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Insurance Law Committee response to the House of Lords Special Public Bill Committee's call for evidence on the Insurance Bill

The City of London Law Society ("CLLS") represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. This response in respect of the House of Lords Special Public Bill Committee's call for evidence on the Insurance Bill has been prepared by the CLLS Insurance Law Committee (the "Committee").

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1. The House of Lords Special Public Bill Committee has published a call for evidence on the Insurance Bill (the "Bill"). It is seeking views on "*the provisions contained within the Bill, and any other matters that would be considered to be relevant to the subject matter*."

2. In response to this call for evidence, the Committee's views on certain provisions of the Bill are set out below.

3. The Committee provided regular comments and feedback to the Law Commissions on the provisions of the Bill during the consultation and drafting process. In general, the Committee supports the Bill and agrees that reform is required. The comments below address areas in which the Committee considers that further work is required, and are not an exhaustive statement of the Committee's views on the Bill.

Clause 4(2): Knowledge of the insured

4. Clause 4(2) of the Bill makes the knowledge of "*individuals who are responsible for the insured's insurance*" knowledge of the insured. Section 19 of the Marine Insurance Act 1906 (the "MIA") requires disclosure "*by the*

agent effecting the insurance". We consider that clause 4(2), which replaces section 19 of the MIA, is considerably wider than section 19 of the MIA. It covers a wider group of individuals, including people who manage the insurance, whether they are responsible for effecting the insurance or not.

5. The effect, in a Bill which in philosophy seems to be directed towards helping the insured, will be to assist the insurer in attaching the knowledge of others to the insured.

Clause 16: The transparency requirements

6. During discussions with clients, one point which has stood out is the reaction to the transparency requirements for contracting out. It has been suggested that the transparency requirements should be removed from the Bill for the following reasons:

    a. the transparency requirements are more appropriate for consumer insurance than business insurance. We would expect a business to be able to take an informed view as to the wording of a policy, with advice from brokers as necessary (although a business may not always use a broker). It is unnecessary to have a statutory requirement that contracting out wording should be clear and unambiguous and should be drawn to the insured's attention; and

    b. the transparency requirements might well lead to unnecessary disputes as there is no authority providing guidance on how they should be interpreted and applied.

7. However, it has also been noted that in many cases the broker is responsible for slip or policy provisions which reduce or remove the protection that the Bill seeks to give to the insurer, as the slip or policy is the broker's standard document. On this basis, if the transparency requirements are retained, they should apply to both the insurer and the insured.

The application of the Bill to reinsurance

8. We have previously suggested to the Law Commissions that the Bill should expressly state that it intends to cover reinsurance contracts. The response of the Law Commissions was that:

    a. the Bill is intended to replace certain provisions of the MIA, and must apply to the same contracts; and

    b. contracts of reinsurance are treated by the common law as contracts of insurance.

9. In relation to each of these responses, we consider that (respectively):

a. the argument regarding the MIA is circular. Clause 19 of the Bill (which "omits" sections 18, 19 and 20 of the MIA) states that it is consequential on Part 2 of the Bill. If Part 2 does not apply to reinsurance, clause 19 of the Bill does not affect the MIA's application to reinsurance.

b. as to the point about the common law treating insurance and reinsurance as the same, we do not consider that the Bill is about "insurance". The Bill is about consumer insurance and non-consumer insurance. Although the Bill does apply to "consumer insurance contracts",[1] it mainly applies to "non-consumer insurance contracts": Part 2 applies to "*non-consumer insurance contracts only*" (see clause 2(1)) and Part 3 applies to representations made for a non-consumer insurance contract (see clause 9(1)).

   On this basis, the Bill is primarily about "*a contract of insurance that is not a consumer insurance contract*" (the definition of a "non-consumer insurance contract"), i.e. a contract of insurance in connection with an insured's trade, business, or profession.

   Where there is an express dichotomy of a "consumer insurance contract", which is plainly only a reference to an insurance contract, not a reinsurance contract, and a "non-consumer insurance contract", the less strained construction is that such wording is also a reference to insurance contracts, not reinsurance contracts.

   Under the common law, which governed insurance and reinsurance contracts, the MIA, which codified the common law, could apply to both insurance and reinsurance. This Bill changes the common law for the contracts which it governs.

10. Given the explanatory notes to the Bill, that the Law Commission has stated its view that the Bill applies to reinsurance and the decision in *Agnew v Länsförsäkringsbolagens A.B.* [2000] UKHL 7[2], we recognise that future courts would probably say that the Bill does apply to reinsurance, should the point ever arise. However, we consider that it is preferable:

    a. to make the position completely clear to avoid a risk of the sort of litigation that occurred in *Agnew*; and

    b. to make the position clear on the face of the legislation itself to avoid having to look at explanatory notes or extraneous material.

[1] The Bill defines a "consumer insurance contract" with reference to the Consumer Insurance (Disclosure and Representations) Act 2012, which defines a "consumer insurance contract" as a contract of insurance between an individual contracting otherwise than for his trade, business or profession and a person who carries on the business of insurance.

[2] In *Agnew*, the House of Lords found that the insurance provisions of the Brussels Convention did not apply to reinsurance contracts.

11. In addition, we consider that sections 15 and 16 are inappropriate for reinsurance, as the parties will in principle be of equal commercial strength.

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THE CITY OF LONDON LAW SOCIETY
INSURANCE LAW COMMITTEE

Individuals and firms represented on this Committee are as follows:

Richard Spiller – Holman Fenwick Willan LLP (Chair)

Michelle Bramley – Freshfields Bruckhaus Deringer LLP

Simon Brooks – Eversheds LLP

Robert Carr – Greenwoods Solicitors

Helen Chapman – Hogan Lovells International LLP

Beth Dobson – Slaughter and May

Christopher Foster – Herbert Smith Freehills LLP

Nigel Frudd – Minories Law

Simon Garrett – CMS Cameron McKenna LLP

Philip Hill – Clifford Chance LLP

Chris Jefferis – Ince & Co International LLP

Francis Mackie – Weightmans LLP

Ken McKenzie – DAC Beachcroft LLP

Michael Mendelowitz – Norton Rose Fulbright LLP

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Richard Breavington of Reynolds Porter Chamberlain LLP was also involved in preparing this response.