

IMCC 2012

Leader clauses - sheep or lemmings?

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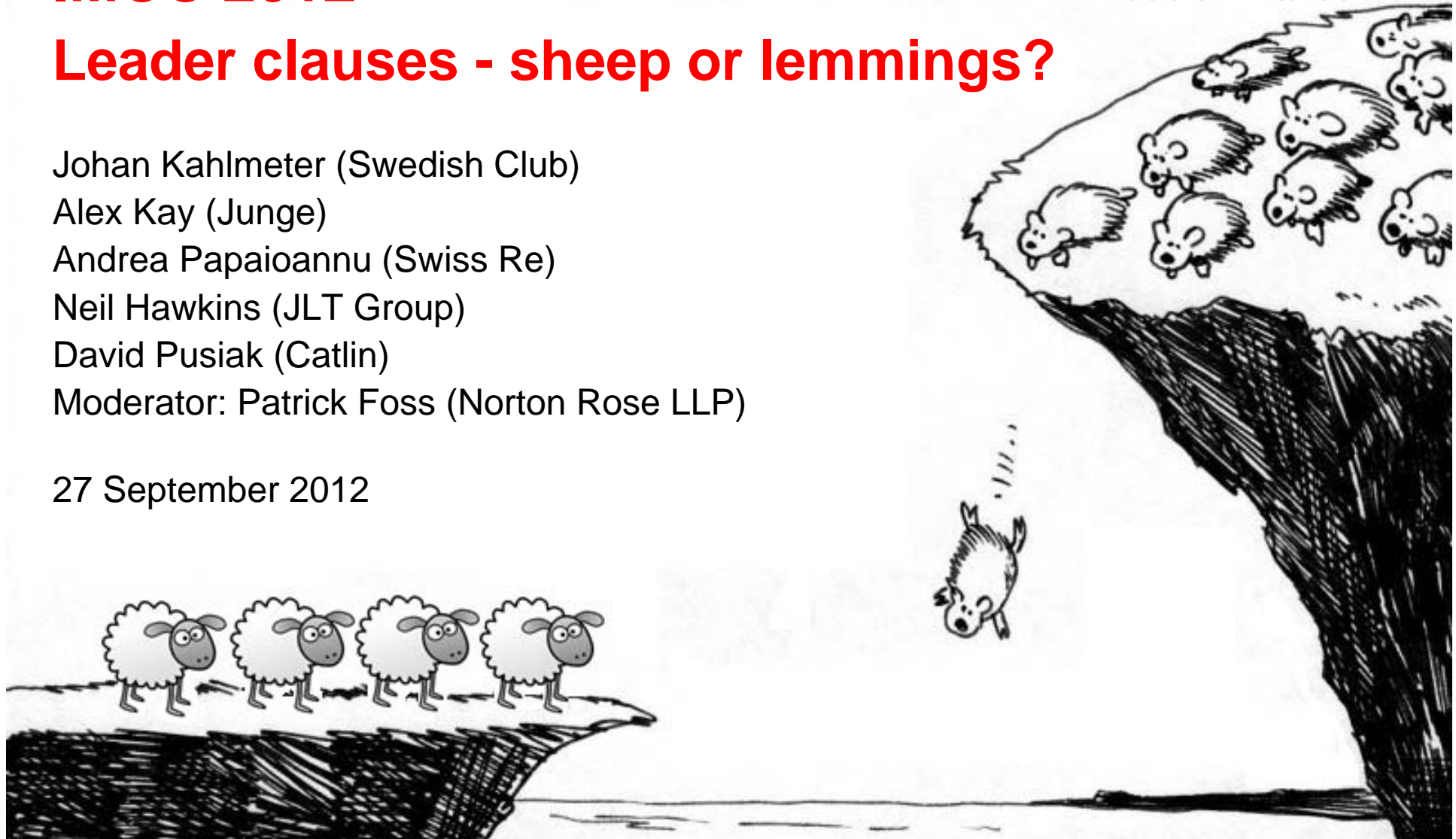
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Introduction

What we are not talking about:

- a) Lloyd's claims schemes, CTP, IUA etc.
- b) Pre-contract negotiations and contract amendments.
- c) Follow settlement clauses in reinsurance.



Introduction

What we are covering:

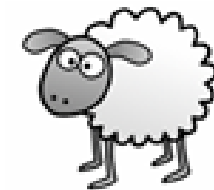
- a) The purpose of leader clauses.
- b) The relevant principles that apply.
- c) How leader clauses affect the relationship between leaders, followers and assureds in the handling of claims.



Introduction

The format for this afternoon:

- a) A number of interactive audience questions.
- b) Overview of legal principles.
- c) Q&A session with the panel about how leader clauses work in practice.
- d) Three claim scenarios.
- e) Disclaimer.



Legal principles

What is a leader clause?

a) London short form:

“To follow settlements of The Leader in all respects excluding ‘ex-gratia’ payments.”

Legal principles

b) London long form:

“This insurance is subject to the same terms and conditions as Policy A and it is agreed, with or without previous notice, to follow The Leader in regard to alterations, extensions, additions, endorsements and cancellations and attaching and expiring dates, and also in regard to all decisions, surveys and settlements in respect of claims and returns.”

