

**THE COMBINATION AND USE OF “AS
ORIGINAL”, “FOLLOW THE SETTLEMENTS”
AND “CLAIMS CO-OPERATION” CLAUSES IN
REINSURANCE CONTRACTS**



University of Oslo

Faculty of Law

Candidate name: 5037

Supervisor: Andreas Meidell

Deadline of submission: 01/11/2011

Number of words: 17,837

01.11.2011

Preface

I would like to thank the Scandinavian Institute of Maritime Law for the pleasant, interesting and inspiring environment. It was a great pleasure for me to be a part of the academic community at NIFS.

I would like to thank very much to my supervisor Andreas Meidell who was an invaluable discussion partner and who gave me many useful practical information and recommendations. In addition I also would like to thank Kaja de Vibe, Marie Falchenberg and librarian Kirsten H Al-Araki for their help.

In the end I thank my family for the patience and optimism during the writing process.

Oslo, October 2011

Author

Content

<u>1 Introduction</u>	4
1.1 The topic.....	4
1.2 The outline of the thesis.....	8
<u>2 Reinsurance – an overview</u>	9
2.1 Reinsurance as one of the alternative form for sharing the risk.....	9
2.2 The legal definition and nature of reinsurance.....	11
2.3 The function, purpose and benefits of reinsurance	12
<u>3 The relationship between the original insurance contract and the reinsurance contract</u>	14
3.1 Introduction.....	14
3.2 Reinsurance on the “same terms and conditions as original” insurance	15
3.3. The presumption of “back to back” cover.....	17
<u>4 The reinsurer’s contractual obligation to indemnify the cedant for settlements (“follow the settlements” clause)</u>	23
4.1 Introduction.....	23
4.2 Follow the settlements clause	24
4.3 The requirement to act honestly and take all proper and businesslike steps	26
4.4 The requirement that claims must fall within the terms of the reinsurance contract as a matter of law.....	28
<u>5 “Claims cooperation” clause and its interrelationship with “follow the settlements” clauses in reinsurance contracts</u>	33
5.1 Introduction.....	33
5.2 “Claim cooperation” clause.....	33
5.3 “Claims notification” clause.....	38
5.4 “Claims control” clause	40
5.5 Interrelationship of “follow the settlements” and “claims cooperation” clauses....	41
<u>6 Conclusion</u>	45
<u>7 References</u>	48

1 Introduction

1.1 The topic

Reinsurance is a global business by nature. It operates on the macroeconomic level and spread the risks not only between companies but also between countries and regions. The situation in the reinsurance market changed significantly during the last 20-30 years. It has changed from being a relationship based on trust and loyalty, so-called “Gentlemen Agreement” into more precise performance of contract rights and obligations. The reasons for this are changed economic situation and the fact that cedants previously took most of the risks, while nowadays cedants often keep only 5-10 percent of the total insured risk. It became more common to reduce the risk exposure by the use of reinsurance.

Under the ordinary insurance contract a person, who is exposed to risk transfers it to an insurer/ cedant who assumes the risk for a fee, insurance premium. Reinsurance objects usually involve significant property values which are often endangered and it is rather unusual that a single insurer is responsible for all risk and typically there is a need to allocate the risk among several insurers. Therefore, the insurer/cedant who already concluded an insurance contract with assured/ person effecting the insurance insures further a portion of his risk with another insurer/ reinsurer. As a result there are two contracts: original insurance contract and reinsurance contract.

The purpose of this thesis is to examine the relationship between the “cedant”/ “reinsured” and the “reinsurer” in reinsurance contracts.¹ Consequently attention will be put on the interrelationship and use of the most often disputed “as original”, “follow the settlements” and “claims cooperation” clauses in reinsurance contracts. Particularly this thesis will focus on analysis of problematic relationship and combination of “follow the settlements” and “claims cooperation” clauses in the reinsurance contracts. This work does not aim to provide an exhaustive analysis of all the legal questions that may arise, but seek to solve selected problems that illustrate main aspects of the topic.

The essential characteristic of reinsurance is that there is no contractual relationship between the assured/ person effecting the insurance and the reinsurer. Therefore, the original policyholder will claim against the cedant and can not go directly against the

¹ The clarification of terminology see in subchapter 2.1

reinsurer (see subsection 2.1). This can cause difficulties for the cedant in a situation where the cedant and reinsurer/reinsurers can not agree on the settlement.

The relevance and interest of the topic “The combination and use of “as original”, “follow the settlement” and “claims co-operation” clauses in reinsurance contracts” is also proved by the fact that there is very little Norwegian legal practice covering the reinsurance field. Most disputes are resolved through negotiations or arbitration but arbitration awards are very seldom published. There are only two Norwegian courts decisions that are directly related to reinsurance. In 2006 there has been taken a decision by Borgarting Court of Appeal which directly involved interpretation of claim cooperation clause in reinsurance contract.² Except the above mentioned case of Borgarting Court of Appeal there was only decision by the Supreme Court of Norway concerning reinsurance issue in so-called “*Vingtor*” case.³ On contrary the English law provides an extensive legal practice and a number of court decisions covering interpretation of the “as original”, “follow the settlement” and “claims cooperation clause” in reinsurance contracts.

Besides, until this time it is written not so much about reinsurance in Norway and this makes the topic of thesis even more interesting and actual. The main legal aspects of reinsurance contracts were discussed by Hans Jacob Bull⁴, Andreas Meidell⁵, Agnar Langeland⁶ and Kaja de Vibe⁷.

From the above mentioned it looks very valuable to look at the English law practice in this field. Therefore, this thesis will be mostly based on the English court decisions. However, it should be kept in mind that English interpretation tradition is different from the Norwegian one. Under the English law there is “four corners rule” principle and most emphasis is put on the contract wording.⁸ Instead under Norwegian law the negotiations between the parties and surrounding circumstances play very important role. Therefore it is obvious that Norwegian courts will not necessarily always accept the English courts position because the assessment of the issue can be different. However in practice the English court decisions usually have relevance for Norwegian courts especially if there is no other practice.

² LB -2005-136447

³ Rt-1956-249

⁴ Bull (2008)

⁵ Meidell (2006) pp. 203- 212

⁶ Langeland (2010) pp. 59- 80

⁷ Vibe (2006)

⁸ Poole (2010) pp. 234- 241

As was mentioned above particular attention in this work will be put on the relationship between the cedant and the reinsurer through the combination and use of “as original”, “follow the settlements” and “claims cooperation” clauses.

Historically the fundamental principle of reinsurance was the right of the cedant to indemnification. When a cedant reinsures something he needs to have “back to back” arrangement in order to know that he will get coverage from the reinsurer. Otherwise, it will not work and will be not satisfactory for the cedant, besides it will cause many discrepancies problems, for example as different deadlines to give notification can apply or choice of law. Therefore, the starting point always is “as original” clause that defines the scope of cover of the reinsurance contract. In order to establish the scope of cover, it is necessary to compare the original insurance contract and reinsurance contract. From the reinsurer perspective this is very important, because this defines what it was obliged to cover under the contract. If the cedant has paid to the assured ex-gratia (without legal liability) outside the scope of cover, the reinsurer always can refuse to indemnify even irrespective of “follow the settlements” clause. This is illustrated by *Forsikringsaktieselskapet Vesta v J.N.E. Butcher and Others* (“*Vesta v. Butcher*”) case.⁹ So, it may be assumed that “as original” provision is a point of departure for every reinsurance contract. There are two most common ways to handle “back to back” cover in the reinsurance contracts and that is by the use of “follow the settlements” or “claims cooperation” clause.

The development of practice of the “follow the settlement” clause can be explained by the above mentioned fact that the relationship between reinsurer and cedant was based on trust and loyalty. Under this clause the reinsurer agrees to indemnify the cedant for liability that he incurred under the original policy without the cedant’s liability being established. This clause gives the cedant a degree of certainty to recover from the reinsurer in a case of doubtful liability.¹⁰ Besides, on practice the cedant has its own interest in providing the correct settlement under the original policy, therefore reinsurers do not want to be involved in each case that is settled by the cedant, but rather prefer to rely upon its professionalism. However at the same time, the reinsurer does not want to pay for claims that fall outside the terms and conditions of the reinsurance contract. Therefore, if the reinsurer wants to have influence on the settlement made by the cedant they may choose to establish an alternative regime “claims cooperation” clause. In a situation where the

⁹ [1989] 1 Lloyd’s Rep 331 (HL)

¹⁰ Hoffman (1993) p. 663

reinsurer wants to have a complete control on the settlement “claims control” clause may be considered. Unlike “follow the settlement” clause the idea under “claims cooperation” clause is that a settlement should not be made without the approval of the reinsurer. The most difficult question that can arise is the legal consequences in case the cedant fails to notify the reinsurer prior to his settlement with the original insured and therefore fails to obtain consent of the reinsurer. The result in such case will depend on the construction of the words and whether the “claims cooperation” clause is an absolute requirement for coverage, the so-called a condition precedent or not. If a “claims cooperation” clause is defined as condition precedent and cedant failed to cooperate it is most likely that cedant will lose the right for compensation. If the “claims cooperation” clause is not a condition precedent its breach will probably not release the reinsurer from the liability of the claim. In particular where the cedant could prove its loss, the reinsurer will be liable under the reinsurance contract. On contrary if it is clear that reinsurer did not provide approval of the settlement “in bad faith” the cedant will be entitled to claim full compensation.

In the last chapter it will be discussed the main problem that arise with the combination and use of “follow the settlements” and “claims cooperation” clauses in the same reinsurance contract. In particular, whether the reinsurer/reinsurers are obliged by the “follow the settlements” clause in the situation where the conditions of the “claims cooperation” clause are breached. So, the relationship between these two clauses is problematic and can cause difficulty. The courts tried to solve this problem during the last decades and it seems that English courts have more clear position on this question. The central cases dealing with this issue are *The Insurance Company of Africa vs. Scor (UK) Reinsurance Company Ltd (“ICA v. Scor”)*¹¹ and *Eagle Star Insurance Company Limited v J N Cresswell and Others (“Eagle Star v Cresswell”)*.¹² In the last case the Court of Appeal concluded that the effect of the “follow the settlements” clause was nullified by the “claims cooperation” clause, which was formulated as a “condition precedent” to reinsurer’s liability.

¹¹ [1985] 1 Lloyd’s Rep 312

¹² [2004] EWCA Civ 602

1.2 The outline of the thesis

This thesis deals with various problems that arise in the relationship between the cedant and the reinsurer through the combination and use of “as original”, “follow the settlements” and “claims cooperation” clauses in reinsurance contracts.

Chapter 2 provides an overview of the nature of reinsurance as one of the alternative forms for sharing the risk, its legal definition as well as function, purpose and benefits of reinsurance.

Chapter 3 discusses the relationship between the original insurance contract and the reinsurance contract, the “as original” concept, problems that may raise with the incorporation clauses and the presumption of “back to back” cover. In addition the English court practice will be analyzed concerning these questions.

Chapter 4 examines and discusses the reinsurer’s contractual obligation to indemnify the cedant for settlements, the so-called “follow the settlements” clause under the recent case law. It will be analyzed the two main requirements that cedant should fulfill in order to get compensation from the reinsurer.

Chapter 5 examines and discusses general concept of the “claims cooperation”, “claims notification” and “claims control” clauses according to the court practice. The main focus will be on the problem issue concerning the coexistence between the “follow the settlements” and “claims cooperation” clauses in the same reinsurance contract.

Conclusion will provide a summary of and concluding remarks in relation to issues and problems accentuated in the thesis.

2 Reinsurance – an overview

Although it is not the intention of this thesis to discuss the nature of reinsurance this is important in order to give the reader a better understanding of the relationship between the reinsurer and the cedant and problems that will be later discussed between “as original”, “follow the settlements” and “claims cooperation” clauses in reinsurance contracts. It is first relevant to analyze the nature of reinsurance, define its legal definition, function, purpose and benefits. All this is important and necessary legal framework of the scope of this thesis.

2.1 Reinsurance as one of the alternative forms for sharing the risk

In order to understand the reinsurance structure and how it works it first of all should be defined the basic concepts and the actors in this system.

An original or *direct insurer* who insures part of his risk with *reinsurer* is usually called “reinsured, reassured, cedant or ceding company.” If the reinsurer decides to reinsure the risk he itself reinsured this will be called “retrocession.” The “re-reinsured” will be called the *retrocedant* and the “re-reinsurer” will be called *retrocessionaire*.¹³

Traditionally the most used word for direct insurer is “cedant” and the one with whom it reinsures its loss “reinsurer”. For the purpose of convenience and in order to avoid confusion this terminology will be used in the thesis. In addition, there will not be made any distinction between reinsurance and retrocession in this thesis.

