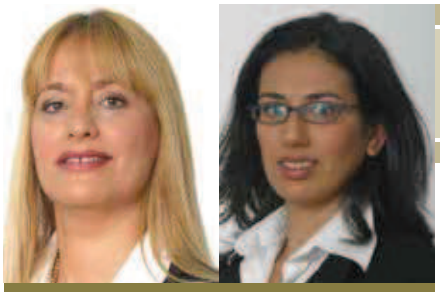

By Adv. Sigal Schlimoff and Adv. Orit Amiran Sin
Gross Orad Schlimoff & Co.

70TH BIRTHDAY OF THE STATE OF ISRAEL
36TH BIRTHDAY OF THE ISRAELI INSURANCE CONTRACT LAW
2ND BIRTHDAY OF THE NEW UK INSURANCE LAW

PRELIMINARY THOUGHTS

The Israeli Insurance Contract Law, enacted in 1981, has introduced a consumer protective environment for insureds.

On all steps of the way, from the inception of the policy, through the issue of disclosure duties, policy conditions for mitigation of risk, remedies available to the insurers and claims payment, the Law is tuned towards reinforcing and protecting the insured's rights.

Many of the Law's stipulations are mandatory, thus contradicting terms in policies will have no validity unless they broaden the scope of the coverage or otherwise operate in the insured's favour.

The main assumption of the Law is that an insurance contract is not a contract between two equal parties, which should enjoy the principle of "freedom of contract". In fact, the Law assumes that the insurer has excessive power to negotiate and conclude the terms of the policy in its favour. The insured will, in most cases, have very little influence, if any, on the terms of the relationship with the insurer.

Therefore, the basic perception of the Law is that wording of the policy should reflect this inequality, and in case of contradiction with the principles of the Law, the latter will prevail.

In personal lines classes of business this assumption is fair, and in many case is essential in order to achieve balance of power between the insured and insurers.

However, the Law applies to all classes of insurance (except marine, aviation, diamonds & precious metals and reinsurance), including commercial insurance of sophisticated and large insureds. This similar treatment of the Law which does not distinguish between personal lines and commercial lines, sophisticated large companies and individuals insureds is very problematic since the basic assumption of inequality is irrelevant in many of these classes of business and with many of such insureds.

It is about time to limit the applicability of the Law or at least its mandatory provisions only to the relevant personal lines.

The principles of the Israeli Insurance Contract Law used to be very different from the principles of the UK insurance law, until the Insurance Act of 2015 was enacted in the UK. The Act, which applies to all contracts of insurance and reinsurance, after August 2016, represents a significant reform of insurance contract law in the UK.

The insurance laws of both countries have become similar in many aspects. If in the past, it was clear that an insured would definitely prefer the application of the Israeli Insurance Contract Law and the insurer will prefer the UK law, today the borders have become blurred.

A few main examples:

Disclosure -

The Israeli Law limits the duties of disclosure imposed on the insured, both before inception of the policy and during the policy period, only to specific questions presented in writing by the insurer.

Furthermore, breach of the insured's duty of disclosure does not, in itself, serve to exempt the insurer from its liability under the policy, unless the breach was fraudulent or if the insurer can show that a reasonable insurer would not have issued the policy or would have done so under significantly different terms.

The new UK Act does not require the insured to disclose all material information, but rather only to make a "fair presentation" of the risk. Moreover, the insurer is deemed to have knowledge on a specific fact, if the insurer has been "put on inquiry" and failed to ask a question.

Proportional Remedies

The Israeli Law consistently provides that breach of duties or conditions by the insured does not automatically lead to denial of coverage or prejudice of the insured's rights under the policy. Rather, the insurer must prove that the breach was material and affected the risk or the loss. Furthermore, the Israeli Law used to be very different from UK Law because it does not recognize the concept of "warranties".

The Israeli Law applies a proportional remedy principle – namely in cases of breach of duty of disclosure or breach of a policy conditions, partial liability will still be imposed on the insurer, to the extent that the policy would have reasonably been executed had the breach not occurred.

The insurer will only be exempt entirely in cases of fraud or if proven that no reasonable insurer would have accepted the risk had the breach not occurred.

A similar concept of proportional remedies was adopted in the new UK Act.

Perhaps the most significant change under the UK Act is that a breach of warranty does not automatically exempt the insurer from its liability, and

a casual connection is now required between the breach and the loss. More significantly, the UK Act no longer allows incorporating representations in a proposal from into the policy as warranties.

The Role of the Broker

There is however, one very important issue which remains materially different between the Israeli Law and the UK Act, which still gives rise, even after 36 years, to many disputes in Israel: this is the role of the insurance intermediary, the broker or the insurance agent.

The Israeli Insurance Contract Law does not distinguish between types of intermediaries, i.e brokers and insurance agents or agencies.

Under Israeli law, the broker/agent is considered the agent of the insurer for various purposes, including for negotiation of the policy terms, unless appointed in writing by the insured to serve as his agent.

This rule is important since representations by the broker will be constructively seen as being those of the insurer, and information disclosed to the broker by the insured will be considered, in most cases, as having been made to the insurer.

In the UK the situation is different – as a general rule, the broker is deemed the agent of the insured.

This different concept may be significant in many cases, and may have implications not only on specific cases but rather on the entire market. Perhaps this is one of the main explanations for the common use by insureds of services of insurance consultants in Israel in all classes of business.

Moreover, in modern life and global economy, where several brokers and agents may be involved in a specific transaction, shouldn't we re-examine the role and status of each one of the links in the chain?

Costs in Addition

Another significant difference between the UK Act and the Israeli Law is in respect of defence costs in liability insurance. Under UK law, the policy limits may include defence costs. Thus, insurers can be certain of their maximum liability under the policy. Under Israeli Law, reasonable defence costs are in addition to the policy limit. Pros and cons for each principle depend on the point of view, but for the benefit of certainty for both sides, its time to formulate a definition of "reasonable costs".

So what do we say after 36 years?

The fact that the UK Insurance Act has changed and adopted principles closer to those of the Israeli Law, may indicate that the concept that an insurance contract is a unique type of contract that requires different rules, is more appropriate.

The protection given by the Law to small insureds is noteworthy and the fact that the "all or nothing" approach was abandoned, seems in retrospect very appropriate.

Having said that, applying these principles to large commercial insureds seems to be a very artificial and inappropriate concept. After more than three decades, it is time that the Israeli Law distinguish between different types of insurance and different types of insureds. In this respect we should mention that the UK Act distinguishes between consumer insureds and non consumer insureds for several purposes, including regarding representations of the insured to the insurer.

The first step in this direction has already been made in the claims handling regime in Israel.

In a directive issued by the Commissioner of the Capital Market, Insurance and Savings, regarding insurance claims handling, the instructions apply solely to personal/ private lines of insurance.