Legal principles

c) German clause:

“The Underwriters hereon agree to follow the Leading Underwriter in every respect and in all their decisions, including inter alia agreements, surveys and settlements of whatsoever nature excluding ex-gratia payments. Subject to all terms, clauses, conditions, special agreements, additional and return premiums in percent of the annual premium and warranties as Leading Underwriter.”

Legal principles

d) Swedish Club:

“The Swedish Club (“The Club”) shall have claims lead.

The Swedish Club has the right on a 100% basis of the claim, in all respects, irrespective of the Swedish Club's share of the risk, to decide any matter relating to any claim made under this Policy, including but not limited to any appointments of experts, decisions, agreements, payments, settlements, claims, surveys, guarantees, towage, salvage, payments on account and claim settlements.

This Claims Lead Clause must be incorporated in all policies, and Co-insurers must follow the Swedish Club's decisions in all respects as long as they are in accordance with the Policy conditions.

Further, the Swedish Club shall at all times have the right to appoint and employ their choice of experts including but not limited to surveyors, lawyers etc. on behalf of the Assured to deal with any matters involving third parties (including investigating or advising and taking or defending legal actions or other proceedings) that may give rise to a claim by the Assured on the Swedish Club.

If the Swedish Club provides for security on a 100% basis of a claim covered under the Policy, Co-insurers are required to put up counter security for their respective shares, as per the Swedish Club's instructions. The Swedish Club has the subsequent discretionary right to request Co-insurers to put up amended securities.”

Legal principles

d) Swedish Club (continued):

“In the event of the Swedish Club putting up security on a 100% basis for the liability of the Assured in consequence of a collision, striking and/or salvage, other underwriters on all policies are not allowed to effect settlement of claims in connection with the liability directly with the Assured, and cannot set off against the Swedish Club’s counterclaims against the Assured.

The Swedish Club has the right to set off against any sums due to the Assured, unpaid Co-insurers' or other underwriters' share or shares of sums advanced and any and all sums incurred for provision of both claims and general technical services including entry and condition surveys, if any, to the Assured by the leader. Alternatively, the Swedish Club has the right to charge participating Co-insurers directly any and all such sums mentioned in this paragraph, but always limited to such co-insuring Underwriter’s proportion hereon.

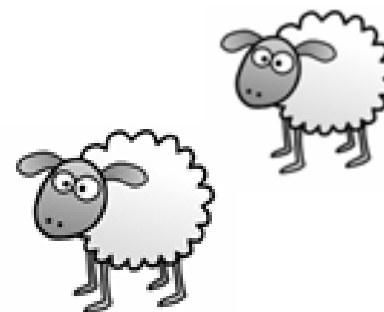
Should the Swedish Club at its own discretion decide to make ex gratia payments to the Assured, the Swedish Club may limit such payments to its share of the risk written under this Policy and such payments should in no respect be binding for any other Co-insurers or underwriters participating in this risk.

Notwithstanding any of the above, or any condition in this Policy to the contrary, the liability of all underwriters to the Assured shall remain several and nothing shall affect the Swedish Club’s right to limit its liability to the Assured to the proportion of the risk which it has written and the Swedish Club shall in no way be liable to the Assured for any amounts due or agreed to be due but not recovered or recoverable from other underwriters or Co-insurers.”

Legal principles

Impact on relationships:

- a) Between leader and assured.
- b) Between follower and assured.
- c) Between leader and follower.
- d) Effect on the broker?



Legal principles

Why do we have leader clauses?

- a) For the assured, they simplify and speed up claim negotiations and settlements.
- b) For the follower, they save costs and make co-insurance more attractive to assureds.
- c) For the broker, less work and administration.
- d) For the leader?

Legal principles

Legal issues:

- a) May involve issues of agency, contract and tort.
- b) Does the leader assume a duty to the followers?
- c) Does a breach of that duty give rise to a potential claim in damages against the leader?
- d) Is the follower always bound to follow?
- e) What happens when the follower is in breach?

Legal principles

English legal authorities:

- a) *The Leegas* [1987] 1 Lloyd's Rep 471
- b) *Roadworks v Charman* [1994] 2 Lloyd's Rep 99
- c) *Roar Marine v Bimeh Iran* [1998] 1 Lloyd's Rep 423
- d) *American International Marine v Dandridge* [2005] Lloyd's IR Rep 643
- e) *PT Buana Samudra Pratama v Maritime Mutual Insurance* [2011] EWHC 2413

Q&A Session for Panel



Claims Scenario 1

- a) High profile total loss.
- b) Technical advice to the leader that the allegation of cause is highly dubious.
- c) Legal advice that there is a potential breach of warranty, but difficult and technical.
- d) Broker has instructions to agree an early compromise at 80%.
- e) Leader wants support from the following market to a settlement.

Claims Scenario 2

- a) The leader has engaged a law firm who have run up a significant legal bill.
- b) Leader has also charged for its own adjusting and legal services in handling the claim.
- c) Follower refuses to pay the external or leader's costs without full explanation and supporting documentation.

Concluding remarks

