

MARKET BULLETIN

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Lloyd's has prepared the attached Policy Production Guidelines to help the market draft contracts of insurance that are compliant with Spanish legal requirements.

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SPAIN: POLICY PRODUCTION GUIDELINES

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Lloyd's provides this document (the Document) for general information purposes only. This Document provides general guidelines about certain key aspects to take into account when producing insurance documentation subject to Spanish law. Therefore, this Document is not, and does not purport to be, a complete account of all matters that are or may be material when producing a specific Spanish contract of insurance.

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EXECUTIVE SUMMARY

INSURED'S RIGHT TO RECEIVE A CONTRACT OF INSURANCE

Spanish insurance legislation grants the insured the right to receive a contract of insurance in writing or, at least, a document evidencing provisional coverage. Cover notes issued by Lloyd's brokers or non-Lloyd's brokers do not replace the contract of insurance, which must be used.

It is the insurer's duty to provide the insured with the written contract, either directly or indirectly (through coverholders or brokers).

The insurer is not only obliged to provide the insured with the contract of insurance but also to ensure that the contract is drafted in accordance with the Spanish Insurance Contract Act where applicable and, in any event, with the general good requirements which always apply even in the case of application of another law.

The Spanish legal system is very protective of the insured's rights. Therefore, non-compliance with Spanish legal requirements may have severe consequences for Underwriters and ultimately increase legal and reputational risks for Lloyd's as a whole.

These guidelines set out a number of points that underwriters and coverholders should take into consideration when preparing a Spanish contract of insurance. The list here is not exhaustive. In summary:

- **Can the MRC be used as the contract of insurance for Spanish risks?**

Yes, the MRC can be used as the contract of insurance as long as it complies with all Spanish legal requirements. These guidelines may provide underwriters with general advice on how to draft the MRC in a compliant manner. For instance, good examples of those requirements to be taken into account when adapting the MRC to a legally compliant Spanish contract of insurance would include highlighting and accepting clauses limiting the rights of the insured, insertion of compulsory information and clauses and completion of the MRC by both contracting parties (policyholder/insured and insurer).

- **Structure of a contract of insurance**

Insurers are not obliged to follow a specific form when drafting a contract of insurance in Spain.

However, Spanish insureds, Spanish Courts and Authorities are all familiar with a specific type of contract that comprises the schedule, general conditions and any special conditions. Therefore, we strongly recommend that Lloyd's underwriters/coverholders follow this structure as Spanish insureds will feel more comfortable.

- **Other important insurance documents**

In addition to the contract of insurance itself, there are other important insurance documents to be taken into account. It must be highlighted the relevance of using good and complete risk questionnaires as, in Spain, the insured's duty of disclosure is very different from that in England.

- **Follow the basic rules**

Underwriters and coverholders are advised to follow three rules that, in our experience, should always be considered when drafting Spanish contracts:

- use clear and understandable wordings adapted to the Spanish terminology;
- draft the contract in a language agreed with the policyholder;
- do not underestimate the importance of local legal advice.

- **Clear identification of the insurer is paramount**

Spain is still not very familiar with the concept of Lloyd's as an insurance market. Hence, it is important to clearly identify the insurer assuming the risk (which is compulsory information).

The Association of Underwriters known as Lloyd's is a licensed "insurer" registered with the Spanish Registry of Insurance and Reinsurance Entities, which is the public registry of all insurers, authorised to operate in Spain. Moreover, Spanish clients should be made aware that they are insured by the Lloyd's market, and, therefore, benefit from the Lloyd's financial strength and security. A good and clear identification of the participating Lloyd's syndicates along with the use of Lloyd's brand is very important in achieving this.

- **Compulsory statements and clauses**

Spanish insurance legislation provides a list of compulsory statements and clauses that must be included in a Spanish contract of insurance. The purpose of these guidelines is not to list them all but to mention the most generally applicable ones. There also are specific clauses and statements that may apply to certain classes of insurance which are not listed here.