Reinsurance is one of the most common ways to distribute a risk among several insurers. The *reinsurance* can be understood as a system in which the insurer who already concluded an insurance contract with assured/ person effecting the insurance (usually an owner of the ship) *insures further a portion of his risk with another insurer (reinsurer)*.¹⁴ Reinsurer for payment of premium agrees to compensate the insurer/ insurance company for the loss which it may suffer under the policy. Reinsurance is a separate contract

¹³ Barlow Lyde & Gilbert (2009) p. 4

¹⁴ Falkanger/ Bull / Brautaset (2011) p. 506

between the reinsurer and the cedant that includes its own terms which may be different from original insurance contract.

As can be understood the reinsurance is a type of insurance because many of the legal rules and principles that apply to insurance contract also apply to reinsurance. For example, principle of utmost good faith and duty of disclosure apply also to reinsurance. However, the practice of reinsurance is different from direct insurance. Therefore, it is useful to point out the following differences between the reinsurance and insurance:

- 1) reinsurance is contracted between two industry professional insurers, rather than a member of the public and a professional;
- 2) reinsurance arrangements tend to be more complex than those of insurance;
- 3) certain practices in reinsurance are so distinct that the insurance supervisory authorities treat them differently (for example in UK);
- 4) in most countries there is a body of case law specific to reinsurance;
- 5) most of direct insurance business is essentially domestic, reinsurance business is a global one that operates on the international level.¹⁵

The distinction between reinsurance and insurance is important for example in England, because tax is payable on insurance premiums, but not on reinsurance premiums.¹⁶

For the purpose of this thesis it is important to mention the essential feature of reinsurance – there is no contractual relationship between the assured/ person effecting the insurance and the reinsurer.¹⁷ Therefore, only cedant will be liable to the assured. This may be important if the cedant has become insolvent. From assured perspective this means that he can not make claim against the reinsurers and his action can only be against his own insurer/cedant. However, there are some exceptions to this general principle. Some reinsurance agreements contain cut-through clauses according to which the assured has a right to claim directly from the reinsurer, normally in the event of the cedant's insolvency.¹⁸ However, in order to be effective this clause should state this clearly. But

¹⁵ Wedge (2005) p. 23 and see further differences between insurance and reinsurance in Carter/ Lucas/ Ralph (2000) pp. 3- 5

¹⁶ FSMA 2000 (Consequential Amendments and Repeals) Order 2001 (SI 2001/3694)

¹⁷ MIA sec. 9(2) and Wilhelmsson (1976) p. 35

¹⁸ Grecoair Inc v Tilling [2005] Lloyd's Rep IR 151 and see Lowry/ Rawlings/ Merkin (2011) p. 502, Barlow Lyde & Gilbert (2009) pp. 41- 45, Merkin (2010) p. 735, Carter/ Lucas/ Ralph (2000) pp. 149-151

there is some doubt as to whether a cut-through clause is valid under the English insolvency rule of equal treatment of unsecured creditors.¹⁹

2.2 The legal definition and nature of reinsurance

In most countries like in the United Kingdom there is no special regulation for reinsurance therefore it is mostly regulated as direct insurance. Only in several countries like Finland, Bermuda, Argentina, Germany and the United States (California) there is a legal definition of reinsurance.²⁰

In Bermuda Insurance Act 1978 in Section 1 states that: “insurance business” means the business of effecting and carrying out contracts – (a) protecting persons against loss or liability to loss in respect of risks to which such persons may be exposed or (b) to pay a sum of money or render money’s worth upon the happening of an event, *and includes re-insurance business.*”²¹ For example, in California in Section 620 of the California Civil Code a reinsurance contract defined as “one by which an insurer procures a third person to insure him against loss or liability by reason of such original insurance.”²² In Germany statutory definition of reinsurance is “insurance of insurance companies.” This definition is similar to the definition defined by Robert Kiln as “insuring insurers.”²³

Legal definition of reinsurance can be drawn for example from the case law. However, as can be seen from the cases there were many attempts to define reinsurance but the English legal definition is still not clear.

In the case *Attorney-General v. Forsikringsaktieselskabet National of Copenhagen* the Court of Appeal stated that a contract of reinsurance was an insurance of the original subject matter. At the same time the House of Lords admitted that it was one where the reinsurer insured the cedant against the original loss, the insurable interest of the cedant being constituted by the original policy.²⁴

The nature of reinsurance was reviewed in the *Toomey v Eagle Star*²⁵ case. The court stated (at page 522) that: “the word “reinsurance” can be used very loosely. Often it is used simply to describe any contract of insurance which is placed by or for the benefit of an insurer”. The court

¹⁹ See Lowry/ Rawlings/ Merkin (2011) p. 502, Barlow Lyde & Gilbert (2009) pp. 41- 45, Merkin (2010) p. 735, Carter/ Lucas/ Ralph (2000) pp. 149- 151

²⁰ Barlow Lyde & Gilbert (2009) p. 4

²¹ BIA sec.1 and discussion regarding this definition see O’Neill / Woloniecki (2010) p. 480

²² Supra note 30

²³ Kiln (2001) p.1

²⁴ [1924] 19 Lloyd’s Rep 32 (CA) and Barlow Lyde & Gilbert (2009) p. 4

²⁵ [1994] 1 Lloyd’s Rep. 516

also admitted that the English authorities do not provide a satisfactory definition of reinsurance, and that the evolution of reinsurance in its various forms has made it difficult to achieve a comprehensive definition.

In the case *Charter Reinsurance Co Ltd v Fagan*, Lord Mustill stated that: “English law [...] not yet finally resolved whether there could be cases where a contract of reinsurance was an insurance of the reinsurer’s liability under the inward policy or whether it is always an insurance of the subject-matter of the original policy, the liability of the reinsured serving merely to give him an insurable interest.”²⁶ So, as can be seen in this decision the question of the definition of reinsurance was not decided clearly by the court. However, it was determined by the House of Lords in case *Wasa v Lexington*²⁷. The court confirmed that reinsurance is insurance of the subject-matter of the insurance contract, on the terms of reinsurance contract. Nevertheless, there are still different points of views on this issue.

2.3 The function, purpose and benefits of reinsurance

As was mentioned above reinsurance is a global business that spreads out capital through large geographical areas. Due to this fact, reinsurance could also spread the risk and losses over large territory without concentrating it in one place. That is why, all insurance companies buy reinsurance in order to protect themselves from different risks against which they provide insurance to their clients. However, the purpose of reinsurance is not only to protect, but also to provide capacity to an insurer to cover risks that they would not be able to cover without reinsurance. Reinsurance does not reduce losses, but it makes easier for insurers to carry the material consequences of them.

Two fundamental functions of all reinsurances were defined as: (1) the business of insuring an insurance company or Underwriter against suffering too great loss from their insurance operations and (2) allowing an insurance company or Underwriter to lay off or pass on part of their liability to another insurer on a given insurance which they have accepted²⁸. Notwithstanding the above O’Neill and Woloniecki argue that “[...] this is an aspirational definition. Once upon the time we were taught [...] that insurance transfers risk and reinsurance spreads risk. It is clear that no such simple distinction now exists. If some genuine risk of loss had to be retained for the transaction to qualify as reinsurance,

²⁶ [1997] A.C. 313 at 385B

²⁷ [2009] 2 Lloyd’s Rep. 508

²⁸ Kiln (2001) p. 1

the parties to arbitrage contracts referred to above might be more alert to what was happening.”²⁹

Traditionally, most of researches of this question argue that the reinsurance serves such basic purposes:

- 1) reinsurance increases the underwriting capacity of direct insurers/cedants to accept risk. Underwriting capacity can be understood as maximum gross amount of risk that the insurance company is able to accept;
- 2) it promotes financial stability for cedant. An insurer can avoid being solely responsible for large claims or claims that arise simultaneously because reinsurer usually accepts some part of the consequences of losses;
- 3) reinsurance can strengthen the solvency of an insurer/cedant. However, there is no absolute security against bankruptcy and reinsurance is just an instrument that can help the company reduce the possibility of destruction;
- 4) it allows countries without high develop insurance market easily spread their losses internationally;
- 5) reinsurance is useful mechanism for overcoming regulatory problems.³⁰

In addition, the following benefits can be pointed out: 1) reduced volatility of underwriting results; 2) capital relief and flexible financing; 3) access to reinsurer’s expertise and services, especially in pricing and underwriting and claims management.³¹ So, it could be stated that the main benefits of reinsurance for insurers are financial flexibility, stabilization of underwriting results.

As could be seen the reinsurance is important for both – reinsurers and customers. For reinsurers because it gives them the opportunity to accept large risks which they could not bear themselves and for customers because without reinsurance an insurers could not offer their service to such extend.

In this section it was made the overview of the main functions, purposes and benefits of reinsurance. Each insurer should decide the question how much reinsurance it needs from the case to case, taking into account several factors like the company financial

²⁹ O’Neill / Woloniecki (2010) p. 36

³⁰ Based on Edelman/ Burns/ Craig/ Nawbatt (2005) p. 3- 5, O’Neill / Woloniecki (2010) pp. 4 - 5, Vibe (2006) p. 8- 11, Carter/ Lucas/ Ralph (2000) p. 9, Barlow Lyde & Gilbert (2009) pp. 4- 6, Rhidian (2002) p. 61- 63

³¹ Swiss Re “An introduction to reinsurance” 1994. http://fa2f2.voila.net/intro_reinsurance.pdf [last visit 12.07.2011] and Swiss Re “Understanding the reinsurance: how reinsurers create value and manage risk” 2004. http://www.hec.unil.ch/isa/RiskMan06/Understanding_reinsurance_p.pdf [last visit 12.07.2011]

strength, in a line with the market situation, his willingness to accept risks. Although, the insurer will be completely liable to his policyholder, reinsurance takes a share of his risks and therefore significantly reduces his possibility of destruction.

3 The relationship between the original insurance contracts and the reinsurance contract

3.1 Introduction

The idea under the reinsurance is that the cedant has a right to compensation. When a cedant reinsures something he needs to have “back to back” arrangement in order to know that he will get indemnification from the reinsurer. Therefore, the starting point is “as original” clause because it defines the scope of cover of the reinsurance contract. This clause will be the subject of discussion in this section. From the reinsurer perspective this clause is very important because it defines what the reinsurer is obliged to cover under the contract. If the cedant has paid to the assured without legal liability (*ex-gratia*) outside the scope of cover, the reinsurer always can refuse to indemnify even irrespective of “follow the settlements” clause. This can be illustrated by *Vesta v. Butcher* case.³² However, it should be pointed out that *Vesta v. Butcher* case does not really fit into the “as original” concept, because “as original” mean that it should be the same background law, the same choice of law as in the direct insurance. Problem with “as original” is that someone needs to decide how the claim should be settled. On practice, cedant usually agrees to pay, but the reinsurer refuses. This can be illustrated by the cases discussed below.

So, it may be assumed that “as original” provision is a point of departure for every reinsurance contract. There are two most common ways to handle “back to back” cover in the reinsurance contracts and that is by the use of “follow the settlements” or “claims cooperation” clause that will be in detail discussed in section 4 and 5.

In addition in this section it will be analyzed the presumption of the “back to back” cover. In particular *Wasa v Lexington case* will be discussed which as stated by O’Neill and Woloniecki is “one of the most important decisions for reinsurers in this millennium”³³.

³² [1989] 1 Lloyd’s Rep 331 (HL)

³³ O’Neill/ Woloniecki (2010) p. 131

3.2 Reinsurance on the “same terms and conditions as original” insurance

There is an established practice to incorporate clauses of the original contract into the reinsurance contract. The purpose is that the reinsurance contract has the same terms as the original insurance contract. Besides, in order to avoid many discrepancies problems, for example as different deadlines to give notification can apply or choice of law. These clauses can have different variants like “all terms, clauses and conditions as original”, “subject to the same terms and conditions as the original policy”, “being a reinsurance of and warranted same gross rate and terms and conditions” or something similar and is usually abbreviate “as original”. The “as original” wording is often the first part of the “full reinsurance clause. The typical “full reinsurance clause” (“J Form”) is as follows: “Being a reinsurance of and warranted same gross rate terms and conditions as and to follow the settlements of [...]”.³⁴ It should be pointed out that the above mentioned clause in reinsurance contract usually includes two different concepts – “follow the settlements” concept and “back to back” one. The main difference is that the consideration of whether the insurance and reinsurance contracts are “back to back” looks at what the parties agreed at the time of reinsurance contract. The consideration whether the reinsurer should follow the settlement by the cedant looks at the wording, but also at the loss to the insured and how it has been dealt with by the cedant.³⁵

So, the main idea under these clauses is that both parties want to secure that the reinsurance is “back to back” with the original insurance. This means that the reinsurance contract and the original insurance contract have the same terms, scope of cover, that risks covered by them is identical and duration provisions of two contracts are matching, that any warranties in the underlying policy will also apply as between the cedant and the reinsurer.³⁶ In order to decide whether the specific clause/term is incorporated English law in *HIH v New Hampshire* case³⁷ defined four main criteria for the assessment. The first is that the terms should be relevant to the reinsurance, the second that this term should make sense in the context of reinsurance, the third is that it should be consistent with the terms of reinsurance and the last is that it is suitable for the inclusion in the reinsurance. The example of the clauses that deemed as not incorporated into the reinsurance contract by “as

³⁴ *Vesta v Butcher* [1989] 1 Lloyd’s Rep 331 (HL) at p. 337

³⁵ *Assicurazioni Generali v CGU* [2003] EWHC 1073 (Comm) and *O’Neill/ Woloniecki* (2010) p. 197

³⁶ *Rhidian* (2002) p. 68

³⁷ [2001] 2 Lloyd’s Rep.161

original” wording is arbitration³⁸ and jurisdiction³⁹, choice of law⁴⁰, time limits⁴¹ clauses. The explanation is that it is very unlikely that parties could have intended their literal application.

