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Best Practice in Presentation of Engineering Risks to Underwriters

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CHAPTER 1

EXECUTIVE SUMMARY

Claims Management begins at the Underwriting of the risk.

Such a well-phrased truism.

When the underwriting of an Engineering risk is conducted responsibly and professionally, the end product is an Insurance/Reinsurance contract that has clarity in what is covered, to what extent it is covered and what is not covered.

Technically speaking, every risk is potentially insurable. The balance is about getting the required price and tweaking the terms and conditions in a way that is fair and acceptable to all parties.

This requires a heady mix of experience, engineering knowledge and insurance expertise.

What is also especially critical in being able to professionally underwrite a risk is the presentation of the risk. Otherwise, in the words of George Fuechsel of IBM, it is “garbage in and garbage out”.

The purpose of this Working Paper is to highlight what is the bare minimum of the gold standard to which every stakeholder in the Insurance/Reinsurance process should aspire to with regards Risk Presentation and to discuss the circumferential issues.

This Working Paper acknowledges the age-old technical vs commercial underwriting tensions that exist and the need for expediency. Market conditions are also recognized.

However, none of these factors amend or alter the need for good practices in the presentation of the risk to be the foundation upon which the Insurance/Reinsurance contract is based.

This is quintessential in ensuring that the Insurance/Reinsurance contract agreed is dependable and not the source of any conflict if and when loss or damage to the Insured Property occurs.

CHAPTER 2

AIM OF THE PAPER

This aim of this Working Paper is to provide clarity and guidance to all those involved in Engineering Insurance placements with regards to best practices in the presentation of risks to Underwriters.

It is therefore directed to all the parties involved in the procurement process of the traditional construction and engineering lines insurance, including but not limited to clients, brokers, direct insurers/cedants and reinsurers. All such parties either are involved in the preparation of the underwriting presentation or are a receiving party of the same.

It is not the primary purpose of this Paper to furnish a detailed and comprehensive checklist of the documents or information needed to underwrite each type of construction project or engineering risk but rather, this Paper is designed to discuss the desired standard of care all parties should aspire to achieve best practices in risk presentation.

For guidance on information to be furnished to underwrite engineering risks, including respective supplementary lists for projects with DSU and Power Plants, the London Engineering Group (LEG) has developed several documents :

https://www.londonengineeringgroup.com/information-indexing.

Other Insurance associations or groups from the rest of the world may also have their own developed guidance on technical information to be provided for engineering risks. In addition, many Insurers and Reinsurers have their own questionnaires or schedules of information.

Whilst all these documents may be very useful benchmarks at the point of preparing a submission, they do not provide a full encompassing discourse on best practices for presentation of risks to Underwriters.

This Working Group Paper focuses on the relevant aspects to be taken into consideration by the party responsible for preparing the underwriting submission for a construction or engineering risk.

Included in our discussion are what is understood to be best practices in risk presentation, what are the roles by the different parties involved, how should the information be delivered, what is considered material information, the duty of disclosure and consequences of failing to disclose and the potential for conflict between Brokers and Underwriters.

We recognize that the best practices presented in this Paper may be more difficult to achieve during soft market cycles, in the same way that Underwriters find it difficult to achieve technical pricing. However, soft and hard cycles are inherent in the Insurance industry and do not affect the relevancy of either technical pricing or best practices.

The underwriting presentation and information supplied to Underwriters is what Insurers and Reinsurers ultimately use for risk assessment prior to offering or agreeing terms with the broker, cedant or client.

It is therefore crucial for Underwriters to receive a well-organized, clear, relevant and sufficiently comprehensive set of material information and documents so that they understand the risk exposures involved and can set the scope of coverage and the premium price that the Underwriter is prepared to offer the Insured.

An excessive amount of data and documents may not necessarily be good unless there is a good indexing of the data. When too many documents/too much information is provided in a disorganized manner, it is possible that material information is overlooked by Underwriters leading to a wrong understanding of the risk.

On the flipside, failure to provide an adequate underwriting presentation comprising all the material information affecting the risk may result in Brokers and Underwriters having a different understanding of the exposures being assumed by the risk carriers and ultimately affect what is covered and what is not in the Insurance Policy.

This can be the source of undesirable conflict during the claims handling process. In extreme cases, it may potentially lead to Insurers rejecting claims arising because the perception is that the client did not disclose material information. This subject of failure to disclose and its consequences are discussed in detail in Chapter 6 of this paper.

The weight given to best practices in risk presentation may vary according to local practices in each market and the underlying consequences may vary according to the Law applied to the Insurance or Reinsurance contract. Regardless of these variances, the actual standard of best practices should not differ from market to market.

This paper acknowledges the reality that whilst there are markets that by and large prepare very good quality presentations, there are then other markets where either the standard practice is just a data dump of whatever information the client supplies or where there is very limited information available to Underwriters. The latter can occur in the Reinsurance market once a leader is selected and a broker may just seek to complete the capacity placement on a risk.

The international Insurance marketplace is becoming more and more global where placements of the risks are conducted simultaneously at many locations and hubs and so now more than ever, it is very important that there is a common understanding as to what best practices are in presenting a risk.

This Paper aims to facilitate a better alignment and standardization of underwriting presentations regardless of the geography or entry point of the business to Insurers and Reinsurers.

There are many added benefits and incentives for using best practices in the presentation of risks to Underwriters. When best practices are adhered to, the risk of not complying with the duty of disclosure of material information is minimized. Consequently, the potential of ensuing conflict between parties due to different understanding of the risk will be reduced.

Another significant benefit for all stakeholders is the reduction in time needed to negotiate and place a risk when best practices for presentation are adhered to.

Most times, the party responsible for the preparation of the underwriting presentation is the broker who utilizes the information as provided by the Insured. In some geographical markets, it is the practice that the risk presentation may also be prepared by other parties such as the Insured's technicians or its Risk Management department or by an independent Consultant.

Notwithstanding the party preparing the presentation, usually a significant amount of time and effort is put into such preparations. This is time and energy well invested because a good, comprehensive and relevant presentation which contains all the material information organized well and required for risk assessment will minimize the follow up requests for additional information by the Underwriters.

The knowledge and experience of the party preparing the information is key in understanding the concerns of Underwriters regarding the risks.

When an underwriter has to request a further list of additional information after reviewing the initial submission, the placement process is slowed down because it may be laborious for the parties to garner this additional information from the Insured.

This process potentially takes even longer when there are more parties involved in the placement chain.

Imagine a process chain that starts from a Reinsurer who asks the reinsurance broker for additional information. This reinsurance broker then asks the Cedant, who then asks the direct broker, who will finally ask the Insured.

And then the flow of information is reversed all through the parties in this placement chain to reach the enquiring Reinsurer.

The process can indeed be quite cumbersome so in order to make it more effective it is important to have a good common understanding of what Underwriters expect to receive from the start. Time saving is an immediate benefit for all parties involved when they adopt best practices in the presentation of risks.

With such a higher level of efficiency, the underwriting and capacity placement of the risk is completed with greater speed and ease whilst attracting more players.

Another important benefit of a good risk presentation is the potential to improve the pricing and terms and conditions quoted by the Underwriters as they would have a better and more complete understanding of the risk and the confidence in the quality of the risk is much improved.

This paper acknowledges that even with best practices being adhered to, there is always the potential for conflict between the Underwriters and brokers/clients but at least, the chances for this to happen are significantly minimized.

Ultimately, the aim of this Paper is to help all stakeholders to understand the requirements of the Underwriters at the point of risk presentation so as to make the process more certain, efficient and to minimize the potential conflict at the time of placement but especially if there is claim.

CHAPTER 3

DEFINITION OF TERMS

To launch from a common platform, we first set out to define the key terms used in this Working Paper.

3.1 BEST PRACTICE

The general understanding of 'best practice' is that it is a method or technique that has been agreed to be the best way to achieve a common goal.

Some may challenge this statement as the concept of "best" is problematic, it assumes that the scenario at hand is static and similar where 'one size fits all'.

It may also be pointed out that due to commercial reasons, best practices may be difficult to execute when the Insured is perennially too busy with their own business concerns to attend to the list of underwriting questions posed.

This Paper recognises that although the engineering risks are not similar and commercial considerations do exist, the common goal of any Insurance policy is the same – it must be a binding contract that has been drafted clearly and based on a coherent understanding of the risk exposures.

This is to the benefit of every stakeholder in the Insurance process and would be seen to have only positive benefits especially if and when there is a loss or accident during the period of insurance.

The probability of a clear Insurance contract being produced is greatly increased when best practices are adhered to.

With this in mind, best practices in the presentation of engineering risks is then the benchmark to which all stakeholders who are part of the Insurance process should aspire to.

3.2 STAKEHOLDERS

Each of these parties play a crucial role in risk presentation because the risk carrier is then able to base their decision to carry the risk (or not) on facts.

The risk carrier in accepting the risk is equipped to agree an Insurance contract that achieves succinct clarity as to what is and is not covered and at what price, terms and conditions.

(a) INSURED PARTIES / THE CLIENT

Project Owner (Private or Government), the Main Contractor, the sub-contractors, the investors for example banks and lenders.

The various Insured parties would be insured for their own respective rights and interests and may be on a named or unnamed basis.

The Insured party, sometimes referred to as the Client, whilst naturally an authority within their own industry would likely struggle to grasp insurance requirements and so struggle on their own to produce an Insurance presentation that is immediately complete to Underwriters.

(b) INTERMEDIARIES

Direct Brokers or Agents, In-house Agents or the Reinsurance Brokers.

Direct Brokers, Agents and In-house Agents have direct contact with the Insured and are the go-between with the Insurance Companies.

They have a frontline position within the Insurance underwriting process as they are in prime position to extract the necessary information from the Insured that the Underwriters would need.

On the one hand, they have direct access to the Insured and on the other, they are part of the Insurance profession and should therefore have a good grasp of what the Underwriter requires in terms of risk presentation.

