SELECTED ESSAYS
ON THE
LAW OF INSURANCE
IN
NIGERIA

Insurance Decree No. 58 of 1991 in Perspective

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ISSUES AND PROBLEMS IN REINSURANCE LAW IN NIGERIA

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INTRODUCTION:

Whenever there is a mishap, the first question from sympathizers is whether the victim, (or where such is fatal) the beneficiaries of the deceased persons are secured by or entitled to some form of benefit. While it is not uncommon for many to talk of risk-bearing in this first sense, we seldom think of how the supposed risk bearer can also reduce the liability to which it is exposed. It is for this second instance that we have the term "reinsurance."

As is to be expected, reinsurance in Nigeria is still in its infancy viewed from the perspective of the level of commercial sophistication and integrity that is expected of those involved in the business. The consolation however is that the sector is presently witnessing a steady growth of discussion among practitioners on how to boost the reinsurance market.¹

The aim of this paper is to appraise the law relating to reinsurance in Nigeria on a comparative basis with the laws of other jurisdictions (particularly English Law being the root of most of our laws) and where necessary identify salient issues and problems that may sooner than later come to the fore. As a first step, we propose to make clear what is meant by 'reinsurance.'

The Concept of 'Reinsurance.'

By reinsurance is meant an agreement concluded between two insurers one known as the reinsurer and the other known as reinsured. The reinsured who is also known as 'direct insurer,' 'primary insurer' or 'cedant' agrees to cede and the reinsurer agrees to accept a certain fixed share of a risk upon terms set out in a contractual agreement. What the reinsurer gets in return for the portion of risk ceded to it is called the reinsurance premium and this is usually calculated as a proportion of the premium received by the reinsured.Where the reinsurer itself reinsures all or part of its liability it becomes a 'retrocedent' and its reinsurer the 'retrocessionaire.'²

In Deloro v. Burnes,³ the court had opportunity to pronounce on the nature of a contract of reinsurance as one whereby a new contract is effected by new policy though on the same risks previously insured, with view to indemnifying the insurers in respect of risks previously written. Unlike the position under normal insurance where the insurer is directly interested in losses being secured the reinsurer under the contract of reinsurance is only indirectly interested in direct losses to the extent that they affect his liability to his reinsured. This explains the view of the American courts that a true reinsurer is merely an insurance company or underwriter which deals only with other insurance companies as its policy-holders.

Under reinsurance, the insurer procures a third person to insure him against loss or liability by reason of original insurance under which risk has already been assured.⁴ The liabilities and obligations created under the reinsurance is mutually exclusive from that between the insurer and the original insured. The fact that certain elements of the underlying contract may have been incorporated into the reinsurance contract is immaterial since what is paramount is whether the original insurer can claim to have any legal interest in the contract of reinsurance.

¹. This may have to do with the risks in the various spheres of our economic life most especially the financial sector. A reality that has struck many is that without a solid and secure base the fall of one may be the death knell of numerous others. See further Olunrewaaju, Crisis in the Financial Sector: Legal Perspectives, paper presented at the 2nd Annual Conference of Nigerian Association of Law Teachers.
⁴. (1907) 1 Ch 114 at 117
⁵. What is now the condition of the last of the reinsurance agreements? Time will tell.
An issue close to this came up in *Meadows Indemnity Co Ltd v. The Insurance Corporation of Ireland Plc and International Commercial Bank Plc.* The facts were that Meadows as reinsurer sought to obtain declarations as to the invalidity both of a reinsurance contract between itself and ICI and of an underlying credit guarantee insurance. The Court of Appeal held that it was not possible for the reinsurer to obtain a declaration that the insurer was entitled to avoid the original contract of insurance. In the words of May LJ:

"These two parties, the reinsurer and the original insured, have no rights or obligations against or to each other; they are not in a contractual relationship. Although there is of course a connection between the contract of insurance on the one hand and of the reinsurance on the other, the reinsurer's rights are in no way involved in the existing dispute between (the insurer) and the (original insured) ... In so far as (the reinsurer) is concerned, any liability on their part will depend upon the contract of reinsurance and the factual situation which existed between them when this was entered into. As I have said, the position of (the reinsurer) is in no way threatened because (the insurers) are vigorously defending (the original insured's) claim in the Irish proceedings..."

It is worthy to note that Neill, LJ on his part was a bit reluctant in going the full hog with his learned brother. He expressed his sympathies thus:

"... as one can ... see the good sense of a person being able to establish by means of a declaration the legal rights of a third person if those rights will, in due course, directly affect him as an insurer or reinsurer..."

With due respect to His Lordship's views, while one cannot on sentimental grounds and commercial prudence deny the need for a reinsurer to monitor the activities of the original insured, there is no latitude in the former to totally abandon the doctrine of privity as exists. His Lordship's view may therefore go not more than an expression of sentiment.

