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Shifting the Balance – Consumer Insurance Contracts Act 2019

Introduction

The Consumer Insurance Contracts Act 2019 (the **Act**) was signed into law on 26 December 2019. After the recent election in Ireland, the Fine Gael government remains in power on a transitional basis. This interim position means the Act's provisions have not yet been brought into effect, although it could happen imminently.

Rebalancing and similarities with UK changes

The Act alters how relevant contracts of insurance are drafted and incepted and, after that, are to be construed and administered. It includes various other consumer-focused elements. The changes, when effective, will mean that all insurers (life and non-life) writing "consumer" business (as that term is defined in the Act, including potentially SME commercial business) must revisit how their proposal forms, policies, certificates of insurance, and follow-up processes operate.

For those familiar with the UK's changes in recent years, the Act is similar (but not identical) to the Consumer Insurance (Disclosure and Representations) Act 2012 and related elements in the Enterprise Act 2016 on late payment of claims. It means some quite arcane insurance legislation (e.g. Marine Insurance Act 1906) and case law from before Ireland's departure from the UK a hundred years ago ceases to have effect for insurance contracts covered by the Act. Importantly though, there is nothing currently envisaged like the UK's Insurance Act 2015. That legislation made changes for commercial insurance arrangements. In Ireland, these continue under the old more "insurer friendly" principles (e.g. concepts like "utmost good faith", potential avoidance of cover through contractual warranties and conditions precedent, and such like).

The Act rebalances the scales as between an insurer and a consumer of a risk product. However, how much of an impact the changes will have will take time to filter through, similar to the UK. The impact of these changes will only be fully known through Irish court judgments, but these tend to be relatively rare. The Irish courts, and those immediately affected by the Act's changes, can thus be expected to have regard to UK practice and applicable case law as it emerges in areas of sufficient similarity.

To potentially assist in the interpretation and implementation of the Act, the Central Bank of Ireland has been given the power to issue a code of practice on the form of a contract of insurance and its other requirements. Whether this will take the form of a revision to the Consumer Protection Code 2012 (the **CPC**), operated by the Central Bank, remains to be seen.

As a final point, although the Act's changes will have an impact, the perception of a lack of fair process in dealings with insureds has in a number of ways already been addressed through the European directives on unfair contract terms and distance selling, as well as the powers of the Financial Services and Pensions Ombudsman.

Scope of the Act

A "consumer" for the purposes of the scope of the Act is defined by reference to the Financial Services and Pensions Ombudsman Act 2017. This definition, which is similar to the definition under the CPC, includes natural persons (not acting in the course of business), sole traders, partnerships, trust clubs, charities, and incorporated bodies, with an annual turnover in their previous financial year of €3 million or less (provided, in the case of an incorporated body, that it is not a member of a group of companies with a combined annual turnover (in the previous financial year) of greater than €3 million). The definition also includes persons or bodies to whom an insurer has offered to provide an insurance contract or a consumer who has sought the provision of an insurance contract.

The Act applies to life and non-life contracts of insurance entered into, and subsequent variations to such contracts. Certain contracts are expressly excluded from the scope of the Act such as:

- contracts of reinsurance;
- certain classes of non-life insurance (including injury to passengers; damage or loss to railway rolling stock, aircraft, ships, goods in transit; aircraft liability and liability for ships); and
- contracts of insurance involving a SPV.

As referenced above, it will be important to bear in mind that, beyond natural persons, SME corporate entities (e.g. entities with a turnover of less than €3 million) can come within the scope of the Act as "consumers". This would be more typically described as a form of commercial insurance.

Some notable changes made by the Act are discussed below.

Replacement of principle of "utmost good faith" (*uberrima fides*)

The Act changes the long-established duty owed by each of the insurer and insured to the other to act in "utmost good faith" or uberrima fides. This is to be replaced with specific statutory duties and obligations for the consumer and insurer.

