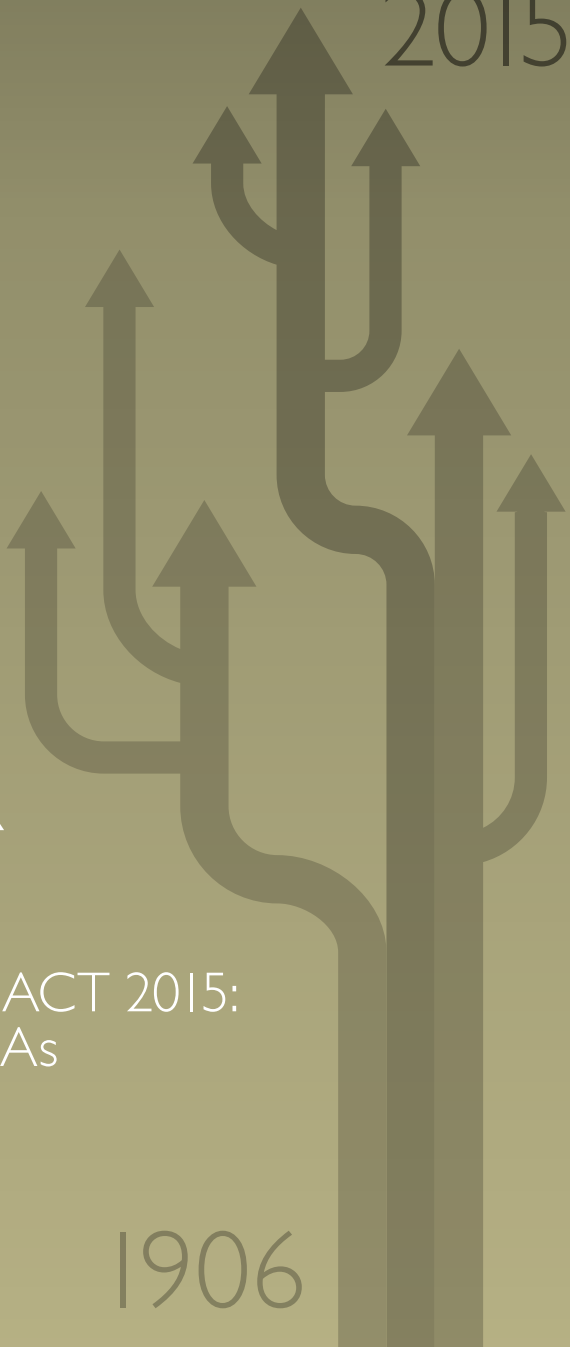
BLM

2015

FAQs



TIME FOR CHANGE

THE INSURANCE ACT 2015: A GUIDE FOR MGAs

POWERED BY RED RESEARCH EDUCATION DEVELOPMENT

1906

FOREWORD

We are delighted to have been able to work with BLM to produce this helpful guidance on the Insurance Act specifically for MGAs. This the culmination of direct engagement with our members through market briefings and "shape & share" interactive seminars on the Act hosted by BLM. We believe the guidance will support MGAs by informing them on the key areas and questions they may have on the Act.

Peter Staddon
Managing Director, MGAA

We are very pleased to have been asked to provide this guide to the Insurance Act for MGAA members. The Act is of course the most significant legislative change to the law of commercial insurance for a century and of profound importance not only to MGAs but also their customers and capacity providers. We do hope that in providing an accessible guide in Q&A format we assist MGAA members with their understanding of the Act and the challenges and opportunities it presents.

Jennette Newman
Partner and head of London market, BLM


HONI SOIT QUI MAL Y PENSE
DIEU ET MON DROIT

INTRODUCTION

The Insurance Act 2015 brings the law of insurance into the 21st century. It is in large part evolutionary rather than revolutionary with many familiar concepts and terminology being retained. It reflects changes in society and business practices that have altered beyond all recognition since the passage of the Marine Insurance Act 1906. Both insurers and policyholders are substantially more complex and insurance needs are significantly different from the world of the late Victorian/early Edwardian era. Business processes are complex and the Insurance Act 2015 reflects the modern commercial world in which it is enacted. Case law and statute that formed the pre-Insurance Act law has now been brought into discrete sections of the new legislation and this has concentrated the minds of many stakeholders placing and underwriting insurance business.

The amendment of the law by the Law Commission carried with it an underlying professionalism agenda. In delineating the obligations of underwriters and policyholders (and of course of the policyholder's advisor, the broker) and in highlighting the importance of process means that significant concerns about the new law have been raised by many stakeholders.

The particular challenges facing the delegated authority market arise precisely because there is an additional step inserted into the underwriting process. The FCA and the industry is of course alive to the challenges which arise and which were considered in June 2015 in the FCA Thematic Review "Delegated Authority: outsourcing in the general insurance market."

Plainly every organisation will face different challenges and demands with different needs and steps to take to ensure compliance. Our experience suggests that there are three key steps to implementation: firstly to know the law, secondly to review your policies and thirdly to review your processes and contractual documents including your TOBAs. (The plea of the lawyer is interjected at this point: please be able to evidence your decisions!) However in considering all of the issues we suggest that the overriding consideration of an MGA when reviewing its Insurance Act (and indeed CIDRA) obligations is to never lose sight of the fact that it is the agent of the capacity provider. Many brokers run schemes which on introduction alter the relationship between the broker and its 'client': it is good practice in those circumstances to ensure that there is a clear separation between 'scheme' and 'advisory' business. All MGA paperwork and correspondence should make it clear that the MGA is not the adviser of the policyholder and a separate website for MGA business should be considered.

