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MARINE INSURANCE LAW: SIX RECENT BOOKS AND SOME QUESTIONS ABOUT REFORM

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THE BOOKS

POLICIES AND PERCEPTIONS OF INSURANCE LAW IN THE TWENTY-FIRST CENTURY. By Malcolm Clarke. Oxford: Oxford University Press, 2005. Pp. xxxiii/374. USD 120.00. ISBN: 0-19-927330-8.

MARINE INSURANCE: LAW AND PRACTICE. By F[rancis] D. Rose. London: LLP, 2004. Pp. lxxiii/783. USD 423.00. ISBN: 1-84311-247-7.

THE LAW OF MARINE INSURANCE. By Howard Bennett. Oxford: Oxford University Press, 2006. Pp. xc/990. USD 301.59. ISBN: 0-19-927359-6.

GOOD FAITH AND INSURANCE CONTRACTS. 2d Ed. By Peter MacDonald Eggers, Simon Picken & Patrick Foss. London: LLP, 2004. Pp. lvi/590. USD 459.00. ISBN: 1-84311-325-2.

WARRANTIES IN MARINE INSURANCE. 2d Ed. By Bariş Soyer. London: Cavendish Publishing, 2006. Pp. xxxix/312. USD 168.00. ISBN: 1-85941-943-7.

MARINE INSURANCE: THE LAW IN TRANSITION. Edited by D. Rhidian Thomas. London: LLP, 2006. Pp. xxx/357. USD 396.00. ISBN 1-84311-535-2.

THE BACKGROUND

What is called the "law" of marine insurance is a curious construction. It is built upon the multifarious mischances of the marine world, by persons acquainted with their mischievous variety, rather than by remote philosophers. It is said by scholars to have its origins in the *lex mercatoria*. That regime itself, about which much is written, and which appears to be in intellectual revival,[1] was certainly not positive law, but consisted of usages of commerce. Lord Mustill, who must know as much about it as anyone, has written:

> The law of marine insurance, like all other types of commercial law, is a child of the markets; both of the contemporary market which it serves, and of the former markets which in the past engendered, shaped and abraded the rules constituting the law of today. The demands of the markets generate practices which successively solidify into tacit understandings, informal principles, explicit rules of the trade, and common forms of contract.[2]

[1] Google *lex mercatoria* for signs of modern life as well as ancient history.

[2] Lord Mustill, *Introduction*, in 2 D. RHIDIAN THOMAS (ED.), THE MODERN LAW OF MARINE INSURANCE, at lv (2002).

"An English merchant in the seventeenth century was bound . . . in his foreign transactions by rules of the Law Merchant before any Lord Mansfield had told him that he was so bound."[3] In the common law's absorption of the rules, Lord Mansfield famously consulted groups of commercial men to learn the usages he put forward as rules for what the contracts did not say or interpretations of what they did say. In 1791, Justice Buller declared that a marine insurance policy "has at all times been considered in Courts of Law as an absurd and incoherent instrument; but it is founded on usage, and must be governed and construed by usage."[4] Chief Justice Lord Kenyon said in the same case that it is for "those who alone act upon such instruments to declare the meaning of them," and that only Lombard Street and "the uniform practice of merchants and underwriters had rendered them intelligible."[5]

The court decisions have never been understood to mean that the parties could not contract otherwise and the Marine Insurance Act 1906 ("MIA 1906"), in which they were codified, expressly reserved the parties' right to reject or vary by contract or (further) usage "any right, duty or liability declared by this Act which may be lawfully modified by agreement,"[6] referring to such mandatory rules as those against wagering, unlawful adventures, and fraud. Many of those decisions and the sections of the Act that codified them are constructions of the old SG Policy appended to the Act and in use long before it. Its words and phrases, still used selectively, acquired constructions in the courts that are treated as law on the theory that their meanings ought to be so understood.

As newer wordings have been added or substituted, the old rules are consulted in construing them. Thus the rules of the Act are almost unique in focusing on meanings in a system of freedom of contract.

English decisions continued to be very influential here well into the twentieth century and so the United States inherits the same history except for the MIA 1906, and our decisions do not treat that body of rules as mandatory. In Anglo-American law, therefore, the rules mainly represent usages judicially blessed and sometimes codified. They remain usages, however, because parties remain free to agree differently. Because what started as practice and became usage in *lex mercatoria* eventually took the *form* of law, we often find it convenient to treat it formally as such, rather than peel back the form and delve in the innominate mixture of usage, standard clauses, snippets of law, and private contractual creativity. This works so long as one deals with the law as it is, or appears to evolve, and most of our scholarly writings do that. But the approach breaks down when discussion turns to reform or major change.

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[3] CARLETON KEMP ALLEN, LAW IN THE MAKING 29 (1927).

[4] Brough v. Whitmore, 4 Term Rep. 206, 210, 100 Eng. Rep. 976, 978 (K.B. 1791) (Buller, J.).

[5] *Id*. at 208-209, 100 Eng. Rep. at 977 (Lord Kenyon, C.J.) (furniture in policy covered provisions based on merchants' opinion in earlier case).

[6] MIA § 87.

