

Changes in UK Insurance Law

An Introduction for European Businesses





Julia Graham

President 2013-2015 and Board Member - FERMA

"I have the privilege of presenting this FERMA document on important changes taking place in UK insurance law.

The Insurance Act 2015 will affect all UK commercial insurance arranged after 12 August 2016. FERMA member organisations and European risk managers need to be aware of the changes, as they will impact on all insurance or reinsurance which is placed in London or the UK.

The Act will bring significant additional direct and indirect benefits to businesses which arrange insurance in the UK. However, to get these benefits European risk managers will need to understand the substance of the reform and adapt their practices in response. Those that do so will see an important shift in the reliability of their insurances.

FERMA therefore urges all European risk managers to read this document, and to start a dialogue with insurers and brokers should this not already have begun.

The change in law is intended to drive greater levels of professionalism in insurance placement from insurers, brokers and insurance buyers. It is therefore completely aligned with FERMA's objective of sharing and supporting risk management as a profession, and we very much welcome the legislation.

FERMA would like to thank the insurance governance experts Mactavish for producing this document. We hope that it will help risk managers really benefit from this important change in UK insurance law."



Bruce Hepburn

CEO - Mactavish

"The UK insurance industry, and especially the London market, has a global reach and reputation. Changes to insurance law in the UK will therefore be felt worldwide. The significant amounts of European insurance and reinsurance arranged in London mean that European businesses need to be aware of the Insurance Act 2015.

We are therefore immensely pleased to have produced this Introduction for FERMA. It summarises the substance of the Act and provides guidance on areas to consider. We hope that it will help European risk managers understand the Act and the impact it will have on their insurance arrangements.

Mactavish has been heavily involved in the law reform process that led to the Insurance Act 2015, and we think that it is an excellent piece of legislation.

By compelling businesses to understand their risk in more detail and shifting insurer focus towards clarifying and defining coverage (as opposed to relying on harsh conditions and a legal environment weighted in their favour), the Act is expected to drive increased innovation in bespoke coverage design, allowing businesses to arrange high quality, bespoke insurance in the UK market. This guide is intended to help risk managers benefit from these improvements."

We would also like to thank AIRMIC (the UK association for risk and insurance management professionals), the British Insurance Brokers' Association (BIBA), and the London & International Insurance Brokers' Association (LIIBA), for their support.





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John Hurrell

CEO - Airmic (the UK association for risk and insurance management professionals)

“The Insurance Act 2015 represents the most radical change in UK insurance law in over a century. It will apply to all commercial insurance contracts governed by English law irrespective of the geographic location of the policyholder. Overall, it is a very positive development from the perspective of buyers but introduces explicit responsibilities on proposers to make a fair presentation of the risk after a ‘reasonable search’ to discover material information to disclose to underwriters.

These new responsibilities on all parties will inevitably be tested in law in the future but meanwhile we, at Airmic, are recommending that members take the best possible advice on how to meet their obligations under the Act in order to take full advantage of the positive new legal framework.”

INTRODUCTION

UK LAW GLOBAL IMPACT

The Insurance Act 2015 is a once-in-a-century change in UK insurance law with a global impact. It will apply to all commercial insurance and reinsurance contracts placed (or varied) after 12 August 2016. The Act is a significant challenge and opportunity for buyers of insurance, including many European risk managers.

The new law is the first significant change since the Marine Insurance Act of 1906, which still provides the legal foundations for UK commercial insurance.

The importance of the UK in international insurance and reinsurance means that the impact will be widespread. Two-thirds (c. £30bn/€40bn) of London Market specialty commercial insurance and reinsurance business (c. £45bn/€60bn) originate internationally from outside the UK and Ireland¹.

The Act aims to reinforce the position of the UK insurance market at the forefront of insurance innovation, ensuring a clear, modern legal foundation more attractive to international insurance and reinsurance placements.

PROFESSIONALISING INSURANCE PLACEMENT

The unifying objective of the new legislation is to professionalise insurance placement, driving a greater focus on the quality of underwriting and risk understanding. The Insurance Act 2015 responds to certain criticisms of the current law: that it is too favourable to insurers, can encourage poor risk analysis and contributes to coverage disputes especially when there are large claims.

By updating insurance law for the realities of complex global businesses and data flows which cut across borders, the Act aims to drive innovation and promote professionalism in the UK insurance market.

