

The United Kingdom Insurance Act 2015

Coming into force on 12th August 2016 and

The International Group of P&I Clubs

12th July 2016

The UK Insurance Act 2015 (the “new Act”) will come into force on 12 August 2016. The new Act will change English insurance contract law currently codified in the *Marine Insurance Act 1906* (“MIA 1906”). The Act has no retrospective effect, it will apply to new contracts or variations to existing contracts after this date. As this date falls within the existing 2016/17 policy year the eight affected International Group clubs have already made changes at the 20th February 2016 to their 2016/17 Rules in anticipation of the Act coming into force. There are eight P&I clubs in the International Group affected by the new Act, as their rules are subject to English law including the MIA 1906. They are respectively:

- Britannia
- London
- North of England
- Shipowners’
- Standard
- Steamship
- United Kingdom
- West of England

The new Act seeks to provide further protection to both consumer and non-consumer buyers of insurance. Bearing in mind the diversity of insurance buyers it was recognised by The Law Commission that elements of the new Act might not be required in so called ‘sophisticated markets’.

The marine insurance sector is generally identified as one such market. Shipowners as insurance buyers together with the mutual P&I Clubs, insurance providers, already operate with well-established practices that benefit and protect the members (insured) . In recognition of the existence of 'sophisticate markets" the Act has incorporated provisions whereby some insurers would be able to contract out (i.e. not apply) certain of the new Act's provisions.

Accordingly , in approaching the new Act with principles of mutuality and an existing Rules framework that protects the Membership, the consensus amongst the eight International Group clubs is to contract out of certain aspects of the new Act. Nevertheless, the eight clubs also recognise that some provisions of the new Act should be adopted as they clarify certain aspects of the law which were previously uncertain. The eight clubs have advised already of the rule changes they have effected at the 20th February 2016.

The 2015 Act has introduced changes in four main areas:

- Insured's disclosure obligations
- Treatment of warranties
- Fraudulent claims
- Payment of claims

We deliberately quote below the content of club circulars in full in this Newsletter without additional commentary in order to maintain the integrity of the collective motivations and positions taken by the eight clubs. All eight clubs have sent circulars with a common language .

Insured's disclosure obligations

Duty of fair presentation

The existing obligation of disclosure, set out in the MIA 1906, will be replaced by a duty to make a "fair presentation" of the risk. This new duty shares many of the features of the current duty of disclosure. However, greater emphasis is given to the insurers' role in the process of disclosure, with a member potentially fulfilling its duty of fair presentation by disclosing sufficient information to put the club on notice that it needs to make further enquiries. The view is that a fair presentation and a professional assessment of the risk are of mutual benefit to members and to clubs and that, consequently, the new duty of fair presentation should and will be adopted by the eight affected clubs.

Remedies for breach of the duty of fair presentation

Under the new Act an insurer will remain entitled to avoid the policy if an insured deliberately or recklessly fails to make a fair presentation. The insurer will also be entitled to avoid the policy where an insured's failure to make a fair presentation was innocent or negligent if that insurer would not have entered into the policy had a fair presentation been made.

It is only in circumstances where an insurer would have entered into the policy notwithstanding the relevant information that the policy will continue and the remedy will depend on the terms on which the risk would have been written or the premium the insurer would have charged to write the risk. The remedy of avoidance may well therefore remain the usual remedy under the new Act where an insured fails to make a fair presentation of the risk.

However, in a P&I context and recognising the importance of proper disclosure in the mutual context, the eight affected International Group clubs intend to contract out of the new Act's provisions on remedies for breach of the duty of making a fair presentation. The eight International Group clubs will keep the MIA 1906 remedy of avoidance in respect of any breach of the duty to make a fair presentation of the risk.

Treatment of warranties

Basis clauses

The new Act prohibits any term in an insurance contract by which the insured warrants the truth of all pre-contractual representations. This prohibition would negate the effect of current club rules which declare such information to be the "basis" of the contract of insurance. This provision is mandatory and, consequently, any such basis of contract wording will be removed from the rules of the eight affected International Group clubs. Any inaccuracies in material representations will instead be treated as relevant to the question as to whether or not there has been a fair presentation of risk.

Warranties and other terms

Compliance with certain warranties, e.g. maintaining a vessel's Class, is a condition precedent to cover by a club irrespective of the type of loss suffered. Current practice and law may give clubs a wider right to reject claims than would be possible under the new Act's remedies for breach of warranty: at present a member's breach of a warranty will discharge the club's liability under the insurance from the date of the breach, unless and to the extent the relevant club's board determines otherwise.

When considering the new Act, importance was given to the mutual nature of the risk, the availability of the relevant club's board's or managers' discretion in appropriate cases and also uncertainty as to how the new Act's provisions on warranties and other terms may be applied in the future. Accordingly, it was felt best to preserve the current position. The affected International Group clubs will, insofar as permitted, therefore maintain existing practices by contracting out of the new Act's provisions on warranties.