- **Clauses limiting the rights of the insured must be highlighted and expressly accepted**

This is one of the most important and controversial issues in Spanish insurance law. This is because under Spanish legislation there is not a clear and exact definition of what a "limitative clause" is. Also, there have been a large number of judgments against insurers for not complying in full with this legal requirement. Some general guidance is provided below. However it is recommended that local legal advice is obtained for specific cases,

- **Contracts must be signed by both of the contracting parties**

There are still a large number of “Lloyd’s” contracts of insurance that are not signed by both the insurer (i.e. either by the Underwriter itself, the coverholder acting on its behalf or by Xchanging) and the policyholder/insured.

INSURANCE DOCUMENTATION

Insurance policy, contract of insurance and certificate of insurance

According to the Spanish Insurance Contract Act (hereinafter SICA), a **contract of insurance** is the contract by virtue of which the insurer agrees, for a specified consideration (premium) and when an event occurs (the risk of which is the object of the coverage), to indemnify, within the agreed limits, the damage suffered by the insured or to pay a capital sum, a rent or other agreed compensation.

SICA uses the words “**policy**” and “**insurance policy**” as synonyms of “contract of insurance”.

In contrast, a “**certificate of insurance**” is a document which evidences the existence of insurance cover but does not state all the terms contained in a separate policy or contract of insurance.

In England, a “certificate of insurance” may also refer to the document issued by a coverholder evidencing the existence of insurance cover and stating the terms of such cover. In these circumstances no policy of insurance is issued.

Please note that the above definition of certificate issued by coverholders does not exist in Spain. Therefore, insurance documents issued by coverholders in Spain will always be considered “contracts of insurance” rather than “certificates of insurance”.

Parts of a Spanish contract of insurance

SICA does not impose any specific structure for contracts of insurance. However, a Spanish contract of insurance will normally include:

- A **Schedule** or **Particular Conditions**, which identifies the essential elements of a contract: parties, the insured risk, period, limits, premium & taxes, etc.
- **General Conditions**, which include general legal provisions, such as payment of premium, cancellation, claims arrangements, aggravation of the risk, etc. This section also includes general exclusions. Very often, these general conditions are a transcription of certain relevant sections of the SICA.
- **Special Conditions**, which tend to describe more specifically the risk and/or the circumstances of the coverage. However, it is worth noting that, while any contract of insurance must have the schedule and general conditions, special conditions are not always included. In fact, special conditions may be incorporated under the general conditions section.

This is the usual structure of a contract of insurance expected by Spanish insureds, authorities and Courts. If a different structure is used, the contract of insurance must meet all legal requirements and be sufficiently clear.

SCHEDULE, GENERAL AND SPECIAL CONDITIONS FORM THE CONTRACT

Other insurance documentation

The following documents may be also important in addition to the contract of insurance:

a) Risk questionnaire

The risk questionnaire is a document used by the insurer to ask a prospective policyholder questions that are considered important for the assessment of the risk.

This document is important because, in Spain, the insured is obliged to disclose all the material facts that could affect the evaluation of the risk. However, this duty of disclosure **is not absolute but limited to the terms of the questionnaire**. If an insurer does not solicit the insured to complete a questionnaire or if the questionnaire fails to ask about a particular issue, then underwriters cannot later allege non-disclosure, even though the insured had knowledge of a material fact.

Underwriters should ensure that their risk questionnaires are well drafted to cover all areas that are considered important for the evaluation of the risk.

b) Proposal form/quotation

The proposal form is a document issued by the insurer to a prospective policyholder which specifies the premium, terms & conditions of the coverage.

Spanish law does not require a specific form. However, SICA states that this proposal shall be binding on the insurer for a period of 15 days.

c) Pre-contractual information

Spanish insurance legislation requires an insurer to ensure that a prospective policyholder receives certain information in writing **prior** to the conclusion of the contract of insurance.

This is a duty for the Underwriter rather than for any coverholder or intermediary involved. If the business is arranged under a binding authority, the coverholder should be given clear instructions in order to provide the insured with the appropriate pre-contractual information. If the contract is arranged on an open market basis, the Underwriter should ensure that the broker complies with this legal requirement.

Pre-contractual information must be provided in writing and should be in Spanish unless otherwise agreed with the policyholder.

The content of this pre-contractual information varies depending on the type of policyholder (individual or legal

**A GOOD RISK
QUESTIONNAIRE IS
CRUCIAL**

**UNDERWRITER MUST
ENSURE THAT PRE-
CONTRACTUAL
INFORMATION IS
PROVIDED**

entity) and the risk (large risk/mass risk) but always refers to the Insurer, its Member State, its Supervisor, the law applicable to the contract and claims arrangements. Its aim is to give a prospective policyholder information about the insurer in order to help them reach a decision.