While it is true that there cannot exist an operative contract of reinsurance in the absence of a contract of direct insurance, there exist no contractual privity between a reinsurer and an insured under a direct policy. The overall effect of this is that while the subject-matter of a reinsurance may be the same with that of a direct insurance, the interest protected by the two differs.

As earlier stated, the reinsurer under a contract of reinsurance does not insure against direct loss, but what is insured is the reinsurer's potential liability to the insured under the original contract of indemnity even where the original insurance contract upon which it is rested is a non-indemnity policy such as life insurance, personal accident insurance or contingency insurance.

**Reinsurance Distinguished from Contribution.**

It is important to distinguish reinsurance from what is known as 'contribution.' The importance of the distinction becomes paramount when cognizance is taken of the fact that both are aimed at reducing the liability to which the insurer is exposed. Reinsurance as we have seen is an agreement to indemnify the assured, partially or altogether, against a risk assumed by it in a policy issued a third party. Thus, for an arrangement to constitute reinsurance one insurer must insure with another insurer to protect the first insurer from a risk he has already assumed.

Contribution on the other hand is where there is in existence two original contracts of insurance in respect of same interest in the same subject matter and covering the same risks. The insured must have effected more than one policy in respect of the same property and against the same risk in such a

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7. This is still the position even where there is a 'test through' clause, the essence of which is to allow a reinsurer pay directly to an insured under the original policy in the event of the reinsured going into liquidation.
way that there is in fact a double insurance. If one of the policies has not yet come into force, or has
lapsed at the time of the loss there is no double insurance.8

Contribution may also involve a situation whereby you have a syndicate of insurance companies
all coming together (with one acting as the lead insurer) to underwrite a particular risk.9 The companies
coming together will have their names reflected in the policy together with the proportion of risk which
they have agreed to underwrite.

Law Applicable to Reinsurance

The Law relating to reinsurance is part of the general law of insurance. Thus, for there to be a
valid contract of reinsurance, all the essential elements relating to contract i.e. offer, acceptance, capacity,
consideration etc. together with those for the formation of the original contract of insurance, namely,
insurable interest,10 duty of disclosure11 must be satisfied. Similarly, the liabilities and obligations of
such intermediaries as brokers and agents are the same.

In the terrain of statutes, the main legislative provisions which govern insurance companies vis-
avis their transaction in Nigeria is the Insurance Decree 1991.12 Under that law an 'insurance business'
is defined in the general interpretation section13 as including 'reinsurance business and reference to
contract and businesses of insurance shall be construed accordingly.' Consequently, it is provided that in
order to carry on the business of insurance legally, the outfit involved must be duly incorporated as a
limited liability company under or pursuant to the Companies and Allied Matters Act; or a Co-operative
insurance society, registered under any enactment or law relating to Co-operative societies or a mutual
insurance company; or a body duly established by or pursuant to an enactment to transact the business
of insurance or reinsurance.14

Somewhat curiously, Decree 58 of 1991 does not explicitly define 'insurer' to include a person
who is carrying reinsurance risk. However, if it is assumed that insurers for purposes of the Decree
includes reinsurers, then, it would mean that they are intended to be just as much subject to the
provisions of Decree 58 as are companies writing direct insurance business. It would similarly follow
that not only must all reinsurers transacting business (whether or not they are established in Nigeria)
with reinsurers in Nigeria be registered for that purpose of carrying risk,15 but they must also be
registered under or pursuant to Decree 58.16 How valid will such an assumption be?

Going by the provisions of section 1(c) of the Decree, Decree No. 58 applies to all insurance
businesses and insurers 'other than' insurance business carried on by insurers whose business of
reinsurance is established outside Nigeria but transacted with an insurer authorised by or pursuant to the
provisions of the Decree.

The clear implication of the foregoing provisions is that for regulatory purposes Decree 58 of
1991 distinguished between reinsurers having their base and established in Nigeria, and reinsurers
established outside Nigeria but transacting reinsurance business with an insurer (as reinsured) established

11. NWLR 532.
13. What will constitute insurable interest under a contract of reinsurance in the fact that an original insurer has been issued a
14. policy covering the liability of the original insured - Colours Ltd. Co. v. New Zealand v. Adelaide Marine Ins. Co. (1886) 12
17. associated with disclosure is however lower in the case of reinsurance because both parties are professionals.
19. S. 32.
20. S. 3(1)(a), (b), (c) and (d).
21. See meaning ascribed to 'insurer' in the interpretation section.
22. S. 3(2).
in Nigeria and operating under the Decree. For those reinsurers having their base in Nigeria the provisions of the Decree apply to them but for those established outside Nigeria the Decree does not.

