

INSURANCE AND REINSURANCE

NewsWire

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Demise of the “Deal Now, Detail Later” Culture?

by Julia Ford

Contract Certainty is a phrase you will hear in the London Insurance Market (both in Lloyd’s and the Companies Market) at present — but what does it mean, and how will it affect the placement of business in the London Market? The recently issued Contract Certainty Code of Practice (which will be discussed in more detail below) makes it plain that “Contract Certainty” is required for *all* contracts, whether insurance or reinsurance, whether relating to single or “mixed” markets (e.g., a London market placement, which includes overseas placements via London brokers) whether open market or binding authority/line slip

business, and whether traded via paper or electronically. This article is intended to provide a brief explanation of what Contract Certainty is, why it matters, what it will entail, and whether it is achievable.

Why “Contract Certainty” Matters

It is a simple fact that, at present, not every contract of insurance or reinsurance entered into in the London Market has been fully documented at the time of inception. This failure to finalize the contractual documentation before inception of a risk, or what has been described by John Tiner, Chief / *continued page 2*

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Executive of the Financial Services Authority (“FSA”) in a speech on December 13, 2004, as the “deal now, detail later” culture, is a significant cause for concern for the FSA, which assumed responsibility for the regulation of the Lloyd’s Market on December 1, 2001 (pursuant to the Financial Services and Markets Act 2000).

The FSA is committed to rectifying this situation and ensuring that all contracts are properly documented before inception. The following quote from the FSA’s London website encapsulates why the FSA is committed to achieving contract certainty in the market:

“The work fits within the FSA’s strategic aim of promoting efficient, orderly and fair markets, working with the grain of the market wherever possible. It will reduce the operational and legal risks to brokers and insurers and improve service and clarity of offering to customers. It will enhance transparency whilst preserving the diversity and competitive position of the market. (<http://www.fsa.gov.uk>)

In the FSA’s view, it is essential for all parties involved in an insurance transaction to understand and identify all the terms of the contract before they are bound to the risk. At a practical level, this will minimize the broker’s E&O exposure, allow the Insurer to properly assess its exposure from the time it goes on risk, and enable the Insured to clearly understand the cover it has purchased.

The FSA has set the insurance industry a challenge to secure a market-driven solution to the “Contract Certainty” problem by *December 2006*. This challenge was set in John Tiner’s speech of December 13, 2004. Following a meeting between the Industry and the FSA on December 20, 2004, two industry working groups were set up to respond to the challenge to achieve Contract Certainty (covering the Subscription market, and “Non-slip” non-Subscription market). It is worth noting, therefore, that, although this article will concentrate on the Subscription market, the *entire* insurance market is currently working in parallel towards Contract Certainty.

The London Market Reform Group (“MRG”) (comprising the IUA, LMA, LMBC and Lloyd’s) has led the drive towards Contract Certainty in the Subscription market. The MRG is assisted by the Market Reform Programme Office (“MRPO”).

What is Contract Certainty?

Until May 2005, there was no clear definition of Contract Certainty within the London Market. One of the first tasks for the MRG had been to produce a definition of what “Contract Certainty” meant to the London Market. The current definition of Contract Certainty is as follows:

Contract Certainty is achieved by the complete and final agreement of all terms (including signed lines) between the insured and insurers before inception.

In addition:

- (i) The **full wording** must be agreed before any insurer formally commits to the contract.
- (ii) An appropriate evidence of cover is to be issued within 30 days of inception.

The **full wording** of the submission to insurers will be a combination of:

- (i) wordings and/or clauses;
- (ii) either referenced and/or full text;
- (iii) bespoke and/or model material.

Brokers may choose which combination is submitted to insurers; insurers may choose whether to accept this or require a different approach.

In effect, as long as a wording complies with the requirements listed above, many different forms of documents could comply with the Contract Certainty requirements in respect of the “full wording.”

Contract Certainty Attributes

The above definition makes it clear that the *Insurers* have the final say on what form the full wording should take, although it seems likely that, in practice, the London Market Principles BRAT slip (“LMP Slip”) can be expected to be the basis of that full wording.

The LMP Slip project formed an earlier stage in the London Market reforms. Since January 2, 2004 it has been mandatory for risks placed in the Lloyd’s market to comply with the requirements of the LMP Slip. To describe fully the project would require an article in itself but in brief, by imposing minimum requirements on matters that had to be included as part of the slip’s clauses, the LMP Slip was intended to:

- ensure clarity and completeness of contractual terms;
- assist in the administration of slips and help ensure that they comply with fiscal and regulatory requirements; and

- facilitate the accurate production of insurance documentation and thereby deliver benefits to brokers, underwriters and policyholders.

The MRG has identified nine “Contract Certainty Attributes” which are intended to act as a benchmark to measure compliance of the LMP Slip with the above definition of contract certainty:

1. *Wording*
2. *Law, Jurisdiction and Arbitration*
3. *Duties Clearly Allocated*
4. *Commercial terms*
5. *Sound Legal Basis*
6. *Risk Disclosures*
7. *Single Agreed Version*
8. *Compliance*
9. *Comprehensible*

This bullet point list is opaque — but it is intended to prompt the following questions about the wording of any insurance contract:

1. Is the submission clear and unambiguous?

2. Is law and jurisdiction and arbitration clearly referenced and complete?
3. Are all terms clear and unambiguous?
4. Are all duties clearly allocated, including processing of contract changes, document production and claims processing?
5. Is any supporting information clearly referenced?
6. Is the submission compliant with regulatory requirements?

