

Consultation response
Insurance Law Research Group
University of Southampton

Warranties

1. We understood the policy objective as being the proscription of basis clauses and an adjustment of the remedy of warranties. We generally agreed with those two policy objectives but thought that the proposed sections were not uniformly ideal to achieve that purpose.¹
2. We agreed with the intention behind section 8 of abolishing basis clauses in line with the Consumer Insurance (Disclosure and Representations) Act 2012 ('CIDRA'), but thought on a careful reading that it gave the impression of going further than intended. The use of the singular of the word "representation" in subsection 2, combined with the following language "any provision of the non-consumer contract" generated the impression that individual warranties would not be possible at all. We thought that a tightening of the language, perhaps in line with CIDRA, would be desirable.
3. Our interpretation was that the provision was intended to focus on pre-contractual representations as opposed to in-contractual representations. We thought that if this was a correct interpretation it was an artificial distinction not inherent to the process of formulation of an insurance policy.
4. In section 9, we agreed with the intention of replacing warranties with suspensory clauses. We questioned whether subsection 2 the clause "(if it can be remedied)" was necessary, and thought that strictly speaking it appeared to preserve the insurer's liability in instances where the breach could not be remedied, which might not always be the right solution. We thought subsection 4 did not add anything to the section, given that the insurer's liability follows from the contract. We thought the section would be more elegant if the order of subsections 5 and 6 were reversed.
5. Turning to the substance of this provision, we thought that clarification as to the triggering of the remedy would be useful for the purpose of understanding waiver. Subsection 9(1) abolishes the current remedy. That remedy is triggered automatically by the breach.² As a result of the lack of opportunity to elect, waiver is by equitable estoppel. If the existing remedy is "abolished", will the remedy that replaces it also be automatic or will there be an element of election? Given that the form of waiver available to the insurer and the elements to be proven depend on this question, it should perhaps have an explicit answer.³

¹ For the sake of simplicity the term "sections" will be employed.

² *The Good Luck* [1991] 2 Lloyd's Rep 191.

³ *Argo Systems FZE v Liberty Insurance (PTE)* [2012] 1 Lloyd's Rep 129.

6. We also wondered generally whether it was the intention that the insured should give notice to the insurers when the breach was/had been remedied.
7. We thought that it would be good to avoid the use of the word “condition” in connection with warranties, as in clause 9(5)(b). We wondered if that clause could perhaps be omitted as not adding anything to clauses (a) and (c).

Fraudulent claims

8. We understood the purpose of these provisions to be the protection of consumers, or C's, who are innocent of CF's fraud. We thought the provisions were generally helpful.
9. While we do understand that the intention with the consultation is not to seek comments on language, we thought that section 11 used too many reference points, embodied in the concepts “relevant event”, “later act”, “the time of the fraudulent claim” all essentially referring to the fraud itself, and that the drafting would therefore benefit from careful consideration to ensure that the timing or chronology is not uncertain.
10. In relation to section 12, we thought that the definition of “insured” in subsection (3) might give the impression that the insurer is entitled to terminate A's contract for CF's fraud, which we did not think was the intention as C's rights would be affected by this.

Other provisions

11. We had no comments on other provisions. We thank you for the opportunity to comment.

This response is based on contributions by Daniel Barnes, Anna Bursich, Bertha Chileshe, Andreas Malekos and Johanna Hjalmarsson, University of Southampton