

Arnould's Law of Marine Insurance and Average

First Supplement
to the
Eighteenth Edition

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BRITISH
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British Shipping Laws

**Arnould: Law of Marine
Insurance and Average**

First Supplement to the Eighteenth Edition

HOW TO USE THE SUPPLEMENT

This is the First Supplement to the 18th Edition of *Arnould on the Law of Marine Insurance and General Average*. It has been compiled in two parts. The first part is a special supplement dealing with the Insurance Act 2015. The second part has been compiled according to the structure of the main work volume. Within each chapter, updating information is referenced according to the relevant paragraph in the main volume. Where it has been necessary to insert additional paragraphs, their place in the main work has been indicated. The second part does not generally include references to the changes which will result from the 2015 Act, for which the reader should refer to the detailed analysis in Part 1.

PREFACE

The current edition of *Arnould* was published at a time when the insurance contract law reform project being undertaken by the English and Scottish Law Commissions was well advanced. The Consumer Insurance (Disclosure and Representations) Act 2012 was already on the Statute Book and further legislation was expected to be proposed during 2014, or thereabouts, to deal with questions of disclosure and representation in business insurance and to deal with the subjects of warranties, damages for late payment and other matters.

The Law Commissions' ongoing endeavours have now borne fruit, in the form of the Insurance Act 2015, save that their proposals with regard to damages for late payment were removed from the Bill during its passage and have since resurfaced in the Enterprise Bill 2015 which is still before Parliament.

The Insurance Act 2015 is the most important and potentially far-reaching legislation affecting English insurance contract law since the partial codification of the existing common law in the Marine Insurance Act 1906. The relevant provisions of the 1906 Act are clearly drafted in most respects and their meaning is well established by and large, but they had come to be seen (understandably) as operating in an unduly harsh manner against the assured and as being unduly favourable to insurers. The drafting of the 2015 Act, which strikes a balance that is somewhat more favourable (overall) to the insured and achieves more proportionate outcomes, is, by contrast, in many respects problematic, uncertain and in places obscure. Confident predictions by the Law Commissions that the Act will result in an overall increase in certainty are hard to credit.

Given the substantial nature of the changes effected by the 2015 Act and the difficulties of interpretation and complexity of its provisions, the editors concluded that a full analysis of the new regime should be provided in a Special Supplement before the Act takes effect, which would stand separately from the relevant Chapters most affected by these reforms (Chapters 15–21 in the main work). It is currently envisaged that the comprehensive analysis in Part I of this Supplement will not need to be repeated in such detail or appear in similar format in future editions where the current law and the new regime are expected to be dealt with alongside each other for the foreseeable future in the relevant Chapters.

Part I of this work, therefore, is a special supplement containing a full analysis of the 2015 Act (analysis of the 2012 Act—CIDRA—is already provided in the main work, in Chapter 15).

The background to the Act and the development of its drafting are explained in Chapter 1.1 of the special supplement. The new regime concerning non-disclosure and misrepresentation in business insurance, re-characterised as the assured's duty of fair presentation, is analysed in the next Chapter (1.2). This new regime was intended by the Law Commissions to build upon and clarify the existing law in this area, at the same time as introducing a new scheme of proportionate remedies in Sch.1 to the Act in place of the sole remedy of avoidance, but there are subtle changes of substance, which are potentially important, some of them obscure and perhaps unintended, contained in this Part of the Act. Chapter 1.3

then deals with ss.9–11 in the 2015 Act (“Warranties and Other Terms”). The meaning of both ss.10 and 11 is uncertain in numerous respects. The drafting of s.11, in particular, has already met with widespread criticism. The remaining chapters in the special supplement deal with the sections of the 2015 Act relating to fraudulent claims and the duty of utmost good faith, the requirements as to contracting out of the new regime, (which again are not entirely free from difficulty), and the discrete subject of the amendments made in Part 6 of the 2015 Act to the Third Parties (Right against Insurers) Act 2010 (the reasons for which are explained in Chapter 1.6).

With the exception of Part 6, the provisions of the Insurance Act 2015 will come into effect on 12 August 2016, in respect of contracts of insurance and variations agreed after that date.

The second part of this work is a conventional updating Supplement to the 18th edition, except that, in order to avoid ceaseless repetition of points covered in the special supplement, references to the changes brought about by the 2015 Act have generally been omitted from the updating material under the Chapter headings affected by the new regime.

There has been an unusual number of significant marine cases since the 18th edition (more than can conveniently be listed in this Preface), which are discussed in Part 2 of this work (the updating supplement). The difficult Supreme Court decisions within the last two years on the *ex turpi causa* defence and the *Hampshire Land* principle are also grappled with, under Chapters 21 and 16 respectively. Legislative and regulatory developments dealt with in Part 2 include the Consumer Rights Act 2015, the Counter-Terrorism and Security Act 2015, the implementation of the Financial Services Act 2012 and of Solvency II, the Brussels Regulation, and the draft clauses in the Enterprise Bill concerning damages for late payment.

The intention of this Supplement is to reflect the state of the law as at 1 October 2015. Some more recent material has been included where practicable.

Jonathan Gilman QC

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