THE LAW OF REINSURANCE

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FOREWORD

The general contract lawyer who strays into reinsurance could well feel that he (or, of course, she) has entered a different world, one where the conversational currency of the natives is to do with fronting and retrocession, treaties and quota shares, fac/oblig arrangements and scratching of slips. All very baffling.

In reinsurance, as in other fields of law, it is of course essential to understand the terms in which business is transacted in the marketplace. But when that has been done (a task which the authors of this new and welcome book make easy) the familiar landscape of contract becomes quickly recognisable: there must be an offer and an acceptance, the terms of the contract must be interpreted, and so on. Not baffling at all.

But a contract of reinsurance has its own special characteristics, addressed by the courts in an unending series of cases coming before them. So it is necessary for the newcomer to know what has been decided and, in particular, what has been decided recently.

This book provides an excellent guide. The authors lucidly explain the underlying principles and offer expert (not always uncritical) summaries of the relevant case law, all in short, easily assimilable paragraphs. London is rightly proud of its dominant role in the world reinsurance market, and a book such as this can only serve to entrench that position.

Lord Bingham
London
December 2004

PREFACE

The London market is one of the world's largest reinsurance markets. It is a focal point for reinsurance capacity and underwriting expertise and takes a key role in difficult and complex risks. It has grown from modest beginnings at the end of the nineteenth century to one of the dominant reinsurance marketplaces in the world. The London Companies' market together with the Names of Lloyd's provide reinsurance cover to insurers throughout the world. The industry has developed flexibly, adopting new products and methods of reinsurance to suit an insurer's every need. Brokers in the London market now offer innovative ways of reinsuring larger and larger risks in complex and sometimes impenetrable reinsurance programmes.

Most reinsurance contracts made in London are subject to English law, making the law of reinsurance in England and Wales of real importance to the world's reinsurance industry (it has further significance as the point of reference for the law of Bermuda, which has developed as a reinsurance market). As reinsurance has become more complex and the amounts of money at stake have grown, so, inevitably, has the quantity and complexity of litigation. Over the past two decades the insurance industry worldwide has suffered a number of extraordinary financial setbacks arising from long tail liabilities for pollution and asbestos related claims, financial collapses and natural and man-made catastrophes. The old-fashioned notion of insurers and reinsurers paying claims on the basis of a 'gentleman's agreement' without contesting whether the claims fall within the strict terms of the reinsurance is long gone. Now reinsurance contracts are carefully examined for conditions, warranties or exclusions that might relieve a reinsurer of a very expensive liability. Both reinsurers and reinsureds have turned to the lawyers and to the courts to help apportion some of the substantial losses suffered by the market in recent years. As the sums at stake are often very large, parties have often been willing to contest every possible point in the case, raising numerous and convoluted claims and defences. Additionally, a reinsurance contract may range from the shortest slip into which must be implied or interpreted most of the essential contractual terms to the longest and most complicated bespoke wording. As a result of these factors, coupled with the many layers of a typical reinsurance programme, the law of reinsurance can often appear to be an unfathomable maze of intricate and opaque concepts. It is too easy to meet a difficult subject with a difficult book, which is as long and

convoluted as the concepts that it is attempting to unravel. We have tried to cut through the complexity and the detail and refine the case law into a concise and accessible structure. We hope that this book will provide a practical guide to difficult topics and make the essential answers quickly and readily available. However, at the sometimes blurred dividing line, between insurance and reinsurance we do not purport to provide a comprehensive explanation of insurance principles and case law and wholeheartedly recommend readers to also refer to the very well-known leading texts in that area.

The law of reinsurance has blossomed from its foundations in the law of contract and has developed out of and, in some respects, even away from the law of insurance. Not only do reinsurance lawyers have to deal with particular market jargon and peculiar practices, but the particular areas of the law that have their only or main application in the reinsurance field such as follow settlements or claims cooperation clauses. It is upon these particular peculiarities and niceties of reinsurance law that this book focuses its attention. What we have attempted to do is distil the principles of law that apply only or mainly in the reinsurance context, without lengthy repetition of more familiar general contractual or insurance principles. What we have not set out to do is to restate insurance law. This is a book that assumes a basic knowledge of insurance law and moves quickly on to look at only how insurance principles translate to the reinsurance context or at exclusively reinsurance concepts.

A further aim of this book is to achieve a review of reinsurance law without lengthy quotations from case law or recitation of factual details in each case. We hope that this book, and in particular its footnotes, will indicate the way to all the relevant case law on a particular topic, so that the reader can then go straight to the cases to research further factual detail or judicial discussion. One continuing frustration to the academic researcher and the practitioner is the prevalence of arbitration in reinsurance. Some of the finest judges and lawyers in the reinsurance field have produced detailed and illuminating judgments in difficult areas of reinsurance litigation, but the learning remains hidden. Due to the confidential nature of arbitrations, it normally requires both parties to consent to publication of the existence, never mind the content, of arbitration decisions. As a result the majority of contested decisions are not available to the researcher and the reinsurance wheel has to be reinvented time and again. For reasons of confidentiality there are numerous decisions of which we are aware, but unfortunately cannot be referred to in this book. It is an omission that we regret, but can do little to rectify.

The structure of this book tries to accommodate both the interested cover-to-cover reader as well as being an immediately accessible reference guide. The opening chapters address and define reinsurance in its many different guises, looking at the many varied types of contract that are commonly offered and then go on to look at the legal principles involved in the formation of each type

of contract. We have sought to explain and categorise slips, slip policies and formal policy wordings going on to explain how terms in a reinsurance contract should be discovered and interpreted. The special principles relating to the different types of follow settlements causes are examined in detail, together with the reinsurance aspects of aggregation and limitation. The rights of the reinsured and reinsurer are compared and contrasted, and the conflict of follow settlements and claims control are discussed. Many aspects of insurance law such as the duty of utmost good faith and the particular effects of breaches of conditions and warranties have been developed in the reinsurance context. Indeed, in an interesting reversal of the norm, some of the leading cases that we discuss are reinsurance cases that are also used and referred to in the insurance field. Finally, we deal with aspects of conflicts of laws and jurisdiction that appear in reinsurance litigation due to their frequently international nature: involving parties and risks in different parts of the world.

We must thank Oxford University Press for their good-natured patience and encouragement. Also thanks go to our insurance and reinsurance colleagues at Devereux Chambers for their suggestions and comments (sometimes conscious and sometimes not), and those who proofread sections of the text. We are also indebted to Lord Bingham for agreeing to write the foreword. The law is as stated at December 2004.

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Devereux Chambers, January 2005.

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