WILHELM RECHTSANWÄLTE COVINGTON Grenieravocats Cabinet d'Avocats - Law firm

Dr. Mark Wilhelm, LL.M., Richard Mattick, Patrice Grenier September 2015

The United Kingdom Insurance Act 2015 – Update and Comparison with the laws of Germany and France

1. THE NEW UK LEGISLATION

On 12 February 2015, the United Kingdom legislature passed the Insurance Act 2015. The new Insurance Act replaces provisions that date back to the Marine Insurance Act of 1906. It gives effect to reforms proposed by the UK's Law Commissions, particularly with regard to duties of pre-contractual disclosure and remedies for non-disclosure, breach of warranty and fraudulent claims. The key provisions will become effective on 12 August 2016. They relate to insurance for businesses (as opposed to consumers), apart from the provisions relating to breach of warranty, which apply to both classes of policyholder.

This update summarises the main changes to UK insurance law that will be made by the new Act and compares them with the respective positions under German and French law.

2. NEW REQUIREMENTS WITH REGARD TO POLICYHOLDERS' DUTIES OF DISCLOSURE AND REMEDIES FOR NON-DISCLOSURE

2.1 Duties of disclosure

2.1.1 UK Insurance Act 2015

Under the Insurance Act 2015, a duty owed by the policyholder to "make to the insurer a fair presentation of the risk" replaces the duty previously imposed on it to disclose every material circumstance that it knows or ought to know in the ordinary course of business.

A fair presentation must either disclose to the insurer every material circumstance that a policyholder knows or ought to know or give the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing the material circumstances. The policyholder cannot rely on simply responding to enquiries from the insurer. As the policyholder is in control of the manner in which the information is disclosed, the statute requires the disclosure to be made in a way that would be "reasonably clear and accessible to a prudent insurer" so as to avoid causing an information overload for the insurer by "data dumping".

A fair presentation must also not contain any misrepresentations (i.e. any representations of fact that are not substantially correct and any representations of expectation or belief that are not in good faith).

2.1.2 German position

Under German law a policyholder must disclose the circumstances in its sphere of risk which are relevant to the insurer's decision to conclude the contract.

Prior to the reform of the Versicherungsvertragsgesetz ("VVG") in 2008, circumstances about which the insurer expressly enquired were deemed to be relevant. The reform eliminated uncertainty about the relevance of a circumstance, so that it now limits the duty of policyholders to disclosing only those circumstances about which the insurer enquires in writing.

2.1.3 French position

French law has opted to limit the duty of policyholders to disclose only those circumstances about which the insurer enquires in writing since an Act of 31 December 1989. Therefore, policyholders have no duty to disclose material circumstances about which the insurer does not enquire. Boilerplate disclosures agreed to by policyholders at the insurer's request are not deemed proper disclosures.

2.2 Remedies for non-disclosure

2.2.1 UK Insurance Act 2015

Where a policyholder has breached its duty of disclosure under English law intentionally or recklessly, the insurer may avoid the policy and withhold the premium.

If the breach was neither intentional nor reckless, the question arises what the insurer would have done if the presentation had been fair. The insurer can avoid the entire policy if it can prove that it would not have entered into the contract of insurance at all. In that case, all premiums paid have to be returned. If the insurer would have entered into the contract on different terms, the contract is treated as concluded on these terms. If the insurer would have charged a higher premium however, it can reduce proportionately the amount it pays in respect of the policyholder's claim.

2.2.2 German position

Where there has been non-disclosure of a material circumstance by the policyholder, German insurance law allows the insurer to terminate the contract and avoid paying future claims by giving one month's notice (in cases of no more than slight negligence) or withdraw from the contract and treat the contract as void ab initio (in cases of at least gross negligence).

Notwithstanding its withdrawal, the insurer may still be obliged to pay a claim if the non-disclosed circumstance is not responsible for the occurrence of the insured event that gave rise to the claim or for the extent of the insurer's liability. However, if the non-disclosure was fraudulent, the insurer can avoid the contract and is free from liability in any event. The insurer is not obliged to return any premiums paid in case of withdrawal or avoidance.

2.2.3 French position

Under French law, any intentional non-disclosure allows the insurer to cancel the policy and keep the premium. Where a policyholder unintentionally breaches its duty of disclosure, the insurer will be entitled to charge a higher premium or terminate the policy if it becomes aware of the breach before an insured event occurs.

If the insurer becomes aware of an unintentional breach of the duty of disclosure after an insured event has occurred, and the insurer would have charged a higher premium if there had been full disclosure, the insurer can reduce proportionately the amount it pays in respect of the policyholder's claim, just as it would be able to do under the new UK Insurance Act.

The parties are however permitted to agree in the insurance policy that any failure, whether intentional or not, to disclose any new circumstance relevant to the insurer's ad-

equate assessment of the risks in due time during the contractual period shall result in the insurer being released from all liability.

3. THE WEAKENING OF INSURERS' REMEDIES FOR POLICYHOLDER BREACH OF WARRANTY

3.1 UK Insurance Act 2015

The Marine Insurance Act 1906 provided that warranties given by a policyholder must be exactly complied with, whether they are material to the risk or not. Any breach of warranty relieved the insurer from all liability under the insurance contract, regardless of the content of the warranty and its relevance to any claim.