The incorporation clauses in practice sometimes can create difficulty, inconsistency or ambiguity. The reason for this may be that parties failed to incorporate precise terms of the original policy or that the scope of cover of reinsurance contract is narrower than original insurance contract and cover was not intended to be “back to back”. For example, some problems may arise with the choice the use of the phrase “as original” in retrocession contract where there are several layers of reinsurance. The problem is that it is unclear whether this is related to the terms of the reinsurance underlying the retrocession or to the original insurance.⁴² As was held in the case *Pine Top Insurance Co. v Unione Italiana Co. Ltd*⁴³ it refers to the original insurance contract, but not to the intermediate reinsurance. However, as could be understood from this decision, in another case it could be reached different conclusion, especially if the wording or facts clearly will show opposite result.

The role of incorporation was also analyzed by Rob Merkin through the most important elements of facultative reinsurance contract. He concluded that incorporation clauses in general cause more problems than benefits and that objective “back to back” cover can also be achieved without the concept of incorporating the terms of the direct policy into the reinsurance contract.⁴⁴

The understanding of the problems that may arise with incorporation clauses and difficulties with interpretation in the courts will probably cause to the decrease of their use. One of the solutions to different issues could be to state clearly that both contracts are independent of each other and that reinsurance contract does not incorporate the provisions of the original insurance contract.⁴⁵ Another solution could be to identify the particular term that should be incorporated and make it appropriate to the language of the reinsurance contract.

The important element that should be pointed out in the case of incorporation terms from the underlying contract into the reinsurance is that it should be imposed in the

³⁸ Cigna Life Insurance Co. v Intercaser SA [2001] Lloyd’s Rep. I.R. 821

³⁹ Prifti v Musini [2004] Lloyd’s Rep.I.R.528

⁴⁰ Ace Insurance v Zurich Insurance Co. [2001] Lloyd’s Rep.I.R 504

⁴¹ Home Insurance Co v Victoria- Montreal [1907] A.C. 59

⁴² Legh - Jones/ Birds/ Owen (2008) p. 1057

⁴³ [1987] 1 Lloyd’s Rep. 476

⁴⁴ Rhidian (2002) pp. 68- 70, Vibe (2006) p. 120

⁴⁵ Barlow Lyde & Gilbert (2009) p. 288

reinsurance contract a clear duty of disclosure on the cedant concerning any changes in the underlying insurance.⁴⁶ This duty is very important for the reinsurer as any adjustments to the underlying policy influence the reinsurer's assessment of the risk and premium. In addition, as stated by Andreas Meidell this duty of disclosure can also be derived from the general contract law rules on disclosure. Decision of the Danish Supreme Court made on 24 of May 2006 is a good example of the importance of duty of disclosure in a relationship between cedant and reinsurer.⁴⁷ In this case the cedant extended coverage of the underlying contract without informing the reinsurer. The court decided that despite the "follow the settlements" clause the reinsurer was found not to be liable as he was not informed about the adjustments after the reinsurance contract was entered into and therefore could not predict this risk. The same is the position under the English law. In marine insurance case *Lower Rhine v Sedgwick* case⁴⁸ the court decided that use of incorporation terms/words in the reinsurance contract do not extent the reinsurer's liability where the subsequent alteration of underlying contract was made after the commencement of the reinsurance contract and without informing the reinsurer.

3.3 The presumption of "back to back" cover

Notwithstanding the incorporation, there is a general established presumption that "back to back" cover apply to proportional facultative reinsurance, unless the contract states otherwise. This presumption is particularly important in a situation when the contract does not define the scope of cover. The "back to back" presumption is supported by the Scandinavian legal literature and in particular by Thomas Wilhelmsson who argued that unless parties agreed opposite, such presumption should apply.⁴⁹ The same is the position under the English law. The "back to back" presumption was confirmed by the court decisions in *Forsikringsaktieselskapet Vesta v Butcher*⁵⁰, *Groupama Navigation et Transports v Catatumbo CA Seguros*⁵¹ and *Wasa International Insurance Co. v Lexington Insurance Co*⁵² where the courts had to decide whether the reinsurance will have the same coverage as the original insurance policy and how far it can be. The two earlier cases

⁴⁶ Vibe (2006) p. 78- 80, Meidell (2006) p. 207- 208

⁴⁷ DHR Dom 2006-05-24 UfR

⁴⁸ [2005] 1 Lloyd's Rep 643

⁴⁹ Wilhelmsson (1976) pp. 44-46, Vibe (2006) p. 118

⁵⁰ [1989] 1 Lloyd's Rep. 331

⁵¹ [2000] 2 Lloyd's Rep 350 (CA)

⁵² [2009] 2 Lloyd's Rep 508 (HL)

established no limitation on that presumption instead the *Wasa case* stated that there is limitation on the “back to back” presumption that will be discussed later. In addition this presumption does not always extend to excess of loss (non-proportional) reinsurance contracts where the terms of the policies, interests of the cedant and the reinsurer are different and premiums are evaluated on different basis. The leading case on this point is *Axa Reinsurance (UK) plc v. Field*⁵³ where the court held that provisions in reinsurance contract do not have the same meaning as original policy provisions where different words are used in each contracts.

The first point was decided in *Vesta v. Butcher* case where problem raised because reinsurance and insurance contracts were governed by different applicable laws. According to the Norwegian law the assured still was able to recover for this damage because it should be causation between the breach and the loss. Unlike, English law does not require any causation and any breach of warranty entitle the reinsurer to deny liability. The reinsurance contract has incorporated provisions from the direct insurance by “as original” wording. The main question that arose was whether the incorporation provision would take effect according to the English law as reinsurance contract was subject to or Norwegian law on which direct insurance was based.

The House of Lords decided this case in favour of cedant. The court came to the conclusion that although the reinsurance was governed by English law, the presumption of “back to back” cover requires the court to interpret the reinsurance contract in the same matter as insurance contract. This means in accordance to the principles of Norwegian law that English warranty will be effective only if there was causation between breach and loss.⁵⁴ This case is also a good example of one of the incorporation problems that were discussed above. It shows how the incorporation of particular provisions or clauses from the original insurance contract into the reinsurance can create harmonization and conflict issues in a situation where two of these contracts are subjects to different law jurisdictions.

The *Vesta v. Butcher* principle was applied to a number of other cases, in particular to *Groupama v Catatumbo* case where original and reinsurance policies where intended to be “back to back”. In this case the same approach was taken to warranty that a vessel’s class should be maintained and the warranty in the reinsurance was agreed to have the same effect as it had under the Venezuelan law governing the direct policy.⁵⁵

⁵³ [1996] 2 Lloyd’s Rep. 233 at 238-239

⁵⁴ [1989] 1 Lloyd’s Rep. 331 at 334

⁵⁵ [2000] 2 Lloyd’s Rep 350 (CA) at 355

Nevertheless in *Wasa v Lexington* case the House of Lords confirmed that *Vesta v. Butcher* principle that was accepted to construction does not apply to all coverage provisions in the reinsurance. The main question that was raised in this case is to distinguish reinsurance terms which are to be afforded back to back cover and those terms which are not.

The reinsurance dispute was litigated in England. At the first instance Mr. Justice Simon decided that reinsurers were not liable and that loss was not within the cover of reinsurance. One of the main arguments was that despite the fact that “the follow the settlements clause and back to back nature of the insurance and reinsurance are both important features of the reinsurance [...] they are not sufficient to displace the importance of the prescribed period of cover”.⁵⁶ The period clause was “fundamental term” and was governed by English law that imposes liability for a 3 years period and not for period between 1942 and 1985.

In the Court of Appeal the cedant argued that despite the different applicable laws, the court should apply the decisions in *Vesta v. Butcher* and *Groupama v. Catatumbo* cases to period clauses. In addition, cedant stated that “back to back” presumption is applicable and wording in both contracts should be interpreting in the same way. The court agreed with this argumentation and decided it in favour of the cedant.⁵⁷

However, the House of Lords revoked the decision of the Court of Appeal and stated that they agree with the first instance decision that the reinsurance contract was governed by English law and the reinsurance policy was only for damage to property during three years period. Therefore, reinsurers were only liable for loss within this time. Concerning the “full reinsurance” clause and “follow the settlements” clauses the Phillips L.J. stated that: “[...] “full reinsurance” clause in this case, and “follow the settlements” clauses in general, did not and do not have the effect of bringing within the cover of a policy of reinsurance risks that, on the true interpretation of the policy, would not otherwise be covered by it.”⁵⁸ Besides, the House of Lords pointed out that the main decision was made not as a matter of conflicts of laws but as a matter of construction of reinsurance contract. They also added that meaning of the reinsurance has to be decided depending of the parties understanding when the reinsurance contract was agreed.

House of Lords stated that wording in the duration clause had a clear meaning in English law and should not be “distorted” by different meaning of original policy. They

⁵⁶ *Wasa v Lexington* [2007] EWHC 896 (Com) at paragraph 46

⁵⁷ *Wasa v Lexington* [2008] EWCA Civ 150 at paragraph 24

⁵⁸ *Wasa v Lexington* [2009] 2 Lloyd’s Rep 508 (HL) at page 512

confirmed that there is a presumption of “back to back” cover in proportional reinsurance contracts, but it is not a rule of law and this presumption can be displaced by express wording of the reinsurance or by other relevant circumstances.⁵⁹

In their analyses House of Lords decided that the insurance and reinsurance contracts were separate and that the “back to back” presumption does not apply. So, duration clause was regarded as exceptional and under English law reinsurer (Wasa) was not bound by the settlement. As a result, cedant (Lexington) was left without compensation from his reinsurers for the rest years.

The different conclusions in the same case by the Court of Appeal and House of Lords can be explained by different points of views to the subject matter of the reinsurance contract. The Court of Appeal stated that contract of insurance is contract for indemnity to the cedant concerning any liability that he incurred under the direct insurance policy.⁶⁰ According to this point of view the cedant – Lexington was found liable to Alcoa for damages under the insurance policy before and after the insurance period as was decided by the Court of Appeal. Malcolm Clarke supported this position and stated that different scholars agree because the “the trigger for recovery under the insurance is that the reinsured’s liability has been established and quantified, not that a peril has occurred” to the insured subject-matter; and “the amount of the reinsured’s indemnity is not based on the degree of damage [to that subject-matter but] on the amount of the reinsured’s exposure”.⁶¹ However, the House of Lords had opposite opinion. They argued that reinsurance contract was not liability insurance, but is an independent contract between the cedant and the reinsurer, the subject matter of which is the same as in the original insurance: “[...] under English law a contract of reinsurance in relation to property is a contract under which the reinsurers insure the property that is subject of the primary insurance; it is not simply a contract under which the reinsurers agree to indemnify the insurers in relation to any liability that they may incur under the primary insurance [...]”.⁶²

They did not overrule or disagree with the earlier cases *Vesta v Butcher* and *Groupama v Catatumbo* cases, they distinguish them.⁶³ The main basis for this was first of all, that these cases were about breach of warranty and not about fundamental term of the

⁵⁹ Supra note 64 at page 509

⁶⁰ Wasa v Lexington [2008] EWCA Civ 150 at paragraph 49

⁶¹ Clarke, Malcolm. *The contractual nature of reinsurance* (2010).

<http://journals.cambridge.org/action/displayFulltext?type=1&pdfType=1&fid=7328876&jid=CLJ&volumeId=69&issueId=01&aid=7328868> [last visit 13.08.2011]

⁶² Wasa v. Lexington [2009] 2 Lloyd’s Rep 508 (HL) at page 511

⁶³ O’Neill and Wolonieski (2010) p. 133 and Barlow pp. 89- 292

reinsurance – period clause. Secondly, at the time when reinsurance was concluded, the law governing the insurance in both cases *Vesta v Butcher* and *Groupama v Catatumbo* was known, unlike in present case “at the time the reinsurance contract was made there was no certainty either [...] as to [...] where an underlying claim would be made or which law would apply”.⁶⁴ Therefore, court did not agree that reinsurance contract can be construed as the reinsurer agreed to be bound by law that will be determine later.

