INSURANCE ACT 2015 - FREQUENTLY ASKED QUESTIONS II

Griffin has issued a number of Bulletins to assist Members in their preparation for the Insurance Act 2015 ("the Act") which comes into force on 12th August 2016. Griffin has also delivered presentations across the Membership in the first quarter of this year to explain the changes being brought in by the Act and their practical impact on brokers. A number of issues relating to the Act have been raised by Members in the course of those presentations and these have been collated as a series of questions and answers in this Bulletin.

GENERAL

1. IS THE MARINE INSURANCE ACT 1906 BEING REPEALED?

Not in its entirety but significant sections of it are being repealed and replaced by provisions of the Insurance Act 2015.

2. THE INSURANCE ACT APPLIES TO POLICIES GOVERNED BY THE LAWS OF ENGLAND & WALES, SCOTLAND AND NORTHERN IRELAND. THE BUSINESS WE PLACE IS ALL GOVERNED BY US LAW, SO WILL THE POSITION BE UNCHANGED FOR THAT BUSINESS WHEN THE NEW RULES COME IN?

Yes, the Act will not have any impact on business governed by the laws of a jurisdiction other than England & Wales, Scotland and Northern Ireland.

3. WE DEAL WITH OVERSEAS BUSINESS GOVERNED BY THE LAWS OF OTHER JURISDICTIONS AS WELL AS BUSINESS GOVERNED BY ENGLISH LAW, SO ARE WE NOW GOING TO HAVE TO HAVE TWO SETS OF TEMPLATES FOR EVERYTHING?

This is not a new problem. Where business is not governed by English law alternative wording has always been required, to cater for the fact that disclosure obligations may be different and the position where provisions are breached may differ from the English law position. It is only the description of the English law position which needs to change.

4. THE ACT REFERS TO CONTRACTS ENTERED INTO AFTER 12TH AUGUST 2016 BUT THE DATE OF INCEPTION OF A CONTRACT COULD BE DIFFERENT TO THE DATE IT WAS ENTERED INTO. COULD THIS LEAD TO SOME CONFUSION AS TO WHETHER THE ACT APPLIES?

Since the Act uses the terminology "entered into", it is possible that a policy which incepts after 12th August 2016 might be regarded as having been "entered into" at an earlier date so that the Act would not apply. If there is any uncertainty as to how a contract would be treated we would recommend that the position is discussed and agreed with underwriters at the outset.

5. WOULD THERE BE ANY ADVANTAGE IN GETTING CLIENTS TO DELAY ARRANGING COVER IN SOME SCENARIOS SO THAT THEY HAVE THE BENEFIT OF THE NEW RULES COMING IN?

We would not recommend delaying cover on this basis as a general rule, since there may be the potential for a gap in cover arising. It would be preferable to seek to negotiate with underwriters that the new rules should apply to any policy placed shortly before the new rules come in.

6. AS BROKERS SHOULD WE RECOMMEND TO CLIENTS THAT POLICIES SHOULD BE SUBJECT TO LOCAL LAWS IF THE POSITION UNDER ENGLISH LAW WILL BE SUBJECT TO UNCERTAINTY, AT LEAST WHEN THE NEW RULES FIRST COME IN?

There will be some uncertainty at the outset as to how some of the new rules will operate in practice, but we would not advise brokers to recommend a local law as an alternative where policies are currently governed by English law. Brokers are unlikely to be certain of how that local law may operate and any disputes arising may then have to be dealt with in that local jurisdiction.

7. WHERE CLIENTS CURRENTLY HAVE BUSINESS SUBJECT TO THE LOCAL LAWS OF OTHER JURISDICTIONS, SHOULD WE RECOMMEND THAT THEY CONSIDER CHANGING TO ENGLISH LAW TO TAKE ADVANTAGE OF THE CHANGES BEING BROUGHT IN?

We would not recommend this approach. There may be good reason why the local law has been chosen and the broker will not be qualified to undertake a comparison of how English law and the local law operates and advise as to whether every aspect of English law is more beneficial. The Act does in fact bring English law regarding insurance contracts more into line with the position under many other legal systems, in terms of proportionate remedies in the event of non-disclosure, less draconian remedies for breach of warranty and so on.

