# AQABA CONFERENCE 2017
# MARINE INSURANCE CLAIMS UNDER THE INSURANCE ACT 2015

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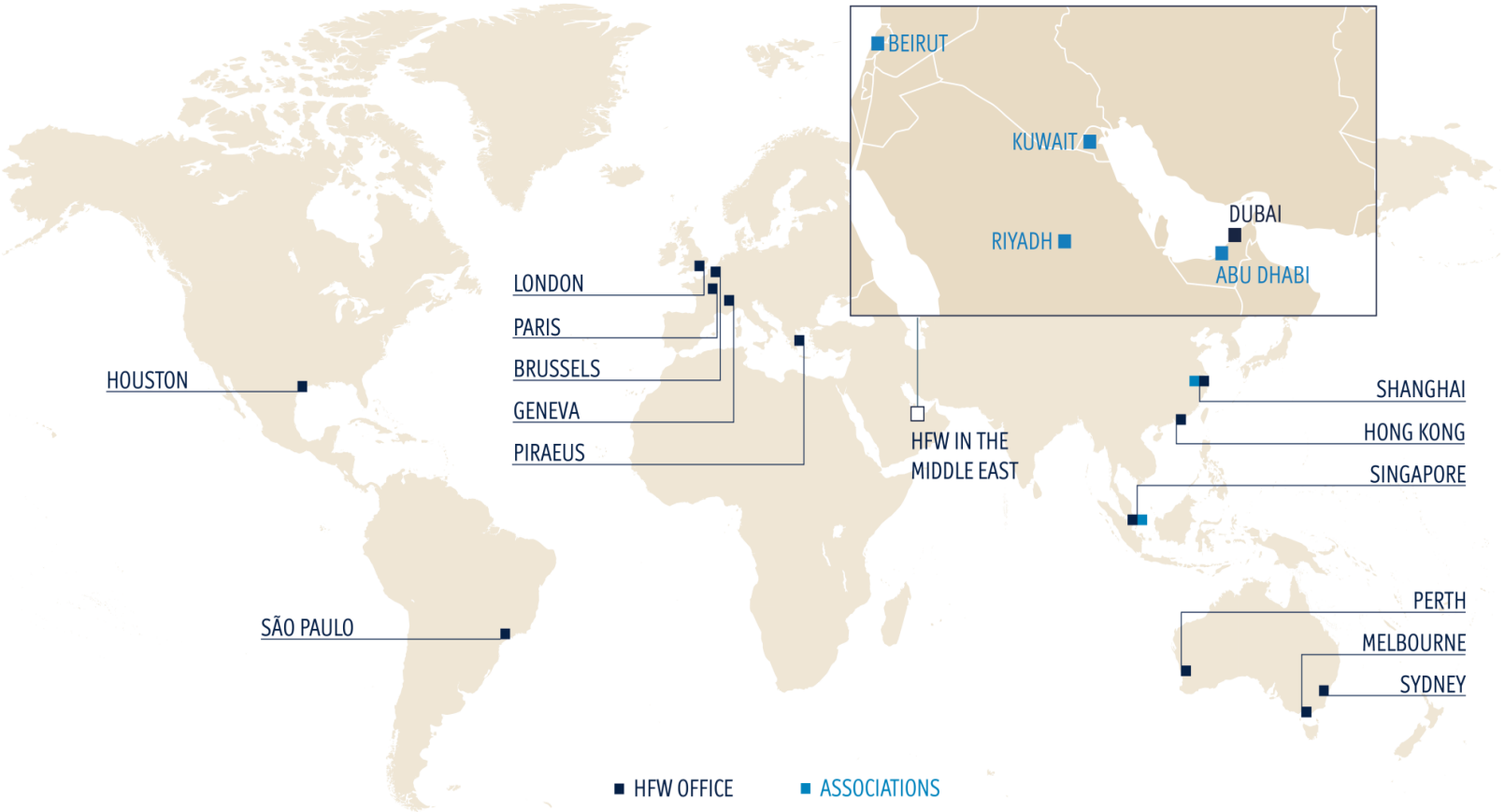

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# Relevance of English Insurance Law

- The London and European insurance markets have increased their share of global specialist insurance/reinsurance business over the last 20 years
- English law is frequently the choice in the context of global insurance programmes, facultative reinsurance and business in expanding markets (Latin America, Middle East, Africa, Asia)
- English law has a well defined body of statute and case law supporting insurance contract interpretation

# The old law: “Blots on the Landscape”

- Involnert v Aprilgrange [2015] “The Galatea”

  “A blot on English insurance law”

- Milton Furniture v Brit Insurance [2015]

  “I have reached this outcome with much reluctance and no pleasure.... Harsh though it might seem, I must find for the [insurer]”

