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Assigning your contracts – a timely reminder

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Almost every commercial contract we see contains a small (in stature, but big in potential impact) boilerplate clause (typically towards the base of the document) that enables one party (or each party, in some cases) to assign or transfer their rights to another party. This provision is particularly important in insurance product distribution arrangements.

In particular, you should consider:

1. ensuring your standard TOBAs and binders with your brokers and coverholders contain clauses to enable you to transfer all (or part) or your rights to someone else, such as a new underwriter / capacity provider or another group company (subject always to any FCA rules and regulatory requirements); and
2. whether to require your insureds to include a clause in their standard terms of business and/or material business contracts permitting them to assign their rights to their insurer. This will make it easier for you to step into their shoes when seeking to recover your own losses. Many such documents that we have seen do contain such clauses, but not all do, and the case below highlights the risks if you get it wrong.

A recent dispute is a very good case in point on this topic. A French aviation company, Dassault Aviation entered into a standard contract to supply 2 aircraft (and related support services) to a buyer. The buyer entered into a separate contract with the Japanese coast guard for the onward sale of the aircraft. Naturally, the buyer considered its potential losses if the aircraft were delivered late and took out a Japanese insurance policy with a Mitsui Sumitomo without telling Dassault. You can probably guess what happened next…

The aircraft were delivered late. The Japanese coast guard claimed damages from the buyer who sought to recover under its insurance policy. The policy responded. Naturally, Mitsui sought to recover its losses from Dassault for the late delivery, in its capacity as an assignee of the buyer's rights under typical subrogration principles (as any insurer would).

The relevant contract of sale between Dassault and the buyer contained a clause preventing assignment without consent – this is very typical in commercial contracts. Dassault therefore defended the claim against Mitsui on the basis that the assignment to the insurer was unlawful without Dassault's consent, and the Court agreed: the insurer could not bring its claim against Dassault. Unsurprisingly, this is now being appealed and we await the outcome. Nonetheless, important lessons can be learned at this stage for both insurers and policyholders regardless of the conclusion.

For insurers, this case demonstrates that your prospects of recovering large sums from responsible third parties will depend on what the policyholder's contract says about assignment – so, you should get this checked as a condition of the insurance and prevent it being varied by the parties mid-term. This reiterates the need to carefully consider issues regarding assignment and any contractual provisions about obtaining insurance and risk allocation.

This case also reminds us that English Courts will generally not re-write contracts, even if it may be arguably in the public interest to do so – they will try (as far as possible) to enforce the wording agreed between the parties. It would not (objectively) have been unreasonable to allow the insurer to recover its losses from the breaching French manufacturer. However, as this contract broadly prohibited assignment, the Court would not re-write that to permit assignment in these circumstances.

It is also worth noting there is a specific situation under English law which will also block an insurer's subrogration right. Take the common situation where an insurer has underwritten a certain risk, such as wedding insurance. The policyholder makes a claim and the policy responds. If the policyholder entered into a wedding contract or standard terms of business which contained a contractual obligation to require the policyholder to obtain insurance to cover their losses, the parties will have agreed that the insurance will cover the relevant losses. The insurer cannot then pursue (via subrogation) the wedding venue separately to recover its own losses.

We have seen this happen frequently over the past 3 years with business interruption policies during the COVID-19 pandemic, particularly with wedding venues who (like many) were particularly exposed during the various periods of enhanced government restrictions. To de-risk this situation, you may want to add an additional question into your (or your brokers') pre-built question matrices to ask whether your insureds are entering into the policy because they feel they should, or they are contractually required to do so. If the latter, you can then make a decision whether to insure the risk (or not) or take whatever other underwriting action is appropriate.

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