

FROM: TIME & TIDE SHIPPING LTD. Ames House, 6 Duke of York St., London SW1Y 6LA	TEL: 020 7839 4526 FAX: 020 7839 4529 TLX: 888028
TO: International Accounting Standards Board ATTN: Mr. Peter Clark, Senior Project Manager	FAX: 7246 6411
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Message:

SENT

By Fax and email

31 OCT 2003

Dear Sirs,

Exposure Draft ED 5 INSURANCE CONTRACTS

I take this opportunity to comment on the subject Exposure Draft and its associated papers.

ED5 defines an insurance contract in the following way:

A contract under which one party (the insurer) accepts significant insurance risk from another party (the policyholder) by agreeing to compensate the policyholder or other beneficiary if a specified uncertain future event (the insured event) adversely affects the policyholder or other beneficiary.

Although uncertainty is undoubtedly a required characteristic of an insurance contract, that the insured event should take place in the future has never been a requirement at least so far as marine insurance is concerned.

Donaldson, L.J. said in *Soya v. White*, [1982] 1 Lloyd's Rep. 136, at page 145, col. 1. :

"....a loss which has in fact occurred, but which is unknown to either party, can certainly be insured against. This is why the statutory S.G. policy contains the words 'lost or not lost'."

Clause 11.2 of the standard English cargo insurance clauses, The Institute Cargo Clauses 1/1/82, specifically provides that, subject to insurable interest,

"...the Assured shall be entitled to recover for insured loss occurring during the period covered by this insurance, notwithstanding that the loss occurred before the contract of insurance was concluded, unless the Assured were aware of the loss and the Underwriters were not."

It is quite apparent from BC12 that the proposed definition in ED5 is only supposed to serve for accounting purposes, but in view of what I write above I fear certain bona fide insurance contracts might slip completely through the regulatory net.

I bear in mind that the integral notes provide:

B5 In some insurance contracts, the insured event is the discovery of a loss during the term of the contract, even if the loss arises from an event that occurs before the inception of the contract. In other insurance contracts, the insured event is an event that occurs during the term of the contract, even if the resulting loss is discovered after the end of the contract term.

B6 Some insurance contracts cover events that have already occurred, but whose financial effect is still uncertain. An example is a reinsurance contract that covers the direct insurer against adverse development of claims already reported by policyholders. In such contracts, the insured event is the discovery of the ultimate cost of those claims.

"Lost or not lost" is most likely to apply where cover is taken out in the middle of a voyage, but is retrospectively effective from its beginning.

Although superficially it might appear that the first part of B5 applies, in that the loss might occur before "the inception of the contract", in fact the marine contract I am referring to rather has the characteristics of the latter example in B5, in that it covers "an event that occurs during the term of the contract, even if the resulting loss is discovered after the end of the contract term". In effect, it is the "contract term" itself which is backdated. Therefore, I do not think B5 covers the point.

Neither do I think that the scenario envisaged by B6 can be brought in, whereby the "insured event" somehow relates to discovery (thereby putting it in the future). In the case I describe, I believe on any natural construction the "insured event" itself can lie in the past (from the point in time of conclusion of the contract). The policy wording "the Assured shall be entitled to recover for insured loss notwithstanding that the loss occurred before the contract of insurance was

concluded" looks pretty conclusive on that.

I think that only leaves the question as to from what point in time the "insured event" has to lie in the future. B4 of Appendix B of ED5 indicates that this is to be related to "the inception of an insurance contract", but does this mean when the risk is accepted (i.e. when the contract is concluded) or the inception of the "contract term"? Commonsense requires that it mean when the contract is concluded, and so this too does not address my concern.

I considered whether the problem could be overcome merely with a small amendment to the Appendix B notes, so that for the purposes of the definition the insured event under "lost or not lost" conditions would be the discovery of the loss, not its occurrence. I think that would probably get quite complicated, but before too long I discarded it anyway due to the definition's use of the word "specified" in relation to the future event. It seems to me that immediately obviates the use of a device to imply a different (future) event for the (possibly past) event specified in the agreement between the insurer and policyholder.

And so I am left with the somewhat simple suggestion of deleting the word "future" from the basic definition. (In view of the requirement of uncertainty, it seems to serve little or no use anyway). Of course, amendments would be needed to the Appendix B notes.

As I have said, I recognise that the proposed definition is solely for accounting purposes. Nevertheless, I trust any decision about whether the ED5 proposed definition will remain unamended will be taken conscious of the possible implications.

Yours faithfully,

A handwritten signature in dark ink, appearing to read 'S.B. Goodacre', with a stylized flourish at the end.

S.B. Goodacre

