CONTENTS

Frontpage
Plagiarism declaration
Contents
Figure

INTRODUCTION..page 1

1. CONTRACTS OF MARINE INSURANCE ....page 2

2. GOOD FAITH ....page 3
2.1. Marine insurance contracts are contracts of good faith ....page 3
2.2. Good faith requires honesty, full disclosure, no misrepresentation and disclosure of alteration of risk ....page 4
2.2.1. Honesty and utmost good faith ....page 4
2.2.2. Disclosure and misrepresentation ....page 5
2.2.3. Disclosure of alteration of risk...page 5
2.2.4. *Pacta sunt servanda* ....page 6
2.3. Good faith applies to each party ....page 6
2.4. Good faith applies to all stages of pre-contractual and contractual relations page 7
2.5. Good faith is tested according to objective criteria based on materiality......page 7

3. MATERIALITY...page 7
3.1. Materiality is assessed based on a two-tier test focusing on whether, objectively, each party to the agreement would have considered the conduct in question to have affected the rights and obligations under the insurance contract........................page 8
3.1.1. Objective criteria...page 8
3.1.2. When is the undertaking ‘affected’? ....page 9

4. REMEDIES..page 10
4.1. Materiality requires a causative link between the breach and the loss or the claim ....page 10
4.2. Material breach of good faith (including an essential term going to the root of the contract) entitles the innocent party to cancel the contract from the date of the breach and claim for damages ....page 11
4.2.1. ‘Material’ breach ....page 11

4.2.2. Breach of ‘good faith’ .... page 11
4.2.3. Breach of an ‘essential term’ .... page 11
4.2.4. Cancellation of contract from the date of breach .... page 12
4.2.5. Claim for damages .... page 12
4.3. Material breach of a non-essential term (not relating to a breach of good faith or requiring strict compliance) suspends the cover until the breach is remedied ..... page 13
4.4. Non-material breach of good faith (which does not cancel the contract) may nevertheless give rise to a claim for damages .... page 14

5. STRICT COMPLIANCE TERMS .... page 14
5.1. Parties may expressly require strict compliance with certain terms of the contract and stipulate that the contract may be cancelled in circumstances of non-compliance, regardless of the materiality of the term or whether the breach caused the loss... page 14
5.1.1. Express versus implied incorporation into the contract...................... page 14
5.1.2. Breach regardless of causation .... page 15
5.1.3. The remedy of cancellation .... page 15
5.2. Alternatively, non-compliance with a strict compliance term will terminate the contract automatically .... page 15
5.3. Terms relating to safety at sea, classification, ownership, management and ISM code compliace should be express strict compliance terms................................ page 16
5.3.1. Safety at sea, classification and ISM code compliance .... page 16
5.3.2. Ownership and management... page 17
5.4. Strict compliance terms should not be labelled ‘warranties’ and the English law ‘warranty’ and its effects should be abolished .... page 17

CONCLUSION .... page 17

Bibiliography

INTRODUCTION

Harmonising international marine insurance law and practice may be an attempt to achieve the impossible. Proud defenders of the common law and civilian traditions may never accord on key issues such as a duty of good faith and strict compliance terms. This paper will analyse one endeavour to identify the main problem areas in international marine insurance law as well as a suggested solution to these problems (the guidelines) as presented to the International Working Group (IWG) of the Comité Maritime International in 2004.[1]

The object of the proposed guidelines is to identify problem areas and solutions in order to harmonise international marine insurance law. The implication is that there is no one such legal system in operation at the moment. However, in order to facilitate the analysis in this paper the writer is making a crude assumption that United Kingdom (UK) marine insurance law as evidenced in the Marine Insurance Act of 1906 represents the general common law approach to marine insurance law and practice at the moment, yet contrasts will be made to other jurisdictions where appropriate. The assumption is made that the common law approach represents international marine insurance practice. As such, the writer takes shelter behind the sentiments expressed by the Australian Law Reform Commission (ALRC):

> 'The marine market, long dominated by Lloyd's and London, is still strongly influenced by UK law and practice. While there are other important insurance regimes, such as the French and Scandinavian regimes, the London market and United Kingdom law have been a leading influence in the global marine insurance market.'[2]

An effort is made throughout the paper to indicate the extent to which the guidelines cover issues in Norwegian marine insurance law. However, it is worth to note that although Hare points out that 'a cardinal question would be "Were the common law systems to embrace the principles of the draft guidelines as the broad structure of those aspects of domestic marine insurance laws, would they then be in better harmony with the civilians?"',[3] this is not the aim of this paper.[4] This paper will merely analyse the guidelines as they are presented against the experience of the Norwegian marine insurance system and general international practice as evidenced by *inter alia* UK marine insurance law. However, certain 'hot spots' of harmonisation will be identified.

There are two important observations that must be made in relation to the analysis of the guidelines. Firstly, the concepts of 'good faith', 'materiality', 'material breach', 'essential term', 'strict compliance term' and so forth seem to be labelled and applied differently in the various legal systems and are at times

---

[1] Hare 'The CMI Review of Marine Insurance: To Rest on Century-old Laurels or to Thread on Hallowed Ground?' 10(2) *Journal of International Maritime Law* (2004) 167 at 172-173.

[2] Australian Law Reform Commission (ALRC) *Report No. 91: Review of the Marine Insurance Act of 1909* (April 2001) paragraph 3.43.

[3] Hare 'The CMI Review of Marine Insurance: Report to the 38th Conference of the CMI, Vancouver, 2004' *CMI Yearbook 2004* 248 at 258.

[4] It would also be very problematic as the guidelines are not really meant to deal with issues in Norwegian marine insurance law – Hare *ibid* at 257-258

undefined in the guidelines. An attempt is made to reconcile the various concepts with the proposed guidelines, but this process is hampered by the second observation: the concepts do not operate in vacuum. Often the systems do provide the same result, however with different standards applying at the various stages of the inquiry. E.g. some systems define the relevant breach very narrowly, but once a breach is established the sanctions are harsh, whereas other systems recognise a larger category of breach but the sanction is more measured. It is therefore difficult to evaluate the different concepts without at the same time digressing into the functioning of the entire legal system. Only a limited picture can be provided in this paper, although under other circumstances the process will by no means prove impossible. Derrington submits that in relation to most issues

> 'the various legal systems are essentially *ad idem* as to the foundations of the relevant principles and … relatively minor tinkering with each system can result in a uniform approach with which any of the systems would be comfortable'.[5]

The discussion below will first introduce the particular issues which arise in the context of marine insurance contracts and then focus on each of the elements of the guidelines under four broad headings, namely: good faith; materiality; remedies; and strict compliance terms. The issues are complex in that they overlap and will require cross-referencing and repetition. The writer has attached to this paper a very rough overview of the main conclusions drawn from the analysis in an attempt to avoid confusion.

