



Current Insurance Law Reform

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Introduction

Insurance contracts have some features which are not shared with other commercial agreements and this can result in businesses finding they do not have cover when they need it most. Some of the harsher features of insurance law are in the process of being reformed. This briefing looks at proposals of particular interest to businesses purchasing insurance.

UK Insurance law reform

Aspects of insurance law that have been criticised include:

- (a) A positive duty on the insured to provide certain information to insurers even if they don't ask for it;
- (b) Breach of warranty unrelated to the loss allowing insurers to terminate cover;
- (c) The breadth of insurers' remedies for fraudulent claims; and
- (d) The inability to claim damages from insurers for late payments of claims.

The Law Commission has proposed changes in all these areas to reduce the harsh impact they can have. A draft Insurance Bill is currently being finalised and is expected to be published in the summer. There may be minor changes to the wording of the proposed provisions but significant change to the content of the Bill is unlikely. It should be noted that the timetable for passing any law onto the statute book and into force is of course subject to variation depending on political will and constraints on parliamentary time, both of which can be affected the occurrence and outcome of elections.

Duty of disclosure

One of the features of insurance law perceived to be most harsh (and least understood) has been the duty of disclosure which imposes a duty on insureds to disclose information that would be material to an insurer and allows an insurer to avoid all its obligations under a policy if that duty is breached (even if innocently). **See our briefing on disclosure as to what constitutes material information.** For consumers, the Consumer Insurance (Disclosure and Representations) Act 2012 removed a positive duty of disclosure. Insurers now need to ask for information and the insured's duties relate to the answers given. The duty of disclosure is also now being

examined in the context of business insurance. This duty is poorly understood by many businesses. Problems cited by the Law Commission are that it is not always clear what should be disclosed to the insurer; it encourages data dumping by businesses; some insurers may rely on passive underwriting as a tool for minimising pay-outs at the claims stage and the single remedy of avoidance is inflexible in dealing with disputes over insurance cover.

The proposed Bill places a new duty on businesses (essentially taken from case law) to make a "fair presentation of the risk" before the contract is entered into. The duty will be discharged where (as previously) the insured discloses each material circumstance. However it will also be discharged where the business has given the insurer enough information which would lead a prudent insurer to make further enquiries, which when answered, would reveal the material circumstances.

These changes should encourage insurers to engage more actively with businesses before insurance is put in place (and brokers will remain key to this process). Of course, many underwriters already do this. Further, the Bill proposes that the remedies for breach of the duty be made more proportionate. Account will be taken of the likely action of the insurers had they known the true circumstances. For example, if the insurers would have insured the risk in any event, but instead charged a higher premium, innocent breach of the duty of fair presentation would result in a reduction of the amount paid out on the claim. Avoidance will still be available to insurers for deliberate or reckless breaches.

Warranties

Warranties in insurance contracts are currently a source of contention as even a technical break of a minor warranty can allow an insurer to refuse to pay out (**see our briefing on warranties and effect of breach**). The Law Commission proposes a more proportionate approach by treating warranties as suspensive conditions. This would mean that while an insured was in breach of a warranty, there is no cover, but once the breach is remedied cover is resumed. Therefore, generally, losses occurring after the breach, once remedied, will be covered.

As a further modification, it is proposed that breach of a term designed to reduce the risk of a particular type of loss, risk of a loss at a particular time or in a particular place only affects the particular risk it is designed to address. For example, breaching a term requiring a door to be kept locked would not allow an insurer to decline paying out for damage caused by fire - an event that had nothing to do with the door being locked or not.

Fraudulent claims

Under the current law, the extent of the remedies available to an insurer in respect of fraudulent claims is unclear. On one analysis, insurers faced with a fraudulent claim can claw back any prior payments under the policy in respect of entirely legitimate claims. The proposals give the insurer the option to terminate the insurance from the point the fraud occurred so that losses suffered after the fraud need not be paid but losses before the fraud will be.

In addition, (similar to D&O cover) the Law Commission intends to make proposals to ensure that the fraud of a group company does not taint cover for other entities in the group.

Damages for late payments of claims

Under the present law, insurers are not liable for loss caused by being slow to pay a valid claim. The draft Bill changes this

position and requires insurers to pay any sums due within a reasonable time. Failure to do so gives rise to liability for damages for breach of contract against the insurer. This is tempered by a proposed defence for insurers that incorrectly refuse to pay a claim but can show that they acted reasonably - for example, where the precise circumstances of the loss were not clear.

Contracting out

One important issue on the introduction of a new legal regime in a commercial context is the ability of the parties to agree their own rules and 'contract out' of the default statutory provisions. The proposed rules allow for businesses to contract out of almost all of the new legislation on the proviso that, where any differences are disadvantageous for the insured, the insurer must make this clear and draw the insured's attention to the consequences of the change.

This proposal is aimed at helping insureds make a more informed choice in selecting cover. In particular, this provision will assist smaller insureds who purchase off-the-shelf insurance (particularly online) and are not fully aware of the consequences of the policy, while still allowing more sophisticated insurance purchasers the freedom to contract.

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