Multinational conglomerate Insureds, whether Owner or Contractor, may have their own in-house Insurance team. These in-house teams would have either direct contact with the Insurance Companies or work with a broker or agent.

(c) EXTERNAL CONSULTANTS

Surveyors, Valuers, Specialists like soil experts etc.

Whilst these companies are not strictly part of the Insurance industry, they provide a vital and very important service to the Insurance industry as they are the experts on the various subject matter that is critical to the underwriting process.

These experts are definitely part of the risk presentation process, albeit not directly but their reports form part of the basis for Insurance coverage negotiations.

(d) RISK CARRIERS

Direct Insurance Companies or Co-Insurers, Lead Reinsurer, Reinsurers and Follow Reinsurers.

The Underwriters in these companies evaluate the risk exposures of potential clients. They decide if they are able to give the Insured Insurance coverage and if yes, at what terms and conditions and at what price.

There is usually an Insurance Company who would issue the over-arching Insurance Policy to the Insured but there are instances where more than one insurance policy per risk is issued. This is especially when there are vertical policy arrangements with differential terms and conditions on the same risk.

Where one Insurance policy is issued, there could be a list of other Insurance Companies listed as Co-Insurers.

When the direct Insurance companies seek their own reinsurance protection directly, they may be in the position of presenting the risk to other Insurance or Reinsurance markets.

There is also the scenario where Reinsurers seek retrocession capacity from other Reinsurers.

The Insurance Company seeking reinsurance support would then be the Cedant and the Reinsurer seeking retrocession is the Retrocedant.

Similar to the direct Insurance arrangement, the reinsurance arrangement would likely have a Reinsurance Leader with Reinsurance Follow markets/companies.

The Reinsurance may be placed on a quota share or excess of loss basis, the former requiring by necessity a more comprehensive risk presentation.

This paper will only delve into Facultative Reinsurance as there is negligible risk presentation into a Treaty Reinsurance programme which is usually a cession on a bordereaux basis except where there is a special acceptance request.

3.3 RISK PRESENTATION

In this section, we will tackle three key questions with regards risk presentation :

(a) What is presented

(b) Who is presenting

(c) What mode of presentation is utilised

(a) WHAT IS PRESENTED

The required underwriting information is defined by the respective Underwriters, be it the Direct Underwriter or the Reinsurance Underwriter.

Without receiving the necessary underwriting information, the likelihood that the Underwriter would walk away from accepting a risk is very high.

Having said that, the Underwriter should differentiate between what is material information as a bare minimum in order to access a risk and what other information is ‘nice to have’ but not critical to the underwriting process.

With a finger on the pulse of real scenarios, an interesting question is – Should the risk presentation differ according to which Underwriter is to receive the submission or which party is preparing the risk presentation?

In other words, would the Insurance Company issuing the policy need the same risk presentation as the Reinsurer who is perhaps carrying the lion share of the risk? Do the Lead Reinsurer and a following Reinsurer who accepts a fraction of the risk receive the same risk presentation?

Ideally and in line with best practices, all Underwriters, both as an Insurer and a Reinsurer should have access to the same risk presentation regardless of who is presenting the risk.

This would provide the Underwriter with the opportunity to study all the relevant information and to make their decision regardless of the size of the share of the risk they agree to carry.

The completeness of the presentation should not differ or vary depending on the party presenting or the Underwriter receiving the risk presentation.

More often than not however, a reinsurance broker placing perhaps 5% of a risk may end up with only 5% of the entire risk presentation because of the broker's distance from the main risk placement both physically and strategically.

It is the position of this paper however that regardless of market practices or specific constraints, best practice is an immovable standard to which all stakeholders in the Insurance process should adhere.

Every Underwriter regardless of the share of the risk they eventually agree to carry should underwrite the risk using all material information so as to enter into the Insurance contract knowingly and in possession of the full facts of the risk.

What is considered material information is discussed more in depth in Chapter 4 of this working paper.

However, it is worth noting here that material information that must be provided by the Insured or the presenting party is not a one time event but rather, an ongoing responsibility and necessity when there is new or changing material information whether during the policy negotiation process, during the policy period or at the policy renewal stage.

The trigger as to whether there is new material information to be declared is the same regardless of whether the Insurance stakeholders are at the start of the Insurance policy negotiations or at the end of the project period.

For as long as there is information that would influence the underwriting decisions of the Underwriter to accept or decline or set/amend certain terms and conditions, this information must be declared.

(b) WHO IS PRESENTING

Whilst some underwriting information may be available online or may be public or industry knowledge, most of the underwriting information would need to come from the Insured who is familiar with the project's technical data and information.

Realistically, the Insured's primary concern and business focus is the actual project – what is being built and how it is being built.

More often than not, the Insured is not savvy in Insurance underwriting and so would struggle to clearly identify what information is material to an Underwriter.

The Insured would then look to rely on the professional services of agents, brokers or external consultants who clearly understand what is material to the underwriting of a risk and who are adroit at interpreting the Underwriter's request for additional information.

The party preparing the underwriting dossier might rely on the available LEG or company questionnaires as the basis for collating the underwriting information. They may also rely on the presentations and risk related data as prepared for the Insured for their investors and local authorities or other interested parties.

The partnership between the party preparing the underwriting submission and the Insured must necessarily be strong as one party has the Insurance know how required but the Insured knows all the minute details of the project from the planning stage to the completed and even operational stages.

In Operational Insurances, the Insured is in particular familiar with the equipment and how it works.

Special mention should be made that where the Insured is in direct communication with the Insurer, the strong partnership mentioned above should be replicated.

As a footnote here, when the presentation has been made, the Underwriters have an ensuing responsibility to review the information provided and to seek further relevant material information where necessary so as to achieve full clarity on the risk they are underwriting.

(c) WHAT MODE OF PRESENTATION IS UTILISED

i. Face to Face Presentations
ii. Road Shows
iii. Electronic Format

i. Face to Face Presentations

Whilst face to face presentations, be it between the Insured and the other stakeholders or between the broker and the Underwriter, appear to be the most efficient method of presentation, consideration must be given to geographical constraints where the various parties may be too far from each other for a physical face to face meeting to be feasible.

Another important consideration with face to face meetings is the limited audience able to receive the underwriting information in this manner, again because of geographical limitations.

In the case of face to face broking to an Underwriter, if the Underwriter requires additional information, the broker may very likely not have the information on hand immediately so the efficacy of this session may not be as high as hoped for.

Where face to face meetings are conducted, what is of critical importance is for minutes of the meeting to be compiled immediately after the meeting and for these minutes to be endorsed by and shared with the attendees.

In this day and age where risks are exponentially more expensive than ever, there needs to be complete clarity and agreement on what was discussed and what information was presented and for this clarity to be encapsulated on paper for perpetuity.

ii. Road Shows

Road shows are sometimes conducted when the Insured risk is very big or complicated.

It is literally taking the details of the risk on the road, be it within a country or across a few countries, to the risk carriers by the Insured.

This is an expensive means of risk presentation and requires deep pockets and a great deal of financial and time commitment on the part of the Insured or sponsoring stakeholder.

A road show does present a golden opportunity for the risk carrier to ask for information directly from the Insured as the latter would know the risk backwards and forwards.

Whilst the road show presentation may be disseminated to all the other potential risk carriers, the additional information discussed during the road show is most likely not further shared beyond the room of the road show.

Therein would lie an attrition or a slippage in the risk presentation being given to all the potential risk carriers.

iii. Electronic Format

Regardless of whether the risk presentation is face to face or via a road show, the underwriting information should always be available in electronic format ready to be disseminated, notwithstanding the physical location of the Underwriters who are involved in the risk process from the early stages of underwriting up to the later stages of extending or renewing the risk and especially at the point of any loss.

Sadly, the reality is that much of the insurance profession has been rather conservative in the Information Technology (IT) their company systems are able to accept especially with regards external methods of IT such as data storage rooms, cloud servers, Dropbox, drones, animation and CCTV on site.

The underlying reason for this inability to fully embrace these methods of risk presentation seems to stem from IT security concerns.

To avail themselves of these forms of underwriting presentations, stakeholders throughout the entire risk presentation process must be able to invest in boosting their internal firewalls.

This is a big ‘ask’ due to the financial burden this poses.

On a separate note, another concern about using data storage rooms and the like is that these methods facilitate data dumps where a colossal amount of information is deposited for the Underwriter to wade through. It becomes like finding a needle in a haystack and the Underwriter can be forgiven for walking away from a risk because there just is not enough hours in the day.

On a more conventional IT level, there is always the method of dissemination via thumbdrives or external memory storage devices.

The type of documents stored on these devices or even sent via email would include the Microsoft variety of Word, Powerpoint and Excel Spreadsheets. There could also be PDF, JPEG, DWG, DWF, MS Project, Winzip and the list goes on.

Firstly, the size of these documents matter because if the risk presentation is very large, then it will not transmit via email to most of the risk carriers.

Even if size is not an issue, there is also the consideration that not all stakeholders may be able to access all the various electronic formats and the risk presentation is left sitting with the IT department for days whilst they try to decrypt the files.

Also, there may be security issues with documents being transmitted electronically this way as there might be confidential information about the project especially where there are Government interests in the project.

3.4 ENGINEERING RISKS

In the world of Engineering Insurers, there is no universal definition of what constitutes an Engineering Risk.

Based on the historical legacy of the stakeholders or at the behest of management directive, each party along the Insurance process would define "Engineering Risks" in differing ways.

Even within the Insurance or Reinsurance industry, each Company has their own unique definition.

Broadly speaking, Engineering Risks would refer to one or both of these sub categories :

(a) Project Engineering Risks
(b) Operational Engineering Risks

(a) PROJECT ENGINEERING RISKS

The Insurances for this type of risk spans the duration of the construction or erection works and is non-renewable.