1. CONTRACTS OF MARINE INSURANCE

Marine insurance contracts are generally treated different to other contracts.[6] This is because there is a perceived imbalance between the contracting parties. A marine insurance contract is by nature an undertaking of risk against a premium.[7] As the subject matter of the insurance is said to be within the knowledge of the assured he must comply with special duties imposed upon him, in particular, however not limited to, a duty to disclose information that would materially affect the risk.[8] The purpose is twofold: firstly, it restores the contractual balance between the parties and is thus an expression of legal fairness, and secondly, it is cost-effective in that the insurer can formulate an accurate premium and does not have to include cost of investigating circumstances relevant to the assessment of the risk.[9]

Hence, in essence marine insurance law aims at levelling the playing field between the contracting parties for their mutual protection.[10] This is therefore the standard against which any system of marine insurance law must be measured. Although there is apparent consensus between the different legal systems as to the

---

[5] Derrington 'Non-disclosure and Misrepresentation in Contracts of Marine Insurance: A Comparative Overview and Some Proposals for Unification' (2001) *Lloyd's Maritime and Commercial Law Quarterly* 66 at 87.

[6] See e.g. Hare *Shipping Law and Admiralty Jurisdiction in South Africa* 1999 at 650-653 and Eggers, Picken and Foos *Good Faith and Insurance Contracts* (2ed) 2004 at 111.

[7] See e.g. the definition in s 1of the Marine Insurance Act of 1906.

[8] ALRC *op cit* n 2 at para 10.47.

[9] Wilhelmsen 'Duty of Disclosure, Duty of Good Faith, Alteration of Risk and Warranties: An Analysis of the Replies to the CMI Questionnaire' *CMI Yearbook 2000* 42 at 58, however cf statements by Clarke in ALRC *op cit* n 2 at 10.49 – 10.50.

[10] See e.g. ALRC *op cit* n 2 at 10.52.

need for and purpose of regulation of the contractual relationships in marine insurance, there is great inconsistency as to how this is practically realised. This paper will analyse the suggestions made to achieve this balance in the guidelines.

2. GOOD FAITH

2.1. Marine insurance contracts are contracts of good faith

The guidelines propose that the concept of good faith shall regulate the relations between the insurer and the assured. The proposal is problematic as 'good faith' is not consistently applied in the legal systems.[11]

The common law jurisdictions do not operate with a general concept of good faith in contract law.[12] Although common law initially recognised good faith as generally applicable to contract law as set forth by the much-sited judgment by Lord Mansfield in *Carter v Boehm,*[13] soon the search for certainty in law by the legal positivists of the 19th century replaced good faith with the requirement of freedom of contract.[14] Yet, freedom of contract led to abuse, and the common law courts therefore re-introduced the duty of good faith albeit in a piece-meal fashion.[15] Hence, although there is today no general duty of good faith in UK contract law, statute law provides that marine insurance contracts are contracts of 'utmost good faith'.[16] It is however conceivable that due to the demands of international and regional instruments (in particular EU Directives) the UK legal system is today forced to slowly implement a more general duty of good faith in contract law.[17] By contrast, in many civil law countries all contracts are as a rule based on good faith between the parties.[18] For instance, in terms of article 1134 of the French Civil Code of 1806 all contracts must be implemented in good faith.[19]

The Norwegian legal system does not operate with a general reference to good faith in contract law or in marine insurance.[20] Rather, specific duties such as the rules of disclosure and duty of care are regulated in statute.[21] These rules serve to ensure good faith in marine insurance contracts.[22] Falkanger, Bull and Brautaset point out in relation to the Norwegian Marine Insurance Plan that

> 'it is important for the insurer that the [person effecting insurance and the assured] act in good faith, and that sanctions are available if they do not comply'.[23]

---

[11] Tetley 'Good Faith in Contract: Particularly in the Contracts of Arbitration and Chartering' 35 *Journal of Maritime Law and Commerce* (2004) 561 at e.g. 571.
[12] *Ibid.*
[13] (1766) 3 *Burr* 1905 quoted *ibid.*
[14] *Ibid* at 569.
[15] *Ibid.*
[16] Section 17 Marine Insurance Act of 1906.
[17] Tetley *op cit* n 11 at 584.
[18] *Ibid* at 567.
[19] Derrington *op cit* n 5 at 67.
[20] *Ibid* at 76 and Willhelmsen *op cit* n 9 at 83.
[21] *Ibid.*
[22] Falkanger, Bull and Brautaset *Scandinavian Maritime Law: The Norwegian Perspective* (2ed) 2004 at 487.
[23] *Ibid.*

There is however little indication that this need for good faith regulated in marine insurance law should in any way take the form of a wider duty of good faith. This may therefore become a problematic area in an effort to harmonise marine insurance law. One Norwegian commentator is for instance very sceptical to the lack of predictability inherent in the general duty of good faith

> '[i]t may be argued that the duty of good faith is a flexible tool because of its broadness, and therefore may fill in the gaps in need of regulation. But the price of such flexibility is a total lack of predictability for the parties to the contract, especially for the assured. [H]e has to deal with a very indistinct standard of behaviour which may come as a total surprise to him'.[24]

Still, it could be argued that the Norwegian duty of disclosure and the statutory marine insurance regulations to a very large extent overlap with the guidelines' duty of good faith.

2.2. Good faith requires honesty, full disclosure, no misrepresentation and disclosure of alteration of risk

The guidelines attempts to give content to the duty of good faith. One of the main problems with the concept of 'good faith' is that it is notoriously difficult to define.[25] The doctrine of good faith is generally said to encompass notions such as integrity of dealings, honesty and sincerity,[26] but its lack of precise legal definition is perhaps best phrased in *Doyle v. Gordon*[27]:

> 'Good faith is an intangible and abstract quality with no technical meaning or statutory definition'[28]

The guidelines suggest that the elements of honesty, disclosure and misrepresentation, as well as disclosure of alteration of risk are integral to the concept of good faith. Each will be discussed hereunder.