As can be concluded the House of Lords decision in *Wasa v Lexington* case raises some practical issues for reinsurers and cedants. On the one hand, this case confirmed that there is a presumption that proportional facultative reinsurance is “back to back” with the original insurance contract. On the other hand, this decision put limitation on that presumption where the law that governs the insurance contract is uncertain when reinsurance contract is agreed that is subject to English law. In those circumstances, as stated by Barlow Lyde and Gilbert, the *Wasa* decision raises the possibility that fundamental terms of reinsurance would be construed according to the law that governing that contract, even if it will be the mismatch between the insurance and reinsurance contracts.⁶⁵ This also proves that the obligations in insurance and reinsurance contracts do not always are “back to back” and it can create gap in reinsurance protection. This is for example in a situation where the cedant issued insurance policies that are governed by a law other than the law of the reinsurance contracts.

Besides, the court did not give the definition of “fundamental term” of the reinsurance. It just stated that period clause is “fundamental term” that can not be displaced by the “back to back” presumption.⁶⁶ So, there are difficulties in determine which clauses are sufficient “fundamental” to displaced *Vesta v. Butcher* and *Groupama Navigations v. Catatumbo CA Seguros* principle to construction of insurance and reinsurance contracts.

This decision has both supporters and opponents. I agree with the opinion of O’Neill and Woloniecki who argued that the *Wasa v Lexington* case “not produced certainty [...]”⁶⁷ As can be seen from the above mentioned cases if the law of the original insurance contract is known or predictable when the reinsurance contract is made than the “back to back” presumption will apply and court should apply *Vesta v Butcher* case unless the reinsurance contract states the opposite. If the law of the original insurance contract is uncertain at the time when reinsurance is made then *Wasa v Lexington* case will apply. So,

⁶⁴ *Wasa v. Lexington* [2007] EWHC 896 (Com) at paragraph 45

⁶⁵ Barlow & Gilbert (2009) p. 294

⁶⁶ *Ibid*

⁶⁷ O’Neill/Wolonieski (2010) p. 150

as the above mentioned scholars stated, there is no logical basis for making such a distinction.⁶⁸

However, this discussion is open. The *Wasa* case shows the tensions between the commercial desirability of the “back to back” cover and the applicability of different legal systems to the insurance and reinsurance contracts.⁶⁹ One legal issue is what other courts will make from these opposite English decisions, whether *Wasa v Lexington* case would be followed by other courts or whether the approach of the Court of Appeal would be more preferred.

⁶⁸ Ibid

⁶⁹ Joseph, David. *Wasa International Insurance Company Limited v. Lexington Insurance Company Limited and others: how “back to back” is “back to back”?* (2007).
<http://www.mondaq.com/article.asp?articleid=49314> [last visit 20.08.2011]

4 The reinsurer's contractual obligation to indemnify the cedant for settlements (“follow the settlements clause”)

4.1 Introduction

There are two most common ways to handle “back to back” cover in the reinsurance contracts and that is by the use of “follow the settlements” or “claims cooperation” clause. The parties to the reinsurance contract are free to establish which regime they prefer.

The main focus in this section will be on provisions that bind reinsurers to settlements made by the cedants. “Follow the settlement” clause under which the reinsurer agrees to indemnify the cedant for liability that he incurred under the original policy without cedant's liability being established. The aim of this clause is to extend the reinsurers liability to “bona fide” settlements and prevent them from withdrawing liability in case of doubtful liability.⁷⁰ As can be seen, the advantage of this clause is that it gives the cedant a degree of certainty to recover from reinsurer up to the limit in the reinsurance contract and it leaves the claims handling to the cedant which often has the greatest knowledge of the case in question. This can be very important if the reinsurance has been placed in another insurance market. Besides, on practice the cedant has its own interest in providing the correct settlement under the original policy. Therefore, reinsurers do not want to be involved in each case that is settled by the cedant, but rather prefer to rely upon its professionalism. At the same time, the reinsurer does not want to pay for claims that fall outside the terms and conditions of the reinsurance contract. That is why, relationship of trust is very important in reinsurance contracts because they are based on it. The cedant must look after the reinsurer's interests as his own, and the reinsurer may legitimately expect the cedant will act prudently and loyally, so the mutual fiduciary duty is imposed on both parties.⁷¹ The need and importance of the relationship of trust and loyalty was confirmed by the Supreme Court in the “*Vingtor*” case. Due to the fact that “follow the

⁷⁰ Hoffman (1993) p. 663

⁷¹ Vibe (2006) pp. 78-79

settlement” clause is based on the relationship of trust and integrity, it is natural to expect that the cedant should act in a loyal manner.⁷²

In addition to “follow the settlements” clause the following questions will be discussed in this section: the requirements that cedant should fulfill in order to get compensation, and the extent to which reinsurers are able to deny liability.

4.2 Follow the settlements clause

“Follow the settlements” clause is one of the most popular and frequently litigated clause between cedant and reinsurer in the reinsurance contracts. English law offers the most extensive practice regarding the interpretation of the “follow the settlements”. Unlike in English law there are no directly related court decisions on this issue under the Norwegian law. It should be pointed out that in some jurisdictions, like USA the reinsurer’s obligation to “follow the settlements” can be categorized as custom/part of the background right. This means that this duty will also apply even if there is no such explicit provision/clause in the contract.⁷³ However, under the English law it is clear that there is no such established custom concerning “follow the settlements” duty.⁷⁴ So, it can be assumed that the same will be applicable under the Norwegian law. In the absence of any “follow the settlements” clause the reinsurers as a starting point will not be liable.

The terms of the reinsurance contracts will often require reinsurer to “follow the settlements” of the cedant. This clause can have different variants like:

- a) “Being a reinsurance of and warranted same gross rate terms and conditions as and *to follow the settlements of [...]*”.⁷⁵
- b) “All decisions pertaining the original insurances and reinsurances coming within the scope of this Agreement rest entirely with the Company, and the obligations of the latter towards its insured shall be binding on the Reinsurer who agrees to *follow the fortunes of the Company* in all respects as if being a party to the original business”.⁷⁶

The use of one of these clauses under different types of reinsurance contract can cause different results. Therefore, each contract should be considered on its own. Usually “follow the settlements” wording is used in facultative contracts. In reinsurance treaties (excess of

⁷² Rt-1956-249

⁷³ Barlow Lyde & Gilbert (2009) p. 532 and Meidell (2006) pp. 209- 210

⁷⁴ Boden v Hussey [1988] 1 Lloyd’s Rep. 423 (CA), Vibe (2006) p. 159

⁷⁵ Vesta v Butcher [1989] 1 Lloyd’s Rep 331 (HL) at p. 337

⁷⁶ Taken from General reinsurance agreement, Article 3, part one and see Gleditsch (1991) p. 44

loss) is common to used different wording: “*All settlements by the reinsured shall be binding upon reinsurers provided that such settlements are within the terms and conditions of the original policies and within the terms and conditions of this reinsurance.*”⁷⁷ The example of the use of “loss settlements shall be binding” words will be discussed in *Hill v Mercantile & General* case in subsection 4.4.

Follow the settlements clause raises many issues that relate to fulfillment obligations under the reinsurance contracts. The first is whether and to which extent reinsurers are obliged to follow the settlements of the cedant that has been made with the policyholder. The second is what the cedant should prove when it comes to obligations under the original insurance contract.⁷⁸ The reason is that reinsurers sometimes still consider that they should have a right to review and refuse payment to the cedant’s settlement of the underlying claim.

An interesting practical situation can rise when there is “as original” reinsurance contract, which includes “follow the settlements” clause and there is also the claims handling provision, but not really a “claims cooperation” clause. The question can rise what will be the consequences if the reinsurer is very “active” and starts to interfere in the settlement process. The starting point is that in the absence of the “claims cooperation”/ “claims control” clause in a contract, there is no requirement for the cedant to get reinsurer’s consent. Besides, the reinsurer is not entitled to be actually involved in the steps taken to settle the claim or the amount at which it could be settled. However, even if there is no contractual obligation to notify the reinsurer of losses, the reinsurer has a right to information and documents showing how the claim was made in order to allow him to contend that it was not dealt with in a businesslike way, but not to satisfy himself as if he was the direct insurer.⁷⁹ Nevertheless, if the reinsurer wants to be involved in the settlement process, he should then include “claims cooperation” or “claims control” clause in the reinsurance contract. By choosing the “follow the settlements” regime the parties to the contract suppose to act in certain way, otherwise if they start to act in the “claims cooperation” regime this by some means reduce the value of the “follow the settlements” clause. The idea under which is to protect the cedant, and to oblige the reinsurer to pay their share in the settlement irrespective of the liability of the cedant in fact, unless certain defenses could be raised and proved by the reinsurer. But it is highly recommended in

⁷⁷ Mance/ Goldstein/ Merkin (2003) p. 694

⁷⁸ Vibe (2006) p. 123

⁷⁹ *Charman v Guardian* [1992] 2 Lloyd’s Rep. 607 at 614

practice to bring the reinsurer into the settlement negotiations because this would make it more difficult for the reinsurer to argue that settlement was not made in a “good faith” or not in a businesslike way.

Before the Court of Appeal judgment in *Insurance Co. of Arfica v. SCOR UK Reinsurance Co. Ltd*⁸⁰ (“ICA v. SCOR”) the legal effect of such clause was uncertain. The Court of Appeal in particular Robert Goff LJ in relation to follow the settlement clause established the basic guidelines when reinsurers are obliged to pay. The reinsurers are obliged to follow the settlements of the cedant (up to the reinsurance policy limit) were following two provisos/conditions are satisfied: *as a matter of law* the claim falls within the risks covered by the reinsurance and *as a matter of fact* the cedants acted in good faith and has taken all proper and businesslike steps, without fraud and collusion. Besides, it could be understood that if cedant had settled the claim honestly and took all proper and businesslike steps then subsequently established fraud on the part of assured did not release the reinsurer from obligation to indemnify the cedant.⁸¹

It should be noted that under general principal of primary insurance law the cedant bears the initial burden of making a “prima facie” showing that loss falls within the scope of reinsurance contract. Later the burden of proof shifts to the reinsurer to prove that one of the available defenses applies. In the situation of doubtful liability, where the conflicting evidence appears, the burden of proof shifts back to the cedant in order to establish that his actions were reasonable and honest by reference to market practice and established custom.⁸²

4.3 The requirement to act honestly and take all proper and businesslike steps

In most follow the settlements cases, it will be presumed that settlement made by the cedant was honest and that he took all proper and businesslike steps unless it will be doubted by the reinsurer.

One of the four points of law, none of which were considered in *ICA v SCOR* case, was whether the cedant fulfilled its “proper and businesslike steps” by appointing a competent loss adjuster. The court in *Charman v. Guardian* case found that the cedant does

⁸⁰ [1985] 1 Lloyd’s Rep 312

⁸¹ [1985] 1 Lloyd’s Rep. 312 at pp. 322, 330, 334

⁸² Ibid pp. 697-698

not discharge his businesslike obligation only by appointing competent loss adjusters. He is identified with them and is also liable for the failure on their side to act in good faith and businesslike way. This has great practical implication because in this case the court confirmed that the reinsurer may defeat the application of “follow the settlements” clause where cedant’s loss adjusters/lawyers did not properly investigate and ascertained the loss.⁸³

An interesting practical situation can arise when there is “as original” reinsurance contract, which includes “follow the settlements” clause and there is also the claims handling/claims managing provision, but not really a “claims cooperation” clause (see chapter 5). This provision states that the only obligation of the cedant is to notify the reinsurer of the claim. Besides, there is an obligation to appoint one of the loss adjusters that were agreed between the parties. In settlement with the assured the cedant appointed and followed the recommendation of one of the competent, agreed loss adjuster and notified the reinsurer. However, the reinsurer still refused to “follow the settlements” of the cedant. The starting point is that the reinsurer should “follow the settlements” of the cedant and cover the reinsured part of the risk. The objections that the reinsurer can raise are that cedant or loss adjuster did not act honestly and not in a businesslike way in connection with the settlement and that the risk is not covered by the reinsurance policy.⁸⁴ So, if the cedant acted in “good faith” and in a businesslike way appointed the loss adjuster which was agreed between the parties who also acted in a businesslike way and it is obvious that risk is covered by the reinsurance policy the reinsurer is liable to “follow the settlements” clause.

Additional wordings and their effect

The courts when construing the “follow the settlements” clauses also explained the effect of the additional wording to the “follow the settlements” provision.

