



# FCA BI Test Case - the appeal

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### FCA compliance consultants

- \* BIBA/AMII Compliance Manual
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## Today's event

- Thank you to your LI for hosting
- Participation is **very** much encouraged
- Verbal and chat forum questions welcome
- Please complete the feedback survey
- You will get the slides
- Feel free to connect with me on **LinkedIn**.



## What I will cover

1. Supreme Court Appeal
2. What the FCA now require insurers to do
3. Your duties as a broker + ICOBS



## Learning objectives

This talk will give you an insight into:-

- The final result of the FCA's test case on Business Interruption Insurance
- Why compliance with ICOBS is important now more than ever



## Just bear in mind

- There is a lot of detail and I will attempt to highlight some of the **KEY** pieces of information (lots of words...)
- Please refer to the FCA BI pages for further information and bear in mind lots of claims have already been paid
- This is my personal 'take' on the judgment and is not formal advice so please take up whatever professional help you may need
- Happy to do the talk in-house



# 1<sup>st</sup> Poll

## Who do you work for?



Hilary Term  
[2021] UKSC 1  
*On appeal from: [2020] EWHC 2448 (Comm)*

### JUDGMENT

**The Financial Conduct Authority (Appellant) v  
Arch Insurance (UK) Ltd and others (Respondents)  
Hiscox Action Group (Appellant) v Arch Insurance  
(UK) Ltd and others (Respondents)  
Argenta Syndicate Management Ltd (Appellant) v  
The Financial Conduct Authority and others  
(Respondents)  
Royal & Sun Alliance Insurance Plc (Appellant) v  
The Financial Conduct Authority and others  
(Respondents)  
MS Amlin Underwriting Ltd (Appellant) v The  
Financial Conduct Authority and others  
(Respondents)  
Hiscox Insurance Company Ltd (Appellant) v The  
Financial Conduct Authority and others  
(Respondents)  
QBE UK Ltd (Appellant) v The Financial Conduct  
Authority and others (Respondents)  
Arch Insurance (UK) Ltd (Appellant) v The  
Financial Conduct Authority and others  
(Respondents)**

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# NEWS


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## Insurers must pay small firms for Covid lockdown losses

By Kevin Peachey  
Personal finance correspondent  
1 hour ago

Coronavirus pandemic



### Top Stories

Growing concern over Brazil coronavirus variant  
Researchers say the new variant could be contributing to soaring infections in Brazil's Amazonas state.  
5 hours ago

Brazil Covid variant already in UK, scientist says  
50 minutes ago

Insurers must pay small firms for lockdown losses  
1 hour ago

## Background

- Most SME type policies cover property damage and have basic cover for BI as a consequence of property damage
- Some can be extended to cover other non-property damage forms of BI to incl notifiable diseases and prevention of access
- Some insurers paid whereas many did not
- FCA's aim was to clarify key issues of contractual uncertainty
- Test case considered 8 insurers and 21 representative wordings so that any judgment would help resolve the greater number of potential claims
- 370,000 policyholders, 700 types of policy and 60 insurers
- High Court said a number of wordings should respond but some should not
- Appeal was from FCA and 6 insurers
- Appeal did not decide that ALL BI policies will now pay

## Initial thoughts...

The Supreme Court has recognised that insurers were wrong to argue that:-

- coverage was applicable only if there were narrow local restrictions
- they could deny claims because the cover had not been intended to be provided
- because the interruption and therefore losses would have happened in any event
- we are definitely in “new territory”



## Clearly

- Momentous
- Insurance is an economic necessity
- Claims still have to be proved
- Common sense attitude has prevailed
- Policy construction needs to develop as has not kept up to date



## And post March 2020?

- Insurers tightened wordings
- Covid is most definitely excluded
- Has clarity become clearer then?
- Third lockdown? Future lockdowns?
- Indemnity periods?
- The future of notifiable disease cover?
- PandemicRe?



