Department for Transport

Department for Transport Response to the consultation on the Review of the Uninsured and Untraced Drivers' Agreements.

On 31 July 2013, the Department for Transport published its Summary of Responses to its consultation on the review of the Untraced Drivers' Agreement 2003 and Uninsured Drivers' Agreement 1999. A copy of that document was placed on the Department for Transport's pages on Gov.uk.

https://www.gov.uk/government/consultations/review-of-the-uninsured-and-untraced-drivers-agreements

We stated that we would produce a revised Government response at a later stage once discussions with the Motor Insurers' Bureau ("the MIB") were finalised.

Although we consulted on both the Uninsured and Untraced Agreements, most of the changes focussed on in this paper apply only to the Uninsured Agreement. A new Uninsured Agreement has now been finalised following discussion with the MIB. This new Agreement is published at

http://www.mib.org.uk/Downloadable+Documents/en/Agreements/Uninsured+Agreements/Default.htm

and will enter into force on 1 August 2015 and apply to accidents occurring on or after that date.

The issues upon which we consulted have been incorporated within the new Agreement, but this Agreement also includes other changes, including changes required by EU law and changes to clarify existing clauses.

We remain in discussion with the MIB on a proposed new Untraced Agreement and will produce a separate Government response to the 2003 Agreement once negotiations have been completed.

The issues were listed in the consultation under four main section headings, but only three of them are related to the Uninsured Agreement and many of the questions in the consultation related solely to the Untraced Agreement. The relevant sections and questions for the Uninsured Agreement were:-

1. Procedural requirements (questions 1 and 2);
2. Appeals and Disputes (question12); and
3. General issues (questions 17, 18 and 19).

Summary of responses to questions (16 responses).

SECTION 1. PROCEDURAL REQUIREMENTS

Question 1 -

Do you agree that, if the MIB is required to be named as a second defendant in a claim and the claim form is submitted to the MIB within a reasonable time frame, then the procedural or notice obligations on the claimant in clauses 8 to 12 of the present (1999) Uninsured Agreement can be removed? If you do not agree, can you please explain your reasons why?

Question 2 -

Do you agree that clause 13 serves no useful purpose any more?

Government Response and the changes we will make

The responses showed general agreement to our proposal in question 1 with no outright disagreement. Three of the respondents thought that the MIB's rights should be restricted to the Civil Procedure Rules ('CPR') and that it should not be entitled to any superior rights in respect of sanctions which it might impose. Most respondents agreed with the proposal in question 2.

We think that the procedural requirements imposed under these clauses in the 1999 Agreement are cumbersome. Where a claimant unwittingly fails to comply with all aspects, they place an unfair burden on claimants as being conditions precedent to liability on the part of the MIB. It is important that the MIB is given adequate warning of proceedings against a motorist where it might ultimately be called upon to satisfy the claim, but we want to simplify this requirement so as to reduce the burden on the claimant and the scope for relatively inconsequential errors leading to dismissal of a claim. Service of documents should be by reference to means permitted under the CPR and so the requirement for notices to be given to the MIB by fax or registered or recorded delivery post pursuant to clause 8 of the 1999 Agreement is too restrictive as a condition precedent.

As a result, the new Agreement replaces these provisions with revised simplified provisions at clauses 12 and 13. The revised provisions include requirements (1) for claimants to provide such information about their claims as the MIB may reasonably require and (2) to name the MIB as an additional defendant in a claim from the outset. As a party to the action from the outset, the MIB should be treated as such, receiving all the relevant court notices and procedural documentation in the same way as the defendant motorist would. This will remove the need for the claimant to take separate steps to notify the MIB. These changes will reflect what already frequently happens in practice.

The new Agreement also removes the requirement of clause 13 of the 1999 Agreement which required claimants, as a condition precedent to the MIB's liability, to pursue insurance details from the relevant driver, whether in person, via the vehicle keeper or by lodging a complaint with the police as set out under Section 154 of the Road Traffic Act 1988. This requirement is not currently relied upon by the MIB

as a condition precedent in practice, particularly with the advent of the Motor Insurance Database (MID).

SECTION 2. APPEALS AND DISPUTES

Question 12 -

Do you agree that claimants should be able to appeal to an independent arbitrator rather than the Secretary of State if they dispute the reasonableness of the MIB's request for information under the Uninsured Agreement (present clause 19 of the 1999 agreement)? If not, what are your reasons?

Government Response and changes we will make

Most respondents agreed and this clause is rarely used in any case. Under the 1999 Agreement, the MIB can ask a claimant to supply it with information or documentation in order to assess the claim at various stages. It could also require the claimant (subject to offering an indemnity as to costs) to take all reasonable steps to obtain judgment against every person who may be liable in respect of the injury or death or damage to property. Any such reasonable requests are conditions precedent to the MIB's liability. This leaves the issue as to what constitutes a reasonable request and what would amount to adequate compliance with such a request.

If there is a dispute about the reasonableness of the MIB's request for information, or of its requirement that the claimant pursue another party to judgment, Clause 19 of the 1999 Agreement entitles either the claimant or the MIB to refer the dispute to the Secretary of State for Transport for a determination, whose decision is final.