8. IS THE BROKER'S LIABILITY FOR PREMIUM UNDER S.53(1) MARINE INSURANCE ACT 1906 BEING CHANGED?

This was an area considered by the Law Commission as part of the review of insurance law but it did not make it into the new Act. The Law Commission apparently plans to issue a final report on this issue but has indicated that the report will contain recommendations rather than draft legislation.

9. APART FROM THIS PRESENTATION, WHAT ELSE WILL GRIFFIN BE DOING TO HELP US TO PREPARE FOR THE NEW ACT?

Griffin's presentation has given an overview of the legal changes being brought in by the Act and some of the practical implications for brokers and insurers. It is designed to prompt Members to consider what they should now be doing. One key step will be to update standard documentation to reflect the new law and Griffin has recently issued a Bulletin with revised template wordings, for disclosure warnings and warranties and condition precedent warnings, to assist with this. In addition the LMA has recently issued a suite of model clauses suitable for use under the new regime.

Other than that Griffin is available to provide further assistance to Members, as required, reviewing revised documentation, meeting teams with particular concerns and so on. However one of the most important areas is in the hands of brokers themselves and that is instigating dialogue with clients and markets to remove as much uncertainty from the new process as possible.

10. WHAT SHOULD BROKERS BE DOING TO HELP THEIR CLIENTS?

Brokers should be talking to clients, and creating written records of such discussions, to ensure they are aware of and understand the changes and how they will be affected. When doing so brokers should consider who they are dealing with from the client's business and question whether that person really knows or understands their business and its insurance needs properly. There needs to be an awareness that the broker may have a better understanding of the risk if he has been involved in an account for several years than the person dealing with insurance matters within the client's business.

DISCLOSURE

11. SHOULD OUR DISCLOSURE WARNING MENTION THAT INSURERS MAY NOW NEED TO ASK FOR FURTHER INFORMATION FROM BUSINESS INSUREDS?

The duty is to make a fair presentation, and to disclose every material circumstance, and so Griffin's view is that this is the message which it is safest to give to insureds by way of a warning. The duty can be satisfied by the 'second limb' of the new test i.e. all material circumstances have not been disclosed but the information given is sufficient to put the insurer on notice to make further enquiries. However, by including reference to this in the standard warning there is a risk this will encourage insureds to consider something less than full disclosure. The new regime in effect gives insureds a second bite at the cherry if they have failed to give full disclosure of all material circumstances, but Griffin would not recommend this as a starting position. For this reason it does not appear in our recommended template wording issued in a recent Bulletin.

12. AS A BROKER, IF WE GET CLIENT SIGN-OFF OF THE PRESENTATION GOING TO THE MARKET, AND THE MARKET THEN ASKS QUESTIONS WHICH WE RELAY BACK TO THE CLIENT, DO WE NEED TO GET SIGN-OFF ON THAT?

Yes. There should be a written record of the client's answers to the questions and the underwriter should be asked to scratch to evidence that it has seen and is satisfied with the answers provided.

13. FOR A 2 YEAR MARINE CONTRACT WHICH STRADDLES THE 12TH AUGUST 2016 DATE, WHAT WOULD HAPPEN IF AN EXTRA VESSEL WERE ADDED ON 13TH AUGUST 2016? WOULD THIS CONSTITUTE A VARIATION SO THAT THE PROVISIONS OF THE ACT WOULD APPLY?

The starting point is to consider what the position would be under the existing regime and whether a new underwriting decision would be called for. If the addition of a vessel would be considered a variation entitling the underwriter to consider information disclosed before deciding the basis upon which to proceed, that will be the case under the new regime. The only difference will be that the disclosure exercise would be done in accordance with the new rules. If the contract clearly contemplated the addition of vessels at various points which would simply be added by way of bordereaux, it may be that the addition would not constitute a variation.

WARRANTIES & ONEROUS PROVISIONS

14. OTHER THAN WHERE A WARRANTY DEFINES THE RISK AS A WHOLE, IS IT RIGHT TO SAY THAT THERE WILL BE NO SUCH THING AS A WARRANTY, AS WE NOW UNDERSTAND IT, WHEN THE NEW RULES ARE IN FORCE?