## What have FCA said?

- FCA will be working with insurers to ensure that they now move quickly to pay claims that the judgment says should be paid, making interim payments wherever possible
- Insurers should also communicate directly and quickly with policyholders that have made claims affected by the judgment to explain next steps
- Tens of thousands of small firms and potentially hundreds of thousands of jobs are relying on this
- Dear CEO Letter 18 Sept 2020 and Guidance issued in June 2020 still stand (all policyholders should have been contacted by now)



# Worst hit sectors

- Airlines + Tourism + Hotels
- Arts + Theatres + Entertainment
- Hospitality
- High Street Retail
- Hair + Beauty



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## Business interruption insurance

First published: 14/05/2020 | Last updated: 15/01/2021 | [See all updates](#)



Find out about how we have been obtaining legal clarity on business interruption (BI) insurance during the coronavirus (Covid-19) crisis. We'll update this page with information on what we've done and are doing

The coronavirus pandemic has led to widespread disruption and business closures resulting in substantial financial loss. Many customers have made claims for these losses under their BI insurance policies. There has been widespread concern about the lack of clarity and certainty for some customers making these claims, and the basis on which some firms are making decisions in relation to claims.

### Related information

[Supreme Court judgment in the BI insurance test case](#)

[FCA press release on the Supreme Court judgment \(15 January 2021\)](#)

[Draft guidance: Business interruption insurance test case](#)



## Reinsurance

- What are “natural perils” and covid one?
- Would the government restrictions be classed as such?
- Can losses be aggregated?
- Has this been a “catastrophic event”?
- Has this been an “occurrence”?
- UK wide jurisdiction but concentrated only in respect of measures in England?
- PRA will have been assessing insurer solvency to incl/excl the availability of reinsurance payouts



## 1. Supreme Court Appeal



## In a nutshell...

1. certain matters of construction relating to:
  - a. Disease Clauses
  - b. Prevention of Access Clauses
  - c. Hybrid Clauses
2. whether the Divisional Court was correct:
  - a. to apply certain counterfactual scenarios in relation to the operation of the clauses in relevant policies which provided for loss adjustments (the "Trends Clauses")
  - b. in its analysis of Orient-Express



## Supreme Court Appeal

- i. Disease clauses
- ii. Prevention of access clauses
- iii. Causation
- iv. Trends clauses
- v. Pre-trigger losses
- vi. Orient Express case



# Crux of judgment

- SC unanimously dismissed insurers' appeals
- All of the insuring clauses will provide cover for BI caused by covid
- Insurers did try to say that pandemics were not BI and that policies were never written or priced to cover this
- They also said competing causes were not covered but the SC disagreed
- There is no ability to reduce claims due to covid pre-triggering a downturn
- However, each policy still needs to be considered against the detailed judgment to work out what it means for that policyholder



The image shows a screenshot of the Bure Valley Railway website. At the top, there is a navigation bar with the railway's name, a search icon, a phone number (01263 733858), and links for Tickets & Timetable, Groups, Explore, Events, Facilities, and About Us. The main banner features a photograph of a red steam locomotive pulling a train through a green landscape. Overlaid on the image is the text: 'TRAINS START RUNNING FROM 11TH JULY - SEE NEW TIMETABLE' and 'PRE BOOKING ADVISABLE DUE TO REDUCED CAPACITY'. Below the image, there are three buttons: 'OPENING TIMES', 'ONLINE BOOKING AVAILABLE' (highlighted in a yellow box), and 'DAILY TIMETABLE'. A URL 'https://www.bvrw.co.uk/#null' is visible at the bottom left.

