



Modernisation of the London Insurance Market

Harnessing Electronic Communications in
Support of Placement

Miriam Goldby

British Insurance Law Association 16.06.2017

Process: Subscription Market

1. Prepare Quote request. This is often done using Market Reform Contract (MRC) template.
2. Obtain quotes
3. Firm Order (MRC Template mandatory as part of contract certainty initiative)
4. Obtain written line / “scratch” of leading underwriter
5. Obtain full / over-subscription from following underwriters
6. Adjust risk percentages
7. Prepare signing slip – “signed lines”
8. Obtain initial of leading underwriter
9. Prepare policy form
10. Obtain signature from central signing facility

LMG, Electronic Support for Placing, 2012, 6

In circumstances where the broker and underwriter record their agreement on paper, this agreement should be captured electronically so the benefits of using the process are realised. Any risk that the later electronic version differs from the paper agreement is no different to that which exists in an entirely paper process where an agreed MRC may be tidied-up and re-presented. This risk should be managed in the same way as present. If the position requires it, scans of the previously agreed MRC can be included with messages requesting final agreement.

Both the broker and underwriter may regard agreeing electronically after having agreed on paper as an unnecessary step. However, what it does ensure for both parties is that their systems include a complete and consistent record and audit trail of all contracts, allowing a single processing approach for further activities such as submissions to XIS.

LMA, Guide to London Market Processing (March 2016), 6

A number of electronic placing systems exist which use a PDF (or similar) image of the MRC or manage the process via email but these are the exception. In addition, a small number of brokers and underwriters have begun using XML (data)-based versions of the MRC which enable underwriters to automatically capture and reuse risk data within their own systems.

The publication of *'London Matters'* identified opportunities to introduce efficiencies through the adoption of a utility platform for placing and endorsing risks. In addition, leading brokers have indicated a desire to place all risks in London via a single electronic channel supporting both face-to-face and remotely broked placements. However, at this time there is no market-wide standard data-based quotation and placing system and the Placing Platform Limited (PPL) project seeks to address this. PPL is under the oversight of the LMG.

LMA, Guide to London Market Processing (March 2016), 23

Objectives

The objectives are to:

- provide a single channel for all risks to be placed in the London market
- record key data relating to those risks centrally
- provide a resulting dataset that can be consumed and augmented by other data stakeholders throughout the lifecycle of the risk.

Benefits

Benefits of participating in a market approach include:

- an efficient market governance solution
- better value from collective purchase and the coordinated management of service
- a formalised role for insurers (and particularly underwriters) including greater influence over development of functionality and protocols.

In turn the platform will provide the starting point of an efficient risk lifecycle based on structured data.

Legal Issue 1

Crema v Cenkos [2010] EWCA Civ 1444, [40]

There can be problems determining the terms of a contract when it is not wholly written, but is either entirely oral or is partly oral and partly in writing, particularly when it is a business contract between two people who are used to dealing in a particular business or trade. This is because commercial men frequently use their own kind of shorthand. There may well be common assumptions about what is to happen in certain circumstances and neither the particular circumstances, nor what is assumed will happen if they occur, are articulated expressly when the contract is agreed orally or some of its terms are put in writing.

Legal Issue 1

- What is the impact of using a mixture of media and multiple records in the formation of the contract?
- How are inconsistencies avoided?
- What takes precedence in the event of inconsistency?
 - Does hard law provide an answer?
 - Does soft law or “market understanding”?
- Legal Framework:
 - Statute Law (Civil Evidence Act 1995) and Common Law
 - Agreements between parties (Interchange Agreements and Business Process Protocols)
 - Market practice and usage

Quotation vs Slip

- *Pindos Shipping Corp v Raven (The Mata Hari)* [1983] 2 Lloyd's Rep. 449, 452-453
 - “fresh negotiation”
- *Dunlop Haywards (DHL) v Erinaceous Insurance* [2009] EWCA Civ 354, [82]
 - “essentially an administrative process”