2.2.1. Honesty and utmost good faith

As is recognised by the guidelines, good faith at a minimum requires honesty. The question then arises whether the common law requirement of utmost good faith can be reconciled with the 'lesser' standard of good faith.[29] Utmost good faith 'requires the [assured] to disclose fully and accurately every material circumstance regarding the particular contract of insurance'.[30] Central features of the duty of utmost good faith is that it requires pro-active honesty by way of voluntary disclosure (which overlap but also extends beyond mere honesty) but may also extend further;[31] it is a breached regardless of the fault of the guilty party;[32] it does not require a causal relationship between the breach and the loss/claim;[33] it operates

---

[24] Wilhelmsen *op cit* n 9 at 85.
[25] Eggers *et al op cit* n 6 at 5-7.
[26] *Black's Law Dictionary with Pronunciations* (6 ed) 1990 at 176.
[27] 158 N.Y. S.2d 248 quoted *ibid* at 693.
[28] *Ibid.*
[29] This is problematic; the common law courts question whether there is such a concept as 'degrees' of good faith. See e.g. Lord Stephenson in *Container Transport International Inc v Oceanus Mutual Underwriting Association (Bermuda)* [1984] 1 Lloyd's Rep 476 at 525 quoted in Hughes *Law of Marine Insurance* at 83.
[30] ALRC *op cit* n 2 at para 10.9.
[31] Hare 'Good Faith, Disclosure, Misrepresentation and the Omnipotent Warranty: South African Perspective' Paper presented to the British Maritime Law Association, Tulane Conference, London, May 2000 available at http://www.uctshiplaw.com last accessed 1 October 2005.
[32] Schoenbaum 'The Duty of Utmost Good Faith in Marine Insurance Law: A Comparative Analysis of American and English Law' 29 *Journal of Maritime Law and Commerce* (1998) 1 at 5-6.

mutually between the parties;[34] and it has an extended reach beyond the formation phase of the contract.[35] In addition, it is held to be an inherently flexible concept which may be developed further by the courts over time.[36]

The guidelines do not incorporate a reference to 'utmost good faith'. Some of its features are however retained, others omitted or expressly rejected. The retained features are the requirement of voluntary disclosure of material facts beyond the pre-contractual stage, as well as the duty's extended reach and mutuality. The guidelines do not address fault or a wider duty of good faith beyond honesty, disclosure/misrepresentation and alteration of risk and expressly rejects the possibility of non-causal breach. As seen above in 2.1., the problems associated with 'good faith' and 'utmost good faith' do not surface in Norwegian marine insurance law as these concepts are not used.

2.2.2. Disclosure and misrepresentation

The guidelines clearly separate the concepts of disclosure and misrepresentation and bring them under the umbrella of good faith. As noted above, not all countries use the concept of good faith to regulate rules of disclosure. Furthermore, many countries do not separate the duties of disclosure and misrepresentation. In these countries, like Norway, there is only one duty 'described as making full and correct or truthful disclosure in the defined circumstances'.[37] Whereas other states, such as the United States and South Africa, operate with different tests for disclosure and misrepresentation.[38] The guidelines however give these concepts a uniform objective test based on materiality, as well as uniform remedies.

2.2.3. Disclosure of alteration of risk

The guidelines introduce the concept of a duty to disclose alterations of risk. This duty arises from the premise that an insurer undertakes risk and calculates a premium on the basis of the information available to him.[39] The question is therefore whether the assured is under a duty to subsequently disclose a material alteration of risk. This situation is not specifically provided for in common law jurisdictions, however Wilhelmsen argues that regulations relating to promissory warranties, held covered clauses (with regard to notification) and deviation found in the Marine Insurance Act of 1906 in effect covers most aspects of alteration of risks.[40] It has been argued that a duty to disclose alteration of risk can 'be used to cover "almost anything the insurer did not bargain for at time the policy was drawn up"'.[41] According to Tulloch the concept also overlaps with the extended duty of utmost good faith.[42] The common law

---

[33] *Ibid.*
[34] *Ibid.*
[35] Grime 'Marine Insurance – A View from London in 1999' 249 *MarIus* (1999) 1 at 13.
[36] Wilhelmsen *op cit* n 9 at 85.
[37] Wilhelmsen *op cit* n 9 at 59.
[38] *Ibid.*
[39] *Ibid* at 87.
[40] *Ibid* at 92.
[41] ALRC *op cit* n 2 at para 9.45.
[42] Tulloch 'Utmost Good Faith' *CMI Yearbook 2003* 534 at 537.

approach is however not settled. As Clarke points out, there is an assumption in insurance law not to restrict 'human activity and endeavour but to encourage it' and that an alteration of risk should be factored in by the insurer when calculating the premium.[43]

Alteration of risk is a civil law concept.[44] The Norwegian Marine Insurance Plan contains a regulation of the duties of the assured in circumstances of alteration of risk. There is in particular a duty of notification in circumstances of change of state or registration; management of the vessel or company; loss of class or change of classification society; the use of the vessel for illegal purposes; the ownership of the vessel changes; or breach of held covered clauses.[45]

There are however certain issues relating to alteration of risk that the guidelines do not deal with and which may hamper harmonisation. Firstly, the test for materiality of the duty to disclose the alteration is in civil law systems subjective, as opposed to the objective test proposed by the guidelines.[46] Secondly, the remedies for alteration of risk depend upon the fault of the assured.[47] Finally, it is not clear how 'alteration of risk' is to be reconciled with the 'strict compliance' terms suggested by the guidelines. The items mentioned as implied strict compliance terms to a certain extent overlaps with those included by the Norwegian concept of alteration of risk. The two concepts are however different in that alteration of risk requires causation between breach and loss, whereas the strict compliance terms in the guidelines do not.

2.2.4. *Pacta sunt servanda*

As will become apparent from the discussion relation to materiality and remedies in 3. and 4. below, the guidelines include the concept of 'contractual terms' into these inquiries. A breach of a contractual term is however not mentioned in relation to the duty of good faith. For the sake of completeness it should perhaps be included here. It has been argued that a breach of a contractual term operates different from a breach of good faith in that the former takes part of the written policy, whereas good faith operates *ex iure*.[48] However, the idea that promises and agreements must be kept is one of the key tenets of the duty of good faith – which is also to some extent the justification for the disclosure of an alteration of risk.[49] As Tetley points out

> '*Bona fides*/good faith in Roman law was "based on an ethical concept [that] was applied in the form of specific rules, the most important of which was formulated in relation to the basic rule – *pacta sunt servanda*"'.[50]

2.3. <u>Good faith applies to each party</u>

---

[43] Clarke 'Alteration of Risk' at 4 available at http://www.comitemaritime.org last accessed 1 October 2005.
[44] Wilhelmsen *op cit* n 9 at 86.
[45] Falkanger *et al op cit* n 22 at 490-491.
[46] Wilhelmsen *op cit* n 9 at 87.
[47] *Ibid* at 89.
[48] Hare Shipping Law *op cit* n 6 at 693 and Schoenbaum *op cit* n 32 at 7.
[49] Tetley *op cit* n 11 at 566.
[50] *Ibid.*

As seen above, utmost good faith is imposed mutually on both the insurer and assured. The mutuality of the duty has been recognised in common law jurisdictions since Lord Mansfield's judgment in *Carter v Boehm*.[51] This notion is retained by the guidelines. However, in most instances the duty falls on the assured. This is because the nature of the duty imposed (voluntary and honest disclosure) most often applies to the assured and corresponds with the overall aim of creating a balance in the contractual relationship between the assured and the insurer. However, the duty may also be imposed against the insurer to e.g. ensure that exceptions to the insurance cover are explained or legitimate claims paid. This can be contrasted to the Norwegian position in terms of which the insurer is under no reciprocal duty to disclose material information, yet a separate statutory duty is imposed upon the insurer to ensure a satisfactory standard of conduct vis-à-vis the assured.[52] The effect is in essence the same.

