

## GUIDANCE NOTE ON THE IMPACT OF THE NEW CONTRACTUAL TERMS REGIME ON BAR MUTUAL INSURANCE COVER

1. Members will be aware that on 31 January 2013, Annexes G1 and G2 of the Bar Code of Conduct ceased to be operative and that the Bar Council now advises them to offer their services to instructing solicitors in accordance with either the Bar Council Standard Contractual Terms contained in Annexe T of the Code of Conduct (hereafter, "the BCSCCT") or their own bespoke contractual terms, as set out on their chambers website.
2. This change gives rise to issues regarding Members' professional indemnity insurance with Bar Mutual. The purpose of this Guidance Note is to explain the steps Bar Mutual has taken to amend its Terms of Cover in light of the move to enforceable contractual terms and to answer a number of common questions that Members have asked the Managers in recent times.
3. If Members do not think their particular query has been dealt with in this Guidance Note, please do not hesitate to contact the Managers by calling 020 7621 0405 or emailing [info@barmutual.co.uk](mailto:info@barmutual.co.uk).

### Bar Mutual Cover for Contractual Liabilities prior to 31 January 2013

4. Since Bar Mutual was established in 1988, its Rules or Terms of Cover have contained the following exclusion from cover (clause 3.1(x) of the 2011 edition of the Terms of Cover):

*"Claims or Disciplinary Proceedings in respect of any liability incurred under any contract, save to the extent that such liability would have been incurred irrespective of the terms of such contract and would otherwise fall within the provisions of these Terms of Cover"*

The effect of this provision was that where the contractual liability incurred by the Member mirrored a liability that would have arisen at common law, equity or statute (for instance, the Civil Liability (Contribution) Act 1978), then the exclusion would not bite and Bar Mutual would indemnify the Member in respect of that contractual liability. In this way, Bar Mutual has been able to control the nature and extent of the civil liabilities for which it provided cover under the insuring clause (currently clause 1.1 of the Terms of Cover) by reference to what liabilities were imposed by law.

### Amendments to the Bar Mutual Terms of Cover to cater for the new regime

5. Bar Mutual has closely followed the development of the BCSCCT and the subsequent approval of the necessary amendments to the Code of Conduct by, first, the Bar Standards Board and, subsequently, the Legal Services Board to give them full effect. As the BCSCCT do no more than reflect the current position at law regarding the relationship between barristers and instructing solicitors, they complied with clause 3.1(x) of the Terms of Cover, as set out above, and any liabilities arising under them would be fully covered by Bar Mutual in the usual way.
6. However, Bar Mutual is of the opinion held by some barristers that many instructing solicitors would not be willing to contract on the basis of the BCSCCT, due to the belief that they were unduly favourable to the Bar. In

addition, it is also conscious that the amendments to the Code do not require Members to use the BCSCT and that they would be able to draft and negotiate different contractual terms if they see fit.

7. In order to respond to this important change to practice at the self-employed Bar, Bar Mutual has amended its Terms of Cover – in particular, clause 3.1(x). The amendments involve the deletion of the previous clause 1.2 (which dealt with cover for liabilities arising from conditional fee agreements) and a reorganisation, and an addition to, clause 3.1(x). The latter now reads as follows:

*“Any liability of Bar Mutual under these Terms of Cover for the following shall be excluded:*

*...*

*(x) Claims or Disciplinary Proceedings in respect of any liability incurred under any contract, save to the extent that*

*(a) such liability would have been incurred irrespective of the terms of such contract and would otherwise fall within the provisions of these Terms of Cover; or*

*(b) the contract is between the Insured Member and instructing solicitors and, insofar as its terms concern a contractual liability of the Insured Member, is in a form previously approved by Bar Mutual for the field of work performed by the Insured Member under the contract.*

*In giving its approval, Bar Mutual shall be entitled to impose terms as to the maximum amount to be indemnified in respect of such liability under these Terms of Cover or such other terms as it, in its absolute discretion, shall think fit. Bar Mutual may also withdraw such approval, provided always that not less than one month's notice of such withdrawal is given to Members.”*

These amendments came into effect at 00:00 GMT on 1 February 2013.

8. The principal effect of these amendments is to provide a basis (in clause 3.1(x)(b)) on which Bar Mutual can extend cover for contractual liabilities so that Members are not prevented from agreeing reasonable contractual terms with instructing solicitors that go beyond the BCSCT. They follow the approach Bar Mutual has used over the past 13 years in respect of liabilities arising out of conditional fee agreements. The amendments also bring together in a single clause the basis on which Bar Mutual provides cover for barristers' liabilities that arise only by virtue of contract.
9. As Members may be aware, COMBAR has now agreed model contractual terms with the City of London Law Society (“the COMBAR Terms”) which, unlike the BCSCT, Bar Mutual does believe go beyond the common law/ equitable/statutory position as between barristers and instructing solicitors. These can be found on the COMBAR website – <http://www.combar.com>.
10. Pursuant to the new clause 3.1(x)(b) of the Terms of Cover, Bar Mutual has approved the COMBAR Terms, subject to the following condition: the maximum indemnity that Bar Mutual will provide in respect of contractual liabilities arising only by virtue of contract is £100,000, exclusive of defence costs – see clause 12.4 of the COMBAR Terms.