Twenty-six different items on the LMP Slip have been linked to one of the above contract certainty attributes. These 26 items are listed on the LMP Slip Checklist (available from www.lmp-reforms.com).

It is clear that a compliant slip will be one step towards achieving Contract Certainty. The MRPO has set up the “Lloyd’s Slip Audit team” which is now marking 25% of all slips submitted to X-changing Insure Services against the “LMP Slip Checklist” to ascertain if the slips are compliant with the checklist, and hence the contract certainty attributes. In July 2005, 33% of Lloyd’s Slips were fully compliant with the 26 point checklist.

In the chart below, the figures published in the LMP Slip Quality Market Report from Lloyd’s dated July 2005, demonstrate the progress made towards fully compliant slips up to July 2005.

Percentage of slips fully compliant with the 26 point checklist*

Reporting period	No. of Slips Checked July-2005	May-2005	Jun-2005	Jul-2005
100% Lloyd’s	655	27%	31%	33%
Lloyd’s & Companies	48	28%	34%	21%
100% Companies	48	-	33%	33%
Aviation	40	52%	63%	60%
Marine	66	21%	36%	29%
Non-Marine	412	26%	32%	32%
Reinsurance	233	22%	22%	29%
Market average		27%	32%	32%

*Please note that the figures have been rounded to the nearest percentage.

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What is the Current Status of the “Contract Certainty” Project?

On October 7, 2005, Nick Prettejohn, Chair of the MRG, wrote to the CEO's of all London Market firms to circulate the “Contract Certainty Code of Practice” and “Contract Certainty Check List.” Copies of both the letter and the Code of Practice and Check List can be obtained from the London Market Reform website — www.lmp-reforms.com. These documents provide the first clear, concrete guidance as to the steps that

client's agreement before inception.”

Plainly the responsibility for achieving a clear, final wording rests with *both parties* to the transaction as well as the broker.

The remainder of the requirements relate to the post-inception stage:

4. *“Brokers will calculate signed lines by inception and notify them to each insurer no later than 30 days after inception date, or by inception date on request.*
5. *Brokers and insurers will not take part in post-inception over-placing.*
6. *Brokers and insurers will ensure that post-inception amend-*

The responsibility for achieving a clear, final wording rests with both parties to the transaction as well as the broker.

the various sections of the market should be taking to achieve “Contract Certainty” in their dealings, beyond ensuring that every LMP Slip contains the 26 specific items contained on the LMP Slip Check list.

The Contract Certainty Check List sets out a guide as to whether the contract certainty attributes have been met, and this should be viewed in conjunction with the LMP Slip Check list in ensuring that slips and wordings achieve “Contract Certainty.”

The Code of Practice and Check List also identify eight “Contract Certainty Principles” that the London Market Reform Group recommends as the sound basis for achieving Contract Certainty in London Market contracts. The first three principles, applicable to the pre-inception stage, are:

1. *“Brokers will provide submissions that satisfy the contract certainty definition and checklist to obtain firm quotes and place firm orders.*
2. *Each insurer will be satisfied that the submission meets the contract certainty definition and checklist before formally committing to the contract, ensuring that any conditions or subjectivities are clearly expressed.*
3. *Brokers will notify all terms to their client and obtain their*

ments are documented and agreed as endorsements.

7. *Brokers and insurers will each collect and maintain data on their contract certainty performance at individual contract level.*
8. *Brokers and insurers will ensure that appropriate evidence of cover, including security, is issued within 30 days of inception (this can be an insurance policy, copy of complete slip, certificate of insurance or broker insurance documentation).”*

Contract Certainty should have already been achieved by the time these further five principles apply. They may therefore be considered a statement of “best practice” that brokers and insurers should comply with, in order to ensure that the benefits of achieving Contract Certainty on inception are not wasted.

Who is Responsible?

The onus for implementing “Contract Certainty” rests with the London Market firms themselves (*i.e.*, brokers and insurers). Firms were required to adopt the Code of Practice, through their own corporate governance processes, before the end of 2005 and then to implement it as quickly and fully as possible.

Although the “Market Reform Programme Office” will report to the FSA on overall progress, each firm is separately responsi-

ble to the FSA for its own performance and is required to maintain data on contract certainty "performance" for each individual contract into which it enters. This is why the collection and maintenance of data is one of the central principles of Contract Certainty (item 7 identified above). The Market is therefore responsible not only for putting its house in order, but *proving* that it has done so.

The Check List has been designed to assist firms in ensuring compliance and on November 9, 2005, the MRG published guidance describing the requirement on Brokers and Insurers to collect data in more detail to measure these targets. The Guidance again stresses the need for each individual broker and insurer to "collect and maintain its own granular statistics for potential review by the FSA." The guidance states Lloyd's Managing Agents may elect to base their statistics on the results of the X-changing Insure Services checking, but brokers and non-bureau companies are required to set up and maintain their own quality monitoring and measuring processes. Proof of compliance with the 26 points on the LMP Slip check list will not suffice as evidence that Contract Certainty has been attained. For exam-

What Next?

