



INTERNATIONAL WORKING GROUP ON MARINE INSURANCE

DISCUSSION PAPER SINGAPORE, FEBRUARY 2001

Website note:

This document is intended to be nothing more than a focus on essential elements of marine insurance which might benefit from discussion by the IWG and in working sessions to be held at the CMI Singapore conference to be held between 11 and 17 February 2001. For conference information see www.cmi2001.com

The CMI's International Working Group on Marine Insurance (IWG) has, for the past two years, focussed on an evaluation of the national marine insurance laws of member countries. To that end, the IWG has

- Presented papers and discussion at the Oslo Conference in 1998
- Issued a CMI questionnaire on Marine Insurance late in 1999
- Presented papers and discussion at the Antwerp Conference in 1999
- Reviewed replies to the CMI questionnaire received from national associations
- Presented a preliminary analysis of those replies at the Tulane London Conference in May 2000
- Presented papers and a fuller analysis of those replies as they relate to certain key issues of marine insurance at the Toledo Conference in 2000
- Presented papers and a final analysis of replies relating to good faith, disclosure, alteration of risk and warranties at the Singapore Conference, 2001-01-16

The exercise thus far has been of great academic worth. For it now to progress to a level where it can make a meaningful difference to the way in which the law regulates marine insurance business, both domestically and internationally, the IWG needs a further mandate from the CMI in assembly.

This discussion paper attempts to set an agenda for discussion during the two sessions on marine insurance scheduled to take place at the Singapore Conference on Monday 12 February 14h00 to 17h00, and Tuesday 13 February 09h00 to 12h30. The IWG will seek guidance from the national associations in the form of answers to the following questions, *inter alia*. Answers to the questions of section A may be taken to the Assembly for confirmation, and will then be used as guidelines for any further steps to be taken by the IWG. It is premature to ask for formal answers to the specific issues raised in Section A,



which is included to facilitate discussion, and to gauge opinions from those present. The Section A questions will be taken forward from Singapore to a full consultative process.

A. GENERAL ISSUES

A.1 Is an evaluation of the national laws of marine insurance such as is presently under way by the IWG considered to be an exercise worth continuing?

- Academically
- In practice, for
 - the marine insurance industry
 - maritime lawyers?

IWG comment:

It may be that an answer to this paramount question will only be called for at the end of the debate.

A.2 If its mandate is to proceed further, should the IWG then identify

- Those areas of *similarity* in the approach of national legal systems to certain issues of marine insurance
- Those areas of *difference* where a measure of uniformity would better serve the marine insurance industry
- Those areas of difference where *differences are sound reason for competitive edge* and where seeking uniformity would be undesirable
- Those areas where *differences are profound*, and where seeking uniformity would be unrealistic?

A.3 In the process, should the IWG continue to seek to identify areas of the law of marine insurance which may be rationalised, clarified and generally improved, thereby serving the marine insurance industry and the shipping industry in which it operates?

A.4 Should the IWG seek solutions to problems in the law of marine insurance that allows the law to take into account and address

- The role which marine insurance should be playing in promoting the highest internationally accepted standards of safety at sea, with particular regard for the insistence upon and enhancement of safety of all marine personnel, both sea-going and shore-based.
- The current economic structures within which marine insurance is underwritten, taking into account *inter alia* regional co-operation, competition and regulation such as the EC
- The differences and similarities in the civilian and common law legal systems, both in relation to the content of substantive law, procedural issues, and idiosyncrasies in draughtsmanship?

A.5 Should the IWG's further efforts accordingly and in the context of the above general guidelines, be focussed upon certain issues of marine insurance, by means of a fully consultative process in which the IWG's goal is to produce:



Either [*the Singapore Conference to express a preference*]

- (a) a **Model Law upon Certain Issues of the Law of Marine Insurance**; or
- (b) an **International Convention on Certain Issues of the Law of Marine Insurance**; or
- (c) a set of **CMI Rules for the Regulation of Certain Issues of the Law of Marine Insurance**

for final discussion and, if approved by delegates, for adoption by the 38th International Conference of the CMI?

