
CLYDE&CO
Insurance Act 2015
Shaking up a century of insurance law
Extract from Clyde & Co's in depth report on the Insurance Act
1892

We are a matter of weeks away from the UK's Insurance Act 2015 finally coming into force on 12 August. The Act is the first major reform of insurance law in the UK since the Marine Insurance Act 1906 and provides a new framework within which insurance business will be conducted.

Clyde & Co has drawn on its extensive knowledge in the field to compile a comprehensive guide to the Act, encompassing a class-by- class analysis of how the Act will affect all major classes of insurance business, along with an international comparison that provides valuable insight into how the new Act compares with insurance law in other jurisdictions. The guide also provides, insurers with a detailed discussion of potential stinging points that might arise under the Act, along with a handy practical tips sheet designed to help insurers navigate the new terrain, which is reproduced in this extract from the full report. If you would like to download the full report please visit **www.clydeco.com**.

Introduction

The Insurance Act received Royal Assent by Parliament on 12th February 2015, and will come into force on 12th August 2016. This represents the most significant reform of UK insurance law since the Marine Insurance Act of 1906. All contracts of insurance, reinsurance and retrocession made after 12th August 2016 (or variations to contracts which are made after 12th August 2016) will be governed by the Act.

The Act is the product of a process of law reform which was instigated by the Law Commissions in 2006. The Act is intended materially to change the way in which insurance business is conducted, and is designed to modernise and clarify the law.

To the "casual observer" it might be surprising that the UK's insurance law regime has for so long been based on a statute that is more than 100 years old and which was originally designed only to address marine insurance. And yet, the business of insurance in the UK has thrived and the UK legal system, based upon a combination of statutory codification and judicial precedent, has, to a significant extent, shaped the international insurance markets and the development of insurance law during the century since the 1906 Act. But as market practices have developed the legal regime needed to be updated to reflect changing demands and bring it into line with other jurisdictions.

With the enactment date now looming, it is important to focus on how the Act will work and the steps that insurers will need to take to ensure they are ready to deal with these changes. In this guide we have focused on how the key provisions of the Act will operate, offering guidance on best practice for insurers as they implement the provisions of the Act, and assessing the practical implications of the Act across all lines of insurance business. Some of the more controversial provisions of the Act, such as the removal of the basis of contract clauses, have already been widely implemented by the market, other provisions have gradually been introduced by insurers as they have sought to ready themselves for the Act. Nevertheless, it is important to note that all contracts of insurance after 12th August 2016 will be formed under a new regime and insurers must take careful note as they are drafting contracts of the potential implications of the Act.

During the process of law reform, the Law Commissions looked at other jurisdictions where similar provisions had already been implemented, and in part eight of this report we have considered how the new UK regime for insurance law measures up against the other major insurance markets.

Like all new statutes, the full impact of the Act will not be appreciated until some of the provisions are interpreted by judicial precedent, and we expect that over the coming years we will see further definition of the Act as it is put into practice.

We hope that this report will add valuable insight for insurers as they move into the new regime.