Under the Act, there is instead a new pre-contractual duty of disclosure of a consumer which is now confined to providing responses to the questions posed by the insurer. The insurer is not entitled to use questions of a general nature in an attempt to circumvent this requirement. All questions must be in plain and intelligible language and if there is any ambiguity or doubt about the meaning of a question, the interpretation most favourable to the consumer prevails. The insurer is deemed to have waived any further duty of disclosure of the consumer where it fails to investigate an absent or obviously incomplete answer to a question. However, this does not apply where the non-disclosure arises from fraudulent, intentional or reckless concealment. The Act also abolishes the principle of uberrima fides for post-contractual duties.

Importantly, on a renewal, the insurer will continue to be bound by the prior existing arrangement with the insured without the ability to revisit it. Here, an insurer may expressly require a consumer to answer specific questions or to update information previously required but it cannot go beyond that in the new presentation of the risk for underwriting.

These sections of the Act will therefore place more onerous duties on insurers in circumstances where they may have previously relied on the well-established principle of uberrima fides. Insurers should consider whether their current policyholder inception and renewal documentation, such as application forms and certificates of insurance, remain fit-for-purpose given these reforms. In reality, changes to existing policy wordings and related materials are always going to be needed.

Restrictions on turning a statement into a warranty

The Act abolishes the law concerning insurance warranties that applied prior to its commencement, including the ability of insurers to convert statements made by the consumer into a warranty (i.e. a fundamental term permitting an insurer to void the contract). Such statements shall have effect solely as representations made by the consumer to the insurer prior to entering into the contract. This includes a prohibition on the use of a 'basis of contract' clause, or any comparable clause. These clauses, which provide that any answers given by the policyholder in the proposal form shall form the 'basis of the contract' between the parties (even where this involves a minor inaccuracy which does not affect the risk undertaken by the insurer), shall therefore no longer be allowed following the commencement of the Act.

Restrictions on ability to refuse cover - remedies for misrepresentation

The Act introduces curtailed remedies which means a more proportionate approach must be taken by the insurer where there is any misrepresentation and/or a subsequent insurance claim. This will be based on whether the misrepresentation is innocent, negligent or fraudulent. These are split out as follows:

- Where a consumer has discharged his/her pre-contractual duties of disclosure, but made an innocent misrepresentation, the insurer will no longer be entitled to potentially avoid the claim on the grounds of the misrepresentation.
- Where the misrepresentation is negligent, the insurer is similarly restricted in the ability to avoid the claim. Instead, the remedy available to the insurer shall reflect what the insurer would have done it had been aware of all the facts. For example, where the insurer would not have entered into the contract had it known the true facts, the insurer may avoid the contract and refuse all claims. However, this may not always be the case.
- If the misrepresentation is fraudulent, the insurer will be able to avoid the contract.

This is a significant reform, as previously an insurer could avoid the contract if a material representation was found to be untrue without varying degrees of fault. On the other hand, for insurers, there may be potential for this section to be open to abuse. For example, it may not always be easy for an insurer to prove a misrepresentation is sincerely innocent or otherwise. Where there is that lack of clarity, cases may typically (under the "contra proferentem" concept) be interpreted in favour of a policyholder.

Claims handling

As well as dealing with matters prior to the conclusion of the insurance contract, and policy construction elements, the Act imposes duties on each of the consumer and insurer in respect of claims handling. For example, a consumer must cooperate with an insurer in the investigation of insured events and must notify the insurer of the occurrence of an insured event (i.e. a likely claim) within a reasonable time.

The insurer has reciprocal duties, a number of which overlap with the insurer's claims processing duties under the CPC. This includes the duty to handle claims promptly and fairly, engage with the consumer regarding the claim, inform the consumer where the claim has been settled or otherwise disposed of, and to pay all sums due to the consumer within a 'reasonable time' (the CPC specifies 10 business days where a claimant has agreed to accept an offer to settle the claim).

There are also specific provisions on payments for insurance contracts concerning property risks. The insurer is not obliged to pay the full claim settlement amount until any repair, replacement or re-instatement work has been completed and specified documents for the work have been furnished to the insurer. However, an insurer is only entitled to defer such payments subject to specified limitations (e.g. 5% of the claim settlement amount if settlement less than €40,000).