Examples of this type of risks include but are not limited to :

- Construction All Risks including Third Party Liability
- Erection All Risks
- Advanced Loss of Profits / Delay in Start Up
- Contractors Plant and Machinery

(b) OPERATIONAL ENGINEERING RISKS

Operational Engineering Risks are renewable physical damage Insurance Policies for well-defined industry segments where the technical or engineering component of the risk is the driver of the exposure.

This includes but is not limited to industries like petrochemical plants, power plants, waste incineration plants, steel mills, cement plants and other technically demanding risks.

The Insurances available would include:

- All Risks
- Business Interruption
- Boiler and Machinery
- Deterioration of Stocks
- Electronic Equipment Insurance
- Rolling Stocks
- Decennial / Inherent Defects
- Civil Engineering Completed Risks

Not every Engineering Insurer would grant every listed cover under their Engineering portfolio.

CHAPTER 4

WHAT IS CONSIDERED MATERIAL INFORMATION

Under English law, case law has established that information is material, and must therefore be disclosed to an Underwriter if it '*would influence the judgement of a prudent insurer in fixing the premium or determining whether he will take the risk*'.

The legal definition of 'material information' may vary depending on the law governing the Insurance or Reinsurance contract but the spirit of the definition remains the same.

Material information at the point of entering into an Insurance contract is significant and essential in the Underwriter's decision to accept a risk, be it for Construction or Operational Insurance/Reinsurance.

The failure to disclose material information is discussed in depth in Chapter 6 of this Working Paper but for here, it is worth noting in short that this failure could lead to the Underwriter declining the risk because he or she does not feel comfortable with how much they do not know about the risk.

This failure could also lead to extremely unfavourable terms and conditions being set by the Underwriter because of a lack of understanding of the risk or comfort levels are once again not achieved.

Finally, a failure to disclose material information could lead to an Insurance claim being denied because the Underwriter may be of the view that they were misled during the risk presentation stage and material information was withheld.

4.1 DIFFERENTIAL DEFINITION OF MATERIAL INFORMATION

Not all things are equal.

The Underwriter who writes 40% of a risk assumes far more liability than another Underwriter who writes a 2% line of the same risk – this translates into very different monetary exposures.

The Lead Underwriter who has to set the terms and conditions of the Insurance policy has a far more technical job than the Underwriter who is a market not involved in the pricing exercise or who is in a 'follow the leader' position.

It is easy to assume that the Lead Underwriter or the 40% line Underwriter would have a longer and more encompassing and onerous definition of what they consider to be material information.

The reality is indeed that the quality and quantity of material information that Underwriters receive on the same risk does frequently vary significantly.

This Working Paper acknowledges market practices but still postulates that every Underwriter, regardless of the share of the risk they carry or if they are the Lead or Follow market, still underwrites the risk.

Consequently, the test of materiality of information remains unchanged for every Underwriter.

The Underwriting decision falls on the Underwriter notwithstanding the intensity of their stakeholder position.

All underwriting information is therefore equally material.

The 2015 case of Brit Underwriting Ltd vs F&B Trenchless Solutions which is discussed in greater detail in Chapter 6 of this Working Paper confirms that materiality is an objective assessment and does not depend on the subjective opinion of the Underwriter.

4.2 MATERIAL INFORMATION IS CRITICAL AND RELEVANT INFORMATION

Having established that all Underwriters are entitled to the same material information, the question of what constitutes material information must then be addressed as there is a difference between what information is material and therefore critical and what information is more cosmetic and 'nice to have'.

When it is clear what information is important and relevant, the Insured or party presenting the risk becomes more discerning with their risk presentation and the Underwriter in turn is able to focus their Underwriting process on the information submitted.

As mentioned earlier in this Working Paper, this symbiotic relationship leads to efficiency in time and process which results in a contract that is clear in its terms and conditions with potentially a better priced Insurance programme.

Without sifting information that is material from less critical or important information, the stakeholders are more prone to a deluge of information like a data dump where actual material information is lost in a mountain of documents, lost in the hundreds of pages of reports.

Conversely, another real consequence of this failure to properly identify information that is material could result in a submission that is so lacking in detail that no proper Underwriting can be carried out.

This Working Paper does recognise that the tension between the urgency of time to arrange the Insurance programme and the time it takes to obtain all the required material information is real but as Dwight Eisenhower, the 34th President of the United States of America, said "What is important is seldom urgent and what is urgent is seldom important".

Though not all encompassing, the table below sets out to demarcate what is material information and information that is not as important or relevant in the combined point of view of both the Insured or the party presenting the risk and the Underwriter.

	RELEVANT	LESS RELEVANT

IMPORTANT	**This is material information that must be presented:** **A. Natural Risk Exposures** **B. Man Made Risk Exposures** **C. Contract Structure**	**Less relevant information that does not contribute to increasing or lessening the risk exposures from the perspective of the Insurance Programme.** **If in doubt, it is prudent to check with the Underwriter if they require the information in question.**
LESS IMPORTANT	**This is information that may be relevant but less important from the perspective of the Underwriting process.** **This is information that may become material and therefore more important during the course of the process of Insurance policy negotiation or during the Policy Period.** **If in doubt, it is prudent to check with the Underwriter if they require the information in question**	**This is information that is less relevant and less important to the point of being completely non-material to the Insurance Underwriting process.** **An example of this type of information is the kind of lunch served at the Project Site cafeteria.** **Material information should not be lost in the submission of this type of information.**

4.3 MATERIAL INFORMATION UNIQUE TO THE INSURED BUSINESS

Whilst all risks would have a common and over-arching checklist of material information such as the need to know the natural perils exposures at the Insured risk location, there is unique material information that applies respectively to specific risks.

This is where the Insured especially plays a very critical role in the presentation of risk information.

Although the Insured may not be skilled in Insurance know how, the Insured lives and breathes their own respective business.

The Insured is at ground zero of the risk and therefore in possession of all the information regarding the risk in question.

Starting the flow of material information with the Insured is requisite because respective risks have unique details that constitute material information.

For example, in a Combined Cycle Power Plant, the Insured is in the driving seat and obligated to disclose the specifications of their turbine/s so that the Underwriter can determine the Insurance coverage granted or not granted based on whether the turbine is an existing model in operation or is a prototype.

To expand on this example, if the Underwriter is made aware of modifications made to the Gas Turbine, then the Underwriter would be able to properly assess their risk exposure as the Gas Turbine may be 'garden-variety' but the modifications may create unproven technology.

A gas turbine is considered proven technology after 8000 hours of operation but a simple change on the inlet or outlet temperature to the gas turbine may be sufficient to qualify the turbine as unproven technology.

This in turn would dramatically alter the Underwriter's view of the same risk as the exposures have now exponentially increased.

Underwriters today face significant issues when rating new or prototype machinery due to fast and ever evolving technical developments where in some cases, none or very limited information is available. In such cases, the involvement of an engineer with in-depth knowledge of the new technology is important.

4.4 MATERIAL INFORMATION UNIQUE TO CONSTRUCTION AND OPERATIONAL RISKS RESPECTIVELY

What is considered as material information is further subject to whether a Construction or Operational Insurance Policy is being issued.

With regards Construction risks, there is unique material information such as the time schedule of works as well as documentation spanning the planning and procurement phase into the handover and subsequent testing and commissioning period.

The very nature of a Construction/Erection project however does create a situation where some material information is based more on assumptions and uncertainties.

These vagaries arise because although much of the project works are set at the start of the project period, out of necessity, alterations or new information may come to light during the duration of the project. It is literally, a work in progress.

It then follows that during the course of the construction/erection, there may very well be new material information or an adjustment in the already submitted information.

This must be declared to the Underwriters as soon as is feasible as these changes in the project may have a direct impact on the risk exposure and the Underwriter may need to amend or impose new or revised terms and conditions or even load the premium in commensuration with the higher risk exposure.

This goes the same for any other factors that could potentially lead to postponement, cancellation, a mid-term restart of the project or cessation of risk.

This responsibility to declare new or amended material information carries on from the Insurance negotiation process to the end of the Testing and Commissioning period and includes material information with regards any significant variation of material or change in manufacturer, for example.

It is important to remember that during the Testing and Commissioning period, the risk exposure is akin to an operational risk and therefore additional considerations must be made.

For operational risks, the material information will most likely be easily accessible and be more stable as the process and operation hazards can be identified in the survey reports and historical information concerning the risk such as the loss history of the risk in question.

When the Underwriter is familiar with the sector or industry of the risk being assessed, the test of materiality would most likely be easier to perform.

Having said that, during the Period of Insurance, it is possible for material information to change.

For example, the technical operating team of a power plant may suffer a complete turnover in staff mid-way during the Insured period.

This is information that must be brought to the attention of the Underwriter as such changes affect the risk exposures under the Insurance Policy.

At the end of the day, the Underwriter may very well agree to hold fast to the pricing, terms and conditions previously agreed but this is a decision the Underwriter must make whilst in possession of all the new or amended material information.

4.5 MATERIAL INFORMATION FOR CONSEQUENTIAL LOSS EXPOSURES

Consequential Loss Insurance or Business Interruption Insurance is also known as Advance Loss of Profit (ALOP) Insurance or Delay in Start-Up (DSU) Insurance in Construction and Project works.

Whilst these Insurances are not Engineering Insurance risks per se, they are frequently granted as add-on Insurance Policies to Property All Risks and Contractors'/Erection All Risks Insurances and the Engineering Underwriter underwrites this coverage and as such becomes relevant in our Working Paper.

(a) CONSEQUENTIAL LOSS IN CONTRACT WORKS

ALOP/DSU is financial coverage designed to compensate the Principal in the event of loss of anticipated gross profit or debt servicing due to physical damage, which is an Insured CAR/EAR peril, causing a delay and occurring during the CAR Insurance period.

ALOP/DSU could also provide financial compensation if companies face higher costs when a project takes longer than expected to complete because of an incurred Insured loss.

