AUSTRALIA: STILL A NATION OF CHALMERS?

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The UK's Marine Insurance Act 1906 was passed following a 12-year gestation period during which Sir Mackenzie Chalmers, the great codifier of the common law, analysed and extracted from 150 years of judicial authority a set of principles which was designed to reflect the law as it stood in 1906. The measure is now enshrined, in largely unamended form, in the law of most common law jurisdictions, with Australia following suit by the Marine Insurance Act 1909 (Cth). The 1906 Act was in part redundant by the time it was passed, and much of the remainder of it has been overtaken by many hundreds of judicial decisions, market practice and standard terms of contracting. Many of the solutions to modern issues are despite the measure and not because of it. Australia has had two opportunities to put the 1909 Act out if its misery but has passed on both. First, marine insurance was omitted from the terms of reference which led to the Australian Law Reform Committee's Report No 20 (1982), and the Insurance Contracts Act 1984 (Cth) duly excluded maritime contracts. Secondly, the Australian Law Reform Committee had a further look at insurance in 2001, this time specifically at marine insurance, but its Report No 91 was somewhat tame in its recommendations: only minor changes to the 1909 Act were recommended and few of them were actually effected. This paper suggests that it is time to administer the coup de grace (dictionary definition – 'to end the suffering of a wounded creature') and to repeal the marine legislation. After 100 or so years, even the best of Chalmers show their age.

I THE EARLY HISTORY OF INSURANCE

Marine insurance is the oldest form of insurance known to the common law world. Its origins have been considered in a number of important works,[1] and there is also a detailed analysis in the judgment of McHugh J in *Gibbs v Mercantile Mutual Insurance (Australia) Ltd*.[2] Those origins will not be rehearsed at length here;[3] it suffices to say that a great debt was owed to Lombard merchants[4] and that the business of marine insurance was firmly established in England by the fifteenth century, although a recorded marine

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1 Charles Trennery, *The Origin and Early History of Insurance* (1911); James Park, *A System of the Law of Marine Insurances* (8th ed, 1842); Charles Wright and C. Ernest Fayle, *A History of Lloyd's* (1928); D.E.W. Gibb, *Lloyd's of London* (1956); Barry Supple, *The Royal Exchange Assurance* (1970); George Clayton, *British Insurance* (1970); Harold Raynes, *A History of British Insurance* (3rd ed, 1983); J.P. Van Niekerk, *The Development of Insurance Law in the Netherlands* (1998); David Jenkins and Takaru Yoneyama *The History of Insurance* (2000). See also the summary in: Australian Law Reform Commission, *Review of the Maritime Insurance Law Law 1909 (Cth),* Report No 91 (2001) 63-68.

2 [2003] HCA 39.

3 See also Robert Merkin and Jenny Steele, *Insurance and the Law of Obligations* (2012) ch 2.

4 The earliest existing policy, issued in Genoa, is dated 1347: William Vance, 'The Early History of Insurance Law', in Committee of the Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History* (1909) vol 2, 98, 105.

insurance dispute did not reach the courts until 1547.[5] Early policies on hull and cargo were in the form of bottomry and respondentia. These arrangements were essentially loans, repayable with interest if the subject matter arrived safely but to be retained if there was a loss. We know something of how business was conducted from various contemporary documents, including the decision in *Ridolphye v Nunez* which involved a dispute on a policy written in 1562, the court noting 'The use and custom of making bills of assurance in the place commonly called Lumbarde Streete of London'.

The centre of underwriting moved from Lombard Street to the Royal Exchange on Cornhill in 1570, following the grant of a charter by Elizabeth I. The Chamber of Assurances thus established operated as an underwriting centre and an arbitration centre, and in 1575 it was designated by Letters Patent as the registry for marine policies, the latter measure designed to deter 'evil-disposed people' from taking out two policies on the same subject matter. Double insurance was one thing, but gambling was another: there is much evidence of wagering policies being issued in substantial numbers in this period. The Chamber of Assurances was of major significance and, although it was destined to last for only a century, many of the practices which still prevail were developed under its auspices, including the use of brokers to place business and the gradual standardisation of wording for marine insurance which was to become the Lloyd's SG Policy in 1779 and which remained in use in England until 1982.