To assist with some of the specific issues arising from the Insurance Act we repeat below the Frequently Asked Questions that have been put to us at BLM as we have worked on Law Commission consultations, responses to HM Treasury and House of Lords consultations and in the numerous training sessions run for many clients and the MGAA. We have added an MGA focused overview to each section highlighting particular challenges for the delegated underwriting.

We hope that you find this Guide useful and informative.

Terry Renouf
Partner, BLM

COMMENCEMENT AND SCOPE

There are no particular issues for an MGA that arise from the commencement of the Insurance Act. New law takes time to bed down and become understood. Additional time should be allowed for both policyholder and MGA to deal with any unfamiliar issues during the placement stage. Consideration should be given to whether a limitation of liability clause could be inserted into policy terms in relation to the 'late payments' terms discussed below (see final Q&A on page 30).

COMMENCEMENT AND SCOPE	
Question	**Answer**
The IA2015 is said to apply to commercial insurance but this term does not appear anywhere in the legislation. Why?	**This is correct –** the definition adopted is "non-consumer insurance contract", a definition adopted from CIDRA which applies to consumer insurance contracts. The IA2015 applies to "non-consumer insurance contract[s]" and CIDRA "Consumer insurance contract[s]" thereby avoiding any legislative gaps caused by different terminology.
Is it the case that sections of the IA 2015 also apply to consumers?	**Yes –** those clauses relating to warranties, irrelevant terms, fraudulent claims and contracting out also apply to consumers.
In practice is this going to lead to significant change when dealing with consumers?	**No. –** the law is in many respects "catching up" with the practice of the Financial Ombudsman. The changes to the law have in fact been applied by the FOS for a number of years and consumer insurance disputes are very rarely handled in the civil courts.
What is the commencement date of the IA2015?	The IA2105 became law on 12 February 2015 but it applies to policies commencing on or after 12 August 2016. Thus its terms will apply to policies incepted or renewed or to variations to such contracts from that date. (And it should be noted that the "late payment" term – see below – applies to policies from 4 May 2017)

So could part of a pre-August 2016 contract be subject to the "old" law and a post-August 2016 variation be subject to the "new" law?	**Yes** but only with regard to the variation e.g. an "old law" policy is varied after 12.08.2016. New rules affect the variation so if a new risk is added the new rules apply to that but not to what was covered under the old policy.
Could a "rolling" contract incepted before 12 August 2016 be subject to the "old law" indefinitely?	In theory this could be the case but the theory will be tested when there is a dispute with the policyholder. We anticipate that a Court is not going to be keen to interpret a policy on the basis that the "old" law applies. Wordings may often suggest that a "rolling" contract is in fact a renewal triggered by the payment of a further premium. BLM consider that the longer the period from commencement on 12 August 2016 the greater the contract uncertainty facing the parties. For a long term insurance contract insuring a major project, structure or long term risk it would be sensible for the parties to have addressed which law, new or old, applies to the contract.
Does the Insurance Act 2015 apply to re-insurance?	It does, though there is only one specific reference to re-insurance which appears in the section dealing with the confidential information held by an agent that does not form part of the knowledge of an insured. The reality is that the complexity of re-insurance programmes and treaties are such that parties do, should and will agree different terms. Re-insurers and those following on a slip in the London Market will take a close interest in the terms agreed by the primary layer.

FAIR PRESENTATION

It is irrelevant to a policyholder that its business is placed with an MGA. The obligations required by the Insurance Act 2015 to provide a "fair presentation" do not alter because the policyholder is dealing with an MGA. An MGA with its delegated underwriting authority should have a clear understanding of its binder agreement and the risk appetite of its capacity provider. The MGA should be also be clear whether the information provided by the policyholder is "sufficient" or "insufficient", and if the latter, whether and how the MGA should undertake further enquiries of the policyholder or seek clarification from the capacity provider. The danger that arises for both MGA and capacity provider is when there is an unclear understanding of the underwriting parameters. Where information that is material has been disclosed to the MGA it will not be possible to argue that the policyholder has failed to comply with its duty of fair presentation.

There will be market challenges generally that arise from the obligation, discussed below, to disclose as part of the fair presentation anything that forms the subject matter of a warranty. The MGA should have a clear understanding of the capacity providers position on this issue.

The further challenge for the MGA arises from the jurisdiction of the FOS in respect of a microbusiness: it should be assumed that the Ombudsman will tend to apply a "consumer" interpretation to complaints rather than non-consumer.