## Section 2 - Business interruption – optional cover

### Additional covers and limits


### Automatically included?

|  |   |
|--|---|
| Bomb hoax £500,000 in total in any one period of insurance.  | ✓ |
| Unspecified suppliers £250,000 or 10% of the sum insured, whichever is the less, for any one loss                                | ✓ |
| Unspecified customers £250,000 or 10% of the sum insured, whichever is the less, for any one loss                                | ✓ |
| Storage at other locations £100,000 any one loss   | ✓ |
| Essential personnel £25,000 in total in any one period of insurance  | ✓ |
| Exhibitions £100,000 in total in any one period of insurance   | ✓ |
| Failure of utilities supply £250,000 any one loss  | ✓ |
| Failure of utilities supply – terminal ends - £250,000 any one loss  | ✓ |
| Fines, penalties and damages £25,000 in total in any one period of insurance   | ✓ |
| Loss of attraction £250,000 whichever is the lesser for any one loss   | ✓ |
| Motor vehicles £500,000 in total in any one period of insurance  | ✓ |
| Notifiable disease, vermin, defective sanitary arrangements, murder and suicide £500,000 in total in any one period of insurance | ✓ |
| Prevention of access – non damage  | ✓ |
| Prevention of access   | ✓ |
| Rental charges   | ✓ |
| Transit £25,000 any one loss   | ✓ |

## Section 2– Business Interruption

### 12. Notifiable disease, vermin, defective sanitary arrangements, murder and suicide


**consequential loss** following:

- a)
  - i. any occurrence of a **notifiable disease** at the **premises** or due to food or drink supplied from the **premises**;
  - ii. any discovery of an organism at the **premises** likely to result in the event of a **notifiable disease**;
  - iii. any **notifiable disease** within a radius of twenty five miles of the **premises**; 

### 13. Prevention of access

**consequential loss** as a result of **damage** to property within a 1 mile radius of **your premises** which prevents or hinders the use of the **premises** or access to it.  
The maximum **we** will pay in total in any one **period of insurance** is stated in the **schedule**.

### 14. Prevention of access – non damage

**consequential loss** resulting solely and directly from an interruption to **your business** caused by an incident within a 1 mile radius of **your premises** which results in a denial of access or hindrance in access to **your premises** during the **period of insurance**, imposed by any civil or statutory authority or by order of the government or any public authority, for more than 24 hours. 

The maximum **we** will pay in total in any one **period of insurance** is stated in the **schedule**.

**Consequential loss**

Loss resulting from interruption of or interference with the **business** carried on by **you** at the **premises** following **damage** to property used by **you** at the **premises** for the purpose of the **business**.

**Damage(d)**

Physical accidental loss of or destruction of or damage to the property insured.

**Indemnity period**

The period beginning when **damage** occurs, and ending when the results of the business cease to be affected because of the damage, but not exceeding the **maximum indemnity period**.

**However for the Notifiable disease additional cover the following definition applies:**

the period during which the results of the **business** will be affected following the loss, discovery or accident beginning:

- a) in the case of a), d), e) and f) with the date of the loss or discovery; or
- b) in the case of b) and c) with the date from which the restrictions on the **premises** are applied and ending not later than the **maximum indemnity period** after that.

60

**Notifiable disease**

Illness sustained by any person resulting from:

- a) food or drink poisoning; or
- b) any human infectious or contagious disease (excluding Acquired Immune Deficiency Syndrome (AIDS)) an outbreak of which the competent local authority has stipulated will be notified to them.

## i. Disease clauses

- The SC considered a typical wording (RSA). Insurers stated that losses were only covered if the disease had occurred in the insured area
- It would be impossible for an insured to show that losses resulted from a localised occurrence as opposed to the wider pandemic and government response
- FCA were of the opinion that as long as one case had occurred in the defined area that cover then applied
- SC said any occurrence of a notifiable disease within the specified area is an insured peril and not anything that occurs outside that area
- Each case of illness is a separate occurrence – not the outbreak nor the disease itself but rather the illness sustained by any person resulting from that disease



- SC found that the disease clause provides cover for BI caused by any cases of illness resulting from covid that occur within a radius of 25 miles of the insured premises
- It does not cover BI caused by cases of illness that occur outside of that area

SC did agree with the HC:-

- Cover is not confined to BI which results only from cases of a notifiable disease within the 25 mile radius as opposed to other cases elsewhere
- Significance should be attached to the potential for a notifiable disease to affect a wide area



