All change

The UK Insurance Act 2014, which is currently going through parliament, will significantly change the (re)insurance landscape

FOLLOWING THE CONCLUSION OF HM Treasury's consultation on the proposed bill drafted by the Law Commissions of England, Wales and Scotland, an amended bill has now been presented to parliament. The bill will be following the special parliamentary procedure for uncontroversial Law Commission bills and it is therefore possible that it will now be passed before the end of the current parliamentary session (30 March 2015).

If royal assent is obtained, the Insurance Act 2014 will apply to every insurance policy and reinsurance contract written in England and Wales, Scotland and Northern Ireland and (with certain exceptions set out below) will come into force 18 months after the date it is passed. This will allow time for policy wordings to be amended, where necessary.

Set out below are the main developments and what the bill currently looks like.

Clauses omitted from the Insurance Bill

The following two substantial changes to the bill were made before it was presented to parliament:

● Damages for late payment. The draft bill had provided for the payment of damages once insurers had had a reasonable amount of time to investigate a claim and could not show reasonable grounds for disputing a claim. Business insurers would not have been able to contract out of this reform where they were "deliberate or reckless".

The proposals for late payment damages have now been entirely abandoned (and not only in relation to deliberate or reckless late payment).

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● The draft bill had proposed that where a term (for example, a warranty or a condition precedent) was designed to reduce the risk of a particular type of loss or the risk of loss at a particular time or in a particular place, a breach would entitle an insurer to refuse claims for losses falling within that category of risk. That proposal has also been omitted from the bill presented to parliament. Accordingly, where, for example, an insured breaches a warranty to install a burglar alarm, the insurer will still be able to refuse cover (subject to the other incoming reforms on warranties (see further below)) where loss is caused by a flood.

It is worth pointing out, though, that the Law Commissions have advised that they will continue to endeavour to find a "workable solution" regarding these two areas, thus indicating that they do not intend to abandon the proposals entirely. As mentioned below, work will continue into next year on further possible reforms.

Summary of the main clauses remaining in the bill

The following clauses are still currently included in the bill:

● *Warranties*: all basis of the contract clauses will be prohibited. A basis of the contract clause in a proposal form has the effect of converting all the answers in the proposal form (no matter how trivial) into warranties.

In addition, all warranties will become "suspensive conditions", allowing an insured to remedy a breach and thus come back "on cover" thereafter (and insurers will also still be liable for losses prior to the breach, as is currently the case).

● *Utmost good faith/non-disclosure*: these reforms will apply to business insurers only (consumer insurance having been dealt with in a 2012 Act). Insureds will still have a duty to volunteer information and will have to make a fair presentation to insurers (making disclosure in a manner that would be reasonably clear and accessible to a prudent insurer).

They will also be required to carry out a reasonable search for information, but an insurer will be presumed to know things that are common knowledge or that an insurer offering insurance of the class in question to the insured in the field of activity in question would be expected to know in the ordinary course of business. The knowledge of an insured company will be what is known to its senior management or those responsible for the company's insurance.

Previously, the bill provided that the knowledge of an insured would not include confidential information that it had acquired through a business relationship with a third party. That has now been amended to refer to confidential information acquired by the insured's agent (for example, broker) or an employee of the agent through a business relationship with a third party.

The current position is that an insured may have to breach its own duty of confidentiality to comply with its duty of disclosure, but a broker would not have to breach its duty of confidentiality owed to a third party (and, for example, an insured would not have attributed to it the broker's knowledge in such circumstances). However, the wording as currently drafted has the effect that, even if an insured actually knows something, but it acquired that knowledge from the broker, which in turn had acquired that knowledge in confidence, they will be treated as not having that knowledge. That appears to be a change from the current position.


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The remedies for a misrepresentation or non-disclosure remain unchanged from the draft bill. Broadly, avoidance (without a return of premium) will be available if the insured has been deliberate or reckless and in all other cases a scheme of proportionate remedies will apply (designed to reflect the situation as it would have been had full disclosure been made).

● *Good faith*: it is still proposed that the remedy of avoidance for the breach of the duty of utmost good faith will be abolished (the Law Commissions having previously pointed out that where an insurer breaches its own duty of good faith, an insured would not want the policy avoided because that would prevent it claiming under the policy).

> *The Law Commissions have indicated that they are aiming to produce a third and final report in 2015 on various issues that were not addressed in the bill*

The Law Commissions have instead indicated that insurers may be prevented from exercising a right if it has not been exercised in good faith (although it is perhaps difficult to see how a legitimate right could be exercised in a manner amounting to bad faith in all but the most extreme of circumstances). Damages are not proposed as an alternative remedy (and so an argument that late payment by an insurer amounts to a breach of the duty of good faith, thus attracting damages for later payment via an alternative route, would not work).

● *Fraudulent claims*: it is proposed that insurers will now have an option of terminating the policy from the date of a fraudulent act, without a return of premium (thus allowing insurers to refuse to pay any genuine claims thereafter, although they would still be liable for legitimate losses before the fraud).

Contracting out of these changes

There has been no change to the proposal that the Insurance Act will represent only a "default regime" for business insurers (although it will not be possible to contract out of the basis of the contract clause prohibition). Where insurers intend to opt out and include a "disadvantageous term", sufficient steps must be taken to draw that to the insured's attention before the contract is entered into. A boilerplate opting-out clause will therefore not suffice: each and every departure from the default position will have to be flagged up. Furthermore, an alternative remedy or position will have to be specified, otherwise there will be a void (and the courts are likely to imply back into the policy the position set out in the Act).

Third Parties (Rights Against Insurers) Act 2010

One surprising feature of the published bill is the inclusion of various minor provisions relating to this Act, which received royal assent on 25 March 2010, but is still awaiting a further statutory instrument to bring it into force.

A review of the main provisions of this Act is beyond the scope of this article, but the Act is broadly intended to make it easier for direct actions against insurers to be brought by third-party claimants where an insured has become insolvent. The changes included in the Insurance Bill allow the Secretary of State for Justice greater scope to make further regulations and amend the definition of an "insured" (and, more specifically, the type of insolvency event that the insured must undergo to trigger the application of the Act).

Although no deadline to bring the 2010 Act into force is set out in the Insurance Act, it is worth noting that the powers being passed to the Secretary of State come into force two months after the bill receives royal assent. Accordingly, it might be anticipated that the aim is to bring the 2010 Act into force at some point in 2015.

Further reform?

In addition to continuing to work on a possible implementation of the two areas deleted from the bill (see above), the Law Commissions have indicated that they are aiming to produce a third and final report in 2015 on various issues that were not addressed in the bill but that have been the subject of review and proposals in earlier papers.

These include the proposed abolition of the need for a formal marine policy (section 22 of the Marine Insurance Act 1906) and 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.

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