

Insurance Policy Reviews

Giving wordings the attention they deserve

LEARNING OBJECTIVES OF THE SESSION

- **Understand how to read your policy most effectively and how it will be construed by a Court in any dispute**
- **Identify what different terms mean and the impact any breach will have**
- **Understand how certain clauses interact with the provisions the Insurance Act 2015**
- **Explain the impact different words can have on aggregation provisions and identify how these need to match your business exposures**
- **Ensure the Dispute Resolution provisions are fit for purpose**

INTRODUCTION

- Insurance is a significant asset
- Does your policy wording get the attention it deserves? – contrast the position with other commercial contracts
- In the event of a dispute, the wording will be scrutinised
- Policy reviews can vary, from identifying red flags to full wording review
- **Key question: what are you trying to achieve from your review?**
- In a hard market, pick your negotiation battles with insurers

POLL QUESTION

How often do you undertake a review of your policy wordings?

- a) Never, I rely on my broker for that
- b) Usually at every renewal
- c) Every 2 to 5 years
- d) Ad hoc if there is a reason to, eg. new broker, new insurer, introduction of the Insurance Act 2015

OUTLINE

Understanding the wording

- Documents
- Construction

What is the scope?

- Insuring clauses
- Definitions and exclusions, including carve-backs
- Aggregation

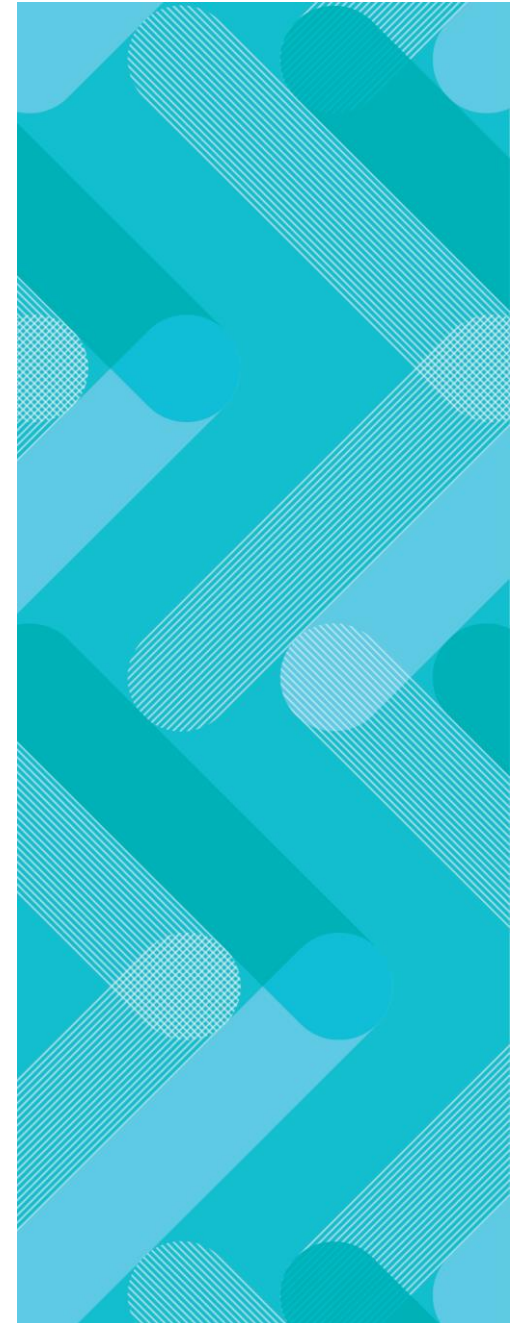
Key terms

- Classification – warranties and conditions
- Insurance Act 2015
- Notification
- Insured's conduct
- Subrogation
- Dispute resolution

NATURE OF THE TASK

- Reviewing wording for:
 - Whether it represents best in class in the market (broker input)
 - Whether it works, and will perform as expected, from a legal perspective (lawyer input)
- The fundamentals of legal efficacy:
 - Who is insured
 - Scope of cover (insuring clauses, extensions, exclusions, definitions)
 - Basis of cover/triggers – e.g. claims made v losses occurring
 - Risks attaching (year-on-year / other insurance / indemnification)
 - Role of reinsurance / use of captives / fronting
 - Operation of financial limits, including aggregation
 - The insured's obligations and implications of breach
 - Governing law and resolving disputes