- Illness needs to be manifested by a person within the insured premises or within 25 miles of them
- SC construed the disease clauses more narrowly than the HC and the FCA
- Wordings were not expressed to apply only to occurrences of illness within the relevant radius
- This did not have the effect that the disease clauses will not in practice respond in the circumstances of the pandemic



- Insurers argued that cover only applied if the disease only occurred in the relevant locality
- The FCA argued this was incorrect - covid outbreak in the relevant policy area was an indivisible part of the disease + the disease occurring in a very large number of places (insured peril is a composite one)
- The court agreed with the FCA's analysis, concluding that the proximate cause of the BI was the notifiable disease + each of the individual occurrences was a separate but effective cause of the national actions
- This is significant for businesses as it means they will not need to point to specific local outbreaks



## ii. Prevention of access

SC reached the same conclusion as it did for the disease clauses

The appeals focussed on:-

1. The nature of the public authority intervention to trigger the clause, in particular, was force of law required
2. The nature of the prevention or hindrance



## Nature of intervention

- Focus on Hiscox wording - SC did not accept that a restriction must always have the force of law before it can fall within the description
- “Restriction imposed” may include a mandatory instruction in anticipation that legally binding measures will follow shortly afterwards or will do so if compliance is not obtained
- An instruction by a public authority may amount to a “restriction imposed” if in clear enough terms to allow reasonable certainty as to what compliance requires
- In most cases the relevant instructions would be directed at the insured premises or the use of them but they are not required to be so



## Key dates

- **3 March:** UK covid action plan
- **5 March:** covid becomes a notifiable disease in England/Wales
- **11 March:** WHO declares covid to be a pandemic
- **16 March:** Gov directs people to stay at home, stop non-essential contact and unnecessary travel, work from home where possible, and avoid social venues
- **20 March:** Gov directs various categories of business to close, such as pubs, restaurants, gyms etc (given legal effect by Regulations coming into force on **21 March**)
- **23 March:** Gov announces lock-down involving closure of further businesses including all non-essential shops and restrictions on individual movement (given legal effect by Regulations coming into force on **26 March**)





## What did this mean?

- The announcement given by the government on 20 March 2020 (named businesses should close) was capable of being a “restriction imposed” - these businesses would reasonably understand that compliance was required
- Regulation 6 of the 26 March Regulations which did not order particular businesses to close but which prohibited people from leaving their homes without reasonable excuse was also capable of being a “restriction imposed”
- SC did not rule on whether each of the announcements and regulations were to be treated in the same way but clearly stronger in respect of schools having to close, certain businesses having to close, etc
- General instructions - stay at home, stop all unnecessary travel and social contact, work from home, etc



## What will trigger the clause?

- SC satisfied if either the insured is unable to use the premises for a discrete part of its activities or if unable to use a discrete part of the premises for its business activities since in both there is a complete inability to use but cover only applies for that part of the business for which the premises cannot be used
- Golf course - can stay open but clubhouse had to close - inability to use a discrete part of the club for a discrete but important part of the business (provision of food and drink and hosting of functions)
- Restaurant or shop that stayed open for take-away or mail order may now claim for the loss in person part of the business
- Interference or disruption which does not bring about a complete cessation would be enough



### iii. Causation

- Insurers argued that in reality there were multiple causes of loss, such as the virus itself, its impact on public confidence and economic activity, and the other measures imposed by the government aside from its order to close premises
- Insurers therefore argued that it cannot be shown that a business would not have suffered loss “but for” the occurrence of covid near the premises or, alternatively, but for the government restrictions
- SC rejected these arguments
- Elements and effects on the insured’s business all arise from the same original cause - the covid pandemic



