

Insurance Contracts Bill 2014

Views and Concerns of London Market Insurers

Paul Jaffe

English Insurance Law

Is the Law Commission
gambling
with the future of English law in international
insurance contracts?



Insurance in the UK economy

- Insurance is one of the UK's largest invisible exports - £9.1bn p.a.
- UK insurance employs some 320,000 people (50,000 in London Market)
- UK insurance industry is 3rd largest in the world
- UK insurance industry is largest in Europe
- Trend of decrease in long-term insurance and increase in general insurance

- Lloyd's capacity = £25bn
- 82% of Lloyd's business is from outside UK
- 56%+ of Lloyd's capital comes from outside UK

Who wants certainty?

- Lord Mansfield (18th Century):
 - *In mercantile transactions the great object should be certainty*
 - *Nothing is more mischievous than uncertainty in mercantile law*
- United Policyholders (2014):
 - *The natural result of transforming a question of law into a question of fact is that discovery expands exponentially, litigation costs vastly increase, the time required to reach a resolution expands exponentially, and additional burdens are placed on . . . courts. The resultant increase in litigation costs, protracted discovery, and expansion of time to resolve these coverage disputes naturally favours the party to the transaction . . . that is in the financially superior position . . .*

Who wants certainty?

- *The Economist (10 May 2014)*
 - *[English and NY lawyers'] biggest advantage is that they have common-law systems with centuries of binding precedent. That means they offer as much certainty as any jurisdiction can. In civil-law countries . . . judges have wide latitude to interpret statutes, increasing the risk of nasty surprises. Common law also permits almost any terms in a contract.*

- Lord Falconer (2005)
 - *English law of contract is the international law of choice, particularly in finance, shipping, and insurance . It contributes significantly to the earnings of the UK . . English commercial law provides predictability of outcome, legal certainty and fairness*

Why certainty?

- Predictable outcomes assist with speedy settlement of claims, because:
 - Both sides get advice that gives the same (or similar) prospects as to the outcome of the claim,
 - Because of this, settlement is easier.

- With unpredictable outcomes, it is more difficult to settle because:
 - Each side gets different or unclear advice,
 - So the value of the claim is unknown.

Factual tests to replace bright lines

- At least 17 new tests requiring clarification – over decades
- At least 14 new factual tests replace legal tests – requiring recurring fact and / or expert discovery

Duty of disclosure - proposals

- A wholesale rewrite of the law
- Insured may satisfy fair presentation of the risk with
 - Sufficient information in relation to material circumstances to put a prudent insurer on notice to make further inquiries
- What Insured “knows or ought to know” is entirely new regime replacing agency law principles
 - Misrepresentation Act 1967 provides stricter requirement on contract parties than new bill
- Individual does not have to disclose confidential information acquired through a business relationship with someone other than the insured or the insurer

Remedy for breach of duty - Proposals

- Change to Remedy
 - New disputes as to what the underwriter would have done had proper disclosure been made

- No remedy if no claim?
 - How do we obtain the premium if, say, under-declaration of values?

Warranties - Proposals

- Where term is to reduce risk of a type of loss, then suspend cover only for that type of loss

- How will this work in practice?

Damages for late payment of claims

- Difficulties with the Changes
 - Some insureds (e.g. single vessel owning cos. and SPVs) may incur huge, possibly foreseeable losses
 - Threat of foreseeable losses will be used to impede claim investigation and adjustment
 - How do we show that there were reasonable grounds for disputing the claim?
 - Time for Statute of Limitations commences when payment should have been made

Contracting Out

- Not the miracle cure for business insurance
- Can contract out only where
 - Consequences of the term are brought to the insured's attention (what about the broker?)
 - Term is clear and unambiguous

Insurance Contracts Bill - concerns

- Reduces certainty as to meaning of insurance policies
 - New Tests – litigation to establish boundaries
 - Tests are more factual – ongoing litigation
- Will make settlement more difficult
- Will increase costs
- Damages for late payment will
 - Increase litigation
 - Increase the “tail” – delaying closure of accounts

Conclusion

- The Good
 - Recognition of the different public policies behind consumer and business law
 - Abolition of Basis Clauses
- The Bad
 - Introduction of significant uncertainty into business insurance policies
 - Reduction in ability to underwrite efficiently
- How will the business insurance market react?
 - Changing the applicable law?