Although marine insurance was the earliest form of cover, life insurance had also begun to emerge in the period covered by the Chamber of Assurance. The first life insurances took the form of death and funeral benefits provided by mutual societies, but by the fifteenth century life insurance in Continental Europe had additionally become a recognised form of gambling on the lives of famous individuals. The practice of life insurance spread to England in each of these forms, and also by policies on the lives of maritime captains and crew[6] who were unfortunate enough to be captured and held to ransom by pirates. The link between marine and life insurance is demonstrated by the fact that the oldest recorded policy, on the life of William Gibbons, dated 18 June 1583, was actually registered at the Chamber of Assurances. Twenty years after the foundation of the Chamber of Assurances, Parliament established a special court – the Court of Assurance – to hear claims on hull policies. The Court of Assurance was manned by commissioners who dispensed with the formalities of the common law courts and did not rely upon pleadings. This was at a time, however, when the senior courts were fighting over jurisdiction by the use of fictions and other devices, and a trio of cases effectively undermined the Court of Assurance: *Came v Moye*,[7] holding that an assured who lost in the Court of Assurance could bring a further action in Chancery; *Dalbie v Proudfoot*,[8] ruling that the Court of Assurance had no jurisdiction over claims brought by underwriters; and *Denoyr v Oyle*,[9] rejecting the suggestion that life cases could be heard by that Court. It inevitably faded away, leaving little record of its decisions.

By the middle of the seventeenth century, therefore, marine and life insurance were well established in England, marine insurance through City merchants and life insurance increasingly through mutual societies, although both forms of cover were attended by a significant amount of gambling. The Royal Exchange was destroyed in the Great Fire of London in 1666, but the bad luck of the marine insurers was a trigger for an entirely new

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5 *Broke v Maynard*, (Selden Society) Vol XI, p 47. The earliest traced claim was filed in the Court of Admiralty in 1524: See Reginald Marsden, *Select Pleas in the Court of Admiralty* (1897) vol II, 47-49.

6 Slaves were insured as chattels. See the famous case of *Gregson v Gilbert* (1783) 3 Douglas 233, holding that throwing slaves overboard to preserve drinking water was not a peril of the seas.

7 (1658) 2 Sid 121.

8 1 Show 396.

9 (1649) Style 166

market, that of fire insurance for commercial buildings, with the first fire office being formed in 1680 and six more coming into existence by 1720. The first contents fire insurance can be traced back to 1708.

II THE FORMATIVE PERIOD: THE EIGHTEENTH CENTURY

This period is one of the most significant for insurance. There were a number of developments which resonate today.

The first was the foundation of Lloyd's. Coffee was introduced into England in the seventeenth century and coffee-houses sprung up in all fashionable areas. They soon became meeting places for merchants, and in 1688 Edward Lloyd opened his coffee house in Tower Street, relocating to Lombard Street in 1691. The first record of Lloyd's is in an advertisement in the London Gazette, dated 18-21 February 1688-9, offering 'a reward of a guinea for information about stolen watches, claimable from Mr Edward Lloyd's Coffee House in Tower Street'. Stolen watches were soon followed by auctions of ships and landed estates, but not – at least in the lifetime of Edward Lloyd himself, who died in 1713 – the underwriting of marine risks. That happened in other parts of London, and marine insurance remained a speculative venture partly because of the massive losses which could be inflicted in time of war. In the Battle of Lagos in 1693, some 92 merchant vessels were lost from an English/Dutch fleet which was attacked off Smyrna by a French fleet, and underwriters were simply unable to meet most of the claims. One of the consequences was the practice of brokers retaining premiums for a given period rather than paying them directly to underwriters, by way of security for any claims that might later arise, and it may be this which gave rise to the common law marine rule that the responsibility of paying premiums rests with brokers and not the assured.

The expansion of Lloyd's into marine insurance was prompted by the second dramatic event, which had its origins in the death of Charles II of Spain in 1701. He was succeeded by Philip V, the younger son of the Dauphin of France. Fears of the unification of the French and Spanish thrones led to the War of the Spanish Succession, in which the protagonists were France and Spain on the one hand and most of the rest of Europe on the other. The wider coalition prevailed, ultimately by the Treaty of Utrecht 1713, but at some financial cost. That was met under an arrangement between the English Government and the South Sea Company, which had been formed in 1711. Under the arrangement, a part of which is enshrined in the Treaty of Utrecht, the Company assumed most of the National Debt for shares and exclusive trading rights in the Americas. The example of the South Sea Company prompted individuals to follow the example and to float companies which raised capital in speculative ventures overseas. Most of these schemes, collectively referred to in hindsight as the South Sea Bubble, were at best over-optimistic and at worst downright fraudulent, and urgent action was needed. Accordingly, the Bubble Act 1720 prohibited the formation of companies other than under Royal Charter or Act of Parliament. Section 12 was of particular significance, in that it prohibited societies and partnerships from 'assuring Ships or merchandise at sea or for lending money upon bottomry' unless chartered. Two charters were granted, to the Royal Exchange Assurance Co and to the London Assurance, and those charters were extended to life and property insurance in 1721. So by 1720 there was a statutory monopoly on insurance in favour of two companies, and the only other way in which insurances could be effected was by individuals.

