INSURANCE ACT 2015/ENTERPRISE ACT 2016

General

We have been asked by a number of Insurers outside the UK to provide a brief overview of the changes to English Law brought about by the Insurance Act 2015 (IA 2015).

The IA 2015 comes into force on 12 August 2016 and all contracts of insurance and re-insurance that are entered into after that date will be governed by it. The Act is in many ways more complex than the familiar terms of the Marine Insurance Act of 1906 (MIA 1906) because it deals with all classes of insurance, both consumer and business insurance and marine and non-marine insurance.

A very detailed and practical guide to the Act has been produced by the International Underwriting Association (IUA). This guide and related recommended clauses can be found on the IUA website, www.iua.co.uk

Much of the IA 2015 is directed towards achieving greater certainty in the difficult area of disclosure and representation when placing insurance. It is also intended that the penalties for non-disclosure (now called "fair presentation") are more proportionate. For example, under a business contract, only a deliberate or reckless breach of the duty of fair presentation will entitle the insurer to avoid the policy.

Sections 12 and 13 of the Act deal with the difficult question of fraudulent claims. The status quo is preserved in that the insurer is not liable to pay a fraudulent claim but this appears not to affect the rights and obligations of the parties before the fraudulent act. The new Act is less clear with regard to "fraudulent devices", e.g. where an otherwise valid claim is supported or exaggerated by an untrue statement. This is a topical issue given the recent Supreme Court judgement in "The D.C. Merwestone", in which it was held, controversially in many eyes, that such a "collateral lie" was not necessarily fatal to a claim if it was in any event recoverable.

Warranties

Of more interest to marine claims practitioners are the new provisions dealing with the effect and scope of warranties. Again the intention is to make the penalties for breach of warranty more proportionate, along the lines seen previously in the International Hull Clauses 2003.

Under Section 33 of the MIA 1906 sub-paragraph 3 states:

> *"(3) A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date."*

It has long been thought that this penalty of automatic loss of coverage is excessive in cases where the breach may be totally unrelated to a loss or has been remedied before any loss has occurred.

Section 10 of the new IA 2015 reads as follows:

> *"**10 Breach of warranty***
>
> *(1) Any rule of law that breach of a warranty (express or implied) in a contract of insurance results in the discharge of the insurer's liability under the contract is abolished.*
>
> *(2) An insurer has no liability under a contract of insurance in respect of any loss occurring, or attributable to something happening, after a warranty (express or implied) in the contract has been breached but before the breach has been remedied.*
>
> *(3) But subsection (2) does not apply if –*
>
> *a) because of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract,*
>
> *b) compliance with the warranty is rendered unlawful by any subsequent law, or*
>
> *c) the insurer waives the breach of warranty*
>
> *(4) Subsection (2) does not affect the liability of the insurer in respect of losses occurring or attributable to something happening –*
>
> *a) before the breach of warranty, or*
>
> *b) if the breach can be remedied, after it has been remedied.*
>
> *(5) For the purposes of this section, a breach of warranty is to be taken as remedied –*
>
> *a) in a case falling within subsection (6), if the risk to which the warranty relates later become essentially the same as that originally contemplated by the parties,*
>
> *b) in any other case, if the insured ceases to be in breach of the warranty.*
>
> *(6) A case falls within this subsection if –*
>
> *a) the warranty in question requires that by an ascertainable time something is to be done (or not done), or a condition is to be fulfilled, or something is (or is not) to be the case, and*
>
> *b) that requirement is not complied with.*
>
> *(7) In the Marine Insurance Act 1906 –*
>
> *a) in section 33 (nature of warranty) in subsection (3), the second sentence is omitted,*
>
> *b) section 34 (when breach of warranty excused) is omitted."*

Paragraphs (1) and (7) make it clear that the automatic loss of all cover under MIA 1906 33(3) no longer exists. Instead, there is a suspension of cover (paragraph 2) between the date of breach and the date the breach is remedied (assuming this happens).

However, paragraph 3 says that no suspension of cover will occur if there is a change of circumstances making the warranty inapplicable, continuing compliance would be illegal or the insurer waives the breach. These exceptions are in similar terms to MIA 1906 section 34.

Paragraph 4 confirms that a breach of warranty has no effect on liability before it occurred or after it is remedied, and paragraph 5 clarifies what a remedy of the breach may consist of.

