

Guidance Paper No.2

INTERNATIONAL ASSOCIATION OF INSURANCE SUPERVISORS



A MODEL MEMORANDUM OF UNDERSTANDING

September 1997

Memorandum of Understanding on Mutual Assistance and the Exchange of Information between the Authority/Jurisdiction and the Authority/Jurisdiction

Attached is a draft Memorandum of Understanding (MoU) on mutual assistance and the exchange of information.

MoU are designed to facilitate co-operation and the exchange of information between regulatory bodies. As such they are statements of intent which do not impose legally binding obligations on signatories or override domestic laws or regulations. Nor do they affect other channels of co-operation, such as arrangements which may exist covering mutual assistance in criminal matters. The strengths of MoU are seen to be in their ability to accommodate the differences between regulators, and in the flexibility they provide in responding to changing legal and regulatory environments.

Whilst the draft MoU may for some be a serviceable model on which to negotiate, there is no suggestion that IAIS members should be able to implement all the provisions in the draft. It is for individual members - in the light of their own laws, regulations and requirements - to decide whether they wish to use the text in its entirety or in part in seeking to agree a MoU with another jurisdiction. Alternatively IAIS members may simply wish to use the draft as an aide memoire as to some of the elements that an optimal MoU might include, and develop their own text reflecting the particular circumstances within their jurisdiction.

One of the key aspects of a successful MoU is the opportunity it provides to develop the relationship between the Authorities concerned. With this in mind, supervisors are encouraged to have regular contacts or meetings with each other to exchange information on developments affecting individual insurers or other general insurance developments.

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1. The [Authority/jurisdiction] on the one hand, and the [Authority/jurisdiction] on the other hand, recognising the increasing international activity in insurance markets and the corresponding need for mutual co-operation between the relevant supervisory authorities as a means for improving their effectiveness in administering and enforcing the insurance laws of their respective jurisdictions, have reached the following understanding:

NOTES:

- a. *The terms of this draft MoU are limited to the exchange of information and mutual co-operation in insurance markets. Those negotiating MoU may wish to extend the scope to include superannuation business if they have a role in this area.*
- b. *A possible alternative introduction would set out in two or more paragraphs the responsibilities of the Authorities of the two jurisdictions and the relevant legislation before going on to include text along the lines of that above.*

Definitions

2. For the purposes of this Memorandum of Understanding, the terms set out below have the assigned meanings unless the context requires otherwise:

- a. "Authority" means:
 - (i) for the [jurisdiction], the [Authority];
 - (ii) for the [jurisdiction], the [Authority].
- b. "requested Authority" means an Authority to whom a request under this Memorandum is addressed.
- c. "requesting Authority" means an Authority making a request under this Memorandum.
- d. "Insurer/insurance company" means a licensed legal entity which underwrites insurance.
- e. "person" means a natural person, unincorporated association, partnership or body corporate, government, agency, or instrumentality of a government.
- f. "laws, regulations and requirements" means the provisions of the laws, or the regulations and requirements promulgated thereunder, of [jurisdiction] and [jurisdiction] on insurance business.

3. The parties recognise that while in their laws, regulations and requirements they may define terms differently, requests for assistance will not be denied solely on the grounds of differences in the definitions used by the requesting and requested Authorities.

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c. Including too many definitions may make the MoU unduly legalistic, and could potentially restrict the scope for co-operation if the definitions were to be narrowly interpreted by those charged with implementing the MoU in the future. However, it is probably necessary for a clear common understanding of the provisions of the MoU to define some of the terms utilised within it. It is up to those negotiating MoU to decide how far they wish to go in this respect.

d. No attempt has been made here to define insurance business to be covered by the MoU - because of the differences which exist between jurisdictions - but those negotiating MoU may wish to consider doing so. In particular it should be clear whether or not the MoU is intended to cover reinsurers/reinsurance business. It may be appropriate to list the relevant laws, regulations and requirements of each jurisdiction in an Annex to the MoU.

Principles

4. This Memorandum sets forth the basis upon which the Authorities in [jurisdiction] and [jurisdiction] [reciprocally] propose to provide for mutual assistance and the exchange of information for the purpose of facilitating the performance of their functions under the respective laws, regulations and requirements of [jurisdiction] and [jurisdiction]. The purpose of the Memorandum is to [ALTERNATIVE A: help maintain efficient, fair, safe and stable insurance markets in [jurisdiction] and [jurisdiction] for the benefit and protection of policyholders] [ALTERNATIVE B: protect policyholders and potential policyholders of insurance companies, and to promote the integrity, stability and efficiency of the insurance industry], by providing a framework for co-operation, increased mutual understanding, the exchange of information and assistance to the extent permitted by laws, regulations and requirements.

