THE CMI LOOKS AT “MARINE INSURANCE LAW”: A UNIQUE CONFLATION OF CONTRACT AND “LAW”

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A UNIQUE CONFLATION OF CONTRACT AND “LAW”¹

I. INTRODUCTION

The Comité Maritime International (“CMI”) has been examining “marine insurance law” to discover the possibilities of “harmonizing” selected features of it internationally. The study has been done by an International Working Group (“IWG”) of nine members of whom I am one.² The proverbial committee’s risk of making a horse look like a camel has been somewhat aggravated by our lack of propinquity and having never all met but conducted our most important business in writing. It was largely because of this, I think, that we failed to seek agreement on the meaning of harmonization at the outset and, at least tentatively, on the devices by which we might realistically aim to achieve it. We have therefore proceeded separately to think those things out as we went along, and have nevertheless done some good and may do more.

My purpose here is to recite some legal and commercial background, describe the studies done, comment personally on a number of the points discussed and explain how I think more good can (and cannot) be done.

II. THE MARITIME LAW AND THE MARINE POLICY

Marine insurance is undoubtedly an ancient, venerable and essential commercial device. The Supreme Court once said it was "well known that the contract of insurance sprang from the law maritime, and derives all its material rules and incidents therefrom... Its first appearance in any code or system of laws was in the law maritime as promulgated by the various maritime states and cities of Europe."³ The Court saw its roots in the Rhodian law that we now call general average and cited references to marine insurance from the tenth century onward.⁴ Bottomry, its close relative and perhaps original, can undoubtedly be traced to ancient times and has been treated by writers together with insurance.⁵

Judicial and academic authors reverently mention the ancient history of admiralty law, but seldom explain whether it developed as a tested product of experience or was a historical accident, and is now a curious and charming antique. Examination of some ancient and distinctive doctrines of the admiralty law, however, shows much of it to have sprung from a premise of continuing importance, also fundamental to the character of marine insurance.

Those doctrines are: bottomry (by which the loss of the vessel cancelled the debt);⁶ limited liability by abandonment (another device to ameliorate loss at sea);⁷ lex Rhodia de jactu (modern general average, by which all interests share the loss of one);⁸ the related right of emergency jettison;⁹ salvage (aid to distressed property at sea with no counterpart on land);¹⁰ lien priorities (precedence for services tending to save the
venture);11 and the ancient laws for the protection of seamen12 with no counterparts then or long afterward for landsmen. What these show in common is a consciousness of the law for many centuries that maritime ventures routinely involved risks of perils extraordinary in their destructiveness and in being far less foreseeable than those common in ventures ashore.

These same considerations inspired the invention of the marine policy as the earliest insurance and continued to distinguish it from the much later fire policy and the other common non-marine policies that can today be sold off the shelf. More knowledge of the world and better communication have ameliorated some of the risks, and technology offers new protections (along with new risks). But the distinction of scope and character of risks on land and sea is evidently still great, as anyone who follows marine news can verify. An exception might be supposed for the pleasure boating that now engages a great deal of marine insurance but it cannot be pressed very far. While small boats hold out all the risks of motor cars, with which they might be compared, they incur also numerous perils of the sea, even in domestic waters.

Beginning with the Middle Ages in Western Europe,13 marine insurance principles had a long development as part of the law merchant (lex mercatoria), the customary law prevailing in the commerce of western Europe and the United States.14 "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."15 In the eighteenth century, Lord Mansfield, relying and elaborating on the usages of the London market, together with continental authorities, enshrined in the law reports many of the enduring usages of marine insurance.16 The United States, where marine insurance began to be written before 1800,17 inherited this body of precedents and applied and elaborated them in early cases and they were codified in England in the Marine Insurance Act 1906 and in that form spread throughout the Commonwealth.

The concept of marine insurance law in the Common Law world is nevertheless almost wholly illusory, as though there were a considerable body of distinct law governing and constraining marine insurance contracts. There is not. While marine insurers are regulated for their financial security, marine policies as commercial instruments are very lightly regulated, if at all. Most of the Common Law rules, including those we are directly concerned with here, have their apparent origins in judicial decisions. Apparent because they generally antedate the decisions, which are not prescriptive law but recognition of the usages of commerce. The main exceptions are rules determining what is a contract in law, requiring insurable interest and prescribing legal remedies,18 with none of which we are concerned here except, peripherally, the last. Lest anyone wonder, marine insurance is entirely within the general law of contracts, which embraces its main "peculiarities" as an aleatory contract,19 embellished with many usages.

The rules in the Common Law world (and I gather largely elsewhere) prescribe the parties’ rights and duties only when they have not contracted otherwise. Marine insurance contracts are not, therefore, required to fit, either in terminology or consequence, within the terms of the Marine Insurance Act20 or similar rules.
uncodified, except for those provisions that can be regarded as obligatory, with which we are not much concerned. This distinction is important in the CMI approach. Professor Wilhelmsen in her fundamental comparative study for us has distinguished between obligatory and non-obligatory rules, and stated that in some instances (notably those of England and the U.S.) she could not determine whether any of the rules with which we are concerned are obligatory.

It is scarcely too much to say in the end that the marine insurance policy is the “marine insurance law”.