Lloyd's has drafted standard pre-contractual notices (non-life business) that comply with these legal requirements. There are two set of wordings, one applicable to freedom of services and the other to establishment business (please refer to Crystal/Insurance documentation section for these wordings).

The Law does not state precisely when the information should be provided. For practical reasons, it is recommended that the insurer inserts this pre-contractual information notice within the risk questionnaire or the proposal form; i.e. when the parties are negotiating the terms of the contract.

BASIC RULES FOR PRODUCING A COMPLIANT CONTRACT OF INSURANCE

1ST RULE: DRAFTING CLEAR AND PRECISE WORDINGS

Clear and understandable wordings

Spanish insurance and consumer laws provide that general and particular conditions must be drafted in **clear** and **precise** terms, which must be **easy to understand**. Otherwise, Courts may construe any ambiguous or confusing condition or term against the interests of the party that imposed its inclusion in the contract. This is the so-called “*contra proferentem*” legal principle.

The most common reasons for drafting unclear wordings are direct translations of English wordings into Spanish, use of inappropriate terminology or misleading legal concepts. The consequences are always against the insurers’ interest and they may be very severe.

By contrast, a contract of insurance drafted in clear terms, using the appropriate Spanish terminology and legal concepts and with an understandable structure is one of the best marketing tools for Underwriters.

2ND RULE: USING THE LANGUAGE THAT THE POLICYHOLDER AGREES

Language

SICA states that the contract of insurance shall be drafted in any of the Spanish official languages where the contract is concluded and at the policyholder’s discretion. However, if requested by the policyholder, the contract may be drafted in another language. Therefore, contracts of insurance drafted in English may be acceptable subject to the agreement of the insured.

In this regard, SICA does not impose on the insured the obligation to agree in writing. However, it is recommended to use a written agreement in order to protect the Underwriter’s interest.

It is common practice to issue insurance documents both in Spanish and English simultaneously. This practice is not expressly forbidden by law but this approach must be taken with care as it may give rise to misunderstandings and confusion. In case of conflict, the Spanish version will prevail.

3RD RULE: SEEKING LOCAL LEGAL ADVICE IS IMPORTANT.

The importance of local legal advice

It is strongly recommended to seek local legal advice, in order to ensure specific circumstances are taken into account when writing different types of insurance/risks. SICA not only provides that there are several types of risks which may be regulated by special laws or rules but also identifies specific requirements with regard to some types of insurance such as fire, transportation, loss of benefits, personal and accident insurance.

Underwriters are encouraged to seek professional advice in Spain to ensure that policies comply with Spanish law. A straightforward translation may not necessarily meet all legal requirements.

IDENTIFICATION OF THE INSURER. THE USE OF THE LLOYD'S LOGO

CLEAR IDENTIFICATION OF THE INSURER IS REQUIRED

The Spanish market is still unfamiliar with the idea of Lloyd's as an insurance market, although concepts such as "Syndicate", "Underwriter" or "coverholder / underwriting agency" are gradually becoming more recognizable. For this reason, the issue of the identification of the insurer is a matter to be considered carefully.

- **The Lloyd's logo should be inserted** and particularly highlighted if used in conjunction with another corporate logo. It is worth noting that Lloyd's is considered in Spain as a single entity and, consequently, the Association of Underwriters known as Lloyd's is the entity registered as an "insurer. For transparency reasons, it is crucial that policyholders are clearly able to recognize their contracts of insurance as being issued by Lloyd's.

Lloyd's Coat of Arms may be used provided that its use is in accordance with the Lloyd's brand guidelines but ideally it should not replace the Lloyd's logo. This is because the Lloyd's Coat of Arms is not well-known in Spain and it is therefore preferable to insert the Lloyd's logo.