2.4. <u>Good faith applies to all stages of pre-contractual and contractual relations</u>

The guidelines seek to extend the time-frame of all aspects of good faith, including disclosure and misrepresentation, to the entire period of contractual relationship including the submission of claims. This is not a proposition foreign to the common law marine insurance systems where the concept of utmost good faith, as opposed to disclosure, is extended in the same manner.[53] The extended time-frame of the duty also overlaps with the requirement of a duty to disclose an alteration of risk discussed in 2.2.3. The requirement that good faith also covers the period of the submission of the claim enforces the insurer's good faith obligation in processing the claim.

There is a clear continuing duty of disclosure in Norwegian marine insurance law.[54] Paragraph 3-1 of the Norwegian Marine Insurance Plan provides that

> '[i]f the person effecting the insurance subsequently becomes aware that he has given incorrect or incomplete information regarding the risk, he shall without undue delay notify the insurer'.

2.5. <u>Good faith is tested according to objective criteria based on materiality</u>

Having established the scope and content of the duty of good faith, the guidelines provide a test for whether a duty or contract is breached by reference to whether the relevant facts or circumstances are 'material'. The concept of 'materiality' is discussed in 3. below.

3. MATERIALITY

The guidelines propose that the test for whether a duty of good faith is breached is based on materiality. As argued above in 2.2.4., good faith includes the maxim *pact sunt servanda*. The materiality inquiry in relation to contractual undertakings seems to be whether the breached term is an 'essential term', i.e. are

[51] Schoenbaum *op cit* n 32 at 14-15.
[52] Paragraph 3-1 of the Norwegian Marine Insurance Plan and Derrington *op cit* n 5 at 77.
[53] Wilhelmsen *op cit* n 9 at 66.
[54] Derrington *op cit* n 5 at 76-77.

the relevant facts or circumstances contemplated in the term material in the sense that there is a breach of an essential term. This issue is revisited again under the discussion of 'remedies' in 4.

3.1. Materiality is assessed based on a two-tier test focusing on whether, objectively, each party to the agreement would have considered the conduct in question to have affected the rights and obligations under the insurance contract

The guidelines suggest that the test for materiality is based on a two-tier test testing the conduct of the reasonable insurer as well as the reasonable assured. Although not worded in this way, it seems that the guidelines suggest that the test for materiality is

a) would knowledge of a breach relating to the fact or circumstance have affected the reasonable insurer's undertaking? and
b) ought the reasonable assured have known that a breach relating to the fact or circumstance affects the insurer's undertaking?[55]

The insurer may avoid liability if the answer to both inquires are positive.[56] Two issues in relation to the test will be discussed in more detail, namely the requirement of 'objective criteria' and the extent to which the reasonable insurer's and the actual insurer's undertakings must be 'affected'.

3.1.1. Objective criteria

The first leg of the two tier test as set forth above is a seemingly purely objective inquiry: if a reasonable insurer had knowledge of the breach relating to the fact or circumstance, would this have affected his undertakings? A similar test is found in common law jurisdictions based on the conduct of the 'prudent insurer', however in some civil law jurisdictions the test is subjective with reference to the 'actual insurer'.[57] In Norway the test for materiality of the circumstances to be disclosed is tested objectively based on the 'prudent insurer'.[58]

If the answer to the first leg of the test is affirmative, then the second inquiry is, firstly, would a reasonable assured have known that a breach relating to the fact or circumstance would affect the insurer's undertaking and, secondly, ought the reasonable assured have known this? In relation to the first point it is important that the guidelines emphasises reasonable knowledge of the effect on the actual insurer's undertaking as opposed to the reasonable insurer's undertaking. This is similar to the inducement test created by the House of Lords in *Pine Top*.[59] However, rather than focusing on the actual insurer's evaluation of the effect as was done in e.g. *St Paul Fire & Marine*,[60] the guidelines propose that

[55] See Hare *Shipping Law op cit* n 6 at 697.
[56] *Ibid.*
[57] Derrington *op cit* n 5 at 74 and Wilhelmsen *op cit* n 9 at 61.
[58] Derrington *ibid* at 79.
[59] *Pan Atlantic Insurance Co. Ltd. v Pine Top Insurance Co. Ltd* [1995] 1 A.C. 501 quoted in Bennett 'Utmost Good Faith, Materiality and Inducement' 112 *Law Quarterly Review* 1996 405 at 406.
[60] *St. Paul Fire & Marine Insurance Co. (U.K.) Ltd v. McConnell Dowell Constructors Ltd* [1995] 2 Lloyd's Rep 116 quoted *ibid* at 408-409.

the inquiry should be more objective, i.e. it focuses on whether the reasonable assured would know that the breach relating to the fact or circumstance would affect the insurer's undertaking. Hence, although the test retains its objective qualities, it is hybrid in that it is subjectivised by reference to the actual insurer and the context in which the contract is concluded without going as far as becoming an entirely subjective test akin to the inducement test. Importantly, the second leg also introduces an element of a causative link between the breach and the effect on the undertaking in the materiality inquiry.

The second point in the second leg of the two-tier test propose that the reasonable assured is tested according to his objective knowledge, i.e. what he ought to have known. This solution is adopted in common law jurisdictions.[61] In the French marine insurance system materiality is based on the assured's subjective knowledge, yet the position in Norway is that the assured is required to make full disclosure of all matters regardless of the knowledge of the assured.[62] The two issues of an objective or subjective approach to materiality and knowledge of the assured seems however to be interlinked. The approach taken to the reasonable assured's knowledge may be used as a tool to temper the potentially harsh consequences of a materiality test which favours the insurer.

However, one major issue which has arisen in the common law jurisdictions in relation to the materiality test remains unresolved, i.e. the issue of how affected the insurer's undertaking must be. This will be discussed in 3.1.2. below.

3.1.2. When is the undertaking 'affected'?

The guidelines do not answer the question as to what extent a breach in relation to the fact or circumstance must affect the insurer's undertaking. This issue has been grappled a bit with by the common law courts.[63] The House of Lords in *Pine Top* upheld a decision by the Court of Appeal in *Container Transport International*[64] which held that what was probably required was that the risk was different, not that a different decision relating to the undertaking would have been taken.[65] However, in order to mitigate potential harsh consequences of this ruling a second element of inducement was introduced by virtue of which 'the actual insurer had to have been induced into the contract'.[66] As discussed above, the common law test of inducement seems to overlap to a certain extent with the two tier test of materiality, but lays a burden on the insurer to prove that he would not have accepted the terms of the contract had he been aware of the facts or circumstances.[67] This is more precise than a requirement that the insurer's undertaking was 'affected' which could at its extreme be satisfied by mere contemplation of a change in risk which would undermine the effectiveness of the two-tier test. Yet, a