If cognizance is taken of the fact that 'reinsurance' being a business that cannot by nature be restricted to the international market, then, it would be appreciated while the Decree still evidenced a recognition for reinsurance business established outside Nigeria. A poser that may come to the fore here is that since such reinsurance business established outside Nigeria does not fall within the realm of the Decree, how then are they monitored?

Prior to 1969, the law which regulated reinsurance was exclusively common law principles. The National Insurance Corporation of Nigeria (NICON) Act, 1969, was the first legislative attempt to regulate and control reinsurance. By section 8 of that Act, all insurance outfits licensed to transact business in Nigeria were mandatorily required to cede to the Corporation 10% of their business.

In 1977 when the Nigerian Reinsurance Corporation was established, section 7(3) of the Act required every insurance company registered in Nigeria to reinsurance with the Corporation 20% of all classes of business written by them. Thereafter, the Corporation has a first option of refusal in the event of an insurer intending to place any part of its remaining business in the international reinsurance market. 17 The effect of this provision is that after a Nigerian insurance company has complied with the 20% compulsory cession, any further reinsurance by such a company has to be offered first to the Nigerian Reinsurance Corporation. In the event of the Corporation refusing to exercise its right in excess of the mandatory 20%, it must issue a certificate to that effect before the company involved can reinsure abroad. 18

Apart from the 20% compulsory cession, insurance companies in Nigeria also cede 5% of their insurance business to the African Reinsurance Corporation. This is also done through the Nigerian Reinsurance Corporation.

For the reinsurance companies registered in Nigeria, they are expected to maintain a paid-up share capital of N50 million be it for life insurance or non-life insurance business. 19 Failure to satisfy this shall constitute a ground for the cancellation of the registration of the insurer under section 7 of the Decree. In addition to this, they are expected to deposit (and keep deposited at all times) with the Central Bank of Nigeria (CBN) their share capital as a 'statutory deposit.' 20 A sum not exceeding 50% of this will be released to the insurer in respect of each class of insurance business on its registration. Where registration is refused or subsequently cancelled, then, the whole of the statutory deposit shall be released. 21

An important provision in relation to applicants wanting to carry on reinsurance business in Nigeria is that their authorisation is subject to the control 22 of the Minister charged with the responsibility for matters relating to insurance. The effect of this provision as stated under the law is to ensure that the establishment of reinsurance is properly aligned to the volume of available business.

With respect to placements in the international reinsurance market, going by section 7(1)(a) where an insurer has contravened the provisions of section 7 of the Nigerian Reinsurance Corporation Act or any law relating to compulsory reinsurance, it may have its registration cancelled. The law is, however, silent on the status of transactions already concluded before the cancellation of the registration.
and the question is whether such transactions are valid or not? Similarly, what happens where the Minister has not authorised the establishment of a reinsurance business and such is discovered to be in existence? What is the status of transactions concluded under it? Under Nigerian law, it would appear that the fact of non-compliance or lack of authorisation will render void a contract of reinsurance.

Firstly, if it is considered that the main purpose and idea behind 'mandatory cession' lies in public policy i.e. ensuring steady growth of reinsurance outfits in Nigeria, it would be appreciated why a reinsured in Nigeria who has not complied with the law relating to mandatory reinsurance may not be able to rely on its own unauthorised act in attempting to recover from its reinsurers. For the reinsurer too it remains to be seen the ground upon which it would claim innocence of the fact of non-compliance.

Secondly, to act without authority under the law is to act illegally. In this regard the moment it appears to the court that the transaction or contract is 'ex tuto' unauthorised, that is illegal, the court would invoke the old and well-known maxim of 'ex turpi causa non oritur actio.' The effect of this is that the court would not enforce the transaction nor allow itself to be an instrument for enforcing such obligations. Even in cases where the issue of lack of authority is not apparent, once the issue is duly brought to the notice of the court and the person invoicing the act is himself implicated in the illegality, then, it is for the court whether or not the defendant has pleaded the illegality or not. If the evidence adduced or the facts disclosed sufficiently prove the illegality, the court ought to wash its hands off the case.

In the absence of corresponding provisions to section 132 of the UK Financial Services Act 1986, it is in doubt whether Nigerian courts can for now draw the kind of distinction that would bar the 'guilty' from enforcing unauthorised insurance contract while allowing the 'innocent' to enforce.

Reinsurance Brokers

Reinsurance brokers play substantially the same role as in original contract of insurance and have their duties governed by the general law of agency and statute. As a specialist, the broker is responsible for advising and arranging insurance covers for the clients. When playing this role in the original contract of insurance, he is an agent of the insured. Similarly in reinsurance contracts, the broker graduates in his status to become agent of the reinsured in placing the reinsurance and negotiating terms and conditions of cover with the reinsurer. Going by the broker's sound knowledge of insurance law and practice, the services rendered by them ranges from the business of placing the slip to advising on the structure of reinsurance programme.