Nick Prettejohn's October 2005 letter to the market stated that the MRPO would contact each firm before the end of 2005 to seek confirmation that the definition and principles of Contract Certainty have been communicated to the Board of Directors of each firm, and that the Board has committed to these principles. All "relevant" staff should be provided with copies of the Checklist and Code of Practice and given relevant training. The MRPO is offering assistance in relation to training.

The FSA has stated that it would formally review progress at the end of 2005 to determine whether the market is on track to achieve satisfactory performance. In addition, Julian Adams, head of the Wholesale Insurance Department, FSA, announced in his talk to the "Acord" Forum, on October 20, 2005, that the FSA was intending physically to audit London Market firms during November 2005.

It is recognized that the achievement of Contract Certainty will be a gradual process. Indeed, the Code of Practice contains targets for the proportion of contracts which need to meet the definition of contract certainty:

To satisfy the FSA a broker should be able to demonstrate that the slip was compliant prior to inception, that they are able to provide signed lines on inception, and that they provide both satisfactory evidence of cover and documentation of amendments.

ple, a broker, to satisfy the FSA that they have attained Contract Certainty in their dealings, should also be able to demonstrate that the slip was compliant prior to inception, that they are able to provide signed lines on inception, and that they do provide satisfactory evidence of cover and satisfactory documentation of amendments. Therefore that broker will need to determine how such criteria will be measured, and ensure that the internal procedures are in place so that the statistical data is captured.

It should be remembered that Contract Certainty applies to all risks placed in the London Market, and therefore it applies to all brokers, insureds and reinsureds who place business in the London Market.

*30% of monthly volume by end 2005
60% of monthly volume by end June 2006
85% of monthly volumes by end 2006*

The market's own targets do not envisage 100% compliance with Contract Certainty by the end of 2006, although this in part must reflect the fact that some business will come to Lloyd's which cannot be fully compliant, *i.e.*, there will always be some occasions where an insured/reinsured seeks cover post inception. There has been no suggestion that a failure to comply with Contract Certainty principles is intended to affect the enforceability of a contract of insurance or reinsurance.

The incentives are market reputation and / continued page 6

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good business practice, but any dilatory company is likely also to be influenced by the threat of FSA intervention. Indeed the FSA's stated position is that:

"Failure to achieve a market solution will result in regulatory intervention but that is not the FSA's preferred outcome."

David Strachan, director of the FSA's retail firms division, recently emphasized at a meeting at the Lloyd's Library that if sufficient progress was not being made at the end of the first quarter 2006 then the FSA would be ready to intervene: *"New regulations are not our preferred option, market change is, but we will act as necessary. We want to act less as a stick and more as a carrot. We will be looking very carefully at firms and sectors that are not making sufficient progress."* There clearly remains a question as to whether the market can reform itself on time, by December 2006, or whether the FSA will be forced to wield a bigger stick. In a meeting with the MRG on December 9, 2005, the FSA made it clear that *"although momentum has been gained, there is still much work to be done to change behavior and working practices at the coal face. Proof of progress will be seen once data is available from the market."*

Whether the carrot or the stick prevails, it looks likely that it will eventually become the norm in the London Market that finalized contract wordings are agreed by inception. So what will the achievement of "Contract Certainty" mean for the London Market? If anyone expects that "Contract

The Hague Convention on Choice of Court Agreements: A New York Style Global Convention for Litigation

by Mark Pring and Ryan Craig

The Hague Convention on Choice of Court Agreements (the "Convention" or "Hague Convention") was concluded on June 30, 2005. At present, the Convention is only an agreement in principle but, if signed and ratified by enough countries, it may offer businesses a viable alternative to arbitration for resolving international commercial disputes.

In this article, we examine the Convention's history and purpose, how it changes existing law, and its prospects for being adopted by the United States, the United Kingdom and other nations.

Background

The Convention's stated purpose is "to promote international trade and investment through enhanced judicial co-opera-

At present the Convention is only an agreement in principle, but once ratified, it may offer business a viable alternative to arbitration for resolving international commercial disputes.

Certainty" will mean just that — certain contracts — and an end to disputes arising out of "uncertainty," they will be disappointed. Contract Certainty will not prevent disputes from arising, but at least it will assure that the disputes that do arise are about a known and agreed document. ©

tion," by establishing uniform rules for enforcement of "exclusive choice of court" clauses in commercial contracts (including insurance and reinsurance contracts, albeit special rules also apply to such contracts) and for recognition and enforcement of judgments based on such agreements. The Convention

applies to international disputes between businesses only — not between customers and businesses.

Negotiations over the Convention go back to at least 1994, when a special commission of the Hague Conference on Private International Law concluded that it would be desirable and feasible to draw up a convention on the recognition and enforcement of judgments in civil and commercial matters. The Hague Conference is an intergovernmental organization, with over 60 member states. It meets in plenary sessions every four years. Between plenary sessions, working groups made up of delegations from member states, called “special commissions,” draft conventions that can be submitted for adoption at a later ple-

vided a much clearer structure for ensuring easier recognition and enforcement (of arbitration awards). The Convention seeks to redress the balance.