One might guess that the focus on the terms of a particular contract would make marine insurance decisions unattractive as academic subjects; but not so! Sir Michael Mustill (as he then was) also once wrote: "It is remarkable that marine insurance has attracted such a wealth of scholars who combined intellectual superiority, breadth of learning and practical acumen. . . . [N]o other branch of commercial law, and perhaps no legal topic of any kind, has been so richly endowed."[7] And he added that "[t]here is cross-citation of authorities between English, American and Commonwealth authorities to a degree which is rare in other fields." The history and structure of the rules probably have something to do with the volume of books and other writings on what would seem to be a pretty narrow patch of law. It is no doubt partly due directly to encountering new circumstances in an expanding world trade with radically changing technology and new trading patterns. And it is plausibly also because these developments led to the continual introduction of new policies, e.g., time hulls, and new clauses and consequent decisions on their meanings alone and in relation to others. Finally, for many years outside critics have written to urge changes in the practice, some of which are needed, by means of changes in the rules, and have not succeeded, surely in part at least because of the character of the rules in relation to the practice.

The first major English work was Park's in 1787,[8] reprinted in 1789 in Philadelphia, and a classic both in England and the United States. More general works, new ones and editions of the older ones, followed.[9] I make no attempt to list those that have followed steadily to the present day from London, many adding nothing new but commentary on later cases. Some, however, have focused on particular topics such as perils of the seas, principles of indemnity, war risks, and charterers' risks.[10] In 1848, Sir Joseph Arnould (sometime Chief Justice of Bombay) published his general work,[11] the most notable of all because it has gone through 16 editions to 1981, been developed

[7] Sir Michael John Mustill, *Fault and Marine Losses*, 1988 LLOYD'S MAR. & COM. L.Q. 310, 313 ns. 8and 9

[8] JAMES ALLAN PARK, A SYSTEM OF THE LAW OF MARINE INSURANCES (London 1787).

[9] E.g., JOHN ELDERTON BURN, A PRACTICAL TREATISE OR COMPENDIUM OF THE LAW OF MARINE INSURANCES (London 1801) (perhaps a précis of PARK by a devotee); SAMUEL MARSHALL, A TREATISE ON THE LAW OF INSURANCE (London 1802) (with sections on life and fire); DAVID HUGHES, TREATISE ON THE LAW RELATING TO INSURANCE (1st Am. ed., New York 1833); FRANCIS HILDYARD, A TREATISE ON THE PRINCIPLES OF MARINE INSURANCES (London 1845) (also responsible for 8th edition of PARK in 1842).

[10] E.g., L.R. BAILY, PERILS OF THE SEAS AND THEIR EFFECT ON POLICIES OF INSURANCE (Liverpool 1860); W. BENECKE, TREATISE ON THE PRINCIPLES OF INDEMNITY IN MARINE INSURANCE (London 1824); MICHAEL MILLER, MARINE WAR RISKS (3d ed. 2005); DIETER SCHWAMPE, CHARTERER'S LIABILITY INSURANCE (Burravoe Ltd. trans. London 1988).

[11] SIR JOSEPH ARNOULD, THE LAW OF MARINE INSURANCE AND AVERAGE (London 1848).

broadly to three volumes,[12] and been often cited in the United States. The subject has been popular in London and evidently salable. Old law book catalogs and stores show that many of the English books were also bought here.

On this side of the ocean, the major works commenced with Phillips in 1823[13] and continued with Duer in 1845[14] and Parsons in 1868,[15] but nothing more appeared on that scale until Parks in 1987.[16] Holmes, J. famously wrote that "[t]here are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business."[17] Although the center of gravity has probably shifted, there is no apparent reason to devalue that advice. The commerce has not been one way only. I believe I recall Dr. Wiswall's pointing out cross-pollination between Dr. Lushington and Judge Ware (and others? I haven't looked back in the book).[18] And in recent notable English appeals, in order to decide the meanings of decisions codified in the MIA 1906,[19] the courts have respectfully examined four nineteenth-century U.S. treatises, those of Kent, Duer, Parsons and Phillips,[20] who in the nature of things had more English than U.S. decisions to discuss. Indeed, in 1880 the Court of Appeal deliberated on whether Duer's view or that of Phillips and Parsons was right about the test of materiality and chose the latter, excluding materiality to the risk in favor of only materiality to the prudent underwriter.[21] In England, Arnould's refers to U.S. decisions and makes comparisons between U.S. and English law; I regret that the practice isn't more common.

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[12] SIR MICHAEL J. MUSTILL & JONATHON C.B. GILMAN, 1 & 2 ARNOULD'S LAW OF MARINE INSURANCE AND AVERAGE (16th ed. 1981); JONATHON C.B. GILMAN, Vol. 3 (1997).

[13] WILLARD PHILLIPS, A TREATISE ON THE LAW OF INSURANCE (Boston 1823) (5th ed. 1867).

[14] JOHN DUER, THE LAW AND PRACTICE OF MARINE INSURANCE (New York 1845).

[15] THEOPHILUS PARSONS, TREATISE ON THE LAW OF MARINE INSURANCE (Boston 1868).

[16] ALEX PARKS, LAW AND PRACTICE OF MARINE INSURANCE AND AVERAGE (1987).

[17] Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co., 263 U.S. 487, 493, 1924 AMC 107, 109 (1924).

[18] See F.L. WISWALL, JR., THE DEVELOPMENT OF ADMIRALTY JURISDICTION AND PRACTICE SINCE 1800: AN ENGLISH STUDY WITH AMERICAN COMPARISONS (Cambridge Univ. Press 1970).

[19] Pan Atlantic Ins. Co. v. Pine Top Ins. Co., [1995] 1 A.C. 501, [1994] 2 Lloyd's Rep. 427 (H.L. 1994); Container Transport Int'l Inc. v. Oceanus Mutual Underwriting Ass'n, [1984] 1 Lloyd's Rep. 476 (C.A. 1984).

