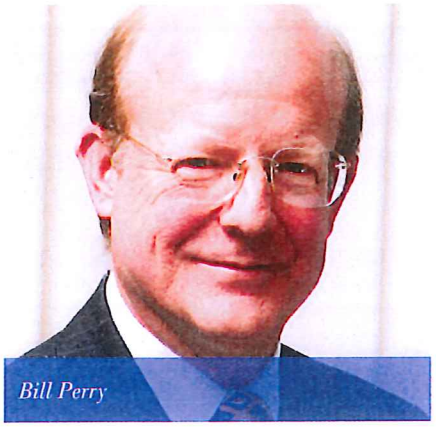
Courts back "follow the leader" clause on claims

Recent English cases reinforce the principle that following markets will be forced to pay claims as settled by their expressly designated lead underwriter, as Bill Perry, senior partner of Carter Perry Bailey and immediate past president of Insuralex, explains.



Bill Perry

It has recently been held by the English courts that where there is a "follow" clause by which a following market agrees to follow the claims settlement of designated lead underwriters, the courts will enforce that agreement regardless of any agreement to the contrary entered into between the lead underwriters and the insured.

That is the warning of Bill Perry, senior partner of Carter Perry Bailey LLP, speaking in the context of the *San Evans Maritime Inc & Ors v Aigaion Insurance Co*, decided by the Commercial Court in February of this year. He observes that this reflects a similar attitude to upholding "follow the leader" provisions as the court displayed in 2011 when it found that MMI would have to follow AXA's claim settlement even if the insured had been operating its vessel in breach of warranty (*P T Buana Samudra Pratama v Marine Mutual Insurance Association*). He suggests that as the English courts will enforce the language used, it is ever clearer that contract certainty means giving careful thought to all "follow" clauses, whether "follow the leader" or, in reinsurance, "follow the settlements".

"The courts have made it clear that they will tend to enforce the terms of follow clauses," says Perry. He continues: "In reinsurance, a reinsured will generally benefit from a strong 'follow the settlements' clause. However, a reinsurer may wish to be involved in claims settlements, particularly in certain facultative arrangements. If reinsurers wish to make their own judgement, they need to ensure that the contract is made very clear from the outset, using claims cooperation or claims control language and ensuring that there are not inconsistent follow clauses. To the extent that co-insurers want to make their own decisions, they must eschew 'follow the leader' provisions."

The San Evans dispute

A vessel was insured under two separate marine hull policies: one for 50 percent by three Lloyd's syndicates, Catlin, Ark and Brit; the other for 30 percent by a Greek insurer, Aigaion. The Aigaion policy contained a follow clause obliging Aigaion "to follow London's Catlin and Brit Syndicate in claims excluding *ex-gratia* payments".

The syndicates settled with the insured but their settlement agreement stated that the syndicates settled for their respective participations only, did not participate in the settlement in the capacity of a leading underwriter under the policy and did not bind any other hull insurer.

The insured asserted that under the follow clause Aigaion was obliged to follow the syndicates' settlement. Aigaion argued that as the syndicates' settlement was expressly not binding on other insurers, it had no obligations under the follow clause. The court found that under the follow clause the syndicates did not act as agents for Aigaion—under the clear words of the clause Aigaion had simply agreed with the insured (who was entitled to rely on that agreement) to follow the syndicates' settlement.

Global challenges

Perry adds that the international nature of many cases gives rise to a familiar but wider challenge for the reinsurance industry: contracts involving different jurisdictions using different assumptions, sometimes not matching as intended when a claim is later disputed. Illustrating this he points to another case this year, *Amlin Corporate Member Ltd & Ors v Oriental Assurance Corporation*, in which an insurance policy and reinsurance cover designed to complement each other were later disputed. In that instance, the court ruled that the language used was "significantly similar" to make it plain that they were intended to work back to back.

"The courts will help if it is clear that the contracts were intended to operate back to back. But it is important to try and be as clear as possible in the language used on both sides because the courts will not expand the reinsurers' basic contractual liability. As in Aigaion," Perry says, "clarity of language is paramount."

He adds that the problem remains that of different laws affecting similar language—a problem with which he is particularly familiar following his role in representing AGF successfully in the House of Lords in the well-known case of *AGF and Wasa v Lexington*.

He notes that not only do many such cases end up in English courts or arbitration, but other countries' courts and tribunals may also look to English judgments and practice for guidance.

For global re/insurers, it is therefore important to use a law firm both familiar with the legal landscape in the UK and able to call on expertise globally. Carter Perry Bailey has the advantage of being the exclusive UK member of Insuralex, an international grouping of independent law firms specialising in insurance and reinsurance law, of which Perry is the immediate past president. This gives Carter Perry Bailey and all Insuralex members access to each other's expertise worldwide, for use in cases and transactions as needed.

"Insuralex is the only Chambers-recommended body of this nature and it gives us that cutting edge when dealing with international disputes," says Perry. "We are also very close to the action in London and our lawyers have been actively involved in a number of the cases that have generated critical decisions for the industry (as indeed have other Insuralex members in their respective countries)." ■

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