FAIR PRESENTATION	
Question	**Answer**
Is the new duty of "fair presentation of risk" substantially different from the "old" law?	The new component is that the disclosure to the insurer should be in a manner which is reasonably clear and accessible to a prudent insurer. The Act continues the existing obligation on the insured to disclose every material circumstance which will be very familiar. If the insured falls a little short of this obligation it will be sufficient to have disclosed sufficient information to put an insurer on notice to undertake further enquiries for the purpose of revealing those material circumstances. This latter item has a new profile because it is contained within the relevant section of the Act but does reflect obligations under the old law.
What is the situation if the insured discloses "sufficient" information to the insurer who does not make an enquiry that would have revealed a material circumstance?	In this situation the insurer will not be able to argue that there was a breach of the duty of fair presentation and avail itself of the various remedies that it would otherwise have available. Any subsequent enquiry (those usually generated as a result of a claim) are too late.
So the need for enquiry by the insurer is an important stage in the placement process that needs careful consideration?	**Yes –** and whilst, as we have noted above, this is not a "new" requirement it does emphasise that underwriting should be done during the placement process and not at the point of claim. Insurer enquiries are appropriate but should as now be carefully considered and carefully framed.
Do we have any indication of what a "clear and accessible" presentation should look like?	**No –** the intention behind this part of the IA2015 was to address the issue of the "data dump". The Act is written at a high level to cover every possible commercial insurance contract and policyholder – a far wider class of risk and policyholder than consumer insurance. The Act cannot be prescriptive. "Clear and accessible" in respect of the directly written business from the sole trader or microbusiness will be determined by the questions in the proposal form. The "clear and accessible" presentation of an international global multinational will be very different. Early discussions between underwriters and brokers will assist all parties. Content will vary depending on the nature of the risk and it is impossible within these replies to be more prescriptive.

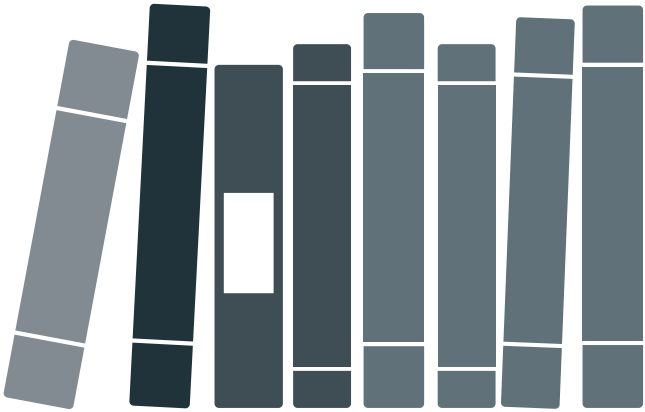
Does the fair presentation have to be one document?	**No** – the information can be contained in more than one document or oral presentation.
What is the quality of the information disclosed? Has this varied?	As now the facts must be "substantially correct" and expectations or beliefs (as to future events or assumptions) must be made "in good faith". The IA2015 does not change the present law.
Is there anything that the insured does not need to disclose?	As now there is no obligation on the insured to: disclose information that diminishes the risk; that the insurer knows (or ought to or is presumed to know) or is something as to which the insurer has waived information.
Does the insured need to disclose anything that forms the subject matter of a warranty?	Under the "old law" the insured did not but the IA2015 abolishes this as an exception: the insured will not now have that as a defence and should disclose anything (such as breaches) that forms the subject matter of a warranty.
What is the rationale for this additional obligation?	As we discuss below a breach of warranty no longer discharges the insurers liability where the breach has been remedied. This change in the nature of warranties alters the risk facing insurers. A warranty (as a risk mitigation term) remains important and will have been a term imposed by an underwriter and therefore material to the risk. The insured's compliance (or otherwise) with risk mitigation terms are therefore "material circumstances" that ought to be disclosed.

INSURED'S KNOWLEDGE AND THE REASONABLE SEARCH

There has been much discussion about who might be the "senior management" of a policyholder. This might vary depending upon the insurance policy itself and the size and complexity of the insured. The challenges for the MGA that is writing SME business may well arise around the looser governance structures of smaller businesses. Relevant knowledge may be held by individuals who have no formal management title. Similarly the extent of a "reasonable search" and the formality of a search will vary. There ought to be clarity between MGA and a capacity provider as to how these issues will be treated.

INSURED'S KNOWLEDGE AND THE REASONABLE SEARCH	
Question	**Answer**
Where the insured is an individual is it only his knowledge that has to be disclosed?	**No** – in addition to his own knowledge the knowledge of an individual responsible for his insurance is also relevant – which could be a person within his business – and would include the knowledge of his broker.
Where the insured is not an individual (e.g. a company) whose knowledge is it that has to be disclosed?	Remember that it is not every scrap of knowledge but only the material information described above which is known. In this instance it is the knowledge of the insured's senior management and again the person responsible for the insured's insurance: internally this latter might well be the risk manager and externally the broker.
Who would be included within the scope of "senior management"? Is it only the Board members? Could it be wider than that?	There is a definition within the Act that explains that "senior management" includes individuals who play significant roles in the making of decisions about how the insured's activities are to be managed or organised. Thus a Non-Executive Director may well not fall within the definition of "senior management" but it must be anticipated that "senior management" can extend to Non-Board level management.

Is there any further guidance beyond the Act itself on this issue?	There are Explanatory Notes that were before Parliament that explain that the categories of person who would be expected to be "senior management" would be narrowly construed – though capable of being applied flexibly. It is important in this context to understand that the knowledge of the insured includes information that "should reasonably have been revealed by a reasonable search" and so even if the individual within a company is not "senior management" their knowledge (if material) should be captured by the "reasonable search".
A search should therefore be undertaken in every instance?	**Yes** – pretty much because the Act refers to information "available to the insured" and that this is information held within the organisation or "by any other person (such as the insured's agent or a person for whom cover is provided by the contract of insurance)." Where the insured is a sole trader one can envisage that a search could be unnecessary in most instances and that a Judge will be sympathetic to the insured but the law does not allow for any exceptions. A commercial and practical view will have to be taken by insurers and brokers in the instance of the smallest businesses.



AGENTS AND BROKERS

There are no particular issues for an MGA when dealing with a broker save for the "Golden Rule" mentioned in the introduction: know who is your client and when you are acting as an agent whether that is of capacity provider or of the policyholder.