If ALOP or DSU Insurances are requested, it is as an add-on to the Contractors' All Risk (CAR) or Erection All Risk (EAR) policy.

ALOP/DSU coverage cannot be granted on a standalone basis as there must be a Section 1 (Material Damage) loss before this coverage will activate.

It therefore follows that the material information of the CAR/EAR policy is the primary/underlying material information also for the ALOP/DSU underwriting process.

Further to this technical material information however, the ALOP/DSU Underwriting process requires special attention is given to additional material information such as:

- Critical Path for Complex Projects
- Anticipated revenues and operating costs on a monthly basis – this needs to be as accurate as possible so as to be able to determine the extent of a potential claim
- Contingency / Disaster / Crisis Recovery plans must be submitted and analysed to determine if there are cost effective plans put in place to minimise the extent of any potential loss and to ensure that the Insured business is able to be up and running again following a loss in the shortest possible time frame
- Suppliers and Manufacturers ability and availability to furnish spare equipment or machinery replacements and parts and the speed of their delivery capabilities

This list is not exhaustive but it does give an overview of information that is material to the Underwriting of ALOP/DSU.

(b) CONSEQUENTIAL LOSS IN OPERATIONAL RISKS

As discussed in Chapter 3, some Engineering markets would include Operational Insurances as part of their Engineering Insurance business portfolio where the Insured engineering or technical component of the risk is the main risk exposure / driver.

These Operational Insurances such as an Industrial All Risks (IAR) / Property All Risks (PAR) policy do not cover the loss of profit or the work-related costs resulting from an interruption in the business.

This risk exposure is covered under the Consequential Loss (Con Loss) or Business Interruption (BI) Insurance.

As this Insurance cannot be purchased on a standalone basis, the Engineering Underwriter is beholden to also underwrite this non-Engineering Insurance.

The Con Loss/BI Policy provides coverage for loss of profits, revenue, rental, standing charges, wages or salaries on payroll basis and increase in cost of working due to business interruption as a result of fire and/or other extended perils and/or other Insured perils under the Property Policy.

The material information required for this coverage is to some extent, a replication of the material information listed under Point 4.5(a) above and in addition:

- Gross revenue, fees, rentals cost, turnover for the past 3 years of business operation
- Projected income for the next fiscal year
- Wages of the staff
- Interdependencies resulting in a bottleneck in operations / production
- Critical Suppliers / Customers list
- Business Contingency Plans e.g. Critical Equipment spares availability, Utilities

Again, this list is not comprehensive but it does point in the right direction with regards material information.

4.6 MATERIAL INFORMATION FOR THIRD PARTY LIABILITY EXPOSURES

Some Third Party Liability (TPL) Insurances like the Decennial Liability Policy which can be found in certain civil law countries such as France or Spain span 10 years of coverage.

Third Party Liabilities are generally all notoriously long tailed in their risk exposure and best suited to be Underwritten by a specialist Liability Underwriter.

In some territories, this coverage is issued separately as a standalone Liability Policy.

However, considering that TPL is usually included as a Section of the CAR policy it does explain why in most territories around the world the Underwriting of this coverage falls on the Engineering Underwriter.

The limit of liability of the TPL cover under the CAR Policy should however preferably not be excessively high and there may also be an aggregated limit of liability.

The material information required to Underwrite this risk exposure is unique to this class of Insurance and is not a straightforward replica of the material information required under the Property Damage or the Consequential Loss sections.

It is worth noting that TPL coverage for an Operational Engineering Insurance is in almost all territories issued as a separate policy and so is not under the ambit of the Engineering Underwriter.

As a non-exhaustive list of material information for the Underwriter to consider when writing the TPL cover for a CAR/EAR risk, the lists below make for a good launching point.

(a) GENERAL LIABILITY MATERIAL INFORMATION TO COLLATE

- Is the project an 'add-on' construction i.e. construction on an existing property to alter, modify, expand etc. or is this a green field project or a brown field project?
- If this is an 'add-on', what neighbouring third party facilities or processes are still actively running concurrently?
- Will the contract works cause any interference with existing load bearing walls or cause the removal or weakening of support?
- Will any excavation take place near existing underground facilities? Is there awareness of all existing underground cables and pipes?
- What is the distance of the nearest building, structure, facility etc?
- What impact would vibration works have to neighbouring property?
- Is construction taking place in a densely populated area?
- How is the construction site situated in relation to roads and other modes of access to third party property?
- What is the method of demarcation/fencing/hoarding of the construction site?
- Is any loading or unloading taking place outside the hoarded construction site?
- How are flammables and the like being stored on the construction site?
- Are demolition works part of the scope of contract?

Further SPECIFIC ADDITIONAL CONSIDERATIONS for:

(b) BUILDINGS

- What is the foot and traffic access to public allowed to the surrounds of the construction site?
- Are there any shared roof facilities between the construction area and any existing third party property?
- Are the construction hoarding clearly marked with warnings?

(c) INFRASTRUCTURE

- Are there pollution impacts or exposures associated with the construction - air, water, land?
- Bridges / Viaducts - what is the maritime traffic passing below the construction site.
- Is there any tunnelling work like Cut and Cover Tunnel Works scheduled under or near existing third party property?
- Large Span Structures being built near any third party property?
- Roads and Railways: are parts of these infrastructures still operational during construction? What is the extent of third party foot or traffic access during this construction?
- New Airports and Airport extensions: are parts of these infrastructures still operational during construction? What is the extent of third party foot or traffic (including third party air) access during this construction?

- Will any explosives be used?
- Details of operational activities during the Testing and Commissioning period
- Dams and Hydroelectric Power Plant: Impact to third party property especially in case of flood from collapsed or broken dam etc.

(d) INDUSTRIAL RISKS

- Are there pollution exposures associated with the construction - air, water, land?
- What are the third-party risk exposures during the testing and commissioning period? During this period, the CAR policy will cover what are essentially operational risks, so the CAR underwriter needs to understand the operational work flow and the potential impact on third parties
- Special Consideration: For chemical risks with significant exposure in USA, an exhaustive exposure analysis might be required

The concept of potentiality addresses what could happen even if all possible precautions have been considered and frequency addresses the possibility of (especially small) repeated claims.

With all the relevant material information, the potentiality and the frequency of risk exposure becomes apparent and the Underwriting process is carried out with more clarity and accuracy.

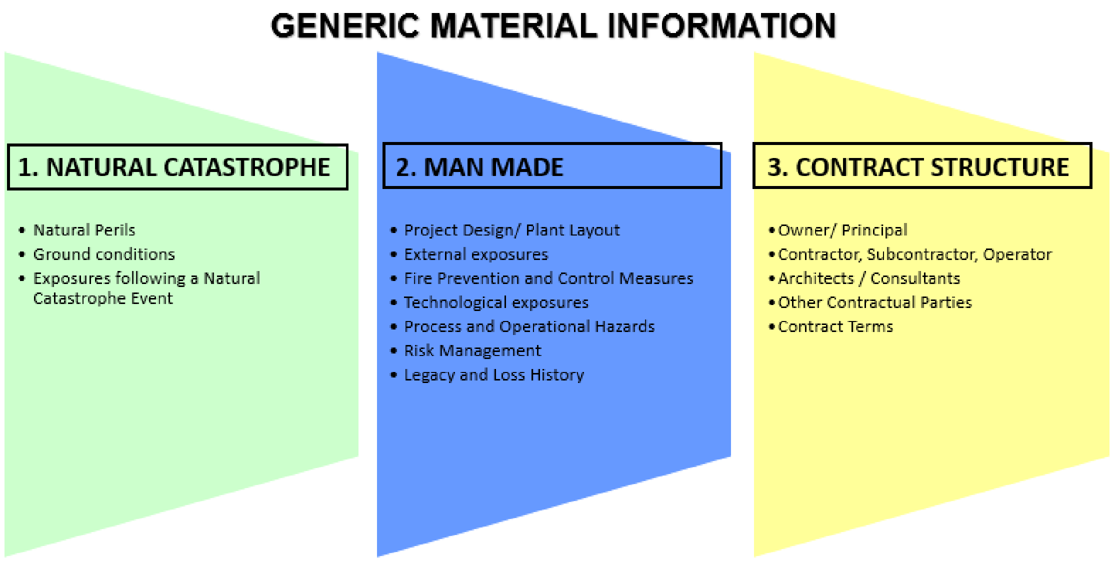
4.7 MATERIAL INFORMATION GENERIC TO ALL ENGINEERING RISKS

As previously mentioned, whilst this chapter seeks to identify and consider what constitutes material information, it does not set out to provide a comprehensive Underwriting checklist of an exhaustive list of material information required.

As laid out in Chapter 1, the insurance profession has a wealth of questionnaires and documents detailing the major areas of concern in a specific sector or industry.

The following tables set out general guidelines for the various stakeholders to springboard from in ascertaining the materiality of the Underwriting information.

These tables take into consideration that there is a significant amount of material information that overlaps across the various Engineering Insurances from Project/Contract Works to completed Operational risks.