[20] JAMES KENT, COMMENTARIES ON AMERICAN LAW (New York 1828) and PHILLIPS, DUER and PARSONS, *supra* notes 5-7.

[21] Rivaz v. Gerussi, 6 Q.B.D. 222 (1880).

In the long, rich vein of English scholarly writing on marine insurance, beginning when there was no other kind worth writing about, here today are six at once! Arguments for reforms will be found in all of them, in varying degrees of moderation. The occurrence of the older extra-specialized works mentioned above and those reviewed here prompts me to point out that writers must have corners of their gardens where they prefer to spend their time and that critics are, of course, no different. These preferences no doubt affect the critics' views of where the writers hang out. I should disclose that my own favorite patches have been good faith and warranties.

REVIEWS

An author's reflections on the game, the players, and the rules

Malcolm Clarke is Professor of Commercial Law in the University of Cambridge. His LAW OF INSURANCE CONTRACTS is in its fourth edition (2002) and I consider it the best present English work of its kind. Although it is a general work and he does not specialize in marine insurance, he is well acquainted with the subject and has been a member of the recent working party of the Comité Maritime International on the harmonization of marine insurance. His general work reflects his respect for its historic sources and the realities of the commerce to which it relates. The present work discloses the impressive scope of his knowledge of those realities and, while it does not specially address marine insurance, what it has to say is relevant to marine as to other lines.

POLICIES AND PERCEPTIONS OF INSURANCE LAW IN THE TWENTY-FIRST CENTURY is not called a second edition but amplifies a 1997 predecessor, POLICIES AND PERCEPTIONS OF INSURANCE. It is not a usual sort of law book, a cyclopedia of jurisprudence for the guidance of practicing lawyers, but a broad view of the business, economics, and sociology of insurance, as seen by an English legal scholar, who refers easily to American, Continental, and Australian law as well. The author says in his preface that the book "is intended to be a critical introduction to the English law of insurance contracts and seeks to present the rules in their socio-economic context."

In all phases of insurance business, from perceptions of risk through the decision to seek insurance, placing it, coverage, claims, fraud, litigation, and social influences, he looks at attitudes, incentives, and disincentives and practices of all concerned, the public, insureds, agents, insurers, and courts, and industry responses to the issues raised, and evaluates them from ethical, social, and legal viewpoints. Considerations often overlooked in academia are discussed; important examples are moral hazard and, beyond that, litigation hazard, a costly one almost never mentioned by writers but surely present in the minds of experienced underwriters. Where he discussed the influence of torts on insurance and the less well-known counterinfluence of insurance on tort liability, I could have supplied an annotation from experience many years ago. We (the United States) brought suit against a vessel that had upset a barge-load of artillery shells into the river, and also against the river pilot because someone in the government thought the pilots were an insouciant lot and should be taught a lesson. That good judge, known as "The Fastest Gavel in the West," found the vessel was being negligently navigated but

exonerated the pilot who was doing it. This was an inscrutable decision unless you knew that the judge's clerk had asked the pilot's counsel and learned that he was uninsured. And so it was a different lesson that was learned. While Malcolm is by no means a radical reformer and remains grounded in commercial realities, he makes many practical suggestions for adjustments of cover and practices that might be profitable for all parties. He clearly has abundant knowledge of the business and its trends and the psychologies of all concerned.

All this is in excellent style, with plain language and with light touches of wit and allusion when appropriate: Under the title, "Claims: Taking the Drama out of the Crisis," "Wishful thinking may be foolish, but . . . it is not fraudulent;" On litigation, a catch line, "Riding Unruly Horses," an allusion to the saying of a judge in 1824 that public policy is a very unruly horse and you never know where it will carry you; On the language of cover, a good essay on "The Myth of Ordinary Meaning and Plain English." . The nine chapters have many useful subtitles, for materials of typically a page or two, and these are represented in the general table of contents and repeated at each chapter heading.

Not despite its generality, but because of it, this very readable book is of interest---and use---to maritime lawyers, teachers of marine insurance, and marine underwriters and brokers. If the underwriters and brokers were to suppose it too relevant to "consumer" insurance to be relevant to them, they should consider the vast mount of marine insurance now written on pleasure craft. And it is just as relevant here as in England.

Two new major treatises

I turn to much larger works devoted entirely to marine insurance, new comprehensive treatises of the classic type, one by Francis D. Rose, Professor of Commercial Law in the University of Bristol, and the other by Howard Bennett, Hind Professor of Commercial Law at the University of Nottingham.

Professor Rose has edited learned journals and essay collections, published widely in commercial law, and written a number of works in marine insurance and other salty legal subjects. His work reviewed here, MARINE INSURANCE: LAW AND PRACTICE, was awarded the 2005 British Insurance Law Association Book Prize. It appeared in 2004, when the publisher could claim that it was "the most comprehensive integrated account of the English law and practice of marine insurance for nearly a quarter of a century." Professor Bennett has also written and spoken widely on his subject and this is his second edition of THE LAW OF MARINE INSURANCE. I have called it new because it is much changed from the first edition, which the preface announced as mainly for "students of the subject and practitioners new to the field," whereas the new preface reports that its emphasis is changed to provide "a greater measure of assistance to practitioners," which has led to more detailed treatment of a number of topics, much rewriting, and six new chapters, filling interstices such as insurable interest, brokers, and

post-contractual good faith, to provide the coverage of a "standard" treatise. As a result, it is a big book, almost doubled in size.

