

Principles & guidance

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Contract Certainty Code of Practice



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Contract Certainty

Scope This guidance applies to general insurance⁽¹⁾ contracts either entered into by an FSA-regulated insurer⁽²⁾, or arranged through an FSA-regulated intermediary.

Definition Contract Certainty is achieved by the complete and final agreement of all terms between the insured and insurer by the time that they enter into the contract, with contract documentation provided promptly thereafter.

Contract Certainty Principles

- A. When entering into the contract The insurer and broker (where applicable) must ensure that all terms are clear and unambiguous by the time the offer is made to enter into the contract or the offer is accepted. All terms must be clearly expressed, including any conditions or subjectivities.
- B. After entering into the contract Contract documentation must be provided to the insured promptly.
- C. Demonstration of performance Insurers and brokers must be able to demonstrate their achievement of principles A and B.
- D. In respect of contract changes Contract changes need to be certain and documented promptly.

Where there is more than one participating insurer

- E. *When entering into the contract* The contract must include an agreed basis on which each insurer's final participation will be determined.
The practice of post-inception over-placing compromises Contract Certainty and must be avoided.
- F. *After entering into the contract* The final participation must be provided to each insurer promptly.
- G. Where the contract has not met the principles The insurer and broker (where applicable) have a responsibility to resolve exceptions to any of the above principles as soon as practicable and without undue delay.

Note 1

See FSA definition of general insurance. The following "pure protection" classes are specifically excluded: Private Medical Insurance, Term Assurance, Critical Illness and Income Protection. Insurers and brokers must be able to justify the criteria used to establish any other exemptions from this scope.

Note 2

The guidance applies equally to reinsurance; insurer may also be read as reinsurer and insured as reinsured throughout.

A When entering into the contract

The insurer and broker (where applicable) must ensure that all terms are clear and unambiguous by the time the offer is made to enter into the contract or the offer is accepted. All terms must be clearly expressed, including any conditions or subjectivities.

Explanation (A.1)

The proposed contract is the document which contains the offer and can take many forms. Individual market protocols define these. Examples include: completed presentation templates; proposal forms; slips or other placing documents. Terms are the contractual provisions of the contract, and should be clear and unambiguous.

Guidance (A.2)

One definition of an offer from a legal perspective is:

"... an offer is an expression of willingness to contract made with the intention that it is to become binding on the person making it as soon as it is accepted by the person to whom it was addressed" (per Chitty on contracts, for the Law of England and Wales).

The implications for Contract Certainty are that:

- where an offer is being made, the proposed contract should meet the Contract Certainty definition, for example, where a firm quotation is being provided; and
- where an offer is not being made, the Contract Certainty definition may still be applied but is not a prerequisite at this stage; for example, where a clearly identified non-binding indication is being provided.

The proposed contract may include subjectivities as part of its terms, and these should be clearly expressed. Further guidance on this topic is included as Appendix 1 to this guidance.

All terms should either be expressed in full or unambiguously identified; for example, by specific reference to bespoke or model material.

Wherever possible, the insured and insurer should enter into the contract prior to inception. In circumstances where this is not possible, Contract Certainty can still be achieved by applying the Contract Certainty principles. Firms should be able to demonstrate the extent to which contracts are being entered into later than inception, their causes and actions being taken to reduce their frequency.

The contract should clearly identify all parties to the contract.

Insurer actions (A.3)

The insurer should check that the proposed contract clearly identifies all of the terms by the time it formally commits to the contract.

Where there is more than one participating insurer, each insurer should satisfy itself that adequate contract checking has been completed.

Where the contract is to provide cover that will commence prior to the contract being entered into, the insurer should ensure that:

- this is permissible, having regard to the class of business and all appropriate laws and regulations;
- the scope of coverage for any claims which arise in respect of the period between the start of the insurance period and the date on which they enter into the contract, is clear.

Broker actions (where a broker is involved) (A.4)

The broker should provide the necessary risk and contractual information that represents the insured's demands and needs, in order to enable the agreement of all terms.

B After entering into the contract

Contract documentation must be provided to the insured promptly.

Explanation (B.1)

Contract documentation contains all the agreed terms of the contract between the insured and the insurer and details of the insurers' participations.

The insurer must provide contract documentation to the insured (or their agent).

Contract documentation must be sent to the insured promptly. The documentation provided may be the insurer authorised contract document and/or other contract documentation which may not be insurer authorised. An insurer may delegate authority for the provision of contract documentation, e.g. to the holder of a delegated underwriting arrangement or to a service provider, but remains responsible in these cases.

Promptly is defined as:

- within 7 working days for Retail customers¹;
- and for all other client classifications, within 30 calendar days.

