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Legal Newsflash

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Still Evolving? An update on the Market-led reform of placing and claims in the London Market

The Contract Certainty Code of Practice was published in June 2007. Since then, the market has kept up the momentum of change, and the Market Reform Group has recently published its detailed work plan for 2009. Joanne Staphnill reviews the progress, and comments on how the market of the future may be affected by these and other developments.

The Contract Certainty Code of Practice (“the Code”) was published in June 2007^[1]. The Code was the result of 2 years of work reforming market practice around placing. The contract certainty project has been a success, with contract certainty having become “business as usual” by the beginning of 2008. It was reported at the time that “firms are becoming better at doing change”, and “increasing number of firms are being more systematic in sponsoring, measuring, resourcing and driving internal change”^[2]. In this article, we provide a brief update regarding the continuing progress of the contract certainty initiative, and consider how this and recent case-law may affect the market in the future.

2008 in review - contract certainty and beyond

At the beginning of 2008 the Market Reform Group (“MRG”) set out the goals for that year. MRG planned to, amongst other things, adopt the Market Reform Contract Endorsement (MRCE) as the industry standard, adopt Electronic Policies, endorsements by e-messaging and promote support for e-placing. The Market Reform Contract (MRC) was to be implemented for binding authorities and lineslips. From the claims perspective, the objective was (amongst other things) to develop and extend Electronic Claims Files (ECF), and adopt them for legacy files.

Happily, the market has kept up the momentum of change, resulting in these objectives being met. The MRG January 2009 press release recognised another “year of solid progress” in market reform^[3], and highlighted achievements such as the fact that ECF is now embedded as “business as usual” in the Lloyd’s market, and there has also been “significant roll out” across companies.

It is noteworthy that the market has coped with the need for change so well, when in practice both the placing and the claims initiatives have required individuals and firms to amend their practices in some significant ways. An example from the placing perspective is that many brokers found that they increasingly had to “front load” their work. One result of the contract certainty project was that there was much more pressure to gather all the relevant information for the risk at the earliest possible stage. Whilst this was necessary to put an end to the “deal now details later” culture of which the FSA so explicitly disapproved, the personal and organisational discipline to effect this change presented a real challenge for many. This shift continues to present daily

obstacles, especially for those in the market dealing with international parties for whom the Code is not the familiar document it is in London. Ironically, the strict letter of insurance law and the professional duties of insurance professionals such as brokers mean that it is likely that the requirements now set out in the Code have always been necessary. Nevertheless, the Code has now provided a permanent reference to what the law and best practice require.

One potential result of the increased role of e-placing to support (or occasionally replace) the face-to-face broke may be that future insurance disputes will turn on consideration of the written/electronic evidence on the e-placing file, including the XML placing message, rather than simply oral evidence of the face-to-face broke as is often the case now. While most brokers will already have ensured that their skills in presenting information in a written and electronic form are as well-developed as their face-to-face broking skills, it is possible that a generation of claims will emerge in which disputes arise on alleged inconsistencies between the face-to-face broke and the supporting information presented in the electronic form.

Developments expected in 2009 and other future developments

The MRG has now published its detailed work plan for 2009^[4]. The MRG seeks to build on the momentum developed over the past few years and especially 2008. However, the MRG also aims to produce a more granular articulation of its vision of the “market of choice”. The aim of this will be to assist firms in identifying how they will derive economic benefit from a reformed market place. There will also be a continuing focus on encouraging the use of electronic placing and endorsement.

Some commentators had predicted that there could be a market initiative beyond contract certainty, on contract “quality”^[5]. It had been thought that such an initiative could (amongst other things) encourage the market to avoid the drafting of policies that were difficult to construe, such as those with contradictory clauses. However, given that the justification for such central initiatives must be that there is a clear market failure and that only collaboration between market participants can deliver the optimal solution, it is not clear to market organisations that such an initiative would be justified in this case. Individual brokers and insurers can continue to take their own steps to improve contract quality, supported by the Pre-Bind Quality Assurance (PBQA) standards that Lloyd’s publish. The Code already goes a long way towards requiring that policies should be reasonably well drafted, such as by requiring that terms should be “clear”. In addition, some recent case-law, *Standard Life v Oak, Aon & Anr* [2008] EWHC 222 (Comm), has restated the need for brokers to ensure that policy terms are not vulnerable to dispute over their meaning and effect.