The legislation seeks to codify a balanced legal regime, favouring neither insurer nor insured. It offers significant benefits for insureds placing insurance in the UK, but **these benefits have to be earned**. This is the central intention of the legislation.

Insureds are given additional protections under the law, as summarised in this document. In return businesses purchasing insurance are expected to undertake a more structured analysis of their own risk and proactively consider the adequacy of their presentations to insurers at renewal.

UK law?

International businesses arranging insurance in the United Kingdom (UK) will most likely be doing this in the London Market, and these placements will therefore come under English law unless another law is chosen.

The Insurance Act 2015 will apply to all commercial insurance and reinsurance contracts governed by the laws of the constituent parts of the UK: England and Wales, Scotland and Northern Ireland. For simplicity this document refers to these separate legal systems as “UK law” instead of referring each time to English and Welsh, Scottish and Northern Irish law.

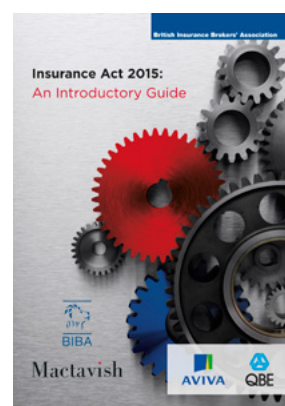
THE DOCUMENT

This Introduction is for European risk managers to understand the key aspects of the Insurance Act 2015 – how it will impact on them and areas to consider before the new law goes live in August 2016. It is not a full technical analysis of the Act, but rather a summary to introduce the subject and matters of key importance to risk managers.

If you are interested in more detailed information on the Act we suggest consulting the British Insurance Brokers' Association and Mactavish Guide – The Insurance Act 2015: An Introductory Guide.

The guide is available from the research section of the Mactavish website:
www.mactavishgroup.com/services/research/

The Insurance Act 2015 will affect all businesses buying insurance or reinsurance cover governed by UK law. This Introduction is therefore relevant for all European insurance buyers who already place some or all of their cover in the London/UK Market or who are considering doing so.



¹ London Market Group – The Fact Base (2014)

KEY ASPECTS OF THE ACT

This section summarises the four key aspects of the Insurance Act 2015: (i) the duty of fair presentation; (ii) warranties and other conditions; (iii) third parties' rights and remedies for fraud; and (iv) contracting out of the Act. Focus is given to aspects that will have the greatest practical impact on commercial insurance buyers.

The common law system in the UK means that much of the law evolves through case law - precedents set by judicial decisions. However, the Insurance Act 2015 is a legal change enacted through legislation.

Although the Act codifies and clarifies common law, it also includes elements of new law. It is principles-based rather than a rigid code. It sets a new baseline more closely aligned with best industry practice. This should lead to more consistent adoption of industry best practices, especially concerning policy placement.

Philippe Rocard

CEO - AXA Corporate Solutions

"AXA Corporate Solutions fully support The Insurance Act which brings welcome clarity and, as a consequence, a greater degree of contract certainty to clients. Whilst the Act puts London at the leading edge of insurance law innovation it emphasizes the need for close co-operation between clients, brokers and insurers to ensure coverage is tailored to the exact specification of the risk presented. We at AXA Corporate Solutions are ready and willing to take a leading role in this process."

1. THE DUTY OF FAIR PRESENTATION

CURRENT LAW - THE DUTY OF DISCLOSURE

The existing duty of disclosure occurs at every placement and renewal. Insureds are required to disclose all material information to insurers to allow the insurer to underwrite the risk. If an insured fails to do this, and an insurer can demonstrate that this affected the underwriting decision, then an insurer can "avoid" the entire policy - behave as if it had never existed, return all premiums and refuse all claims payments.

The duty of disclosure is widely recognised to be too broad, onerous and unfair to insureds, especially given the quantity of information that complex modern businesses hold, vast amounts of which could be deemed "material". The insurer's avoidance remedy is generally regarded as draconian and not in line with modern business practices or requirements.

NEW LAW - THE DUTY OF FAIR PRESENTATION

The objective of the Act is to clarify the extent of the duty and make the consequences of not satisfying it fairer.

A fair presentation

Modern multinational businesses - which generate huge amounts of information and have complex data flows - are one of the key considerations of the Act. The legislation reflects the reality that disclosing all material information is exceptionally challenging for such businesses, and also recognises the impossibility of insurers processing all this data in an unstructured format.