Finally, the Act introduces proportionate remedies in respect of claims handling. Where a claim made by a consumer contains information which is false or misleading, and where the consumer knows it is false or misleading, or consciously disregards whether it is false or misleading, the insurer can refuse to pay the claim and terminate the contract.

Insurable interest

As well as those provisions regarding "rebalancing" the respective rights of insurer and insured, the Act makes a number of technical changes intended to update and repeal certain outdated legal concepts that have existed under Irish insurance law (drawn in many cases from the old applicable UK regimes).

The Act abolishes the notion of 'insurable interest' as a pre-requisite to a consumer making a claim, except where the contract is also an indemnity contract. The Irish Law Reform Commission, at whose behest many of the technical changes are made, had noted that insurers are responsible for assessing a risk before it is underwritten. Given this, where the insurer determines that a proposer does not have sufficient interest in a matter, the point has been made that the insurer does not have to sell them the insurance. Accordingly, insurers cannot later seek to avoid a claim because the claimant does not have an 'insurable interest' which they were not concerned about when they sold the policy.

Whilst a technical change, this again further tips the balance towards the consumer and places further emphasis on the importance of the pre-contractual stage of the insurer/consumer relationship.

Subrogation & third-party rights

The Act implements changes in order to avoid unintended consequences for family and employer-employee relationships where an insurer is exercising "subrogation" rights. Subrogation is a legal principle which entitles an insurer to "step into the shoes" of its policyholder and recover against a third party who is responsible for the damage to the insured. The Act provides that an insurer cannot exercise its rights of subrogation in certain situations e.g. where the person in respect of whom the insurer seeks to exercise its rights is a family member of the insured but does not hold their own insurance, or where the insurer seeks to exercise its rights of subrogation against an employee of the insured employer, unless the loss was caused intentionally or recklessly by the employee. This change seeks to avoid situations where an insured may be discouraged from pursuing a claim for fear that, once compensation is paid out, the family member who has caused the damage may be pursued by the insurer in order to recover the cost of the claim.

In addition, the Act introduces a statutory exception to the rigidity of so-called "privity of contract" rules. Ireland, save in certain scenarios, continues to operate quite rigid privity of contract principles. For example, there is no direct equivalent to the UK's Contracts (Rights of Third Parties) Act 1999. However, through the Act, privity principles will now be varied to allow a third-party claim against an insurer where the insured has died, cannot be found or is insolvent, or where the court considers it just and equitable to allow it. The section will therefore circumvent scenarios such as where a policyholder is a corporate body in liquidation and an employee is an insured and wishes to take a claim under the corporate policy.

Other reforms

The Act introduces other reforms. An overview is as follows:

- A 14-day cooling-off period where a consumer's right to cancel is not governed by the European Union (Insurance and Reinsurance) Regulations 2015 (which provides a compulsory cooling-off period of 30 days for individual life insurance policies) or the European Communities (Distance Marketing of Consumer Financial Services) Regulations 2004 (which only applies to consumers not acting in the course of their business or trade).
- Renewal rights, for example, on renewal of the contract the insurer must provide the consumer with a schedule of all premiums and claims paid for the preceding five years. The insurer must also notify a consumer of any alteration to the terms and conditions of a policy within a 'reasonable time' and no later than 20 working days before renewal. The Non-Life Insurance (Provision of Information) (Renewal of Policy of Insurance) (Amendment) Regulations 2018 recently extended the renewal notification period from 15 working days to 20 working days for all non-life insurance policies. This section appears to create a similar requirement, for both non-life and life policies, as far as consumers (as defined by the Act) are concerned (albeit only where there is alteration to the terms and conditions of the policy).
- On cancellation of a policy by the insurer, it must repay the full balance of premium for the unexpired term and provide the reason for cancellation. In addition, the insurer cannot impose any financial cost on the consumer where a contract is cancelled.
- An insurer may only refuse a claim pursuant to an "alteration of risk clause" where there is a change in the subject matter of the policy. A clause which refers to a "material change" shall be interpreted as referring to changes which take the risk outside that which was within the reasonable contemplation of contracting parties when the contract of insurance was concluded.
- The Act extends the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 to a "consumer" within the meaning of the Act. The Regulations previously only applied to natural persons acting outside their business.

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