THE GRIFFIN INSURANCE ASSOCIATION

WHEN "AS ORIGINAL" DOESN'T MEAN "AS ORIGINAL"

GENERAL WORDS OF INCORPORATION

It has long been common practice in the reinsurance market to use "general words of incorporation", such as "As original", to incorporate into a facultative reinsurance contract the terms and conditions of the underlying policy. Sometimes a fuller wording is adopted, such as "to follow the same terms, exclusions, conditions definitions and settlements as original", but the intention and effects are broadly the same. This practice has often been criticised by the Courts because "as original" or similar wordings do not have the effect of incorporating everything from another contract and thus, may not incorporate what you (or your client) think they incorporate.

THE ISSUE

The use of general words to incorporate a direct insurance wording into a reinsurance cover is intended to ensure back-to-back cover for the reinsured and to avoid having to draft a full reinsurance wording.

However, many of the provisions in a primary insurance policy, if incorporated wholesale and without modification, may simply not be appropriate or make sense in a contract of reinsurance. Any mis match of terms and expressions may lead to some uncertainty due to interpretation difficulties. For instance, a primary insurance may contain references to "assured" and "insurer"as well as notification and claims control provisions which may be redundant, meaningless or contradictory if incorporated in a reinsurance context. In addition, "as original", or any similar formulation, cannot have the effect of incorporating the entirety of the underlying policy. There are certain clauses, such as governing law/jurisdiction and arbitration clauses that can only be incorporated into another contract by specific reference., In AIG Group (UK) Ltd -v- The Ethniki [1998], it was held that the inclusion of the words "as original" in a reinsurance slip policy was not sufficient to incorporate an jurisdiction clause contained in the underlying insurance. Similarly, in Trygg Hansa Insurance Co. Ltd. -v- Equitas Ltd. and Others [1998]. The Court held that words in the reinsurance contract requiring the reinsurer to follow "the same terms, exclusions, conditions, definitions and settlements as the Policy of the Primary Insurer" were not sufficient to incorporate an arbitration clause in the underlying contract. The Court held that specific reference to the arbitration clause was required to incorporate it.

The extent to which general words succeed in incorporating terms from other policies was examined in CNA International Reinsurance Co. Limited -v- Companhia de Seguros Tranquilidade SA (unreported). In this case the Court had to consider whether the reinsurance incorporated the terms of the underlying standard form Lloyd's Policy covering cancellation of a series of concerts by Placido Domingo on the grounds of ill-health.

The Court held that the underlying policy had been incorporated into the reinsurance but this still created difficulty as the Court had to interpret a direct policy which had "obscure" (and meaningless terms which gave rise to ambiguity and confusion.

The Court held that it was required to give effect to the incorporated terms as far as this was possible and would treat references to "assured" as if they meant "reinsured" and would consider each clause from the direct policy that was being relied on to see if it was applicable

to the reinsurance and, if so, what it meant in such a context. Certain clauses would be meaningless; others could be adopted in a modified form.

The problem with this approach it that it is uncertain how a Court will resolve inconsistencies between the reinsurance and the direct insurance wording and this it may give rise to unwelcome results for a broker's client. For instance, a condition precedent in the direct policy that the assured was not to admit liability, was held to be incorporated into the reinsurance policy in full. Similarly, a claims control clause was incorporated into the reinsurance giving reinsurers control of any claim under the direct policy.

CONCLUSION

If "as original" type wording is to be used in a reinsurance then a broker should consider whether the reinsurance wording needs to specifically exclude any clauses in the direct insurance that do not "work" or give rise to ambiguity if incorporated into a reinsurance contract. Furthermore, the reinsurance will need to specifically state what law and jurisdiction applies as this cannot be incorporated from the direct insurance unless specifically addressed in the reinsurance. If care is taken, it should still be possible to agree the terms of the reinsurance by specific reference to appropriate clauses in the underlying policy without necessarily having to produce a full wording for the reinsurance.

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