Dunlop Haywards v Erinaceous Insurance [2009]
EWCA Civ 354, [82], per Rix LJ

The Mata Hari ... was a case ... where an alleged oral “held covered” agreement was overtaken by a fresh negotiation concluding in many new terms. It was impossible therefore to say that the class maintained warranty could not have been deliberately introduced at that point without any error. In the present case, however, ... all the essential terms of the excess cover were already in place at the time of the quotation sheet and FON. Those were brief documents, but they were premised on the considerable information provided and the terms of the expiring insurances. It is said therefore that the drawing up of the slip was an essentially administrative process, and that it was for that reason that those who signed the slip were for the most part ... junior colleagues of the underwriters who had signed the quotation sheet and/or FON. It certainly appears to be the case that none of those junior colleagues can recall anything about the signing of the slip. It may be that there was some minor addition or alteration to the slip, but the matter is obscure to me, and the overturning of the whole basis of the contract is quite another matter.

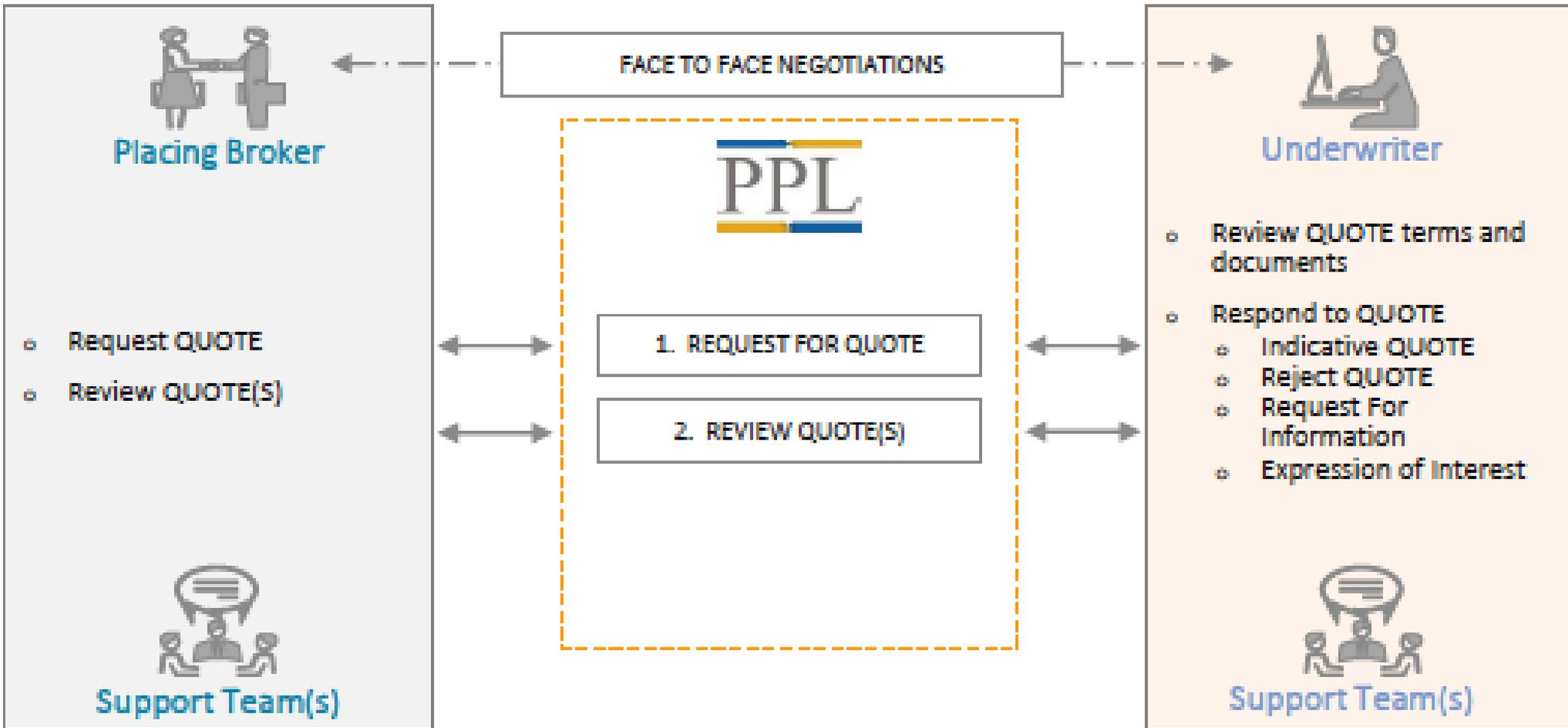
Slip vs Policy

- *Ionides v Pacific Fire & Marine Insurance Co* (1871) LR 6 QB 674, 685 , affirmed by (1872) LR 7 QB 517.
 - “may be given in evidence where it is, though not valid, material”
