



Consumer Insurance (Disclosure and Representations) Act 2012 (“CIDRA”)

Insurance Bill 2014-15 (“Bill”)

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CIDRA coming into force:

- 6 April 2013



CIDRA and the Isle of Man:

- UK legislation
- Consumer insurance contracts governed by the laws of:
 - England and Wales
 - Scotland
 - Northern Ireland
- Consumer insurance contracts entered into or varied in the UK
(?)



CIDRA in a nutshell:

- Consumer insurance contracts
- New duty – take reasonable care not to misrepresent
- Previous duty abolished - to volunteer information (and not to misrepresent)
- New statutory code – agency
- Special provisions – group schemes / insurance on life of another



The legal position before CIDRA:

- Sources of law:
 - Common law
 - UK Marine Insurance Act 1906 (“**MIA**”)
 - Issues often stated by reference to MIA even in non-marine cases – e.g. Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd [1995] 1 AC 501, at 518
 - Other: e.g. EU Directive on Unfair Terms in Consumer Contracts
- Key features of the law before CIDRA (ss.17ff MIA):
 - Reciprocal duty of utmost good faith (*uberrimae fides*):
 - Obligation to disclose
 - Obligation not to misrepresent
 - Remedies:
 - Non-disclosure – avoidance
 - Misrepresentation – avoidance (and damages)

The legal position before CIDRA (contd):

- Key features of the law before CIDRA (ss. 17ff MIA) (contd):
 - Warranties / “basis of the contract” clauses
 - Breach of warranty – automatic discharge



Criticisms of the law before CIDRA:

- Law Commission (England and Wales) and Scottish Law Commission:
 - Consumers usually unaware of duties
 - Policyholders acting honestly and reasonably still vulnerable
 - Unrelated or minor mistakes can result in refusal of claims
- Some examples of unfair results:
 - The case of the missing jewellery - Lambert v Co-operative Insurance Society Ltd [1975] 2 Lloyd's Rep 485
 - The case of Ms A's lower back pain (UK Financial Ombudsman Service ("**FOS**"))



Mitigating the harsh effects of the law before CIDRA:

- Industry codes – eg, Association of British Insurers (“**ABI**”) Code of Practice, “*Managing Claims for Individual and Group Life, Critical Illness and Income Protection Insurance Products*” (January 2009)
- UK Financial Services Authority / Financial Conduct Authority rules
- FOS discretion



Shortcomings of previous measures to mitigate:

- Overlapping and inconsistent rules
- Consumers only able to obtain justice from FOS (not courts) – subject to limits on FOS jurisdiction:
 - Jurisdiction limited to awards of £100,000 (pre-CIDRA)
 - Cases requiring cross-examination of witnesses usually declined



Key elements of CIDRA:

- “Consumer insurance contracts” (s.1 CIDRA):
 - Consumer
 - Insurer
- Consumer’s duties:
 - Take reasonable care not to misrepresent (s. 2(2) CIDRA)
 - Previous duty of utmost good faith no longer applies (s. 2(4) CIDRA)
- Insurers’ remedies:
 - “Qualifying misrepresentation” (s. 4(1) CIDRA):
 - Consumer misrepresentation in breach s. 2(2) duty
 - Without misrepresentation insurer would not have (i) entered into contract (or agreed variation) or (ii) would have done so on different terms (insurer required to prove)



Key elements of CIDRA (contd):

- Deliberate/reckless qualifying misrepresentation:
 - Consumer (i) knew misrepresentation untrue or misleading or did not care whether or not untrue or misleading, and (ii) knew matter to which misrepresentation related relevant to insurer or did not care whether or not relevant (s. 5(2) CIDRA)
 - Insurer may: (i) avoid contract and refuse claims, and (ii) need not return any premium (except to extent unfair not to) (par. 2, Sch. 1 CIDRA)

- Careless qualifying misrepresentation:
 - not deliberate/reckless (s. 5(3) CIDRA)
 - remedy depends upon what insurer would have done absent misrepresentation (par.3ff, Sch. 1 CIDRA):
 - Would not have contracted: avoid contract and refuse all claims (repay premium)
 - Would have contracted on different terms (other than premium): contract treated as if entered on different terms
 - Would have charged higher premium: reduce proportionately amounts paid on claims