IWG comment:

*The IWG does not believe that a **Convention** is a realistic option. It would create a framework too inflexible for general acceptance in the market. A **Model Law** would give direction to those jurisdictions which are now engaged in a review of their domestic marine insurance legislation, and would hopefully foster uniformity in future approach. Marine Insurance **Rules**, (operating contractually, in a similar way as the York Antwerp Rules) may provide the most flexible answer, allowing for regular updating to cater for the demands of the market and the law.*

A.6 In preparing an international instrument, which of the following issues of the law of marine insurance should the IWG consider?

1. The formation of a contract of marine insurance – the proposal, slip and contractual formalities
2. The duty of good faith*
3. Pre-contractual (material) non-disclosure*
4. Pre-contractual (material) misrepresentation*
5. Failure to disclose (material) alteration of risk during period of cover*
6. Insurable interest as a pre-requisite for valid cover
7. Insured value – undervaluation and overvaluation
8. Implied terms
9. Ordinary wear and tear
10. Inherent vice – ship and cargo
11. Fault in design, construction & materials
12. Unseaworthiness generally
13. Inadequate maintenance
14. Breach of internationally recognised safety regulations
15. Misconduct of the assured, its servants and agents (identification) during the period of cover
16. Management of ship & shipowner and the ISM Code
17. Change of flag, class, ownership, management and crewing agency
18. Warranties – express or implied – and the consequences of their breach*
19. Breach of material terms of the policy, not being ‘warranties’, which automatically terminate the contract of insurance or which give the insurer the right to terminate on notice
20. Premiums – including method and place of payment, payment to brokers and grace period for non-payment
21. Loss – constructive, total and averaging
22. Claims – submission, good faith, time bar and prescription



23. Sue and labour
24. Subrogation
25. Insurance agents and brokers

IWG comment:

The IWG recognises that not all of the issues identified below may be suitable for inclusion in an appropriate international instrument, it being the aim of the IWG to identify those which are best left to domestic interpretation and those which should be included in the Model Law. The issue of causation is thought by the IWG to be based upon such disparate legal principles in the common and civilian legal systems as to defy any attempt at uniformity. It has thus been omitted from the list. Each issue will be dealt with separately below. Delegates are invited to present further topics for consideration by the IWG.

An asterisk indicates issues covered by the deliberations of the IWG thus far, and included in Prof Wilhelmssen's analysis of CMI questionnaire replies <Singapore 1 page 332 and www.comitemaritime.org>. These issues will be debated more fully in Singapore than others on this list which still require the attention of the IWG.*

- A.7 Should the IWG consider any specific aspects of P&I insurance which are not common to hull, cargo or freight policies?
- A.8 Should the IWG consider any specific aspects of Reinsurance which are not common to hull, cargo or freight policies?

B. SPECIFIC ISSUES OF MARINE INSURANCE

[The above list, *seriatim*]

1. THE FORMATION OF A CONTRACT OF MARINE INSURANCE – THE PROPOSAL, SLIP AND CONTRACTUAL FORMALITIES

Possible problem areas for future discussion include:

- Domestic requirements that the contract be in writing and/or formally executed
- The proposal and its 'fine print' being made *the basis of the contract*
- Minimum content of a marine insurance policy
- Signing of a slip as the formation of the contract - pre-contractual disclosure implications

IWG comment:

It is unlikely that any form of instrument would attempt to regulate the formation of a contract of marine insurance, though it the creation of an English law warranty by elevation of the proposal to being the 'basis of the contract', and the signing of a slip signifying the commencement of the contract may have bearing on the issues of the warranty and of disclosure respectively.



2. THE DUTY OF GOOD FAITH*

[Wilhelmsen §4 p79 - 85; cf §3.4.3 at p 68: §3.4.5 at p 72
ALRC p 99 - 123]

2.1 Should marine insurance law require

- from both parties to a contract of marine insurance
- strict adherence to
- objective / subjective
- standards of good faith, both
 - pre-contractually (part of which would embrace the obligation to disclose - see below), and
 - for the full period of cover,
- including during the submission of claims?