- *Youell v Bland Welch* [1992] 2 Lloyd’s Rep 127
 - Only admissible where there is a request for rectification (obiter)
- *HH Casualty and General Insurance v New Hampshire Insurance Co & Ors* [2001] EWCA Civ 735
 - In principle always permissible to look at the slip “as part of the matrix or surrounding circumstances of a later contract” (obiter)
- *Great North Eastern Railway v Avon Insurance plc* [2001] 1 Lloyd’s Rep IR 793 (CA), para. 31
- *Assicurazioni Generali SpA v Ege Sigorta AS* [2002] Lloyd’s Rep. IR 480 (QB), at 484

Assicurazioni Generali v Ege Sigorta [2002] Lloyd's Rep. IR 480, 484, per Colman J

'... the tendering of wording by a London broker to an underwriter is, in so far as the function of the wording is to reflect exactly what has already been agreed in the slip, a purely ministerial exercise. Unless expressly indicated by the broker as containing matters inconsistent with the pre-existing slip, the tender of wording would not be understood as an offer to vary the contract nor would the signature of the wording be understood by the broker as an acceptance of an offered variation. It would be understood only as agreement that the broker had accurately turned the slip contract into policy wording. Consequently, if both the broker's staff and the underwriters' staff incorrectly agreed that the wording was accurate, whereas in truth it was not, what had been accomplished would not be an amended contract but a wording inaccurately reflecting the true contract.'