---

[61] Derrington *op cit* n 5 at 79.
[62] *Ibid.*
[63] See Bennett *op cit* n 59.
[64] *Op cit* n 64 quoted *ibid* at 406.
[65] *Ibid.*
[66] *Ibid.*
[67] *Ibid* at 408.

precise definition of the weight attached to particular circumstances may be problematic. Bennett summarises the position to such a test taken by the court in *Container Transport International* as an acceptance that the 'particular weight this hypothetical abstraction would attach to the circumstance in question was incapable of subsequent determination by a court'.[68]

Some jurisdictions mitigate the potential harshness of a wide concept of 'materiality' by adjusting the remedies according to the guilty party's degree of fault.[69] As seen above, all facts and circumstances must be disclosed by the assured in terms of Norwegian law. However, the harshness of this provision is mitigated by the requirement of fault, e.g. an innocent breach of the duty to disclose (both relating to knowledge and significance of the knowledge) does not relieve the insurer of liability.[70] The guidelines do not include an element of fault in the available sanctions. It could be argued that the state of mind of the guilty party should not relieve him of the harsh consequences of a breach of contract and not deprive the innocent party a right to a remedy. Yet, it seems that a certain level of mitigation is required in order to strike an equitable balance between the parties. It could be argued that this mitigation is found in the guidelines by means of the requirement of a causal connection between breach and loss/claim, discussed in 4.

4. REMEDIES

As noted above in 2., the remedies are integral to the overall accomplishment of a marine insurance system of achieving the goal of an equitable balance between the insurer and assured.

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

The guidelines require the breach of the duty of good faith to be causatively linked with the loss or the claim. Hence, the breach of the duty of good faith (including an essential term) must cause the loss or the claim to be regarded as 'material'. It seems that this is what is anticipated by the guidelines when they classify the various remedies based on 'material' and 'non-material' breaches.[71]

The test for a material breach thus differs from the materiality test of a fact or circumstance. In the latter scenario the causative link (or 'inducement') is between the breach and the 'affected undertaking' whereas in the former scenario the link is between the breach and the loss/claim. This 'second layer' of causation may however prove to be an efficient device to mitigate the potential harsh consequences of an objective test which does not stipulate how 'affected' the insurer's undertaking must be. It seems equitable that an insurer should be able to e.g. cancel a contract where a breach of good faith caused the loss. However, it is not necessarily equitable that a breach which induced the undertaking but is unrelated

[68] *Ibid* at 406.
[69] Wilhelmsen *op cit* n 9 at 69.
[70] *Ibid.*
[71] See further discussion under 4.2.1. below.

to the loss/claim should have the same consequence. Yet this latter situation prevails in the common law jurisdictions.[72]

A problem which may still have to be addressed is the different tests for causation found in the various jurisdictions, but this is outside the scope of this paper. The discussion below will analyse in further detail the various sanctions proposed.

4.2. Material breach of good faith (including an essential term going to the root of the contract) entitles the innocent party to cancel the contract from the date of the breach and claim for damages

The following aspects of the proposed sanctions will be discussed further: the concepts of 'material' breach which goes to the root of the contract; breach of 'good faith'; breach of an 'essential term'; cancellation of contract from the date of breach and damages for breach.

4.2.1. 'Material' breach

As argued in 4.1. above, the guidelines only apply the remedies to 'material' breaches. This requirement can arguably have different interpretations. The guidelines do not provide a definition of what constitute a 'material breach'. Christie suggests that it means that the breach must be material *per se* – i.e. it must not be trivial, but 'go to the root of the contract'.[73] This interpretation could be equated to the requirement of *inter alia* fault and causation in the Norwegian system. I.e. the breach must not be trivial in that it must not be innocent and cause the loss.[74] Similarly, the ALRC proposes that 'material' should be linked to causation, i.e. a breach is trivial unless the breach is causatively linked to the loss.[75] It is submitted that this latter interpretation, i.e. that a material breach requires causation, is probably correct. It makes sense, firstly, because it corresponds to the requirement of 'materiality' as discussed in 4.1. above and with 'essential and non-essential terms' discussed in 4.2.3. and 4.3. below and secondly, there is little basis for implying that the guidelines introduces an aspect of fault into the inquiry. However, importantly, the issue of fault is left open and perhaps, subject to the reservations expressed in 3.1.2. above, the guilty party's state of mind could be used by the courts to bring even more flexibility into the sanctioning regime.

4.2.2. Breach of 'good faith'

As seen above, the guidelines have defined 'good faith' as encompassing honesty, disclosure and misrepresentation as well as disclosure of alteration of risk. The guidelines does not include the latter in the proposed remedies, however it can probably be inferred from the use of the word 'disclosure'. In addition, most alteration of risk issues would probably be considered 'essential terms' of the contract.

[72] Eggers *et al op cit* n 6 at 34.
[73] Christie *The Law of Contract* (4ed) 2001 at 598-590.
[74] See e.g. ALRC *op cit* n 2 at paras 10.98-10.100.
[75] *Ibid* at para 10.129.

4.2.3. Breach of an 'essential term'

The guidelines do not define an 'essential term'. As seen above in 3. it seems logical that an essential term should be defined in terms of the two-tier test for materiality. According to Christie, an essential term is a sufficiently important term the breach of which justifies cancellation of the contract.[76] In the context of marine insurance law and the guidelines this should logically be a term which relates to a fact or circumstance which is regarded as material. In the common law jurisdictions these terms are also classified as 'conditions'.[77] However, the definition of a condition versus a 'warranty' in this marine insurance system is problematic as are some of the legal consequences which flow from a breach of conditions.[78] Yet, conditions seems to roughly correspond to the concept of an essential term in that they are fundamental to the undertaking by the insurer, i.e. they go to the root of the contract. Similarly, most alterations of risks would also be fundamental terms of the contract, alteration of which would be material and constitute a breach of the duty of good faith. One of the great advantages of the guidelines is that they streamline these concepts and bring them all under the umbrella of good faith and the two-tier test for materiality.

4.2.4. Cancellation of contract from the date of breach

The use of the remedy of cancellation of contract from the date of the breach has certain implications. Firstly, premium paid would be refundable from the date of breach as the insurer would not have undertaken risk in terms of the contract in this period. Moreover, it would also seem that the insurer would be liable for any claims arising prior to this date. Finally, a right to cancel the contract does not take account of the circumstance in which the insurer may have continued the operation of the contract albeit at a higher premium or with the undisclosed risk excepted. Hence, the remedy may be excessive and inflexible in the circumstances. For instance, the Norwegian Marine Insurance Plan does take this into consideration for the purpose of sanctioning negligent conduct.[79]

It should however be noted that the remedy of cancellation coupled with damages is a much less severe sanction than the rescission found in current common law jurisdiction in relation to non-disclosure.[80] On the other hand, in Norway the remedy of cancellation is separated from the issue of liability of the insurer and is prospective in effect.[81] The liability of the insurer in this system often corresponds to the assured's degree of fault.[82]