Understanding the wording



DOCUMENTS

Slip

- created by the broker
- contains a summary of the terms of the proposed insurance
- presented by the broker to potential underwriters for their consideration
- final version shows underwriters' stamps, signed lines and underwriting references as inserted by each underwriter at the request of the broker

Policy

- Schedule: sets out specific terms e.g., identity of insured, policy period
- Wording: sets out the terms and conditions of the insurance contract and can be a standard form document

Endorsements

- a later agreement which amends the policy e.g. alters the scope of the cover

Cover Note / Summary of Cover

CONSTRUCTION

“The core principle is that an insurance policy, like any other contract, must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean. Evidence about what the parties subjectively intended or understood the contract to mean is not relevant to the court’s task.”

Financial Conduct Authority v Arch Insurance [2021] UKSC 1

CONSTRUCTION – KEY PRINCIPLES

Words to be given their ordinary meaning in the context of the policy

Words with a technical meaning will be taken to bear that meaning

Can consider background circumstances which existed at the time that the policy was written – the factual matrix

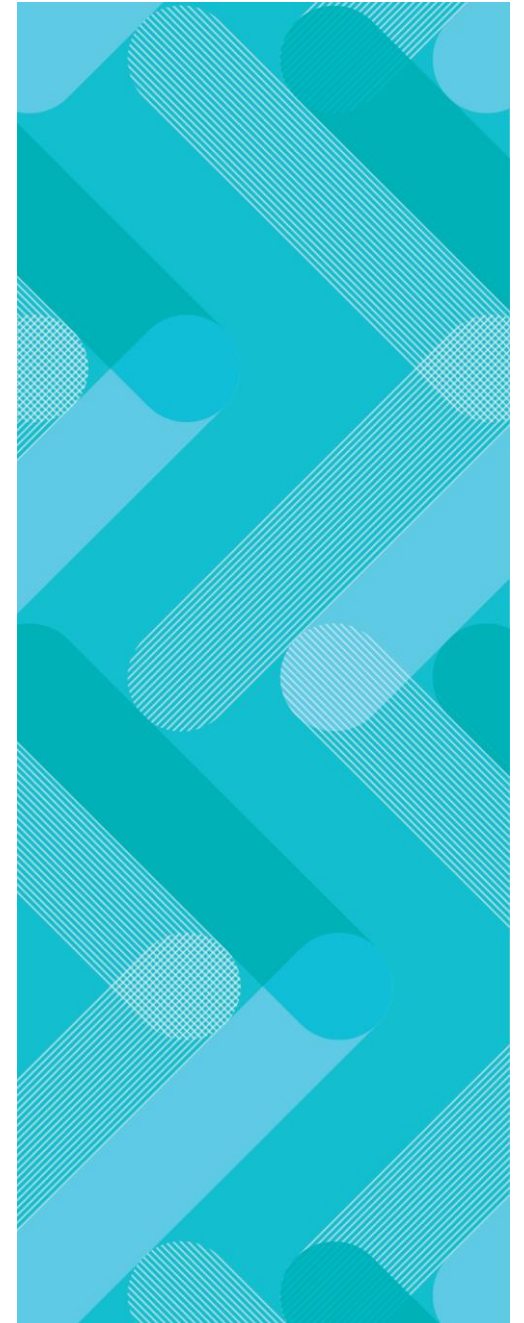
Subjective intent of either party is irrelevant

Policy will be construed in accordance with sound commercial principles and good business sense, but this should not be invoked retrospectively

Policy will be construed in line with the purpose of an insurance contract

Contra proferentem rule – any genuine ambiguity will be construed against the party who prepared the document

What is the scope?



WHAT IS THE SCOPE?

- **Insuring clause**
 - The starting point
 - Does it cover the risk?
 - Check 'Insured' is the correct entity/entities
- **Read with the Definitions**
- **Exclusions**
 - Ensure sufficiently narrow and clearly drafted
 - Can significantly limit cover
 - Beware carve backs
- **Extensions**
- **Watch out for standard market clauses**

Sample insuring clause

“Subject always to the Limits of Liability and to all of the terms, conditions, exclusions and other provisions hereinafter mentioned, the Company shall indemnify the Insured for all Damages and Defence Costs they become legally obligated to pay as a result of a Claim in excess of the Self-Insured Retention”

(Liability Policy)

WHAT IS THE SCOPE?

