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The purpose of this paper is to raise for discussion the question of whether the law of marine insurance is in need of review.

In the recent past, marine insurance has been set apart from the legislative reform process in each of the United Kingdom(1) and Australia(2), largely on the basis of it being seen as a separate market governed by long standing rules of practise and administered by experienced practitioners whose everday dealings involve all aspects of the insurance contract. An additional factor at play in excluding marine insurance from the scrutiny of national legislative reformers has been its central role in a competitive international market.

That is not to say however that we should not pause to consider from time to time whether the principles upon which marine insurance is based continue to provide effective service to the parties to the marine insurance contract.

Insurance, in one form or another, has been with us for some thousands of years - at least since Babylonian times(3). A rudimentary form of transit insurance has been described in the writings of Cicero, although some commentators argue that marine insurance as we know it today did not start until the twelfth or thirteenth centuries in Italy(4). The rules

governing the practise of insuring risks have developed over the intervening years. The more recent milestones of the development of marine insurance in the United Kingdom and hence in Australia and internationally can be marked by:

- the establishment of Lloyds in the latter part of the 17th century and the early part of the 18th century;
- the adoption of the SG Policy wording in 1779;(5)
- the formation of the Institute of London Underwriters ("the Institute") in 1884;(6)
- the subsequent development of standard trade clauses under the aegis of the Institute;
- the codification of English law in the Marine Insurance Act 1906;(7)
- the abolition of the SG Policy form and the revision of the Institute clauses in 1982 and 1983; and
- the preparation and promulgation of the UNCTAD Model Clauses on Marine Hull and Cargo Insurance in 1988.(8)

The revision of the Institute Cargo Clauses and Institute Hull Clauses followed hot on the heels of the release by UNCTAD of its Report into the Legal and Documentary Aspects of the Marine Insurance Contract.(9) Whether or not the changes were prompted by the criticisms made in the UNCTAD report is really irrelevant. The facts are that the Technical and Clauses Committee of the Institute did revise their clauses and that London market representatives subsequently worked with the International Shipping and Legislation Working Group of UNCTAD to assist in preparation of the UNCTAD Model Clauses.(10) The result has been a strong resemblance

between the UNCTAD Model clauses and the new Institute clauses and a degree of international uniformity so far as the contract terms are concerned.

The question I wish to pose is whether that is the end of the reform process or whether further work remains to be done.

On the one hand the new Institute Clauses have been as a continuation of the "mainstream" of the Act and the decided cases on the old terminology.(11) That view presumes that the Marine Insurance Act continues to provide a viable framework within which to interpret the new clauses. It does not address the wider question of the role the Marine Insurance Act has to play in the development of a consistent international legislative regime.

A contrary view is that the Act is out of date in that its central doctrines were formulated 200 years ago and were the subject of codification some 90 years ago. It has not kept pace with the changes since its codification and the introduction of revised standard clauses will not be sufficient to modernise the law.(12) In important areas the Act remains an inflexible and unsatisfactory instrument for the purpose of dealing with all claims which come within its purview.

The contest will always be between the need for certainty on the one hand and the need for any law to provide for just and equitable resolution of differences on the other. This contest was referred to in the Memorandum attached to the Marine Insurance Bill when it was first introduced by Lord Herschell to the House of Lords in 1894:

> "In dealing with rules of law, which may be modified by the stipulations of the parties, it is to be borne in mind that the certainty of the rule laid down is more important than its theoretical perfection. As Willes J. said in 1786, "In all commercial transactions the great object is certainty; it will therefore be necessary for the court to lay down some rule, and it is of more consequence that the rule should be certain than whether it is established one way or the other" (Lockyer -v- Offley 1TR at 259. See, too, Sailing Ship Blairmore -v- Macredie [1898] A.C. at 597, per Lord Halsbury). What mercantile men require is a clear rule to provide for cases where the parties have either formed no intention or have failed to express it clearly. Where the rule of law is certain, the parties know when to stipulate and what to stipulate for."(13)

The need for certainty remains an important factor today in any review of the law. The vast majority of cases are dealt with by commercial men without recourse to lawyers - let alone to the courts. An example of the volume of claims settled by Lloyds and Companies in the London market in one year was given by Donald O'May in 1987.(14) The figure given was close to 1.6 thousand million pounds (Pounds 1,600,000,000) for hull and cargo claims. Against that total the number of cases litigated on a yearly average was very small. The figure given was for 1985 but one would expect similar ratios to apply at the present time. It is clearly the certainty of the established rules of law which enables this to be done. The over-riding need however is to balance the desirability of such certainty with the need to look at and discuss those parts of the Act which appear not to work effectively.

