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Insurance Contract Law

SUMMARY OF RESPONSES TO ISSUES PAPER 9

The Requirement for a Formal Marine Policy: Should Section 22 be Repealed?

This document summarises the responses to the Law Commissions' Issues Paper 9: The Requirement for a Formal Marine Policy: Should Section 22 be Repealed?

April 2011

THE LAW COMMISSION
THE SCOTTISH LAW COMMISSION

Joint Review of Insurance Contract Law

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TO ISSUES PAPER 9:
*The Requirement for a Formal Marine Policy:
Should Section 22 be Repealed?***

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NOTES

APPROACH TAKEN IN THIS PAPER

Describing responses

- N.1 This paper describes the responses we have received to the proposals set out in Issues Paper 9, “The Requirement for a Formal Marine Policy: Should Section 22 be Repealed?”. We provide a short description of the current law in Part 1 and our proposals in outline in this document, but readers should refer back to the Issues Paper for a fuller explanation.
- N.2 This document aims to report the arguments raised by consultees. It does not give the views of the Law Commission or the Scottish Law Commission.

COMMENTS AND FREEDOM OF INFORMATION

- N.3 We are not inviting comments at this stage. However, if having read the paper, you do wish to put additional points to the Commissions, we would be pleased to receive them.
- N.4 Please contact us:

By email at commercialandcommon@lawcommission.gsi.gov.uk, or

By post, addressed to Christina Sparks, Law Commission, Steel House, 11 Tothill Street, London SW1H 9HL

- N.5 As the Law Commission will be the recipient of any comments, the Freedom of Information Act 2000 will apply and all responses will be treated as public documents. We may attribute comments and include a list of all respondents' names in any further report we publish. Those who wish to submit a confidential response should indicate this expressly. Automatic confidentiality disclaimers generated by an IT system will be disregarded.

THANKS

- N.6 Many people have devoted considerable time and resources to this project. We would like to thank all those who have sent written responses to the Issues Paper, who have written articles on the proposals and who met us to discuss their views. We read and consider all responses we receive to our Issues Papers. Whilst we are unable to directly quote all consultees' submissions in this brief summary, those views are important to us as we put together our proposals for the next Consultation Paper.

PART 1

INTRODUCTION

- 1.1 In October 2010, the Law Commission and the Scottish Law Commission published Issues Paper 9, "The Requirement for a Formal Marine Policy: Should Section 22 be Repealed".¹ This document is a summary of the responses we received to that paper. We are currently considering our proposals in the light of these comments and intend to publish further proposals in a joint consultation paper in 2011.
- 1.2 As with our Issues Paper 8, this paper dealt with a technical point of law confined to marine insurance. We received 9 responses, as shown in the table below. Whilst the number of responses is comparatively low, this is a specialist area and has an impact on a comparatively narrow range of stakeholders.

Table 1: Respondents to Issues Paper 9, by category

Type of consultee	Number
Insurers, reinsurers and insurance trade associations	3
Lawyers, legal representative associations, and the judiciary	1
Other	2
Brokers and brokers' associations	3
Total	9

BACKGROUND

- 1.3 By section 22 of the Marine Insurance Act 1906, a contract of marine insurance is inadmissible in evidence unless it is "embodied in a marine policy". Where there is no marine policy a person is not allowed to prove the terms of the contract in court, and therefore cannot prove the right to make a claim. This formality requirement was originally a mechanism to prevent the evasion of stamp duty on marine insurance policies.
- 1.4 Stamp duty has long since been abolished, but section 22 has survived. The concept of the policy as distinct from the contract appears to be of little remaining significance, save to the extent that a lien can be exercised over it under section 53(2) of the 1906 Act, and that the transfer of the policy document can be used to assign claims under it.

¹ Insurance Contract Law, Issues Paper 9: The Broker's Liability for Premiums - Should Section 22 be Repealed? (October 2010).