III. The Project

A. Inception

The CMI launched its study to explore possibilities for international harmonization of certain issues of marine insurance law that were treated somewhat differently from country to country, with different consequences in the insurances of the same subject. In describing the background of the initiative, leading up to the appointment of the IWG, Professor John Hare, who became its chairman, has written:

It is over 100 years since maritime lawyers last made a concerted and international attempt to agree the harmonisation of certain basic issues of marine insurance law. That attempt took the form of the Buffalo Conference of the International Law Association in 1899, which in turn led to the adoption of The Glasgow Marine Insurance Rules in 1901. Even the Glasgow Rules, however, appear to have been abrogated by disuse, their significance no doubt dimmed by the appearance of Sir MacKenzie Chalmers’ masterly 1906 UK Marine Insurance Act.

Throughout the 20th century, marine insurance was practised in most parts of the world under the influence of the 1906 UK Act. Regional initiatives such as those in Scandinavia have made their mark in seeking both certainty and reform. But for many countries that inherited the 1906 Act directly or indirectly, marine insurance law has remained static and relatively stable …

Unfortunately, however, the stability of the law of marine insurance has not been mirrored in a like stability in marine insurance practice. …

In the knowledge that …[some] national review processes were building momentum, the CMI in 1998 agreed to co-host a Marine Insurance Symposium with the Scandinavian Institute of Maritime Law in Oslo. The symposium took the form of an exploration of common ground and diversity in issues of ship insurance. It did not deal with cargo insurance, nor did it seek answers. It was primarily an academic discussion forum. But it served to identify a number of issues of marine insurance as deserving of further research. These were summed up by CMI President Patrick Griggs at the end of the symposium [by identifying 12 issues of varying importance].
Professor Hare has mentioned that he had been unable to find the Glasgow Rules themselves. They, and more importantly, the reports of proceedings at Buffalo\textsuperscript{24} and Glasgow\textsuperscript{25} have been found and supplied to him and to me by the diligent resourcefulness of Michael Marks Cohen, and they make very interesting reading. The organization involved was the International Law Association and the roster of men who deliberated on the rules is of mostly familiar and distinguished names of British, European and American judges, lawyers, underwriters and adjusters of the day. The rules adopted dealt only with total, and constructive total, loss, abandonment, deductions of new for old, unseaworthiness and double insurance.\textsuperscript{26} These subjects had seized the attention of the Association evidently because of the fact that marine insurances were often placed partly in several countries, with varying treatments of the amounts of indemnity, not always resolved through proper law clauses or the rules on choice of law.\textsuperscript{27} The motivation was therefore similar to that of the CMI, although in the recent process attention was directed largely to other issues.

The discussions at Buffalo and Glasgow reflect variable notions of the delegates as to whether they were dealing with law or contract terms, although never does it appear that they contemplated anything obligatory. When the discussion in Buffalo must have seemed to lean too much toward a view of the proposed rules as law, Robert D. Benedict of New York was prompted to say: “The question which we are considering is, What kind of a contract is the best one to be made between insurer and insured?” and went on to remind the delegates that the actual system was one in which the insurer bought what he wanted and was willing to pay for.\textsuperscript{28} T.G. Carver of London, the principal draftsman, viewing the rules as a species of law, saw them nevertheless only as a “system of law, which may be adopted by contract to form the background of the policy, wherever underwritten … So that in this way a policy may have the same operative effect whether it is underwritten in France, or Germany, or America, or England”.\textsuperscript{29} Mr. Justice Gorell Barnes, Chairman, said in Glasgow that “these Rules, which are only optional for persons to introduce into their policies or not as they like, can be adopted afterwards in practice, if it is thought desirable.”\textsuperscript{30} And in conclusion there appears to have been consensus that the Rules should be implemented by referring in policies to Glasgow Rules, and possibly excepting particular rules by number.\textsuperscript{31}

All this took place before the Marine Insurance Act 1906 was passed, although in the years when it was under consideration,\textsuperscript{32} and demonstrates that at least in Britain and America the abundant “case law” on the subject represented distillations of usage into default rules on which the parties could fall back when they had not agreed to anything else. Professor Hare was no doubt correct in attributing the disuse of the Glasgow Rules in part to the MIA. That Act dealt with the same issues similarly in most respects but with material differences in substance and structure and it was to have been expected that the Rules would not prevail in London, nor in that case elsewhere.

B. Narrowing the Issues and Exploring the Differences
We soon saw that the project should be narrowed to the few issues of greatest interest and identified them as the duty of disclosure, the duty of good faith, alteration of risk and warranties. To these was later added the problem of responsibility imputed to assureds as a bar to recovery and identification of those whose actions would be so imputed.

Questionnaires were sent to the national associations asking about their national treatment of the issues and the national doctrines disclosed by the responses were analyzed and compared in a masterly paper by our Rapporteur, Professor Wilhelmsen, which may serve as a continuing reference on the comparative practices involved, especially as between the Common Law and Civil Law systems.34

In my view, which I believe is shared in varying degrees by others on the IWG, the practical possibilities in our work are tied closely to the nature of the market and its commercial concerns.

IV. THE MARKET

A. Freedom of Contract

The marine insurance market in most of the world is a free market. Insurers sell only coverages they are willing to sell, with limitations acceptable to them and at acceptable premiums, which they almost alone are equipped to assess. Taxonomy is easier when everything is uniform, and we are therefore tempted in our closets to think it should be so. But there is no more reason that marine insurance contracts should be substantively uniform internationally, or even domestically, than that all automobiles should have identical wheels, except that, as the wheels should be identical on a given car, so should the terms of insurance on a given vessel or cargo.

