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The International Comparative Legal Guide to:

Insurance & Reinsurance 2013

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General Chapters:

Country Question and Answer Chapters:

Insurance Contract Law Reform Proposals in the United Kingdom

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Introduction

There has been a great deal of talk over a number of years about reforming UK insurance contract law. This chapter looks at the reforms currently under the spotlight and the likelihood of their reaching the statute books in the near future.

Background

The UK has, traditionally, been seen as a pro-insurer jurisdiction. Perhaps unsurprisingly, therefore, there have been suggestions that the balance should be addressed more in favour of insureds. Because it was felt that there was the potential for particular harshness in the consumer context, many of the proposals for reform thus far have concentrated on consumer insurance. However, reform of the law of insurance for business has also been put forward.

The Law Commission of England and Wales and the Scottish Law Commission ("the Law Commissions") embarked on a project in January 2006 to review and potentially reform insurance contract law for the UK [see Endnote 1]. Since that time, the Law Commissions have produced three consultation papers and nine issues papers. These consultation papers have resulted in one Act of Parliament's so far having received royal assent. A further bill is expected in 2013. In reaching their recommendations, the Law Commissions have taken into consideration the law in other jurisdictions. In some instances, they have taken the law in a particular country as a model for reform – for example, the Law Commissions were influenced by the Australian decision not to permit "basis of the contract" clauses (see further below).

We summarise below the main developments to date in the project, together with the proposals for future reform.

1) The Consumer Insured's Duty of Disclosure

A consultation paper on reforming the duty of disclosure (for both consumer and business insureds) was published in July 2007. Thereafter, no doubt because of political concerns, the Law Commissions concentrated on producing a bill in relation to the consumer insured's duty of disclosure. This culminated in the introduction of the Consumer Insurance (Disclosure and Representations) Bill into Parliament in May 2011. The bill followed the procedure for uncontroversial Law Commission bills (which sped up its passage, as certain stages could be carried out in committee). The bill received royal assent on 8 March 2012 to become an Act of Parliament and it is expected that it will come into force in spring 2013, thereby allowing insurers time to adapt their internal procedures and to re-draft proposal forms, as appropriate.

It is important to note that the Act relates only to consumer insurance contracts (i.e., contracts entered into by insureds who are individuals and for purposes which are unrelated to their trade, business or profession). Proposals concerning business insureds are set out further below.

It will not be possible to contract out of the new Act (insofar as any contract term purports to put the consumer into a worse position than he/she would be under the Act).

We set out below the main points included in the Act and the likely impact which these changes will have upon insurers.

Main Points: the Consumer Insurance (Disclosure and Representations) Act

(1) Consumer insurance contracts will no longer be contracts of utmost good faith and there will be no requirement for the consumer to volunteer information to the insurer

Insurers must therefore draft proposal forms extremely carefully to ensure that they are designed to ask for all information which they are likely to need in order to decide whether to grant cover (and, if so, on what terms). On the other hand, the Act does not expressly require that a question be shown to be objectively material to the insurer's evaluation of the risk. This could, therefore, at least in theory, have the effect of *widening* the scope of disclosure which a consumer has to give, depending on the questions asked.

(2) The Act provides that the consumer must take reasonable care when answering the insurer's questions. If a consumer can demonstrate that it took reasonable care, there can be no avoidance, and claims should be paid

In order to assess whether a consumer has acted with reasonable care, a court may take into account factors such as:

(i) the type of policy in question and its intended market;

(ii) any explanatory material produced or authorised by the insurer;

(iii) the clarity and specificity of the question put to the consumer; and

(iv) whether or not an agent was acting for the consumer.

The ordinary standard to be applied will be that of the "reasonable consumer". However, where an insurer is aware of any particular characteristics or circumstances of the actual consumer, those are to

be taken into account. Insurers may therefore consider asking questions which would reveal something about the consumer which might fix him/her with a higher standard of care (if appropriate).

Since insurers normally ask questions which are within a consumer's knowledge, it is arguably difficult to see under what circumstances a misleading answer could be made by a consumer acting with reasonable care. Note that a dishonest misrepresentation will always be taken to show a lack of reasonable care.