- Versloot Dredging v HDI Gerling [2016] “The DC Merwestone”

  “It is disproportionately harsh to the insured and goes further than any legitimate commercial interest the insurer can justify”

- Sprung v Royal Insurance [1997]

  “...a blot on English common law jurisprudence”

# Changes in Insurance Law – The New Landscape

- Insurance Act 2015 – effective from 12 August 2016
  - fair presentation of risk
  - conditions and warranties
  - fraudulent claims

- The Third Parties (Rights Against Insurers) Act 2010 – effective from 1 August 2016
  - third party rights against insurers of insolvent insureds

- The Enterprise Act 2016 – effective from 4 May 2017
  - damages for late payment of claims

# Content of the Insurance Act

- Duty of fair presentation and abolition of utmost good faith
  - Remedies for breach
- Warranties and representations
  - Remedies for breach
- Warranties (and other terms) relevant to particular types of loss
  - Clauses excluding or limiting liability for loss of a particular kind or at a particular time or location not to exclude/limit liability for loss of a different kind or at a different location or time
- Remedies for fraudulent claims
- Contracting out

# What is not in the Act?

- Damages for late payment of claims
- A definition of “insurable interest”
- Broker's liability for premium
- Requirement for a marine policy to be in writing and signed

# Fair Presentation - introduction

- The Law Commission indentified five issues with the existing duty of disclosure:
  - Poorly understood
  - Difficult for medium and large companies to comply
  - “Data dumping”
  - Passive underwriting
  - Sole, inflexible remedy of avoidance

# Fair presentation – old law

- Duty to disclose every material circumstance which is known to the insured
- Insured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him
- Draconian remedy of **avoidance**

# A “fair presentation of the risk”.... before the contract is entered into

What Actual Knowledge does Insured have?
- Individual
- Not an individual

"Utmost Good Faith"
v
"Fair Presentation"

"Basis of the contract" clauses unenforceable

What *Ought* Insured to Know?

What Does Insurer Actually Know?
- Who participates in risk taking decision?
- Employees of Insurer's agent or any other capacity?

What is a "reasonable" search?
- Of own organisation?
- Of agent
- What is meant by making enquiries "by any other means" ?

What *Ought* the Insurer to Know?

What is the Insurer *Presumed* to Know?

What does broker know?
- Which he/she must advise (which Insured does not already know)

What Need Not Be Disclosed?
At what point does Insured not need to disclose suspicions and/or results of enquiries in relation to them?

# Fair presentation – key changes (1)

- Obligation to make a "**fair presentation**" of the risk
- Insured must
  - Disclose every "material circumstance" that it knows or ought to know so that the underwriter can write and price the risk
  - Failing that, give the insurers sufficient information to put a prudent insurer on notice to make further enquiries
  - Present the risk in reasonably clear and accessible manner (no data dumping)
- Facts substantially correct and opinions/beliefs genuinely held
- Circumstances must be material and the prudent underwriter test is retained
- Disclosure of unusual or special circumstances etc would still be required: the duty to volunteer information remains
- However intention also to create positive duty of enquiry – no claims underwriting

# Fair presentation – key changes (2)

**Material Circumstance**

- A circumstance or representation which would influence the judgment of a prudent insurer in determining whether to take the risk and, if so, on what terms

**Examples**

- Special or unusual facts relating to the risk
- Particular concerns which led the proposer to seek insurance cover
- Standard information which market participants generally understand should be disclosed

**Exceptions:**

- Circumstances that diminish the risk
- What is known / ought reasonably to be known (information which should have been passed to underwriter or is held by insurer and readily available) / is presumed to be known by the insurer (common knowledge or industry-specific)
- Something as to which the insurer waives information

# Fair presentation – key changes (3)

- Who must disclose information?
- Actual knowledge covers Board/senior management and person(s) responsible for arranging insurance (includes “blind-eye” knowledge)
- Constructive knowledge (“ought to know”) is information which would have been revealed by a reasonable search of information available to insured
- Does not include confidential information which was acquired by the insured’s agent through a business relationship with a person who is not connected with the contract of insurance
- Inducement test remains

# Remedies

- **Proportionate remedies** where non-disclosure/ misrepresentation is not deliberate or reckless
- *What would insurer have done had it known the truth?* (follows inducement)


- "Deliberate or reckless" breaches – avoidance (and no return of premium)

# Fair presentation

- Insureds may seek agreement from insurers:
  - To limit knowledge to individuals/departments
  - As to what constitutes a “reasonable search”
  - To approve the disclosure process

# Warranties – old law

- A warranty is a term of an insurance contract which must be complied with exactly whether or not it is material to the risk
- A term by which an insured:
  - Undertakes to do/not to do a particular thing
  - Undertakes that some condition shall be fulfilled
  - Affirms or negatives the existence of a state of facts
- Can be created by an express statement or the construction of a term
- Breach cannot be remedied: the insurer is automatically discharged from liability from the date of breach even if the breach is not causative of a loss

