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JOHANNESBURG

General Principles of Insurance

VOLUME 2

State insurance funds
and specialized insurance markets

Vivian, R. and Mushai, A (2020)
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Foreword

The global short-term insurance market is highly complex and fiercely competitive, the local market is no different. The risks covered by short-term insurance are pervasive, touching every aspect of human activity and these risks and the management thereof are technically complicated. Climate change and COVID-19 have added further complications to this market. It is therefore abundantly clear that those who operate in this market must be equipped with the requisite technical skills and relevant knowledge to ensure that the short-term insurance sector operates effectively and efficiently. Hence, skills training is an imperative.

Those who work in short-term insurance are specialists, bringing technical expertise from a range of disciplines into the sector. However, the pace of technological changes and its impact on every aspect of life has necessitated the need for continuous training and development. Therefore, it is a challenge to keep employees abreast of developments in short-term insurance. A further challenge is to develop a system that allows articulation from the industry to university qualifications and vice-a-versa, or one that explicitly progresses university graduates into professionals.

To support ongoing development of the sector, the Insurance Sector Education and Training Authority (INSETA) has partnered with the University of Witwatersrand to address the skills gaps of employees and new entrants in short-term insurance. This current initiative is aimed at developing a body of knowledge for the short-term insurance industry. It provides foundational learning that can be used at various institutional types from education institutions to the workplace. It is part of a process of standardising learning outcomes and establishing a common frame of reference.

Two volumes of this body of knowledge are now complete. The intention is to provide this material as a common good, and as Open Source material to be used in the industry. The material was developed by Prof Vivian and Dr Mushai with the sponsorship of the INSETA. In addition, INSETA and The South African Insurance Association (SAIA) set-up a consultative committee from which a sub-committee of industry experts was drawn to review specific sections of the material in greater detail. It is intended that this process should be an ongoing process and the material should be further developed and refined as necessary.

Ideally, this is not the end of the process but the beginning. The current pandemic has highlighted the need for ongoing research into insurance matters which can translate into research and learning at universities and within the industry itself.

INSETA is pleased to be part of a process of empowering this industry and working collaboratively with key-roleplayers and we look forward to further enhancing this body of knowledge with support from the broader sector.

Nadia Starr
25 November 2020
INSETA Chief Executive Officer

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Personal Accident and Employer's liability

01-1: PERSONAL ACCIDENT INSURANCE

1 PERSONAL ACCIDENT INSURANCE

1.1 Historical Development

After the marine, fire[1] and life markets were established the need for insurance to cover injuries caused during events such as railway accidents,[2] workers' being injured at work, motor vehicle accidents.[3] This gave rise to the accident market with its associated accident policies including, worker's compensation, personal accident,[4] employer's liability and general liability began to develop.[5]

1.2 Operative clause

The typical operative clause of a personal accident policy covers the following defined events:

> Bodily injury caused by accidental, violent, external and visible means to any principal, partner, director or employee of the insured (hereinafter in this section referred to as such person) specified in the schedule.
>
> The company will pay to the insured, on behalf of such person or his estate, the compensation stated in the schedule in the event of accidental bodily injury to any such person directly and independently of all

1 Fire insurance became established in 1696

2 Railway accidents played the major role in the establishment of personal accident insurance

3 For accident insurance in general consult Welford AWB. *The Law relating to Accident Insurance* 2ed Butterworths 1932 (Baker Welford, 1932).

4 Personal accident insurance became established at about 1845.

5 For a discussion of the historical development of personal accident insurance consult Foot, A (1902) 'Personal Accident Insurance' 1902 *Journal* 229-343

> other causes resulting within twenty-four calendar months in death or disability as specified in the schedule under the heading circumstances.[6]

The purpose of personal accident insurance is to secure to the assured or his representatives the payment of a sum of money in the event of his death or disablement by accident. It is not a contract of indemnity.[7]

The words in the operative clause have been subject to much judicial analysis.

...bodily injury...

Bodily injury is injury to the body, for example the fracturing of a leg, or skull or finger. The injury, however, need not be accompanied by an outward and visible signs. Thus death by drowning, suffocation, by smoke or gas is bodily injury.

...accidental ... means...

The word accident is used in various circumstances such as with worker's compensation, public liability, motor, employer's liability and personal accident policies.[8] The word must be interpreted in the context that the word is used. In a Scottish case *Clidero v Scottish Accident Insurance Company* 1892 19 R Ct of Sess 355 29 LR 303 (*Clidero v Scottish Accident Insurance Company*, 1892) a fairly stout man got out of bed and put on his stockings. In doing so his colon slipped and became extended, placing some pressure on his heart that he died a few days later. The court ruled that he had not died by accidental means.[9] In the American case, *Landress v Phoenix Insurance Company* 219 VS 491 1933 (*Landress v Phoenix Insurance Company*, 1933) the majority of the court held that death by sunstroke after the deceased had suntanned himself was not death by accidental means.[10] In *Hamlyn v Crown Accident Insurance Co Ltd* 1893 1 QB 750 (*Hamlyn v Crown Accident Insurance Co Ltd*, 1839) the court decided that the assured who wrenched his knee dislocating the cartilage of the knee joint when he stooped to pick up a marble had suffered an injury as a result of a violent, accidental, external and visible means. It is difficult to reconcile this decision with the actual words of the operative clause.

In *Griessel NO v SA Myn en Algemene Assuransie Edms Bpk* 1952 4 SA 473 T (*Griessel NO v SA Myn en Algemene Assuransie Edms Bpk*, 1952), the insured unsuccessfully proposed to a passenger while driving a motor car. When she replied that she was not going to ruin her life by marrying the insured he commenced to swerve the car from left to right causing the car to crash into a tree. The insured and a number of passengers were killed. The court held that the onus was to convince the court that on the balance of probabilities the assured had died of an accident and not his own conscious intention to kill or maim himself and that the plaintiff had failed to do so. Further the evidence showed that the accident had been caused directly or indirectly to intoxicating liquor, an exclusion to the policy.

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6 MultiMark III. See also Re United London and Scottish Insurance Co Ltd; Brown's Claim 1915 2 Ch 167 at 170.

7 *Theobald v Railway Passengers' Assurance Co* 1854 10 Ex 45 (*Theobald v Railway Passengers' Assurance Company*, 1854).

8 *Sinclair v Maritime Passengers' Insurance Co* 1861 3 E & E 478 at 485 (*Sinclair v Maritime Passengers' Insurance Co*, 1861); *Reynolds v Accidental Insurance Co* 22 LT 820 at 821 (*Reynolds and Anderson v Phoenix Assurance Company and Others*, 1978); *Re Scarr and General Accident Assurance Corporation* 1905 1 KB 387 at 394 (*Re Scarr and General Accident Assurance Corporation*, 1905).

9 It may be added the injury was also not caused by violent external means.

10 It would also not be violent external and visible means.

In *Agiakatsukas NO v Rotterdam Insurance Co Ltd* 1959 4 SA 726 (*Agiakatsukas NO v Rotterdam Insurance Co Ltd*, 1959) the insured was killed as a result of his driving his car into the back of a stationary lorry. It was suggested that the deceased was intoxicated at the time of the accident. The insurer argued the onus was on the insured to show that he died from violent external and visible means and if intoxicated, then this was the proximate cause of the accident. This was a convoluted argument. The court ruled that the onus was on the insured to show that the deceased died from 'violent external and visible means' and on the facts, this was proven. To avoid liability in terms of two terms in the policy involving intoxication, the onus shifted to the insurer. The insurer could not discharge this onus and the court found accordingly for the insured.

In *Sikweyiya v Aegis Insurance Company Limited* 1995 4 SA 143 ECD (*Sikweyiya v Aegis Insurance Company Limited*, 1995) it was held that a man who died as a result of being stabbed in the back, murdered, had died as a result of accidental means. It is difficult to accept that the word accidental retains its normal every day meaning under these circumstances. If a person is murdered, very few people would regard his death as accidental.

In *Aegis Insurance Company Ltd v Consani NO* 1996 4 SA 1 A (*Aegis Insurance Company Ltd v Consani NO*, 1996), James Verhoef died as a result of a rifle wound to his head. In terms of a personal accident policy the insurer undertook to pay R1m to his estate if he suffered bodily injury caused by accidental, violent external and visible means - the usual personal accident operative clause. From the circumstances of his death it was not clear whether or not he had committed suicide and the insurer repudiated the claim. The onus is on the claimant to prove that the death was accidental and the claimant could not discharge the onus and accordingly judgment was given for the insurer. The fact that the policy contains a suicide exclusion does not mean that if suicide is suspected that the onus shifts to the insurer to prove the suicide. The onus remains on the claimant to prove that the death was accidental.

... independently of all other causes ...

In *Concorde Insurance Co Ltd v Oelofsen NO* 1992 4 SA 669 A (*Concorde Insurance Co Ltd v Oelofsen NO*, 1992) Pieter Oelofsen suffered a fatal heart attack within hours of being involved in a motor car accident. Before the accident Oelofsen had a pre-existing serious heart condition. It was argued for the insurer that because of this condition he did not die from independently of all other causes. The court held that the proximate cause of Oelofsen's death was the accident. There were no other contributory causes and hence the phrase 'independently of other causes' did not assist the insurer.

1.2.1 Measure of compensation

Once the event falls within the operative clause, the question of the appropriate compensation arises. This usually depends on the extent of the injury along the following progression:

1.2.1.1 Compensation dependent on the extent of injuries

- Death
- Permanent total disability

- Permanent partial disability
- Temporary total disability
- Temporary partial disability

Medical expenses
Medical expenses are associated with accidents and the personal accident policy can cover medical expenses.

The personal accident policy is not an indemnity policy but pays a defined amount.

1.2.1.2 Permanent disability

In the case of permanent disability, the compensation is determined by the continental scale as indicated in text box.

1.2.1.3 Temporary total disability

Temporary total disability shall mean total and absolute incapacity from following usual business or occupation.

1.2.1.4 Medical expenses

The typical operative clause for medical expenses reads as follows:

> Medical expenses shall mean all costs and expenses necessarily incurred for artificial aids, prostheses, medical, surgical, dental, nursing home or hospital treatment (including costs and expenses incurred in emergency transportation or freeing such person if trapped or bringing such person to a place of safety) as a result of bodily injury and incurred within 24 months of the defined event.
>
> **Life support machinery**
> Notwithstanding anything contained in the defined events, the twenty-four month period stated therein shall not include any period or periods where the death of such person is delayed solely by the use, for a period or periods of not less than three consecutive days, of life support machinery, equipment or apparatus.

As noted, the personal accident policy is a non-indemnity insurance the same cannot be said of the medical expenses section of the policy. This section is indemnity insurance.

1.3 Exclusions

The policy contains a number of exclusions. The following are typical:

> The company shall not be liable to pay compensation for death, disability or medical expenses in respect of such person
> (a) while he is travelling by air other than as a passenger and not as a member of the crew nor for the purpose of any trade or technical operation therein or thereon;
> (b) by his suicide or intentional self injury;

(c) caused solely by an existing physical defect or other infirmity of such person;
(d) as a result of the influence of alcohol, drugs or narcotics upon such person unless administered by a member of the medical profession (other than himself) or unless prescribed by and taken in accordance with the instructions of a member of the medical profession (other than himself);
(e) while he is or as a result of his engaging in motor cycling (whether as driver or passenger) other than on the business of the insured, mountaineering necessitating the use of ropes, winter sports involving snow or ice, polo on horseback, steeplechasing, professional football, hang gliding or racing of any kind involving the use of any power driven vehicle, vessel, craft;
(f) as a result of his participation in any riot or civil commotion;
(g) in the case of females, directly or indirectly resulting from or prolonged or accelerated by or attributable to pregnancy, childbirth, abortion, miscarriage, obstetrical procedures or any sequelae thereof.

Exclusions in policies for perceived high risk activities are well known. In *Barnard v Protea Assurance Co Ltd* 1998 3 SA 1063 C (*Barnard v Protea Assurance Co Ltd*, 1998), involved the payment of an accident benefit (which contains exclusions similar to those of the personal accident policy) in a life insurance contract. The contract excluded 'active participation in ... skin-diving.' Barnard died while undergoing scuba diving training. He had disclosed in the proposal form that he was an amateur scuba diver. The insurer repudiated the claim in terms of the skin-diving exclusion. The court held that the exclusion did not apply and the insurer was liable in terms of the contract.

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01-2: EMPLOYER'S LIABILITY

1 EMPLOYERS' LIABILITY INSURANCE

1.1 Introduction

Employers' liability insurance is very much an English class of insurance. It will be recalled that in England, towards the end of the previous century it was almost impossible for an injured employee to successfully bring an action in tort against his employer. In order to ameliorate this position, the British Parliament introduced by statute a limited form of employers' liability and hence forth, in England, employers' liability insurance became a necessity.

Provisions similar to the English provisions, imposing liability on employers, were incorporated into South African legislation, not as separate specific legislation but as part of the worker's compensation legislation.[1] In South Africa this limited form of liability was imposed and then covered in the same legislation. The employer became liable but at the same time to worker's compensation covered the additional risks. This forms part of COID in terms of s56. There is thus a form of statutory liability imposed on the employer in terms of s56 of COID which the allows the employee to get increased compensation. In theory it should not be necessary for the employer, to in addition to paying for COID, also to purchase employers' liability insurance. It is logical that COID exempts the employer of this additional liability as it indeed does.[2]

1 S5 of the Workmen's Compensation Act 59 of 1934 (Workmen's Compensation Act, 1934)
2 Section 35 of COID

There was however a gap, in that, the repealed Workmen's Compensation Act 30 of 1941 applied only to persons earning less than R52 800 pa. The new Act COID does not have this limitation. Hence it was possible for an employer to be sued by his employees in cases where the injured employee earned in excess of the statutory limit. Nevertheless such cases were rare. Under those circumstances a separate employer's liability policy was necessary. COID on the other hand covers all employees so the need for employer's liability insurance is less clear. Notwithstanding that there is no clear need for employers' liability insurance it is still sold in South Africa and successful actions by employees against employers are on record.

1.2 The operative clause

Typically the operative clause of the employers' liability section of a business multi-peril policy reads as follows:

> In consideration of the payment of the premium by or on behalf of the insured the company ... *agrees to indemnify* ... in respect of the defined events ...
>
> Defined events
> Damages which the insured shall become legally liable to pay consequent upon death of or bodily injury to or illness of any person employed under a contract of service or apprenticeship with the insured which occurred in the course of and in connection with such person's employment by the insured within the territorial limits and on or after the retroactive date shown in the schedule and which results in a claim or claims first being made against the insured in writing during the period of insurance.3[3]

The various terms which appear in the operative clause are discussed.

... to indemnity...
The employers' liability is an indemnity policy, it indemnifies the insured against all amounts which the insured becomes legally liable to pay.

...legally liable to pay...
The phrase legally liable to pay is common to most liability policies. For a more detailed discussion note: The employers' liability is no exception. The operative clause contains the phrase '... *shall become legally liable to pay*'. The policy does not define the term. It is the court of law which determines whether or not the insured is legally liable. In practice it is sufficient that it becomes clear that as a matter of law the insured is legally liable to the plaintiff to convince the insurer that this requirement has been met. It is generally not necessary for a court to actually make a ruling that the insured is legally liable to pay before the insurer will be satisfied that the insured is legally liable.

Because the policy does not define the basis of liability, liability does not depend on any specific existing or predetermined basis of liability such as delict, statute or contractually assumed liability. All that is required to meet the requirement 'legally liable to pay' is that the insured must be regarded as being legally liable to pay. Of particular importance, in this regard, is s35 of COID which exempts the employer from liability. If the

[3] Multi-Mark III

employer is exempt from liability then the employer cannot be legally liable to pay. Because of this section the need for employers' liability insurance is doubted but liability cannot be completely ruled out.

...consequent upon death...
The employers' liability policy covers claims arising out of personal injury.

...or bodily injury...

... or illness ...

... of any person employed under a contract of service or apprenticeship ...

... with the insured ...

... which occurred in the course of and in connection with such person's employment ...

... territorial limits ...
Some of the world's jurisdictions are regarded as particularly favourable to litigation and insurers are reluctant to grant world wide cover. There is usually a term in the policy which defines the territorial limit. This term reads as follows:

> Anywhere in the world but not in connection with:
> (i) any business carried on by the insured at or from premises outside or
> (ii) any contract for the performance of work outside the Republic of South Africa, Namibia, Botswana, Lesotho, Swaziland, Zimbabwe and Malawi.

... claim first be made against the insured during the period of insurance...
It should be noted that the employers' liability policy is a claims made policy and not an occurrence policy. The problem is the American court's interpretation of the occurrence wording in connection with occupational diseases. It evoked the multiple trigger doctrine. A person may at the end of their career manifest symptoms of the disease. Under this circumstance the question arises; when did the occurrence or event take place? The American courts have held that it could be when the person was first exposed to the substance or while working with it or when the disease is manifested. This interpretation means that an insurer could be liable on a policy that it issued decades before it created the notion of a multiple trigger. It is then not possible to ever close a policy. The claims made wording was introduced to enable the insurer to know the extent of its liability. Thus at the end of the year, a claim had either been made or not made. This wording is not without its own problems.

… Onus …
It should be remembered that generally the onus is on the insured to show that the insurer has an obligation to indemnify him. In this event the onus is on the insured to show that all the terms in the operative clause have been met.

1.3 Limit of indemnity

The employers' liability usually contains a term which limits the liability of the insurer. Typically this reads as follows:

> The amount payable inclusive of any legal costs recoverable from the insured by a claimant or any number of claimants and all other costs and expenses incurred with the company's consent for any one event or series of events with one original cause or source shall not exceed the limit of indemnity stated in the schedule.

1.4 Specific Exceptions

The employers' liability policy contains a number of exclusions. The most common are the following:

1.4.1 Liability assumed by contract

Insurers are reluctant to indemnify the insured for liabilities voluntarily assumed by the insured by contract. The policy contains an exclusion, which typically reads as follows:

> liability assumed by the insured under any contract undertaking or agreement, where such liability would not have attached to the insured in the absence of such contract undertaking or agreement

1.4.2 Occupational diseases

Insurers face enormous claims for occupational diseases such as asbestosis and tend to exclude claims for occupational diseases. Typically the exclusion reads as follows:

> liability for disease or impairment attributable to a gradually operating cause which does not arise from a sudden and identifiable accident or event

1.4.3 Fines and penalties

Fines and penalties are uninsurable in terms of the general theory of insurability since to insure these are regarded as against public policy. Fines and penalties are a common risk in an occupational situation because of safety legislation. The policy contains a term to make it clear that these are excluded. The term excludes the following:

> fines penalties punitive exemplary or vindictive damages

1.4.4 Damage awarded in other jurisdictions

It may be possible to obtain a judgment in another country and then attempt to execute the judgment in South Africa. Insurers are reluctant to accept this risk and exclude it in terms of the following typical wording:

> (i) damages in respect of judgment delivered or obtained in the first instance otherwise than by a Court of competent jurisdiction within the Republic of South Africa, Namibia, Botswana, Lesotho and Swaziland
>
> (ii) costs and expenses of litigation recovered by any claimant from the insured which are not incurred in and recoverable in the area described in (i) above

1.5 Cases

1.5.1 English case law

Current employer's liability issues in the United Kingdom market include claims for repetitive strain injuries (RSI), stress[4] and asbestos. Employer's liability is required by law but escalating costs have caused insurers to withdraw from the market.[5]

RSI and arise where a person carries out work of a repetitive nature and after many years is injured from this activity. Thus a typist may develop painful finger joints from years of typing. The typist may then decide to sue her employer which will look to the employers' liability policy for indemnification.

English case law

The English case set the precedent that liability could arise for RSI.[6] RSI claims usually arise from using a product such as a typewriter or computer and the plaintiff may attempt to bring a product liability case instead of an employers' liability case.

1.5.2 South African case law

There are a number of cases where employees sued their employer. These took place mainly before this common-law right was removed by s4 of Workmen's Compensation Act 59 of 1934; s7 of the 1941 Act and s35 of the current Act. *Waring & Gillow Ltd v Sherborne* 1904 TS340 (*Waring & Gillow Ltd v Sherborne*, 1904) is an example of this type of case. In this case Sherborne was killed through the negligence of a fellow servant while working on the erection of the Old Carlton Hotel. The court noted (343) that by the Roman-Dutch law an employer is liable to a servant for injuries resulting from the negligence of a fellow servant. The employer raised the defences of *volenti non fit injuria* and contributory negligence.

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[5] John Parker 'Resolving the catch-22 situation surrounding EL [Employer's Liability]' 163 34 *Post Magazine* 10 (Parker, n.d.).

[6] Stokes, A 'Repeat Performance' 1996 157 14 *Post Magazine* 22 (Stokes, 1996)

02-0: STATE INSURANCE SCHEMES

03-1: WORKER'S COMPENSATION

Contents

1 WORKER'S COMPENSATION

1.1 United Kingdom: employer's liability

Historically an employee injured at work through the negligence of his or her employer could sue the employer in terms of the common-law. This however did not happen, in the UK, until 1837. Employees rights to sue were very limited but improved with the passing of the Employer's Liability Act 1880 (Employer's Liability Act, 1880). While this was unfolding worker's compensation legislation was passed. Employer's liability[1] and worker's compensation must be viewed against this historical development of the Victorian era.[2]

Worker's compensation is closely associated with employer's liability and accident prevention (health and safety). Employer's liability deals with the risk of an employee bringing a civil claim against his or her employer. Employer's liability insurance covers this risk. Accident prevention (health and safety) is concerned with the prevention of injuries and occupational diseases.[3] Worker's compensation provides compensation to employees injured in an accident during the course and scope of employment. These three subjects were not always as clearly demarcated as separate disciplines, as at present.[4]

1.1.1 Liability of employers in the nineteenth century in Britain

In the earlier[5] part of the nineteenth century worker's compensation had not been introduced and the worker's common-law remedies were very limited[6] as a study of early English cases[7] indicates. The tort

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1 For a history of employer's liability in the United Kingdom consult Durham v BAI (Run Off) Ltd 2008 (*Durham v BAI (Run Off) Ltd*, 2008).

2 Stein (2008). This analysis unfortunately is, as is common with historical research concerning worker's compensation and the history of torts in general, marred by anachronisms.

3 Accident prevention is the risk control function of risk management which deals with preventing injuries to employees. These injuries give rise to the claims that are funded, in part, via WCA or Employers' Liability insurance. For details of risk control programmes consult Valsamakis, Vivian, and Du Toit 2010 (Valsamakis, Vivian, & Du Toit, 2010).

4 For a further discussion consult Scott, 'Safety and the Standard of Care' 1980 1 *ILJ* 161 (Scott, 1980).

5 The early part of the nineteenth century is emphasized because towards the latter part of the century, claims against employers began to succeed *Smith v Charles Baker & Sons* 1891 AC 325 (*Smith v Charles Baker & Sons*, 1891)

6 Cane (1993:270)

7 The first recorded English case of an employee suing his employer was *Priestley v Fowler* 1837 3 M & W 1 (*Priestley v Fowler*, 1837). The case was reported in the same year of Queen Victoria's ascension. The case thus marks the beginning of the long Victorian era. The development of employer's liability and worker's compensation in England, during the nineteenth century is succinctly covered by Ruegg (1901:268-279). South African law and theory is strongly influenced by the English of negligence as the basis of tort liability was unknown, as were claims for injuries from employees, in general. Three historical defences, the so-called ‘unholy trinity’, prevented claims against employer succeeding.8 These defences were (1) the common employment defence,9 (2) *volenti non fit injuria* and (3) contributory negligence.

1.1.2 Common employment defence - limitation of vicarious liability

The common employment (also called the fellow employee) defence declined to extend vicarious liability to the acts of fellow employees. At the time the principle of vicarious liability was unknown and was still developing.10 The question was then should this new form of liability be extended to the work situation. When the issue arose the court declined to extend vicarious liability to the situation when one fellow-employee caused the injury of another fellow employee. This was in the well-known and oft criticized11 case of *Priestley v Fowler* 1837 3M & W1 (*Priestley v Fowler*, 1837) where the English court (per Lord Abinger) held that an employer was not vicariously liable to his own employee for the negligent acts of a fellow employee. The court in essence refused to extend the doctrine of vicarious liability to an employee injured by a fellow employee. This case, is commonly believed12 to have established the so-called defence of common employment or also known as the fellow employee defence. The doctrine was justified by some on a fictitious implied term in the contract of service to the effect that the servant agreed to run the risks naturally incident to his employment and that one of these risks is that of harm due to the negligence of a fellow-servant. *Priestley v Fowler* supra was subsequently followed13 and approved by the House of Lords.14 The doctrinal basis of the common-employment defence became complex going beyond vicarious liability and extending to other defences, making it somewhat of an artificial defence.

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law and most writers commenting on this aspect of the development of South African law rely on English law, see for example Budlender (1979,157) *Labour Law Bulletin*.

8 Fleming, JG (1987: 488) *The Law of Torts* 7ed The Law Book Company Limited 1987 (Fleming, 1987).

9 Also called the common employment defence.

10 The history of vicarious liability is traced by Holmes (1891) ‘Agency’ 1891 4 *Harvard Law Review* 345 (Holmes, 1891); Wigmore (1894) ‘Responsibility for Tortious Acts: Its History’ 1894 7 *Harvard Law Review* 315 (Wigmore, 1894).

11 The case is often used as the point of departure in legal philosophy as with Dworkin (1986,2)

12 Newark, ‘Bad Law’ 1966 17 *NILQ* 469, 477 (Newark, 1966) argues that the belief that the defence of common employment is mistakenly traced back to *Priestley v Fowler*. (supra)

13 It was approved by Baron Alderson in 1850.

14 *Bartons-hill Coal v Reid* 1858 Macq 266 (*Bartons-hill Coal v Reid*, 1858). For an overview of an interpretation of the social changes which gave rise to the introduction of worker's compensation in America see Friedman & Ladinsky, "Social change and the Law of Industrial accidents" *Columbia Law Review* 1967 67 50 (Friedman & Ladinsky, 1967). A problem with this type of analysis is that historical developments may be taken out of their historical context and *ex post facto* rationalisation applied to “discover” causation. Causation in history is notoriously difficult to establish.

This complex nature caused a number of problems. The common-employment defence was finally abolished in the UK in 1948.15

1.1.3 *Volenti non fit injuria* defence

In the next case the defence of assumption of risk,16 or *volenti non fit injuria* succeeded reinforcing the fellow-employee defence. It was argued that were an employee is injured that employee had contractually assumed to run the risk of injury including the risk of being injured by a fellow-employee.17

1.1.4 Contributory negligence defence

The third defence is the contributory negligence defence. Often the conduct of an injured employee contributed to his own injury. Where this happens, the employer could raise the defence of contributory negligence, which was initially accepted as a complete defence. Thus for example, assume an employer left a pit uncovered and visible to all. Assume then that an employee does not keep a proper lookout, fails to see the open pit, falls into it and is injured. The final causal link in the chain of events is the employee walking and falling into the open pit. The employee's negligence contributed to his own injury and since he had the last opportunity to avoid the accident, his negligence was a complete defence. In modern times the loss is apportioned in proportion to the fault of the parties. In the previous century however, it was not possible to apportion the damages.

1.1.5 Reforms: Employer's Liability Act 1880

The above three defences made it clear that the common-law did not provide the injured employee with a remedy. In the age when the welfare state was developing this state of affairs could not last and investigations to change the system were undertaken.

In 1877 a select committee of the House of Commons was appointed to consider whether or not the defence of common employment (fellow-employee) should be abolished. It did not go so far as to recommend its abolition,18 but advised that the master should be held vicariously liable for the negligence of certain persons to whom he had delegated his rights of master over the workmen. These persons were called vice-Masters in the report. The recommendation was enacted in terms of the Employer's Liability Act of 1880 43 & 44 Vict c42 (Employer's Liability Act, 1880).19 The Act introduced a limited form of

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15 Cane (1993:270 n2)

16 The injured workman was assumed to run the risk of injury and if injured no liability attached to the employer. *Woodley v Metropolitan Railway* 1877 2 ExD 384 (*Woodley v Metropolitan Railway*, 1877)

17 Ruegg (1901:270)

18 It was only abolished in terms of the Law Reform (Personal Injuries) Act of 1948 (11 & 12 Geo VI c41) (Law Reform (Personal Injuries) Act, 1948).

19 The classes of workman to whom the Act applied were defined in terms of s10 of Employer's and Workmen Act of 1875 (Employer's and Workmen Act, 1875). Domestic and menial servants, and seamen were excluded from the Act. It should be noted that in South African law domestic servants vicarious liability. The 1880 Act also limited the defence of *volenti non fit injuria* since it imposed liability for defects in ways, works, plant and machinery. The "reforms" were not fully effective since the employer was free to contract out of the liability imposed by the Act.20 About this time in any event the House of Lords began, taking its cue from the willingness of parliament to recognise the liability of an employer to his employee, to restrict the application of the *volenti non fit injuria* defence.21

It was clear that a much more radical approach, than simply broadening the common-law of torts was needed. A system to provide compensation to those injured at work was needed; worker's compensation. This approach culminated with the introduction of worker's compensation, a no-fault system, following the German example.

1.1.6 Conclusions regarding the common-law rights of injured employees in the nineteenth century

The rights of injured employees to recover damages in terms of the common-law doctrines of tort, during the nineteenth century before the introduction of worker's compensation were limited indeed. Before statutory law could develop to augment the law of torts and impose a more extensive form of employer's liability, Bismarck introduced worker's compensation in Germany which was followed in Britain. Our attention must thus be directed to the developments in Bismarck's Germany. After the successful introduction by Bismarck, England followed suit.

1.2 Germany: Bismarck introduces workers compensation

Worker's compensation was first introduced in Germany22 in 1884 and the reason for its introduction can be found by studying the economic history of Germany during this period.23

A number of popular, but erroneous views exist explaining the introduction of worker's compensation, such as the rising number of industrial accidents, or the law developing towards an end purpose (whatever that might mean),24 or because of risks created by machinery as a consequence of the industrial revolution.

are not equated with the English menial servant; *Stuttaford v Batty's Estate* 1917 CPD 639 (*Stuttaford v Batty's Estate*, 1917).

20 *Griffiths v Earl of Dudley* 1881 9 QBD 357 (*Griffiths v Earl of Dudley*, 1881).

21 *Smith v Baker & Sons* 1891 AC 325 (*Smith v Charles Baker & Sons*, 1891): The abolition of the common employment defence however was to be a complex matter; see Howells 'Priestley v Fowler and the Factory Acts' 1963 *Modern Law Review* 367 (Howells, 1963).

22 Examples of worker's compensation can be found before the German introduction, but the credit to its introduction goes to Bismarck's historical measure of 1884.

23 Vivian & Costa 'The American liability crisis, Bismarck and Public Choice' *Berg* 13 March 1992 (Vivian & Costa, 1992).

24 As suggested by Pound (1914)

The reason for its introduction is now commonly referred to as ‘rent-seeking’.25 Bismarck introduced worker’s compensation to gain votes. Bismarck was losing votes to the socialists26 and in an attempt to gain more support from the electorate he introduced a number of social welfare programmes including worker’s compensation27, medical-aid and state pensions. The new policy was announced in an Imperial Message in 1881 but the first attempts at legislation met with opposition in the Reichstag. It was only in 1883 that the Sickness Insurance Law was finally passed. The Accident Insurance Law was passed in 1884 after two earlier versions had to be withdrawn. The Old Age and Invalidity Insurance Law was passed in 1889.

Although the political calculations that moved Bismarck at the time are specific to German history, the outcome is of wider historical significance, as other countries followed the German example.28 The tripartite system of compulsory insurance had a considerable influence on social insurance developments in other European countries and in America.

1.3 United Kingdom: Introduction of worker's compensation

Germany having introduced worker’s compensation, Britain followed. It should however be noted that in England, worker's compensation was not introduced out of fear by employers of being sued by employees. Such a fear would have been irrational at the time since employees had no basis of suing employers, but rather out of societies’ desire to make provision for the injured employee. Many see the development of worker’s compensation as part of the movement towards the welfare state. It is not clear that this is correct since the cost of worker’s compensation is not borne by the state but the company and largely the employee him or herself.

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25 Public choice theory deals with the application of economic theory to political science. Its basic behavioural postulate is that, man (a politician included) is an egoistic, rational, utility maximiser (see Mueller 1990, 229 for rent seeking). A politician is a vote-maximiser. Vote-maximising politicians provide policies or legislation to win votes. Voters on the other hand provide votes. Legislation consists of either public goods with characteristics that appeal to given groups of voters or income transfers from one sector of the population to another. Bismarck provided welfare type of social legislation to attract the votes from the Social Democratic Party. There was no grand underlying theory such as concern for risks which can be evoked to explain why a State should compensate the injured worker.

26 Socialist votes for Reichstag elections increased from 124 655 in 1871 to 493 000 in 1877.

27 When the legislation came it formed part of a grand imperial system of social insurance, not only against accidents, but also against sickness, old age and indigence (Dawson, 1890,93).

28 Hennock, (1987,1)

England has a long history of employment legislation.29 A clear distinction was and is not maintained between safety legislation, employers' liability and worker's compensation. In 180230 the first Factory Act 42 Geo III c 73 was passed which was followed by a number of other Acts. The 1844 Act allowed the inspector to bring an action for damages on behalf of a workman who had been injured by machinery. In 1845 the Fatal Accidents Act 9 & 10 Vict c 93 (Fatal Accidents Act, 1845) was promulgated which for the first time gave dependants a right to compensation. The legislation was to a degree consolidated in 1878. The Employers' Liability Act of 1880 43 and 44 Vict c 42 (Employer's Liability Act, 1880) was an important milestone since it restricted the common-employment defence and introduced the concept of the Vice-master. This legislation had to do with the extension of the law of torts. The next wave of legislation between 1878 and 1901 had to do with safety requirements, which soon gave birth to the idea of liability for the breach of a statutory duty, still effectively a tort-based form of liability.

The break with fault based notions came with the passing of the Workmen's Compensation Act 60 & 61 Vict c 37 in 1897 (and 1900, 1906, and 1925) (Workmen's Compensation Act, 1897) based on the same notions of the German system of compensation, except a state fund was not created. This Act merely imposed an obligation on the employer to pay compensation to workman injured in the course of his employment. The employer in essence became the insurer of the workman, but in practice they, being risk averse, employers soon sought insurance which gave birth to the workmen's compensation insurance market.

The 1897 Act applied to some industries only, such as those which are generally supposed to involve hazardous risks. By 1900 the legislation passed by the Conservative government of the day had established that the employer would pay compensation for every accident arising out of the work, whether caused by negligence or not. No-fault liability had been introduced. It was assumed that the employer would insure against this liability and pass the cost on by way of increased prices. It was assumed the cost could be internalised and the notion of internalising the cost of accidents had gained credence.31 A further Act was passed in 1900 but these Acts did not displace the defence of common employment. Worker's compensation legislation was consolidated in 1925, when replaced by the National Insurance (Industrial Injuries) Act 9 & 10 Geo VI c 62 of 1946 (National Insurance (Industrial Injuries) Act, 1946) and later legislation. The National Insurance Acts were consolidated in the Social Security Act 1975 and at present no separate worker's compensation legislation exists but benefits are paid under the Social Security (Contributions and Benefits) Act 1992 (Social Security (Contributions and Benefits) Act, 1992).

Employees who suffer personal injury obtain benefits in terms of the Social Security Act. The administration of the Act was removed from the jurisdiction of the ordinary courts and is vested in the

29 For an overview of the changes in the previous century consult Ruegg (1901,241 et seq).

30 The early factory legislation does not appear to have made a great impact. The first Factories Act mentioned by Pascoe, LC (1974,474) Encyclopaedia of dates and events 2ed Hodder and Stoughton 1981 is the 1825 Act.

31 *Smith v Barker & Sons* 1891 AC 325 at 340 (*Smith v Charles Baker & Sons*, 1891) per Lord Bramwell.

Secretary of State. This is not surprising.32 Employees thus enjoy a preferential treatment when it comes to injuries and no logical reason exists for this preference.33 There is no logical reason why, say, an injured workman should get compensation but not an injured motor vehicle victim. An injured worker may claim compensation in terms of the Social Security Act and sue his employer. The employer is obliged to insure under the Employers' Liability Compulsory Insurance Act 1969 (Employers' Liability Compulsory Insurance Act, 1969).

1.4 Influence of worker's compensation on the American law of torts

The introduction of worker's compensation has had a profound impact on the theory of the American law of torts. It was argued that, if, with the introduction of worker's compensation an employer could be liable without fault, why then could not the law of torts expand to achieve the same result in general. There is no reason in particular why workers should be in a better position than others. Pound (1914,233) came to the conclusion:

> Today there is a strong and growing tendency to revive the idea of liability without fault, not only in the form of wide responsibility for agencies employed, but in placing upon an enterprise the burden of repairing injuries without fault of him who conducts it, which are incident to the undertaking.34

Thus the notion of enterprise liability was born, whereby the corporations should be liable without fault not only for injuries suffered by workers but for all costs of injuries caused by the risk created by the enterprise. These costs should be borne or internalised by that enterprise. Smith (1914)35 argued that the common-law doctrine of torts in general would move towards the position of worker's compensation, that is liability without fault. He further correctly predicted that this would be brought about by the courts and not by legislation. The intellectual foundation for the liability crisis of the 1980s had been laid.

Worker's compensation placed the employed person in a much better position than the unemployed. If the unemployed is injured he gets no compensation and his medical costs are not paid. Why should he be

32 The purpose of Worker's compensation was to provide a rapid and administratively inexpensive method of giving compensation to the injured workmen. The early introduction did not achieve this as matters went to court. An administrative instead of judicial solution was sought and the modern tendency is to remove matters from the judicial system to administrative tribunals - developed.

33 According to this view, there is no logical reason why an employed person should receive compensation if injured without fault whereas an unemployed person receives not compensation. A unemployed person contributes towards the benefits received by the employed person when the unemployed person purchases any goods or service. Following this approach all persons should receive compensation as part of the welfare programme of a state.

34 Pound, R (1914) 'The End of Law as Developed in Legal Rules and Doctrines' 1914 27 *Harvard Law Review* 195-324 (Pound, 1914).

35 Smith, J (1914) 'Sequel to Workmen's Compensation Act', 1914 *Harvard Law Review* 235 (Smith, 1914).

in a better position? The broader philosophical approach to this question in England and America can be contrasted. In England the introduction of worker's compensation raised the argument that social welfare benefits should be extended to cover all injured persons which culminated in worker's compensation becoming part of the social welfare system. In America on the other hand, it was argued, that the law of torts should be expanded to cover all persons through judicial activism. The one used parliament and open debate, the other the courts and judicial activism resulting in confusion of principles causing distortion of the law of torts as it expanded to cover all sorts of situations for which it was never designed and is ill equipped to handle.

In South Africa the law of delict has expanded to cover not only personal injury claims but all types of losses, including pure financial or economic losses.

1.5 South Africa: Employer's liability

1.5.1 Employer's liability in South Africa - early cases, before worker's compensation

There were some cases involving employees suing employers before the introduction of worker's compensation legislation and these are examined to understand employer's liability in South Africa.36

In *Hilpert v Castle Mail Parkets Co* (1897-1898) 12 EDC 38 (*Hilpert v Castle Mail Parkets Co*, 1897) an employee's claim against his employer was dismissed as the injury was caused by a fellow-employee. The fellow-employee (common-employment) defence was thus imported into the Cape.

In *Lewis v The Salisbury Gold Mining Company* 1894 1 Official Reports 137 (*Lewis v The Salisbury Gold Mining Company*, 1894) a miner was injured while being lowered into the mine allegedly because of the negligence of the engineman. As a result of the accident the employee's leg was amputated. The employee sued his employer which raised by way of exception the defence of common-employment. Initially the court *a quo* ruled in favour of the employer, by implication that the defence of common-employment applied in South Africa. The matter was taken on appeal with judgment being delivered by Chief Justice Kotzé. The court dismissed the exception concluding that the Roman-Dutch law recognises that an employer is liable for the injures caused by his servants within the scope of their employment. The fellow servant defences did not apply in the Transvaal.

In *Eagleson v The Argus Printing and Publishing Company* 1894 1 Official Reports 259 (*Eagleson v The Argus Printing and Publishing Company*, 1894) judgment was once again by Kotzé CJ. In this case a 12-year-old employee was injured while carrying out a task lying outside of the sphere of his employment.

36 Nowadays because of current s35 of COID which precludes an employer successfully suing an employer claims from employees are unlikely as claims for compensation from employees are dealt with in terms of workers compensation.

37 This case was heard in what was the old Republic of South Africa, which became the Transvaal after the Union.

The court concluded that two fellow employees were negligent and found in favour of the injured employee.

In *Eyssen v Calder and Co* 1903 20 SC 435 (*Eyssen v Calder and Co*, 1903), Calder and Co (defendant) entered into a contract with the military authorities to provide labour which they did. Eyssen (plaintiff) was one of the persons so provided. The defendant stationed a time keeper at the place of work to record the time worked by each person it provided and paid the persons for time worked. While stacking bales of forage, under the directions of the military authorities, a bale fell and struck the plaintiff causing him to lose the sight of one eye. It was accepted that the accident was caused by a fellow employee. The court declined to address the issue of whether or not the English doctrine of common-employment had become part of South African law, holding that Calder and Co was not in law the employer of the labour but the agents of the military authorities in engaging and paying the men. Having supplied the labour, the defendants ceased to have any control over the men beyond paying the men and, if thereto required, dismissing the men. They had no right to give any command as to the manner in which the work should be performed, and cannot therefore be liable for any injury resulting from the negligent performance of that work. The persons who could and did give such commands were the military authorities, and it is to them only that the plaintiff should look for compensation for the serious injury done to him.

In *Waring & Gillow v Sherborne* 1904 TS 34038 (*Waring & Gillow Ltd v Sherborne*, 1904) Sherborne was killed in a building accident and his wife sued for loss of support. In addition, the wife sued for mental shock suffered on hearing of the death of her husband. The trial court found in her favour and awarded her the sum of £3 500 (equivalent to 35 years income, if the deceased had been employed in England!) with respect to the loss of earnings claim. The appeal court reduced the award to £1 600. The court rejected the claim based on mental shock being unfounded in South African law.

Employer's liability insurance covers the risk of liability of employers to employees and is discussed in greater detail under Employer's liability insurance section.

1.6 South African: Establishment of the Rand Mutual

At the turn of the century South Africa's legal system depended heavily on developments in England and hence injured employees had only very limited rights of recovery against employers.39 Large employers, such as the mining industry however were not satisfied that injured employees should not be compensated and introduced a scheme to compensate injured workers. In 1894 three mining companies established the Rand Mutual Assurance Company.40 It should be noted that this pre-dates the English Workman's Compensation Act passed in 1897. Since the mining industry established its own fund it was largely

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38 The judgment of the court *a quo* is reported as 1904 TS 39.

39 Lewis v GM Co 1894 1 OR 1 (*Lewis v GM Co*, 1894); *Eyssen v Calder & Co* 20 SC 435 (*Eyssen v Calder and Co*, 1903); *Waring & Gillow v Sherborne* 1904 TS 340 (*Waring & Gillow Ltd v Sherborne*, 1904); *Van Heerden v SA Pulp and Industries Ltd* 1946 AD 382 (*Van Heerden v SA Pulp and Industries Ltd*, 1946).

40 Budlender (1984:27)

uninvolved with the later efforts to develop a statutory scheme of compensation but the legislation had to take into consideration the existence of the Rand Mutual since it covered a large section of the work force.

1.7 South African: worker's compensation legislation

Before the Union, the various provinces had passed their own legislation. In the Cape there was the Workmen's Compensation Act 40 of 1905 (Cape), in the Transvaal the Workman's Compensation Act 36 of 1907 (Transvaal)4141 and in Natal the Employer's Liability Act 12 of 1896. In 1914 the Workmen's Compensation Act 25 of 1914 (Workmen's Compensation Act, 1914), a consolidating Act was passed.42 The 1914 Act was based on the British Act of 1906 and the New Zealand Workmen's Compensation Act. The new Act provided for compensation in the case of all accidents 'arising out of or in the course of employment' where the accident was not due to the 'serious and wilful misconduct of the employee'. In terms of Act 25 of 1914 the injured worker could choose between making a claim under the common law or making one against his employer under the statutory provisions.43 The worker could not however avail himself of both remedies. In 1917, the Act was extended to provide compensation for certain industrial diseases.

The Workmen's Compensation Act 25 of 191444 was repealed by the Workmen's Compensation Act 59 of 1934.45 (Workmen's Compensation Act, 1934) In the early form, the obligation was placed on the employer to pay the statutory compensation.46 There was however no guarantee that the employer would be able to pay this compensation. The next step was to make the purchase of insurance cover compulsory.47 The 1934 Act as amended, was in turn repealed and replaced by the Workmen's Compensation Act 30 of 1941,48 This Act was repealed and replaced by the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (Compensation of Occupational Injuries and Act, 1993). It is not clear why it was felt necessary to repeal and replace the previous Act, since the new Act is very similar to the old.

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41 Paul Kruger, in the days of the South African Republic, had considered passing Employer's Liability legislation.

42 Other consolidating Acts were promulgated in the Cape, Transvaal and Natal. For a commentary on this Act Barry *et al* (1914) can be consulted.

43 *Wagenaar v Thomas* 1930 AD 465 (*Wagenaar v Thomas*, 1930) indicated that the choice precluded a claim against the third party.

44 A commentary by Barry *et al* (1914) was published on the 1914 Act.

45 Commentaries on this Act were published by Nathan (1935) and Frank (1940).

46 S1(1) Act 25 of 1914.

47 Chapter VII Act 59 of 1934.

48 For a commentary on the Act consult Schaeffer & Heyne (1972) Workmen's Compensation in South Africa (Schaeffer & Heyne, 1972)

In so far as the risk manager is concerned, the worker's compensation is important and prevented much of the employers' liability crises which has occurred in many parts of the Western world.49 An injured workman cannot sue his employer but must seek compensation in terms of the mechanism set up in the legislation. It is often asserted that worker's compensation legislation was, specifically, passed to prevent employees from suing their employers.50 This view is however, clearly wrong, an anarchism. Other Acts are also relevant for purposes of compensation.51

In recent years the Compensation Fund has attracted criticism for generally from the same commentator.52

1.8 Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COID)

1.8.1 Overview of the Act[53]

The main purpose of this Act is to provide for compensation for disablement caused by occupational injuries or diseases sustained by employees in the course of their employment, or for death resulting from such injuries or diseases. The Act appears to be social welfare in nature but is in fact a form of personal accident insurance paid for by the employer.54

The Act is divided into 11 chapters and contains four schedules, as indicated in text box.

Chapter I	Definitions	s1
Chapter II	Administration of Act	s2-4
Chapter III	Compensation fund and Reserve Fund	s15-21
Chapter IV	Compensation for occupational injuries	s22-37
Chapter V	Claims for compensation	s38-46
Chapter VI	Determination and calculation of compensation	s47-64
Chapter VII	Occupational diseases	s65-70
Chapter VIII	Medical aid	s71-79

49 Vivian (1988: 29)

50 Robert W Vivian 'Workmen's compensation law doesn't protect bosses', *Business Report* Letters September 14, 2002 (Vivian, 2002).

51 Silicosis Act 47 of 1946 (Silicosis Act, 1946).

52 Terry Bell 'System of compensation is mired in incompetence', *Business Report* February 2, 2003 (Bell, 2003a); Terry Bell 'Time to scrap Workmen's Compensation Act', *Business Report* October 31, 2003 (Bell, 2003b); Terry Bell 'Compensation fund in state of disarray', *Business Report* May 14, 2010 (Bell, 2010).

53 Amended by Compensation for Occupational Diseases Amendment Act 61 of 1997.

54 Although the levy is paid by the employer, this does not mean that the incidence of the cost falls on the employer. The levy is part of the labour cost and should been seen as a form of compulsory personal accident insurance, the cost of which is part of the labour cost but paid for by the employer.

Chapter IX	Obligation of employers	s80-89
Chapter X	Legal procedures	s90-93
Chapter XI	General	s94-101

Schedule 1-4

Chapter I deals with definitions and the application of the Act. Chapter II deals with administrative issues. Chapter III deals with the establishment of the accident and reserve funds. Chapter IV deals with the right to compensation. Chapter V deals with the amount of and method of determining the compensation payable while Chapter VI deals with the requirements of giving notice of accidents, lodging of claims and Chapter VII with occupational diseases. Chapter VIII deals with medical aid to the injured employee. Chapter IX, deals with the rendering of wage returns by employers and the levying and recovery of assessments. Chapter X specifies certain legal procedures.

The first schedule deals with the percentage of disablement for various injuries while the second schedule specifies the disease which attracts compensation in various industries. It is not intended to discuss the Act in detail but only to deal with some of the provisions which are more commonly encountered.

1.8.2 s29 - Who pays the compensation?

In terms of s29 compensation is payable to any employee entitled thereto by:

- the employer individually liable;55
- the commissioner56 from the accident fund;57 or
- a mutual association.

The employer individually liable is defined in the Act to mean an employer who in terms of s84(1)(a) is exempt from paying assessments to the compensation fund. This class of employer generally includes the provincial administration, government, exempted local authorities. Judging by the number of reported accidents the employer individually liable is the exception and compensation is generally payable by the commissioner from the accident fund. Exemption is permitted for mutual funds in terms of s84(1)(b) and

55 The employer individually liable is defined in terms of 1 of the Act to mean an employer who in terms of s84(1)(a) is exempt from paying assessments to the compensation fund. The employer individually liable is in turn indemnified by a mutual fund.

56 In terms of s1 of COID the commissioner is defined as the Compensation Commissioner appointed in terms of s2(1)(a) of the Act.

57 McKerron R (1971,101), in what was for many years the leading text book on the law of delict, incorrectly states ‘By this Act [the 1941 Act] an employer is made liable to pay compensation is payable to a workman in his employ for any personal injury sustained ...’ The employer (other than in the case of the employer individually liable) does not pay the compensation to employee but contributes to the various funds one of which in turn is responsible to pay the compensation.

refers to a mutual such as the Rand Mutual Assurance Company in the mining industry and a similar arrangement, the Federated Employers' Mutual Assurance Company Limited in the building industry.

Generally compensation is payable by the commissioner from the compensation fund. In the remainder of this chapter, for the sake of simplicity, reference will be made only to the commissioner and the compensation fund but it must be borne in mind the same usually applies to the employer individually liable. The commissioner reports on the accidents from all funds and not only on those paid from the compensation fund.

S29 differs from its predecessor in an important respect that it lists the mutual association as a body responsible to make compensation payments. This addition is a source of confusion.58

1.8.3 s16 - Compensation and reserve funds

Compensation is payable from the compensation fund established in terms s15 of the Act. The fund is financed mainly out of contributions paid by the employers who fall under the provisions of the Act. Employees are not required to contribute toward the fund.59 The purposes for which the fund can be applied are set out in s16. The most important purpose of the fund is to pay compensation and the medical aid costs60 to and on behalf of employees entitled to benefits under the Act.

In terms of s16(2)a the commissioner may appropriate the surplus from the compensation fund to the reserve fund. The surplus indicated above is accordingly transferred via an appropriation account to the reserve fund. Various other expenses are also appropriated including a contribution to the National Occupational Safety Association (NOSA).

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58 See *Rand Mutual Assurance Co Ltd v Road Accident Fund* 2008 6 SA 511 SCA (*Rand Mutual v Road Accident Fund*, 2008).

59 Although employees do not pay the levies the cost of the levy is still a labour cost. If the employer did not pay the levy, the employee would have to purchase his own personal accident insurance to deal with the risk. The additional cost of this personal accident policy would be passed onto the employer as an increased salary.

60 Workers' compensation medical costs have escalated dramatically. This is not confined to South Africa. In a study produced for the Minnesota Department of Labour and Industries (1990) it was found that workers' compensation medical expenditures may be more than twice those for similar treated injured persons, outside of the workers' compensation system. For a discussion of this report consult LC Baker and AB Krueger 'Twenty-Four-Hour Coverage and Workers' Compensation Insurance' 9 *Health Affairs* 271-281 (Baker & Krueger, 1993); LC Baker and AB Krueger 'Evidence on Price Discrimination in Workers' Compensation Medical Care' Working Paper, Princeton University (Baker & Krueger, n.d.); David L Durbin, Dan Corro and Nurhan Helacian 'Workers' Compensation Medical Expenditures: Price v Quantity' 1996 63 1 *Journal of Risk and Insurance* 13-33 (Durbin, Corro, & Helacian, 1996).

1.8.4 s22 - Right of employees to compensation

The injured employee is entitled to a statutory right of compensation61 by virtue of s22(1) which reads:

If an employee meets with an accident resulting in his disablement or death, such employee or the dependants of such employee shall, subject to the provisions of this Act be entitled to the benefits provided for and prescribed in this Act.

In order to bring a claim under the purview of this section it must be shown that (1) an employee (2) has (2) an accident (3) resulting in his disablement or death. Negligence or fault on the part of the employer or anyone else is not a requirement for compensation. Contributory negligence on the part of the employee will not preclude his claim for compensation. Most of the above keywords are defined in the Act and have been judicially interpreted.

1.8.4.1 ... employee ...

Employee is defined in the Act. The definition contains a general part and then lists a number of specific persons62 who are specifically included as employees. The section continues to enumerate situation where the person is not an employee. The essential part, of the general part of the definition of employee reads as follows:

> (a) 'employee' means any person who has entered into or works under a contract of service ... with an employer, whenever the contract is express or implied or oral or in writing ...