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e. Alternative A above reflects wording in the IAIS By-laws. Alternative B is adapted from similar provisions in securities MoU.

5. The Authorities intend to:

- use their best endeavours to ensure that the fullest mutual assistance is provided within the terms of the Memorandum; and
- engage in consultations, as appropriate, on mutually agreeable approaches designed to enhance the integrity and efficiency of their respective insurance markets and the exercise of insurance market supervisory functions.

6. The Authorities have various powers to obtain information in the exercise of regulatory functions that are within the scope of this Memorandum. To the extent permitted by laws, regulations and requirements, each Authority will [use reasonable efforts][endeavour] on a timely basis to provide the other Authority with any information that is in its possession or discovered which appears to give rise to a breach of the laws, regulations or requirements of the other Authority, or if provided to the other Authority will be likely to assist in administering the laws, regulations or requirements of the other Authority.

7. The Memorandum does not modify or supersede any laws, regulations and requirements in force in, or applying to, the [jurisdiction] or [jurisdiction]. Nor does it create directly or indirectly any enforceable rights.

Scope

8. Each Authority proposes to ensure that mutual assistance is provided to the other, subject to its laws and overall policy, in the following areas of administration and enforcement of the laws, regulations and requirements relating to the business of insurance:

- a. administration of legislative provisions dealing with proposals for the establishment, acquisition and take-over of insurance companies;
- b. administration and enforcement of financial and other eligibility requirements for key positions of responsibility in insurance companies including ownership;
- c. the continuing monitoring, auditing, inspection and examination of insurance companies for compliance with prudential, financial reporting and other supervisory requirements;
- d. the conduct of specific inquiries into the activities of individual insurance companies;
- e. ensuring compliance with disclosure and marketing requirements for insurance products; and
- f. fraudulent practices in relation to the offer, purchase or sale of insurance products.

The Authorities will take into account the standards developed by the International Association of Insurance Supervisors where these are relevant.

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f. It is clearly for those negotiating MoU to determine on the basis of their respective responsibilities whether they wish to extend the provisions to cover - for example - insurance intermediaries and/or the sale and marketing of insurance, in addition to the regulation of the financial strength of insurance companies and the fitness of individuals engaged in the insurance industry.

g. Article 8(b) may need to take account of any restrictions which may be imposed locally by privacy legislation.

9. In response to requests that satisfy the terms set out below under the heading "Requests for information and assistance", and subject to the conditions established, each Authority will provide the fullest possible measure of mutual assistance to the other subject to its laws and overall policy. Such assistance may include:

- a. providing access to information in the files of the requested Authority;
- b. questioning or taking testimony of persons designated by the requesting Authority;
- c. obtaining specified information and documents from persons;
- d. conducting compliance inspections or examinations of insurance businesses; and
- e. permitting the representatives of the requesting Authority to participate in the conduct of enquiries made by the requested Authority pursuant to b through d of this paragraph.

Each request will be assessed on a case by case basis by the requested Authority to determine whether assistance can be provided under the terms of the Memorandum.

10. The Authorities recognise the need and desirability of providing mutual assistance and exchanging information to assist each other in securing compliance with their respective laws, regulations and requirements. However, assistance may be denied on the grounds of public interest.

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h. Public interest is taken to include issues affecting sovereignty, national security, and other essential interests.

11. The Authorities intend to ensure that assistance will be provided in the maximum number of circumstances. However, the Authorities acknowledge that certain requests may relate to a possible breach of laws, regulations and requirements that involve an assertion of jurisdiction not recognised by a requested Authority. Where a requested Authority considers that an assertion of jurisdiction in a matter that is the subject of a request would conflict seriously with and prejudice its sovereign interests the request will be denied.

12. The Authorities recognise that, so long as there are differences in the scope of the laws, regulations and requirements applied in each jurisdiction, conduct prohibited by the Authorities in one country may not be prohibited by the Authorities in the other. The Authorities intend to engage in consultations about individual cases falling outside the scope of the definition of laws, regulations and requirements to determine whether assistance will be provided in such cases.