The words "*attributable to something happening*" are important because it covers the situation where a breach has been remedied but has started a chain of events that gives rise to a loss. The IUA Guidelines give the following example (see page 20):

> *"The words "attributable to something happening" will catch a situation where (for example) a vessel is torpedoed while sailing in a war zone (in breach of warranty), following which she sails out of the war zone, and sinks. Ostensibly, the breach of warranty has been remedied before the loss, but the insurer will not be liable, because the loss was "attributable to something happening" after the warranty was breached (i.e. the torpedo attach), and before it was remedied."*

Application of IA 2015

As noted above the new Act is due to come into effect shortly. The standard Institute Time Clauses Hulls (01.10.83) and all similar clauses such as the Institute Additional Perils Clause (01.10.83) include as a sub-heading the following words:

> *"This insurance is subject to English law and practice"*

Jurisdiction issues are a lawyer's paradise, so that anything one reads on the topic needs to be reality checked carefully with regard to different circumstances and locations. In the absence of any additional wording else-where in the policy, while this sub-heading establishes the applicable choice of law, it does not determine the jurisdiction in which any action relating to the contract may or must be brought. In the absence of an express jurisdiction clause (which might include Arbitration in a specified location) the natural forum would generally be in the domicile of the contracting parties.

However, uncertainties may arise when:

- the contracting parties are in different countries
- one or other party applies to a Court in a third jurisdiction that is willing to deal with the matter, either because of a perceived connection or in the interests of justice.

For example, the English Court may accept that it is the "forum conveniens", i.e. the forum in which the claims can most conveniently be tried in the interests of all the parties and to meet the requirements of justice. An English Court would be particularly disposed to take this view if the parties based overseas have adopted a contract that includes the Institute Clauses which expressly provide for English Law and Practice, and we have seen instances where this has been the case and proceedings have been started. However, the Court would also take note of any other express terms in the insurance contract, including any choice made by the parties to submit disputes to Arbitration in their domicile or other specified location, and might see these as grounds for declining to hear the case. This is a very complex area of the law and we can only comment in very general terms.

If a forum outside the UK is found to be applicable and it is willing to apply English law when considering a claim, as specified in the contract, there may be limits to the

extent that English law will be allowed to over-ride the provisions of the domestic law of that forum – the application of time bars being a likely example, but there may be other legislation relating to insurance that is inconsistent with the Marine Insurance Act of 1906 and the Insurance Act of 2015.

These are issues that can only be properly considered by lawyers operating in the relevant jurisdiction. Having a Jurisdiction Clause is always recommended by lawyers for any contract and the English Courts are likely to be the most predictable when applying English law to a H&M claim. However this may not be acceptable in many locations and other options need to be considered.

The Enterprise Act 2016

During the consultation phase leading up to the Insurance Act 2015, one of the topics that was hotly debated was the payment of interest on claims, or damages in respect of delayed payment. After much resistance from the insurance industry, no proposals found their way into the IA 2015, but the issue has now re-surfaced in the Enterprise Act 2016, which became law on 4 May 2016. This is a wide ranging statute that includes a number of measures intended to encourage and support small businesses. One of the problem areas that had been identified by the Government was the impact of late payment on small businesses, and this included the late payment of insurance claims; this has now become a matter that is dealt with by this statute.

The Enterprise Act (Part 5) introduces an implied term about payment of claims by amending section 13 of the Insurance Act 2015, adding the following:

> *"**13A Implied term about payment of claims***
>
> *(1) It is an implied term of every contract of insurance that if the insured makes a claim under the contract, the insurer must pay any sums due in respect of the claim within a reasonable time.*
>
> *(2) A reasonable time includes a reasonable time to investigate and assess the claim.*
>
> *(3) What is reasonable will depend on all the relevant circumstances, but the following are examples of things which may need to be taken into account –*
>
> *a) the type of insurance*
>
> *b) the size and complexity of the claim,*
>
> *c) compliance with any relevant statutory or regulatory rules or guidance,*
>
> *d) factors outside the insurer's control.*
>
> *(4) If the insurer shows that there were reasonable grounds for disputing the claim (whether as to the amount of any sum payable, or as to whether anything at all is payable) –*
>
> *a) the insurer does not breach the term implied by subsection (1) merely by failing to pay the claim (or the affected part of it) while the dispute is continuing, but*
>
> *b) the conduct of the insurer in handling the claim may be a relevant factor in deciding whether that term was breached and, if so, when.*

(5) Remedies (for example, damages) available for breach of the term implied by subsection (1) are in addition to and distinct from –

a) Any right to enforce payment of the sums due, and

b) any right to interest on those sums (whether under the contract, under another enactment, at the court's discretion or otherwise)."

These amendments will take effect from 4 May 2017, and no doubt insurers will be giving consideration to the potential impact of these provisions. For non-consumer policies it will be possible to opt out of the above section, providing the requirements of transparency are met, but any "opt out" will not apply to deliberate or reckless breaches of the implied term to settle in reasonable time.

The remedy for Assureds is a claim for damages arising from a breach of an implied term in a contract. As with any claim for breach of contract, the Assured will have to prove the extent of his losses and their connection with the alleged unreasonable delay – there is no automatic right to receive interest as is found in the Nordic Plan, for instance.

The same comments regarding the application of the IA 2015 are applicable here. If anything, local jurisdictions may be all the more relevant in terms of how they view claims for damages and the level of evidence to prove a claim; many countries already have in place a special forum to deal with the rights of 'consumers' and business.

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