The MIA and its versions in other countries do not prescribe policy terms, as do, for example, statutes prescribing a standard fire policy or the compulsory terms of automobile insurance. This is also the case in the United States, where there is no such national statute, and even in California, where corresponding rules are statutory.35 Much of this body of rules is concerned simply with interpretation of the contract contained in the common form of marine policy, in which usage is of special importance, and it has always been accepted that the usages need not be set out in the policy.36 The MIA explicitly provides that the parties may by agreement or usage negative any right, duty or liability that would arise by implication of law or any term of the MIA itself "that may be lawfully modified by agreement".37 The quoted qualification saves such terms as those prescribing what is a legal contract and the enforcement authority of the courts. The same view apparently is taken of similar rules in important Civil Law countries.38

B. The Risks

We should to keep in mind also that in reality the risks insured extend well beyond the nominal risks expressed in the policy. The risks actually described are those
such as seas, collision, theft, and latent defect, which are the results of the forces of nature or the negligence or wrongdoing of third parties, and are not willed by the insured. Policies also involve the risk of ignorance, that is, that the insured does not in fact know important circumstances affecting the risk, with the result that the underwriter will be permissibly uninformed about them; this is an inherent risk. And every policy involves a degree of moral risk, that is, the risk that, whether by negligence or intent, an assured will wrongly take advantage of it.

Some policy terms and subject matters present very large moral risks. Experienced underwriters are conscious of this and either ask much higher premiums, or decline coverage for the reason that they are not in the business of insuring moral risk beyond what is necessarily inherent. Valuation affords the simplest examples; others are less obvious and the well-informed and prudent underwriter may well decline cover altogether or carefully limit it when he smells a high level of moral risk.

Another risk, which we may call an administrative risk, is that of uncertainty and consequent cost of investigation and litigation to determine coverage. It focuses attention on the objective certainty of contract terms, as alternative to terms that invite subjective arguments about reasonableness and circumstances. An underwriter may be willing to take a risk on a vessel in certain operations, provided she has the security of a suitable tug standing by to assist her. He might leave suitability to be argued about when a claim arises, or he might be more specific (e.g., "suitable tug of not less than 1450 BHP to be in attendance whilst at anchor")\(^{39}\) refusing to accept that the tug be called into attendance when storms are predicted because it will strike him as increasing not only the risk of loss but some of the risks of argument about causation and other issues.

V. THE LIMITS OF HARMONIZATION

It was understood from the outset that we were not to undertake an international convention, but to look for possibilities of harmonization, presumably without the necessity of controversial changes in substance. It was soon agreed also that we were not to produce a model law for consideration by interested nations. The existing “rules” had the superficial look of positive regulation and were so thought of by many. As we set to work, therefore, we heard some lobbying for a new rule of positive law to modify one or another of the thicket of usages mistaken as misguided regulation.

In thinking about our legitimate aims, therefore, it has been necessary to define harmonization and also to define the “laws” we were talking about; to consider where they came from and what they are and are not. We must work within that understanding or waste our time. And as I have explained above, “marine insurance laws” turns out on examination to be a misleading tag. In considering what may be plausible, it is also well to remember that leaders of marine insurance in the United States, in correspondence with the MLA when they first heard of the project, expressed keen opposition to giving countenance to what they (incorrectly) supposed was an attempt by the CMI to impose new laws on the business.
Against this background, I come now to what it seems to me harmonization must mean. It cannot mean the assertion of new and unreal usages of substance to supplant those that exist. They would be ignored unless they were prescriptive contract terms. We have already declined to recommend model laws. Such prescribed terms, even on a selective basis, would do violence to the principle of contractual freedom on which the markets operate, not only in the Common Law world, but also in that of the Civil Law, and would not be well received and certainly not lead to harmony. There is indeed no legitimate reason to desire uniformity of the substance of risk transfers in policies written in different nations, apart from the degree of uniformity that the broker should negotiate in insurances of a given subject.

The practical solutions lie in promoting modifications of standard policy terms by the leaders of the business. The London market's recent adoption of the International Hull Clauses\(^{40}\) encourages me to believe in the practical possibility of progress by these means. What is desirable and probably within reach is the adjustment of some terms to clarify intent, making them more readily understood in both systems and likely to produce the same result from a given contract in one country as in another. Our results should be represented, if possible, by express wordings simple enough to be reliably translated; be congruent with the much larger reinsurance market; and also suggest relaxing the rigor of some conditions now ritually enshrined in standard forms but not needed in all cases.

VI. STUDIES OF THE ISSUES

A. Generally

After some preliminary open-ended discussions of the issues, some of us were assigned to produce studies of the problems and possibilities in the chosen topics and did so in preparation for wider discussion. All these are published in print and online by the CMI.\(^{41}\) The topic of disclosure was in the end treated as subsumed in that of good faith without much discussion of detail. The Chairman also produced a Report of progress to the 2004 Vancouver Conference including a paper stating some tentative conclusions for discussion.

B. The Chairman’s Discussion Paper

The text of the discussion paper that follows was presented as such with the agreement of the IWG and the understanding that there was not agreement to all the substance of it. In particular, disagreements were expressed as to the test of materiality and any connection of materiality with the cause of a casualty, and misgivings or doubts as to the unqualified extension of the duty of good faith to claims and the remedy of damages.