4.2.5. Claim for damages

---

[76] Christie *op cit* n 73 at 597-598.
[77] Oxford Dictionary of Law (4ed) 1997 at 94.
[78] Christie *op cit* n 73 at 598 and Schoenbaum *op cit* n 32 at 40-46.
[79] Wilhelmsen 'The Marine Insurance System in Civil Law Countries – Status and Problems' 242 MarIus 1998 15 at 43.
[80] Schoenbaum *op cit* n 32 at 35.
[81] Falkanger *et al op cit* n 22 at 488.
[82] *Ibid.*

The guidelines propose that the innocent party should have a claim for damages over and above the right to cancel the contract. As a starting point, a claim for damages for breach of good faith is problematic in common law countries. This is because good faith is regarded as a principle of equity and not delict/tort and does therefore not give rise to damages.[83] There does neither appear to be a provision for damages in Norwegian marine insurance law.[84] Moreover, it is arguably so that in most cases cancellation would provide the innocent party with a sufficient remedy.[85] Yet, it could be prudent to retain this remedy for the circumstance where an innocent assured may want to both cancel the contract and claim damages against an insurer which in breach of good faith fails to settle a claim under the policy.[86]

4.3. Material breach of a non-essential term (not relating to a breach of good faith or requiring strict compliance) suspends cover until the breach is remedied

The guidelines propose that a material breach of a non-essential term should suspend the cover (and impliedly the parties liabilities) until the breach is remedied. A non-essential term is a term the breach of which would not affect the insurer's undertaking as per the test of 'materiality'.

According to the guidelines a material breach suspends the insurance cover. This is similar to the suggested remedy proposed by the Australian Law Reform Commission.[87] In terms of the ALRC a breach of a term which does not cause loss (i.e. it is not 'material') should not enable the innocent party to rescind the contract, but rather suspends the operation of the loss until the breach is remedied.[88] However, if the breach is 'material' i.e. it caused the loss, then the breach is not remediable.[89] This is also the remedy for breach of warranties in a Canadian non-marine insurance contract and the 'majority view' in the United States regarding the remedy for breach of warranties.[90] The proposition in the guidelines is however that a breach that *caused the loss but did not affect the insurer's undertaking* is remediable. The use of suspension of the contract in the way proposed by the guidelines may therefore be problematic. Although it could be argued that the assured would want the cover to continue in the circumstances and therefore want to remedy the breach, there would be no possibility for the claim to be paid out as the loss has already occurred and the contract will be suspended in this period. Perhaps an equitable balance could be struck by importing degrees of fault, i.e. that an innocent breach of a non-essential term which caused the loss does not suspend the contract, a negligent breach of a non-essential term which caused the loss suspends cover and a fraudulent breach of a non-essential term which caused the loss cancels the contract.

---

[83] Grime *op cit* n 35 at 15, Schoenbaum *op cit* n 32 at 38, ALRC *op cit* n 2 at para 10.101 and Tetley *op cit* n 11 at 538.

[84] Falkanger *et al op cit* n 22 at 489-491.

[85] See e.g. discussion by the court in *Banque Financière de la Cité SA (formerly Banque Keyser Ullman SA) v Westgate Insurance Co. (formerly Hodge General & Mercantile Co. Ltd.)* [1988] 2 Lloyd's Rep 513, CA judgment by Steyn J (as he then was).

[86] *Banque Financière* [1990] 2 Lloyd's Rep 377, HL per Lord Templeman at 387.

[87] ALRC *op cit* n 2 at para 9.129.

[88] *Ibid.*

[89] *Ibid.*

[90] Hare 'The Omnipotent Warranty: England v The World' available at http://www.uctshiplaw.com last accessed 1 october 2005 (Canada) and Wilhelmsen *op cit* n 9 at 99 (US).

In addition, suspension of cover may be a remedy for a non-material breach of a non-essential term which remains unregulated by the guidelines.

4.4. Non-material breach of good faith (which does not cancel the contract) may nevertheless give rise to a claim for damages

The guidelines propose that 'non-material' breaches of 'good faith' may give rise to a claim for damages. It is suggested that a 'non-material' breach is a breach which does not cause the loss.[91] The guidelines do not specifically mention essential terms but the assumption is that these are included in the concept of good faith.[92] As to the problem in relation to damages for a breach of good faith, see 4.1.5.

The remedies mentioned above may however be sidelined in the case of strict compliance terms which is given further consideration in 5. below.

5. STRICT COMPLIANCE TERMS

5.1. Parties may expressly require strict compliance with certain terms of the contract and stipulate that the contract may be cancelled in circumstances of non-compliance, regardless of the materiality of the term or whether the breach caused the loss

The guidelines proposed that certain terms may be elevated to the status of 'strict compliance terms', compliance with which must be exact. The concept is closely linked to the concept of 'warranties' found in common law marine insurance systems. There are various problems associated with warranties, which is why the guidelines expressly reject the term and its legal consequences. According to Hare, Norwegian law does 'not recognise the elevation of contractual term, however material and causative, to any special status akin to the English insurance warranty'.[93]

The following issues will be dealt with in more detail: express versus implied incorporation into the contract; breach regardless of causation; and the remedy of cancellation.

5.1.1. Express versus implied incorporation into the contract

The guidelines only leave room for express incorporation of strict compliance terms into the contract. This can be distinguished from the implied warranties found in the common law systems as well as the statutory 'duties of care' found in the Norwegian Marine Insurance Plan.[94] The Australian Law Reform Commission has recommended that all implied warranties should be made express terms of contract as

---

[91] See discussion in relation to 'material breach' in 4.1. and 4.2.1. above.
[92] See above in 2.2.4.
[93] Hare 'Omnipotent Warranties' *op cit* n 90.
[94] Falkanger *et al op cit* n 22 at 488.

this would ensure that the assured is informed about his obligations.[95] Many of the aspects dealt with by the implied terms are also expressly incorporated by the Institute Clauses.[96]

5.1.2. Breach regardless of causation

The guidelines propose that non-compliance with a strict compliance term will justify a remedy for breach, regardless of whether the non-compliance caused the loss. The perhaps greatest criticism of the common law 'warranty' was that even a relatively minor term (or the terms described by the guidelines as non-essential terms) could be elevated to warranties which in the absence of exact compliance would lead to recession of the contract even if the non-compliance was not causally linked to the loss. This situation seems to be unaltered by the guidelines. However, it seems that breaches of an obligation such as the duty to keep a vessel seaworthy should relieve the insurer of liability regardless of causation on public policy grounds.[97]

5.1.3. The remedy of cancellation

The guidelines propose that the remedy for non-compliance with a strict compliance term should be cancellation of the contract. It seems that the insurer will remain liable for loss that has occurred prior to the breach. As noted above, the traditional common law remedy is rescission. In contrast, the civil law countries allow cancellation only where the breach cause the loss.[98] Cancellation may be particularly harsh in circumstances where there is non-compliance with a non-material and non-causative term which was not due to the fault of the guilty party. In contrast, the Australian Law Reform Commission has proposed that the contract should continue in operation but that the liability of the insurer depends on the causal link between the breach and the loss.[99] As noted above, there may be a public policy objection to this solution in relation to strict compliance with safety standards and the like. A more balanced approach may be to argue that only non-material and non-causative contracts should survive non-compliance.