The Insurance Act 2015 provides that the insurer may not now rely on a breach of warranty to refuse payment of a claim, if the breach was irrelevant to the risk of loss. Policyholders will be entitled to payment of a claim if they can show that their breach could not have increased the risk of the loss occurring. Thus, for example, if a policyholder's property was burgled, but the policyholder had not installed a working fire alarm as warranted, the insurer must still pay the claim, if the policyholder can prove that a non-operational fire alarm did not increase the risk of burglary.

Under the previous English law, a breach of warranty released the insurer from any payment obligation from the moment of breach. Under the Insurance Act 2015, a breach of warranty will only suspend, rather than release, the insurer's liability. It gives the policyholder the possibility to remedy the breach. If the breach has been remedied before an insured event occurs, the insurer will still be obliged to pay any for valid claim..

The Insurance Act 2015 also abolishes so-called "Basis of the Contract"- clauses. These clauses in insurance contracts previously had the effect of converting statements made by policyholders, often in pre-contractual information, into binding warranties at the expense of the policyholder. The insurer could thus avoid liability under the contract if the policyholder made incorrect statements, regardless of whether they were material or induced it to sign the contract.

3.2 German position

Under German insurance law, the insurer is released from liability for any claim if the policyholder has intentionally breached a statutory or contractual obligation. If the policyholder breached the obligation recklessly, the insurer is entitled to reduce its payment by a

proportion corresponding to the severity of fault. The insurer remains fully liable if the violation by the policyholder was only negligent.

However, like under the new English law, for a release of the insurer from liability, the policyholder's violation has to be relevant to the occurrence of the insured event or the extent of the insurer's liability. If the insured event would have occurred even without the breach of obligation, the insurer remains liable for the claim.

3.3 French position

French law provides that a breach of warranty by a policyholder results in the insurer being released from all liability for a claim to which the breached warranty is relevant. However, the insurer is liable if such a breach of warranty is remedied before the claim arises.

4. INSURERS' REMEDIES FOR FRAUDULENT CLAIMS

4.1 UK Insurance Act 2015

The Insurance Act 2015 introduces a statutory regime to cover cases of fraudulent claims in order to clarify what the insurer's remedies are following a fraudulent claim. The Act allows the insurer to refuse to pay a fraudulent claim and to treat the contract as terminated from the date of the fraudulent act and keep the premium. However the insurer remains liable for legitimate claims arising before the fraudulent act, notwithstanding termination (there had been some confusion about this in the case law).

The Act also introduces the concept of "severability" in group insurance contracts. If a fraudulent act is committed by one of a number of insured persons entitled to make claims under a group insurance policy, it is deemed that that person and the insurer had entered into a separate insurance contract. Thus, although the insurer is entitled to withdraw from the separate contract with that individual, the group insurance contract is not cancelled, so as to protect the other insured parties.

4.2 German position

Under German Law, the insurer is allowed to refuse payment and to terminate the contract in case of a fraudulent claim. Under group insurance policies, an insured's fraud does not prejudice the rights of the other insureds under the same contract. However, any (pre-contractual or later) fraud of the policyholder of the group insurance contract can have consequences for the insureds and endanger their cover.

4.3 French position

Under French law, a fraudulent claim allows the insurer to deny payment of the claim as well as terminate the policy and to keep the premiums. However, the insurer remains liable for legitimate claims arising prior to the fraudulent act. A fraudulent claim made by one insured under a group insurance contract has no effect on the cover provided to other insureds.

5. RIGHTS TO "CONTRACT-OUT"

5.1 UK Insurance Act 2015

The insurer may not contract out of the provisions of the Insurance Act 2015 that affect consumer insurance contracts. In relation to insurance of businesses, the Act permits the parties to agree to disregard the new statutory rules in relation to everything except "Basis of Contract" clauses, provided the insurer complies with the following transparency requirements: it must take sufficient steps to draw the disadvantageous contracting-out term to the attention of the policyholder before the contract is entered into and the new terms must also be clear and unambiguous as to that effect.

In order to determine whether these requirements are met, the characteristics of policyholders of the kind in question are to be taken into consideration. Policyholders need to be vigilant and look out for attempts by insurers to contract out of provisions that may protect policyholders.

5.2 German position

German Insurance Law similarly allows the parties to contract out of the VVG when major risks are concerned. The general German statutory provisions on the freedom of contract apply. However, conflicting terms always bear the risk of being ineffective, in particular when a clause disadvantages the policyholder inappropriately. In case of doubt, the effectiveness of a disputed clause is subject to judicial review.

5.3 French position

French insurance law is mostly mandatory and it usually does not allow parties to contract out of it, unless it is for the benefit of policyholders or in the case of certain types of insurance (e.g., marine insurance, aviation insurance).

6. CONCLUSION

The Insurance Act 2015 will lead to changes for companies that buy insurance in the UK market. Policyholders must be aware of the implications of the new law for the underwriting of risks as well as for claims. Policyholders from outside the United Kingdom in particular should not hesitate to seek external advice on the matter.

Should you have any questions on the Act, or the content of this update, please do not hesitate to contact the authors:

Dr. Mark Wilhelm, Wilhelm Rechtsanwälte
mark.wilhelm@wilhelm-rae.de, +49 211 687746 12

Richard Mattick, Covington
rmattick@cov.com, +44 20 7067 2023

Patrice Grenier, Grenier Avocats
pgrenier@grenier-avocats.com, +33 1 40 20 14 81