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61 The employee is entitled to compensation not damages. The Apportionment of Damages Act 34 of 1952 does not apply *Grace v Workmen's Compensation Commissioners* 1967 4 SA 137 T (*Grace v Workmen's Compensation Commissioners*, 1967).

62 If an unborn child (this is an issue where a pregnant woman is employed and the unborn child is injured) is injured an issue which arises is, is this unborn child an employee for purposes of worker's compensation? The position of injuries sustained by unborn children has been considered by the American courts. In 1989 the Court of Appeal in *Bell v Macy's California* held that worker's compensation provides the exclusive remedy for the unborn child, injured when their mother is injured at work. However in 1997 in *Snyder v Michael's Stores Inc* the state Supreme Court disagreed ruling that the exclusive remedy did not apply to the unborn child. See 'Employers exposed to suits by children injured in the womb' 1997 November, 3 *Business Insurance* ("Employers exposed to suits by children injured in the womb," 1997). It is unlikely that the South African courts would regard the unborn child as an employee for purposes of worker's compensation.

Year	No of accidents reported		
	Accident Fund	Exempt Employers	Total Number of accidents
1996/97	242 782	23 377	266 159
1997/98	261 841	28 111	289 952
1998/99	244 370	24 889	269 259
1999/00	220 753	21 373	242 126
2000/01	202 299	21 316	223 615
2001/02	253 666	26 965	280 631
2002/03	210 020	20 254	230 274
2003/04	217 680	19 853	237 533
2004/05	201 003	17 870	218 873
2005/06	219 399	18 581	237 980
2006/07	196 172	17 054	213 226

Table Number of reported accidents

Source: Various Workmen's Compensation Commission Reports

The essential part of this general definition, contract of service, accords with the usual notion of what constitutes a contract of employment. The contract of service was well known in Roman Law as *locatio conductio operarum* [the letting and hiring of services]. This contract must be contrasted with that of the independent contractor, who is not an employee. The independent contractor is usually hired to execute some or other specific project or work. This contract was also well known in Roman Law as the *locatio conductio operis* [the letting and hiring of work].

Specific persons included in the definition of employee are:

(i) a casual employee if employed for purposes of the employer's business;

(ii) a director or member of a body corporate who has entered into a contract of service or of apprenticeship or learnership with the body corporate, in so far as he acts within the scope of his employment in terms of such contract;

(iii) a persons provided by a labour broker against payment to a client for the rendering of a service or the performance of work, and for which service or work such person is paid by the labour broker;

(iv) in the case of a deceased employee, his dependants, and in the case of an employee who is under disability, a curator acting on behalf of that employee.

The Act contains a number of exceptions. These include:

(i) a person ... performing military service or members of the South African Police, in term's of the Defence Act 55 of 1957 and Police Act 7 of 1958 respectively, subject to certain conditions;

(ii) a domestic employee employed as such in a private household;63

An employee, is not limited to persons who are employed to work in industry or factories, industries where one would expect to encounter personal injuries. What is required is that a contract of [service] employment should exist. Therefore persons who are employed in shops and offices, universities, etc, are all examples of employment. Even ministers of religion may be employees and hence entitled to benefits in terms of the Act.

The definition of employee does not limit employees to those cases where the levy or 'premium' is paid. The right to compensation which is provided by the Act is not the same as an insurance. An employee is entitled to compensation even if the employer did not pay the assessment. The employee has a statutory claim for compensation under the Act which is neither contractual nor delictual.

S89 Mandators and contractors

As indicated it is often important to determine if the injured person is an employee. A practical situation where this is important is where the person works or an independent contractor. An independent contractor employed in terms of the *locatio conditio operis* is not an employee. This may have a number of important consequences. The injured person is not entitled to compensation because he is not an employee (he may naturally be an employee of the independent contractor and hence entitled to compensation because of this contract). The principal is not generally vicariously liable for the acts of the independent contractor. There is no easy test to determine if a person is an employee.64 Employers often use contractors to complete specific projects. It is possible that one of the employees of the contractor is injured and seeks compensation. This position is governed in part by S89 of the Compensation for Injuries and Occupational and Diseases Act which deals with Mandators and Contractors and reads as follows:

(1) (a) If a person (the mandator) in the course of or for the purposes of his business enters into an agreement with any other person (the contractor) for the execution by or under the supervision of the contractor of the whole or any part of any work undertaken by the mandator, the contractor shall, in respect of his employees employed in the execution of the work concerned, register as an employer in accordance with the provisions of this Act and pay the necessary assessments.

(b) If a contractor fails so to register or pay any assessment, the said employees of the contractor shall be deemed to be the employees of the mandator, and the mandator shall pay the assessments in respect of those employees.

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63 In *Van Vuuren v Pienaar* 1941 TPD 122 (*Van Vuuren v Pienaar*, 1941) an assistant matron in a school hostel was regarded as a domestic servant. The place where the employee lives does not matter in determining if the person is a domestic servant, *Stuttaford v Batty's Estate* 1917 CPD 639 (*Stuttaford v Batty's Estate*, 1917).

64 *Smit v Workmen's Compensation Commissioner* 1979 1 SA 51 A (*Smit v Workmen's Compensation Commissioner*, 1979); *Colonial Mutual v MacDonald* 1931 AD 412 (*Colonial Mutual v MacDonald*, 1931); *Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB* 1976 4 SA 446 A (*Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB*, 1976).

(2) If a mandator has paid an assessment or compensation for which he would not have been liable but for the provisions of subsection (1), such mandator may recover that assessment or compensation from the contractor.

(3) If a mandator has in terms of this section paid an assessment or compensation to the commissioner, he may set off the amount so paid by him against his debt to the contractor.

(4) Notwithstanding the provisions of this section, the commissioner may recover compensation from the contractor instead of from the mandator, and if the full amount cannot be recovered from the one, the shortfall can be recovered from the other.

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(5) A mandator shall not be liable in terms of this section in respect of any accident which happened at a place which is not on or about the premises on which the mandator undertook to execute the work, or which is not otherwise under his control or management.

1.8.4.2 ...meets with an accident ...

Accident is defined to mean:

'an accident arising out of and in the course of the employee's employment'.65

This definition does not shed much light on the meaning of accident, per se but rather limits the concept of accident (1) to accidents which arise out of and in the course of employment and (2) result in a personal injury. The word accident is used in a number of insurance policies and in other contexts. The courts have often had to interpret the meaning of an accident and it is important when doing so, to interpret the concept in the context that it was used.

The meaning of an accident, within the worker's compensation and employment context, must be considered.66 In *Innes v Johannesburg Municipality* 1911 TPD 12 at 16 (*Innes v Johannesburg Municipality*, 1911) Bristow J relying on English law stated:

65 *Urquhart v Compensation Commissioner* 2006 1 SA 75 at 77E-F (*Urquhart v Compensation Commissioner*, 2006)

66 See also *Griessel NO v SA Myn en Algemene Assuransie Edms Bpk* 1952 4 SA 473 T (*Griessel NO v SA Myn en Algemene Assuransie Edms Bpk*, 1952)

I think the word 'accident' is used in the ordinary popular sense. It cannot indeed be supposed to have been used in any other, for it is not a technical term and no definition of it is given. Now, as popularly used, the word does not admit of definition, for the reason that it has no clearly defined meaning... In England the definition, or rather, criterion, given by Lord Mac Naughton in *Fenton v Thorley* 1903 AC 443 at 448 (*Fenton v Thorley*, 1903) has been generally accepted, according to which "accident" in the popular sense denotes 'an unlooked for mishap or an untoward event which is not expected or designated.' and I am content to accept this, provided that it is clearly understood that it is a test rather than a definition. ... Now it seems to me that the 'mishap' or 'event' which constitutes an 'accident' must be a specific event, the nature of which and the time, place and circumstances at and under which it happened, admit of definite proof.

The important part of the quotation is it the accident must be a specific event the nature of which, time and place and circumstance can be ascertained.

In *Briesch v Geduld Proprietary Mines Ltd* 1911 TPD 707 at 722 (*Briesch v Geduld Proprietary Mines Ltd*, 1911) Smith J added to this opinion' 'It is also, I think, established that 'accident' does not necessarily denote agency external to the injured person.' In *Nicosia v Workman's Compensation Commissioner* 1954 3 SA 897 T at 900 (*Nicosia v Workman's Compensation Commissioner*, 1954) the court summarised an 'accident' to mean:

the injury must be caused by some untoward or unexpected event, capable of definite ascertainment as to the nature, time and place, but need not necessarily be any agency external to the injured workman.

Injured employees receive compensation under circumstances in which, given the normal meaning of the word, it is difficult to see that an accident (or disease) has occurred. Thus for example the compensation is now payable for noise induced hearing loss and repetitive strain injuries.

Intentional acts

Claims are also paid where employees are injured as a result of intentional acts, sometimes criminal acts. In *Worker's Compensation Commissioner v FA Stewart (Pvt) Ltd* 1991 3 SA 830 ZS (*Worker's Compensation Commissioner v FA Stewart (Pvt) Ltd*, 1991) in Zimbabwe a farm manager was murdered in a hold-up. The court agreed he died in an accident.

1.8.4.3 ... out of and in the course of employment ...

The next part of the definition of an accident to be considered is the phrase out of and in the course of employment.67 This limits the normal meaning of accident to events which arise out of and in the course

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67 The phrase "out of and in course of employment" has been subject to much discussion, much of which is difficult to reconcile; see *Minister of Justice v Khoza* 1966 1 SA 410 A at 417 and 419 (*Minister of Justice v Khoza*, 1966); *Board of Management of Trim Joint District School v Kelly* 1914 AC 667 at 682 (*Board of Management of Trim Joint District School v Kelly*, 1914) of employment. This phrase has been used for a long time and the tendency is for the courts to interpret it very broadly in line with the court's understanding of the social purpose of the worker's compensation legislation. It has been accepted for a long time that the Act should be beneficially interpreted.68 As a general principle, therefore, the phrase should be broadly interpreted, where possible, to ensure in case of doubt that the injured person receives compensation. In *Davis v Workmen's Compensation Commissioner* 1995 3 SA 689 C at 694F-G (*Davis v Workmen's Compensation Commissioner*, 1995) the court noted:

[t]he policy of the Act is to assist the workmen as far as possible. ... The Act should therefore not be interpreted restrictively so as to prejudice a workman if it is capable of being interpreted in a manner more favourable to him.69

The worker's compensation provides cover for persons injured out of and in the course of their employment, it does not cover person not acting in the course of employment. Clearly there may be a grey area between whether the accident arose out of and in the course of employment or not and problems of interpretation and fact arise. For example when the car bomb exploded in Church Street, Pretoria in 1983 the issue arose were those injured still acting in the course of their employment. The bomb exploded as employees were leaving Air Force Headquarters, killing nineteen people and injuring more than 100 others.70 Were employees who were leaving the premises entitled to compensation? The people who were leaving the building had stopped work for the day and thus the incident did not arise out of or in the course of employment. The injured persons did not receive compensation. The case of Neville Clarence at the time an Air Force officer who was blinded, received wide publicity since he did not receive compensation.

If the Act applies, then the employee loses his right to sue for damages. The court would have to bear this in mind, in coming to a decision on specific cases. In *Kau v Fourie* 1971 3 SA 623 T (*Kau v Fourie*, 1971) an employer was sued having seriously assaulted the employee and tried to raise the defence that in terms of the worker's compensation legislation no action could be brought against him. The court ruled that injury caused by the assault did not fall under the scope of the act. Hence the employer could be sued.

In general not many problems arise with the phrase 'out of and in the course of employment' since the vast majority of persons who submit claims are clearly injured by an event which does arise out of and in the course of their employment. Problems occasionally arise at the extreme limits of the concept. This

68 *Bist v L&SW Rly Co* 9 WCC; 1907 AC 209 (*Bist v L&SW Rly Co 9 WCC*, 1907)

69 See also *Williams v Workmen's Compensation Commissioner* 1952 3 SA 105 C at 109C (*Williams v Workmen's Compensation Commissioner*, 1952) and *Urquart v Compensation Commissioner* 2006 1 SA 75 at 84 B (*Urquhart v Compensation Commissioner*, 2006).

70 *The Star* 1996/08/14 R Brand 'Blinded ex-officer's struggle to get Air Force compensation' (Brand, 1996).

usually arises where the employee is mugged, murdered, injured by a fellow employee who is 'playing the fool', or injured as a consequence of his own serious and wilful misconduct71 or gross negligence.72

The Act clarifies two aspects involving the case of employment, where the employer provides transport and mutual aid operations.

COID regulates a number of situations where it is not clear that the accident occurred in the course of employment. S22(5) deals with the situation where the employer provides transport to convey employees to and from work.73 The section reads:

For the purposes of this Act the conveyance of an employee free of charge to or from his place of employment for the purposes of employment by means of a vehicle driven by the employer himself or one of his employees and specially provided by his employer for the purpose of such conveyance, shall be deemed to take place in the course of such employee's employment.

Other situation where a dispute may arise, whether the accident arose in and through the scope of employment is where an employee forms part of a 'mutual aid' agreement. A number of companies enter into agreements that should an emergency take place, such as a fire, the various companies in the area will assist each other. In order to be prepared the employees of the companies get together before hand in training sessions. It could be argued under these circumstances that where employees are injures this is not in and through the course of employment. The Act was amended to cater for this situation. It is dealt with in terms of s25 of COID, which reads as follows -

If an employee meets with an accident -

(a) while he is, with the consent of his employer, being trained in organised first aid, ambulance or rescue work, fire-fighting or any other emergency service:

(b) while he is engaged in or about his employer's mine, works or premises in organised first aid, ambulance or rescue work, fire-fighting or any other emergency service:

(c) while he is, with the consent of his employer, or engaged in any organised first aid, ambulance or rescue work, fire-fighting or any other emergency service on any mine works or premises other than his employer's,

such accidents shall, for the purposes of this Act, be deemed to have risen out of and in the course of his employment.

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71 *Vermeulen v Heyne* 1913 AD 542 (*Vermeulen v Heyne*, 1913)

72 As to whether or not drunkenness constitutes "gross carelessness" see *Sanders v Eddy Brothers* 1912 AD 558 (*Sanders v Eddy Brothers*, 1912). For the disregard of safety rules by an electrician consult *Van Breda NO v Victoria Falls & Transvaal Power Ltd* 1916 AD 325 (*Van Breda NO v Victoria Falls & Transvaal Power Ltd*, 1916).

73 Whether commuting accidents arise out of and in the course of employment is a perennial problem, see Cane (1993:279)

1.8.4.4 .. disablement or death...

Disablement or death in the Act should be read in conjunction with the definition of accident: "resulting in a personal injury, illness or the death of the employee". The Act provides compensation for personal injuries which is usually equated to bodily injury. The Act does not cover loss for material damage. Should for example a motor vehicle accident take place at a workplace damaging an employee's motor car, the fund will not provide compensation for the cost of repairs to the car. As a general rule the question of whether or not an employee has suffered an injury does not pose a problem because when the employee suffers the injury this is apparent to all concerned. Two aspects have arisen which require some attention. Firstly diseases and secondly the employee suffering what is referred to by the layman as a nervous breakdown.

Post Traumatic Stress Disorder - taking photographs

Two types of claims are admissible under the provisions of the Act; injuries and diseases. An issue which arises is whether or not claims for psychiatric injury are compensatable. In delict the court has recognised that the nervous system is part of the body and thus injury to the nervous system constitutes bodily injury. A claim for psychiatric injury in terms of worker's compensation however is a statutory claim and not a delictual claim. If it is to succeed it must be brought under the purview of the legislation. Two obvious issues arise. Firstly, did the employee suffer personal injury as required by the Act. Since the courts decided psychiatric injury constitutes bodily injury this leans to the interpretation that it will also be a personal injury. There is still an interpretational matter. When the Act was originally drafted psychiatric injury was not accepted to be covered. Secondly is the accidental requirement present with the psychiatric injury claim. Where a person witnesses and accident and suffers post-traumatic stress disorder it is met, since it is the accident. There have been claims of this nature which have succeeded. In *Urquart v Compensation Commissioner* 2006 1 SA 75 (*Urquhart v Compensation Commissioner*, 2006) a press photographer suffered a breakdown on the 28th May 1995 which he alleged was caused from having to take traumatic photographs and the 'last straw which broke the camel's back was an incident on the 3 June 1994 when he was assaulted while photographing a fraud suspect. On the question whether this constitutes a personal injury the court ruled in his favour:

> The law has long recognised that for purposes of compensation or damages a psychiatric disorder or psychological trauma is as much a personal injury as a cracked skull...

In *Odayar v Compensation Commissioner* 2006 (6) SA 202 N (*Odayar v Compensation Commissioner*, 2006) the court considered if Post Traumatic Stress Disorder constituted an occupational disease in terms of COID. This matter is considered in greater detail infra.

Diseases

Diseases as a personal injury

The Act specifically deals with compensation for diseases but it is pointed out that sometimes a disease is a personal injury. This is the case when an accident cases the disease. So in *Brintons Ltd v Turvey* 1905 AC 230 (*Brintons Ltd v Turvey*, 1905) where a person was infected by anthrax caused by the accidental lighting of a bacillus from infected wool this was treated as personal injury by accident.

s65 - Compensation for occupational diseases in terms of COID

Compensation for occupational diseases is governed by s65 of the Act which reads

> 65(1) Subject to the provisions of this Chapter, an employee shall be entitled to the compensation provided for and prescribed in this Act if it is proved to the satisfaction of the commissioner-
>
> (a) that and employee has contracted an occupational disease; or
>
> (b) that an employee has contracted a disease other than an occupational disease and such disease has arisen out of and in the course of his employment.

Occupational disease is defined to mean 'any disease mentioned in the first column of Schedule 3 arising out of and contracted in the course of an employee's employment'. The statutory notion of an occupational diseases is thus not any disease contracted as a consequence of employment but only those mentioned in Schedule 3. A person who contracts a disease other than the statutory notion of an occupational disease is still entitled to compensation in terms of s65(1)(b) if that person can prove the requirements of this subsection. The distinction between the diseases mentioned in s65(1)(a) and (b) is important. If the employee contracts an occupational disease (s65(1)(a)) and was employed in any work mentioned in Schedule 3 it is presumed that the disease arose out of and in the course of his employment.74 By implication if the disease is that mentioned in s65(1)(b) the burden rests on the employee to prove that the disease arose out of and in the course of his employment.

Diseases may take years or even decades to become manifest. Prescription then becomes an important issue. Once it is known that the employee has contracted the disease, or to use the concept used in the Act the disease has 'commenced'75, the employee loses his right to the benefits unless the disease is brought to the attention of the commissioner or employer or mutual association concerned.76

Once the it is shown that an employee is entitled to compensation for a disease then essentially the disease is equated to an accident and the provisions regarding compensation for accidents apply to the claim for compensation for the disease.77

An occupational disease may for purposes of the legislation be equated to an accident, but it is of course not an accident. An accident takes place at a specific place and point of time. A disease is contracted over a period of time. This gives rise to a number of problems. The matter of when the 'accident' took place was an issue in *Workmen's Compensation Commissioner v Van Zyl* 1995 1 SA 708 N (*Workmen's*

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74 s66

75 s65(5) clarifies what is meant by 'commencement'. It is deemed to be the date on which a medical practitioner first diagnoses the disease or an earlier date if that date is more favourable to the employee.

76 s65(4).

77 s65(6).

Compensation Commissioner v Van Zyl, 1995) and on appeal 1996 3 SA 757 A. Mr Van Zyl was employed from 25th April 1967 to April 1991 when he was retrenched. During his employment he was exposed to chrome dust which is an irritant to the respiratory system and causes ulceration. This disease was included as an industrial disease in terms of the Second Schedule of the subsequently repealed Workmen's Compensation Act 30 of 1941. In 1972 he had been diagnosed as having an ulcer which caused irreparable damage. Mr Van Zyl's condition deteriorated continuously from 1972 to 1985 when Mr Van Zyl was promoted and was no longer exposed to chrome dust. The issue to be determined what was the date, for the purposes of the Act, of the commencement of the disablement? The court decided that it was 1st January 1985, the date from which he was promoted as thus no longer exposed to the chrome dust. This was clearly an interpretation very much in favour of the employee and in coming to this conclusion the court endorsed the view of Friedman JP in *Davis v Workmen's Compensation Commissioner* 1995 3 SA 689 C (*Davis v Workmen's Compensation Commissioner*, 1995):

The policy of the Act is to assist the workman as far as possible. See *Williams v Workmen's Compensation Commissioner* 1952 3 SA 105 C at 109C (*Williams v Workmen's Compensation Commissioner*, 1952). The Act should therefore not be interpreted restrictively so as to prejudice a workman if it is capable of being interpreted in a manner more favourable to him.

As of 1st January 1993 occupational asthma was added to the Second Schedule of the Workmen's Compensation Act 30 of 1941 which was an issue and the case of *Jooste v Compensation Commissioner* 1971 SA 83 C (*Jooste v Compensation Commissioner*, 1971). Ms Jooste had contracted asthma before this date and sought compensation but the Commissioner contended that only employees who contracted asthma after this date was entitled to compensation. This view was rejected by the court.78

Compensation for occupational diseases can also be paid in terms of the Occupational Diseases in Mines and Works Act 78 of 1973 (Occupational Diseases in Mines and Works Act, 1973) but where it is the person may not also be compensated in terms of COID.79

1.8.5 ... entitled to the benefits provided for and prescribed in this Act ...

Once the requirements for compensation set out in s22 has been met the injured employee is entitled to compensation. It will be noted that there is no requirement that the assessment be paid in order that compensation be paid.80 An exception to this general position may be where an employee of an employer who carries on business chiefly outside of the Republic meets with an accident while temporarily employed in South Africa. This is governed by s23(3)(a) of COID which reads:

If an employer carries on business chiefly outside of the Republic and an employee of his ordinarily employed outside the Republic meets with an accident while temporarily employed in the Republic,

78 Jooste v Compensation Commissioner 1997 1 SA 83 CC (*Jooste v Compensation Commissioner*, 1971).

79 See page

80 The position when the assessment is not paid is dealt with in terms of s87 of COID.

such employee shall not be entitled to compensation unless the employer has previously agreed with the commissioner that such employee shall be entitled to compensation and, where applicable, has paid the necessary assessments in respect of him..

1.8.6 s35- Liability of the employer

The Compensation Fund is financed out of compulsory contributions levied on and paid by the employer; compensation is funded by the employer. Neither employees81 nor the state contributes to the compensation. The employer is relieved of any civil liability by virtue of s35 of the Act,82 which reads:

> (1) No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.
>
> (2) For the purposes of subsection (1) a person referred to in section 56(1)(b), (c), (d) and (e) shall be deemed to be an employer.

Neither an injured employee or one who has contracted an occupational diseases nor that employee's dependants is entitled to recover damages from the employer but must be compensation in terms of the legislation.83 The employee is not however precluded from claiming from a third party, providing the third party is not persons defined by s56(1)(b),(c) (d) or (e).84

Attempts have been made to declare s35 as being unconstitutional. In *Mlomzale v Mizpha Boerdery (Pty) Ltd* 1997 1 SA 790 C (*Mlomzale v Mizpha Boerdery (Pty) Ltd*, 1997), an action defended by virtue of s7 of the Workmen's Compensation Act 30 of 1941, the predecessor of the abovementioned s35 where it was alleged that s7 was unconstitutional and the court was asked to refer the matter to the constitutional court. Since the accident occurred prior to the enactment of the constitution the matter was non-suited. The court nevertheless expressed the opinion that (at 794C) '[i]t is by no means clear that the provisions of s7 constitute an unjustifiable infringement of the plaintiff's rights.' The question of whether or not s35 is unconstitutional was later considered in Jooste v Score Supermarket Trading (Pty) Ltd (Minister of

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81 It can be argued, as economists usually do, that the cost is a labour charge and cost is borne by employees.

82 S57 was the corresponding section in Act 30 of 1941

83 *Petterson v Irvin & Johnson Ltd* 1963 3 SA 255 K (*Petterson v Irvin & Johnson Ltd*, 1963); *Bhoer v Union Government & Another* 1956 3 SA 582 C (*Bhoer v Union Government & Another*, 1956); *South British Insurance Co v Harley* 1957 3 SA 368 A (*South British Insurance Co v Harley*, 1957); *Vogel v South African Railways* 1968 4 SA 452 O (*Vogel v South African Railways*, 1968); *Table Bay Stevedores v SAR&H* 1959 1 SA 386 A (*Table Bay Stevedores v SAR&H*, 1959).

84 In this regard s35 is much clearer that its predecessor s7.

Labour Intervening) 1999 2 SA 1 CC (*Susana Elizabeth Magdalena Jooste v Score Supermarket Trading (Pty) Limited*, 1999) where the constitutional court concluded that it was not unconstitutional.

A number of attempts have been made by employees to claim damages from employers despite the statutory limitation of employer's liability.85 In *Mankayi Thembekile v Anglogold Ashanti Ltd* 2011 (*Mankayi Thembekile v Anglogold Ashanti Ltd*, 2011) an employer in the mining industry was sued by an employee alleging he had contracted an occupational disease. The employee had received compensation in terms of the A. Occupational Diseases in Mines and Works Act 78 of 1973 but nevertheless sued the employer. The employer raised s35 of COID but the court ruled it did not prevent the employee from suing the employer. Occupational diseases in mines now appear to be gap in the system.

1.8.7 Benefits paid by the fund

The degree of compensation is not determined by the common law, but is specified by the Act itself.86 This makes the Act easier and less expensive to administer than the common law system where fault and quantum is determined by the courts. Compensation is however not overly generous and as already pointed out does not provide for pain and suffering.

1.8.8 s56 - Increased compensation

Some may feel that it is unjust for an employer to escape liability in those cases where the employer is negligent and the injured employee must accept smaller compensation in terms of the Act. S56 of the Act makes provision for increased compensation under certain circumstances where negligence or patent defects, is involved.87 The relevant portion of s56(1) reads:

> 56(1) If an employee meets with an accident or contracts an occupational disease which is due to the negligence-
>
> (a) of his employer;88

85 *Pettersen v Irvin and Johnson Ltd* 1963 3 SA 255 C (*Petterson v Irvin & Johnson Ltd*, 1963); *Mphosi v Central Board for Co-operative Insurance Ltd* 1974 2 SA 19 W (*Mphosi v Central Board for Co-operative Insurance Ltd*, 1974); *Mlomzale v Mizpha Boerdery (Pty) Ltd* 1997 1 SA 790 CPD (*Mlomzale v Mizpha Boerdery (Pty) Ltd*, 1997).

86 Chapter IV and Chapter VIII

87 The corresponding section in Act 30 of 1941 was section 43. Since the wording of s56 is almost identical to that of s43 the court will be guided by the interpretation of section 43. For a comment on s43 consult Benjamin (1987,15) 'Additional compensation for accidents at work : an under utilized remedy' 1987 8 1 ILJ 15 (Benjamin, 1987).

88 See *South African Railways v Estate Walton* 1940 AD 321 (*South African Railways v Estate Walton*, 1940), dealing with s5 of Act 59 of 1934. The liability of the employer does not include vicarious liability.

(b) of an employee charged by the employer with the management or control of the business or of any branch or department thereof;

(c) of an employee who has the right to engage or discharge employees on behalf of the employer;

(d) of an engineer appointed to be in general charge of machinery, or of a person appointed to assist such engineer in terms of any regulation made under the Minerals Act, 1991 (Act No. 50 of 1991); or

(e) of a person appointed to be in charge of machinery in terms of any regulation made under the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993),

the employee may, notwithstanding any provision to the contrary contained in this Act, apply to the commissioner for increased compensation in addition to the compensation normally payable in terms of this Act.

(2) For the purposes of subsection (1) an accident or occupational disease shall be deemed also to be due to the negligence of the employer if it was caused by a patent defect8989 in the condition of the premises, place of employment, equipment, material or machinery used in the business concerned, which defect the employer or a person referred to in paragraph (b), (c), (d) or (e) of subsection (1) has failed to remedy or cause to be remedied.

(3) ...

(4) (a) If the commissioner is satisfied that the accident or occupational disease was due to negligence as referred to in subsection (1), he shall award the applicant such additional compensation as he may deem equitable.

(b) The amount of such additional compensation together with any other compensation awarded in terms of Act shall not exceed the amount of the pecuniary loss which the applicant has in the opinion of the commissioner suffered or can reasonable be expected to suffer as a direct result of the said accident or occupational disease.

This section appears to have been introduced to overcome the defences of the previous century - no vicarious liability for acts of fellow-employees, *volenti non fit iniuria* defence and no-liability where there is contributory negligence. To overcome the refusal to recognise a general vicarious liability which included fellow employees, vicarious liability for vice-employers was introduced. The section thus

89 *Van Deventer v Workmen's Compensation Commissioner* 1962 45A 28 T (*Van Deventer v Workmen's Compensation Commissioner*, 1962).

introduces a limited form of vicarious liability. To overcome the defence of *volenti non fit iniuria* defence liability for patent defects was introduced.

... due to the negligence ...

No provision was inserted into this section to mitigate against the defence of contributory negligence since at the time contributory negligence was a general defence and no need existed to place the injured employee in a better position than the general public. The consequence is that contributory negligence remains a complete defence against the person, usually the injured employee who but for his negligence had the last opportunity90 to avoid the injury, who claims for increased compensation.91 The courts have interpreted the phrase due to the negligence coupled with the fact that the Act provided compensation and not damages to mean that compensation cannot be apportioned. In *Fred Saber (Proprietary) Ltd v Franks* 1949 1 SA 388 at 403 (*Fred Saber (Proprietary) Ltd v Franks*, 1949), while dealing with s43 of the previous Act, the judge said:

Before dealing with the facts, it is necessary to construe the 'due to' in s43 of the Workmen's Compensation Act. In legal language these words mean 'caused by' and consequently the enquiry under s43 is directed to ascertaining the cause of the accident ... If the accident was notwithstanding the negligence of the appellant, caused by the respondents own negligence or if it was caused by the combined negligence of the appellant and the respondent, the respondent is not entitled to increased compensation.

... negligence ... of his employer ...

Since the very purpose of s56 is to introduce a limited form of vicarious liability, when the Act refers to 'negligence of his employer' it cannot possibly refer to vicarious liability. Reference to 'negligence of his employer' refers to the personal negligence of the employer and not vicarious liability of the employer. It follows that the phrase cannot refer to a company since a company cannot be negligent, other than vicariously.

... or any branch or department thereof ...

The courts tended to interpret the previous equivalent section similar to s(1)(b) broadly. Thus a shift boss employed on a gold mine was held to be in charge of a department within the meaning of this section.92 A plate layer employed by the South African Railways, in charge of a length of railway line was held to

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90 The last opportunity rule was abolished with the apportionment legislation.

91 *Grace v Workmen's Compensation Commissioner and Another* 1967 4 SA 137 T (*Grace v Workmen's Compensation Commissioners*, 1967); *Table Bay Stevedores and Another v South African Railways and Harbours* 1959 1 SA 386 A (*Table Bay Stevedores v SAR&H*, 1959); *South African Railways and Harbours v South African Stevedores Services Co Ltd* 1983 1 SA 1006 A (*South African Railways and Harbours v South African Stevedores Services Co Ltd*, 1983); *Young v Workmen's Compensation Commissioner and Another* 1998 3 SA 1085 T at 1091 IJ (*Young v Workmen's Compensation Commissioner and Another*, 1998).

92 *Looyen v Simmer & Jack Ltd* 1952 4 SA 547 A (*Looyen v Simmer & Jack Ltd*, 1952). See also *Le Roux v SAR&H* 1954 4 SA 275 T (*Le Roux v SAR&H*, 1954).

be in charge of a department.93 Application for additional compensation is made to the commissioner and not against the employer, but the commissioner may increase the levy on the employers.94 In terms of s 56(4)(b) the amount of such additional compensation together with any other compensation awarded in terms of the Act shall in not exceed the amount of the pecuniary loss suffered by the applicant. Thus the applicant cannot recover non-pecuniary losses such as pain and suffering as part of the of additional compensation.

It should be recorded that over 300 000 accidents are reported each year and only 30 or so applicants are made for increased compensation.

1.8.9 s 36 Right of recovery from a third party

Accidents may arise in circumstances which create obligations by a third party, other than the employee's employer, to pay compensation to the employee. In these circumstances the employee may have a claim against the commissioner and also against the third party. Also since the commissioner may pay compensation, the possibility of the commissioner recovering amounts so paid to the employee, from the third party should be considered. S36 deals with this situation.95 The relevant portion of which reads as follows:

> S36 (1) If an occupational injury or disease in respect of which compensation is payable, was caused in circumstances resulting in some person other than the employer of the employee concerned (in this section referred to as the "third party") being liable for damages in respect of such injury or disease-
>
> (a) the employee may claim compensation in terms of this Act and may also institute action for damages in a court of law against the third party; and
>
> (b) the commissioner or the employer by whom compensation is payable may institute action in a court of law against the third party for the recovery of compensation that he is obliged to pay in terms of this Act.
>
> (2) In awarding damages in an action referred to in subsection (1)(a) the court shall have regard to96 the amount to which the employee is entitled in terms of this Act.

93 *SAR&H v Celliers* 1959 4 SA 31 T (*SAR&H v Celliers*, 1959).

94 s56 (7) & s85(2)

95 The corresponding section of Act 30 of 1941 was s8. The following cases can be consulted with regard to s8: *South African Railways & Harbours v South African Stevedores Services Co* 1983 1 SA 1006 A (*South African Railways and Harbours v South African Stevedores Services Co Ltd*, 1983); Blumenfeld (1983,261) 'Workmen's compensation: Third party liability' 1983 4 *ILJ* 261 (Blumenfeld, 1983).

96 The corresponding section of Act 30 of 1941 was s8 which was subject to judicial interpretation. In *Bonheim v South British Insurance Company Ltd* 1962 3 SA 259 A at 266 (*Bonheim v South British Insurance Company Ltd*, 1962) Ogilvie Thompson JA pointed out that the precise meaning of "shall have regard to" is not entirely clear, but assumed that they mean "deduct". See also *Klaas v*

(3) In an action referred to in subsection (1)(b) the amount recoverable shall not exceed the amount of damages, if any, which in the opinion of the court would have been awarded to the employee but for this Act.

(4) For the purposes of this section compensation includes the cost of medical aid already incurred and any amount paid or payable in terms of section 28, 54(2) or 72(2) and, in the case of a pension, the capitalized value as determined by the commissioner of the pension, irrespective of whether a lump sum is at any time paid in lieu of the whole or a portion of such pension in terms of section 52 or 60, and periodical payments or allowances, as the case may be.

This section deals with the rights of the employee and commissioner to recover from the third party. These two actions are now considered in greater detail.

1.8.9.1 s36(1)(a) - Recovery by the employee or dependants

Section 36(1)(a) makes it clear that the common law right of recovery of the employee or dependants against the third party is not interfered with. Section 36 does not however create any rights of recovery and the employee must look to the normal sources of obligations such as contract and delict to found the claim.

1.8.9.2 s36 - Recovery by the commissioner

Section 36 grants to the commissioner a statutory right of recovery. Some statutory bodies such as government departments may regard themselves as obliged to make such a recovery. It is for example common practice for the South African Police to seek recovery for amounts paid to injured policemen.

The manner in which s36 is applied can be illustrated by way of example. In the case of *South African Railways & Harbours v South African Stevedores Services Co* 1981 1 SA 353 D (*South African Railways & Harbours v South African Stevedores Services Co*, 1981) where an employee of the SAR&H was killed as a result of the joint negligence of the SAR&H and South African Stevedores Services Co. The SAR&H was an employer individually liable and was obliged to pay compensation to the amount of R13 287,72 to the widow of the deceased worker. The widow sued South African Stevedores Services Co and was awarded an amount of R20 300. From this amount, the amount previously paid by the SAR&H was subtracted and the widow received R7 012,28.

Union & South West Africa Insurance Co Ltd 1981 4 SA 562 A at 581A (*Klaas v Union & South West Africa Insurance Co Ltd*, 1981). *Senator Versekerings Maatskappy Bpk v Bezuidenhout* 1987 2 SA 361A (*Senator Versekerings Maatskappy Bpk v Bezuidenhout*, 1987), *Wille & another v Yorkshire Insurance Co Ltd* 1962 1 SA 183 D (*Wille & another v Yorkshire Insurance Co Ltd*, 1961), *Ngcobo v Santam Insurance Co Ltd* 1994 2 SA 478 T (*Ngcobo v Santam Insurance Co Ltd*, 1994); *Maarberg v Springs Mines Ltd* 1944 TPD 1 (*Maarberg v Springs Mines Ltd*, 1944).

1.8.9.3 Recoveries

The Table below ndicates the number of claims made and the aggregate amount recovered in terms of s36 by the commissioner. It is clear from this that s36 is frequently applied.

Year	Number of claims instituted	Total value of claims	Value recovered
1982/3			
1983/4	1 256	R2 514 076	R2 241 434
1984/5	1 150	R3 167 452	R2 500 198
1986/7	741	R2 928 363	R2 682 236
1987/8			
1988/9			
1989/0			
1990/1	1 172	R605 364	R5 448 350
1991/2	1 384	R11 937 000	R6 533 000

Source: Reports of the Workmen's Compensation Commissioner.

1.8.10 Dispute resolution

As indicated when introduced in the UK the system became bogged down with litigation and an administrative system was introduced to restrict the involvement of the courts, other than on clearly defined grounds. The workers compensation system was removed from the jurisdiction of the courts. The workers compensation dispute revolution mechanism is defined in terms of ss6, 7, 45, 46 and 90-93 of the Act. The High Court acts as a court of appeal (not a court of the first instance or a review court) and the court's terms of reference are set-out in s90(5). The Director-General may state a case for the High Court to decide on.

1.9 Occupational Diseases in Mines and Works Act 78 of 1973

The Compensation for Occupational Diseases and Injuries Act provides97 for compensation for occupational diseases in industry in general. An additional specific legislation also exists providing for compensation for occupational diseases contracted in controlled mines and works in the Occupational Diseases in Mines and Works Act 78 of 1973 (Occupational Diseases in Mines and Works Act, 1973). The issue of compensation of occupational diseases and this legislation has a long history. The Occupational Diseases in Mines and Works Act 78 of 1973 (ODMW) repealed and replaced98 the

97 Chapter VII (ss65-70).

98 s136 read together with the schedule to the Occupational Diseases in Mines and Works Act 78 of 1973.

previous Act, the Pneumoconiosis Compensation Act 64 of 1962. In terms of the current Act no person who has a claim to benefits under the Occupational Diseases in Mines and Works Act 78 of 1973 in respect of a compensatable disease, as defined in that Act, on the ground that the person is or was employed at a controlled mine or a controlled works shall be entitled to benefits under the Compensation of Occupational Injuries and Diseases Act.99 It was not clear that ODMWA specifically removes the common-law right of an employee to sue his employer for occupational diseases contracted in mines and works and compensated.100 It is possible that the right is removed in terms of s100101 which has the clear purpose of ensuring that employees are not doubly compensated in terms of compensatory laws. The question which needs to be resolved is that when the section refers to 'any other law' that this reference includes the common-law.

Compensatable disease is defined to mean:

(a) pneumoconiosis

(b) the joint condition of pneumoconiosis and tuberculosis;

(c) tuberculosis which, in the opinion of the certification committee, was contracted while the person concerned was performing risk work, or with which the person concerned was in the opinion of the certification committee already affected at any time within the twelve months immediately following the date on which that person performed such work for the last time;

(d) permanent obstruction of the airways which, in the opinion of the certification committee, is attributable to the performance of risk work;

(e) any other permanent disease of the cardio-respiratory organs which in the opinion of the certification committee is attributable to the performance of risk work; or

(eA)102 progressive systemic sclerosis which, in the opinion of the certification committee, is attributable to the performance of risk work; or

(f)103 any other disease which the Minister , acting on the advice of a committee consisting of the director and no fewer than three other medical practitioners designated by the Minister, has, subject to the provision of subsection (2), by notice in the Gazette declared to be a compensatable disease and which, in the opinion of the certification committee, is attributable to the performance of risk work at a mine or works;

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99 s100(2) of the Occupational Diseases in Mines and Works Act 78 of 1973. *Jiya v Durban Roodepoort Deep Ltd* 2000 1 SA 181 W (*Jiya v Durban Roodepoort Deep Ltd*, 2000).

100 The matter was settled.

101 Jiya v Durban Roodepoort Deep Ltd 2000 1 SA 181 W (*Jiya v Durban Roodepoort Deep Ltd*, 2000).

102 Para.(eA) inserted by s.1 of Act 27 of 1974.

103 Para. (f) substituted by s. 2 of Act 45 of 1975.

A Mines and Works Compensation Fund was established in terms of s61 of the ODMW Act. Compensation is funded by contributions from owners of controlled mines[104] and controlled works.[105]

This fund has become, in common with many state departments dysfunctional. The Risk Committee which is supposed to be established in terms of the Act has not regularly met for several years. Mines and Works which should have been declared controlled mines and works have not been classified. The 2003 actuarial evaluation indicated that the fund had a R610 m deficit and it is not clear how this deficit will be resolved.[106]

In *Mankayi Thembekile v Anglogold Ashanti Ltd* 2011 (*Mankayi Thembekile v Anglogold Ashanti Ltd*, 2011) the Constitutional Court ruled s35 of COID did not prevent and employee suing his or her employer where the person had received compensation in terms of Occupational Diseases in Mines and Works Act 78 of 1973.

104 Controlled mine and works are defined in terms of ss9 and 10 of Occupational Diseases in Mines and Works Act 78 of 1973.

105 S62.

106 'Chamber seeks ruling on fund shortfall', *Business Report* November 23, 2010 ("Chamber seeks ruling on fund shortfall," 2010).

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02-2: ROAD ACCIDENT FUND

Contents

1 PERSONAL INJURIES CAUSED BY MOTOR VEHICLE ACCIDENTS

1.1 Comment on the risk

Each year over 700 000 motor vehicles are involved in accidents on South African roads and nearly 10 000 persons die as a consequence. The courts routinely make multimillion rand awards in favour of persons injured in motor accidents. Motor accidents clearly pose a major threat to drivers, owners, users of motor vehicles, and users of roads. These accidents are extremely costly. An analysis of the expenditure of insurance companies indicates that about fifty percent of the South African insurance industry is devoted, in one way or another to paying claims associated with motor accidents.

1.2 Historical development of motor accident funding legislation

Whether or not persons who are injured in motor accidents should be treated preferentially to persons who are injured in any other type of accident has been a matter of debate in most parts of the world as well as in South Africa. Most countries, having first introduced workers' compensation legislation, continued and introduced legislation to deal with compensation for persons injured as a consequence of motor vehicle accidents. South Africa followed this international example. The first Act was the Motor Vehicle Insurance Act 29 of 1942 (Motor Vehicle Insurance Act, 1942) as amended. In terms of this Act, the purchase of third party liability became compulsory and could be bought from any insurance company, which sold this type of insurance, at a premium determined by a competitive market. In 1964 the Act was amended to authorise the Minister of Transport to set the premiums. When an increase in premiums became necessary the insurers approached the Minister to approve a twenty percent increase, he refused and insurers withdrew from the market. The Minister entered into an agreement with a consortium of sixteen insurers to provide the compulsory insurance. The premiums thereafter remained static until the 30 April 1975. Static premiums exposed insurers to substantial losses which could be ameliorated via reinsurance and during 1966 the consortium reinsured the risk with a company formed specifically for this purpose, called the Motor Vehicle Assurance Fund. In 1969 the Act was amended to allow the Minister to take control of the MVA Fund. By 1972 the principal Act needed to be consolidated and hence the 1942 Act was repealed and replaced by the Compulsory Motor Vehicle Insurance Act 56 of 1972 (Compulsory Motor Vehicle Insurance Act, 1972). The Motor Vehicle Accidents Act 84 of 1986 (Motor Vehicle Accidents Act, 1986), in turn replaced the 1972 Act. It was also in terms of this Act that the funds for the fund were raised, for the first time, by means of a petrol levy. A problem of the time was to provide insurance in the various homelands. Each homeland, theoretically needed its own fund and it became clear that some way of co-ordinating the various funds was required. This was achieved when a new Act, The Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 (The Multilateral Motor Vehicle Accidents Fund Act, 1989) was then introduced.

The road accident compensation system has, for a long time, been a matter of concern and the operation of the legislation has been subject to numerous commissions of inquiry. The fund technically has been insolvent since 1982. This was a matter of concern and supervision of the fund was placed under the control of the Financial Services Board in terms of The Financial Supervision of the Road Accidents Fund Act 8 of 1993 (The Financial Supervision of the Road Accidents Fund Act, 1993). The Chief Executive Officer and Registrar of Insurance in his first report noted that urgent restructuring of the fund was required or the government would be faced with a financial disaster of huge proportions.

During these years no provision was made for an increase in outstanding claims. During 1987/88 year the provisions were actually written back. The accounts during that period to not comply with Generally Accepted Accounts Practices (GAAP) in that without the provisions the accounts did not correctly reflect the liabilities of the fund. Once allowance has been made for outstanding claims a more correct assessment of the financial position of the accident is as follows:

The fund has an accumulated deficit of R4.2 bn in 1994/95 financial year. No other piece of legislation has been subject to greater judicial attention than the legislation which deals with personal injury claims arising out of motor accidents. A formidable body of case law exists.

1.3 Road Accident Fund Act 56 of 1996

The prevailing legislation is the Road Accident Fund Act 56 of 1996 (Road Accident Fund Act, 1996) as amended. The most fundamental changes were introduced in terms of Act 19 of 2005 which came at the end of a very long process, took a long time to be implemented and is currently subject to a number of court challenges. The final status of the legislation is still unclear. The legislation obliges the fund, established in terms of this Act to compensate third parties for personal injury claims arising out of motor accidents which fall within the provisions of the Act and prohibits claims against persons who in such manner negligently cause injury to the so-called third party. The basis of the liability of the RAF is set out in s17 of the Act which reads:

1.3.1 S17(1) - Liability of the Fund and agents

(1) The Fund or an agent shall -

(a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;

(b) subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established,

be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee. Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum.

(1A)(a) Assessment of a serious injury shall be based on a prescribed method adopted after consultation with medical service providers and shall be reasonable in ensuring that injuries are assessed in relation to the circumstances of the third party.

(b) The assessment shall be carried out by a medical practitioner registered as such under the Health Professions Act (Act No 56 of 1974).

For a proper understanding of the liability of the RAF, s17 should be read in conjunction with other sections of the Act since the liability of the RAF is subject to a number of qualifications. In some cases, the liability is limited and in others excluded. S17 must in particular be read together with s19(a). If it is recalled that the origin of the Road Accident Fund Act is third party liability insurance, and indemnity insurance indemnifies the insured for amounts which the insured becomes legally liable to pay, then it is clear that a section is needed in the Act which makes it clear that the Road Accident Fund is only liable under those circumstances where the insured is legally liable. The Act itself does not create the liability. S19(a) is the section which has this objective in mind and reads:

The Fund or agent shall not be obliged to compensate any person in terms of s17 for any loss or damage-

(a) for which neither the driver nor the owner of the motor vehicle concerned would have been liable but for s21; or

The RAF is only liable to pay compensation if the liability of the driver, owner or servant of the owner is established on some other grounds, usually delict.

The various phrases in s17 are now considered.

1.3.1.1 ... agent ...

As indicated above, initially the RAF did not deal with claims, it was the reinsurer of the claims. Individual insurers covered the risk, and then a consortium of insurers, and after the fund was financed via the petrol levy, selected insurers were appointed as agents to handle claims. Increasingly dissatisfaction arose by the agents and increasingly the fund started taking over the handling of all claims, directly (more correctly through its appointed attorneys). It is now rare for an insurer to deal with road accident claims as the agent of the RAF although the legislation may appear to indicated that this is the case. The claims were allocated to the specified insurers depending upon the day on which the claim arose. Where the identity of the owner or driver of the vehicle which caused the claim was unknown, the RAF itself handled the claim. These are usually hit-and-run cases.

1.3.1.2 ... obliged to compensate any person (the third party) ...

The law often refers to a Third Party, as in this case. The concept of a third party is important for insurance purposes. The first and second parties usually refer to the parties who enter into a contract, in this case the insurance contract. Thus the insured and insurer who are the parties to the insurance contract are the first and second parties. In general terms the third party is the person who is injured through the negligent driving of a motor vehicle.

The phrase ‘any person’ is very broad and is indicative that the obligation of the RAF to compensate is not limited to the person who suffers bodily injury but includes persons who suffer loss as a result of the person who was injured. The phrase in brackets ‘... (the third party) ...’ appears to limit the meaning of ‘any person’ to exclude the owner who traditionally would have been the first or second party. However, the phrase in brackets should be construed as a convenient phrase and not a qualification of the phrase ‘any person’. The confusion can be illustrated. In the days when it was compulsory for the owner to purchase insurance cover it could happen that he was negligently injured by a person during his (the owner’s) own car. Under these circumstances, in terms of the traditional meaning of third party, the owner would not be a third party and the issue arose whether or not the Act intended to provide compensation to the injured owner. The court concluded that the owner could be a third party for purposes of the Act. The confusion is less obvious today where the owner no longer enters into an insurance contract with an insurer and the costs of RAF is funded by a charge on fuel. The phrase ‘any person’ does not confer *locus standi in iudico* and it is submitted that only those persons who have *locus standi* can sue. It is suggested this is not a matter to be dealt with in terms of s17 but rather s19.

1.3.1.3 ... any bodily injury to himself or herself ...

The phrase ‘bodily injury to himself or herself’ indicates that the Act covers only personal injury claims. It does not cover property damage claims. From s17 it can be seen that RAF only covers claims for personal injury. Bodily injury includes claims for the usual items which are claimed as part of bodily injury claims including, medical expenses, loss of earnings, loss of support and pain and suffering. A more recent development has been that damages for psychiatric injury can be claimed which is covered by the RAF. There is tendency for these to be limited paving the way for the Road Accident Benefit Scheme.

1.3.1.4 ... or the death of or bodily injury to any other person ...

The RAF is liable for claims by dependants and a variety of other persons who suffer a loss and have a claim arising out of personal injuries in circumstances which give rise to a claim by the dependants or other person. The significance of the bodily injury limitation of s17 can be illustrated by an example. Assume an employee negligently crashes into a brand new car causing R130 000 damage to the car and injuring the driver of the car and killing a passenger in that car. The damage to the car is not covered by the fund but the cost of compensating for the driver's and passengers injuries is covered. The RAF could be liable to compensate the dependants of the passenger who suffered a loss in respect of the death of the passenger.

1.3.1.5 ... caused by or arising from the driving of a motor vehicle by any person at any place within the Republic ...

The purpose of the motor accident legislation to provide financial assistance for the specific purpose of motor accidents. It is not a type of general liability or accident liability cover. In order to achieve this objective, the Act must contain words purporting to limit the scope of cover to events which arise from motor vehicle accident. The words chosen for this purpose are '...caused by or arising out of the driving of a motor vehicle ....' It seems that this phrase must be widely interpreted, not for any socialist interpretation but simply because it marks out the scope of cover provided by the statutory scheme. This form of liability is normally excluded from other classes of insurance and hence the issue of where the line should be drawn is simply a question of which is the policy which is the most convenient to deal with this type of risk. It is preferable that the statutory scheme deal with the risk, as far as possible all bodily injury claims associated with motor vehicle accidents. To achieve this purpose the phrase should be broadly interpreted.

The words 'arising out of the driving of a motor vehicle' differs from the common law concept of causation. The concept as encapsulated by the above phrase is somewhat broader than the common-law concept.

In *Grobler v Santam Versekering Bpk* 1996 2 SA 643 (*Grobler v Santam Versekering Bpk*, 1996) Grobler was injured, while a passenger in his own car when his car collided with a dead horse. The horse had been killed shortly before when a vehicle drawn by Stubbs collided with it. Stubbs had not negligently caused the death of the horse, but negligently failed to remove it from the middle of the road. If Stubbs had not negligently caused the death of the horse, could the negligent failure to remove the horse, which obviously did not arise out of the driving of the vehicle still constitute negligence arising out of a motor vehicle. The court concluded that it could.

... motor vehicle ...

Motor vehicle is defined in the Act as follows:

motor vehicle means any vehicle designed or adapted for propulsion or haulage on a road by means of fuel, gas or electricity, including a trailer, a caravan, an agricultural or any other implement designed or adapted to be drawn by such motor vehicle;

There have been a number of cases involving injuries caused by forklift trucks and a lawnmower arguing whether or not these are motor vehicles in terms of the Act.

fork-lift trucks

In *Chauke v Santam Ltd* 1997 1 SA 178 A (*Chauke v Santam Ltd*, 1997) the question arose of whether a forklift truck was a motor vehicle as defined in the Act. Chauke was an employee who was injured by a forklift truck while walking about the yard of the transportation company where he was employed. Taking the view that a forklift truck is a vehicle as defined in the Act he instituted an action against Santam Ltd as the authorised agent of the fund. Santam raised a special plea that the forklift truck was not a vehicle in terms of the Act. The case was first heard before a magistrate who upheld Santam's special plea. The matter was taken on appeal to the Witwatersrand Local Division where the appeal was dismissed. The matter was then taken on further appeal to the Appellate Division court. The court concluded that a forklift truck was not a motor vehicle in terms of the Act. The court laid stress on the requirement that a motor vehicle must be a vehicle which designed or adapted for propulsion on a road. Since in this case the forklift did not have lights, indicators or a hooter, it was clear that it was not designed for use on a road.