- 1.5 Issues Paper 9 considers whether marine insurance contracts should meet any formal requirements. Although it is good practice to put contracts in writing, we felt that this should be left to market participants rather than imposed by statute. We discussed the Contract Certainty Code of Practice which aims to provide insureds with greater certainty over what they have bought and insurers with greater certainty over risks taken. We also discussed the Market Reform Contract, which is a standard form contract for insurers and brokers to use developed to comply with Contract Certainty. These developments suggest that the industry wishes to move away from the distinction between “slips” and “policies”.
- 1.6 We took the view that the market now disregards section 22 and that there was scant justification for the retention of this formality requirement. In the light of this, we tentatively proposed that section 22 be repealed, and sought consultees’ views as to the consequences of doing so.
- 1.7 In addition, we considered whether a policy can be an electronic document. Notwithstanding the Law Commission’s view in 2001 that a policy had to be tangible to satisfy section 22, we now take the view that this does not necessarily prevent an electronic document from meeting the requirements for a policy.
- 1.8 Another issue is what is meant by the insurer’s signature under section 24(1). We said that the signature requirement imposes an unnecessary regulatory burden on insurers and should be removed.
- 1.9 Under section 53(2) of the 1906 Act, the broker has a lien over the policy “ for the amount of the premium and his charges in respect of effecting a policy”. When an insured could not make a claim without producing the policy, the lien gave brokers a useful means of ensuring that insureds paid their debts. We initially discussed the issue of the broker’s lien over the policy under section 53(2) in Issues Paper 8, where we asked whether the law in this area operated satisfactorily. One uncertainty which has arisen is whether, following *Eide UK Ltd v Lowndes Lambert Group Ltd*,² the right to retain proceeds is dependent on the broker having a lien over the policy. It is not clear from the authorities whether a broker who does not possess a policy but who has been paid the claim proceeds has a right to retain those proceeds in settlement of a debt.³
- 1.10 As Issues Paper 9 sets out, section 53(2) also relates to section 22, in that if section 22 were to be repealed, we would need to consider whether this would adversely affect the operation of section 53(2). In Issues Paper 8, we said that section 53(2) “gives the broker a lien both over the policy and any policy monies it receives from the insurer”. We explained in Issues Paper 9 that it may not be entirely accurate to describe a broker’s rights to proceeds as a “lien”. Until now the courts have limited a “lien” to tangible goods rather than money. The right over proceeds is best thought of as a form of set-off or compensation.

² [1999] QB 199.

³ In Scots law, it would appear that when sums under the policy are paid out to the broker by the underwriter, the lien held by the broker is transferred into a right of retention in respect of the sums paid (see AJM Steven, *Pledge and Lien* (2008) para 17-45). There is also, however, doubt as to whether money as such can be the subject of a right in security under Scots law. (See *The Laws of Scotland: Stair Memorial Encyclopaedia, Reissue 2, “Banking, Money and Commercial Paper”* (2000) para 145).

1.11 All this needs to be put into the context that marine brokers have long been held to have a general lien over the goods and chattels of their principals in respect of claims they have against them. The general lien would extend to all claims proceeds that the broker holds for the insured, regardless of how section 53(2) is interpreted. Despite this, we proposed that section 53(2) should be amended or replaced. The law should clarify that a broker has an express general lien over any property of the insured, provided it has come into its possession lawfully. We also suggest that there should be clarification that the broker has a right to retain any funds held by the broker in its capacity as broker, irrespective of whether the broker has a lien over the policy.

1.12 The relevant statutory provisions are attached as an appendix to this paper.

CONTENTS OF THIS PAPER

1.13 This paper is divided into 2 parts:

- (1) Part 2 deals with the proposed repeal of sections 22, 23, 24(1) and 89, and Schedule 1.
- (2) Part 3 summarises consultees' views on the extent of the broker's lien.

PART 2

THE REQUIREMENT FOR A MARINE POLICY

2.1 In Issues Paper 9, we expressed the view that there should be no requirement that a marine insurance contract be signed or in writing and asked consultees whether they agreed. Seven respondents (78%) concurred. Of the remaining two consultees, the British Insurance Brokers' Association (BIBA) thought that there should be written evidence of the contract and that it should be signed.

2.2 The Bar Council Law Reform Committee (Bar Council) said that removing the requirement of a "policy" should cause no inconvenience or injustice, not least because of the uncertainty of its meaning:

It is difficult to think of a practical example in recent times where a contract of marine insurance has been undone on the grounds that no policy has been issued. This may well be because there will always (or almost always) be a written record of a marine insurance contact, usually constituted by a signed slip.