1. NATURAL CATASTROPHE RISK EXPOSURES	
NATURAL PERILS	• Earthquake, tsunamis • Extreme Weather conditions: Storm / Tornado / Hurricane / Typhoon • Flood, heavy rain, inundation • Lightning • Volcanic Eruption • Landslide, subsidence, rockslide
GROUND CONDITIONS	• Soft soil condition, Geological reports • Groundwater tables • Flood / inundation history / frequency • Borehole reports
EXPOSURES FOLLOWING A NATURAL CATASTROPHE EVENT	• Access to the Project Site / Insured Location • Fire • Response of Critical Services

2. MAN MADE RISK EXPOSURES

PROJECT DESIGN / PLANT LAYOUT	• Physical Separation / Design of buildings, machinery • Precautionary Measures : Brading, Drainage etc • Spacing between lines • Construction Specifications
EXTERNAL EXPOSURES	• Third Party Presence in and around the Insured risk location • Theft, Robbery • Suppliers' Contingency Plans • War and Strikes • Damage following labour strikes and riots • Economic / Governmental Sanctions • Project Procurement Dependencies
FIRE PREVENTION AND CONTROL MEASURES	• Fire Protection eg Sprinklers, deluge systems • Fire Detection : smoke detectors etc • Onsite Fire Fighting Capabilities eg water pumps and pressure, locations of fire hydrants, appointment of Fire Warden/s • Offsite Fire Fighting : nearest Fire Station • Fire loss prevention and mitigation training for all staff • Non Smoking Areas clearly demarcated and strictly adhered to
TECHNOLOGICAL EXPOSURES	• Cyber Risks Awareness • Technological Design Complexities • Prototypical Designs, Unproven/Proven • New Innovative Methods or Material • Reliability, Manufacturer's Warranties • Redundancy • Technical age of the equipment
PROCESS AND OPERATIONAL HAZARDS	• Capacity, turnaround intervals • Hazards inherent to the Insured Risk • Moral Hazard red flags • Parallel production lines • Production redundancies at offsite locations
RISK MANAGEMENT	• Maintenance Processes in Place : Preventive and Corrective • Safe Work Practices, staff training and experience • Operating and Emergency Protocol • Response to Recommendations • Claims 'lessons learnt' • Regular Inspection • Process Hazards Control • Plant process protection • Work Permit Practices
LEGACY AND LOSS HISTORY	• Recent survey report • Loss reports • Legacy issues

3. CONTRACT STRUCTURE	
OWNER / PRINCIPAL	• Experience in Insured business • Long standing relationship with the contractor • Financial assessment • Engagement in Project supervision • Workforce Engagement • Innovation and Creativity • Management Changes • Organisational Resilience • Commitment to Safety culture
CONTRACTOR, SUB-CONTRACTOR, OPERATOR	• Project teams experienced in this type of project, of this scale, complexity, location etc • Working relationship with the project owners, partners, subcontractors • Site Organisation • Emergency / Contingency Plans • Extent of works sub-contracted and further sub-contracted – are any of these parties involved in any critical processes • Third Party Operators for any business process • EPC Contract Details
ARCHITECTS / CONSULTANTS	• Experience especially designing similar projects • Role during Construction (Independent Technical Oversight)
OTHER CONTRACTUAL PARTIES	• Hold harmless agreements to be declared • What roles do these parties play
CONTRACT TERMS	• Requirements for additional clauses : information must be provided for Underwriting purposes with reasons for inclusion requests

CHAPTER 5

DUTY OF DISCLOSURE

This chapter considers the legal duty of disclosure. It considers the position in detail in England and Wales, and then compares this to the position in some other common jurisdictions as well as considering how the duty varies in different geographic regions.

The implementation of the Insurance Act 2015 (the "Act") represents one of the most significant reforms of insurance law in England and Wales in the past century. The Act came into force on 12 August 2016 and applies to all contracts of insurance and reinsurance written after that date. Superseding the old regime of the Marine Insurance Act 1906 and its duty of utmost good faith (the "Old Regime"), the Act has implemented a modified duty of fair presentation pursuant to which the insured, before entering into a contract of insurance, must make a fair presentation of the risk to the insurer. The Act retains some of the provisions of the Old Regime but also codifies some of the developments that have occurred since 1906.

Whilst all contracts of insurance and reinsurance written after 12 August 2016 are governed by the Act, there have been very few claims that have resulted in court proceedings. As such there has been no guidance from the courts as of yet and a large amount of uncertainty remains in the market as to the interpretation of various provisions of the Act.

In addition to the duty of disclosure being modified, the Act changes the remedies that are available to insurers for cases where the duty has been breached. This will be discussed in Chapter 5.

FAIR PRESENTATION OF RISK

Duty

An insured must now make a fair presentation of a risk to an insurer before entering into a contract of insurance. This requires the disclosure of every material circumstance which the insured knows or ought to know or, failing that, disclosure which gives the insurer sufficient information that would put a prudent insurer on notice that it needs to make further enquiries in order to reveal the material circumstances. Further, the disclosure must be made in a manner which would be reasonably clear and accessible to a prudent insurer. Every material representation as to a matter of fact must be substantially correct and every material representation as to a matter of expectation or belief must be made in good faith.

The insured does not need to disclose a circumstance if it diminishes the risk; the insurer already knows it; the insurer ought to know it; the insurer is presumed to know it; or if it is something that the insurer waives information in relation to.

The insured complies with its duty provided it discloses sufficient information to put the prudent insurer on notice of the need to make further enquiries for the purpose of revealing material circumstances. This codified the old common law position that the insured was obliged to provide a fair and accurate presentation of material facts that enabled a prudent insurer to form a proper judgment, either on the presentation alone, or by asking questions in order to elicit further details[1]. Because an insured complies with its duty to make a fair presentation by

[1] *Garnat Trading & Shipping (Singapore) Ptd Ltd and another v Baominh Insurance Corporation [2001] EWCA Civ 773*

providing enough information to put the insurer on notice to ask further questions, the onus is now on insurers to ensure they ask the relevant questions.

What is a material representation / circumstance?

In short, a circumstance or representation is material if it would influence the judgement of a prudent insurer in determining whether to take the risk and if so on what terms. This has not changed from the Old Regime which held a circumstance to be material if it would influence the judgment of the prudent insurer in determining whether to take the risk and, if so, on what terms.

As the definitions of materiality under the old and new regimes are the same, the authorities are still reliable. The most important of these is *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd*[2]in which it was held that a fact influences the judgement of an insurer if it has an effect on the mind of the insurer weighing up the risk. The fact does not have to have been critical to the insurer's decision to accept the risk or on the amount of premium chosen.

The test for materiality is an objective one – the attitude of the hypothetical prudent insurer. The insured's subjective opinion on materiality is irrelevant even if such an opinion is held in good faith as is the insurer's subjective opinion. The insurer's opinion becomes very important when it comes to determining whether any non-disclosure induced the insurer into entering a contract of insurance which would entitle the insurer to a remedy (see Chapter 5).

The Act also provides some examples of material circumstances. These examples include special or unusual facts; any particular concerns which led the insured to seek insurance; and anything which those concerned with the relevant class of insurance or field of activity in question would generally understand as being something that should be assessed during the fair presentation of the type of risk in question.

What constitutes insurers' knowledge?

The carve-outs to the general duty of the insured relate to circumstances that the insurer already knows, ought to know or is presumed to know. It is therefore important to understand what constitutes insurers' knowledge.

Actual knowledge: An insurer is only deemed to know something if it is known to one or more individuals who participate on behalf of the insurer in the decision whether to take the risk and if so on what terms. This is largely understood to mean underwriting teams. This is obviously very fact dependent.

When drafting proposal forms, insurers should ensure to tailor a form for a prospective insured to include questions that will produce the required information to assess and write the risk. The form should be drafted clearly and should not be too prescriptive so as to reduce the risk of a court finding that what was asked was all an insurer wanted to know.

Constructive knowledge: An insurer ought to know something if an employee or agent of the insurer knows it and ought reasonably to have passed on the relevant information or the relevant information is held by the insurer and is readily available to an individual. This would include readily available internal records such as previous years' proposals; facts provided in relation to previous risks; and previous claims. If insurers rely on agents outside the organisation to carry out risk due diligence, information held by that agent that should have been passed on to the insurer will be taken to be known by the insurer (whether actually known or not).

[2] [1995] 1 AC 501

It is therefore vital for insurers to understand the risk assessment information held by other departments within the company. For example underwriters should collaborate with claims handlers to understand the risk profile of a potential insured.

Presumed knowledge: An insurer is presumed to know something which is common knowledge or something that an insurer in the class of insurance or field of activity in question would reasonably be expected to know in the ordinary course of business.

What constitutes insureds' knowledge?

The insured has a duty to disclose every material circumstance that is known or ought to be known to the insured. For individual insureds, they are deemed to know what is known to the individual or what is known to one or more of the individuals responsible for the insured's insurance (e.g. a broker).

For corporations the relevant knowledge is that of the senior management, the individuals who play a significant role in the making of decisions about the management and organisation of the insured's activities or those responsible for the insured's insurance. This includes but is not limited to the board of directors. This will vary from case to case and may be difficult to define where large companies are spread over a number of countries. It was noted in the drafting of the Act that 'senior management' was to be construed narrowly.

An individual's knowledge (both for individual insureds and individuals comprising the senior management of a corporation) also includes matters which the individual deliberately refrained from enquiring about or confirming.

There is also a requirement for insureds to disclose material circumstances that they ought to know. What an insured ought to know is comprised of what should reasonably have been revealed by a reasonable search of information available to the insured. The information available to the insured is not limited to what is held within the insured's organisation but also by those responsible for the insured's insurance (including brokers and agents).

It is assumed that the test for what constitutes a 'reasonable search' is an objective one. There is also some uncertainty as to whether when judging the reasonableness of a search, the insured should be taken to know what information an insurer is likely to want to know.

The duty of disclosure imposed on brokers under the Old Regime has been repealed, but balanced out by the Act providing that an insured is taken to have actual knowledge of matters known by brokers and agents. It is important to note that an insured is not taken as knowing something known to its agent which was acquired by that agent through a business relationship not connected to the contract of insurance in question. For example, if a broker is tasked with placing building and contents insured for an insured's premises on an estate and the broker knew of a spate of burglaries on the estate because of work that had been undertaken for another client, that knowledge would not be imputed to the insured looking for building and contents insurance who was ignorant of the burglaries. The information must therefore be held by someone connected with the contract of insurance in question.

Every material representation given by an insured as to a matter of fact must be substantially correct. The Act deems a material representation to be substantially correct if a prudent insurer would not consider the difference between what is represented and what is actually correct to be material. The insured also has a duty to present the disclosure in a clear manner. This aspect of the duty was codified in order to prevent insureds "data dumping" on insurers.