AGENTS AND BROKERS	
Question	**Answer**
The knowledge of the broker is that of the insured? This seems pretty broad. A broker can be acting for many clients operating in the same industry, sector or area. Is the insured going to find that everything that a broker knows from his contacts with other clients is going to form part of his knowledge and should be disclosed? Even if he does not know it and his broker cannot tell him because the information is confidential to the other client?	The Act does come to the assistance of the broker and the insured in these circumstances. Where a broker acquires confidential information it is not taken as information known to the insured where the broker is the insured's agent and the information acquired is done so through a business relationship with a person not connected with the contract of insurance in question.
Are there any circumstances where the broker is not the insured's agent?	A broker retained to advise or procure insurance for an insured will always be the agent of the insured. The question does highlight a problem that can easily crop up in circumstances involving delegated underwriting. Where a broker operates such a scheme he is the agent of the insurer who provides the capacity and the protections around confidential information discussed above will not apply. It will be essential to ensure that the business relationships are identified and confusion about roles and responsibilities are made quite clear.

As an MGA how can we ensure our sub-agents pass on all of the information they have been made aware of? If they do not, where does the Insurer stand in the event of a claim?	Is the sub-agent acting as a broker and therefore advisor to the insured or is it a situation where there has been a further delegation of the underwriting to the sub-agent? If it is the former and the information was material then the insurer will have its Insurance Act remedies available to it. If it is the latter then it appears that the insured has complied with its duty of fair presentation and the insurer will have to pay the claim. If the sub-agent has underwritten a policy beyond its authority then the dispute will be between insurer and sub-agent (and probably between insurer and MGA because the sub-agent is the agent of the MGA!)

KNOWLEDGE OF THE INSURER

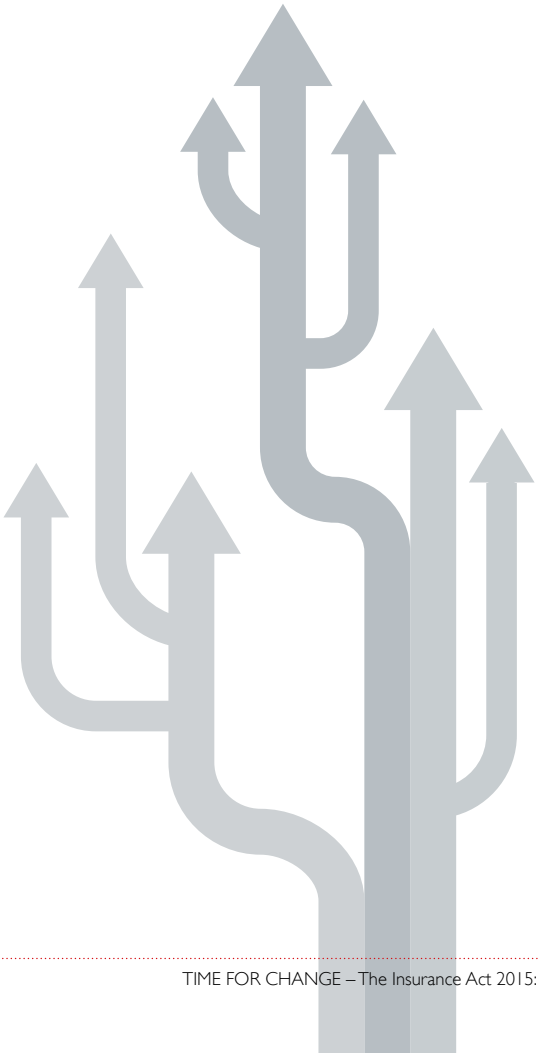
The knowledge of the MGA about a policyholder will not be deemed to include information held by the capacity provider. Two possible exceptions would be in the unusual situations where (a) the capacity provider plays some part in the underwriting decisions or (b) has the responsibility for handling claims for that policyholder, either itself or through an agent such as a TPA.

The insurers knowledge (including what an insurer is presumed to know and the specialist knowledge of an insurer offering insurance in a particular class of business) will be the knowledge of the individuals at the MGA who participate in the decision to take the risk for that policyholder. There will be particular challenges for outsourced underwriting where the claims are administered separately and reporting lines may not go directly to the MGA. This danger will be particularly acute at the point of renewal of a policy by the insured.

KNOWLEDGE OF THE INSURER	
Question	**Answer**
The knowledge of an insured is that of the whole organisation. Is it the same for an insurer?	**No** – what an insurer knows is limited to the underwriter or the underwriting team who participate in the decision to take the risk.
So a deliberate decision to remain blissfully ignorant could favour an underwriter or his team?	**No** – there was an underlying professionalism agenda behind much of the Law Commission's recommendations. "Naïve" capacity that accepted risks that could not ultimately be paid is to be discouraged and so the Act does state that the underwriter is taken to know not only his actual knowledge but what he ought to know.