Carve-backs

Cyber Policy examples

The Insurer(s) shall not be liable to make any payment for that part of any loss and/or claim:

Employer Duties

*arising out of the **Insured Entity's** duties as an employer or any of the **Insured Entity's** employment practices (including wrongful dismissal, discharge or termination, discrimination, harassment, retaliation or other employment related claim) in relation to **Employees**.*

*This Exclusion 5 shall not apply to **Privacy Breach** in relation to **Personal Data** of an **Employee** or an individual applying for employment with the **Insured Entity**.*

Terrorism and Strike Action

*arising out of any **Act of Terrorism** or any strike or similar labour action.*

*This Exclusion 20 shall not apply to **Unauthorised Access, Denial of Service, a Cyber Extortion Event, an advanced persistent threat (APT) against a Network or any other Cyber Terrorism**.*

AGGREGATION

What is aggregation?

- Wording that provides for two or more separate losses covered by the policy to be treated as one individual loss
- Has to be a unifying common factor that links them together
- Can apply to deductibles and limits – and policy attachment
- Crucial message – the words matter!
- Consider the words in the context of your own business exposures – how will claims or losses actually arise / frequency and severity

Act / Error / Omission
(can be 'related' or a 'series of related')

Event / Occurrence

Originating Cause / Source

AGGREGATION

One size does not fit all

£1m each and every claim, £20,000 excess each and every claim



AGGREGATION

One size does not fit all

£1m each and every claim, £20,000 excess each and every claim



AGGREGATION

Aggregation and policy attachment

- Check that attachment wording and prior notice exclusion dovetail to avoid gaps in cover between policy years

Sample wording

Single Loss means all Damages and/or Defence Costs payable under this Policy attributable to, or in connection with one originating cause or source.