- **The Managing Agent's corporate logo** may be included alongside the Lloyd's logo. However, for reasons of clarity, the policyholder should be able to identify his or her policy as a "Lloyd's policy".
- **The coverholder's corporate logo** may be included together with the Lloyd's logo, but the former should always appear in a smaller font. This is to avoid confusion about the identity of the insurer.
- **Identification of the Syndicate(s) and percentages** is not compulsory from a legal standpoint. However, for reasons of transparency, the Spanish insurance supervisor, the DGS, has specifically recommended the inclusion of these details.

COMPULSORY INFORMATION

SICA states a number of compulsory information fields that must be included in the Schedule or Particular Conditions. These are:

- The full name and address of both the Insurer and the policyholder and the identity of the insured and the beneficiary (if any). Syndicate(s) and risk percentages should be identified. The insurer's address is that of Lloyd's.
- Whether the risk is covered for the benefit of the policyholder, the insured [these are generally the same thing] or a third party.
- The nature of the risk to be covered.
- A full description of the insured's risk and its location.
- Sum insured and/or limit of coverage. (If the parties expressly agree that the sum insured ought to cover the full value of insurable interest throughout the contract, the policy must contain the criteria and procedure for adjusting both the sum and the premium if the insurable interest changes).
- Amount of premium, showing the breakdown of charges and taxes, if applicable.
- Date, place and method of the payment of premium
- Duration of the contract, stating the day and hour of inception and expiration of the policy.
- Name of the insurance intermediary (insurance broker or agent), if applicable.
- In the event of a floating policy¹, indication of the manner on which the payment declaration is to be made.

**UNDERWRITER MUST
ENSURE THAT THE
MINIMUM INFORMATION
IS INCLUDED**

This list represents the **minimum** information that compliant Schedule and Particular Conditions sections should contain. However, including the above information does not alone imply that the contract of insurance is fully compliant with Spanish law. In fact, depending on the type of insurance or risk covered, there may be other compulsory information to be included. For example, if a motor liability risk is written on a freedom of services basis, the name and address of the Lloyd's motor claims representative must be inserted.

¹ Insurance cover for situations where the total insurable amount can be reasonably estimated but cannot be determined accurately-enough for computing correct premium, until the insurance policy comes to an end. For example, a cargo policy covering individual shipments each of which is declared and eventually exhausts the sum insured.

COMPULSORY CLAUSES

In addition to the compulsory information listed in the previous section, Spanish insurance legislation identifies a number of clauses that must be inserted in all Spanish contracts of insurance.

- **Right to complain**

The contract of insurance must include a provision informing the insured of his right to complain if the policy wording differs from the proposal or any agreed clause. The insured has one month from the date of delivery of the policy to make a complaint. If no complaint is made within that time, the policy wording stands.

Lloyd's has drafted a standard clause for this purpose (LSW 1091, which is available electronically in English and Spanish from the Lloyd's Wording Repository).

It is suggested that this clause be inserted at the end of the Schedule or as a preliminary within the General Conditions.

- **Receipt of the pre-contractual information**

A declaration duly dated and signed by the insured indicating the date of receipt of pre-contractual information is compulsory.

Lloyd's has drafted standard clauses for this purpose whose content varies depending on the type of pre-contractual information given by the insurer to the policyholder when negotiating the terms of the contract.

It is suggested that this clause be inserted at the end of the Schedule (please refer to Crystal/Insurance Documentation section for these wordings).

- **Important information**

Spanish legislation states that the same pre-contractual information previously provided by the Underwriter when the parties negotiated the terms of the contract, must also be inserted into the contract of insurance.

Lloyd's has drafted standard clauses (non-life business) that comply with this requirement. There are separate wordings applicable to services and establishment business (please refer to Crystal/Insurance Documentation section for these wordings).

This "Important information" section may be inserted into the Schedule or General Conditions.

- **Data protection clause**

The UK Data Protection Law is applicable as the data controller (the Managing Agent) is based in UK. Therefore, Underwriters should ensure that suitable data protection clauses are included in the risk questionnaire or proposal form and the contract of insurance.

- **The Consorcio clause**

The Consorcio de Compensación de Seguros is a public entity originating from the Spanish Civil War. The Consorcio acts as a catastrophe insurer for certain types of insurance and perils in respect of Spanish risks.

The Spanish supervisor, the DGS, issued a Resolution of 23rd November 2006 that approved the official Consorcio clause for inclusion in any contract of insurance covering Spanish risks and which is subject to the Consorcio's cover. This clause is available both in Spanish and English from Crystal (please refer to Crystal/pre-placement considerations/class specific regulations/ Spanish Consorcio for this clause).

