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CORONAVIRUS: UK LIVE EVENTS REINSURANCE SCHEME

HM Treasury has announced that the Government has partnered with the Lloyd's insurance market to offer at least £750 million worth of support to the events sector – under the new Live Events Reinsurance Scheme, companies will be able to purchase protection against certain COVID-19 event cancellation risks. In this briefing, we outline the Scheme by comparison to similar initiatives from the UK and elsewhere, and highlight potential issues which may arise.

INTRODUCTION

As part of efforts to contain the coronavirus pandemic, many countries implemented prohibitions on mass gatherings and enforced closures of non-essential businesses and venues. These restrictions effectively amounted to a ban on large-scale events and have had a devastating impact on the events sector. As the world inches towards a new normal, the spectre of such measures being reintroduced at short notice continues to haunt the industry. Event organisers have traditionally relied on event cancellation insurance as a safety net, with policies providing protection for their costs and, depending on the wording, their anticipated profit, in the event that an event could not go ahead. However, the commercial insurance market has largely stopped covering coronavirus-related risks due to the size of potential exposures and the perceived likelihood of future restrictions. The result for many event organisers is that it is not financially viable to plan future events.

In October 2020 Austria became the first country to announce a €300 million 'protective umbrella' for its events industry, pursuant to which organisers could be reimbursed for financial losses resulting from COVID-related cancellations or restrictions. A number of European governments followed suit with other 'guarantee funds', with the aim to provide compensation rather than insurance.

The UK Government has now introduced its own Live Events Reinsurance Scheme which, unlike the other European initiatives, is more akin to a regular insurance product. Coverage will be delivered through Lloyd's insurers and the Government will serve as a de facto reinsurer by guaranteeing the underlying pot of more than £750 million.

Key takeaways

- The Live Events Reinsurance Scheme will indemnify insureds for costs incurred in circumstances where an event is legally unable to happen due to government restrictions related to COVID-19.
- The Scheme is set to run for a year from September 2021 until end-September 2022.
- The Scheme represents a departure from the approach taken under the Film & TV Production Restart Scheme (which was also designed to fill a gap in the commercial insurance market) in that it takes an insurance-based approach.
- Extensive losses can arise from COVID-19-related disruption, as the FCA test case on business interruption insurance (*The Financial Conduct Authority v Arch Insurance (UK) Ltd & others* [2021]) has shown. The Scheme will not cover many of the types of losses dealt with in that case, or deal with concerns other sectors have about the insurability of Covid-related risks.
- For full commentary on the FCA test case, please refer to our earlier briefing linked here

THE SCHEME

At this stage, the Government has yet to share full details of how the Scheme will operate. However, the announcement states that companies can purchase cover from September 2021 onwards and there will be no limitation on costs which can be claimed per event. In addition to the premium, Scheme participants will be responsible for covering an agreed portion of their losses (i.e. the 'excess'). The excess will be deducted from the sum total of a claim, and the remaining costs will be apportioned between the Government and insurers in accordance with an agreed risk share arrangement.

Pursuant to this risk share arrangement, the Government and insurers will initially pay 95% and 5% of the costs respectively, but the Government's share of each claim may increase to 97% and eventually 100% as more sums are paid out under the Scheme. In other words, insurers' total exposure is capped – upon incurring a specified amount of losses, the Government will cover them in full.

Old versus new: Film & TV Production Restart Scheme and Pool Re

It is noteworthy that the Government has taken such an approach to the Scheme, which marks its second attempt to plug a gap in the post-COVID commercial insurance market. The first was the £500 million Film & TV Production Restart Scheme unveiled in July 2020, which sought to address the lack of viable insurance for the UK film and TV industry by covering coronavirus-related losses arising from cast and crew illnesses and filming delays or disruptions. To date, the Restart Scheme has been extended thrice, with the deadline for claims currently set at 31 March 2022 for losses incurred up to 31 December 2021.

The Restart Scheme is not an insurance scheme and does not guarantee a payout on the occurrence of a specified event. Instead, it provides compensation on a discretionary basis to organisations that have suffered loss.

By contrast, the new Scheme is intended to be a (re)insurance product. In this respect it is reminiscent of Pool Re, the government-backed terrorism reinsurer born of a market failure caused by the withdrawal of commercial reinsurers during the IRA bombing campaign in the early 1990s. Pool Re is a mutual company mainly comprising commercial insurers who each contribute to a central fund from which terrorism losses are paid out, and the Government has extended an unlimited financial guarantee to it to ensure that businesses would still be covered if the fund were exhausted.