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11. Bar Mutual will be carefully monitoring the new claims experience it receives as a result of this extension to cover.
12. If Members have any queries about their cover position, they should contact the Managers, whose contact details are at paragraph 3 above. The following Questions and Answers are intended to address any concerns Members may have about the amendments to the Terms of Cover and Bar Mutual cover for contractual liabilities in general.

### Questions and Answers

**Q1: *I intend to use the BCSCCT in respect of my future work. How does that effect my Bar Mutual cover?***

A1: Use of the BCSCCT has no effect on your Bar Mutual insurance cover. Your full limit of cover will apply to any claim made against you if the relationship between you and your instructing solicitor is governed by the BCSCCT.

**Q2: *My chambers has decided not to introduce contractual terms with solicitors who instruct us. We intend to use Terms of Business that are based on the BCSCCT but they shall expressly state that no binding contract will come into existence. Does this mean we shall not be covered?***

A2: No. You will be fully covered. Agreeing to undertake work on a non-contractual basis will not affect your Bar Mutual cover. The adverse consequence of doing so will be that you will have no right of action against your instructing solicitor and the old Withdrawal of Credit Scheme has been abolished. The same position regarding cover applies if an instructing solicitor is not prepared to put their relationship with you onto a contractual footing.

**Q3: *My chambers will be using the BCSCCT, but the instructing solicitors want terms relating to payment and interest that are more favourable to them than are found in the BCSCCT. Do we need Bar Mutual approval to amend these terms?***

A3: No. Bar Mutual's concern is with a barrister's liabilities and whether a contract has the potential to enlarge them beyond what they would be if there were no contract between a barrister and an instructing solicitor. If you would like to amend a term that does not impact on your liability position, you are free to do so, without having to consult Bar Mutual.

**Q4: *My instructing solicitor is insisting on having blanket permission to put my written advices on its knowledge database. I would prefer not to do this. Would I have any insurance cover difficulties if I did agree?***

A4: No – your Bar Mutual insurance would not be affected. However, it does give rise to a risk management issue because there will be a risk that your advice on a particular point of law may be removed from the factual context in which it was given and relied on outside that context. While a claim against you in such circumstances would be very unlikely to succeed, we strongly recommend that a disclaimer of responsibility to anyone other than the lay client for whom you are instructed is included in any advice that your instructing solicitor will store on any knowledge database.

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**Q5: *In recent years the old clause 1.2 of the Bar Mutual Terms of Cover has provided cover for contractual liabilities to a solicitor arising from conditional fee agreements where the negligence of a barrister in certain specified instances causes the lay client's case not to be a "success" (as defined in the CFA), thereby preventing the solicitor from being entitled to recover its fees. Now that the old clause 1.2 has been deleted, will Bar Mutual still cover these liabilities?***

A5: Yes. Cover will continue to be available as before via the combination of clauses 1.1 and 3.1(x)(b) of the Terms of Cover. If Members are working on CFA terms that Bar Mutual has approved in the past (that is, the Chancery Bar Association Standard CFA Conditions or the Personal Injuries Bar Association Standard CFA Terms), they remain covered.

**Q6: *My instructing wants to instruct me on the basis of the COMBAR Terms and point blank refuses to use the BCST. Does this raise insurance cover difficulties for me?***

A6: It does not, provided you ensure that the maximum liability you agree to accept in respect of any contractual liabilities that would not arise in the absence of the contract is limited to £100,000. By virtue of clause 3.1(x)(b) of the Terms of Cover, Bar Mutual has extended cover to include such liabilities where it has approved the contractual terms and subject to any conditions it decides to impose. As stated above, Bar Mutual has approved the COMBAR Terms, subject to an indemnity cap of £100,000, exclusive of defence costs.

**Q7: *My instructing solicitor is content to use the COMBAR Terms but is unhappy about agreeing a liability cap of only £100,000 in respect of contractual liabilities. What would happen to my insurance cover if I agreed to a higher limit?***

A7: You are free to agree any level of liability cap – or, indeed, that there should be no liability cap at all – in respect of contractual liabilities to instructing solicitors if you choose. If you do, however, the maximum indemnity that Bar Mutual will provide under this head is £100,000. If you agree a liability cap that exceeds £100,000, or there is no liability cap and you receive a claim under the contract with your instructing solicitor where the quantum exceeds £100,000, your Bar Mutual cover will stop at £100,000 and you will be personally responsible for any sum in excess of that. In addition, Bar Mutual will be entitled to pro-rate any defence costs incurred in respect of the claim pursuant to clause 2.2 of the Terms of Cover.