(3) If the consumer makes a careless misrepresentation, the insurer's remedy will be based on what it would have done had the consumer not breached its duty

This may result in the insurer's being able to avoid the contract; to impose different terms; or to reduce proportionately the payment to the consumer (because a higher premium would have been charged). This appears to be an entirely subjective test under the Act. Hence, there is no need for the insurer to demonstrate that its contention - for example, that it would not have entered into the policy at all - is a stance which a reasonably competent insurer would have adopted. Accordingly, it remains to be seen how readily the courts will accept an insurer's submissions concerning what it would have done in the absence of a breach of duty. It would be a question of the credibility of the individual underwriter's testimony.

(4) If the misrepresentation was deliberate or reckless, the insurer can avoid the contract

A "deliberate or reckless" misrepresentation is a misrepresentation made in circumstances where the consumer knew:

(i) that the representation was untrue or misleading, or did not care whether or not it was untrue or misleading; and

(ii) that the matter to which the misrepresentation related was relevant to the insurer, or did not care whether or not it was relevant to the insurer.

Furthermore, it is to be presumed, unless the contrary is shown that the consumer:

(a) had the knowledge of a reasonable consumer; and

(b) knew that a matter about which the insurer asked a clear and specific question was relevant to the insurer.

Although the burden rests on the insurer to demonstrate that a misrepresentation was deliberate or reckless, the insurer need not demonstrate actual dishonesty or fraud by the insured.

If the insurer decides to avoid the policy, it can keep any premiums paid by the consumer "*except to the extent (if any) that it would be unfair to the consumer to retain them*". This proviso is not explained further in the Act and it is unclear what sort of "unfairness" will count. It might be that the courts would look, for example, at how quickly an insurer has acted after it became aware of the deliberate or reckless misrepresentation and whether any indication (express or implied) was given that the insurer would return the premium.

(5) A representation made by a consumer in connection with a proposed consumer insurance contract (or in connection with a proposed variation to a consumer insurance contract) will not be capable of amounting to a warranty

As a result, the "basis of the contract" clause which commonly appears at the end of a proposal form will have to be deleted from consumer insurance contracts, or will be of no effect.

The Act also provides rules for determining whether a broker (or other agent) is acting as the agent for the consumer or for the insurer. With the exception of three scenarios (broadly, where the agent is expressly authorised to act as the insurer's agent), an agent is presumed to be the agent of the consumer (in the absence of any relevant circumstances). Examples of factors which would tend to confirm that the agent is acting for the consumer would be:

(i) the agent undertakes to give impartial advice to the consumer;

(ii) the agent undertakes to conduct a fair analysis of the market; and

(iii) the consumer pays the agent a fee.

Examples of factors which may tend to show that the agent is acting for the insurer are:

(i) the agent places insurance of the type in question with only one of the insurers who provide insurance of that type; and

(ii) the insurer permits the agent to use the insurer's name in providing the agent's services.

Finally, the Act makes provision for group insurance. Broadly, where a contract of insurance is entered into by a person ("A") in order to provide cover for another person ("C"), and C is not a party to the contract, C's disclosure and representations to the insurer will be treated as if they were made by a party to the contract.

2) The Business Insured's Duty of Disclosure

In June 2012, the Law Commissions published a consultation paper on (i) the business insured's duty of disclosure and (ii) warranties.

Many of the proposals in respect of disclosure set out in the consultation paper do not represent "new" law but, instead, seek to clarify the law of disclosure as it applies in a non-consumer context. The proposals apply to all business insurance, including reinsurance and the insurance of large risks (e.g., marine, aviation and transport risks). Rather than "protecting" business policyholders, the proposals are said to be intended to achieve "neutrality" between the parties.

A key point is that, unlike in consumer insurance, the Law Commissions propose to retain the business insured's duty to volunteer essential information.

The Law Commissions propose amending the relevant sections of the Marine Insurance Act 1906. However, to a large degree, the proposals are intended to codify principles which have already been developed by the courts. For example, legislation would be introduced to reflect the requirement that an insurer prove that, but for a certain misrepresentation, it would not have entered into the contract at all, or would have done so only on different terms. It is also suggested that legislation clarify that, if a representation is one which the policyholder knew or ought to have known about, it must be true; otherwise, it must be made only in good faith.