Simon Konsta
Global Head of Insurance
June 2016

In practice – how to comply with the Act

Reform	The Act provides:	Practical tips for claims and underwriting specialists
Duty of fair presentation	Insured can discharge duty by providing "sufficient information to put a prudent insurer on notice that it needs to make further enquiries"	– Be proactive in reviewing/processing material received – Ensure all information is carefully read – Data dumping by the insured is prohibited so question material received in this way (it must be presented to you in a "clear and accessible manner") – Question any blank spaces/incomplete answers promptly – Check all queries raised are fully answered – Check have received answers in relation to any subsidiary entities also being insured – Give same level of scrutiny to renewals **In relation to proposal forms:** – Review and amend as necessary to include questions that will produce the information required to assess and write the risk – Draft in a non-ambiguous manner eg do you have risk management procedures and are they implemented? – Be careful not to be too prescriptive – a form which is too prescriptive runs the risk of the courts finding that what was asked was all an insurer wanted to know, thus an insurer's argument may be limited **In relation to underwriting guidelines:** – Consider producing underwriting guidelines setting out what insurers will accept, minimum premium levels etc to demonstrate that a proportionate remedy should be applied if there is a non-disclosure and to ensure consistency across the company – Be careful not to be too prescriptive – guidelines which are too prescriptive run the risk of the courts finding that factors in the guidelines were exhaustive in relation to what an insurer wanted to know, thus an insurer's future argument/defence (in the event of a dispute) may be limited – Keep a record of any departures from the guidelines with reasons for the departure
Reasonable search	"an insured ought to know what should reasonably have been revealed by a reasonable search of information available to the insured"	– Insureds may try to agree in advance what comprises a "reasonable search" – consider carefully whether such an agreement may limit your rights – Consider setting out what you do not require sight of – Be careful that the defined score of the search is not wider than the score of the Act (if it is, consider contracting out of the Act in this regard, bearing in mind the transparency rules)
Knowledge – what an insurer "ought to know"	"an insurer ought to know something only if (a) an employee or agent of the insurer knows it, and ought reasonably to have passed on the relevant information to an individual [who decides on behalf of the insurer to write the risk] and (b) the relevant information is held by the insurer and is readily available to [such] an individual"	– Ensure everyone clearly knows who is responsible for deciding to write the risks and that they are up to date with personnel changes – Ensure all information from other departments is passed to underwriters in a timely fashion, including claims history and details regarding ongoing claims – Have systems in place to make information held off-site "readily available" for underwriters – Check all information from brokers, loss adjusters and any other agents used has been passed to the underwriter

Reform	The Act provides:	Practical tips for claims and underwriting specialists
Knowledge – what an insurer is "presumed to know"	"an insurer is presumed to know (a) things which are common knowledge, and (b) things which an insurer offering insurance of the class in question to insureds in the field of activity in question would reasonably be expected to know in the ordinary course of business"	– Continued education needs to be provided to all individuals regarding developments in the class of business in question – Consider methods of sharing sector knowledge and market information, for example – a weekly email or newsletter rounding up the week's news and developments in the field in question
Proportionate remedies	No longer "all or nothing" approach to non-disclosure	– Keep good records of underwriting decisions including reasons, notes of unusual factors, questions raised, answers to queries – Keep copy of broker presentation if possible
Warranties	Warranties are now "suspensive conditions"	– Review wordings carefully – If there is something you absolutely do not want to cover then consider putting in as an express exclusion clause in the policy (applies to warranties and terms currently expressed as condition precedents)
Basis clauses	These are now prohibited – not possible to contract out of section	– Review wordings to ensure these are removed
Section 11	Where there is non-compliance with a term that is designed to reduce the risk of loss, insurers will not be able to rely on that non-compliance where the insured can show that such non-compliance "could not potentially have increased the risk of the loss which actually occurred in the circumstances in which it occurred". For example, where there is a requirement to install a burglar alarm, and that is not done, insurers will not be able to refuse an indemnity on that ground for flood loss.	– Consider carefully which terms are important – Avoid uncertainty by making clear express provision for the consequences of breaching particular terms – Consider opting out of section 11 altogether (subject to considerations in Contracting Out section below)
Damages for late payment	Implied term in every insurance contract that insurer will pay claim within a reasonable time – Reasonable time includes reasonable time to investigate and assess the claim – Reasonableness depends on all the circumstances	– Deal with claims as promptly as possible – Have written record showing how the claim is being progressed – Be mindful that disputes between layers will likely not be considered a reasonable reason why payment was delayed – Be aware that it may be necessary to disclosure underwriting files – in order to establish reasonableness in subsequent proceedings – Be aware that you may need to waive privilege in respect of legal advice received to demonstrate reasonableness – Consider partial payment on uncontroversial element of claim under reservation of rights for the disputed element
Contracting out	– Cannot contract out in consumer policies – Cannot contract out of prohibition on basis clauses – Damages for late payment – in a non-consumer policy you can contract out, providing transparency requirements are met. However, the term will be void if it puts the insured in a worse position as a result of "deliberate or reckless breaches" of the implied term	– You must take sufficient steps to draw any disadvantageous term to the insured's attention before the contract is entered into or the variation agreed – The disadvantageous term must be clear and unambiguous as to its effect – If the above "transparency requirements" are not fulfilled, the term will not be upheld – Consider wordings carefully and assess whether you may be inadvertently contracting out of sections of the Act. If you are in effect contracting out, then the transparency requirements in section 17 will have to be met in the normal way – Need to show to the FCA that you are treating customers fairly