The draconian effect of breach of warranty is one of the (many) reasons why the Law Commission instigated this review of insurance law. Under the new regime breach will no longer terminate cover but will suspend it until the breach is remedied, if capable of remedy. In a scenario where the breach is not remedied, or is not capable of remedy, there will be no cover in place from the point of breach. This will, on the face of it, be equivalent to the current scenario where cover terminates upon breach. Where the 'terms not relevant to the loss' provisions come into play so that the insured can argue that the breach of the warranty is not relevant to their loss, a claim may still be paid but that provision will not help where the warranty defines the risk as a whole.

15. DO WE NOT NEED TO FLAG UP WARRANTIES ANY MORE AS BREACH NO LONGER TERMINATES COVER?

It remains as important as ever for brokers to highlight warranties and other onerous provisions to clients and seek confirmation that they can comply. It should be evident from the documentation that this has been done. If any such provision is breached the position remains that there may be no cover which will mean there is a dissatisfied client and hence a potential exposure for the broker.

16. IS IT BETTER FOR SUBJECTIVITIES TO BE WARRANTIES UNDER THE NEW ACT AS COVER WILL BE SUSPENDED IF THE WARRANTY IS NOT COMPLIED WITH, RATHER THAN THERE BEING NO COVER IF A SUBJECTIVITY IS NOT MET?

It is interesting that this question presumes that if a subjectivity is not met there is no cover. Where a subjectivity remains outstanding at inception contract certainty requires that it should be fully clausedwithin the contract, so that the consequences of it not being complied with (which does not necessarily mean no cover) are clear.

Under the current regime a broker would want to avoid a subjectivity appearing within the contract as a warranty, since if it was not complied with cover would automatically terminate. Under the new regime including a subjectivity as a warranty will suspend cover which may not be as draconian but this will need to be approached with extreme caution by Members as breach will still prove fatal if the warranty is something which is not capable of remedy. A prime example would be including 'warranted no known or reported losses' as at a certain date which, if not accurate, is not something which could be remedied.

17. WHAT HAPPENS WHERE A TERM DEFINING THE RISK AS A WHOLE IS BREACHED AND THAT BREACH IS THEN REMEDIED?

Cover will be suspended during the period of breach and any losses occurring, or attributable to something happening, during that period will not be paid. Cover will then come back on when the breach is remedied. The 'terms not relevant to the loss' provisions in the Act (Section 11) will not assist in this scenario since they specifically do not apply to a term defining the risk as a whole.

18. HOW CAN A BROKER COMPLY WITH A LETTER OF UNDERTAKING WHICH OBLIGES IT TO NOTIFY A PARTY, SUCH AS A BANK, WHERE AN INSURED'S COVER HAS CHANGED, WHEN IT MAY NOT KNOW WHAT THE POSITION IS CONCERNING COVER?

This problem already exists and is not a new problem created by the Act. Brokers are not obliged to enter into Letters of Undertaking and, in doing so, assume legal obligations to third parties, who are not their clients, for no reward. Nevertheless Griffin recognises that Members sometimes need to agree to provide these for commercial reasons and offers advice on how to do so, whilst limiting the potential E&O exposure. There will always be the possibility that an insured is unaware that they have, say, breached a warranty and so have no cover in place, and/or that the Member is unaware of this and so cannot notify a third party where it has agreed to do so. The difference under the new regime is that cover would be suspended in that scenario, rather than terminated, but otherwise the potential problems remain the same.

19. WHERE A PREMIUM PAYMENT WARRANTY IS BREACHED SO THAT COVER IS SUSPENDED AND PAYMENT IS THEN MADE SO THAT COVER COMES BACK ON, IS THE INSURER ENTITLED TO PREMIUM FOR THE PERIOD WHEN HE WAS NOT ON RISK?

The insurer will be entitled to the full premium in accordance with the terms of the contract, and that full amount needs to be paid in order for the warranty to have been complied with. As soon as any outstanding premium is received this needs to be paid on without delay to the insurer in this scenario. There will be an exposure for a broker if there is any delay in the accounting process which results in cover being suspended for any longer than it should be. The client will need to understand, of course, that payment to the broker will not lead to cover coming back on instantly (unless the wording provides that premium paid to the broker is deemed to be received by the insurer).

20. IF A POLICY STATES THAT A PREMIUM NEEDS TO BE PAID WITHIN 15 DAYS OR THERE WILL BE CANCELLATION AB INITIO, WHAT HAPPENS?