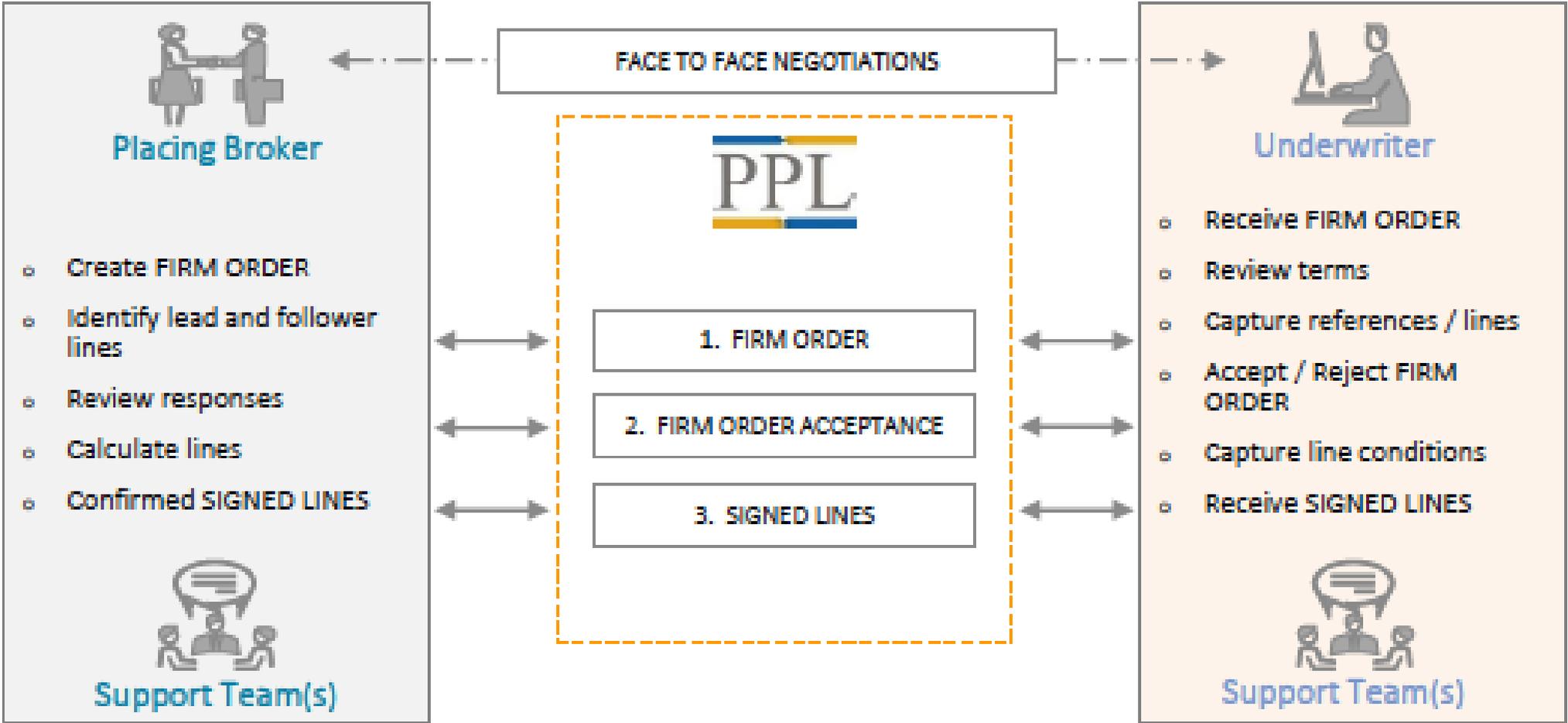
PPL Quote Process



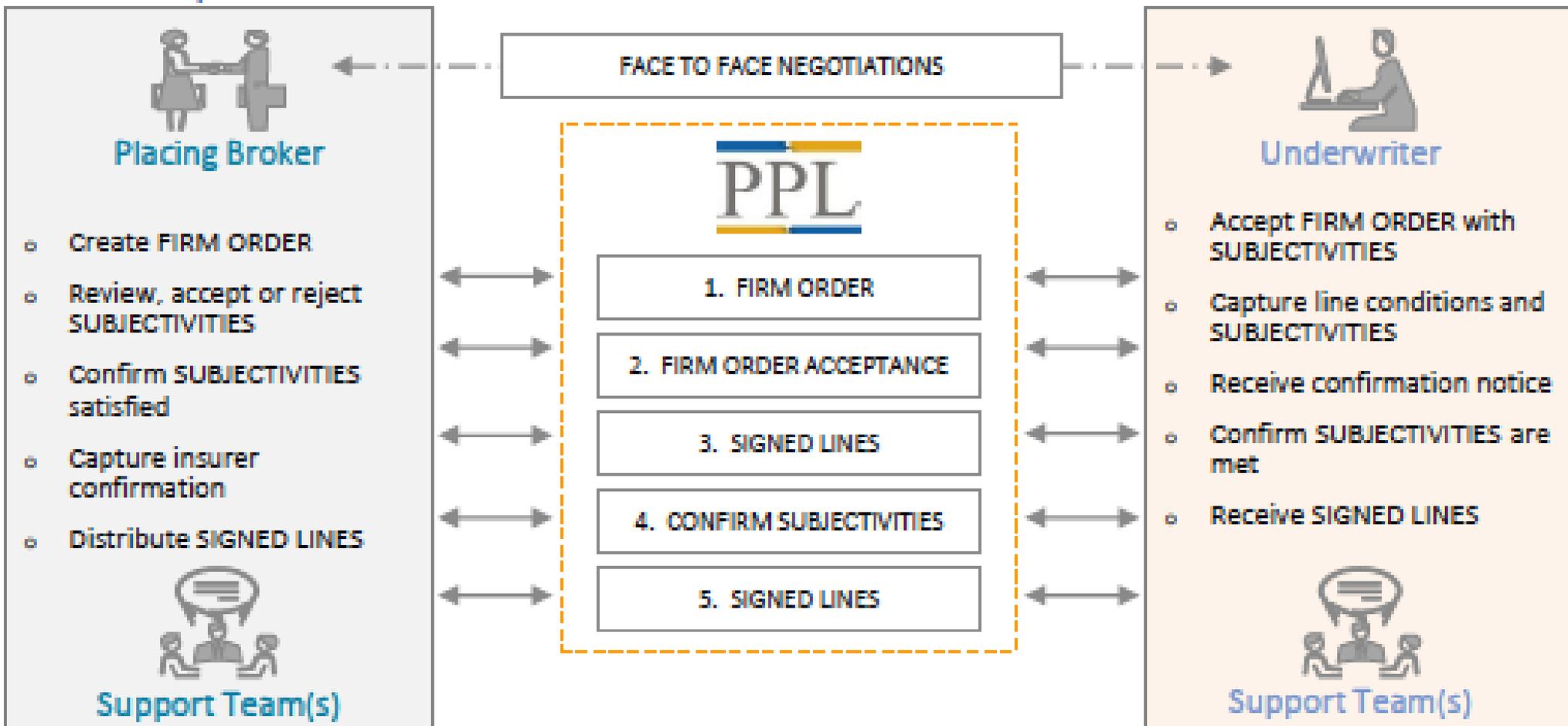
PPL and inconsistencies

- Authorisation to perform any action within the contract formation process determined at the start with team configuration.
- Roles include “read only” and “fully binding” roles (three different stamps).
- Quote request sent first to proposed lead(s). Request includes
 - Placement document (details of risk) uploaded in free format (e.g. word doc)
 - A few fields to be filled in on submission form
- Four response possibilities for underwriters with clearly marked tabs:
 - Quote (which brings up a few more options)
 - Amendment of placement document – changes automatically tracked.
 - Validity of the quote in days
 - EOI (Expression of Interest)
 - RFI (Request Further Information)
 - Reject
- System automatically generates placing quote sheets which include the text of the typed exchanges.
- A legal warning pops up every time a contractually relevant action is about to be taken over the system.

PPL Firm Order Process



PPL Firm Order Process (Subjectivities)



PPL and inconsistencies

- Broker receives quote with amended Placement Document.
- System highlights differences between sent and received documents.
- To enter into a binding contract, the broker clicks on “Firm Order”, uploads a placing slip (MRC) and fills in a submission form (many of the fields of which are pre-populated from the quotation request submission form).
- If MRC template used for Quote request, same document (as amended) can be used for Firm Order.
- As many following underwriters as desired may be sent the Firm Order submission form.
- Required:
 - Selection of “Slip Lead” and “Lloyd’s Lead”
 - Percentages that it is proposed each underwriter should take
 - Details as to the premium payment
- On receipt the proposed leader has to agree to lead and all underwriters have to agree to percentages and stamp the agreement.
- Underwriters may “Accept”; “Accept with Subjectivities” or “Reject”.