This was the impetus needed for the expansion of Lloyd's. Individual underwriters searched for a focal point for their activities, and alighted upon Lloyd's Coffee House. This had a distinct advantage over other institutions in that it had been gathering and publishing information on shipping movements as early as 1696, and the still extant

Lloyd's List was launched in 1734. It appears that within 20 years of the passing of the Bubble Act, the overwhelming majority of marine policies were placed at Lloyd's. The two chartered companies in fact wrote very little marine business, no more than about 10% of the total value, so the statutory monopoly worked strongly in Lloyd's favour. The business was encouraged by further colonial wars running more or less uninterrupted from 1749 until peace with France in 1815. So, by the time the Bubble Act was repealed in 1824 and companies could again enter the market, the dominant position of Lloyd's – which had relocated to the Royal Exchange in 1774[10] – had been long-established. As noted above, one major achievement was the adoption of the Lloyd's SG Policy in 1779. The only serious competition in the period of the Bubble Act was the growth in the principle of mutuality, whereby shipowners formed themselves into mutual societies and contributed to a common fund. Those organisations were of doubtful validity under the Bubble Act, but nothing was done to limit their activities. Following the repeal of the Bubble Act these organisations turned their attention to particular forms of cover: shipowner liability for cargo, collisions and crew; and war risks. Those post-1820 organisations are the direct ancestors of the modern day Protection and Indemnity (P&I) Clubs, whose business remains confined to these matters.

The third development was the anti-wagering legislation of the eighteenth century. The only forms of insurance in existence at this time were marine, life and fire. The first two were riddled with gambling in the form of policies being taken out by persons uninterested in the subject matter and concerned only with the prospects of recovery. Although gambling itself was one of the key national pastimes of the eighteenth century, it was thought to have a pernicious effect: the idle rich were driven to destitution and despair; expectant heirs would gamble away their prospective inheritances; there was a risk that a person with no interest in a vessel or life other than the policy might take matters into his own hands to ensure the happening of the risk insured against; and the very integrity of the insurance industry was at stake. This led to the *Marine Insurance Act 1745*, which prohibited wagering policies on vessels, and later to the *Life Assurance Act 1774* which extended the principle to life policies. The former measure was re-enacted as the *Marine Insurance Act 1906*, and can now be viewed by Australian readers as ss 10-12 of the *Marine Insurance Act 1909* (Cth).[11] The 1774 Act, by contrast, remained in place in Australia until it was removed from the statute book by the Insurance Contracts Act 1984 (Cth).[12]

The final development was the appointment of Sir William Murray, Lord Mansfield, as Chief Justice in 1754. His stewardship of the King's Bench Division until 1788, ably assisted by disciples such as Sir Francis Buller, was undoubtedly the most significant single period in the development of commercial law. The importance of Lord Mansfield has been ably documented elsewhere,[13] but for present purposes it suffices to note that it was in this period that the key decisions on marine insurance were handed down. By the end of 1786 Park J had sufficient material to produce his classic *System of the Law of Marine Insurances*, and the eighth edition published in 1842 under the hand of Francis Hildyard runs, in the form reprinted in 1987, to nearly 1,000 pages.[14] By the time of the passing of MIA 1906 there were some 2000 reported cases. Those early decisions remain enshrined in MIA 1909. It is astonishing just how often resort is still

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[10] There had been a split in the organisation in 1769, as a reaction mainly to the amount of wagering policies on lives being written at Lloyd's. The more serious underwriters broke away and it is that group that can be regarded as the founders of the modern Lloyd's.

[11] Hereafter MIA 1909.

[12] Hereafter ICA 1984.

[13] Cecil Fifoot, *Lord Mansfield* (1936); Edmund Heward, *Lord Mansfield* (1979).

[14] There is, admittedly, one chapter on each of fire insurance and life insurance.

had by the modern English courts to marine insurance cases decided in the second half of the eighteenth century.

III NINETEENTH CENTURY AND BEYOND

The history of insurance since the turn of the nineteenth century is one of opportunism and entrepreneurial spirit. Marine, life and fire insurance at first were the only forms of cover. The repeal of the *Bubble Act* in 1824, followed by the successful struggle for limited liability culminating in the *Joint Stock Companies Act 1856*, opened the door to the formation of insurance companies,[15] and the opportunity was taken to extend insurance protection to risks as they emerged. The marine market remained dominated by Lloyd's and P&I Clubs, although other companies were formed. But Lloyd's did not extend its operation beyond marine insurance until 1887 and so there was a frantic period in which novel forms of insurance were offered by newly-formed insurance companies. Some of those companies were a means to fraud, some did not possess underwriting skills and some did not have assets. This led to the first formal regulation of the solvency of insurance companies in 1870 following the collapse of the Albert Life Assurance Co in 1869 along with the score or so of the life companies that it had absorbed. But the growth of regulation is beyond the scope of this paper.