These timescales are measured from the later of the following:

- the inception date of the contract;
- the date on which the insured and insurer enter into the contract;
- where there is more than one participating insurer, the date on which the final insurer enters into the contract.

Where a broker, intermediary or service provider is involved in the preparation or delivery of the contract documentation, sufficient time should be allowed for any associated checking and onward provision of the documentation within the period defined as promptly.

Guidance (B.2)

The following are examples of insurer authorised contract documentation:

- Insurance Policy;
- Schedule of Cover;
- Certificate of Insurance;
- A copy of the complete slip.

Unless expressly authorised by the insurer(s), any further documentation provided by the broker, such as the schedule of insurer participations, is provided in its capacity as agent of the insured and remains the broker's responsibility.

The following are examples of other contract documentation which may be provided by the broker as a record of the contract.

Broker insurance document

A broker insurance document contains the terms and conditions of the insurance contract as well as details of the insurer(s). Unless expressly agreed by insurer(s), a broker insurance document is contract documentation provided by the broker in its capacity as agent of the insured and must not be represented as insurer authorised.

Other broker produced documents

A broker may choose to send other documentation to the insured e.g. adding the full text of a clause or wording as defined in the contract. However, unless expressly agreed by the insurer(s), the broker is responsible for the accuracy and completeness of such documentation.

Insurer actions (B.3)

Ensure that the type of contract documentation to be provided to the insured (or their agent) is clear.

Provide contract documentation to the insured (or their agent) promptly.

Observe any protocols relating to the checking and onward provision of documentation where a broker, intermediary or service provider is involved. For example, some market sectors have established protocols of 2 working days for Retail customer contracts and 9 calendar days for all other client classifications.

Broker actions (B.4)

Ensure that the type of contract documentation to be provided to the insured (or their agent) is clear.

Where responsible, provide contract documentation to the insured (or their agent) promptly.

¹ A Retail customer is defined as: a natural person who is acting for purposes which are outside his trade, business or profession, and including an individual or partnership (excluding a Limited Liability Partnership) in England & Wales who buys a general insurance contract which covers them in both a private and a business capacity.

C Demonstration of performance

Insurers and brokers must be able to demonstrate their achievement of principles A and B.

Explanation (C.1)

Insurers and brokers are each responsible for, and need to be able to demonstrate, performance of:

- the agreement of all terms by the time of entering the contract;
- the achievement of the above by inception date;
- the prompt provision of contract documentation for which they are responsible;
- how exceptions are identified and resolved and the actions taken to reduce occurrence.

The methodology for demonstrating performance should be consistent and typically based on the following:

- the inception date of the contract;
- the date on which the insured and insurer enter into the contract;
- for brokers and where there is more than one participating insurer, the date on which the final insurer enters into the contract.

Guidance (C.2)

Examples of how Contract Certainty can be demonstrated include the following.

Verification against a checklist

A checklist could be applied to each contract and a record kept of whether or not Contract Certainty was achieved. The checklist criteria may need to vary, depending upon client classification or class of business. Hence an organisation may require more than one checklist to cater for specific circumstances. Some example material is included as Appendix 2.

Sample or File audits

Statistically credible samples of contracts may be reviewed to verify whether or not Contract Certainty was achieved.

System or Process controls

Where controls are in place which ensure that all or part of the principles have been met. For example, where an e-Trading platform is used to automate and validate the collection of required data or to provide contract documentation in specific formats and timeframes.

These approaches may be blended by organisations according to the nature of their activities.

The timing of the assessment of Contract Certainty may vary according to the role of the individual organisation and their preferred approach. This may result in single or multiple performance measures within organisations.

In demonstrating their performance, organisations should consider how they identify and resolve exceptions in a timely manner. Due regard in this approach should be given to the implications for the insured, and the significance and frequency of such exceptions.

Organisations should satisfy themselves that they have processes in place to meet any other Contract Certainty principles as they apply to their business.

Individual industry bodies may also require organisations to provide them with data in a specific format or timeframe to demonstrate performance at an industry level. Organisations are recommended to consider this when implementing their processes.

Insurer consideration

Where the broker sends contract documentation to the insured (or their agent), the insurer is not required to establish or record the date of provision.

Broker consideration

Where the insurer provides the contract documentation directly to the insured, or has delegated this role other than to the broker, the broker is not required to establish or record the date of provision.

D In respect of contract changes

Contract changes need to be certain and documented promptly.

Explanation (D.1)

This means:

- complete and final agreement of the change by the insured (or their agent) and insurer, by the time that the parties commit to it, while:
- maintaining the certainty of the contract; and
- providing documentation in respect of the change to the insured (or their agent) promptly thereafter.

Guidance (D.2)

Changes to the contract can only be made by documented mutual agreement and in accordance with any provisions in the original contract, clearly identifying the effective date of the change.

