



CMI CAPE TOWN COLLOQUIUM FEBRUARY 2006

REPORT OF THE CMI STANDING COMMITTEE ON MARINE INSURANCE

The Vancouver Conference in September 2004 saw the closing report of the Marine Insurance Working Group that had researched issues of marine insurance since 1998. In that report¹ I confirmed that, notwithstanding the disbanding of the Working Group, the CMI would continue to have a standing committee on marine insurance tasked with monitoring marine insurance laws and especially national reform initiatives.

At its Paris Exco meeting in April last year which I was unfortunately unable to attend, the CMI Council asked Dr Tom Remé to convene a standing committee comprising Dr Remé as acting chair, Dr Sarah Derrington of the University of Queensland in Brisbane, Mr Christian Hübner of Axa Insurance Co in Paris, and Mr Ed Catell of Holstein Keating in the USA. I was asked to serve on and take charge of the committee and I have agreed to do so, as always with the redoubtable Tom Remé at my side.

Sadly, none of the marine insurance standing committee members was able to journey to Cape Town, but they have reported in to me and we hope to be able to carry on our work during the coming year with email contacts. Christian Hübner confirms that the French MLA is represented here for marine insurance matters by Henri Najjar.

The Research of the Marine Insurance Working Group

Because many of the delegates here in Cape Town were not at previous CMI conferences and colloquia, it may be useful to give you a short précis of the what the Working Group set out to achieve, and then in hindsight take a quick look at what was actually achieved by the group.

You will all know that there is in modern times, a divide between marine insurance as practised in the common law countries and that of the civilians. To an extent (and this was perhaps one of the lessons learned during our work) that divide is perceived as a market edge. If you are negotiating renewals, you are likely to have English brokers knocking at your door selling an IUA London 2003 Hull policy,² Scandinavian brokers punting for the Norwegian Marine Insurance Plan, and perhaps a Belgian in the background waving a Corvette policy. They will not be trying to sell you a standardised policy under a uniform system of law. Each will aver the superiority of his or her own policy and the law under which it is written -

¹ CMI Documentation Vancouver II p 248.

² The IUA 2003 terms are available, with the permission of the International Underwriting Association in London, on the UCT Shipping Law site at www.uctwhiplaw.com/fulltext/ian/iuaintro.htm.

though perhaps they will gloss over differences of interpretation arising out of jurisdictional idiosyncrasies.

It was precisely that divide, which was seen to be growing rather than narrowing, that motivated a call for a CMI study of marine insurance by Lord Mustill in 1998. At that time, some of the English satellite marine insurance jurisdictions, notably Australia and New Zealand, South Africa, Hong Kong and China, and indeed also the United States were talking marine insurance reform. Australia prepared a most comprehensive and useful report, and a draft Act. The USA talked in some quarters of an Act or perhaps a Restatement. South Africa has had a draft Act based on the UK Act for more than a decade. It seemed that marine insurance law was set to diverge further.

The call for reform was in fact nothing new, though it was directed mainly at those jurisdictions that followed English law. The English Law Commission report of 1980 threw down the gauntlet to lawyers to remedy undoubted injustices arising from non-causative and trivial breach of warranty. This call was taken up by many, including Lord Longmore at the Donald O'May lecture in 2003.³

Across the channel, our civilian colleagues did not share the same dissatisfaction with their own marine insurance law. And where anomalies existed, they were corrected. The EU market was content to put its own house in order. Scandinavia had already completed its most successful contractual restatement of the law of marine insurance in the Norwegian Plan (which is not legislation as such, but which is incorporated into marine insurance contracts by agreement between the parties).⁴

But the common law countries were, and in fact still are, underwriting under the influence of Sir McKenzie Chalmers 1906 Act. And that Act, remarkable as it is for its longevity, was as much a crossroad as it was a bridge across the channel. A bridge across the common law/civilian divide of the channel, because the 1906 Act drew so much on both the English and continental civilian English court judgements and writings. And yet a crossroads because the 1906 Act entrenched certain substantial differences that had already begun to distinguish English marine insurance law its continental counterpart. Good faith, abandonment, total, partial and constructive total loss, subrogation and of course the dreaded English marine insurance warranty took a very different road.

The divisiveness of the 1906 Act is seldom recognised in view of the broad acceptance of the Act as the blueprint for English policies for over a century. And the 1906 Act, through its relative clarity (for its time) and its sheer longevity, is criticised only by the very bold. But problems had already been recognised even before the Act came into effect in 1906 (having lain on the legislative table for long years while the British Government was otherwise occupied fighting the rebels of South Africa). In 1901, the International Law Association held a conference at Glasgow which culminated in the adoption of the Glasgow Marine Insurance Rules. The objects of the Glasgow Conference are surely relevant to us, a century later:

The object in view has been to find a mode of bridging over the differences which exist in marine insurance law in the different States - a method by which a policy of insurance may have the same legal effect whether it is made in Belgium, France, Germany, the United States or in England. And the proposal is to have a body of rules, covering those portions of the law on which the principal divergencies occur,

