

# Control of Well Insurance: Policy Warranties & the Onus of Proof

This article examines how policy coverage implications arising from the Insurance Act 2015 could affect Control of Well cover even if the policy is not subject to English Law.



At English Law, the Insurance Act 2015 entered into force on the 12th August 2016 and applies to business insurance policies concluded on or after that date. The Act also applies to variations to insurance contracts, where the variation was agreed on or after the 12th August 2016, even if the insurance contract was agreed at an earlier date.

Accordingly, most oil & gas policyholders, whose policies are affected by English Law, will now be subject to the provisions of the Act. The Insurance Act 2015 applies to policies that are expressly subject to English Law. Furthermore, the Act can also apply to policies subject to other legal regimes if provisions from the Act are expressly incorporated into such policies via specific terminology.

Control of Well cover is a risk category within the oil & gas insurance market which has the potential to be impacted by the changes introduced by the Insurance Act 2015.

One of the main objectives of the Act was to address existing law relating to policy warranties. It is the changes in law relating to policy warranties that are of particular significance in relation to Control of Well policies.

At English Law, a policy warranty is a condition precedent to the liability of the insurer. Prior to the advent of the Insurance Act 2015, a breach of warranty discharged underwriters from any further liability under the entire policy from the time of the breach. Underwriters being discharged from any further liability even if the breach did not increase the risk of loss. The onus of proof resting on underwriters to demonstrate that the warranty had been breached.

In accordance with the Insurance Act 2015, a warranty becomes a suspensive condition. Coverage being suspended while the Insured is in breach of the warranty but being restored once the breach is remedied.

Furthermore, the Act provides that warranties and similar terms which seek to mitigate risk will not be

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effective **if the Insured can show** that non-compliance “could not have increased the risk of loss which actually occurred in the circumstances in which it occurred”.

Accordingly, the Act now ensures that many policy warranties will no longer adversely impact coverage, provided any breach did not increase the risk of loss. Although it could be contended that the Act places the Insured in a less advantageous position so far as onus of proof is concerned.

It would therefore appear the revised statutory position relating to policy warranties significantly improves the position for Insureds. In this belief, underwriters and brokers may seek to expressly incorporate into the policy certain specific provisions from the Act. For example, in respect of the Energy Exploration & Development policy form EED 8/86, London based underwriting body the Joint Rig Committee seek to expressly link the policy Warranties and Due Diligence Clauses to the Insurance Act 2015.

The potential exists for terminology from the Act to have been incorporated into Control of Well policies irrespective of the Law & Practice clause in the policy.

However, for many years certain standard oil & gas policy wordings have already significantly improved the Insured's position in relation to warranties. For example, in accordance with the standard policy terminology, the EED 8/86 blowout preventer warranties, storm choke warranties and the like only relate to coverage in respect of individual claims, rather than ongoing coverage under the entire policy. Furthermore, the EED 8/86 warranties only apply if a breach caused the loss. Significantly, the onus

of proof under the EED 8/86 policy form rests with underwriters and not the Insured. (EED 8/86 General Conditions, Clause 4(c) Exclusions).

Additionally, for the avoidance of any doubt, the EED 8/86 policy form also states that the policy Due Diligence Clause only applies to individual claims and only in the event that a breach caused the loss. The onus of proof resting with underwriters and not the Insured.

Furthermore, applying the Act's provisions could significantly shift the onus of proof regarding evidencing compliance with the EED 8/86 warranty that the Insured must use every endeavour to control the well and to stop the escape or flow.

Accordingly, the standard EED 8/86 Control of Well policy form already places the Insured in a more favourable position, relating to warranties and the like, compared with the changes introduced by the Insurance Act 2015. Specifically, the onus of proof under the EED 8/86 policy form rests with underwriters and not the Insured. Furthermore, under the EED 8/86 policy form the breach must have a connection with the cause of the loss rather than merely increasing the risk of loss.

Therefore, following the advent of the Insurance Act 2015, it is essential that oil & gas policyholders seek clarity with regards to the terminology of their insurance contracts. In particular, policyholders must ensure that by incorporating provisions from the Act into their policies they do not find themselves in a less favourable position.

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