How does this differ from the Old Regime?

As mentioned above, until the implementation of the Act, the duty of disclosure was governed by the Marine Insurance Act 1906. The Old Regime placed an obligation on insureds to disclose every material circumstance about the risk and not to misrepresent material facts.

This has now been modified by the Act so that an insured must make a fair presentation of risk by either disclosing every material circumstance which the insured knows or ought to know or give the insurer sufficient information to put a prudent insurer on notice to ask further questions. There are also the additional supplemental duties to:

- ensure that information is clear and accessible (i.e. no data dumping); and
- ensure representations are substantially correct.

The limits to the insured's duty have largely remained the same. An insured still does not have to disclose information if the insurer knows it, ought to know it or is presumed to know it.

The most substantive differences between the Old Regime and the Act relate to the remedies available for the breach of the duty of disclosure. For this, please see Chapter 5.

Does the duty of disclosure vary from market to market?

Due to the global and international nature of insurance, and society generally, it is important to remember that whilst English jurisdiction is very common, it is only one of many jurisdictions in which insurance is written. It is therefore important to understand how the duty of disclosure may vary around the world. One of the key considerations when writing insurance in foreign markets is the application of the local law and having an appreciation for how duties and obligations may vary by jurisdiction. The following section has sought to provide some background information regarding law and jurisdiction as well as to compare and contrast the duty of disclosure in various jurisdictions and to provide some guidance on how they may differ from the current English regime and the Old Regime as well as some geographical comparisons between developing and emerging markets in Asia and Latin America.

Law and jurisdiction

All contracts of insurance should contain a governing law clause and a jurisdiction clause. A governing law clause specifies the party agreed system of law that will apply to the interpretation of the contract and the effect of the contract in the event of a dispute – for example English law or French law. A jurisdiction clause identifies which courts the parties have agreed will hear any disputes that may arise – for example the English or French courts.

Although less common, it is possible to have differences between the law and jurisdiction. For example, a policy may say that it is to be interpreted under English law but that any disputes will be heard in the courts of Dubai, in which case the Dubai courts would be obliged to apply English law.

Failure to include law and jurisdiction clauses in contracts can cause expensive and protracted delays to the resolution of claims. As will become clear below, the choice of governing law and jurisdiction can have a significant effect on the duties and obligations of the parties involved in a contract of insurance, as well as on the remedies available in the event of those duties and obligation not being complied with.

India

The duty of utmost good faith remains the governing principle of insurance contracts in India pursuant to the Marine Insurance Act 1963 ("MIA 1963"). In fact the provisions of MIA 1963 governing the duty of utmost good faith are identical to the provisions of the Old Regime, with sections 19 to 23 of the MIA 1963 exactly replicating sections 17 to 21 of the Marine Insurance Act 1906.

France

The duty of disclosure in France is substantively different to the duty in the UK (and India). There is no duty to disclose all material circumstances but a requirement to truthfully answer questions put by the insurer at the time of executing the contract. The onus is therefore on the insurer to ask the relevant questions in a sufficiently clear and precise manner.

The insured must also declare, during the course of the contract, any new circumstances that have the effect of increasing the risk or creating new risks. The insured must notify the insurer within two weeks of becoming aware of the new circumstances. This is a significant difference from the duty of disclosure set out in the Act, although in reality there may be little difference as policies governed by English law will often expressly require disclosure on an on-going basis.

Malaysia

In Malaysia the concept duty of utmost good faith derived from the Marine Insurance Act 1906 has been retained. Insurance contracts are contracts of *uberrimae fidei* and insureds are required to disclose to the insurer all material facts affecting the risk at the time of making or renewing a contract of insurance. The principles of the Old Regime apply by virtue of the Malaysian Civil Law Act 1956. Additionally, certain types of non-disclosure may be found to be fraud within the meaning of section 17 of the Contracts Act 1950[3]. Insurance companies in Malaysia (in applying these principles derived from English law) may be able to avoid policies on the ground of non-disclosure even if the non-disclosure did not fall within the definition of fraud set out by section 17 of the Contracts Act 1950. Because of this, proposal forms are required to contain a warning in order to remind potential insureds of their duty of utmost good faith.

Singapore

As in Malaysia the duty of disclosure in Singapore remains closely associated with the concepts and case law of the Old Regime. The provisions of the Marine Insurance Act 1906 are employed in Singapore to provide the framework for the duty of disclosure in that an insured must disclosure every material circumstance which is known to the insured and the insured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. A material circumstance is defined as something that would influence the judgment of a prudent insurer in fixing premium or deciding whether to take the risk. The English law case of *Pan Atlantic Insurance Co. Ltd v Pine Top Insurance Co Ltd* (as mentioned above), continues to provide the test for materiality in Singapore. In a similar fashion to Malaysia, section 25(5) of the Insurance Act (of Singapore) requires proposal forms

[3] In general, for fraud to be found, there must be an element of intent to deceive or inducement.

to contain clear and prominently displayed warnings of the consequences of failing to comply with the duty of disclosure.

Failing to disclose a material circumstance allows an insurer to avoid the contract in a similar fashion to the Old Regime. In reality however, the remedy for non-disclosure is not commonly exercised and it tends only to be done so where the materiality of the circumstance is obvious.

Brazil

The duty of disclosure in Brazil is derived from the same concept underpinning the Old Regime – ie *uberrimae fidei* – the duty of utmost good faith. This concept has now been enshrined into the Brazilian Civil Code. With regards to contracts of insurance, section 765 of the Brazilian Civil Code requires the parties to act in utmost good faith during the formation and performance of the contract. Courts are often reluctant to accept the application of this requirement because it is vague and unclear as to what utmost good faith means. It is generally accepted that the duty requires each party to act honestly, fairly and reasonably towards the other.

The remedy available will depend on whether there is an element of intention or negligence on the part of the insured. If an element of intention is found, the insured loses the right to the insurance protection and is required to pay any due and unpaid portion of premium. This is very similar to the Old Regime remedy of avoidance. If the insured was negligent in its non-disclosure to insurer may elect to avoid or affirm the policy with a return of or payment of additional premium where necessary.

Mexico

As in Brazil, the duty of utmost good faith is implied into all Mexican contracts of insurance. In Mexico, an insured is required to declare the information requested in the proposal form supplied by the insurer although the insured is not required to disclose anything additional to the information requested. Failure to disclose, or misrepresenting, the information required by insurers will allow insurers to deny coverage if the risk materialises even where the omission or misrepresentation is irrelevant to the loss.

CHAPTER 6

WHAT ARE THE CONSEQUENCES OF A FAILURE TO DISCLOSE

Failure to disclose, or 'Non-Disclosure', refers to the situation where an Insured fails to reveal a relevant fact when renewing or applying for their insurance contract. This failure to disclose a relevant piece of information could play a crucial role at the moment of deciding the validity of a policy or the settlement of a claim.

In some situations, the non-disclosure is seen as a crucial factor on a claim settlement, and applying the legal position can mean a harsh outcome for the Insured.

The consequences of a failure to disclose material information depends on the law of the contract governing the agreement between the parties.

Under English law, the consequences of non-disclosure can be severe and ultimately result in avoidance of the policy, which means that the insurer can cancel the policy, decline the claims and retain any premiums paid.

Decisions made by the Court as a result of a failure to disclose material facts, should act as a reminder to both Insureds as well as to Insurers; namely,

(Re)Insureds: it is critical to make a complete and proper disclosure of all material facts when entering into a contract of insurance or reinsurance.

(Re)Insurers: to ensure that the underwriting guidelines are comprehensive, well maintained and relevant. Keeping up to date with the latest market and legislation changes in the countries they operate. Uphold practices and procedures so that when put to a test, (Re)insurers can be in a position to meet the necessary onus of proving what they would have done had complete and proper disclosure been made by the Insured prior to the policy being issued.

The Insurance Act 2015 replaced the 1906 Marine Insurance Act Duty of Disclosure and the common law understanding of "utmost good faith". This imposed a clear duty on Insureds to answer questions honestly.

In contested transactions, where the parties to the litigation have not agreed on all issues, disclosure can be problematic and will likely be subject to greater scrutiny. It is in those circumstances that there may be immediate pressure to limit disclosure in an attempt to control the result of the decision made by an authority or by a Court. However, in order to avoid regulatory action or unsuccessful litigation, it is best to adopt as best practice a process whereby an Insured complies fully with its disclosure obligations and the Insurer makes enquiries deemed necessary to better assess its exposure prior to the issuance of the contract. This is in order to avoid an unfavourable ruling should a claim arise that requires arbitration or Court intervention. The likelihood of an unfavourable ruling might be regarded as a consequence arising from a non-disclosure of material facts, at the opportune time, related to the risk or insurance coverage being negotiated.

The Duty of Fair Presentation adjusts the disclosure obligations of the Insured “to present” to Insurers information of every material circumstance which the Insured knows or should know “or gives the Insurer” sufficient information to put a prudent Insurer on notice that it needs to make further enquiries. It is the last part of this duty i.e. imposing an obligation on Insurers to make their own enquiries which is a significant change in disclosure duties.

Under the Marine Insurance Act 1906, if an Insurer can prove material non-disclosure or misrepresentation by an Insured it can cancel a policy with effect from inception returning all premiums and denying all claims. However, under the Insurance Act 2015 the legislation allows for Insurers to review the Insureds entitlement to indemnity (i.e. claim payment) if the Insurer can prove breaches of Duty of Disclosure and if it can prove it would have either not taken the risk in the first place or would have taken the risk at different terms and conditions.

If a breach of Duty of Disclosure can be proved the remedies will be determined by the actions the Insured would have taken if Fair Presentation had been made in the first place. The Insurance Act 2015 balances the interests of Insureds and Insurers by introducing the concept of "Proportional Remedies".