For example, this point of law was analyzed in the *Charman v Guardian* was whether the words “*liable or not liable*” contained in the facultative reinsurance contract changed the meaning of the “follow the settlements” clause. The cedant argued that this wording released him from the obligation to settle claim in businesslike way. However, the

⁸³ *Charman v Guardian* [1992] 2 Lloyd’s Rep 607 at p. 612 and *Colin Baker v Black Sea* [1995] L.R.L.R. 261 (QB Com Ct)

⁸⁴ *ICA v Scor* [1985] 1 Lloyd’s Rep. 312, *Hill v Mercantile* [1996] 1 WLR 1239 and *Agnar Langeland* (2010) p. 66

court stated that words “*liable or not liable*” made no difference to the relationship between the reinsurer and the cedant.

In *Assicurazioni Generali v CGU*⁸⁵ case the issue was concerning the scope of obligation to behave in a “businesslike manner”. The term of the contract required: “...to follow *without question* the settlements of the Reassured...” The cedant argued that this wording mean that the only limitation on his obligation had not acted in a bad faith. Instead, the court stated that he did not agree that this wording released the cedant from obligation to “act properly and take all businesslike steps”, but rather not to allow the reinsurer to go behind the settlement and not to be bound by it. This is in the situation where the cedant admitted or compromised the question of liability on the basis that it falls within the scope of the reinsurance contract as a matter of law.⁸⁶ The similar result was accepted in the case *Hiscox v Outhwaite and Others (No 3)*⁸⁷ with the additional wording “*in every respect unconditionally binding*”.

Therefore, from the above mentioned case law it could be concluded that the addition of the words “*liable or not liable*”, “*without question*”, “*in every respect unconditionally binding*” does not alter the meaning of the clause and very clear words would be required in order to achieve this.

4.4 The requirement that claims must fall within the terms of the reinsurance contract as a matter of law

Even if the cedant can show that he acted honestly and took all proper and businesslike steps, the reinsurer always entitled to raise issues whether the claims paid by the cedant fall within the terms of the reinsurance contract as a matter of law.

In *Hiscox v Outhwaite and Others (No 3)*⁸⁸ the reinsurance agreement in excess of loss form was concluded between the cedant (the Hiscox) and reinsurer (the Outhwaite). The effect of clauses in reinsurance contract provided a “follow the settlements” obligation on the reinsurer with the addition of the words “*in every respect unconditionally binding*”. The cedant found itself exposed to liability to the assureds in respect of asbestos injury claims and claimed recovery from the reinsurer. The reinsurer refused payment. The cedant

⁸⁵ [2004] Lloyd’s Rep IR 457

⁸⁶ Barlow Lyde & Gilbert (2009) p. 506

⁸⁷ [1991] 2 Lloyd’s Rep. 524, discussed further in section 4.2.2

⁸⁸ *Ibid*

argued that reinsurer was liable for all claims that he settled in “proper and businesslike manner”. However, the reinsurer resisted on the grounds that he could only be liable for payments for which the cedant was legally liable under the contract with the original assureds. The Court applied the principle of *ICA v SCOR* case and stated that “this principal was unexceptional” but that it could give rise to difficulty in a situation where the terms of the underlying insurance contract and reinsurance contract are the same and there is a “follow the settlements” clause. That difficulty was recognized in the case *Insurance Co. of the State of Pennsylvania v. Grand Union Insurance Co*⁸⁹ the argument that “where, as is usual, the policy of reinsurance refers to the terms of the original insurance, the reinsurer can look through to those terms and complain, as was sought to be done here, of breaches of condition in the underlying policy. I reject that.”⁹⁰ The reason for this was that many settlements made by cedant based on the compromises on liability and quantum and if to allow the reinsurers to “go back” and argue concerning the construction of the policy, this will “destroy the value of the [follow the settlements] clause.” The second difficult issue that was raised by the Court was if reinsurance and original insurance contracts were on the same terms whether the reinsurer was entitled to raise issues concerning the scope of the reinsurance coverage. The Court stated (at page 530): “In my judgment, the reinsurer is always entitled to raise issues as to the scope of the reinsurance contract, and where the risks are co-extensive with those of the underlying insurance he is not precluded from raising such issues, even when there is a “follow the settlement” term of the reinsurance contract [...] he reinsurer may well be bound to follow the insurer’s settlement of a claim which arguably, as a matter of law, is within the scope of the original insurance, regardless of whether the Court might hold, if the issue was fully argued before it, that as a matter of law the claim would have failed.”

From the above mentioned, it could be concluded the main principles that apply to “follow the settlements” clauses. First, the reinsurer is only liable for losses that fall within the reinsurance contract itself. Second, where the scope of the reinsurance contract is coextensive with the underlying insurance contract, the reinsurer entitled to plead that claims that were settled by the cedant *without legal liability* are not binding on him and therefore do not fall within the reinsurance contract. The existence of the “follow the settlements” clause and the fact that cedant acted honestly and has taken “all proper and businesslike steps” does not influence on this. Third, that is enough if the cedant *could* have been liable as a matter of law, the reinsurer may be bound to follow the cedant’s reasonable settlement of a claim and can not later seek to establish that the cedant would

⁸⁹ [1990] 1 Lloyd’s Rep. 208

⁹⁰ *Ibid* p. 223

not have been found liable.⁹¹ The Court came to the conclusion that reinsurer was not liable if the cedant has no legal liability.

In *Assicurazioni v CGU* (see above) the Court of Appeal supported the above mentioned position. The court held that the reinsurer is always entitled to raise issues concerning the scope of the reinsurance contract, despite the fact that terms of the original insurance and reinsurance are the same. Regarding the second requirement in the *ICA v SCOR* case the cedant fulfills it if the claim fell or arguably fell within the terms of the reinsurance as a matter of law. So, the reinsurer can not question facts that were found by the cedant and the latter does not need to prove that claim was in fact covered by the original policy. The only thing that reinsurer could require to put the cedant to proof on which basis the claim had been settled to ensure that the facts and wording has not been disregarded.⁹²

In *Hill v Mercantile & General* case⁹³ (“*Hill v Mercantile*”) the issue was regarding the “loss settlement shall be binding” wording in “follow the settlements” clause. The clause was: “All loss settlements by the reassured [...] shall be binding on the reinsurers, providing that such settlements are within the terms and conditions of the original policies and/or contracts [...] and within the terms and conditions of this reinsurance.”

There was no disagreement whether the cedant acted honestly and has taken “all proper and businesslike steps”, but the reinsurer argued that settlement made by the cedant fell outside the terms and conditions of both the original policy and the reinsurance. The cedant argued that reinsurer was bound by the settlements. The trial court took decision in favour of reinsurers. The cedant successfully appealed, but House of Lords overruled the Court of Appeal decision the restored the first instance judgment.⁹⁴ The House of Lords held that reinsurers had arguable defences to the claims. Lord Mustill stated that there is a conflict inherent in reinsurance between the need to avoid twice an investigation on the same claims issues and the need to ensure that the cedant acted with honesty in settling the claim with the original insured under which the reinsurer has no control. He added that in the *resolution of this “tension” there are only two obvious rules*: “First, that the reinsurer cannot be held liable unless the loss falls within the cover of the policy reinsured and within the cover created by the reinsurance. Second [...] the parties are free to agree on ways of proving whether these requirements

⁹¹ Barlow Lyde & Gilbert (2009) pp. 22, 508

⁹² Lowry/Rawlings/ Merkin (2011) p. 517

⁹³ [1996] 1 WLR 1239 (HL) p. 1251

⁹⁴ Mance/ Goldstein/Merkin (2003) pp. 694-695

are satisfied.”⁹⁵ He also stated that *ICA v SCOR* does not apply to this case because they both based on different facts and different wording provision. In particular in *Hill v M&G* case the clause required that claims should be within both the terms and conditions of insurance and reinsurance policies. He also added that there are many variations of these clauses and their “different application under different types of reinsurance contract” made it difficult to place general principles of interpretation and that in every contract each clause should be considered separately.

Consequently there is some uncertainty in two cases. On the one hand, as could be concluded from Lord Mustill’s argumentation where the wording in direct policy and reinsurance is the same, “unqualified follow the settlements” clause may remove the reinsurers’ protection under the second requirement in *ICA v SCOR* case. The reinsurer cannot rely on the questions of law concerning the meaning of its own contract if the same questions were resolved by the cedant honestly and in a businesslike manner. On the other hand, this does not take into account the established principle in *Hiscox v Outhwaite* case that if the cedant is not *legally liable* to pay claim, the claim does not fall within the reinsurance contract and would not be binding on the reinsurer.⁹⁶ Besides, the reinsurers always have right to argue that claim does not fall within the policy of reinsurance. This can be illustrated by the *Wasa v Lexington* case that was discussed above.

An important question concerning the settlements under contracts governed by foreign law was concerned in the case *Commercial Union Assurance Co. Plc & Others v NRG Victory Reinsurance Ltd*⁹⁷ (“*CU v NRG*”). The reinsurer (NRG) refused to indemnify the cedant for the settlement which they agreed and paid in Texas to the assured (Exxon Corporation) for a cost of clean-up of the spill of oil. The reinsurance contract contained “follow the settlements” clause that stated that it is a condition precedent to liability under the contract that any settlements should fall within the terms and conditions of the original and reinsurance contracts. The cedant relied on the evidence from local lawyers. The lawyer stated that settlement might be outside the cover of the original policy and gave other reasoning like unfavorable attitude to the insurers. The reinsurer argued that original policy was governed by the English law under which the cedant was not liable to Exxon Corporation. Besides, even if the Texas court would give the judgment against cedant, the judgment can not prove the loss under the original policy and evident from lawyer could

⁹⁵ [1996] 1 WLR 1239 (HL) pp. 1251-1252

⁹⁶ Barlow Lyde & Gilbert (2009) p. 24

⁹⁷ [1998] 2 All ER 434

not prove the cedant liability under the original policy.⁹⁸ The Court of Appeal agreed with the reinsurer that evidence from lawyer does not establish liability. At the same time, they added that judgment of a court or arbitration panel is enough proof of cedant liability under the policy within certain limits like: it should be the court of competent jurisdiction, that judgment should not be in breach of an exclusive jurisdiction clause or contractual provision, the cedant took all proper defenses, the judgment was not manifestly perverse.⁹⁹

So, the judgment of the competent court or arbitration award unlike the evidence from the lawyer is enough in order to establish the liability of the cedant. This judgment the cedant can use when arguing against the reinsurer. In addition, from the above discussed case law it should be concluded that for the cedant in order to avoid disagreements with the reinsurer it is better to obtain his consent to the settlements which involve compromise with the assured. This would make it more difficult for the reinsurer to argue that settlement was not honest and businesslike. However, as pointed out by the many scholars the reinsurer rarely like to consider compromise settlements before the real effecting of the settlements.¹⁰⁰

⁹⁸ Mance/ Goldstein/ Merkin (2003) pp. 696- 697

⁹⁹ Barlow Lyde & Gilbert (2009) p. 25

¹⁰⁰ Supra note 138 p. 698

5 “Claims cooperation” clause and its interrelationship with “follow the settlements” clauses in reinsurance contracts

5.1 Introduction

This chapter will provide an overview of “claims cooperation” clause and its use in reinsurance contracts. From the Norwegian court practice there is only one decision by Borgarting Court of Appeal which directly involved interpretation of claim cooperation clause in reinsurance contract.¹⁰¹ However, there is a comprehensive English court practice regarding this question that will be also analyzed below. In addition “claims notification” and “claims control” clause as variations of “claims cooperation” clause will be briefly examined in the subsections 5.3 and 5.4. It should be pointed out that “claims cooperation” clause typically starts with the notification. After the cedant notifies reinsurer about the claim parties normally run into “follow the settlements” or “claims cooperation” regime.

But the main issue that will be discussed and analyzed in this section is the combination and use of “follow the settlements” and “claims cooperation” clauses in the same reinsurance contract. Although reinsurance contracts usually do not have detailed regulation of the relationship between these two clauses they often contain both of them which causes contradictions which as court practice shows are not that easy to solve and handle. The author will provide possible ways of handling such contradictions in the subchapter 5.5.

5.2 Claims cooperation clause

Usually reinsurers are not engaged in the settlements made by cedants. However, parties to the reinsurance contracts are free to establish alternative to “follow the settlements” regime, the so-called “claims cooperation”. The “claims cooperation” clauses can be found in proportional and non-proportional reinsurance contracts, but most commonly it occurs in facultative cover of the risks. This clause will often come into play

¹⁰¹ LB -2005-136447

as a modification of the “follow the settlements” commitment and partial reversal of such unconditional follow duty. By other words, the “claims cooperation” clause obliges an insurer to consult and collaborate with their reinsurers in connection with the handling of injury, entering into an agreement with the insured and the payment of the agreed settlement.¹⁰²

The idea under the “claims cooperation” clause is that a settlement should not be made without the approval of the reinsurer and therefore, the reinsurer will have influence on the settlement. On one hand the existence of this clause could be explained by the fact that cedant would like to bring its reinsurer into the settlement negotiations since this would make it more difficult for the reinsurer to argue that settlement was not made in a “good faith” or not in a businesslike way. On the other hand “claim cooperation” clause requires the cedant to cooperate with the reinsurer in a way to notify him of a claim or circumstances that most likely cause to claim, to give him access to documents and circumstances of the loss. This will usually give the reinsurer access to management of claims in the primary relationship and right to disagree to any settlement made by the cedant.