2.2 Should the accepted standard of faith be

- Good faith (eg Germany, France, Belgium and South Africa)
- Utmost good faith (eg England, the USA, Australia, and China)
- Defined in any way as to content? [cf Wilhelmsen § 4.3 p 85]

2.3 In the absence of such good faith, should that absence in itself give rise to the power of the aggrieved party to

- claim damages and/or
- rescind the contract
 - in all situations
 - only where the breach of the duty of good faith is in some way material to the risk or the loss/claim and/or has induced the innocent party into a position in which loss or prejudice may result
 - only where such breach amounts to a fraud?

IWG comment:

The IWG recognises the wide disparity in approach not only between the common law and civilian systems, but also in national regimes within those systems. It is probably easier to regulate the operation of principles of good faith within separate notions which embody elements of good faith (such as disclosure and alteration of risk) than to envisage a generally acceptable over-arching requirement of good faith (or utmost good faith) spreading throughout the contract. That such a principle has precedent in history and in current practice is clear. Much debate would be necessary to reach international consensus on the content of a general requirement of good faith and upon the consequences attendant upon its absence.

Nevertheless there is considerable support for the re-establishment of an actionable requirement of contractual good faith generally, and the IWG accordingly has not closed the door to the possibility of a bold approach to a general requirement of good faith in the contract of marine insurance, giving rise to a stand-alone remedy in the event of its absence. Any attempt at regulation of good faith would need to take into account mandatorily applicable international regulation such as the EC Directive on Unfair Terms in Consumer Contracts.



3. PRE-CONTRACTUAL (MATERIAL) NON-DISCLOSURE*

[Wilhelmsen 3 p 57 –68
ALRC 100 – 118]

IWG comment

In general, the common law jurisdictions regard the duty to disclose as part of the more general duty (ill-defined as it may be) to exercise good faith. Some systems regulate disclosure as a separate issue. Similarly, whereas some jurisdictions know no difference between positive misrepresentation and misrepresentation by silence as a breach of the duty to disclose, others regulate positive misrepresentation, but not passive failure to disclose. It is thus considered prudent to treat good faith, disclosure and misrepresentation separately at this stage. Issues of materiality impact however on all three concepts, and very similar issues are involved.

3.1 In marine insurance contracts, should

- the assured, and
- the insurer

be required by the operation of law

- during negotiations before the conclusion of the contract
- at times of renewal of the contract
- at all times during the contract

to disclose all material facts, each to the other?

3.2 Should the standard of materiality in relation to the duty to disclose be defined?

3.3 If so, should materiality be

- in relation to non-disclosure by the assured
 - material to the acceptance of the risk by the insurer and/or
 - material to the assessment of premium by the insurer
- in relation to non-disclosure by the insurer
 - material to the acceptance of cover by the assured
- determined with regard to the norm of
 - the insurer
 - the assured, or
 - a combination of both
- determined by standards of
 - objectivity, or
 - subjectivity, or
 - a combination of both?
 - other defined standards, such as “decisive influence”?

3.4 Should either party be able to waive the requirement of the duty to disclose

- generally, or
- specifically, in relation to particular facts not disclosed?



3.5 Should the duty to disclose include

- only facts subjectively known to the party on whom the duty rests
- facts which ought to have been known as constructive knowledge
- facts in objective common knowledge in the industry?

3.6 What sanction should follow a breach of a duty to disclose? Should there be

- a pre-requisite that the non-disclosure induced the innocent party into the contract?
- automatic termination of cover?
- voidability at the instance of the innocent party?
- cover, subject to payment of an increased premium sufficient to embrace the increased risk, and assessed with reference to
 - the particular insurer, subjectively, or
 - the insurance market, objectively?

4. PRE-CONTRACTUAL (MATERIAL) MISREPRESENTATION*

[Wilhelmsen § 3.2.2 p 349]

4.1 In marine insurance contracts, should

- the assured, and
- the insurer

be required by the operation of law

- during negotiations before the conclusion of the contract
- at times of renewal of the contract
- at all times during the contract

to refrain from misrepresenting any material facts, each to the other?

