JONES DAY®

MAY 2016

COMMENTARY

Big Changes Coming in English Commercial Insurance Law: The United Kingdom Insurance Act 2015

Key Points

- The United Kingdom Insurance Act 2015 ("Act") comes into force on August 12, 2016 and applies to policies placed or varied on or after that date.
- The Act reviews disclosure obligations on those seeking commercial insurance.
- The Act provides for imputation of certain information to policyholders and to insurers alike.
- The Act moderates the consequences of breaches of certain policy terms.
- The Act restricts the extent to which insurers can argue that information provided to them has been warranted (and seek to deny indemnity as a result).
- In an amendment made by the UK Enterprise Act 2016, a provision has been inserted into the Act that, from May 4, 2017, will imply into all contracts of insurance governed by English law a provision whereby 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.

Background

The Act is the product of a joint project undertaken by the Law Commission of England and Wales and the Scottish Law Commission. The goal of this project was to study the state of commercial insurance law in the UK and to make recommendations deemed to improve and modernize dealings between policyholders and insurers in respect of the key areas of risk placement and claims. This work resulted in the Insurance Act 2015, the coming into force of which was delayed until August of this year.

Key Changes Introduced by the Act

The Act legislates in four fundamental areas:

1. It addresses the information known to (or deemed to be known to) and disclosed among the parties to an insurance contract at the time of risk placement.
2. It controls the consequences of alleged failures to disclose/misrepresentations and certain policy breaches.
3. It restricts the form of wordings that can be used by insurers to impose warranties.
4. Effective May 4, 2017, it will impose upon insurers an obligation to pay sums due in relation to any claim within a reasonable time.

Each of these is briefly outlined below.

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Knowledge, Deemed Knowledge, and Disclosure at the Time of Risk Placement

The Duty of "Fair Presentation." Under English insurance law, policyholders seeking to obtain insurance traditionally have been placed under an obligation to make a disclosure of those things that are material to the risk being underwritten. Under the Act, however, a policyholder is required to disclose not only those things it knows but also those things that it "ought" to know. As to those things it "ought to know," the Act includes information that would have been revealed by a "reasonable search." In addition, for policyholders that are entities, the Act deems the entity to know information held by its senior management and those procuring its insurance.

Observations:

- While the Act applies to policies placed or varied by August 12, 2016, the disclosures made for such insurances are highly likely to be made in advance of policy inception. In that respect, the Act could have something of a retroactive reach (applying new law to disclosures made before that new law is in place). Therefore, policyholders must be mindful of these requirements when involved in such placements or renewals.
- The boundaries of what will be taken to be a "reasonable search" are not well known, and they are likely to be elusive.
- The scope of persons included within the categories of "senior management" and "those procuring insurance" is also not easily determined.
- Protection is given in respect of certain types of confidential information.
- Insurers will likewise be deemed to know certain information available to them.

Remedies if the Duty of Fair Presentation is not Discharged. Under current law, insurers are open to argue that a failed duty of disclosure (or misrepresentation) can, in certain circumstances, void the insurance *ab initio*. The Act eliminates this as an automatic consequence of material breach except in cases of reckless or intentional conduct. Instead, the Act will require an insurer to prove materiality, and a court will determine what the insurer *would* have done if the full facts had been known to it. The Act therefore adopts a "proportionate" approach more akin to that found in Civil Code countries.

Observations:

- Under some circumstances, if the insurer can establish that it would not have written the insurance at all, then avoidance may still be available, subject to a return of premium monies.
- If the court finds that the risk would still have been written, but at a higher premium, then that higher premium will be imposed retrospectively (by offsetting against claim monies).
- If the court finds the insurer would have written the insurance but on different terms, then those different terms will be held to apply, and the claim will be adjusted accordingly.
- The outcome of these tests may well turn on the proof available and on which party has the burden of proof.

The Act's Effect on Breaches of Policy Terms and Conditions

The Act introduces a significant change to the English law of "warranties" in insurance policies. Under current (pre-Act) English law, a breach of warranty in a policy of insurance, if established, renders that policy void from the date of breach. The Act eliminates this consequence. Rather, breach will be held to *suspend* the policyholder's right to indemnity, which right will be reinstated automatically once the breach is remedied, if such is possible. The Act also works a significant change in English insurance law by eliminating an insurer's ability to defend against a claim for indemnity based on a policyholder breach that did not increase the risk of loss.

Observations:

- The Act does away with mechanical or technical breaches as a significant risk, focusing on those that actually are material.
- The Act places the burden of proving nonmateriality on the policyholder.

The Act's Effect on Certain Standard Policy Terms

The Act abolishes standard policy terms that "deem" information to have been warranted. Under current English law, insurers are permitted to use "Basis of Contract" clauses, whereby certain information or representations are deemed to be the basis of the insurance contract. These clauses have been given the legal effect of warranties, with the resulting risk that a breach, even if innocent, could result in the invalidation of insurance. These are no longer permitted.

Observation:

- The abolition of "basis of contract" clauses was deemed to be so important that insurers are not permitted to contract out of this provision.

The Act's Effect on the Time to Pay Claims

For policies placed or varied on or after May 4, 2017, Section 13A of the Insurance Act 2015 will imply a term into those policies whereby if the insured makes a claim, the insurer must pay any sums due in respect of that claim within a reasonable time.

The concept of a "reasonable time" is a flexible one and is likely to generate disagreement between insurers and policyholders. It is important to note, however, that this represents an improvement for policyholders because English law currently does not recognize per se remedy for late settlement of an insurance claim.

Conclusion

This is a nontechnical summary of the Act and its significant changes. Of necessity, there are nuances and implications that cannot be described here. In particular, the Act permits insurers to seek to contract out of (or around) some of its provisions, and it also makes certain amendments to the Third Parties (Rights Against Insurers) Act 2010. Moreover, the requirements of the Act could affect the manner in which policyholders should arrange their dealings with others, such as brokers and trading partners.

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