

Lessons in Law: Eleven Insights into (Re)Insurance Law

I was asked recently to identify for new insurance lawyers ten interesting English (re)insurance law points I have learned after 30+ years in the industry. Someone then suggested that we publish them. I hope they will be of interest, both for those at earlier stages in their career, and for those at a similar “experienced” age to me who may well have different views. I cheated with eleven, as I could not decide which one to give up. So here we go:

1. Duty of Good Faith

Insurance contracts have historically been one of a limited number of contracts attracting a duty of good faith. This is a duty (originally established in the 18th century and now based in statute) to disclose material facts and not to make fraudulent claims. It is not some sort of duty of general fair dealing, although some in the market treat it as such. It is one of the reasons for the success of the English market. Commercial insurers have to be told what is material for their underwriting and therefore do not have the significant due diligence costs generated on, say, an M&A deal of similar value.

2. Insurance Warranties and Conditions

The effect of warranties and conditions is reversed from the position under an ordinary contract. A warranty breach historically terminated cover (but now suspends cover until, if possible, remedied) rather than just providing a right to damages. A breach of a condition provides only a right in damages, not a right to terminate the contract. Warranties (and conditions precedent) are horrible

terms for an insured/reinsured, losing cover regardless of any loss caused to the insurer by breach. But do not give up, as some insurers will only take the point if prejudice is suffered. There are significant differences between insurers generally in their approach to claims.

3. Treatment of Settlements or Judgments

Do not think that a settlement or even a judgment automatically binds a liability insurer or a reinsurer (unless they have been involved/consented). It is open to either to contest whether there was a liability at all or the amount of the settlement. Reinsureds often get protection on this through a “follow the settlements” clause, but care is needed as the two types have very different effects, with one leaving open to challenge underlying legal coverage issues under the insurance. There remains some doubt over the meaning of “follow the fortunes” wording one occasionally still sees.

4. Construction of Insurance Contracts

After regulatory changes in 2004 removing “deal now, detail later” and requiring contract certainty, there

is no doubt that coverage disputes have reduced. But there are still plenty of them, with some contracts being a patchwork of standard and sometimes inconsistent or unclear wordings. Even where one has clear words such as an “event”, there is often scope for dispute on the facts. Unlike the US, contracts have to be construed objectively only in light of their general background and purpose – without evidence of the parties’ subjective intent, their wording negotiations and anything that happened after conclusion of the contract. An English insurance lawyer must be a master of the principles of contractual construction.



5. The “Hold Harmless” Principle

It is a legal oddity, but an insurer/reinsurer’s obligation is technically to prevent the loss occurring in the first place and is therefore in breach of contract once the loss happens. This used to have potentially significant consequences in preventing any consequential loss claims where there is delay in payment of the claim. It has now been moderated to some extent by statute.

6. Insurance Brokers

You have to be a fighter to act for brokers, who are often the target of claims. The one broking duty that particularly rankles is the duty to avoid a risk of a dispute through unclear policy wording, bearing in mind that wording can often be said to be ambiguous. A broker faces an exposure even where the issue raised by the insurer would not be successful at trial but generates a reasonable settlement (see *FNCB v Barnet Devanney*) – and it is very difficult to challenge a settlement for which a wide range is usually reasonable and still less where backed by legal advice. Butcher J (as he then was) has tried in recent times to restrict this consequence, albeit his attempts have been since constrained by the Court of Appeal. The oddity is that it may in the right circumstances be sensible to advise a broker to indemnify the insured and take control itself over the action against the insurer.

7. Allocation

Leaving to one side the oddities of mesothelioma claims, allocation is a question of looking to the loss as

settled (or, strictly, as really settled) by the insured/reinsured. There is no issue on a post settlement reasonable allocation by an insured/reinsured, unlike in the US, and certainly no “all sums” doctrine here.

8. Nature of Reinsurance

It is also an oddity that English law still cannot reach a clear decision on the nature of a reinsurance contract – is it an insurance of the underlying risk or a type of liability insurance of the reinsured? Over the years, insurance judges have found ways to express their views but in obiter dicta and they go both ways. This might have had significant consequences on limitation if time starts to run from the underlying loss rather than the date of settlement or judgment on the insured’s own claim against its insurer. We now seem to have an illogical fudge where a reinsurance is probably treated as an insurance of the underlying risk but time is treated as starting as if it were a liability insurance.

9. “Back-to-Back” Reinsurance

A proportional reinsurance generates a strong presumption that it should be construed “back-to-back” with the underlying insurance, even if the underlying insurance is governed by a foreign law, but caselaw leaves open whether this applies to “fundamental” terms of the reinsurance. It is open for debate in particular whether a proportional reinsurance of business governed by an identifiable US law will pick up liability on an “all sums” basis, not least if “all sums” was only established under the relevant State law after inception of the reinsurance.

10. Scope of “Follow the Settlements” Clauses

It is still undecided whether a “follow the settlements” clause binds a reinsurer to a commutation (or at least the IBNR element of it). It has been addressed with differing answers in various arbitrations.

11. Market Preference for Arbitration

Finally, historically a dispute was not the ‘done thing’ in the London reinsurance market, so reinsurance contracts will usually provide for arbitration to keep the dispute confidential. This has had the consequence that many reinsurance decisions which might have developed English law have never seen the light of day, and the same points are reargued from time to time. A similar point applies to Bermuda Form insurance arbitrations. There is a lot to be said for agreement in the market to at least a presumption of publication of awards, anonymised if necessary.

I am sure plenty of new interesting points will continue to arise, but I do wonder whether a number of the above would still be on someone’s list in 30 years’ time.

CHRISTOPHER FOSTER

Global Head of Insurance
& Reinsurance

T +44 (0)20 7264 8088

M +44 (0)7795 368712

E christopher.foster@hfw.com

HFW has over 700 lawyers working in offices across the Americas, Europe, the Middle East and Asia Pacific. For further information about our (re)insurance capabilities, please visit [hfw.com/insurance-reinsurance](https://www.hfw.com/insurance-reinsurance).