It is possible to link almost every significant development in commerce, as well as in Parliament or the courts, in which a risk or liability became apparent, with the formation of new insurance companies. Around the middle of the nineteenth century first party cover was extended to a variety of risks, including damage by hailstones and loss of livestock. Liability insurance emerged somewhat later, to cover judicial rulings and statutes rendering shipowners liable for cargo losses, collisions and damage to harbours and jetties. New specialist insurers arose following: the first high profile death on the railways in 1830;[16] the passing of *Lord Campbell's Act* in 1846 under which the dependants of deceased victims were given their own cause of action against tortfeasors; the abolition of window tax leading to the introduction of glass into shop windows; the use of steam boilers in factories; the increased incidence of burglary; the partial abolition of the doctrine of common employment by the *Employers Liability Act 1880*; the introduction of strict liability workmen's compensation in 1897; and the appearance on the roads of motor vehicles in 1895.

These were for the most part commercial policies. The consumer market began to develop in the twentieth century, in the interwar period. New forms of cover continued to emerge to meet new demands, and readers will have little difficulty in selecting their own illustrations of this process up to date.

IV REFORM: MARINE AND NON-MARINE LAW

In England all of this occurred – compulsory insurance for motor vehicles and employers' liability aside – with no attempt to assert material control, ie, regulation over the terms of policies, as opposed to the solvency of those writing them. As a result, in the post-war period consumers under household policies found their claims resolved on

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15 In the period of the *Bubble Act*, organisations akin to companies were formed under Deeds of Settlement, and these – although of untested legality – were not prevented from offering fire and life insurance. Fire offices were formally permitted by the *Fire Insurance Duty Act 1782*, subject to a licensing requirement.

16 No less a person than the President of the Board of Trade, William Huskisson, who was run over by Stephenson's *Rocket*.

principles laid down by Lord Mansfield and Parliament in the eighteenth century and designed to deal with the asymmetry of information between underwriters and policyholders, the absence of efficient means of communication, the developing (and to modern eyes inexplicable) practices of insurance brokers, forms of cover now long since obsolete and the then preoccupation with gambling. The position in England remains that the common law, as developed in marine cases and extended and modified in its application to other forms of cover, is entrenched. In recent years there has been some modification. European Union consumer protection measures have restricted the ability of insurers to rely upon some of the more draconian policy provisions, and the statutory force given to the Financial Ombudsman Service[17] by the *Financial Services and Markets Act 2000* coupled with the legally-enforceable regulatory requirements in the Financial Services Authority's Handbook to treat consumers and small business policyholders fairly, have removed many of the problems. Further, the initiative of the English and Scottish Law Commissions to reform insurance law, an investigation launched in 2006 and likely to last until the end of 2012, has produced one measure – the *Consumer Insurance (Disclosure and Representations) Act 2012* – which abolishes the duty of disclosure and modifies remedies for misrepresentation in consumer contracts. One interesting aspect of the English reforms, and indeed the Law Commissions' project, is that no distinction has been drawn between marine and non-marine insurance. Insofar as a marine policy is taken out by a consumer or a small business, the protective measures extend to it.

By contrast, the terms of reference of the Australian Law Reform Commission, on its commissioning in 1978 to review insurance law, excluded marine insurance. This was apparently because most marine business was written either in England or on London market terms so that whatever Australia said the position would not change, and also because the vast majority of marine policies were and remain purely commercial. The landmark ARLC Report No 20 published in 1982 makes only fleeting reference to MIA 1909, and the ICA 1984 itself excludes marine insurance other than, by virtue of an amendment, s 9A,[18] and which disapplies MIA 1909 in the case of a pleasure craft (other than cargo). The second ALRC Report on insurance, ALRC No 91 published in 2001, was specifically on marine insurance. The Commission was given only a year to complete its work,[19] and its terms of reference were relatively restrictive, focusing in particular on competition, consumer protection and compliance costs. In the event, ALRC 91 was a document with modest objectives. ALRC 91 proposed the retention of the two codes, subject to some 44 recommendations for amendment, very few of which have been implemented. These will be referred to in the course of this paper. The reasons for timidity are set out in para 1.14:

> Although the amendments proposed by the Commission would reduce the differences between the MIA and the ICA, the Commission considers that the familiarity of practitioners both within Australia and overseas with the basic structure of the MIA warrants its retention as a separate scheme as the amendments are more readily identifiable and accommodated by those practitioners. Furthermore, if all marine insurance contracts were covered by the ICA regime, many sections of the MIA would have to be re-enacted in the ICA to retain certain distinctive provisions that underpin marine insurance contracts[20] both in Australia and in other countries whose legislation is based on the Marine Insurance Act 1906 of the United Kingdom.

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17 The body existed, as the voluntary Insurance Ombudsman Bureau, between 1981 and 2000.