The new duty of fair presentation is, therefore, much more specific about the information that needs to be disclosed, how it is gathered and who needs to be consulted, the accessibility of the presentation for insurers and the overall adequacy of the presentation.

As shown in the centre of the diagram below, the underlying duty is defined in a broadly similar way to the current law, with a requirement to disclose all material facts or, failing this, sufficient information for the insurer to make further enquiries to reveal the material facts. There is now a new and additional requirement for “clear and accessible” presentation of risk information: ensuring adequate signposting, flagging of key facts and avoidance of “data dumping” large volumes of unprocessed data.

As the outer segments of the diagram explain, the Act is also more specific about the insured’s knowledge (which needs to be disclosed) and the insurer’s knowledge (which does not).

Insureds will need to include in their presentations the knowledge held by the insurance/risk management team, senior management and the broker team. A reasonable search is required to uncover additional material information that might be held by the wider business, the insured’s agents (like the broker or other service providers) and individuals benefiting from the cover.

Insurers will be obliged to consider the information they already have when underwriting a risk and the “further enquiries” test is intended to encourage insurers to pay greater attention to insureds’ presentations and ask follow-up questions, if required, during placement.

Proportionate remedies

If an insured has failed to satisfy the new duty then

- unless this was done deliberately or recklessly
- the claims outcome is proportionate. The Act introduces the two principles of proportionate claims adjustment and of putting the insurer and insured in the position they would have been in if there had been no breach of the duty. New terms can be added to the policy, claims can be reduced proportionately (in line with any additional premium that would have been charged), or the insurer can still avoid the policy if they would not have insured the risk.