³ See also my own writings about the warranty *The Omnipotent Warranty: England v The World* at www.uctwhiplaw.com/mimicfram.htm

⁴ The Norwegian Marine Insurance Plan is at www.norwegianplan.no

*which may be adopted as the fundamental law of the policy by express incorporation in it.*⁵

One is moved to ask “What has changed”? For this was precisely the brief of the CMI initiative. And the CMI Working Group, like the ILA, also realised that it had to limit its brief to certain more pressing issues of marine insurance law where there is a particular divide between the common law and the civilians:

- The duty of good faith
- The duty of disclosure
- Alteration of Risk; and
- Warranties

The Working Group began by sending out the customary CMI Questionnaire. The replies were collated and reports drawn up by the group members. Notable for her industry and output was Prof Trine-Lise Wilhelmsen of the Institute of Maritime Law in Oslo.

So extensive, and I suggest useful to future debate, is the documentation produced, that we have decided to make it available on a CD as a CMI publication. This should be achieved in the near future.

The group met with roleplayers in the market, mindful always that it is the industry and its consumers that the law should serve. One criticism was that the Group played too much to the English common law audience, and not to the civilians. This was fair criticism, but it reflected also the central fact that it is English law (by which I refer to the law of the UK and all the English law satellite jurisdictions) that is probably in the most need of reform.

And with its studies done, the Group had then to decide what recommendations to make. We had long realised that any form of international instrument along the lines of the Hague Visby Rules would be inappropriate. We had accepted also that if, at the end of the day, the exercise proved to be mainly academic, nothing would have been lost. But we considered also the possibility of a set of guidelines which could inform (but not dictate) national reform initiatives, especially of those countries that followed English law.

The draft guidelines

It was against that background that I set about preparing for the Vancouver conference what I described there as a wishlist of how I would like to see marine insurance law reformed. It was and remains a rather personal wishlist, because it was not a document prepared by the workgroup, and there are some members who, though generally supportive of it, would prefer what Prof Malcolm Clarke calls ‘virtuous inactivity’.

Since Vancouver, with the regrouping of the Standing Committee, there has been little progress from our side. I have been out of the CMI loop for the past year, for personal reasons, but I am happy to revive the initiative and to explore again the commonality that does remain in the approaches between the common lawyers and the civilians. The

⁵ Taken for the proceedings of the conference and the text of the Rules issued by the International Law Association in 1901. Attempts for many years to source this document led finally to the location of the records of the ILA by Mr Michael Marks Cohen, who kindly provided me with a copy for which I am most grateful. The Rules covered loss, abandonment, double insurance and the warranty of seaworthiness.

guidelines, as a discussion document only, are on the conference website. I would much appreciate comment on them from anyone interested in contributing to the debate.⁶

Report-back on national developments

2005 seems to have been a year marked largely by 'virtuous inactivity' on the marine insurance front. The developments (or lack thereof) reported to the committee are:

(a) Australia

Sarah Derrington reports that "the draft Bill, prepared by the ALRC, has still gone nowhere and there is no indication that anything will happen in the foreseeable future". As Sarah points out, it would be a great pity if the work of the ALRC came to naught.

(b) France

Christian Hübner reports that there is a revision of Art 126-2 of the French code dealing with terrorism. The measure will apply to new contracts and renewals after July 24th 2006, but there seems some doubt as to its application to aviation and marine business.

(c) Germany

Tom Remé reports that the previous German government had issued a draft for a reform of the Insurance Contracts Act of 1908. That Act does not currently apply to marine insurance, which is regulated under the Commercial Code. The rules found in the code are, according to Dr Remé, not strict, and have long been replaced contractual agreement. The new draft Insurance Contracts Act would, however, apply to marine insurance, but it may still be contracted out.

Tom reports though that with the change in government, "it seems unlikely that the reform of marine insurance will be finalised soon."

(d) The USA

Ed Catell, who for some years chaired an MLA committee studying the possibility of a US Federal Marine Insurance Act based on the UK Act) and who was a committed reformist, reports that he sees the prospect of change in marine insurance law at present as "zero". He has undertaken to report from time to time on developments in marine insurance law, which, per Wilburn Boat, will no doubt vary from state to state.

Graydon Staring, however, as a closing stroke to his sterling service on the CMI International Working Group, published a most interesting and informative article in Benedict's Maritime Bulletin.⁷ I would commend that article to anyone interested in taking marine insurance reform further. It is perhaps the best summing up of the work of the group, yet at the same time, it is the most practically critical. Mr Staring appeals for the continuation of the IWG's work in seeking practical solutions, largely within the market, to the problems which the IWG identified. The only aspect upon which I take issue with Mr Staring is that it has always been my view that lawyers have an obligation to change laws that they recognise to be unjust. As

⁶ The draft guidelines on Marine Insurance Reform are also on the UCT Shipping Law website at www.uctshiplaw.com/assign2005/marinsure.htm, with a selection of comments prepared as an assignment by some of the UCT Shipping Law 2005 LLM students from various countries.