In order to avoid conflicts of interest a reinsurance broker not only has a duty to inform his principal when he is acting for another principal, but also has a fiduciary duty to disclose any dealings in which he is personally interested and which may be in conflict with his principal. While it is not unusual to have joint broking (with the respective roles of the joint brokers clearly spelt out), a broker, unless permitted by law, express or implied agreement, or by the custom or usage of the market in which he operates, cannot appoint a sub-broker under the original contract of insurance.

23. See the provisions of section 14 of the 1982 Act which provides that the effecting and carrying out of a contract of insurance in the U.K. by an unauthorised insurer constitutes a criminal offence. See however the reforms of section 132 of the Financial Services Act 1986.


26. For their duties under statute, see generally sections 50 and 32 of the Factories Act 1996.

This limitation of the broker is however absent in the case of reinsurance as it is always implied that a reinsurance broker is authorised to appoint sub-brokers. This may occur when a reinsurance broker in Nigeria intends to place a share of his order with overseas reinsurers. It is common in such situations for the broker involved to instruct a locally based broker to act as a sub-broker since the latter will be presumed to have better contacts with the local reinsurers. It is important to note that such delegation does not create any privity of contract to rest liability between the principal and the sub-broker.38

An exception to this however, is where in an action for monies had and received the sub-agent has acknowledged that he is holding the monies on behalf of or on account of the principal and has promised the principal to pay back.39 Similarly, a reinsured may be able to maintain a right of action in tort against a sub-broker.40 The non-contractual duty of care owed in this regard is on the footing that a sub-broker is clearly aware of the existence of the reinsured, and will normally be aware that the reinsured is giving instructions to the reinsurance broker.

The Reinsurance Contract

In expounding on the variety and types of reinsurance contracts it is not intended here to deal exhaustively with the intricacies of the various arrangements in use. Rather, what is intended is to content ourselves with an outline of the basic contract forms and examine the salient issues inherent in them.

Over the years, certain key issues have been known to determine what type of reinsurance an underwriter purchases. A first issue to be considered is the nature and totality of risk contained in his inwards portfolio which requires reinsuring. In this regard, it is paramount to the reinsurer that the reinsured retain enough of the risk to ensure that the reinsured is sufficiently motivated to exercise care in his original underwriting.

A second issue that will be considered is the equity base of the company or syndicate involved. This invariably gives an insight into the ability of the company to retain risk. A third issue for consideration in relation to facultative reinsurance is whether the line to be written on that risk is excluded from or limited (because of its size) in its protection under the outwards whole account or catastrophe programme or whether the underwriter wishes to avoid ceding that type or amount of risk to his treaty reinsurers. Lastly, the cost of purchasing a reinsurance must be balanced against its value to the reinsured. At this stage, it would be for the reinsured to make up its mind on whether to protect itself against accumulations of multiple unrelated 'attribitional' losses, or 'vertical' aggregations of similar losses arising out of the same reinsurance event or catastrophe, or both.41

CLASSIFICATION OF REINSURANCE

1. Facultative Reinsurance

Under this form of reinsurance, a reinsurer has the option of accepting the tendered part of the original insurer’s risk while leaving out the balance to be ceded to other insurance companies. At this stage when the business is presented the reinsurer is free to determine whether or not to effect cover in respect of the risk offered.

One major advantage it has lie in the fact that each of the reinsurers is able to take a share of the business proportionate to its own capacity. A second advantage is that the reinsured is under no obligation to first consult the reinsurer before negotiating and reaching an agreement with an assured. Thirdly and most importantly, where the insurer has paid the insured, a facultative reinsurer cannot deny to indemnify to the extent of the proportion of risk ceded to it on ground that the claim was settled without liability.42
The above advantages notwithstanding, facultative reinsurance also has its own drawbacks. For instance, since it is usually placed by means of a slip, it involves considerable labour and time for the broker. This is especially true where large risks are involved and the broker is saddled with the task of approaching several reinsurers to cover the full extent of the risk. Apart from this, the reinsured may also be at risk at a time when it is uncertain whether sufficient reinsurance cover will be obtained. It is because of these limitations that facultative reinsurance does not most times offer attraction to underwriters.

The terms of facultative reinsurance agreements vary from one situation to another, and from one type of cover to another. While certain classes of insurance employ the use of standard facultative reinsurance agreements, some others make use of the non-standard facultative reinsurance agreements which allow the parties to mutually agree on the terms to be incorporated. To ensure that the risk is laid off in a cost-effective manner, the approach of underwriters is always to seek reinsurance on the same terms as the direct placement except as to premiums and commissions. To achieve this, underwriters (pending when they have confirmed with the broker that the facultative placement has been done on the same footing with direct placement) qualify their acceptance of inward risk as 'subject to satisfactory reinsurance.'