Three preliminary observations may be made:

1. The Pool Re guarantee was meant to be temporary, but remains in force to this day. There were concerns that if the Government kept to the original deadline for the Restart Scheme, upon its expiry the film and TV industry would revert to being an insurance black hole and production would once again be stymied by coronavirus. It should not be assumed that given enough time, insurers will return to 'normal' service and be prepared to underwrite risks they previously insured as a matter of course.
2. Commercial insurers pooled their own funds together to create the common Pool Re pot. It is not clear at this stage whether the new Scheme will be funded by a similar pooling arrangement by insurers,

or if the £750 million figure represents the extent to which the Government is outrightly backing the Scheme for.

3. Under the Scheme, the Government is protecting insureds against the risk of Government action, in contrast with Pool Re where the risk (i.e. of a terrorist attack) is that of action by a third party. It remains to be seen how this will impact claims in practice, or whether this will impact Government decisions on whether, or how, to impose any future restrictions.

POTENTIAL ISSUES

The exact scope of indemnity available under the Scheme remains unknown for now, but the announcement states that costs will be covered "*in the event of cancellation due to [an] event being legally unable to happen due to Government Covid restrictions.*" The phrase 'legally unable to happen' suggests coverage will only apply in circumstances where an event is rendered unlawful due to government restrictions, and industry stakeholders have expressed concerns that this does not offer sufficient protection. Some government restrictions may stop short of banning events altogether, but the reintroduction of e.g. social distancing measures may mean an event needs to reduce capacity or change venues – an inability to comply with such new restrictions due to timing or financial constraints might lead organisers to opt for cancellation. On the face of the announcement, it is unlikely that organisers would be indemnified for costs incurred from such cancellations.

Other examples of how an event might be *legally* allowed but *practically* unable to happen due to government restrictions could include scenarios where:

- a member of a headlining act tests positive for COVID-19 and is legally required to self-isolate;
- a local lockdown prevents a performing act from travelling to the event venue, but the venue location itself is not subject to any restrictions; or
- changes to travel guidelines mean an act has to quarantine for an extended period following arrival in the UK and therefore miss their performance date.

Cover is also limited to costs whereas pre-coronavirus, insurance was also available to cover loss of anticipated profits. This distinction may have an impact on events which rely on financing (granted on the basis of anticipated future revenues) for funding purposes.

The approach elsewhere

Notwithstanding the fact that comparable schemes in other European countries were primarily established to offer compensation instead of insurance, a look at those initiatives may provide some insight as to how the Scheme could be implemented in the UK to afford companies meaningful protection.

In Austria, the 'protective umbrella' awards compensation for financial disadvantage resulting from events being cancelled or 'significantly restricted' because of official measures taken in respect of COVID-19. Compensation is available in principle if a 'considerable' number of participants (which is defined in terms of discrete groups such as audience, performers, speakers etc.) in an event become affected by restrictions; an event that is forced to reduce its audience size by 30% or more because of statutory restrictions could therefore claim for losses. The German scheme refers to compensation for such losses as an 'economic bonus' reserved for smaller events, such that if a show for 1,000 people sells out but only 250 people are subsequently allowed into the venue, its fund will make up the difference.

Various qualifiers can operate to limit the breadth of such initiatives. There will almost certainly be specific criteria setting out the types of events which are eligible for the Scheme. This could be financial (e.g. only events which will generate a certain level of income may qualify) or otherwise (e.g. there must be a minimum audience size). Eligibility criteria could also apply to event organisers, such that companies in financial difficulty might not be able to participate.

Scope

More generally, the overall ambit of the Scheme is relatively narrow, focusing on the impact that new government restrictions would have on the events sector. However, in the course of the pandemic a vast range of businesses and sectors have suffered business interruption losses for many different reasons, including formal closure orders, legal restrictions on customers attending businesses, prohibitions on travel, as well as changes to consumer habits and supply chain issues.

The scope of business interruption cover under policies issued prior to the pandemic was the subject of the Supreme Court's judgment in *The Financial Conduct Authority v Arch Insurance (UK) Ltd & others* [2021], commonly known as the FCA test case on business interruption insurance. The overall result of the FCA test case represented a victory for many insureds who had taken out policies with the wordings under consideration pre-pandemic. However, businesses are likely to struggle to obtain new business interruption policies protecting them from future Covid-related losses, and for many of those businesses the Scheme will not plug that gap.

CONCLUSION

The Scheme will provide much needed protection for many events, but its precise terms, and whether those terms can translate to effective protection for organisers in practice, remain to be seen.

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