IS BRITAIN THE SICK MAN OF EUROPE? SOLVENCY ISSUES IN THE NHS

The UK healthcare market has experienced a number of challenges of late. The British Government’s view of private sector involvement in public sector health service provision has alternately softened or hardened under successive governments. A prime example of this is the attitude toward Private Finance Initiative (PFI) schemes in procurement – at times, supported very vocally, and at other times, strongly criticised. Many in the UK are familiar with the frequent criticisms of PFI from members of the Government and politicians, among them former Health Minister Andrew Lansley.

Private involvement has been characterised as both the panacea for public sector ills and an impediment to the effective operation of the publicly funded National Health Service (NHS). Established in 1948, the NHS is a collection of hundreds of “trusts” (essentially, public sector corporations), most organised geographically, set up to provide health services to the public.

FINANCIAL CONCERNS

Historically, private stakeholders with involvement in the health sector (for example, when contracting with an NHS trust) took comfort from the financial covenant strength of the trusts. This covenant strength was effectively demonstrated by an analysis of the relevant NHS legislation, which had the commercial effect of government backing for failing trusts and trust liabilities.

In 2004, this link was effectively severed for certain trusts (“Foundation Trusts”) as they were awarded a high degree of independence in their finance operations. This allowed Foundation Trusts to commit to significant levels of capital expenditure and investment in other projects, often by securing PFI agreements. As of August 2012, there were 144 Foundation Trusts in the UK.

Recent media coverage in the UK has highlighted concerns about the structural integrity and financial covenant strength of certain NHS trusts — Foundation Trusts in particular. In October 2011, the Government identified 21 trusts facing budgetary deficits and associated financial difficulties. In many respects this sector is caught between the twin pressures of public sector service provision and commercial “efficiency”.

Concerns over the financial viability of the South London Healthcare NHS Trust led to the intervention this summer of the Secretary of State (the UK Government minister with ultimate responsibility for the NHS).

SPECIAL ADMINISTRATION

An NHS Trust (and particularly a Foundation Trust) in poor financial health or failing with service provision faces the prospect of central government intervention. Under the National Health Service Act 2006, the Secretary of State has the power to order the appointment of a Special Administrator over such trusts. The appointment of the Special Administrator automatically suspends the powers of the trust’s chairman and directors, and the Special Administrator has comprehensive powers to potentially re-negotiate contracts and/or preside over a transfer or wind-up of all or part of a trust’s operations. This could have significant and adverse consequences for private sector counterparties, funders and, of course, any partners in joint venture agreements (particularly where PFI is involved).

The existing legislation is due to be overhauled by the Health and Social Care Act 2012, under which the independent regulator, “Monitor”, was established. Under the terms of the new act, the powers of the Secretary of State will be augmented by Monitor, who will have the independent ability to ask a court to appoint an administrator over an NHS trust.

At present, only the provisions governing the appointment of Monitor as the independent regulator have come into force.

“Parties with a financial stake in the UK’s public health sector service can expect further upheaval in the coming months.”
Until further secondary legislation is implemented, any appointment of a Special Administrator will be as a direct result of an order by the Secretary of State under the existing regime.

**CONCLUSION**

The precipitative steps taken by the Secretary of State in respect of the South London Healthcare NHS Trust debacle demonstrate a government-level commitment to secure continued provision of health services and to intervene when service provision is threatened by financial instability. Indeed, at the time of writing, health ministers have identified a further seven NHS trusts for special government intervention, although at present it is unclear what this intervention will involve.

Ultimately, those parties with a financial stake in the UK’s public sector health service can expect further upheaval in the coming months, and possibly government intervention, potentially testing the terms of intercreditors, joint venture agreements and security positions.