The facts of *Mutual & Federal Insurance Co Ltd v Day* 1999 4 SA 813 E (*Mutual & Federal Insurance Co Ltd v Day*, 1999) were somewhat different. In this case the forklift truck was much bigger, the size of a normal car. It was registered and licenced with the local authority and had lights, indicators, hooter and number plates. In this case the court concluded that it was designed or adapted for use on a road and hence was a motor vehicle in terms of the Act.

mobile lawnmowers

In *Matsiba v Santam Versekerings Maatskappy* 1997 4 SA 832 SCA a minor son was injured when a 'mirage ride on' lawnmower collided with him. The Supreme Court of Appeal had to decide if a petrol driven lawnmower was a motor vehicle in terms of the Act; if not, the claim did not fall under the provisions of the Act. The Court *a quo* came to the conclusion that the lawnmower was not a motor vehicle as defined by the Act. The Supreme Court of Appeal applied the reasoning of *Chauke v Santam Ltd* 1997 1 SA 178 A that, in order to be a motor vehicle, it must be designed or adapted for propulsion on a road. The lawnmower was not designed for this purpose, it was designed to cut grass and had a maximum speed of 6 kph, had no lights or brake-lights, it had no indicators or a hooter. The court concluded that the court *a quo* was correct. The lawnmower is not a motor vehicle in terms of the Act.

1.3.1.6 *... if the injury or death is due to the negligence or [any] other wrongful act ...*

The RAF is only obliged to pay compensation if negligence or fault is involved on the part of specified parties. Currently the liability of the RAF is a fault based system. So, for example, if a father of six children is killed in a motor accident and as a result of his death, his wife and children are left destitute no compensation will be forthcoming, unless it can be proved that the father died as a result of the negligence or the unlawful act of the driver, owner or servant of the owner. Unlike worker's compensation the mere fact that a person dies or is injured in a motor accident is not sufficient to justify compensation. Negligence must be proved. Even if it is strongly suspected that negligence was the cause of the death of the father, no compensation is payable, unless negligence can be proven.

Many people have felt that the requirement of wrongful negligent causation is unjust and that all that should be required for compensation is that a person be injured in a motor accident. This type of system is the no-fault system. The question of introducing a no-fault system has attracted much academic comment of the years and has been investigated by all of the commissions but each time the commission has recommended against its introduction until the latest commission, the Satchwell Commission. Although fault is required, it does not appear to take much for a court to find that fault exists. Fault over the years has evolved. A few cases will illustrate the ease with which courts find fault, when the RAF (including its predecessors in title) is involved.

In *Burger v Santam Versekerings Maatskappy* 1981 2 SA 703 A (*Burger v Santam Versekeringsmaatskappy Bpk*, 1981) a motorist went onto the wrong side of the road (for reasons unknown) and collided with a motorist on the correct side. The motorist who was on the correct side of the road was then successfully sued on the basis that he should have blown his hooter to warn the other motorist that she was on the wrong side. The court ruled that the motorist on the correct side was indeed negligent for not blowing his hooter. The motorist indicated that he may well have blown his hooter but could not remember. The court rejected this noting that if he had blown his hooter, he would have remembered!

In *Santam Versekerings Maatskappy Bpk v Letlojane* 1982 3 SA 318 A (*Santam Versekeringsmaatskappy Bpk v Letlojone*, 1982). In this case the injured party thought an oncoming bus would follow its normal route and turn. Accordingly he did not stop at the intersection but went through a yield sign controlled intersection. The bus did not turn but went straight, resulting in a collision. The bus driver was held to be negligent to drive straight without giving warning of his intention of going straight (e.g. by blowing his hooter).

In *Kruger v Santam Versekerings Maatskappy* 1983 4 SA 445 A (*Kruger v Santam Versekerings Maatskappy*, 1983) the injured party was a passenger in a motor car. The driver of this car went through a yield sign, controlled intersection without reducing speed and without keeping a look-out for traffic in the main road. The car collided with a tractor in the main road. The injured party sued the tractor driver. The tractor driver was held to be negligent in that he should have observed the yielding traffic more closely.

In *Motor Vehicle Assurance Fund v Dubuzane* 1984 1 SA 700 A (*Motor Vehicle Assurance Fund v Dubuzane*, 1984). The deceased's body was found near a pedestrian crossing. Based purely on circumstantial evidence, it was decided that he was negligently knocked over by a motor vehicle. The circumstantial evidence was not of a very substantial nature at all and, with respect, I fully endorse the view of the minority judgement that 'a finding of negligence on the part of the driver can rest on nothing but pure conjecture'. Cases like this are to be expected since the Multilateral Motor Accident Fund (MMF) which became the RAF is the source of considerable income to the legal profession which has a vested interest in the expansion of the law of delict and the status *quo*.

In *General Accident Insurance Co South Africa Limited v Xhego and Others* 1992 1 SA 580 A (*General Accident Insurance Co South Africa Limited v Xhego and Others*, 1992) a number of passengers on a bus were injured when the bus was attacked by persons throwing petrol bombs at the bus. The bus driver was held to be negligent by driving in a road which had a history of attacks and in not stopping quickly enough to allow passengers to disembark.

1.3.1.7 ... of the driver ... or of the owner ... or of his or her employee in the performance of the employee's duties as an employee

In order that the RAF be liable the injury or death must be due to the negligent act of one of three persons.

(i) the driver

(ii) the owner

(iii) the employee of the owner in the performance of his duty as an employee.

... the driver ...

In the majority of cases that come before the courts, the driver is negligent. To confine liability to cases of negligent drivers would however be too narrow. The Act includes two further categories; owners and employees.

... the owner ...

Owner is defined in the Act as follows:

> 'owner', in relation to-
>
> (a) a motor vehicle which a motor dealer has in his or her during the course of his or her business and which may in terms of any law relating to the licensing of motor vehicles not be driven or used on a public road except under the authority of a motor dealer's licence of which the motor dealer concerned is the holder, means that motor dealer;
>
> (b) a motor vehicle which has been received for delivery by a motor transport licence holder in the course of his or her business of delivering new motor vehicles and which has not yet been delivered by him or her, means that motor transport licence holder;
>
> (c) a motor vehicle which is the subject of an instalment sale transaction, means the purchaser in the instalment sale transaction concerned;
>
> (d) a motor vehicle under an agreement of lease or a period of 12 months, means the lessee concerned.

In *Mokholwane v Pro Honda* 1997 4 SA 223 SCA (*Mokholwane v Pro Honda*, 1997) the court considered the meaning of owner where a motorcycle had been leased out by Pro Honda for a period of two years to Urban Townhouse Management (Pty) Ltd. It was driven by Mokholwane an employee of Urban Townhouse, who was injured in an accident when the front brakes locked. It was alleged that Pro Honda, the factual owner was negligent in maintaining the motorcycle. If Pro Honda was indeed the owner then Mokholwane could not sue Pro Honda, the claim being barred by virtue of s21 of the RAF. However, the definition of owner in the Multilateral Motor Vehicle Fund Act 93 of 1989, in relation to a motor vehicle under an agreement of lease of at least 12 months, means the lessee concerned is defined to be the owner. Under this circumstance the owner, as defined, was Urban Townhouse Management and not Pro Honda and the court thus concluded that the MMF was not liable, leaving the way clear for Pro Honda to be sued.

1.3.2 s19 (4) Undertakings in lieu of future expenses

(4) Where a claim for compensation under subsection [17](1)-

(a) includes a claim for the costs of the future accommodation of any person in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him or her, the Fund or an agent shall be entitled, after furnishing the third party concerned with an undertaking to that effect or a competent court has directed the Fund or the agent to furnish such undertaking, to compensate the third party in respect of the said costs after the costs have been incurred and on proof thereof;

(b) includes a claim for future loss of income or support, the Fund or an agent shall be entitled, after furnishing the third party in question with an undertaking to that effect or a competent court has directed the Fund or the agent to furnish such undertaking, to pay the amount payable by it or the agent in respect of the said loss, by instalments in arrear as agreed upon.

The precursor of s19 (4) of the RAF was Art 43 of the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 and its precursor was sec of *Marine and Trade Insurance Co Ltd v Katz* NO 1979 4 SA 961 A (*Marine and Trade Insurance Co Ltd v Katz*, 1979).

By virtue of this provision the fund could give an undertaking to meet future costs in lieu of paying a capital sum, which is difficult to determine with any certainty. Initially undertakings were the exception to the rule, but nowadays they are the rule. Once an undertaking is given no award is made for future medical expenses or future loss of income or support. A contentious matter however is the effect of providing an undertaking where the liability of the fund is limited in terms of other provisions of the Act. Thus for example where the liability of the fund is limited to R25 000 is it still competent to the Fund to tender the agreement to pay future expenses. The difference between the agreement and cash settlement has bearing on the legal fees. Where the lawyer has entered into a contingency fee arrangement and the injured victims does not receive a cash settlement, the lawyer runs the risk of not being paid, or having to wait for payment until such time as the victim receives payments. It is thus not surprising that opposition to undertakings existed, especially where the amounts involved are not substantial. The matter was considered in *Road Accident Fund v Clayton* 2001 3 SA 305 at 309E-G (*Road Accident Fund v Clayton*, 2001) the court concluded that it was not competent for the Fund to tender an undertaking *in lieu* of damages where the liability of the Fund was limited.

The provision of undertakings does involve the Fund in considerable additional administrative work and it has been criticised for its tardiness in attending to its responsibilities in terms of these undertakings.

1.3.3 Limitation of the RAF's Liability

1.3.3.1 Limitation with respect of loss of income or support

Not all injured parties can receive compensation or where they do, full compensation from the RAF. Until recently the fund would pay any amount ordered by a court, or the RAF thought a court would award. Over the years, awards were subject to considerable inflation, increasing in size. The fund settled a claim for R500m. It should be clear that this open ended liability is unsustainable. In terms of s17(4)(c), as amended by Act 56 of 2005, the claim for loss of income or support is limited to an amount of R262 366 per year with effect from July 31, 2017.

1.3.3.2 Limitation with respect to medical expenses

A further limitation was introduced with respect to medical expenses. Until the amendment introduced in terms of Act 19 of 2005 medical expenses were not limited. However the position was changed to the following:

The liability of the Fund or any agent regarding any tariff contemplated ... shall be based on the tariffs for health services provided by public health establishments contemplated in the National Health Act 61 of 2003 and shall be prescribed after consultation with the Minister of Health.

The Fund only pays the public hospital rates which clearly will be insufficient to cover the medical costs of a person who chooses to go to a private hospital. The tariff for emergency treatment is dealt with separately and is subject to negotiation between the fund and health care provider.

1.3.3.3 s18 - Limitation where persons are conveyed in or on the vehicle: repealed.

There was a limitation for claims arising from persons conveyed in or on the vehicle concerned. These limitations were repealed by Act 19 of 2005.

1.3.4 s18(2) - Worker's Compensation

In many instances the injured third party may also be an employee and his claim for compensation also falls under the provisions of the workers' compensation legislation and as such is entitled to compensation in terms of the relevant legislation. S18(1) of the RAF makes provision for this eventuality and reads:

(2) Without derogating from any liability of the Fund or an agent to pay costs awarded against it or such agent in any legal proceedings, where the loss or damage contemplated in section 17 is suffered as a result of bodily injury to or death of any person who, at the time of the occurrence which caused that injury or death, was being conveyed in or on the motor vehicle concerned and who was an employee of the driver or owner of that motor vehicle and the third party is entitled to compensation under the Compensation for Occupational Injuries and Diseases Act, 1993 (Act 130 of 1993), in respect of such injury or death-

(a) the liability of the Fund or such agent, in respect of the bodily injury to or death of any one such employee, shall be limited in total to the amount representing the difference between the amount which the third party could, but for this paragraph, have claimed from the Fund or such agent and any lesser amount to which that third party is entitled by way of compensation under the said Act; and

(b) the Fund or such agent shall not be liable under the said Act for the amount of the compensation to which any such third party is entitled thereunder.

This circumstances of *Cromhout v Multilateral Motor Vehicle Accidents Fund: Santam Ltd v Williams* 1998 1 SA 563 SCA (*Cromhout v Multilateral Motor Vehicle Accidents Fund: Santam Ltd v Williams*, 1998) were governed by Act 47 of the Agreement in terms of the Multilateral Motor Vehicle Accidents Fund as amended by Proc 102 of 1991. The amendment confirmed the limitation of Act 47 (now s18) to workmen being conveyed in a vehicle owned or driven by the workmen's employer. If the injured workman was a pedestrian workman the limitation does not apply. The question which arose, in a number of cases was whether a pedestrian workman injured before the amendment but whose claim was still pending after the amendment is restricted to the limited compensation. A number of conflicting decisions had been made.

1.3.5 s19 - Liability excluded in certain cases

Whereas s18 deals with cases where the injured third party's claim is limited to R25 000, s19, specifies instances where the RAF or its agents incur no liability. The relevant portion of the s19 reads:

The Fund or an agent shall not be obliged to compensate any person in terms of section 17 for any loss or damage-

(a) for which neither the driver nor the owner of the motor vehicle concerned would have been liable but for section 21 (see page 31 supra); or

(b) ... deleted (Act 56 of 2005)

(c) if the claim concerned has not been instituted and prosecuted by the third party, or on behalf of the third party by-

 (i) any person entitled to practise as an attorney within the Republic; or

 (ii) any person who is in the service, or who is a representative of the state or government or a provincial, territorial or local authority; or

(d) where the third party has entered into an agreement with any person other than the one referred to in paragraph (c) (i) or (ii) in accordance with which the third party has undertaken to pay such person after settlement of the claim-

 (i) a portion of the compensation in respect of the claim; or

 (ii) any amount in respect of an investigation or of a service rendered in respect of the handling of the claim otherwise than on instruction from the person contemplated in paragraph (c)(i) or (ii); or

(e) suffered as a result of bodily injury to any person who-

 (i) unreasonably refuses or fails to subject himself or herself, at the request and cost of the Fund or such agent, to any medical examination or examinations by medical practitioners designated by the Fund or agent;

 (ii) refuses or fails to furnish the Fund or such agent, at its or the agent's request and cost, with copies of all medical reports in his or her possession that relate to the relevant claim for compensation; or

 (iii) refuses or fails to allow the Fund or such agent at its or the agent's request to inspect all records relating to himself or herself that are in the possession of any hospital or his or her medical practitioner; or

(f) if the third party refuses or fails-

 (i) to submit to the Fund or such agent, together with his or her claim form as prescribed or within a reasonable period thereafter and if he or she is in a position to do so, an affidavit in which particulars of the accident that gave rise to the claim concerned are fully set out; or

 (ii) to furnish the Fund or such agent with copies of all statements and documents relating to the accident that gave rise to the claim concerned, within a reasonable period after having come into possession thereof.

1.3.6 s21 - Claim for compensation lies against the Fund or agent only

The original idea behind the legislation was to introduce a form of compulsory third-party motor liability insurance. This type of insurance indemnifies the owner and persons who drive the vehicle with the permission of the owner against liability claims. The owner and those who drive with his permission are thus protected, facing no personal liability and the injured party is assured that adequate funds are available to pay his losses. The Act, in order to meet the intention of indemnity insurance must contain provisions holding harmless the owner and other persons against claims. s21 attempts to achieve this purpose. The third party cannot choose whether to sue the person who negligently caused his injury or to claim against the fund. The claim must be made against the fund and the third party is precluded from bringing an action against the negligent person in terms of s21 reads:

> s21 - Abolition of certain common-law claims
>
> (1) No claim for compensation in respect of loss or damage resulting from bodily injury to or the death of any person caused by or arising from the driving of a motor vehicle shall lie-
>
> (a) against the owner or driver of the vehicle; or
>
> (b) against the employer of the driver

This section does not apply to claims for emotional distress by a person other than the injured person. It has long been held that if the fund does not pay, the person who causes the injury remains liable. The intention of the replaced section is to remove all common law liability.

The first decision which recognised that the third party may sue for amounts of his claim left unsettled was *Rose's Car Hire (Pty) Ltd v Grant* 1948 2 SA 466A (*Rose's Car Hire (Pty) Ltd v Grant*, 1948) which dealt with the provisions of s13 of Act 29 of 1942.

Dodd v Multilateral Motor Vehicle Accidents Fund 1997 2 SA 763A (*Dodd v Multilateral Motor Vehicle Accidents Fund*, 1997) involved interpreting Art 52, promulgated in terms of Act 93 of 1989. Initially the plaintiffs were the dependants of the late Arnold Siegers, who was killed in a collision between two vehicles, one driven by Jacob Matheba and the other by Dodd the appellant. Siegers was a passenger in the vehicle driven by Dodd. The dependants sued Dodd. Since Siegers was a passenger in the vehicle driven by Dodd, the fund's liability was limited to R25 000 for each dependant (766 C-E and 767 F-G). The court *a qua* found (per Preiss J) that negligence should be apportioned between Dodd (one third) and Matheba (two thirds). The judge (Spoelstra J) ruled that Dodd and the MMF were jointly and severally liable, resulting in Dodd effectively being liable for the entire amount, despite being only one third negligently responsible for the accident. Dodd appealed against this finding, arguing that since the MMF was liable to the plaintiff's by virtue of the negligence of the second car, the liability of the appellant was extinguished. The court decided that Dodd's liability was not extinguished because a second vehicle was involved (769 E-G), illustrating again the limited protective value of this section of the Act and thus the need for motor insurance. The R25 000 passenger limitation was subsequently abolished, which improves the matter for users of motor vehicles.

1.3.7 s23 - Prescription of claim

The prescriptions of claims is dealt with in terms of s23 of the Act. S23(1) reads as follows:

(1) Notwithstanding anything to the contrary in any law contained, but subject to subsections (2) and (3), the right to claim compensation under section 17 from the Fund or an agent in respect of loss or damage arising from the driving of a motor vehicle in the case where the identity of either the driver or the owner thereof has been established, shall become prescribed upon the expiry of a period of three years from the date upon which the cause of action arose.

There are of course other subsections to s23 which must be considered when dealing with a specific matter. This section has been subjected to constitutional challenge. It is not clear why it was thought necessary to deal specifically with the issue of prescription in terms of the Act seeing that the Prescription Act exists. The issue of prescription could have been left to that Act, the preferable principle being that laws of general application are to be preferred to laws of specific application.

1.3.8 s25 - Right of recourse of Fund or agent

Generally because of s21, (see par 3.5 supra), a person injured in a motor accident, through the negligent driving of another, must look to the RAF or agent, for compensation. This results in the fund paying out hundreds of millions of rand each year. This raises the issue whether, once the RAF or the agent has paid the claim, the fund can recover anything from the persons who caused the accident or some other person?

The fund clearly does not have the common law right of subrogation, since it is a creature of statute. It does have a statutory right of recourse in terms of s25 of the Act which reads: Motor Vehicle Insurance Act 29 of 1942 (Motor Vehicle Insurance Act, 1942) and the Compulsory Motor Vehicle Insurance Act 56 of 1972 (Compulsory Motor Vehicle Insurance Act, 1972):

(1) When the Fund or an agent has paid any compensation in terms of section 17 the Fund or agent may, subject to subsections (2) and (3), without having obtained a formal cession of the right of action, recover from the owner of the motor vehicle concerned or from any person whose negligence or other wrongful act caused the loss or damage concerned, so much of the amount paid by way of compensation as the third party concerned could, but for the provisions of section 21, have recovered from the owner or from such person if the Fund or agent had not paid any such compensation.

(2) The Fund's or agent's right of recourse against the owner of a motor vehicle under subsection (1) shall only be applicable in any case where the motor vehicle at the time of the accident which gave rise to the payment of the compensation was being driven-

(a) by a person other than the owner and the driver was under the influence of intoxicating liquor or of a drug to such a degree that his or her condition was the sole cause of such accident and the owner allowed the driver to drive the motor vehicle knowing that the driver was under the influence of intoxicating liquor or of a drug; or

(b) by a person other than the owner without the driver holding a licence issued under any law governing the licensing of drivers of motor vehicles which the driver was required to hold, or the driver, being the holder of a learner's or other restricted licence issued under such -law, failed, while he or she was so driving the motor vehicle, to comply with the requirements or conditions of such learner's or restricted licence, and the owner allowed the driver to drive the motor vehicle knowing that the driver did not hold such a licence or that the driver failed to comply with the requirements or conditions of a learner's or restricted licence, as the case may be; or

(c) by the owner and he or she was under the influence of intoxicating liquor or of a drug to such a degree that his or bet condition was the sole cause of such accident; or

(d) by the owner without holding a licence issued under any law governing the licensing of drivers of motor vehicles, which he or she was required to hold, or the owner, being the holder of a learner's or other restricted licence issued under such law, failed, while he or she was so driving the motor vehicle, to comply with the requirements or conditions of such learner's or restricted licence; or

(e) by the owner and he or she failed to comply with any requirement contemplated in section 22(1) with reference to the said accident, or knowingly furnished the Fund or the, agent with false information relating to such accident and the Fund or agent was materially prejudiced by such failure or by the furnishing of such false information, as the case may be.

(3) The provisions of subsection (2) (c) , (d) and (e) shall apply mutatis mutandis in respect of any right of recourse by the Fund or the agent against any person who, at the time of the accident which gave rise to the payment of the compensation, was driving the motor vehicle concerned with or without the consent of its owner.

The right of recovery is concerned primarily with instance involving intoxicating liquor, drugs or unlicenced drivers.

... has paid any compensation in terms of s17 ...

As with the right of subrogation the Fund does not get a right of recourse until it has paid compensation.

... may...

The Fund is not compelled to exercise its right of recovery but may recover.

... recover from the owner of the motor vehicle concerned ...

At a first glance the right of the fund to recover from the owner appears to be strange. In conventional insurance schemes the owner would be the insured and an insurer has no general right to recover from its insured, to do so would negate the very notion of insurance. Under certain circumstances, insurers can acquire a right of subrogation against their insureds and actions by insurers against insureds, in terms of the right of subrogation, are on record. Further, participation in Road Accident Fund scheme is compulsory. The public has, so to speak, been press-ganged into the scheme. It is extraordinary under these circumstances that an owner should be liable to the fund. Indeed it is only under exceptional circumstances that the fund can recover from the owner. Public policy considerations suggest that at most the right of recovery against the owner should be limited to those circumstances where the conventional insurer would not pay the claim.

... or from any person whose negligence or other wrongful act caused the loss or damage concerned ...

This person would usually be the driver but could be some other party, as for example an employee of the owner.

... so much of the amount paid by way of compensation as the third party concerned could ...

... as the third party concerned could, but for the provisions of section 21, have recovered from the owner or from such person if the Fund or agent had not paid any such compensation ...

The owner is thus only liable to the fund if he would have been liable to the third party. In those cases where the owner is not driving and the accident is caused by the negligence of the driver, it suggests that the only ground for liability to the fund is where the owner is vicariously liable to the third party.

... under the influence of intoxicating liquor or of a drug ...

The fund can recover where the driver was negligence and was intoxicated or under the influence of liquor or drug to such a degree that this was the sole cause of the accident and the owner knowingly allowed the person to drive.

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03-0: SPECIALIST MARKETS

03: SASRIA

Contents

INSURANCE AGAINST POLITICALLY MOTIVATED ACTS OF MALICIOUS DAMAGE; RIOT; STRIKE AND PUBLIC DISORDER[1]

1.1 Pre-Sasria - RSMD Extension

Shortly before the Soweto Riots the conventional insurance market started to offer limited cover for Riot; Strike and Malicious Damage (RSMD) via the RSMD extension to the fire policy.[2] The limitations of this cover became clear during the mid-1970's, when political turbulence resulted in a considerable escalation of violence and unrest, with a particular escalation in acts of politically-motivated nature causing damage. These acts included riots but went on to bombings and sabotage, etc. Whilst conventional insurance policies could be extended to include riot; strike and malicious damage, the extension itself excluded:

- civil commotion amounting to a popular rising;
- any act of any person, acting on behalf or in connection with any organisation with activities directed towards the overthrow by force of the Government *de jure* or *de facto*, or to the influencing of it by terrorism or violence.

In addition conventional policies also contained what was known as the War Exclusion, which was worded as follows:

> 'This policy excludes loss or damage caused by war, invasion, and act of foreign enemy, hostilities or warlike operation, whether war be declared or not, civil war, mutiny, political riot, military or popular rising, insurrection, rebellion, revolution, military or usurped power, martial law, or state of siege.'

1 These notes were originally prepared by Mr Don Galimore, at the time of PFV and subsequently revised by Mr Mike Strydom, at the time CEO of Sasria who resigned in December 2004, see Sasria circular 414. The notes were thereafter substantially revised.

2 At the time assets all risks policies were also being designed and were in operation.

So before the formation of Sasria the cover was limited and it was uncertain what the extent of the cover in fact was. In the climate of political activity, unrest and violence within South Africa, it was evident that the cover offered by the conventional insurance market was inadequate and did not cover, i.e.:

1. Politically-motivated acts, i.e. acts amounting to a popular uprising or aimed at influencing government policy including acts of terrorism.
2. Degrees of force or threat beyond mere spontaneous riot, such as civil commotion amounting to a popular uprising, right through to war.

The problem was exacerbated by the fact that many politically-motivated acts could be readily identified as such, and therefore would be excluded in terms of the conventional policies.

1.2 Soweto Riots 1976: The Aftermath

Matters came to a head, when the 1976 Soweto Riots occurred resulting in considerable property damage, R15m, in the case of the West Rand Administration Board alone. The claims could not be resolved and inconclusive litigation was resorted to.[3]

The unrest had several root causes, the main one initially identified was dissatisfaction with the educational system. The riots were investigated by a Commission of Enquiry, which was appointed on the 2nd July 1976. The Commission was chaired by the Hon. Mr. Justice Petrus Malan Cillie, the then Judge President of the Transvaal Provincial Division of the Supreme Court. The commission took considerable time before it presented its findings, which in the end were not very useful in deciding if the riots were of a political nature or not.

The damage caused by the 1976 Soweto Riots thus could not readily be labelled as damage caused by acts, which were overtly political, in which event insurers could have been liable in terms of the RSMD extension. In consequence, many insurers, anticipating losses of considerable magnitude, arising from causes similar to that experienced in the 1976 riots, and the aftermath thereto, declared that it was never the intention of their policies to pay claims for riots and malicious damage which were politically-motivated. Claims of this nature had not been encountered in South Africa since the 1920s uprisings.

In addition, as regards riot, there were several grey areas on causation, which made it very difficult to determine whether the riot was politically-motivated or not. The conventional insurance market was thus reluctant to underwrite these types of risks, realising that potential losses could be enormous and that reinsurance would be very difficult, if not impossible to obtain.

3 *Oos-Randse Bantoesake Administrasieraad v Santam Versekeringsmaatskappy Bpk en Andere* (1) 1978 1 SA 160 (*Oos-Randse Bantoesake Administrasieraad v Santam Versekeringsmaatskappy Bpk en Andere (1)*, 1978) and *Oos-Randse Bantoesake Administrasieraad v Santam Versekeringsmaatskappy Bpk en Andere (2)* 1978 1 SA 164 W (*Oos-Randse Bantoesake Administrasieraad v Santam Versekeringsmaatskappy Bpk en Andere (2)*, 1978).

1.3 Formation of Sasria

1.3.1 Creation

Widespread damage caused by politically motivated persons, in the extreme case, war, is generally regarded as a fundamental risk, and as such uninsurable in the private market. To the extent that this risk can be financed, this is usually a government responsibility, dealt with in terms of the War Damages legislation.[4] The South African Insurance Association (SAIA.), the central organisation of all short-term insurance companies in the Republic, was approached by the Government, to see if there was a way in which insurance could be provided. SAIA was of the view that there was a vital need for full political riot and strike cover, which could be insured. The Government also indicated it would participate in an acceptable scheme, but emphasised that the control was to remain in the hands of the private sector.[5]

These wishes coincided with the wishes of the members of the SAIA, but no individual company was willing or able to underwrite such extensive risks. Under the auspices of the SAIA, the industry had a number of meetings, and arising from these meetings, it was decided that a separate organisation would have to be formed, a corporate or statutory entity, the intention of which would be to provide facilities to cover full politically motivated malicious damage and political riot cover, including acts of terrorism.

SASRIA came into being, as a company, on the 25th January 1979, as a consequence of s6 of the Finance Act 94 of 1978 (Finance Act, 1978),[6] which authorised the government to act as the reinsurer of last resort. Sasria was registered under s21 of the Companies Act of 61 of 1973 (Companies Act, 1973) as an Association Incorporated Not For Gain. It was converted into a company owned by shareholders with the government being the only shareholder in terms of the Conversion of Sasria Act 134 of 1998 (Conversion of Sasria Act, 1998).[7] Essentially Sasria was nationalised and after nationalisation the government paid itself a dividend of R10 bn.

1.3.2 Structure

As a s21 Company it did not have shareholders; instead, it had participating members who are all of the insurers which wrote fire classes of business. It was agreed at the time, that participation in SASRIA would be restricted to short-term insurers registered to transact business in the Republic and all such insurers who wished to join, would be required to become signatories to an Agreement, which, inter alia, embodied reinsurance obligations of each member company. An agreement was in addition concluded with Government,

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4 South African in line with the other countries has had a number of Acts: War Damage Insurance Act 21 of 1941 (War Damage Insurance Act, 1941); War Damage Insurance and Compensation Act 85 of 1976 (War Damage Insurance and Compensation Act, 1976).

5 For a discussion on the formation and operation of SASRIA note 'Riot insurance by Sasria' *South African Insurance Law Journal* 1979 D-7 *et seq* ("Riot insurance by SASRIA," 1979); NG Atkins 'Political riot insurance' *Businessman's Law* 1979 (8) 199- (Atkins, 1979); 'Special risks insurance - Questions over Sasria' Financial Mail January 27, 1984 35-36 ("Special risks insurance - Questions over Sasria," 1984).

6 Finance Act 94 of 1978 was repealed by the Finance Acts Consolidation Acts 78 of 1992 and the Sasria provisions replaced by Reinsurance of Damages and Losses Act 56 of 1989.

7 An interesting question, is the Conversion of Sasria Act 134 of 1998 a Bill of Attainder?

embodying their obligations as ultimate reinsurer to SASRIA. These agreements were concluded during February 1979. It is important to note that despite participation of members, neither members nor government had proprietary rights in SASRIA or its assets. By specific exclusion under s10 of the Income Tax Act of 1962 (Income Tax Act, 1962), SASRIA was exempt from paying income tax. This concession was withdrawn at a much later date and SASRIA became a tax paying entity with effect from 1 January 1997.

1.3.3 Objectives

As a registered insurance company, the objectives of SASRIA are set out in the Articles and Memorandum of Association in terms of which the objective is the provision of insurance cover to protect assets against certain defined events, being primarily politically motivated acts, and acts of terrorism and political riot. Initially there was no cover for consequential loss, other than for loss of rent payable. The objectives of SASRIA also accord with the objectives expressed in s21 of the Companies Act of 61 of 1973 (Companies Act, 1973) i.e. the promotion of community interests.

1.3.4 Financing

Financing of Sasria was by way of premiums for coupon policies. After payment of modest administration and acquisition costs, plus claims, the balance generated would be retained in Sasria to the build-up the risk fund, or reserve. In addition, the Sasria members, per the agreement, undertook to take a total net line of R5 million for their own account. Sasria produced a formula for calculating what each individual member's proportion of this R5m line would be. (This was calculated as a percentage of the net fire premium of each member).

The method of dealing with claims then, in anyone insurance year, was to consume in the first instance, all the current year's earned premiums and accumulated general reserves. Member companies would then be called upon to pay the next R5 million; if claims still exceeded this limit, the government would then be responsible for the excess as a stop loss reinsurer. The reinsurance layer afforded by member companies was dispensed within in 1989 when Sasria managed to arranged international reinsurance coverage on a 'per-risk' excess of loss basis.

1.3.5 Sasria cover v conventional cover - political or non-political?

A basic precondition to obtain SASRIA cover is that there must be an underlying fire policy in place, covering the conventional insurance risks (non-motor). The theory behind this is that the insured should be covered for every insurable eventuality,[8] so that in the event of a claim, either the Sasria policy or the underlying policy should respond and that there should be no gap in the cover.[9] However because of the burden of proof an unintended gap may exist.

It is a precondition of any underlying policy that the standard SAIA exceptions be included in the underlying policy. These exceptions include, inter alia, the entire Sasria policy wording, but continues to include the

8 Damage to land based assets due to war is generally regarded as uninsurable.

9 Hyman 'A gap in Sasria cover' *South African Insurance Law Journal* 1981 D-23 *et seq* (Hyman, 1981) and 'Closing the Sasria Gap' *South African Insurance Law Journal* 1981 D-29 ("Closing the Sasria Gap," 1981).

standard war and associated risks (see Annexure 1 for the SAIA exclusions). Thus every conventional underlying insurance policy excludes war and associated risks and perils covered by Sasria. War and associated risks are also excluded from the Sasria policy, these being uninsurable risks and the responsibility of the government, to be dealt with in terms of the War Damages and Compensation, in terms of which the Minister of Finance is empowered to create a fund for war damage. No funds have yet been set aside for such a purpose.

During the early years of Sasria's existence, several discrepancies arose between Sasria and the conventional insurers and it became clear that there were certain issues, which still needed to be addressed. It became clear that generally in practice, the motive of persons who caused the damage could not be readily established. For example, damages resulted in a riot and there was disagreement as to whether the rioters were politically motivated or not. If the rioters were politically motivated, Sasria and not the conventional insurer would responsible for the loss.

(i) Riot
It became very difficult to determine whether a riot was politically motivated or not.

(ii) Arson
In addition, mysterious fires often occurred, often at a time of unrest, where again, it was very difficult to determine whether such arson was politically motivated or not.

(iii) Malicious damage
The same considerations applied here.

(iv) Withdrawal of reinsurance
In 1985/1986, overseas reinsurers to the South African market, gave final notice of their intention to exclude all riot and strike cover from their treaties, whether such riot and strike was the result of politically motivated acts or not. This meant that insurers would be unprotected above their normal net retention. Conventional insurers therefore threatened to remove the RSMD extension from their policies.

It became clear that Sasria would have to broaden its cover to include damage caused where persons are not politically motivated, to remove doubt as to which policy covered the risk. This would however require a change in the legislation to ensure that this non-political risk was covered by the government's reinsurance agreement. In January 1987, the Finance Act was amended to extend the cover originally granted by Sasria by the inclusion of cover in respect of loss or damage caused by non-political riot, strike and public disorder. Acts of malicious damage would, however, remain to be covered by conventional insurers. It was at the time specifically agreed by the conventional insurance markets that they would include the so-called malicious damage extension to their policies, which provides cover for ordinary malicious damage.

1.4 Sasria in Operation

1.4.1 Adverse selection and the flat rated system

Initially, there was very limited statistical information available. It was clear, however that certain areas (and times) were higher risk areas (and times) than others. Nevertheless it was decided to adopted a simplified flat rating structure in terms of which all risks, for the same type of policy paid the same rate. This system is referred to as an objective underwriting philosophy, to distinguish it from the usual system of subjective rating. This clearly distinguished Sasria from conventional insurers, which maintain a subjective underwriting philosophy i.e., the conventional insurance company assess each risk, and allocates a risk rated premium to it. Sasria, on the other hand, applies rates across the board within specified rating categories. The rates were factually well in excess of the loss history allowing Sasria to accumulate a significant reserve fund. This fund was necessary to sustain the types of losses which could be suffered by Sasria. Consequently, pinpointing certain high-risk areas, an across-the board rating structure was formulated.

This rating system has a number of legal consequences not necessarily obvious, at a first glance. Firstly since risk characteristics are not relevant there is no point in disclosing these. Taken to its logical conclusion there is no duty to disclose any material facts when arranging Sasria cover. However in *Van Zyl and Maritz NNO and others v South African Special Risks Insurance Association and others*, 1995 2 SA 331 SE (*Van Zyl and Maritz NNO and others v South African Special Risks Insurance Association and others*, 1995), Sasria evoked disclosure via a backdoor by arguing if the underlying insurer validly repudiates the policy for want of proper disclosure, that means there is no underlying policy a condition precedent to Sasria's liability. In this event since there is no policy, there is no Sasria cover (at 336D-F). In any event, in this case the risk was not only that the damage caused by persons with political motives but also that the insureds were in serious financial difficulties, giving rise to moral hazard risk. The court found in favour of the insurers.

Sasria cover is non-cancellable and non-refusable i.e. provided that the application for Sasria cover complies with Sasria's regulations, Sasria may not refuse or cancel cover. This is in conformity with Sasria's objective underwriting philosophy. In addition, no insured person may cancel Sasria cover mid-term (Sasria cover must run to the expiry of an annual period). Sasria does not however 'insure' certain losses, since, the normal rules of insurance still apply to Sasria. One of the basic requirements for a contract of insurance is that there must be an element of uncertainty of the occurrence of the loss, and where this element is not present, no contract of insurance can exist. Thus for example, an insured would not be entitled to effect Sasria cover on his premises where a rioting mob can be seen to be descending on his premises!

1.4.2 Cover limitation: one insured

Bearing in mind Sasria's extensive exposure, it was deemed prudent to cap losses and impose a loss limit. As consequence, at present, a holding company including all of its subsidiaries will be entitled to a loss limit of R500 million per calendar year. Companies with insured values in excess of R500 million are entitled to a loss limit discount which works on a sliding scale. The higher the total asset value, the higher the discount. Such companies are referred to by the Sasria policy wording as 'One Insured' entities.

1.4.3 Exclusivity of provision of cover

It was deemed necessary by the insurance market and by Sasria, to grant Sasria exclusive rights within South Africa to insure Sasria type of losses.[10] In the past, the only competition came from Lloyd's of London, which had been writing political riot cover for three or four years prior to Sasria's formation. This was considered undesirable as Lloyd's was in a position to pick and choose the better risks and offer lower premiums than Sasria could offer, thus taking premium outside of the Republic, and if unrest materialised could cancel the cover. Thus, as discussed below, in 1984 the Finance Act was again amended to provide that Sasria was the only insurance company in the Republic of South Africa entitled to insure against the specific Sasria risks.

1.4.4 Limited consequential loss cover - no cover for loss of profits

As noted above initially the only consequential which could be covered was loss of rent. After growing pressure from member companies, organised industry and commerce, Sasria approached government to extend Sasria cover to cover the normal Standing Charges of commercial enterprises, i.e. those costs which would still have to be paid despite damage to the premises of the insured - i.e. salaries and wages, water, electricity and rates, advertising costs and all of those non-variables charges which carry on when no machinery is turning. This was agreed to by government, and as from the 1st March 1985 Sasria cover was extended to cover such risks. The consequential loss does not go far enough since loss of profits are not covered.

1.4.5 Sasria's claims experience

The claims experience of Sasria is dictated by the political and labour climate. Due to the nature of the risks involved, Sasria has paid some of the biggest claims in the history of South African insurance eg 1991 Ciskei *Coup d'etat*, R70 million; 1993 Mining Claims R120 million; 1994 Bophuthatswana Riots R250 million; Pre-election 1994 Johannesburg bomb blast R15 million.

1.4.6 The Sasria Fund

Despite the claims experience, the Sasria reserve funds escalated at a very rapid rate, considerably helped by the enormous income generated by investment of the fund. As at mid-1997, the fund stood at approximately R10.3 billion, which clearly make Sasria the largest short-term insurer on the African Continent. The R10 bn proved to be an irresistible temptation to the government.[11] Sasria was nationalised in terms of the Conversion of Sasria Act 134 of 1998 and the government paid itself a massive dividend thereafter. Having nationalised Sasria, stripped it of its cash, the government does not know what to do with it.[12]

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10 Commentators, probably correctly, interpreted this as action on part of the market to outlaw competition, an example of regulatory capture ('Sasria - outlawing competition' *Financial Mail* September 7, 1984) ("Sasria - outlawing competition," 1984)

11 'Gov may tap R8,5bn Sasria war chest' *Business Day* December 12, 1996. ("Gov may tap R8,5bn Sasria war chest," 1996)

12 'Cabinet will soon decide on Sasria's restructuring' *Business Report* February 26, 2001 ("Cabinet will soon decide on Sasria's restructuring," 2001); 'Sasria shelves its privatisation plans for 5 years' *Business Report* March 10, 2001 ("Sasria shelves its privatisation plans for 5 years," 2001); 'Sasria to remain under state care' *Business Report* March 12, 2001 ("Sasria to remain under state care," 2001).

1.4.7 TBVC Territories

Up to and including 1988, Sasria provided cover only for risks situated in the Republic, as the government had maintained that the TBVC territories were independent of the Republic of South Africa and that assets should not be insured by a South African insurer backed by the RSA Government. Individuals and firms situated in the TBVC territories were thus obliged to affect cover in the Lloyd's market. It did, however, become evident that the cover was necessary in the TBVC territories. Eventually, the Government of the Republic concluded an agreement with Sasria whereby cover would be granted in the TBVC territories, and that the reinsurance structure would remain with the government acting as final reinsurer of these risks. The Government of the Republic consequently entered into concomitant agreements with the Governments of the TBVC territories, whereby the TBVC territories in effect, became reinsurers of the RSA Government for losses occurring within those countries. Each of the TBVC territories were allotted different loss limits for one insured case as well as territorial loss limits. Sasria cover at that stage, therefore, in 1989, embraced all five Republics. In addition, a differential (and higher) rating structure was introduced in the TBVC territories. After the elections in April 1994, however, the TBVC territories were re-incorporated into the Republic of South Africa, in consequence of which the loss limits previously imposed in the TBVC territories were abolished and increased to the same limits as that in the Republic of South Africa. In addition, the rating was brought in line with those in the Republic of South Africa.

1.4.8 Loan Guarantee Business

During 1989, Sasria was approached by the Urban Foundation and was requested to participate as an insurer for Sasria perils on a mortgage loan scheme, which they had initiated. The underlying policy took the form of a loan guarantee policy issued to certain lending institutions. Having been issued with such loan guarantee policies, the relevant lending institutions became more willing to grant loans to low income groups, where these housing loans constituted a high financial risk. The over-riding intention of course, being to alleviate the housing shortage to an extent. Sasria readily announced acceptance of its participation in the mortgage loan scheme and this type of cover was added to the current Sasria perils with the consent of the Government.

1.5 Deficiencies Remain

It has been recognised for a long time that deficiencies exist in the Sasria system, some of which are now discussed.[13]

1.5.1 Limited consequential loss cover

The limited consequential loss cover which Sasria provides still leaves gaps which, if needs to be covered has to be covered through overseas markets i.e. Sasria does not offer cover for net profit, nor for damage at suppliers' customers' or utilities' premises. This causes an outflow of premium to the overseas insurance markets. Whilst Sasria has in the past requested the Government to extend the Sasria cover to cover such losses, the Government has been reluctant to do so, their motivation being that they do not wish to ultimately expose the taxpayers' money to the potential losses which might be suffered should this cover be given.

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13 'Special risks insurance - Questions over Sasria' Financial Mail January 1984, 27 ("Special risks insurance - Questions over Sasria," 1984).

1.5.2 R500 Million loss limit

The many major conglomerates perceive the loss limit of R500 million per holding company and all subsidiaries as being unrealistic, especially where the overall asset value of such conglomerates exceeds billions of Rands.

1.5.3 Administration

The Sasria member companies are entrusted with the issue and administration of coupons and policies as well as formulating claims for submission to Sasria. This has in the past created certain delays in administration. This is essentially due to the fact that inexperienced and junior personnel at the Sasria member companies are entrusted with such administrative tasks, often leading to incorrect issue of claim documentation and incorrect policy procedures being adopted. The problem is perceived by the industry to be an educational problem. Sasria and the insurance industry have, however, attempted to address this problem by the introduction of seminars and lectures, which are given on a regular basis.

1.5.4 Inflexibility

Over the years Sasria has been perceived to be a rather inflexible organisation, which has not been willing to 'bend the rules', so to speak. This has been as a consequence of the objective underwriting philosophy adopted by Sasria whereby one rule has to apply to all, with no exception. In an attempt, however, to accommodate the wishes of the industry, Sasria has set up several liaison structures used as panels of discussion for industry matters relative to Sasria. These include inter alia, liaison committees with the South African Risk Insurance Managers Association, the South African Insurance Brokers Association and the South African Insurance Association.

1.6 Some Solutions Found to Problematical Issues

1.6.1 Monthly premium facilities

Prior to 1986 cover was limited to annual policies. However, in March 1986, in conformity with industry needs, Sasria began permitting the issue of monthly coupons for Personal Lines Group Schemes. In 1993 this was extended to Commercial Schemes.

1.6.2 Hold covered

One of the administrative problems was that of holding covered, a practice from time immemorial in the conventional market. Sasria initially only permitted cover to apply from the time the coupon or policy was issued. This had obvious practical difficulties, made worse by administrative failings on the part of insurers. In 1988 Sasria allowed a 30-day hold covered procedure, provided certain detailed information was given to the insurer in advance of cover applying.

1.6.3 Loss limits

Since the years of Sasria's formation, the loss limit for one insured entity has risen from R50 m to Rl00 m, to R150 m, to R200 m, to R250 m, R300m to the current level of R500 m.

1.6.4 Voluntary deductibles

Since 1993, Sasria has permitted an insured to elect to take a deductible on losses incurred, in the range of Rl million -RI0 million, with concomitant discounts.

1.6.5 Reinstatement value conditions for motor fleets

In terms of the Sasria motor policy, Sasria was entitled at its option, to either repair or replace a vehicle, which was the subject of a claim. The replacement cost of the vehicle, as with conventional insurers, is restricted to the reasonable market value of the vehicle. In 1994, however, Sasria began permitting reinstatement value conditions to be applied to entire motor fleets, which were confined to depots overnight.

1.6.6 Further developments

With the Sasria fund having reached substantial levels and because of inefficiencies in the current administrative process, Sasria is in the process of making concerted efforts to:

- absorb the entire administrative process to the exclusion of members
- introduce full loss of profits covers
- increase loss limits.

1.7 Can Cover be Bought Elsewhere?

1.7.1 Reinsurance of Damages and Losses Act 56 of 1989

The Reinsurance of Damages and Losses Act 56 of 1989 (Reinsurance of Damages and Losses Act, 1989), empowers the Government to enter into a reinsurance agreement with an insurance company. The act also specifies the risks, which the Government may reinsure. Whilst Sasria is not specifically mentioned in the Act, it is with Sasria that the Government has reached such an agreement. (The Reinsurance of Damages and Losses Act, 1989, replaced s6 of the Finance Act). Section 4 of the Act, provides that no insurance company, other than the insurance company with which the Government has contracted (Sasria), may offer the insurance which is prescribed by the Act, unless the insurance company (Sasria) specifies in writing that it is not willing to undertake a particular risk. It has in the past been the practice of Sasria to use this proviso to permit insureds to place full loss of profits cover, including standing charges, in markets other than Sasria, specifically because Sasria does not currently insure full loss of profits.

1.7.2 Filling the gaps

Sasria imposes a loss limit during anyone calendar year for anyone insured for R500 million.[14] Several local and overseas insurers are permitted to offer cover in excess of this amount. This is commonly referred to as wrap-around cover.

1.8 Necessity of Sasria Cover

1.8.1 SAIA Exceptions

The Standard SAIA exceptions are very wide-ranging as indicated before. Not only do they exclude riot, strike, terrorism and politically motivated acts of malicious damage, but also the more difficult to define acts such as those to bring about a social or economic change, acts in protest against any Government authority, and acts to inspire fear in the Public or any section thereof. Also excluded are acts of authorities in trying to deal with any of the excluded events. Due to the volatility of the political and labour situation which has existed in South Africa for a good number of years, (even post-election 1994) the Sasria cover remains a very important component of any insurance package, which no commercial enterprise can afford to leave uninsured. The same considerations apply to residential or personal property, situate in areas which, because of their locality can be considered to be volatile areas. One would imagine that after the April 1994 elections, the need for Sasria cover, and especially that cover which deals with politically motivated acts, would be somewhat dissipated. Whilst to a minor extent this is certainly the case, with a highly politicised population and a proliferation of political parties and ideologies, the threat of damage caused by political activity remains very real. Even post-election, Sasria continues to pay many claims arising from political motivation. In addition, and as discussed before, Sasria covers a wide range of perils which are not associated with political activity or political motivation i.e. riot, labour disturbance, strike, public disorder and civil commotion. Damage caused by labour disturbances and strikes, in particular, have been intensified post-election.

1.9 Reverse Onus of Proof

The Standard SAIA exceptions, which were incorporated into any conventional policy of insurance, contains the reverse onus of proof clause. It has been argued that the two policies including the reverse onus of proof can great an unintended gap, through which the insured's claim may fall.[15] This provides that if the conventional insurer alleges that the peril is a Sasria peril, and that the loss is not covered by the conventional insurance policy, the burden of proving the contrary rests on the insured i.e. the insurer can point to the standard SAIA Exceptions and ask the insured to prove that the loss did not fall within any of the terms of the exceptions to the policy. In the case of *Spinneys (1948) (Ltd) and others v Royal Insurance Company Limited* 1980 1 Lloyd's Rep 406 (*Spinneys (1948) (Ltd) and others v Royal Insurance Company Limited*, 1980); Justice Mustill, in examining the effect of the reverse onus of proof clause, i.e. to determine whether the plaintiff had proven that the relevant exceptions like rebellion, insurrection, hostilities, popular rising and even civil war do not apply, commented as follows:

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14 Increased to R500m in terms of circular 424 dated 21st December 2005.

15 Hyman (1981)'A gap in Sasria cover' *South African Insurance Law Journal* 1981 D-23 *et seq* (Hyman, 1981).

> The validity of the clause is not in doubt; see *Levy v Assicurazioni Generali* [1940] 67 (l), Lloyds' Report Page 174; (1940) AC 791 (*Levy v Assicurazioni Generali*, 1940), but it should not be construed in such a sense as to make the policy unworkable. In my judgment the insurers cannot bring the clause into place simply by asserting that the loss was excluded by a particular exception, and challenging the insured to prove the contrary. They must produce evidence from which it can be reasonably argued that:
>
> (a) a state of affairs existed or an event occurred falling within an exception; and
> (b) an excepted peril directly or indirectly caused the loss. It is only when an arguable case of this nature is made out that the insured is required to disprove it.

A South African case which supports the Spinney's judgement is *Joosub Investments (Pty) Ltd. v Maritime & General Insurance Co Ltd* 1990 3 SA 373 C (*Joosub Investments (Pty) Ltd. v Maritime & General Insurance Co Ltd*, 1990). In this case it was held (per Seligson AJ) that the reverse onus of proof clause in the underlying (conventional) policy, must be interpreted as applying not whenever the insured merely alleges that the loss was caused by an excepted peril, but only if there is some evidence to show or from which it can be reasonably inferred, that this is in fact the case.

1.10 Broad Range of Sasria Rates

1 Material damage

(i) Industrial and Commercial - 0.015%
(ii) Residential- 0.004% b)

2 Standing charges

(i) Industrial and Commercial- 0.060%
(ii) Residential - 0.004%

3 Motor

(i) Private Motor Cars- R15 p.a.
(ii) Commercial Vehicles - R30 p.a.
(iii) Minibus Taxis - R30 p.a.

The above rates apply to all property situated in the Republic of South Africa.

1.11 Comment on Interpretation of the Sasria Policy Wording

(See Annexure 2 for Policy Wording).

By and large the Sasria policy wording is self-explanatory. There are, however, certain words and clauses which cause much difficulty in interpretation and it is the intention of this paragraph to highlight these words and phrases, bearing in mind the nature of Sasria and the purpose for which it was established.

(a) Sasria will cover each insurable event described in paragraphs 1-5 of the operative wording of the policy.

(b) The interpretation of certain words, however, have been problematical to insurers. These words are listed below, with a guideline as to interpretation.

Clause 2: 'Any act which is calculated or directed to bring about a loss or damage in order to bring about any social or economic change'

The word 'social' should be taken to mean 'of society or its organisation, or issues relating to mutual relations between distinctive classes of human beings'. The reference to 'social' does not refer to the peculiar circumstances of individuals, and the word 'economic' should be taken to mean the chain of production and distribution of wealth. Again it does not mean the financial circumstances of individuals. The reference to economic change is a reference to a change in the chain of production and distribution of wealth as it relates to the general populace or to entire communities.

Clause 2: 'Any act which is calculated or directed to bring about loss or damage for the purpose of inspiring fear in the Public or any section thereof'.

In this context the work 'Public' should be taken to mean the general populace and any section thereof means a readily identifiable section of the Public and should not be taken to mean an individual or group of persons not forming part of an identifiable section of the Public.

Clause 3 'Public Disorder'.

Whilst there is no common law definition of what would constitute a public disorder, public disorder is deemed by the Sasria policy to include civil commotion. Civil Commotion has been judicially defined and since civil commotion is deemed to be included within the words 'public disorder' public disorder should be interpreted *iusdem genris*, or of the same like or manner as civil commotion. Civil commotion can be defined as an outbreak of lawlessness of a fairly considerable scale amongst the citizens of a State, and is interpreted by the Courts to mean something falling between a riot and total insurrection. By implication, public disorder, therefore, should be taken to mean an outbreak of lawlessness amongst the citizens of the State, and is something of a greater degree than riot and of lesser degree than anarchy.

