INSURANCE ACT 2015
WHAT IS AND ISN'T CHANGING?

By Helen McCormick, Associate Director – Claims & Legal

On 19 March 2016 the Radio 4 Moneybox programme took calls from people in Carlisle who had been affected by severe flooding the previous December and had their insurance policies voided because of confusion about how close they lived to the River Eden.

The insurer, Integra, said that the insureds had failed to correctly answer key questions on the flood risk to their property. They had stated that their homes were more than 400 metres from the river when they were actually closer.

"It was just a tick box question along with all the others. They didn't tell me that it was important", said the callers. *"I gave Integra the information that I thought was correct. I wasn't trying to mislead them"*, *"I've never made any claims on my home insurance before and now we need them they've turned their backs on us!"*

A common theme emerged: the insureds had answered these key questions honestly and to the best of their knowledge, while the insurers were acting unfairly and unreasonably.

The Insurance Act 2015, which comes into force on 12 August 2016, is the most significant reform of UK insurance contract law for a century. The Act is intended to materially change the way in which the business of insurance is conducted and to extend the reforms made to consumer contracts in 2009 to non-consumer insurance contracts, to make it harder for insurers to avoid claims for technical breaches by the insured.

The Act can be seen as part of the general shift towards a more insured-friendly regime. This has also been seen in the Enterprise Act 2016, which introduced an obligation on insurers to pay within a reasonable time, and the recent decision of the Supreme Court in Versloot Dredging BV & Another v HDI Gerling Industrie Versicherung AG, which ruled that a *'collateral lie'* told as part of an insurance claim did not defeat the whole claim. This decision was seen by some as a departure from the previous position.

SO WHAT'S CHANGING?

	Marine Insurance Act 1906	Insurance Act 2015
Duty of 'Fair Presentation' **IA 2015** **Part 2**	The insured is obliged to disclose every material circumstance known to him.	Obligation to disclose replaced by duty to make a 'fair presentation of the risk'. There is a greater emphasis on the insurers' role in the process. The insured may have done enough by disclosing sufficient information to put the insurer on notice that it needs to make further enquiries. No 'data dumping' by the insured is permitted.
Remedies for Breach of Duty of Fair Presentation **IA 2015** **Part 2, section 8**	Failure to disclose allows the insurer to avoid the contract.	The insurer can avoid the contract, reject claims and keep the premium if there was a deliberate or reckless failure by the insured to comply with their duty of fair presentation. However, if it can be shown that the insurer would have entered the contract even if there had been a fair presentation then the remedy will depend on the terms on which the risk would have been written or the premium the insurer would have charged.

	Marine Insurance Act 1906	Insurance Act 2015
Basis Clauses **IA 2015** **Part 3, section 9**	Any untrue statement made during pre-contractual negotiations allows the insurer to avoid the contract.	It is no longer permitted for insurers to include a term in the insurance contract which converts all pre-contractual representations into warranties.
Warranties **IA 2015** **Part 3, section 10–11**	A warranty is a condition which must be complied with exactly by the insured whether or not it is material to the risk. If not, the insurer is discharged from all liability for claims as from the date of the breach whether or not the breach was related to or caused the loss.	Breach of a warranty suspends the contract. Insurers are liable for events occurring both before the breach and after it has been remedied. Insurers cannot rely on a breach of a policy term to avoid liability if the insured can demonstrate that the breach is entirely unconnected with the actual loss which they have suffered. However, insurers CAN rely upon a breach of a policy term if the term breached 'defines the risk as a whole'.
Remedies for Fraudulent Claims **IA 2015** **Part 4, section 12**	There is no specific section dealing with this, but at common law, insurers are not liable to pay fraudulent claims, although note the recent decision in Versloot Dredging BV & Another v HDI Gerling Industrie Versicherung AG which held that 'fraudulent devices' do not count.	The insurer is not liable to pay a fraudulent claim. He may terminate the contract from the time of the fraudulent act and he need not return the premium. 'Fraudulent claims' are not defined, see Versloot Dredging BV & Another v HDI Gerling Industrie Versicherung AG regarding 'fraudulent devices'.
Remedies for Fraudulent claims: group insurance **IA 2015** **Part 4, section 13**	See above.	Where there is a contract which provides cover to persons who are not parties to the contract and a fraudulent claim is presented by one of those parties (beneficiaries) the insured's rights survive; the insurer may not terminate the contract for fraud by the beneficiary.
Good Faith **IA 2015** **Part 5, section 14**	Contracts are based on a duty of utmost good faith; breach of this duty entitles the insurer to avoid the contract.	Insurers are not permitted to avoid contracts for breach of the duty of utmost good faith.
Late payment of claims **IA 2015** **Part 4, section 13 A** **Enterprise Act 2016**	No specific section dealing with late payment of claims.	The Enterprise Act 2016, which came into force on 4 May, amends the IA 2015 and implies into all contracts of insurance a term requiring reimbursement of claims within a reasonable time.