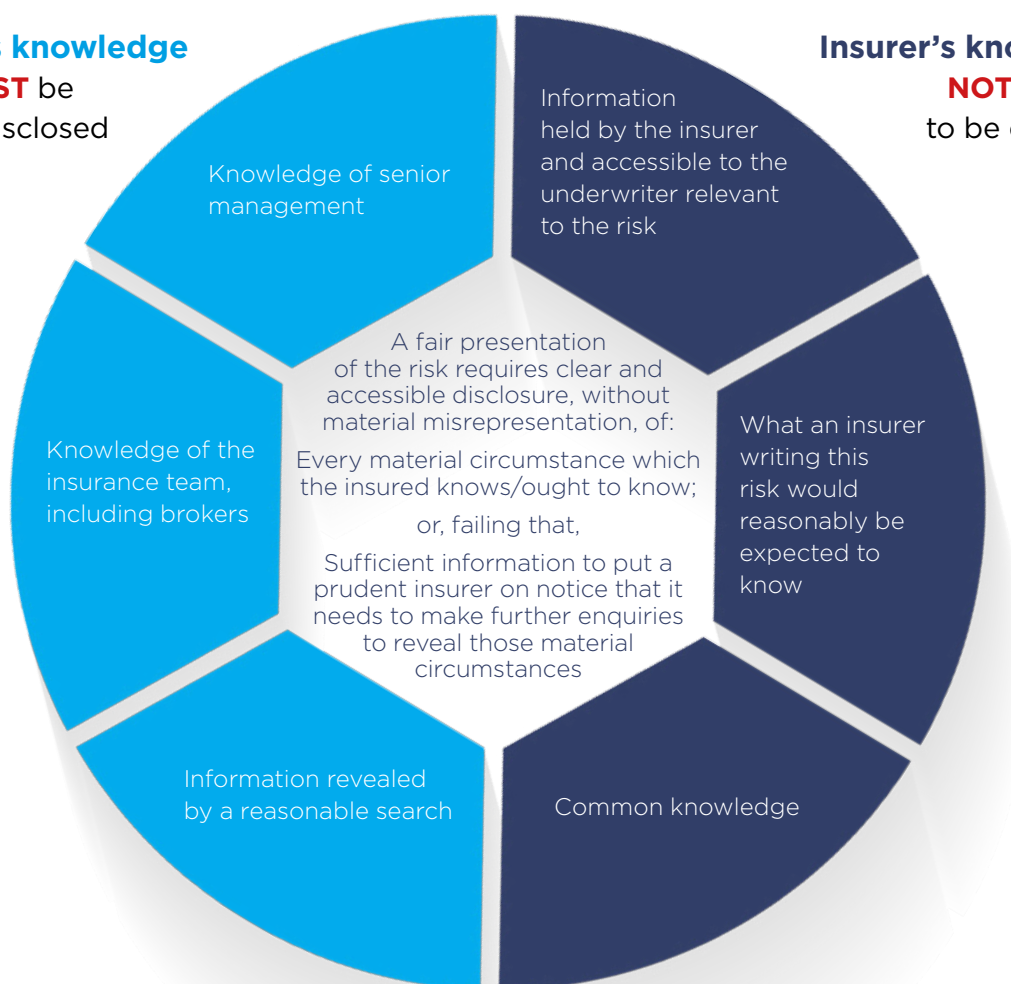
THE DUTY OF FAIR PRESENTATION: HOW IT FITS TOGETHER

Insured’s knowledge

What **MUST** be actively disclosed

Insurer’s knowledge

NOT required to be disclosed



IMPACT

The new duty of fair presentation and proportionate remedies represent a significant additional protection for insureds when compared to the regime they replace, provided buyers adapt to the new standards.

By moving away from an approach focused on the materiality of the information, the new duty requires insureds to pay more attention to the processes used to gather the information, how these processes are evidenced, and the overall adequacy of how the information is presented to insurers – does the information create a fair and accurate picture of the risk(s) being insured or could it mislead?

In addition, the new duty is now fairer so it is widely predicted that it will be relied upon more frequently by insurers. This makes it even more important to get the presentation right.

David Hertzell

Special Adviser - Mactavish - and the Former Law Commissioner responsible for the Act

“The overriding objective of the legislation is to professionalise placement, creating a law which is appropriate for twenty-first century businesses, and supporting the international position of the UK insurance market.”

2. WARRANTIES AND OTHER CONDITIONS

CURRENT LAW

Warranties are conditions in insurance contracts that need to be complied with exactly. Failure to do so terminates the policy immediately and insurers can refuse all claims payments from this point, even if the condition is irrelevant to the claim. For example, breach of a warranty for testing a fire protection system could invalidate a flood claim. Furthermore, “basis clauses” create warranties of all the information provided by the insured, creating a problem if any of the information is incorrect, even if the inaccuracy is trivial.

The draconian effect of these conditions has been amended by the Insurance Act 2015 to establish a more balanced legal framework for modern insurance placement.

NEW LAW

Basis of contract clauses will be abolished entirely and breaching a warranty will no longer automatically terminate the policy. Instead breach of warranty will suspend the cover until the breach is remedied (if the breach can be remedied). Losses during the suspension period (or relating to it) will therefore not be covered.

In addition risk mitigation terms in policies (including warranties) now operate differently. There has to be a link between non-compliance with the term and the loss that actually occurred to allow an insurer to dispute a claim. Combined with the new suspensory regime for warranties, this is intended to give insureds greater protection in the event of irrelevant and temporary warranty breach.

However, it should be noted that certain types of warranty or condition may fall outside of this limitation. For example, terms that define the risk as a whole (which might include clauses requiring notification of material alterations to the risk) or terms that do not reduce the risk (like clauses that specify time limits or procedures for notifications or claims handling).

IMPACT

These changes are positive for insureds, although it is important to bear in mind that there are still some important limitations. Insurers will remain able to contract out of most aspects so this still needs to be managed (see the contracting out section below).

The new constraints on insurers' ability to reject claims are also expected to increase focus on the scope of policy coverage (e.g. insuring provisions and exclusions), making it even more important than ever to ensure that coverage is correctly aligned to risk and clearly defined.

3. THIRD PARTIES' RIGHTS AND REMEDIES FOR FRAUD

The Act clarifies what happens in the event of fraudulent claims by insureds and corrects errors in the legislation implementing "The Third Parties (Rights against Insurers) Act 2010" (which simplifies the compensation procedure when an insured business goes bankrupt).

However, these elements of the Act are clarifications of the current law and are less likely to be a critical concern for most insureds.

4. CONTRACTING OUT

The new law is the default legal regime but insurers and insureds will be able to bypass almost all of the new legal framework (except for the abolition of basis of contract clauses) if they wish. This could consist of individual clauses in policies, which specify that they operate differently to the provisions in the Act, or overarching conditions meaning that an entire policy, or programme of policies, does not follow some, or all, of the provisions of the Act.

