Introduction

During classics times, Greek god Poseidon was relied upon by sailors for a safe voyage on the sea. Many sailors drowned horses in sacrifice of his honour, to *insure* themselves and their ships of a safe voyage on a calm sea. From the above one could conclude that the Greeks were practising marine insurance principles even before the introduction of the *Lex Mercatoria*[1].

However, Poseidon was a very moody divinity; when he was in a bad mood, Poseidon would strike the seafloor with his trident, causing unruly springs and earthquakes, ship wrecks, and drownings. Like Poseidon's character, today's maritime insurance markets, through the increase of maritime risks, fluctuations in freight rates and ship prices are also very unstable. Subsequently the marine underwriters whom in most parts of the world work(-ed) under the influence of the 1906 UK Marine Insurance Act had 'to sail these rough seas'. To improve these "sailing conditions" in the marine insurance market and through pressure from the marine insurance industry it was that legislators in many countries have reacted to review and reform their laws of marine insurance.

Set off by these a variety of reforms[2], the CMI's international working group ('IWG') researched various marine insurance[3] markets, their legislation and provisions and concluded their research by launching seven guidelines to break down the 'rough waves' that dominated the (inter-)national marine insurance market. The goal of this essay is to give the reader of this paper an analysis of the CMI guidelines and to indicate the extent to which the CMI guidelines deal with marine insurance issues in the Netherlands.

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[1] See Tetley, "The General Maritime law - The Lex Maritima" (1994)

[2] For example the review of the Australian Marine Insurance Act 1909 and the Scandinavian Marine Insurance Plan

[3] By marine insurance, it is meant Hull and Machinery (H&M) and Cargo insurance

Marine insurance legislation and conditions in the Netherlands

Contractual relations in an insurance contract are principally governed by the provisions in the policy and by their applicable general conditions.

Marine insurance contracts in the Netherlands are regulated by the Dutch Commercial Code[4], Book 7 of the Civil Code[5], Book 3 of the Civil Code[6]; the standard conditions for cargo are codified in the Dutch Bourse Cargo Policy 1991. Furthermore there is the general Code of Conduct for Insurers.

The Commercial Code applies to both hull and cargo insurance; although I have to point out that the Commercial Code is not the dominant guideline in daily practice.

As part of Contract Law, (marine) Insurance Law in the Netherlands is not of a mandatory character, nevertheless, there are some mandatory provisions in the general Contract Law[7] and in the general Insurance Law[8], which are also applicable to marine insurance contracts.

The CMI draft guidelines

In 1998 the CMI decided to undertake an international study of marine insurance as it had recognised the existence of a need for the harmonisation of marine insurance law. Consequently, the CMI International Working Group on the Laws of Marine Insurance prepared a study, according to the growing discontent with certain aspects of the law of marine insurance, particularly: (a) the duty of (utmost) good faith; (b) the duty to disclose; (c) alteration of risk; and (d) concept of warranties. During CMI 2004 Vancouver conference the IWG presented their conclusions in the form of a "*wish list*"[9], which promotes lawyers to initiate legislative reform of some outdated clauses in the their Marine Insurance Act.

These Guidelines consist of seven individual general principles regarding the above mentioned issues.

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[4] Wetboek van Koophandel, Title 9 of Book I & II, Articles 251-284

[5] Burgerlijk Wetboek #7, Articles 7.17.1.1 – 7.17.2.25a

[6] Burger Wetboek #3, Articles 11-45

[7] Burgerlijk Wetboek #3&6

[8] Burgerlijk Wetboek #7

[9] See the CMI review of marine insurance report to the 38th conference of the CMI Vancouver II, 2004, by John Hare, pag. 248-260

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.

The universal basis for insurance contracts is trust. The insured must be able to rely on his insurer to fore fill his financial contractual obligation in case the insured calls upon his insurance contract. On the other hand insurers have to rely on the insured to pay his premiums on time, to provide the insurer with fair and honest information and that the insured will claim any damage.
As well as in general, in marine insurance, contracts of good faith (or trust) are the crux of daily insurance business.
The concept of good faith (also called *bona fides*) in Marine insurance contracts in the Netherlands has existed since the *placcaat* of 1571[10], where the policy form set out in s35 declared that everything would be done by the insurers in good faith and without fraud or guile (*'alles ter goeder trouen, ende sonder bedroch oft argelist'*). Latter codified in the Commercial Code of 1838 and revised in 1927.
The principle of good faith is also found in today's Dutch Civil Law[11]; parties who enter into a contract must negotiate and carry out the contract honestly and fairly. Nevertheless Dutch insurance legislation does not express a regulation of the concept of good faith except for what already follows from the regulation of duty of disclosure. However, the requirement to act in good faith can be expressed in insurance contract clauses.