- Proximate cause = covid (at least one case) + the actions, measures and advice of the government
- Causal connection required had to take account of the nature of cover provided so that insured peril + similar uninsured events bring about a loss even if the occurrence of the insured peril is neither necessary nor sufficient to bring about the loss itself
- Causal link between the insured peril and loss will be one of proximate causation
- Well established that where there are two proximate causes of loss, neither of which is excluded but only where one is insured, insurers are liable
- Conclusion does not depend on the particular terminology used in the clause to describe the required causal connection



## iv. Trends clauses

- Trends clauses (part of quantification machinery) are intended to ensure that the indemnity is not reduced or inflated by factors unrelated to the cover
- Insurers said they were not liable for losses which would have occurred regardless of the insured peril
- Trends clauses provided insurers with a second bite of the cherry in reducing indemnity due - this time on how much rather than the basis of causation
- SC considered this as a form of exclusion as there to quantify losses and not delineate the scope of cover
- Trends clauses should be construed consistently with insuring clauses so as not to take away cover
- No deduction is to be made for same underlying or originating cause – covid and various consequences will not be trends or circumstances



## v. Pre-trigger losses

- Many businesses suffered a downturn in business due to covid before the insured peril was triggered and insurers said this should be taken into account as a trend and deducted from the claim
- SC decided that indemnity is there to ensure the insured's financial results are the same as what would have been achieved had the insured peril (+ underlying or originating cause) not occurred
- Insurers need to focus on what would have been earned had there been no covid disregarding any demonstrable revenue drop prior to the policy being triggered



## vi. Orient Express Case

- This earlier case law had set precedent - BI losses caused by two hurricanes where the material damage was covered but subsequent BI was not as insurers said these would have been incurred in any event due to the devastation to the area around the hotel
- HC said wrongly decided and declined to follow it
- SC went further and decided it should be overruled
- BI loss resulted from the hotel damage + damage to surrounding area - insured and uninsured peril (damage to rest of area) operating concurrently
- Providing that the uninsured peril is not excluded the loss resulting from both is covered



## Learning outcomes?

- Clarity in wordings – once you establish your intentions, define what is meant carefully and utilise exclusions if need be but ensure that they are clear and understood by all parties
- Covid has not gone away and businesses are still interrupted
- Definition of disease per policy? Up to date?
- Severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) is the name of the new virus (11 Feb 2020). This name was chosen because the virus is genetically related to the coronavirus responsible for the SARS outbreak of 2003. Whilst related, the two viruses are different and are also mutating



## 2. FCA requirements



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[www.fca.org.uk](http://www.fca.org.uk)

18 September 2020

Dear CEO,

### **Business Interruption (BI) Insurance**

On Tuesday, the High Court handed down its judgment on the BI test case. The objectives of the BI test case have and continue to be to achieve clarity as quickly as possible for policyholders and insurers on whether certain BI policies and wordings respond to the Covid-19 pandemic. This judgment is a critical step in obtaining that clarity.

#### Claims handling

We believe that insurers should reflect on the clarity the judgment provides and, irrespective of any possible appeals, consider the steps they can take now to progress claims of the type that the judgment says should be paid. This should include taking all reasonable steps to ensure that all those claims are ready to be paid and settled at the earliest possible opportunity after any relevant appeals.

Insurers should analyse the scope of any appeal. They should then, under Chapter 5 of our [Guidance](#), consider the implications for their relevant non-damage BI policy wordings where they have determined that the test case may affect the outcome on claims generally, including questions of causation.

Where insurers have policy wordings which were:

- affected by the test case, but
- where the relevant questions in the test case are not subject to any appeal,

then they should, in accordance with Chapter 7 of our [Guidance](#) (and the Financial Ombudsman Service's (FOS) expectations for complaints accepted by them), reassess all potentially affected claims/complaints, unless the claim or complaint has been properly settled on a full and final settlement basis. If the FOS has accepted the complaint, the insurer should keep the FOS fully informed.

Where insurers have policy wordings which were:

- affected by the test case, and
- the relevant questions in the test case are the subject of an appeal,

then we expect insurers to continue to progress claims of the type that the judgment says should be paid, as described above, so that they are as progressed as possible when any appeal judgment is handed down.

