



Entitlement to commission when brokers are changed mid-term

Useful guidance on mid-term broker changes has recently been provided by the Commercial Court. A mid-term broker change occurs where business is transferred to a new insurance broker prior to the end of the contract period.

In particular the court commented upon broker entitlement to commission in this context (and more generally) and also the relevance of market practice to a mid-term broker change.

The claim

In *ARB International Ltd v Baillie* [2013] EWHC 2060 (Comm), a Lloyd's insurance and reinsurance broker brought a claim against its former managing director (Mr Baillie) for alleged losses of over £1million arising out of a mid-term broker change.

ARB complained that Mr Baillie had negligently entered into disadvantageous terms on behalf of the company governing the payment of commission following the mid-term broker change. The contracts affected by the mid-term broker change included:

- Binding authorities¹;
- Quota share treaties²; and
- Declaration-based policies³.

The court dismissed the claim, holding that on the evidence, none of Mr Baillie's actions (whether taken individually or collectively) had been in breach of his duties owed to ARB.

Commission

The judge held that, in the absence of an express agreement, the following general principles can be applied to the earning of broker commission:

- A broker's entitlement to commission arises when business is:
 - written under a binding authority; or
 - ceded to a quota share treaty; or
 - declared under a declaration based policy; or
 - more generally when risk is bound.

- The entitlement remains even if premium is paid by instalments but may be affected if premium is earned prorate through the life of the contract.
- The arrangements for reporting will evidence when this has happened. It does not matter that the broker may have done nothing more since the binder, treaty or policy was first entered into.
- The commission remains related to the premium because the contractual obligation to pay commission engages when premium-generating business is written, ceded or declared.
- The broker still has functions to perform after commission has been earned.
- As part of its duty to a client, a broker is obliged to carry out a client's instructions to transfer files and to do so promptly (although not documents that belong to the broker).

Market practice

The judge found that there was no relevant standard or common market practice for a mid-term broker change. This is not surprising in light of the expert evidence to this effect and the high threshold that needs to be overcome to establish such a practice.

In particular the judge commented that the draft mid-term broker change "Best Practice Market Guidelines" circulated in November 2010 by the London & International Insurance Broker's Association (LIBA) "did not, and has not...become market standard. Nor did anything else in its place". Each mid-term broker change will depend on its own facts.

To minimise the prospect of disputes over mid-term broker changes, thought should be given at the outset of the relationship with each client as to the consequences which will follow from such a change.

¹ being an authority given by an underwriter to an agent to accept risks on the underwriter's behalf

² being a treaty reinsurance under which the reinsurer agrees to accept a specified share of risks ceded to the treaty at inception or over time

³ being policies involving periodic declarations of activity that engage risk and therefore cause premium to accrue

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