`Good faith, Disclosure, Alteration of Risk & Essential Terms

1. Marine insurance contracts are contracts of good faith. Good faith requires each party to conduct itself with the other party in relation to all material aspects of their
insurance contract according to objective norms recognized by the society in which they are being judged.

2. Acting in good faith requires each party before and at all times during the contract and in the submission of claims, to be honest in relation to all material matters, to disclose all – and not misrepresent any – material facts; and to disclose any material alteration of the risk during the currency of the policy.

3. Certain Clauses may be stated by the parties in the contract as requiring strict compliance; the contract may stipulate that in the absence of strict compliance by either party, the other party shall have the right to cancel the contract (or even that the contract shall terminate automatically), regardless of whether non-compliance caused the loss. Such should be the case in relation to safety at sea, classification, ownership, management and ISM Code compliance. The description “warranty” should not be used, and the English law [of] warranty and its effects in law should be abolished.

4. Materiality in relation to an absence of good faith, a failure to disclose, a misrepresentation or a breach of a contractual term (not requiring strict compliance) is assessed according to a two-tier test of whether a reasonable insurer and a reasonable assured, both operating within the norms of the society and the context of the transaction in which such materiality is being adjudged, would consider the conduct to have affected the acceptance of the risk, the assessment of the premium and or the evaluation of claims by the insurer, and or the acceptance of cover by the insured.

5. Materiality requires a causative link between the breach and the loss or the claim.

6. Any material absence of good faith or material breach of the obligation to disclose or not to misrepresent or any material breach of an essential term going to the root of the contract, gives the aggrieved party the right to treat the contract as at an end, effective from the date of the breach, with the right to claim damages. Material breach of a non-essential term not relating to good faith, disclosure or misrepresentation and not contractually stipulated as requiring strict compliance, suspends cover until the breach is remedied.

7. A non-material absence of good faith or breach of the obligation to disclose or not to misrepresent not founding a right to cancel the contract of insurance may nevertheless give rise to a claim for damages.

C. Utmost Good Faith

In a paper on this subject by Andrew Tulloch, he briefly reviewed its history in the common law since Lord Mansfield’s classic statement of it and referred readers to the four papers on the subject delivered at a seminar held during the 1994 CMI Conference in Sydney. Focusing then on particular issues, he stressed mutuality, about which there appears no difference of opinion. Moving on to the issue of whether the standard of materiality in disclosure should be objective or subjective, he noted that in most civil law jurisdictions the subjective view prevails that it is the effect on the actual underwriter that counts, and ended by embracing Pan Atlantic v. Pine Top, thus taking
both positions at once. The issue of duration of the duty involves its continuance after inception and its application to claims. There he not unexpectedly accepts the view of the House of Lords\textsuperscript{46} that it continues and applies to claims up to the time they are put in litigation, and should apply to any variation of cover, while noting that the duty is not stated as such in the civil law but has a counterpart there in the duty to inform the insurer of an alteration of risk. He does not discuss the issues arising from the knowledge and disclosures of brokers and other third parties but these are taken up under the heading of Identification below. This is his concluding summary:

In responding to the issues raised in the Discussion Paper presented at the Singapore conference, it is submitted that marine insurance law should require from both parties to the contract of marine insurance strict adherence to both objective and subjective standards of good faith, both pre-contractually and for the full period of cover, including during the submission and handling of claims up to the point of commencement of litigation in respect of claims.

In jurisdictions where it is not otherwise part of the general law of contract, there should continue to be a provision that in relation to contracts of marine insurance there is an overriding duty of good faith. The obligations and duties in relation to disclosure and misrepresentation should be clearly stated in the legislation but the general concept should also be retained.

Absence of good faith should give rise to the power of the aggrieved party to claim damages and/or rescind the contract in situations where the breach of the duty of good faith is in some way material to the risk or the loss/claim and/or has induced the innocent party into a position in which loss or prejudice may result or where such breach amounts to a fraud.

**Author’s comments:**

It appears to me that, with or without the adjective “utmost”, a duty of abundant good faith is found almost everywhere and applied to disclosure, with differences as to its duration, the test of materiality and the duty of the underwriter to make his concerns known to the prospective assured. The continuity of the duty through the claims process to the beginning of litigation, now established in the U.K., is not established here, although I have seen it provided in policies and that is probably the best course for insurers to take. The recent English rule of *Pan Atlantic v. Pine Top* requiring the insurer, in order to avoid the policy for concealment, to prove causation by showing that the underwriter would have written it anyway, is undesirable as unsound in principle and almost useless in practice. As I have joined in writing more fully elsewhere,\textsuperscript{47} it is a striking departure from the objectivity prevailing in comparable tests of causation, and it coexists with the long-standing presumption of reliance in both England and America, which is unlikely to be rebutted if counsel and the court are alert, since neither the underwriter nor any other witness should be allowed to engage in non-factual speculation as to what the underwriter might have done in other circumstances.
A point of interest to us in the U.S., which is not discussed but should be, is a perceived distinction between U.S. and English law, as to whether the test for influence of a non-disclosure should be its probable influence or its decisiveness. Various words are used, perhaps in the search for elegance, and whether their results are substantially different is hard to say, but in our “common” language it should not be impossible to bring them together.