Thus both books offer broad coverage, but with significant distinctions. Decisions have multiplied in the "quarter of a century" mentioned. They have probably changed little in fundamentals, but their applications vary with the terms to which they apply, and there were many changes in the whole book of London Institute Clauses in 1983, and major innovations offered in the new International Hull Clauses introduced in 2002 and revised in 2003. Such changes are of special importance in a field of law almost unique in its dependence on commercial usage.

Professor Rose says in his preface, "the true flavour of the law of marine insurance can only be appreciated through consideration of both the underlying law and what participants in the market do in practice." Moreover, a new text may organize the law in a new and valuable way, and the author sets out to do so, with the announced aim "to draw together the historical, formal and practical sources in order to (re)state the modern law of marine insurance in the light of its current operation in practice . . . not to be restrained by the practice of presenting the law within the formal framework of the Marine Insurance Act 1906 and the terms of individual standard form clauses, and to recast it within the light of general developments in law and practice and, where possible, in a more rational way." In his introduction he writes that "[t]he rules governing insurance [presumably marine] are a distinctive mixture of contract, law and practice." He does not mention usage unless that is meant by "practice," and goes on to treat the rules as law after brief mention that only a few of them are mandatory.

Professor Bennett describes the rules before codification as "default principles from which the commercial community was free to derogate by an appropriately worded agreement," but does not plainly acknowledge (or deny) the preservation of this character in the MIA 1906. It would be foolish for a U.S. reviewer to suggest how the authors should describe English law, and I do not do so, but it would be interesting to see more acknowledgement and discussion of the view that most of the rules are codified usages, since they govern only if the parties have not said otherwise. The point is important whenever someone proposes to amend them by statute as a means of reforming the contracts affected.

One can see that Professor Rose would like to break free of structural bondage to the MIA 1906. This doesn't mean, however, that he's going to break far from it; he can't very well do so. But he certainly does not regard it with complete deference. He writes of its change-of-voyage rule that it is "another example of Chalmers' codification of the case law on the decided illustrations of an underlying general principle which has not itself been stated in the legislation." He is also refreshingly a bit less deferential to the courts than I think many writers are, and goes beyond pointing out the unexplored implications of decisions to criticize some of them outright for faulty reasoning.[22]

[22] See, e.g., pp. 200-202 (criticizing *The Prestrioka*, [2003] 2 Lloyd's Rep 327 (C.A.)).

Happily, he also cannot break free of talking about clauses and, while both authors weave them into their texts, a very good feature of his work is that, as he goes along, he compares the International Hull Clauses 2003 with their predecessors in relation to existing doctrine more pointedly. He similarly looks at variant wordings on that same subject in various sets of Institute Clauses. Among other things to like is his discussion of combined transport policies, his uncommonly incisive and thorough treatment of suing and laboring, and also of double insurance.

I have mentioned significant distinctions and that we are likely to prefer some topics and work them harder than others. Thus, Professor Bennett tells us less about suing and laboring and subrogation and recoupment but more about good faith and much more about causation. He also cites more cases overall. This fact itself does not make a book better but it may possibly be useful in research. The two authors sometimes approach an issue through different cases and at different angles and for this reason I would prefer to consult them both if possible. A good example of this is found in their treatments of war and strike risks. Professor Bennett's two chapters on these topics are somewhat the longer and are anchored in the court decisions (including American ones), while Professor Rose's chapter, "Discord ("War and Strikes") Risks" is anchored in clauses. With a question in this area, it would be worthwhile to read both. Neither author presents a conventional chapter on warranties, perhaps because they are disfavored and principal targets for reform. With Professor Rose they fill most of a chapter headed "Terms of the Contract," and Professor Bennett, with a (reformist?) bow to the Civil Law, inters them in "Attachment and Alteration of Risk."

It is no surprise that there are no radical developments of doctrine to be announced, apart from the introduction of inducement or causation as an element of avoidance for non-disclosure (which I tend to regard as a bit of a weed patch). Both authors give us thoughtful discussions of the speeches in the *Pan Atlantic* case,[23] in which the House of Lords decided that the test of materiality is not decisive influence and went on to decide that avoidance for non-disclosure depended on causation or what they called "inducement." I could wish they might have come to grips with the remarkable fact that the learned lords, despite their experience of trying cases, appear to embrace the pursuit of speculation rather than fact (see below). Had I not other books to discuss, I should like to see more on good faith and especially on warranties (but see my disclosure above) and readers who want more on these topics have only to consult the next two books to be discussed.

In style, Professor Rose is magisterial and Professor Bennett a little less formal, tending more to the colloquial and with interesting historical background to some issues, reflecting the book's intended appeal for student use. The size of this thousand-page book is not due to extraordinary verbiage but largely (perhaps one-fourth) to shorter lines and greater line spacing, which make it pleasanter to read than its companions here.

[23] *Pan Atlantic Ins. Co. v. Pine Top Ins. Co., supra* note 19.

The books have the standard critical apparatus, well done, from tables through footnotes and index, and the appendices of statutes and clauses, all too usual in such tomes. I would welcome occasional references to U.S. law to acknowledge the "special relationship" and illustrate some nuances. They aren't done, except for a few by Professor Bennett, mainly on war risks. U.S. lawyers in this field, however, should certainly have these books at hand, since it is still necessary to be in touch with the English thinking and these appear now to be the current standard texts. If you can have only one, you shan't learn here which it should be.

