

Insurance Contracts Bill 2014

Views and Concerns of London Market Insurers

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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?