And does the Act give any guidance on what an underwriter ought to know?	**Yes** – it includes information of other employees within the insurers business and information held externally by agents of the insurer that "ought reasonably to have been passed on".
This seems to mirror the "reasonable search" obligation that is imposed on an insured. Are there parallels?	It does and brings a focus on to an insurer's processes. Information and data in large insurers is unimaginably different from that of 1906 when the old law was codified. Whilst the law is not really new in respect of insurers knowledge the other changes that the Act brings in mean that it would be timely for insurers to give careful consideration to their existing processes and procedures for getting information held both internally and externally to the underwriting team on renewal.
And just to be clear – the underwriters knowledge includes information that could be held externally to the insurer?	**Yes** – where the information is held by an agent of the insurer and so this would include claims information held by a TPA or a risk survey where that had been undertaken at the request of the insurer.
Would it be a good time to review supplier agreements and SLAs to ensure that they cover the need for the timely flow of information?	Again that would seem to be an appropriate task particularly given FCA concerns expressed in Thematic Reviews around the length of supply chains.
Is it feasible for the largest insurers to have to search every nook and cranny of the organisation to find information that it might have inadvertently acquired that is relevant to the risk being placed?	There is an acknowledgement of the size and complexity of an insurance business because the Act states that where information is held by an insurer it should be "readily available". This clause addresses the concern about the terra-bytes of data that is available and captured and the Courts have had a degree of sympathy with insurers grappling with legacy systems. It does seem likely that as insurers come to terms with "big data" and its management that the Courts will become less tolerant.
Is there other knowledge that an insurer will be presumed to know?	Again, **yes** – the insurer will be presumed to know matters of common knowledge, but additionally, where an insurer is offering insurance of a class to insureds in a field of activity it will be expected to have the specialist knowledge that relates to that field of activity.

Could it be said therefore that a "specialist" underwriter is held to a higher standard?	**Yes** – in theory. On the one hand it would be hard to see a Court having too much sympathy for an insurer that writes business but then suggests that it has no expertise in the class or risk that it was accepting. Having said that one could envisage situations where "unusual" risks might have been included within "standard" policies and the Act does allow flexibility for those situations. As ever the outcome will be "fact specific".



REMEDIES: AVOIDANCE AND PROPORTIONATE REMEDIES

The MGA should know and understand the capacity provider's attitude to remedies. Is the capacity provider intending to contract out? For example, an additional premium remedy is "contracting out" if it replaces the proportionate remedies required by the Act. This contracting out arises because there is the possibility that a small claim could trigger a large premium increase – an outcome that would be adverse to the policyholder. When contracting out and imposing an adverse term the MGA will need to ensure compliance with the transparency provisions of the Act.

Where there is a breach of the duty of fair presentation, the MGA should be able to produce contemporaneous notes or records of the presentation that was made. Additionally, evidence of the underwriting protocols or guidelines that would have applied at the date of inception will need to be disclosed.

REMEDIES: AVOIDANCE AND PROPORTIONATE REMEDIES	
Question	**Answer**
Is avoidance still available as a remedy?	**Yes –** Where there has been a breach of the duty of fair presentation and the insurer would not have entered into the contract of insurance at all. It is also important to note the consequences of a deliberate or reckless breach on the part of the policyholder which is discussed in the next question.
So what has changed? I have heard that proportionate remedies will be available where there is a breach of the duty of fair presentation.	This is the major change brought in by the Act. There is a distinction between a breach which is deliberate or reckless and a breach which is not. In the case of the former the insurer may avoid regardless of whether it might have written the policy on different terms. The insurer may keep the premium where the breach was deliberate or reckless. Where the breach falls short of deliberate or reckless (and can include "innocent") the remedies available will depend on what the insurer would have done had the insured complied with the duty. Avoidance is still available where the insurer would not have entered in to the contract but where the outcome is that different terms or a different premium would have been applied or sought then those terms will be applied retrospectively and the claims adjusted or averaged.
What is the test of "deliberate or reckless"?	The Act states that the insured either knew that it was in breach or that it did not care whether or not it was in breach.
Who has to prove that the breach of the duty of fair presentation was deliberate or reckless?	It is for the insurer to establish that the breach was deliberate or reckless.
Does deliberate or reckless mean fraudulent?	It is a pretty good approximation. Reckless is a little wider than fraudulent with the latter implying an informed attempt to deceive. It therefore does give the Courts some "wriggle room" where the evidence just falls short of fraud but the Judge is pretty sure that it is. Given that the burden of proving deliberate or reckless rests with the insurer the question "Can I prove fraud?" is a good starting point.

What happens to the premium where the breach was not deliberate or reckless and the insurer would have avoided?	In these circumstances the premium is returned.
Where there is non-deliberate or non-reckless breach how will the terms on which the policy would have been written be established?	This will be a matter of evidence for the Court to determine in the event that it cannot be agreed between the parties. It would be very useful for instance to be able to show instances of "similar fact" proposals by other businesses that were not taken up or where different terms were proposed and accepted. The Underwriting Guidelines will be admissible evidence and clear directions as to unacceptable risks will be highly persuasive.
Will Courts accept that the Underwriting Guide is "commercially sensitive" and unavailable to share with the court?	The Courts will accept that your underwriting guide is (or given the time to take a matter to a hearing "was") commercially sensitive. The Courts are used to dealing with these situations and appropriate orders and protections are available to litigants. The Courts will, however, compel you to disclose all relevant documents as part of the litigation process.
Will this need to evidence decisions drive an underwriter down a wholly systemised process with every difficult or potentially controversial proposal declined – to the ultimate detriment of the insured as a class?	One can certainly see that this is a possible outcome but in the same way that the new law is principles based and cannot be prescriptive the Judiciary will understand that Underwriting Guides cannot anticipate every fact. Commercially there must remain discretion to accept and decline risk. The Underwriting Guide will show the parameters of risk and the further evidence, including oral evidence of the underwriter, will illustrate the discretion and professional judgment exercised. Alternatively the underwriter can contract on different terms if he wishes and it may well be preferable to do so for unusual or difficult proposals.