Parties to international business transactions often designate the forum and governing law to be applied, should a dispute arise, and embody their agreement in “choice of court” clauses. Typically, agreements on choice of forum and choice of law reflect either the parties’ belief that a jurisdiction where neither of the contracting parties resides will provide the parties with a neutral and fair forum for the resolution of their disputes, or the parties’ view that the chosen court has a particular expertise that will be relevant to any dispute that may

The refusal to enforce choice of court provisions not only disregards the original agreement of the parties, but it generates other problems for international litigants as well.

nary session. The special commission that drafted the Convention on Choice of Court Agreements included attorneys from the U.S. State Department’s Office of the Legal Advisor and the UK’s Department of Constitutional Affairs, as well as from private practice. This Convention has therefore received high-level attention in the U.S. and in other countries.

Originally, the special commission set out to craft uniform rules of international jurisdiction and enforcement of judgments generally. Because, however, the special commission could not reach such a broad agreement, it re-evaluated its ambitions and narrowed the scope of the Convention to “exclusive choice of court agreements.” The Convention was motivated by two major problems that currently arise in international disputes: firstly, the courts of different nations vary in their willingness to enforce clauses in commercial agreements that identify a choice of court, and secondly, court judgments are not always enforced by the courts of other nations. Whilst within the EU, for instance, a regime has developed allowing for mutual recognition and enforcement of court judgments, this has not been the position elsewhere. Commercial entities have found that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) — with over 130 Contracting States — has pro-

arise. However, such choice of court provisions are not always enforced, either by the court the parties have chosen to hear their disputes or by the courts of other jurisdictions.

Courts have invoked various doctrines in refusing to enforce choice of court agreements. Some courts have applied the doctrine of *forum non conveniens*, holding that a court other than a court chosen by the parties would be a ‘more convenient’ forum, either because of the residence of the parties or witnesses in that territory or its proximity to the events giving rise to the dispute. Some courts, for instance, refuse to hear cases where the disputed transaction lacks a “reasonable relationship” to the forum.

The refusal to enforce choice of court provisions not only disregards the original agreement of the parties, but it generates other problems for international litigants as well. International litigants, for example, are sometimes forced to litigate essentially the same lawsuit in more than one forum at the same time. This happens when one or both parties files suit in a court other than the one they had previously agreed should decide their disputes. Such parallel proceedings are not only expensive, but they also pose complex strategic problems and present both the risk of conflicts between courts and inconsistent judgments, which can com- / *continued page 8*

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pound the issues in dispute even further.

Even when the parties' chosen court agrees to hear their case, the victor may not be able to *enforce* the court's ultimate judgment on the merits in a different country. This is a significant practical problem when the debtor's assets are located in jurisdictions other than the one in which the judgment was rendered.

the case. [Art 6.]

- ⊙ Third, a judgment rendered by the chosen court, under an exclusive choice of court agreement, must be recognized and enforced by the courts of other states that are party to the Convention. [Art. 8.]

The definition of an "exclusive choice of court agreement" under Article 3 can cover both (1) the designation of "one or more specific courts of one Contracting State to the exclusion

The Convention applies three main rules that are designed to allow international businesses to agree on the forum where they want to have a dispute heard, should one arise, and to rely on enforcement of that choice.

These problems led the U.S. Department of State's Office of the Legal Advisor to contact the Secretary General of the Hague Conference in 1992, with the suggestion that the Conference draft a convention on international jurisdiction and the enforcement and recognition of judgments. As mentioned above, the scope of the Convention was later narrowed to deal only with the enforcement of "exclusive choice of court agreements." The final draft of the Convention was accepted by the Conference on June 30, 2005, but it has not yet been adopted in any nation and thus is not yet legally binding.

What the Convention Does

The Convention seeks to solve the problems discussed above by applying three main rules that are designed to allow international businesses to agree on the forum where they want to have a dispute heard, should one arise, and to rely on the enforcement of that choice all the way through litigation and the satisfaction of judgment.

These rules rely on the concept of an "exclusive choice of court agreement," that is, an agreement to litigate a dispute in the chosen court(s) and in no other.

- ⊙ First, the chosen court has exclusive jurisdiction over the dispute and cannot decline to hear the case. [Art. 5.]
- ⊙ Second, any other court lacks jurisdiction and may not hear

of any other courts" and (2) the designation of "the courts of one Contracting State" (*i.e.*, a more general designation not limited to specific courts within a State).

It should be noted that the Convention also contains an "optional" fourth rule by means of the declaration process under Article 22, whereby Contracting States may declare that their courts will recognize and enforce judgments given by courts of other Contracting States designated in a *non-exclusive* choice of court agreement. It remains to be seen how far this option will be taken up.

As already indicated, the Convention is intended to apply only to international commercial matters. Specifically excluded from the Convention's scope are consumer transactions and employment contracts. Other excluded matters include disputes over real property, family law matters, wills, insolvency, and personal injury claims. Also excluded are tort claims that do not arise from a contractual relationship, some maritime claims, anti-trust claims, claims for nuclear damage, and most but not all intellectual property claims. [Art. 2.]