As I think we speakers all concluded in Sydney, the duty of utmost good faith is here to stay a while, notwithstanding efforts to weaken it by way of racing morality downhill. And while there are some differences of detail in the disclosure rules, the question of disclosure should as a practical matter almost always be dealt with in the policy’s “home port” and by its proper law. The problem to be foreseen will arise in relation to policies placed in different jurisdictions on the same subject and risks. Harmonization to deal with it probably lies in explicit choice of law or even more explicit statement of the standard chosen.

D. Alteration of Risk

Alteration of risk is the insurance concept that plays the part in a number of Civil Law countries played elsewhere by the conditions we usually call warranties. Professor Malcolm Clarke of Cambridge, in reporting on this subject, took as a point of departure the tendency in the Common Law countries to require the insurer to see his policy through to the end without alteration: “[t]oday the law of non-marine insurance remains that of 1849, that a policyholder ‘who insures may light as many candles as he pleases in his house, though each additional candle increases the danger of setting the house on fire.’ [Footnote omitted.] The law of marine insurance is no different.” That statement refers, of course, to the law without the effect of the extensive use of warranties in our policies. He goes on to say:

Many civil law countries, especially as regards non-marine insurance [footnote omitted] but also in some cases marine insurance, draw a very different inference: alteration of risk is not countenanced by the insurer. It creates a new situation. So, the policyholder may be required to tell the insurer about it, rather as he must when the contract is varied. The situation is thus seen as one in which the policyholder’s duty is in substance perhaps but not in name one of utmost good faith. The pattern within the various countries differs.

“Alteration of risk” describes a situation of fact possible in any insurance. As a doctrine it is (stated very generally) that, where changed circumstances increase the risk of loss beyond that contemplated at inception, the assured may have a duty to report the fact to the insurer, and the policy may be terminated, presumably subject to the possibility of an agreed increase of premium. As explicit rules, the doctrine is usually statutory (or found in Scandinavian hull conditions) and is various in detail as to such matters as the times allowed for notice of alteration and before subsequent termination of cover and return or retention of premium.
The rules are often vague as to the increase that will trigger the duty to give notice, although breaches of standard policy terms such as of voyage, registration, ownership or classification will do so. At this point we see the doctrine operating where Common Law policies employ warranty, a term not familiar to the Civil Law in this context. A consequence of this difference is the uncertainty of the sanction for breach, since a court considering alteration of risk may consider materiality, much as would be done in a case of non-disclosure, whereas the warranty forecloses that question and operates positively on breach. Other differences in the sanctions for breach may depend on whether failure to give notice was deliberate or inadvertent and whether a loss during cover was caused by the alteration of risk.

**Author’s comments:**

My impression is that the outcome will most often be the same under the one system as the other when decided in the legal system of the policy’s origin, but will be clearer and more certain with warranties, or better yet, conditions clearly stated as such with the consequences of breach also explicit. Conditions are known to the Civil Law and no doubt are used to some extent in policies written in contemplation of the alteration of risk doctrine, where the stated condition may be the foundation of the claim of alteration. Indeed, “warranty” itself appears to have invaded some Civil Law countries, some of which, however, may not enforce strict compliance. And under long influence of the London market, London clauses with their warranties are used in several Civil Law countries.

It appears to me that it would be very difficult to harmonize policies objectively in this respect. It is undeniable that there is a difference of substantive consequence. There is no reason why policies should have to be substantively uniform among countries, or indeed within any country, and substantive conformity cannot therefore be plausibly urged. It also cannot be successfully, even if sensibly, urged that a system of specificity and clarity be dropped in favor of rolling the dice in court under a more subjective doctrine. What can reasonably be desired is that a policy have the same effect wherever it chances to be ruled on. A “common law” policy with explicit conditions and sanctions could be readily understood abroad and, with some possible exceptions intimated above, could be enforced, but the proper enforcement of an inexplicit policy under the doctrine of alteration of risk is another thing. The solution may lie in recognition of local usage or choice of the law of place of contracting (not, e.g., the center of gravity) to deal with the intended meaning of the contract and, as with utmost good faith above, explicit terms to avoid divergent treatments of the same subject and risks.

E. Misconduct of the Assured and Identification

This topic has to do with the assured’s misconduct and consequent loss of cover and the identification of those whose misconduct can be imputed to it for this purpose. Professor Wilhelmsen discusses the critical levels of malfeasance regarded as bars to recovery in several nations, and then their standards for identification, which is the
Norwegian way of describing the rules for imputing misconduct of others to the assured claimant.\textsuperscript{54}

She finds the critical threshold of misconduct to be willful misconduct in the MIA and America and gross negligence (rarely defined) in most Civil Law countries. The distinction in theory is that, while the one test starts with neglect, the other starts with willfulness and therefore lack of fortuity. (Our American test of willful misconduct is commented on below.) Intent is mentioned in some countries and it seems to go without saying that it will be a bar wherever the threshold is set lower. She points out in passing that ordinary negligence, while not a bar, is not invariably covered, depending on the form of policy. How much gross negligence and willful misconduct differ in degree is not easy to say, but she regards the latter as more extreme and therefore a standard more accommodating to the assured, as she indicates in her Summary, parts of which follow:

The common features … are exclusions for fraud, willful misconduct, intent and - - in the civil law systems -- also for gross negligence. … It is also clear that the exclusion for willful misconduct includes the civil law concept of intent. On the other hand, it does not include the civil law concept of gross negligence. Thus, the concept of willful misconduct implies a degree of fault that departs further from the standard of reasonable behavior than gross negligence. … The general conclusion, however, is that this exclusion is more strict in the civil law systems than in the common law systems. …

[O]rdinary negligence is normally covered in full, but … there is a certain distinction between the named-peril systems and systems using the all-risk approach. In the latter case, any casualty caused by ordinary negligence by the assured will be covered. Under a named-peril system, there is an additional requirement that negligence has struck the insured object by a peril insured against. …

The material further seems to imply that the regulation concerning misconduct of the assured has caused fewer problems and also is less practical than many of the other provisions covering the duties of the assured during the period of the insurance. … The lack of interest for the regulation in the UK MIA concerning willful misconduct may be explained by the fact that the insurer can obtain a much better protection by using warranties, where there is neither a question of fault nor a condition of causation. Compared to the warranty approach, the regulation concerning willful misconduct is a much less effective tool for the insurer to avoid liability.\textsuperscript{55}

Moving on to the questions of identification or imputation, the professor does her usual best in discussing them as between an assured and: (1) his agents and servants obtaining the policy; (2) his servants operating under the policy. She also explores the situations between co-assureds and between the claimant and another assured who obtained the policy but appears unable to reach very meaningful conclusions on the evidence available.
The first point mentioned is part of the subject of disclosure in placing. It appears that there is no great lack of harmony here as indicated in her Summary:

Some common features may, however, be pointed out. As for identification between the person effecting the insurance and his agents, the common solution seems to be that faults committed by the agent are the risk of the person effecting the insurance. It does not matter whether the agent is a servant within the organization of the person effecting the insurance, or a broker outside this organization. The responsibility for others is therefore extensive in this phase of the insurance contract.56

The imputation of operational fault from employees to the assured is less simple. It appears to be normally governed by rules in general terms in Civil Law countries, and that the terms vary considerably, ranging from “legal representatives” through “senior employees” to “persons for whose acts the assured is responsible”. Of course, where an objective duty such as classification or seaworthiness is provided by warranty or statute, there is no question of imputation; the condition is either met or not. The Common Law system does not hold out specific rules. For corporate assureds, where the issue arises, a standard of privity obtains, based on whether and to what extent management of the matter in issue has been delegated to the employee; it appears in application to range through the upper reaches of the Civil Law standards. In summary:

The question concerning identification between the assured and his senior servants is often not regulated at all, or the regulation is so general that it is difficult to determine how far down in the hierarchy of the organization identification may take place. … However, there seems to be a general attitude that acts or omissions committed by ordinary employees without special authority concerning insurance matters shall not bar the recovery. Also, there is a general provision that no identification shall take place for acts or omissions committed by the master or crew, even if the more detailed regulations on this point vary.

Author’s comments:

There appears to me to be little prospect of harmonizing rules of identification or imputation but also little to be gained by doing so because the rules, where they are explicit, are still very general, with the result that applications of them are likely to be subjective to a degree making apparent harmony illusory. The underlying principle itself appears to be harmonious and that is probably the best that can be reasonably desired.

At least in theory there is a clearer distinction in the standards of gross negligence and willful misconduct as the cause of loss barring recovery. As each test is really subjective, however, I wonder if the difference in practice is great and if the test isn’t really that the conduct “shocked the conscience” of the judge.

Finally, some remarks about the U.S. meaning of willful misconduct, which is verbally too delightful to ignore. In the leading case a master ran his vessel over a falls by
ignoring a rule. The Supreme Court, denying the insurer’s contention, placed such misconduct somewhere between gross negligence and intent and said that “public policy requires no more than that a man be not suffered to insure himself against his own knavery …”\textsuperscript{57} It is pleasant to see that “knavery” is preserved in the test.\textsuperscript{58} To apply it we need to be clear about knaves. Some of us have made the acquaintance of a fair number and classified them, with occasional help of a court and some help from the knaves. But some lawyers and judges today, less comfortable with the robust language of an earlier century, may recall a nursery song and suppose that knavery must be connected with the amusing naughtiness of the Knave of Hearts in the affair of the Queen’s stolen tarts.

F. Warranties and Conditions

The paper on warranties and conditions\textsuperscript{59} deplored the use of “warranty” to denote a condition precedent because of its confusing other uses, and described the sources and character of our rules, the importance of conditions in marine policies and the limits of harmonization much as they are described in Parts II, IV and V above. It points out that conditions (a Latinism convenient for harmonization) have existed in the Civil Law from the days of imperial Rome, excusing performance when breached, as they do in the Common Law when the intention is clear.