2.3 However, the Bar Council identified two schools of thought among practitioners in the marine insurance area as to whether any formal requirements should remain. One view is that there should be a requirement for a formal written document, even if there was no need for a "policy" as such. Reasons given include:

- (1) Having the requirement for a policy has probably helped to ensure contracts of marine insurance are in writing (even if not in a "policy");
- (2) The policy requirements of written evidence which underlie the requirement of written evidence of a contract of guarantee (pursuant to the Statute of Frauds 1677) also apply to insurance contracts. A written contract would avoid insurers facing claims under alleged oral contracts;
- (3) An existence of such a requirement would encourage sound practices in the insurance market; and
- (4) The introduction of a collateral obligation on the part of the insurer to issue a written record of the insurance contract. If section 52 of the 1906 Act were amended to require the insurer to issue a written record of the contract on payment of the premium, the injustice attaching to the absence of a written record of the contract could be eliminated. The example given was where cover is agreed over the telephone, although in marine insurance it was not seen as a common occurrence.

2.4 The other view is that statutory formality requirements are unnecessary:

- (1) With the exception of guarantee insurance, there is no requirement for non-marine insurance policies to be in writing and this has not caused any significant problems in practice. Furthermore, there is no logical basis for treating marine and non-marine differently.

- (2) The practice of slips is unlikely to change.
- (3) Even if there is a signed policy, disputes can arise about whether the policy reflects the parties' agreement, and if not, whether the policy can be rectified.
- (4) In foreign markets, contracts of marine and non-marine insurance are usually concluded by exchanges of emails, even when the contracts are subject to English Law; sometimes, but not always, a signed policy is issued later. The view is that often these parties will be unaware of the requirements of sections 22 to 24. If formalities remain, there will be scope for unscrupulous insurers to take opportunistic defences (particularly under section 24).

PROBLEMS WITH THE EXISTING LAW

- 2.5 Three main points emerged from most consultees' responses: section 22 created an unhelpful distinction between a policy and other records of marine insurance contracts; separate policy documents were not always produced; and the voluntary self-regulation of market participants meant that section 22 was not needed for there to be a formal record of marine insurance contracts.

Section 22 creates an unhelpful policy-slip distinction

- 2.6 While BIBA did suggest that a modified section 22 be retained, no consultee expressly indicated that there was any merit in the distinction between a policy and other types of contractual document. The Lloyd's Market Association (LMA) said that one of the chief advantages of reform would be to "make it clear that there does not have to be two documents".
- 2.7 As explained above, one view submitted to the Bar Council was that the practice of producing policies may lead to further litigation, as disputes can arise as to whether the policy in fact reflects the agreement between insurer and insured.

The market treats section 22 as if it did not exist

- 2.8 All consultees who referred to current market practice indicated that section 22 was no longer aligned with it. BIBA stated that contracts were treated as legally binding whether a policy had been issued or otherwise:

Custom and practice within the UK market is evidence that there is a legally binding contract even if the policy has not been issued in accordance with section 22.

- 2.9 To similar effect, the International Underwriters' Association (IUA) said that section 22 was no longer "fit for purpose", indicating that:

the market has essentially moved away from the formal requirement to produce a policy and generally does not rely upon section 22 in contract disputes.

- 2.10 The LMA pointed out that to the extent that formal documents were still relied on in the market, practice had evolved to the point where a slip was adequate evidence, indicating that “in terms of market practice, a slip suffices as evidence of an insurance contract”. The IUA concurred with this view.

Whatever the benefits of formality requirements, there is no need to have a mandatory statutory regime

- 2.11 Even though consultees largely supported the abolition of formality requirements in this area, most consultees saw the benefit in keeping a formal record of insurance contracts. As Geoffrey Lloyd and Derrick Cole pointed out:

Logic would dictate that it is common sense to express the terms of an agreement as complicated as an insurance contract in writing for the very sound reason that, as time passes, both parties would need to be clear as to what exactly was agreed at inception.

- 2.12 Most consultees took the view that, while it was desirable for formal records to be kept, primary legislation was not necessary. The LMA said that the issue of contract documentation standards should be left to the market. Moreover, five consultees (Marsh Limited (Marsh), Association of British Insurers (ABI), London and International Insurance Brokers Association (LIIBA), LMA and IUA) said that they could see no reason for having a special rule for marine insurance that did not apply to non-marine.