In order for remedies to be considered the Insurer has to establish that there is a qualifying breach of Duty of Fair Presentation falling into either of the following two categories:

a) Deliberate or Reckless – which preserves the rights of Insurers
b) Neither Deliberate nor Reckless – which preserves the rights of Insureds

If the qualifying breach is established to be Deliberate or Reckless the Insurer:

a) May avoid the contract and refuse to pay all claims; &
b) Need not return any of the premiums paid

The rights which the Insurer has as a result of a non-disclosure of a relevant fact are set out by the Insurance Act 2015. This is different from the expiring law where premium had to be returned unless fraud had taken place and was proven.

If the qualifying breach is established which is determined as non-Deliberate or Reckless the new proportionate remedies will be applied:

a) If the Insurer would not have entered the contract under any terms the Insurer may avoid the policy and refuse to pay all claims but must return all premiums
b) If the Insurer would have entered the contract under different terms other than relating to premium, then the claim would be dealt with by applying the terms the Insurer would have entered into at the start of the contract (i.e. certain new exclusions or sub limits may apply to the claim). The policy cannot be avoided however
c) If the Insurer would have entered the contract at a higher premium, then the Insurer is entitled to reduce the amount of any claim proportionally by the amount of additional premium it would have originally charged.

   i.e. if the Insurer would have originally charged double the premium any claim indemnity will be reduced by 50%

How will a court determine how would the underwriter have acted differently based on other relevant information? This can be put into two categories;

a) Witness evidence i.e. if the Insurer has suspicion that information was deliberately withheld this has to be disclosed to a court and the Insured will be called as a witness to testify
b) Physical evidence i.e. underwriting notes, premium calculations, benchmarking against similar risks amongst others.

WHAT COULD HAPPEN WHEN BEST PRACTICE IN THIS RESPECT FAILS?

There are some widely published law cases which have been used as examples to:-

a) show how materiality and inducement is set up in the Insurance Act 2015
b) highlight the importance on the disclosure of material facts at the time of negotiating an insurance contract.

Case 1:

In the case of Brit Underwriting Ltd vs F&B Trenchless Solutions, Brit were entitled to avoid a contractors public liability policy and responsibility for approximately GBP 3 million of damage to a derailed train, because the contractor failed to disclose to Brit, prior to policy inception, about excessive ground settlement as a result of prior tunnelling works.

The insurance was provided on the basis that the works would lead to ground settlement of between 2-4mm and that they would at no point take place underneath an active railway.

Before contracting with the insurer, however, the insured knew of an actual ground settlement of up to 15-18mm and the appearance of a visible void in the ground in the vicinity of the works. The insured was also undertaking works under an active railway line.

Eight days after the insurance contract incepted, a freight train derailed when passing over a level-crossing above the insured's tunnelling. The derailment was determined to have been caused by severe settlement of the railway tracks as a result of the insured's works. The main contractor filed a claim against F&B which in turn attempted to claim an indemnity from its insurer. The insurer sought a declaration that it had validly avoided the policy on the grounds of non-disclosure and misrepresentation.

The Judge held that:

- The increased settlement and undertaking of works under active railways were material; they were "matters which would clearly influence the judgement of a prudent insurer".
- The actual underwriter had been induced by the non-disclosure and misrepresentation to enter into the contract, accepting the underwriter's evidence that, had he been told about the settlement and the void in the lead up to writing the risk, he would have excluded the site from the policy. The insurer had, therefore, validly avoided the policy.

As to materiality, the Judge found that the *"central flaw"* in much of F&B's defence was to overlook the objective nature of the test for materiality. For example, F&B argued that its preliminary view was that the tunnelling was not the cause of the void and thus the fact of the void was not material for disclosure. The Judge noted that F&B's own opinion, while relevant, did not relieve the appearance of the void of materiality for underwriting purposes. Under the new Act, the 'prudent insurer' test of materiality has been retained.

On inducement, if the insurer is to have a remedy for breach of the duty to make a fair presentation, it must show that the underwriter would have done something different had they received a fair presentation. In this case the underwriter was able to overcome that evidential hurdle.

In terms of a remedy, however, the underwriter's evidence seems to have been that he would have written the policy but he would have excluded the site. In those circumstances, under the 2015 Act the policy would have been rewritten with the appropriate exclusion. Accordingly, F&B would not have been able to make a recovery for this loss but would have retained coverage for any other losses in the policy period. The underwriter, meanwhile, would have retained the premium.

Case 2:

In the case of Axa Versicherung Ag v Arab Insurance Group (ARIG), the court found that ARIG's failure to disclose loss statistics for previous marine energy construction risks was material because a reasonably prudent underwriter would expect prior year statistics to be disclosed to give a fair presentation of the risk. Note however that the Insurance Act 2015 also required AXA to show that it would have changed its underwriting decision if it had known the prior year loss statistics in order to avoid the policy, and in this particular case, Axa did not meet this threshold.

The reinsurer sought to avoid two reinsurance treaties entered into with the defendant reinsured on the basis that the reinsured failed to disclose loss statistics and three incidents likely to result in claims. The reinsured accepted that the past loss statistics were material. However, the judge accepted the Reinsured's argument that the particular Underwriter had not been induced by the non-disclosure. The reinsurer appealed and the Court of Appeal rejected that appeal.

When proving the inducement, the Court of Appeal made some observations in this respect:

a) The presentation had to be judged objectively in order to determine whether it was fair;

b) In considering whether the presentation was fair, the court must decide what the insured or broker would have said in addition to that which was necessary to make the presentation fair, in order to encourage the insurer to write the risk. That is a subjective test and was relevant here because, had the loss statistics been disclosed, it was argued that the broker would also have told the reinsurer that a change of underwriter at the reinsured would result in a more rigorous approach to the selection of risks going forward.

   The Court of Appeal clarified that although the insurer must prove inducement, the insured or broker must prove that it would have raised additional matters had a fair presentation been made. The Court of Appeal rejected the argument that there should be a presumption that the broker would have said everything good about the risk that could be said, it did accept that "the court may need little persuading that a competent broker would have endeavoured to say as many good things about it as were open to him".

c) Proving inducement is subjective as the fact that the reinsurer could have been interested in something is irrelevant if in fact he would not have been.

It is important to remark in this case that Underwriters will be concerned that insureds or brokers might use those additional factors effectively as a justification (perhaps years later) for not having made a fair presentation at the correct time. Instead, it should be up to underwriters to decide at the time of placement whether they would still write a risk (and if so on what terms), having been given a fair presentation.

Case 3:

Another example is a project for the construction of a new section of motorway between two cities. The scope of the contract involves Design and Construction. The key parties involved: Ministry of Infrastructure, SPV (Special Purpose Vehicle) or Concessionaire, Main Contractor and Lenders.

The procurement of insurances took place at inception of the contract and prior to the completion of Design phase as per lenders requirement.

Construction insurances were purchased based on a preliminary design study, which included the construction of embankments up to 20-30 meters in height. Due to the type of Design and Built contract, insurers knew that the design presented was not final and could be subject to changes.

Later in the design phase and after insurance placement had been completed the path of the motorway was optimized and a 70 meters high embankment was included. A loss occurred during construction to this embankment when it slid due to the presence of a weak ground layer. This event was aggravated by the fact of being such a high embankment as it increased the earth pressure. The client did not specifically disclose this change because insurances had already been placed and did not understand it as materially affecting the risk.

This is an on-going case in a non UK jurisdiction involving public and private partners. This is not necessarily an issue of non-disclosure leading to cancellation of a policy; however this highlights the importance of disclosing material information and the implications when the design is subject to additional changes. These changes should be properly advised to the Insurer by the Insured in order to avoid unpleasant repercussions.

Case 4

In Jones vs Environcom Ltd., the post-contractual duty of the broker is of interest. It is important to mention that at both pre-contractual and post-contractual stages, the broker is playing an active role when acting on behalf of the Insured and by no means can be considered only as a post box that passes documents between the Insured and the Insurers. With respect to Jones vs Environcom Ltd, the insurer sent various documents to the broker regarding the assured's duty of disclosure and material facts. The assured was engaged in the business of electrical goods waste recycling, operating from premises in Lincolnshire. In 2004 Environcom Ltd. installed a state of the art refrigerator line which was designed to extract and destroy CFC chemicals present in the compressors within refrigerators. The work process involved the removal of compressors bolted to the bottom of the refrigerators. In most cases a spanner, screwdriver or hammer could remove the bolts, but some had to be removed by the use of plasma guns. The evidence showed that the use of plasma guns gave rise to a risk that hot metal splatter and sparks could ignite fridges being processed.

It indeed proved to be the case that the plasma guns caused ignitions in fridges. There was also a series of fires. The insurer rejected the claim on the grounds of material non-disclosure of the use of plasma guns in the process of dismantling fridges and the occurrence of further fires in addition to two previous claims.

The evidence showed that the broker had not specifically warned the assured of its duty of disclosure, but had sent various documents to the assured, which referred to that duty. This was not however sufficient for the broker to perform his pre-contractual duty of care owed to the assured. Therefore, it is important that the broker is satisfied that the position is in fact understood by the Insured and this will usually require a specific oral or written exchange on the topic, both at the time of the original placement and at renewal.

The broker owes a duty of care the Insured regarding the performance of the Insured's pre-contractual duty of good faith. A reasonable broker is required to know the difference between material and non-material facts; taking reasonable care to obtain insurance coverage that clearly meets the Insured's requirements. The broker's role is not only passing communications between the Insured and the Insurer but also to exercise reasonable care and skill to ensure that the Insured understands the Insurer's requirements, which includes the duty of good faith.

In the case Jones vs Environcom Ltd, it was held that the broker:

•must advise his client of the duty to disclose all material circumstances so that the assured is aware of and understands his duty of disclosure;
•must explain the consequences of failing to observe the duty of good faith;
•must indicate the sort of matters which ought to be disclosed as being material (or at least arguably material);
•must take reasonable care to elicit matters which ought to be disclosed but which the client might not think it necessary to mention;
•must take reasonable care to disclose any material facts of which the brokers themselves were aware and not to make material representations to insurers which it knew to be untrue.