The case of Yowell & Ors v. Bland Welch & Co. brought to the fore the need for an underwriter and his reinsurance broker to ensure that facultative placement is on similar terms as the original. In that case the protection purchased was an obligatory open cover on an excess of loss basis to which a relatively limited number of individual vessels would be declared on original terms as they were built. On the original placement insurance for a primary period was to be declared, with the insurer having the option to extend it at an additional premium whereas the broker responsible for placing the outwards reinsurance facility on behalf of the original underwriters in fact arranged cover which was held limited to a 48-month period. Consequently, losses were paid under the primary insurance long after the reinsurance period had expired, and it was held that the reinsurance would not respond, thus, giving rise to a claim against the brokers for breach of contractual duty in the way the reinsurance was placed.

A most common arrangement is that referred to as 'fronting.' What obtains here is that a local cedant will issue the direct policy and retain a ceding commission while the fronted reinsurer takes out in all but name. This arrangement is resorted to in situations where the local cedant lacks the requisite expertise to assume the risk or where there are limitations and restrictions on foreign reinsurers' ability to write business on a direct basis. The local cedant is then controlled in its operations by what is known as the 'claims control' or 'corporation' clause. What this does is to handicap the local cedant in agreeing to any claim without reference to, or prior approval of the fronted reinsurer.

2. Treaty Reinsurance.

Under this agreement reinsurance is effected in respect of a series or specified number of risks contained in a reinsurance treaty. The distinction between it and the facultative reinsurance is that once the treaty is concluded the reinsurer is required to underwrite all portions of risks ceded to him in terms of the treaty. In the case of facultative reinsurance, however, as earlier pointed out, the reinsurer is not required to accept all business ceded. He has a discretion to refuse to accept the business if he does not consider it sufficiently attractive.

A major advantage treaty reinsurance has over facultative reinsurance is the possibility of the reinsurer giving immediate cover with the conviction that reinsurance cover will be automatically obtained. Similarly, the stress of the broker under treaty reinsurance is greatly reduced since the reinsurer's source of business is in a way steady.

Treaty reinsurance possesses certain essential characteristics. Firstly, unlike in the case of facultative reinsurance where direct insurance will frequently precede the facultative reinsurance placement, in treaty reinsurance, the facility is arranged prior to the placement of the original contract of insurance. This is the basis upon which a reinsured giving cover on the original contract is assured that reinsurance cover will be obtained.

The above being the position, it should be realized that even though the reinsurance facility under a treaty reinsurance may be on ground prior to the placement of the original contract of insurance, it cannot go on risk until the underlying original contract upon which it is based has been concluded. In the words of Collin LJ: an undertaking to indemnify against risks not already undertaken is not in the real sense of it to be treated as a contract of reinsurance.

Going by the very nature of treaty reinsurance in the way it involves an undertaking to reinsurance certain specified future risks whenever they are ceded by the reinsurer, certain complications are left in the way of the reinsurer's duty to disclose. The duty to disclose as we have seen was the moment the contract is concluded - the question thus raised is how possible it is for the reinsured to disclose every material fact concerning such future risk at that initial stage when the treaty is being negotiated?

It is respectfully submitted that the solution may lie in the reinsured being expected to give heed to the principles of utmost good faith all through the duration of the contract. The best way to ensure this is for the reinsurer to incorporate it in the wording of the treaty.

Treaty insurance may come into being in two ways - proportional treaties whereby the risks are shared between the insurer and the reinsured, and non-proportional treaties whereby the reinsurer is liable for an amount in excess of a stipulated sum.

Proportional treaties like facultative reinsurance agreement may also take the form of quota share and surplus treaties while non-proportional treaties can take the form of excess of loss treaty. Facultative reinsurance may also take this latter form.

3. Quota Share Treaties

Here, the reinsurer undertakes to reinsurance an agreed proportion of all business of a specified kind written by the reinsured with the exception of profit commissions and reinsurance overdrafts deducted by reinsured before cession. The main feature of this form of treaty which marks it out from others is that the reinsured's retentions are fixed by the treaty and apply for the duration of the treaty to every policy issued. The moment the treaty is concluded the reinsured is no more in a position to exercise any discretion in determining its retentions.

Because of the way the quota share treaty results in the disposal of large volumes of business that could be retained in several instances by the reinsurer, it is mainly used in the case of new treaties to show the sharing of risks by the reinsurer and reinsured, or by reinsured who is unable to secure favourable terms in negotiations with reinsurers.