"Most abounding good faith"[24]

Now we come to the book for the connoisseur of *uberrima fides*. Messrs. Eggers and Foss, the authors of the first edition of GOOD FAITH AND INSURANCE CONTRACTS in 1998, have been joined by Mr. Picken in producing a second edition. Although the authors recognize good faith without the superlative qualification, as in the title, they are mainly concerned with its utmost quality in reinsurance and marine insurance, the lines in which it still prevails. This edition adds discussion of numerous recent decisions and is substantially rewritten in parts to bring them into their settings and relate them to others, and grows about 100 pages in the process. It retains, however, its original structure of 19 chapters on the subjects as before.

Not only the connoisseur but the cynical adversary may find grist in it, for it is hard to imagine what more can be said about it elsewhere, except for its omission to refer to American authorities, if only to say how agreeable they are. This is too bad but doesn't spoil the book for U.S. lawyers seeking the history, rationale, and nuances of the doctrine and the many examples furnished. The descent of the doctrine is direct from England in 1776 to both England and the United States today, and accepted summaries of it here are about the same as in the MIA 1906. The principal difference that has emerged is the element of inducement or causation invented in the *Pan Atlantic* case,[25] about which more later.

There is a detailed and well-documented history of the doctrine from its origin in the *lex mercatoria* through its absorption in common law and recognition in equity, with discussions of the social and economic views involved. The old puzzle as to whether the duty is law or implied term or implied condition precedent, critical to the issues of initial voidness or the need for equitable rescission and the availability of damages for breach, is examined. The authors conclude that it is a positive rule of law and not a condition or other term. All the usual issues---the qualities of misrepresentations and concealments, knowledge, actual and presumed, agents, waivers and the effects of warranties, claims and other post-contractual duties---are extensively discussed, with a remarkable profusion of illustrative citations. The English standard of materiality distilled is not exactly the American standard. In 1880, England went with Phillips and Parsons rather than Duer. This choice disagreed with the undoubted leading case in the United States which

[24] 2 DUER, *supra* note 14, 380.

[25] *Supra* note 19.

embraced materiality to the risk and which Duer had undoubtedly followed literally.[26] Nevertheless, results tend to be the same and the chapter on Examples of Material Facts that follows it is of considerable practical value; it presents 40 pages or so of discussion of facts found to be, or not be, material in the circumstances. Of course, materiality is ordinarily a question of fact rather than law, but these discussions may be helpful in assaying materiality and advocating or opposing it.

A short chapter, "Proposals for Reform," is not a prospectus but a nicely balanced discussion of proposals from others, most of which deal with materiality and involve the judgment of the assured as well as that of the prudent underwriter, and exclude marine and aviation insurance. They conclude at one point that, if "the whole ambit and consequences of the duty are to change, change must take place either in the industry or, preferably, by the legislature." Some doubt about that choice will be expressed below.

The only disappointing feature of this very scholarly work is its treatment of inducement in relation to placing. The track through early discussions of it culminates, of course, in *Pan Atlantic*, which is described perfunctorily and endorsed deferentially as "the only sensible result," a conclusion that is perhaps the only sensible result for English lawyers writing about a unanimous decision in the House of Lords. The authors' final judgment is entitled to respect but one might like some discussion of the other side of the question, on which I will comment below.

In collaborations, the final editorial task for two is not doubled but squared and one may suppose that for three it is cubed. They've managed well. There is some redundancy that might not be committed by a sole author, a literary flaw perhaps, but also perhaps useful to remind us when we look at one topic and not others related to it. The subject of the work is intensely subjective. Its dearth of objective signposts makes the reading of its history, nuances, and examples important for those of us dealing with the issue of utmost good faith in Anglo-American law, and we should have it at hand.

All you ever wanted to know about warranties

Besides disclosure, the closely-related hot topic is warranties, and here we have from Dr. Bariş Soyer the second edition of his WARRANTIES IN MARINE INSURANCE, bringing it up to date with much thoughtful analysis of how things stand and what might be done with them. Starting with the distinction of insurance warranties from others, it canvases the English jurisprudence through the whole field, not excepting the interpretation of clauses as warranties when the word is not used, and not when it is. Whether or not one agrees, it is refreshing to see the author occasionally discuss a judge's "mistaken" view. He discusses critically, and quite properly so, instances when a warranty, with its drastic remedy of voidness, ought to have been a simple exclusion of cover, or "suspensory provision" as he terms it. His important chapter *Implied Warranty*

[26] *M'Lanahan v. Universal Ins. Co.*, 26 U.S. (1 Pet.) 170, 188, 1998 AMC 285, 299-300 (1828); *see also Sun Mutual Ins. Co. v. Ocean Ins. Co.*, 107 U.S. 485, 509-511, 1998 AMC 1191, 1212-13 (1882).

of Seaworthiness contains useful discussion of the varieties of its breach and also of the recent ISM Code and ISPS Code in relation to the warranty.