The formulation of the “claims cooperation” clause varies by policy. Typical examples of “claims cooperation clause” are as follows:

- a) “It is a condition precedent to liability under this reinsurance that all claims be notified immediately to the Underwriters subscribing to this Policy and the Reassured hereby undertake in arriving at the settlement of any claim, that they will co-operate with the Reassured Underwriters and that no settlement shall be made without the approval of the Underwriters”¹⁰³
- b) It is a condition precedent to any liability under this Policy that:
 - i) the Reinsured shall, upon knowledge of any circumstances which may give rise to a claim against them, advise the Reinsurers immediately and in any event not later than 30 days;
 - ii) the Reinsured shall co-operate with Reinsurers and/or their Appointed Representatives subscribing to this Policy in the investigation and assessment of any loss and/or circumstances giving rise to a loss;
 - iii) No settlement and/or compromise shall be made and liability admitted without the prior approval of Reinsurers.¹⁰⁴

¹⁰² Agnar Langeland [2010] pp. 63- 65

¹⁰³ ICA v Scor [1985] 1 Lloyd’s Rep. 312

¹⁰⁴ Gan v Tai Ping [2002] EWCA Civ 248

One of the most difficult questions that can arise is the legal consequences in case where the cedant fails to fulfill the requirements under the “claims cooperation” clause and therefore did not obtain the consent of the reinsurer. As can be seen from the case law, this breach does not automatically deprive the cedant of cover. It will depend on the construction of the words and whether the “claims cooperation” clause is a condition precedent or not. The burden of proving that the cedant not fulfilled the claims provision is on the reinsurer. The interpretation of the “claims cooperation” clause was made in the *ICA v Scor* case and later was also considered in the *Gan v Tai Ping* case¹⁰⁵, in which the “claims cooperation” clause was decided to be a condition precedent to the reinsurer’s liability. So, if a “claims cooperation” clause is defined as a condition precedent and cedant failed to cooperate with the reinsurer the cedant will lose the right for compensation even though it was able to prove its liability as a matter of fact and law under the original insurance contract. The consent from the reinsurers should be obtained before any payments, compromises and before the liability is recognized. On contrary if the clause is not a condition precedent and the cedant proved that he was legally liable to the assured, the reinsurer should provide compensation. Alternatively, if it is clear that reinsurer did not provide approval of the settlement “in bad faith” the cedant will be entitled to claim full compensation. The reason is that reinsurers are under a duty of “good faith” in exercising their rights under the cooperation clauses and should not arbitrary refuse to approve a settlement. The burden of proving that the reinsurer did not act in a “good faith” is on the cedant.¹⁰⁶

As was stated above there is only one decision in Norway by Borgarting Court of Appeal which directly involved interpretation of claim cooperation clause in reinsurance contract. The “claims cooperation” clause stated that:

“Notwithstanding anything herein contained to the contrary, it is a condition precedent to any liability under this Reinsurance that:

- i) The Reinsured shall, upon knowledge of any circumstances which may give rise to a claim hereunder, advise the Reinsurers as soon as possible;
- ii) The Reinsured shall furnish the Reinsurers with all information available Respecting such claim or claims and shall cooperate with the reinsurers in the adjustment and settlement thereof;
- iii) No settlement and/or compromise shall be made and no liability admitted without the prior approval of the Reinsurers.

¹⁰⁵ [2002] EWCA Civ 248

¹⁰⁶ Ibid

All other terms and conditions remain unchanged.¹⁰⁷

This decision demonstrates willingness of Norwegian courts to follow the practice of the English courts at least at the Court of Appeal level. The reason for this is that even though the district court held that reinsurers were obliged to pay because under Norwegian law it is required a causal relationship between negligence and the result, the Court of Appeal accepted a different point of view. This decision was not appealed and was final. In its argumentation the court made reference to the above mentioned English case *Gan v Tai Ping* and stated that contract should be interpreted objectively and that it should be put great weight to the contract wording which was made between two professional parties. Besides, the court pointed out that the international practice and understanding of similar cooperation clauses must be emphasized even though the agreement in principle was judged according to Norwegian law. Therefore, the breach of the “claims cooperation” clause was decided to be a condition precedent to the reinsurer’s liability which was the reason to apply a stricter interpretation of wording under Norwegian law. This meant that reinsurer was not obliged to pay.

So, it is very important for the cedant to comply with the “claims cooperation” clause in practice in order to get compensation. If the cedant did not compromise and did not make any payment without the reinsurer’s consent for the reinsurer it will be difficult to refuse payment. If the cedant did not comply with the cooperation provisions it probably that it could not recover from the reinsurer. However, if the cedant could prove that the reinsurer did not give the consent in a “bad faith” it will be entitled to compensation.

Another difficulty is that it is not always so obvious whether the clause is construed as a condition precedent. This can be illustrated by the *ICA v Scor* case where it was held that the claims cooperation clause imposed two different obligations on the cedant. The first part of the clause concerning the obligation to notify claims was decided to be a condition precedent to liability under the reinsurance, but the second part regarding the cooperation with the reinsurer in settlement of claim, was not a condition precedent to liability.¹⁰⁸ This case is also an example how the wording of the “claims cooperation” clause should not be formulated: first, the scope of the condition precedent is not clear; the second one is that the “claims cooperation” clause and “follow the settlements” clauses were in contradiction to each other, the effect of this will be considered below.¹⁰⁹ In order

¹⁰⁷ LB-2005-136447

¹⁰⁸ [1985] 1 Lloyd’s Rep. 312 at pp. 318, 326, 330

¹⁰⁹ Mance/ Goldstein/ Merkin (2003) p. 700

to avoid these problems both parties to the contract should put more attention to the wording and conditions of the clauses in order to make them clear. This will help to express the parties' real intentions and how the clauses should operate in practice. Besides, under English law the construction of the words decide the precise effect of the clause. It is good to state expressly in the contract that fulfillment of requirements under the cooperation clauses is a condition precedent to liability, but as was decided in *Eagle Star v Cresswell* case it is not necessary to use the particular term if the meaning and reality of the words were the same.¹¹⁰ If the reinsurer is willing to be engaged in the cedant's settlement it is better to include "claims cooperation" or "claims control" clauses without inclusion a "follow the settlements" provision. This will promptly ascertain the cedant's obligations and help to avoid the contradiction between two clauses.

It is possible that problem can rise in practice regarding the operation of the "claims cooperation" clause where there is more than one reinsurer (sometimes it can be up to twenty reinsurers) and they could not agree because of the difference in opinions. This situation could be very difficult for the cedant because in reinsurance the original policyholder will always claim against the cedant and can not go "directly" against the reinsurer (see subsection 2.1). If in this situation there is a leading underwriter clause than the leading reinsurer who will represent the interests of all reinsurers would be allowed to settle the defense of the claim, to cooperate with the cedant and all reinsurers will be bound by his decision (to follow the leader). In the absence of this clause the decision of the leading reinsurer will not be binding on others. The possibility of inconsistency in views among reinsurers was pointed out by the court in *Gan v Tai Ping* case: "If he [reinsured] places ten reinsurances [...] and fails to insist on a leading underwriter clause, whereby all reinsurers must follow a leader, he risks, at least in theory, being presented with up to ten different views as to what would constitute a reasonable settlement, and all of them may be reasonable."¹¹¹ So, in such case where there is no such clause in the contract or the leading reinsurer and others reinsurers do not agree on the settlement, then the "claims cooperation"/"claims control" clause is difficult to use in practice. The cedant would not be bound to follow any of conflicting views by its reinsurers in such circumstances and must act prudently and in a businesslike way. However, if the cedant settled the claim with the approval of some reinsurers, they probably should be bound to follow cedant's settlement even though other reinsurers would not be bound. In a situation, where the approval of the cedant's settlement is a

¹¹⁰ [2004] EWCA Civ 602

¹¹¹ [2001] EWCA Civ 1047 at paragraph 75

condition precedent to the liability (for example, in *Gan v Tai Ping* case) the cedant does not other choice than to allow the claim to proceed to judgment against him.¹¹² In such kind of situation very important role also plays the loss adjuster, which is the separate independent company, competent and expert in investigation and settlement of claims. Its opinion should be decisive in a situation when both parties could not agree on the settlement.

5.3 “Claims notification” clause

Very often “claims notification” clause/“claims information” clause could be found in the reinsurance contracts. It usually requires the cedant to notify the reinsurer about the events or loss that most likely give rise to a claim under the reinsurance contract (“loss that gives rise to a claim”). There are different requirements as to the time when the notification of damage/loss should be made, for example, “as soon as may be reasonably practicable”, “immediately” or during the specific time. Sometimes, the requirement to notify the reinsurer of a loss or claim is not formulated as a particular clause but may be included as a part of the “claims cooperation”/ “claims control” clause.

In practice it could be difficult to define exactly whether the particular loss gives raise to a claim against the reinsurer because cedant does not always has enough information concerning extend of the loss. This is especially relevant in the excess of loss reinsurance where the reinsurer agrees to indemnify the cedant against the amount which exceeds a cedant retention. Therefore, in such situation the cedant is required to notify the reinsurer if the loss/claim damage is likely to reach 75 percent of his retention. The standard/criteria that will be taken into account in order to determine whether the loss is likely to reach 75 percent of retention or in another situation whether there is a “loss that gives rise to a claim” is an objective standard. This standard means what a reasonable, with proper knowledge and experienced cedant would have applied in particular situation. In addition there should be reasonable grounds to believe that such event would cause the loss, and only honest believe of the cedant is not enough.¹¹³

Another important issue that was pointed out in *Royal and Sun Alliance plc v Dornoch Ltd*¹¹⁴ and *AIG Europe (Ireland) Ltd v Faraday Capital Ltd*¹¹⁵ is to use the

¹¹² O’Neill/ Woloniecki (2010) pp. 238- 239

¹¹³ Agnar Langeland (2010) p. 67

¹¹⁴ [2005] Lloyd’s Rep IR 544 (CA)

appropriate claims notification wording. In these cases the “claims control”/ “claims cooperation” clauses stated that it was a condition precedent to reinsurer’s liability that cedant should upon *knowledge* of any loss/losses which may give rise to a claim advise the reinsurers within specific time (72 hours/ within 30 days). The courts in these cases that had similar facts reached different conclusions. The reason for this was that after carefully considering the facts of any particular claim they distinguish the above mentioned cases, because time when the cedant could know of a loss which may give rise to a claim was different. In *Dornoch* case the cause of action under the reinsurance did not arise until the loss of the assured has been determined. As soon as there was no knowledge of actual loss, the notification was not required from cedant before this loss has been established for example by award or judgment. In *AIG v Faraday* case it was decided by the Court of Appeal that fall in the share price was a “loss” from shareholder’s point of view that “most likely/ might” give rise to a claim. The cedant knew about this loss that in fact caused a claim. Therefore, the cedant was obliged to notify about any loss that may have given rise to a claim to the reinsurer. The courts in both cases criticize the claims notification wording because the problems that arise in these two cases could have been avoided if the clauses provided that notice should be given of a claim or circumstances, rather than “knowledge of a loss”. The point is that “knowledge” is elusive concept and it is often difficult to define the exact time when the “knowledge” of the loss arose. Therefore, it is better to avoid using this concept as a requirement of notification to a liability of insurer or reinsurer.¹¹⁶ So, for a cedant it is better to avoid using this wording at all. In case where the claims notification wording nevertheless requires “knowledge of a loss” a cedant should give early notification to reinsurers even though it is likely that no claim or loss will occur.

There is no particular form in which the notification should be made, unless it is specified in the contract. In *H.L.B. Kidsons v Lloyd’s Underwriters*¹¹⁷ the court concluded that communication that was for another purpose and did not aim to provide notification could still amount to a valid notification.

The general rule regarding notification is that claim will be deemed as properly notified when notice has been received by the reinsurer. The question that can arise what will be the consequences if the broker who was informed of the claim by the cedant did not

¹¹⁵ [2007] EWCA (Civ) 1208

¹¹⁶ *Supra* note 121 and Barlow Lyde & Gilbert (2009) pp. 448- 450

¹¹⁷ [2008] EWCA Civ 1206

give notice in time or fails to do it at all to the reinsurer's broker or vice versa. In these situations the English court most likely will support the view that the broker is the representative of the cedant and this means that notice was not given to the reinsurer. Then the cedant can have a claim against his broker, who also can claim against reinsurer's broker if it was their mistake to notify the reinsurer.¹¹⁸ The same would probably be applicable under the Norwegian law as well.