4. Surplus Treaties

The basis upon which this operates is the agreement between parties that the reinsured will cede and the reinsurers will accept, all business of a specified kind over and above an amount representing the limit up to which the reinsured wishes to remain at risk. The surplus treaty affords the reinsured opportunity to decide on the extent of his retention. This liberty may, however, be curtailed to a certain minimum to guard against reinsured from passing on very large proportions of doubtful risks.

38. Golding, 202 - 203
There is always an upper limit to the liability of the reinsurers and where there are two or more reinsurers participating in reinsuring the surplus, the proportion of the surplus being undertaken by each reinsurer is known as his 'line.' Where a reinsured is of the opinion that the upper limit of his reinsurance requirements amounts to eight times the amount of his retention, he would create an 'eight line' treaty. The number of lines created is referred to as the 'multiplier,' and is usually dependent on the amount of the reinsured's retentions and on the amount of insurance he is required to provide.

A salient point to note is that while each reinsurer maintains a separate agreement with the reinsured, they are still to be treated in the same manner in respect of the portions allotted to them. Payment of claims and participation in premiums is also made according to the proportion of the surplus underwritten.

As a further safeguard where large risks are involved, treaties may be further divided into half-lines and even quarter-lines.

5. **Excess of Loss Treaties**

This is the one most suited for the reinsurance of liabilities. Under it the reinsurer is only liable to pay losses over and above a defined amount and up to a further defined limit. The implication is that any loss falling below the lower limit is entirely on the account of the reinsured. Under this head of reinsurance, premium is paid to represent a percentage of the total annual premium income of the reinsured.

A distinction between excess of loss treaties and other forms of reinsurance is that in the former there is not the same degree of sharing of risks as there is in the latter. Thus, a reinsured may reflect an overall loss as a result of several unrelated losses occurring which do not exceed the underlying retention of the insured. Similarly, the excess of loss reinsurers could experience several losses while the reinsured reflect gains in its business.

Excess of loss reinsurance is usually written in layers. In this way a first reinsurer will be liable for losses in excess of a first limit, another in respect of losses in excess of a second limit and so it continues. This is with a view to spreading the risk among a number of reinsurers.

6. **Obligatory or Open Cover Treaty**

This is in the strict sense of it is not a class of reinsurance, rather, the arrangement is something of a hybrid between facultative and treaty reinsurance. Under it the reinsurer is required to accept all the business ceded, but the reinsured has the option of deciding which business to cede.

To the extent that the reinsured has the discretion to determine whether to cede the business, it has the outlook of facultative reinsurance. In that the reinsurer is obliged to accept all business ceded, it resembles treaty reinsurance.

**Extent of Reinsurer's Liability**

To what extent it may be asked is the obligation of the reinsurer to indemnify the reinsured in respect of losses paid out on the original contract of insurance? The reinsurance policy most times state the basis upon which the reinsured's indemnity is to be calculated. Where such agreement is, however, lacking, the obligation of the reinsurer to indemnify will only come to the fore when the extent of the reinsured's liability has been established by judgment or arbitration.

In the words of Maugham L.J, "A policy of reinsurance is an agreement by way of complete or partial indemnity of the insurer. That has long been settled and has been stated in more than one case. Like every contract of indemnity, it can only operate if the liability of the debtor, the insurer, is

40. See Golding, 40, 47.
established, and it is necessarily contingent on that liability being established. It follows that the insurer has no cause of action against the reinsurer until the loss for which the former is liable (if any) has been ascertained.

One issue upon which judicial opinion has raged is on how the terms guiding 'loss' for the purpose of a reinsurance policy should be construed. While some have argued that the moment a contract of reinsurance is engrafted on a policy, it incorporates all the terms of the original policy in such a way that they will be applicable to the reinsurance contract,

In *Forsikringstierelskapet Vesta v. Butch*, the insurance policy on a Norwegian fish farm contained a warranty by virtue of which the assured promised to keep a 24-hour watch over the farm. Loss was caused by a storm, and while at the time of the loss the warranty was not being complied with, the insurer was still liable under Norwegian insurance law which does not allow the insurer to plead a warranty unless its breach was causative of the loss.

In the reinsurance policy of the Norwegian insurer, the reinsuring underwriters accepted liability in the following terms: 'being a reinsurance of and warranted same gross rate, terms and conditions as and to follow the settlement.' It was conceded before *Hobhouse J.* that the effect of this clause was to incorporate the terms of the original policy into the reinsurance agreement.

The reinsurers for their own part argued that, because the effect of a breach of warranty in English law is to permit the insurers to deny liability whether or not the breach was causative of the loss, and because the reinsurance agreement was governed by English law, they were entitled to rely on the assured's breach of warranty under the original contract as a defence against the reinsured.

