## Possible Reforms to Insurance Contract Law :

## (3) Summary of Provisional Findings of BILA Sub-Group Addressing Reinsurance

### Introduction

- Most common or commonly litigated reinsurance legal problem areas do *not* necessarily arise out of inadequacies of English (insurance) contract law.
- R/i markets have long-established tradition of *self-help/improvement* as trading entities and in market associations to refine wordings and develop good practice : discipline imposed by legally-established duties.
- Longstanding reliance upon *market arbitration panels*, emboldened by s.46 Arbitration Act 1996.
- Present focus most properly directed to where present English insurance contract law potentially prevents or inhibits the parties understanding obligations assumed or receiving help from the Court or arbitrators when calling for due observance of them, i.e. where:
  - Law is considered unhelpfully *out of step* with practice, perception of or justice between parties engaged in reinsurance business;
  - Judges themselves have been expressing *unease/uncertainty* in applying law, e.g. what duties apply independently from/in addition to those presented in the contract terms;
  - Participants in r/i market are straining unsuccessfully or unhealthily, to circumvent law, e.g. where rulings upon terminology used have made this difficult;
  - Uncertainty unnecessarily abounds.

### Issues causing concern

*1. Non-disclosure/misrepresentation – test for materiality*

In r/i sphere as elsewhere, disputes over correctness/completeness of information supplied still likely to arise, regardless of stringency of test/remedy. Perceive no marked support – post-*Pan Atlantic* ruling - for change in test of materiality. Problems in meeting test, more than in applying.

Given complex nature of subject-matter or nature of many reinsurance contracts or underlying business, lengthier and more detailed submissions or presentations may be required. Of itself, not necessarily unwelcome.

May reduce factual disputes if written records retained at time of placement etc. Creation of uniform r/i protocol re: what to be disclosed, difficult to prescribe.

2. ***Renewal - Duty of disclosure***

No apparent need to change/dilute duty incumbent upon cedant/broker upon renewal (in wake of recent reinforcement/restatement of duty by courts).

Uncertainty caused :

- where period of cover is expressed for more than 12 months and unclear reference to "subject to renewal" or similar; and
- where leading underwriter presented with different information to follower.

Likely to be overcome by attention to contract drafting and leading underwriter provisions respectively.

3. ***Retention/restriction of remedy of avoidance?***

Judicial criticism in *Pan Atlantic v Pine Top* : no satisfactory result where only remedy "all or nothing", but mixed views upon revised regime or basis for judicial discretion.

If avoidance confined to where loss connected to undisclosed/misrepresented facts : reduce deterrent of cedant/broker securing placement at reduced premium upon misleading presentation. Facing sanction only if loss occurs (crudely, "licence for poor presentation" replacing "licence for poor underwriting").

If avoidance confined to extreme cases of blameworthiness (even fraud) on part of cedant/broker for failure to make full and fair presentation, introduces unwelcome difficulties in distinguishing/establishing evidence of deliberate/reckless/innocent failures and reasonableness of reliance upon brokers in this context.

Some advocates for making avoidance dependent upon value actually placed on relevant material facts by reinsuring underwriter.

Meanwhile, voluntary continuation of contract – on terms – remains in settlement armoury of parties (where continuing commercial relations allow). Parties in reinsurance context may also contract out, but doubtless if MIA 1906 or other provisions to be reformed more generally, beneficial to include reinsurance, if not in identical fashion.

4. ***Reliance on contractual exclusions/variation of duties and applicable remedies?***

Express contractual provision may meet need to reflect commercial wishes of contracting parties. May need to reconsider position of law, and ease with which refinements may be made, in light of attention these issues are continuing to receive from higher courts in the present film finance cases (*Rojak*, *Phoenix* etc.)

5. ***Duty of good faith – post-placement***

Since decisions in *The Star Sea* and *Merc-Scandia*, ambit/effect of breaches of duty of good faith not wholly resolved or certain. Still unattractive task for insurer to rely upon to avoid where right not otherwise provided for in contract.

Not immediate cause for concern for either party to reinsurance contract where at liberty to provide in contract (as conditions precedent), duties to be observed post-placement.

6. ***Warranties***

Still found in reinsurance contracts. Present status of law *is* unsatisfactory. Imaginative interpretations by courts have produced different results where describing statements of initial fact / promises of future compliance. Further uncertainty created by severability/confinement of warranties to specific obligations, even if implied warranties more of concern in maritime cases.

Term best avoided. Reinsurance contract draftsmen should rely upon alternative terminology. More positive reform likely to be desirable in light of higher court review of attempted exclusion/redefinition in film finance cases.

7. ***Agency – duties of brokers/intermediaries/sub-brokers***

Uncertainty still surrounding capacity (and if as agent, agent for whom) of brokers or other intermediaries at different stages of reinsurance contract cycle.

Also, concurrent or conflicting duties owed and recognised in contract, tort or of fiduciary nature. What duties owed by sub-broker or placing broker (where producing broker and other intermediaries in chain) of particular concern in reinsurance where commonly chain of intermediaries in different jurisdictions and long.

Formal contracts of engagement with intermediaries would provide certainty over scope of assumed responsibility, but contentious unless reviewed as part of GISC/wider market initiatives.

*8. Insurable interest*

Shortcomings in the MIA 1906 of what constitutes "insurable interest" have, for reinsurance purposes, left uncertainty when applied to different types of reinsurance contract. Further difficulties in applying principles of what is reinsured where reinsurance "placed" ahead of underlying contracts (discussed elsewhere).

*9. Premium payment*

Unsatisfactory provisions in MIA 1906 and past arcane practices and off-set accounting have caused confusion as to sanction for non-payment, whether lien for brokers, rights of set-off and/or personal liability for non-payment. Other difficulties upon insolvency etc.

Again, express contractual provision ought to impose certainty, but law remains too difficult to apply.

*10. Limitation*

In view of long tail of much reinsurance business, important for reinsurance market to resist too short a "long stop" period – as recently suggested by Law Commission.

Other problems remain. Limitation Act and other statutory provisions leave too much uncertainty over applicable trigger dates for causes of action arising in reinsurance context. Unsatisfactory inconsistency over whether necessary that party with right of action knew or could have known of right of action. Also, different periods apply to performance by broker and/or parties to contract, even where in same jurisdiction, even if all could be corrected by appropriate express overriding contractual provision.

**Additional Notes**

- ***Rules of construction/incorporating provisions***

  Rules of construction – parole evidence rule etc – have led to some uncertainty over upon what Court/parties may rely to establish intention, especially where conflict between slip and wording, but no rules can reconcile the irreconcilable. (Lord Mustill has correctly observed that House of Lords highly expensive "finishing shop" for wordings.)

  In case of facultative reinsurance cases, practice of incorporation of wordings has proved less a shortcoming of insurance contract law than in practice of constructing policies. Most obviously in context of "follow all terms etc". Plainly desirable to avoid incorporation and set out terms in full (forming part of LMP 2001 review).

- ***Definitions/"event"/aggregation generally***

  Important for courts, lawyers and market practitioners all clearly to distinguish between types of reinsurance contract in issue when drafting, reviewing or interpreting. Courts correctly encouraged to look at "factual matrix" including type of contract to help determine meaning.

- ***Waiver/estoppel***

  Given problems experienced by lawyers and market practitioners alike in applying principles in context of insurance and reinsurance placing, claims administration etc., potential need to develop reinsurance protocol or express contractual provisions in area of most common difficulty.

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