The Act was a codification of the law as it existed at the turn of the century. Up to that time the law of marine insurance rested almost entirely upon common law - covering over 2,000 reported cases. The primary doctrines around which the Act was built were:

- non-disclosure
- warranties
- seaworthiness
- deviation
- abandonment
- general average (14).

The MIA 1906 did little more than enshrine those doctrines as law as they existed in the latter part of the nineteenth century. They have not been subjected to comprehensive scrutiny and review in the intervening period. The serendipitous way in which cases and facts involving particular sections of the Act come before the courts and are fought there does not necessarily mean that the Act is modernised and kept up to date. Indeed, one commentator has expressed the view that the MIA 1906 has impeded the development of the law of marine insurance.(16)

However, prospective reformers of marine insurance need to be very cautious about the question of reform in any local or parochial setting - particularly when the subject for reform is likely to be the Act. The influence of the legislative regime contained in the Act has been widely felt across the world. This has occurred directly by incorporating the MIA 1906 into local legislation as has been done in Australia, New Zealand, India and Kenya . In some areas it is the practice of the

local judiciary to refer to British law. The courts in the United States of America have accorded great weight to the MIA 1906 in the past, although the decision in Wilburn Boat Company -v- Fireman's Fund Insurance Co., (17) marked a watershed in that harmonious relationship. In other countries, such as Thailand, Hungary, Denmark, Norway, Finland and Sweden insurers provide for reference to British law by contractual stipulation in the marine insurance policy.(18)

Another source of influence in the international setting is that of the French marine insurance regime. Until the latter part of the 1960's the legislative base for French marine insurance was the Civil Code of 1803 and the Code of Commerce of 1807. The Code of Commerce had its origins in the *Ordonnance sur la Marine* published by Colbert in 1681.(19) Reforming legislation was contained in the Law of 3 July 1967 ("the 1967 Law")(19) and the Decree of 19 January 1968.(20) The 1967 Law was the result of a review by a commission of lawyers, judges and practitioners. In very brief terms the 1967 Law has three main divisions, being:

(i) general rules as to the nature and character of the law;

(ii) rules common to all types of marine insurances relating to
- conclusion of the contract,
- obligations of the insurer and the insured,
- adjustment of the indemnity;

(iii) rules for particular types of marine insurance
- hull insurance
- cargo insurance
- liability insurance.(21)

The 1967 Law seeks to govern all insurance contracts which have for their object the coverage of risks relating to maritime transport. The combined effect of Articles 1 and 54 of the 1967 Law is that it provides a unified legal regime which covers the entire transit where one leg of that transit involves an ocean voyage.

In addition to the review of the marine insurance regimes of United Kingdom and France, a review was undertaken by UNCTAD of certain countries in the Latin American area. The conclusion emerging from that latter review was that no single source of influence was observed to exist. The countries analysed belonged to the civil law tradition and the French Code of Commerce of 1807 and the Spanish Code of Commerce of 1829 and 1885 have had some influence. Also, in Colombia, the Commercial Code reflects many of the provisions of the MIA 1906.(22)

For the purposes of this paper, the fact remains that whilst the marine insurance regime of the United Kingdom is a primary source of influence, other regimes do have an effect on the global marine insurance market. The case for reform should therefore be approached from an international point of view.

The review by UNCTAD of the legal and documentary aspects of the marine insurance contract led to the promulgation of non-mandatory Model Clauses on marine hull and cargo insurance. In the same way as the Institute Clauses will fail to be construed in the context of the Marine Insurance Act, so too will the UNCTAD Model Clauses be construed in the context of the relevant national legislative regime. I am not aware of any move by UNCTAD to carry its review on to a second stage to promote discussion of

the existing national legislative regimes and discussion of the desirability or indeed feasibility of drawing up a uniform legislative code.

The better course would appear to be to work towards a review of the various legislative regimes that exist and bear upon marine insurance in the international setting. That review may take place under the aegis of UNCTAD or of some other international body. I believe that such a review would most effectively be expressed in the form of an international convention. Many of the facets of international trade, of which marine insurance is a part, are already regulated by international convention. These include carriage of goods by sea,(23) carriage of passengers and their luggage by sea,(24) combined transit risks,(25) and international sale of goods.(26)

Such international discussion of the legislative regimes may also provide an opportunity to devise a consistent framework to handle transit risks generally as opposed to merely marine risks.