Clause 17 of the new Agreement now provides for an appeal process to an independent arbitrator rather than the Secretary of State so as to ensure independence away from one of the parties to the Agreement. We feel this is a more appropriate process.

As a result of the simplified procedural requirements in the new Agreement (see changes described under questions 1 and 2 above), appeals to an arbitrator only apply to disputes as to the reasonableness of the requirements requested by the MIB under clauses 12 and 14. Either the MIB or the claimant can make a referral. The arbitrator will be a QC appointed by the Secretary of State on a rota from a panel, similar to the arbitrator appointment provisions under the Untraced Agreement. QCs are appointed to the panel by the Lord Chancellor or, for Scottish cases, by the Lord President (see changes under question 19 below). The arbitrator's determination in writing will be final.

In practice, we do not expect there to be many disputes of this type, in particular because of the more limited circumstances under the new Agreement which will be subject to this procedure. There have hardly been any such referrals over the many years of operation of the 1999 Agreement

SECTION 4. GENERAL ISSUES

Question 17

Do you agree that we should remove clauses 5(2)(d) and 6(3)(d) of the Untraced and Uninsured Agreements respectively. If not, why not?

Government Response and changes we will make

10 respondents agreed with the proposal and five respondents commented on the proposal as explained in the published summary of responses.

The 1999 Agreement excludes compensation for those who knowingly enter an uninsured vehicle which is subsequently responsible for an accident. This exclusion is allowed under EU law and the new Agreement does not change this. However, we will remove the provision in these clauses, which raise an evidential presumption against the claimant in circumstances which are overly complicated and virtually never applied.

Question 18 (both agreements)

Do you agree that we should introduce a definition of 'crime' in the Uninsured Agreement like that in the Untraced Agreement? If not, please explain why not?

Government Response and changes we will make

There have been developments since the consultation on this issue. These developments mean that a definition of 'crime' is no longer needed. The Court of Appeal judgment on 9 March 2015 in the case of Delaney v Secretary of State for Transport (2015) EWCA 172 upheld the High Court judgment against the Secretary of State that the exclusion of compensation where a passenger knew or ought to have known that the vehicle was being used in the course or furtherance of a crime was contrary to European law. This provision is, therefore, omitted from the new Agreement as is the provision which excluded claims where the passenger knew or ought to have known that the vehicle was being used as a means of escape from or avoidance of lawful apprehension.

Moreover, to ensure uniformity and European law compliance, the like provisions under clause 5(1)(c) of the Untraced Agreement have also been removed by means of a Supplementary Agreement (the Fifth Supplementary Agreement) dated 3 July 2015.

Question 19 (both agreements)

If there are any grounds why the Agreements should not be changed to reflect that the Lord President has powers to appoint arbitrators in Scotland, let us know.

Government Response and changes we will make

There were no objections to the proposal that the Scottish panel of arbitrators should be appointed by the Lord President.

The new Uninsured Agreement gives the power to the Lord President accordingly to appoint arbitrators to the Scottish panel. If there is more than one arbitrator on the Scottish panel, then they will be appointed in rotation from this panel. In practice, as described in the response to question 12 above, this is a provision which is likely to be rarely used for the Uninsured Agreement.

A 4th Supplementary Agreement to the Untraced Agreement also provides that the Lord President makes the appointments to the Scottish panel for untraced arbitrations.

Other Changes not dealt with expressly in the Consultation

As mentioned above, there have been various other changes made to the new Uninsured Agreement.

These included:-

1. Clearer wording around what claims are excluded on the grounds of subrogation/subsidiarity, emphasising the last resort status of the MIB where the claimant can secure redress through insurance elsewhere (see clause 6 of the new Uninsured Agreement). These provisions are also brought into effect for untraced claims to ensure consistency by means of the 5th Supplementary Untraced Agreement dated 3 July 2015;
2. Clauses 7(2) and 8(4) have been added so that when considering the claims of a dependant or the estate of person who died, the knowledge of the lack of insurance or theft of a vehicle should relate to the knowledge of the deceased;
3. The introduction of a terrorism exclusion (clause 9) to mirror the provision in the 2003 Untraced Agreement (clause 5 (1)(d)) emphasising that injury or loss arising out of a terrorist act should not be viewed as a liability requiring coverage by a motor insurer and, hence need not be picked up by the MIB as the guarantee fund;
4. The requirement for the MIB to deal with claims arising from the uninsured use of an uncoupled trailer when used as a vehicle. The Road Traffic Act 1988 is silent on this in relation to use in the UK and we felt a need to fill this gap by formally requiring MIB to deal with any claims that arise. In practice these will be few, if any, in number – see the definition of "relevant liability" under clause 1 (d);
5. The matching of the wording for passenger knowledge to that used in section 143(3)(c) of the Road Traffic Act 1988;
6. The removal of clause 3 of the 1999 Agreement as serving no useful purpose and lacking clarity; and
7. The formal recognition that MIB should be entitled to the assignment of a settlement and not simply of a judgment so as to reflect that, in practice, the majority of cases are settled without having to go to a final judgment with all the attendant costs involved. Clause 15 (a) of the 1999 Agreement is, therefore, extended – see clause 15 (b) of the new Agreement.