Simply a good time for good causes

Run off and Restructuring website (news)

8 April 2013

The panel, from left to right: Tony Weller, Citadel Risk; David Abbott, Clyde & Co; Jonathan Sacher, Berwin Leighton Paisner; Stephen Carter, Carter Perry Bailey: John Needham, Littlejohn

Norwich welcomed back members of the legacy market for one night of debate, drinks and tapas at the inaugural Simply RendezVous event. The evening proved a success not only for its lively discussion session but also as a fund raiser for good causes. A total of £2100 donated by sponsors and participants will be split between two charities: Growth and Goodwill for Africa and Macmillan Cancer Support.

Centrepiece of the night, held at La Tasca, Tombland, on 18 March, was a panel discussion chaired by Jonathan Sacher, partner in Berwin Leighton Paisner. To start the proceedings, John Needham, partner, Littlejohn reviewed the proposed changes to the way brokers handle client money in the light of the FSA consultation form CP 1220 (published last autumn – the paper from the consultation is expected in late summer this year). From an operational point of view, said Needham, this will bring huge changes with extra costs, resources and work required.

One important point for the legacy market, he stressed, both for brokers and for insurers, is the FSA's emphasis on legacy balances in brokers – 'it's a huge issue that is costing the market a lot to monitor and to manage.' The FSA paper says that brokers should clear out all of their old balances (excepting those that pre-date FSA supervision) within 13 months of the introduction of the new rules, with a possible transition period extending that to 18 months. After that, the proposal is that any remaining credits with brokers must to be given to charity. Insurers should be prepared for correspondence from brokers asking them to confirm any balances due.

Next on the bill, Tony Weller, CEO of Citadel Risk, gave a view of developments in the captive run-off market, with the focus on US and Caribbean jurisdictions. Despite a recent rise in activity and speculation over regulatory regimes (such as Solvency II), the key issues, he said, had not changed.

First, anyone running off a captive should consider some form of LPT negotiations. The major impediment to such negotiations remained the unwillingness of owners to pay for IBNR, which they often did not understand or regarded as a fallacy.
Second, the unrealistic expectations of fronting carriers. Along with US state regulators, their concern was that anyone

assuming the risk from the original carrier or reinsurer had sufficient funds to pay claims. However, their demands were often unrealistic as they did not really want deals to go through.

Third, the regulatory environment in the US which he said was 'a very mixed bag' and often unpredictable outside the 'big four' states. 'In terms of the run-off market in the US it is very much dependent on the state that is regulating the entity responsible for the ultimate liabilities. You have 50 different regulations, it's not just the statute it's also the education and the mood of the regulator, particularly in the smaller states.'

Despite these obstacles there was still a market issue to address, said Weller, namely 'a glut of captives that are very poorly capitalised … and never really got the economies of scale that they needed.' Yet many captive owners prefer to conduct the run-off themselves, 'taking the risk that the IBNR does not exist and hoping administrative costs are going to suck down and go away – and they never do.'

The discussion then moved on to consider the significance of two recent legal decisions, starting with Stephen Carter, artner, Carter Perry Bailey on the AstraZeneca judgment. Captive insurer AstraZeneca wrote liability cover for its parent company in the US and Canada, under a policy based on the Bermuda Form wording. Bermuda Form contracts, he explained, are normally governed by New York law with provision for arbitration under English law. In this instance the contract stated it was to be governed by English law and with no provision for arbitration.

AstraZeneca Insurance suffered a major loss as a result of claims against its parent relating to side effects from the drug Seroquel. The insurer settled a claim of $83.5 million and then attempted to recover from its reinsurers. The defendant reinsurers argued they were only liable if the underlying insured was subject to actual legal liability, whereas AstraZeneca had said it was entitled to recover the settlement as it was arguably liable.

The court's decision confirmed the existing position in English law that the insured must establish actual legal liability in the absence of any provision to the contrary in the policy, and that ascertainment of the loss by judgment or settlement does not automatically establish that there was actual legal liability. Second, the judge found that under English law there was no duty to indemnify the insurer against defence costs unless specifically provided for. On each of these points, the outcome might have been different had the contract been governed by New York law, or had it been drafted for English law. The lesson of this, said Carter, 'is if you take a contract drafted for one jurisdiction and apply another law to it, it may have knock on effects and unforeseen consequences.'

David Abbott, partner, Clyde & Co spoke on the recent ruling [Aioi Nissay Dowa Insurance Company Ltd v Heraldglen Ltd and Another] of the English Commercial Court, upholding the decision of an arbitration tribunal, that the World Trade Center attack comprised two events not one. This decision was in relation to the reinsurance of an aviation hull account, covering several aspects of liability from that of security firms through to property damage. The tribunal looked at it using the 'unities test' and found it to be two distinct events – two aircraft, two hijackings, two locations.

As to whether this decision creates a precedent, Abbott said it did not, because the task for the judge was merely to see whether the arbitration tribunal had erred in law – 'a different tribunal could have come to a one-event conclusion and that probably would not have been overturned either using similar analysis.' Another important factor would be the type of business re/insured – the definition of one event for a property book might differ from that for a liability book.

But while this decision does not create a precedent, said Abbott, 'it is influential – a future tribunal would have to explain why they came to a different conclusion.'