This is a little ambiguous in view of the reference to cancellation ab initio as opposed to automatic termination from the moment of breach, and clarification should be sought from the insurer as to whether the term in question is intended to operate as a warranty. If the term is a warranty, cover would be suspended under the Act rather than cancelled until premium was paid, if it was subsequently paid. If the insurer wanted the position to be otherwise and was dealing with a business insured, it could contract out of the default position under the Act to achieve this. It would need to ensure that the wording of the clause was clear and unambiguous, that it was drawn to the attention of the business insured and that the business insured had agreed to its inclusion.

21. COULD AN INSURED WITHHOLD PREMIUM DUE UNDER A PREMIUM PAYMENT WARRANTY AND THEN PAY QUICKLY WHEN, FOR EXAMPLE, THERE WAS AN IMMINENT WARNING OF A HURRICANE?

An insured could do so. The policy would be suspended but, if the payment was made in time, there would then be cover for the hurricane. This would be a risky approach on the part of the insured since there would be a period of suspension of cover and the insured would need to be certain that overdue premium would then reach the insurer in time for cover to come back on. An insured using such tactics may, of course, find it difficult to obtain renewal terms.

22. WHERE A POLICY INCLUDES A CONDITION PRECEDENT TO INSURERS' LIABILITY THAT ANY CLAIMS MUST BE NOTIFIED WITHIN A SPECIFIED TIME-SCALE, WILL THE ACT CHANGE THE POSITION WHERE THE DEADLINE FOR THE NOTIFICATION IS MISSED?

The Act does not change the position concerning conditions precedent, other than giving an insured in breach the opportunity to take advantage of Section 11 which deals with 'terms not relevant to the loss'. Under Section 11 an insured in breach of a condition precedent (or some other onerous provision) can argue that its claim nevertheless should be paid, since the breach has not increased the risk of the loss which actually occurred in the circumstances in which it occurred. The limitation of Section 11 is that it will only apply to specific risk mitigation clauses. It will not alter the law in relation to the insured's obligation to notify insurers of claims and circumstances, as they are not terms which tend to reduce the risk of loss; by the time it comes to notification the loss has already occurred.

Although the position will not change when the Act comes in, this does not really reflect the spirit behind the changes being brought in as a result of the lengthy review by the Law Commission. The position will remain that insurers may be able to avoid liability for claims notified just out of time, even where they have suffered no prejudice as a result of the delay. It seems this remains an area where Members need to do what they can to negotiate as much protection for clients as possible. Obtaining insurers' agreement to include a provision in wordings that notification to the broker is deemed notification to insurers will go a considerable way to mitigating the risk. In addition negotiating the inclusion of words such as 'as soon as reasonably practical' rather than tight time-frames within which notifications must be made will also help.

23. IF A POLICY REQUIRED AN ART GALLERY, FOR EXAMPLE, TO HAVE A BURGLAR ALARM AND THE INSURED WAS IN BREACH OF THAT PROVISION BUT THEN SUFFERED A FLOOD, WOULD THAT FLOOD DEFINITELY BE COVERED UNDER THE NEW RULES?

The terms not relevant to the loss provisions would give the insured art gallery the opportunity to argue that the flood claim should be paid because the breach did not increase the risk of loss that actually occurred. The onus would be on the gallery to prove this and it would depend upon the particular facts. If a pipe had burst, the burglar alarm may have made no difference and so the gallery may be successful in pursuing its claim. Alternatively, if an intruder caused any damage resulting in flooding, for example, or water poured through a ceiling which would be likely to trigger motion sensors, the alarm may be highly relevant and hence the insurer not liable to pay the claim.

24. IF A WARRANTY IS BREACHED AND SO COVER IS SUSPENDED, WHAT HAPPENS IF THE POLICY IS PROVIDING COMPULSORY INSURANCE SUCH AS EMPLOYERS' LIABILITY COVER?

This is not an issue created by the new legislation. Under the current regime cover would terminate if such a warranty applied and under the new regime it will be suspended, both of which cause a problem in the context of compulsory insurance.

This type of scenario is covered by the Employers' Liability (Compulsory Insurance) Regulations 1998 which provide that certain types of conditions in employers' liability policies are prohibited. An insurer cannot provide that it shall be under no liability, or that any liability otherwise arising shall cease, in the event of non-compliance with any of these prohibited conditions. This ensures that there is protection for employees, since otherwise employers could be in breach of such a condition and employees would then be deprived of the opportunity to seek redress for any injury suffered. Where a prohibited condition appears in a Business Combined Policy, for example, it should be clear in the wording that this does not affect the Employers' Liability element of the cover.

