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Application of the Insurance Act 2015 under English law

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 **NORTON ROSE FULBRIGHT**

Genova
18-21 September 2016

AGENDA

- Insurance Act 2015
- Major changes to English insurance law
- Placing/wordings
- How it affects Underwriters





INSURANCE ACT

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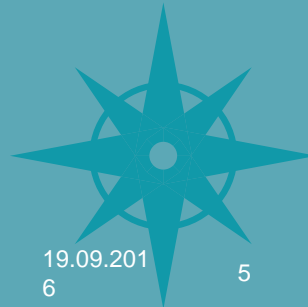
INSURANCE ACT

- English insurance law dates back to 18th and 19th centuries
 - many court cases/precedent
 - Marine Insurance Act 1906
 - codified principles developed in the old cases



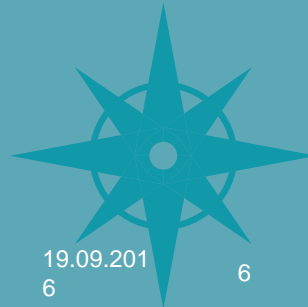
INSURANCE ACT

- 1906 Act
 - introduced to protect developing insurance industry
- Now widely criticised – in some respects
 - outdated
 - unfair to Assureds
 - does not reflect the information revolution



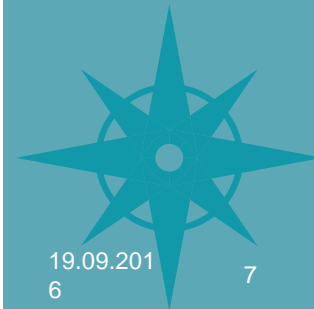
INSURANCE ACT

- Reform
 - numerous attempts since 1980 and before
 - this process started in 2006
 - wide consultation
- Insurance Act 2015
 - passed 12 February 2015
 - became effective 12 August 2016
- Non-consumer insurance



INSURANCE ACT

- The most significant change to English insurance law
 - since 1906
 - probably ever!
- Applies automatically to:
 - (re)insurance policies subject to English law
 - entered into on/after 12 August 2016
 - post 12 August 2016 variations to policies existing at that date



INSURANCE ACT

- Large parts of MIA 1906 remain in force
- MIA 1906 has not been repealed
- But important changes to the law on
 - pre-contractual obligations
 - warranties
 - other insurance terms



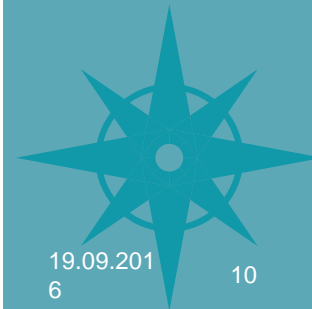
INSURANCE ACT

- Other changes to:
 - remedies on fraudulent claims
 - duty of good faith
 - Enterprise Act 2016
- Not addressing today



INSURANCE ACT

- Impacts:
 - underwriting process/remedies
 - wordings
 - claims
- Strictly - no action required, but ...
- Contracting out - action required





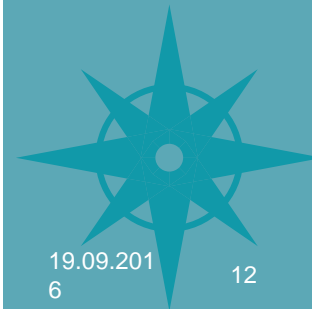
MAJOR CHANGES - PLACING

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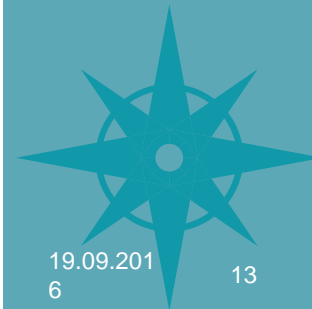
MAJOR CHANGES - PLACING

- Old law on disclosure:
 - materiality
 - inducement
 - avoidance
- Motivation behind reform:
 - clarify what is expected of Assureds
 - “*proportionate*” or relevant remedies