PPL and inconsistencies

- Underwriters can amend the proposed premium terms and can include line conditions within the subjectivities.
- The decision to cover can be made subject to peer review.
- Once stamps obtained, the broker can recalculate the lines and can sign down stamped lines unless this is not permitted by the underwriter.
- The final MRC document can be converted to a PDF with the written and signed lines as well as any subjectivities appearing at the end.
- Each underwriter will have the exact same document on their system, however it will only show their own (or their own and the lead's) lines.
- Integration of PPL with users' back-office systems is in the pipeline.
- PPL does not interface with the policy issue and signing services offered by Xchanging and/or the Insurers' Market Repository.
- This functionality should be considered by the market in order to achieve a seamless policy issuing process and preclude inconsistencies between slip and policy.
- On the other hand, increasing use of "slip policies" might make this unnecessary.

Slip Policies

- Lloyd's Glossary: "Slip policy" - A signed slip which is agreed to be a policy where the insured or the reassured does not require a separate policy.
- MIA 1906, ss 23(1), 24(1) and 25(1)
- Financial Services and Markets Act 2000 (Meaning of "Policy" and "Policyholder") Order 2001 (SI 2001/2361)
- *General Reinsurance Corp v Forsakringsaktiebolaget Fennia Patria* [1982] QB 1022, 1027: 'It looks to me like any other slip used in the London market, but the intention evidently was that it should itself be the reinsurance contract and would not be superseded by a policy.'
- *HH Casualty and General Insurance v New Hampshire Insurance Co & Ors* [2001] EWCA Civ 735, para 95: 'the slip was called a "slip policy". That immediately calls into question the basic presumption that a slip is intended to be superseded by a policy. Secondly, it is hard to see how the policy wording, for all that it is presented as a self-contained "policy", was intended to supersede the slip policy. It would appear ... that the policy wording is incomplete, and that it would be preferable to regard the policy wording as containing the "Conditions" to be incorporated into the slip policy.'

Contractual Framework

- Interchange agreements applicable among users of electronic communication systems can pre-establish the moment when underwriter becomes bound (evidence of agreement). E.g. Interchange Agreement relating to use of The Exchange (predecessor to PPL).
- Content of the agreement (evidence of cover):
Evidence of Cover in Electronic Placing: Guidance issued by LMG
- Where there is conflict or ambiguity
 - LMG p 9 Rule of thumb: “latest information available at time of acceptance”
 - LMG p 10 Order of precedence

LMG, Evidence of Cover in Electronic Placing, 2010, 10

Where information is presented at the same time but in multiple formats, there is scope for differences in the data, leading to ambiguity about which information is correct. In an ACORD placement message, for example, there could be a difference between structured data in the message and the associated placing document accompanying the same message.

Where material differences exist between information supplied in various forms within an ACORD message at a common point in the placing process, the following order of precedence applies.

- 1) The MRC or other placing document (e.g. scanned or Word/pdf) associated with the message.
- 2) Supporting business documents (e.g. schedule of values) associated with the message.
- 3) Other supporting information (e.g. graphics, pictures, videos and sounds) associated with the message.
- 4) Structured ACORD compliant risk data, delivered within the ACORD XML message.

For any bi-lateral agreement on precedence of data to take effect, the intention of the trading partners should be formalised by an agreement.

Market Practice and Usage

- Decided insurance cases demonstrate that courts will not necessarily require formal proof custom to give effect to market practices, e.g. cases on
 - “customary manner” of assigning a policy
 - meaning of specific contractual words
 - legal effect of market shorthand
- Use of PPL and other electronic tools supporting placement is not currently mandatory, but if it were to become a ubiquitous practice that all communications are recorded electronically over these tools, the courts are likely to take this into account when determining the content of contracts.
- This is in line with the contract certainty objectives.