Clause 3 'Riot'.

The word riot has caused difficulties in the past as the South African common law does not provide a definition of riot. Usually it is the practice of insurers to be guided by the English law and thus in this case the English law definition of riot. However, the word riot has now been deliberated in South Africa in an appeal case (TPD –Full Bench). The judgment was delivered by Van Dyk Horst J, Striker J and Nugent J all concurring in the case of *Sasria v Elwyn Investments (Pty) Ltd* (1993 unreported) (*Sasria v Elwyn Investments (Pty) Ltd*, 1993). Whilst no clear definition of riot was given, the court handed down some useful guidelines. Essentially the court had to decide whether the word riot should be given a legal meaning or its ordinary dictionary mean. At page 9 of the judgment, Van Dyk Horst J. says the following:

> 'There is no valid reason why so-called legal meaning of the word 'riot' in English practice should be applied to the plain wording of a South African policy of insurance. A policy is intended to be a contract between parties, one of which at least is as a general rule, a layman. Such policies would attempt to use words in their ordinary meaning to express their agreement'.

At page 10 of the judgment:

> 'it follows that I cannot go along with the suggestion in Gordon and Getz, The South African Law of Insurance, 4ed, page 426 with reference to the technical meaning of Black's Law Dictionary and *Field v The Receiver of Metropolitan Police* 1907 2 KB 853 (*Field v The Receiver of Metropolitan Police*, 1907) that this technical meaning should in substance be applied in South Africa'

At page 11 of the judgment:

> 'the ordinary meaning of riot has to be applied with interpreting the policy of insurance. The problem, however, with the application of the ordinary meaning of the word riot is that it is so wide that it is prima facie improbable that this was intended in the policy of insurance'

Here the learned Judge was referring to various dictionaries definitions.

In consequence, in interpreting the word 'riot' and in accordance with this case:

- the English Law definition of riot should not to be used;
- the various dictionaries definitions are too wide;
- the ordinary meaning of the word 'riot' should be adopted, i.e. what does the insurer and the layman perceive as being a riot. It is therefore evident that common-sense principles should be adopted, whereas legal and technical meanings should not. The court did however emphasise that elements of 'tumult', 'strife' and violence or threat of violence should be present.[16]

A similar issue arose in *Slabbert Burger Transport (Pty) Ltd v Sasria Ltd* 2007 Juta's Daily Reports 0135 W.[17] During a time of an industrial dispute an insured truck was destroyed by fire suspected to be caused by three unidentified men who had purchased a quantity of petrol shortly before the fire occurred. The issue was, was the event caused by an insured peril, in short, did the claim fall between the cracks? The specific phrase under consideration was, was the act 'calculated or directed to bring about a strike.' Since the strike was already taking place on the face of it, the act was not aimed at bringing about the strike. The court nevertheless ruled that the damage to the truck was caused by a peril listed in the SASRIA policy. The meaning was broad enough to include extending the strike.

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16 The court in the Slabbert Burger Transport case expressed the view that this judgment went too far (Van Niekerk 2007:88).

17 Discussed by Van Niekerk (2007) Juta's Insurance Law Bulletin 10 (2) 88-91.

ANNEXURE

Annexure 1: Standard SAIA Exceptions (for Inclusion in the Nominated Insurer's Policy)

(A) This Policy does not cover loss of or damage to property related to or caused by:

- (i) civil commotion, labour disturbances, riot, strike, lockout or public disorder or any act or activity which is calculated or directed to bring about any of the above;
- (ii) war, invasion, act or foreign enemy, hostilities or warlike operations (whether war be declared or not) or civil war;
- (iii) (a) mutiny, military rising, military or usurped power, martial law or state of siege, or any other event or cause which determines the proclamation or maintenance of martial law or state of siege;
  - (b) insurrection, rebellion or revolution;
- (iv) any act (whether on behalf of any organisation, body or person, or group of persons) calculated or directed to overthrow or influence any State or government, or any provincial, local or tribal authority with force, or by means of fear, terrorism or violence;
- (v) any act which is calculated or directed to bring about loss or damage in order to further any political aim, objective or cause or to bring about any social or economic change, or in protest against any State or government, or any provincial, local or tribal authority, or for the purpose of inspiring fear in the public, or any section thereof;
- (vi) any attempt to perform any act referred to in clause ;(iv) or (v) above;
- (vii) the act of any lawfully established authority in controlling, preventing, suppressing or in any other way dealing with any occurrence referred to in clause (i), (ii), (iii), (iv), (v) or (vi) above.

If the Insurers allege that by reason of clause (i), (ii), (iii), (iv), (v), (vi) or (vii) of this Exception, loss or damage is not covered by this Policy, the burden of proving the contrary shall rest on the Insured.

(B) This Policy does not cover loss or damage caused directly or indirectly by or through or in consequence of any occurrence for which a fund has been established in terms of War Damage Insurance and Compensation Act, 1976 (No. 85 of 1976), or any other similar Act operative in any of the Republics to which this Policy applies.

(C) Notwithstanding any provision of this policy including any exclusion, exception or extension or other provision not included herein which would otherwise override a general exception, this policy does not cover loss of or damage to property or expense of whatsoever nature directly or indirectly caused by, arising out of or in connection with any act of terrorism regardless of any other cause or event contributing concurrently or in any sequence to the loss, damage or expense.

For the purpose of this General exception 1(C) an act of terrorism includes, without limitation, the use of violence or force or the threat thereof whether as an act harmful to human life or not, by any person or group of persons, whether acting alone or on behalf of or in connection with any organisation or government or any other person or body of persons, committed for political, religious, personal or ideological reasons or purposes including any act committed with the intention to influence any government or for the purpose of inspiring fear in the public or any section thereof.

If the company alleges that, by reason of clause 1(C) of this exception, loss or damage is not covered by this policy, the burden of proving the contrary shall rest on the insured.

Annexure 2: Coupon Policy for Special Risks Insurance

In consideration of the prior payment of the premium stated in the Schedule and the receipt thereof by or on behalf of SASRIA Limited,(hereinafter called the Company) and subject to the insurers policy being current and valid at the effective date as stated in the Schedule, the Company will by payment or at its option by reinstatement or repair indemnify the insured during the Period of Insurance up to an amount not exceeding the total sum insured in respect of each item and not exceeding in the aggregate during the said Period of Insurance, the total insured value, or the aggregate limits of liability as stated in the proviso hereunder, whichever is the less against loss of or damage to the property insured directly related to or caused by:

(i) any act (whether on behalf of any organisation, body or person, or group of persons) calculated or directed to overthrow or influence any State or government, or any provincial, local or tribal authority with force, or by means of fear, terrorism or violence;
(ii) any act which is calculated or directed to bring about loss or damage in order to further any political aim, objective or cause, or to bring about any social or economic change, or in protest against any State or government, or any provincial, local or tribal authority, or for the purpose of inspiring fear in the public, or any section thereof;
(iii) any riot, strike or public disorder, or any act or activity which is calculated or directed to bring about a riot, strike or public disorder;
(iv) any attempt to perform any act referred to in clause (i), (ii) or (iii) above;
(v) the act of any lawfully established authority in controlling, preventing, suppressing or in any other way dealing with any occurrence referred to in clause (i), (ii), (iii) or (iv) above.

NOTE:
In this Coupon Policy, the term "Public Disorder" shall be deemed to include civil commotion, labour disturbances or lockouts.

PROVIDED that:
Notwithstanding anything to the contrary, where One Insured is insured by one or more current and valid insurance (other than Contract Works and/or Construction Plant and or Motor) issued by or on behalf of the Company, the aggregate liability of the Company under all such Insurances shall be limited to the sum of R500 million (five hundred million Rand), during a calendar year where the property insured is in the Republic of South Africa.

For this purpose, ONE INSURED shall mean:
Any Single One Insured, or a Holding Company and all it's Subsidiaries (as contemplated exclusively by the Companies Act, 1973).

In the case of One Insureds other than Companies, the Company reserves the right to determine who the One Insured is for this purpose.

PROVIDED FURTHER that this insurance does not cover:
(a) consequential or indirect loss or damage of any kind or description whatsoever, other than loss of rent if specifically insured, which shall be limited to a period not exceeding that required to render the building tenantable;
(b) loss or damage resulting from total or partial cessation of work, or the retardation or interruption or cessation of any process or operation;
(c) loss or damage occasioned by permanent or temporary dispossession resulting from confiscation, commandeering or requisitioning by any lawfully constituted authority.
(d) NUCLEAR/CHEMICAL/BIOLOGICAL TERRORISM EXCLUSION

it is agreed that, regardless of any contributory cause(s), this insurance does not cover loss (es) in any way caused or contributed to by an act of terrorism involving the use or release or the threat thereof of any nuclear weapon or device or chemical or biological agent.

For the purpose of this exclusion an act of terrorism means an act, including but not limited to the use of force or violence and /or the threat thereof, of any person or group(s) of persons, whether acting alone or on behalf of or in connection with any organization(s) or government(s), committed for political, religious, ideological or personal purposes or reasons including the intention to influence any government and /or to put the public, or any section of the public in fear.

If it is alleged that by reason of this exclusion any loss (es) is not covered by this Coupon / Policy the burden of providing the contrary shall be upon the insured.

SPECIAL CONDITIONS

1. It is a condition precedent to any liability that at the time of the happening of any occurrence given rise to a loss in terms of this Coupon Policy there shall be in force the Nominated Insurer's Policy covering the interest of the Insured in all the property insured by this Coupon Policy against loss or damage by fire.

2. All the terms, conditions, exclusions, exceptions and warranties applicable to the Nominated Insurer's Policy, other than:
   (a) exception A(i), A(iii)(b), A(iv), A(v), A(vi) and A(vii) to the extent that A(vii) refers to A(i), A(iii)(b), A(iv), A(v) and A(vi); and
   (b) the Burden of Proof Clause set out in Exception A to the extent that such Clause refers to the Exceptions listed in (a) above;
   (c) any excess, deductible or similar payment to be met by the Insured in terms of the Nominated Insurer's Policy;

   shall be deemed to be incorporated in this Coupon Policy and shall as a condition precedent to any liability hereunder relate to and be complied with by the Insured accordingly.

   Memorandum

   The reference to Exceptions A(i), A(iii)(b), A(v), A(vi) and A(vii) and to the Burden of Proof Clause in Exception A is a reference to those Exceptions as they appear in the Standard SAIA. Exceptions which the Nominated Insurer is obliged to incorporate in his Policy. Should the numbering in the Nominated Insurer's Policy not correspond with the numbering of the Standard SAIA. Exceptions the above references shall apply to the corresponding Exceptions in the Nominated Insurer's Policy *mutatis mutandis*.

3. If the property covered in terms of the attached Schedule shall at the commencement of any destruction of or damage to such property by any peril insured hereby be collectively of greater value than the total sum insured stated herein, then the Insured shall be considered as his own insurer for the difference and shall bear a rateable share of the loss accordingly. Every item, if more than one, shall be separately subject to this consideration.

4. Any adjustment of Premium Clause or Condition in the Nominated Insurer's Policy shall not be applicable to this Coupon Policy.

5. No alteration of this Coupon Policy is valid unless signed by a Director of the Company.

6. Any Reinstatement Value Conditions in the Nominated Insurers Policy shall be applicable to this Coupon Policy except insofar as it relates to Motor Vehicles.

7. The cover granted by this Coupon Policy shall apply to property situated in the Republic of South Africa.

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3-3: P&I Clubs

ACKNOWLEDGEMENT

I was appointed Lloyd's general Representative South Africa in August 2008. As part of an effort to educate the Insurance Market and Institutions of higher learning about the Lloyd's Market, it was decided to deliver lectures at Universities throughout the world in an endeavour to explain the legal and operational aspects of the Lloyd's market. When I started delivering lectures at Wits in 2009, I soon realised that the lecture material was in dire need of updating in order to capture major amendments covering the regulatory framework of the UK and International Insurance Industries. Similarly, the South African regulatory environment has experienced major overhaul with the advent of Twin Peaks and its concomitant provisions.

The work of updating these lecture notes would not have been possible without the outstanding work by Julian Burling, MA, LLB (Cantab) (Formerly Counsel to Lloyd's) in his book entitled: "LLOYD'S: LAW AND PRACTICE " 2013. The book was first published in 2014 by Informa Law from Routledge. The chapters dealing with: Brief History of Lloyd's; Lloyd's a Statutory Body; Corporate Capacity; Council of Lloyd's and the governance structures and bye-laws thereof were extracted from this book.

Other sources include the Lloyd's library; Lloyd's internal publications; Lloyd's Annual Financial Statements and the South Africa Insurance Act 2017.

I would like to express special thanks to Chesterfield for donating the Lloyd's Law & Practice text book and the Corporation of Lloyd's for the logistical support.

DISCLAIMER

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JOHN LINDA SIBANDA - FCIS; FIISA; FCIBM

LLOYD'S GENERAL REPRESENTATIVE 2008 TO 2018

1. BRIEF HISTORY OF THE LLOYD'S MARKET

ORIGINS

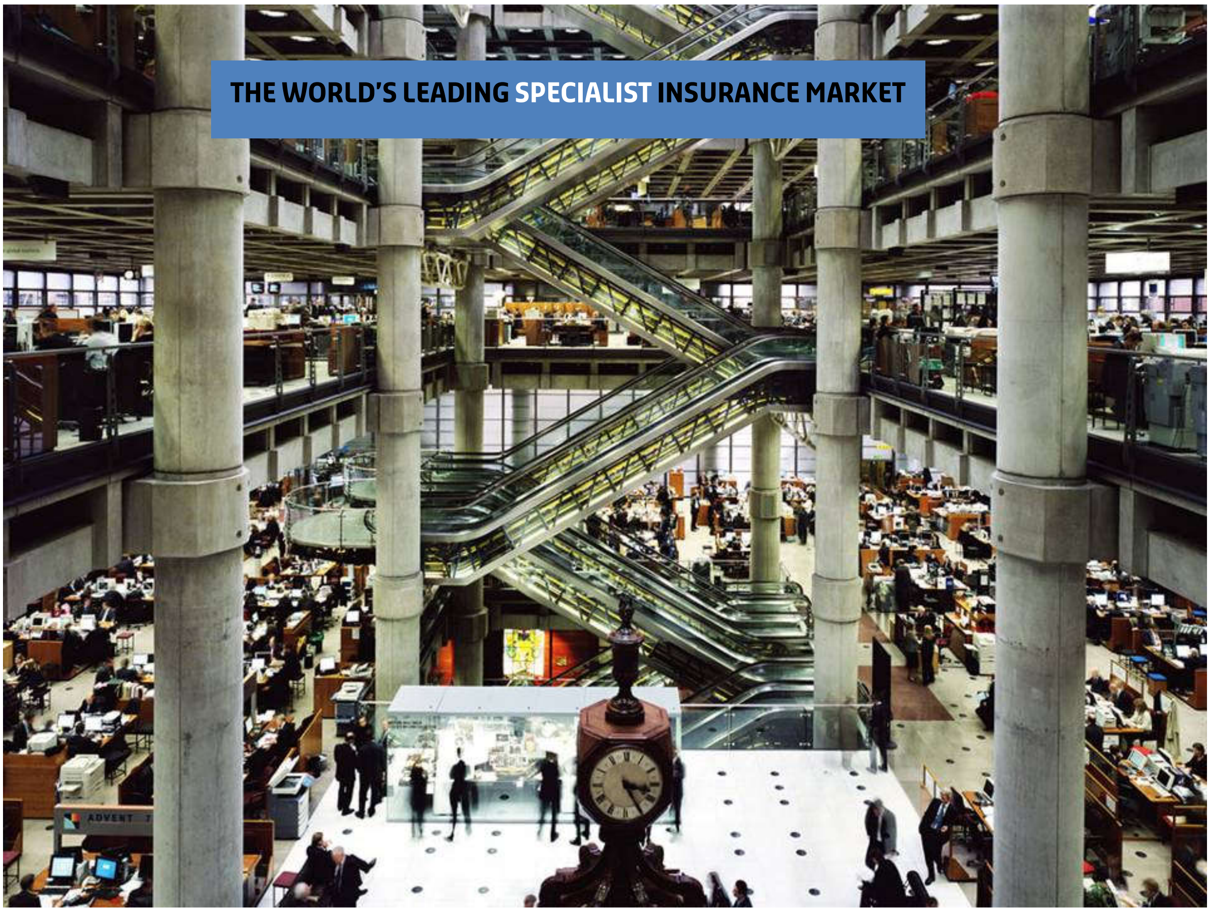
1.1 There is no record of insurance underwriting at Lloyd's before 1760/ the earliest surviving reference to Edward Lloyd's coffee house is an advertisement in the London Gazette dated February 1688/9 for a reward for the recovery of stolen watches, notice of the watches to be sent to Mr Edward Lloyd's coffee house in Tower Street. Lloyd was publishing lists of shipping movements for subscribers, the earliest surviving example being dated 1701. By 1703 Lloyd was in the business of obtaining passports for travellers abroad, and "protections" for ships' crews from the press gang. By the time of his death in 1713 the business known to have been carried on at his coffee house included the auction of ships and cargoes.

1.2 It may reasonably be assumed that some underwriting by merchants also took place at Lloyd's Coffee House during his lifetime. At that time the transaction of marine insurance was carried out by brokers, "office keepers", who made finding insurers for ships and cargoes their full time business, and underwrites (including Defoe and Pepys), who mainly carried it on as a side line to their usual business; they needed no fixed premises for the purpose and could be approached in a coffee house.

1.3 *Lloyd's List*, for which subscriptions were taken at the bar of Lloyd's Coffee House, was first published in 1734 and until other features such as stock prices were added in 1737, consisted of nothing but shipping intelligence. It can be assumed that this was obtained partly from frequenters of the coffee house and also from correspondents in ports. By 1788 Lloyd's Coffee House had correspondents in the principal British and Irish ports who regularly sent in lists of arrivals, sailings and casualties which were received at Lloyd's Coffee House several hours before the ordinary delivery of letters. For this free postage and early delivery, the Master of the Coffee House paid £200 pa, to be divided between the Secretary of the Post Office and the Comptroller of the Inland Department. These privileges gave Lloyd's Coffee House a practical monopoly of complete and up to date shipping intelligence.

1.4 By 1760 a confidential Register of Shipping had been established and published, at first biennially and later annually, by "A Society of Underwriters at Lloyd's Coffee House". Unlike the *Lloyd's List*, it was produced and owned by a body of underwriters, and managed by a committee who held their meetings at Lloyd's and not by the Master (manager) of the Coffee House. That Register, the forerunner of the modern Lloyd's Register of Shipping, is proof of the identification of Lloyd's Coffee House with the London underwriting interest.

1.5 In 1769 a large number of the more reputable customers, dissatisfied with the management of the coffee house, persuaded one of the waiters, Thomas Fielding, to establish a New Lloyd's Coffee House. The new premises were at 5 Pope's Head Alley. The manager of the previous Lloyd's Coffee House was persuaded to retire and the privileges of free postage and early delivery, and the arrangements with the printers of *Lloyd's List* and the port correspondents, transferred to the New Lloyd's Coffee House. A *New Lloyd's List* was published. The parting was acrimonious and the old coffee house continued for some years, but lacking the distinctive clientele of the New Lloyd's.



About Lloyd's

Lloyd's is a global specialist insurance and reinsurance market. Under our globally trusted name, we act as the market's custodian. Backed by diverse global capital and excellent financial ratings, Lloyd's works with a global network to grow the insured world –building resilience of local communities and strengthening global economic growth. With expertise earned over centuries, Lloyd's is the foundation of the insurance industry and aims to be the future of it. Led by expert underwriters and brokers who cover more than 200 territories, the Lloyd's market develops the essential, complex and critical insurance needed to underwrite human progress.

2. INCORPORATION OF LlOYD’S

2.1 “Lloyd’s” is a statutory corporation incorporated by a private Act of Parliament, Lloyd’s Act 1871, by the name of Lloyd’s. Lloyd’s is referred to as “the Society” in the Lloyd’s Acts 1871 to 1982 and it is often referred to as “the Corporation”, as are its staff who carry out administrative or other functions for the purposes of the business of the members of Lloyd’s.

2.2 The term “at Lloyd’s” is used in Lloyd’s Acts to describe insurance contracts underwritten by members in their capacity as such. In general parlance, however, usage is less precise. For the purpose of authorisation, solvency and other requirements, the EU Insurance Directives refer to a fictitious collective insurance undertaking, “the association of underwriters known as Lloyd’s” as carrying on insurance business; a convenient construct at the EU directive level but having no juridical equivalent in English domestic law. Rating agencies assign insurer financial strength ratings to the Lloyd’s market (Lloyd’s and its members collectively) but often refer to it simply as “Lloyd’s”. Credit ratings, however, are assigned to debt securities issued by Lloyd’s i.e. the body corporate, itself. In these notes, the expression “the Lloyd’s market” and the term “Lloyd’s”, are used interchangeably.

CORPORATE CAPACITY

2.3 As a statutory corporation Lloyd's has legal personality distinct from its members. It is an unregistered company under s. 1043 of the Companies Act 2006, but is exempt from the requirement to have a registered office. Sections 47 (execution of deeds) and 1157 (relief for the liabilities of officers and auditors of a company) of the Companies Act 2006 apply to it by virtue of s. 13 of the Lloyd's Act 1982 as they apply to a registered company, its officers and auditors. Lloyd's is capable of being wound up as an unregistered company under s. 221 of the Insolvency Act 1986.

The objects of Lloyd's are specified by s. 4 of the Lloyd's Act 1911 (replacing s. 10 of the 1871 Act so as to allow for non-marine business):

a. The carrying on by Members of the society of the business of insurance of every description including guarantee business;
b. The advancement and protection of the interests of members of the Society in connection with the business carried on by them as Members of the Society and in respect of shipping and cargoes and freight and other insurable property or insurable interest or otherwise;
c. The collection publication and diffusion of intelligence and information;
d. The doing of all things incidental or conducive to the fulfilment of the objects of the Society.

2.4 The property and funds of Lloyd's and the income therefrom are, by s. 7 of the 1911 Act, held for the following purposes:

a. For defraying the costs, charges and expenses incurred by the Society, the Council or otherwise in the execution and carrying out of Lloyd's Acts 1871 to 1982;
b. For furthering the objects of the Society;
c. Making good any default by any member of the Society under any contract of insurance underwritten at Lloyd's which in the opinion of the Council it is in the interests of the members of the Society to make good;
d. Guaranteeing or securing, in such manner as the Council think fit, any debt or obligation of or binding on the Society, any of its subsidiaries or any other person;
e. For such other purposes (if any) as may from time to time be prescribed by byelaw; and subject thereto for the benefit of the members of the Society jointly.

THE COUNCIL OF LLOYD'S

2.5 Lloyd's governing body is the Council of Lloyd's, constituted by s. 3 of the 1982 Act. Its members are elected or appointed (and their membership ceases or is terminated) in accordance with that section and the "constitutional requirements" set out in Schedule 1 to the Constitutional Arrangements Byelaw (No. 2 of 201). It is largely, but not entirely, elected by members of Lloyd's who are classified by the 1982 Act for voting purposes as either working members or external members of the Society. It comprises a number of "working members of the Council" elected by working members of the Society, and "external members of the Council" elected by the "external members of the Society", together with a number of "nominated members of the council", i.e.

persons appointed by the Council itself, not being themselves members, annual subscribers or associates. The respective numbers of working, external and nominated members of the Council (currently six of each) are from time to time determined in accordance with the "constitutional requirements" and s. 3(3) of the 1982 Act. The external members are in turn classified as either "individual external members of the Council" or "C-external members of the council" (being representative of corporate capital), the respective numbers of each being determined by the aggregate "voting capacity" of the respective constituencies of "individual external members of the Society" and "C-external members of the Society", as defined solely for the purposes of the Constitutional Arrangements Byelaw. "Individual external members of the Society" for this purpose include corporate members whose members consist only of, or nominees for, a single individual or a group of "connected individuals" (defined largely in terms of "close relatives"), together with the general partner of "continuity limited partner" in any SLP or a "non-contributing member" of a LLP. If the aggregate voting capacity of C-external members of the Society exceeds 95 per cent of the "total external voting capacity" of external members, there are (from the expiry of the term of office of the last individual external member of the Council) to be no individual external members of the Council.

The Council shall have the management and superintendence of the affairs of the Society and the power to regulate and direct the business of insurance at Lloyd's and it may lawfully exercise all the powers of the Society, but all powers so exercised by the Council shall be exercised by it in accordance with and subject to the provisions of Lloyd's Acts 1871 to 1982 and the byelaws made thereunder.

In practice the Council delegates most of its functions to the Franchise Board or sub-committees thereof, or to senior employees of Lloyd's. Section 30 of the 1871 Act, as modified by s. 15(2) of the 1982 Act, provides that ss. 97 to 100 of the Companies Clauses Consolidation Act 1845 (relating to contracts and proceedings by directors, and the liabilities and indemnification of directors) apply to Council members as they apply to directors and a company.

BYELAWS

2.6 Section 6(2) of the 1982 Act gives the Council power to make such byelaws as from time to time seem requisite or expedient for the proper and better execution of Lloyd's Acts 1971 to 1982 and for the furtherance of the objects of the Society, including such byelaws as it thinks fit for any or all of the purposes specified in Schedule 2 to this Act. The purposes so specified in Schedule 2to the 1982 Act are extensive but are without prejudice to the generality of the power conferred on the Council by s. 6(2). Byelaws must be made by special resolution of the Council. Most of the detailed regulatory requirements at Lloyd's are in the form of "requirements" made either by the Council or its delegates in exercise of powers conferred by byelaws.

2.7 Lloyd's is required by FSA (now PRA and FCA) rules to notify the regulator "of its intention to make any amendments which may alter the meaning or effect of any byelaw", normally not less than three months in advance of the proposed change. It is also required to consult interested parties, except in urgent cases, before amendments take effect. In the FSA, now FS, handbook "byelaw" has an extended meaning, viz. "any Byelaw, direction, regulation, or other instrument made using the powers of the Council under section 6 of Lloyd's Act 1982… and any condition or requirement made under any such Byelaw, direction, regulation or other instrument". That expression corresponds broadly to the expression "requirements of the Council" used in Lloyd's byelaws, viz.

2.8 Byelaws, as subordinate legislation, have the force of law over those conducting business at Lloyd's, irrespective of whether there is in place an agreement to be bound by them between such persons and Lloyd's. Byelaws are promulgated by posting in the Room. Byelaws currently in force are published on the Lloyd's website, as are market bulletins giving details of new byelaws and of various (but not all) requirements made under byelaws. Most byelaws in force at the time of writing are the result of a process of consolidation that begun in 2003 of over 200 byelaws between 1982 and that date. Copies of earlier byelaws can be obtained from the Council secretariat at Lloyd's.

2.9 The Council, or its delegates, may also give directions under s. 6(1) of the 1982 Act as regards the conduct of business at Lloyd's. The delegates for the purpose of s. 6(1) are currently the Chairman and Deputy Chairmen of Lloyd's elected under s. 4 of the 1982 Act. The power of the former Committee of Lloyd's (constituted by s. 5 of that Act and comprising all of the working members of the Council) to make regulations regarding the business of insurance at Lloyd's was abrogated when that section was repealed by the legislative Reform (Lloyd's) Order 2008, SI 2008/3001 and the Committee abolished.

2.10 The Council and its delegates may waive compliance with any "requirement of the Council" if it is considered that compliance would be unduly burdensome on the person to whom the dispensation is to apply, having regard to the benefit that compliance would confer on any member of Lloyd's policy holder and that the dispensation will not result in any undue risk to any member or Lloyd's policyholder. Compliance may also be dispensed with where the Council (or delegate) is satisfied that a requirement of the Council is incompatible with any provision of FSMA 2000 or any rule etc. made under it.

2.11 Lloyd's provides in its Underwriting Requirements for the review of decisions made by or on behalf of the Franchise Board, culminating in an appeal to the Lloyd's Appeal Tribunal. However, the courts have declined to hold that there is a public law element in the relationship between Lloyd's and its members that would afford members judicial review of the decisions of the Council or its delegates, or that in that context Lloyd's is a "public body" for the purpose of the Human Rights Act 1998 or for the purpose of an action for misfeasance in public office.

2.12 Section 14 of Lloyd's Act 1982 exempts Lloyd's (and its officers, employees and persons in or to whom powers or functions are delegated by or pursuant to Lloyd's Acts) from liability in damages at the suit of "a member of the Lloyd's community" for "negligence or other tort, breach of duty or otherwise" in the exercise or failure to exercise its powers, duties or functions under Lloyd's Acts 1871 to 1982. A "member of the Lloyd's community" is defined for this purpose as

a) a person who is –

(i) a member of the Society'
(ii) a Lloyd's broker;
(iii) an underwriting agent;

(iv) an annual subscriber;
(v) an associate;
(vi) a director or partner of a Lloyd's broker or an underwriting agent;
(vii) a person who works for a Lloyd's broker or underwriting agent as a manager; or

b) a person who has been a member of the Lloyd's community in one or more of the capacities listed in paragraph (a) above; or
c) a person who is seeking or who has sought to become a member of the Lloyd's community in one or more of the capacities listed paragraph (a) above.

The immunity applies in so far as the underwriting business of a member or the business of an underwriting agent or Lloyd's broker may be affected; or as regards the admission or non-admission to or continuance or suspension of membership of Lloyd's; or the grant, continuance, refusal, suspension, withdrawal or refusal of permission to carry on business as an underwriting agent or Lloyd's broker; or the requisition of information or documents, conduct of inquiries or investigations, or exercise of disciplinary or investigatory powers or functions. But it does not apply where the act or omission complained of was done or omitted to be done in bad faith or was that of an employee of Lloyd's in the course of carrying out routine or clerical duties, duties not involving the exercise of any discretion. Neither does s. 14 exempt Lloyd's from liability in respect of death or personal injury or for libel or slander.

2.13 In *Ashmore v Corporation of Lloyd's (No.2)* Gatehouse J held that there was no implied duty of care owed by Lloyd's to its members to take reasonable steps to alert them about matters which might seriously affect their underwriting interests or to impose a premium income monitoring system. In *Society of Lloyd's v Clementson* the Court of Appeal unanimously held that as regards the exercise by Lloyd's of its regulatory powers, no term was to be implied into the contract between the member and Lloyd's (embodied in the general undertaking entered into by each member) that Lloyd's would regulate and direct the business of insurance at Lloyd's with reasonable care.

44. [1992] 2 lloyd's Rep 620.
45. [1995] 1 LRLR 307

GOVERNANCE OF LLOYD'S

2.14 Since 2003 the Council has delegated most of its functions to the Franchise Board and to its various subcommittees and senior members of the staff ("the Executive") of Lloyd's. The terms of reference of the Council and its delegates are determined annually and are published on the Lloyd's website. At the time of writing, the principal committees of the Council are:

a. the Franchise Board,
b. the Nominations Committee,
c. the Remuneration Committee and
d. the Audit Committee.

The principal subcommittees of the Franchise Board are:

a. the Market Supervision and Review Committee,
b. the Capacity Transfer Panel,
c. the Risk Committee and
d. the Investment Committee.

46. http://www.lloyds.com/~/media/files/lloyds/investor%20governance/terms_of_reference_march_2013.pdf (last accessed 13 May 2013)

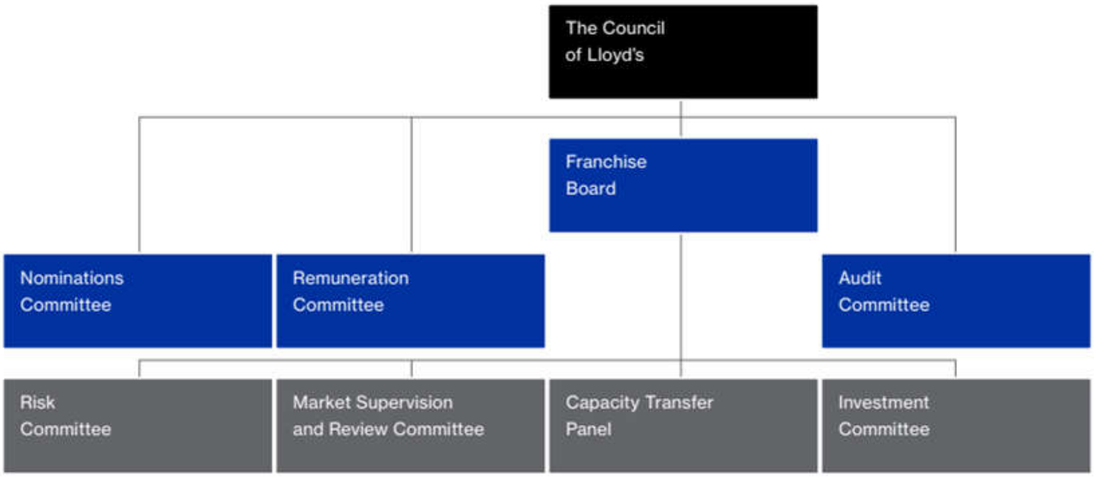
2.15 The Franchise Board was established in January 2003, arising from the Chairman's Strategy Group recommendations, to manage the "Lloyd's franchise", as conceived by the CSG, focusing primarily on strategic and policy issues and a relatively small number of key operational issues. The functions of the franchise Board are:

a. to seek to create and maintain a commercial environment at Lloyd's in which the long term return to call capital providers is maximised (the Franchise goal) and from time to time to –
(i) set a long-term market profitability target:
(ii) determine the major risks to the Lloyd's market and determine appropriate action to address or mitigate those risks; and
(iii) determine the key factors, levers and drivers which may affect or influence the profitability of the Lloyd's market throughout the 'insurance cycle' having regard to global economic developments including developments and trends in the international market for insurance and reinsurance;

b. to develop and implement a strategy to achieve the Franchise Goal (the Franchise Strategy) and manage all of the affairs of the Corporation accordingly; and
c. to supervise, regulate and direct the business of insurance at Lloyd's; and
d. to protect the Lloyd's franchise, name, reputation and licences.

Lloyd's governance structure provides challenge, clarity and accountability

Principal Committees of Lloyd's



The Council and Franchise Board

The Council of Lloyd's is the governing body of the Society of Lloyd's and has ultimate responsibility for overall management of the market. The Council delegates many of its functions to the Franchise Board, whose members are appointed by the Council and come from both inside and outside the Lloyd's market.

The day-to-day powers and functions of the Council and Franchise Board are carried out by the Corporation's Executive Committee – the Chief Executive, the Head of Marketing and Communications, Chief Financial Officer, Chief Commercial Officer, Chief Operating Officer, Chief Risk Officer, Human Resources Director, General Counsel and Secretary to the Council and Franchise Board, Performance Management Director and Chief Strategy Officer.

Lloyd's is regulated by the PRA and FCA, which have direct supervision of managing agents and monitor capital and solvency. The Corporation is active in managing risk within the market to ensure that Lloyd's central assets, brand, licences and reputation remain protected.

The Council of Lloyd's is committed to the principle of good corporate governance and supports the application of the principles of the UK Corporate Governance Code, as far as they can be applied to the governance of a Society of members and a market of separate competing entities.

LLOYD'S RISK COMMITTEES

3. 1988 – 1996 CRISIS MANAGEMENT

3.1 In 1986, as Neill reported, there were 28, 944 Names: 5, 379 working members, and 23, 547 external, all individuals, participating in 370 syndicates. The number of active members rose to 32, 433 for the 1988 year of account, participating in 376 syndicates. Lloyds had opened a new building in November 1986 on the site of the 1928 building to accommodate the expanding number of syndicates. Yet 25 years later, at the beginning of 2012, there were 2, 161 members of Lloyd's underwriting, of whom only 585 were individuals. Corporate members (including Scottish limited partnerships) provided 97 per cent of the capacity of the Lloyd's market by 2011. Of the 92 syndicates underwriting in 2012, 46 could be described as "fully aligned", i.e. syndicates all of whose (corporate) members were under common control with the managing agent, functioning as virtual insurance companies. One may wonder what factors caused or contributed to such a radical change in the nature of the membership?

3.2 By the time the last of the Neill recommendations to be implemented, inception date allocation of risks was included in the Syndicate Accounting Byelaw (No. 18 of 1994), the legal framework of the Lloyd's market, the *acquis* of the Fisher and Neill proposals, and the financial integrity of the Lloyd's market, were being tested almost to destruction. From 1988 a series of severe losses that affected the London insurance markets as a whole, led to unprecedented cash calls on members (at that time all individual members, or "Names") which many were unable or unwilling to meet. The main losses were long tail attritional losses in respect of asbestoses, pollution and health hazard liabilities arising in the United States and a series of natural and man-made catastrophes of over US$1bn in value occurring between 1987 and 1990. In addition, the 1987 UK windstorms, the *Piper Alpha* oil rig explosion, the *Exxon Valdez* oil spill, Hurricane Hugo and an earthquake in San Francisco exacerbated the situation. These latter were worsened by an incestuous chain of repeated reinsurance and retrocession of the same underlying risks between syndicates in the market in the "LMX Spirals" that developed in the 1980s. Cash calls on Names, on closed year losses or years of account left open, led to substantial claims under personal stop loss policies written by stop loss syndicates. After 20 years of profits, the Lloyd's market sustained aggregate losses of £510m for the 1988 year of account, £2,063m for 1989 and £2,915m for 1990. The number of members actively underwriting began to decline dramatically.

3.3 A Hardship Committee was established in 1989 to consider requests for financial assistance by Names that were unable to meet their liabilities to pay syndicate cash calls or reimburse Lloyd's where the Central Fund had been used for that purpose. In 1990 it received 170 applications, of which 26 were granted. By the time the formal Hardship Scheme was closed at the end of 1995 about 1,400 Hardship Scheme Agreements had been entered into between Lloyd's and Names. Further financial accommodation would be afforded by Lloyd's as an element of the 1996 settlement. To date, there are Names that still have not settled their loans under the Hardship Agreement, a few of which are based in South Africa.

3.4 The cash calls engendered litigation between Names, forming action groups for the purpose, and various kinds of defendant: claims against members' agents and managing agents for breach of agency agreement contracts and for negligence in tort; claims against syndicate auditors and actuaries; claims by syndicate members against Lloyd's brokers; and litigation between Names and

Lloyd’s itself relating to claims by Lloyd’s for reimbursement from Names where it had applied the Central Fund to meet cash calls made on them (or had “earmarked” the Central Fund on their behalf to enable them to pass the annual solvency test, where they had failed to maintain sufficient assets in trust at Lloyd’s). Claims by Names against their managing or members’ agents led to claims by those agents under errors and omissions (E&O) policies, many of them written by specialist syndicates at Lloyd’s. There was to be further litigation between names and Lloyd’s when, as part of an overall settlement of all the litigation, Lloyd’s imposed on all members the compulsory reinsurance by a single, specially created reinsurer, Equitas Reinsurance Ltd, of all non-life business allocated to pre- 1993 years of account.

3.5 In addition to the review of syndicates with severe losses conducted by its General Review Department from 1989 onwards, Lloyd’s instituted a system of mandatory loss reviews to enquire into the circumstances in cases where the loss on a syndicate year of account exceeded 100 per cent of the syndicate allocated capacity, with byelaw powers to compel the attendance of witnesses and produce evidence. Twenty-seven such loss reviews were instituted before the mandatory system was discontinued in 1997. Material from the loss review reports was to feature prominently in litigation by Names.

4. MAINTENANCE OF FUNDS AT LLOYD’S

4.1 There is no requirement for a corporate member to have a minimum amount of paid up share capital or, any longer, for an individual member to show minimum means. A member has a continuing obligation to provide “funds at Lloyd’s”, defined by paragraph 16 of the Membership Byelaw as “security in respect of [a member’s] underwriting business at Lloyd’s in such form, in such amounts and held on such terms as the Council may specify”. Funds at Lloyd’s may comprise “Lloyd’s deposits”, “special reserve funds”, “personal reserve funds” and “any other items or allowances which the Council may approve for the purpose and being in such form and held on such terms as the Council may specify”. These are all held in trust, separately from the member’s free assets. A member is required as a condition of underwriting to maintain the requisite amount of funds at Lloyd’s and for that purpose to provide and maintain a Lloyd’s deposit at the required level, in whatever form is selected (whether deposit of cash and/or investments, securities and trust deeds securities by a guarantee or letter of credit, or, where the member is a company, by a covenant and charge by a third party), and to have executed the appropriate trust deeds, and appointed a custodian or investment manager where relevant. Even where the member is no longer underwriting and has become a non-underwriting member it is required to make good any shortfall in the deposit within a prescribed period.

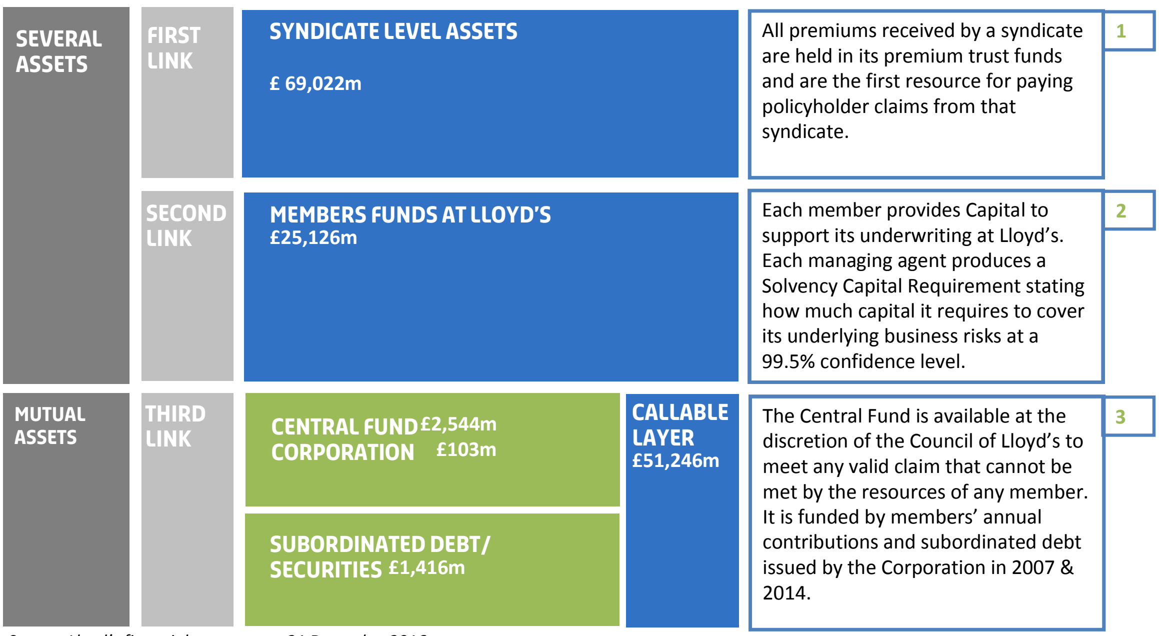
4.2 Entrance fees and annual subscriptions are payable by members under the Membership (Entrance Fees and Annual Subscriptions) Byelaw (No. 9 of 1987). As mentioned in paragraph 4.21 above, the Council has under the Membership, Central Fund and Subscriptions (Miscellaneous Provisions) byelaw (No. 16 of 1993) restricted its power to do so, by means of the undertaking given in clause 8 of each corporate member’s membership agreement. A similar undertaking has been given in favour of individual members by means of a deed poll executed on behalf of the Council in 1993 and by a subsequent deed poll in 1996 when the undertaking was extended to cover contributions to the New Central Fund as well as to the "old" Central Fund. In practice the annual subscriptions and New Central Fund contributions are now calculated by a member's written premium income (net of brokerage, discounts' and commissions, but before reinsurance), rather than the overall premium limit, on the assumption that the members' managing agents will not permit the written premiums to exceed the premium limits and that they may for good reason fall short of them. Initial payments are made at the beginning of the year based on the syndicate business forecasts, with second instalments payable at the beginning of June. The contributions are adjusted two years later in the light of audited syndicate returns. The annual subscription at the time of writing is 0.5 per cent of written premium income. Entrance fees are also charged to members by Lloyd's under the Powers of Charging Byelaw (No. 12 of 1990) for the many services provided by Lloyd's, including the costs of administering members' funds at Lloyd's and of the Lloyd's overseas offices.

FINANCIAL RECOURCES AT LLOYD'S (1):

SYNDICATE LEVEL

4.4 Lloyd's Annual Report and various Lloyd's publicity material refer to the "Lloyd's Chain of Security" as having three links:

a. syndicate level assets,
b. members' funds at Lloyd's and
c. central assets.



Source: Lloyd's financial statements, 31 December 2016

4.5 An equally apt analogy might be a series of reservoirs constructed to ensure that the syndicate level premiums trust funds are maintained at a sufficient level to meet the members' liabilities in connection with their underwriting business. That is in effect what the FSA/PRA handbook requires. The first "link" or reservoir consist of the assets maintained at syndicate level: these are the members' premiums trust funds (PTFs) and the overseas business regulatory deposits funded from them. The PTFs, working trust funds, are used to meet the claims, reinsurance premiums and other outgoings and expenses of the syndicate's business; the overseas deposits, in contrast, are required by overseas laws or regulators as security for the payment of claims in the relevant jurisdictions but in practice are never used because the system of financial resources at Lloyd's is designed to ensure that the PFTs are always sufficient for the purpose.

PREMIUMS TRUST FUNDS (PTFS)

4.6 Every underwriting member is required by Lloyd's as a condition and a requirement of membership and of underwriting to execute one or more premiums trust deeds (PTDs) in the prescribed form and to carry the receipts of his underwriting business to the appropriate premiums trust fund established in accordance with them. Those Lloyd's requirements derive from a statutory requirement, introduced (initially as regards fire, accident and non-marine business only) by the Assurance Companies Act 1909 and extended to marine, aviation and transit business by the Assurance Companies Act 1946. There are separate PTDs and corresponding PTFs for general business and for long-term business, in accordance with statutory requirements reflecting the EU insurance directives. By executing a PTD the member declares a trust over all assets potentially receivable by the member in connection with the member's underwriting business for the benefit of the member's creditors from time to time in respect of that business: this removes those trust assets from the member's general estate, including in the event of insolvency.

4.7 The mandatory form of the PTD is periodically revised, and all extant PTDs executed by members underwriting for 1999 or any subsequent year of account amended accordingly, to keep up (or catch up) with the structure of underwriting at Lloyd's, including the forms of underwriting agency agreements. The last major overhaul was undertaken in 1998, for members underwriting for 1999 and later years of account. The current versions are PTD G 2010 (reproduced at Appendix 5) for general business and PTD L 2010 for long-term business, in almost identical terms. The current forms of PTD are executed only between the member and Lloyd's. Until a new form of PTD was introduced for members who intended to underwrite for the 1999 year of account a member had a separate PTD (and PTF) for each members' agent through whom, or under arrangements made by whom, the member underwrote insurance business. Members' agents no longer have dispositive powers in relation to PTFs (except in so far as conferred by the members' agent's agreement in relation to personal stop loss recoveries etc.). That multiplicity of PTDs is still reflected in certain "Special Trust Directions" referred to later in this chapter.

FINANCIAL RECOURCES AT LLOYD'S (2):

MEMBER LEVEL – "FUNDS AT LLOYD'S"

4.8 A member's funds at Lloyd's (FAL) consist of the member's Lloyd's deposit, personal reserve fund, and, in the case of an individual member, any special reserve fund established by the member. Funds at Lloyd's serve as regulatory capital and their primary purpose is to be available to meet cash calls on the member, i.e. to replenish a particular Managing Agent's Sub-Fund of a member's PTF so far as it relates to particular syndicate.

FAL REQUIREMENTS

4.9 The current published requirements under paragraph 16 of the Membership Byelaw (No. 5 of 2005) for the provision of funds at Lloyd's, the Membership and Underwriting conditions and Requirements (M&URs) (Funds at Lloyd's), are those attached to Market Bulletin Y4067 dated 10 October 2007. Each member wishing to underwrite must specify in overall premium limit for the relevant year of account, with separate limits for general and long-term business. Each member must provide, by the "coming into line" dates in June and November in each year, the amount of "net funds at Lloyd's" calculated by reference to Appendix 2 to the M&URs, and to any existing net solvency deficiency or outstanding cash calls, after taking account of anticipated personal stop loss recoveries eligible for the solvency test. The amount of the net funds at Lloyd's to be provided is now calculated by reference to the ECA determined by Lloyd's for the member, having regard to the combination of syndicates on which the member participates and is to participate and to the business written by them and to their business plans for the following year, subject to a minimum of 40 per cent of the member's overall premium limit (OPL).

4.10 In addition to the general requirement to provide funds at Lloyd's at a specified level to support the member's underwriting, as a condition of underwriting a member must have executed either a Lloyd's deposit trust deed or a Lloyd's security and trust deed in the prescribed form and maintain a Lloyd's deposit under it. There are separate life deposits for long-term business. Instead of executing a Lloyd's deposit trust deed itself, a corporate member may, subject to the consent of Lloyd's, provide a Lloyd's deposit (or life deposit) in the form of a "covenant and charge" by a third party or a deposit provided by a third party and held pursuant to a Lloyd's deposit trust deed (third party). The forms of documentation are discussed below. The requirement to maintain a Lloyd's deposit is sometimes waived in the case of an aligned corporate member participating in only one syndicate which keeps all its funds at syndicate level ("funds in syndicate").

4.11 Appendix 3 to the M&URs sets out "acceptable asset" rules for FAL. Letters of credit subject to not less than four years notice of cancellation, with English proper law and exclusive jurisdiction clauses and complying with other Lloyd's requirements as to prescribed contents, are permitted assets (but under Solvency II will cease to count towards the MCR), as are guarantees issued by an approved credit institution, approved building society or approved life assurance company, and, for individual members, life assurance policies. Other acceptable assets may be prescribed for time to time. A member's FAL assets must be diversified and INSPRU 2.1.22R concentration limits apply to assets other than approved securities and holdings in UCITS schemes (as defined in the FSA/FS Handbook Glossary), LOCs, guarantees and life assurance policies. There are special rules for valuing a covenant and charge.

4.12 Where a letter of credit or bank guarantee is used to give security, a Lloyd's Security and Trust Deed is used. It is similar in form and content to the Lloyd's Deposit Trust Deed. The parties are the member and Lloyd's. The trust fund consists of the guarantee(s) of LOC(s) deposited with Lloyd's and a covenant by the member with the Trustees that if the Trustees serve on the member a notice requiring the payment by the member of a sum on account of its funds at Lloyd's, the member within 30 days thereafter will pay such sum to the Trustees to be held on the trusts of the deed. The member's aggregate liability is limited to the amount of FAL for the time being required of the member, less any "qualifying reserves", i.e. FAL in another form that the member has provided. The member can indicate that Lloyd's can draw on the guarantee or LOC notwithstanding that the 30-day period has not yet expired. The member covenants to procure that the guarantor will maintain in full force the LOC(s) or guarantee(s) and from time to time to renew or extend the LOC(s) or guarantee(s) so that they shall at all times be enforceable for the next four years.

4.13 FAL letters of credit are sometimes used in conjunction with so-called "gearing policies", quota share or stop loss policies taken out by the corporate member not as part of the syndicate underwriting but analogous to personal stop loss policies taken out by individual members, and under which a share of the member's profits becomes payable to the reinsurer. The LOC is given both as security in respect of claims under the policy and as a provision of FAL, but to be acceptable to Lloyd's as FAL, cannot be other than unconditional and payable on account of the member's obligation to provide a Lloyd's deposit, disregarding any deductibles under the policy or any right of the reinsurer to avoid the policy for non-disclosure or misrepresentation.

4.14 The provision of capital for corporate members by third parties who are not part of the member's corporate group or connected with it, whether discreetly by simple provision to the member of funds for a conventional deposit or the provision of collateral to LOC providers or overtly by the provision of guarantees, letters of credit or covenant and charge, or by "gearing policies", can be attractive both to corporate members and to the third parties. It provides a source of flexible, short-term capacity to the corporate member, particularly in a hard market, and gives the third party an opportunity to participate in the Lloyd's market without the degree of due diligence needed for shareholder investment. The practice is at times widespread and can raise questions as to the identity of the third party and the ultimate control of the corporate member. The risks to Lloyd's and the Lloyd's market are primarily of dispute between the third party capital provider and the member or other members of the corporate member's group and of rapid and significant withdrawal of capital from the market. In 2004 such "third party capital" supplied 7.4 per cent of total market capacity, of which over half came from just three capital providers. When the FSA became concerned at the concentration of LOC providers in the Lloyd's market for such purposes, Lloyd's undertook to the FSA to monitor the provision of letters of credit by way of security for FAL or quota share policies and accordingly requires details of such LOCs and of the collateral given for them in the annual declaration of compliance by corporate members.

4.15 The Personal Reserve Sub-Fund of the member's PTF is also an eligible component form of a member's funds at Lloyd's, and can simply be transferred by the Regulating Trustee to a Managing Agent's Sub-Fund.

FINANCIAL RECOURCES AT LLOYD'S (3):

THE CENTRAL FUND AND OTHER CENTRAL ASSETS

4.16 The "Central Fund" described in the Lloyd's Annual Reports as the third link in the Chain of Security actually comprises two different funds: the "old" Central Fund established under the Central Fund Byelaw (No. 4 of 1986) and the New Central fund established under the New Central Fund Byelaw (No. 23 of 1996). The New Central fund, recognising the "firebreak" between 1992 and prior general business established by the Reconstruction and Renewal of 1995 – 1996, may not be used to make payments to any company in the Equitas Group or meet any liabilities, if the Council so decided. The "Central Fund" is an important component of the assets meeting the collective capital and solvency requirements for the Lloyd's market under FSMA.