It is not clear in the guidelines what would happen in circumstances where there is a breach of a strict compliance term which would under ordinary circumstances be a breach of good faith. The remedies set out above indicate that a breach of good faith entitles the innocent party to claim damages, whereas non-compliance with a strict compliance term only justifies cancellation.

5.2. <u>Alternatively, non-compliance with a strict compliance term will terminate the contract automatically</u>

[95] ALRC *op cit* n 2 at para 9.134 and see also Hare 'Omnipotent Warranties' *op cit* n 90.
[96] See generally Soyer *Warranties in Marine Insurance* 2001.
[97] Although the ALRC argues that this is best left to regulation by the Australian Maritime Safety Authority – ALRC *op cit* n 2 at 9.37.
[98] Hare 'Omnipotent Warranty' *op cit* n 90.
[99] ALRC *op cit* n 2 at 9.129.

The guidelines suggest that termination of the contract could be automatic. This would mean that the decision whether to cancel the contract is not dependent upon the decision of the insurer.[100] Similar arguments as those raised in relation to cancellation in circumstances of breach of a non-material and non-causative strict compliance term would *a fortiori* apply here. On the other hand, automatic cancellation may well be justified in the specified circumstances mentioned in 5.3. below. The guidelines should perhaps clarify this distinction.

5.3. Terms relating to safety at sea, classification, ownership, management and ISM code compliance should be express strict compliance terms

The guidelines propose that the issues of safety at sea, classification, ISM code compliance, ownership and management should take the form of express strict compliance terms. These issues are of special importance and are normally given distinctive treatment by the various marine insurance systems. The discussion below will group them into safety at sea, classification and ISM code compliance and ownership and management issues.

5.3.1. Safety at sea, classification and ISM code compliance

As a starting point, these issues are recognised as they are all linked to safety matters. The guidelines speak of safety at sea, and the writer assumes this refers to safety regulations, i.e. 'regulations concerning measures for the prevention of loss'.[101] This may include safety regulations issued by a classification society (as is the case in Norway) and, as argued below, it may therefore render the special mention of 'classification' inequitable as well as unnecessary.[102] In the common law jurisdictions safety regulations are probably included in the implied warranty that a maritime adventure shall be carried out in a lawful manner.[103] The concept may also overlap with 'ISM code compliance'.

The issue of 'classification', i.e. a duty to keep the vessel in class and comply with class requirements is included as a warranty in the Institute Clauses but does not constitute an implied warranty in the common law jurisdictions.[104] In Norway this issue is regulated as a matter of alteration of risk, but with stricter consequences.[105] It may be argued that it is inequitable to require strict compliance with the duty to keep the vessel in class, when it can be established that the insurer would have accepted a change of class.[106]

The guidelines suggest that ISM code compliance should be a strict compliance term. The common law jurisdictions do not provide a warranty for ISM code compliance.[107] However, it could be argued that this

[100] Wilhelmsen *op cit* n 9 at 99.
[101] Wilhelmsen *op cit* n 9 at 110.
[102] *Ibid.*
[103] *Ibid* at 111.
[104] *Ibid* at 114.
[105] *Ibid.*
[106] *Ibid.*
[107] *Ibid* at 113.

issue would fall under the implied warranty for seaworthiness.[108] The guidelines do not suggest that seaworthiness should be regarded as a strict compliance term. This could be because seaworthiness is difficult to define, and non-compliance with the ISM code would probably result in unseaworthiness. It may however be circumstances (unlikely as it may seem) that unseaworthiness could occur outside the ISM code and safety regulations. It may therefore be prudent to include this concept in the guidelines as well, particularly because it has an established jurisprudence in marine insurance law.

5.3.2. Ownership and management

The guidelines propose that unaltered ownership and management should be a strict compliance term. Most legal systems already contain provision to this effect and the common law systems sanction this with automatic termination of contract.[109] In Norway a change of ownership leads to automatic cancellation whereas a change of management would lead to a prospective cancellation of the contract and/or discharge of the insurer's liability depending on *inter alia* fault, materiality and causation.[110] Both are regulated in terms of 'alteration of risk' in the Norwegian Marine Insurance Plan chapter 3.[111]

5.4. Strict compliance terms should not be labelled 'warranties' and the English law 'warranty' and its effects should be abolished

The guidelines suggest that the English law 'warranty' should be abolished. From the discussion above, it seems however that most of the unfavourable elements are retained by the guidelines. The main criticisms against warranties are that (automatic) cancellation is allowed of non-essential terms and non-causative breaches.[112] As seen above, this has not been remedies by the guidelines. However, one alteration that has been made is the problem pointed out by Hare, i.e. that 'warranties are of such importance to the [assured] that in our view he ought to be able to refer to a written document in which they are contained'.[113]

CONCLUSION

As argued in 1. above, the aim of any marine insurance system is to strike an equitable and cost-effective balance between the insurer and the assured. This paper has analysed the attempt in the guidelines to provide platform from which harmonising such a system could be achieved. The paper has relied heavily on the experience of the common law jurisdictions both because they to a large extent represent international marine insurance practice and because they are problematic. A contrast has been made to other jurisdictions, particularly the Norwegian marine insurance system. Although the guidelines aim to harmonise international marine insurance law, this paper has merely attempted to analyse these guidelines and provided an indication as to how issues have been dealt with in Norwegian marine insurance law.

[108] *Ibid.*
[109] Wilhelmsen *op cit* n 9 at 117.
[110] *Ibid.*
[111] *Ibid.*
[112] Hare 'Omnipotent Warranty' *op cit* n 90.
[113] *Ibid.*

The guidelines have emphasised that good faith between the parties to a marine insurance agreement shall regulated their contractual relationship. In 2. the paper attempted to trace the content and scope of this duty in the context of the guidelines. As to the content, the paper found that the proposed concept of the good faith was a broad and consisting of the rules relating to disclosure, misrepresentation, disclosure of alteration of risk, as well as *pacta sunt servanda*. The common law utmost good faith has not been retained although the only change proposed is the inclusion of causation in the guidelines. As to Norwegian law it was pointed out that good faith is not used as an umbrella concept in this legal system, which may prove difficult but not necessarily critical to the effort to harmonise the marine insurance systems. It was in addition pointed out the duty to disclose an alteration of risk is a concept which is regulated differently in the Norwegian legal system than in the guidelines. As to the scope of good faith the guidelines proposed that concept applies mutually and throughout pre- and contractual relations. This is a par with Norwegian marine insurance law.