18 Introduced by the *Insurance Law Amendment Act 1998* (Cth).

19 Subsequently extended by four months to take account of a CMI conference in Singapore.

20 The ALRC referred specifically to ss 61-94, which deal with loss and abandonment, measure of indemnity, subrogation, return of premium, mutual insurance and other matters.

So we have a situation in Australia in which there are two primary codes,[21] a maritime code in MIA 1909, and a non-marine code (including pleasure craft) in ICA 1984. In England there is only one code, and any reforms will maintain that position. So the international comity justification for leaving marine insurance untouched will disappear. The purpose of this paper is to determine how much of the 1909 Act retains modern relevance. Does Australia really need two codes? Would it really be impossible to devise a measure which treated common issues in a common fashion? In order to answer those questions, it is necessary to examine the content of the MIA 1909, the relevance of its provisions to the modern market and the differences between marine and non-marine law. As will be seen, the author sees no convincing reason for the maintenance of a parallel system. The point is of some significance for English law as well, in that analysis appears to show, harsh as it may seem, that most of the legislation is redundant.

V THE MARINE INSURANCE CODE

The Marine Insurance Act 1906 was the work of the Parliamentary draftsman, Sir Mackenzie Chalmers,[22] and was the last of his great codifying measures. It took some twelve years to prepare[23] and steer through Parliament, and was greeted with much contemporaneous acclaim. More or less word for word provisions are to be found throughout the common law world, the most recent adoption being Canada in 1993 once it had become clear that marine insurance fell within the competence of the Federal Government.[24] In intellectual terms nobody can doubt the skill and fortitude of the draftsman in making sense of some 2,000 decisions. But has the measure stood the test of time?

It has to be appreciated at the outset that the 1906 Act, just like Chalmers' other codes (notably the *Sale of Goods Act 1893*) was not a civil law code designed to provide answers to future problems, but rather a snapshot of how the law stood in 1906. There was no attempt to deal with unresolved issues or (intentionally at least[25]) to overturn judicial rulings. It was, therefore, always understood that future litigation would arise on matters omitted. Being a codification, the 1906 Act did not seek to exclude the obsolete. There are, by way of example, references to bottomry and respondentia, concepts which

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21 There are separate provisions for motor insurance and workmen's compensation, and there are various state laws on insurance, some of which have proved to be quite dramatic in their impact.

22 For the career of Chalmers, see Justice James Allsop and Michael Wells, 'Marine Insurance Act 1909, 100th Anniversary' (speech delivered to the Maritime Law Association of Australia and New Zealand, 11 November 2009) [6]-[18].

23 Ibid, [22]-[24].

24 *Triglav v Terrasses Jewellers* [1983] 1 SCR 283.

25 In *Macbeth & Co v Maritime Insurance Co* [1908] AC 144 the House of Lords concluded, in a case which arose before the commencement of the 1906 Act, that the value of the wreck was to be taken into account in determining whether a vessel was a constructive total loss, apparently contrary to the wording of the subsequent legislation. See *Hall v Hyman* [1912] 2 KB 5, holding that the statute prevailed over the common law.

had been out of use for the best part of two centuries.[26] Some elements of the legislation are inaccurate, although only in minor respects.[27]

The Act was also, minor exceptions apart,[28] not concerned with the effect of market wordings but only with the terms of the ancient and now superseded Lloyd's SG Policy wording (which remains appended to the legislation). Thus the decision of the House of Lords in *Thames and Mersey Marine Insurance Co Ltd v Hamilton Fraser & Co, The Inchmaree*,[29] holding that damage to mechanical equipment on board a vessel was not a peril of the seas, was reversed by market wording, the so-called Inchmaree Clause, which has for over a century provided cover for damage caused by the bursting of boilers, but the legislation faithfully reproduces the effect of the judicial ruling[30] even though it had by that time been superseded. The Institute of London Underwriters had indeed been formed in 1884 by the non-Lloyd's market to produce wordings which overcame judicial rulings thought to be inconsistent with market understandings or aspirations and that body – renamed, after merger in 1998, as the International Underwriting Association of London – continues to issue the 'Institute Clauses' which lay down the standard terms upon which London market insurers will issue cargo, hull and other forms of marine insurance.[31]