My remarks thus far have been couched in very general terms. It may be helpful if I turn to the specific and discuss ways in which the MIA 1909 has been seen to be less than effective and highlight areas which may realistically be the subject of discussion with a view to reform.

I have cautioned against a parochial approach to reform of the Act, but I should make reference to a discussion held under the aegis of the New South Wales branch of this Association in March this year.(27) On that occasion a number of practitioners highlighted those parts of the MIA 1909

which may be considered for amendment or reform. Some areas are relatively straightforward and will not provoke much discussion. In other areas, notably non-disclosure and warranties, discussion of review and reform is likely to be more animated. The matters flagged for discussion and the arguments posited in this paper should not be taken to be exhaustive of the likely areas for eventual review. Reference in the paper below is made to sections of the MIA 1909. A table setting out the companion sections to the MIA 1906 and to the Marine Insurance Act 1909 (NZ) is set out in a schedule to this paper.

Mixed sea and land risks - s.8 of the MIA 1909.

In some circumstances an insurer may issue a single policy covering both import and export risks as well as inland transit risks which are not incidental to an ocean voyage. In those circumstances the policy will fall within the ambit of each of the MIA 1909 and the Insurance Contracts Act 1984. In that case the obligations of the parties to the contract will differ according to which act is applied.

The United Kingdom Law Commission report(28) made reference collectively to the marine aviation and transport insurance fields as warranting the exclusion from the Commission's recommendations on "Non Disclosure and Breach of Warranty" in the general insurance area. Without taking issue here with any implication made by the Commission as to the adequacy of marine insurance law in the area of non disclosure and breach of warranty, its acknowledgement of the industry classification, grouping policies within the MIA 1906 and analogous aviation and transport policies under the category of "MAT" insurance is a useful pointer. Transport is increasingly being seen as a homogeneous endeavour. There will be

increasing demand for transport related insurances whether they be marine, aviation or other, to be treated in a consistent way.

Insurable interest s.12 of the MIA 1909.

The question of "lost or not lost" was considered in the recent case of NSW Leather Co Pty Limited -v- Vanguard Insurance Company Limited(29). That case is the subject of a separate paper at this session and will not be dealt with here, save to say that the treatment of the case by the courts has unfortunately led to some confusion in the market as to the meaning of the clause in practical terms.

Disclosure by assured s.24 of the MIA 1909.

I believe that discussion is warranted on the disclosure provisions on two bases being whether the provisions operate too rigidly in favour of the insurer and secondly whether the sanction of avoidability in all cases is too onerous a penality.

The underlying principle is that the marine insurance contract is based on the utmost good faith and if utmost good faith be not observed by either party the contract may be avoided by the other.(30) One cannot quibble with that as one of the most fundamental tenets upon which marine insurance is based. It bears upon both parties to the contract, but is usually applied in relation to the conduct of the assured. On one view however it bears more heavily and more unreasonably on the assured than on the insurer.

The MIA 1909 provides(31) that the assured must disclose every material circumstance which is known to the assured. A circumstance is material if

it would influence the judgment of a prudent insurer. If the assured fails to make the required disclosure, the insurer may avoid the contract.

The difficulty arises in relation to two questions, being, what is meant by "influence the judgment" and the notion of the "prudent insurer".

As to the meaning of "influence the judgment", those words fall short of requiring that the prudent insurer was induced to enter into the contract by the non-disclosure. Nor ought they be taken to mean that the non-disclosure need have a decisive influence on the mind of the prudent insurer.

The section was considered and construed in CTI -v- Oceanus.(32) That case concerned inter alia non-disclosure of the claims experience of previous insurers of containers used in ocean transport.

The Court of Appeal reviewed the question of the meaning to be given to "influence the judgment" of the prudent insurer. According to Lord Justice Kerr:

> "The word "influenced" means that the disclosure is one which would have had an impact on the formation of [the prudent underwriter's] opinion and on his decision-making process in relation to the matters covered by s.18(2) MIA 1906]"(33)

Lord Justice Stevenson held a similar view concluding:

> "... that everything is material to which a prudent insurer, if he were in the proposed insurer's place would wish to direct his mind in the course of considering the proposed

insurance with a view to deciding whether to take it up and on what terms, including premium. His mind would, I think, be influenced in the process of judging whether to do so, either temporarily where he could say that he would ultimately have reached the same decision without it, or permanently where it would have led him to reach a different decision."(34)