5.4 “Claims control” clause

In a situation where the reinsurer wants to have a complete control of the cedant's settlement with the assured, “claims control” clause may be considered. It takes the settlement out of the cedant's control and put it upon the reinsurer. The “claims control” clause is usually found in the situation where the reinsurer took all or most of the risk and therefore, the reinsurer's economic interests will be greater than the cedant's.

The “claims control” clause should be distinguished from the “claims cooperation” one. The latter obliges the cedant to notify of claim/loss and cooperate with the reinsurer and usually gives the reinsurer the ultimate right to agree to any settlement in order to be bound by it. As was stated above the “claims control” clause usually takes place where the reinsurer wants to have the whole control under the claims management process of the settlement with the assured. The existence and widespread of these clauses in the last years can be explained by the fact that the insurance often is only a fronting operation for London market reinsurers and it is obvious that the cedant has no real interest because reinsurer accepts 100 percent of the risk.¹¹⁹

The “claims control” clause usually requires from the cedant: 1) to notify reinsurer/s of a claim or circumstances that most likely give rise to a claim within some time (immediately, specific time, as soon as may be reasonably practicable) 2) to give the reinsurer right to appoint loss adjusters, surveyors, assessors and also the reinsurer may expressly be entitled to control all negotiations in connection with the underlying loss. So, “claims control” clause is aimed to give the reinsurer the right to handle and investigate claims made against the cedant. The consequences of a breach of such clause will depend on its wording.

¹¹⁸ Barlow Lyde & Gilbert (2009) p. 446

¹¹⁹ Lowry/ Rawlings/ Merkin (2011) p. 520

In *AIG v The Ethniki* case¹²⁰ the reinsurance contract included “follow the settlements” clause and a “claims control” one: “[...] it is a condition precedent to any liability that the reassured shall, upon any knowledge of loss or losses which may give rise to a claim under this policy, advise the underwriters thereof by cable within 72 hours; the reassured shall furnish the underwriters with all information available respecting such loss or losses, and the underwriters shall have the right to appoint adjusters, assessors and /or surveyors and to control all negotiations, adjustments and settlements in connection with such loss or losses”. The reinsurer refused to indemnify because the cedant failed to inform the loss in time and to provide information regarding the loss. The court supported this argumentation due to the fact that “claims control” clause was a condition precedent to reinsurer’s liability, despite the existence of the “follow the settlements” clause. The similar conclusion was reached in *Eagle Star Insurance Company Limited v J.N. Cresswell and Others*¹²¹ case where the “claims cooperation” clause, but in reality by its content “claims control” clause, was held to be a condition precedent to liability concerning the settlements and negotiations about which the reinsurers were not informed and which the reinsurers did not control. So, the cedant was deprived of the right to rely on the “follow the settlements” clause that was also present in the policy and reinsurers were held not to be liable.

5.5 Interrelationship of “follow the settlements” and “claims cooperation” clauses

In this subsection it will be discussed the most interesting and complicated problems that appeared in the last few decades, namely when the same reinsurance contract contains both “follow the settlements” and “claims cooperation” clauses. The main question that arises of interrelationship between these clauses is whether the reinsurer/reinsurers are obliged by the “follow the settlements” clause in the situation where the cedant failed to fulfill the conditions of the “claims cooperation” clause. The courts tried to solve this problem during the last decades. On the one hand it seems that courts have more or less clear position concerning this question. On the other hand there are still some uncertainties as to the consistency of this position, therefore different discussions and argumentations will be analyzed and taken into account during the discussion below.

¹²⁰ [2000] 2 ALL ER 566

¹²¹ [2004] EWCA Civ 602

The natural question that arises from the above mentioned is why the relationship between these two clauses is problematic and not easy to answer. The reason for this is that there is inconsistency between the languages of the two clauses and therefore they are in obvious conflict with each other. This was pointed out by the Court of Appeal in *ICA v Scor* case and later in *Eagle Star v Cresswell* case.: “There is [...] an inconsistency between (1) a follow the settlements clause, the underlying philosophy of which is that reinsurers trust insurers to make settlements of claims, and (2) an undertaking in a claims co-operation clause, the underlying philosophy of which is that settlements shall not be made without the approval of reinsurers.”¹²²

In *ICA v Scor* case, which have been considered above (see section 4) the majority of the court concluded that “claims cooperation” clause which was formulated as a “condition precedent” to reinsurer’s liability *emasculates* the effect of the “follow the settlements” clause. The “follow the settlements” clause will be applicable only to settlements that were approved by the reinsurer. Therefore, the reinsurers will be only bound when the cedant has received their approval to the settlement. As the cedant did not receive their approval it was unable to rely on the “follow the settlements” clause and would have to prove its loss. The “claims cooperation” clause that was formulated as a “condition precedent” was given precedence over the “follow the settlements” clause. The same result was reached in *Eagle Star v Cresswell*¹²³ case where the court stated that the “follow the settlements” clause must *yield* to the “claims cooperation” clause the wording of which defined it as a condition precedent to the reinsurer’s liability and if it was broken the reinsurers are not liable.

So, it seems that English courts at least at the Court of Appeal level have more clear position regarding this issue. However, if one takes into account that the House of Lords are entitled to change the law and that not all of the judges agreed with this position it is still possible for the cedant to reach a different result. Besides, in *Eagle v Star v Cresswell* case the court pointed out that there is no one solution that will fit to all cases. In a situation where a policy contains “follow the settlements” and “claims cooperation” or “claims control” clauses, the result under English law will depend on the effect of construction of the wording that were used in clauses.

Lord Stephenson was dissenting with majority in the Court of Appeal in *ICA v Scor* case. He held that the cedant (ICA) had done all they could be way of cooperation and were entitled to rely on the “follow the settlement” clause. Even though the settlement was

¹²² [1985] 1 Lloyd’s Rep. 312 at 331

¹²³ [2004] Lloyd’s Rep IR 537 (CA)

one which reinsurer (Scor) had not approved, the reinsurer could not be released from giving effect to the judgment of the trial court. So, the cedant was able to recover under the “follow the settlements” clause because 1) reinsurers seem to “approved” settlement established by judgment of a court; 2) settlement by adjudication fell outside the scope of the “claims cooperation” or “claims control” clause and therefore did not require the approval from the reinsurer¹²⁴. In support of this position the relevant is the decision by the House of Lords in *Vesta v Butcher* case (which was considered in section 3). In this case the “claims control” clause which entitled the reinsurers to have sole control of all negotiations was ignored. The result of the decision was that “follow the settlements” clause in “back to back” reinsurance contract nullified a “claims control” clause if the claim was valid and unanswerable under the law of the original policy.¹²⁵ Lord Templeman in this case admitted that courts should give consideration that these clauses are mutually contradictory and are incapable of coexistence. In addition he (at page 335) did not accept the argument of the underwriters that “follow the settlements” clause was emasculated by the incorporated “claims control” clause. Analyzing the relationship between “claims control” clause and “follow the settlements” one Lord Lowry in the same case (at page 348) admitted that in the situation where the cedant settled a claim and did not obtain the consent from the reinsurer, he must prove his liability to the assured by showing that he was liable and the amount that he paid was correct. The reinsurers then should follow cedant’s settlement unless they have a good defence.

As can be concluded from *Vesta v Butcher* and *ICA v Scor* cases it is recommended not to include the “follow the settlements” clause and “claims cooperation” or “claims control” clauses in the same reinsurance contract. The presence of these two clauses in the contract causes not only inconsistency but also make them ineffective to great extent. On the one hand, if the reinsurer’s consent has not been obtained the cedant has to prove not only that he was legally liable under the policy but also the amount that he paid. On the other hand, the effect of the “claims cooperation” or “claims control” clause may be nullified as for example in *Vesta v Butcher* case if the settlement that was properly settled by the cedant will be held to bind the reinsurer, even though the cedant failed to cooperate as was required in the contract. Based on the *Vesta v Butcher* case the courts probably will decide that loss under the underlying policy is proved, in a situation where there is opposite to each other “back to back” contracts that contain “follow the settlements” clause,

¹²⁴ [1989] 1 Lloyd’s Rep 331 (HL) and Barlow Lyde & Gilbert (2009) p. 457

¹²⁵ Ibid

especially in situation where the underlying liability will be governed by foreign law and has been adjudicated by a court.¹²⁶

As can be understood from the *ICA v Scor* case an interesting issue in interrelationship between “follow the settlements” and “claims cooperation” clauses that can arise is whether the reinsurer can argue that “follow the settlements” clause is not operative in a situation where there is a trial court decision or award against the cedant. According to the view expressed by O’Neill and Woloniecki in such case the reinsurer should suffer the same result as cedant, even in situation when the higher instance court will overrule the previous judgment. However, there are some reservations: unless the reinsurer can prove that cedant did defense not in a businesslike way or that cedant refused to follow reinsurer’s direction under the “claims control” / “claims cooperation” clause to settle at a lower figure.¹²⁷ I agree with such a conclusion and think that the reinsurer should follow the settlements of the cedant in case there is a court ruling that order the cedant to pay to the assured and cedant did a proper defense and acted in a businesslike manner. This is because the idea under the “follow the settlements” clause is to protect the cedant, and to oblige the reinsurer to pay their share in the settlement irrespective of the liability of the cedant in fact, unless certain defenses could be raised and proved by the reinsurer.

So, the interesting question is whether the House of Lords will accept the approach of the majority in the Court of Appeal in *ICA v Scor* and *Eagle Star v Cresswell* cases or prefers the reasoning of the Lord Stephenson in *ICA v Scor* that seems to be acceptable approach in future. Another interesting question is which conclusion will accept the Norwegian court if similar situations arise. As was stated above interpretation tradition in Norway differs from the English one. The assessment by the Norwegian court can be wider because usually contractual negotiations and surrounding circumstances will play important role in addition to contract wording.

¹²⁶ Ibid

¹²⁷ O’Neill/ Woloniecki (2010) pp. 221- 222

6 Conclusion

As can be concluded the relationship between the “cedant” and the “reinsurer” in reinsurance contracts can cause many problems and uncertainties. However, due to the extensive English court practice they have become clearer during the last years.

As the main idea under the reinsurance is that the cedant has a right to compensation there is a general established presumption that the reinsurance contract is “back to back” with the underlying insurance contract. Therefore the “as original” provision is the starting point for every reinsurance contract. This clause is very important for the reinsurer because it defines the scope of cover of the reinsurance contract. By other words, what the reinsurer is obliged to cover under the contract and reinsurer usually uses it as a defense. This is illustrated by *Vesta v. Butcher* case discussed in chapter 3.

The parties to the reinsurance contract are free to establish one of the two ways to handle “back to back” cover in the reinsurance contracts either by use of “follow the settlements” or “claims cooperation” clause or both.

In a situation where the parties insert “follow the settlements” clause in the reinsurance contract, the reinsurer is bound to pay his share in the cedant’s settlement, without cedant’s liability been proved. The reinsurer will be relived from its obligation to compensate under the clause when: 1) the claim falls outside the scope of the reinsurance or the underlying insurance contract; 2) the cedant acted not in a “good faith” and not in a businesslike way in settling the claim. The burden of proof in this situation is on the reinsurer. If the parties did not insert “follow the settlements” clause in the reinsurance contract, the burden of proof is on the cedant that settlement of the claim was covered by the reinsurance and underlying insurance contract as a matter of fact and law.

The idea under “claims cooperation” clause is that a settlement should not be made without the approval of the reinsurer. In the case where the cedant fails to notify the reinsurer prior to his settlement with the original insured the legal consequences will depend on the construction of the words and whether the “claims cooperation” clause is an absolute condition precedent or not. If a “claims cooperation” clause is defined as condition precedent and cedant failed to cooperate it is probably that cedant will lose the right for compensation. On contrary if it is clear that reinsurer did not provide approval of the settlement “in bad faith” the cedant will be entitled to claim full compensation. In a situation where the reinsurer wants to have a complete control of the cedant’s settlement

with the assured, the reinsurer should be considered the “claims control” clause. It takes the settlement out of the cedant’s control and puts it upon the reinsurer. So, these clauses will be a great benefit to the reinsurer if they expressly will be formulated as a condition precedent to the reinsurer’s liability.

If there is no “claims cooperation” or “claims control” clause in a contract, there is no requirement for the cedant to get reinsurer’s consent or to notify the reinsurer in advance about the settlement. In this case the reinsurer has no right to interfere with the way the cedant handles a claim. But it is highly recommended in practice to bring the reinsurer into the settlement negotiations because this would make it more difficult for the reinsurer to argue that settlement was not made in a “good faith” or not in a businesslike way. In addition it should be pointed out that “claims cooperation”/ “claims control” clause may be incapable of operation in a situation where there is more than one reinsurer and they can not agree. In such a situation, the cedant would not be bound to follow any of conflicting views by its reinsurers and is obliged to act prudently and in a businesslike way.