REMEDIES: CLAIMS, THIRD PARTIES AND DWP

REMEDIES: CLAIMS, THIRD PARTIES AND DWP	
Question	**Answer**
How will third party claims be dealt with where a proportionate remedy is applied in the event of the insured breaching the duty of fair presentation? If perhaps the claim were adjusted by 50%?	In these circumstances the obligation on the insurer is to pay 50% of the third party's claim and the insured will, if he can, have to pay the balance of the damages.
Is this not going to cause "reputational" issues for insurers where third parties are left with a shortfall?	Possibly, but in fact, third parties are in fact better off under the new law. Previously, in circumstances where there was a breach of the duty of disclosure, the insurer was entitled to avoid the policy: the third party would have received nothing from the insurer and would be relying on the solvency of the insured for payment of any damages. Under the Act, part of the claim is paid.
Does the Act and the new proportionate remedies affect for the compulsory classes of cover as far as third parties are concerned?	The Road Traffic Act provides extensive, if not complete, protection for the third party, with the insurer (or MIB) paying the claim and having rights of recovery against the policyholder. Employers' Liability insurance is also a compulsory class of cover but it does not have the regulatory protections for the third party of motor cover. Nevertheless, and no doubt having regard to the "reputational issues", insurers rarely decline cover in EL claims.
Would the Third Parties (Rights Against Insurers) Act assist the third party where a proportionate remedy has been applied?	**No** – it merely provides a mechanism for the third party to step in to the shoes of the insured. It does not provide the third party with any better rights, or improve the contractual position, of the insured or consequently the third party.

What happens in the situation where payments have been made under the policy which, following further enquiry, exceed the insurers obligation after the proportionate remedy has been applied?	This question raises many additional questions about claims handling practice and the complexities of the relationship between insurer and insured where a reservation of rights should have been made. Aside from all of those points the insurer should look to recover the sums paid from the insured. It would assist the insurer if there were a contractual right of recovery within the policy that covered this situation.
How do proportionate remedies work with CRU/ NHS charges? Would the DWP really be happy with the Compensator just paying it's proportion and directing them to the policyholder for the rest?	The definition of "compensator" is wide and the DWP is not going to distinguish between an insurer and an employer. Indeed the legislation probably creates a joint and several liability where proportionate remedy is irrelevant. In practice the CRU1 is filed by the insurer which will continue to receive reminders and the insurer remedy may having paid the DWP be through a contractual recovery of sums paid from the insured.
What happens to claims control if the insured has to pay more than half of the claim? The insured will no doubt consider it unfair that the insurer manages the claim and chooses the lawyers and experts when in this instance the funding is primarily by the policyholder? However the insurer has the claims handling experience and the advantage of control and economies available from managing a supplier network.	If the insured is seeking an indemnity (which presumably it is even if the proportionate remedy is applied) then the contractual right rests with the insurer to control the claim. The proportion of the "average" applied is irrelevant but one can understand the insured's concerns. The practicalities are that and mechanics might come down to a discussion with the insured where experience, expertise and supplier network are factors that would reduce the costs of settlement and would be relevant to the insured. One can easily see that reputational issues and "conduct risk" will be factors an insurer will have to take into account in these situations.

From a defence solicitors point of view who is your client? Where a proportionate remedy is to be applied or has been agreed and the defence lawyer is being jointly paid the two clients have to agree all steps. What if insurer and insured don't agree on next steps?	Good practice is to outline the situation on receipt of instructions, make sure that the policyholder understands that the retainer is with the insurer and that they are acting subject to reservation of rights. Thereafter, the parties will have to find a way to resolve the difficulties that potentially arise from "joint" instruction if there is an agreement on the proportionate remedy. Arguably the "control" clause is relevant and the option available that the insurer satisfies the contractual obligation to indemnify under the policy with a pre-settlement payment to the policyholder who can then proceed as it sees fit. How does this solution affect the CRU / NHS position? Arguably the contractual settlement of the coverage dispute is not a compensation payment but the DWP in practice will keep sending reminders!!
It appears that "proportionate remedies" throws up some new problems and situations that the claims department will have to deal with. Is this correct?	In certain respects the situation and complexities that arise where there has been a failure by the insured to disclose every material circumstance is not new. Where it arises, the need for the insurer to reserve rights remains. The Act does not affect the protection of the third party that is available in motor claims nor the broader considerations that apply to employers' liability claims brought by third parties. The situation that is new is that claims that could have been avoided under the "old" law may now be subject to adjustment. Payments will now be made (e.g. for CRU and NHS charges) that in the past would not have been where the policy was avoided. These situations can be anticipated and where payments have been made by insurers which exceed the obligation to indemnify, a contractual recovery clause may assist the insurer in recouping some of its outlay.

WARRANTIES AND REPRESENTATIONS

Basis clauses are endemic and often appear in policy documentation or proposal forms. These clauses are ineffective and should be removed. Failure to do so would offer a hostage to fortune in any litigation where the insurer was arguing that its policy wordings were Insurance Act compliant. It would be helpful for the MGA to have confirmation from its capacity provider whether it intends to contract out of the clauses providing that all warranties become suspensive terms.