All the nine judges who presided over the case were unanimous on the point that the plain object of the reinsurance agreement was to provide the insurer with reinsurance cover matching that of its own liability to the original assured. How to achieve this result was, however, the problematic aspect of their decisions. *Hobhouse J.* relying on a novel conflict of laws approach found in favour of the reinsured. In his view the reinsurance agreement was either governed in its entirety by Norwegian law or at least that its construction and interpretation were to be governed by Norwegian law.

Of particular significance is the view of the Court of Appeal on the two approaches suggested by the trial court. While the first approach was viewed as unrealistic (bearing in mind the facts of the case), the second was viewed as unduly complex. According to them the warranty was to be given the meaning it would have had the case been heard by a Norwegian court. This reasoning of the Court of Appeal was affirmed by the House of Lords. As confirmed by Lords Bridge, Templeman, Ackner and Lowry, the warranties in the two policies were intended to have the same effect, so that if the warranty could not be pleaded by the insurer against the assured, it could not be pleaded against him by the reinsurers.

In deviating from the approach of his learned brothers (though agreeing with their conclusion) Lord Griffith was opposed to the assumption that the reinsuring clause had the effect of incorporating the warranty in the original policy into the reinsurance agreement. To him the reinsurance agreement provided only that the assured would be indemnified if it faced liability in Norway and no more.

To this writer, the views of the House of Lords is very much in accord with commercial fairness. However, a lot would still depend on practitioners in the field to ensure that reinsurance policies are devoid of obscure wordings to avoid situations whereby inappropriate terms are unconsciously incorporated into reinsurance agreement.

43. *Home Insurance Co.* (1937) *AC* 59. This group premised their opinion on the fact that those parts of the original policy which bear no relationship to the purposes of the reinsurance contract are inconsistent with it and are inapplicable to the reinsurance agreement.
44. (1983) All ER 462.
Follow the Settlement, "Follow the Fortunes" Clauses.

Reinsurance policies at times engage the use of such phrases as 'follow the settlements' or 'follow the fortunes' of the reinsured. The effect of the former clause is that the reinsurers agree to indemnify insurers in the event that they settle a claim by the assured, provided that the claim falls within the risks covered by the policy of reinsurance and provided also that in settling the claim the insurer have acted honestly and have taken all proper and business-like steps in making the settlement.46

Follow the fortunes on the other hand, it has been suggested is aimed at setting-up a kind of community of interest in treaty matters, such that whatever fortune, good or bad, should befall the ceding company should be shared by the reinsurer and anything the ceding company decide to do in relation to any treaty matter should also be binding on the insurer notwithstanding its lack of knowledge of the act.47

Formulating the Reinsurance Agreement

Broker Q who secures reinsurance on behalf of a reinsured and offered to obtain retrocessional agreement for the reinsurer from who is the offer coming? From the reinsurer or the retrocessionaire? The answer depends on an analysis of the essential elements of a reinsurance contract. The point must straightaway be made that reinsurance being a species of contract, the rules applicable are the same as that relating to the general principles of the law of contract, namely offer, acceptance, consideration and intention to create legal relations.

In the reinsurance context, the broker is the agent of the reinsured for nearly all purposes. Consequently, Q in the above example will be regarded as making the offer on behalf of the reinsurer (turned retrocedent) to the retrocessionaire who in turn must accept the offer, thus formulating an agreement.48

In relation to consideration two situations must be distinguished. Where both the reinsured and the reinsurer are registered and based in Nigeria, a reinsurance for which the reinsured pays no premium will by virtue of Section 37 of Decree No. 58 be unenforceable for lack of consideration. Where the reinsurer has its business established outside Nigeria although involved in reinsurance transactions with an insurer authorised in Nigeria, a lot will depend on the law the parties have chosen as applicable to their relationship.

The other essential terms that must be agreed to by the parties are the nature of the risk; the limits of the indemnity; the duration of the reinsurance and the premium payable. Where these elements have not been agreed upon nor discernible from available evidence, there will be no reinsurance.

Formerly, the view was that reinsurance may be in writing or oral save where the original insurance is made on life.49 The application on life was promised on section 2 of the Life Assurance Act 1774 which requires that the name of the person interested in the policy be inserted therein in order not to render the policy null and void. Presently however, it would seem that all forms of reinsurance contract are required to be in writing. The reason for this is that under section 51 of Decree 58, a policy of insurance shall not be made on the life of a person or other event50 without inserting in such policy the name of the person interested in it, or for whose benefit or on whose account the policy is made.

Reinsurance agreements may also be formulated by means of telex, fax or other electronic means. The problems that may however arise from them varies, ranging from determination of the place of contract for purpose of jurisdiction, apportionment of liability for incorrectly transmitted messages or wrong diversion of message either through mechanical fault or inadvertence of the electronic operator. The solution to these problems will depend on the facts and circumstances of each given case. This notwithstanding certain broad propositions may be offered as guide.