The presence of both “follow the settlements” and “claims cooperation” clauses in the same reinsurance contract can cause problems and inconsistencies. The reason is that they basically contradict each other. The courts tried to solve the main question that arises of interrelationship between these clauses, in particular whether the reinsurer/reinsurers are obliged by the “follow the settlements” clause in the situation where the cedant failed to fulfill the requirements of the “claims cooperation” clause. As can be concluded the position at the Court of Appeal level under the recent cases (*ICA v Scor* and *Eagle v Star v Cresswell*) is more in favour of reinsurers. It was found that the “claims cooperation” clause which was formulated as a “condition precedent” to reinsurer’s liability nullifies the effect of the “follow the settlements” clause. However, if take into account that the House of Lords are entitled to change the law and that not all of the judges agreed with this position it is still possible for the cedant to reach a different result. The argumentation would be recommended to be based on the point of view of Lord Stephenson who dissented with majority in the Court of Appeal in *ICA v Scor* case and the decision by the House of Lords in *Vesta v Butcher* case. In which the “claims control” clause that entitled the reinsurers to have sole control of all negotiations was not taken into account at all (discussed in subchapter 5.5).

After analyses of the main case law the recommendation will be not to include the “follow the settlements” clause and “claims cooperation” or “claims control” clauses in the

same reinsurance contract. The reason for this is that presence of these two clauses in the same contract makes them ineffective to great extent. On the one hand, if the cedant did not obtain the reinsurer's consent he has to prove not only that he was legally liable under the policy but also the correctness of amount that he paid. On the other hand, the effect of the "claims cooperation" or "claims control" clause may also be nullified as was for example in *Vesta v Butcher* case.

Therefore, the question is still open which approach will accept the House of Lords. Whether it prefers the position of the majority in the Court of Appeal in *ICA v Scor* and *Eagle Star v Cresswell* cases or the argumentation of the dissenting Lord Stephenson in *ICA v Scor* and position in *Vesta v Butcher* case. As there is no one solution that will fit to all cases, it will be probably based on the particular facts of each case and strict interpretation of precise wording of each clause.

Another interesting issue is which conclusion will accept the Norwegian court if similar situations arise. It should be pointed out that interpretation tradition in Norway differs from the English one. Unlike in English law under Norwegian law great role have the contractual negotiations between the parties and surrounding circumstances. The assessment by the Norwegian court can be wider and therefore it is obvious that Norwegian courts will not necessarily always accept the English courts position. However, in practice the English court decisions usually have relevance for Norwegian courts and this can be illustrated by the Borgarting Court of Appeal decision which directly involved interpretation of claim cooperation clause in reinsurance contract. In its argumentation the court made reference to the English case *Gan v Tai Ping* case (discussed in subchapter 5.2) and applied stricter interpretation of wording than under Norwegian law. This decision is a good example for Norwegian insurance companies that usually conclude reinsurance contract with international reinsurers. The reason is that underlying contracts are often subject to Norwegian law and reinsurance contracts usually are subject to the English law. Besides, most of the clauses are borrowed from the London market. The combination of different jurisdictions and borrowed terms can cause many problems. This can be illustrated for example by *Vesta v Butcher* case. Therefore, parties to the reinsurance contract should put more attention to the design and particular wording of each clause or even review some clauses. This will help to express their real intention and to avoid the above mentioned problems in practice.

7 References

List of judgments/decisions

- AIG Europe (Ireland) Ltd v Faraday Capital Ltd [2007] EWCA (Civ) 1208
- AIG Europe (UK) Ltd v The Ethniki [2000] 2 ALL ER 566
- Ace Insurance SA-NV v Zurich Insurance Co [2001] Lloyd's Rep.I.R 504
- Assicurazioni Generali SpA v CGU International Insurance Plc and Others [2004] Lloyd's Rep IR 457
- Attorney-General v Forsikringsaktieselskabet National of Copenhagen [1924] 19 Lloyd's Rep 32 (CA)
- Axa Reinsurance (UK) plc v. Field [1996] 2 Lloyd's Rep. 233
- Boden v Hussey [1988] 1 Lloyd's Rep. 423 (CA)
- Charman v Guardian Royal Exchange Assurance Plc [1992] 2 Lloyd's Rep. 607
- Charter Reinsurance Co Ltd v Fagan [2009] 2 Lloyd's Rep. 508
- Chippendale v Holt [1895] Com. Cas.197
- Cigna Life Insurance Co of Europe SA-NV v Intercaser SA de Seguros y Reaseguros [2001] Lloyd's Rep. I.R. 821
- Colin Baker v Black Sea & Baltic General Insurance Co Ltd [1995] L.R.L.R. 261 (QB Com Ct)
- Commercial Union Assurance Co. Plc & Others v NRG Victory Reinsurance Ltd [1998] 2 All ER 434
- Eagle Star Insurance Company Limited v J N Cresswell and Others [2004] EWCA Civ 602
- Forsikringsaktieselskapet Vesta v J.N.E.Butcher and Others [1989] 1 Lloyd's Rep 331 (HL)
- Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd [2002] EWCA Civ 248
- Grecoair Inc v Tilling [2005] Lloyd's Rep IR 151
- Groupama Navigation et Transports v. Catatumbo CA Seguros [2000] 2 Lloyd's Rep 350 (CA)
- H.L.B. Kidsons v Lloyd's Underwriters [2008] EWCA Civ 1206
- HIH v New Hampshire [2001] 2 Lloyd's Rep.161 (CA)
- Hill v Mercantile & General Reinsurance Co Ltd [1996] 1 WLR 1239 (HL)
- Hiscox v Outhwaite and Others (No 3) [1991] 2 Lloyd's Rep. 524

Home Insurance Co of New York v Victoria- Montreal Fire Insurance Co [1907] A.C. 59
Insurance Co. of the State of Pennsylvania v. Grand Union Insurance Co [1990] 1 Lloyd's
Rep. 208
Insurance Company of Africa v Scor (UK) Reinsurance Co Ltd [1985] 1 Lloyd's Rep. 312
Lower Rhine and Wurtemberg Insurance Association v Sedgwick [2005] 1 Lloyd's
Rep. 643
Pine Top Insurance Co. Ltd. v Unione Italiana Anglo-Saxon Reinsurance Co. Ltd [1987] 1
Lloyd's Rep.476
Prifti v Musini Sociedad Anonima de seguros y reaseguros [2004] Lloyd's Rep.I.R.528
Royal and Sun Alliance plc v Dornoch Ltd [2005] Lloyd's Rep IR 544 (CA)
Toomey v Eagle Star [1994] 1 Lloyd's Rep. 516
Wasa International Insurance Co. Ltd. and AG Insurance Co. Ltd v. Lexington Insurance
Co [2007] EWHC 896 (Com)
Wasa International Insurance Co. Ltd. and AG Insurance Co. Ltd v. Lexington Insurance
Co [2008] EWCA Civ 150 (CA)
Wasa International Insurance Co. Ltd. and AG Insurance Co. Ltd v. Lexington Insurance
Co [2009] 2 Lloyd's Rep. 508 (HL)

Norwegian case law

LB -2005-136447 Borgarting Court of Appeal
Rt-1956-249 Vingtor

Danish case law

DHR Dom 2006-05-24 UfR

Treaties/Statutes

Bermuda Insurance Act 1978

Marine Insurance Act 1906

Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order
2001 (SI 2001/3694)

Secondary Literature

Barlow Lyde & Gilbert. *Reinsurance Practise and the Law*. London, (Informa) 2009

Bull, Hans Jacob. *Forsikringsrett*. Oslo, (Universitetsforlaget) 2008

Carter, Robert, Leslie Lucas & Nigel Ralph. *Reinsurance*. Fourth edition. London, (Reactions Publishing Group in association with Guy Carpenter & Company) 2000

Clarke, Malcolm A., Julian M. Burling & Robert L. Purves. *The Law of Insurance Contracts*. Sixth edition. London, (Informa) 2009

Edelman, Colin, Andrew Burns, David Craig and Akash Nawbatt. *The law of reinsurance*. Oxford (Oxford University Press) 2005

Eggers, Peter Macdonald, Simon Picken QC and Patrick Foss. *Good Faith and Insurance Contracts*. Third edition. London, (Lloyd's List) 2010

Falkanger, Thor, Hans Jacob Bull & Lasse Brautaset. *Scandinavian Maritime Law: The Norwegian Perspective*. Third edition. Oslo, (Universitetsforlaget) 2011

Gleditsch, Jon. *Reassuranse: en kort innføring*. Oslo (Forsikringsakademiet) 1991

Hoffmann, William C. *A common law of reinsurance loss settlement clauses: A comparative analysis of the Judicial Rule Enforcing the Reinsurer's Contractual Obligation to Indemnify the Reinsured for Settlements*. Tort & Insurance Law Journal, Volume XXVIII, Number 4, Summer 1993 p.659-710

Kiln, Robert and Stephen Kiln. *Reinsurance in practice*. Fourth edition. London (Witherby & Co) 2001

Langeland, Agnar. *Om "claims co-operation" i reassuransekontrakter og tolkningsmomenter i lys av nyere rettsavgjørelser*. MarLus nr. 387, 2010

Legn-Jones, Nicolas, John Birds and David Owen. *MacGillivray on Insurance Law*. Eleventh edition. London, (Sweet & Maxwell) 2008

Lewison, Sir Kim. *The interpretation of contracts*. London, (Sweet & Maxwell) 2007

Lowry, John, Philip Rawlings and Robert Merkin. *Insurance Law: Doctrines and Principles*. Third edition. Oxford/Portland/Oregon, (Hart) 2011

Mance, Lord Justice, Iain Goldrein and Robert Merkin. *Insurance disputes*. Second edition. London/ Hong Kong, (Informa) 2003

Meidell, Andreas. *Reassuransekontrakten – en kort innføring*. I: Tidsskrift for forretningsjuss, 2006 p 203–212 available at www.lovdato.no

Merkin, Robert. *A Guide to Reinsurance Law*. London, (Informa) 2007

Merkin, Robert. *Colinvaux's Law of Marine Insurance*. Ninth edition. London, (Sweet & Maxwell) 2010

O'Neill, P.T and J.W Woloniecki. *The law of reinsurance in England and Bermuda*. Third edition. London, (Sweet & Maxwell) 2010

Poole, Jill. *Textbook on contract law*. Tenth edition. Oxford, (Oxford University Press) 2010

Riley, Keith. *The Nuts and Bolts of Reinsurance*. Second edition. London (Wetherby & Co.Ltd) 2001

Tomas, Rhidian D. *The Modern Law of Marine Insurance*. Volume two. London, New York, Hong Kong, (LLP) 2002

Vibe, Kaja de. *Reassuransekontrakter – rettsanvendelse, cedantens opplysningsplikt og reassurandørens dekningsforpliktelse*. MarIus nr. 338. University of Oslo, (Sjørettsfondet) 2006

Wedge, Peter. *Reinsurance claims management*. First edition. London, (Witherby & Co) 2005

Wilhelmsen, Trine-Lise & Hans Jacob Bull. *Handbook in Hull Insurance*. Oslo, (Gyldendal Norsk Forlag AS) 2007

Wilhelmsson, Thomas. Om reassurandörs ersättningsskyldighet vid skadeåterförsäkring, Försäkringsjuridiska Föreningens publikation nr 21, Stockholm 1976

Internet Resources

Swiss Re “*An introduction to reinsurance*” 1994.

http://fa2f2.voila.net/intro_reinsurance.pdf [last visit 12.07.2011]

Swiss Re “Understanding the reinsurance: how reinsurers create value and manage risk”

2004. http://www.hec.unil.ch/isa/RiskMan06/Understanding_reinsurance_p.pdf [last visit 12.07.2011]

David Joseph. *Wasa International Insurance Company Limited v. Lexington Insurance Company Limited and others: how “back to back” is “back to back”?* 19 June 2007.

<http://www.mondaq.com/article.asp?articleid=49314> [last visit 20.08.2011]

Malcolm Clarke. *The contractual nature of reinsurance*. The Cambridge Law Journal, volume 69, pp.24-25, 2010.

<http://journals.cambridge.org/action/displayFulltext?type=1&pdfType=1&fid=7328876&jid=CLJ&volumeId=69&issueId=01&aid=7328868> [last visit 13.08.2011]

List of Abbreviations

BIA	Bermuda Insurance Act 1978
HL	House of Lords
NSC	Norwegian Supreme Court
Lloyd's	Lloyd's underwriters
Lloyd's Rep	Lloyd's Law Reports
Lloyd's Rep I.R	Lloyd's Law Reports Insurance & Reinsurance
L.J.	Lord Justice
MIA	Marine Insurance Act 1906
Swiss Re	Swiss Reinsurance Company
FSMA	Financial Services and Markets Act 2000