Key elements of CIDRA (contd):

- Abolition of warranties/“basis of the contract” clauses (s. 6 CIDRA) - clauses converting representations into warranties ineffective
- Statutory code - agency (s. 9 and Sch. 2 SIDRA):
 - Principal responsible for acts of agent – common law principle maintained (s. 12(5) CIDRA)
 - Sch. 2 CIDRA “Rules for Determining Status of Agents”:
 - Agent insurer’s agent:
 - Appointed representative
 - Collects information with express authority of insurer
 - Express authority to bind insurer to cover
 - Other cases - agent presumed to be consumer’s agent (unless consumer proves otherwise)
 - Factors which may confirm agent acting for consumer (examples):
 - Agent undertakes to give impartial advice to consumer
 - Consumer pays agent fee

Key elements of CIDRA (contd):

- Sch. 2 CIDRA “Rules for Determining Status of Agents” (contd):
 - Factors which may tend to show agent acting for insurer (examples):
 - Agent places insurance of that type with only one insurer
 - Insurer permits agent to use insurer’s name in providing agent’s services



Key elements of CIDRA (contd):

- Special provisions for group schemes and insurance on life of another:
 - Qualifying misrepresentation made by one member of group of consumers for whose benefit consumer insurance contract effected does not affect cover of other members (s. 7(4) CIDRA)
 - Life assured owes duty of care not to make misrepresentation – qualifying misrepresentation by life assured gives insurer same remedies as if made by person taking out contract (s.8(2) CIDRA)
- Prohibition on inclusion of terms putting consumers in worse position in respect of (i) pre-contract/variation disclosure and representations; and (ii) remedies (s.10(1) CIDRA)



ABI “[CIDRA] Implementation Recommendations” (March 2013):

- Update documents generally (take legal advice) – also: remove references to “duty of disclosure” from consumer-facing documents and communications
- Assumptions – long list more likely to lead to misrepresentations:
 - Straightforward wording
 - Tick-box for each assumption
 - As few as possible assumptions listed together
 - Highlight consequences of agreeing that incorrect assumptions apply
- Default answers – pre-selected answers more likely to lead consumers to enter incorrect information:
 - Remove default answers



ABI “[CIDRA] Implementation Recommendations” (March 2013) (contd):

- Help text – where consumers required to hover over or click on icon to get information, insurers may not be able to rely on help text to ensure questions were clear:
 - Transparent and user friendly
 - Automatic pop-up help text boxes
 - Especially important areas for help text:
 - Under-insurance
 - Un-occupied property
 - Previous claims, accidents and losses
 - Vehicle value
 - Main driver



ABI “[CIDRA] Implementation Recommendations” (March 2013) (contd):

- Rolled-up questions – two or more questions asked together may be difficult to answer truthfully:
 - Ask separate questions separately
- Warning of duty not to misrepresent:
 - Warn at point of sale of possible consequences of not taking reasonable care to answer honestly
 - Encourage reading of all help texts
 - Questions asking for “sum insured” should include warning notice about consequences of under-insuring



ABI “[CIDRA] Implementation Recommendations” (March 2013) (contd):

- Sufficient evidence of qualifying misrepresentation – need to provide evidence of questions asked and of responses:
 - Keep recording of telephone calls
 - Keep copies of question sets filled in by consumers online
- Renewals – consumers not always aware of need to inform insurers of changes:
 - Send copy of a statement of facts with letter requesting correcting of incorrect information
 - Include warning of consequences of failure to correct information
 - Provide examples of relevant changes



ABI “[CIDRA] Implementation Recommendations” (March 2013) (contd):

- Question sets – consumers buying motor / property insurance often misunderstand certain questions, risking misrepresentation:
 - Suggestions to amend motor insurance question sets in relation to:
 - Main driver
 - Owner/registered keeper
 - Convictions
 - Secondary convictions
 - No claims discount
 - Previous claims, accidents and losses
 - Modifications
 - Vehicle value



ABI “[CIDRA] Implementation Recommendations” (March 2013) (contd):

- Suggestions to amend property insurance question sets in relation to:
 - Previous claims, accidents and losses
 - Occupancy
 - Contents value
 - Flooding
 - Bankruptcy



The Bill coming into force:

- Through Parliament before current session ends (30 March 2015) (?)
- Come into force in April 2016 (?)