CONTRACTING OUT

Although the Act is intended to herald a more insured-friendly regime, it also introduces some new concepts and, with that, considerable uncertainty. For this reason, many International Group P&I Clubs have chosen to exercise their right to contract out of some sections. Insurers may contract out provided they do so in a 'transparent fashion' at the outset of the contract.

For example, the concept of section 11 of 'whole risk' is a new one and both insureds and insurers can expect legal challenges until the courts have resolved what this means. Seven UK-based IG P&I Clubs have contracted out of this section. For example, many Club Rules provide that the entered vessel must remain in class, and that cover is suspended while the vessel is out of class, subject to the discretion of the Board of the Club. This is less harsh than the Marine Insurance Act 1906 provisions. Insurers who opt in to section 11 might have the right to rely upon a loss of class to deny a claim, regardless of whether it was the cause of a loss.

Many IG clubs are contracting out of sections 13 and 14 (group insurance and utmost good faith) and section 13A (late payment of claims), although insureds still have the protection of the act if the insurer deliberately or recklessly fails to pay the claim. Insurers are not permitted to contract out of section 9 (basis clauses).

WHAT ISN'T CHANGING?

One notable section about which change was discussed but not implemented is section 53 of the Marine Insurance Act, which provides:

"Unless otherwise agreed, where a marine policy is effected on behalf of the insured by the broker, the broker is directly responsible to the insurer for the premium, and the insurer is directly responsible to the insured for the amount which may be payable in respect of losses, or in respect of returnable premium".

Effectively, the section imposes the risk of the insured's insolvency on the broker, and the risk of a broker's insolvency on the insurer. The courts continue to uphold the rule that insurers cannot withhold payment for a loss under a policy on the basis that the broker has not paid the premium.

The section codified the traditional practice where an insured required additional time to pay the premium but the Lloyd's marine underwriters were only prepared to extend credit to the Lloyd's broker with whom they were dealing. This practice developed into a custom whereby the underwriter looked for payment to the broker alone who would, in turn, either pay the amount of the premium directly to the underwriter or credit the underwriter in his running account before obtaining reimbursement from his client, the insured.

However, there are obvious practical difficulties for the insurer with this rule (for example where the broker is insolvent). Reform of the section was considered by the Law Commission to bring it more in line with non-marine insurance, where the broker usually holds the money on trust for the insured or receives it as agent for the insurer (respectively, a 'non-risk transfer' and a 'risk transfer' Terms of Business Agreement). However, some of the proposed reforms proved controversial and changes to section 53(1) were not included in the bill which eventually became the Insurance Act 2015.

Section 85(2) provides an exception for mutual insurance, and so section 53(1) does not apply to unpaid calls from Members to P&I Clubs for example. This section also remains unchanged.

CONCLUSION

While the Act is intended to provide greater protection for insureds and make it harder for insurers to avoid claims for technical breaches, it also introduces significant uncertainty in some areas. However, it is possible for insurers to contract out of most of the new provisions. There are limits to the insurers' ability to contract out, in particular they must do so in a 'transparent fashion', and there is some uncertainty about what this means. Some are predicting that the next stage of reform will be to remove the insurers' right to contract out altogether.

However, if your insurers have contracted out and reverted to the more familiar Marine Insurance Act 1906 concepts, this will afford them and you some certainty, at least for the time being until any legal challenges arising out of the new Act have been tested by the courts.

16, Rue Notre Dame I L-2240 LuxembourgI Incorporated in Luxembourg I RC Luxembourg B14288
0816