"OLD" CENTRAL FUND

4.17 The "old" Central Fund replaced the one that was held under the Central Fund Agreement 1927, sometimes referred to as the Central Guarantee Fund. In line with the general recommendation that contractual undertakings be replaced by byelaws where appropriate, Fisher recommended that a new Council be given powers to amend the 1927 agreement. The principal demerit of the 1927 Agreement was that a member had to be declared to be in default before the Central Fund was used, whereas it was more convenient to use the Central Fund to pay cash calls directly or to reimburse banks which had funded syndicates so that members need not be declared to be in default. The need for amendments to the 1927 agreement can be illustrated by the example, to finance the construction of the 1958 building that had to be agreed by all the subscribing members. This was an onerous requirement.

4.18 The "old" Central Fund received annual contributions from members between 1987 and 1996. It also received "special contributions" levied by the Council to meet a potential market solvency shortfall in 1992 and to fund the R&R market settlement in 1996. The "old" Central Fund was largely exhausted by the Lloyd's contribution to that market settlement but still has assets representing (*inter alia*) recoveries from non-accepting members whose cash calls had been met from it and charges over property as security for the repayment of Hardship Scheme and other debts owed by members whose liabilities were met from the fund. Investments in the "old" Central Fund were appropriated, "earmarked", to enable members with solvency shortfalls to pass the collective solvency test. In such cases the Council could demand repayment of the amount of any earmarking to the extent to which it appeared that the earmarked assets would likely be applied to meet the members' liabilities. By way of defence to claims, by Lloyd's for reimbursement of sums paid out of the Central Fund to meet members' cash calls, it was asserted buy some members that the Central

Fund and the solvency test rules constituted a breach of the Treaty of Rome. That challenge to the byelaw failed.

4.19 The "old" Central Fund may be applied (and the fund may be charged) in the absolute discretion of the Council for any of the following purposes:

a. making good any default by any member of the Society under any contract of insurance underwritten at Lloyd's;

b. preventing the occurrence or reducing the extent of such default by any member of the Society;

c. compensating in whole or in part any person (including the Society) or on behalf of any member of the Society for making any payment which has the effect of preventing or reducing such default by any such member;

d. extinguishing or reducing the liability of any member of the Society to any person whatsoever whether or not arising under a contract of insurance;

e. repaying monies previously borrowed for the purposes of this byelaw and paying interest, premium or other charges on such monies;

f. any other purpose; where in the opinion of the Council it is expedient for the advancement and protection of the interests of the members of the Society in connection with the business carried on by them as such members.

In practice, the "old" Central Fund was mainly applied in meeting syndicate cash calls. It is not a trust fund and no policyholder or anyone else has a right to payment from it (except where the Council has specifically charged it or put it in trust for such purpose).

NEW CENTRAL FUND

4.20 The New Central Fund, established in 1996 as part of the "firebreak" from 1992 and prior general business liabilities, and its governing byelaw replicate many features of the "old" Central Fund. It belongs legally and beneficially to Lloyd's. It consists of member's contributions, borrowings by Lloyd's for the purpose, recoveries in respect of applications (and, in theory at least) or any appropriations in relation to specific members in the global solvency test, and other sums added to the fund. There are annual contributions, and there may also be "callable contributions" (the "callable layer") not exceeding a pre-announced amount, and, if it appears to the Council to be requisite or expedient, special contributions. All contributions are determined by special resolution of the Council and are subject to the undertaking given to members not to exceed the pre-announced annual amount without the consent of a majority of members (by capacity) liable to pay them. For 2017, annual contributions were 0.5 per cent of a member's written premium for the year of account (adjusted retrospectively by reference to audited syndicate returns). New corporate members pay increased annual contributions of 2 per cent for the first three years of membership, except where they are "successor corporate members" or participate only in already existing syndicates. The callable layer is 3 per cent of allocated capacity, but valued according to the syndicate's sterling/US dollar business mix i.e. variable according to exchange rate movements.

4.21 For a few years beginning with the introduction of ICAS in 2005 members were required in addition to paying annual contributions, to make deeply subordinated annual "syndicate loans" to count as upper Tier 2 capital within the New Central Fund. The fund was further increased by the proceeds of issues by Lloyd's of subordinated debt in 2004 and perpetual subordinated capital securities in 2007, the latter being used to repay all outstanding syndicate loans.

4.22 The New Central Fund is taken into account in complying with the collective solvency and capital requirements under GENPRU, INSPRU and IPRU(INS) and in commercial insurer security ratings for the Lloyd's market and Lloyd's credit ratings as regards the subordinated debt and perpetual subordinated capital securities. The purposes for which it may be applied, at the discretion of the Council, are:

a. directly or indirectly extinguishing or reducing any liability of a member to any person arising out of or in connection with insurance business carried on by that member at Lloyd's;

b. repaying monies previously borrowed for the purposes of [the] byelaw and paying interest, premium or other charges on such moneys;

c. [repaying special contributions made by members to the Central Fund for the purpose of the R&R settlement and the funding of Equitas – now concluded];

d. any other purpose (whether or not similar to any purpose mentioned in (a) to (c) above) which may appear to the Council to further any of the objects of the Society.

Sums so applied to discharge a member's liabilities can be recovered from the member as a civil debt, with interest and without set-off. In practice, where a corporate member appears to be on the verge of insolvency and unable to meet syndicate cash calls, to prevent that member becoming actually insolvent and having to call a creditors' meeting, Lloyd's gives an undertaking to the member, or to its provisional liquidator if one has been appointed, to meet from the New Central Fund all cash calls during the following 12 month period up to a limit which is the best estimate of the maximum likely aggregate amount of such cash calls. Where such a corporate member is in provisional liquidation, Lloyd's gives a supporting commitment to the court to the effect that in no circumstance will an insurance business creditor of the member receive less than it would have in a winding up commenced on the date of the provisional liquidation order.

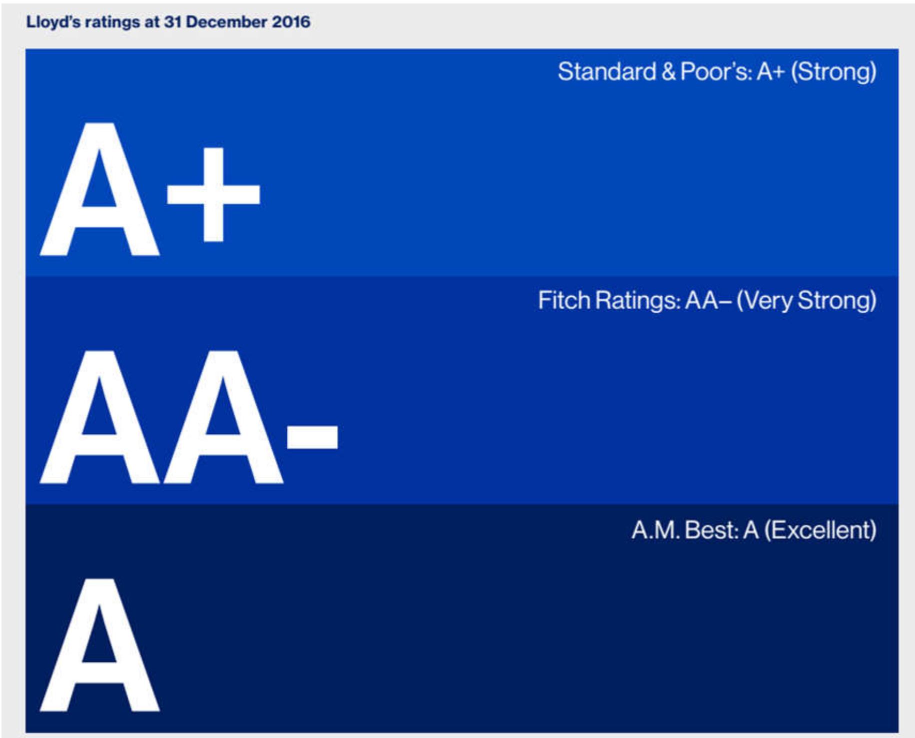
4.23 The New Central Fund may not be applied (a) by way of payment (other than a payment on arms' length terms in respect of property, assets, services or other benefits) to any member of the Equitas group; or (b) directly for the purpose of extinguishing or reducing any liability of a member in respect of which Equitas Reinsurance Limited has, under an Equitas reinsurance contract, undertaken to reinsure and indemnify that member; except, in either case, in discharge of any legally binding obligation of Lloyd's existing before the date on which the byelaw came into force or with the prior sanction of a general meeting of the members of Lloyd's. A general meeting in early 2007 approved a contribution by Lloyd’s out of the New Central Fund towards the premium for the Equitas-NICO retrocession and run-off agreement.

SECURITY AND RATINGS

4.24 The single market ratings – from Standard & Poor’s, Fitch Ratings and A.M. best – reflect the fact that all contracts underwritten at Lloyd’s are backed by Lloyd’s Chain of Security. All policyholders benefit from the robust financial position of the market as a whole.

LLOYD’S RATINGS

4.25 All Lloyd’s syndicates benefit from Lloyd’s central resources, including the Lloyd’s brand, its global licences and the Central Fund. As all Lloyd’s policies are backed by this common security, a single market rating can be applied. Lloyd’s financial strength ratings apply to all policies issued by Lloyd’s syndicates since 1993. Three of the world’s leading insurance rating agencies – Standard & Poor’s, Fitch Ratings and A.M. Best – assess Lloyd’s capitalisation and financial strength. Additional information on the security underlying policies at Lloyd’s can be found on the Lloyd’s website.



LLOYD’S CAPITAL SETTING PROCESS

4.26 Lloyd's capital setting process is done at a global level. Syndicates that write South African business in addition to business in other territories have to deposit funds in their Fund’s at Lloyd’s (FAL) in order to support the underwriting of this business. This is calculated by the Market Reserving and Capital team at Lloyd’s.

4.27 Lloyd’s is subject to the Prudential Regulation Authority’s (PRA) SCR requirement, which looks at all the risks facing an insurance undertaking, including insurance, credit, market, liquidity, group and operational risks. However, whilst the PRA requirement is in regards to the one-year view of risk, member capital at Lloyd’s is based on the Ultimate view, which Lloyd’s considers as being more appropriate given the structure of Lloyd’s. The ultimate measure captures the adverse development until all liabilities have been paid and is considered to be a more appropriate risk measure, since it captures the risk in respect of the planned underwriting for the prospective year of account in full, covering ultimate adverse development and all exposures.

The first stage of this is the generation of syndicate SCRs on an ultimate risk horizon (uSCRs) by managing agents through individual syndicate stochastic internal models; these are then extensively reviewed by Lloyd’s and “syndicate specific loads” are applied if the syndicate uSCRs are not considered to be adequate. These are individually targeted at a 99.5% confidence level for each syndicate.

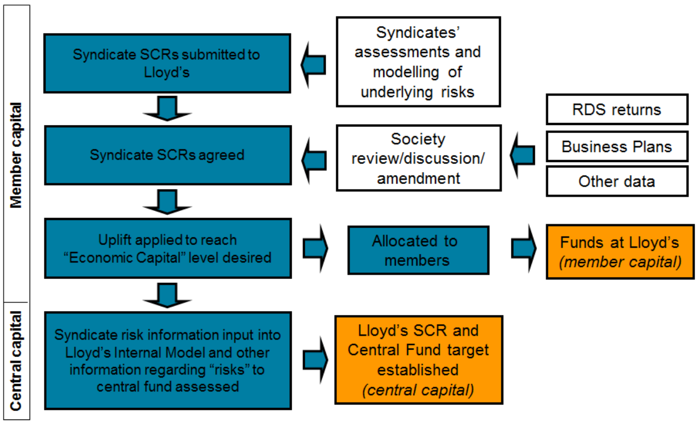
At the second stage Lloyd’s then applies an “economic capital uplift” (currently 35%) to these several assets, to maintain Lloyd’s aggregate capital at a level significantly in excess of regulatory minima, to meet its financial strength objectives.

4.28 The syndicate capital requirement is reviewed in conjunction with the business plan. The capital requirement for each syndicate is evaluated on an annual basis each September. A detailed review is performed for the capital submissions in terms of the models’ data, assumptions, methodology, outputs, validation, governance etc. Additionally, a high-level review is performed in the first quarter of the following year (if there is a capital resubmission by a syndicate) to ensure that emerged/prospective experience is in line with the models’ assumptions.

The overall capital and central capital is well above Solvency II required levels and is subject to on-going rigour to ensure it remains appropriate.1 For these reasons, Lloyd’s believes its solvency and capital position is appropriate.

[1] Lloyd’s capital and solvency is assessed within Lloyd’s ORSA

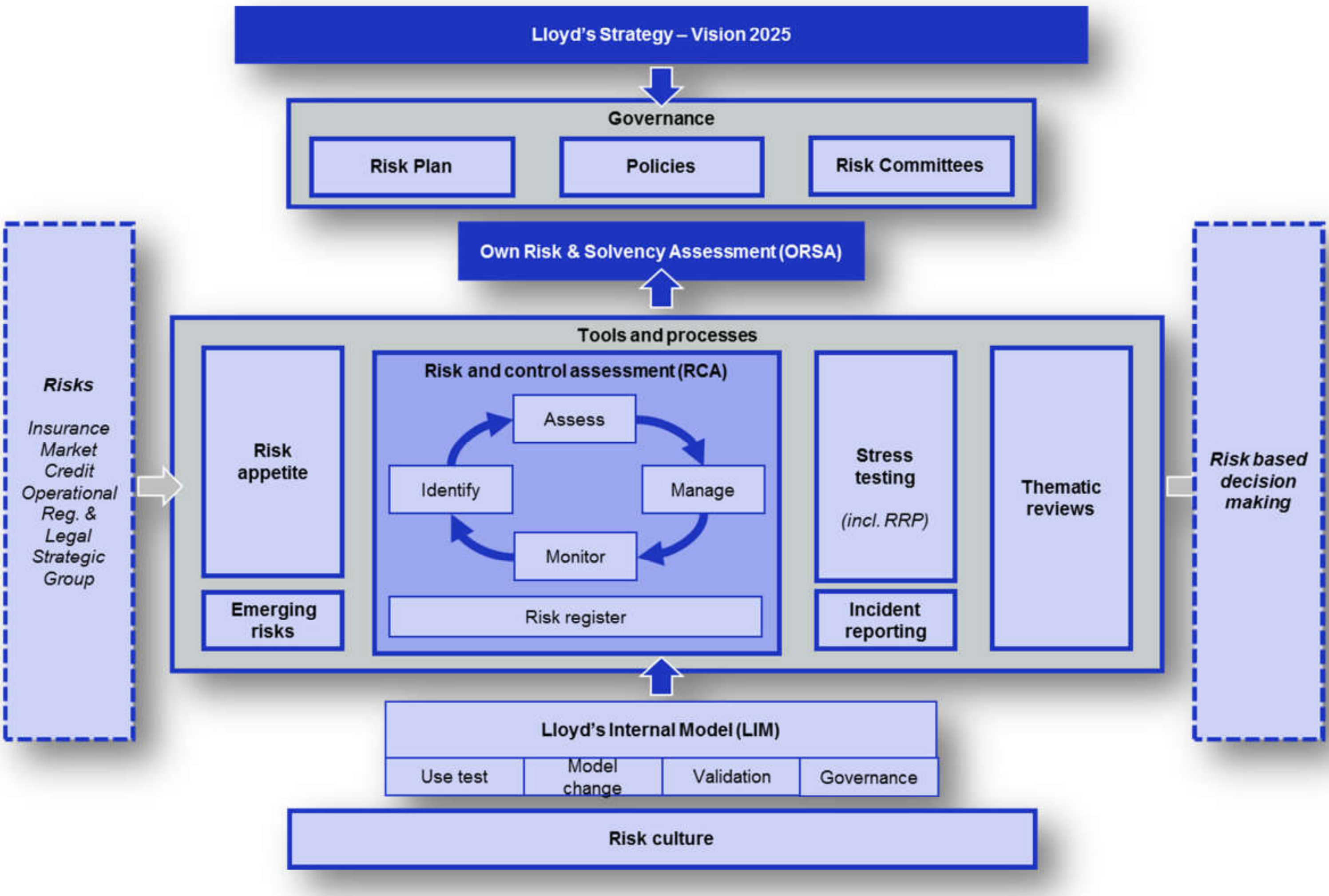
Figure below shows Lloyd's Capital setting process:



4.28 Lloyd's objective is to hold capital of a sufficient quantity and quality to be able to meet its economic objectives in terms of financial strength and ratings, as well as meeting its regulatory capital requirements as set out by the PRA.

4.29 With regard to its' Regulatory objectives, Lloyd's is similar to any other (re)insurance undertaking, it must maintain capital of sufficient quantity and quality to meet its Solvency Capital Requirement (SCR). Lloyd's is required to calculate its Minimum Capital Requirement (MCR). Under Solvency II, this is the minimum amount of capital Lloyd's needs to cover its risks. If an insurers' risk capital falls below their MCR they will be prohibited from writing any further business.

RISK MANAGEMENT FRAMEWORK



Overseas Risk Group (ORG)

The function of the ORG is to provide assurance that risks related to Lloyd's overseas offices and subsidiaries are identified and managed in accordance with approved policy and risk appetite.

LLOYD'S SYNDICATES IN 2016

Acappella	ADVENT	AEGIS	ALLIED WORLD
AmTrust at Lloyd's	antares	APOLLO	Arch Underwriting at Lloyd's
ARCUS 1856	Argenta	ARGOGLOBAL	Ariel Re
ARK	ascot	ASPEN	asta
ATRIUM	AXIS	Barbican Insurance Group	Beaufort Underwriting Agency Limited
beazley	BRIT Global Specialty	CAPITA	CATHEDRAL Underwriting Ltd
Charles Taylor Managing Agency	Chaucer	CHINA RE	CHUBB
CNA / HARDY	Dale Underwriting Partners	DTW 1991	Endurance
ERS	EVEREST	FARADAY	HAMILTON·LLOYD'S
HISCOX	icat Syndicate 4242	Liberty Specialty Markets	MAP

MARKEL	MS Amlin	Munich Re Syndicate Limited Munich RE	Navigators Insuring A World In Motion
NEON	Nephila	Newline Group	Novae Looking Forward
Pembroke Managing Agency	1492 Probitas	ProSight Specialty Insurance	QBE
R&Q	RenaissanceRe	RiverStone A Fairfax Company	S A Meacock & Company Limited
Sirius International	SKULD	Sompo Canopius	STARR Companies
STARSTONE	Syndicate 2525	TALBOT Validus Group	The Channel Managing Agency
The Standard Syndicate	Tokio Marine HCC	Tokio Marine Kiln	TRAVELERS
VIBE	W/R/B Underwriting	XL XL Catlin	

5. REGULATION OF THE LLOYD'S MARKET UNDER FSMA

5.1 The Financial Services and Markets Act (FSMA) and subordinate legislation made under it by HM Treasury and the former Financial Services Authority have since 30 November 2001 provided a comprehensive, integrated regime for the regulation of the banking, securities and insurance industries in the UK. Securities, contracts and other financial products are alike referred to in the legislation as "investments". Until FSMA, the participants in the Lloyd's market had been regulated by Lloyd's itself with only minimal external statutory oversight. From an early stage in the drafting of the Financial Services and Markets bill the government decided that Lloyd's policyholders should have the benefit of a regulatory regime similar to that applying to insurance companies and that the FSA should have wide powers over Lloyd's itself and over participants in the Lloyd's market. The government's primary concern would be the protection of policyholders against the risk that valid claims might not be paid, and that particular account should be taken of risks arising from poor underwriting, inadequate monitoring and control of underwriting risk, and concentrations of risk.

5.2 Consequent on the Government's 2010 review of financial regulation in the wake of the 2007 – 2008 financial crisis, the FSA, on 1 April 2013 ("legal cutover") was replaced by, and its functions under FSMA distributed between, the two new regulatory authorities, the Prudential Regulation authority (PRA) and the Financial Conduct Authority (FCA). They are subject to direction by a new Financial Policy Committee of the Bank of England, responsible for macro-prudential regulation. The PRA (a subsidiary of the Bank) is responsible for the prudential regulation of prudentially significant firms, Lloyd's itself and managing agents are dual-regulated, i.e. by both PRA and FCA. Members' agents and Lloyd's brokers are regulated by the FCA alone. For that purpose FSMA was significantly amended by the Financial Services Act 2012. The Government intended to limit the extent to which regulated firms and other users of FSMA would have to deal with legislative change.

5.3 Until the Insurance Companies Act 1974, the UK statues applying to non-life insurers did not apply to a member of Lloyd's at all, provided that he carried all premiums received by him or on his behalf to a premiums trust fund and his accounts were annually audited by an approved accountant who submitted a certificate of adequacy (or otherwise) of assets to the Committee of Lloyd's, and to the Board of Trade (later the Secretary of State). The Committee of Lloyd's was from 1946 required to submit annually to the Board of Trade a statement of business done by the members of Lloyd's during the preceding 12 months. Part II of the Insurance Companies Acts 1974 and 1982 (regulation of insurance companies) did not apply to a member of Lloyd's, subject to the proviso mentioned above. With the UK accession to the European Economic Community in 1973, solvency, accounting and reporting requirements were increasingly imposed on the members collectively and the Secretary of State given corresponding powers of intervention.

6. SYNDICATES (1): STRUCTURE AND PARTICIPATION

6.1 The FSA/PRA rules require that "[n] either the Society nor managing agents may permit a member to carry on any insurance business except as a participant on one or more syndicates". Lloyd's Acts 1871 to 1982 refer to syndicates (without defining them) only in the context of the Council's power to make byelaws requiring the audit of syndicate accounts and the provision of reports and accounts to syndicate members, and empowering the Council to order an enquiry concerning the affairs of any syndicate. For the purposes of Lloyd's byelaws the Definitions Byelaw (No. 7 of 2005) provides that

"syndicate" means a member or group of members underwriting insurance business at Lloyd's through the agency of a managing agent or a substitute agent to which a syndicate number is assigned by the Council. Except where it is expressly otherwise provided, the several groups of members to which in different years a particular syndicate number is assigned by or under the authority of the Council, shall be treated as the same syndicate, notwithstanding that they may not comprise the same members with the same individual participations.

6.2 Why have syndicates at all? There are two aspects to this: underwriting by individuals with several liability, and their doing so through the agency of a professional underwriting agent. For over 100 years after the Bubble Act the underwriting by partnerships of marine insurance in competition with the statutory duopolists, Royal Exchange and London Assurance, was prohibited. Only individual underwriters were permitted to compete with them until the repeal of the Bubble Act in 1824. Until the second half of the nineteenth century, Lloyd's underwriters wrote small lines for very small syndicates or entirely individually. Competition from companies after the Joint Stock Companies Acts 1844 and 1856, particularly in the 1870's and 1880's, and the growth of non-marine insurance during that period, when there were yet too few experienced non-marine underwriters, necessitated the formation of larger syndicates. When the Society, previously regulated by a deed of association executed by all the then members, was incorporated in 1871, the "Fundamental Rules of the Society" in the Schedule to the 1871 Act provided that an underwriting member should not underwrite a policy of insurance "in the name of a partnership or otherwise than in the name of one individual (being an underwriting member of Society) for each separate sum subscribed". The Cromer Committee, reporting in 1969, considered, as ways of limiting members' liability, the introduction of one-man companies and of syndicates constituted either as limited partnerships or as companies but ruled out both, partly on tax grounds and partly because of the size of paid up reserves that would be needed to ensure that policyholders' claims were met. The "fundamental" several underwriting rule repealed by the 1982 Act was replaced by s. 8(1) of that Act, to essentially the same effect in requiring the several liability of subscribers to policies (but without the limitation to individuals):

An underwriting member shall be a party to a contract of insurance underwritten at Lloyd's only if it is underwritten with several liability, each underwriting member for his own part and not one for another, and if the liability of each underwriting member is accepted solely for his own account.

6.3 The paradigm syndicate is thus a group of members who entrust their underwriting business to a (corporate) managing agent which employs professional underwriting and other staff for the purpose. The managing agent's authority derives from a "managing agent's agreement" in a standard form prescribed by Lloyd's. The authority given to the managing agent to underwrite insurance on behalf of each of the members constituting the syndicate lasts for one underwriting year, or "year of account" at a time, the "annual venture", and is automatically extended for the following year unless terminated in accordance with the provisions of the managing agent's agreement. Since 1995 syndicate members have had the contractual right, but no obligation, to remain on the syndicate as constituted for the following year of account. For each successive year of account the managing agent will underwrite business on behalf of what may be a differently or an identically constituted syndicate, which, unless it has only a single, continuous member, will technically be a different syndicate but will be treated for many purposes as the same one, with the same identifying number. The 12-month period derives originally from historical usage, dating from the time when insurance was predominantly of ships or their cargoes for a relatively short period and underwrites wished to receive their profits as quickly as possible. The 12-month period has been consciously preserved for the purpose of the standard managing agent's agreement in recognition of the general rule of English law that an agency is always revocable, even in breach of contract (but without prejudice to claims for damages for breach of that contract), unless given for the purpose of supporting or effectuating any security, or, perhaps of protecting or securing an interest of the agent or where there is statutory protection of third parties or the agent in respect of acts done under a power of attorney. Although the authority to accept new risks on behalf of the members of the syndicate as constituted for each year of account is temporally limited, the managing agent's authority to do what is necessary to wind up the underwriting business is not. This includes claims handling, placing syndicate reinsurances and collecting recoveries under them, management of syndicate investments and finally, at the end of three years, the reinsurance of all the outstanding liabilities of the members of the syndicate as constituted for that year into a later year of the same or another syndicate as constituted for a later year of account, the "reinsurance to close" (RITC). The RITC enables the profit for the year of account to be calculated and distributed to the members.

6.4 The success of the Lloyd's market in attracting corporate capital since 1993, the relaxation of the anti-concentration rules for corporate members' capacity allocation, and the establishment of an auction system and other mechanisms for "transferring" between members rights to participate in syndicates for future years of account have resulted in a market of which in 2011 only 3 per cent of the capacity was provided by individual members and 88 per cent by insurance industry or other corporate investors. Of the 92 syndicates in the market at the beginning of 2012, 46 could be described as "fully aligned" in the sense that the syndicate single member or several members and the managing agent were under common control. Where the syndicate has a single, continuing, member under common control with the managing agent (a so-called "integrated Lloyd's vehicle" or ILV) the syndicate is in effect continuous from year to year, not limited to successive periods and having no use for RITC until the investor wishes the corporate member to cease underwriting. One might expect the managing agent and the syndicate member in an ILV to contract in whatever form and on whatever terms their corporate controller chooses, and indeed, to merge member and agent entities. This seems likely eventually to be permissible. However, this may take some time because a significant proportion of the market is still in a state of transition towards that end, because private investors in the market need or prefer access to a spread of fair-sized syndicates, and because UK and foreign regulatory and taxation arrangements are still based on the traditional paradigm.

RELATIONSHIP BETWEEN MEMBERS

6.5 A syndicate has no legal personality and its members are not in partnership with each other or with the managing agent. The managing agent, the syndicate members and all of their members' agents contract with each other by means of the Syndicate and Arbitration Agreement in Schedule 2 to the managing agent's agreement. They agree each to observe all the terms of the various agency agreements and to submit certain kinds of dispute to arbitration: members of a syndicate would, for example, be able to bring proceedings for breach of contract against a member who decided to resign from the syndicate and terminate the managing agent's underwriting authority prematurely, if doing so threatened the viability of the syndicate or the performance of its business plan.

6.6 When the managing agent underwrites insurance contracts, or places outwards reinsurance, on behalf of the syndicate it does so on behalf of each member severally, in shares determined by the syndicate constitution, or "stamp", for the year. The slip subscribed by a syndicate is aptly described as "a bundle of contracts between the assured and a large number of individual underwriters". Similarly, whereby a single slip a syndicate reinsures another syndicate (or group of syndicates or companies) "the slip is partied on both sides…each reassured is put in contractual relations with each reinsurer". To leave the assured and its broker in no doubt, the subscription clause placed on contracts, LMA 3333 provides:

(Re) insurer's liability several not joint
The liability of a (re)insurer under this contract is several and not joint with other (re)insurers who are party to this contract. A (re)insurer is liable only for the proportion of liability it has underwritten. A (re) insurer is not jointly liable for the proportion of liability underwritten by any other (re) insurer, nor is a (re) insurer otherwise responsible for any liability of any other (re) insurer that may underwrite this contract.

The proportion of liability under this contract underwritten by a (re) insurer (or, in the case of a Lloyd's syndicate, the total of the proportions underwritten by all the members of the syndicate taken together) is shown next to its stamp. This is subject always to the provision concerning "signing" below. In the case of a Lloyd's syndicate, each member of the syndicate (rather than the syndicate itself) is a (re) insurer. Each member has underwritten a proportion of the total shown for the syndicate (that total itself being the total of the proportions underwritten by all the members of the syndicate taken together). The liability of each member of the syndicate is several and not joint with other members. A member is liable only for that member's proportion. A member is not jointly liable for any other member's proportion, nor is any member otherwise responsible for any liability of any other (re) insurer that may underwrite this contract. The business address of each member is Lloyd's, One Lime Street, London EC3M 7HA.

The constitution of the syndicate may change during the year if members die or become insolvent or have to stop underwriting for any other reason; and the (remaining) members will be liable in different proportions as regards risks written after that date. A new stamp then applies for the remainder of the year or until the next change if earlier. The several liability of the members for their respective proportions of each risk written is reflected in the title in the syndicate investments representing premiums and other income of the business being vested in the managing agent's trustees of each of the several syndicate members' premiums trust funds, pooled for the purpose of the business of the members of the syndicate as constituted for the three open years. Each member is liable to pay cash calls to ensure sufficient liquidity in the pooled funds for meeting outgoings of the business. These syndicate level premiums trust funds of each member are used to fund the various overseas business regulatory deposits, which are principally trust funds held for each name for each syndicate.

MEMBER IN PERSPECTIVE

a. A UK registered limited liability company set up exclusively to underwrite at Lloyd's.
b. Underwrites through participation on one or more syndicates.
c. A member delegates to a managing agent the management of each syndicate on which they participate.
d. A member is required to deposit Funds at Lloyd's (FAL) in an amount agreed with Lloyd's (through the capital setting process) to support their underwriting.
e. A member's FAL may be provided in a number of forms acceptable to Lloyd's.
f. Each member pays contributions to Lloyd's Central Fund (0.5% of written premium per year) and member subscription (0.5% of written premium per year).
g. A member will also pay fees (variable) and a Profit Commission based on syndicate performance to the managing agent.

SETTING UP A MEMBER

h. It is recommended that entities wanting to establish a new member consult with a Lloyd's members agent and/or a professional advisor.
i. Lloyd's will supply a membership application pack which must be completed.
j. A member must sign a managing agent agreement with the managing agent that manages the syndicate(s) on which they will participate.
k. The member must deposit FAL as calculated by Lloyd's before being allowed to commence underwriting.
l. A new member participating on a new syndicate pays Lloyd's Central Fund contributions at a rate of 2.0% of written premiums for its first three years of account.
m. Timeframe: Typically 2 months to complete and approval application.
n. Lloyd's costs: £25,000 application fee for a new corporate member.
o. Set-up costs: Estimated to be +/- £250K including set-up of UK company, legal fees etc.
p. Lloyd's: That a new corporate member appoints a members agent* to
q. Recommends: provide administrative services for the member.

SYNDICATE IN PERSPECTIVE

r. The identity given to a member or group of members underwriting insurance business at Lloyd's who have agreed to support a common business plan.
s. Each syndicate must be managed by a managing agent.
t. Each syndicate is set-up on year of account basis and can be renewed for subsequent years of account*.

u. Each year is "closed" at 36 months by a mechanism called "Reinsurance to Close" or RITC, where the outstanding liabilities of a syndicate year of account are reinsured into the next syndicate year of account.
v. The syndicate number appears on all policies it underwrites.
w. The syndicate's business plan and capital requirement is approved by Lloyd's on an annual basis or more frequently if required.
x. * Year of Account basis = all risks incepting during that calendar year.

SETTING UP A SYNDICATE

y. Each new syndicate must be approved by Lloyd's Franchise Board.
z. Lloyd's is looking for business proposals that:
aa. Bring new business and business opportunities into the market
bb. Diversify Lloyd's market portfolio, by class and/or geography
cc. Increase expertise
dd. Introduce new business and/or distribution models
ee. A new syndicate proposal must be sponsored by a managing agent.
ff. A new syndicate capital loading of 20% will be applied for the first 3 years of account.
gg. Timeframe: Typically 9-12 months
hh. Lloyd's costs: £100,000 application fee (upon Franchise Board approval)
ii. Set-up costs: Estimated to be typically £1m - £2m including costs of employees, consultants, managing agent etc
jj. Lloyd's Recommends: That a new syndicate is managed by an existing managing agent for a period of at least 36 months.

SPECIAL PURPOSE SYNDICATE

kk. A syndicate set-up for the purpose of reinsuring a "host" Syndicate through a single quota share reinsurance agreement.
ll. The Reinsurance agreement can be whole account or for specific classes.
mm. An SPS does not underwrite individual policies.
nn. An SPS is managed by the managing agent of the "host" syndicate.
oo. The SPS' business plan and capital requirement is approved by Lloyd's on an annual basis or more frequently if required.
pp. An SPS may have reduced reporting requirements.
qq. The Active Underwriter of an SPS is typically the Active Underwriter of the "host" syndicate.

PROCESSING SYNDICATE APPLICATION

You	Process step	Lloyd's
Determine interest in investing at Lloyd's	Meetings/Correspondence with Lloyd's	Provide new entrant guidance. Discuss possible options.
Choose Advisors and/or Partners	Meetings/Correspondence with Lloyd's Managing	Facilitate contact with Managing Agents and consultants/advisors
Agree which option to take and prepare Proposal – Initial discussion	With chosen Managing Agent	Lloyd's provides initial feedback and determines if proposal can proceed to 1st formal stage.
Initial presentation of Proposal	High Level Pitch	Lloyd's provides feedback and determines if proposal can proceed to
Final presentation of Proposal	New Entrant Assessment Group	Detailed discussion of business proposal. Lloyd's provides feedback and determines if proposal can proceed to the committee stage.
Board consideration	Executive Team / Franchise Board	"In principle" approval is granted to successful proposals.
Delivery	Making it Happen	Lloyd's undertakes pre-permission review. MA and/or syndicate ready to
Start Underwriting	Permission granted	Lloyd's grants formal permission.

SETTING UP A MANAGING AGENT

rr. Each new managing agent must be approved by Lloyd's Franchise Board and both the PRA and FCA.
ss. A new managing agent is only approved if the syndicate that it will manage has been clearly identified.
tt. The managing agent must demonstrate that it has the skills, resources and governance framework in place before permission to manage a syndicate is granted.
uu. Timeframe: Typically 18-24 months
vv. Lloyd's costs: £200,000 application fee (payable upon Franchise Board approval)
ww. Set-up costs: Variable. Estimated to be typically £5m - £10m including costs of employees, consultants, premises etc.
xx. Lloyd's Preferences: That a new syndicate is managed by an existing managing agent for a period of at least 36 months. This allows for a gradual build-up of resources and knowledge. After 36 months Lloyd's will consider applications to set-up a new managing agent.

MANAGEMENT OF SYNDICATES

6.7 The functions, duties and powers of the managing agent as regards each syndicate member, and the duties of the member to the managing agent are set out in the standard managing agent's agreement. To establish or manage a syndicate the managing agent needs the permission of the Franchise Board. A managing agent also needs Part 4A permission under FSMA to carry on the regulated activity of "managing the underwriting capacity of a Lloyd's syndicate as a managing agent at Lloyd's", whatever that means, and various other regulated activities. The managing agent must appoint an active underwriter for the syndicate, defined as "the individual at or deemed by the Council to be at, the underwriting box with principal authority to accept risks on behalf of the members of the syndicate. There will also be deputy or assistant underwriters, class underwriters and possibly a director of underwriting for the agent. If the syndicate is a run-off syndicate, the managing agent need not appoint an active underwriter but must appoint a run-off manager.

6.8 The managing agent is required to prepare a business plan for the syndicate each year, adherence to which is monitored by Lloyd's, and which is used by the managing agent to determine the syndicate's individual capital assessment (syndicate ICA) on which Lloyd's determines the amount of the syndicate economic capital assessment (ECA) on which the level of funds at Lloyd's requirements for the constituent members are derived.

6.9 The syndicate members, rather than the managing agent, appoint the recognised accountant as auditor for the purpose of the annual solvency test, the audit of the syndicate annual report under the Syndicate Accounting Byelaw, and the preparation of any report on the syndicate required by the Council under paragraph 13 of the Audit Arrangements Byelaw (No. 7 of 1998).

MANAGING AGENTS

6.10 A managing agent is, for the purposes of requirements of the Council:

an underwriting agent which has permission to manage a syndicate and carry on underwriting and other functions for a member

where “underwriting” means, unless the context otherwise requires

The business of underwriting and all related activities including the acceptance of risks, the purchasing of reinsurance and the settlement and payment of claims

And “underwriting agent” is defined simply as meaning a managing agent or a members’ agent. “Managing agent” is defined in broadly the same way for the purposes of the FSA/FS Handbook. The functions of managing agents are set out in clauses 3 to 5 of the standard managing agent’s agreement.

PERMISSION BY LLOYD’S TO ACT AS MANAGING AGENT

6.11 A managing agent (other than a substitute agent) needs the permission of the Franchise Board both to act as a managing agent and to manage a syndicate. These matters are currently governed by the Underwriting Byelaw (No. 2 of 2003) and the Underwriting Requirements made under it. Individuals and partnerships are not eligible to be managing agents. An underwriting agent may not act both as a managing agent and a member’s agent: “combined agents” are no longer permitted. Managing agents permitted to act as such are entered in the register of underwriting agents and approved run-off companies maintained by the Franchise Board.

6.12 The Franchise Board may not grant permission to an applicant to act as a managing agent, or o manage a particular syndicate, unless satisfied that it is a suitable company to be permitted so to act. Criteria as to suitability are set out in the Underwriting Requirements. The Franchise Board must have regard to whether the applicant is a competent, proficient and capable organisation. Criteria include the following:

a. compliance with good governance principles (effective board of directors, clear division of responsibilities, balance of responsibilities);
b. the quality and adequacy of the applicant’s human resources, including the competence, reputation, character and suitability of each of the applicant’s directors, and of its officers, trustees, and staff,
c. the collective suitability of the board and of its committees,
d. the quality and adequacy of its training programme
e. the past, present and forecast underwriting performance of its underwriters;
f. the qualify and adequacy of other resources, including IT systems, accounting and credit control systems, its consultants, advisers, service providers and agents;
g. the quality and adequacy of its controls and procedures to manage its business.

h. the applicant is of appropriate reputation and standing; whether persons who are controllers of, associates of or connected with the applicant are of appropriate reputation and standing;
i. whether the applicant has adequate capital and financial resources;
j. whether the applicant is able to meet the Lloyd's performance framework of Minimum Standards.

In considering whether a managing agent is suitable to manage a syndicate the Franchise Board must also have regard to the syndicate business plan.

CONTINUOUS REQUIREMENTS

6.13 Once given permission to act as a managing agent and to manage a specific syndicate, the managing agent is bound to observe various continuous or periodic requirements imposed by, or under, the Underwriting Byelaw. Part B, "Principles of relationship and service standards" is a vestige of the "franchise" construct proposed by the Chairman's Strategy Group", in which managing agents were to be regarded as "franchisees". Paragraph 10, headed "Principles of relationship", empowers the Franchise Board, following consultation, from time to time to "issue statements setting out Lloyd's goals and market objectives and the principles in accordance with which Lloyd's and managing agents will generally be expected to work together and assist each other to achieve those goals and objectives. The "Principles of relationship" are set out in Chapter 1, paragraph 3, of the Underwriting Requirements made under the paragraph 10 of the Underwriting Byelaw. They include a statement that:

The Franchise Board will –

a. From time to time publish guidelines and standards with which it will generally expect franchisees to comply. These guidelines and standards will cover a range of underwriting and risk management issues which are based on sound insurance industry practice
b. Develop the business planning process for syndicates and implement and operate it in a constructive and facilitative manner
c. Carefully monitor the performance of each syndicate against its business plan and assist franchisees to improve the results of underperforming syndicates. If, however, a franchisee does not respond to a facilitative approach the Franchisee Board will take appropriate action which may ultimately include the removal of a franchisee from the franchise.

In return, the Franchisee Board will expect franchisees to operate in accordance with the following principles –

a. Deal with Lloyd's in an open, constructive and cooperative manner
b. Protect –
    - The brand and reputation of Lloyd's
    - Lloyd's security rating
    - The security behind Lloyd's policies including the New Central fund

- Lloyd's licences and authorisation to conduct insurance business in the UK and overseas

c. Deliver high levels of service to brokers and policy holders in accordance with set service standards, systems and protocols
d. Prepare high quality business plans in accordance with the relevant guidelines with a review to achieving the Franchise Board's long term profitability targets
e. Operate and underwrite in accordance with agreed business plans
f. Accurately report syndicate performance in a timely manner and assist Lloyds in understanding the factors which may have affected syndicate performance
g. Notify the Franchise Board in good time of any matters which may have a material effect on the franchisee, its syndicates or on Lloyd's as a whole
h. Protect the confidentiality of information provided by Lloyd's.

To further these objectives, the Franchise Board has issued statements of principles and minimum standards for the administration of insurance business under paragraph 12 of the byelaw, and introduced business planning and performance monitoring requirements under Parts C and D and risk management requirements under Part E.

6.14 A managing agent is required by Lloyd's at all times to comply with FSMA and the requirements made under it by regulators.

RESTRICTIONS ON BUSINESS

6.15 An underwriting agent may carry on only its business as such at Lloyd's and such other business as the Franchise Board may permit.

6.16 Managing agents are restricted as to the sub delegation of certain important functions. The Intermediaries Byelaw (No. 3 of 2007) prohibits a managing agent from sub delegating its authority to enter into contracts of insurance to any person other than:

a. its own directors or employees;
b. another managing agent in accordance with a line slip, registered binding authority or restricted binding authority;
c. an approved coverholder (a service company or other intermediary) in accordance with the terms of a registered binding authority or restricted binding authority;
d. a restricted coverholder in accordance with the terms of a restricted binding authority; or Lloyd's itself and its representatives and agents. The ability to sub-delegate the issue of documents evidencing contracts of insurance is similarly limited.

6.17 Part L of the Underwriting Byelaw makes provision as regards the management of run-off accounts (years of account of any syndicate left open beyond their normal closing date) and run-off syndicates (a syndicate which no longer accepts new or renewal insurance business other than the variation or extension of risks previously underwritten, or reinsurance to close of an earlier year of account of the same syndicate). This may include the requirement by the Franchise Board of the preparation of run-off contingency plans, run-off closure plans and run-off reports.

6.18 Certain “run-off functions” (“executive functions”, “insurance functions” and “administrative and processing functions”, as defined by the Franchise Board) may not be sub delegated by a managing agent without the Franchise Board’s prior consent, and then only to an “approved run-off company” or to another managing agent. Approved run-off companies are subject to a requirement for the permission of the Franchise Board in much the same way as managing agents.

7. LLOYD’S BROKERS AND OTHER AGENTS OF THE ASSURED

7.1 A distinguishing feature of the Lloyd’s market is that business generally (but with certain exceptions) comes to syndicates through professional insurance intermediaries: either “open market business”, transacted with the managing agents of any syndicate(s) in the Underwriting Room at Lloyd’s premises (or at the managing agent’s office) in London by Lloyd’s brokers or other intermediaries acting on behalf of the proposer/policyholder, or “coverholder” business underwritten on behalf of the members of a particular syndicate or syndicates by a sub-delegate of their managing agent(s) pursuant to a “binding authority” agreement.

A variety of risk appetites can be found in the Room, where business is still done face to face

THE STATUTORY MONOPOLY OF LLOYD'S BROKERS AND THE CHANGING REGULATORY REGIMES

7.2 As regards open market business, placing by Lloyd's brokers remains the paradigm. The history of this in recent years has been convoluted and sometimes obscure. Until 19 November 2008 Lloyd's brokers had a statutory monopoly, admitting of few exceptions, both of placing open market business and of arranging binding authorities for their clients with syndicates.

7.3 The Lloyd's broker placing monopoly was removed with effect from 19 December 2008 by the Legislative Reform (Lloyd's) Order 2008 (SI 2008/3001), which repealed s. 8(3) of the 1982 Act and also the divestment provisions in ss. 10-12. A Lloyd's broker is now defined as a partnership or body corporate permitted by the Council to describe itself as a Lloyd's broker.

Nevertheless, not all brokers permitted to place business to Lloyd's are allowed to call themselves a "Lloyd's broker".

7.4 The reasons for the changes were that managing agents had a commercial imperative to seek new routes to clients throughout the world, that the regulatory regime for brokers generally had changed considerably since 1982 and it was unduly onerous for Lloyd's to have to process applications from every broker wishing to have access to the Lloyd's market, and that in the face of competition from overseas insurance centres it was increasingly important that use of the Lloyd's "platform" should not involve additional costs for policyholders in the unnecessary multiplication of intermediaries in the placing chain. At the same time there was widespread recognition of the importance of high quality intermediaries in the market at Lloyd's and that many brokers would continue to want to hold themselves out as Lloyd's brokers and to participate in Lloyd's governance arrangements. So the monopoly was ended but the distinct class of Lloyd's broker retained.

CURRENT LLOYD'S REGIME FOR PLACING BROKERS

7.5 Paragraph 27 of the Underwriting Byelaw (No. 2 of 2003) sets out exhaustively the categories of persons from or through whom (and the means by which) a managing agent may accept businness on behalf of a syndicate:

(a) from Lloyd's broker, provided that prior to accepting business the managing agent has entered into a terms of business agreement with the Lloyd's broker;

(b) directly from the insured or reinsured or, in the case of a syndicate, through a managing agent,

(c) through an approved coverholder in accordance with the terms of a registered binding authority or a restricted binding authority;

(d) through a restricted coverholder in accordance with the terms of a restricted binding authority;

(e) through a service company coverholder in accordance with the terms of a binding authority that is a service company agreement;

(f) in respect of personal lines business, commercial life business, and commercial motor business, without limiting any other sub-paragraph, from or through a person who is not a Lloyd's broker where –

(i) that person is registered with a competent authority for the purposes of the Insurance Mediation Directive (No. 2002/92/EC) and complies with the provisions of the Financial Services and Markets Act 2000 and with the Financial Services Authority's requirements which are applicable to it; or

(ii) the managing agent accepting business on the member's behalf has obtained the consent of the Franchise Board to accept business from that person;

(g) in respect of reinsurance of Lloyd's Reinsurance Company (China) Limited directly from Lloyd's Reinsurance Company (China) Limited;

(h) in respect of business constituting "Singapore policies" or "offshore policies" (as respectively defined in the Insurance Act (Cap 142) of the Republic of Singapore) and where the contracts in question are made in Singapore, through a service company coverholder registered with the Monetary Authority of Singapore; and

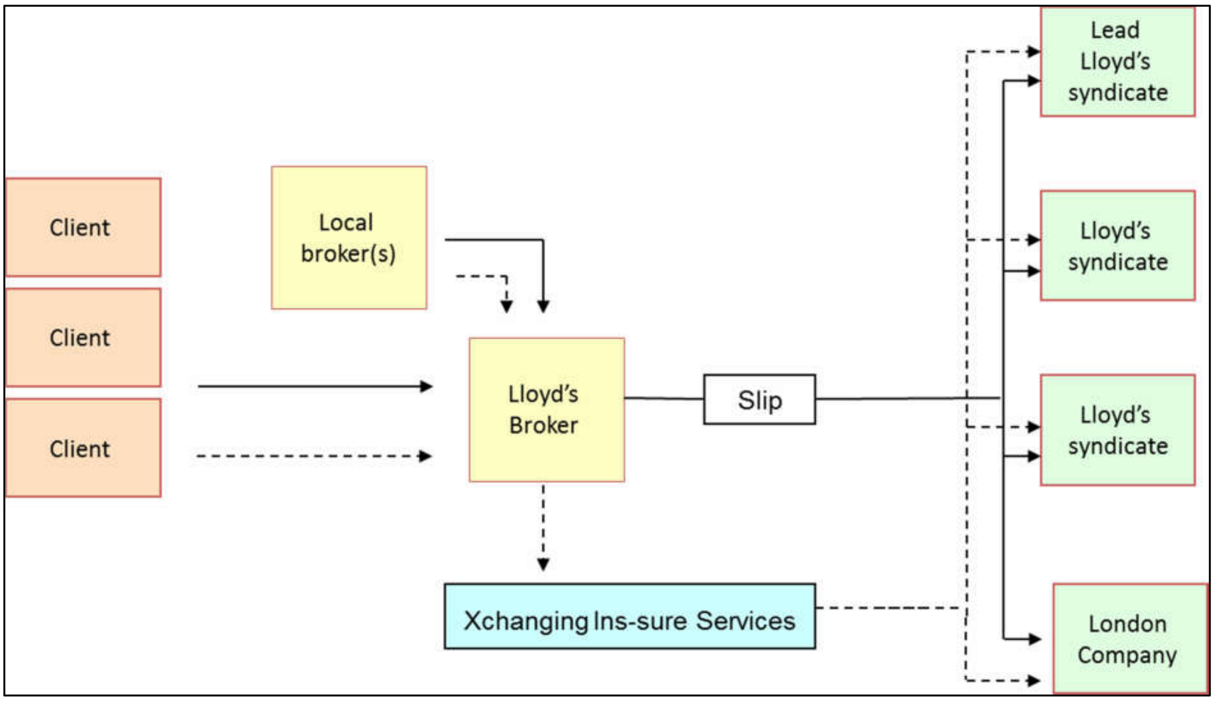
(i) from or through any other person where, prior to accepting business, the managing agent has –

(i) satisfied itself that the person meets such criteria as the Franchise Board may from time to time prescribe for the purpose of the subparagraph; and

(ii) entered into a terms of business agreement with that person.

Thus categories (a), (b), (f) and (i) permit the acceptance of business from intermediaries acting as agent for the assured, and categories (c), (d), (e), (f), (h) and (i) through intermediaries acting on behalf of the managed syndicate.

THE PLACING OF BUSINESS



MANAGING AGENT/LLOYD'S BROKER TOBAS

7.6 Lloyd's simply requires that TOBAs record the general terms and conditions under which the managing agent and the Lloyd's broker will do business, and that they must include at least the following matters: the extent, if any, of broker's authority to do acts or perform functions on behalf of the managing agent or the syndicate; the broker's and the managing agent's authorities as regards the holding of premiums and claims moneys, and the timing of payments (so-called "terms of trade"); the ownership of records and access to each other's records; and the applicable law and jurisdiction.

OPEN MARKET CORRESPONDENTS

7.7 As regards open market business from some overseas territories it is a condition that the non-Lloyd's broker in the territory concerned, whether a non-Lloyd's broker placing business directly with the managing agent under paragraph 27(i) of the Underwriting Byelaw or a non-Lloyd's "producing broker" placing business through a Lloyd's broker, is registered by Lloyd's as an "open market correspondent" (OMC). This is the case where there is a local legislative or regulatory requirement in the territory concerned that members of Lloyd's, as licensed insurers in that territory, approve the local intermediaries with whom they do business, or that they know their identities, or that local insurance intermediaries are to report business placed at Lloyd's to the local general representative (or attorney-in-fact) for underwriting members of Lloyd's, or pay taxes or other fiscal charges through him. Lloyd's formerly required registration also in cases where it was necessary or desirable to do so to protect the interest or reputation of the Lloyd's market or the Lloyd's brand. OMCs need to be sponsored by a Lloyd's broker or by the managing agent with which they will be directly placing business and are required as a condition of registration by Lloyd's: to execute an "open market correspondent's undertaking" by which they undertake to Lloyd's and to the general representative (or attorney-in-fact) to (*inter alia)* comply with all local laws and regulatory requirements;

- to comply with any conditions imposed on them by Lloyd's or any instructions or guidance given by Lloyd's about the activities of an OMC;
- to keep proper accounts and records relating to their activities as OMC;
- to produce documents, information and other information relating to their activities as OMC;
- to notify the general representative of any complaints against or breaches of legal requirements by them;
- to pay all premiums due to Lloyd's underwriters promptly to the OMC's sponsor; and to forward to the OMC's clients promptly and in accordance with any TOBA, or if different, any legal requirements, any claims moneys, return premiums or other moneys paid by the OMC's sponsor(s) for remittance to its clients.

OMCs will not normally have any authority to represent or act for Lloyd's underwriters (except in so far as local law treats them as receiving premiums on their behalf or they are also registered as an approved Lloyd's coverholder).