Three proposed changes to the current law are particularly noteworthy:

(1) A new system of proportionate remedies for breach of the duty of disclosure is suggested

It has been explained above that the Consumer Insurance (Disclosure and Representations) Act establishes that the remedy for a breach will depend (broadly) on whether the insured has acted honestly and on what steps the insurer would have taken before the policy was concluded had it known the true position. That test is largely replicated in the proposals for business insurance. Hence, where the insured has acted dishonestly, the insurer will still be able to avoid the policy (and retain the premium).

In respect of negligent conduct:

(i) where the insurer would have declined the risk altogether, the policy can still be avoided (with a return of premium, although, where a policyholder has acted deliberately or recklessly, the insurer need not return the premium);

(ii) where the insurer would have accepted the risk but would have included a certain contractual term, the contract should be treated as if it included that term; and

(iii) where the insurer would have charged a greater premium, the claim should be reduced proportionately. This contrasts with some other jurisdictions where only the additional amount of premium is payable to the insurer.

Crucially, however, insurers will be able to contract out of these remedies in the context of business insurance – provided that this is done through the use of clear and unambiguous language which is expressly brought to the attention of the policyholder before the contract is concluded. It might be thought that the ability to contract out could render these proposed changes meaningless. However, the Law Commissions suggest that, outside of specialist insurance, parties would not routinely agree that the insurer should be entitled to avoid in all cases.

Even where the proportionate remedies would apply, it is worth noting that the proposed test, as with consumers, is entirely subjective. This may serve to "water down" the effect of the proposals, since it may, in practice, be hard to disprove that a particular insurer would have viewed a certain breach of the disclosure obligation as so serious that he would not have written the risk at all. Again, it will be a question of credibility.

(2) The Law Commissions have proposed clarification of what is meant by "knowledge" when applied to a business

The Law Commissions have observed that larger businesses often experience greater problems with disclosure than small businesses, since multi-national businesses are now so complex that few can be sure they have assembled all the requisite information to give to insurers. Accordingly, it is proposed that there should be clarification of this issue.

In particular, "knowledge" should include information known to: (a) the directing mind and will of the organisation; and (b) the persons who arranged the insurance on behalf of the organisation. It would also encompass both actual knowledge and "blind eye" knowledge (i.e. where the relevant individuals deliberately avoid acquiring information because they would prefer not to know).

It is recommended that a corporation should also be under an obligation to make reasonable enquiries before placing insurance. These enquiries ought to be proportionate both to the type of insurance being purchased and to the size, nature and complexity of the business itself. This may mean that larger businesses will not be able to rely on merely completing the proposal form, given that the duty to volunteer essential information remains for all types of business insurance. There would be no duty to disclose information which would not be revealed by reasonable enquiries (presently, the insured is under no duty to make reasonable enquiries, save where those enquiries are required in the ordinary course of business).

The Law Commissions considered whether a special regime ought to apply to "micro-businesses" (i.e. companies with fewer than ten employees). Even though they recognised that it might be logical to afford such businesses the same protection as that given to consumers, they concluded that a separate regime would not be readily workable or justifiable.

(3) The duty of disclosure should also include information received or held by a broker in the course of acting for the policyholder

The Law Commissions have dropped a suggestion that an insurer should be given a right to claim damages against brokers. However, they saw a need to clarify that a duty of disclosure includes information received or held by a broker in the course of acting for the policyholder (a duty which currently arises owing to the general law of agency). This includes producing, placing and intermediate brokers (and not just placing brokers). However, it does not include information given to the broker by other clients in relation to other insurers. The same actual knowledge/blind eye test as applies to policyholders would also apply to brokers.

If a broker is involved in helping the policyholder to carry out reasonable enquiries, the insurer should have a remedy against the policyholder if the broker fails to disclose information which it would have discovered by reasonable enquiries.

3) The Law of Warranties

The possibility of reforming the law of warranties has been mooted since the 1980s and the Law Commissions published a consultation paper in 2007 on this topic. The June 2012 paper dealing with the business insured's duty of disclosure (see above) also dealt with the law of warranties.

There are three proposals for reform in the consultation paper and they apply to both consumer and business insurance. It is envisaged that it will be possible to contract out of the reform for business insurance but not for consumer insurance (but, again, clear and unambiguous exclusionary language will be required and it will have to be brought to the attention of the policyholder). The proposals are as follows:

(1) To abolish "basis of the contract" clauses

Any clause which purports to give warranty status to answers on a proposal form would be of no effect. It will be necessary expressly to provide if a warranty is one of past or present fact. However, the proposals do not go as far as the recommendation in 2007 that warranties of fact in a consumer policy should be made ineffective.