The insurer must inform the insured if it wishes to contract on terms that are more disadvantageous to the insured than the new Act. Whether the insurer has taken sufficient steps to do this will vary depending on the circumstances of the transaction and sophistication of the parties – but would include, for example, notification to the broker.

Insureds will need to be vigilant about contracting out because it could deny them the full benefit of the new more favourable legal regime. However, it is also worth recognising that more favourable legal positions can be negotiated - the freedom to negotiate bespoke terms being a central principle of the UK legal system.

The Financial Times

"Companies urged to take insurance more seriously: One of Britain's most powerful pension trustees has said companies need to take insurance more seriously so that they do not become exposed to financial problems. ... Poorly designed insurance contracts often gave underwriters scope to postpone or dispute big claims, he [Paul Spencer, CBE] said, meaning companies could be forced to reach settlements for significantly lower sums than they seek. ... [the] comments came ahead of a long awaited revamp of the legal regime that governs insurance contracts, which gives greater protection to policyholders."

Andrea Leadsom

Economic Secretary to the Treasury
(the Government department responsible for the legislation)

"Our long term economic plan is all about backing successful sectors like our insurance industry. ... we want to make sure that the industry continues to grow and provide better services to customers, which is why we have brought insurance contract law into the 21st century."

AREAS TO CONSIDER

CHECKLIST TO CONSIDER IN THE BUILD-UP TO 12 AUGUST 2016

The Act will affect claims outcomes but the most immediate impact will be at placement or renewal. Areas for businesses to consider before the law goes live on 12 August 2016 are:

1. Renewal timings

- Renewal plans might need to be amended, to allow more time for the additional information-gathering processes and for insurers to make further enquiries following the issuing of the presentation.

2. Presentation of disclosure information

- Presentations will need to be reviewed and amended if necessary, to ensure that information is adequately presented, ordered and sign-posted.

3. Knowledge of senior management

- Knowledge held by senior management, so far as it is relevant to the risk, should be included in a fair presentation. As the Act has to apply to all sizes of business this is a flexible category, defined to include anyone who plays a significant role in deciding how the business' activities are to be managed or organised.
- Companies will need to decide who this includes and ensure that information they hold is included in the presentation.

4. Implementing a reasonable search process

- The business will need to think about which organisations and individuals need to be consulted as part of the reasonable search process. The requirement could be quite wide ranging, covering for example: the broker's information systems, subsidiaries, outsourced services providers like facilities management, and individuals benefiting from policies like Directors & Officer's liability insurance.
- Underlying data gathering processes should be assessed to see whether additional documenting or auditing is required, so they could be defended if challenged.

5. Broker knowledge

- A fair presentation will need to include your individual broking team's knowledge. Agreement should be reached with the broker on how the incorporation of their knowledge will work in practice, for example in relation to historic claims or survey data.

6. Insurer knowledge

- It cannot simply be assumed that all information within the insurer organisation is available to the individual underwriter (and thus not required as part of a presentation). So businesses should seek to clarify this with their insurers before deciding what does not need to be included in the presentation.

7. Cross-check improved risk understanding with policy coverage

- The requirements of the fair presentation regime are expected to make insurance buyers analyse and explore their business risks in more detail. This may also throw up new questions concerning policy coverage, requiring buyers to review their current wordings to identify areas where cover should be extended, amended or clarified.

8. Reviewing changes in policy wordings

- Many insurers are revising wordings in preparation for the new Act. Revisions to consider carefully include conditions precedent to liability, which may be used by some insurers in preference to warranties.

9. Early adoption of the Act

- Some insurers are proposing early adoption of the substance of the Act. Businesses need to be aware of the additional obligations that come with the new regime, not just the benefits, and be prepared for them if they decide on early adoption. Clarity will be required if early adoption is to be legally binding.

10. Managing contracting out

- Businesses need to ensure that they and/or their broker are prepared to identify and manage insurers contracting out of the new Act and introducing disadvantageous terms. This will be especially important in the immediate transition when protocols and standards for contracting out are still evolving.

11. Reviewing bespoke or broker drafted wordings

- Where the wording is a bespoke wording, with elements drafted by the insured, or the wording is a broker wording, the obligation for notifying contracting out will not necessarily sit with the insurer.
- Conducting a review of these wordings to ensure that they are aligned with the Act and do not introduce disadvantageous contracting out provisions is advisable.