Fraudulent Claims

The new Act's provisions on fraud provide clarity on this area of the law. Therefore, the affected International Group Clubs will adopt the new statutory provisions as to the treatment of fraudulent claims. However, the affected International Group Clubs will exclude the operation of the new Act's provisions on the continuing validity of policies following a fraudulent claim made by a beneficiary who is not specifically named in the terms of entry, such as an entity associated with or affiliated to a Member against whom a covered claim is enforced. Where a fraudulent claim is made in this context, for consistency, the International Group takes the view that the fraud should have the same impact on the Member as if it had made the fraudulent claim. The affected International Group Clubs will therefore contract out of these aspects of the new Act.

Payment of Claims

The Enterprise Bill 2015 (which is currently being considered by the UK Parliament) proposes to amend the new Act by implying into all contracts of insurance a term requiring the reimbursement of claims within a reasonable time. The Bill proposes certain remedies for breach of that implied term, including the possibility for the insured to claim interest. Bearing in mind the mutual nature of the risks insured and the manner in which claims are handled within the International Group system and under the Pooling Agreement, these provisions do not appear to be appropriate. The eight affected International Group Clubs therefore intend to contract out of this provision and will maintain the longstanding exclusion of the payment of interest on Members' claims. However, the new Act does not permit an insurer to contract out of the implied term in circumstances where the insurer deliberately or recklessly fails to reimburse an insured's claim within a reasonable time. Members will therefore be protected to that extent.

By way of **summary** on the foregoing points set out in full from the Clubs circular:

- Insured's disclosure obligations

Duty of fair presentation

The view is that a fair presentation and a professional assessment of the risk are of mutual benefit to members and to clubs and that, consequently, **the new duty of 'fair presentation' has been adopted by the eight affected clubs.**

Remedies for breach of the duty of fair presentation

Recognising the importance of proper disclosure in the mutual context, **the eight affected clubs have opted out of the new Act's provisions on remedies for breach of the duty of making a fair presentation** keeping the MIA 1906 remedy of avoidance in respect of any breach of the duty to make a fair presentation of the risk.

- **Treatment of warranties**

Basis clauses

This provision is mandatory and, consequently, any such basis of contract wording is removed from the rules of the eight clubs.

Warranties and other terms

Due to the uncertainty regarding the availability of the relevant clubs' boards or managers' discretion in appropriate cases and also with uncertainty on how the new Act's provisions on warranties and other terms may be applied in the future, insofar as permitted, existing practices will be maintained by **contracting out of the new Act's provisions on warranties.**

- **Fraudulent Claims**

The new Act's provisions on fraud provide greater clarity in this area of the law. Therefore, the affected Clubs **will adopt the new statutory provisions as to the treatment of fraudulent claims. However,** the affected Clubs **will exclude the operation of the new Act's provisions on the continuing validity of policies following a fraudulent claim made by a beneficiary who is not specifically named in the terms of entry,** such as an entity associated with or affiliated to a Member against whom a covered claim is enforced. The affected Clubs **will therefore contract out of these aspects of the new Act.**

- **Payment of Claims**

Bearing in mind the mutual nature of the risks insured and the manner in which claims are handled these provisions do not appear to be appropriate for. The eight affected Clubs **have contracted out of this provision** and will maintain the longstanding exclusion of the payment of interest on Members' claims.

However, the new Act does not permit an insurer to contract out of the implied term in circumstances where the insurer deliberately or recklessly fails to reimburse an insured's claim within a reasonable time. Members will therefore be protected to that extent.

For the eight clubs affected the 2015 Act introduces the new obligation on Members to make a 'fair presentation of the risk' (Sections 3 – 7 of the 2015 Act) and replaces the pre-contractual obligation on an insured under the MIA 1906 to disclose every material circumstance known to him.

The key provision in relation to this new duty is contained within Section 3 of the 2015 Act, which states that the new duty to make a 'fair presentation of the risk' requires:

- 'disclosure of every material circumstance which the insured knows or ought to know'; or
- 'failing that, disclosure which gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances'.

For the remaining Clubs of the International Group not affected by the 2015 Act it is important to remember that their Rules are governed by their domicile legislation. The Rules of the remaining clubs of the International Group contain clauses, listed for example as *Conditions Precedent*, which address Members obligations to the club relating to requirements of disclosure and alteration of risk, fraudulent, unlawful and deliberate acts with associated clauses setting out the remedies available to the insurer in cases of non-compliance.

For disclosure these address the duty of Member's towards the club at an early stage and prior to the club agreeing terms, conditions and premium for entry to provide full information with a continuing duty to inform timely the insured of variations / changes in circumstances to that originally advised. The wording of such clauses can be considered as 'similar' to the Marine Insurance Act 1906 which places duty and obligations on the insured only with remedy for failure resting with the insurer of cancellation of cover 'ab initio'.

It remains that of previous good practice, be it for the eight clubs of the International Group affected by the 2015 Act or those not so affected, the disclosing of detailed material information at the start of negotiations for coverage with insurers is paramount and , as important , is the advising timely in advance insurers of any variations occurring to that information during the course of the policy period.

We remain at your complete disposal for any further information or advice on this matter.

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