WARRANTIES AND REPRESENTATIONS	
Question	Answer
Basis clauses are banned. Is there anything that an insurer can do where a risk mitigation clause is important?	Whilst the generic clause that converts every representation made to a warranty is unlawful this does not preclude appropriate wording being adopted in relation to specific clauses.
The IA 2015 also prevents an insurer from relying on a breach of warranty as discharging an insurers liability under the contract?	**Yes (and no!) –** it was felt that the automatic and continuing discharge of cover where there was a breach of warranty was too harsh. The Act now provides that the insurer's liability is suspended until the breach is remedied, assuming that the breach can be remedied.
So a claim has to be paid where the loss occurs before the breach of warranty?	**Yes** – subject of course to any other issues but a breach or warranty post loss cannot be relied on (as now)
But a claim arising after an unremedied breach does not have to be paid?	**Yes** – but this could be subject to another change in the law brought in by the Act relating to "irrelevant losses". (see below)

And finally – a claim arising after the breach has been remedied must be paid?	**Yes** – again subject to any other issues. This is the area where the law has changed. A warranty is now treated as a suspensive term where a breach can be remedied.
Is there a time period for the policyholder to correct the breach of warranty?	**No** – whether the insured is in breach or not will be a matter of fact and cover will be suspended if the insured is in breach. If this is not the intention of the parties and an alternative outcome is desired it should be reflected in the policy wording
And so dates relating to loss and breach and remedy will be very important?	**Yes** – and also clarity of wordings where it is chosen to use warranties as a risk mitigation device. Case law indicates that the Courts have been troubled by the effect of a breach of warranty. Whilst the impact of breach is mitigated – and one can anticipate that judges will interpret them less unfavourably (for the insurer) – a more clearly drawn term will benefit the parties and ultimately make the judicial decisions less uncertain.
Is there any guidance on the "quality of the remedy" of the breach of warranty?	In some instances breach and remedy will be obvious. In others less so. The Act states that a breach is taken to be remedied where the risk to which the warranty relates is essentially the same as that contemplated by the parties.

"IRRELEVANT TERMS"

This new clause will be subject to litigation. Some markets have opted for a clause that only allows the insurer to repudiate a claim where there is a direct causal link between the breach of the term and the loss. The intention of the Insurance Act clause is to create a lesser nexus but associating the breach with risk of the loss. The MGA should understand the approach of the capacity provider to this clause. Has the capacity provider indicated that it wishes to contract out of the "irrelevant terms" clause? Is there a commercial benefit to contract out and provide a clause requiring a causal link between the breach of a risk mitigation term and loss. Has the capacity provider identified which clauses it considers describe the risk as a whole and has, therefore, excluded from the "irrelevant terms" provisions of the Act?

"IRRELEVANT TERMS"	
Question	**Answer**
Is there any further change to the law relating to warranties?	There is, as mentioned above. Again it narrows the circumstances where an insurer may decline to pay a claim and relates to terms that tend to reduce the risk.
The terminology suggests that this clause applies more widely than warranties?	It does, as a risk mitigation term within a contract can include conditions precedent as well as warranties.
Does this clause potentially apply to the insured risk as a whole?	It would do so but for the fact that the Act is quite clear and specifically states that where the term applies to the risk as a whole the new clause does not apply. Thus a term that defined the age of the operator of a vehicle is a term that defines the whole risk and is not caught by this new clause.

And what is the effect of the new law on a risk mitigation term?	The Act states that an insurer, (where a loss occurs, and the insured is in breach of the risk mitigation term) may not rely on the non-compliance to limit or discharge its liability for the loss where the non-compliance could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred.
That seems quite complex. Does it mean that the insurer can only refuse to pay the claim where there is a direct causal link between the breach and the loss?	**No** – the words do closely follow the relevant clause within the Act (section 11). It should be noted that it is the "risk of the loss" that the insurer will have to show was increased as a result of the insured's non-compliance.
Would a practical example help?	**Yes** – most commentators have adopted the terminology of the heading of the clause in the Act: "Terms not relevant to the actual loss". The oft-cited example is where the insured is in breach of a sprinkler warranty but claims for a loss arising from a burglary. Under the present law the insurer may refuse to pay the burglary claim but the Act will intervene and prevent it from doing so because the non-compliance with the sprinkler warranty would not have increased the risk of the loss of the theft which actually occurred.
Are there any other limitations to the extent of the clause relating to irrelevant terms?	**There is** – compliance with the terms must tend to reduce the risk of loss of a particular kind, or loss at a particular location or loss at a particular time.
And again – wordings are going to be important?	**Indeed.** – risk mitigation clauses intended to refer to the risk as a whole, should be considered carefully and consideration explicitly given to identifying the term as one that "defines the risk as a whole" – if or course it does so!
And the effect of two clauses of the Act on warranties and irrelevant terms should be considered together?	Again **yes** – particularly if you are considering amending wordings of policies to "contract out" of the Act.

LATE PAYMENT

Has the capacity provider acknowledged that a slow payment of a claim by its TPA could result in payment of damages in addition to the indemnity claim? It would be prudent to consider a limitation of liability clause within the contract of insurance in the event of a "late payment" claim.

LATE PAYMENT	
Question	**Answer**
The IA2015 was amended even before it came in to force? Why was that and what was the amendment?	The Government introduced an amendment relating to "late payments" of claims. It did so through the Enterprise Act 2016 because there had been concerns raised about the issue which meant there was not the consensus necessary for this aspect of the Law Commission sponsored legislation to proceed.
What is the "late payment" amendment?	The amendment provides that it will be an implied term in every insurance contract that "the insurer must pay any sums due in respect of the claim within a reasonable time."
What was the problem that the amendment was seeking to solve?	It is fair to say that the law relating to insurance was "odd". Under some very old case law the obligation on the insurer was to "hold harmless" the insured. Thus when the insured event occurred the insurer was in breach of contract and the claim was treated as damages. English law provides that you cannot recover damages on damages and so any "late payment" by an insurer, however late or egregious, attracted no further award for breach of contract.