Some of these exclusions may seem to unduly limit the scope of the Convention. Excluding particular matters from coverage, however, may provide more certainty and uniformity than exists under the New York Convention, which still allows individual states to refuse to recognize an arbitration award where they determine that it concerns matters that are "not

capable of settlement by arbitration” or are contrary to public policy. [NY Con. Art. V.]

The Convention also contains exceptions that allow courts to refuse to enforce a judgment in certain situations. A court does not have to enforce a judgment, for example, where a party did not receive notice of the proceeding, where the judgment was obtained through extrinsic fraud, or where a party to the purported agreement lacked capacity to make the agreement. [Art. 9.]

Courts may also refuse to enforce a judgment where they find that the agreement is “null and void,” under the law of the state of the chosen court. [Art. 9.] This language is borrowed from the New York Convention, which suggests that the drafters intend for it to be applied according to the precedents that have developed in the arbitration context. Courts may also refuse to enforce a judgment to the extent that it awards non-compensatory damages, like punitive damages.

Insurance and Reinsurance Disputes

The Convention contains specific provisions governing insurance and reinsurance agreements. International insurance and reinsurance disputes are governed by the rules of the Convention even where the dispute is in respect of a claim for

escape the Convention’s rules by arguing that the losses paid were for punitive damages, another matter to which the Convention does not apply. The dispute would still be heard in accordance with the Convention rules.

Insurance and reinsurance agreements would, however, still have to contain an exclusive choice of court clause in order to fall within the scope of the Convention.

Current Status

The Convention is not “self-executing.” It will not enter into force until at least two countries have become parties to it. No countries have yet become parties to it. It remains, therefore, only an agreement in principle at present.

It is understood that member states are still waiting for a further report on the Convention to come out, which might not be published until late spring 2006 at the earliest.

Becoming a party requires a country to sign the Convention and then deposit an instrument of ratification at the Hague. Ratification, in most countries, generally requires some kind of internal political process approving the Convention. In the United States, for example, the Convention would have to be submitted by the President to the Senate, where it would have to win approval.

The Convention applies to international insurance and reinsurance disputes even where the dispute concerns a claim for indemnity with respect to a loss arising out of a matter to which the Convention does not apply, provided the insurance or reinsurance agreement contains an exclusive choice of court clause.

an indemnity for underlying losses paid in relation to a matter to which the Convention does not apply. [Art. 17.]

For example, an insurer or reinsurer could not resist the application of the Convention by arguing that the insured’s claim for coverage is based on the insured’s payment of damages in a personal injury suit, a matter that is specifically excluded from the scope of the Convention. If the contract in dispute is an insurance or reinsurance contract between two (or more) commercial entities, then the Convention should in principle apply. Similarly, an insurer or reinsurer could not

In the United States, the next step would most likely be for the House and Senate to adopt legislation implementing the Convention. This could be as simple as making the text of the Convention part of the United States Code, as was done with the New York Convention. Alternatively, Congress could adopt more specific legislation directing how the Convention is to be applied.

Currently, the Convention has not been signed by the United States, nor has it been submitted to the Senate for its advice and consent. According to the State */ continued page 10*

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Department, however, becoming a party to the Convention is a high priority and there is no reason that the United States will not become a party.

So far as the UK is concerned, the situation is potentially more complex, not least because of the impact of EU law generally and, more specifically, the jurisdiction regime established some time ago for EU members and certain other countries.

In the UK there are potentially four different legal regimes that apply at present to jurisdictional matters:

- EU Regulation 44/2001, which applies where the Defendant is domiciled in a member state of the European Union except for Denmark which has opted out of the Regulation 44/2001;
- the Brussels Convention, which applies where the Defendant is domiciled in Denmark;
- the Lugano Convention, which applies when the Defendant is domiciled in Iceland, Norway or Switzerland; and
- the common law rules which apply to matters that fall outside the Conventions and Regulation 44/2001.

Regulation 44/2001 and the Brussels/Lugano Conventions contain special sets of jurisdictional rules for direct insurance contracts intended to benefit policyholders by limiting the insurer's right to sue the insured to the latter's "domicile" even where a jurisdiction stipulates otherwise. Further, these special rules (e.g., Article 7-12(a) of the Brussels Convention and Section 3 of Regulation 44/2001) are not confined to consumer risks, but apply to *all* insurance contracts save for those insuring certain classes of business, including ships, aircraft and goods in transit. (The Brussels Convention rules have, however, been held not to apply to reinsurance contracts and it is generally considered that the same authorities prevent Section 3 of Regulation 44/2001 from applying to reinsurance.)

Otherwise, as a general principle for EU commercial disputes, if the parties to a contract have chosen in advance the jurisdiction in which disputes will be heard, the common law, Regulation 44/2001 and the Brussels/Lugano Conventions all strive to encourage parties to honor their bargain. The EU bodies will no doubt seek to reconcile the current regime and that envisaged under the Convention — to deal with inconsistencies such as that outlined above — in order to facilitate commercial agreements with trading partners outside the EU.

