

Claims Control Clauses – how much control do they give?



Claims Control Clauses (referred to as CCC's) are often found in facultative reinsurances where the reinsured, that is, the direct insurer, has a small or nil retention. The purpose of the clause is to give the reinsurer control over investigating and settling claims. However, standard wordings in use in the market may not confer as much protection as reinsurers expect.

Market form NMA 2738 (1/1/97) provides an example of a CCC, as follows:

Notwithstanding anything to the contrary contained in this Reinsurance it is a condition precedent to Reinsurers' liability under the Reinsurance that:

- (a) The Reinsured shall give to the Reinsurer(s) written notice as soon as reasonably practicable of any claim made against the Reinsured in respect of the business reinsured hereby or of its being notified of any circumstances which could give rise to such a claim.*
- (b) The Reinsured shall furnish the Reinsurer(s) with all information known to the Reinsured in respect of claims or possible claims notified in accordance with (a) above and shall thereafter keep the Reinsurer(s) fully informed as regards all developments relating thereto as soon as reasonably practicable.*
- (c) The Reinsurer(s) shall have the right at any time to appoint adjusters and/or representatives to act on their behalf to control all investigations, adjustments and settlements in connection with any claim notified to the Reinsurer(s) as aforesaid.*
- (d) The Reinsured shall co-operate with the Reinsurer(s) and any other person or persons designated by the Reinsurer(s) in the investigation, adjustment and settlement of such claim.*

Compliance with the CCC is expressed to be a condition precedent to the reinsurer's liability. Therefore, under English law, the effect of a breach is to discharge the reinsurer from liability. However, the burden of proving a breach is on the reinsurer. CCC's are also in the nature of exclusion clauses: the reinsurer can only rely on the clause to exclude its liability if the words are clear on a fair construction of the clause.

The requirement in sub-clause (a) to give written notice "*as soon as reasonably practicable*" is less onerous than the requirement to give immediate notice, or notice as soon as possible. However, the courts have interpreted this phrase as requiring prompt action on the part of the reinsured, since this is necessary if the CCC is to operate as intended.

Sub-Clause (b) requires the reinsured to provide the reinsurer with all known information, and thereafter to keep the reinsurer fully informed of all developments. There are conflicting authorities on the extent of this duty, for example as to whether possible avoidance arguments or breach of warranty must be communicated. In *Gan Insurance v Tai Ping* (2002) the Court of Appeal

held that the duty to inform must relate to the ordinary course of claims handling and the obvious purpose is to put reinsurers into a position where they can make a sensible judgment regarding any proposal to admit liability, or compromise a claim. This supports a wide interpretation of the duty to inform.

Sub-clause (c) gives the reinsurer the right at any time to appoint adjusters or other representatives to control all investigations, adjustments and settlements in connection with the claim notified. This leads to a number of points.

1. The reinsurer is confined to the claim arising under the reinsurance in respect of which it has claims settling authority. The CCC confers no right to control settlements entered into by, for example, a co-reinsurer which has its own claims settling authority (*Beazley v AIC* 2013).
2. The reinsurer can exercise its right at any time to control investigations or settlements. Therefore the reinsured must continue to provide sufficient information to enable the reinsurer to decide whether to exercise its right of control. However, the CCC uses the specific term “settlements”. There is accordingly no breach if the reinsured fails to give notice of communications with the underlying insured or third parties that fall short of this description, or which are legally insignificant or do not concern the claim under the reinsurance – because, for example, they concern only the reinsured’s retention (*Beazley v AIC*).
3. Provided the reinsured has provided sufficient information, if the reinsurer decides not to exercise its right of control, the reinsurer may be said to have waived its entitlement to accept or reject the settlement. A reinsured is not likely to be held in breach if it commences negotiations copying in the reinsurer, and thereafter, if the reinsurer is silent, continues negotiations on its own terms.
4. The CCC does not refer to matters such as the conduct of litigation or other formal methods of dispute resolution. It is therefore not clear that the CCC allocates to the reinsurer any right to control the defence of underlying defence or coverage litigation.



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