#### Government support

Insurers should consider our August 2020 [statement](#) on the deductions that some insurers have been making from claims payments for some types of Government support policyholders have received during the pandemic. This statement highlighted particularly that insurers need to consider the appropriateness of such deductions on a case by case basis in the context of their policy, and treat their customers fairly in accordance with [Principle 6](#). It set out the need for insurers to consider individually the precise terms of the policy, the claim and how the policyholder applied any government support they received.

We also noted that the treatment of any forms of Government support as income for tax purposes may well differ from how the support should be assessed under a BI policy. Tax considerations typically do not form any part of the calculation of losses for business interruption policies. We therefore do not consider the Government's treatment of the Small Business, Retail, Hospitality and Leisure or Local Authority Discretionary grants for tax purposes is a proper basis for insurers treating those payments as turnover under the policies. Nor do we see that insurers can apply these amounts as savings against fixed business expenses. This is because the amounts received are not attributable to any particular business expense and policyholders will have used the grants in any number of ways. We expect firms to have explicitly considered the treatment of the various forms of government support

Insurance **POST**

## Government hits out at insurers over grant deductions from BI claims



Emmanuel Kenning

[@InsPostbod](#)

28 Sep 2020

Indicative reading time: 1 minute

**John Glen MP, economic secretary to HM Treasury, has rebuked insurers deducting government grants from business interruption claims payments and warned of further action.**

"It is the government's firm expectation that grant funds intended to provide emergency support to businesses at this time of crisis are not to be deducted from business interruption insurance claims," he stated.

Glen, *pictured*, noted that the effect of making the deductions – [an issue previously reported on by Post](#) – was that rather than supporting businesses and protecting jobs during the pandemic "taxpayer funds are being channelled into savings for insurers".

He called on providers making deductions to "respect the spirit" of the

### Communicating with policyholders

Insurers should communicate directly and as soon as possible with policyholders who have made claims/complaints potentially affected by the judgment to explain the next steps. Under Chapter 6 of our [Guidance](#), insurers should provide at least an initial update on the implications of the judgment by 22 September 2020. We know the level of detail that insurers can provide at this stage, when the scope of any appeal is known, and how quickly they can communicate the full implications for each policyholder will depend on their particular policy wordings and the implications of the judgment for those wordings. We expect insurers to provide the clearest information that they are able to at the earliest opportunity.

### Providing us with information on affected policies

Under Chapter 5 of our [Guidance](#), insurers should update the information they previously provided to us. We will give further details on how they should do that once we know the scope of any appeal.

### Summary

The High Court judgment on the test case has brought greater clarity and certainty for all parties. It is critical that this results in insurers paying valid and successful claims in full at the earliest possible date to support business and consumers during the current situation. Where we see that insurers are not meeting the expectations set out here, we will use the full range of our regulatory tools and powers to ensure they do so. We will also continue to co-ordinate closely with the Financial Ombudsman Service.

## Finalised guidance

### Business interruption insurance test case: Finalised guidance for firms

June 2020

- 6.3 Insurers should publish sufficient details with appropriate prominence and signposting to keep all policyholders with relevant non-damage business interruption policies updated about the test case and its implications for potential claims under their policies. Insurers may publish this information on the firm's website or by other general means. This information should be published promptly after 17 June 2020.

## So?

- Insurers should have been considering in detail claims pending the result of the appeal
- If claims are delayed compensation could become payable
- Businesses remain under threat
- General reaction post March is to exclude covid...
- Pandemic Re?



Further to MS Amlin's recent letter we continue to review the Financial Conduct Authority (FCA) test case judgment, assess the decisions made and how it impacts the claims we have received.