It is interesting to compare the views of the Court of Appeal with the views of Lord Mansfield in 1766 in the decision of Carter -v- Boehm(35). The premises upon which Lord Mansfield proceeded in that case may be summarised as follows:

"Although the suppression should happen through a mistake, without any fraudulent intention; it is still the underwriter who is deceived, and the policy is void; because the risque run is really different from the risque understood and intended to be run, at the time of the agreement ... The question therefore must always be whether there was, under all the circumstances at the time the policy was underwritten, a fair representation; or a concealment; fraudulent, if designed; or, though not designed, varying materially the object of the policy, and changing the risque understood to be run."(36)

The present day proposition would have to be that it does not matter whether the risk understood and intended to be run at the time of the agreement was different because of any non-disclosure. It is sufficient if it is merely a factor that the prudent underwriter would wish to consider.

For the purposes of discussion, it is helpful to consider other national legal regimes on the point of non-disclosure. The Norwegian insurance conditions(37) provide that where an assured has not acted fraudulently but has failed to perform his duty of disclosure, and where it is established that the insurer would have accepted the contract if he had been fully informed, but on different terms and conditions, then the insurer will be liable if it is proved that the loss is not attributable to the non-disclosed or misrepresented information. Provision is made in that case for termination of the contract by the insurer on 7 days' notice. If the insurer is able to establish that he would not have accepted the contract if fully informed, then he is free from liability. Where an assured has made incorrect or incomplete disclosure without fault on his part, the insurer is liable as if full disclosure had been made. He may however terminate the insurance on giving 14 days' notice.

A different approach arises under French law. The basic rule there is that non-disclosure of material information or misrepresentation which "appreciably" diminishes the insurer's opinion of the risk renders the contract voidable even though the misrepresented information was not connected to a loss under the policy. If however, the assured can prove good faith then two possibilities emerge. If it is determined that the insurer would not have covered the risk had he been fully informed, then the contract is voidable. If it is determined that the insurer would have covered the risk, but at a higher premium, then the insurer's liability for loss is reduced in proportion to the ratio between the premium actually paid and the premium which would have been charged had the insurer been fully informed (the "proportionality principle").(38)

The other point which is worthy of consideration in relation to s.24 MIA 1909 is the question of the "prudent" insurer. The assured is obliged by the Act to disclose all facts which a prudent underwriter may wish to know. That appears to be a more onerous burden than any which bears upon the assured in any other walk of life. He is obliged to make an assessment of what information would be material to a specialist underwriter when he would in all likelihood have no experience about what would or would not be material. The situation is ameliorated to some extent by the interposition of specialist brokers between the assured and the insurer in the traditional United Kingdom and related markets. However that does not entirely protect the assured.

The wording of the Act in relation to the prudent insurer can also lead to anomalous results when one looks at the way in which the insurance market operates in real terms. There will always be cases where an underwriter will take on a risk for commercial reasons other than those moving a "prudent" underwriter. Some underwriters will say that they cannot afford not to write a fixed line on every risk presented by a particular broker. Others will concede that they will from time to time write a "loss leader" in the hope of getting another line of business.(39) In that case an underwriter may be able to avoid a policy for non-disclosure where the risk run was exactly the same as the risk intended to be run by him.

I believe there is fertile ground for discussion of the non-disclosure principles generally and in particular whether the outright sanction of voidability might be given more limited scope and the "proportionality principle" introduced.

Voyage and time policies s.31(2) MIA 1909.

It is questioned whether a time policy limited to 12 months is appropriate in all circumstances. Builders' risks, policies covering construction of vessels are frequently issued for periods in excess of 24 months. The equivalent provision in the MIA 1906 has been repealed.

Floating policies s.35 MIA 1909.

Policies arranged on an annual turnover basis do not seem to be caught by the wording of the section. There is thus no obligation on the assured to "honestly state" the value under an annual turnover policy for adjustment purposes.

Double insurance s.38 and s.86 MIA 1909

No clear method of apportioning the loss between insurers has been provided in the Act. The competing methods of apportionment are the "maximum liability method" and the "independent liability method". The case of Commercial Union Assurance -v- Hayden(40) supported the use of the independent liability method. Some discussion and clarification of the appropriate method would ease the confusion which presently exists.