MAJOR CHANGES - PLACING

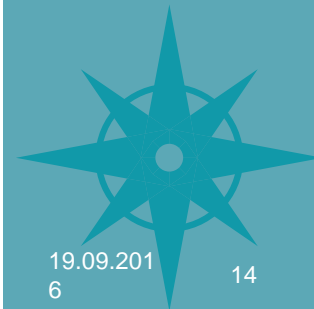
- Important changes around:
 - no need for Assured expressly to disclose something, where sufficient is said to trigger further enquiries by the Underwriter
 - whose knowledge at a corporate Assured is relevant for disclosure
 - what the Assured “*ought to know*” – the reasonable search
 - what Underwriters are deemed to know – particularly on own records



MAJOR CHANGES - PLACING

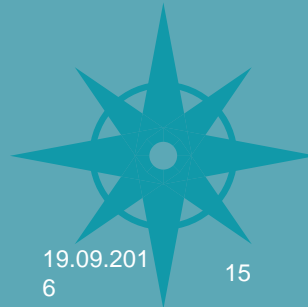
- Remedies - significant changes on failure to make a fair presentation

- Failure to disclose MED in prior year:
 - “fraudulent” → avoidance
no RP
 - not written on any basis → avoidance
RP
 - new or different terms → inserted wef
inception
 - higher premium → pro rata
reduction in
clam



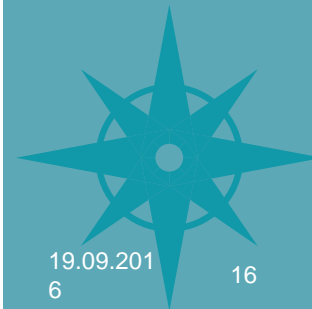
MAJOR CHANGES - PLACING

- Underwriting process:
 - consider agreeing placing protocols around knowledge/reasonable search
 - what should Assureds disclose for particular types of risk?
 - effective sharing of information with claims teams
 - be alert to information “*prompts*”



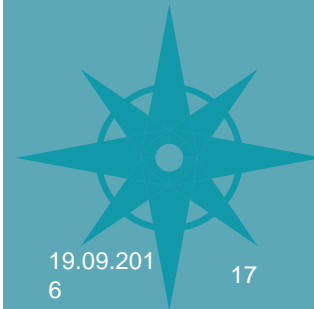
MAJOR CHANGES - PLACING

- Remedies where failure to make fair presentation:
 - what would Underwriters have done, had the presentation been fair?
 - greater importance of underwriting guidelines
 - greater emphasis on underwriting records
 - maintain a record of risks declined



MAJOR CHANGES - PLACING

- Contracting out:
 - fairer regime on remedies
 - but can revert to the MIA 1906
 - IGP&I Clubs have done so
- Limited impact/contracting out to date?
- Not Insurance Act requirements:
 - to agree that a presentation has been fair
 - to agree that a search has been reasonable
 - to limit the remedies open to Underwriters





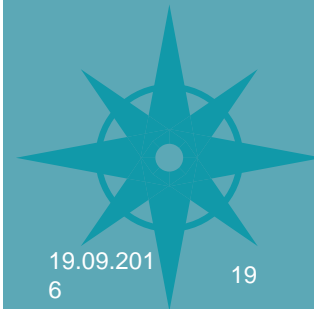
MAJOR CHANGES - WARRANTIES

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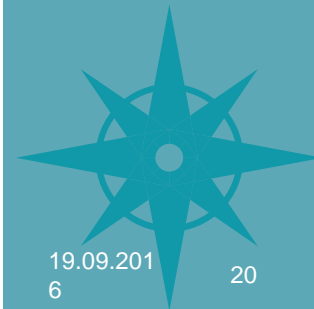
MAJOR CHANGES – WARRANTIES

- Old law on warranties:
 - complete discharge from liability on breach
 - remedy pre-loss does not help
 - no causal link required
- Motivation behind reform:
 - complete discharge from liability
 - absence of causal link
 - inability to rectify breach prior to loss
- All unfair to Assureds



MAJOR CHANGES - WARRANTIES

- Important changes:
 - basis of contract clauses are void
 - breach of warranty suspends cover
 - loss post remedy still covered
 - eg – breach of class warranty
- Time sensitive warranties:
 - non-compliance suspends cover
 - but on late compliance cover resumes
 - eg – breach of condition survey warranty