“Customary Manner” of Assignment

Safadi v Western Assurance Co (1933) 46 Ll L Rep. 140, 144: ‘upon proof, assignment in some customary manner other than by written assignment or indorsement thereon can be a good assignment, and I am of that opinion. ... I have no doubt myself that policies often are assigned otherwise than by indorsement. In the case of c.i.f. contracts they are so often handed over without any indorsement being made upon them that I should be surprised if it could not be proved that that is a customary manner of assigning policies.’

The Angel Bell [1979] 2 Lloyd’s Rep 491, 497: ‘[the broker] told me that unsigned and undated notices are accepted in the market as affecting an assignment. It would not have required much to rebut this evidence, but the cargo interests have not done so.’

South British Insurance v Mediterranean Insurance & Reinsurance [1986] 2 Lloyd's Rep. 247

(at 248-249, per Neill LJ)

In par. 7 [of the amended points of defence] there appear the words –

... 35% of original net premium is the element in all risks rate which is generally recognised in the market as attributable to the risk of total loss [- and it was asked -] whether it is alleged that there exists a custom of the market to this effect.

The answer was:

It is not alleged that there exists a custom but it is alleged that the principle stated is standard and well recognised.... It is inconceivable that any reasonable person in the insurance market could have intended that the result contended for by the Plaintiffs should ensue.

(Such a result was also observed by an expert witness to be “contrary to all common sense and market understanding”)

(at 250: reference to Bingham J's first instance decision): ‘The First Defendants may or may not succeed in proving a custom of the market....’

Counsel for defendants continued to insist that what he was arguing were “questions of reasonableness and the practice of the market”

Dunlop Haywards v Erinaceous Insurance [2008] EWHC 520 (Comm), [37]

Summary of evidence of Mr Haylett, a Lloyd's broker for over 25 years:

- (1) A firm quotation such as that given by the underwriters when they gave their initial quotations is treated as an offer which can be accepted by the client.
- (2) If the offer is accepted, the broker informs the underwriter and a contract comes into existence at that point.
- (3) In the Lloyd's and London market the underwriter is presented with the quotation and asked to confirm that he has been informed of the acceptance of the offer, which he invariably does by writing down "FON".
- (4) If the underwriter intends to change the basis of the quotation when putting down an "FON", it is inconceivable that neither he nor the broker would make any note or record of the changed terms on the quotation sheet....
- (5) If there is no such change noted or endorsed, the "FON" indicates that a binding contract exists on the terms of the previous quotation.
- (6) If the original quotation has subjectivities ... the "FON" contract will also carry the same subjectivities. However, it is still a binding contract, albeit that it does not become unconditionally binding until the subjectivities are satisfied.

Legal Issue 2

- Can electronic tools assist in complying with the duty of fair presentation (IA 2015, s 3)?
- MRC Template contains comprehensive list of fields.
- As many documents as necessary can be uploaded to accompany the submission form.
- Audit trail will facilitate determination of whether underwriters had “sufficient information to be put on notice” (s 3(4)(b)) or “ought to know” (s 3(5)(c)).
- **Section attachments can be added so that different underwriters can be sent different documents.**
 - If a document contains information which is material to the risk is sent to some underwriters but not others, the duty of fair presentation may be breached vis-à-vis the latter (though not the former).
 - Audit trail will indicate who received it and who did not.
 - Some underwriters may be entitled to avoid the contract and not others.

Resources

- ACORD and LMG, *Electronic Placing of Insurance Risks: Business Process Protocols*, v1.1, January 2009
- LMA *Guide to London Market Processing: Current Market Processes and Related Modernisation Activity* (Issue 20 - March 2016)
- LMG *Electronic Support for Placing Systems Processes and Procedures*, Version 1.6, January 2012
- LMG, *Evidence of Cover in Electronic Placing: Guidance* (v 1.6, May 2010)
- LMG and Boston Consulting Group, *London Matters: The competitive position of the London Insurance Market* (November 2014)
- LMG, *PPL Day in the Life Scenarios* (January 2017)
- Xchanging, *Electronic Policies User Guide*, Version 1.1, March 2010