It will be important to keep a close eye on how the *Standard Life* case is interpreted in future litigation. In *Standard Life*, the first instance judge, Tomlinson J held that a clause that permitted claims to be aggregated per claim “*and/or Claimant*” meant that the 97,000 individual endowment mortgage mis-selling claims could not be aggregated together. None of the claims were above Standard Life’s £25 million excess, so Standard Life had to bear the entire loss of over £75m. In this example it appears that just a few imprecisely drafted words led to a significant loss.

In commenting on the duties of brokers, the judge stated that it is the duty of the broker to obtain, so far as is possible, insurance coverage which “*clearly*” meets his client’s requirements. Coverage is only clear insofar as it “*leaves no room for significant debate*”. The coverage will be unclear, and the broker in breach of duty, “*if the form thereof exposes the client insured to an unnecessary risk of litigation*”. The judge went on to comment that “*of course the risk of litigation can never be wholly avoided*”, and the broker would not be in breach of duty in consequence of the Insurer putting forward a “*spurious*” construction of the cover. The present case was not, according to the judge, one in which it was necessary to explore the nature of this duty “*at its limits*”.

The comment that it is the duty of a broker to obtain cover that clearly meets the client’s requirements is not controversial. Indeed, this echoes the requirement of the Code itself. However, the judicial gloss - that cover is only clear if there is no unnecessary risk of litigation - could potentially be subject to criticism. The judge states that if there is any dispute regarding the terms of an insurance contract (except for cases where insurers are raising an entirely spurious

point), this in itself demonstrates that the broker was prima facie in breach of duty. If this is correct then it would follow that the broker would be liable to pay (at least) the insured's costs of the coverage dispute unless explicit advice had been given that certain terms were arguable, and that there was some reason why the insured should accept coverage that was debatable in some respects.

However, it will be important to ascertain how this comment is interpreted or applied in future cases to find out what the limits of the duty are. The Code requires both insurer and broker to produce a policy which contains clear and consistent terms. The market led requirement on both the insurer and broker to make sure that a contract is certain does not fit easily with a situation where an insurer can raise a poor argument (albeit one with sufficient merit to be more than spurious) and thereby almost automatically places the broker at risk of a negligence claim. Due to the requirement on a broker to avoid acting in a conflict of interest, it is possible that circumstances could arise where the insured is no longer able to rely on the broker for advice on a coverage dispute where insurers have taken such a point. This could leave the insured without expert advice unless it retains solicitors.

Summary

The London market has performed impressively in progressing the market-led reforms over the past few years. It appears that the market will be well equipped to identify and plan for the challenges of the future. However, the inevitable time-lag between changes in the market and case-law means that any potential risks in a new approach may not be highlighted in a judgment for a number of years. In the meantime, the momentum of change cannot be halted, so brokers in particular should be vigilant for any new potential problems or claims that could arise.

[1] The contract certainty project began in December 2004 with an FSA challenge to the UK insurance industry to end the "deal now detail later culture". The Code has the approval of the FSA. However, for the avoidance of doubt, it should be noted that the contract certainty project has been a market initiative led by the Contract Certainty Steering Committee (CCSC) and Market Reform Group (MRG), not the FSA itself. See http://www.marketreform.co.uk/index.php?option=com_content&view=frontpage&Itemid=2.
[2] Market Reform newsletter 24 February 2008, http://www.marketreform.co.uk/Documents/RD_Newsletters/Feb08v2.pdf
[3] http://www.marketreform.co.uk/Documents/About_market_reform/MRGPressReleaseJan2009FINAL.pdf
[4] http://www.marketreform.co.uk/Documents/About_market_reform/WorkplanDetail2009-11FINAL.pdf
[5] Including this firm, in a February 2008 article, "Moving Into the Fast Lane?"
<http://www.robinsimonllp.com/upload/pub/Newsflash%20Bermuda%20News%20Feb082008-03-05-17-29-03.pdf>

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We can put together a seminar/talk or panel discussion on the issue above, or any of the issues featured in our publications to be held at any of our offices, or yours.

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