And so when the new law comes in to effect a failure to pay a claim within a reasonable time could oblige the insurer to pay something more than the contractual indemnity?	**Yes** – in fact the normal contractual principles of English law will apply: compensation for the losses that would have been within the reasonable contemplation of the parties at the date the contract was incepted.
And similarly the usual contractual defences will be available to the insurer?	**Indeed** – the insured will have to show, amongst many issues, that it has sustained a loss, that any losses are not too remote, that they are caused by the insurer's breach and that it has sought to mitigate its loss.
Does the amendment to the Act give any further guidance?	**It does** – it specifically states that the insurer does not breach the implied term by failing to pay the claim where there are reasonable grounds for dispute. It also states that the type of insurance, size and complexity of the claim is relevant and that obligations to comply with other relevant statutory or regulatory rules may be taken in to account. Additionally in judging what is reasonable the Court should consider factors outside the control of the insurer.
It appears that there are quite a number of obstacles to be overcome by an insured in pursuing a claim for "late payment"?	**There are** – establishing that the insured has suffered a foreseeable consequential loss and that it has mitigated its loss may be amongst the foremost barriers for a commercial insured. It is more likely that the cohort of successful claims would be established by smaller businesses rather than larger corporate entities.
When does the "late payment" term come in to force?	The amendment to the IA2015 was passed on 4 May 2016. The new term will be implied into policies commencing on or after 4 May 2017. Thus its terms will apply to policies incepted or renewed, or to variations to contracts, from that date.
Is there a time limit within which an insured should bring its claim?	The usual time limit of six years continues to apply in respect of the claim for an indemnity under the policy. The legislation accepted that there should be a new limitation period that related to the "late payment" to enable insurers to close their books. An action should be brought within a year of the insurer paying the claim. An action brought outside that time limit will give the insurer a limitation defence.

CONTRACTING OUT

In general, the market is adopting the Insurance Act – not without some qualms. However, the Act is flexible for the commercial insurance contract and this is appropriate as a "one size fits all" solution would not meet every commercial need and might well prevent cover being offered in some instances. It has to be anticipated that contracting out, with the associated transparency provisions, will be more difficult and costly when dealing with SMEs, and the approach of the FOS in dealing with microbusinesses would add a further layer of uncertainty. Nevertheless, a clear understanding of the capacity providers position on contracting out should be established by the MGA, particularly where it is dealing with larger and more sophisticated policyholders.

LATE PAYMENT	
Question	Answer
There are quite a few changes to be considered. Are they mandatory?	**Only two** – firstly, "basis clauses". It is not possible to contract out and a "basis clause" will have no effect. Secondly in respect of "late payment" where the breach by the insurer of the implied term is "deliberate or reckless". Other than that the Act recognises that a "one size fits all" solution will not work for the range of policyholders (sole trader to global multinational) and policies that is covered by commercial insurance
So it would be possible to "opt out" of the Act and in to the Marine Insurance Act 1906?	**Yes** – in theory and subject to the "transparency requirements" – see below – but the danger is that substantial parts of the MIA are repealed and so the parties will need to be clear what they are opting in to – it can't be a "void".

So where you want to vary contract terms and modify the Insurance Act it is better to do so by bespoke amendment to policy wordings?	**Yes** – and to be clear there will be many policies where it is right to do so and appropriate for insurer and policyholder. Where the terms are "disadvantageous" to the policyholder the terms will only be effective if they comply with the transparency provisions of the Act.
Can you explain the transparency provisions?	**Indeed** – they are twofold.: firstly sufficient steps must be taken to draw the disadvantageous term to the attention of the policyholder and secondly the term must be clear and ambiguous as to its effect.
Does notification to the broker comply with the obligation to bring the term to the attention of the policyholder?	**It does** – the broker is the agent of the policyholder.
What is "sufficient" and what is "unambiguous"?	Again, the terms are designed to offer flexibility. It will be easier to satisfy the transparency requirements for a large corporate advised by a global broker than for a sole trader whose policy was placed directly. The intention is that the smaller insured will have greater protection and that the terms of the Act more likely to apply.
So would it be helpful to think of the transparency provisions as in effect a graduated scale? Harder to satisfy for smaller and simpler risks and easier for the sophisticated, broker-advised end of the spectrum?	**Yes** – and consequently with similar costs issues associated with compliance.
Do you anticipate that the market would consider contracting out of the "late payment" clause?	The Law Commission proposals did cause some concern and it will no doubt be considered. The FOS is already in effect making awards for "late payment" and will continue to do so. Commercially it may be hard to contract out of a term that goes to the heart of the insurance "bargain". However, unlimited liability for any commercial entity is a concern and we anticipate that the more likely outcome is that insurers will wish to "contract out" by applying limitation of liability clauses e.g. any award for late payment being limited to two or three times premium or being no greater than the indemnity claim.

CONTACTS

Jennette Newman
Partner and head of London market
T: 020 7865 3422
E: jennette.newman@blmlaw.com

Terry Renouf
Partner
T: 020 7865 3310
E: terry.renouf@blmlaw.com

Visit blmlaw.com/timeforchange where a number of other publications in this series of explanatory guides are available