The Insurance Act 2015: an overview

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The Marine Insurance Act 1906 (MIA) (which actually applies to both marine and non-marine insurance contracts) has been the cornerstone of English insurance law for over 100 years. However, it was considered by some to be outdated and not reflective of today's commercial realities and practices. The new Insurance Act 2015 (the Act) will be the most significant statutory change to English insurance law in England and Wales for over a century, its aim being to modernise and simplify insurance contract law.

The Act received Royal Assent on 12 February 2015 and will come into force in August 2016. It will apply to all insurance contracts worldwide that are subject to English law. This article is a brief introduction to the changes effected by the Act.

Duty of utmost good faith

Section 17 of the MIA provides that insurance contracts are governed by the doctrine of utmost good faith, to be exercised by both parties – the insured and the insurer. If the obligation is not observed by either party, then the contract may be avoided *ab initio*. In other words, the parties are to treat the contract like it was never entered into, with the insurer returning all premiums paid and the insured returning all monies received for any previously paid claims. Thereafter, the contract is deemed as truly terminated and at an end.

Under the Act, insurance contracts still remain contracts of good faith, but the remedy for breach is no longer the total avoidance of the contract from its inception. Furthermore, whilst the onus still remains largely on the insured, who is still required in pre-contract negotiations to disclose every 'material circumstance' which it knows or ought to know, under the Act, an insured will also satisfy its duty of utmost good faith (and pre-contract disclosure) if it gives the insurer *'sufficient information to put a prudent insurer on notice that it needs to make further enquiries to reveal such material circumstances'*.

The new concept of proportionate remedies

Under the MIA, the insurer was allowed to expect from the insured disclosure of 'every material circumstance' in pre-contract discussions and the definition of what was considered 'material' under English common law was anything that *might* influence the mind of an underwriter. So the burden on the insured during pre-contract discussions was an onerous one and, in the event of material non-disclosure or misrepresentation by the insured, the remedy was (again) the avoidance of the policy from its inception. However, no distinction was made between honest and dishonest, or reckless and negligent mistakes by the insured under the MIA, which was considered unfair by some.

The Act now distinguishes between two categories of breach when it comes to the insured's duty of disclosure and introduces the concept of 'proportionate remedies' with the view, on one hand, to preserve the rights of insurers where there has been a deliberate or reckless breach and, on the other, to provide certain rights to policyholders where the breach is innocent or careless.

Now, under the Act:

- an honest breach of the disclosure duty by the insured would entitle the insurer to a proportionate remedy, essentially so as to put it in the same position it would have been in if the error had not been made. This may mean an increase in the premium payable (or a similar downward reflection in any claim payout), or an amendment to the terms of the insurance contract, or even termination of the contract if the insurer would not have entered into the contract at all, had the risk been so disclosed.
- a dishonest or reckless breach will entitle the insurer to refuse all claims and retain the premium.

Warranties – redefined

One of the major reforms in the Act has been the reclassification of warranties. Currently, under the MIA, a breach by an insured of a warranty in the insurance contract will entitle the insurer to treat the contract as at an end from the date of the breach. However, under the Act, a breach of warranty will only suspend, rather than discharge, an insurer's liability to pay a claim. This suspension will apply from the moment of the breach of warranty until the breach has been remedied by the insured, assuming the risk underwritten is essentially the same.

Contracting out

From August 2016, the Act will be the default regime for all commercial insurance contracts subject to English law, although it is possible for the parties to contract out of the Act, if it is a commercial contract of insurance. However, under the Act, any more disadvantageous term for the insured, when compared with the Act, must be clear and unambiguous as to its effect and the insurer is obliged to bring such a term to the insured's or the broker's attention before the contract is entered into.

It is important to state that the Act gives the option to parties in commercial contracts to opt out of this new legislation and make alternative arrangements, provided that the insurer always complies with the transparency requirements mentioned above. Furthermore, it is worth mentioning that the Law Commission, which lobbied for and drafted much of this Act, anticipated that in sophisticated, high-risk markets such as marine insurance, contracting out would be prevalent as other terms may be more appropriate.

Conclusion

The Insurance Act 2015 will be coming into effect in August 2016 and will significantly modernise English insurance law going forward. We will keep our members fully informed of these changes and how the Act may impact on our Rules over the coming months, through bulletins, circulars and other club publications.