Requests for information and assistance

13. The Memorandum does not affect the ability of the Authorities to obtain information from persons on a voluntary basis, provided that procedures in place in the jurisdiction of each Authority for the provision of such information are observed.

14. Any request for information or assistance made under this Memorandum will, wherever possible, be in writing, but in cases of urgency it may be oral and confirmed in writing within ten days.

15. To facilitate an appropriate and timely response, the requesting Authority should specify:

- a. the information or assistance required (identity of persons, specific questions to be asked etc);
- b. the purpose for which the information or assistance is sought (including in appropriate cases details of the law, regulation or requirement of the requesting Authority which is suspected to have been breached);
- c. a description of any particular conduct or suspected conduct which has given rise to the request, and its connection with the jurisdiction of the requesting Authority;
- d. the link between any suspected breach of law, regulation or requirement and the regulatory functions of the requesting Authority;

- e. the relevance of the requested information or assistance to any suspected breach of law, regulation or requirement of the requesting Authority;
- f. whether it is desired that, to the extent permitted by the laws applying to the requested Authority, any persons from the jurisdiction of the requesting Authority should be present during interviews which form part of an investigation, or the conduct of an inspection, and whether it is desired that such persons should be permitted to undertake an active role - for example by participating in questioning or the taking of testimony;
- g. any other matters specified by the laws and regulations in the jurisdiction of the requested Authority; and
- h. any information related to the urgency of the request for information or assistance.

The requested information must be reasonably relevant to securing compliance with the law, regulation or requirement specified in the request.

16. A request for information or assistance made under this Memorandum shall be addressed to one of the requested Authority's contact points listed in Annex 1, or that individual's nominee.

17. Each request will be assessed on a case by case basis by the requested Authority to determine whether assistance can be provided under the terms of the Memorandum. In any case where the request cannot be accepted completely, the requested Authority will consider whether there may be other assistance which can be given. In particular, the requested Authority will consider in appropriate cases whether the request might be dealt with via channels for mutual assistance in criminal matters.

18. In any case where a requested Authority is not satisfied that a request fully complies with the requirements of the Memorandum, it may require the [Director][Head] of the requesting Authority to certify that the request meets the provisions in this Memorandum. The requested Authority should review its position in the light of such a certification.

19. In deciding whether to accept or decline a request the requested Authority will, in particular, take account of:

- a. matters specified by the laws and regulations in the country of the requested Authority;
- b. whether the request involves an assertion of jurisdiction not recognised by the country of the requested Authority;
- c. whether it would be contrary to the public interest of the requested Authority to give the assistance sought; and
- d. the resources available to the requested Authority to deal with the request.

20. The requested Authority may, as a condition of agreeing that assistance is given under the Memorandum, require the requesting Authority to make a contribution to costs. Such a contribution may, in particular, be required where the cost of a request is substantial or where a substantial imbalance has arisen in the cumulative costs incurred.

Procedures for questioning or taking testimony and conducting inspections

21. In accordance with paragraph 9 above:
- a. questioning or taking the testimony of persons, if requested, will be conducted in the same manner and to the same extent as investigations or other proceedings under the laws of the jurisdiction of the requested Authority;
 - b. when requested by the requesting Authority, questioning or taking testimony will be conducted under oath and a transcript made;
 - c. a representative of the requesting Authority may be present at the questioning or testimony, may prescribe specific questions to be asked of any witness and, pursuant to paragraph 22 of this Memorandum, may otherwise participate in the examination of any witness.

NOTES:

i. It is recognised that only some Authorities will have the ability to take testimony under oath.

22. Subject to the following conditions, a requested Authority may grant a request made by the requesting Authority that a person or persons designated by the requesting Authority, including representatives of the requesting Authority, be permitted to conduct the interrogation of any person, or participate in the inspection or examination of the books and records of an insurance business or its custodian or agent:

- a. the requesting Authority must specify the reasons for this request;
- b. it is for the requested Authority to decide whether to grant or deny the request, within the framework provided by this Memorandum. The requested Authority may impose such conditions on the participation of the requesting Authority as it deems appropriate;
- c. if the request is granted and the laws of the jurisdiction of the requesting Authority require the opportunity for the witness to consult with legal counsel, or for counsel to the witness to pose questions to the witness, such participation will, subject to (b) above, be permitted; and
- d. if the request is denied, the Authorities agree to consult pursuant to paragraph 30 of this Memorandum concerning the reasons for the denial and the circumstances under which the request might be granted.

