Comments on the draft

9 December 2014

We broadly agree with the purpose of the clause and objected in a previous consultation chiefly based on the drafting of the clause. We welcome this late attempt at redrafting, notwithstanding the brief opportunity available to reply. We have paid particular attention to the detailed drafting and its capacity for serving the intended purpose.

By way of general observation, we noted some of the language in the Stakeholder Note and wondered if it was better capable of serving the purpose of the legislation than the actual proposed draft provisions. Clarity in drafting should contribute to ease of implementation and reduce the need for clarifying litigation or subsequent regulatory measures.

**11 Terms not relevant to the actual loss**

(1) This section applies to a term (express or implied) of a contract of insurance, compliance with which would tend to reduce the risk of loss of a particular kind, at a particular location or at a particular time.

(2) The insurer may not rely on failure to comply with such a term to exclude, limit or discharge its liability, if the insured shows that its failure to comply with the term could not have increased the risk of a loss such as actually occurred/is wholly irrelevant to the loss suffered.

(3) The insurer may rely on failure to comply with a term, compliance with which would tend to reduce the risk of loss as a whole or which defines the limits of the policy, provided it shows that it is such a term.

(4) This section applies in addition to section 10.

Comments

1. For subsection 1, we actually preferred the Law Commission’s Stakeholder Note para 1.4 as more elegant and apt to define the type of term in question. We saw the point of the reference to terms defining the risk as a whole, but thought that this could usefully be moved to its own subsection (3 above). We note that the words “or the extent of such loss” could easily be added to subsection 1 to permit the aim stated in para 1.7 of the Stakeholder Note to be fulfilled.

We suggest conflating subsections 2 and 3 of the draft clause into a single provision (2 above), yet again with an eye on language in the Stakeholder Note. No substantive change is intended. This is because we thought that there was some surplusage in the paragraphs, unnecessarily complicating the matter.

1. We worried that the distinction between risk and causation (eg Stakeholder Note para 1.16) was artificial and confusing in a situation where an actual loss has occurred, which must always be the case for this provision to operate. We thought it would be better for the parties to have a clear test, and proposed the “wholly irrelevant” test [highlighted in green], mostly inspired by the Stakeholder Note para 1.11 (the Stakeholder Note uses the term “totally irrelevant”; our choice of “wholly irrelevant” is based purely on semantic preference). Such a test would in our view simplify determination of the insurer’s liability to pay for the loss suffered. It is a narrow test which could be broadened if that is considered desirable by removing the word “wholly”. This results in a section which as a whole is of some modest value to the insured, and importantly does contain a bright line rule that should be easy to apply. In any event, we thought that the test should be briefly expressed and be clear in its terms. We believe that also the other version of the test [highlighted in yellow] achieves these purposes better than the wording currently proposed and should be preferred if the “wholly irrelevant” test does not find support with the Law Commission.
2. We think the reference to terms defining the risk or the limits of the policy as a whole is unfortunate. The examples given in the Stakeholder Note, paras 1.8 and 1.9, are not wholly convincing in pertaining clearly to one category or the other. The addition of the words “or a significant part of the risk” in para 1.9 seems unfortunate in a context where bright lines are particularly desirable. We believe that examples of terms can easily be found, or devised, in practice that would qualify as affecting all or only a part of the risk. We have therefore devised language (3 above) which we believe makes it clear where the relevant burden lies.

Thank you for the opportunity to comment. We hope that your proposals will contribute to the speedy adoption of the bill.

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