One of the author's announced aims is to promote "reform." His six chapters on *lex lata* are followed by one comparing German and Norwegian rules, both springing from industry codes and employing the concept of alteration of risk rather than warranty. Although he makes scattered references to American reports, he does not discuss U.S. law because, he explains, the *Wilburn Boat* case makes it unpredictable. His last chapter is *A Case for Reform?* He provides a good survey of the forces for reform in England and elsewhere, reducing the proposals to three choices: (1) scrapping the warranty regime from the MIA 1906 and permitting the parties to agree that the insurer not be liable for a loss caused by breach of an express term; (2) amending the MIA 1906 to turn all warranties into suspensory terms; and (3) requiring proof of a causal link between breach and loss. This last is the one he embraces. Unfortunately, the relationship of warranty to non-disclosure does not get much attention. He observes (without citation) that "Lord Mustill is of the opinion that to impute a regulatory function to marine insurance law is inconsistent with its private law character" but he is evidently not fully persuaded, as he goes on to discuss the desirability of restricting freedom of contract with considerations of public policy.[27]

Unfortunately, the book suffers a little in numbers and letters from lack of a good copy editor. Although there is no treatment of U.S. law, as such, most of the English material is good in the United States also.

Forward march!

D. Rhidian Thomas is Professor of Maritime Law and Director of the Institute of International Shipping and Trade Law at the University of Wales, Swansea, and author and editor of a number of books. He is a tireless and well-informed critic of the MIA 1906 and advocate of changes. MARINE INSURANCE: THE LAW IN TRANSITION, a somewhat wishful expression of his interest, is a collection of papers presented at a colloquium he organized at Swansea in 2005, all pointing toward change. Whether or not you share all his concerns, his own preface to the book is an excellent summary of a number of weaknesses in the MIA 1906, in relation to modern commercial practice, in addition to his major complaints about the narrowness of the English view of insurable interest and the operation of the doctrine of utmost good faith.

The first paper is by our friend above, Malcolm Clarke, on trends in interpretation. Starting from an inventory of the classic rules, he finds movement only in relation to the parol evidence rule, which the House of Lords has treated as "old intellectual baggage" to be relaxed in favor of considering the background "matrix of facts." He explores opportunities and limitations in this process, especially as regards certainty and interpretation in other countries involved. His work is a pleasure to read because of its literary quality and welcome use of tropes and allusions. Professor Thomas himself supplies the second paper, on insurable interest. A very full and scholarly explanation of the principle and present state of the law is followed by

[27] P. 73.

arguments for relaxation of the requirement of a right in the property or arising from a contract about it, in favor of risk to pecuniary interest. He rightly notices that the latter prevails in many U.S. states (New York and California are examples).

Next Peter McDonald Eggers weighs in on the pre-contractual duty of good faith, with authority attested by his collaborative work reviewed above. It is interesting to learn (from either book) how the test of materiality in the MIA 1906 is considered to come from a choice in 1880 of the views of Phillips and Parsons over that of Duer, which would have required materiality to the risk as well as materiality to a prudent underwriter. He would prefer to see the test of Duer, which prevails in the United States, applied in England. He also argues that the remedy of avoidance is harshly inflexible and proposes that courts have discretion to avoid the policy or to assess damages, according to the circumstances.

The issue of utmost good faith after the inception of the contract has had a pretty good run in English courts and not much consideration in the United States. David Foxton, a barrister, contributes an interesting, and I should think comprehensive, survey of the issue as raised in a variety of circumstances, leading to the conclusion that there is not "a unitary, continuing, post-contractual obligation of good faith in a marine insurance contract," which is not to say that parties asserting it have not had other good strings to their bows. When it is raised in the United States, counsel may find useful analysis in this article. In a chapter on "classification of terms," Bariş Soyer reprises materials looking to the further decline in the use of warranties and the conventional remedy for their breach. Next are writers on a new London Market Principals' Slip, probably of little interest far from London,[28] and the International Hull Clauses 2003, focusing on latent defect, post-contractual good faith, and promissory warranties.[29] There follow two chapters on comparative law, mainly in respect of good faith, causation, and warranties or alteration of risk.[30]

The last chapter (before the appendix of the usual suspects) is a good wind-up, as it should be. Peter McDonald Eggers comes back to write on *The Marine Insurance Act 1906: Judicial Attitudes and Innovation---Time for Reform?* and does it very well. He does not bash the Act or any part of it, as some writers seem on the point of doing, but praises it and its drafter, with cogent reasons and illuminating history of the work that went into it and the principles observed by Chalmers. He makes the case that, good as it is, it needs to be improved and also brought up to date in a number of particulars. As usual, the main subjects for improvement are good faith and warranties. It is a great

[28] Peter Rogan of Ince & Co.

[29] Chris Zavos of Barlow Lyde and Gilbert.

[30] Dr. Mark A Huybrechts, Professor of Law at the University of Leuven and Antwerp, *Comparative Marine Insurance Law: Highlighting the Significant Features of Marine Insurance Law in Belgium and other Selected European Legal Systems*; Haakon Stang Lund, of Wikborg, Rein & Co., Oslo, *Comparative Lessons Derivable from the Norwegian Marine Insurance Plan 1996*.

merit of his essay that he approaches these subjects sensitively, with the market in mind, and weighs the merits and demerits of proposals heard. He appears, for example, to favor more flexibility in the remedies for non-disclosure and modifying the harshness of warranty rules without "unwarrantably distort[ing] the parties' freedom of contract." A thoughtful work, well-written.

This book is devoted to change. To the great extent that it deals with amendment of the MIA 1906 as such, it will not be of much concern to American lawyers, but the discussions of doctrinal change, apart from the Act itself, should be of interest to marine underwriters and those who advise them in looking ahead at commercial and legal pressures they will probably encounter.

