

New Joint Excess Loss Clauses Published

Following a 3 year project by the Joint Excess Loss Committee, Joint Excess Loss Clauses (JELC) CL432 have now been published and will replace the previous wording (CL400) with effect from 1st January 2018. As with the previous wording, parties are free to agree different terms and conditions if they wish.

The CL432 wording is designed for incorporation into excess of loss reinsurance contracts (primarily used in the marine and energy markets) and has an annex of optional additional clauses. The wording was last amended in 2003 and the latest amendments take account of the changes introduced by the Insurance Act 2015, but also extend well beyond.

We set out below the main changes in this new wording.

Insurance Act 2015: Clause 2

A key amendment relates to the damages for late payment remedy which came into force in respect of all policies of insurance and reinsurance which are subject to English law and issued after 4th May 2017. A new clause, Clause 2.2, excludes the reinsurer's liability for any late payment damages which become payable by the reinsured because of the reinsured's unreasonable delay in payment of a claim. However, a new Additional Clause B offers the reinsured the option of purchasing a limited buyback of that cover (despite its title, the buyback of cover is fairly broad).

A new Clause 19, has also been introduced to exclude reinsurers' liability to pay late payment damages save where reinsurers acted deliberately or recklessly in not paying the reinsured's within a reasonable time, where contracting out is not allowed under the 2015 Act.

This change has been highlighted in the headnote to the wording, in order to comply with the transparency requirements of the 2015 Act.

Event Loss: Clause 3

The 2003 wording treated loss etc arising from one event as a single loss. The new wording, by Clause 3.1, defines event by spelling out how closely connected the individual losses have to be to the event in order to be aggregated. This is done by reference to the unities test which was first formulated in the *Dawson's Field* market arbitration award (1972) and applied in *Kuwait Airways Corporation v Kuwait Insurance Co* [1999] and subsequently (in summary, a number of losses can be described as arising from an event if the losses have a sufficient unity of time, location, cause and, where relevant, intention of human agents). The connecting words "arising from" will (on the basis of caselaw) require a significant causal link but the event does not have to be a, or the, proximate cause.

Seepage and Pollution Exclusion and Limited Writeback: Clause 8

The new wording now contemplates (and excludes) exposure under property and construction policies, as well as liability policies.

The exclusion retains a limited writeback, and there are two main amendments here:

- 1) A reference to "liability under the Offshore Pollution Liability Agreement" has been changed to "liability accepted by the direct insured under the terms of the Offshore Pollution Liability Agreement (OPOL) or equivalent". Under OPOL there could be an agreement to pay for an incident, up to a

certain limit, without proof of liability. The requirement that the original insured has accepted the liability under the OPOL Agreement helps to limit this. However, the clause has also been broadened to apply to any "equivalent" agreements in other countries.

- 2) A reference in the old wording to liability under three specific US and Canadian statutes (the Outer Continental Shelf Lands Act, Federal Water Quality Improvement Act and the Arctic Waters Pollution Protection Act) has been replaced with one to liability imposed on the direct insurer by any statute designed to protect the marine environment provided the direct insured was obliged by statute or statutory instrument or equivalent to have such insurance. Accordingly the scope of the writeback has been significantly broadened to apply to liability under similar legislation in any country, not just the US or Canada.

Downstream Exclusion and Limited Writeback: Clause 9

This exclusion replaces the optional Refinery Exclusion Clause, or REC (Additional Clause G in the 2003 version). It is much broader and excludes all cover that would normally be found under many onshore energy policy wordings. This exclusion would therefore not normally be found in an onshore energy policy, although an offshore energy policy would be likely to exclude onshore property, which is insured separately under different policies and in different markets.

Liability Exclusion & Limited Writeback: Clause 10

The old JELC 2003 wording had two optional liability exclusions: LEC A and LEC B (Additional Clauses E and F). In the new wording LEC A has gone and LEC B, in a heavily amended form, has been moved into the main body of the wording.

The starting point is that all claims in respect of the insured's liability to third parties are excluded subject to a carve out. LEC B in the 2003 version

on a claims made or losses discovered basis; the 2017 version adds occurrences reported policies to that list, reflecting industry changes – but subject to the same proviso that the claim or event notification must occur during the Policy period.