Views had been expressed that warranties should not be enforced unless they were found to be material and their breach found to be the cause of loss. Because these views proposed to move the marine insurance contract outside the body of general contract law and deprive the underwriter of the right to set the limit of what he would sell for the premium charged, it appeared important to speak about them.\textsuperscript{60}

We may reasonably assume that, under either system of law, the parties have the right to contract for any covenant or condition they intend, as expressed in the contract, within limits fixed by public policy and effects on third parties. Materiality is that character of a term that would affect a party’s decision whether to enter into a particular contract. As such it is inherently a matter of a party’s intent. By reason of its inclusion as an express element of contract performance, the stipulated condition precedent is inherently material, in contrast to a mere representation, which is subject to a test of materiality because it is merely documentation of a placing disclosure. “The very fact that the parties have expressly stipulated for the future performance of any act is in effect conclusive evidence that they regarded the performance of that act as material.”\textsuperscript{61}

Neither in the Common Law of contracts generally nor the marine insurance law does there appear any support for the idea that a condition depends upon an event, such as a casualty, not mentioned in it.\textsuperscript{62} Nor does that appear in such limited sources of Civil Law as I have seen. A condition is met or fulfilled so long as the statement remains true and is breached when the statement is false. Its truth or falsity has no logical relationship to a casualty unless the casualty is referred to in the statement itself. Thus a true condition on the existence or continued existence of the contract can be enforced on discovery of its breach, e.g., loss of class or
change of owner, at any time, without regard to the occurrence of a casualty or loss. Causation would become an issue only if damages were sought for the breach. The right of termination arises, not because the insurer has not agreed to assume certain losses but because he has not agreed to assume certain risks. Causation is indeed a proper subject for agreement and when it is injected into a supposed condition or warranty the result is an exclusion rather than a condition. In any case, it is important that the policy wording be clearly understood as to whether it amounts simply to an exclusion or to a condition with explicit sanctions.

The new International Hull Clauses were discussed, showing how the insurance market could be nudged into the abandonment of “warranty” in favor of conditions stated with explicit sanctions of termination, suspension or non-recovery suited to their character and importance, and the reduction of some frequent warranties to exclusions.

In sum therefore, the results … are that, in some instances the rigors of undertakings and sanctions have been reduced, in almost all instances sanctions are explicitly a matter of contract and not dependent on the MIA, and the whole is accomplished in clear wordings. The issuance of the Clauses strongly indicates the possibility of harmonizing conditions through policy clauses and provides examples for doing it. One should hope that the American Institute, putting aside any pride of authorship, would embrace the International Hull Clauses or at least adopt its treatments of conditions and exclusions.63

My conclusions were that:

[I]f acceptable wordings can be devised, it is practical to seek solutions through the cooperation of marine underwriters in the leading centers of the business, starting presumably in the Common Law markets, where it appears that the greater changes may be required. London wordings already much reformed will presumably be acceptable throughout the Commonwealth and also even in some Civil Law countries where London wordings are presently influential. In the United States, the American Institute is probably less dominant but its wordings will be used in major placements and should come to be influential in others. The following proposal obviously owes much to the start made in London with the new International Hull Clauses.

With the hope that they may be found workable also under the Civil Law, I propose[d] …that:

1. The word “warranty” be completely abandoned in policies, severing all links with rules concerning warranties and, taken with the further proposals that follow, presumably ending judicial inquiry as to whether a “warranty” or condition is intended;
2. The word “condition” be used where, and only where, a true condition precedent is intended;

3. In every instance of a condition, the policy spell out the exact consequences of breach, in most cases the termination of coverage at the time of breach or on reaching port, subject to held covered clauses;

4. Navigation limits be routinely exclusions to cover while limits are breached, subject to held covered clauses, leaving it to underwriters in particular cases to raise the limit to the level of a condition (as where breach may suggest moral hazard or reckless operation);

5. In appropriate instances coverage be excluded only as to losses caused by breach of condition; and

7. A clause be considered for use with standard printed clauses to control deviation from these standards in manuscript riders. Alternatively, a general statement of interpretation might be attempted, for adoption by underwriters, as explaining the significance of their conditions and exclusions where not otherwise expressly provided. 

VII. WHERE WE ARE NOW

A. Action and Shortfall

At Vancouver there was a view that the IWG had completed the studies that were justified now but that it ought to be retained with what we may call at most a watching brief. A resolution to that effect in more formal terms was adopted, and thus the project remains on the CMI’s program but appears to be dormant.

This is unfortunate. The possibilities for harmonization that we set out to explore must surely involve the availability of practical devices for the purpose, in addition to the study and identification of differences in national treatment of the issues chosen. Early in the work, our study was described as seeking “for commonly accepted solutions” to the issues examined. We should not have stopped short of that. It is true that solutions were proposed in reference to warranties and conditions (Part VI. F above) but they related only to that one topic and never had the benefit of general discussion in the IWG or elsewhere. The work done is a good foundation for the design of solutions, but who is to do it if not the IWG? The error was made in not considering at the outset: (1) whether a perceived disharmony is a practical commercial or legal problem or simply a mild, perhaps esthetic, irritant; (2) the forms in which solutions might be commercially and governmentally attractive; (3) what forms, if accepted by some, would be likely to create new disharmonies.

That fundamental issue hung over and inhibited our work. A convention was never contemplated but the possibility of model laws was floated early. Almost as early,
it was (rightly) disparaged by some voices. Yet it continued to be discussed, albeit without much apparent enthusiasm, as late as November 2003, and so its ghost sought recognition long after its death should have been certified.

It was unfortunate also that we were not able to take some instruction from the reports of the Glasgow Rules discussions. That the Rules themselves did not come into use is probably a historical accident not due to lack of inherent virtue. The process of framing them would have been instructive. The very able delegates engaged in lively discussions of national differences. A few of these were substantive and were resolved by compromise. More significantly for us, we see the delegates from Britain, America and Europe discussing in English the adjustment of English wordings so as to be better understood in their several national systems and tongues as they try to put together a result for actual use.