So, the measure was retrospective and not prospective, it did not filter out the obsolete and it paid only passing regard to standard market clauses. Inevitably, given the nature of the undertaking, it contains some errors.[32] All of it is presumptive, in that it can be excluded by agreement. In retrospect, the most that could have been hoped for was the fulfilment of Lord Herschell's attitude to Chalmers earlier code, the *Bills of Exchange Act 1882*, namely that the correct approach to a measure of that type was to start with the wording of the legislation and to eschew 'a minute critical examination of the prior decisions'.[33] By those standards the 1906 Act has been a spectacular failure.[34] In 2001 the present author, with Colin Croly, undertook an analysis of the previous decade of insurance cases. We discovered that, of the 355 insurance cases decided in that period, 119 involved disputes as to the meaning of legislation, a further 41 raised matters which had not been resolved by legislation and the rest were for the most part factual disputes.[35] Cases just in 2011 have indeed seen the courts being required to resort to a minute critical analysis of eighteenth and nineteenth century authorities to determine the meaning of

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26 George Steckley, 'Bottomry Bonds in Seventeenth Century England' (2001) 33 *American Journal of Legal History*. However, isolated uses of bottomry bonds may remain, and some reference was made to bottomry in the context of the Scottish fishing industry in the consultations which led to the Arrest Convention 1999. Bottomry was ultimately omitted, although it did appear in the 1952 Arrest Convention and still merits a mention in the *Senior Courts Act* 1981 (UK).

27 See, eg, the definition of barratry, as to which see below. Cf MIA 1909, s 85, which extends the legislation to P&I Clubs but in terms that such a club is one under which two persons mutually agree to insure each other. In fact, since 1856, P&I clubs have been in corporate form. ALRC 91 proposed to modify the provision accordingly (recommendation 44).

28 Notably MIA 1909, s 84(1): 'Where the policy contains a suing and labouring clause …'

29 (1887) LR 12 App Cas 484.

30 MIA 1909, s 61(2)(c).

31 The most recent versions are the International Hull Clauses 2003 (HC 2003) and the Institute Cargo Clauses 2009 (hereafter ICC 2009), although the former have for the most part not been adopted and the majority of London market business is written on the terms of the Institute Hull Clauses 1982.

32 Such as the obligation to sue and labour (MIA 1909, s 84) and the definition of mutual insurance (MIA 1909, s 91).

33 *Bank of England v Vagliano Brothers* [1891] AC 107, 145.

34 Cf Lord Goff *Proceedings of the British Academy* (1983) 169.

35 Colin Croly and Robert Merkin, 'Doubts About Insurance Codes' [2001] *Journal of Business Law* 587.

those most fundamental of concepts, actual total loss[36] and perils of the seas.[37] These are not isolated examples. This is perhaps unfair to Chalmers himself. The scholarship and effort involved in producing the legislation is not to be underestimated,[38] and it was appreciated from the outset that the law would develop along with changing market practices and new forms of wording, but that does not mean that we should remain bound by it.

In the following paragraphs the provisions of ICA 1984[39] and MIA 1909 are compared, with a view to answering the question whether two separate codes remain necessary. As will be seen, the author's conclusion, contrary to that of ALRC 91, is that there is very little in MIA 1909 which requires preservation. That does not of course mean that every provision of ICA 1984 is relevant to marine insurance, because many are plainly not. Further, there are some aspects of marine insurance which do not sit easily within a non-marine regime. However, the general point is that there is far greater symmetry than has often been assumed. That which does remain relevant could either be maintained by agreements which do not offend ICA 1984 or, in isolated cases, added to ICA 1984. There are certainly some provisions of ICA 1984 which should not be extended to marine insurance, and there are one or two points at which the marine code provides better solutions than ICA 1984.

The proposal made in this paper is that MIA 1909 should be repealed and that marine insurance should be brought within ICA 1909 but with exemption from a very small number of specified sections (some of which are, as things stand, confined to personal lines policies). It might also be necessary to add a small number of sections to deal with marine insurance matters, although far fewer than ALRC 91 suggested. The remainder of this paper illustrates how the scheme might work.

VI DEMARCATION DISPUTES

ICA 1984, s 9(1)(d) excludes from its ambit an actual or proposed contract to which MIA 1909 applies. This is now modified by s 9A, which brings in pleasure craft. There is a remaining demarcation dispute between marine and non-marine contracts, which at present is of major significance given the differing rules on utmost good faith and the effect of breach of conditions and warranties. Demarcation disputes have in recent years been rare in England, and they matter less because there is harmony on the key issues of insurance law. In Australia there has been litigation as to the meaning of the phrase 'losses incident to a marine adventure', 'losses on inland waters … incidental to any sea voyage' and 'maritime perils' in MIA 1909, s 7, 8 and 9 respectively.

ALRC 91 sought to draw a clearer line between marine and terrestrial risks. There were various problems to which ALRC 91 felt unable to find any workable solution, eg, the nature of a policy covering mixed land and sea risks, sea liability risks, and also marinas and oil rigs. Leaving those matters aside, under the ALRC 91 proposals: ICA 1984 would cover carriage of goods by water other than for the purposes of a trade profession or occupation (recommendation 2) so that fishing vessels irrespective of size would constitute marine risks whereas domestic goods being carried by vessel would be terrestrial; air risks incidental to a sea voyage should be within MIA 1909

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36 *Masefield AG v Amlin Corporate Member Ltd* [2011] EWCA Civ 1124.