Additional comments on the books

All these books are well divided into sub-captioned chapters and admirably provided with the appropriate tables and good indices. All except the first, where it would be less useful, follow the excellent practice of numbering paragraphs with chapter number first and using these numbers in the index of cases, which is a convenience in pinpoint citations and in looking for the author's comment on a particular case. Rarely, if ever, is a marine insurance book published without the MIA 1906 (and commonly also other acts) and a collection of clauses appended, as in four instances here (average 122 pages) and many in the past. Do lawyers really want to extend their book shelves so as to consult the MIA 1906 just by reaching for the nearest book? Some publisher should distribute these inevitable appendices in a slim volume and encourage the slimming of the texts.

CONCLUSIONS---THE COUCH OR THE REFORMATORY?

Major writers on this subject today are bound to discuss "reform," by which they refer to amendment to the MIA 1906 and the same rules in other regimes. "Reform" is somewhat misleading, a rallying word suggestive of malfeasance or immorality, and of a broad project, although it refers mainly to three topics of a large subject. The first, insurable interest, is a horse soon curried: The rule in the MIA 1906 is unreasonably narrow compared to ours and should be amended if it cannot be interpreted more broadly. The others are warranties, and materiality and inducement in placing, which are more complex and closely related in a way not often discussed in proposals for reform. A disclosure need not be made when there is a warranty against the fact to be otherwise disclosed, because its breach will have much the same effect as its non-disclosure would have had.[31]

[31] MIA 1906, § 18(3) ("In the absence of inquiry the following circumstances need not be disclosed, namely: * * * (d) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty."); see 2 DUER, *supra* note 14, at 552, 559-560; 1 PHILLIPS, *supra* note 13, § 601; 1 PARKS, *supra* note 16, at 224-230; Cal. Ins. Code §§ 333, 335, 336, 1900.

In thinking about the topics below, I have in mind that: (1) the marine insurance market is free, competitive, and open to negotiation, and more can generally be bought for more premium; (2) the MIA 1906 protects this character in England from statutory rigidity by its § 87; (3) the common use of standard clauses does not produce contracts of adhesion; (4) insurers (and assureds) have an important interest in objectivity to reduce uncertainty and the expense of litigation; and (5) an underwriter is a real person who is responsible to her principals to place their money at risk using reasonable care, prudence, and skill,[32] and it is reasonable to infer that she does so.[33]

Materiality

Dedicated reformers sometimes deal with issues rather abstractly and without much guidance from market reality. An example is the proposal to substitute the "reasonable assured" (like the famous man on the Clapham omnibus?) who isn't an assured yet but only an applicant, for the prudent underwriter as the arbiter of materiality. Isn't this an abandonment of an informed standard simply to give the proposer a fair turn at it? There must be a great many reasonable people without an inkling of what matters in writing marine insurance. Their brokers, however, are responsible for knowing such matters. If the proposers have the judgment to consult an expert, would it not be the expert we'd like to hear from? And if their judgment were not to consult an expert, would that be all the more reason to rely on it? Another proposal is a double tripwire of the two tests, which sounds equitable because it is conceptually symmetrical but is completely illusory because, in practical effect, the reasonable would-be-assured test will control. The buyers of insurance on small pleasure craft may be disregarded here because it is commonly written on the basis of application questionnaires that tend to define materiality.

Warranties

It is notorious that the word "warranty" has been misused, by applying it to what is plainly just restriction of coverage, e.g., Capture and Seizure, or by indiscriminate use in what should reasonably be exclusions. The word itself has been eliminated from American Institute Hull Clauses and almost from the International Hull Clauses 2003, in which a number of former warranties have been converted to exclusions. These are the sorts of changes that point "the way ahead," as some writers put it. Another proposal mooted is therefore that all warranties be turned into exclusions, but this does not recognize that a prudent underwriter may well object to resuming cover after the breach, as for instance when a vessel leaves forbidden drug-infested waters with who knows what drugs on board and an owner whose management is no longer reliable. Should not an underwriter therefore still be able to demand a navigation warranty rather than an exclusion? The condition precedent, whether or not called a warranty, has some role to

[32] See, e.g., Restatement (Second) of Agency § 379 (agent's duty of standard care and skill); *Deeny v. Gooda Walker Ltd.,* [1996] L.R.L.R. 183 (1994) (underwriter's duty of reasonable skill and care).

[33] *See, e.g.,* Fed. R. Evid. 406 (routine practice relevant to prove it was followed).

play; nobody proposes to abolish the condition ("warranty") of legality. Are exclusions and conditions, reasonably chosen, not reasonable measures of the nature and amount of risk to which the underwriter is willing to commit the funds committed to her prudence by the insurers?

Some propose that the sanction of breach of warranty should depend on its being the cause of "the casualty." What casualty? It has been held for centuries that a warranty establishes materiality by the surest proof. If the understood purpose of the condition precedent is to terminate the policy when the risk is altered from that insured, why should it not do so without having to wait for a casualty? And if the warranty is not enforced, does this not throw the burden back upon the non-disclosure rule for failure to disclose that the risk would not be in accordance with the warranty? Possibly even more serious to the insurers is the involvement of the issue of causation, the most arcane and difficult issue in law and the cause of expensive litigation. A further suggestion reported is that the relationship of warranty and loss depend not on causation but on a more attenuated "causal relation." Under this standard wouldn't we all have to take up the study of cosmology?

The reform of warranty needed can be briefly stated: The market should abandon the word and adopt a standard that all conditions precedent be explicitly so described and state the sanction for breach, as some now do. Meanwhile an interesting exercise would be to put oneself in the role of an underwriter asked by a prospective assured to agree that breach of a warranty would have no effect if it did not cause a casualty and consider what questions one would ask and what explanations would then persuade one not to decline the risk or raise the premium.

