

Product distribution – protecting yourself from an early exit

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We have seen an increase in instructions to advise on the termination provisions in TOBAs and binders, including disputes when the parties disagree over their application. In this article we look at some common issues.

Any experienced contracts lawyer realises that any commercial contract their clients enter into is treated as if it were an insurance policy – it often gets placed in a drawer and only referred to when needed, 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 giving authority to a new broker, MGA or other coverholder it is easy to get distracted– two parties who trust each other go into business with the best intentions to explore new markets and opportunities. But, as ever, things change over time and relationships don't always work out the way the parties intended.

Take a situation where you delegate authority to your appointed coverholder to distribute your underwritten policies under your, or your scheme's, branding. What is the position where you want to migrate your policy portfolio to another and terminate your involvement with your existing coverholder – where does that leave you?

Contractually, excluding any performance related reason for the termination (i.e. your placing coverholder may not have hit their targets for any given period or encountered regulatory difficulties), they may have done nothing wrong and a commercial change driven by you that is out of their hands is threatening to leave them exposed, losing all the business and potentially any commission. It is also likely they will have put a lot of time and effort into building the relationship to date, which may cause them to challenge the termination.

In English law, there is no implied protection from termination for your coverholder, nor is there any guarantee of compensation if the relationship is terminated through no fault of the agent. Therefore, you need to ensure the TOBA gives you the flexibility you need. There are at least three basic things you should always ensure that your TOBA has in place to give you as much flexibility as possible when delegating your authority:

1. **When does entitlement to commission arise** - identify when the majority of income is to be paid and if there is a period when the majority of policy renewals, or “bulk” renewals take place, and make sure you carefully consider your termination windows. Bear in mind your coverholder – if properly advised – will want to protect any such bulk renewal provisions and will want to negotiate termination windows accordingly. Always remember in any event to ensure the agreement sets out the position on commission payments, if triggered, during these times.
2. **Assess the minimum runway length needed to land safely** – your coverholder should weigh up the work they have done in onboarding the relationship and consider the minimum length of time it would want or need the relationship to run to make it commercially viable – you should do the same and ensure the relevant binder runs for a fixed minimum initial period, preventing

termination without cause before that date to ensure the coverholder is not brought back down too fast. Have those open discussions up front and ensure the binder reflects the commercial pressures on both sides.

3. **Don't try to cover their tracks** – your coverholder will want to ensure it is paid for work done and remains entitled to commission on policies incepted during its contracting relationship that will continue to renew following termination. You should always ensure any right to walk away that you may have is clear as to the position on commission payments following termination. It is sensible to build in a run-off period and commission tapering mechanism to reduce your exposure to legacy payments. You will also need to 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 provide contractual certainty. If you seek to terminate your agreement without following the agreed contractual procedure, you will likely be committing a material breach of the contract – this will gift your coverholder substantial leverage when seeking to claim damages from the termination and resulting lost business. If the terminating party made the first move and got it wrong, the other party will be entitled to compensation calculated against what they would have earned had the contract been properly performed. Time should therefore be taken to ensure these issues are properly considered and built into the binder at the outset, rather than relying on a standard template!

Conversely, if you already have a TOBA in place but aren't sure of your exit options, it is always sensible to check the contractual position before taking action.

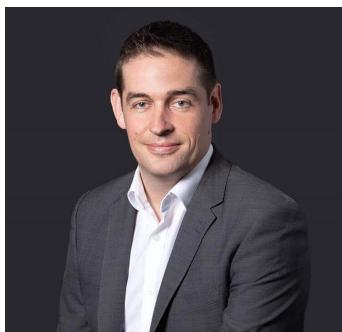
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