For several decades, businesses, and insurers and reinsurers in particular, have relied on the general enforceability of arbi-

tration agreements and awards. The enforceability of arbitration agreements and awards is largely attributable to the widespread acceptance of the New York Convention. That widespread acceptance may also be partially responsible for the preference of insurers and reinsurers for resolving disputes through arbitration. The Hague Convention could make litigation a viable alternative to arbitration, but only if it is widely adopted. •

Rights and Duties of Expert Witnesses in English Litigation

by Michelle Radom

The Civil Justice Council¹ has published a "protocol"² for expert witnesses which expressly aims to consolidate the guidance previously given to expert witnesses when interpreting the Civil Procedure Rules and their associated Practice Directions³. The protocol came into force in England and Wales on September 5, 2005.

We set out below some of the practical issues arising out of this protocol, which clients and experts alike should consider.

Introduction

Such clarification was necessary because, prior to the protocol, there were two codes of practice (issued by the Expert Witness Institute and the Academy of Experts). The protocol applies to all experts who are or have been instructed to give or prepare

¹ The Civil Justice Council is an advisory public body set up by statute with responsibility for overseeing and coordinating the modernization of the civil justice system.

² The protocol can be accessed via the Civil Justice Council website on: www.civiljusticecouncil.gov.uk

³ The Civil Procedure Rules were introduced in April 1999 to govern the administration of civil and commercial litigation in England and Wales. They do not apply directly to arbitrations (outside the county court system).

evidence for the purpose of civil proceedings in a court in England and Wales. It takes as its starting point the overriding objective to avoid litigation in general and to manage efficiently proceedings where litigation cannot be avoided.

Most importantly, failure to comply with the protocol may result in costs orders against the experts (as well as their instructing parties). This is not an empty threat. In a 2004 decision, the court demonstrated its willingness to impose an order covering the parties' wasted costs where an expert's evidence caused significant extra expense to be incurred and did so "*in flagrant and reckless disregard of his duties to the court.*"⁴

Duties

Experts always owe a duty to exercise reasonable skill and care to those instructing them. However, when they are instructed to give or prepare evidence for civil proceedings, they have an

2. Experts must confine their opinions to matters which are material to the dispute and which lie within their expertise. They must indicate if they are not satisfied (for whatever reason) that their opinion can be said to be final or without qualification. Experts must also inform their instructing parties promptly of any change in their opinions and the reason for it.
3. Terms of appointment must be agreed from the outset and the protocol lists the terms which should normally be included. Experts must confirm without delay whether or not they accept the instructions they have received. Once acting, experts should discuss any intention to withdraw from the case with their instructing parties. In certain instances, a request for directions from the court may be more appropriate (see below). Formal written notice must be given of withdrawal from the case.
4. The protocol also lists criteria regarding the contents of

Failure to comply with the new English protocol for expert witnesses may result in cost orders against the experts — as well as their instructing parties.

overriding duty to the court and not to those who instruct or pay them.

1. There are certain key components of that overriding duty. Their opinions must be independent. The appropriate test laid down in the protocol is whether they would have reached the same opinion even if the other side had instructed them. This is of real concern to the courts. In his lecture to the annual conference of the Expert Witness Institute, the Master of the Rolls (the head of civil justice) expressed concerns about the independence of expert witnesses under the current adversarial system. He believes that it is "inevitable" that experts will be swayed by the interests of those who instruct them.

experts' reports, including details of the statement of truth⁵ to be included. Experts must cite all works by other parties on which they have relied. A summary of conclusions (usually at the end of a report) is mandatory. The mandatory statement of the *substance* of all material instructions should not be incomplete or misleading. "Instructions" include all materials provided by solicitors in order to gain advice. The protocol also deals with the circumstances in which experts may amend their reports. Experts must inform their instructing parties and produce amended reports as quickly as possible.

5. Experts have a duty to attend court if called upon to do so. Instructing solicitors must therefore keep experts updated on court timetables.

⁴ *Phillips v Symes* [2004] EWHC 2330 (Ch)

⁵ All witness statements (both factual and expert) must be verified by a statement of truth which is a statement that the witness believes the facts stated in the document are true.

Rights

Along with their duties, experts have clear "rights."

Experts must be kept regularly informed / *continued page 12*

Expert Witnesses

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by those instructing them. This includes receiving copies of all court orders and directions which may affect their reports. Obtaining clear instructions is crucial. Experts are allowed to be wrong, provided their opinion is, in the words of James Badenoch QC (Chairman of the Expert Witnesses Institute), “*honestly held and carefully expressed...Lawyers do owe a crucial duty...to ensure that the evidence of experts is well founded, fairly expressed and appropriately directed.*”

The protocol sets out what the instructions to experts should include. If in doubt about their instructions, experts should refuse to act pending clarification.

Experts have a right to ask the court for directions, and the court has powers to direct a party to provide required information to the expert.

Experts should be told when their reports will be/have been disclosed and they must be kept informed about the progress of the case. Instructing solicitors must tell their experts about any material changes to the information which the experts have been given.

Written questions may be put to experts by any party to the proceedings and experts are under a duty to answer questions properly put. At the same time, experts have the right to file written requests to the court for directions where they believe questions are improper or out of time.