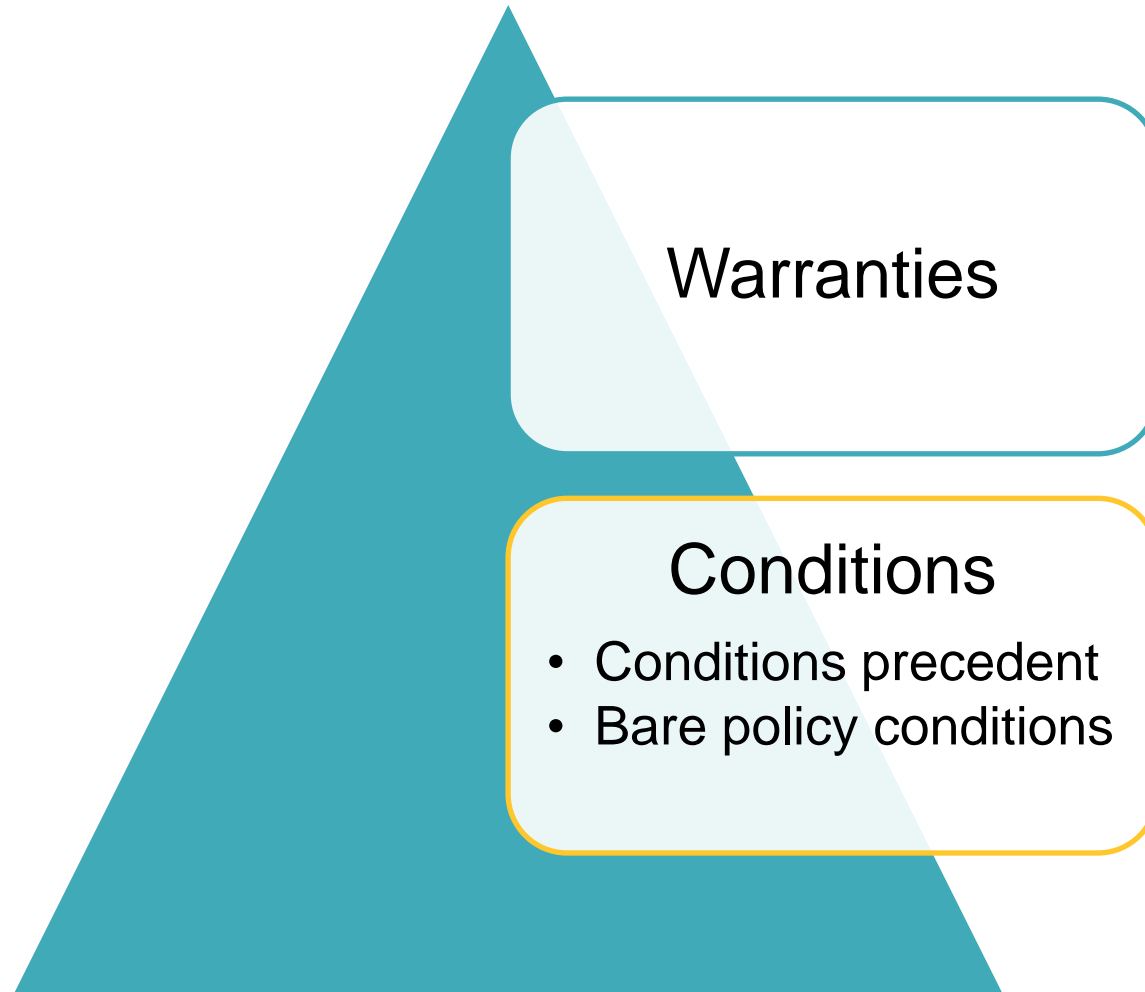
Related Claims

Any Claim first made or circumstances which the Insured first discovers, after the expiration of the Period of Insurance, which gives rise to sums payable which constitute part of the same Single Loss as sums payable for any previous notification provided in accordance with General Condition 13 (Notification), will be deemed to have been first made or first discovered by the Insured during the Period of Insurance, and the provision of any notice in relation to such Claim or circumstances after the expiration of the Period of Insurance shall be deemed notification during the Period of Insurance and in accordance with General Condition 13 (Notification).

| Key terms



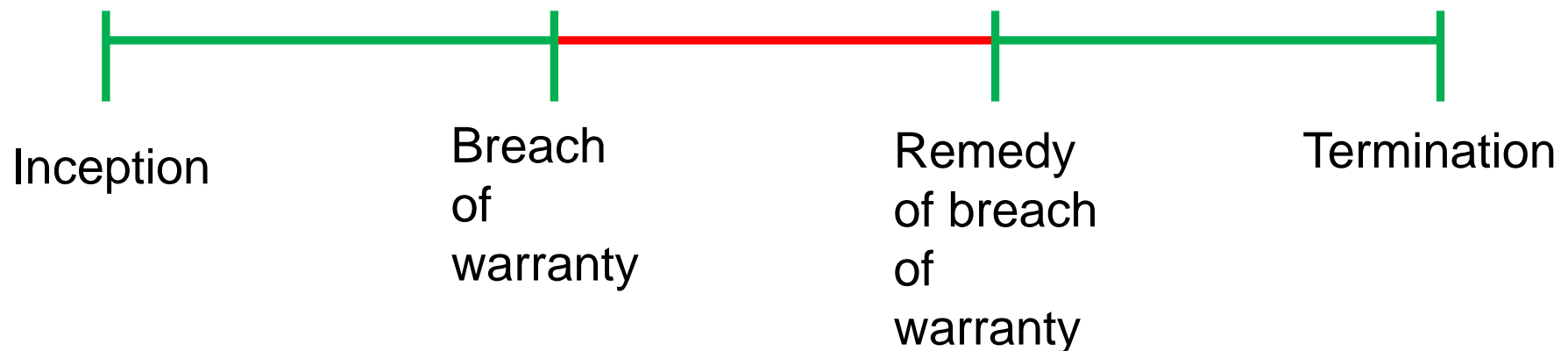
CLASSIFICATION OF INSURANCE POLICY TERMS



WARRANTIES

What is a warranty?

- Pre-contractual promise by the insured
- Warranties can be created by:
 - express statement (eg. “It is warranted that...”)
 - construction if the term goes to the root of the contract and damages would be inadequate/unsatisfactory remedy
- Warranties operate as suspensive conditions



CONDITIONS

Conditions precedent

- CP to validity of policy/ attachment of risk – failure to comply means insurer does not come on risk
- CP to the insurer's liability – failure to comply generally prevents insured from making a particular claim
- Can be created by:
 - Consequences of breach spelt out
 - Labelled as "condition precedent"
 - Sweeper clauses – AVOID!