- 2.13 Similarly, Geoff Lloyd and Derrick Cole noted that while formality requirements may be desirable, these were a matter of “good practice” that fell within the remit of the Financial Services Authority. To illustrate the fact that there is no need for a special rule for marine insurance, they drew a contrast between marine insurance and life assurance. Market practice in life assurance is to make presentation of the policy a condition precedent to payment. They said, however, that the market functions perfectly well without a statutory requirement.

THE PROPOSED REPEALS

- 2.14 In Issues Paper 9, we proposed that section 22 of the 1906 Act be repealed, along with sections 23, 24(1) and 89, and schedule 1 to the Act. Consultees largely agreed with our proposals.

Section 22: the requirement for a marine policy

- 2.15 All nine consultees responded to the question of whether section 22 should be repealed so that a “marine policy” is no longer required for a contract of marine insurance to be proved in court. Of these, eight (89%) said that it should. The remaining consultee, BIBA, said:

The law simply needs updating to reflect electronic trading and processing systems such as Xchanging.

- 2.16 Among those who agreed there was a need to repeal section 22, the IUA said that documents other than a policy should be allowed to act as evidence of an insurance contract:

Specifically, we believe that other documentation in addition to the insurance policy should be admissible to prove evidence of a contractual arrangement. These might commonly include a copy of the complete slip, a certificate of insurance and a schedule of cover.

- 2.17 The Bar Council indicated that while some of its members thought a requirement for a formal document should be retained:

there is common ground that the distinction between a policy and a slip – to the extent that one now exists – should be extinguished... .

- 2.18 LIIBA cautioned that attention should be paid to ensuring that contract certainty be preserved.

Section 23: the requirement that a marine policy contain the insured's name

- 2.19 All nine consultees addressed the question of whether section 23 should be repealed. Of those, seven (78%) said that it should. Of the two remaining consultees, BIBA said that:

The insurable interest needs to be specified during the appropriate time of the contract. In relation to cargo which could be sold on through out the duration of the voyage then the insurable interest would need to be established and evidenced at time of claim. With other classes the insurable interest should be evidenced at inception and is unlikely to change.

- 2.20 As for the Bar Council, members of its committee expressed divergent views. Those who thought that all statutory formality requirements ought to be repealed favoured the repeal of section 23. Those who did not, thought that section 23 should be retained.

Section 24(1): the requirement that a marine policy be signed

- 2.21 Seven consultees (78%) said that there should be no requirement that a marine policy be signed. BIBA, however, said that it should be changed to allow for electronic signature on behalf of the insurer or persons authorised on its behalf, which would include a broker acting as agent of the insurer. Those on the Bar Council who favoured the retention of formality requirements also thought that a signature should be required. Those who did not, thought that no such requirement was appropriate.

Section 89: the ability to use a slip as evidence of an insurance contract once a policy is adduced

- 2.22 All nine consultees agreed that there was no need to retain section 89.

Schedule 1: standard form of policy and rules of construction

- 2.23 Five consultees (56%) said that schedule 1 should be repealed.
- 2.24 Of the remaining consultees, only the Bar Council said that both the standard form of policy and rules of construction should be retained. They indicated there was a general view that Schedule 1:

still provides some assistance other than in the realm of establishing the existence and terms of a marine insurance contract by evidence, in that either (a) Schedule 1 is a necessary adjunct to the rules of construction set out in the Schedule which apply subject to section 30 of the Marine Insurance Act 1906, and/or (b) numerous terms used in the Lloyd's SG form of policy in Schedule 1, which have benefitted from the Courts' interpretation for the better part of two centuries, are still used in modern policies.

- 2.25 Two consultees (Marsh and LIIBA) both said that while the form of policy should be repealed, the Rules of Construction were still relevant, as the terms appear in Institute Clauses and elsewhere in marine insurance contracts. They would prefer that these Rules of Construction should remain as default definitions unless the insurance contract provides otherwise.