The ratio of the principle of contractual good faith is an expectation of each party to a contract that the other will honestly and fairly perform his duties under the contract in a manner that is reflected by fair and common business sense; non-compliance to the requirements of good faith may result in extra-contractual responsibility. However, the deemed equality between contractual parties, is not truly fair by its nature; only the insurer is allowed to cancel his contractual obligations under a insurance contract because of circumstances that were not material for his acceptance of the risk.

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[10] Development of the principles of Insurance Law in the Netherlands from 1500 to 1800, by J.P. van Niekerk,1998 , pag. 998

[11] Artilce 11, Book 3, Burgerlijk Wetboek

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.***

The general principal of acting in good faith is a requirement for both contractual parties in a marine insurance contract. Good faith is required throughout all stages of the insurance contract. To act in good faith supports the contractual parties also in their duty to disclose all material facts and information, any material alteration concerning risk during the currency of the contract and not to misrepresent any of the above.

In contrary to the Common Law countries, where the good faith doctrine remains strongly established, in Dutch Law, indirect regulation[12] of a duty of good faith is used, in both the Insurance Law and in general Contract Law[13].

The duty of good faith and the alternation of risk are often intertwined with the duty of disclosure[14], the latter is found in the Dutch Commercial Code and Book 3 & 6 the Civil Code; these provisions are mandatory. In Dutch Insurance Law the duty of disclosure play's a dominant role.

When in breach of the duty of good faith and full disclosure the insurer can uphold that the contract is null and void[15].The ratio behind this clause is that, if the insurer had known all the facts he wouldn't have concluded the contract. The equality within this clause can be argued; why does the insured carry the final responsibility of the duty of disclosure? What if the insured acted on good faith, but the insured did not know or could not know all (material) facts of the nature of the risk in question? Now day's insurance companies are multinationals, which can undertake thorough assessments and risk calculations and furthermore who have the possibility to finance their loss from claims by premiums which will be paid in the future. This is not a plea for a change in legislation to the duty of disclosure or misrepresentation, it is a merely an observation of daily risks calculation in today's insurance markets. The guideline stipulates a fair obligation, because it fosters a high standard of care and economic efficiency for each contractual party during every stage of the contract however the means to enforce this obligation is still solely held by the insurer. The sole consolation for the insured in case the contract is held to be void or nullified, is that the paid premiums will have to be returned.
A solution to this dilemma could be found in a more equal appreciation of the interests of insured and the insurer.

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[12] in interaction with the duty of disclosure or with fraud

[13] Art. 11 & 44 of Book 3 of the Civil Code

[14] '*Mededingplicht*' in Dutch, found in Art. 251 Commercial Code and Art. 7.17.1.4 (1) Book 7 of the Civil Code

[15] Art. 44 of Book 3, Civil Code & Art. 7.17.1.5. Commercial Code.

In conclusion I would like to point out that Article 251 of the Dutch Commercial Code requires no causation between the non-disclosure and the actual damage consequently under the Commercial Code; the contract will be *rescission-ed*[16]. Under general insurance Law the insurer is also allowed to cancel the contract and/or ask for additional premium[17] to overcome situations like misrepresentation, non-disclosure or fraud.

3. ***Certain terms 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 warranty and its effects in law should be abolished.***

"*It is one of the less attractive practices of English Insurance law that breach of warranty in an insurance policy can be relied on to defeat a claim under the policy even if there is no causal connection between the breach and the loss.*"[18]

As suggested in the guideline the use of the description 'warranty'[19] should be abolished from insurance contracts clauses. The principle of warranty seems rather immoral, why could the insurer demand strict compliance within the borders of the warranty which is not direct materialized to the risk and why is the insurer subsequently entitled to repudiate the policy for a breach of it?

In Marine Insurance contracts, warranties like seaworthiness, change of voyage, deviation and delay are very common in daily practice.

In Dutch Law, as in many other Civil Law countries, the principle of warranties in insurance contracts does not explicitly exist. However, the principle of contractual freedom allows the use of conditions precedent or material terms that are comparable to the common law concept of warranties.