RESPONSIBILITIES OF LLOYD'S BROKERS TO CLIENTS

7.8 Lloyd's brokers and other brokers of commercial risks will normally enter into TOBAs with their clients, setting out the nature and scope of the services to be provided. The nature, extent and standard of the implied duty of care owed by a Lloyd's broker or other broker involved in placing business in the Lloyd's market, to its clients, to the ultimate assured (where not the broker's immediate client) or third parties are beyond the scope of this lecture notes but reference is made to the extended treatment in Clarke, *The Law of Insurance Contracts*, Chapter 9, and CMS Cameron McKenna, *Insurance Broking Practice and the Law*, Chapter 1, paras. 1.64 to 1.159. TOBAs between brokers and their clients may exclude liability for consequential loss, lost business opportunities etc., and may impose an aggregate monetary limit on liability. The specialised nature of the Lloyd's market and the international provenance of the business placed there often necessitates the use of a chain of brokers in placing the risk, from the proposer's local broker via any other "producing broker(s)" and thence the Lloyd's broker to the syndicate. This inevitably raises the question of what responsibilities are owed by the Lloyd's broker to the insured with whom the Lloyd's broker is not in a direct contractual relationship and what are the responsibilities of the brokers in the chain to each other when something goes awry in the placing of a risk. Liability in tort to an insured or proposer who is not in privy of contracts with the placing broker is likely to be founded, if at all, on an assumption of responsibility on the part of the latter to the former where there is contact between them.

7.9 In *Johnstone v Leslie and Godwin Financial Services Ltd, the* retrocedants were unable to claim under their retrocession contracts in respect of asbestos claims nearly 30 years after the contracts had been placed because the brokers had mislaid all documents which would have enabled them to identify the retrocessionaires. The judge found that the evidence showed it had always been an ordinary incident of the duty of a Lloyd's broker to collect claims on behalf of his principal (without extra charge), that it was the universal or almost universal practice of brokers at Lloyd's to retain documents so that they would be able to process claims on behalf of their principals when they arose, and that there was to be implied into the contract between broker and client a duty to exercise all reasonable care to be able to collect claims when called upon to do so and to retain documents for that purpose for so long as a reasonable broker might regard claims as possible. To dispose of the slips without the client's consent would be a breach of that duty.

7.10 Although judges have stated time and again, sometimes with considerable reluctance, that Lloyd's brokers are agents of the assured rather than of the insurer, some others regard them as organisations which invent products which they hope to interest insurers in selling and potential policyholders in buying. Moreover, particularly until the advent of computer systems for storage of documents Lloyd's underwriters relied on them to keep records of the policies placed and to perform various administrative services for them: they were described in *The Zephyr* as "the servants of the market".

7.11 Lloyd's brokers may act as agents of the underwriters for some purposes, e.g. placing outwards facultative insurance, receiving premiums from assureds and holding them on behalf of (and on trust for) the underwriters under "risk transfer" provisions of the applicable TOBA, instructing lawyers and loss adjusters on behalf of the syndicate and obtaining reports from them. Brokers sought to justify the latter practice in that it better enabled them to negotiate settlement of claims on behalf of their clients. However, so far as it involved commissioning adjusters; reports for underwriters on the basis that they were confidential to underwriters and could not be disclosed to the assured, the practice was critices3ed by the courts in *Anglo-African Merchants v Bayley* and *North & South Trust v Berkeley* as involving an irreconcilable conflict of duty. The Lloyd's Code of conduct for Lloyd's Brokers (1988), revoked in 2000, accordingly provided that

A Lloyd's broker should not, without the fully informed consent of both parties, act for both his client and insurers during the claim settling process if by doing so he would be undertaking duties to one principal which are inconsistent with those owed to the other. In any event, a Lloyd's broker who receives or holds on behalf of the insurer's concerned and adjuster's report or similar document relating to an insurance claim should only do so on the basis that the information in the report may be imparted to the client.

The subsequent introduction of claims handling by the claims office(s) and the sharing of electronic claims files (submitted by brokers to underwriters and the claims office) to the IMR under the current Electronic Claims File (ECF) system should reduce the perceived need for brokers to act on behalf of underwriters in this respect.

8. PLACING AND ACCEPTING INSURANCE AT LLOYD'S: OPEN MARKET BUSINESS

8.1 The traditional method of placing business was described by Lord Diplock in 1974 in *American Airlines v Hope* as follows:

Contracts of insurance are placed at Lloyd's by a broker acting exclusively as agent for the assured. It is he who prepares the slip in which he indicates in the customary "shorthand" the cover that the assured requires. He takes the slip in the first instance to an underwriter whom he has selected to deal with as leaving underwriter, i.e., one who has a reputation in the market as an expert in the kind of cover required and whose lead is likely to be followed by other insurers in the market. If it is the first contract of insurance covering that risk in which a particular underwriter has acted as leading underwriter it is treated as an original insurance. The broker and the leading underwriter go through the slip together. They agree on any amendments to the broker's draft and fix the premium. When agreement has been reached the leading underwriter initials the slip for his proportion of the cover and the broker then takes the initialled slip round the market to other insurers who initial it for such proportion of the cover as each is willing to accept. For practical purposes all the negotiations about the terms of the insurance and the rate of premium are carried on between the broker and the leading underwriter alone. Where, as is often the case, the slip gives to the assured options to cover additional aircraft or additional risks during the period of the cover it does so on terms to be agreed with the leading underwriter. This is indicated by the abbreviation "tba L/U".

The slip contemplates its eventual replacement by a policy of insurance in the standard form in use at Lloyd's for (aviation) risks, but subject to such deletions and additions as are indicated in the slip. Such additions are generally clauses which themselves follow a standard form and are sufficiently identified in the slip by a reference to a description or a number but some may be specially tailored to the particular requirements of the assured. In the latter case if the slip is for an original insurance the actual clause is set out in the slip itself, although it may be only in abbreviated form.

Almost invariably the slip provides that the wording of the policy is to be agreed by leading underwriter.

8.2 The conventional analysis is that by initialling ("scratching") the slip the underwriter accepts the offer to purchase insurance made by the broker on behalf of the proposer, unless the underwriter gives a clear indication of contrary intention. The broker's offer made on the instructions of the client after consultation is often referred to as a "firm order". The general practice is not entirely uniform. Sometimes the underwriter may regard himself as making an offer by scratching the slip, to be accepted by the (re)assured's firm order. Where the underwriter amends the slip presented to him and then scratches it, the scratch will be regarded as a counter-offer which can be accepted by the broker on behalf of his client.

8.3 Traditionally, a formal policy with fuller wording reflecting the abbreviated terms of the slip would be prepared and submitted by the Lloyd's broker for checking, sealing and issue (and, at one stage, preparation) by the Lloyd's Policy Signing Office (LPSO). The Lloyd's broker would normally do this when, having received the premium from the assured (via any producing broker) it submitted the "closings" to LPSO, i.e. the premium accounting information including details of any "signing down" of the subscribing syndicates; lines, together with an instruction to pay the premium to underwriters through the Central Accounting system. This was done by submitting a London premium advice note (LPAN) and the slip to LPSO. In 2001 LPSO's functions were assumed by Xchanging Ins-sure Services, which signs and issues (but no longer checks) policies on behalf of Lloyd's syndicates and members of the International Underwriting Association (IUA), and for any other company authorising it. Frequently no policy would be issued for a long time, because before the so-called "delinking" (introduced in stages from 2000 onwards) of the submission of accounting information by means of LPAN from giving instructions to settle the premium, the Lloyd's broker would wait to submit the slip, draft policy and LPAN to LPSO until it had received the premium form the assured. Often, particularly in the case of reinsurance, no policy was require by the assured; only in the case of marine insurance is a policy necessary for recovery under the insurance contract. There is no requirement by Lloyd's that a policy be produced; this is rather a matter of the client's preference or regulatory requirements. Policies are issued electronically unless local regulatory requirements necessitate a paper policy or the assured asks for one.

ELECTRONIC PLACING

8.4 The use of electronic systems for placing support, accounting and settlement and claims management is widespread in the London market. The conversion of business processes from paper to electronic ones and the development of a market-wide electronic system are led by the LMG. Electronic messaging in the London market is based on the ACORD "Reinsurance and Large Commercial" (RLC) data standard. A fundamental component of the developing structure is the Insurers' Market Repository (IMR) which provides a repository for documentation (in scanned image, Word or Excel file, or PDF form) to support accounting and settlement, policy issuance and claims processes. Most of the accounting and settlement processing of open market business is carried out through Xchanging Ins-sure Services Ltd, using the IMR. For premium processing purposes Lloyd's brokers load MRC slips and LPANs (or treaty statements) to the IMR for submission to Xchanging. Binding authority premium submissions are periodically submitted in bulk in the same way, as are proportional treaty statements. Lloyd's has also developed "the Exchange" (The Exchange Message Limited, or TMEL), now jointly owned and managed by the LMA, LIIBA, IUA and Lloyd's, which provides an electronic messaging hub for the sending and receiving of messages between brokers and insurers that are registered users. The messages are validated against ACORD standards.

8.5 Endorsements in all classes of business at Lloyd's can now be agreed electronically through the Exchange. The conclusion of the initial insurance contracts entirely through a uniform electronic system has been slower to develop. Electronic placing support (the exchange of structured and unstructured data) is used in conjunction both with traditional face-to-face meetings between broker and underwriter, at which information can be viewed on the screen, and with remote electronic broking. Contracts may be concluded electronically either "peer to peer" or through proprietary trading platforms such as R13K (now Qatarlyst), in which a Word version of the slip is loaded by the broker onto the system and the risk accepted by the underwriter entering his password, causing the system to apply his electronic syndicate stamp. Apple iPads are often used by brokers in the Room for the purpose instead of paper slips. It is not considered that the electronic process necessarily alters the traditional chronological analysis of offer and acceptance.

PLACING: MARKET PRACTICE

8.6 There are variations in the placing practices described above. Whether and to what extent an underwriter is to be regarded as having become unconditionally bound will often be determined having regard to expert evidence, which may refer to market practice at a particular (past) period. Practice develops.

8.7 "Promised lines" are small lines sometimes written on the back of a slip or on a separate piece of paper where early on in the placing the broker wants to give followers an impression of confidence in the slip by showing them large lines already subscribed. A promised line is by practice of the market of the same effect as if written on the slip itself. If may sometimes be regarded by the market as a binding commitment by the underwriter, but one which does not, however, commit the broker to taking a line from him.

8.8 The underwriter's signature or initials over the syndicate stamp are necessary for the syndicate to be bound: the preparatory placing of the syndicate stamp on the slip is not sufficient. That a line is written on a slip only in pencil does not prevent it being unconditionally biding.

8.9 The corollary of the rule that the insurance contract is normally constituted by the underwriter'[s acceptance of the broker's offer, on scratching the slip, is that subscribing syndicates (or companies) will be bound for their stated proportions, and the (re)assured will be bound by the terms of the contract, even if the risk is not yet fully subscribed when the loss occurs. They will be bound on the terms and conditions they have agreed even if later subscribers insist on different ones.

RELATIONSHIP BETWEEN POLICY AND SLIP

8.10 Where a policy is issued subsequently to the scratching of a slip, it may vary from it. In *Youell v Bland Welch*, where the slip had provided "Wording to be agreed by Leading London Reinsurer", Phillips J ruled that the slip, being an earlier version of the same contract, was under the parol evidence rule inadmissible as an aid to the construction of the policy:

To refer to the slip as an aid to the construction of the policy runs counter to one of the objects of replacing the slip with the policy.

In the Court of Appeal Beldam J, obiter, took the same view, whereas Staughton LJ preferred to apply the test of construction of ambiguities by reference to the surrounding circumstances, or "matrix", of the contract. He doubted whether the aspect of that rule excluding evidence of negotiations applied so as to exclude evidence of a prior concluded agreement, in the form of the slip, albeit one which the parties expected to be replaced by different wording in a formal contract. In the event, he found the slip, admissible or not, of no assistance.

8.11 In *HIH v New Hampshire* however, the question arose whether a policy wording could be construed by reference to a slip policy, in circumstances in which it was quite unclear what relation the documents were thought by the parties to bear to each other. Rix LJ (obiter) declined to follow obiter dicta in earlier cases to the effect that the policy could never be construed by reference to the slip:

"Where it is common ground that one contract has been intended to supersede an earlier contract, it must follow that the parties' contract must be found exclusively in the later contract. Thus the earlier contract cannot be used to add to, or modify, the later contract.

[82]. But does it follow that the earlier contact cannot even be looked at for the purposes of construing the later contract?

[83]. In principle, it would seem to me that it is always admissible to look at prior contracts as part of the matrix or surrounding circumstances of a later contract. I do not see how the parol evidence rule can exclude prior contracts, as distinct from mere negotiations...

[84]. Where, however it is not even common ground that the later contract is intended to supersede the earlier contract, I do not see how it can ever be permissible to exclude reference to the earlier contract. I do not see how the relationship of the two contracts can be decided without considering both of them."

Rix LJ's dicta in that case were applied in *Standard Life v Oak Dedicated Ltd* and *Mopani Copper Mines v Millennium Underwriting.*

LEADERS AND FOLLOWERS

8.12 where a risk is placed In the London subscription market, whether at Lloyd's or in the company market, the slip is likely to confer on the leader functions in relation to determining the precise wording of the original contact, any subsequent endorsements, and the settlement of claims. Questions arise from time to time as to the authority of the leader to bind the following market at each stage, any duties owed by the leader to the following market, and the effect on the following market of material misrepresentations or non-disclosure by brokers in their dealings with the leader.

8.13 A leading underwriter agreement may be an *ad hoc* clause in the slip or a standard form market agreement incorporated into it by reference. It may give the lead underwriter the power to agree the wording or terms of the policy, or to agree amendments, or to waive conditions, or to settle claims. Since October 2001 the LMP General Underwriters Agreement (GUA), produced for use with the LMP slip and subsequently the Market Reform Contract (MRC), has replaced the earlier market agreements and incorporates, as appropriate, schedules for use by the different markets, i.e. non-marine, marine cargo, marine hull etc.

8.14 Debate has arisen whether the leading underwriter clause in a slip scratched by each follower confers on the leader authority as agent to act on behalf of the following market or operates as an agreement between followers and the assured to be bound by what the leader does, an endorsement agreed between assured and leader acting as a "trigger" to a change in the agreements between the assured and the followers. In *Roadworks v Charman* His Honour Judge Kershaw QC, sitting as a Deputy Judge of the Commercial Court, held that the leader acts as agent of the following market: by taking a line they not only contract with the assured but also make the leader their agent for the purpose shown in the leading underwriter clause. That purpose included waiving a contingent condition as to the survey arrangements for the beaching of the insured barge. In *Mander v Commercial Union,* Rix J tentatively suggested, however, that, at least under a facultative open cover, the leader is not constituted an agent of the following market by the leading underwriter clause but rather that by subscribing to the cover they will be bound by a declaration to the cover agreed by the leader, the agreement by the leader to the declaration acting as a trigger rather than an act of agency. This analysis, in his view, avoids imposing on the leader the unrealistic fiduciary obligations of an agent (such as the duty to avoid conflicts of interest), and (since the terms of the open cover are there for all to see) there can be no reason to think the leader makes representations about the scope of his authority that might give rise to actions for breach of warranty of authority on his part.

8.15 Can the authority of the leader (or power, depending on whether one takes the agency or trigger view) be terminated? In *Unum Life,* Andrew Smith J declined to hold that there was an implied term that expires by effluxion of time. He was also satisfied that it was not usually the case that a leading underwriter provision would be revocable, but he accepted the force of the argument that it would be revocable, at least on notice. This would accord with the general principle that an agency is always revocable (even if revocation constitutes a breach of the agency contract) unless coupled with an interest or in certain other special circumstances. The leader might well continue to have ostensible authority until the assured or its broker was given notice of the revocation. In *Unum Life* the judge at first instance and Mance and Keene LJJ on appeal had no doubt that the agency had been terminated by the follower's avoidance of the reinsurance for non-disclosure of material facts.

LEADERS AND FOLLOWERS: GENERAL UNDERWRITERS AGREEMENT

8.16 Notwithstanding the possible advantages of the "trigger" theory, the GUA unequivocally appoints the leader as agent of the followers for the purpose of agreeing post-placement alterations (but not settling claims). The GUA is an agreement between the subscribing insurers themselves but is not expressed to be an agreement between them severally and the assured, who is, however, assumed to have rights as regards the GUA under the contracts (Rights of Third Parties) Act 1999. The "Slip Leader" and the other "Agreement Parties", if any, are to be identified in the "Subscription Agreement" section of the slip (i.e. a slip in the form of the MRC, except where the client otherwise requires or its use is otherwise not mandatory).

8.17 The Slip Leader alone and the Slip Leader together with the other Agreement Parties (if any) are given the powers to amend the contract set out in Parts 1 and Parts 2 respectively of the appropriate Schedule for the class of business in question (specified in the subscription section of the slip). Part 3 of the relevant Schedule specifies types of alteration to the contracts (i.e. the several insurance contracts with each "Underwriter") that can be agreed only by those Underwriters themselves. "Underwriter" is not defined but appears, as in many other generic market documents, to include the members of a syndicate taken together, acting through the underwriter employed by the syndicate's managing agent. A GUA stamp is to be applied by the Slip Leader to, if it is not already incorporated in, any endorsement presented for agreement, and initialled by the Slip Leader (and

Agreement Parties is appropriate) in the appropriate box so as to indicate which Agreement Parties have authority to agree the endorsement. Where there is any conflict the slip and any endorsement override the GUA, "provided that they have been shown to and agreed by each subscribing Underwriter for its own proportion". This enables adaptation of the Schedules to confer agreement authority otherwise than contemplated by the schedules.

8.18 There are provisions for the replacement of the Slip Leader in certain circumstances such as insolvency, withdrawal of regulatory permissions, or going into run-off. The delegated authority can be terminated by an Underwriter at any time with effect from the date of giving notice to the broker, but not so as to affect accrued rights of that Underwriter or the assured as regards alterations already agreed. The authority will be automatically terminated where the Underwriter is subject to an insolvency or similar procedure or has regulatory permission withdrawn for the relevant class of business.

8.19 Where the risk concerned is written as a declaration to a lineslip, marine open cargo cover or other contract for insurance or reinsurance the GUA applies to that risk only if expressly incorporated in both that lineslip, open cover or other contract and in the resulting declaration, certificate or other form of contract of insurance or reinsurance.

LEADERS' DUTIES OF CARE IN PLACING PROCESS

8.20 In *Roadworks v Charman* Judge Kershaw QC, without expressing any concluded view on the point, envisaged the possibility that in exercising power under a leading underwriter clause the leader might owe a duty of care to the followers, whether a duty arising from an implied term in a contract of agency or one existing independently of contract. As regards the initial underwriting, although there is a defined potential class of following underwriters who the leader knows may well rely on his judgement in rating the slip and deciding its terms and conditions, it is not at all clear that he can be said consciously to assume functions in relation to them sufficient to create a duty of care to them. In *Bonner v Cox* underwriters negligently underwrote an open cover, ceding severely loss-making business under their reinsurance, but it was held that they owed no duty of care to the reinsurers in the way risks were selected and underwritten.

9. DELEGATED UNDERWRITING

9.1 Delegated underwriting is the means through which global insurers give underwriting authority to independent, professional insurance intermediaries to act on their behalf. Such insurance intermediaries with delegated authority (called "coverholders" at Lloyd's) are not just sales agents of insurers but are able to quote and bind contracts of insurance. The model has been operating at Lloyd's for over 100 years. It enables Lloyd's to offer insurance solutions for complex risks through an onshore presence in another province, jurisdiction or country.

9.2 In December 2017, there were 3,720 approved Coverholders in the whole Corporation, to whom syndicate underwriters had lent their pen under binding authority agreements (often called “binders”). These Coverholders provided about 30 per cent of the premium income of the Lloyd’s market. In the absence of branches (syndicate “service companies” being the nearest equivalent) the use of coverholders permits syndicates to operate outside the Room both in the UK and overseas as if they were locally based insurers.

9.3 The sub delegation of underwriting authority to insurance intermediaries not directly subject to Lloyd’s jurisdiction and the physical remoteness of coverholders from the managing agents at Lloyd’s, have on occasion given rise to expensive losses to syndicates, sometimes resulting from fraud. Overseas Coverholders, for many years, were subject to prior vetting by the committees of the underwriters’ market associations: so-called “tribunalisation”, a process which was not compulsory. In 1977 the Bernnan working party had proposed to the Committee of Lloyd’s that tribunalisation should be extended to all markets and classes of business except as regards brokers and others operating binding authorities in the UK, that there should be a central register containing the salient features of all binding authorities granted, and that a recommended binding authority agreement with standard general conditions should be introduced. The Committee was, however, reluctant to impose the proposals on the market without the maximum degree of agreement, and there was disagreement particularly on some terms of the proposed standard form. Implementation was therefore delayed. Fisher recommended that the new Council should take power to regulate binding authorities, that binding authorities be expressed to be conditional on registration by LPSO, and that it should be mandatory for binding authorities to comply with any requirements as to their form that the Council might decide to introduce. Every binding authority should contain a limit on the amount of premium to be written under it, consideration should be given to giving biding authorities to named individuals rather than firms or companies, and sub delegation by the coverholder should not be permitted without the express approval of the syndicate underwriter(s) granting it. This rule still applies today.

9.4 The Lloyd’s Act 1982 therefore gave the Council power to make byelaws for regulating the granting and operation of binding authorities or any other means by which authority to accept insurance on behalf of underwriting members is delegated. Byelaws for that purpose were first made in 1985. The Intermediaries Byelaw (No. 3 of 2007) now prohibits the delegation by a managing agent of its authority to bind the members of its syndicate to any person otherwise than –

(a) to a director or employee of the managing agent, or with the consent of the Franchise Board, to any other individual engaged to provide services to the managing agent;

(b) to another managing agent or authorised insurance company in accordance with the terms of a line slip;

(c) to another managing agent in accordance with the terms of a registered binding authority or a restricted binding authority;

(d) to an approved coverholder in accordance with the terms of a registered binding authority or restricted binding authority;

(e) to a restricted coverholder in accordance with the terms of a restricted binding authority;

(f) the Society, or a representative or agent of the Society; or

(g) in accordance with any other of the requirements of the council

It similarly restricts the sub delegation of the managing agent's authority to issue documents evidencing contracts of insurance underwritten by the members of a syndicate, but so as to include also "LPSO", i.e. currently, Xchanging Ins-sure Services Ltd, for the issue of signed Lloyd's policies, and Lloyd's itself and Lloyd's Agents, for the issue of insurance certificates under the Insurance Certificates Byelaw (No. 1 of 2006).

9.5 The Delegated Authority dimensions for 2016 were as follows:

a. Premium to Lloyd's: approx. £7.8bn

b. Approved Coverholders: 4,236

c. Registered binding authorities: 8,400

d. Service companies: 38**0**

MANAGING GENERAL UNDERWRITERS (MGUS)

9.6 The term is generally interchangeable with MGAs. Some sources state that the term MGU is more prevalent in life and health companies and other sources suggest that MGUs solely focus on underwriting as opposed to some MGAs that have responsibility for claims. Conning defines MGUs as follows: "MGUs typically have broader underwriting guidelines due to their expertise with the program or line of business. Insurers will give an MGA predefined parameters to underwrite and bind risks that fall within these parameters."

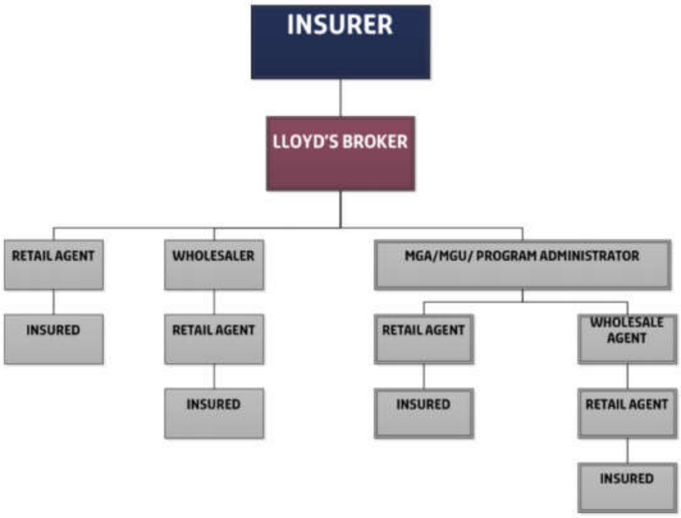
BROKER BINDERS OR FACILITIES

9.7 Some brokers also act as underwriters either underwriting business in a separate department of the broking house or setting up 'in-house MGAs'. The term 'broker facility' can be used to either describe business underwritten by the broker or a lineslip. (With a lineslip, the underwriting is not delegated to the broker but to the lead underwriter.

PROGRAM MANAGERS / ADMINISTRATORS

9.8 Typically, these are intermediaries that administer a program consisting of homogenous risks. There is an association for Program Administrators in the U.S known as "Target Markets"; this association has nearly 400 members.

9.9 Where the coverholder sits in the distribution chain can vary, often according to the territory. In the USA, coverholders are typically wholesale businesses. The chain works as follows:



In this example, the retail broker acts for the insured. Therefore, business is not deemed to have been bound until the business has been accepted by the Coverholder. Typically, the Coverholder will charge between 20% and 35% and may charge a profit commission in addition. The Lloyd's broker generally, will charge an additional 5% brokerage.

Acquisition costs need to be looked at in the context of "what is the alternative". Delegation of underwriting to a third party can require businesses to create an entire infrastructure to support the underwriting. Therefore, delegated underwriting acquisition costs cannot be willy- nilly compared to open market business, the nuances of each arrangement needs to be considered.

THE BENEFITS OF THE DELEGATED AUTHORITY MODEL

9.10 The delegated authority model is mutually beneficial for the Coverholder and the insurer. As a result, these agreements are often in place for a number of years. The main benefits can be summarised below:

- Obtaining business through Coverholders can be more cost effective than the open market particularly for high volume, low premium business.
- Coverholders benefit from Lloyd's brand, security and knowledge sharing.
- The insurer can access local business which it would not otherwise see.
- The insurer is able to access local knowledge and expertise.
- It is a low risk strategy for venturing into a new area.
- There is an opportunity to establish local relationships which can help develop new products in partnership with the insurer.

Having a Coverholder on the ground can provide swifter customer service and reduce the insurer's administrative burden.

COVERHOLDER

9.11 A coverholder is described as “a company or partnership authorised by a managing agent to enter into a contract or contracts of insurance to be underwritten by the members of a syndicate managed by it in accordance with the terms of a binding authority”.

9.12 Coverholders can be divided into 3 categories:

(a) Independent (examples – Jimcor, Hanover E&S, Sea Coast).

(b) Owned by a regional or national wholesale broker (Gresham owned by Amwins, TAPCO owned by BB&T, WKF&C owned by RT Specialty).

(c) Owned by a regional, national or global retail broker (Preferred concepts owned by ASPN part of Alliant Specialty, VO Schinnerer owned by Marsh, RPS owned by AJG).

OTHER TERMS

9.13 Coverholder is a Lloyd’s term. Intermediaries that write on behalf of insurers are also known by other terms. (The coverholder term is useful for Lloyd’s as the more common term of “Managing General Agent” is easily confused with “Managing Agent”). In the statutes of various U>S> States, a Managing General Agent (MGA) is described as "an individual or business entity appointed by an insurer to solicit applications from agents for insurance contracts or to negotiate insurance contracts on behalf of an insurer and, if authorised to do so by an insurer, to effectuate and countersign insurance contracts". The Association of American Managing General Agents (AAMGA) includes within its membership most the of U.S MGAs with whom Lloyd's does business. This association has acted as a useful sounding board for Lloyd's in the past and now includes Canadian MGAs within its organisation. It has also formed alliances with the UK's Managing General Agent Association (MGAA) and Australia's Underwriting Agencies Council (UAC).

SERVICE COMPANY

9.14 A Service company coverholder means an approved coverholder that:

(a) Is associated with a managing agent by reason of:

- It being a wholly owned subsidiary of the managing agent.
- It being a wholly owned subsidiary of the managing agent’s holding company, or such other matters as the Franchise Board may determine in any particular case or generally, and;

(b) Will be authorised by the managing agent (the associated managing agent) to enter into a contract or contracts of insurance in accordance with the terms of a service company agreement.

This definition was agreed following consultation with the Market in 2008. It has been approved by council and it is now incorporated into the byelaws.

There are two types of service companies, those that act like a traditional third party coverholder writing high volume, low value business and those that essentially are an extension of the syndicate where the service company office has been set up to accommodate the underwriting of high value low volume business, where the class of business expert happens to be based outside the Parent Company.

LLOYD'S REGULATION OF COVERHOLDERS

9.15 Lloyd's approves the establishment of all Coverholders operating on behalf of Members of Lloyd's and requires that they comply with the relevant laws and regulations of the territory in which they are based.

As part of the application process to establish a Coverholder, Lloyd's requires the completion of an application form through which they agree to comply with all relevant rules and requirements of both Lloyd's and the local legal, fiscal, taxation and regulatory authorities, as well as to conduct business with integrity and with due care and skill, amongst other requirements.

Moreover, Lloyd's Managing Agents are required to adhere to the Lloyd's *Delegated Underwriting Code of Practice*[2], which is issued by Lloyd's and sets out the standards expected of Managing Agents in establishing and managing local Coverholders. This Code requires Lloyd's Managing Agents to proactively manage and monitor the performance of the Coverholder to whom they have delegated authority.

In addition, Lloyd's supervises Coverholders on an ongoing basis as part of its statutory role in managing and overseeing the Lloyd's market. Through these oversight mechanisms, Coverholders are required to report regularly to their Lloyd's Managing Agent on the activities delegated to them. Lloyd's Managing Agents are required to regularly audit their Coverholders, to ensure that they are complying with their obligations and standards, including those established under their binding authority agreements, their reporting requirements and local regulatory obligations.

Lloyd's oversight regime for Coverholders is robust and thorough, and forms a fundamental element of Lloyd's oversight of its global operations.

BINDING AUTHORITIES, LINESLIPS AND CONSORTIA

9.16 Lloyd's defines the linked expressions "binding authority" and "coverholder" comprehensively, viz.

"binding authority" means an agreement between a managing agent and a coverholder under which the managing agent delegates its authority to enter into a contract or contracts of insurance to be

[2] http://www.lloyds.com/The-Market/Tools-and-Resources/Resources/~/media/Files/The%20Market/I%20am%20a/Coverholders/Code%20of%20Practice%2020110718%20final%20with%20table%20of%20contents.pdf

underwritten by the members of a syndicated managed by it to the coverholder in accordance with the terms of the agreement

And

"coverholder" means a company or partnership authorised by a managing agent to enter into a contract or contracts of insurance to be underwritten by the members of a syndicate managed by it in accordance with the terms of a binding authority.

The byelaws and requirements draw a distinction between binding authorities given to "approved coverholders" or to "restricted coverholders", on the one hand, and lineslips and consortia on the other (even though lineslips and consortia as a matter of literal construction fall within the definition of "binding authority"). Lloyd's does not in practice regard lineslips as binding authorities.

9.17 A lineslip is defined as "An agreement by which a managing agent delegates its authority to enter into contracts of insurance to be underwritten by the members of a syndicate managed by it to another managing agent or authorised insurance company in respect of business introduced by a Lloyd's broker named in the agreement".

Individual risks will be broked by the Lloyd's broker to the lineslip leader by way of "declarations" for rating and acceptance by him according to the authority in the lineslip. In 2011, lineslips accounted for about 5 per cent of the Lloyd's market's premium income. Approved coverholders, and binding authorities given to them, and restricted coverholders are required to be registered, but managing agents leading lineslips, and the lineslips themselves, are not.

9.18 Consortium arrangements fall within the definition of binding authority. A consortium is:

"A group of underwriters and, as the case may be, insurance companies who have agreed that in respect of a specific class of insurance business certain named or otherwise designated underwriters or insurance companies within that group may accept risks on behalf of all members of the group in accordance with the terms of the agreement between them."

Consortia have to be registered each year with Xchanging for processing purposes. Managing agents do not need approval from Lloyd's to act as coverholder for the consortium but authority may not be delegated to an insurance company member of the consortium or to a third party "consortium manager" unless that company or partnership has been registered as an approved coverholder. Lloyd's regards consortia, unlike lineslips, as binding authorities for the purpose of the byelaws.

9.19 Guidance given by Lloyd's states that it does not generally regard marine open cargo covers, group policies or master policies as delegated underwriting for the purpose of the Intermediaries Byelaw. The basis for that view, as expressed in relation to open covers granted to freight forwarders and other agents, is not entirely clear but appears to be their insurable interest to the extent that they may be bailees. The use by managing agents of third party websites for the conclusion on those websites of insurance contracts, even where there is no exercise of underwriting discretion by the third party, will be regarded as delegated underwriting requiring coverholder approval.

10. LLOYD'S OVERSIGHT OF COVERHOLDERS
(1) THE APPLICATION PROCESS

10.1 Applicant needs a Sponsoring Broker and Managing Agent who have conducted their own due diligence in-line with the guidance Lloyd's provides in the Code of Practice. Approval criteria Lloyd's applies includes:

- Business Plan
- Maintenance of all required Regulatory Approval / Licences
- Financials / Bank Accounts
- Professional Indemnity Insurance
- Key staff / Company Experience Suitability of Systems / Business Continuity
- Submission of prescribed Undertaking – this sets out basic expectations Lloyd's has on coverholders and gives Lloyd's / Lloyd's representatives reserve powers to intervene if issues arise.
- Satisfy the Fit & Proper Test.

OVERSIGHT OF COVERHOLDERS
(2) ONGOING OVERSIGHT

10.2 Lloyd's has imposed an on-going duty on managing agents to ensure that coverholders remain fit and proper. They have a continuous obligation to inform Lloyd's of potential concerns. The oversight duties incude:

- Managing agent reviews (Internal audit)

- External audit – Lloyd's has set guidance to ensure focussed external audits of coverholders are carried out (including pro-forma "audit scope")

- The Canadian office performs a disciplinary check on a monthly basis on all approved Coverholders through Canadian Insurance Regulators Disciplinary Actions database - Managing agents are notified in case of a match

- Lloyd's provides education / support to coverholders – e.g. online financial crime training course

OVERSIGHT OF COVERHOLDERS
(3) REVIEW OF APPROVAL

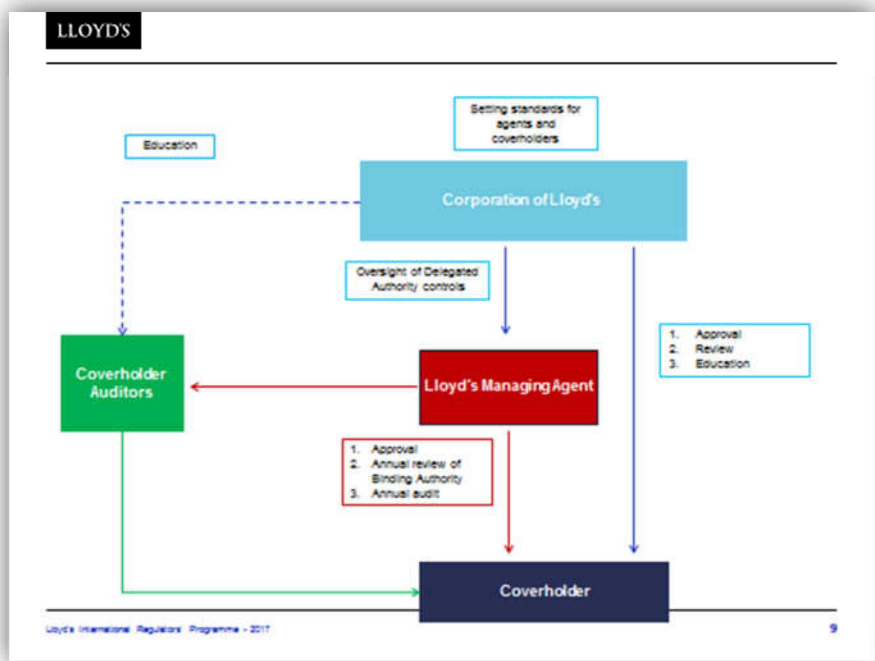
10.3 Where there are potential issues, Lloyd's has wide ranging powers to:

- Conduct reviews of a coverholder's suitability. It can request documents / information / records direct from coverholder

- Impose conditions or requirements on the coverholder to ensure it remains suitable

- Suspend or deregister the approval of a coverholder and direct it to handle the run-off in a proper manner

OVERSIGHT OF DELEGATED AUTHORITY BUSINESS



10.4 Lloyd's has oversight of MA's and Coverholders. MA's use auditors as audit is an essential part of their oversight process, along with annual compliance and other MI information that is required from all Coverholders. A robust audit program is put in place to enable the MA's to assess the coverholders performance and compliance continually.

In an ever changing regulatory environment, Lloyd's and its managing agents and brokers needs to be aware of any changes of requirements and ensure that the coverholders are suitably educated in those requirements.

LLOYD's OVERSIGHT OF DELEGATED AUTHORITY BUSINESS

10.5 As part of its role to supervise the Lloyd's market, Lloyd's manages the risks arising from delegated underwriting business as follows:

By Lloyd's oversight and supervision of managing agents via -

- Lloyd's underwriting, claims and risk standards.
- Intermediaries Byelaw (force of UK secondary legislation made under UK Lloyd's Act 1982).
- Mandatory requirements made under the Intermediaries byelaw.
- Code of Practice for Delegated Underwriting

OVERSIGHT OF MANAGING AGENTS

10.6 Managing agents are obliged to supervise coverholders as their agents. Lloyd's has developed the *Delegated Authority Standards* to help ensure that managing agents disperse of their duties and this covers the following areas:

- Strategy for writing and managing delegated underwriting
- Thorough due diligence of coverholders
- Clear binding authorities in place
- Contract certainty, compliance and conditions
- Conduct risk

MINIMUM STANDARDS

10.7 As part of best practice, Lloyd's has developed minimum standards with the aim of ensuring that:

- The managing agent has a clear strategy for writing and managing delegated underwriting as part of its overall business plan.
- The managing agent carries out thorough due diligence of coverholders to which it proposes to delegate authority.
- The managing agent ensures that it has binding authorities in place with each coverholder to which it delegates authority clearly defining the conditions, scope and limits of that authority and which comply with Contract Certainty requirements, including the requirement to demonstrate regularly that insurance documents have been issued within required timescales.
- The managing agent proactively manages delegated underwriting contracts once incepted to ensure compliance with contract conditions.
- Managing agents recognise and manage the conduct risk posed by delegated authority and are able to evidence that conduct issues are assessed, monitored and managed.

11. LLOYD'S TOOLS AND GUIDELINES

11.1 Lloyd's has developed the following tools as best practice for all stake holders:

Code of Practice

- This sets out all the expectations we have for managing agents. In particular gives detailed guidance on the due diligence process/terms of the contract of delegation/on-going management and termination provisions.

Lloyds.com

- Contains in one place all key materials and resources including Lloyd's requirements/model wordings/application forms.

Crystal / Risk Locator Tool

- An on-line repository of guidance to ensure managing agents (and coverholders) trade in-line with applicable local laws and regulation.

Financial Crime guidance

- Designed to ensure that managing agents manage risks of corruption / international sanctions / money laundering.

WWW.lloyds.com.crystal

12. ACCOUNTING AND PAYMENT OF PREMIUMS AND CLAIMS

12.1 Premiums, claims and return premiums in respect of open market business written in London, and most binding authority business, are processed through the settlement and accounting system operated by Xchanging Ins-sure Services Ltd. There are also special local accounting and reporting systems for Canadian, Illinois and Italian business.

12.2 Until 1961 each Lloyd's broker would maintain an account with each syndicate for the payment of their mutual transactions, i.e. the transactions entered into by the broker on behalf of any of its clients with the members of that syndicate. They maintained running accounts under which net payments were made periodically. As regards marine business (excluding other business), unless otherwise agreed, a broker effecting a policy on behalf of an assured is directly responsible to the insurer for the premium but the insurer is directly responsible to the assured for the payment of losses or return premiums. A Lloyd's broker has implied (where not express) authority on behalf of his assured client to receive payment of losses in cash (and so to discharge the insurer's liability) but not to receive payment by settlement in account (e.g. by setting off sums owed by the broker, or by the broker's other clients, to that insurer).

12.3 Since 1961 Lloyd's has operated a Central Accounting (also known as Central Settlement) system for the payment of premiums, returns, claims and similar items. It is primarily a multilateral net settlement system between Lloyd's brokers and syndicates. It is also used for payment between syndicates and their service companies and for the payment of various "market charges" imposed by Lloyd's on members of syndicates, e.g. New Central Fund contributions and levies for the funding of overseas offices. Participation in the system is governed by the Central Accounting Byelaw (No. 20 of 1998) and by agreements between managing agents and Lloyd's brokers and Xchanging Ins-sure Services Ltd and Lloyd's. The mainframe settlement system is operated by Xchanging Ins-sure Services Ltd on behalf of Lloyd's Settlement and Trust Funds Office (STFO).

12.4 The Lloyd's Central Accounting system operates in a number of different settlement currencies and operates, broadly speaking, as follows: The system receives payment instructions from the various insurance transaction processing systems operated by Xchanging Ins-sure Services Ltd in respect of a particular premium or claim agreed by both broker and relevant syndicates. Payments are made by brokers, or service companies, from, or received by them into, nominated bank accounts, which in the case of Lloyd's brokers, will normally be non-statutory trust accounts maintained by them under CASS 5 of the FSA/FCA Handbook, and in the case of syndicate service companies, should be syndicate PTF accounts. Payments are received by syndicates into, or paid by them from, syndicate PTF accounts. Lloyd's has authority from all participating Lloyd's brokers, service companies and managing agents to issue direct debit or direct credit instructions to the participants; banks in respect of those accounts. The system selects all the entries due for the next settlement date and aggregates all the transactions relating to each broker and each syndicate to produce a single net figure for each broker and for each syndicate for each settlement currency, with further separation within Canadian and US dollars between the various different trust funds. Where several syndicates are managed by the same managing agent the amounts credited or debited may be aggregated. System participants are each sent a statement showing all the transactions relating to them that are to be included in the next settlement, with a statement also of the net total due to or from them. An early settlement notice showing the net amount to be credited to its bank account is also sent to each participant, who is free to raise a query or object to a payment, although any adjustment may, depending on circumstances, have to be made after the settlement.

12.5 Payments are made using central bank accounts maintained by Lloyd's, crediting or debiting the relevant participants' bank accounts. BACS is used for sterling payments and various other payment systems for other currencies. System participants are obliged to put through the system; this is done primarily by means of the direct debiting arrangement but Lloyd's can also reduce *pro rata* all payments made through the system on behalf of a defaulting participant or pursue the defaulting participant for indemnification and interest. Alternatively, Lloyd's is entitled to reverse the payments *pro tanto* in such circumstances. Lloyd's can also reverse payments where the recipient has been credited in the settlement calculation with an amount that was not due to it on that settlement date.

12.6 Payments may be made by special settlement, i.e. payment in full rather than by netting. Payments may be made directly to brokers, coverholders or assureds, outside the Central Accounting system altogether.

12.7 On 1 February 2018 – Lloyd's launched a transformational new model that will simplify how claims within the London market are handled in an effort to improve client service and streamline claims agreement across the London market. The Single Claims Agreement Party model will enable quick and efficient authorisation of claims by allowing policy leaders to agree non-complex payments up to £250,000 on behalf of following carriers. Participation in a single agreement arrangement will be optional and considered by brokers and carriers at point of placement.

12.8 The Single Claims Agreement will make the processing of small to medium sized losses under London subscription market placements, faster, cheaper and more efficient to the benefit of clients.

12.9 Under the Lloyd's Claims Scheme, following syndicates are already bound by the decision of the lead Lloyd's underwriter for 'standard' claims within a set class of business thresholds, typically below £250k. However, a lead agreement model is not typical in the company market, and each IUA carrier has agreement rights to the claim for their proportion. The new single claims agreement arrangement and the related model will allow the (London) slip lead to bind all followers on risk, if carriers accept the arrangement and the clause as a policy term at the point of placement.

13. SUPERVISION OF UNDERWRITING AT LLOYD'S

13.1 Traditionally, the Committee of Lloyd's "did not interfere in the market matters" by determining what types of business members could or could not write or the way in which they carried on their business. That attitude persisted until the late 1980s, even after the Fisher Report and the 1982 Act had given Lloyd's comprehensive powers of self-regulation. There were always exceptions to this, often in response to scandals or crises. The exclusive use of the standard form S, G and SG policies was made compulsory in 1779, to prevent underwriters from waving the warranty of seaworthiness at the commencement of the voyage. Lloyd's Deposits were introduced gradually between 1865 for marine business and, after the Burnand affair, comprehensively by 1918. A compulsory "Audit", i.e.

solvency test, and premiums trust funds were introduced in 1909. Premium income limits, calculated in part by reference to the size of a member's deposits and with different limits for different classes of business, were imposed by the Committee from the end of the First World War onwards. After the Harrison affair the writing of direct financial guarantee business at Lloyd's was prohibited by market agreement. A resolution of a general meeting in 1898 adopted the FC&S clause, excluding war risks from marine policies unless expressly reinstated; and by market agreement in 1936, at the instigation of the Committee of Lloyd's, land war risks were excluded from property insurance. Non-marine and aviation "tonner" policies were prohibited by the Committee in 1981. *Ad hoc* guidance or pressure from the Chairman or a Deputy Chairman sometimes resolved disputes or mitigated the effects of injudicious behaviour by underwriters or brokers.

13.2 In the interests of the commercial reputation of the Lloyd's market as a whole, the Council gradually became more interventionist from about 1990. The first claims scheme was pushed through in 1991, in the face of opposition by the non-marine and aviation markets, and the market claims offices persuaded to incorporate themselves. The Walker Committee's report in 1992 on the LMX spiral identified general shortcomings in the internal management of managing agents. It urged the development of peer review within agents of the plans, policies and performance of every underwriter. Recognising the inadequacy of premium income monitoring as a means of constraining high risk exposure, and the difficulty of assessing the riskiness of different types of business, Walker proposed the commissioning of a volatility analysis and risk assessment aimed at the development of a set of risk weights for different classes of business, in line with developing practice among corporate competitors and the potential adoption by US regulators of risk-based capital requirements. The 1993 Business Plan heralded a more proactive approach to regulation, and reported that, to prevent problems arising from undue and unrecognised aggregations of risk, the new Regulatory Board should introduce systems for risk profiling and a requirement that managing agents produce plans for dealing with realistic disaster scenarios.

13.3 A rudimentary system of risk-based capital requirements for corporate members was introduced in 1996 for the 1997 year of account. This was followed by the recommendations in the May 1997 consultation document *Strengthening Lloyd's Chain of Security – A Review* for, *inter alia*: a greater focus on disaster modelling, using standard prescribed assumptions, including maximum probable losses, to test the adequacy of syndicate reinsurance programmes; a minimum capital requirement of 50 per cent of overall premium limited for all members by 1999; and the introduction of a risk-assessed capital framework, using syndicate specific data, to determine capital ratios for all members from 1998.

13.4 Other external influences on internal policy increased. In 1996 a series of Codes of Practice was promulgated, elaborating on a set of "Core Principles" derived from the SIB Principles, and prescribing standards for "Sound and Prudent Management", "Managing Underwriting Risk" and "Managing Reserving Risk". These were, at least in part, inspired by the criteria of sound and prudent management introduced as Schedule 2A to the Insurance Companies Act 1982, as amended to implement the Third Non-Life Insurance Directive (92/49/EEC). Underwriting performance of syndicates was monitored by the Regulatory Division, and those in the "bottom quartile" were treated with capital loadings on syndicates or, in the worst cases, withdrawal of the managing agent's approval to manage the syndicate. The management of risk by means of improved internal assessment of risk factors and by more risk-sensitive capital requirements advanced hand in hand.

13.5 In 2002 the Chairman's Strategy Group viewed the Lloyd's market as a franchise in which Lloyd's was the franchisor and the managing agents the franchisees. Permission to act as a managing agent in the market was conditional on compliance with the "Franchise Principles" and "franchise guidelines" addressing underwriting, risk management and standards of services. The Franchise Board set a long-term target of profitability for the market, and defined a new business planning process for syndicates under which each syndicate business plan would need approval by the "franchisor" and performance against the plan would be monitored, with quarterly reports. The franchise proposals were rapidly implemented; and a new Risk Management Division was also established to operate in parallel with the Franchise Performance Directorate.

13.6 The implementation of the franchise performance regime coincided approximately with the introduction by the FSA of the Individual Capital Assessment regime for insurers, based on the Basel II agreement for banks, which in calculating capital requirements placed a new emphasis on Pillar 2 self-assessment of risk as a capital yardstick, in addition to the formulaic Pillar 1 requirements. Syndicate business planning and the assessment by the managing agent and by Lloyd's, of syndicate level capital requirements became a reciprocal process. This will continue with the Solvency II regime under which the managing agent will be required, in respect of each syndicate, to prepare an internal model for Pillar 1 and an Own Risk and Solvency Assessment (ORSA) for Pillar 2.

PERFORMANCE MANAGEMENT

13.7 The Underwriting Byelaw (No. 2 of 2003) provides for the registration of managing agents and the grant of revocation of their permission to manage syndicates. It also provides for statements setting out the "Principles of Relationship", one of the few obvious vestiges of the "Lloyd's Franchise" regime. Most of the byelaw is concerned with the supervision of the management of syndicates by their managing agents. It provides the framework of Lloyd's rules as regards the submission and compliance by managing agents with, and monitoring by Lloyd's of:

- syndicate business plans;
- the publication by the Franchise Board of, and compliance by managing agents with, underwriting guidelines;
- risk management requirements;
- and the management of syndicates in run-off.

The ultimate purpose of these requirements is to protect the New Central Fund from exhaustion and to ensure that all valid claims by Lloyd's policyholders can be met, as required by INSPRU 8.2.5R

SYNDICATE BUSINESS PLANNING AND MONITORING

13.8 Each year every managing agent is required to prepare and submit to the Franchise Board for approval, a business plan for each syndicate managed (or to be managed) by it, other than a "run-off syndicate". Managing agents are not permitted to underwrite business otherwise than in accordance with a business plan to which the Franchise Board has agreed. In practice the Franchise Board's powers are exercised by the Performance Management Directorate (PMD). The business plan is to set out "the parameters within which the managing agent will carry out underwriting on behalf of that syndicate" and information relating to any association or to any current or proposed underwriting transaction which may give rise to a conflict of interest. Related party transactions disclosure is now made in a separate document.

13.9 The Franchise board has power to make requirements as to the period to which the plan is to relate, its format and contents, the methods and assumptions to be used in preparing it, and the date or dates on which it is to be submitted. Syndicate business plans submitted under the byelaw are initially in the form of "syndicate business forecasts" (SBF), a term colloquially used also to refer to the entire plan during its currency. At present the PMD sends "SBF Instructions" for each year (updated throughout the year), electronically, with a template to managing agents through the Lloyd's Core Market Return system website. SBFs are to be submitted, through that system, for the following year of account. SBFs are required to give details of the types of business that the syndicate is writing or intends to write, by reference to class and risk code, and various other factors, also to be included are, typically the following:

- forecasts of technical account results,
- underwriting performance,
- premium income development,
- loss ratio composition,
- analysis of administrative expenses,
- sources of business,
- premium income split by risk code, geographical split of business,
- total investment returns,
- differences in premium income from the current year to the prospective year with anticipated reasons for it,
- cash flow summary,
- syndicate capacity, gross and net permitted line sizes,
- realistic disaster scenarios (RDS),
- outwards reinsurance premiums and reinsurance programme.

13.10 Prior to their approval on behalf of the Franchise Board, SBFs are reviewed by PMD for robustness and realism. They are also reviewed by a Business Plan Steering Group before final approval. If necessary, the managing agent can be required to submit a revised business plan/SBF, or may apply to do so, on its own initiative. For non-aligned syndicates, SBFs are to be submitted by a date in September, for approval in October, with a first draft submitted in July.

13.11 Once the business plan is approved it is taken into account in the annual capital setting process. Managing agents are to keep the appropriateness of the business plan under review. If they find that they are underwriting otherwise than in accordance with them, they must notify the Franchise Board (i.e. PMD), forthwith, and can at any time apply to amend them. Compliance with the business plan in the SBF is monitored. Each quarter the managing agent has to submit, via the Core Market Return system, a quarterly monitoring report (QMR) to PMD, and a supplementary monitoring report if so required. The final QMR for a year also includes an annual return to Lloyd's (in successive iterations), which enables the submission of the Lloyd's Return to the FSA (and its successor regulators) under IPRU (INS) Part VII and the completion of the statutory solvency test for the members of Lloyd's taken together, the preparation of corporate members' accounts under Schedule 3 to the Insurance Accounts Directive Regulations 2008, the release of the Lloyd's market's aggregate results on the Stock Exchange and the syndicate level tax returns. From 31 December 2012 it also includes a Solvency II balance sheet (a QMC return), which also determines the net balances available for release to members. In addition to (prospective) SBFs and (retrospective) QMRs, from 2010 Lloyd's has also obtained a monthly Performance Management Data Return (PMDR) which provides, two weeks after the end of each month, risk level data on risk-adjusted rate change, benchmark price and written premium. This allows Lloyd's to monitor performance against their approved business plans and to assess that against market trends as the business is written. This enables timely intervention by way of alteration of business plans, capital loadings, and requirements for change in management teams.

13.12 "Underwriting management principles" are as follows.

