/20, art.5). Such an order will be notified to the Commission and to all the Member States. The ship in question will be banned from every Member State port, until her owner notifies a certificate complying with the Directive.

The Directive does not provide for any enforcement measures for vessels flying the Member States' flag. The possibility of a ban

applies to vessels flying the flag of another Member State than the port State and to third country flagged vessels only. Ships flying the flag of the port State will be subject only to that individual Member State's penalty measures. The Directive does exhort Member States to develop penalty rules if they do not already have them (Directive 2009/20, art.7).

The enforcement measures against ships under the flag of a third State may be thought disproportionate but is clearly intended to send a clear signal that meticulous compliance by shipowners with the obligation to carry the certificate is expected. The Directive only applies to registered owners and bareboat charterers but time and voyage charterers will be keen to have guarantees that a certificate exists

and is duly available on board, for fear of the chartered vessel being banned from entering the intended ports.

The Directive will not have presented a problem to most shipowners who regularly frequent EU waters and ports. The International Group of P&I Clubs issued a memorandum following the issuance of the Directive emphasising that those shipowners who have their P&I insurance with an International Group member will already have had liability insurance in excess of the limits required by the Directive.

## SWISS RE GERMANY HOLDING GMBH V FINANZAMT MÜNCHEN FÜR KÖRPERSCHAFTEN

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On October 22, 2009, the ECJ released its judgment in the case of *Swiss Re Germany Holding GmbH v Finanzamt München für Körperschaften* (C-242/08) [2009], confirming that a transfer of a portfolio of life reinsurance contracts, outside of a business transfer, will be subject to VAT at the standard rate.

### BACKGROUND

The question of whether or not transactions are subject to VAT is key in the context of insurance business as VAT incurred by such businesses will generally represent an absolute cost. The usual starting point is to

try to ensure that a portfolio transfer will fall within the "transfer of a business as a going concern" (TOGC) rules, so that payment made for the transfer is outside the scope of VAT altogether. This is often the case where the transfer of the portfolio is part of a wider business transfer, under which the business as a whole is being transferred, but it can also apply where just the relevant contracts are transferred. In addition, no VAT is payable on a transfer from one member of a VAT group to another, but this relief is obviously of limited benefit.

### THE SWISS RE GERMANY CASE

This recent ECJ case concerned a referral from the German courts in relation to the proper classification of a transfer of a portfolio of life reinsurance contracts for VAT purposes, which were sold by Swiss Re Germany to a Swiss insurance company. It was common ground that the transfer was not a TOGC as the transfer did not satisfy the necessary legal requirements. The German tax authority argued that the transaction was subject to VAT as a supply of goods; Swiss Re Germany appealed on the grounds that this was an exempt supply