B. The Future?

Perhaps there is no future, apart from initiatives of underwriters from time to time. It is improbable, however, that those will occur in ways transcending the borders between legal systems. That, in reality, rather than a program of reform, appears to have been the incentive of the CMI. More sensibly then, the effort should be renewed, and preferably by the CMI’s picking it up another year where it left off.

First it should bury any vestigial notion of statutory or other obligatory rules, as well as irrelevant reforms of substance, and address what may be possible in our several legal systems without amending their laws, a process less calculated to produce harmony than the opposite. We should then discuss what may be the best devices for advancing harmony in the results of commercial practice in those systems, looking at proposed examples from several national standpoints. If a plausible document results, it should be put before a larger group of representative lawyers, underwriters and brokers for discussion, or submitted to the International Union of Marine Insurers and appropriate representatives of brokers for comment, before adoption.

If the CMI will not pursue the matter, then alternatively, the U.S. M.L.A. should support harmonization within the Anglo-American sphere by use of the International Hull Clauses, or a set in close harmony with them if proper pride dictates that we must have our very own.

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1 The word appears in quotation marks because legal philosophers ranging from the positivism of John Austin, in *The Province of Jurisprudence Determined* (1832), through that of H.L.A. Hart, in *The Concept of Law* (1961), have much to say about what is “law” and it is doubtful that they would agree to include the subject of this study without significant qualification.

2 Prof. John Hare of Cape Town; Dr. Thomas Remé of Hamburg; Prof. Trine-Lise Wilhelmsen of Oslo; Patrick Griggs (then President of CMI) of London; Prof. Malcolm Clarke of Cambridge; Simon Beale of London; Jan-Fredrik Rafen of Oslo; Graydon S. Staring of San Francisco; and Andrew Tulloch of Melbourne.

See id. at 31-33, 1997 AMC at 2404-06 (1871).

See 1 AL EX L. PARKS, THE LAW AND PRACTICE OF MARINE INSURANCE AND AVERAGE 3-8 (1987); 1 JOHN DUER, THE LAW AND PRACTICE OF MARINE INSURANCE 13 (1845); JAMES ALLAN PARK, A SYSTEM OF THE LAW OF MARINE INSURANCES 410-28 (1787). The bottomry or respondentia bond can be regarded as an inverted insurance policy, in which the indemnity (loan) is paid in advance and, if the ship arrives safely, is repaid together with the premium (interest).

See note 5 supra.

ORDONNANCE DE LA MARINE OF 1681, Mariners and Ships T. 4, art. II, 30 Fed. Cas. at 1206.


See Mouse’s Case, 12 Coke. 63 (1609).


See The John G. Stevens, 170 U.S. 113, 119 (1898).


See 1 DUER, supra note 5, at 1-55; PARK, supra note 5, at iii-xxiv; 1 PARKS, supra note 5, at 3-8.

See, e.g., 1 DUER, supra note 5, at 2-7.

CARLTON KEMP ALLEN, LAW IN THE MAKING 29 (1927).

See generally, 1 PARKS, supra note 5, at 8-11 (describing Lord Mansfield’s reliance on commercial practices).

See id. at 12.

See, e.g., Marine Insurance Act 1906 (hereinafter MIA) §§ 4 (insurable interest and wager), 18(1) (legal remedy of avoidance) and 22-23 (required elements for admission in evidence).

See RESTATEMENT (SECOND) OF CONTRACTS § 76 comment c, § 232 comment c, § 239 comment b and § 379; see also CODE NAPOLEON §§ 1104, 1964-83.

MIA § 87.

See, e.g., King v. Allstate Ins. Co., 1991 AMC 204, 906 F.2d 1537 (11th Cir. 1990) (policy term limiting avoidance to intentional misrepresentations valid over objection that general rule is obligatory).


Glasgow Marine Insurance Rules, 1901, GLASGOW 213.

T.G. Carver, Q.C., BUFFALO 104.

BUFFALO 148-49; see also Joseph Walton, Q.C., id. at 154 (“It is not a question of morality. … The question is, What is the more convenient contract to make as a common form?”).

GLASGOW 100.

Id. 153.

Id. 208-12.


Id. 330-31.

Id. 332.

CAL. INS. CODE §§ 1880 et seq.


MIA § 87.

Wilhelmsen, SINGAPORE I § 2.1.1, at 333.

JOINT HULL COMMITTEE, INTERNATIONAL HULL CLAUSES (01/11/02).


Andrew Tulloch, Utmost Good Faith, VANCOUVER I, 534.


Id. at 503.

Id. at 504. The author refers particularly to Italy, Belgium, the Peoples Republic of China, Malta, Greece, Norway, France and Slovenia.

See Wilhelmson, SINGAPORE I §§ 6.2.1 and 6.2.4, at 386, 389, mentioning Portugal, Spain, Slovenia, Venezuela and China.

Id. §§ 2.2.3 and 2.2.4, at 345-46.

Trina-Lise Wilhelmson, Misconduct of the Assured and Identification, VANCOUVER I, 540.

Id. § 2.7 at 550.

Id. § 3.6 at 572.


Id. at 533


See, e.g., MIA § 33; O.W. HOLMES, JR., THE COMMON LAW 316-19, 322 (1881).

VANCOUVER I, at 533.

Id.

See CMI NEWS LETTER No. 4-1999, p. 4.