Contract Certainty Scope

This guidance applies to general insurance¹ contracts either entered into by an FSA-regulated insurer², or placed by an FSA-regulated intermediary³.

Contract Certainty Definition

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

Contract Certainty Principles

When entering into the contract.

A: The insurer (and broker) must ensure that all terms are clear and unambiguous before making any offer to enter into the contract or accepting such an offer. All terms must be clearly expressed, including any conditions or subjectivities.

After entering into the contract.

B: Contract documentation must be provided to the insured promptly.

Demonstration of performance

C: The insurer and broker must be able to demonstrate their achievement of principles A and B.

In respect of contract changes

D: Contract changes need to be certain and documented promptly.

Where there is more than one participating insurer

When entering into the contract.

E1: The contract must include an agreed basis on which each insurer’s final participation will be determined.

E2: The practice of post-inception over-placing compromises contract certainty and must be avoided.

After entering into the contract.

F: The final participation must be provided to each insurer promptly.

Where the contract has not met the principles

G: The insurer (and broker) has a responsibility to resolve exceptions to any of the above principles as soon as practicable and without undue delay.

¹ See FSA ICOB definition
² The guidance applies equally to reinsurance, insurer may also be read as reinsurer throughout.
³ This potentially includes "global programme”/ “reverse flow business” but not pure protection contracts (To be reviewed)
Contract Certainty Guidance

When entering into the contract.

A: The insurer (and broker) must ensure that all terms are clear and unambiguous before making any offer to enter into the contract or accepting such an offer. All terms must be clearly expressed, including any conditions or subjectivities.

A.1 Explanation

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

A.2 Guidance

The contract should clearly identify all parties to the contract.

Quotes: A firm quote should only be given where the insurer has ensured that the proposed contract meets the contract certainty definition.

Non-binding indication: Non-binding indications may be used when the proposed contract is not compliant with the contract certainty principles or has not been checked.

The proposed contract may include subjectivities as part of its terms. These are conditions of the contract, and in order to avoid ambiguity should be expressed as such. Further guidance on this topic is included as Appendix B to this guidance.

All terms should either be fully expressed or unambiguously identified, for example by specific reference.

A.3 Insurer Actions

• The insurer should check that the proposed contract clearly identifies all of the terms before they formally commit to the contract.

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

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

• 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.

After entering into the contract.

B: Contract documentation must be provided to the insured promptly.

B.1 Explanation

Contract documentation contains all the agreed terms of the contract and details of the insurer(s).

The insurer must provide a contract document to the insured (or broker).

Where a broker is involved they must provide contract documentation to the insured or their representative. This may be the insurer authorised contract document and/or other contract documentation which may not be insurer authorised.
Promptly is defined as:

- within the ICOB requirements for Retail customers;
- 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 sufficient time should be allowed for the checking and onward provision of contract documentation within the period defined as promptly.

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 non-investment contract which covers them in both a private and a business capacity.

**B.2 Guidance**

The following are examples of insurer authorised documents:

- 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 insurers. Unless expressly agreed by insurers, 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 referenced clause or wording as defined in the contract. However, unless expressly agreed by the insurer, the broker is responsible for the accuracy and completeness of such documentation.
B.3 Broker Actions

- Ensure that the type of contract document to be issued is clear.
- Where responsible, provide contract documentation to the insured promptly.

B.4 Insurer Actions

- Ensure that the type of contract document to be issued is clear.
- Provide a contract document to the insured (or broker) promptly.
- Where there is a broker, intermediary or service provider involved allow sufficient time for checking, typically 9 calendar days.

Demonstration of performance

C: The insurer and broker must be able to demonstrate their achievement of principles A and B.

C.1 Explanation

Insurers and brokers are responsible for their own performance and needs to be able to demonstrate:

- the agreement of all terms at the point of entering the contract;
- the prompt provision of contract documentation for which they are responsible;
- the means of identification of and any appropriate resolution to, exceptions to the above including keeping the insured informed as necessary.

C.2 Guidance

Examples of how contract certainty can be demonstrated include:

- 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 A.

- 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 eTrading 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 for the demonstration 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.

C.3 Insurer considerations:

Where the broker sends its own contract documentation to the insured, the insurer is not required to establish or record the date of provision.

Where the broker is forwarding insurer authorised contract documentation to the insured, the insurer is not required to establish or record the date of provision to the insured.

Where an insurer has delegated authority to a third party, the insurer has a responsibility to monitor performance within the terms of the delegation agreement e.g. where an appointed agent or cover-holder is authorised to issue contract documentation on behalf of insurers, the insurer should satisfy itself that this process is undertaken in accordance with the principles.

C.4 Broker considerations:

Where the insurer provides the contract documentation directly to the insured, the broker is not required to establish or record the date of provision.

Where the appointed agent or cover-holder is not the placing broker, there is no requirement for the placing broker to demonstrate performance.

Where the appointed agent or cover-holder is the placing broker it is required to demonstrate performance.

In respect of contract changes

D: Contract changes need to be certain and documented promptly.

D.1 Explanation

This means:

- complete and final agreement of the change by the insured and insurer, at the time that the parties commit to it, while:
  - maintaining the certainty of the contract;
  - with change documentation provided to the insured (or broker) promptly thereafter.

D.2 Guidance

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.

Any changes to an existing contract need not be treated as a new risk for demonstrating contract certainty.
Where there is more than one participating insurer

When entering into the contract.

E1: The contract must include an agreed basis on which each insurer’s final participation will be determined.

E1.1 Explanation

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

E1.2 Guidance

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

E1.3 Broker Actions

- Propose suitable signing provisions, which reflect any client requirements, for inclusion within the contract, ensuring that they achieve certainty of participations throughout the time on risk.
- Complete the placement as soon as practicable and without undue delay.
- Include a suitable several liability clause

E1.4 Insurer Actions

- To ensure that any proposed signing provisions achieve certainty of participation throughout the time on risk.
- Ensure that a suitable several liability clause is present.

E2: The practice of post-inception over-placing compromises contract certainty and must be avoided.

E2.1 Guidance

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

E2.2 Broker Actions

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

E2.3 Insurer Actions

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

After entering into the contract.

F: The final participation must be provided to each insurer promptly.

F.1 Explanation

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 at 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 the later of 30 days of inception, or completion of placement unless already provided in accordance with one of the above.

F.2 Guidance

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

F.3 Broker Actions

• Calculate insurer participations at the later of inception or completion of placement.

• Respond to insurers’ requests for provision of insurer participation information.

• Provide insurer participation information to insurers within the specified timescales.

F.4 Insurer Actions

• 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.

Where the contract has not met the principles

G: The insurer (and broker) has a responsibility to resolve exceptions to any of the above principles as soon as practicable and without undue delay.

All exceptions can be remedied and wherever appropriate, should be.

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

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

If the delay is likely to be significantly beyond the required timescales then it is the responsibility of the insurer (and broker) 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.