



Insurance and reinsurance news

The recent *Equitable Life* case, decided by the Higher Regional Court of Celle (the OLG Celle), is the first example of a German court considering the recognition of a UK creditors' scheme of arrangement. Although the court said it would not recognise the scheme, it may still be possible to get schemes recognised in Germany in different circumstances.

The decision of the OLG Celle is under appeal to the German federal court (Bundesgerichtshof), which is expected to be heard towards the end of 2010.

Background to the claim

The German claimant was a policyholder of UK life insurer Equitable Life. The policy was governed by German law and included an element of profit participation payable when the policy matured. Following litigation in England around payments due to UK policyholders with guaranteed annuity rates, the claimant and others stood to receive decreased profit payments. As a result the claimant considered that he had various claims against Equitable Life for breach of its pre-contractual duty of disclosure.

However, following the English litigation, Equitable Life had successfully proposed a scheme of arrangement under the English Companies Act to settle any claims arising out of the litigation.

Litigation in Germany

The claimant sued Equitable Life in Germany and Equitable Life argued that the claim was barred by the scheme. The court therefore had to decide whether the scheme should be recognised in Germany.

At first instance and on appeal the claim was held to be time-barred but the courts did comment on the effect of the scheme.

- Equitable Life argued for recognition on two grounds:
- the scheme should be recognised as an insolvency proceeding; or
 - the scheme should be recognised as a judgment.

Recognition as an insolvency proceeding

The scheme became effective before the EU Directive on the Reorganisation and Winding-up of Insurance Undertakings (the Insurers' Directive) came into force so Equitable Life could not rely on that.

The court refused recognition under the provisions of the German Insolvency Code, because schemes of arrangement are not in the list of UK insolvency proceedings recognised under the EU Insolvency Regulation. This was not in force at the relevant time and not applicable to insurance companies anyway but is used by the court as a guide to interpretation. In addition schemes of arrangement do not satisfy the requirements for an 'insolvency proceeding' under German law:

- the debtor must be insolvent on a balance sheet or cash flow basis (not a pre-requisite for an English scheme of arrangement);
- the proceedings have to include the appointment of a liquidator – this does not occur when a scheme of arrangement is implemented; and
- the proceedings have to be collective, ie in the interests of all creditors.

Recognition as a judgment

Recognition of the scheme was also denied under the EU Regulation on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters (the Brussels I Regulation). The Higher Regional Court of Celle (the OLG Celle) held that a scheme lacks the

necessary characteristics to qualify as a ‘judgment’ under that Regulation because it considered the scheme more akin to a compromise between the debtor company and its creditors, which was approved by the court. The sanctioning of the scheme did not settle a contentious dispute between two parties. Even though the English court decided whether the parties had followed the necessary procedure and whether the scheme was fair, the court’s role was not to decide the actual terms of the scheme.

At first instance the court held that recognising the scheme would be contrary to German public policy because it bound policyholders, whether or not they approved the scheme. This would allow the court to refuse recognition under the Brussels I Regulation even if the scheme were a ‘judgment’. On appeal the OLG Celle did not decide the point but indicated that German public policy would probably not have prevented recognition of the scheme.

Conclusion

This decision is of enormous practical importance as schemes of arrangement, which do not exist in continental Europe, could be a very useful tool in reaching finality on claims by creditors in the region both in the insurance context and more broadly.

Although the decision is not binding and is still under appeal, the *Equitable Life* case gives the first clear indication that the German courts are reluctant to recognise English schemes. However, under different circumstances, there may be different arguments that were not considered by the OLG Celle. For example if the claims are governed by English law, the scheme company is insolvent, there has been greater court involvement or the Insurers’ Directive applies. The suggestion that recognition does not offend public policy is potentially a helpful one for other scheme companies seeking a different result.

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