37 *Global Process Systems Inc v Berhad, The Cendor Mopu* [2011] UKSC 5.

38 Sir Andrew Longmore has described it as 'a brilliant synthesis of a maze of common law decisions', cited in Malcolm Clarke, 'Doubts from the Dark Side – The Case Against Codes' [2001] *Journal of Business Law* 605.

39 See generally, Peter Mann, *Annotated Insurance Contracts Act* (4th ed, 2003) which has comprehensive annotations of cases decided under ICA 1984; Kenneth Sutton, *Insurance Law in Australia* (3rd ed, 1999).

(recommendation 3); losses arising from repairs to a vessel should be within MIA 1909 (recommendation 4); and MIA 1909 should extend to risks on inland waterways (recommendation 5).[40] ALRC 91 also suggested that doubts as to whether the policy had to be in marine form before the MIA 1909 applied to it should be resolved, and that whether a policy was marine or non-marine should be determined by its content and not is form (recommendation 6). After ALRC 91 was published the High Court ruled in *Mercantile Mutual Insurance (Australia) Ltd v Gibbs* that a policy covering liability[41] for injuries sustained from commercial paraflying from a vessel operating in the estuary of the Swan River is one on marine risks either because the area was 'sea' (Gleeson J, with Hayne and Callinan JJ in fallback agreement) or because the losses were incident to a marine adventure (Hayne and Callinan J).[42] McHugh J (dissenting), ruled that the vessel must be intended for use in open sea or incidental to such use, and Kirby J (dissenting) held that the question had to be asked in the context of the protective provisions of ICA 1984.

Under the proposals in this paper, there would remain a need for a definition of marine insurance, but for the purpose of excluding the operation of specific sections of ICA 1984. But it may be that the definition should be drafted with those exemptions in mind, as suggested by Kirby J, rather than from the point of view of high principle.

MIA 1909, ss 7-9 should be repealed.

VII FORMALITIES AND TYPES OF POLICY

MIA 1909, ss 28-30 and 32, dealing with contractual formalities, appear in the form originally set out in MIA 1906, ss 22-24 and 26, amendments introduced in England in the *Finance Act 1959* having been disregarded. The two statutes both state that a claim is inadmissible unless embodied in a policy (MIA 1909, s 28; MIA 1906, s 22[43]), that the name of the assured or agent must be inserted (MIA 1909, s 29; MIA 1906, s 23) that the policy must be signed by the insurers (MIA 1909, s 30; MIA 1906, s 24) and that the interest in a marine policy must be designated with reasonable certainty (MIA 1906, s 26; MIA 1909, s 32). MIA 1909, s 29 retains the pre-1959 rules that the policy must identify the subject matter, the voyage or period, the sum insured and the identity of the insurers. The origin and significance of the English provisions are discussed at length by the English and Scottish Law Commissions in Issues Paper 9, published in October 2010, and it is clear that the sections are no longer perceived as having any useful function.

Turning first to MIA 1909, s 28, the Law Commissions point out that the requirement for a policy was a means of ensuring that stamp duty was paid on marine insurances, and the sanction of unenforceability was introduced to secure compliance. Stamp duty was abolished in 1970 but the section and sanction remain. The section has been undermined by the courts. In *Swan and Cleland's Graving Dock and Slipway Co v Maritime Insurance Co*[44] it was assumed that the assured was entitled to bring

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40 Anticipating the decision in *Mercantile Mutual Insurance (Australia) Ltd v Gibbs* (2003) 5 LRC 419.

41 It had previously been held that a liability policy could not be a marine policy: *Hansen Development Pty Ltd v MMI Ltd* [1999] NSWCA 186.

42 See also *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226, which held that a policy has to be looked at as a whole, and is not a marine policy simply because it incidentally covers marine risks. This was in the context of whether the assured rather than the broker could be sued for the premium, an issue which no longer arises since the repeal of MIA 1909, s 59, which imposed sole liability upon the marine broker.