THE CONSEQUENCES OF REFORM

- 2.26 No consultee indicated that repealing section 22 would have any significant practical effect, above and beyond aligning law with current practice. As BIBA explained, the market is already using the Contract Certainty Code of Practice to ensure a minimum level of formality in recording insurance contracts:

We expect that the practical effect would be negligible given that section 22 is widely ignored. BIBA believes that the contract certainty code of practice - principles and guidance issued in June 2007 and agreed by the ABI, BIBA, IIB, the IUA, Lloyd's, the LMA and LMBC is being observed. Custom and practice within the UK market is evidence that there is a legally binding contract even if the policy has not been issued in accordance with section 22.

- 2.27 The IUA were of the same view, stating that:

the practical effect [of removing section 22] would be negligible given that the market has essentially moved away from the formal requirement to produce a policy and generally does not rely upon section 22 in contract disputes.

- 2.28 The LMA noted that in practice, the Market Reform Contract and other forms of insurance contract are regarded as adequate evidence of a marine insurance contract. Indeed, they observed, the insurer is not necessarily under an obligation to produce a policy:

It is now no longer mandatory under Lloyd's byelaws for a managing agent to arrange (via the broker) for LPSO (Xchanging) to prepare a policy.

- 2.29 The Bar Council pointed out that abolishing the requirement for a policy would cause no inconvenience or injustice, "not least because of the uncertainty of its meaning". This was because:

all – or at least the vast majority of – marine insurance contracts are contained in or evidenced by a written document... .

Further issues to be considered

- 2.30 Consultees raised three further issues we would need to consider if section 22 were to be repealed.

The “policy” as the written record of the contract and as the contract itself

- 2.31 In our Issues Paper, we asked consultees whether there would be any unintended consequences if the references to “marine policies” in the 1906 Act were to be interpreted as references to marine insurance contracts. The Bar Council highlighted that the 1906 Act conflates the written document in which a marine insurance contract is embodied with the contract itself, pointing out that this could have unintended consequences. It stated that the two concepts of the contract (legal concept) and, if applicable, a written record (the physical embodiment of the contract) should be separated, giving the following example:

... if there has been a material non-disclosure by one of a number of co-assureds inducing a composite marine insurance contract, the insurer is entitled to avoid the contract with the “guilty” co-assured but not the “innocent” co-assured. The legislation should not provide that the insurer is entitled to avoid all of the contracts, with guilty and innocent co-assureds alike, included in the one written embodiment of the contracts.

- 2.32 The Bar Council said that all references in the Act should be reviewed to determine whether they are references to a “contract” or a “written record of the contract”.

The need to retain the mechanism for assigning a policy

- 2.33 In the same vein, Marsh pointed out that the use of a policy as a written record remains practically important under section 50(3) of the 1906 Act. As we explained in Issues Paper 9, this allows all of the claims under a policy to be transferred by indorsement in blank; in effect, by handing over a document embodying all the terms of the contract. Marsh observed that if section 22 is repealed:

One practical effect may be that a party who takes an assignment of a marine policy will undoubtedly still require some form of evidence that a contract of insurance is in place.

- 2.34 LIIBA also commented that there needs to be something to address the assignment of electronic policies and contracts, noting that this need not be a statutory requirement.

Abolition or amendment of section 52 of the 1906 Act

- 2.35 Section 52 of the 1906 Act provides that in the absence of agreement to the contrary, an insurer is only bound to issue a policy on payment of the premium. Those members of the Bar Council who thought formality requirements should be retained suggested that its current effect should be considered.⁴

⁴ See paragraph 2.3(4) above.

ALTERNATIVES TO OUR PROPOSED REFORM

- 2.36 As we observed above, while all members of the Bar Council advocated the abolition of the requirement for a “policy”, some members favoured the retention of formality requirements. Those who did, suggested the following requirements: a written document referring expressly, or by incorporation by reference, to (a) the existence of a concluded contract, (b) the identity of the assured or the name of the agent who concluded the contract, and (c) the subject-matter of the insurance.
- 2.37 Another alternative approach was suggested by BIBA. They suggested that there ought to be a requirement of written evidence of the contract and that it had to be signed. That contract should specify the insurable interest. They suggested that we adopt an electronic system similar to that used for motor insurance certificates, and that such reform could be implemented by using the powers under section 8 of the Electronic Communications Act 2000.