Seaworthiness and safety regulation[20] are the only two areas in the Dutch Commercial Code that are regulated by conditions which are somewhat similar to warranties. If breached this will give rise to repudiation, the breach had to be causative of the loss.

From a Civil Law point of view the abandonment of the principle of warranty would open the door to harmonisation of the international marine insurance market, without having to take the insurers means of avoiding loss where the assured falls far short of performance expectations.

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[16] Rescission is translated in Dutch to '*vernietigbaar'*, which legally differs from null and void which is translated to '*nietig'* in Dutch.

[17] Art. 7.17.1.6, Book 7 of the Civil Code

[18] Lord Griffith in the Vesta v. Butcher case [1980] 1 L1

[19] A warranty is a condition which must be strict complied with, if breached; the insurer is entitled to reject the claim whether or not the breach is causally related to the loss.

[20] See Articles 311 Com. Code, 343 Com. Code jo. Art. 4, Schepenwet.

The use of a strict compliance clause instead of a warranty in a marine insurance contract, especially in relation to safety at sea, classification, ownership, management and ISM code compliance, would promote a overall safety at sea and improve the safeguard of the environment and by doing so would of general interest of the shipping industry, third parties of the industry and the world at large.
The question however is, is a marine insurance contract the right tool to enforce this 'side effect'? Shouldn't the applicable mandatory legislation be enough?

To 'replace' a warranty clause with a strict compliance clause could even accommodate the insurer's ability to ensure that the ship is in all respects in an acceptable condition to meet the perils insured against, and that the necessary precautions have been taken to keep the ship in this condition[21].
Although the above concepts are often extensively governed in mandatory legislation, a marine insurance contract can effectuate the basic safety regulations even more.
Nevertheless both parties of marine insurance contract should be at liberty to negotiate the contractual terms in appropriate circumstances; the problem with conditions of strict compliance or warranties is that they are unfair and harsh for the insured. Such conditions give the insurer the possibility to avoid liability even if the warranty was not material to the insurer's decision to accept the risk without any requirement of causation, and without regard to any kind of fault on the part of the insured. Therefore policies should be required to spell out precisely the consequences of a breach of a condition of strict compliance.
The legislator should provide the mandatory terms for automatic termination in case of fraud, change of ownership/flag, and breach of the provision of causative of unseaworthiness linked to the loss of the ship, and the extent to which the ISM Code should be applicable to the insurance contract.

[21] Duty of Disclosure, Duty of good Faith, Alteration of risk and warranties, by Prof. T.Wilhelmsen, 2000

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.***

"The insured must disclose everything known to him that is material even though he does not appreciate its materiality."[22]

and

"It is the duty of a proposer for insurance to disclose any fact, exclusively within his knowledge, which is material for the insurer to know...What information is material for the insurer to know is information that may influence his opinion as to the risk that he is incurring and consequently as to whether he will take it, or what premium he will charge if he does take it."[23]

These quotes give a nice example of a one-tier materiality test[24] and consequently also point out the Common Law problem which favours the insurer and leaves the insured almost at the will of the insurer.

Absences of good faith, a failure to disclose, a misrepresentation or breach of a contractual term, are the 'ticking time bombs' under an insurance contract. In case of materiality of the in the guideline mentioned lack of requirements, the root of the contract itself is damaged. By a wrong proposition of the relevant facts, the fair acceptance, the assessment of the premium and evaluation by insurer will effected. On the other hand misrepresentation of the essential circumstances and facts by the insurer will also have a negative effect on the fair acceptance of cover by the insured. Therefore a two-tier test for materiality will more equally assess the specific contractual details and circumstances to determine whether those circumstances were material to the risk and the calculation of the premium.

A two-tier approach is a fair manner to regulate both contractual parties' interests.

As in the *Outdshoorn Municipality- case*[25], the first stage, in which the reasonable and prudent insurer will have to prove that if he had known all the material facts he would have declined the risk or would have asked for a larger premium. The second stage is asking whether a prudent person effecting the insurance should have known that the information was material to the insurer[26]. All within the context of the norms of society and the contract to which the materiality is of the essence. Testing both the insurer and the insured statements objectively would seem to me to be the fairest assessment of

[22] Gordon & Getz, The South African Law of Insurance, 4th Edition.