The Bill and the Isle of Man:

- UK legislation
- Contracts of insurance governed by laws of:
 - England and Wales
 - Scotland
 - Northern Ireland
- Contracts of insurance entered into or varied in the UK (?)



The Bill in a nutshell:

- Updates statutory framework for insurance contracts in following areas:
 - Disclosure and misrepresentation in non-consumer insurance contracts
 - Warranties
 - Insurer's remedies for fraudulent claims
- Predominantly concerned with non-consumer insurance contracts



The legal position before the enactment of the Bill (recap):

- Reciprocal duty of utmost good faith (*uberrimae fides*):
 - Obligation to disclose
 - Obligation not to misrepresent
- Remedies:
 - Non-disclosure – avoidance
 - Misrepresentation – avoidance (and damages)
- Warranties / “basis of the contract” clauses
- Breach of warranty – automatic discharge



Key elements of the Bill:

- Disclosure and misrepresentation in non-consumer insurance contracts (s. 3 Bill):
 - “fair presentation of the risk”:
 - Either (i) disclose every material circumstance known or that ought to be known, or (ii) give sufficient information to put prudent insurer on notice to make further enquiries
 - Make disclosure in manner reasonably clear and accessible to prudent insurer
 - Do not misrepresent



Key elements of the Bill (*contd*):

- Carve outs – disclosure of material circumstances not required where insurer:
 - Knows (s. 5(1) Bill)
 - Ought to know (s. 5(2) Bill)
 - Is presumed to know (s. 5(3) Bill)
- Remedies (s. 8 and par. 2 Sch. 2. Bill):
 - Duty of utmost good faith remains – but breach will no longer automatically entitle insurer to avoid contract
 - Deliberate/reckless qualifying breach – avoid, refuse claims and retain premium
 - Not deliberate/reckless qualifying breach - range of proportionate remedies:
 - Would not have entered into contract: avoid contract
 - Would have entered into contract on different terms: treat contract as having included those different terms
 - Would have entered into contract at higher premium: reduce amount to be paid on claim proportionately



Key elements of the Bill (contd):

- Insurance warranties (s.10 Bill):
 - Breach of a warranty – insurer no longer automatically off risk
 - Warranties as “suspensive conditions”
 - “Basis of the contract” clauses
- Insurers’ remedies for fraudulent claims (s.12 Bill):
 - Existing regime (consumer/non-consumer insurance contracts) replaced with new statutory regime:
 - Insurer not liable to pay fraudulent claims
 - Insurer can elect to terminate contract and refuse to pay losses suffered after fraud
 - Insurer liable for legitimate losses before fraud



Key elements of the Bill (contd):

- Fraudulent claims by members of group insurance policies:
 - Fraudulent claimant and insurer treated as though they had entered into separate contract
 - Statutory regime (above) applies as between fraudulent claimant and insurer
- UK Third Parties (Rights Against Insurers) Act 2010 (“**2010 Act**”):
 - 2010 Act simplifies and modernises procedure for third party victims to seek compensation from insurer in circumstances where insured has become insolvent or has ceased to exist
 - Bill corrects certain defects in 2010 Act



Key elements of the Bill (contd):

- Contracting-out (consumer/non-consumer insurance contracts) (ss. 14ff Bill):
 - May contract out of default regime as long as any “disadvantageous term” meets transparency requirements
 - Certain provisions not subject to contracting out
 - Transparency requirements: (i) draw attention to disadvantageous before contract entered into or varied and (ii) disadvantageous term clear and unambiguous as to its effect
 - Characteristics of insured and circumstances of transaction



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- Member Lex Mundi comprising 400 offices across 163 jurisdictions

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