Electronic policies and signatures

- 2.38 We asked consultees whether, if the requirement for a policy was to be retained:
- (1) the law should be amended to clarify that a marine policy may be an electronic document; and
 - (2) if they did not agree that section 24(1) should be repealed, the section should be amended so that there is clarification as to how an insurer may sign paper and electronic policies. We also asked for views on what constitutes an electronic signature for these purposes.
- 2.39 These questions were academic for most consultees given their support for the repeal of section 22. Nonetheless, consultees who did favour the repeal of section 22 also expressed views on what the law should provide should section 22 not be repealed. As regards the first question set out above, no consultee dissented from the suggestion that a policy could be an electronic document, eight (89%) expressly saying that they favoured such an approach.
- 2.40 In relation to the second, six consultees suggested there were reasons for clarifying or altering the method of authenticating marine insurance contracts if section 22 were to be retained (66%). Three simply reiterated their view that there was no longer a need for section 24(1) (33%).
- 2.41 Consultees explained that electronic policies are commonplace in the modern market. The IUA, who said it was “essential” that a policy could be an electronic document, and explained how new technologies were being used to produce and sign policies electronically, stated:

The market continues to advance in the placement of risks and contract production via electronic means. In particular the introduction of the Insurer Market Repository has facilitated the increasing production of electronic policies. Furthermore, the Exchange, a relatively straightforward messaging hub, enables brokers, underwriters and IT suppliers to have a single connection point from which they can send and receive structured placement information securely between multiple parties. This facilitates the electronic placing of risks. Such London Market initiatives are underpinned by stringent security mechanisms around the use of trading platforms and electronic signatures. For example, where an electronic policy is produced, a digital signature is applied to the PDF document to verify its integrity and also that it has been processed by the bureau policy signing / checking process. That digital signature effectively locks-down the policy document.

- 2.42 BIBA pointed out that the use of electronic policies and electronic signatures was now commonplace:

More than 91% of policies are now submitted to Xchanging electronically with signed policies also returned in an electronic format.

- 2.43 The LMA told us that signatures were not being used at all under a pilot scheme for endorsements it is currently operating:

Under the electronic endorsement scheme currently being run in the marine cargo and hull market as a pilot project, an endorsement may be agreed under offer and acceptance rules through the ACORD secure messaging system. The London Market Group (LMG) is sponsoring the project and the LMA is taking the lead in managing it.

- 2.44 The ABI said that if we were going to have a statutory requirement for authenticating electronic policies, there should be a rule whereby a policy will be treated as authenticated if evidence is adduced that it was sent by the insurer. The onus would then be on the insurer to show that it had not assented to the policy:

We suggest that the insured should be required to show that the document was sent by the insurer (e.g. comes from an email address at that company). It would then be for the insurer to prove that it was sent fraudulently or without their knowledge.

- 2.45 Similarly, BIBA said that while policies should be allowed to be signed electronically, the potential risk of fraud means there needs to be an audit trail "open to scrutiny".

PART 3

THE BROKER'S LIEN

The need for clarification

- 3.1 Eight consultees (88%) agreed that there was a need for the broker's lien to be clarified by statute. The IUA said that they were not aware of any significant problems with the operation of the broker's lien in section 53 as it appeared to be rarely invoked by brokers. However, they agreed that repealing section 22 should not have the effect of removing the broker's lien for marine risks, and if it extends to them, non-marine risks. BIBA made the comment that, in their experience, the lien is not often applied and that brokers' cancellation clauses play a useful role in the marine market. The ABI were of the view:

that an intermediary should have a specific lien on policy proceeds, where for example he has paid the premium to the insurer and is owed all or part of that premium by the insured.

The extent of the lien

- 3.2 As explained in paragraph 1.11 above, in Issues Paper 9, we suggested that the lien should extend to any property of the insured that has lawfully come into the possession of the broker in its capacity as broker. Seven consultees (78%) agreed and one consultee declined to express a view. The ABI suggested an alternative, stating that the broker's lien should apply only to the policy and its proceeds, rather than a general lien against any property owned by the insured.
- 3.3 The Bar Council took the view that:

This entitlement to retain and/or set off funds should not be a "broker's lien" properly so called in that it should not be dependent on the broker possessing the original written record of the marine insurance contract. The right should exist notwithstanding.