41. Golding, Reinsurance (6th Ed. 1987) 69. This view has been vigorously opposed by Butler and Merkin, Reinsurance Law (1985) rev. vol. II, Cl. 1 - 07. In this area of the law, the dust is yet to settle.
43. See Efeye v. Akinwale & Sons to Fore Act, Ltd. (1975) NCLR 433 at 439.
44. Emphasis mine.
Following the decision in *Brinkbon Ltd v. Stahag Stahl GmbH* 51 it can be asserted that the contract concluded by fax or telex is made at the place where the offeror receives the offeree's acceptance of his offer. This more likely will be the office of the reinsured's broker. An interesting question is raised where a number of sub-brokers also participated in placing various proportions of the risk. A strict application of the theory advanced in *Brinkbon's case may result in a reinsured being bound against its wish. A possible solution may thus be that until the acceptance is received either by the reinsured himself or by the broker who can conclusively prove that he has authority, the contract will not be taken as concluded.

In relation to apportionment of liability, it would seem that a person who employs a particular mode for communicating his offer implicitly authorises the other party to use the same means of communication. In the event of any inaccuracy, that first party will suffer the consequences. The exception to this will be where it can be shown that the failure of the chosen mode of communication was caused by the willful misconduct or negligence of the other party.

**The Slip**

The slip is the document by means of which reinsurance transactions are concluded. In the words of Webster, 52 the slip is 'a document prepared by a broker, setting out a proposal to be made to an underwriter when accepted by the underwriter becomes binding on him.' Ordinarily, the slip is prepared by the broker in accordance with the instruction of the reinsured. The purpose is to offer the risk to each underwriter in a form which is concise.

The lead underwriter initials the slip 53 by accepting the whole or part of the risk. Where he accepts only a portion of the risk the broker continue to circulate the slip in the market until the full extent of the risk has been subscribed. Just as in original contract of insurance, nothing prevents a broker to continue to collect signatures on the slip after the risk has been fully subscribed with a view to having the risk 'over-subscribed' and 'signed-down.'

At this stage the broker will send a cover note to the reinsured confirming to him the details of the cover he has effected. Where the reinsured is not satisfied with the cover obtained he may request the broker to persuade the underwriters to vary the terms agreed. It must be made clear that since the cover is already on the insured has no optional right to cancel the reinsurance. He may, however, be allowed to withdraw from a partially subscribed slip without prejudice to the right of the underwriters to receive a 'time on risk' premium.

The above stated practice of the broker preparing and obtaining subscriptions to a facultative reinsurance in such a way that the moment the broker offers the slip for the direct cover to underwriters they automatically become reinsured is peculiar to reinsurance contract. 54 Similarly, peculiar to reinsurance is that while under the original contract of insurance there is usually a single or a handful of insured in a direct placing, a reinsurance contract takes the form of several reinsured all being reinsured under a single contract. 55

Another noticeable custom in the reinsurance market obtains at the initial stage of the transaction. The reinsurer may insist on the inclusion of the Reinsurance Underwriting and claims Control Clause. 56 The effect of the first clause is that the reinsured agrees to retain, during the currency

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51. (1983) 2 A.C. 54(HL), see also *Interton Ltd v. Miles Far East Corp* (1955) 2 Q.B. 527 (C.A).
53. It is significant that the contract is effected at the time the slip is initialed. See *General Reinsurance Corp v. Forsikringstilsagloget Finnka Patria* (1982) 1 Lloyd's Rep. 87, at 90.
55. See *General Accident Life & Fire* (1984) 1 Lloyd's Rep. 71 per Hobhouse J.
56. This is especially true of Aviation insurance.
of the policy, a stipulated minimum percentage on the identical subject matter and risk in identically the same proportion on each separate part thereof, provided that in the event of the retained lines being less than as in above, the lines of the reinsurers are proportionately reduced.

By the terms of the second clause the reinsured further agrees that no amendments to the terms or conditions, or additions to or deletion from, the original policy shall be binding upon the reinsurers unless with their (reinsurers) prior consent. In the event of any loss that may give rise to a claim under the policy, the reinsured also undertakes to advise the reinsurers within seventy-two hours and furnish them with all relevant information in respect of such loss or losses. By virtue of the clause, the reinsurers also have the sole right to appoint assessors, lawyers, surveyors, loss adjusters etc. and to control all negotiations and settlement pertaining thereto.

CONCLUSION.

The above issues discussed notwithstanding, there is no denying the fact that reinsurance practice is still in its infancy in Nigeria. Unfortunately for the reinsurance market, it like other spheres of our economic life have not enjoyed too steady a growth. With the right attitude on the part of the practitioners, a lot of the acrimonious disputes that many a times cripple commercial transaction will be easily resolved. This is the path to giving more life to reinsurance.