Bare conditions

- Deal with conduct of insured during currency of policy
- Breach generally gives insurer an action for damages for proven loss
- No right to determine the policy

CONDITIONS

Which of these clauses is a condition precedent?

This policy covers claims first made against the Insured during the Period of Insurance and notified to the Insurer during the same Period of Insurance...

It is a condition precedent to any liability on the part of the Insurer under this Policy that the Claims Conditions are duly and faithfully observed and fulfilled by the Insured.

The Insured shall give to the Insurer notice in writing as soon as practicable of any circumstance of which they shall become aware during the policy period which may give rise to a loss or claim against them. Such notice having been given any loss or claim to which that circumstance has given rise which is subsequently made after expiration of the policy period shall be deemed for the purposes of this insurance to have been made during the subsistence hereof

CONDITIONS

Which of these clauses is a condition precedent?

*This policy covers **claims first made** against the Insured during the Period of Insurance **and notified** to the Insurer during the same Period of Insurance...*

*It is **a condition precedent** to any liability on the part of the Insurer under this Policy that the Claims Conditions are duly and faithfully observed and fulfilled by the Insured.*

*The Insured shall give to the Insurer notice in writing as soon as practicable of any circumstance of which they shall become aware during the policy period which may give rise to a loss or claim against them. **Such notice having been given** any loss or claim to which that circumstance has given rise which is subsequently made after expiration of the policy period shall be deemed for the purposes of this insurance to have been made during the subsistence hereof*

POLICY TERMS UNDER THE INSURANCE ACT

Terms not relating to the loss
Section 11

- Applies to all terms which tend to reduce the risk of loss of a particular kind or at a particular location/time
- If insured can show that the non-compliance could not have increased the risk of loss = no remedy for insurers

Implied terms
Section 13 A

- Insureds now have right to claim damages if insurance claim is not paid within a reasonable time
- Usual hurdles for proving breach of contract will apply

Key takeaway: Don't agree to insurers removing new Insurance Act 2015 protection

POLICY TERMS UNDER THE INSURANCE ACT

Issues to consider

Define 'senior management'

Consider narrowing whose knowledge is attributed to the insured for the duty of fair presentation

Ensure any Innocent Non-Disclosure clauses are fit for purpose

Consider if any aspects of the Act should be dis-applied

Check if the insurer is seeking to contract out

NOTIFICATION

- Check these provisions carefully:
 - What triggers the notification requirement?
 - Whose knowledge?
 - What is the timing?
 - What, if any, requirements as to form of notification?
- Avoid conditions precedent

Property Damage/Business Interruption policy:

*The insured must notify insurers of **any occurrence** which is **likely to give rise to a claim** under this policy **as soon as practicable** upon the **Head of Insurance or the General Counsel being made aware** of such an occurrence*

Public Liability policy:

*The insured shall as a condition precedent to insurers' liability give **written notice** **immediately of any occurrence which may give rise to claim** under the policy*

INSURED'S CONDUCT

- **What obligations are on the insured?**
- **Does the wording assist you?**
 - Qualify terms, e.g. “within a reasonable time”, “to the extent within the insured’s control”
 - Try and ensure the insured has as much leeway as possible eg. in terms of timing
- **What is the consequence of breach?**
 - **Avoid conditions precedent and warranties** (breach of which may afford insurers a defence without showing prejudice)
 - Beware sweep-up clauses
 - If warranties are included, ensure the business is aware of them so that any breach of warranty can be remedied

INSURED'S CONDUCT

Ted Baker Plc v Axa Insurance UK Plc & Ors [2017]

Facts

- Ted Baker made a BI claim in relation to a large amount of stock stolen from its warehouses by an employee
- The combined insurance policy contained a sweep-up clause:
“It is a condition precedent to any liability on the part of the Company under this Policy that...the terms hereof so far as they relate to anything to be done or complied with by the Insured are duly and faithfully observed and fulfilled by the Insured”
- The claims conditions required Ted Baker to deliver “reasonably required” documents to Insurers
- Ted Baker failed to provide a set of documents pending confirmation of Insurers’ position on whether they would pay Ted Baker’s costs in producing the documents
- Insurers claimed this constituted breach of a condition precedent
- Ted Baker argued that it had believed Insurers had ‘parked’ the issue of production of documents and that they were under a ‘duty to speak’ to inform Ted Baker otherwise

