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Insurers Must Cover FIFA Suspect's Costs In \$50M D&O Row

By Suevon Lee

Law360, Los Angeles (April 27, 2016, 9:40 PM ET) -- Lloyd's of London and Axis Specialty Europe SE must immediately reimburse and advance legal costs for Eduardo Li, an ex-FIFA executive charged in connection with a widespread corruption scandal, under a \$50 million directors and officers liability policy, a New York federal judge held Wednesday.

The ruling by U.S. District Judge Raymond J. Dearie, who is also **overseeing the criminal case** against Li and other suspects in the massive FIFA international soccer corruption probe, marks a key win for the former president of the Costa Rican soccer federation, who **sued the insurers** when they said they wouldn't fund his defense.

Judge Dearie, applying ancillary jurisdiction in the coverage dispute, said in his 23-page order denying the insurers' motion to dismiss that a preliminary injunction ordering Lloyd's and Axis to immediately reimburse and pay the costs of Li's indictment, extradition and defense is appropriate, given that the balance of hardships "tip decidedly in Li's favor."

"If no injunction is issued, Li will never receive the benefit of his bargain, likely be deprived of his chosen counsel at this critical time, and sustain a conviction he might otherwise have avoided, while the insurers, in any event, are relieved of their obligation to advance funds pending a final resolution," the judge wrote, adding that the only downside for insurers in granting an injunction would be the "monetary loss which may be recouped as provided in the policy."

Li, a former executive with FIFA and former executive member of the North, Central American and Caribbean Association Football, or CONCACAF, faces criminal allegations that he used his position within organized football to obtain bribes and kickbacks in connection with the sale of rights to FIFA World Cup qualifiers.

The Costa Rican citizen was arrested in Switzerland in May 2015 on charges that include international racketeering conspiracy, as part of a widespread investigation that has ensnared other FIFA executives. Li was extradited to the United States in December and held at the Metropolitan Detention Center in Brooklyn until he was released on bail on March 8.

While he had access to a \$3 million insurance policy purchased by CONCACAF from Federal Insurance Co., the funds have already been exhausted by Li and his co-defendants, requiring him to turn to the D&O \$50 million liability policy through Lloyd's and Axis.

The insurers moved to dismiss Li's coverage action by arguing, in part, that Switzerland has jurisdiction as specified in the policy's forum selection clause. Judge Dearie disagreed, saying first, the Lugano Convention — an international treaty setting forth rules of jurisdiction to which Switzerland is a member — applies to the dispute and that it takes precedence over Swiss national law.

Second, the judge held that Li isn't subject to the policy's forum selection clause because he is a non-signatory to the clause who wasn't domiciled in the contracting state, relying on a 2005

decision by the European Court of Justice interpreting a comparable section of the Brussels I Convention to the applicable section in the Lugano Convention.

The judge also denied the insurers' argument for dismissal of the action on forum non conveniens grounds, saying Li's choice to bring suit in New York federal court was legitimate and appropriate.

The insurers claimed that relevant witnesses and documents were in London and Switzerland, that the underwriters have offices in UK and Switzerland and that FIFA, to whom the policy was issued, is also based in Switzerland.

Yet the judge noted there are relevant witnesses and parties in New York as well, "including Li, his co-defendants, prosecutors, and a copy of the contract at issue," saying that while litigating in New York may be inconvenient to the insurers, it isn't "oppressive or vexatious" so as to warrant dismissal.

"Li faces serious charges and the possible consequences for him are indeed grave," Judge Dearie expanded. "The stability of the attorney client relationship during this critical time cannot be overstated."

Representatives for both Li and the insurers declined to comment Wednesday on the decision.

Li is represented in the insurance matter by Robin L. Cohen and Burt M. Garson of McKool Smith.

Lloyd's and Axis are represented by David S. Sheffer of Wilson Elser Moskowitz Edelman & Dicker LLP.

The case is *Eduardo Li v. Certain Underwriters at Lloyd's, London et al.*, case number 1:15-cv-06099, in the U.S. District Court for the Eastern District of New York.

— Additional reporting by Pete Brush. Editing by Ben Guilfooy.

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