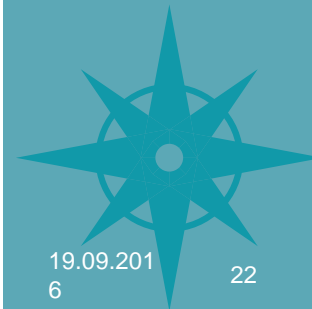
MAJOR CHANGES – RISK MITIGATION TERMS

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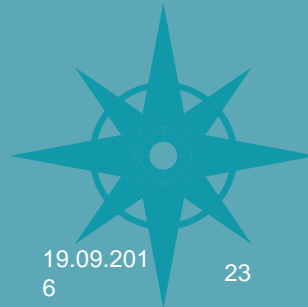
MAJOR CHANGES – RISK MITIGATION TERMS

- Old law on causation:
 - non-causative breach of warranty
 - non-causative breach of other termsstill afford complete defence to a claim.
- Motivation behind reform:
 - prevent unfairness to Assureds
 - eg: loss by piracy v breach of condition survey recommendation
 - moderate consequence of breach of “*risk mitigation terms*” but not terms which “*define the risk*”



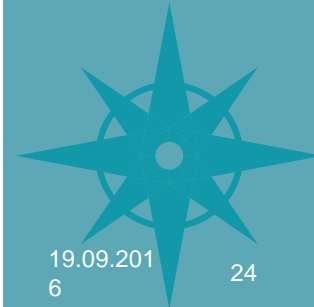
MAJOR CHANGES – RISK MITIGATION TERMS

- Important changes:
 - breach of terms which tend to reduce loss
 - of a particular kind
 - at a particular location
 - at a particular time
 - will not afford a defence if breach irrelevant to the type of loss which occurred
 - burden on the assured to establish
 - not a causation test
 - but not easy to apply either!



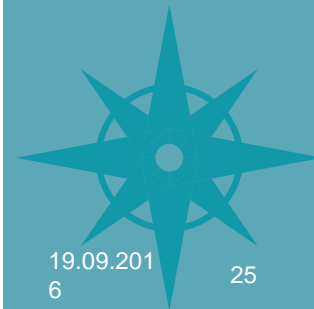
MAJOR CHANGES – RISK MITIGATION TERMS

- Does not apply to “*terms which define the risk as a whole*”
 - unclear what they are
 - little guidance so far – other than use
- But rather significant for marine
 - navigating limits
 - towage warranties
 - class warranties/termination
 - ownership/management
 - condition/other surveys



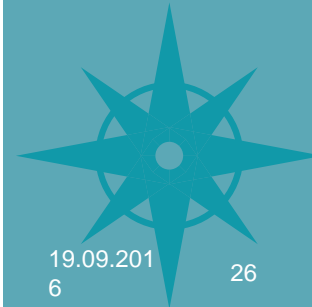
MAJOR CHANGES – RISK MITIGATION TERMS

- Significant bearing on what happens if terms (including warranties) are breached:
 - defines the risk → defence to claim
 - risk mitigation → defence only if breach relevant to the type of loss which occurred



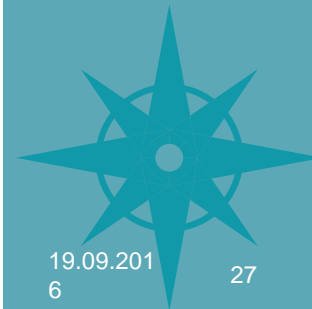
MAJOR CHANGES – RISK MITIGATION TERMS

- Contracting out:
 - permissible, save basis of contract clauses
 - IGP&I Clubs have
- Joint Hull Committee clauses:
 - <http://www.lmalloyds.com/lma/jointhull>
 - embrace suspensive effect of breach of warranty
 - opt out of time sensitive warranty provisions
 - identify terms which “*define the risk as a whole*”



MAJOR CHANGES – RISK MITIGATION TERMS

- *“terms which define the risk as a whole”*
 - navigating limits/geographical scope
 - class
 - flag, ownership, management
 - ISM
 - disbursements
 - survey/assessment requirements
- Opt out clauses for use with:
 - ITC – hull, IV, port risks, yachts
 - AIHC – hull, IV





SUMMARY

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SUMMARY

- Significant changes to English insurance law now in effect - much more Assured friendly
- Big impact on placing and wordings
- Uncertainty in some areas – leave to the Courts or address now
- No legal requirement to do anything, but if you do not, expect the unexpected



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