Right of set-off

- 3.4 Eight consultees (88%) agreed that the broker should have a right to retain funds held on behalf of the insured to settle the insured's outstanding debt in respect of premiums or charges. The remaining consultee, Adam Samuel, had no strong views on this matter. The LMA pointed out that it had some reservations if the funds were being held under a risk transfer TOBA on behalf of another insurer.
- 3.5 The LMA (under the clarification question) said that the right of set-off ought to depend on whether the funds against which that right would be exercised were held on behalf of the insurer or the insured. If those funds were held on behalf of the policyholder, then the broker ought to have a right of set-off. If not, there were potentially problems if the policyholder had insurance contracts with separate insurers. For example, it would cause problems were a broker allowed to exercise a right of set-off against money paid by one insurer where the policyholder had failed to pay premium due to another insurer. If that premium were disputed, the "innocent" insurer who had paid the claim ought not to be drawn into that dispute.

Applicability to both marine and non-marine insurance

- 3.6 We asked whether consultees agreed that there should be statutory clarification that the broker's general lien applied to both marine and non-marine insurance. Six consultees (66%) said that we should clarify the law to make it applicable to both. The ABI agreed to statutory clarification that the lien applied to all classes of insurance, on the basis that there was a specific lien against all policy proceeds rather than a general lien against any property owned by the insured.
- 3.7 The Bar Council had differing views on the point. Summarising the views of those who disagreed with our proposal, it said:

[the lien] ... should apply only to marine insurance contracts, because the broker's lien arises in part because of the broker's personal liability to the insurer for the premium under section 53(1)...They suggest that it seems unlikely the broker has such liability under non-marine insurance contracts (see *Pacific and General Insurance Co Ltd v Hazell* [1997] LRLR 65, 78-79).

- 3.8 It also argued that if the broker were liable for the premium under non-marine insurance contracts, then the broker ought to have the benefit of a lien under such contracts.

Other observations

- 3.9 Consultees largely agreed with our proposals for the reform of the broker's lien under section 53(2) of the 1906 Act. However, in the light of our proposed reform of section 53(1) (Issues Paper 8), two consultees (IUA, LMA) were of the view that it was illogical for the lien to operate if the broker itself were not responsible in its own right for the premium. The IUA said:

Assuming that section 53(1) does not apply to non-marine insurance, then the normal rules of agency would likely apply for those classes of business. The corollary of this is that it would be the insurer, rather than the broker, who would pursue the policyholder for any unpaid premium. In such circumstances it would arguably be illogical to allow the broker to operate a lien over the policy in respect of non-payment of premium. However, in respect of other aspects where the broker is financially disadvantaged it makes sense to allow the same protections as in marine risks.

- 3.10 Marsh observed:

The existing statutory lien rarely gives brokers adequate protection in circumstances where the insured has not paid the premium e.g. in cases where third parties such as mortgagees have an interest in the policy.

APPENDIX A

RELEVANT PROVISIONS OF THE MARINE INSURANCE ACT 1906

Section 22

Contract must be embodied in policy

Subject to the provisions of any statute, a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with this Act. The policy may be executed and issued either at the time when the contract is concluded, or afterwards.

Section 23¹

What policy must specify

A marine policy must specify –

- (1) The name of the assured, or of some person who effects the insurance on his behalf.

Section 24(1)

Signature of insurer

- (1) A marine policy must be signed by or on behalf of the insurer, provided that in the case of a corporation the corporate seal may be sufficient, but nothing in this section shall be construed as requiring the subscription of a corporation to be under seal....

Section 89

Slip as evidence

Where there is a duly stamped policy, reference may be made, as heretofore, to the slip or covering note, in any legal proceeding.

Section 90

Interpretation of terms

In this Act, unless the context or subject-matter otherwise requires ... “policy” means a marine policy.

¹ s 23 formerly required that a marine policy must specify four additional facts, namely the subject-matter insured and the risk insured against; the voyage, or period of time, covered by the insurance; the sum or sums insured; and the name or names of the insurers. These four additional requirements were, however, repealed by the Finance Act 1959.

LIST OF CONSULTEES

We considered 9 responses to our Issues Paper.

WRITTEN RESPONSES

Association of British Insurers

British Insurance Brokers' Association

International Underwriting Association

Lloyd's Market Association

London and International Insurance Brokers' Association

Marsh Limited

Mr Adam Samuel

Mr Derrick Cole and Mr Geoffrey Lloyd

The General Council of the Bar