[23] Fransba Vervoer (Edms) Bpk v Incorporated General Insurance Ltd 1976 (4) SA 970 (W) at 975H-976B

[24] Leading case in the test of Materiality is the Pan Atlantic insurance Co. v. Pine Top Insurance Co. Ltd. -case, 1994 in which the House of Lords adopted the concept of "middle way"

[25] *Miller JA in* Mutual & Federal Insurance Co v. Oudtshoorn Municipality 1985 (I) SA 419 (SCA).

[26] From Shipping Law & Admiralty Law in South Africa, 1999, Prof. J. Hare, pag. 697

materiality. Objectivity accords with basic principles of fairness and trust.
The Dutch Commercial Code Article 251, does not contain specific information to be disclosed is material for the insurer or concerning misrepresentation, it only contains a condition of inducement concerning the sanction. However a dominantly in the Netherlands used solution is to modify the duty of disclosure if the insurer is using a form of proposal. This method is also common in non-marine insurance. It is sufficient for the assured to answer the questions asked correctly. This method makes the question of materiality less important, as the insurer may not claim that information not asked for nevertheless was material.

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

If automatic termination of the contract upon breach is tolerated, should the breach be causative of the loss not necessarily causative of the loss, but nevertheless in relation to a material term?[27]

Although at first side the shortest guideline, the above guideline may be one of the most significant guidelines, since it deals with materiality and the principle of causality.
In Anglo-American Insurance Law, the insurer can rely on a (often innocent[28]) breach of warranty in an insurance policy, to defeat a claim under the policy even if there is no causal connection between the breach and the loss; and by doing so pressuring the insured into a settlement. It proposes inequity upon an insurance contract when the insurer is entitled to reject any claim for a breach, no matter how irrelevant the breach may be to the loss.
To Civil Law practitioners the absence of a causal link between the breach and the loss or the claim, and the insurer reliance for to counter a (future) claim, seems an anathema and rather unfair. And again is a fine example of common law favouritism for regulation in support of the insurer.
To even the balance between the insurer and the insured, materiality should require a causative link between the breach and the loss or the claim.
Although I have to point out that in Dutch Law[29] in case (intentional) fraud, with or without the absence of a causative link between the breach/loss and the claim, the insured will lose his right to claim damages.

[27] From CMI newsletter 2003-2
[28] For a nice example see the ‘fishing boat-example’, in The Omnipotent Warranty: England *v* The World, by Prof. J. Hare, 1999
[29] Art. 251 Commercial Code & Art.7.17.1.6 (4) Civil Code, Hoge Raad 18 May 1990, NJ 1990,556 de Kroon/Ennia -case

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.***

The guideline sets out fair parameters to which both contractual parties to a marine insurance contract are obligated in case of (essential) non-compliance. Furthermore it *degenerates* the universal rule that if a contractual party does not comply with a contractual obligation, they will be liable in damages to opposed party in the contract. The question is to what extant can the aggrieved party hold its contractual counterpart liable? The above guideline seems to place the material facts and the essential terms on a scale; providing an interesting benchmark. However in daily practice it will be found difficult to apply these objective rules, to subjective matters as an insurance contract.
Especially placed in the light of test of materiality, which is primarily used with reference to the element of wrongfulness, namely, as a requirement for liability distinct from the element [30]of inducement[31] or by the highly subjective reasonable man test[32].
Analogous to the above guideline the Dutch legislator codified in Articles 7.1.17.4, 7.1.17.5 and 7.1.17.6 of the Civil Code, to terminate or temporarily suspend the contracts cover in absence of material conditions as a failure to disclose and misrepresentation or when in breach of non-essential terms-again- relating to a failure to disclose and misrepresentation. In addition it is of interest that the Dutch Supreme Court (Hoge Raad) in its verdicts has a preference for the social aspect when materiality is disputed, social aspects is translated to continuation of the insurance contract instead of the economical termination of the disputed contract.

[30] Schadeverzekeringrecht, by M.L. Hendrikse, 2002, pag. 115
[31] General Principles of Insurance, by M. Reinecke & S. van der Merwe, 1989, pag. 118.
[32] From Mutual and Federal Insurance Co Ltd v. Oudtshoorn Municipality, 1985 (1) SA

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.