(2) That a breach of warranty would suspend the insurer's liability rather than discharge it, so that, if a breach is remedied before the loss, the insurer must pay the claim

However, the Law Commissions are also consulting on whether an insurer's right to cancel a contract (with a *pro-rata* return of premium) following a breach of warranty should be contractual rather than statutory and therefore governed by the terms of the contract.

(3) To change the law relating to warranties (or indeed any type of contract term) designed to reduce the risk of a particular type of loss

So, for example, the breach of a warranty to install a burglar alarm would suspend liability for loss caused by a burglar but not from a flood. Similarly, where a term is included to reduce the risk of a loss at a particular time or in a particular location, in the event of a breach, liability would be suspended only in relation to losses at that time or at that location. The Law Commissions rejected the

proposal that there should have to be a causal connection between the breach of the warranty and the loss.

The Law Commissions recommend that these proposals should apply equally to express warranties in marine insurance. The default regime for breach of warranty should also apply to reinsurance in the same way as it applies to direct insurance business (currently, if a policyholder breaches a warranty, the reinsurer may refuse to indemnify the insurer even if the insurer has chosen to waive the breach). However, reinsurers would be able to contract out of this reform.

4) Other Proposals for Reform

In December 2011, the Law Commissions published their second consultation paper on Post-Contract Duties and Other Issues. We set out below the key remaining proposals for reform:

(1) New duty to pay valid claims after a reasonable time

Possibly the most controversial proposal in the 2011 paper is the proposal that an insurer who unreasonably delays or wrongfully repudiates a claim would be in breach of a new duty to pay valid claims after a reasonable time.

The current position under English law (Scottish law, and indeed many other jurisdictions around the world, having a different position) is that insurance contracts are excepted from the usual rules of contract law. A legal fiction provides that an insurer's primary obligation is to "hold the insured harmless" (i.e. to prevent loss rather than to compensate for loss). As a result, insurance payments are not treated as debts due under a contract but rather as damages for breach of contract. The English courts have consistently held that claimants are not entitled to damages for the non-payment of damages and so it is for this reason that insureds are not entitled to damages for an unreasonable delay in payment (or an unreasonable refusal to pay at all) by an insurer (although the insured will be entitled to simple interest and costs if it commences proceedings). The English courts have also rejected the argument that there is an implied term requiring insurers to pay a claim within a reasonable time (breach of that separate duty giving rise to a claim for damages).

The Law Commissions propose that the insurer's primary obligation should be re-characterised as a duty to pay valid claims within a reasonable period of time (and not a duty to prevent loss). Where an insurer breaches that duty, an insured would be entitled to damages for proven and foreseeable loss, under ordinary contract law principles.

Under these proposals, insurers would be given sufficient time fully to investigate a claim and to review and consider the claim. It is also envisaged that it would be possible to exclude liability in business insurance policies (but not consumer insurance policies). However, a "shield" of good faith is proposed to protect policyholders from an insurer's seeking to rely on an exclusion clause in a business insurance policy (i.e. the insurer will have to explain any delay/decision to repudiate a valid claim). As a result of these proposals, it is suggested that time to commence legal proceedings against an insurer will not start running until the insurer has had a "reasonable" time to investigate and assess a claim. It is also proposed that damages for distress, inconvenience or discomfort should be made available to the consumer.

These proposals have caused controversy amongst many insurers. They fear that they could put pressure on them to settle doubtful claims without a thorough investigation – or else, run the risk of speculative claims for damages for late/non-payment. There is particular concern also about the recovery of consequential losses. Of course, it will also be difficult to state with any certainty what is a "reasonable" amount of time for an investigation.

(2) Fraudulent Claims

The Law Commissions have recognised that fraudulent insurance claims pose a serious problem for the industry. They believe that the law on the effect of a fraudulent claim is currently "convoluted and confused". It is well-established that an insured who fraudulently exaggerates an insurance claim forfeits the whole claim, but it is less clear what effect that fraud has on other claims made under the policy (either before or after the fraudulent conduct). For example, section 17 of the Marine Insurance Act 1906 appears to entitle the insurer to avoid the contract *ab initio* and recover any claim payments already made. However, current case law indicates that the remedy is too harsh and, instead, that the only remedy is forfeiture of the fraudulent claim itself. The Law Commissions support that latter position.