However, we understand how important it is to resolve this situation as quickly as possible and avoid any unnecessary delay in concluding **whether this affects our decision to decline your claim, and also your subsequent complaint.**

Therefore, although our review is still ongoing and we are unable to confirm cover in respect of your claim, we invite you **on a strictly without prejudice basis** (i.e. without prejudice to the policy position and all your rights) to let us know the total of the losses **you will be seeking to recover under your policy as a result of the impact of Covid 19 on your business,** together with all the evidence you seek to rely on in support - pre & post period of loss if applicable.

Standard turnover accounts;

Profit & loss accounts;

Expense accounts;

Order books (or equivalent) for 6 months pre lockdown and 6 months post lock down;

Diary/booking confirmations;

Records of Employee wages/Staff costs and records of Employee absence;

Details of any payments received under the Government Furlough Scheme and/or Small Business Grant Fund; and

Business decisions taken during this period.



## 3. ICOBS (for brokers)



# Broker's duties

- **Assessing the insured's needs**
- Not obtaining insurance
- Not obtaining the insurance the insured wanted
- **Not obtaining insurance meeting the insured's needs**
- Not exercising discretion in a reasonable way
- Failing to act with reasonable speed
- Liabilities associated with Non-Disclosure
- Liabilities associated with Misrepresentation
- **Not advising adequately on the existence of and terms of cover**
- **Other failure to give competent advice**
- Liabilities during the currency of the policy
- Failure in respect of notification and in respect of claims

Based on Jackson & Powell Professional Liability Chapter 10.



## Demands and needs



ICOB5 5.2.2

**R**

01/10/2018



(1) Prior to the conclusion of a *contract of insurance* a *firm* must specify, on the basis of information obtained from the *customer*, the demands and the needs of that *customer*.

(2) The details must be modulated according to the complexity of the *contract of insurance* proposed and the type of *customer*.

(3) A statement of the demands and needs must be communicated to the *customer* prior to the conclusion of a *contract of insurance*.

[Note: articles 20(1) and 20(2) of the *IDD*]

ICOB5 5.2.2A

**G**

01/10/2018

A *firm* may obtain information from the *customer* in a number of ways including, for example, by asking the *customer* questions in person or by way of a questionnaire prior to any *contract of insurance* being proposed.

ICOB5 5.2.2B

**R**

01/10/2018

When proposing a *contract of insurance* a *firm* must ensure it is consistent with the *customer's* insurance demands and needs.

[Note: recital 44 to, and article 20(1) of, the *IDD*]

ICOB5 5.2.2C

**G**

01/10/2018

*ICOB5 5.2.2BR* applies whether or not advice is given and in the same way regardless of whether that contract is sold on its own, in connection with another *contract of insurance*, or in connection with other goods or services.

## ICOBS 5.3 Advised sales

### Suitability

**ICOBS 5.3.1** A *firm* must take reasonable care to ensure the suitability of its advice for any *customer* who is entitled to rely upon its judgement.

**R**

01/10/2018



### Advice on the basis of a fair analysis

**ICOBS 5.3.3** If an *insurance intermediary* informs a *customer* that it gives:

**R**

01/10/2018



(1) advice on the basis of a fair analysis, it must give that advice on the basis of an analysis of a sufficiently large number of *contracts of insurance* available on the market to enable it to make a recommendation; or

(2) a *personal recommendation* on the basis of a fair and personal analysis, it must give that *personal recommendation* on the basis of an analysis of a sufficiently large number of insurance contracts available on the market to enable it to make a *personal recommendation*;

and in each case, it must be in accordance with professional criteria, regarding which contract of insurance would be adequate to meet the customer's needs. [Note: article 20(1) third paragraph of the *IDD*]

### Personalised explanation

**ICOBS 5.3.4** Where a *firm* provides a *personal recommendation* (other than in relation to a *connected travel insurance contract*) the *firm* must, in addition to the statement of demands and needs, provide the *customer* with a personalised explanation of why a particular *contract of insurance* would best meet the *customer's* demands and needs.