It should be pointed out that depending on the precise insurance or risk covered, other compulsory clauses may apply.

THE IMPORTANCE OF CLAUSES LIMITING THE INSURED'S RIGHTS

THE RULES FOR THESE CLAUSES ARE NOT MERE FORMALITIES

According to SICA, any clause that limits² the insured's rights (restrictions, exclusions, claims made clauses, etc) must be expressly highlighted in the policy and accepted by the insured in writing.

These rules are not mere formalities: If they are not expressly stated and accepted in writing they may be legally treated as null and void, turning the contract into an insurance without limits.

In order to avoid or, at least, minimise the risk, Underwriters should ensure that any clause limiting the insured's rights is properly highlighted and expressly accepted by the insured. For this purpose, a detailed analysis of the contract is required.

Moreover, a specific clause confirming the express acceptance by the policyholder/insured should be inserted not only into the Schedule but also into the General and Special Conditions. An example of this clause may be the following:

Model clause

In accordance with article 3 of the Spanish Act on Insurance Contract, clauses that may be deemed to restrict the insured's rights have been specially highlighted in bold. The Policyholder/Insured states by means of his/her signature, that he/she has examined and understood the aforementioned highlighted clauses and agrees to abide by each of them.

Who must accept these clauses when writing master policies or group insurance?

Group insurance and master policies are contracts of insurance covering a number of individuals (i.e, employees of a company or members of a professional association or institute). The contract of insurance is arranged by the policyholder (the employer or association) and, upon payment of the premium, the individual insureds (employees or members) receive an individual certificate.

In these cases, it is for the policyholder, rather than for each individual insured, to accept expressly the exclusions and restrictive clauses. However, **each individual insured has the right** to be aware of these clauses limiting their rights. Therefore, each individual certificate of insurance must contain the exclusions and limitations for information purposes. Otherwise, no limitation or exclusion will be enforceable.

² Occasionally, it is not clear whether a clause limits the insured's rights or, defines the risk to be covered. However, certain court case law provides that clauses which define the risk are clauses that specify the object of the contract and determine the risks that trigger the right to be indemnified. Clauses that limit the right of the insured are those clauses that restrict, condition or modify the right of the insured to be indemnified. Local legal advice should be sought for specific cases.

WHO SIGNS THE CONTRACT OF INSURANCE?

THE CONTRACT OF INSURANCE MUST BE SIGNED BY THE CONTRACTING PARTIES

A contract of insurance is a contractual agreement and therefore should be signed by each contracting party, namely the policyholder/insured and insurer. Moreover, the contract of insurance is formed by the Schedule, General and the Special Conditions, which means that all of them should be signed by the contracting parties.

If the policyholder/insured does not sign the contract of insurance there may be problems, in particular with regard to exclusions, restrictions and clauses that limit the rights of the insured. Clear instructions should be given to coverholders and brokers in order for them to obtain the policyholder/insured's signature.

As regards the Insurer, the following scenarios may be distinguished:

Establishment business.

The contract of insurance is issued and signed by the Spanish coverholder. As the coverholder does not assume the risk by itself but on behalf of the underwriters, a clear statement reflecting this fact must be inserted.

Open Market business.

For open market business, there are, in principle, four alternatives:

- The MRC can be accepted as evidence of the contract of insurance without the need to issue any other document. However, both the underwriter and the policyholder/insured **must sign the MRC which needs to comply with all Spanish legal requirements.**
- A Lloyd's policy can be prepared on the basis of the MRC, as per the existing system. XIS will sign and seal this document that, in addition, should also be signed by the Spanish policyholder/insured.
- A managing agent can issue its own policy, if the contract is written 100% by one syndicate. Therefore, both the Managing Agent and the policyholder/insured should sign the contract.
- Non-Spanish coverholder: As for Spanish coverholders, a clear statement should be included indicating that the coverholder is acting on behalf of certain Underwriters at Lloyd's.

Brokers Insurance Documents (BID), cover notes or similar documents that may be issued by brokers as evidence of cover are not acceptable under Spanish Law as they do not replace the contract of insurance.