CONTRACTING OUT

25. WHY IS THERE THE ABILITY TO CONTRACT OUT AT ALL?

Insurers cannot contract out of the Act's provisions when dealing with consumer insureds. When dealing with business insureds the parties are considered to be on a more equal footing and so should be free to contract on the basis they choose subject to certain provisos. The ban on Basis of Contract clauses cannot be contracted out of and any other provisions which are 'disadvantageous' to the business insured need to be clear and unambiguous, drawn to the business insured's attention and the business insured must agree to their inclusion.

26. IS IT ANTICIPATED THAT MANY MARKETS WILL CONTRACT OUT OF PART OR ALL OF THE ACT?

The Law Commission anticipated that some of the more sophisticated markets may wish to contract out, such as the marine market. Although Griffin is not aware that the marine market generally has plans to do so, the UK-based P&I clubs have all agreed to contract out in part and have issued a Circular setting out their agreed position. A copy of the Circular appears on Britannia's website and can be accessed at: http://www.britanniapandi.com/assets/Uploads/documents/UKinsuranceact2015112015.pdf. Since the Law Commission's review lasted for many years, and had considerable market support during that time, it is hoped that contracting out will not be too widespread. It is important that Members check the position with their markets without delay.

27. CAN AN UNDERWRITER LITERALLY CONTRACT OUT ON A CLAUSE BY CLAUSE BASIS EACH TIME THAT YOU DEAL WITH HIM?

It is open to an underwriter to do so but, on a practical level, one would expect that an underwriter would adopt a particular stance on the provisions of the Act and apply that with some consistency to particular wordings.

28. CAN AN UNDERWRITER CONTRACT OUT OF THE ACT'S PROVISIONS INDEFINITELY?

Again it is open to an underwriter to do so. The 'disadvantageous terms' which he applies as an alternative to the position under the Act will need to be highlighted and agreed to on every occasion in order to meet the Act's transparency requirements.

29. WOULD INSURERS BE ABLE TO CONTRACT OUT OF SOME WARRANTIES IN A POLICY BUT NOT ALL? FOR EXAMPLE, IF A POLICY CONTAINS TEN WARRANTIES CAN INSURERS DECIDE THAT THEY ARE HAPPY FOR THE PROVISIONS OF THE ACT TO APPLY TO EIGHT OF THEM, SO THAT A BREACH WOULD MEAN COVER IS SUSPENDED, BUT THEN CONTRACT OUT FOR THE REMAINING TWO WARRANTIES, SO THAT BREACH TERMINATES COVER?

There could be a situation where an insurer may take the view that it is generally happy with the Act applying to a contract, other than in respect of one or two elements of it. It may, for example, decide that it wants to apply a Premium Payment Warranty and if payment is not received in accordance with that it wants to be able to consider itself off risk, as would be the case now. There does not seem to be any reason why an insurer cannot take this approach, as long as the payment provision in this example, or 'disadvantageous term' as the Act would call it, meets the transparency requirements already referred to above (i.e. is clear and unambiguous, is drawn to the business insured's attention and the business insured agrees to it).

30. HOW WILL INSURERS SHOW IN THE CONTRACT OR OTHER DOCUMENTS THAT THEY ARE CONTRACTING OUT?

Any 'disadvantageous terms' need to be clear on the MRC and there needs to be a separate record that they have been agreed to by the Insured.

ENTERPRISE BILL

31. WHAT IS LIKELY TO BE CONSIDERED A 'REASONABLE TIME' TO PAY A CLAIM UNDER THE ENTERPRISE BILL'S PROVISIONS.

H M Treasury has stated that the introduction into every contract of insurance of a requirement on the insurer to pay sums due within a reasonable time, is part of the government's commitment to combat unreasonably late payment of sums to businesses in particular. What is reasonable in any scenario is likely to be fact dependent and will be assessed by reference to all of the circumstances including the type of insurance, complexity of the claim, compliance with any relevant statutory or regulatory rules or guidance and the extent to which relevant factors are outside the insurer's control. A reasonable time will always include time to investigate and assess the claim. The insurer will also have a defence to a claim for breach of the implied term where it had reasonable grounds for disputing the validity or value of a claim.

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