23. Notwithstanding any other provision of this Memorandum, any person providing testimony, information or documents as a result of a request made under this Memorandum will be entitled to all the rights and protections of the laws of the jurisdiction of the requested Authority. Where assertions are made regarding other rights and privileges arising exclusively pursuant to the laws of the jurisdiction of the requesting Authority, the Authorities will consult to determine the most appropriate way to proceed.

Permissible uses and confidentiality

24. The information supplied will be used solely for the purpose of:
- a. securing compliance with or enforcement of the law, regulation or requirement specified in the request by initiating or assisting in criminal prosecution arising out of the breach of such law;
 - b. conducting or assisting in civil proceedings arising out of the breach of the law, regulation or requirement specified in the request and brought by the Authorities or other law enforcement or regulatory bodies within the jurisdictions of [*jurisdiction*] or [*jurisdiction*]; and
 - c. taking regulatory action or imposing regulatory requirements within the areas set out in paragraph 8 above.
25. Each authority will keep confidential [to the extent permitted by law]:
- a. any request for information made under the Memorandum and any matters arising in the course of its operation, unless such disclosure is necessary to carry out the request, or the requested Authority specifically waives such confidentiality;
 - b. any information passed under the Memorandum unless it is disclosed in furtherance of the purpose for which it was requested.
26. Unless the request provides otherwise, the confidentiality provisions of the Memorandum shall not prevent the Authorities from informing other law enforcement or regulatory bodies within the jurisdictions of [*jurisdiction*] and [*jurisdiction*] of the request or of passing information received pursuant to a request to such bodies, provided that:
- a. such agencies or bodies have responsibility for prosecuting, regulating or enforcing laws, regulations and requirements falling within the areas set out in paragraph 8 above;
 - b. the purpose of passing such information to such an agency or body falls within the areas set out in paragraph 8; and
 - c. the requesting Authority has provided any such undertaking in relation to the information requested which is required by [the law of the jurisdiction of] the requested Authority.
27. The requesting Authority will notify the requested Authority of any legally enforceable demand for information it receives, and will assert such [appropriate][relevant] legal exemptions or privileges with respect to such information as may be available. The requesting Authority will consult with the requested Authority prior to complying with any such demand.
28. Any document or other material provided by an Authority in response to a request under this Memorandum and any copies or other material disclosing its contents, other than material generated as part of the deliberative, investigative, internal or analytical process of the requesting Authority, will not become the property of the requesting Authority.

29. In response to a request by the requested Authority, and to the extent permitted by the laws of the jurisdiction of the requesting Authority, as soon as the requesting Authority has completed action on the matter for which assistance has been requested under this Memorandum, it will return to the requested Authority all documents and copies thereof not already disclosed in proceedings referred to in paragraph 24 above, and other material disclosing the content of such documents, other than material generated as part of the deliberative, investigative, internal or analytical process of the requesting Authority, which may be retained.

Consultations and waiver

30. The Authorities will keep the operation of this Memorandum under continuous review and consult with a view to improving its operation and resolving any matters. In particular, an Authority will consult the other Authority upon request in the event of:

- a. a request being denied in whole or in part;
- b. a change in market or business conditions or in the laws, regulations or requirements governing insurance business, or any other difficulty arising which makes it necessary to amend or extend this Memorandum in order to achieve its purposes; or
- c. an assertion by the requested Authority that the provision of assistance would be so burdensome as to disrupt the proper performance of its functions.

31. Where the specific conduct set out in the request for assistance may constitute a breach of a law, regulation or requirement in both the territory of the requesting and the requested Authorities, the relevant Authorities will consult in order to determine the most appropriate means for each Authority to provide assistance.

32. Any of the conditions of this Memorandum may be relaxed or waived by mutual agreement.

Termination

33. This Memorandum will continue to have effect unless terminated by one of the Authorities by giving thirty days advance written notice to the other Authority that the understandings set out herein are no longer to have effect.

Contact points

34. All communications between the Authorities should be between the principal points of contact listed in Annex 1 unless otherwise agreed.

Entry into effect

35. This Memorandum will be effective from the date of its signature by the [Authority/jurisdiction] and [Authority/jurisdiction].

Signed this [] day of [] 199[]

Contact points