4.2 Should the standard of materiality in relation to the duty not to misrepresent be defined?

4.3 If so, should materiality be

- in relation to misrepresentation by the assured
 - material to the acceptance of the risk by the insurer and/or
 - material to the assessment of premium by the insurer
- in relation to misrepresentation by the insurer
 - material to the acceptance of cover by the assured
- determined with regard to the norm of
 - the insurer
 - the assured, or
 - a combination of both
- determined by standards of
 - objectivity, or
 - subjectivity, or



- a combination of both?
- other defined standards, such as “decisive influence”?

4.4 What sanction should follow a material misrepresentation? Should there be

- a pre-requisite that the misrepresentation induced the innocent party into the contract (‘actual inducement’)?
- automatic termination of cover
 - in all cases
 - only in cases of fraudulent misrepresentation
 - and then in all such cases, or
 - only where there is also inducement?
- voidability at the instance of the innocent party?
- cover, subject to payment of an increased premium sufficient to embrace the increased risk, and assessed with reference to
 - the particular insurer, subjectively, or
 - the insurance market, objectively?in relation to
 - all cases of misrepresentation, or
 - only in cases of innocent (unintentional) misrepresentation?

5. FAILURE TO DISCLOSE (MATERIAL) ALTERATION OF RISK DURING PERIOD OF COVER*

[Wilhelmsen § 5 p 375 – 385]

If there has been a material alteration of risk (upon which the same issues of materiality would arise as are dealt with in §3 above)

5.1 Should there be a duty imposed by the law on the assured to disclose this alteration to the insurer?

5.2 Is this duty to be regarded in the same light as, and to be governed by

- the same principles as apply to pre-contractual non-disclosure?
- general principles of good faith?

5.3 What sanction should follow a breach of a duty to disclose? Should there, as in pre-contractual non-disclosure, be

- automatic termination of cover?
- voidability at the instance of the innocent party?
- cover, subject to payment of an increased premium sufficient to embrace the increased risk, and assessed with reference to
 - the particular insurer, subjectively, or
 - the insurance market, objectively?



IWG comment:

There can be no requirement of inducement in relation to failure to disclose an alteration of risk. Many such failures to disclose would not necessarily be at the time of conclusion or renewal of the contract.

6. INSURABLE INTEREST AS A PRE-REQUISITE FOR VALID COVER

[ALRC Chap 7 p 127]

Possible problem areas for future discussion include:

- Should an assured be required to have an insurable interest in the property / the risk to be insured
 - at all
 - when concluding the contract
 - at the time of the loss
- If no insurable interest is required, should the law nevertheless outlaw insurance contracts which are mere wagers?
- Should insurable interest be defined as to its content?
- Should insurable interest in relation to cargo be treated the same as that in relation to ship?
- Should the law recognise for either ship or cargo?
 - PPI policies
 - Lost or not lost policies

7. INSURED VALUE – UNDERVALUATION AND OVERVALUATION

Possible problem areas for future discussion include:

- Should marine insurance be limited to contracts of indemnity?
- Should valued and unvalued policies be defined?
- Should
 - under-insurance,
 - double insurance and
 - over-insuranceand their respective consequences be defined?
- In relation to under-insurance, should the law
 - impose automatic averaging of claims
 - recognise averaging only where contractually agreed by the parties?



- In relation to double insurance, should the rights of insurers to a contribution *inter se* be statutory or contractual?
- Should the consequences of over-insurance, be determined with regard to ordinary principles of
 - fraud
 - breach of good faith?

IWG comment:

In certain jurisdictions, such as South Africa (quaere UK?) there is averaging by the operation of law only in relation to marine insurance, but not in non-marine, where parties must agree average. rights of contribution are similarly vague in certain jurisdictions.

8. IMPLIED TERMS

Possible problems for discussion include:

- Should there be implied terms recognised by the law?
- If so, what terms should be implied by law into
 - voyage policies,
 - time policies?
- When should such terms operate?
- Specifically, should implied terms relating to
 - seaworthiness of ship
 - seaworthiness of cargo
 - legality of voyage and purpose
 - change of voyage
 - deviation from geographical route
 - due dispatch in the prosecution of the voyage

be entrenched in a uniform law?