The guideline is disputable, is it not a supplement to guideline #6? Doesn't the previous guideline provide the insurer with sufficient tools of action against absence of facts?
Obviously good faith, the active duty to disclose all material facts and to non-misrepresentation should be full induced by the both contractual parties. Moreover the insurer already posses the fair right to terminate or suspend the cover or to change his insurance conditions of the insurance contract in case of any absence of any material conditions.
If the absence non-material conditions will cause no problems for the coverage of future claims or the absence of the non-material conditions can not causative be linked to a loss the insurer should not be entitled to an additional claim for damages. In many cases the insurer will focus on the absence of material facts, which obviously often are causative linked to the loss and therefore easily to provide evidence. To prove that the absence of non-material facts is essential for the loss or the breach is far more difficult to establish for the insurer and will therefore be (at first instance) avoided by the insurer.
In Dutch Law the insurer has however the duty of disclosure is defined as a duty to disclose information that the assured possesses knowledge about, no knowledge will as a starting point imply that there is no breach, and that the insurer may not invoke any sanctions, like a right to cancel the contract, a right to claim additional premium, a right to claim freedom of liability for an incurred casualty, a right to partial reduction in the liability, and avoidance of the contract.

Conclusions

Although common marine insurance law and civil marine insurance law both originate from the same root[33]; there are as mentioned, still some basic differences between them.
Today' problems with insurance provisions in Common Law countries are precisely pointed out by the guidelines. Problems like the principle of warranty, the test of materiality and the absence of (utmost) good faith.
In many Civil Law systems like the Netherlands, the above concepts do not form a problem as they do not appear (to the same extend) in civil law insurance provisions. The main issue under Dutch Law is the active duty of disclosure, which is often intertwined with the concepts of alteration of risk and good faith; the 'currency' of the duty, the relevant information revealed by the prosper insured, and the possible sanctions in case of a breach.

Harmonization of both insurance systems will require that a willing attitude of the insurance markets towards changes which could result in an international and uniform marine insurance concept, from which the highly international focused shipping industry could benefit. The member states of the European Community have proved that harmonization of civil law and common regulations are not an impossible task[34].

I would like to finish this conclusion with a personal note; to my fair opinion the guidelines reflect the problems of the common law systems more than they are applicable to (marine) insurance provisions in of a civil law system like in the Netherlands. At times it was a struggle to make a clear comparison between the both of them. Especially, because of our Marine Insurance provisions are some what ill defined (although our extensive marine insurance history) in the Commercial Code and therefore Marine Insurance contracts in general are governed by the concept of "freedom of contract" and by the at the change of the millennium newly introduced principles of Insurance Law (Book 7 of the Civil Code) in which most provisions deal to a certain extant with the problems of the guidelines.

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[33] See Closing Statements on behalf of the Common Lawyers, by Prof. J. Hare, at International Marine Convention held in Antwerp in November 1999.

[34] Good faith now figures *expressly* in certain directives of the European Union, for example, the E.C. Directive on Commercial Agency, 99 the E.C. Directive on Unfair Terms in Consumer Contracts100 and the E.C. Directive on Distance Contracts, 101 all include explicit provisions on good faith & Article 7(1) of United Nations Convention On Contracts For The International Sale Of Goods, 1980 stipulates that the doctrine of good faith is to be used an obligation of good faith conduct in international trade.

Therefore I took the liberty to analyse the guidelines and subsequently indicate which Dutch regulations would apply to the implied problem set out in each guideline. Furthermore I would like to point out that I found -at times, *very*- difficult to deal with the term 'materiality', as there -in the various literature- is no uniform definition of the concept[35].

Although the marine insurance markets and their legislators in general are somewhat conservative, I think that the various recent reviews of the marine insurance legislation prove that reforms can improve the balance between the insurer and the insured and the circumstances in the market. And that the CMI'IWG' guidelines will be found a good "blue print" for future reviews of marine insurance legislation in common law countries. Especially for the greatest challenge of them all, the reform of the 1906 UK Marine Insurance Act!

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[35] Gordon & Getz, by D. Davids, 1993, pag. 130
- Brids' Modern Insurance Law, by J, Birds and N. Hird, 2004, pag.102 & 114-115
- General Principles of Insurance, by M. Reinecke & S. van der Merwe, 1996, pag. 117-118
- Shipping Law & Admiralty Jurisdiction in South Africa, by Prof. J.Hare, 1999, pag. 697.

The CMI' odyssey to harmonize international marine insurance law

An analysis of the CMI guidelines and their Dutch equivalents

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Kaapstad, October 2005