

MID-TERM BROKER CHANGES

The High Court case, [ARB International Ltd -v- Baillie](#), addressed issues arising from a Mid-Term Broker Change (“MTBC”), in particular relating to entitlement to brokerage.

The contracts which were affected by the MTBC included binding authorities, quota share reinsurance treaties and excess of loss and facultative policies. The court was satisfied that there was no recognised commercial practice against which the actions in the dispute could be measured and brokerage entitlement determined. The London & International Insurance Brokers’ Association (“LIIBA”) had circulated some draft MTBC “Best Practice Market Guidelines” in November 2010 but it was agreed that these have not become a market standard, nor has anything else.

It was accepted that in the case of excess of loss and facultative policies (other than policies written on a declaration basis) a broker’s commission is earned if the broker is “an effective cause” of the placement in question (i.e. when the risk is successfully placed). The judge’s view of the wider position was that commission is earned on each piece of business when it is written under a binding authority, ceded to a quota share treaty or declared under a declaration based policy.

The fact that the matter came to court at all highlights the value of drafting on any transfer, a Transfer of Business Agreement that expressly addresses all matters relating to the question of commission, in order to avoid disagreement. This will limit the room for doubt or dispute.

The judge offered some suggestions on matters which could usefully be agreed by the broking parties, including:

- *who should take responsibility for, and bear the costs of further work required on, business where the commission had already been received by the outgoing broker;*
- *who should enjoy commission earned on business that was not written under a binding authority, ceded to a quota share treaty, or written (declared) under a declaration-based policy until after the transfer (where that binder, treaty or policy had been placed before the transfer).*

The precedents section of the Griffin website contains a pro-forma “[Transfer of Business Agreement](#)”. This sets out details of the sort of things that brokers should be considering on transfer, including those raised by the judge, but also dealing with matters such as retention of documents, premium and claims issues together with accounting detail. It also provides for notice of disputes, negligence allegations and for necessary file access.

File access and file transfer instructions were in fact amongst the general issues that the judge considered. He was clear that the interest of the policy holder needed to be considered throughout the transfer process and indicated that as part of its duty to a client a broker was “obliged to carry out the client’s instructions to transfer client files and carry those instructions out promptly”. The “*treating customers fairly*” principle demanded this approach and the broker would have had no right to delay the transfer as a lever in the negotiation over commission entitlements.

However, he acknowledged that there could be limited exceptions for some parts of the contents of files and the need for arrangements to allow the outgoing broker future access but did not elaborate.

The Griffin "[Document Management Guidelines](#)" contain guidance on "Transfer of Records" and other aspects of document management. These include practical guidance such as agreeing a list of records which are changing hands and getting agreement by the incoming broker of responsibility for the documents which are being transferred. They also comment that the broker should only be handing over documents which it has held on behalf of the client. A Griffin Bulletin "[Production of Documents](#)" sets out detail of "Documents Held on The Client's Behalf".

Where, as in this case, there is no formal written agreement relating to a transfer, the question of whether there was a verbal agreement between the brokers as to commission entitlement is likely to arise. Assessment of this will necessitate hearing witness evidence and considering correspondence which will involve time and expense and is not likely to enhance either broker's reputation. From a risk management point of view, where possible, brokers should always try to avoid such problems arising by reaching an agreement that is confirmed in writing.

This bulletin is for general information purposes only and does not provide a comprehensive or complete statement of the law relating to the issues discussed nor does it constitute legal advice. In addition, by its nature, this bulletin may be superseded by subsequent regulatory or legal developments. Professional advice should be sought where appropriate in relation to any particular circumstances.

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