

INSURANCE ACT 2015

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 5: Good Faith and Contracting Out

Section 14: Good faith

- 113. Section 17 of the Marine Insurance Act 1906 provides that insurance contracts are contracts based upon the utmost good faith. It also provides that, “if the utmost good faith be not observed by either party, the contract may be avoided by the other party”. The common law mirrors this provision in relation to non-marine insurance.
- 114. [Section 14](#) removes avoidance of the contract as a remedy for breach of this duty of good faith, both from the 1906 Act and at common law.
- 115. [Section 14\(4\)](#) repeals section 2(5) of CIDRA, which is superseded by the provisions of this section.
- 116. The intention of section 14 is that good faith will remain an interpretative principle, with section 17 of the 1906 Act and the common law continuing to provide that insurance contracts are contracts of good faith.

Section 15: Contracting out: consumer insurance contracts

- 117. This section applies to all consumer insurance contracts.
- 118. [Section 15\(1\)](#) prevents insurers from contracting out of the provisions of the Act to the detriment of the consumer. A term in a consumer insurance contract (or variation) or in another contract is void to the extent that it would put the consumer in a worse position than provided for in the Act.
- 119. [Section 15\(3\)](#) states that section 15 does not apply to contracts to settle claims. A settlement of a claim will therefore continue to provide certainty for the parties. It would not be possible for a consumer to go behind a settlement by alleging that it was less favourable than the statutory provisions in the Act.

Section 16: Contracting out: non-consumer insurance

- 120. This section applies to all non-consumer insurance contracts. It concerns the situations in which an insurer can “contract out” by using a term of the non-consumer insurance contract to put the insured in a worse position than it would be in under the default rules contained in the Act.
- 121. [Section 16\(2\)](#) provides that, generally speaking, parties can agree to contract terms which are less favourable to the insured than provisions of the Act. Such terms may appear in the insurance contract itself or any separate contract. However, such terms will only be valid if the insurer has complied with the “transparency requirements” contained in section 17.

122. There is only one situation in which the insurer cannot contract out to the detriment of the insured, which is set out in section 16(1). This is the prohibition on basis of the contract clauses and similar provisions in section 9.

Section 17: The transparency requirements

123. As discussed above, section 16(2) provides that a contractual term which puts the non-consumer insured in a worse position than it would be in under the terms of the Act is of no effect unless the requirements of section 17 are satisfied. Such a term is referred to in section 17(1) as a “disadvantageous term”.
124. The section 17 conditions (the “transparency requirements”) are set out in sections 17(2) and 17(3).
125. The requirement, in section 17(2), that the insurer take sufficient steps to draw the term to the insured’s attention is intended to ensure that the insured is given a reasonable opportunity to know that the disadvantageous term exists before it enters into the contract.
126. Under the general law of agency, this requirement could also be satisfied by taking sufficient steps to draw the term to the attention of the insured’s agent. Section 22(4) is also relevant here. That section explicitly states that references to something being done by or in relation to the insurer or the insured include its being done by or in relation to that person’s agent.
127. If the insured (or its agent) has actual knowledge of the disadvantageous term, section 17(5) makes clear that an insured may not claim that the insurer has failed to draw the term sufficiently to its attention.
128. Under section 17(3), the term must also be clear and unambiguous as to its effect. This is intended to require the effects of the disadvantageous term to be set out explicitly, not merely that the language is clear and unambiguous.
129. [Section 17\(4\)](#) provides that that in determining whether the transparency requirements have been met, the characteristics of insured persons of the kind in question should be taken into account, as should the circumstances of the transaction. What is sufficient for one type of insured may not be sufficient for another.
130. The extent to which the term is required to spell out the consequences will depend on the nature of the insured party and the extent to which it could be expected to understand the consequences of the provision.

Section 18: Contracting out: group insurance contracts

131. [Section 18](#) addresses contracting out of section 13, which deals with the insurer’s remedies where a member of a group insurance contract makes a fraudulent claim.
132. [Section 18\(2\)](#) concerns group members who would each be a “consumer” if they had entered into the insurance contract directly with the insurer rather than it being a group policy. Section 18(2) provides that a term of a contract which seeks to put a consumer member of a group scheme in a worse position than they would be in under section 13 is, to that extent, of no effect.
133. Where a group member would not have been a “consumer” if they had entered the contract directly with the insurer, they are a “non-consumer C” and section 18(3) applies. This provides that an insurer must comply with the transparency requirements in order to use a contract term to put a non-consumer C in a worse position than it would be in under section 13. For the purposes of those requirements “the insured” means the person who took out the insurance on behalf of the group (referred to in section 13 as A).