Independent Role

The use of single joint experts appointed by all the parties to the proceedings is encouraged and directions about joint instructions are set out in the protocol. Single joint experts should keep all instructing parties regularly informed as they owe duties to all parties (as well as the court). They should not meet with only one party, unless that has been agreed by the other parties.

The protocol sets out arrangements for discussions between experts and experts must not be instructed to avoid reaching agreement (or to defer doing so). Instructing solicitors can attend such discussions only if all the parties have given their consent. The content of such discussions can only be referred to at trial if the parties agree. The protocol lists what the mandatory statement to be prepared after any discussion must contain. The parties are not bound by any agreement between the experts.

Finally, experts should bear in mind that contingency or conditional fees must not be offered to or accepted by them.

Conclusion

Expert witnesses play a crucial role in civil litigation. The new protocol hopefully provides clarity for experts by consolidating all the existing codes of practice which apply to them. In view of the potential for costs sanctions (outlined above), anyone asked to act as an expert would be well advised to review the protocol carefully. ☺

Case Notes

The Undisclosed Principal in Insurance Law

by Anita Rivera

Talbot Underwriting Ltd. v. Nausch Hogan & Murray, Jascon 5 [2005] EWHC 2359 (Comm)

The English High Court ruled in October 2005 that the doctrine of “undisclosed principal” is of limited application in insurance law. If the policy itself does not contemplate that an assured is acting for a third party, and the insurer is unaware that cover is intended for the third party as well, then the undisclosed principal doctrine is unlikely to apply.

Nevertheless, even if the doctrine does apply, an intention to contract on behalf of an undisclosed principal is a material fact which insurers would want to know and which would affect their underwriting judgment. Failure by an insured to disclose the agency relationship would therefore allow insurers to avoid the policy for non-disclosure. However, if the insurer is aware that the person entering into the insurance contract is acting for a third party, but fails to inquire as to the identity of the third party, then the insurers are likely to be taken to have waived disclosure by their failure to make further enquiries and the third party (*i.e.*, the undisclosed principal) will be covered under the policy.

The Doctrine of Undisclosed Principal

The general position was stated by Lord Denning MR in *Teheran-Europe Co. Ltd v ST Belton (Tractors) Ltd* [1968] 2 QB 545 at 555 where he said:

“A person may enter into a contract through an agent whom he has actually authorized to enter into the contract on his behalf.....where an

agent has such actual authority and enters into a contract with another party intending to do so on behalf of his principal, it matters not whether he discloses to the other party the identity of his principal, or even that he is contracting on behalf of a principal at all, if the other party is willing or leads the agent to believe that he is willing to treat as a party to the contract anyone on whose behalf the agent may have been authorized to contract. *In the case of an ordinary contract*, such willingness of the other party may be assumed by the agent unless either the other party manifests his unwillingness or there are other circumstances which should lead the agent to realize that the other party was not so willing (*emphasis added*).

and interrelated companies and/or joint ventures” of the assured. The policy also provided coverage for any “additional assured...as may be required.”

The Issues

The Court was asked to consider the following issues:

1. whether S was a co-assured under the policy;
2. whether S was the undisclosed principal of an agency agreement between S and C, thereby giving S the right to subrogate its claim under the policy; and
3. whether there was a real prospect of success of Insurers’ claim for damages against NHM on the basis that they failed to place a policy of insurance that expressly named S as a co-assured.

NHM submitted that S was an “associated company” or

In October 2005 the English High Court ruled that the doctrine of undisclosed principal is of limited application in insurance transactions. If an insurance policy does not provide that an assured is acting on behalf of a third party, and the insurer is unaware that the cover is intended for the third party, then the undisclosed principal doctrine is unlikely to apply.

The Facts

The *Jascon 5* was a vessel (the Vessel) owned by CPL (C). C was part of the Sea Trucks group of companies. C entered into a contract with Sembawang (S) for repair and refurbishment to take place at its shipyard in Singapore. As part of this contract, C had to obtain insurance for the work and the policy was to include S as a co-assured. C instructed the risk in London to be placed by the defendant brokers NHM. NHM, via another broker, NMB, placed the insurance with the Claimant (the London Market insurers (“Insurers”). During the period covered by the policy, the Vessel sustained flooding and S incurred expense by way of the cost of repair of the Vessel. S made a claim under the policy but the claim was refused on the ground that S was not an assured under the policy.

C was named on the policy as an assured but S was not. However, the policy did insure “subsidiary, affiliates, associated

party to a “joint venture” with C; that the phrase “as may be required” in the additional assured clause meant as required or intended by the already described assured, namely C, and that Insurers did not need notification of S as a named co-assured. NHM also argued that, whether or not S fell into the class of co-assured described in the policy itself, it was entitled to step in and take the benefit of the contract as undisclosed principal.

The Decision

The Court rejected the argument that S was an “associated company” or part of a “joint venture,” as the clause set out specific named entities and then referred to additional unnamed entities with various types of relationship to C. The Court held that the expressions used to define the various types of relationships between unnamed entities and the assured were intended to cover members of C’s corpo- / *continued page 14*

Case Notes

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rate group. Equally, the Court held that the relationship between S and C was not a “joint venture” because all the work was to be done by S and there was no profit sharing arrangement or common management of any kind.