(a) The *Underwriting strategy and planning* principle requires that the managing agent has an effective process for challenging the annual business plan which forms part of the long-term plan for each managed syndicate. The business plan will typically contain the following elements: –

- a defined risk appetite, both gross and net of reinsurance;
- each syndicate's risk accumulations, as included within the syndicate ICA net and gross exposures to a single RDS event are not to exceed 75 per cent and 20 per cent of syndicate allocated capacity respectively;
- a projected return on capital (ROC) that is reasonable, both net and gross of reinsurance, for each syndicate class of business (the capital projections should be on the same basis as those for the relevant ICA;
- the forecast ultimate net loss ratios at an appropriate level of detail (ideally defining the attritional, large and catastrophe components);
- a proposed reinsurance programme defined in terms of limit, cost and reinstatement;
- all material assumptions by each category of underwriting; and an explicit consideration of the resources need to execute the plan.

(b) The *Underwriting and controls* principle requires that the managing agent has effective systems and controls over each managed syndicate's underwriting. The minimum standards in this regard are that all underwriting will take into account the syndicate's annual business plan and underwriting policy, which typically includes line guide details by class of business and a procedure for authorising material deviations from them, the approach to fronting for other insurers, and the approach to achieving “contract certainty”; the underwriter’s terms of reference and authorities, which should be in writing and reviewed annually to reflect the underwriters’ experience and knowledge and to ensure alignment with the business plan; pricing policy; up-to-date exposure management and assessment information (including the management aggregates within the parameters of the business plan and ensuring that appropriate reinsurance is in place); requirements to achieve “pre-bind quality assurance”; and compliance with external regulatory requirements. “Pre-bind quality assurance” will take into account the appropriateness of wordings, encouraging the early submission of wordings for assessment, and the use of specialist workings and legal advice for high-risk business. The Lloyd’s website gives detailed guidance on this.

(c) The *Pricing and rate monitoring* principle requires the managing agent to have appropriate pricing methodologies and effective rate monitoring processes. The minimum standards require a “demonstrable and transparent pricing policy”; measurement of the difference between the actual price charged and the benchmark price established by the managing agent; measurement of pricing movements form the previous year for renewal business; analysis of the impact of non-renewal of business on the current portfolio; written guidelines on the principles to apply in the quantification of pricing movements; and information to be recorded by underwriters. Lloyd’s Performance Management Data Return (PMDR) system, providing monthly data on risk adjusted rate change, benchmark price and written premium, enables Lloyd’s itself, for the purpose of protecting the New Central Fund, to monitor these matters to check whether managing agents are writing prudently and in accordance with their business plans.

(d) Managing agents are required by the *Exposure management and assessment* principle to have effective systems and processes to record, monitor and assess underwriting exposure. As minimum standards, this entails:

- having effective systems for assessing and modelling exposure for each managed syndicate;
- validating the output from those processes and systems and integrating it within annual business plans, underwriting controls and the capital setting process;
- and regular reporting of exposures to the board and to Lloyd’s.

Realistic Disaster Scenarios (RDS) do not necessarily represent the full range of accumulations to be monitored.

(e) The manging agent must have effective controls over its outwards *reinsurance* arrangements. Effective controls include a clear and comprehensive plan for the reinsurance of each syndicate, agreed by the board, which takes into account managing agent’s risk appetite for retained insurance risk and the potential for the accumulation of risk and multiple losses; systems and controls for the management of all elements of the reinsurance programme, a clear definition of authority to purchase reinsurance; and a clearly defined approach to using “non-standard reinsurance”.

(f) Finally, there are to be effective systems for the recording and reporting of underwriting-related data to management and to Lloyd’s.

RISK MANAGEMENT

13.13 The "risk management principles" require "risk governance", involving a defined approach to risk management, a clear understanding of the organisation's risk appetite and capacity and an organisational structure which supports the effective management of risk; a "process" for identifying, assessing and mitigating the significant risks to the achievement of business objectives; a "process" for monitoring its risk profile and identifying and responding to significant issues and events; and a risk management framework that is integrated with the capital modelling process and methodology, allowing management effectively to assess overall capital needs, enhance capital allocation and measure the return on risk.

13.14 It is important to note that managing agents are required by the PRA Prudential sourcebook for insurers, to establish and maintain adequate systems and controls to manage the risks to which the insurance business carried on by each syndicate it manages is exposed to:

- contagion risk,
- credit risk in insurance,
- market risk in insurance,
- derivatives in insurance,
- liquidity risk and
- operational risk.

LLOYD'S MARKET OVERSIGHT

13.15 The Corporation of Lloyd's plays a vital role in supervising the Lloyd's market. Lloyd's prudential, exposure management and risk management control frameworks are specifically designed to address the risks inherent in a global portfolio, overseeing the market as a single entity. Lloyd's control framework is set out in detail in the Lloyd's Minimum Standards which covers a number of areas. The full details of Lloyd's minimum standards are available here: http://www.lloyds.com/the-market/operating-at-lloyds/lloyds-minimum-standards.

In summary, Lloyd's establishes minimum standards with regards to the following areas:

- Underwriting Management:
  - Underwriting Strategy and Planning.
  - Underwriting and Controls.
  - Delegated Authority.
  - Pricing and Rate Monitoring.
  - Exposure Management.
  - Reinsurance.
  - Underwriting Data Quality.
- Claims Management:
  - Claims Management Processes.
  - Claims Business Plan.
  - Skills and Resources.

    - Claims Processing.
    - Claims Reserving.
    - Use of third Parties.
- Risk Management:
    - Effective Risk Management System.
    - Risk Governance.
    - Risk Processes.
    - Own Risk Solvency Assessment (ORSA).
- Governance:
    - System of Governance.
    - Organisational Structure.
    - Board Effectiveness.
    - Fit & Proper.
    - Outsourcing.
    - Required Functions.
    - Remuneration policy.
- Scope, Change and Use:
    - Model Scope.
    - External Models and Data.
    - Use Test.
    - Expert Judgement.
    - Model Change.
    - Documentation.
- Modelling, Design and Implementation:
    - Calibration.
    - Statistical Quality Methodology.
    - Statistical Quality Assumptions.
    - Statistical Quality Consistency.
    - Model Results.
    - Internal Model Data.
- Validation:
    - Validation Policy.
    - Validation Governance.
    - Frequency and Scope.
    - Compliance and Confirmation.
    - Validation Results.
    - Validation Tools.
    - Validation Report.
    - Risk Indicators.
- Investment Management:
    - Investment Strategy, Governance and Use.
    - Outsourcing.
    - Valuation and Reporting.
- Reserving:
    - Board Responsibility.
    - Statement of Actuarial Opinion.
    - Actuarial Function.
    - Board Information.

    - Reserving Procedure.
    - Documentation.
    - Data.
- Regulatory:
    - Relationship with Regulators.
    - Licensing and Market Access.
    - Information and Reporting.
    - Financial Crime.
- Operating at Lloyd's:
    - Operations and IT.
    - Finance.
    - Human Resources.
    - Reporting.
    - Brand and Reputation.

- Conduct Risk: During 2014, Lloyd's prepared extensive minimum standards aimed at embedding the Financial Conduct Authority's requirement to treat customers fairly into the processes and culture of all Managing Agents at Lloyd's. All Lloyd's Managing Agents are expected to comply with these requirements in order to operate at Lloyd's.

RISK MANAGEMENT AT LLOYD'S

13.16 Lloyd's risk management framework has been designed to effectively manage various risks throughout the market and Corporation. In particular, Lloyd's has developed a Risk Management Strategy, which articulates its overall strategy to managing and overseeing risks facing the Society.

Risk Management Strategy

13.17 The key aim of the Lloyd's Risk Management Strategy is to set out in a single document, owned by senior management, Lloyd's approach to risk management, key components of its risk management framework, and the rationale for their design. It is used as a reference document and relies on more detailed documentation to describe how processes operate and interact, such as the Risk Appetite Framework and the Own Risk and Solvency Assessment (ORSA) Policy. Risk strategy objectives link Lloyd's approach to risk management to the business strategy and are focused on delivering Lloyd's vision.

13.18 There are seven principles of risk management which underpin the Lloyd's approach. These principles are used to guide the maintenance and development of the risk framework. The principles are:

a) Strong governance
b) Simplicity
c) Clear ownership
d) Enterprise wide view
e) Strong risk culture
f) Verification of results with other functions
g) Timely management information and reporting

Other aspects of the risk management strategy include:

h) The risk governance structure, including the risk committees and their respective operating models
i) The risk management system, including the risk appetite framework and the Own Risk and Solvency Assessment
j) Ensuring that key roles and responsibilities are clearly apportioned

Due to the nature of Lloyd's and the responsibility of overseeing performance and risk in the market, the Risk Management Strategy intentionally goes further than a traditional risk management policy, as it has a broader coverage and references the tools and documents (such as the Risk Policies – see the Risk Policy Framework) which shows how the framework has been constructed.

Ownership
13.9 The Risk Management Strategy is owned by the Executive Risk Committee ('ERC') and was initially approved in September 2010, with an update undertaken in June 2011. In order to ensure that the Risk Strategy and Risk Appetite Framework are consistent with the overall Lloyd's strategy, the annual reviews of each occur simultaneously.

Once the overall strategy has been approved, the Franchise Board ('FB') considers whether this requires changes to threshold and tolerance levels within the Risk Appetite Framework. Any changes are proposed by the FB and subsequently agreed by the ERC.

Lloyd's Risk Appetite framework
13.10 Risk appetites show the current risk profile of Lloyd's against an agreed level of tolerance. In doing this, for key risk areas, Lloyd's articulates the point at which we cease to be comfortable and therefore take appropriate action in good time.

A number of measures now referred to as 'Risk Appetites' have existed for some time, but not as part of a consistent framework. In reviewing these alongside the risk areas to which Lloyd's is most prone, a revised set of 14 risk appetites were selected and implemented as part of the new framework. These are aligned with its strategic objectives and provide a pragmatic method to cascade the Franchise Board's willingness to take on risk into day-to-day decision making.

The unique structure of Lloyd's means that it primarily oversees risk taken on in the Market, but also runs its own risk in some areas. To recognise this, 8 risk appetites cover Market level risk and 6 focus on the Corporation. When measuring market level risk, it is important to have early warning to assist the market oversight activity, and as such these are used more as 'trigger points' to prompt activity and are not intended to automatically restrict the risk appetite of each Syndicate at Lloyd's. Those covering the Corporation are typically more traditional 'rules' or 'zero tolerance' measures.

13.11 Each 'Risk Appetite' is made up of two components:

- Statement – a descriptive overview of our desired position and,
- Metric(s) – one or more specific measures for which thresholds are set

Reporting and Use

13.12 Risk appetites are reported to the FB on at least a quarterly basis. Each measure has a business owner with the framework being coordinated by the Risk Management team. Risk appetite metrics are regularly rated against the set thresholds (red, amber or green) with formal quarterly reporting to the FB via the risk committees. All metrics with an amber or red rating are specifically flagged with associated detail and management actions for Franchise Board review.

The Framework has been in place since 2010 and appetites are amended as necessary with new and/or changed measures subject to FB sign-off. A full annual review is also carried out. The development process ensured strong involvement of the FB and the Lloyd's Market Association ('LMA'), for market-level risks, with multiple iterations of the framework being reviewed and approved by the FB as further enhancements were made.

Lloyd's Risk Policy Framework

13.14 Risk policies demonstrate how Lloyd's identifies, measures and manages its key risks. A Risk Policy Framework has been developed which articulates Lloyd's approach to implementation and use of risk policies.

The key objectives of the Lloyd's Risk Policy Framework can be summarised in four categories:

- Providing clarity of risk and risk management across the Corporation
- Consistant approach
- Sharing knowledge
- Meeting regulatory requirements

Risk Policy Framework Scope

13.15 The Risk Policy Framework covers all Lloyd's departments and the Executive Team. Policies apply either to all staff e.g. Information Security or to specific areas e.g. Underwriting. The risk policies are designed in keeping with the nature, scale and time horizon of the business and so are tailored to Lloyd's specific risk profile. The Framework covers the operation of the Lloyd's Corporation including its market oversight activities, but not the operations of the Managing Agents and Syndicates which are the responsibility of each Managing Agent.

Policy Content and Implementation

13.16 The policy describes the processes, controls, metrics and reporting used to manage the risk, taking into account the nature scale and time horizon of the business.

The policy owner provides training and guidance to support the policies including mandatory training to meet regulatory requirements.

The policy includes a process for any mitigating actions. The actions may be discussed at the appropriate risk committee or with the policy owner.

Oversight and Ownership

13.17 Ownership lies with the relevant Head of Department or appropriate Manager and in conjunction with an annual assessment process ensures the continued adequacy and effectiveness of each policy. Additional oversight is provided by the Risk Committees.

The result of these assessments will be reported to the ERC, with any further levels of independent assurance conducted by internal audit.

Reporting and Escalation

13.18 Any breaches of policies or appetite, non-compliance or exceptions to policy are reported to the Policy Owner. These are reported to the risk sub-committees, where they may be escalated to the ERC.

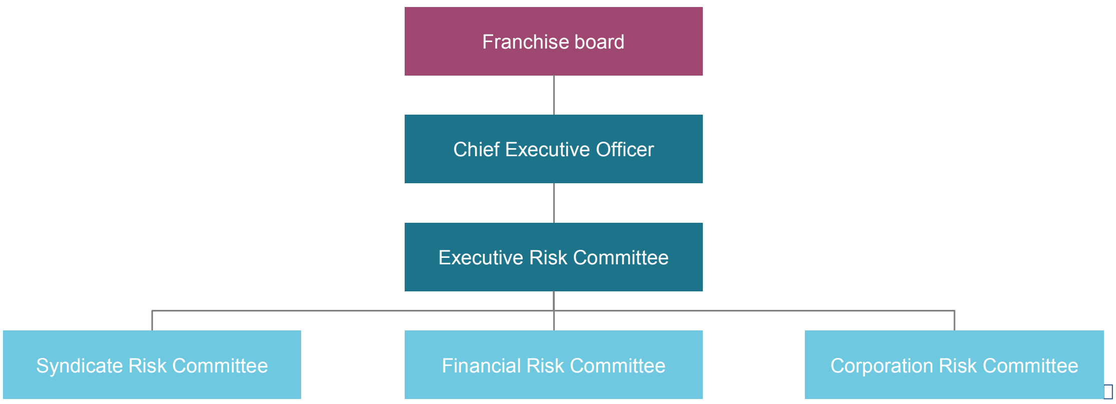
Risk Management Process and Risk Profile

13.19 This Overview contains three sections outlining the following aspects of Lloyd's risk governance:

- Risk governance structure
- Roles and responsibilities
- Reporting and escalation process

Risk Governance Structure

13.20 Lloyd's operates four risk committees within the risk governance structure, reporting, via the CEO, to the Franchise Board, putting risk and capital management at the forefront of the Franchise Board agenda and at the heart of the overall Lloyd's governance structure. The enhanced structure shown below has been in place since September 2010 and has proved effective in identifying and addressing the key risks facing Lloyd's.



In September 2010 the risk governance structure was enhanced to a two tier approach and went live with four new risk committees. This enabled improved coverage of risk and increased challenge through the expertise of a more focused membership. Lloyd's risk governance structure previously comprised of two risk committees, the Lloyd's Risk Committee and the "G5" committee.

In light of the revised structure significant improvements were made to the risk reporting. In terms of market and Syndicate level oversight, there were few changes made to the initial "lines of defences" risk reporting and data, as this was considered to be robust. Although it should be noted that significant improvements have been made to the capital and solvency data and reporting.

The risk committee structure is a critical aspect of the risk management framework of Lloyd's and the roles of the risk committees (and the role of the CEO within the risk committee structure) is described in detail within the Risk Management Operating Model.

Role of the Risk Committees

13.21 Executive Risk Committee ('ERC') - The ERC is the most senior committee in the risk governance structure and its primary responsibility is managing strategic risks. The risk reports for the ERC are produced from a number of processes and sources. The key items include risk appetite, reports from the sub-committees and capital management processes (from the Lloyd's Internal Model - LIM). Quarterly reports from the ERC are formally reported to the Franchise Board, which provides independent challenge and oversight. All of the relevant processes and reports are set out in the ERC Operating Model document.

Syndicate Risk Committee ('SRC') - The SRC is responsible for oversight of Syndicate level risks and uses the work performed by market oversight teams such as the Performance Management Directorate. The SRC uses the assessments undertaken by such teams to determine which Syndicates require an increased level of oversight. Issues are captured at market oversight team level in the Managing Agent packs and Syndicate risk matrix. Where issues are material they are escalated to ERC for challenge and direction, and thereafter to the Franchise Board. For more information, see the SRC Operating Model document.

Financial Risk Committee ('FRC') - The purpose of the FRC is to provide assurance to the ERC that all financial market risks faced by the Society are properly managed in accordance with risk appetites. Financial risks are measured in a comprehensive fashion and this view is augmented by stress & scenario testing to assess the effect of unusual market conditions. The FRC makes appropriate recommendations, based on its analysis, to mitigate risks as well as approving and overseeing risk policies. For more information, see the FRC Operating Model document.

Corporation Risk Committee ('CRC') - The function of the Corporation Risk Committee is to assist the ERC by providing assurance that all material risks associated with operations at the Corporation level are identified and managed in accordance with approved policy and risk appetites. This includes, but is not limited to, employee practices risk, systems and information risk, business disruptions risk and regulatory risk. For more information, see the CRC Operating Model document.

Risk Coverage

13.22 Lloyd's has a defined a Risk Universe and Risk Register document, a comprehensive list of risk categories, to which it is exposed, arising both through the activities or the market and the activities of the Corporation. The universe leverages the standard Solvency II risk categories, extending these to ensure full coverage of the range of risks faced, and is articulated through a hierarchy which can be aggregated or disaggregated as required.

Reporting and Escalation Process

13.22 Processes are in place to deliver robust management information, aligned to the risk areas considered by each risk committee. Each risk committee has developed a specialist MI pack that has been aligned to the area of risk. An example of this the SRC's processes to collate market oversight teams view of issues at agents, which aids the decision making at SRC.

The ERC risk and capital MI report brings together the views of its sub-committees, risk appetite, capital and solvency into one pack. This enables the ERC to oversee and challenge its subcommittees and management mitigating actions. The capital and solvency information from the LIM, which is contained within this report, allows the ERC to consider capital implications at the same time as risk.

Full detail of the risk reporting processes is described in the risk committee operating model documents, including the processes used to identify, measure, monitor and manage risk. These documents also state the roles, responsibilities and key decisions taken by each of the committees, including the points of escalation to the ERC and Franchise Board.

In conclusion, the enhanced risk governance structure provides effective risk management oversight for the complex risk profile at Lloyd's. Reports are regularly provided to the Franchise Board, via the CEO, putting risk and capital management at the forefront of the Franchise Board agenda.

Emerging Risk Framework

13.23 The key objectives of the Lloyd's emerging risk framework can be summarised in three categories:

1. Improving the information available to make business decisions.
2. Sharing knowledge of Emerging Risk identification and expertise.
3. Meeting regulatory requirements.

Emerging Risk Coverage

13.24 Risk Committee structures and processes are used to identify new and emerging risks that may impact on Lloyd's risk profile. The risk committee memberships ensure wide coverage of technical ands and expertise.

Insurance risks have additional focus and a dedicated Emerging Risks and Research Team.

Where appropriate these risks are considered to ensure the LIM covers Lloyd's key risks.

Risk Identification

13.25 It is the responsibility of the risk committees to ensure that new and emerging risks are identified and assessed, as set out in the terms of reference, which is detailed in the risk governance paper.

The team uses processes which include, Horizon Scanning, Lloyd's Market Special Interest Group and research.

Assessment
13.26 A wide range of risk identification and assessment methods are used to ensure accuracy and reliability, which are described further in the Emerging Risk Framework. These include:

- Standard risk assessment procedures.
- Scenario analysis and stress tests, which are detailed in the stress and scenario testing framework.
- Quantitative and qualitative assessment.

Governance
13.27 As new and emerging risks are regular agenda items for the Risk Committees, this has aided the implementation and embedding the process. The ERC now reviews the emerging risk report on a quarterly basis.

It should be noted that emerging risks have been informally considered by the risk committees at Lloyd's for a number of years. An example of this was the early identification of the financial crisis and potential issues with Eurozone.

The formal Stress Testing and Scenario Analysis Framework and implementation of the LIM had enhanced the analysis that can be undertaken on emerging risks. The LIM has been designed with the capability to undertake "What if" analysis.

13.28 In conclusion, by having an established identification, assessment and reporting procedure that contains a clear governance structure, Lloyd's is able to maintain a broad awareness of key emerging risk across both the Corporation and the Market.

Business Plans
13.29 Lloyd's is not an insurance company; it is a market where counterparties meet to buy and sell insurance risk. When we talk of Lloyd's, we refer to two distinct parts:

- The market, which is made up of many independent businesses, and
- The Corporation of Lloyd's, which is there, broadly speaking, to oversee that market and to manage the mutual capital layer that increases policy holder protection.

As such, the strategy and business planning process of the Corporation does not determine the specific business plans of Managing Agents in the same way the head office of a unitary insurance group may set plans. The Lloyd's Strategy sets the overall objectives for the Lloyd's market which feed into the business plans of individual Syndicates through the review of Syndicate business plans which are approved by Lloyd's each year. Similarly, before Syndicates may begin underwriting, Lloyd's determines the appropriate capital requirement for each Syndicate and Member based on the approved plan. These processes form a core part of the Lloyd's ORSA, and the processes such as risk appetite on which it relies, described further below.

14. THE LLOYD'S ORSA

14.1 The ORSA is an integral part of the on-going process of risk and capital management at Lloyd's. It incorporates a series of processes which ensure an appropriate level and quality of capital is maintained to support the risks taken across Lloyd's, both at a Market and Corporation level, on a current and future basis in light of the Strategy and Risk Appetite set by the Franchise Board.

Additionally, whilst Lloyd's is required to calculate and maintain a minimum level of regulatory capital, the Solvency Capital Requirement ('SCR'), a key focus of the ORSA is to continually assess Lloyd's own view of the risks faced and associated economic capital needs in order to meet the strategic goals of the franchise.

As such, the Lloyd's ORSA incorporates many of the key Corporation processes which operate through the course of the business cycle. The diagram below summarises the Lloyd's ORSA process, divided into five key areas.

LOCAL ORSAS REQUIREMENTS

14.2 In additional to its centralised ORSA Lloyds produces local ORSAs in several international territories including South Africa, Switzerland and Canada. Lloyd's local ORSAs consider both the global risks as identified in the Lloyd's ORSA where they are deemed material to South Africa, and local risks. The specifics of a local ORSA will be driven by local regulatory requirements, though wherever possible the processes and approach to risk will be aligned with Lloyd's centralised ORSA processes.

ORSA Reporting and Use

14.3 The outcomes of the ORSA are formalised at least annually in the ORSA Report. In addition to pilot versions, the first 'live' ORSA was approved by the ERC and Franchise Board in March 2012. The report draws together key conclusions from detailed underlying risk and capital management processes, allowing the ERC and Franchise Board to use the Report to conclude on their comfort with the overall risk and capital profile of the Society.

When reviewing the Report, the ERC and Franchise Board are asked to consider the following questions:

- Does the Report cover the key risk issues and capital assessments as you see them?
- How comfortable are you with the risk we are taking on? Is it within your overall appetite?
- What, if any, additional management actions should be considered across the Corporation or Market?
- How comfortable are you with the level of capital held across the Chain of Security?
- How comfortable are you that Lloyd's is well prepared to withstand shocks or risks to which is may be exposed over the next three to five years?

Additionally, the ORSA Report is a key feed into the Strategy process, highlighting the key current risks to Lloyd's as well as those which may emerge over the next three to five years. This information is considered, for example, during the Franchise Board away day which forms a key part of the strategy setting process.

In conclusion, the ORSA is the mechanism which ensures the alignment of risk, capital, strategy and business planning at Lloyd's.

15. LLOYD'S MANAGEMENT OF CATASTROPHE RISK

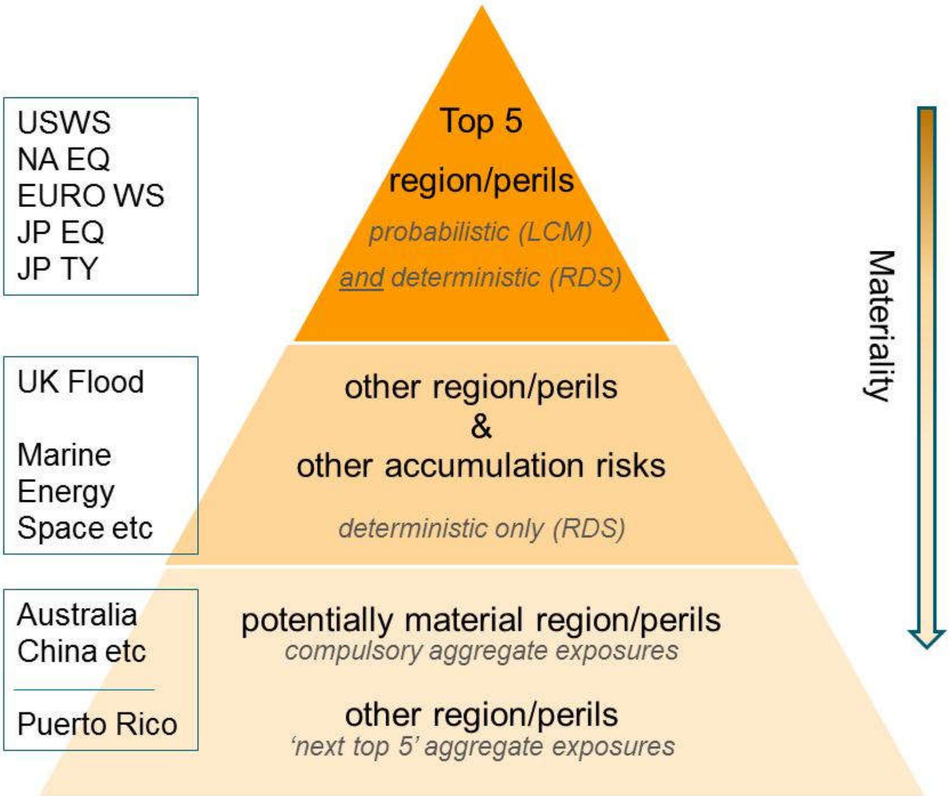
15.1 Lloyd's framework uses a combination of probabilistic, deterministic and other modelling techniques to understand and manage Syndicates' catastrophe risk.

- The ***Lloyd's Catastrophe Model [LCM]*** is a probabilistic, exposure-based model covering Lloyd's most material region/perils for property catastrophe:
    - US hurricane
    - North America earthquake
    - European Windstorm
    - Japan earthquake
    - Japan typhoon

  The **LCM** forms part of Lloyd's quarterly monitoring and reporting against catastrophe risk appetite. The **LCM** is also a key component of Lloyd's Internal Model under Solvency II, and is accordingly subject to formal internal and external validation.

- The **AEP 1-in-30** measures are probabilistic loss-estimates for the LCM region/perils on an Annual Exceedance Probability basis at 1-in-30.
- The **Realistic Disaster Scenarios (RDS)** are deterministic loss-estimates for more specific regions, perils and classes of business that are material to Lloyd's. The scenarios are subject to a formal process of review by Lloyd's to ensure that they represent appropriate stress-tests, and are published annually.
- Other regions, perils or classes of business are covered by additional reporting metrics, including aggregate exposures by country or region, exposures by line of business, etc.

The diagram below illustrates how these approaches apply at different levels of materiality of catastrophe risk. Lloyd's regularly monitors the market's exposure in regions and perils not currently considered material enough to warrant deterministic or probabilistic reporting (the third tier).



OPERATIONAL

15.2 At an operational level, there are three components to Lloyd's processes for managing catastrophe risk. These are business-planning, reporting and exposure-management.

a) Planning

Annually in July and September, Syndicates are required to submit business-plans and capital for the forthcoming calendar year. The submission includes projected levels of catastrophe risk and associated capital, as measured by:-

- probabilistic loss-estimates for the **Lloyd's Catastrophe Model** [LCM], covering the five key region/perils – US hurricane, North America earthquake, European Windstorm, Japan earthquake and Japan typhoon
- forecasts of probabilistic **AEP 1-in-30** losses, also for the five key region/perils
- forecasts of deterministic losses for each **Realistic Disaster Scenario**

The **AEP 1-in-30** and **RDS** are subject to Lloyd's Franchise Guidelines for catastrophe risk. These specify that:

- projected Gross Losses for each **AEP** region/peril and each **RDS** must not exceed 80% of forecast Gross Net Premium Income and (separately) capital in the form of Members' Economic Capital Assessment [ECA]; and
- projected Final Net Losses for each AEP region/peril and each **RDS** must not exceed 30% of GNPI and ECA.

15.3 Syndicates can ask for permission to exceed Franchise Guidelines on a scenario-by-scenario basis, separately for Gross and Net. There is no assumption that these will be granted. For consideration of dispensations against Guidelines for Final Net, reinsurance counterparty risk is specifically considered: this includes any Group or other shared reinsurance provisions, which are themselves subject to formal Franchise rules.

Lloyd's Capital and Planning Group [CPG] evaluates business-plans and capital, and has the final power of approval or rejection for any element including requested dispensations from Franchise Guidelines.

Once Lloyd's has approved a business-plan, Syndicates' Boards are required to manage the businesses within approved levels throughout the calendar year, including specifically for catastrophe risk.

Material changes of plan must be re-submitted to Lloyd's for approval.

Reporting and Monitoring

15.4 Lloyd's monitors Syndicates' in-force exposures to catastrophe risk as follows:

Syndicates return estimated losses to in-force exposures for the **Lloyd's Catastrophe Model** on a quarterly basis. These are monitored against projections in the approved business-plan, and form part of reporting against Lloyd's overall catastrophe risk appetite.

Syndicates must return estimated losses to in-force exposures for the **AEP 1-in-30** and the 'compulsory' **RDS**[3] on a half-yearly basis (as at 1st January and 1st July); the de minimis **RDS** are reported annually. All are monitored against approved business-plan. Syndicates are required to explain the reasons for any breaches of approved plan and/or Franchise Guidelines to CPG, which specifies remedial actions.

With regard the LCM, **AEP 1-in-30** and **RDS**, Lloyd's monitors exposures to other regions and perils that are currently less material at a market level. This is on a half-yearly basis, as part of **RDS** reporting.

Lloyd's may require specific additional reporting at any time. 'Model completeness', meaning that all potential sources of accumulation risk are identified and appropriately represented in Syndicates' Internal Models, is a major focus for Lloyd's Exposure Management during 2015.

Exposure Management

15.5 All Syndicates are required at all times to meet Lloyd's Minimum Standards for Underwriting as they apply to exposure-management. A link can be found here:

http://www.lloyds.com/the-market/operating-at-lloyds/lloyds-minimum-standards/underwriting-management/exposure-management

Syndicates are also required to meet all the tests and standards of the European Union Solvency II Directive ('Solvency II'). These include specific provisions for catastrophe risk.

Lloyd's revised and strengthened the Minimum Standards during 2014, specifically incorporating elements from Solvency II and other regulatory requirements for catastrophe risk with regard to:-

- external models and data
- data quality (including completeness, accuracy and appropriateness)
- model completeness
- validation
- uncertainty
- independent challenge

15.6 Lloyd's Exposure Management team has responsibility for conducting a regular, structured cycle of reviews against Minimum Standards as part of Lloyd's overall Performance Management framework. This process is overseen by the Performance Standards Review team.

Reviews are evidence-based and documented. All completed reviews are peer-reviewed, and the conclusions must be formally agreed by Lloyd's Head of Exposure Management & Reinsurance.

There is a clear escalation process in the event of Syndicates found not to be meeting all standards. Exception reporting is a regular part of the Performance Management framework, including to the Franchise Board where necessary.

[3] There are sixteen 'compulsory' RDS, meaning that Syndicates must report any level of loss-estimate including zero. The remainder are *de minimis*, meaning that only losses above a certain threshold need be reported.

16. LLOYD'S IN SOUTH AFRICA

ACT NO. 18 OF 2017: INSURANCE ACT, 2017

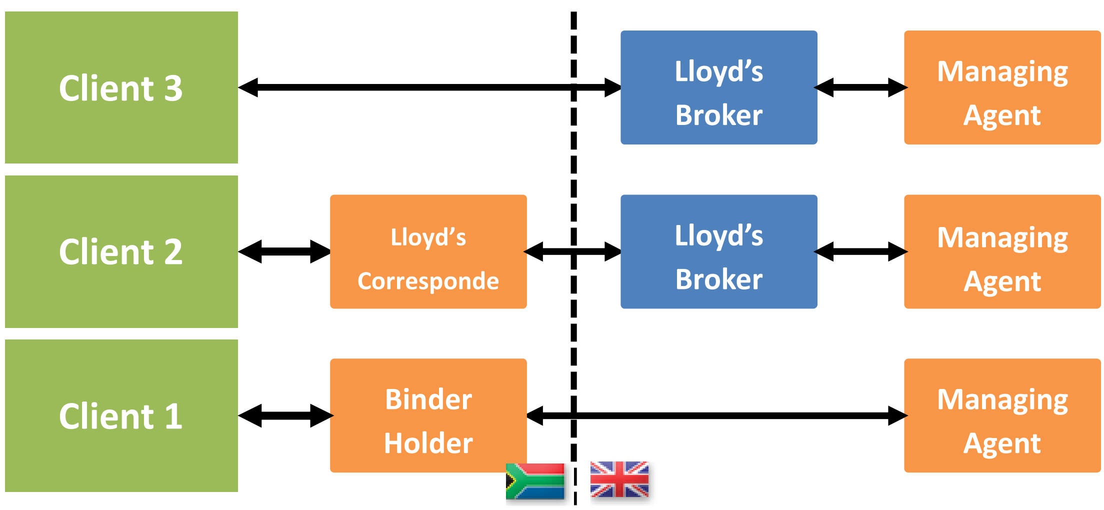
16.1 On the 18th January 2018, the President assented to the above mentioned Act which will come into operation on a date to be gazetted by the Minister of Finance. It will replace the Short Term Insurance Act 53 of 1998.

The purpose of the Act is to promote the maintenance of a fair, safe and stable insurance market for the benefit and protection of policyholders, in a manner consistent with the Constitution. It aims to do this by establishing a legal framework for the prudential regulation and supervision of insurers and insurance groups and to facilitate the monitoring and the preservation of the safety and soundness of insurers. It also aims at promoting financial inclusion and introducing a legal framework for microinsurance.

The Act seeks to provide a consolidated legal framework for the prudential supervision of insurers that is consistent with international standards for insurance regulation and supervision, and takes into account the specific conditions of South Africa.

16.2 Lloyd's South Africa (Pty) Ltd was established in 1997. It is a 100% subsidiary of the Corporation of Lloyd's. The office acts as the Lloyd's representative office to discharge the statutory obligations of the General and Fiscal Representative of Lloyd's Underwriters under the supervision and management of the General Representative.

16.3 Accommodation in legislation recognises Lloyd's unique structure. Position in statute provides terms with which Lloyd's can comply, ***equivalent*** to company market. Local assets, maintained by Lloyd's provide security for South African policyholders, irrespective of the distribution network. Lloyd's provides regulatory reporting / prudential process assurance covering all business written through local intermediaries and directly with South African policyholders. Lloyd's South Africa has legal obligations and a regulatory representation role. Lloyd's South African operation follows the model for how Lloyd's operates branches worldwide – as shown below:



16.4 Lloyd's underwriters and Lloyd's licensed
The new Insurance Act 2017, states the following under Sec 24. (1)

"Lloyd's underwriters and Lloyd's, subject to subsection (2), are licensed to conduct—
(a) non-life insurance business in all the classes and sub-classes set out in Table 2 of Schedule 2, in respect of commercial lines; and
(b) non-life insurance business in sub-class 17 set out in Table 2 of Schedule 2 in respect of personal lines.
(2) Lloyd's underwriters and Lloyd's may only with the approval of the Prudential Authority conduct non-life insurance business in the classes and sub-classes, other than sub-class 17, set out in Table 2 of Schedule 2 in respect of personal lines.
(3) The Prudential Authority may impose licensing conditions similar to those referred to in section 25(8) on a Lloyd's underwriter or Lloyd's."

Important to note is that although Lloyd's is not required to register like all other insurance companies conducting insurance business in South Africa, in terms of the Act Lloyd's is deemed registered/licensed. The treatment of Lloyd's in South Africa is in line with the treatment by other jurisdictions, especially the Lloyd's Act in Britain discussed in Section 2 of these notes.

Representative Office
16.5 Sec 34.of the Insurance Act 2017 requires that Lloyd's must establish a representative office in the Republic. Under Sec (2) *(a),* Lloyd's must appoint, and at all times have, a representative and a deputy representative."

It further goes on to say that "a representative and a deputy representative must be natural persons permanently residing in the Republic for as long as he or she remains a representative and a deputy representative."

Duties of the Lloyd's General Representative
16.6 Sec 30.1 of the Insurance Act 2017 stipulates that the representative of Lloyd's is responsible for meeting the requirements imposed on it, Lloyd's underwriters and Lloyd's under this Act, irrespective of the delegation or outsourcing of any responsibilities.
The duties of the Lloyd's General Representative and his Deputy can be summarised as follows:

ensures compliance with South African legislation, including this Act and any other legislation regulating the conduct of insurers;
ensures compliance with the Trust Deed referred to in section 41 of the Act;
notify the Prudential Authority in writing of any non-compliance in terms of the legislation.

Represents the interests of Managing Agents

Oversees Trust Fund and appoints independent auditor as required by Legislation

Carries out due diligence on prospective Open Market Correspondents (OMC) and Cover holders.

On behalf of Managing Agents, receives summons and complaints.

16.7 Lloyd's in South Africa, like in other licensed territories, conducts its business through Delegated underwriting which is recognised as a key growth area for Lloyd's both in existing markets and as an opportunity for development in new markets. Coverholders are used to gain local and class of business underwriting expertise and access to networks of retail agent relationships.

LLOYD'S SUPPORT AND OVERSIGHT OF LLOYD'S SOUTH AFRICA OFFICE

16.8 Lloyd's provides on-the-ground support to Coverholders operating in South Africa by having a Lloyd's South Africa General Representative, Compliance Manager and Operations staff employed by the Corporation of Lloyd's, whose key functions are to:-

- participate in the Lloyd's approval process and support the FSB authorisation process for Lloyd's Coverholders seeking authorisation to conduct business on behalf of Members of Lloyd's in South Africa;
- manage all regulatory, prudential and compliance responsibilities for Lloyd's in South Africa on behalf of Members of Lloyd's as appropriate;
- accept service of suit on behalf of Members of Lloyd's in the event of a dispute in connection with a Lloyd's policy;
- responsible for overseeing the payment of taxes owed.

16.9 Lloyd's provides support and oversight for its global operations through central functions, under the supervision of the UK Prudential Regulatory Authority (PRA) and Financial Conduct Authority (FCA) with assurances provided to the FSB that these functions are sufficiently and effectively carried out. Lloyd's branch in South Africa has access to the resource and expertise of these Lloyd's functions, including:

- Actuarial Services
- Accounting and Reporting
- Exposure and Risk Management
- Legal Services
- Sanctions and Financial Crime Compliance
- Delegated Authority Oversight
- Underwriting Performance Management
- Claims Performance Management
- Investment Management and Oversight
- Market Conduct
- International Regulatory Affairs

Additionally, the presence of Lloyd's locally tends to generate demand for the development of a highly-skilled workforce to provide such functions to Lloyd's clients and other key stakeholders – including the development of local actuarial, accounting, insurance law, risk modelling, claims handling, and underwriting expertise, to name a few.

17. REGULATORY REPORTING

17.1 As noted in the list of its responsibilities above, the Corporation of Lloyd's prepares and submits regulatory reporting to relevant authorities in the UK and internationally. Reporting is prepared centrally by Lloyd's, taking into account its status as a single entity and the integrated position of global business within Lloyd's overall structure.

As proof of the solvency of the Lloyd's market (taking into account all operations and activities throughout the world), Lloyd's provides many overseas regulators with the Global Financial Filing (GFF) and tailored regulatory returns.

The GFF consists of the following:

- A certificate signed by the Chairman of Lloyd's and the Prudential Regulation Authority to certify that Lloyd's has submitted to the Prudential Regulation Authority a report on its financial situation and solvency and on the whole of the insurance business carried on by its Members.
- Certificated statement including:
    - Certificate by the Council of Lloyd's - includes the certification that the Society of Lloyd's has maintained the required solvency margin
    - Statement by the Lloyd's Actuary
    - The external Auditors' Report
- Lloyd's Annual Report
- A list of Members of the Council of Lloyd's
- The Register of Lloyd's Members with open years.

Regulatory Reporting In South Africa

17.2 Lloyd's currently meets specific South African reporting, funding and audit requirements set out under the Lloyd's provisions with the Short Term Insurance Act 1998 (STIA) which recognise Lloyd's unique structure. Soon it will have to comply with the provisions of Act 2017 to be gazetted by the Finance Minister. Reporting is prepared centrally by Lloyd's and submitted to the Financial Services Board (FSB) in unison with local reporting requirements. As with the local market, Lloyd's is currently moving towards more detailed reporting under the new Solvency, Assessment and Management (SAM) prudential regime; this will include detailed quantitative and qualitative reporting, new funding and audit provisions and the productions of a local Own Risk Solvency Assessment (ORSA). Lloyd's currently holds ZAR 1,435,376,000 of assets locally within the Lloyd's South African Trust Fund (LSAFT) for the benefit of its South African policyholders; this funding requirement will approximately double under the new SAM regime.

Regulating Lloyd's In South Africa

17.3 Lloyd's business in South Africa is subject to three layers of regulatory oversight:

a) UK regulatory authorities (PRA/FCA)
b) Corporation of Lloyd's
c) Financial Services Board (FSB) in South Africa

The role of each in the supervision of Lloyd's operations in South Africa is discussed in more detail below.

Oversight of Lloyd's By Uk Regulators

17.4 The Corporation of Lloyd's and Lloyd's Managing Agents are dual-regulated by the Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA) in the UK. Lloyd's is authorised in accordance with section 31 of the Financial Services and Markets Act 2000 to carry on the PRA-regulated activities relating to the Lloyd's market (but not including carrying on insurance business). Under section 314 of the Financial Services and Markets Act 2000, each regulator has a duty to keep itself informed about the way in which Lloyd's supervises and regulates the Lloyd's market and the way in which regulated activities are carried on in the Lloyd's market. To meet this obligation, the PRA and FCA both dedicate significant resources to supervising the various entities comprising the Lloyd's market to ensure that Lloyd's policyholders have a similar level of protection to the policyholders of other UK insurers.

The PRA prudentially regulates Lloyd's as a single entity and PRA regulation applies to the entirety of Lloyd's business, whatever its geographical origins. Most international regulators recognise the PRA's prudential supervisory role and that the security of policyholders worldwide ultimately depends on the financial security of the Lloyd's market as a whole.

The FCA is responsible for supervising the business conduct of the Corporation and Lloyd's Managing Agents and again, this applies to the whole of Lloyd's global business portfolio.

LLOYD'S CENTRAL OVERSIGHT OF THE MARKET

17.5 The governing body of Lloyd's is the Council of Lloyd's (the Council) established by Lloyd's Act 1982. Under that Act, the Council has the power to manage and supervise the affairs of Lloyd's, to regulate and direct the business of insurance at Lloyd's and to make such byelaws as it thinks fit for those purposes and for the furtherance of the objects of Lloyd's. As a result, the Corporation of Lloyd's plays a fundamental role in supervising the Lloyd's market in addition to the oversight provided by the UK regulators.

Lloyd's prudential, exposure management and risk management control frameworks are specifically designed to address the risks inherent in a global portfolio; overseeing the market as a single entity. Lloyd's control framework is set out in detail in the *Lloyd's Minimum Standards* which covers a number of areas including:

- Underwriting Management
- Claims Management
- Risk Management
- Governance
- Investment Management
- Reserving
- Conduct Risk

All Lloyd's Managing Agents are expected to comply with these requirements in order to operate at Lloyd's.
Additional Detail on Lloyd's Supervision of the Market can be read on our website: http://www.lloyds.com/the-market/operating-at-lloyds/lloyds-minimum-standards

OVERSIGHT BY THE FSB

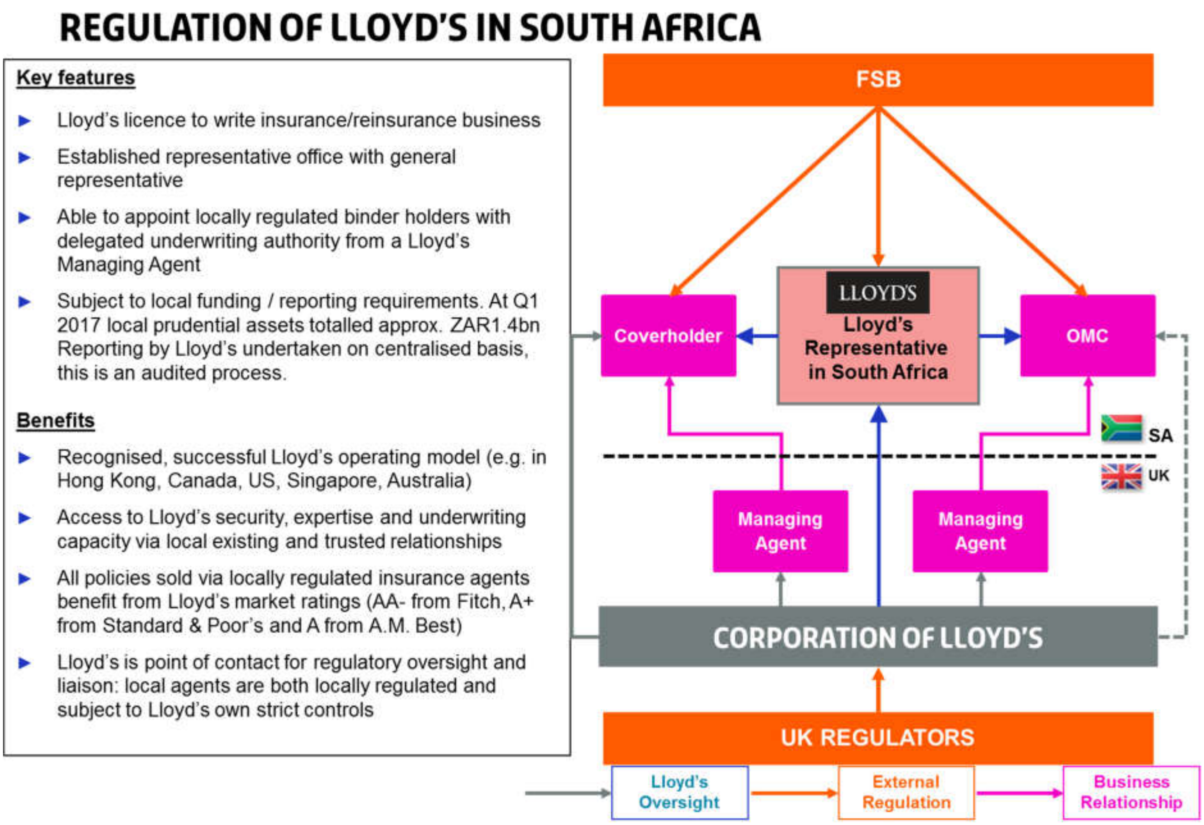
17.6 Lloyd's unique market structure has been recognised in the South Africa Short-Term Insurance Act 1998 (STIA) and continues to be recognised in the new Insurance Act 2017 that was assented to by the President on the 18th January 2018.

The regulatory oversight of Lloyd's business in South Africa is twofold.

- Firstly, Lloyd's South Africa branch is regulated as a single entity for prudential, regulatory and compliance purposes- defined as such under South Africa and UK Insurance legislation - and its operations in South Africa are overseen by the FSB.

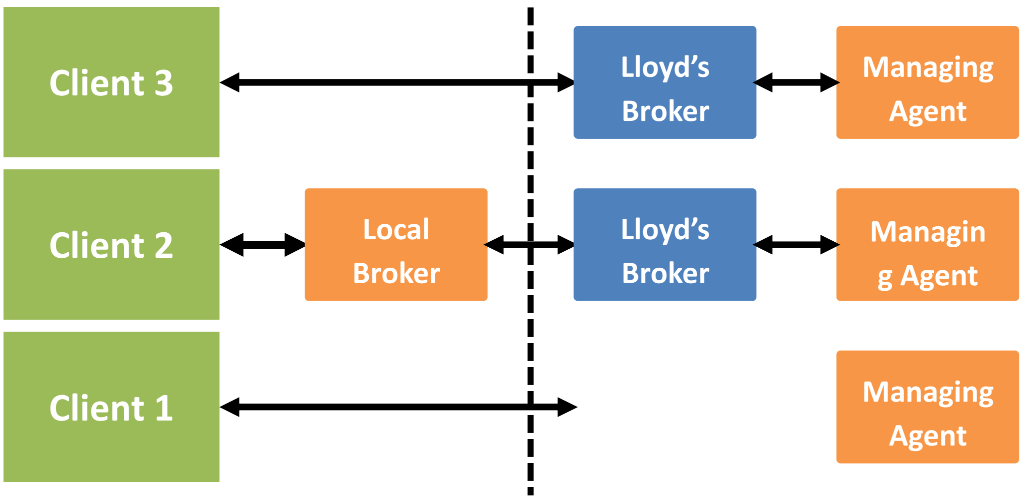
- Secondly all Lloyd's Coverholders operating in South Africa are locally registered entities authorised by Lloyd's and the FSB to operate within the Lloyd's South Africa branch under the supervision of the FSB.

In addition to the above, the central oversight of the Lloyd's market provided by both the UK regulators and the Corporation of Lloyd's, provides yet further assurance of the quality and depth of the supervision in place over the Lloyd's market.



17.7 LLOYD'S SINGLE LICENCES – REGULATORY AND BUSINESS ARRANGEMENTS

1	Cross border reinsurance & MAT	Possible local legal representation
2	Licensed – Mutual recognition	No local capital. Collateral or registration based on financial strength rating may be required
3	Licensed – Local regulatory obligations	Local intermediaries submit direct to London or overseas for binding
4	Local Company – Lloyd's China	Examples in China, Latin America, US



In order to operate and be licensed in an overseas country it is important that insurance legislation includes provisions which recognise Lloyd's structure as an insurance market. Without such provisions, Lloyd's could be excluded from the local market and unable to function.

Lloyd's is accommodated in legislation in all territories where it is licensed as a direct insurer in the traditional manner, as per its licence in South Africa. Examples worldwide include **Australia** (Insurance Act 1973), **Hong Kong** (Insurance Companies Ordinance), **New Zealand** (Insurance (Prudential Supervision) Act 2010) and the **EU** (Solvency II).

Accommodation in law provides the option for Lloyd's to be licensed locally. Additionally, regulatory provisions must be included which adapt equivalent insurance company requirements, which Lloyd's can then comply with.

18. LLOYD'S SOUTH AFRICAN TRUST FUND

18.1 Sections 40 and 41 of the Act deal with the establishment of a Trust by Lloyd's and the appointment of Trustees. The trust and the trust deed must comply with any prescribed requirements and be approved by the Prudential Authority.

18.2 Lloyd's underwriters must provide and maintain security in respect of the insurance business conducted in the Republic in the form of assets valued in accordance with prescribed requirements that are at least equal to the aggregate of the technical provisions for the insurance business of each Lloyd's underwriter in the Republic calculated in accordance with this Act.

18.3 The funds held in the trust may not, without the approval of the Prudential Authority, be withdrawn or accessed by a Lloyd's underwriter or Lloyd's in circumstances other than those referred to in section 7(2)(a).

18.4 The LSATF is not a working trust fund but is a fund of last resort to benefit South African policyholders in the event that the Lloyd's Chain of Security discussed under Section 4 is exhausted.

18.5 The below Fund management parameters are taken from the Master Investment Parameter Document 13 September 2016.

PERMITTED INVESTMENTS

Asset Type Max per issuer Max per portfolio
South African government bonds, notes and bills 100% (min 50%)
Debt securities of the listed types*: 50%
Bonds issued by South African Government Agencies with a credit rating equal to that of the South African Government 10%
Money market instruments 50%
Fixed Bank Deposits with institutions rated Baa2 or better with a maximum maturity of 3 months 10%
Bank certificates of deposit with institutions rated BBB+ of better with a maximum maturity of 12 months 10%
Cash on account at Standard Bank 1%

* Debt instruments which contain embedded derivatives affecting their maturity or coupon are permitted.

18.6 In taking cognisance of the rating restriction, wherever possible, bank deposits will be made with the South African Domestic Branch of international banks rated AA- or better internationally by at least one of Standard & Poor's, Moody's Investor Services, Fitch Ratings or AM Best rating agencies.

18.7 With regard to restriction on duration, the value weighted duration will be maintained between 0 and 2%*. The neutral duration of the portfolio is deemed to be 1%.
For the purpose of this calculation, callable securities will be assumed to be redeemed at their final maturity date.

18.8 The performance of the funds is measured against a benchmark that has been structured using a combination of the 0 to 3 year maturity element of the BofA Merrill Lynch South African Government Bond Index (GOSA) and the South African Overnight Index Average Deposit Rate, combined in such proportions that the modified duration of the benchmark is equal to 1%.
All investments shall be denominated in South African Rand.