The most extensive changes are in the writeback. A number of the types of operation in the writeback have been expanded and/or clarified (e.g. professional indemnity/E&O cover in respect of certain stated operations is not excluded whereas professional indemnity/E&O generally is excluded), and several new ones have been added to the writeback, including offshore alternative energy facilities (wind, wave etc.) and cargo in transit by land pipelines.

Terrorism Exclusion and Limited Writeback: Clause 11

The one substantive change here is that the optional buyback in the 2003 version has been moved into the main body of the wording (Clause 11.3).

Cyber Attack Exclusion: Additional Clause F

This exclusion has been removed from the main wording and has become an optional clause which excludes cover for loss etc. caused by or arising from the use or operation of an Information Technology Device.

Information Technology Hazards: Clause 17

A new Information Technology Hazards clause has been introduced. It defines an IT Hazard as "loss of or damage to or a reduction or alteration in the functionality or operation of an Information Technology Device". Aggregation by reference to the IT Hazard is not allowed, but the clause allows for aggregation arising from certain defined physical perils e.g. the sinking of a vessel, notwithstanding that an IT Hazard was also a significant cause of the loss.

Exclusion of Damages for Late Payment of a claim by Reinsurers: Clause 19

Please see our comments on Clause 2 above.

Notice of Claims: Clause 21

This clause requires the reinsured to give prompt written notice of any loss which it has reason to believe may lead to a claim under the reinsurance. The wording has been amended to clarify that this requirement applies notwithstanding the terms of any agreement entered into by the reinsured (for example: a confidentiality agreement with the original insured or some other third party). This may not be a significant problem in practice, because such agreements usually include an express carve-out that allows the reinsured to pass confidential information to reinsurers. The parties are usually prepared to accept this carve-out because the sharing of information between the reinsured and the reinsurer would normally be covered by common interest privilege (see e.g. *Svenska Handelsbanken v Sun Alliance and London Insurance plc* [1995]).

Termination: Clause 24

Notice of termination may now be given not just by registered post, but also by methods of instantaneous communication provided that there is a permanent note of that communication. So notice may now be given by email or fax.

If the law or regulation, other than sanctions regulations, of any country prohibits or prevents performance of any part of the contract or the remittance of any payment, this clause provides that in those circumstances the constrained party notifies the other party, which suspends payment until circumstances change, subject to the other party's right to terminate the contract or suspend cover for the affected business line.

Arbitration and Choice of Law: Clause 27

The revised clause now provides for arbitration under ARIAS UK Rules, rather than *ad hoc* arbitration. The ARIAS Rules are widely adopted in London market reinsurances and offer a coherent code which can help to sidestep procedural wrangles, without requiring the parties to engage the services of an arbitration body.

The new clause is an improvement on the old in various other ways. For example, the old clause provided for the two party-appointed arbitrators to make an Award; if they could not agree then they were to bring in the Chairman of the Tribunal to make a majority Award.

The new clause by contrast provides for all three arbitrators to decide the matter. It also expressly allows the parties to appoint lawyers or other professional advisers as arbitrators, provided they have at least 10 years' experience of the industry.

Reinsured's damages for late payment limited writeback: Additional Clause B

This is the optional writeback to the exclusion of cover under Clause 2.2 of the main wording.

Non Marine Exclusion (Cargo): Additional Clause E

This clause is an optional exclusion that, as regards cargo risks, excludes inter alia process and retail stock risks.

Cyber Attack Exclusion: Additional Clause F

This is an optional exclusion that excludes cyber attack cover i.e. cover the policy might otherwise afford for cyber losses, where the losses arise from the use of an IT Device "as a means for inflicting harm". These words are taken from CL380, the Institute Cyber Attack Exclusion Clause. It is an optional exclusion in the JELC Clauses, rather than in the main body of the wording, perhaps to reflect the fact that marine and energy policies do not always incorporate CL380, or adopt amended CL380 language, and so avoids a potential mismatch between the cyber cover afforded by the underlying and XL policy.

For further information on the new wording, please contact nigel.brook@clydeco.com or mike.roderick@clydeco.com.