Nor did the Court find that S fell within the “additional assured” provisions of the policy. The Court held that the idea that S could be insured in the way suggested by NHM (*i.e.*, not being specifically identified as an assured or able to fit within a class mentioned in the policy, but nevertheless incorporated as an assured by means of the wording in relation to “additional assured”) was inconsistent with the policy as a whole and its emphasis on group coverage.

The Court concluded that the terms of the insurance contract prevented S, as an undisclosed principal, from taking its benefit. The insurance was drafted to cover the interest of C (and related entities), together with any joint venture into which the members of C’s group might enter. The failure to include S whether by name or by category showed that the intention was that S should not be covered by the policy, which cannot be circumvented by the doctrine of the undisclosed principal.

Furthermore, the Court upheld the Insurers’ argument that NHM was negligent in failing to disclose the intention that the policy was to cover S as a co-assured. The Court went on to rule that, had S had been entitled to claim on the policy as a beneficiary under the policy, then there was a failure on the part of C and NHM to disclose their intention for S to be included as a

treated as “ordinary” contracts for the purpose of applying Lord Denning’s comments on the undisclosed principal doctrine. Insureds and undisclosed principals cannot automatically assume, without clear communication, that insurers are “willing” to include the undisclosed principals under any insurance contract. ©

The English Court Provides Guidance on Compliance with Claims Co-Operation Clauses

by Jonathan Ogle

[Shinedean Ltd v. \(1\) Alldown Demolition \(London\) Ltd \(In liquidation\) \(2\) AXA Insurance UK Plc \[2005\] EWHC 2319](#)

This recent English High Court decision has ruled that where an insurance policy does not stipulate a time limit in which the insured has to comply with a claims co-operation clause, a term is to be implied that compliance should take place within a reasonable time. In this context, reasonable time should be

A recent decision by the English High Court ruled that where an insurance policy does not stipulate a time limit within which the insured must comply with a claims cooperation clause, a term is to be implied that compliance should take place within a reasonable time.

co-assured. That would have been a material non-disclosure and, in the circumstances, the Insurers could not be said to have waived the disclosure obligation. As a consequence, Insurers were entitled to avoid the policy.

Conclusion

It is clear therefore, that insurance contracts are not to be

judged generously in favor of the insured, taking into account any prejudice suffered by the insurer.

The Issues

The court had to decide three preliminary issues:

1. whether the assured was in breach of the claims co-operation conditions;

2. whether compliance with the claims co-operation clause was in fact a condition precedent to insurer's liability to indemnify the assured under the policy; and
3. whether the insurer was thereby entitled to decline to indemnify as a result of any such breaches by the assured.

Background

The claimants owned a property in Kent, England and contracted with an associated company to carry out specific work to the property. In 2002, this company contracted with the assured, a company specializing in demolition work, to carry out the demolition and necessary excavation

liable for the claim, as the assured had breached the co-operation clause.

The Decision

HHJ Richard Seymour QC held that:

1. The co-operation clause did not specify a time limit for compliance, and it should be implied into the clause that the assured would co-operate within a reasonable time. In deciding what was reasonable, the court held that it would depend, in part, upon whether or not insurers had suffered any prejudice. On the facts of this case, it was held that the assured had not breached this element of the clause by

In the absence of policy language requiring the insured to comply with a claims cooperation provision within a specified time, a duty to cooperate, even if expressed as a condition precedent, is not breached by a delay in compliance, unless the insurers have suffered prejudice as a result of the delay.

work on the property. While carrying out this demolition work, the assured excavated a hole, adjacent to a neighboring property owned by Mr. and Mrs. Patel, causing damage to the property.

The claimant settled the claim with Mr. and Mrs. Patel for the damage they suffered and also, as a result of a collapsed wall, also had to incur additional costs. The completion of the development project was consequently delayed. The assured had previously entered into a policy of insurance with Axa which provided cover in relation to, amongst other things, public liability and contractor's all risks insurance. Under the terms of the policy, there was a notification provision requiring the assured to give notice of a claim and thereafter to co-operate with insurers. Compliance with each of the claims conditions was, by a general provision, expressed to be a condition precedent to the insurer's liability. The assured gave sufficient notice of the claim, but thereafter failed to give any information to the insurers despite repeated requests. The assured eventually provided relevant information, but only once proceedings had been commenced and only as an attachment to a witness statement. The insurers therefore argued that they were not

providing the information requested at a late stage.

2. The claims co-operation clause was a condition precedent. Although it appeared in a list of claims provisions, it was found that all of these were conditions precedent because of their similarity in nature; and
3. Since insurers had suffered little or no prejudice, given that the claim by Mr. and Mrs. Patel had been settled in a prompt and bona fide fashion, there was no basis to decline indemnity.

Comment

This is an important decision, as it clarifies that a duty to co-operate, even if expressed as a condition precedent, is not breached by any delay in compliance with the provision, unless the insurers have suffered some kind of prejudice by reason of the delay. Readers should note, however, that the position is different if the policy provides that compliance can only be effected in a given way or at a given time. For example, irrespective of prejudice, insurers are entitled to rely upon a condition precedent where a notice of loss is to be given. In this case, the requirement was specifically compliance within a reasonable time, and it is in this instance that prejudice becomes an important factor. ☺

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