**R**

01/10/2018

[Note: article 20(1) third paragraph of the *IDD*]

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## ICOBS 6.1 Providing product information to customers: general

### Ensuring customers can make an informed decision: the appropriate information rule

**ICOBS 6.1.5**

**R**

01/10/2018



(1) A *firm* must ensure that a *customer* is given appropriate information about a policy in good time and in a comprehensible form so that the *customer* can make an informed decision about the arrangements proposed.

(2) The information must be provided to the *customer*:

(a) whether or not a *personal recommendation* is given; and

(b) irrespective of whether a *policy* is offered as part of a package with:

(i) a non-insurance product or service (see *ICOBS 6A.3* (Cross-selling)); or

(ii) another *policy*.

(3) Appropriate information is both objective and relevant information, and includes *IPID information*.

### What level of information needs to be provided?

**ICOBS 6.1.6B**

**R**

01/10/2018

A *firm* must ensure that the level of appropriate information provided takes into account the complexity of the *policy* and the type of *customer*.

[Note: article 20(4) of the *IDD*]

**ICOBS 6.1.7**

**G**

01/10/2018



The level of information required will vary according to matters such as:

(1) the knowledge, experience and ability of a typical *customer* for the *policy*;

(2) the *policy* terms, including its main benefits, exclusions, limitations, conditions and its duration;

(3) the *policy's* overall complexity;

(4) whether the *policy* is bought in connection with other goods and services including another *policy* (also see *ICOBS 6A.3* (cross selling));

(5) distance communication information requirements (for example, under the distance communication *rules* less information can be given during certain telephone sales than in a sale made purely by written correspondence (see *ICOBS 3.1.14 R*)); and

(6) whether the same information has been provided to the *customer* previously and, if so, when.

### Appropriate information for commercial customers

ICOB 6.1.7A

A firm dealing with a *commercial customer*.

G

01/10/2018

- (1) may choose to provide some of or all of the appropriate information in an *IPID* (see *ICOB 6.1.10AR*), a *policy summary* or a similar summary if it considers this to be a comprehensible form in which to provide that information; and
- (2) should include the *IPID information* (regardless of whether an *IPID* itself is provided).

ICOB 6.1.9

Cancellation rights do not affect what information it is appropriate to give to a *customer* in order to enable him to make an informed purchasing decision.

G

06/01/2008



## Concerns for brokers

- Did you assess fully the client's requirements - were wider policy wordings/limits available incl pandemic cover and at what cost? Good file notes?
- Was the standard level of cover adequate (plus any optional extensions) and on what basis did you recommend the policy as suitable?
- Can you be blamed for the insurers' interpretation of their own wording?
- As wordings have changed since March 2020 how does this judgment affect the policies sold since then and current/future lockdowns? Does your advice reflect this?



## Practical steps for brokers?

- Ensure it remains on your risk register (this is a BIG risk)
- Have you had any claims or notifications?
- **PI insurance is hard to get covering covid and is much more expensive and you must have it covered to continue to advise clients**
- If you have an exposure how much is your excess and consider this part of TC2.4 (bear in mind the onerous financial resilience surveys)
- Ensure advice to clients over this is very clear i.e. state pandemics will not be covered and staff trained and up to speed (esp as WFH)



## Manchester Underwriting

- 9 out of 10 claims that we've received do not relate to wordings affected by the decision
- Brokers may well not be liable but we're going to be fighting a lot of claims still
- And even where there is cover, it's often sub-limited at a very low level in relation to the insured's loss (why was it sold then?)
- 50 claims/notifications - 90% clearly have no cover and the claimant is arguing that the broker has been negligent in selling a policy that doesn't give cover that was needed
- Personally, I think brokers will not be liable in most (but not all) cases



# 2<sup>nd</sup> Poll

## What are you going to do now?



## Learning objectives

This talk will give you an insight into:-

- The final result of the FCA's test case on Business Interruption Insurance
- Why compliance with ICOBS is important now more than ever



**Thank you for listening**

**Questions and debate please**

**[www.branko.org.uk](http://www.branko.org.uk)**

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