

Subjectivities: Guidance on converting a subjectivity into a fully-clausured condition of the insurance contract

Introduction

- 1.1 There is a need in the Market to address the challenges associated with the imposition of subjectivities in (re)insurance contracts. In the past, these have given rise to considerable uncertainty in relation to the contract of (re)insurance since the precise terms of the relevant requirement, and the consequences if the requirement was not met, were rarely specified at the time the risk was placed.
- 1.2 Subjectivities are conditions of the contract, and must be expressed as such, to avoid unnecessary ambiguity. Principle 2 of the Contract Certainty (“CC”) Code of Practice requires that:

“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.”

The guidance to Principle 2 states:

“Issues may remain outstanding after inception, for example an outstanding survey requirement. Subjectivities should be imposed within the placing document. The responsibilities and timescales for resolution, and the consequences of failure, must also be clearly specified. Where subjectivity is outstanding at inception then it must be stated as a fully-clausured condition of the cover given.”

- 1.3 The Market Reform Slip (issued in June 2006) contains a “Subjectivities” heading within the Risk Details section under which these conditions are to be set out or referred to as being attached.

Purpose

- 2.1 This guidance aims to help ensure that a subjectivity takes the form of a clearly expressed condition (specifying the responsibilities and timescales for resolution, and any consequences of failure), thereby fulfilling the CC requirements in this area as defined in the Code of Practice and the CC Checklist.
- 2.2 The guidance comprises a common subjectivity example with its shortcomings highlighted by explanatory guidance, followed by an illustrative example drafted on the basis of this guidance.

Guidance

- 3.1 There are subjectivities that:
 - must be complied with or resolved before the contract becomes binding;
 - apply both before and after inception, compliance with which is a condition of all or part of the coverage; and
 - apply after the formation of the contract as conditions of continued coverage.

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3.2 A subjectivity should set out:

- i) the condition/action that needs to occur, by whom and to what standard;
- ii) the timescale, if any, within which the condition is to be met;
- iii) the terms which are to apply until the condition is met; and
- iv) the consequences which are to follow if the condition is not met.

3.3 A subjectivity that simply states “*subject to survey*” clearly falls short of the standards expressed at paragraph 3.2 above. In order to satisfy the CC Code of Practice the following key requirements need to be considered:

- i) the condition/action that needs to occur, by whom and to what standard;

This involves consideration of:

- what type of condition/action is necessary;
- by whom it is to be undertaken; and
- what will be deemed to be satisfactory compliance.

The expression of the standard of compliance with the subjectivity may need to involve two factors:

- the standard of quality of the necessary documentation to be provided, or action to be undertaken (e.g. the particulars which may be required to be included in documentation and/or the form it should take); and
- the standard(s) by which the outcome/result of the action taken or documentation will be assessed and by whom it will be approved (e.g. that it must be satisfactory to (re)insurers).

For example:

“The insured shall provide to the insurers a survey report on [insert property address] prepared by [insert name of firm of surveyors] which is satisfactory to the insurers.”

- ii) The timescale, if any, for the condition to be met;

The timescale for completion of the condition involves a consideration of what is the intended timeframe for the subjectivity to be applicable. Is it to be complied with before or after the formation of the contract? If after formation, is it to be complied with before or after inception?

A timescale may be inappropriate in certain circumstances, for example, where the relevant condition provides for a continuing obligation. However, where a timescale is imposed, it is best expressed either as a specific date or by setting out a method of calculation of the deadline date.

For example:

“The required survey report shall be provided by the insured to insurers by [insert time and time zone] on [insert date].”

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iii) The terms which are to apply until the condition is met;

Possible terms may affect:

- the commencement of all or part of the coverage;
- the premium;
- recourse to the full limit(s) of indemnity; and/or
- recovery of any loss.

For example:

“Until the insured has provided to the insurers a survey report and such report is confirmed in writing by the insurers to be satisfactory to them, coverage in respect of the specified property shall be limited to []% of the sum insured set out in [insert reference to the relevant section of the contract].”

iv) The consequences if the condition is not met.

Possible consequences may include:

- any of the possible terms referred to in iii) above;
- imposition of additional terms;
- termination of the contract, with (re)insurers ceasing to be under any liability whatsoever, including in the period before the deadline for compliance with the condition;
- insurers coming off risk and ceasing to be under any further liability as from the date of non-compliance with the condition;
- insurers not being under any liability prospectively and/or retrospectively in respect of a particular aspect or aspects of coverage;
- additional premium chargeable; and/or
- that the terms of the contract of (re)insurance are open to re-negotiation by the (re)insurers.

The condition may also need to incorporate specific provisions dealing with the service and timing of any notice on the insured particularly as regards cancellation.

For example:

“In the event that the insured fails to provide a survey report by the date specified, the insurers shall be entitled to terminate this contract by giving not less than fourteen days’ notice in writing to the insured at their address shown in the contract. In the event of such termination, the insured shall be entitled to pro rata return of premium for the unexpired period of the contract.”

Subjectivity Example

4.1 Below is an illustrative example of a survey subjectivity that contemplates the four key requirements of a fully-claused condition. This example is intended for illustrative purposes only, as the particular wording of such a condition will depend entirely on the intentions of the insurers on any given contract. Some conditions may need to be more comprehensive than the illustrative example below.

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“Survey Condition

The Insured shall provide to the Insurer a survey report on [insert property address] such report to be prepared by [insert name of surveyor(s)] (“the Survey”). The Survey shall be so provided by [insert time and time zone] on [insert date] (“the Survey Deadline”).

Between inception and the Survey Deadline, cover is provided by the Insurer on the terms and conditions specified in the contract to which this condition is attached (“the Contract Terms”).

Where the Survey is not submitted to the Insurer by the Survey Deadline cover shall terminate at the Survey Deadline.

Where the Survey is submitted to the Insurer by the Survey Deadline, cover shall continue from the Survey Deadline on the Contract Terms until expiry of the period of the contract unless and until terminated in accordance with the following paragraph.

In the event that the Survey is unsatisfactory to the Insurer, the Insurer shall have the right, within [] days of its receipt, to terminate the contract by serving not less than [] days’ notice in writing to the Insured at the Insured’s address as shown in the contract, such notice expiring no earlier than the Survey Deadline.

In the event of termination under this survey condition, the Insured shall be entitled to pro rata return of premium for the unexpired period of the contract unless a loss has arisen for which the Insured seeks indemnity under this contract in which case the Insurers shall remain entitled to the full premium specified in the Contract Terms.

To the extent that this survey condition conflicts with any other cancellation, notice and premium provision in the Contract Terms, this survey condition shall prevail.”

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