Warranties s.39 Marine Insurance Act 1909

Promissory warranties as set out in division 7 of the MIA 1909 go to the heart of marine insurance. They have their roots in an earlier time when the very existence and wellbeing of civilized society was believed to rest upon the performance of promises. If an assured promised something then he should fulfil his promise.(41) As expressed in s.39 and s.40 of the Marine Insurance Act 1909, the assured promises that a particular thing shall or shall not be done or that some conditions shall or shall not be

fulfilled or that he affirms or negatives the existence of a particular state of facts. The Act demands exact compliance with the warranty whether it be material to the risk or not and whether it be remedied prior to the loss or not.(42) The rule has proved to be a bitter pill for some courts to swallow given the facts of some matters that have come before them.

The Act presumes an equality of bargaining power on the part of the insured and the insurer. That does not always exist now and one must wonder whether it ever existed. It may have been the case in the very early days of marine insurance when the assured was likely to have been a joint venturer in the marine adventure with an interest in each of the cargo and the ship but it is some years since that state of affairs existed.

The United Kingdom Law Commission(43) recorded representations made to it about whether private individuals who own sailing boats and pleasure craft and who obtained insurance within the terms of s.1 of the MIA 1906(44) should be grouped together with the professionals whose everyday business dealings involve the making and carrying out of marine insurance contracts. There is a case to be made for excluding pleasure craft and similar vessels from the ambit of the Marine Insurance Act.

In the 1985 decision in Knezevic -v- Sanderson & Ors(45) the Honourable Mr Justice Hunt expressed some impatience with the continued application of the warranty provisions in the pleasure craft setting. That case concerned a claim for damages as a result of injury sustained by a swimmer struck by a pleasure boat whilst snorkelling in Sydney Harbour. The insurer alleged that the driver of the boat was unlicensed and in breach of the Water Traffic Regulations (a licence was required if the vessel

travelled at more than 10 knots). The insurer was not able to establish that the boat was travelling in excess of 10 knots at the time of the collision, however, it was alleged that the boat did proceed at more than 10 knots at some time during the voyage in question. The insurer relied upon s.39 and s.47 (warranty of legality) of the MIA 1909. In relation to the warranty provisions His Honour said:

> "Whatever justification there may have been for these provisions of the Marine Insurance Act in 1909 [s.39 and s.47] - and it is difficult to see how any justification remains nearly three-quarters of a century later - they are surely wholly inappropriate to "Pleasure Craft Insurance" policies which relate to small runabout boats which are used in enclosed waters such as Sydney Harbour. There seems to me to be little if any difference in the insurance requirements of the owners and drivers of such boats and those of the owners and drivers of motor vehicles on the public roads. Anyone with any experience of boating on Sydney Harbour at most times during the weekend would be hard put to tell the difference. This is a matter to which urgent legislative attention should be given by both State and Federal Parliaments."(46)

His Honour went on to find as fact that the boat had not exceeded the speed limit and accordingly he did not need to deal with the issue of the warranties. His Honour's comments however reflect a sentiment which is to be found increasingly in both the United Kingdom and Australia.(47)

Whilst the concepts of non-causative breach of warranty entitling the insurer to avoid the policy are steeped in antiquity, one can question their continued role from the point of view of fairness and equity to the assured. This is not only with pleasure craft.

There is no doubt either from the cases or from a reading of the Act(48) that in the case of voyage policies there is an implied warranty of seaworthiness at the commencement of the voyage. Regardless of what the assured may subsequently do to remedy the unseaworthiness and whether or not any loss is related to that unseaworthiness, the insurer may avoid the policy. The only saving grace is that voyage policies are less frequently used now than previously. There is surely some merit in reviewing this provision.

There would also seem to be some difficulty in reconciling the absolute warranty of seaworthiness in voyage policies with the cover given in the Institute Voyage Clauses-Hulls. In clause 4.2(49) the cover given is illusory unless one disregards the warranty of seaworthiness altogether.

The effect of the warranty of seaworthiness of goods has been modified from the point of view of cargo policies in relation to s.46(2)(50) of the Marine Insurance Act by the addition of clause 5.2(51) waiving any breach of warranty.

So far as time policies are concerned, s.45(5) of the Marine Insurance Act 1909 provides that there shall be no implied warranty as to seaworthiness. However, the matter does not rest there. If a vessel is lost at sea, but not through unseaworthiness within the privity of the assured, the insurer may still decline cover under the Institute Hull Clauses and assert that the loss occurred as a result of unseaworthiness rather than as a result of peril of the seas. This effectively places the onus back on the assured to show that before the casualty the vessel was seaworthy.

94.	88	88	Reasonable time etc a question of fact
95.	90(repealed)	89	Reference to slip or cover note