# Warranties and other terms – key changes (1)

- Breach will **suspend** the insurer's liability for the duration of the breach. Breaches may be remedied (or waived) and cover restored
- The insurer is only off risk for the period commencing with the breach and concluding with the compliance with the warranty
- Not all warranties are capable of being remedied if breached. i.e. "Warranted No Known or Reported Losses" – the insured either knew about and reported a loss or he didn't

# Warranties and other terms – key changes (2)

- Section 11: deals with warranties and other terms designed to reduce a particular type of loss
- If a term is designed to reduce the risk of a particular kind of loss, or loss at a particular place or time, the insurer should only have a remedy if the loss suffered is of the particular kind contemplated by the term, or is a loss at the time or place contemplated by the term
- The burden is on the insured to show that the breach could not have increased the risk of loss
- Concentration on *type of loss* rather than *how the loss was caused* – test is not whether the non-compliance actually caused the loss

# Basis of contract clauses

- Insurance Act creates an absolute prohibition on the use of “basis of contract clauses”. If an insurer wants a warranty as to particular facts, this must be included in the policy

- Basis of contract clauses:
  - Declaration in a policy or proposal form that certain representations made by an insured are warranted to be true and accurate
  - The statements made “form the basis of the contract” or are incorporated into the policy
  - Effect = converts pre-contract representations made by the insured into warranties
  - Remedy = discharge from liability from date of breach

# Fraudulent Claims: Types

- IA15 does not define fraudulent claims: left to the Courts
- Broadly: fraud is being dishonest or reckless as to the truth
- Fraudulent insurance claims come in 3 varieties:
  1. Making a purely fictitious claim (e.g. arson)
  2. Falsely exaggerating a valid claim (e.g. Inventing “lost” items)
  3. Fraudulent Device: an attempt to deceive intended to promote a valid claim
- Sometimes all 3 occur on the same claim (and boundaries can be blurred)

# Insurers' remedies for fraud

- s17 MIA - only remedy for breach of good faith is avoidance. Courts tend not to apply in fraudulent claims
- Remedies for fraud unclear, especially as regards post-fraud claims
- Under the Act:

| | | | | |
|---|---|---|---|---|
| Entire fraudulent claim forfeited | Insurer can recover sums paid for the claim | Insurer can treat contract as terminated from date of fraud | If so, no liability for losses after date of fraud | Fraud will not affect any previous valid claims |

- Everyone benefits from clarification of remedies

# Amendments to The Third Parties (Rights Against Insurers) Act 2010

- The Third Parties (Rights Against Insurers) Act 2010 came into force on 1 August 2016
- Insurance Act 2015 grants powers to change the meaning of “relevant persons” for the 2010 Act
- This Act makes it easier in the event of claims against insolvent companies by removing the need to establish insured's liability

# Late Payment of Claims: Sprung v Royal Insurance UK Ltd

- Claims monies plus interest but not damages for late payment

# Late Payment of Claims: the Problem

*Sprung –v- Royal Insurance (UK) Ltd [1997] C.L.C. 70)*

- Sprung (family business)insured his factory against theft and “sudden and unforeseen damage”
- In April 1986 vandals caused significant damage
- Insurers denied the claim since policy did not include cover for wilful damage
- Sprung could not afford the repairs, and was unable to raise a loan. He went out of business
- Insurers abandoned their defence. Court found claim should have been paid 4 years earlier. Sprung had suffered an uninsured loss of £75,000 for the lost opportunity to sell his business
- Court of Appeal (reluctantly) held Sprung was not entitled to claim this further loss, as the claim was not recognised in law
- Clarke: a *“blot on English common law jurisprudence”*

# Late Payment of Claims: Enterprise Act 2016

- Implied term: insurer must pay claims within a reasonable time
- Failure to do so can lead to compensation for resulting loss
- Reasonable time to include matters beyond insurers control
- Genuine disputes should not be penalised
- All claims for late payment to be brought within one year of claim settlement (and within six years of breach)
- Insurers can contract out
- Ramifications:
  - Claims practices opened up?
  - Damages recoverable under reinsurances?  Or is it extra contractual?
  - Inflated claims/increased exposures/reserves?

# Contracting out

- Consumer insurance: mandatory regime
  - Insurers will not be able to use contract terms to put the consumer in a worse position than under the proposed legislation

- Business insurance: default regime
  - Insurers will be able to use contract terms to improve their own position but only if the term is clear, unambiguous and brought sufficiently to the attention of the insured (or their broker)

  - Cannot contract out of abolition of basis clauses

- Any exclusions must meet the "transparency requirements"

# Any Questions?

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