⁷ Staring *The CMI Looks at Marine Insurance Law* was published in Benedict's Maritime Bulletin, Vol. 2, No. 3, Third Quarter 2004.

are some aspects of English marine insurance law. I do not believe that it is sufficient to leave bad laws be, and allow the market to correct their effect.

(e) South Africa

South Africa enjoys a rare jurisprudential privilege of having a legal system that has drawn on both the common and civilian law over the 350 years of its recent history. Its 'fall-back' regime of law remains the Roman-Dutch 'common law' based on the civilian laws practised in Holland in the 18th century, yet growing constantly from indigenous judge made law and the influence of appropriate foreign law. It has a large English law content, and largely English procedures. Its commercial laws are becoming increasingly codified.

For historical reasons, it never adopted the 1906 Act, though English law was applied directly in the Cape and Natal for nearly a century. But much marine insurance is written subject to present-day English law by contractual choice.

Attempts have been made for a decade to prepare a redraft of the 1906 Act which will cater for some of the differences between English law and the residual Roman Dutch law from which English law diverged after Chalmers' 1906 Act. These attempts were orchestrated mainly by the SA Association of Marine Underwriters, but there has as yet been no resolve, nor is any further development presently on the horizon.

What has happened is that, as seems to be a trend in other parts of the world (for example in Germany) non-marine insurance legislation has been extended to apply to marine insurance. South Africa has a Short-Term Insurance Act, which includes marine insurance as 'transportation insurance' and which regulates certain issues. Most concern formality, but there is a significant section that deals with disclosure and misrepresentation, and which, since a 2002 amendment, now regulates also that materiality relating to non-disclosure and misrepresentation will be assessed by objective criteria.⁸

(f) The UK

Perhaps the most welcome support that the IWG had was from the London market. The 2003 IUA terms were, I am told, much influenced by the input of the IWG - and it is perhaps there that the lead may be found for the way forward. If the CMI continues to research and inform, then the markets (and perhaps even the courts) can use that input to assist their own reform

⁸ The new section makes the objective standard applicable to misrepresentation, which was previously assessed subjectively. It reads (emphasis added):

(1) (a) Notwithstanding anything to the contrary contained in a short-term policy, whether entered into before or after the commencement of this Act, but subject to subsection (2)-

(i) the policy shall not be invalidated;
(ii) the obligation of the short-term insurer thereunder shall not be excluded or limited; and

(iii) the obligations of the policyholder shall not be increased, **on account of any representation made to the insurer which is not true, or failure to disclose information**, whether or not the representation or disclosure has been warranted to be true and correct, unless that representation or non-disclosure is such as to be likely to have materially affected the assessment of the risk under the **policy concerned** at the time of its issue or at the time of any renewal or variation thereof.

(b) The representation or non-disclosure shall be regarded as material if a reasonable, prudent person would consider that the particular information constituting the representation or which was not disclosed, as the case may be, should have been correctly disclosed to the short-term insurer so that the insurer could form its own view as to the effect of such information on the assessment of the relevant risk.

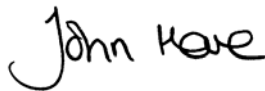
processes. We cannot stress enough that reform is impotent if it is not embraced by the market.⁹

And the IUA 2003 policy reforms reflect also the focus that the CMI has tried to maintain on promoting a harmonisation of marine insurance laws that will take cognisance of the dictates of maritime safety. One of the cornerstones of maritime safety since the beginning of shipping has been, and should always be, seaworthiness.

But all is not virtuously inactive in the UK: I am happy to see that at the Swansea Colloquium convened by Prof Rhidian Thomas last year, one of the topics was “The Marine Insurance Act 1906 – Judicial attitudes and innovation: Time for reform?” and indeed that the papers of the colloquium are soon to be published under the title “Marine Insurance: The Law in Transition”. Prof Thomas has kindly agreed to report to us on the Swansea colloquium and on current developments in the UK.

Conclusion

As mandated by the CMI Council, the Standing Committee will continue to maintain watch on marine insurance developments within member states. To that end, we will be asking for a marine insurance spokesperson for each country from whom we may from time to time ask for reports in order to send them through to the full CMI membership. The success of our work will depend largely on our being kept informed by you, and we would be most happy to hear from you.¹⁰



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⁹ The IUA has all but removed reference to the English ‘warranty’ from the hull clauses. The navigational limits and seaworthiness clauses are no longer referred to as a warranty, and the consequences of breach are now spelled out - in a way similar to the change of class/management clauses. The effect of a breach of these essential clauses is now *suspension* of cover for the duration of the breach (even in relation to loss or damage not caused by the breach of warranty) but cover is restored on remedy of the breach.

¹⁰ You are welcome to email any of the Standing Committee members who are
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