

Pitfalls and Opportunities in International Reinsurance

**ADRIAN MECZ
PARTNER**

CHADBOURNE
& PARKE

1093368

Presentation content

- Cover available in the Lloyd's Market
- Common clauses and pitfalls
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- Wasa v. Lexington
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Cover available in the Lloyd's Market

- Aviation
- Casualty
- Energy
- Life
- Marine
- Motor
- Property
- Reinsurance

Facultative v. treaty

- **Facultative reinsurance:** generally, a single risk is reinsured by one of more reinsurers. The individual underlying risk is identifiable in the reinsurance contract.
- **Treaty reinsurance:** usually, a number of risks, identified generically by reference to a type of insurance cover or “book of business”, for instance, the entirety of the underwriting of an insurer (or reinsurer) over a given period, or the entirety of the underwriting of a particular category of business, for example marine cargo.

Layers of reinsurance

- **Third excess reinsurers**
- **Second excess reinsurers**
- **First excess reinsurers**
- **Primary reinsurers**
- **Captive**
 - Reinsurers on different layers do not always adopt a common position
 - e.g. Primary layer reinsurers may take a coverage position and decline a claim; excess layers may pay it (or the other way round!)
 - Different layers appoint different lawyers
 - Different commercial interests
 - Captives can be a block; there is no privity of contract between reinsurers and the assured (the captive is interposed). This potentially impacts on the co-operation of the assured and on the ability to obtain documents from the assured

Claims co-operation v. claims control

- Key features
- Include notification time-limits
- Interaction with follow clause
- Effect of condition precedent
- Do the clauses have teeth?

Claims co-operation clause

“CO-OPERATION

Upon Underwriters’ request and at reasonable times and places designated by the Underwriters the Assured shall with respect to any loss/circumstances which may give rise to a claim covered by this Policy;

submit to examination by Underwriters and subscribe to the same under oath;

(1) produce for Underwriters’ examination all pertinent records;

(2) co-operate with Underwriters in all matters pertaining to the loss/claim; and

(3) cause all persons interested in the matter, so far as it is within the Assured’s power including Employees, to submit to examination by Underwriters and subscribe to the same under oath.

The Assured shall execute all papers and render assistance to secure to Underwriters the rights and causes of action provided for herein.

The Assured shall do nothing after discovery of loss to prejudice such rights or causes of action”.

Claims co-operation: case law

ICA v. Scor

*"The reinsured hereby undertakes in arriving at the settlement of any claim, that they **will co-operate** with underwriters and that no settlement shall be made without the approval of the Underwriters subscribing to this policy."*

AIG v. Faraday

*'Notwithstanding anything contained herein to the contrary, it is a **condition precedent** to any liability under this Policy that:*

- (a) the Reinsured shall upon knowledge of any loss or losses which may give rise to a claim, advise the Reinsurers thereof as soon as is reasonably practicable and in any event within 30 days.*
- (b) the Reinsured shall furnish the Reinsurers with all information available respecting such loss or losses, and **shall cooperate** with the Reinsurers in the adjustment and settlement thereof.'*

Claims control (1)

Eagle Star v. Creswell

This is a claims control clause (described in the terms as a “*claims co-operation clause*”):

“CLAIMS CO-OPERATION CLAUSE

The company agrees:

- (a) To notify all claims or occurrences likely to involve the Underwriters within 7 days from the time that such claims or occurrences become known to them.*
- (b) The Underwriters hereon **shall control** the negotiations and settlements of any claims under this Policy. In this event the Underwriters hereon will not be liable to pay any claim **not controlled** as set out above. Omission however by the Company to notify any claim or occurrence which at the outset did not appear to be serious but which at a later date threatened to involve the Company shall not prejudice their right of recovery hereunder.”*

The Ethniki

*"Notwithstanding anything herein contained to the contrary, it is a **condition precedent** to any liability under this policy that the reassured shall, upon any knowledge of loss or losses which may give rise to a claim under this policy, advise the underwriters thereof by cable within 72 hours; the reassured shall furnish the underwriters with all information available respecting such loss or losses, and the underwriters shall have the right to appoint adjusters, assessors and/or surveyors and to **control** all negotiations, adjustments and settlements in connection with such loss or losses".*

Claims control (2)

RSA v. Dornoch

*Notwithstanding anything herein contained to the contrary, it is a **condition precedent** to any liability under this policy that:*

- (a) the reassured shall upon knowledge of any loss or losses which may give rise to claim under this policy, advise the Underwriters thereof by cable within 72 hours¹;*
- (a) the reassured shall furnish the Underwriters with all information available respecting such loss or losses and the Underwriters shall have the right to appoint adjusters, assessors and/or surveyors and **to control** all negotiations, adjustments and settlements in connection with such loss or losses.*

¹Notification; c.f. with *ALG v. Faraday*

Cut-through clauses

- Sanctity of privity of contract under English law
- Requires express agreement of reinsurer
- Even then, if the cedant is insolvent, cut-through may not be permitted (as a “priority”) – local law / regulatory issues
- Contracts (Rights of Third Parties) Act 1999 normally excluded
- In any event, does the reinsurance “confer a benefit” on the insured?

Applicable law

- Foreign law for the underlying insurance; English law for the reinsurance
- Effect of general words of incorporation
- Dangers of importing English law concepts into local law
- Back to back cover: *Wasa v. Lexington*
- Jurisdiction clause

Wasa v. Lexington (1)

The insurance contained a 'Service of Suit' clause

It was common ground that the courts of Washington State were courts of competent jurisdiction where suit was properly brought in accordance with that agreement.

The decision on coverage was a unanimous decision of the state Supreme Court.

Wasa did not say that it was unjudicial, perverse or contrary to law.

The Law Lords, however, stressed the fact that the policies were not back to back in the sense of applicable law since the reinsurance was governed by English law.

Lord Mance: The reinsurance slip construed according to purely English law principles, covers only property damage which occurred during the three year reinsurance period.

Lord Phillips: the vital question in this case is: did the parties to the reinsurance implicitly agree that whatever law might be applied to the interpretation of the primary cover, and whatever result this might produce, would apply equally to the reinsurance?

He said that if they did, this would effectively be to treat the contract of reinsurance as one to indemnify the primary insurer in respect of any liability sustained under the primary cover. That is not the position under English law.

Wasa v. Lexington (2)

English law continues to support the presumption of back to back cover in the case of proportional facultative reinsurance.

But creates scope for a gap in cover in uncertain circumstances, most notably where it is considered by an English court that the construction of the terms of the original policy by a foreign court is fundamentally at odds with the position under English law in a manner which the parties could not have contemplated at the time of the contract.

It is impossible now to predict the circumstances in which reinsurers will be permitted to escape indemnity.

Pre-dispute resolution

- The London Market has a wealth of expertise – it should be utilised by reinsureds
- London brokers will help reinsureds understand how to present claims and file adequate proofs of loss
- Brokers will highlight points of importance before a dispute arises between reinsurers and reinsureds

Dispute resolution

- Commercial Court, High Court in London
 - free
 - experienced judges
 - start to finish in 2 years or less
 - Market perspective through expert evidence

- Arbitration (Arbitration Act 1996, LCIA, ICC)
 - tribunal will typically include Market practitioners
 - can be an expensive and lengthy process

- Mediation (CEDR)
 - under-utilised in reinsurance disputes

Adrian Mecz

Partner

Chadbourne & Parke LLP

amecz@chadbourne.com

+44 20 7337 8040