Contract Certainty need not be separately demonstrated for any changes to existing contracts.

E, F Where there is more than one participating insurer

E When entering into the contract

The contract must include an agreed basis on which each insurer's final participation will be determined (E.1).

Explanation (E.1.1)

Ensure that the method of calculating insurer participations (signed lines) is clearly stated in the contract.

Guidance (E.1.2)

This is achieved by the inclusion of signing provisions, which result in clearly defined participations throughout the time on risk. Further guidance regarding suitable signing provisions is included in Appendix 3.

Insurer actions (E.1.3)

Ensure that any proposed signing provisions achieve clearly defined participations throughout the time on risk.

Ensure that a suitable several liability clause is present.

Broker actions (E.1.4)

Propose suitable signing provisions, which reflect any client requirements, for inclusion within the contract.

Complete the placement as soon as practicable and without undue delay.

Include a suitable several liability clause.

The practice of post-inception over-placing compromises Contract Certainty and must be avoided (E.2).

Guidance (E.2.1)

Post-inception over-placing must be avoided in order to achieve clearly defined insurer participations throughout the time on risk.

Insurer actions (E.2.2)

Do not seek to enter into a contract which would result in post-inception over-placing taking place.

Broker actions (E.2.3)

Do not seek to form a contract which would result in post-inception over-placing taking place.

F After entering into the contract

The final participation must be provided to each insurer promptly.

Explanation (F.1)

In relation to this principle, promptly means that:

- at the request of the insurer an insurer's participation on the contract will be made available by inception or upon completion of the risk placement if this occurs post-inception;
- where the insurer needs the insurer participations to prepare the contract documentation then insurer participations should be provided by the broker in sufficient time to allow for this;
- where the contract denotes that contract documentation is to be prepared by the broker, then the insurer participations should be provided in sufficient time to allow for insurer authorisation of the contract documentation;
- each insurer's participation on the contract will be provided within 30 calendar days of either inception or completion of placement, whichever is the later.

Guidance (F.2)

Insurer participations are available to insurers at the time of placement by writing a line "To Stand".

Insurer actions (F.3)

Write "line to stand", or request insurer participation from the broker, where there is a requirement to know the exact participation at an early stage.

Broker actions (F.4)

Calculate insurer participations by either inception or completion of placement, whichever is the later.

Respond to insurers' requests for provision of insurer participation information.

Provide insurer participation information to insurers within the specified timescales.

G Where the contract has not met the principles

The insurer and broker (where applicable) have a responsibility to resolve exceptions to any of the above principles as soon as practicable and without undue delay.

If all terms have not been agreed by the time of entering into the contract then every effort should be made to do so as soon as practicable thereafter.

Similarly wherever accurate contract documentation has not been provided promptly, the insurer and broker (where applicable) must use their best endeavours to ensure that the provision of contract documentation is delayed as little as possible.

Some market sectors have established protocols for the rectification of inaccurate contract documentation; for example, which require corrections to be made within a 14 day timescale.

If the delay is likely to be significantly beyond the required timescales then it is the responsibility of the insurer or broker (if applicable) to keep the insured informed of the position.

The above actions will help prevent the creation of a backlog of contract documentation. Where insurers and brokers already have a legacy of contract documentation, this needs to be resolved.

Appendix 1: Subjectivities guidance

Introduction

The objective of Contract Certainty is to provide clarity for both insured and insurer on the terms of the insurance contract. Sometimes, information that the insurer requires is not available and as a result the insurer may impose a subjectivity on the contract.

In the past, subjectivities have given rise to uncertainty in relation to the contract since the precise terms of the relevant requirement, and the consequences if the requirement was not met, were insufficiently specified by the time of entering into the contract.

The proposed contract may include subjectivities as part of its terms, and these should be clearly expressed. Principle A of the Contract Certainty Code of Practice requires that:

“The insurer and broker (where applicable) must ensure that all terms are clear and unambiguous by the time the offer is made to enter into the contract or the offer is accepted. All terms must be clearly expressed, including any conditions or subjectivities.”

Purpose

This guidance aims to help ensure that a subjectivity is expressed as an unambiguous condition (specifying the responsibilities and timescales for resolution, and any consequences of failure) of the contract.

This guidance comprises a subjectivity example.

Guidance

There are subjectivities that:

- must be complied with or resolved before the contract is entered into; and/or
- apply both before and after the inception date of the contract, compliance with which is a condition of all or part of the coverage provided; and/or
- apply after the insured and insurer have entered into the contract as conditions of continued coverage.

A subjectivity should set out all of the following:

- 1) the condition/action that needs to occur, by whom and to what standard;
- 2) the applicable timescale, if any, within which the condition is to be met;
- 3) the terms which are to apply until the condition is met;
- 4) any consequences which follow if the condition is not met.