Inducement

I have complained that the writers on good faith in placing have not offered any critical analysis of what I see as the intellectual disconnections under the mask of "inducement." Since the *Pan Atlantic* case came from the House of Lords, English writers need make no further argument for this change, but on this side of the ocean it is not yet the law and still calls for some explanation. Having raised the subject before[34] without satisfaction and done so here again, let me explain myself.

It is surely true to say that the underwriter is induced to subscribe by the entire presentation the broker makes to her, including the absence from it of many negative features, but it is not sensible to say she relied on not hearing about something she was never aware of. In this it is distinct from a representation (but even there the reliance is

[34] See Graydon S. Staring & George L. Waddell, *Marine Insurance*, 73 TULANE L. REV. 1619, 1655-57 & nn.202-203 (1999); Graydon S. Staring, *Marine Insurance---Is the Doctrine of "Utmost Good Faith" Out of Date?*, CMI YEARBOOK 1994 (SYDNEY II) 288 (1995).

not sufficient for causation, as Lord Donaldson has pointed out[35]). Inducement sounds comfortably like a fact, a description of a past event. When we look at the process beneath the word, we see that it is not. What is undertaken to be proved is that, if told, she would have done something she didn't do. To this end she and others may be pressed to testify to what she would have done.[36] How one would exercise his judgment in other circumstances is not a fact but a speculative prophecy and therefore not admissible evidence in the common-law system as we know it.[37] If even a contemporaneous prophecy of future judgment is not evidence, how can retrospectivity improve it? The speculative subjectivity of such evidence is contrary to the objective approach taken in analogous matters. I have never been allowed to ask such a question and have been more than consoled by preventing others from asking one, on the ground that it called for neither fact nor admissible opinion. Moreover, if a prophetic question is to be asked, should it not be consistent with the standard of materiality adopted, which was not that of decisive influence? The accepted standard is that the material circumstances are those that would influence,[38] or probably influence,[39] the judgment of a prudent insurer. Would not the appropriate question therefore be, not what the underwriter would have decided, but whether she would have taken the undisclosed fact into account in forming her judgment?

The Presumption of Inducement

Lord Mustill acknowledged the presumption of inducement in *Pan Atlantic*, and some writers have looked askance at it, implying bastardy from his failure to disclose its antecedents. Justice Story also made no such disclosure when he stated matter-of-factly in 1828 that "[t]he underwriter must be presumed to act upon the belief, that the party procuring insurance, is not, at the time, in possession of any facts, material to the risk, which he does not disclose."[40] Both judges may have intuited it, for all I know, and we know that intuition is not necessarily unfounded in reason. I propose an explanation for our British friends in the spirit of brotherhood in the Common Law.

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[35] *See JEB Fasteners Ltd. v. Marks Bloom & Co.*, [1983] 1 All E.R. 583, 588 (C.A. 1982) (Donaldson, L.J.).

[36] See MCDONALD EGGERS, *et al.*, *supra*, text at 378 n.287 ("The question must be asked whether the underwriter would or would not have written the risk at all or done so on the same terms had there been complete and accurate disclosure.").

[37] *See, e.g., Washington v. Department of Transp*., 8 F.3d 296, 299-300 (5th Cir. 1993) (what witness would have done if properly warned not admissible); *Kloepfer v. Honda Motor Co.*, 898 F.2d 1452, 1459 (10th Cir. 1990) (same).

[38] MIA 1906, § 18(2).

[39] *Sun Mutual Ins. Co. v. Ocean Ins. Co*., 107 U.S. 485, 510-511, 1998 AMC 1191, 1213 (1882).

[40] *M'Lanahan v. Universal Ins. Co.*, 26 U.S. (1 Pet.) 170, 185, 1998 AMC 285, 296 (1828).

The presumption of "inducement" is a special case of the standard presumption of due care we all enjoy, the burden of disproving which lies on another. As an actual underwriter is responsible to her principals to place their money at risk using reasonable care, prudence, and skill, in this country at least, she enjoys the inference at least of having acted with those qualities. The "inducement" is not reached until after a determination of materiality to a prudent underwriter. It starts with an inference or presumption that the underwriter is induced by the positive factors presented and the absence of negative ones. The non-disclosure of a negative one is therefore one of the inducements unless the contrary can be shown. That cannot be shown by its inherent nature after finding it material but only by showing that the underwriter would have disregarded it. Perhaps that is enough, but to go further, there is a reasonable inference that the underwriter performs her legal duty, the effect of which is that she would not have ignored it. At this point inducement is presumed. Ironically, at this point also, the law lords seem to have got back on the track from which they were derailed when they began to ask what the underwriter would have done if she had known a particular fact.

Finally

As I have remarked above, academia prefers to contemplate prescriptive law rather than usage. Discussion of proposed amendments therefore takes little account of the right confirmed by section 87 of the MIA 1906 to contract otherwise, unless what is contemplated is to thrust into the system of usage an express restriction on the freedom of contract. This was no doubt the reservation Lord Mustill had in mind in his opinion cited above that "to impute a regulatory function to marine insurance law is inconsistent with its private law character." Would the reformers propose to abolish that right? The Act is a horse that will stand for beating; is it perhaps a dead horse? Does not the introspective commercial analysis going on in the market appear to hold more promise?

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