INSURED'S CONDUCT

Ted Baker Plc v Axa Insurance UK Plc & Ors [2017]

First instance

- Claim failed for breach of the condition precedent:
 - There had been no agreement to 'park' the request for documents
 - Insurers were not under a duty to speak
- Claim also failed on quantum grounds - loss of profit on thefts didn't exceed deductible

Court of Appeal

- Appeal succeeded on condition precedent issue – Insurers were under a duty to speak
- Ted Baker was entitled to expect Insurers to notify them that they regarded the documents as outstanding – therefore, estopped from relying on CP
- No general duty on Insurers to warn a policyholder as to the need to comply with policy conditions, but duty to speak where reasonable man would expect correction of misapprehension (dishonesty not required)
- Ted Baker's claim still failed as it had not established quantum of loss

SUBROGATION

- Unless the policy states otherwise, where an insurer has paid a loss in full to the insured, it has a right to pursue any claim that the insured would have had against a third party
- Policy is likely to state that subrogation rights must be preserved
- Insurer will have control of any claim it is subrogated to and this may impact commercial relationship between the insured and third party
- Think about waivers of subrogation – removes the insurer's right to pursue a claim against a named party
- Consider carefully in the context of contractual arrangements and co-insurance

DISPUTE RESOLUTION CLAUSES

Choice of law

What is it?

Contractual term in which the parties specify that any dispute arising under the contract shall be determined in accordance with **the law** of a particular jurisdiction

Why does it matter?

- Some countries require their law to be chosen
- Some systems of law are more favourable than others e.g. insurability of civil fines
- Nature of the legal system (civil vs. common law) and the extent of jurisprudence for certainty

Example:

This agreement and any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with it or its subject matter or formation shall be governed by and construed in accordance with the law of England and Wales.

DISPUTE RESOLUTION CLAUSES

Choice of forum

Jurisdiction clause

- A term of a contract in which the parties specify that any dispute arising under the contract shall be determined by the courts of a particular jurisdiction
- Choice of jurisdiction clauses can be exclusive or non-exclusive

Arbitration clause

- A term which provides an agreement by the parties to submit disputes to arbitration
- Typically provides details on the seat of arbitration, procedural rules to be applied, how and how many arbitrators to be appointed and the scope of disputes covered

Optional extra – Mediation clause

- Provides for mediation on either mandatory or voluntary basis
- Query whether include and, if so, at discretion of the insured?
- Typically provides mechanism for trigger, time limit to settle and how mediator will be chosen

DISPUTE RESOLUTION CLAUSES

Example problem: Conflicting clauses within the coverage tower

Example:

Policy	Governing law	Jurisdiction
Primary	New Jersey	New Jersey
First Excess	New York	England
Second Excess	New York	Arbitration
Third Excess	New York	Arbitration

Issues:

- 3 sets of lawyers may be needed = costs x 3:
 - one set in New Jersey to advise on New Jersey law and procedure;
 - one set in New York to advise on New York law; and
 - one set in England to advise on English procedure
- Risk of inconsistent judgments
- Inability to consolidate proceedings

DISPUTE RESOLUTION CLAUSES

Example problem: Various clauses within single policy

Example:

Jurisdiction and Governing Law

It is agreed that this Policy is governed by English Law and any dispute arising under this Policy shall be litigated solely and exclusively in the English Courts.

Dispute Resolution

Any controversy arising out of in connection with this policy shall be finally settled by arbitration. Such arbitration proceedings shall take place in London in accordance with the Rules of the London Court of International Arbitration, by three arbitrators appointed in accordance with the said Rules. The proceedings shall take place in the English Language.

Arbitration

If any difference shall arise as to the amount to be paid under this Policy (liability being otherwise admitted) such difference shall be referred to an arbitrator to be appointed in common agreement between Insurers and the Insured. Where any difference is so referred, the making of an award shall be a condition precedent to any right of action against the Insurers. Such arbitration shall take place in London.

Q & A



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