12. Reinsurance

- The Act also applies to reinsurance contracts governed by UK law, both facultative and treaty. So it may impact on insurances placed in other legal jurisdictions, where the reinsurance arrangements are under UK law.
- Like other areas of business, it is important to understand and manage complex supply chains. Ensuring that the implications of the Insurance Act are understood up the reinsurance chain is similarly important. For example, ensuring that fair presentation requirements are met as part of the reinsurance placement.

13. Captives

- It will be important to align inward and outward captive placements with the new law, to ensure that the contracts are back-to-back and risk is reliably transferred from the captive to the insurance market, and especially to ensure compliance with the expectations of fiscal authorities.

LONG-TERM IMPACT

The longer-term impact of the Act will become apparent as the market responds in the period both up to and after August 2016. However, the broad outlines are already clear. A greater emphasis on the quality of processes and risk understanding for buyers, brokers and insurers will drive higher levels of professionalism.

By compelling businesses to understand their risk in more detail and shifting insurer focus towards clarifying and defining coverage (as opposed to relying on harsh conditions and a legal environment weighted in their favour), the Act is expected to drive increased innovation in bespoke coverage design, allowing businesses to arrange high quality, bespoke insurance in the UK market and further reconfirming its international reputation as a leader in insurance innovation.

Gavin Kealey QC

Head of Chambers - 7 King's Bench Walk - and a Deputy High Court Judge in the Commercial Court

"A serious effort to improve English insurance law: taking away insurers' draconian remedies, rebalancing the law of warranties, imposing clearer duties of risk presentation, clarifying fraudulent claims - but dangerous, hidden traps for the unwary."

Richard Harrison

Barrister (and Insurance Junior of the Year - 2014 Chambers Bar Awards) - Devereux Chambers

"The Act aligns the law more closely with the commercial expectations of the parties. The new legal landscape requires insurers, policyholders and brokers to reappraise policy wordings to avoid unnecessary disputes. Innovations in policy wording can be expected so it is vital to understand the significance of the changes."

Geraldine Wright

Secretary - London & International Insurance Brokers' Association (LIIBA)

"The Insurance Act 2015 is a once in a century shift in UK insurance law. By prioritising greater professionalism in UK insurance and reinsurance, the Act will allow the London market, and the rest of the UK, to remain at the forefront of innovation in insurance placement. This will make London even more attractive for global businesses purchasing insurance."

ABOUT FERMA

FERMA, the Federation of European Risk Management Associations, brings together twenty-three national Risk Management Associations of 21 countries. FERMA exists to lead and enhance the effective practice of Risk Management, Risk Financing and Insurance. It achieves this aim by working with its Member Associations and other organisations in Europe and Globally, promoting awareness of Risk Management through the media, information sharing and supporting educational and research projects.



ABOUT MACTAVISH

Mactavish is the UK's leading expert on Insurance Governance.

Mactavish specialises in the analysis of commercial risk, coverage analysis, insurance policy reliability, disclosure, placement procedures and conduct, and insurance governance standards. Mactavish is expert on the implications of the Insurance Act 2015, contributing heavily to the law reform process. We publish widely acclaimed research into the corporate insurance landscape and work with buyers, brokers and insurers to deliver improved insurance solutions.

Mactavish is licensed by the Bar Standards Board of the Bar Council to instruct barristers directly, for both contentious and pre-contractual legal work in the field of insurance. This allows us to offer clients a full suite of support – ranging from drafting changes to contracts right through to assisting with claims governance post-loss.

Mactavish

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Steve White

CEO - British Insurance Brokers'
Association (BIBA)

“It is imperative that insurance buyers understand the changes introduced by the Insurance Act 2015, particularly when placing business in the London market. New requirements regarding reasonable search and fair presentation bring with them new responsibilities on buyers, these must be met to ensure they receive the suitable insurance protection they need.”

Lars Henneberg

Head of Risk Management -
A.P. Møller-Mærsk A/S

“We use the UK insurance market for a significant part of Maersk’s insurance programme, as it can provide the large and complex capacity which we require. The Insurance Act 2015 drives a greater focus, by all the parties involved in the transaction, on the detail of the risk being transferred. However, the Act requires businesses buying insurance to proactively adapt to the new standards. Foreign companies buying insurance in the UK need to ensure that they fully understand the legislation so that they do not get caught out.”

Mactavish

Mactavish is the UK’s leading expert on insurance governance.

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