

Insurance Act: Underwriter's Checklist

August 9, 2016

The Insurance Act 2015 will come into force on 12 August 2016. It will apply to all English law contracts of insurance and reinsurance (or variations to current contracts) underwritten on or after that date. Contracts of insurance include slips, declarations under lineslips, and certificates issued by coverholders.

The following is a checklist for underwriters with relevant LMA Model Clauses:

Applicable law

1. Does the Act apply?

- is the (re)insurance contract expressly subject to English law (or Scottish, Welsh or Northern Irish law)?
- is the choice of law overridden by the Rome Convention as implemented in EU States because the insurance is of a mass risk (ie not a Large Risk) and the insured or insured property is in the EU, but not the UK. A Large Risk includes an MAT risk or where the insured is a large organization.
- is the contract underwritten on or after 12 August 2016?

Presentation of the risk

2. Is the contract for consumer insurance (ie for an individual buying insurance wholly or mainly for purposes unrelated to the individual's trade, business or profession)? A consumer is under no duty to disclose material information but must take reasonable care when responding to questions (CIDRA 2012 applies).

3. If the contract is for non-consumer insurance or reinsurance, the (re)insured is under a duty to disclose material information known to its senior management or those procuring the insurance, and what would be disclosed by a reasonable search:

- has the (re)insured identified its senior management? (LMA 9120)
- has the (re)insured identified those procuring the (re)insurance (eg its risk manager, its brokers)?
- has the (re)insured described the search it has conducted for material information?
- was the search reasonable and sufficient to reveal information that you would want to take into account when underwriting the risk?
- did the search include beneficiaries of the cover (eg directors, other companies in the group), the (re)insured's agents, and other entities in its organisation (LMA 9119)?
- was there anyone else likely to have material information (eg property managers, accountants)?

4. The presentation will be fair even if not complete if you are put on notice that you need to make enquiries:

- are there shortcomings in the placing information?

- does the presentation include all the information that you would usually expect to see from this kind of insured?
- have all the questions in the placing application/questionnaire been answered?
- have you asked for missing information?
- have you got a written record (eg email, note) of your questions and answers?
- has the written record been stored in a place where it can be found?

5. The (re)insured need not disclose information that is known to you:

- what information is available to you in-house?
- what do you usually review (eg claims database)?
- have you kept a record of relevant data reviewed by you?

6. You may have remedies if the (re)insured's presentation of the risk is not fair depending on what you would have done had all the material information been disclosed:

- have you made a record of the key factors taken into account when underwriting the risk?
- have you underwritten in accordance with a manual or guidelines? If not, have you recorded
- where and why you have departed from them?
- do you have a record of declinatures?
- are the records stored in a place where they can be found?

Contract terms

7. Does the proposed contract contain a "basis of contract" clause? These are no longer enforceable but you may list information the truth of which is critical and a condition precedent to insurer's liability (LMA 5253).

8. Do you want to contract out of the Act so that

- breach of warranty discharges the insurer from liability (rather than suspends liability until remedied), eg for non-performance of a premium warranty? (LMA 5258 & 5259)
- breach of warranty discharges the insurer from liability even though it is not relevant to the loss? (LMA 5260 & 5261)
- the remedy for breach of the duty of fair presentation is avoidance of the contract? (LMA 5257)

9. If you are not the lead underwriter, do you want to rely on any material misrepresentation made to the lead? If so, use LMA 5262.

10. If you are underwriting treaty reinsurance covering risks written on or after 4 May 2017, are you reinsuring the risk of your reinsured being liable for damages for late payment of a claim (under the Enterprise Act 2016)?

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