Subjectivity Example

Below is an illustrative example of a survey subjectivity that addresses the four key requirements of a fully-claused condition. The example is intended for illustrative purposes only, as the particular wording of such a condition will depend entirely on the intentions of the insurer on any given contract.

Some conditions may need to be more comprehensive than the illustrative example below.

“Survey Condition

The Insured shall provide to the Insurer a property 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 its address 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 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.”

Appendix 2: Sample checklist content

Principle A requires that all terms are clearly and unambiguously expressed. A checklist provides one means by which conformity with this principle may be assessed.

Some sample questions, which an organisation may choose to use in the development of its own checklist(s) are given below. Each question and the criteria required should be tailored to its business. For example, a checklist could specify, “the expression of period of cover should include the start date and time, end date and time and the relevant time zone”.

- Are all parties to the contract clearly identified?
- Is the period of cover clearly expressed?
- Are the sums insured and/or limits clearly expressed?
- Is the premium or rate (together with any relevant deductions) clearly expressed?
- Are any applicable taxes clearly expressed? NB. It is not necessary to specify actual tax rates or their allocation, to achieve Contract Certainty.
- Are any payment terms clearly expressed?
- Are the currencies for any monetary amounts clearly identified?
- Does the contract contain or reference the specific wordings and/or clauses?
- Can it be confirmed that there are no remaining terms to be agreed?
- Are all conditions or subjectivities of the contract clearly expressed?
- Are any provisions for the notification and agreement of claims clearly expressed?
- Does the contract define the applicable Law and Jurisdiction, unless agreed otherwise?
- Where a wording is dependent on another wording (For example, “as expiring” or “as original”), is the latter clearly identified i.e. either attached or uniquely described or referenced?
- Are any responsibilities for the production and delivery of an insurer authorised contract document clearly expressed?
- Are any relevant provisions for the agreement of changes to the contract clearly expressed?

Where there is more than one participating insurer

- Do the signing provisions achieve clearly defined participations?
- Is the several liability of insurers clearly expressed?

Where there are regulatory requirements that affect the achievement of Contract Certainty, these should be considered as part of the assessment. For example, in the UK the inception date of a motor policy must not precede the date of entering into the contract.

Appendix 3: Signing provisions

Model Signing Provisions Guidance where there is more than one participating insurer

Background

Signing provisions enable the insurer participations for each contract to be clearly determined as required by principle E1. Any subsequent variation of these insurer participations then requires the documented agreement of the insured and all insurers whose participations are to be varied.

Every contract should include a signing provisions clause. There are two versions of the Model Signing Provisions; one without a disproportionate signing clause, and one that allows disproportionate signing before inception at the election of the insured. The broker can select the appropriate version to use in the contract, taking account of the insured's requirements. The model clauses are not mandatory and insureds, brokers and insurers may make additions, deletions or amendments.

Insurer signing instructions

Other than as defined in the model signing provisions the only insurer signing instruction that meets the Contract Certainty principles is "line to stand".

Model Signing Provisions

Without Disproportionate Signing

Signing Provisions

In the event that the written lines hereon exceed 100% of the order, any lines written "To Stand" will be allocated in full and all other lines will be signed down in equal proportions so that the aggregate signed lines are equal to 100% of the order without further agreement of any of the insurers.

However:

- a) in the event that the placement of the order is not completed by the commencement date of the period of insurance, then all lines written by that date will be signed in full;
- b) the signed lines resulting from the application of the above provisions can be varied, before or after the commencement date of the period of insurance, by the documented agreement of the insured and all insurers whose lines are to be varied. The variation to the contracts will take effect only when all such insurers have agreed, with the resulting variation in signed lines commencing from the date set out in that agreement.

With Disproportionate Signing

Signing Provisions

In the event that the written lines hereon exceed 100% of the order, any lines written "To Stand" will be allocated in full and all other lines will be signed down in equal proportions so that the aggregate signed lines are equal to 100% of the order without further agreement of any of the insurers.

However:

- a) in the event that the placement of the order is not completed by the commencement date of the period of insurance, then all lines written by that date will be signed in full;
- b) the insured may elect for the disproportionate signing of the insurers' lines, without further specific agreement of the insurers, providing that any such variation is made prior to the commencement date of the period of insurance, and that lines written "To Stand" can not be varied without the documented agreement of those insurers;
- c) the signed lines resulting from the application of the above provisions can be varied, before or after the commencement date of the period of insurance, by the documented agreement of the insured and all insurers whose lines are to be varied. The variation to the contracts will take effect only when all such insurers have agreed, with the resulting variation in signed lines commencing from the date set out in that agreement.