It is therefore now proposed that a fraudulent claim should not make a contract voidable from the start but that instead the fraudster should forfeit the whole claim as well as all subsequent claims (i.e. claims arising between the date of the fraud and the date the insurer elects to terminate the policy). It is also proposed that the insurer should be able to claim the costs reasonably and actually incurred in investigating the claim. In consumer insurance, an insurer would not be allowed to add to these remedies. However, in business insurance, an insurer could vary these remedies by the terms of the contract. Special provisions will be introduced to deal with fraud by members of a group scheme.

(3) Insurable Interest

It is a long-standing principle under English law that an insurance policy will be invalid if the insured does not have an "insurable interest". Briefly, that requires the person taking out the insurance to stand to gain a benefit from the preservation of the subject matter of the insurance (or to suffer a disadvantage if it is lost). However, the precise application of that principle has become confused, with a mix of common law and statute.

The Law Commissions propose that the requirement of insurable interest should be imposed by statute alone. They suggest a statutory restatement confirming that the requirement of an insurable interest applies to all forms of insurance (and, in the absence of which, the policy will be void – with the insured entitled to a refund of his premium payments). The Law Commissions are presently undecided as to whether there should be a statutory definition of "insurable interest". For contingency insurance (where the amount of the payment is set at the time of the contract) the insurable interest must be present at the time the contract is made. In other cases, it would be sufficient to have an interest at the time of the loss. It is also proposed that the law is changed so as to widen the category of those able to insure the life of another on the basis of financial loss (there was widespread support for widening the test to one based on a reasonable expectation of economic loss).

(4) Sections 22 and 53 of the Marine Insurance Act 1906

The Law Commissions have also looked at two provisions of the Marine Insurance Act 1906 which were said to appear to be outdated and problematic.

First, there is a proposed abolition of the need for a formal marine policy (section 22 of the Marine Insurance Act 1906).

Secondly, reform of section 53(1) of the 1906 Act (which makes a broker liable to pay premiums to the insurer and applies only to marine insurance policies) is proposed. As currently drafted, section 53(1) overrides the normal rule of agency law that an agent is not personally liable on a contract effected for its principal.

It is suggested that the policyholder will be liable to pay the premium to the insurer in respect both of non-marine and marine insurance. The issue of whether the broker is liable to pay the premium to the insurer should be a matter of agreement between the broker and the insurer. Non-marine brokers should be able to contract in with respect to such liability. It is proposed that marine brokers, on the other hand, should continue to be liable for paying premiums unless they contract out.

It is also proposed that section 53(2) of the 1906 Act should be amended (in relation to both marine and non-marine insurance) to give the broker a general lien over all property of the insured that has lawfully come into the broker's possession in its capacity as broker (and should give brokers the right to retain any funds held on behalf of the insured to settle the insured's outstanding debts in respect of premiums or charges).

Future Steps

The consultation period in respect of the December 2011 consultation paper (see Section 4) above) ended on 20 March 2012 and that in respect of the June 2012 paper (see Sections 2) and 3) above) ended on 26 September 2012. The Law Commissions have advised that they plan to complete their project and produce a draft bill on the issues covered by both the December 2011 and the June 2012 consultation papers by the end of 2013. Actual reform in respect of business insurance law may, therefore, still be some years off and it is possible that the provisions which are finally adopted by Parliament will differ to some degree from the Commissions' current proposals. Furthermore, owing to pressure on parliamentary time, there is a risk that any future draft bill produced by the Law Commissions next year will not result in an Act of parliament prior to the next General Election in 2015.

Conclusion

So, to summarise: important changes in the area of consumer insurance law are expected to take effect in spring 2013. Other changes, which include changes in respect of business insurance law, are also in the pipeline but their effect may not be seen for a number of years yet. The times are a-changing still in the UK, but not rapidly.

Endnote

1. It is expected that such reforms will include Northern Ireland (and therefore the whole of the United Kingdom) and not just England, Wales and Scotland (Great Britain). The Consumer Insurance (Disclosure and Representations) Act will apply to Northern Ireland, for example.

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