19. SUMMARY

WHAT IS LLOYD’S

19.1 Lloyd’s is the world’s specialist insurance and reinsurance market. With expertise earned over centuries, Lloyd’s is the foundation of the insurance industry and the future of it. Led by expert underwriters and brokers who cover more than 200 territories, the Lloyd’s market develops the essential, complex and critical insurance needed to underwrite human progress. Backed by diverse global capital and excellent financial ratings, Lloyd’s works with a global network to grow the insured world, building resilience for businesses and local communities and strengthening economic growth around the world.

A UNIQUE MARKET

19.2 Lloyd’s is a unique insurance market with an unrivalled concentration of specialist underwriting expertise. Every day, more than 50 leading insurance companies, over 200 registered Lloyd’s brokers and a global network of over 3,800 Coverholder office locations operate in and bring business to the Lloyd’s market. Much of the capital available at Lloyd’s is provided on a ‘subscription’ basis – where Lloyd’s underwriters join together as syndicates and where syndicates join together to underwrite risks and programmes. This kind of collaboration, combined with the choice, flexibility and financial certainty of the market, makes Lloyd’s the world’s leading insurance platform. From start-ups to small and medium-sized enterprises, national governments and multinational corporations, the customers are the people driving the global economy. And they rely on the specialism, strength and security of the Lloyd’s market to help them protect what matters most.

GLOBAL REACH

19.3 The Lloyd’s market has helped customers around the world withstand shock, recover and rebuild and are proud to continue that essential service today. Built for an interconnected economy, Lloyd’s insures people, businesses and communities in more than 200 countries and territories. The global network is underpinned by the quality and expertise of local coverholders, brokers and underwriters who know the risk landscape in detail, and whose connection to the Lloyd’s market helps one to find the tailored, highly-specialised insurance cover they need.

UNMATCHED EXPERTISE

19.4 At Lloyd’s, customers have access to the combined scale, expertise and capacity of the entire market, not just a single insurance company. Brokers identify the underwriters best placed to insure the client’s risk from a diverse range of syndicates including international companies and smaller niche firms. When brokers and underwriters are part of the Lloyd’s market, they also have exclusive access to information, insight and specialised tools that help them create the most relevant, appropriately priced products for their customers. It is this ability to create relevant and tailored insurance and reinsurance solutions from the diversity of the market that sets Lloyd's apart.

Underwriters in the Lloyd's market know that standard policies don't always meet the needs of their customers, and they are able to develop specialised, well-priced solutions in response. Because Lloyd's is uniquely well-placed to consider even the most complex, high-risk exposures, the market has covered Arctic explorers, international aid organisations, satellite launches and taken on major global risks including cyber, terrorism and the consequences of climate change.

Of course, insurance and reinsurance cannot eliminate risk. But as our world is reshaped by economic, environmental, geopolitical, societal and technological shifts, the breadth, depth and responsiveness of the Lloyd's market gives one the confidence to move forward in the face of uncertainty.

FINANCIAL STRENGTH

19.5 Insurance plays a crucial part in advancing social progress. It gives customers – the world's investors, companies and communities – the courage they need to step more boldly into the future. Lloyd's, takes this role very seriously. That's why when one places their risk with Lloyd's, they can be certain that valid claims will be paid no matter their scale or complexity. Lloyd's is able to make this commitment because of the strength of its Central Fund, a contingency that pays claims in the rare instance of a syndicate becoming insolvent. The Central Fund is an important part of the Chain of Security, a three tier capital structure supporting all policies underwritten in the Lloyd's market. For South Africa based clients, a fourth layer exists in the form of the Trust Fund.

LOOKING AHEAD

19.6 The Lloyd's market has been at the forefront of its industry for more than 300 years, pioneering new forms of protection for a rapidly changing world. Lloyd's was the first to create policies for motor, aviation and space risks. Lloyd's underwriters originated cyber insurance, Directors and Officers liability insurance and developed the specialist coverage needed to enable entrepreneurial disruptors to thrive. Lloyd's market's underwriters are among the very best in the world, anticipating and responding to new and emerging risks and using state-of-the-art modelling to create the specialist products and policies that the client needs, but in an unpredictable global climate, Lloyd's underwriters must also rely on their experience and industry knowledge to cast light into the darkness ahead. Behind the Lloyd's market is the Lloyd's Corporation, not itself an insurer but an independent organisation and regulator that acts as the market's guardian to protect and maintain the market's reputation. Working with leading business, academic and insurance experts, the Lloyd's Corporation also provides services to the market and contributes original research, reports and analysis to the industry's knowledge base. Lloyd's uses its central position in the marketplace to catalyse discussion and action on the issues and megatrends that will impact the future of the global economy, including technological advancements, wealth inequality, political instability and climate change.

In a 2015 speech, Governor of the Bank of England, Mark Carney said insurers are "amongst those with the greatest incentives to understand and tackle climate change in the short term. Your motives are sharpened by commercial concern as capitalists and by moral considerations as global citizens. And your response is at the cutting edge of the understanding and management of risks arising from climate change… Others will need to learn from Lloyd's example in combining data, technology and expert judgment to measure and manage risks."

The Way Ahead Securing the future of food
Disruption to the global food system would have economic and social, as well as physical, impacts. Lloyd's Food System Shock report encouraged insurers to work with researchers to model these interconnected risks and develop appropriate risk transfer products to improve the system's resilience and sustainability.

The Way Ahead Exploring next phase renewables
Lloyd's strength lies in its ability to write both large and complex risks that meet the demand of industry today.
In 2016, Lloyd's insured Noor 1 in Morocco, the world's largest concentrated solar power plant that harnesses the enormous energy potential of the Saharan sun. Its advanced technology allows Noor 1 to continue to produce power even after nightfall.


The Way Ahead Democratising space flight
In an average year, Lloyd's specialist space underwriters provide satellite owners and users – from national governments to telecommunications firms and research institutes – with protection worth more than US$7bn.
Lloyd's underwriters have played a crucial role in enabling satellite launches globally. The market's ability to evaluate new developments in this evolving technology helps to keep the space sector growing around the world.

3-2: LLOYD'S

Contents

1 MUTUAL MARINE INSURANCE: P & I CLUBS[1]

1.1 Introduction

The origin and development of mutual insurance may be traced back to the activities of associations, societies and guilds of ancient and medieval times which provided their members with funeral benefits and other forms of financial assistance. In recent years mutual companies have been converting to shareholder owned companies accordingly mutual companies are less common nowadays. However insurance cover on a mutual basis still plays a significant role in the field of insurance. This section discusses protection and indemnity (P & I) associations or clubs, which provide insurance cover on a mutual basis against a wide spectrum of potential legal liabilities arising out of the operation of their ships.

P&I associations also provide cover to charterers against their legal liabilities, however originally they did not have charterers reinsurance in place, required to target standalone charterers effectively.[2] In the 80s dedicated Clubs arose to focus on charterers liability, such as the Charterers Club which formed in 1986, but later following the trend, demutualised. Ship managers are also covered by P&I Clubs, often being added as co-assured's with shipowners or charterers.

Demutualisation has been a trend in insurance since the 80s, and for P&I Clubs this

[1] This section is largely reproduced from Van Niekerk and Dillion which is unfortunately now out of print and not available. The text has also been amended, revised and updtate. The text is increasingly differsing from the original.

[2] http://www.willis.com/Documents/Publications/Services/Professional_Indemnity/Protection_and_Indemnity.pdf

had a marked influence during the 1990s. However the commercial insurance fixed premium providers have not made huge inroads into the mutual marine industry except with regards the small ship segment, or vessels denied access due to age or class. The International Group can also offer much higher limits and "Blue Cards"[3], which are attractive to the larger vessel owners.

In general, despite the shipping industry having been in the doldrums since the 2008 financial crash, the P&I Clubs experienced a decade of prosperity, with collective reserves growing. This trend saw a reversal in 2018-19, with lower premiums resulting in lower reserves. At the same time the fixed premium market has continued to grow, with even the International Group of Protection and Indemnity Clubs (IGP&I) earning 20% of their revenue in 2018-19 from this market.[4] Apart from fixed premium for traditional risks, P&I Clubs have generally seen increasing diversification into FD&D (long standing), War Risks and M&E (marine and energy, using Lloyd's syndicates). Overcapacity causing declining rates in the market drove this, however overcapacity has been corrected somewhat since 2019. Since the 2017-18 year, large losses of low frequency have been impacting Club pooling losses, as well as an upward pressure on claims costs and investment volatility.

1.2 Mutual marine insurance

Marine insurance provides indemnification against losses arising out of a marine adventure. Insurance is the transfer to the insurer of the loss in exchange for a consideration, the premium. Insurance is possible because of the law of large numbers which enables the insurer to pay the losses of the few from the collected premiums of the a homogeneous group of insureds. Broadly speaking, the taking over and spreading of risks, may be effected in two ways. Firstly indemnification provided by an independent, unexposed person in exchange for the the premium or secondly it may be undertaken on a mutual or non-profit basis by every person of the mutual who is, himself, a member of the group having a common interest and exposed to similar risks. In both cases the insureds pay a contribution which is pooled, in exchange for insurance. The British Marine Insurance Act of 1906 (Marine Insurance Act, 1906) recognises mutual insurance in section 85(l):

Where two or more persons mutually agree to insure each other against marine losses there is said to be a mutual insurance.

Every member of the group pooling its losses is therefore, theoretically, both a underwriter and insured by all the other members. In recent years this has changes as P&I Clubs decide to become incorporated incorporated. The P&I Club then becomes the underwriter. Privity of contract exists only between the Club and each member and not between members *inter se*. A member, as insured, recovers an indemnity for his loss from the P&I Club itself and not from the respective members. The

[3] A financial guarantee of security for compensation under the CLC, Bunker and Wreck Removal conventions.

[4] 2019 Marine P&I Pre-Renewal Review, Gallagher

consideration which is given for this insurance cover is the liability to contribute proportionally, as provided for by the rules of the Club, towards the losses of other members.[5] Insurance on this basis differs from the usual mode of insurance for profit, in that, the association effecting the cover is controlled by the insured members themselves. The association is operated solely for the benefit of its members who pay, by way of contributions, an amount sufficient to cover claims during the period of insurance and to meet expenses incurred by the association. Profits, if any, are retained as part of the reserve or refunded to the members.[6]

Apart from sustaining a loss because of the loss of or damage to his ship, a ship-owner may also incur legal liabilities to others for loss or damage caused by or arising out of the operation of the ship. P & I cover, as will be shown, is concerned with marine liability insurance. The interest of ship-owners (and others interested in, responsible for or in possession of a ship, such as charterers, managers and operators) to insure against these liabilities is in England statutorily recognised. Thus, the British Merchant Shipping Act of 1894 (57 & 58 Vic c 60) (British Merchant Shipping Act, 1894), which allows a ship-owner (and others) to limit his liability for loss of life or personal injury or for loss of or damage to any property or any rights, provided liability was incurred without his actual fault or privity,[7] makes it clear, probably *ex abundante cautela*, that the ship-owner is still at liberty validly to insure against this (limited) liability.[8] The British Marine Insurance Act of 1906 also generally recognises that there is a marine adventure, the losses incident to which may be insured against by a contract of marine insurance, where "[a]ny liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property, by reason of maritime perils".[9] A marine policy against third party liability is an indemnity policy[10] and it is important to note that statutory measures providing for the transfer of a liable but insolvent insured's rights under a liability policy to the injured third party may also find application in the case of marine liability insurance.[11]

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5 Singh and Colinvaux pars 515-516, Arnould par 129 and Chalmers *Marine Insurance Act 1906* 136 n5.

6 Smith 12.

7 Cf s 503 UK Merchant Shipping Act (UK MSA) of 1894, as amended by UK Merchant Shipping (Liability of Shipowners and Others) Act of 1958 (6 & 7 Eliz 2 c 62). The SA equivalent is contained in s 261 Merchant Shipping Act (MSA) 57 of 1951. See .... liability in respect of goods carried) and in the Prevention and Combating of Pollution of the Sea by Oil Act 6 of 1981, which came into force on 1 October 1982 (Proclamation 156 published in *Gazette* 8366 of 3 September 1982).

8 s 506 UK MSA 1894. There is no equivalent provision in the SA Act. See in general Hurd *Law and Practice of Marine Insurance relating to Collinson Damages and other Liabilities to Third Parties* which, although now somewhat outdated, provides a useful background to shipowner liabilities.

9 s 3(2)(c) UK Marine Insurance Act (MIA) of 1906 and see Arnould par 301.

10 See s 75 MIA 1906 as to the measure of indemnity.

11 The SA measures in this respect are contained in s 156 Insolvency Act 24 of 1936. As to the English Third Parties (Rights against Insurers) Act of 1930 (20 & 21

1.3 History and development of protection and indemnity insurance

The origins of modern-day P & I associations[12] go back to what were known as Hull clubs which came into being in the United Kingdom during the eighteenth century. These clubs were established by ship-owners because of the unsatisfactory marine insurance facilities available at the time. In terms of the South Sea Bubble Act of 1720 the formation of joint stock companies were prohibited. The two existing insurance corporations the Royal Exchange Assurance and the London Assurance were unaffected. The right of private persons to underwrite marine insurance was, however, preserved, a fact, which contributed to the continued growth of Lloyd's, to become the leading marine insurance market in the world. Because the two companies provided a rather limited and expensive cover and were selective in the risks they took over, ship-owners in many cases ignored the government monopoly granted by the 1720 Act and joined together in (probably illegal) clubs or associations to insure their vessels on a mutual basis. These Hull clubs, conducted on an informal basis as premium underwriting associations and run by the members themselves, continued to increase in popularity and number during the earlier part of the nineteenth century. The removal of the monopoly granted to the Royal Exchange Assurance and the London Assurance in 1825, the consequent passing of the enabiling legislation in 1844 saw the emergence of several other marine insurance companies and cheaper rates offered by Lloyd's underwriters, however, led to their eventual decline by the middle of the nineteenth century.

During this period the noticeable growth in potential ship-owner third party liability for a wide variety of losses, previously relatively insignificant and borne by the ship-owners themselves, created the need for marine liability cover. The courts ruled in a number of cases that property insurance only indemnified against loss or damage to property. Other losses consequent to that damage is not covered by property insurance. Thus other consequential losses have to be covered by other policies. The marine market was largely unwilling to provide this cover. The increase in passenger traffic owing to emigration and the passing of the English Fatal Accidents Act in 1846 created a much greater risk of shipowners being held liable for loss of life and personal injury to passengers and crew. A growth in the size and number of ships, the accompanying risk of collision with ships and other objects. In 1935 in *De Vaux v*

Geo 5 c 25), see eg. Templeman *Marine Insurance* 422-423 (Templeman, 1979a) and *The Vainquer José* [1979] 1 Lloyd's Rep 557 (QBD) (Templeman, 1979b). For the American position, see Kierr "The effect of direct action statutes on P & I insurance ..." 1969 *Tulane Law Review* 638 (Kierr, 1969) and Houdlett "Direct action statutes and marine P & I insurance" 1972 *Journal of Maritime Law and Commerce* 559 (Houdlett, 1972).

12 See Singh and Colinvaux parts 465-489, Arnould pars 129-130, Dover 497-504 and in particular Birch Reynardson 'The history and development of P & I insurance: The British scene' 1969 *Tulane Law Review* 457 (Reynardson, 1969) and Kipp 'The history and development of P & I insurance: The American scene' 1969 .... (Kipp, 1969).

Salvador[13] the courts confirmed the oft applied rule that liability for collision damage was not a 'peril of the seas' and thus not covered by a marine policy. The liable shipowner was therefore not covered under his ordinary hull policy, made insurance protection for collision (or running down) liability imperative. The loss of the *Westenhope* off the South African coast in 1870 under circumstances which resulted in the shipowner being unable to rely on his bill of lading exceptions and which rendered him liable in damages for the value of the cargo lost, together with the increasing exercise by cargo underwriters of their subrogation rights, underlined the desirability of cover against cargo claims. As it became clear that existing underwriters were unwilling to provide (full) cover against these and other potential liabilities, shipowners formed mutual insurance associations, which at first only offered protection cover and later also indemnity cover.[14]

The formation of these protection and indemnity clubs was greatly facilitated by the fact that the basis for their development already existed in the mutual insurance carried on by the Hull clubs.

In 1899 the first pooling agreement was drawn up by what became known as the London Group of P&I Clubs (and ultimately became the International Group), whereby claims in excess of a certain sum were shared, proportionate to their size among the six member clubs. It only worked if smaller losses were retained by the insuring member and if the risks shared were similar. All pool members had to agree to the introduction of new risks and Rule changes.[15]

As time went by and the risk to shipowners of third party liabilities increased, P & I clubs continually extended (and even today still extend) the ambit of insurance cover to their members. Their flexibility in providing new liability cover as new liabilities arose ensured their continued existence, growth and dominance in the field of marine liability insurance.

1.4 P & I clubs

A P & I club is controlled by a committee of directors, elected from the shipowner-members. At periodic meetings the directors determine the general policy of the association, decide on the scope of risks to be covered and approve claims made on the club. In the event of any dispute arising between individual members and the club they act as arbitrators. The clubs are managed either by individual managers employed by the club or by independent management firms. The managers, with the

13 (1836) 4 Ad & El 420, 111 ER 845.

14 The traditional though notional distinction between protection cover (against liability for loss of life and injury and against running down risks) and indemnity cover (against liability for cargo loss or damage) is of no particular significance today, although the name 'Protection and Indemnity' clubs for what in reality are 'shipowners liability' associations or clubs (see Doghlin 595) has remained in general use.

15 See Robin Pearson, Takau Yoneyama, Corporate Forms and Organizational Choice in International Insurance, p62

aid of a world-wide network of representatives, handle and investigate claims and report on a regular basis to the committee under whose direction they fall. At this stage it may be pointed out that the activities of P & I clubs are not limited merely to providing their members with insurance cover. They also, for example,[16] assist members in the handling and defence of third party claims, provide security and guarantees to release members' ships from arrest or to prevent such arrest, take care of the administrative side of obtaining shipping certificates, undertake technical research and take an active interest in national shipping legislation and international maritime conventions. P & I clubs, formed by shipowners, exist for the benefit of their members and they endeavour, in a general way, to promote the interests of shipowners on a broad front.

The terms upon which P & I clubs conduct their insurance business are contained in each club's own set of rules and regulations which is made subject to its memorandum and articles of association.[17] A shipowner wishing to become a member of a particular club and to enter a ship for insurance in the club[18] must complete an application for membership of and entry into the club. This application form, which, if accepted, is deemed to form the basis of the insurance contract between the shipowner and the club, authorises the directors to enter the owner's name in the register of members and his ship for insurance in the register of insurances. Members who wish to enter further vessels for insurance follow a similar procedure. After acceptance of an application for entry, the managers issue to the owner a certificate of entry. This certificate forms the contract of insurance;[19] it usually contains the rules and regulations of the club, setting out (in standard clauses) the risks against which the owner of the ship is covered, the class in which the ship is entered and the period of insurance. The certificate is considered to be conclusive evidence of and binding as to the matters therein contained. Generally brokers are less involved where large established shipowenrs are concerned by in South Africa where smaller vessels and fleets are concerned this is not the case. In the event of any variation of the risks against which the entered vessel is covered being at any time agreed upon by the shipowner and managers, an endorsement slip stating the variations is issued to the owner.

As far as the period of cover is concerned,[20] the practice is to insure vessels either for a fixed period or for a policy year which traditionally runs from noon on February 20 until noon on the following February 20. Voyage charters are by their nature different as the cover attacheds for the voyage. Even in the case of voyge charter it is possible

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16 See further Singh and Colinvaux pars 523-527 and Coghlin 605-607.

17 Cf s 85(3) MIA 1906.

18 See in general as to membership and entry, Singh and Colinvaux par 513, Ivamy 513-514 and Arnould par 132.

19 See Arnould part 19 310 n34 as to the nature of this contract of mutual insurance.

20 Arnould par 133, Ivamy 515-516 and Meredith 'Fines, penalties and other miscellaneous liabilities; expenses of defence; general conditions and exclusions' grounds for cancellation ...' 1969 *Tulane Law Review* 602 609-610 (Meredith, 1969).

to have an annual policy with cover being provided under the policy for the period of the voyage. If at the end of the policy year the vessel is still entered in the club, cover automatically continues on the same terms for a further year in the absence of notice to the contrary from the club. Provision is made for the termination of cover on the happening of a number of events. Thus an owner will cease to be insured in respect of a particular ship where he sells or parts with his interest in the ship, where the vessel is mortgaged without a sufficient guarantee for the payment of all contributions having been given, or where the ship becomes an actual or constructive total loss. An owner will cease to be insured on his failure to pay to the club amounts due and demanded, on his death, incompetency or insolvency, or, where the ship-owner is a company, on its winding up.

In consideration for his cover, a ship-owner must pay such contributions as are provided for in club rules and regulations.[21] Although this contribution may in a wider sense be termed a premium,[22] the Marine Insurance Act of 1906, which does not contain a definition of 'premium', provides in section 85(2) that '[t]he provisions of this Act relating to the premium do not apply to mutual insurance, but a guarantee, or such other arrangement as may be agreed upon, may be substituted for the premium'.[23] Contributions are paid by calls being made upon members. Originally they were paid as and when expenses were incurred and claims were paid by the club. The practice now is to estimate at the beginning of each policy year the total expenses which will be incurred and payments which will be made, and to collect from members an amount sufficient to establish a mutual insurance fund to meet these expenses and payments. A member's contribution is based upon a particular rate per ton of contributing tonnage of entered vessels, or more usually and in order to attain true mutuality, upon different rates for each ship depending on an individual assessment of the type of ship, the nature of its usual cargo, nationality of its crew, area of trade, claims record and the amount and scope of insurance cover required and granted. These initial contributions are known as advance calls. During the policy year further supplementary or back calls may, if necessary, be made upon members. In the 2000s a number of clubs have changed this term to 'deferred premium', however the underlying principle remains the same. On termination of an entry the club may release a member from his liability for calls against the payment of what is known as a release call. One of the disadvantages of insurance on a mutual basis is thus the fact that an assured cannot with absolute certainty determine in advance the exact total cost of his insurance cover for a particular period.

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21 Singh and Colinvaux pars 517-520, Arnould par 134, Ivamy 514-515, Dover 504-505 and Coghlin pars 595-599.

22 *Lion Ins Assoc v Tucker* (1883) 12 QBD 176 187 (*Lion Ins Assoc v Tucker*, 1883) per Brett MR.

23 In *North-Eastern 100 'Steamship Ins Assoc v Red AS' Steamship Co* (1905) 21 TLR 665 (KBD) 667 (*North-Eastern 100 'Steamship Ins Assoc v Red AS' Steamship Co*, 1905) (and see too (1906) 22 TLR 692 (CA)) Channel J pointed out that these contributions were not merely premiums, but also the losses which members suffered as insurers of other risks, and that they could therefore not be dealt with merely as premiums not payable because no risk had attached.

Fixed premium P&I insurance offered by conventional insurance carriers, was established in the early nineties to compete with the system of calls, in particular exposure to supplementary calls (or what is increasingly term 'deferred premium'), which at policy year's end are levied when there is insufficient premium to meet previous underwriting years. This led to P&I Clubs offering fixed premium alternatives too, but generally for small to medium sized vessels.

One of the main advantages of fixed premium is that a fixed facility won't charge 'general increases' across the board, nor will members without claims have to contribute to the claims of others. However as fixed premium facilities have increased in size, volume and consolidations, the criticism has also arisen that they have started to lose their inherently 'fixed premium' nature whereby the assured is individually judged on its own performance. The argument in favour of the clubs is that being mutuals, they do not aim to make profits at the expense of the principle of mutuality. Nevertheless they are subject to the same market pressure and reinsurance costs for the fixed premium P&I market, which they will also pass on to their operators, depending on the relative 'softness' or 'hardness' of the market.

The P&I sector is dominated by the members of the International Group of P&I Clubs, which collectively insure approximately 90% of the world's ocean-going tonnage in terms of the International Group Agreement (IGA). As at 2020 it is comprised of 13 member clubs, chaired by a senior Club manager representative, elected on a three year rotation.[24]

1.5 P & I cover

1.5.1 Cover provided by the hull policy

In general it may be said that a P & I club provides its members with liability cover which is not provided under their hull policies. A condition of cover is that every entered vessel is deemed to be fully insured against all the risks included in the hull policy; risks covered by the usual Lloyd's policy form with the Institute Time Clauses (Hulls), including the Running Down (or Collision) Clause (RDC),[25] attached, are not covered by the clubs. In order to appreciate the scope of P & I cover, it is necessary to bear in mind that the Lloyd's hull policy form includes cover for general average, salvage liability, and, in terms of the RDC, for collision liabilities.[26]

[24] https://www.igpandi.org/about

25 As to the running down clause (RDC), see in general Ivamy 209-219 and Templeman 415-443. For the current wording of the RDC, see the *Reference Book of Marine Insurance Clauses.*

26 See in general Hecht 'The hull policy: Interrelationship of hull and P & I' 1967 *Tulane Law Review* 389 (Hecht, 1967).

1.5.2 Cover provided by the P&I Club

P & I cover is unique in that it is unlimited in amount, the only exception being cover for oil pollution liability where the limit since is $100 million for all claims arising out of a single accident.[27] The clubs do, however, protect themselves by reinsurance, both by excess cover obtained from underwriters at Lloyd's and from other companies, and by a pooling agreement among themselves. This is effected by way of the Pooling Agreement and the International Group Agreement 1999 (or IGA).[28] Since 1951 the IGA has also been the vehicle for purchasing collective reinsurance for the group.[29] To encourage ship-owner-members to exercise care and to limit their claims and to allow large ship-owners to cut down on the cost of their insurance by self-insuring a part of their losses, deductibles may be provided for, requiring owners to bear an agreed first proportion of their losses themselves. Although the nature and scope of the risks covered vary from club to club, although Clubs within the IG are somewhat limited by the pooling arrangements, ship-owners[30] are generally protected against the following liabilities.

1.5.2.1 Collision liability: Running Down Clause or ¾ Clause

The RDC, attached as clause 1 of the Institute Time Clauses (Hulls) to the Lloyd's policy form, provides, in part, that

> "... if the Vessel hereby insured shall come into collision with any other vessel and the Assured shall in consequence thereof become liable to pay and shall pay by way of damages to any other person or persons any sum or sums in respect of such collision for ... loss of or damage to any other vessel or property on any other vessel ..., the Underwriters will pay the Assured ... three-fourths of such sum or sums so paid ... provided always that their liability in respect of any one such collision shall not exceed ... three-fourths of the value of the Vessel hereby insured ..."

The assured is thus protected against collision liability by his hull policy up to three-fourths of the amount of that liability, or three-fourths of the value of his vessel, whichever is the smaller. One-fourth of his collision liability and any further balance or excess of collision liability over and above three-fourths of the value of his vessel, will be covered by his P & I club. The RDC furthermore provides no cover at all for liability in respect of damage caused without actual collision contact (such as wash or suction damage), fire damage, or damage caused when, because of negligent navigation, another ship is forced to take avoiding action and runs aground or collides with a third ship; only collision with another 'vessel' is insured, and liability for damage caused by collision to other structures, such as harbours, wharves, piers, bridges, pipelines, cables, breakwaters or navigational aids, is therefore not within the

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27 Bessemer Clark 'The role of the Protection and Indemnity club in oil pollution' 1980 *International Business Lawyer* 206 206 (Clark, 1980).

28 This agreement provides reinsurance above US$10 million up to US$30 million (or US$50 million counting the Group's cell captive reinsurance provided by Hydra). See https://www.igpandi.org/reinsurance

29 Christopher Hill, Bill Robertson and Steven J. Hazelwood. *Introduction to P&I*. 2nd Edition, 1996, at p.130

30 For the insurance of time charterers and other non-shipowners, see Arnould par 310 n78 and Palmer 'Liability as owner of the vessel named herein: Coverage of liability of no-owners' 1969 *Tulane Law Review* 481 (Palmer, 1969).

clause.[31] It has been held that 'vessel' does not include a wreck, floating dry-dock, pontoon crane, flying boat or the nets of a fishing boat. A shipowner may also incur collision liability under a contractual indemnity clause (for example in a towage contract),[32] but this liability will not be within the RDC as it only covers liability 'by way of damages'. All these liabilities are therefore covered by the shipowners P & I insurance.

1.5.2.2 Wreck removal and oil pollution liability

As the RDC specifically excludes wreck or cargo removal or disposal expenses consequent upon collision, P & I insurance protects the shipowner against liability for costs and expenses incidental to the raising, removal, destruction or marking of the wreck of the entered vessel or her cargo[33] when such costs and expenses are legally recoverable from the owner or when such removal or marking of the wreck is compelled by law.[34] Although not a common risk, claims under this head may be large.

Liability resulting from oil pollution is a relatively new, though increasingly large risk which shipowners have to face.[35] As the RDC now specifically excluded cover for liability in respect of 'pollution or contamination of any real or personal property or thing whatsoever' except of the vessel (or property on her) with which the insured vessel is in collision, P & I clubs have come to the aid of their shipowner-members and provide cover (although not unlimited) against claims for pollution by oil escaping from entered vessels and for resultant damage caused and expenses incurred. Liabilities covered include delictual and statutory liability, voluntary liability assumed by tanker owners as well as criminal liability for fines imposed.

The 1992 Civil Liability Convention[36] and the 1992 Fund Convention governs the liability of shipowners for oil pollution damage by laying down the principle of strict liability for shipowners and creating a system of compulsory liability insurance. The shipowner is normally entitled to limit his liability to an amount which is linked to the

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31 The RDC expressly excludes cover for liability in respect of Aany real or personal property or thing whatsoever except other vessels or property on other vessels.

32 See Bradley 'Towage exclusion: Tower's liability insurance' 1969 *Tulane Law Review* 615 620 (Bradley, 1969). Towage collision liability in general is not invariably covered by P & I insurance, but usually only reasonable customary towage on generally accepted terms: Ivamy 246.

33 As to wreck removal, see Dover 510-511, Coghlin 595 603, Birch Reynardson 471 and eg. *The Cape Borer* [1975] 2 Lloyd's Rep 108 (US Dist Ct, Eastern Dis NY).

34 E g s 304A MSA 57 of 1951.

35 See Bessemer Clark 207-210 for the current problems in this field of shipowner liability. A perusal of the new Prevention and Combating of Pollution of the Sea by Oil Act 6 of 1981 will give an idea ....

36 This entered into force on 30th May 1996. See http://www.iopcfunds.org/uploads/tx_iopcpublications/Text_of_Conventions_e_01.pdf

tonnage of his ship. 2003 amendments bring the maximum payable by the IOPC Fund 1992 to 203 million Special Drawing Rights (SDR)[37], including the sum paid by the shipowner or his P&I Club. In 2003 a third tier of compensation was created by the Protocol to the 1992 Fund Convention, increasing the maximum limit to 750 million SDR. This Supplementary Fund Protocol entered into force in March 2005 and is optional for any state which is a member of the 1992 Fund Convention. Under the third tier the amount of compensation to be paid by oil receivers is significantly higher than shipowners. Accordingly the International Group proposed a voluntary agreement to increase the limitation under the 1992 Civil Liability Convention to 20 million SDR for tankers of less than 30,000 gross tons, then representing about 75% of the world's fleet. STOPIA (Small Tanker Oil Pollution Indemnification Agreement) took effect on the 3rd March 2005, later replaced by a revised STOPIA 2006. TOPIA, applies to all tanker owners regardless of size, who undertake to indemnify the Supplementary Fund in respect of 50% of the amount of any claim falling on the Supplementary Fund. Such changes necessitated amendment to the P&I Club Rules, in particular relating to members which are owners of tankers carrying persistent oil in bulk as cargo.

1.6 Liability for death and injury; crew liability

P & I clubs provide protection against a wide variety of possible liabilities which the shipowner may incur in respect of loss of life, personal injury or illness claims, cover the these again being expressly excluded by the RDC. The importance of this head of cover is indicated by the fact that of all amounts paid by the clubs, approximately one half is paid as a result of death or personal injury claims brought against members. Included are claims not only by crew or passengers, but also by stevedores, pilots and other harbour workers, and other in or near the entered vessel, as well as by those on board another vessel with whom the entered vessel is in collision. Not only delictual liabilities, but also statutory liabilities and liabilities under collective or special agreements made by the shipowner and approved by the club, are covered.

Furthermore, a shipowner may incur a wide variety of liabilities in respect of his crew[38] and P & I clubs offer cover against, for example, crew repatriation expenses, crew substitution and distressed seamen's expenses, deviation expenses incurred in securing medical treatment for an injured or sick seaman and liability for the loss of seamen's personal effects.

1.7 Cargo claims[39]

The liability of shipowners as carriers in respect of cargo or other property carried in

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37 This is an international reserve asset, created by the International Monetary Fund from a basket of currencies in 1969 to supplement member countries' reserves. As at August 2020 1SDRconverts to approximately 1.4 USD. See http://www.IMF,org

38 Cf e g ch IV MSA 57 of 1951.
39 See in particular Moore 'Liability for damage to property carried ...' 1969 *Tulane Law Review* 581 (Moore, 1969).

the entered vessel forms an equally important part of P & I club liability cover. This is particularly so in view of the Hague Rules (and the subsequent amendment thereof) and national legislation resulting therefrom, which prescribe and restrict the rights and immunities of the carrier liable for cargo carried and which put an end to the practice of inserting wide exclusion clauses in contracts for the carriage of goods by sea. P & I clubs afford cover against liability for cargo claims under charterparties or bills of lading for loss or damage arising out of the carrier's breach of his obligation to make his ship seaworthy and cargoworthy and to properly load, carry, discharge and care for goods carried in the entered vessel. Club rules generally provide that members are not to enter into bill of lading or charterparty contracts on terms less favourable than allowed by the Hague Rules.

1.8 Salvage and general average

P & I cover includes the shipowner's liability for life salvage which, because it is a statutorily imposed obligation not under the general maritime law, is not covered by the ordinary hull policy. Furthermore, the balance of the ship's proportion of general average or salvage is paid by the P & I club, namely to the extent that the hull policy does not fully cover that proportion because the value of the ship is assessed for contribution to general average or salvage at a sound value which may be in excess of the ship's insured value under policy. Cargo's proportion of general average which cannot be recovered from cargo interests because of a breach of the contract of carriage, such as unseaworthiness or improper navigation which necessitated the general average sacrifice or expenditure, is also included.

1.9 Fines and other expenses

P & I club insurance also protects the shipowner against liability for a number of fines which may be imposed by the authorities in connection with his entered ship, for example, for failure to comply with customs, immigration or safety regulations. Apart from the liabilities already mentioned, clubs also cover liabilities for costs and expenses properly incurred in connection with claims within the club's rules and in respect of legal proceedings relating to third party claims. In addition to specific heads of cover, most clubs have an 'Omnibus rule' which gives directors the discretion to pay claims in respect of '[l]iabilities, costs and expenses incidental to the business of owning, operating or managing ships which the Directors may decide to be within the scope of the Association'.[40]

1.10 Other mutual associations

Although P & I clubs are by far the most important, there are several other types of mutual insurance associations which provide shipowners with cover not ordinarily provided by their hull policies. Thus, War Risks associations[41] which were

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40 See Meredith 602 et seq and Singh and Colinvaux par 510.

41 Singh and Colinvaux pars 529-535, Arnould par 131, Ivamy 248-253 and Dover 512-514.

established as a result of the high premiums charged by hull underwriters for cover against war risks, insure not only against liabilities, but also against loss of or damage to the entered vessel owing to operations of war including losses caused during hostility, riot, revolution, civil war and the like. Strike clubs[42] provide similar cover for delay caused by striking crews and harbour workers. Defence associations[43] undertake to cover legal costs and expenses, not recoverable under ordinary marine policies or from P & I clubs, incurred in enforcing the rights relating to an entered vessel and in defending claims against her, such as claims in respect of freight and demurrage, or arising from charterparties or contracts for ships. These associations also provide legal assistance. Finally mention should also be made of a relatively new type of mutual insurance association, the Through Transit club. This club covers through transit liabilities incurred by container operators and owners, such as the liability for damage to containers, loss of or damage to container cargo, container equipment damage and other third party liabilities arising in connection with the carriage of goods by container.

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42 Smith 15.

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Contents

1 INSURANCE AGENTS, BROKERS AND ADVISERS

Brokers and agents are referred to as intermediaries. Insurance intermediaries have played and continue to play an important role in the development of the South African insurance market.[1] In view of the manner in which the insurance market developed and operated, this was inevitable. In the early part of the 1800's foreign insurers were represented in South Africa via general agents. These were general agents in the sense that they did not specialise in insurance. Insurance was merely one aspect of their business. They represented insurance companies in much the same manner as they represented any other overseas principal. As the insurance market began to develop, insurers began to send full-time overseas representatives to South Africa[2] to coordinate and look after their affairs. The next step was the establishment of branch offices which co-ordinated the company's business in and sub-offices in various parts of the country. The final step in the process was the formation of local companies, in which South African residents could own shares which were traded on the Johannesburg Stock Exchange. Under pressure from the government of the day, many companies converted to local

1 The following can be consulted regarding insurance intermediaries in South Africa (Atkins, 1980); (Muller, 1983); (P. Havenga, 2001).

2 The first foreign insurance company to send a full time representative to South Africa was the Royal Insurance Company (MacIntyre, 1898).

companies in the 1960s in the so-called domestication process. This gradually led to the decline in foreign insurance companies operating in the market. This also led to the rise of the independent insurance broker.

In addition to influential foreign insurers, South African companies were also formed.[3] But these tended to operate on much the same lines as the foreign companies, via agents appointed in different centres. Many of the United Kingdom companies operated in terms of what was called the Tariff system, where members of the tariff operated in terms of an agreement governing virtually all aspects of the insurance company's operation including policy terms and premiums to be charged. Generally South African companies were not keen to join the tariff which resulted in acrimonious relationships between the foreign and local companies. In many cases local companies were bought out by the foreign companies.[4] The tariff continued in the UK until the 1970s when it was abandoned because of the anti-competitive nature of tariff agreements. South Africa followed the UK abandoning the tariff. Up to the 1970's the distribution channel was dominated by insurance agents. Brokers entered the market from the 1950s onwards and thereafter began to dominate the short-term market. Brokers differed from agents in that brokers considered themselves independent of insurance companies and did not claim to represent any particular insurance company.

A distinction must be made between an agent and a broker. In the history of insurance, the older of these two institutions is the agent; the broker being of more recent origin. An agent has the authority to bind his principal and a broker has no such authority. Since persons conduct specific transactions, each specific transaction should be considered to determine if the intermediary is a broker or an agent. In many cases a broker is given authority by the insurer to bind the insurer with respect to specific transactions, in which case it is possible for a broker to act as the agent of the insurer with respect to that transaction.

2 AGENT

The notion of an agent developed quite late with the first rules appearing about the twelfth and thirteenth century.[5] Accordingly it can be accepted that the law of agency was not fully developed in Roman law.[6] In law an agent is a person who has the authority to bind his principle. This authority is generally for specific transactions. Thus to determine if one person has the ability to bind another, the factual circumstance surrounding the transaction needs to be examined. There is a number of ways in which one person can acquire authority to bind another.[7] There are (1) express authority (2) Authority implied by law (3) authority implied by the facts (4) ostensible authority (estoppel) and (5) ratification. Usually an agent accepts a specific mandate from the principal the agent can be in breach of contract if he does not perform the mandate he has accepted. In many cases involving agents the issue then becomes one of contract; in particular answering the question

3 The first South African insurance company was the South African Fire and Life Insurance Company formed on the 14th March 1831 by Le Breton (Vivian, 1996a).

4 So for example the South African Fire Company was bought out by the London and Lancashire. The South African Federal Insurance Company was also bought out by the London and Lancashire.

5 W Müller-Freienfels (1957) 'Law of agency'. *American Journal of Comparative Law* 6 (2 & 3) 193-215 (Müller-Freienfels, 1957); W Müller-Freienfels (1964) 'Legal relations in the law of agency: Power and commercial certainty'. *American Journal of Comparative Law* 6 (2 & 3). 193-215. (Müller-Freienfels, 1964)

6 Zimmerman (1990)

7 Gibson (1983: 243-256)

did the person (the agent) accept a mandate and if so was the mandate carried out? This is probably better understood by examining cases. The matter arose again in *Truck & General Insurance v Riasal Tours* NPD 8 April 2004 AR356/2003. (*Truck & General Insurance Co Ltd & another v Riasal Tours CC*, 2003)[8]

In *AW Cowey v London and Lancashire Fire Assurance Company* 1899 20 NLR (*AW Cowey v London and Lancashire Fire Assurance Company*, 1899) Cowey had insured his property, furniture, against fire. The furniture was kept at Cowey's dwelling at 124 West Street Durban but Cowey also had a store at 457 West Street Durban. There was a term in the policy that required that if the insured goods were moved from the dwelling where they were kept the insurer must be notified and consent obtained. Cowey moved the furniture from the dwelling to the store and did not advise the insurer. Shortly after the furniture had been moved the agent of the insurer, Mr Sinclair, called on Cowey at the store whereupon Cowey asked him when would the next premium be due. The agent responded by saying, 'There' which Cowey took to be reference to the location of the goods. To which Cowey replied, 'No, here'. Cowey took that to be the notification that the goods had been moved. Sinclair did nothing about the notification, putting it out of his mind. Afterwards the furniture was destroyed by fire and the insurer repudiated the claim because it had not been notified of the move as required by the term in the policy. Now clearly Sinclair was the agent of the insurer and by notifying him the court accepted that insurer had been notified. The question to be resolved was whether or not this terse exchange of information constituted notification. The Chief Justice Gallwey concluded that the insurer had indeed been notified but the two other judges disagreed. The terse exchange contained insufficient information for anyone let alone Mr Sinclair to understand it to be a notification of the removal of the insured property from one place to another. But the court accepted that if Sinclair had indeed been notified, the insurer had been notified.

3 BROKER

It is possible that for some transactions the broker acts as an agent for either the insured or the insurer. This becomes a question of fact depending on the circumstances. So an insurer may authorise the broker to collect the premiums. Should this happen the broker is the agent of the insurer for this transaction.

3.1 Binding authorities

Many brokers work in terms of binding authority granted by insurers, the most well-know example is the Lloyd's binding authority.[9]

8 Discussed by JP van Niekerk Journal of Business Law 14 (2) 46 - 49.

9 Rachel Gordon (2004) 'Binding authorities' 165 (13) *Post Magazine* 22-23 (Gordon, 2004).

4 LAW OF AGENCY AND THE BROKER

4.1 Placing of cover

The broker receives a mandate to place cover in the market; i.e. to arrange insurance for the insured. The broker may give the insured a proposal form to complete or some underwriting survey or document. When passing the information on to the insurer the broker is acting as the agent of the insured. When the broker presents the proposal to the insurer, the insurer is offering to be insured which the insurer can either accept or reject. Generally it is not the insurer making the offer to sell insurance. Thus the information he passes on is the information of the insured. The insured cannot at a later stage claim the information was that of the broker and not his information. The insurer seldom if ever deals directly with the insured. When the insurer is in communication with the broker it is communicating with the insured. The broker approaches the insurers in the marketplace and obtains a quotation. If the quotation is accepted this is communicated to the insurer. In the process of placing cover the broker is the agent of the insured. The broker is however paid by the insurer usually on a commission basis. With very large accounts the broker negotiates a fee from the insured and does not receive a commission; as it is usually said the commission is rebated back to the insured.

If the insurer provides an insurance policy the broker takes possession of it as the agent of the insured and must pass it on to the insured.

4.2 Collection of premiums

Since the insurer seldom deals with the insured it does not collect the premiums but appoints the broker to collect the premium. Thus when the insured pays the premium to the broker it has paid the premium to the insurer. When it comes to collecting premiums the broker is the agent of the insurer.

4.3 Dealing with claims

When a claim arises the insured notifies his broker of the event who usually will give the insured a claim form. At the claim stage, usually the broker is acting as the agent of the insured. Complications can arise at the claim stage. The insurer may appoint a loss adjuster to deal with the loss. The loss adjuster gives his report to the insurer which can then discuss the report with the broker. Once the broker has seen the report this could create a conflict of interest situation. The report is confidential to the insurer and if the broker has sight of it, it could create a conflict of interest situation.

5 LIABILITY OF SHORT-TERM INSURANCE BROKERS

Although insurance brokers have been involved in placing insurance business since the formation of the insurance market centuries ago professional liability claims are a more modern phenomenon. The claims in the United Kingdom predate those in South Africa. Accordingly, the position in the United Kingdom is first examined.

5.1 Liability claims against brokers in the United Kingdom

5.1.1 Duty of the broker see the insured is properly covered

A person who requires insurance may enter into a contact with a broker for the broker to arrange the insurance. The insured gives the broker a mandate to place cover. In this transaction the broker is the agent of the insured. The liability of the broker will stem from the mandate becoming liable because he or she has breached the mandate. The broker's mandate is to see that the insured is properly covered. Once it is established that a mandate, a contract exists, this then requires that the broker perform his mandate fully and faithfully and to act in the best interests of his principal, the insured. In carrying out his mandate the 'broker must exercise such skill and care as reasonably may be expected from a person in his situation.' In the McNealy case, the noted "the placing of insurance the insurance broker is the agent of the assured, and of the assured only, see *Rozanes v Bowen* 32 1928 Lloyd's Law Reports at 28 (*Rozanes v Bowen*, 1928).

In *McNealy v The Pennine Insurance Co Ltd West Lanc Insurance Brokers Ltd and Carnell* 1978 2 Lloyd's LR 18 CA (*McNealy v The Pennine Insurance Co Ltd West Lanc Insurance Brokers Ltd and Carnell*, 1978), the insured, Mr McNealy arranged motor insurance cover through the Pennine Insurance Company which offered insurance at a low rate to a selected class of insureds. The insurance company provided a long list of occupations which it would not cover including, bookmakers, jockeys and others connected with racing, whole or part-time musicians and so on. When the broker, Mr Carnell went to see McNealy to fill in the proposal form he asked him as to his occupation to which McNealy replied, "Property Repairer" and that is what was filled in on the proposal form. McNealy was also a part-time musician and indeed after arranging insurance he left on a six week tour with a band to Italy. On his return he had an accident in which his motor car was damaged and his passenger Miss Whittaker was injured. He submitted a claim against his insurer which promptly denied liability on the basis that he was a part-time musician and it did not cover part-time insurers. McNealy's view as simple, "If the insurance company are (sic) [is] not liable to me on my insurance, I want to sue the brokers.' The case was paid for by Legal Aid, thus the British taxpayer (at 21). It does not appear as if Carnell asked or knew that McNealy was a part-time musician. It appears he took McNealy's reply at face value and did not probe the issue in detail. The Pennine had however made it very clear to brokers through leaflets which Carnell had that it would not insure part-time musicians. The three judges each gave short judgments, each finding in favour of McNealy: Lord Denning MR the most senior judge ruled (at 20):

> "Not having a remedy against the insurance company, Mr. McNealy said, 'If that is so, surely the broker, my agent, is liable'. Certainly, he is liable. It was clearly the duty of the broker to use all reasonable care to see that the assured Mr McNealy was properly covered."
>
> And "It seems to me that that quite clearly was a breach of duty, In. I think the Judge [a quo] was quite right. The broker was liable for not taking proper care to effect the insurance"
> (Emphasis added)

The duty of the broker was to see that the assurance was properly covered.

Lord Shaw expressed a similar view, "Accordingly the question being whether in the circumstances of this case the broker had taken reasonable care [to place the cover], the answer is that he clearly had not" as did Lord Waller, '" It was clearly his duty, in my view, to make, as certain as he reasonably could that the plaintiff, Mr McNealy, came within the categories acceptable to the Pennine Insurance Co [thereby obtaining the cover]" The judges gave no indication of where the duty to ensure cover, comes from nor the extent of the duty. The judges referred to only one previous case which was not on point.[10] The most obvious source of this duty is the contract between the broker and insured if such a contract does indeed exist. The duty of reasonable care is a concept familiar to delict (torts in British law). The McNealy case has been quoted with approval in South Africa as discussed below.

5.2 Liability claims against brokers in South Africa

Until recently reported cases against insurance brokers were rare as was academic comment. (P. H. Havenga, 1987); (Cohen, 1997); (P. Havenga, 2001). It is generally accepted that in South Africa the first successful case against a short-term insurance broker is the case of *Stander v Raubenheimer* 1996 2 SA 670 O (*Stander v Raubenheimer*, 1996). This case relied heavily on the United Kingdom case of *McNealy v The Pennine Insurance Co Ltd West Lanc Insurance Brokers Ltd and Carnell* 1978 2 Lloyd's LR 18 CA discussed above. In the Stander case the insured moved houses and the house he moved into had a thatch roof. The broker arranged cover for the household contents which poses a higher fire risk.[11] A few years later the house was damaged by fire and the insurer repudiated the claim on the basis that it had not been advised that the house had a thatch roof, a material non-disclosure. The insured never advised the broker that the house he moved into had a thatched roof but sued the broker alleging that the broker should have asked him if the house had a thatched roof. The broker denied liability. The court came to the conclusion that a broker has a very onerous duty towards clients:

> "… as to the nature of the defendant's (broker) contractual obligations, that the plaintiff's testimony that the defendant had expressly undertaken to ensure that the plaintiff was at all relevant times covered against damage to the contents of his home, wherever situated and however constructed, had not been controverted by the defendant. (At 674I-675A.)"

The court held as to the nature of the broker's contractual obligations to the insured that since the insured's testimony that the broker had expressly undertaken to ensure that the insured was at all relevant times covered against damage to the contents of his home, wherever situated and however constructed, had not been controverted by the broker (674I-675A). This duty was broad enough to place an obligation on the broker to ask if the new house had a thatch roof and since the broker did not ask, the broker was liable to the insured. This decision can be criticised as establishing too great a liability on brokers. In the common-law the duty is upon the insured to disclose all material facts. This duty arose because it was recognised that all material facts are known to the insured and not the insurer. There is an obvious incentive for the insured to conceal material facts and to limit this incentive the courts imposed a positive duty on the insured to disclose these facts. It is not clear why this duty should change from a duty to disclose on the part of the insured to a duty to ask on the

10 *Rozanes v Bowers* 1925 32 Lloyd's Law Reports 98 (*Rozanes v Bowen*, 1928). There have been subsequent cases *JW Bollom & Co Ltd v Byas Mosley & Co Ltd*, 2000 (*JW Bollom & Co Ltd v Byas Mosley & Co Ltd*, 2000).

11 For a discussion on this case consult Vivian (1996) 'The broker must ask?' *Cover* 1996, October 4. (Vivian, 1996b)

part of the broker. It could just as easily have been said the insurer has a duty to ask; but that is not the case. It is not clear why it should be the case when a broker is interposed between insured an insurer. The Stander case set the scene soon followed by others.

In *Lenaerts v JSN Motors (Pty) Ltd and another* 2001 SA (*Lenaerts v JSN Motors (Pty) Ltd and another*, 2001) the insured bought a motor vehicle via a dealer which arranged insurance at the same time. Soon after the purchase the insured left the territorial area of South Africa where the vehicle was damaged in a collision. The insurer repudiated the claim and the broker was held liable for not advising the insured about the territorial limit clause in the policy which the court held was "It is part and parcel of the broker's general duty to use reasonable care to see that the insured is covered."
(emphasis added)

Lapperman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd and another 2004 (2) SA 1 SCA (*Lapperman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd and another*, 2004) was a long running case. The insured suffered a loss when diamonds were stolen. The policy contained a number of provisions pertaining to procedures of record keeping the insured was supposed to follow. The insurer repudiated and the insured sued the broker alleging the broker should have told him about the provisions. The SCA found the broker had discharged its obligations to the insured and was not liable to the insured.

In *Mutual and Federal Insurance Company Ltd v Ingram NO and others* 2009 6 SA 53 E (*Mutual and Federal Insurance Co Ltd v Ingram NO and others*, 2009) a wall collapsed onto cars on the floor of a motor dealer causing these new cars extensive damage. The insurer repudiated in terms of a term in the policy and the court ruled the broker was liable for not arranging appropriate cover.

6 LIABILITY OF LIFE INSURANCE BROKERS

Ries v Boland Bank Ltd 2000 4 SA 995 C (*Ries v Boland Bank PKS Ltd and Another*, 2000) a broker was held liable to the wife of the deceased because he did not do enough to ensure the insured filled in a change of nomination form. This was overturned on an appeal.[12]

7 LIABILITY OF INVESTMENT ADVISERS

In *Durr v ABSA* 1997 3 SA 448 SCA (*Durr v ABSA*, 1997) a manager of ABSA advised a client to invest in a company which subsequently went insolvent. The manager did not do a proper analysis of the company. The SCA ruled ABSA was liable to compensate the client for the loss sustained.

Jowell v Bramwell-Jones 2000 2 SA 44 SCA (*Jowell v Bramwell-Jones*, 2000) was another long running case. A wife (and mother to the children involved in the matter) inherited a substantial sum from her husband subject on condition that she could use the income but the capital be passed on to their children. She wanted to increase her income and she was advised sell her equities and invest in bonds. Equities hold the prospect for higher capital gains while bonds higher interest income. One of the children then sued, while his mother was still

12 *BoE Bank v Ries* 2002 2 SA 39 SCA (*BoE Bank Ltd v Ries*, 2002)

alive, the investment advisers alleging that the capital he would inherit would decrease because of this decision to switch asset classes. The SCA decided it could not decide until the mother had in fact died.

8 REGULATION OF INTERMEDIARIES

Intermediaries face considerable challenges because of increased regulation and alternative dispute resolution systems such as Ombudsmen.

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