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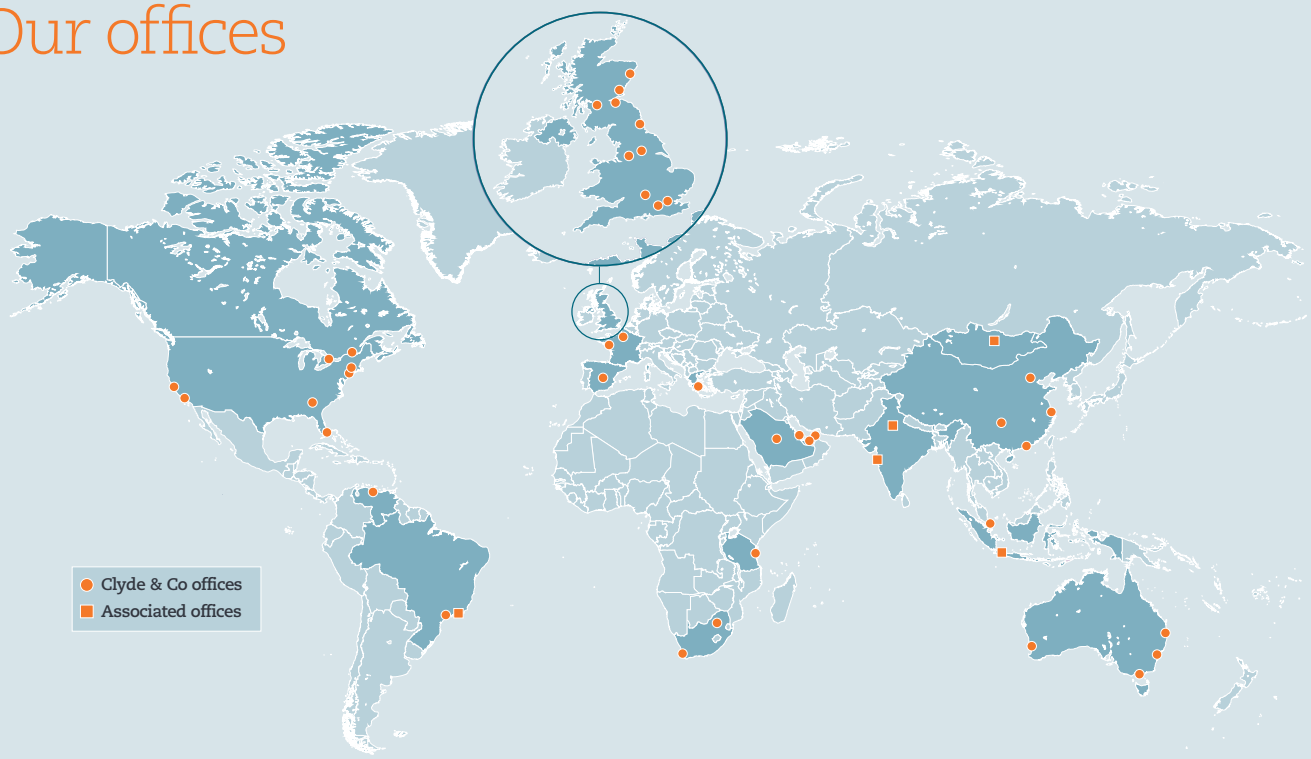

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