**[SLIDES]**

[SLIDE 1]

**FACULTATIVE CONTRACTS: FOLLOW THE SETTLEMENTS AND CLAIMS CONTROL CLAUSES**

**Julian Burling, Serle Court**

**AIDA Reinsurance Working Party**

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[SLIDE 2]

**Facultative reinsurance**

* Large/difficult risks
* Reassured wants to choose cessions
* Fronting

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“There are only two rules, both obvious. First, that the reinsurer cannot be held liable unless the loss falls within the cover of the policy reinsured and within the cover created by the reinsurance. Second, that the parties are free to agree on ways of proving whether these requirements are satisfied. Beyond this, all the problems come from the efforts of those in the market to strike a workable balance between conflicting practical demands and then to express the balance in words.”

*Hill* v *Mercantile & General* [1996] LRLR 341, 350 per Lord Mustill

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**Follow the settlements clause**

“Being a Reinsurance of and warranted same gross rate terms and conditions as and *to follow the settlements* of [the reassured] ...”

“J”, “LUNMA Full reinsurance clause”.

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*Without* follow settlements clause:

Third party judgment against reassured may not be enough to establish liability of reassured under underlying insurance: *Hayter* v *Nelson* [1990] 2 Lloyd’s Rep 265, 271, Saville J,

*Wasa* v *Lexington* [2010] 1 AC 180, 200 Lord Mance

Settlements without judgment will not establish liability under underlying insurance:

*Commercial Union* v *NRG Victory Reinsurance* [1998] 2 Lloyd’s Rep 600

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*With* follow settlements clause:

“... the effect of a clause binding reinsurers to follow settlements of the insurers, is that the reinsurers agree to indemnify insurers in the event that they settle a claim by their assured, i.e., when they dispose, or bind themselves to dispose, of a claim, whether by reason of admission or compromise, provided that the claim so recognized by them falls within the risks covered by the policy of reinsurance as a matter of law, and provided also that in settling the claim the insurers have acted honestly and have taken all proper and businesslike steps in making the settlement.”

*Insurance Company of Africa* v *SCOR* [1985] 1 Lloyd’s Rep 312, 330, Robert Goff LJ

Onus on reinsurer to establish settlement not reasonable or in good faith:

eg *Charma*n v *GRE* [1992] 2 Lloyd’s Rep 607

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**Claims clauses**

* Claims co-operation clauses v claims control clauses (esp in fronting policies)
* Claims co-operation: consultation; sometimes prohibits settlement without reinsurer’s written approval
* Claims control: right of insurer to determine/take over conduct of proceedings
* Where no claims clause, reinsurer has no right to be consulted about or involved in settlement of claims , or amount of settlement: *Charman* v *GRE*
* Inconsistency between claims clause requiring reinsurer’s approval of settlements and follow the settlements clause – need for reassured to prove liability: *ICA* v *SCOR*
* Where claims control/requirement for reinsurer consent is *condition precedent*, duty not to withhold consent unreasonably: *Gan* v *Tai Ping (No.2)* [2001] Lloyd’s Rep IR 667

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**Compromise?**

1. Cedant to notify reinsurer of (a) [circumstance likely to give rise to a] claim under direct policy [in excess of specified limit], irrespective of whether the Cedant considers that it is or is likely to be liable in respect of such claim, and (b) Cedant’s estimate of cost of claim.
2. Reinsurer entitled at its option to determine the adjustment, conduct, defence, compromise and settlement by the Cedant of any claim in excess of specified limit and any appeal from any judgment given or arbitral award made for or against Cedant.
3. Subject to (2), Reinsurer shall follow the settlements (including any compromise payments and, where they have been agreed by Reinsurer, ex gratia payments) of Cedant, irrespective of whether Cedant’s liability has been proved, and shall be bound by any judgments/ arbitral awards against Cedant.