

Product distribution – how to protect yourself from an early exit

24 February 2023  Thomas Gibby

Any decent contracts lawyer will tell you that any contract you enter into should be treated like an insurance policy - you will put it in the drawer and only refer to it when you need to, i.e. when something has gone wrong or a party wants to use it to do something, e.g. walk away. Your TOBAs and binders are no different.

When entering into any commercial relationship, it can be easy to get distracted by the positive atmosphere that often surrounds it – two parties who trust each other go into business with the best intentions. But, as ever, things change over time and relationships don't work out – are you protected?

Take a situation where you are the placing broker, MGA or other intermediary acting as an administrator and intermediary for your client who runs an insurance scheme. You have an authorised representative TOBA to distribute underwritten policies under the scheme's branding. What is the position where the capacity provider changes, or your client (the scheme provider) decides to sell its portfolio to another and terminate your involvement – where does that leave you? We have seen an increase in instructions from clients in the past 6 months requesting advice on their exposure under their existing contracts, which has prompted us to pass on some tips.

Contractually, excluding any performance related reason for the termination (i.e. you may not have hit your targets for any given period), you may have done nothing wrong and a commercial change out of your hands is threatening to leave you exposed, losing all the business and potentially any commission. It is also likely that you have put a lot of time and effort into building the relationship to date.

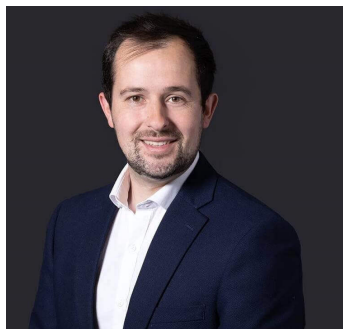
However, in English law, there is no implied protection from termination for an agent or intermediary distributor selling insurance products, nor is there any guarantee of compensation if the relationship is terminated through no fault of the agent or intermediary. Therefore, you need to ensure the TOBA gives you the protection you need. There are at least three things you should always ensure that your TOBA has in place to stop this from happening:

1. **Keep your eyes on the prize** - identify when the majority of your income is to be earned and if there is a period when the majority or policy renewals, or "bulk" renewals take place, make sure you lock in a narrow termination window to ensure that your client cannot walk away immediately before the next set of renewals are due to avoid paying the majority of their commission and pulling the rug away from under your feet.
2. **Assess the minimum runway length to land safely** - weigh up the work you have done onboarding the relationship and consider the minimum length of time you would want or need the relationship to run to make it commercially viable – then make sure the relevant TOBA is for a fixed minimum initial period, preventing termination without cause before that date to ensure that you aren't brought back down too fast.
3. **Don't cover your tracks** - ensure that you are paid for work done and make sure you are entitled to commission on policies inceptioned during your contracting relationship that will continue to renew following termination. If your client assesses its book of business and runs the numbers and decides that it is cheaper to walk away than continue to pay you ongoing commission for existing policies, and new policy inceptions are tailing off or plateauing, they are likely to want to explore that option. Always make sure your bordereaux reports are accurate, complete and up-to-date to quantify costs of termination, if needed.

Having clear exit provisions will allow each party to know where they stand, and give you contractual certainty. If a party serves a termination notice under a contract that does not follow the agreed contractual procedure, they will effectively shoot themselves directly in

the foot and commit a material breach of the contract themselves – this will gift the non-terminating party substantial leverage when seeking to claim damages from the termination and resulting loss of business, as the terminating party made the first move and got it wrong and they will be entitled to compensation calculated against what they would have earned had the contract been properly performed. The TOBA is therefore always a good place to start, and, as the commercials of any relationship are different, it is never sensible to rely on a standard TOBA template!

Key contact



Thomas Gibby
Principal Associate

thomas.gibby@brownejacobson.com

+44 (0)330 045 2874

Related expertise

Commercial

Commercial dispute resolution

Commercial law

Corporate and commercial services for insurance