9. ORDINARY WEAR AND TEAR

Possible problems for future discussion include:

- Distinguishing ordinary wear and tear from fortuitous action of an insured peril
- Claims made in both good and bad faith for machinery damage resulting from ordinary wear and tear.

10. INHERENT VICE & LATENT DEFECT – SHIP AND CARGO

11. FAULT IN DESIGN, CONSTRUCTION & MATERIALS

12. INADEQUATE MAINTENANCE

13. BREACH OF INTERNATIONALLY RECOGNISED SAFETY REGULATIONS

[Wilhelmsen §7.4 p 400 - 402]



14. UNSEAWORTHINESS GENERALLY

[Wilhelmsen §7.3 p 397 – 400]

Paras 10 – 13 are closely related, and will need consideration with causative unseaworthiness. But seaworthiness generally may present special issues, including:

- The standards of sea/cargo-worthiness to be applied to ship and cargo. Should they be
 - predetermined?
 - objective? or
 - subjective? or
 - a combination of both?
- The requirement that such unseaworthiness be causatively linked to the loss
- The extent of that link.

15. MISCONDUCT OF THE ASSURED, ITS SERVANTS AND AGENTS (IDENTIFICATION) DURING THE PERIOD OF COVER

Possible problems for future discussion include:

- The extent to which general principles of agency cater for vicarious liability and identification of one person's actions with another
- The extent to which such vicarious liability or responsibility can affect a policy in which the assured obtains cover against his/her own actions.

16. MANAGEMENT OF SHIP & SHIPOWNER AND THE ISM CODE

Possible problems for future discussion include:

- The extent to which the ISM Code should be recognised
 - by law, and or
 - by contractas the yardstick of good management
- The extent to which failure to comply with the Code amounts to actual fault or privity of the assured in relation to Inchmaree type cover
- Policy terms in relation to the Code and to other codes such as the STCW

17. CHANGE OF FLAG, CLASS, OWNERSHIP, MANAGEMENT AND CREWING AGENCY

[Wilhelmsen §7 p 393 – 397]

Possible problems for future discussion include:

- The use of policy terms which require strict compliance failing which there is automatic termination of cover
- The scope of these terms, for instance, whether they should include crewing agency changes



IWG comment:

This measure, introduced in the Institute Clauses, is one of the most positive steps taken by the marine insurance industry to play a more active and effective role in ridding the seas of substandard, unseaworthy ships whose owners surround themselves in an ever-changing mist of anonymity and avoidance of accountability. Because they are unpopular in certain market circles, it may be that a measure of international uniformity that such clauses be mandatory in marine policies may give more strength to the insurance industry's arm in relation to this scourge.

18. WARRANTIES – EXPRESS OR IMPLIED – AND THE CONSEQUENCES OF THEIR BREACH*

[Wilhelmsen §6 p 385 – 390
ALRC Chap 5 p 62]

IWG comment:

The concept of the English law warranty giving rise to automatic termination of cover, and of its more acceptable counterpart, the civilian essential term, the breach of which gives a right to terminate the contract to the aggrieved party, has been dealt with fully in Prof Wilhelmsen's paper, in the ALRC and in other sources such as papers by Hare available on the UCT Marine & Shipping Law website at <www.uctshiplaw.com>. Yet, offensive as the English warranty may be to some commentators, they are nevertheless so well entrenched in English practice that they may present to the marine insurance industry perhaps the greatest challenge to reform. This area especially is one where underwriters and lawyers need to resolve whether change is desired. If certain aspects of the law of warranties is generally regarded as bordering on the immoral, and in need of reform, establishing international uniformity on that reform should help ensure that what have been judicially described as the 'toxic' aspect of warranties are removed from the equation of competitive edge.

18.1 Should the law of marine insurance recognise

- any policy term the breach of which automatically terminates cover?
- only terms, the breach of which, in appropriate circumstances (see 19 below) gives the aggrieved party the right to treat the contract as having come to an end?

18.2 If automatic termination of the contract upon breach is countenanced,

- should the breach be
 - causative of the loss
 - not necessarily causative of the loss, but nevertheless in relation to a material term (whatever the term may be called)?