Case 5

BP Plc vs AON & Anor. This case refers to a claim for damages in tort in respect of the placement and operation by Aon London of a Global Construction All Risks Open Cover agreement. BP brought the claims for damages on their own behalf and on behalf of its affiliates, the international co-venturers with BP or its affiliates and the project contractors. The claim was made in respect of offshore projects, in which 30 projects were declared to the leading underwriters Swiss Re and AIG. BP had no interest in the relevant loss or damage to project property, which forms the basis of these claims. The losses were sustained by BP affiliates and joint venture partners in the projects or by contractors or subcontractors whose losses were passed on directly or indirectly to BP's affiliates or joint ventures.

BP retained Aon Texas to place its "all risks" cover for its worldwide oil and gas construction projects. Aon London was instructed to place part of the risk in the London market. There was extensive direct contact between BP and Aon London. BP was entitled to infer from what was said and done by Aon London that it was providing its professional services to BP, and that Aon London could be relied upon as assuming responsibility to provide those services. This was despite the existence of a service agreement between BP and Aon Texas governing the scope of the broking operations and any contractual relationship between BP and Aon London.

The initial negotiations of the Open Cover did not involve BP but involved Amoco, Aon and the European and London markets, including certain Lloyd's syndicates, as well as the American market. Swiss Re was leading the European market and AIG the American market. Aon won the bid tender conducted amongst American brokers by Amoco. Aon Risk Services Inc, its exclusive insurance broker for its Global Onshore and Offshore Construction Programme was appointed as broker of record. However, Aon Risk Services Inc. was a non-existent entity and there was no separate corporation of that name. Aon Group had many offices and included various separate corporations in USA and abroad and its different broking offices were mentioned in correspondence with the Reinsured as Aon Risk Services. The initial stage of negotiations was handled by their offices in Texas and Connecticut. Less directly involved was their London operations (Aon Ltd.).

In the process of the court hearing the evidence showed that Aon personnel were drawn from different Aon offices and employed by different companies in the Aon Group and cooperated to produce presentations to Amoco related to winning the Global Cover broker appointment.

A fee was agreed to be paid to Aon for their services and structured to work on declarations made to underwriters in respect of each project for which Amoco sought cover. Aon Texas issued the placement slip to be discussed with Amoco by Aon Connecticut. Further presentations documents were made by Aon London for the purpose of discussion with underwriters and presentation to the London and European market. Aon London confirmed the lead line from Swiss Re to Amoco and Aon successfully completed the placement; well over half the placement was completed by Aon London with European and London markets. The remainder was complete by their broking office in Connecticut. Aon Texas worked in parallel liaising with Amoco with regard to the placement exercise. The placement was completed smoothly; however, a material fact was left unattended. Aon failed to inform to BP / Amoco that a Lloyd's Syndicate granted coverage only for a 12-month period and not the entirety of the policy period.

The purpose of the Open Cover was to insure on an all risk basis the physical loss and damage of the property of BP involved in oil and gas construction projects worldwide.

Aon owed a duty of care in tort to BP to make effective declarations to the defendants under the Open Cover in respect of projects notified under the contract until June 2000. Aon was in breach of that duty as and when it failed to make timely declarations to each Defendant.

In the course of the settlement negotiations between BP and Reinsurers and by the terms of the settlement in July 2003, BP conceded that the Syndicate was not bound by declarations, whereas in truth BP had a strong case that the Syndicate was bound. The argument not raised by BP in the settlement negotiation, that the Syndicate was bound to the terms of settlement which the leading underwriter by the scratching the endorsement was one that faced a substantial challenge on the grounds of misrepresentation as to the effect of the Leading Underwriter endorsement and possible mistake.

There was no contributory negligence on the part of BP with regard to the failure of Aon London to declare the project to the reinsurers. BP's failure to take out replacement insurance as a substitute for the Open Cover was not conduct which broke the chain of causation between Aon London's negligent failure to make declarations to the Reinsurers and the loss suffered by BP. Nor did it represent a failure by BP to mitigate the loss. The measure of damages was based on the amounts that would have been received from the Reinsurers if valid declarations had been made to them.

It was concluded that, the placing process would not have been completed until the end of September 2002, and all the losses subject of claims under the declarations submitted would have occurred before replacement cover could be placed. Further, many of these projects were substantially completed and had little remaining construction work to be done. It is thus improbable that an oil company in BP's position would have embarked on a major insurance replacement exercise to cover projects with a relatively short period left to run when losses had already been sustained. Furthermore, it is probably extremely unlikely that any oil major in similar position would have thought it worth paying away substantial amounts of premium at that stage, having already sustained self-insured losses of circa USD 170 million. Even more, taking into account the reduced period of exposure to insurable perils during the construction period and the more limited protection under the WELCAR terms.

The duty does not depend on there being a contract, but in most cases, there will be a contractual relationship between the Broker and the Insured. There is normally no duty of care not to make negligent misstatement implicit in the relationship of insurer and insured and so no duty owed by either to the other.

Summary

The financial impact to the Insured when material information is not disclosed can be significant, creating a direct business impact to the Insured if, in the case of a loss, the indemnity is refused. This could also lead to a strain or break in the business relationships between the parties.

It is undoubtedly of great importance to have a best practice for the presentation of material facts for insurance contracts. In the light of the examples above, what comes to mind is what should be considered best practice for presentation of material facts for insurance contracts. There is a need to review on a most concise and pragmatic way the procedures for the supply of relevant information for all types of engineering insurance to the Insurers.

Brokers and/or Agents acting on behalf of an Insured may or may not have a written contract with their clients but they hold a responsibility towards their client when preparing a presentation or submission aimed to obtain an insurance coverage. They owe a series of duties to their principal, the person or entity for whom they are acting and must consider the material facts at the moment of:

- providing information or advice
- choosing the Insurer or defining the market security required
- preparing wordings
- ensuring contract certainty
- performing duties related to post-contractual obligations once the insurance is in place or a termination is required.

The examples above, demonstrate that the consequences of a failure to disclose can be significant. For example: a construction company could find that their claim was denied and, in an extreme case, it could find itself without insurance. It could then be faced with trying to obtain a policy mid-way through a project immediately after a loss, immediately after having had its previous policy declared void. This could create very challenging circumstances in which to find an insurer willing to provide cover. It could also place the construction company in breach of a contractual obligation to maintain insurance cover during the construction project until it was able to secure replacement coverage. If the construction company considered that its brokers had failed to manage properly the original presentation of the risk to underwriters, it might seek to recover its losses from the broker and the broker’s errors and omissions insurers.

CHAPTER 7

THE IMPACT OF COMMERCIAL RELATIONSHIPS BETWEEN BROKERS AND UNDERWRITERS AND MARKET CONDITIONS

In simple terms usually the goal of the broker is to achieve, for their client, the widest cover for the lowest price. Similarly, in simple terms, the goal of the underwriter is to achieve the highest premium with the narrowest cover that is acceptable to the party that is to be insured. Some people might assume the broker would only be interested to highlight the positive aspects of a risk and never mention the negatives. It may also be said that underwriters assume the worst and focus only on the negative aspects of a risk.

So what's in it for a broker to make the effort to compile a summary for a fair risk presentation by the insured?

This question can't be answered globally, because it depends on the broker's approach, the underwriters' reaction to a lack of information and also on the market cycle phase. If a broker were only focussed on quick results, low prices and not really interested in long term relationships with the underwriter, it might be an effective strategy to provide only minimum unprocessed information. This would save the broker time and effort. In a soft market and in the absence of clear information to the contrary, some underwriters may make positive assumptions about levels of risk to justify competitive rates. As long as the underwriters sign wordings including the statement that they have had all necessary information to assess the risk, there will also be no (direct) impact on claims handling.

Brokers who are primarily interested in long-term relationships based on trust and who want to avoid any problems for their clients in case of a claim (problems which might occur if the insurer has the impression that they have been misled during the risk evaluation) will have a different approach. They will see it as important to provide a fair and comprehensive risk presentation.

In a hard market, and in the absence of clear information to the contrary, underwriters are likely to make negative assumptions about levels of risk and about unclear aspects. In this situation a clear and comprehensive risk presentation should make a positive contribution to achieving lower premiums and wider cover for the Insured than would otherwise be available.

If the broker has made the effort to properly understand the risk, much of the necessary work has been done making the task of preparing a risk presentation for underwriters much more straightforward. As an additional benefit, the broker can also demonstrate to the client what has been done, that the broker understands the risk and the clients' needs and this can be used as a way for a broker to differentiate its services from those of its competitors.

There is no need for there to be a conflict between the broker and underwriter – much will depend on the people from each party, the level of trust that exists between them and the way they do business together.

CHAPTER 8

CONCLUSIONS

In this paper we have set out what are the fundamentals of the fair presentation of an engineering risk by a (Re)Insured to a (Re)Insurer. We have described the parties involved and defined relevant terms.

The purpose of this is to ensure that all parties to the insurance contract fully understand the risk being underwritten and the policy coverage being given.

We have looked at the legal requirement of the duty of disclosure, notably under English Law but also with examples from other legal jurisdictions.

In all cases it is apparent that the failure to properly disclose can have grave consequences for an insured at what is a most vulnerable time when a loss has occurred and a claim is to be made.

Whilst it is clear that the main obligation is placed on the insured it is also clear that the broker or agent has a responsibility to advise and guide the insured as to their duties and what might be material. In addition the insurer has a responsibility to review the information provided and make appropriate enquiries to seek the additional information they may require.

We have set out examples of what might be considered material information which can only be just that – examples. Each case must be treated individually on its merits.

In overall conclusion we think it is clear from our work and as set out in this paper that it is in every parties interest to ensure that there is a full and fair presentation of a risk in a structured way and that the resulting insurance contract should be structured to reflect the facts of the risk presented.