In 3. the paper analysed the guidelines proposed test for a breach of good faith by means of an objective test based on materiality. It was argued that the two-tier test presented provides a more objective standard than the tests of materiality and inducement presently found in the common law jurisdictions, whilst retaining certain subjective factors. The two-tier test does no provide an answer to the issue grappled with by the common law courts in relation to the extent an insurer's undertaking must be affected. It was argued that a very low (or high) threshold for 'effect' may undermine the effect of the test. In Norway, a strictly objective test of materiality is tempered by the inquiry into the fault of the guilty party.

In 4. the paper argued that the test for materiality could be tempered by implying that 'material breach' implies that the breach must cause the loss/claim. It was argued that this is the most likely interpretation of the term. The paper neither rules out the possibility that the state of mind of the guilty party could play a role in this inquiry as well, however did not pursue this issue in further detail. The paper furthermore analysed the various remedies proposed for essential and non-essential term, material and otherwise. It was argued that an 'essential term', as opposed to a 'non-essential term', was a term which relates to facts or circumstances that satisfy the two-tier test of materiality. The guidelines propose that breach of good faith (including essential terms) entitles the innocent party to cancel the contract and/or sue for damages. A material breach of a non-essential term also gives rise to damages. The paper argued that damages is a problematic remedy for breach of good faith in common law jurisdictions as it is a rule of equity and not delict/tort. Damages seems furthermore not to be a remedy in the Norwegian marine insurance system. In Norway cancellation of contract is a prospective remedy separated from the liability of the insurer, as opposed to the remedy suggested by the guidelines which effects cancellation from the day of the breach. The paper furthermore pointed out that the proposed remedy of suspension of a contract in circumstances of a material breach of a non-essential term is unconventional as most legal systems normally require a non-causative breach to use this remedy.

In 5. the paper analysed the concept of ‘strict compliance terms’ proposed by the guidelines. The paper found that many parallels could be drawn to the treatment of warranties in the common law jurisdictions. Most important, the possibility that a breach can occur in relation to a non-essential and non-causative term is retained in the guidelines. The guidelines proposed that non-compliance with a strict compliance term gave rise to a right to cancel the contract, alternatively automatic cancellation. The paper argued that this may be problematic in the circumstances, both because this may be regarded as unduly harsh and because the remedy does not account for the damages which may otherwise be awarded. There seems to be little justification for this difference in treatment of a strict compliance term and other terms, unless the term relates to the specified issues. The largest change is that the guidelines require strict compliance terms to be expressly included into the contract. The paper lastly analysed the special regulation in relation to certain specified issues of safety and ownership/management of a ship and their use. It was found that these are regulated differently in the various jurisdictions which may prove difficult for the purpose of harmonising these rules.

As an overall assessment: It seems that all the essential concepts found in most marine insurance systems are present in the guidelines and that these guidelines not only provide a streamlined approach to the various issues of good faith, but that also a balanced test is found in the concept of materiality. The use of a causative link for the purpose of remedies is also commendable as this brings in an element of discretion to mitigate potential inequities which may occur in relation to the materiality test, in particular the application of facts to the term ‘affected’ undertaking. The remedies need however some contemplation in relation to non-essential terms and the award of damages may also be problematical. The guidelines interpretation of strict compliance terms may prove to be problematic as they retain most of the features regarded as inequitable in relation to warranties. It could be that harmonising all these concepts into an international marine insurance system may prove impracticable. Particularly because the common law system and the Norwegian system operate with different approaches to law – the common law system requires flexibility, whereas the Norwegian legal system desire well-formulated and certain regulation. Perhaps a more realistic approach to harmonisation can be found by inserting guideline 1: ‘When interpreting the rules of marine insurance a court must consider the rules contained in comparable marine insurance systems’. The relatively unproblematic Norwegian marine insurance system should provide a good starting point for this kind of comparison.

BIBLIOGRAPHY

1. BOOKS

Christie *The Law of Contract* (4ed) 2001

Eggers, Picken and Foos *Good Faith and Insurance Contracts* (2ed) 2004

Falkanger, Bull and Brautaset *Scandinavian Maritime Law: The Norwegian Perspective* (2ed) 2004

Hare *Shipping Law and Admiralty Jurisdiction in South Africa* 1999

Hughes *Law of Marine Insurance*

Soyer *Warranties in Marine Insurance* 2001

2. GENERAL REFERENCE

Black's Law Dictionary with Pronunciations (6 ed) 1990

Oxford Dictionary of Law (4ed) 1997

3. LAW REFORM REPORTS

Australian Law Reform Commission (ALRC) *Report No. 91: Review of the Marine Insurance Act of 1909* (April 2001)

4. ACADEMIC ARTICLES

Bennett 'Utmost Good Faith, Materiality and Inducement' 112 *Law Quarterly Review* 1996 405

Clarke 'Alteration of Risk' at 4 available at http://www.comitemaritime.org last accessed 1 October 2005

Derrington 'Non-disclosure and Misrepresentation in Contracts of Marine Insurance: A Comparative Overview and Some Proposals for Unification' (2001) *Lloyd's Maritime and Commercial Law Quarterly* 66

Grime 'Marine Insurance – A View from London in 1999' 249 *MarIus* (1999) 1

Hare 'Good Faith, Disclosure, Misrepresentation and the Omnipotent Warranty: South African Perspective' Paper presented to the British Maritime Law Association, Tulane Conference, London, May 2000 available at http://www.uctshiplaw.com last accessed 1 October 2005

Hare 'The CMI Review of Marine Insurance: Report to the 38th Conference of the CMI, Vancouver, 2004' *CMI Yearbook 2004* 248

Hare 'The CMI Review of Marine Insurance: To Rest on Century-old Laurels or to Thread on Hallowed Ground?' 10(2) *Journal of International Maritime Law* (2004) 167

Hare 'The Omnipotent Warranty: England v The World' available at http://www.uctshiplaw.com last accessed 1 october 2005

Schoenbaum 'The Duty of Utmost Good Faith in Marine Insurance Law: A Comparative Analysis of American and English Law' 29 *Journal of Maritime Law and Commerce* (1998) 1

Tetley 'Good Faith in Contract: Particularly in the Contracts of Arbitration and Chartering' 35 *Journal of Maritime Law and Commerce* (2004) 561

Tulloch 'Utmost Good Faith' *CMI Yearbook 2003* 534

Wilhelmsen 'Duty of Disclosure, Duty of Good Faith, Alteration of Risk and Warranties: An Analysis of the Replies to the CMI Questionnaire' *CMI Yearbook 2000* 42

Wilhelmsen 'The Marine Insurance System in Civil Law Countries – Status and Problems' 242 MarIus 1998 15

5. LEGISLATION

Marine Insurance Act of 1906

1996 Norwegian Maritime Insurance Plan (Norsk sjøforsikringsplan)

THE GUIDELINES AIMED AT REGULATING THE CONDUCT OF THE PARTIES TO A MARINE INSURANCE CONTRACT