18.3 Specifically in relation to the English warranty:

18.3.1 Should a warranty be

- implied by the law in any circumstances
- expressed by the parties in the contract?

18.3.2 If expressed, must such expression be specific, identifying that the term is a warranty and that its breach may give rise to

- a right to terminate
- automatic termination



18.3.3 Should a warranty be deemed as such by wording in a proposal stating that *the proposal is the basis of the policy*

- in any circumstances
- only if that 'warranty' be material to the risk / premium?

18.3.4 In essence, should the English law warranty be

- outlawed totally, in favour of the recognition of essential or material terms, and the consequences of their breach
- watered down to require that
 - the warranty be objectively material to the acceptance of the risk or the assessment of the premium
 - the breach of the warranty be causative of the loss

19. BREACH OF MATERIAL TERMS OF THE POLICY, NOT BEING 'WARRANTIES'*
[Wilhelmsen §6.3 p 391 – 393]

IWG comment

Most systems make use of the essential term (clause or condition), breach of which gives rise, in appropriate circumstances, to the right to terminate and claim damages. It is widely felt that were the warranty as such abolished, the insurer would be left with adequate means of avoiding loss where the assured falls far short of performance expectations.

Certain issues remain, including:

19.1 Should the parties be at liberty to agree in a marine insurance contract which terms are to be regarded as essential?

19.2 Should the law, in the interests of promoting safety at sea or for any consumer protection motivation, presume certain terms or types of terms as essential?

19.3 Should the law allow for automatic termination of the insurance contract in any circumstances short of fraud?

19.4 Should the law provide for automatic termination of an insurance contract where either party commits a fraud

- upon the other
- generally, upon third parties or the world at large

IWG comment:

It may be that the insurance industry should consider that commission of a fraud terminates the policy from the time of the fraud. In that it introduces an illegality to the contract, the consequences of a fraud should perhaps leave the aggrieved party without the option to overlook the fraud and proceed with the contract, perhaps even at the price of an AP.



20. PREMIUMS – INCLUDING METHOD AND PLACE OF PAYMENT, PAYMENT TO BROKERS AND GRACE PERIOD FOR NON-PAYMENT

Possible problem areas for future discussion include:

- Payment of premiums to brokers recognised by the law as payment to the insurer (who is not generally the broker's principal)
- Regulation of method and place of payment
- Payment of premiums other than in money
- Notice of non-payment and periods of grace for non-payment of premiums

21. LOSS – CONSTRUCTIVE, TOTAL AND ABANDONMENT

Possible problems for future discussion include:

- Types of losses recognised by marine insurance
- The consequences of such types of loss, especially
 - in relation to CTL, the requirement of notice of abandonment

IWG comment

Not all jurisdictions recognise CTL and ATL differently in law. To those which do not know the concept of a CTL, notice of abandonment is a formality with which they may easily fall foul.

22. CLAIMS – SUBMISSION, GOOD FAITH, TIME BAR AND PRESCRIPTION

Possible problems for future discussion include:

- Unfair
 - notice of claim provisions
 - reporting of loss provisions
 - contractual time-bars
- Lack of international uniformity in legal prescription of insurance claims
- Absence of good faith in the submission and support of claims, especially whether, in the absence of fraud, 'puffing' supporting documentation for a claim vitiates cover.

23. SUE AND LABOUR

Possible problems for future discussion include:

- The power to sue and labour
- The duty to sue and labour
- Sueing and labouring and indemnity and the resulting ability to recover more than the insured value



24. SUBROGATION

Possible problems for future discussion include:

- Subrogation of the insurer to the rights of the assured being an automatic consequence in law only upon full payment of a claim
- Contractual subrogation to take effect either before payment or upon part payment of a claim

25. INSURANCE AGENTS AND BROKERS

[ALRC p 155]

Possible problems for future discussion include:

- The nature of an insurance agent and an insurance broker
- Regulation of rights and duties of both
- Regulation of the conduct of agents and brokers
- Payment of premiums to brokers
- Dual mandates in which brokers act both for insurers and for the assured.

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