43 English law refers to any claim, whereas the 1909 Act precludes only actions for loss.

44 [1907] 1 KB 116.

proceedings even if he did not have possession of the policy as long as he could show that a policy existed, and, more recently, in *Eide UK Ltd v Lowndes Lambert Group Ltd, The Sun Tender*,[45] the Court of Appeal doubted whether the absence of a policy is fatal to a claim. In practice insurers have never relied upon their own failure to issue a policy, and in those cases where it had been found at the outset of proceedings that by oversight a policy had not existed, some wording was issued to satisfy the statutory requirement; had they failed to do so, an application for specific performance would have followed at high speed.[46] The real significance of the provision is that a broker who has paid the premium has a lien on the policy by way of security for his funding, but in Australia the rule that the broker pays the premium – in what was MIA 1909, ss 59 and 60 – were, following ALRC 91 (recommendation 34) repealed by the Financial Services Reform (Consequential Provisions) Act 2001, rendering MIA 1909, s 28 all but pointless. Instead, Australian law has opted for the much more sensible approach[47] in s 985B of the *Corporations Act 2001* that the broker is not personally liable to pay the premium but that, if the assured has paid the broker, it is deemed to have been received by the insurers, so that the risk of broker misconduct or insolvency is borne by the insurers. ALRC 91 (recommendation 37) wisely recommended the repeal of the operative words in MIA 1909, s 28.

One of the more intractable issues which has arisen in respect of formalities is the significance of the slip. This document has been used for close on three centuries as the means by which a broker made a proposal for insurance to underwriters. In theory, although not always in practice, the slip was replaced by a policy document. That process gave rise to a number of questions which remain partly unresolved. The first was whether a scratched slip constituted a policy in its own right. The numerous authorities on the point ceased to be relevant in England following the abolition of stamp duty, and although it has arisen in Australia there has proved to be no need for its resolution.[48] The second was whether a slip was superseded by policy wording subsequently issued or at least whether it could be used to rectify the policy wording. The answer, as given by the Court of Appeal in *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co*,[49] a resounding 'definite maybe',[50] in that it all depends upon what the parties intend. There is no need for a statutory provision – MIA 1909, s 95 – to enshrine that principle. All of that aside, slips are now a thing of the past in the London market. The Market Reform Contract has, since 2009, required wordings to be prepared at the outset and presented to insurers as the proposal.

As noted above, MIA 1909, s 29 demands that the policy must specify the name of the assured, the subject matter insured, the period or voyage covered, the sum insured and the names of the insurers. By contrast MIA 1906, s 23, is confined to the first of these matters. None of this is necessary. In practice marine policies always contain all of these things, along with many others, and very often the real problem is not the provision of minimum information but complex drafting, often adopting incorporation, which gives rise to inconsistency and ambiguity. There are many good reasons for tightening up the

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45 [1998] 1 Lloyd's Rep 389.

46 *Mercantile Mutual Insurance (Australia) Ltd v Gibbs* (2003) 5 LRC 419.

47 The English and Scottish Law Commissions are of a similar view: Issues Paper No 8, July 2010.

48 *Benson-Brown v HIH Casualty and General Insurance* [2001] WASC 6, but the court was satisfied that the slip contained all of information required by statute and that insurers could be required by specific performance to issue a policy.

49 [2001] Lloyd's Rep IR 596.

50 Originated by that arch-mangler of the English language, the great Samuel Goldwyn. For more priceless gems, see, *Samuel Goldwyn Quotes*, 'Brainy Quotes' <http://www.brainyquote.com/quotes/authors/s/samuel_goldwyn.html> at 2nd November 2011.

drafting of marine contracts, but this provision adds nothing. ALRC 91 felt that the formalities should be preserved, but that a new provision should be inserted stating that no marine policy was to be invalid by reason of non-compliance (recommendation 39). The logic behind this is elusive.

MIA 1909, s 30(1) states that the policy must be signed by each subscribing underwriter or its corporate seal appended, and s 30(2) states that the assured has a separate contract with each of them. Section 30(2) is trite law[51] and its removal would not affect anything. Section 30(1) is a pure formality which is always complied with in practice, at least in the London market, and its main effect is to give rise to doubt as to whether electronic signatures will be permitted once they become more widely used.

Finally, MIA 1909, s 32 requires the subject matter to be designated with reasonable certainty, and if there is merely a general description then the policy applies to the interest intended by the assured to be covered. The former provision is straightforward and does not require statutory authority, but the latter is inconsistent with the objective approach to policy construction now adopted. In the two modern decisions in which it has featured, *National Oilwell (UK) Ltd v Davy Offshore Ltd*[52] and *O'Kane v Jones*[53] it has been held that the subjective intentions of the assured to extend cover to a third party co-assured do not override the ordinary rules on agency and undisclosed principal. The provision is almost certainly redundant.

The schedule to MIA 1909 includes the Lloyd's SG policy wording which was perfected in 1779,[54] based on earlier wordings in use in London. The wording was formally abandoned in 1982, disappointingly for legal historians or lovers of arcane language but not for those who need to know exactly what premiums are actually buying. The old form was subject to criticism in the earliest cases in which it was considered, and there has been much colourful and withering judicial comment over the years.[55] It is no longer used[56] and the wording should be allowed to rest in peace. That was the view of ALRC 91 (recommendation 43). The Rules for the Construction of the Policy in the Schedule, as applied by MIA 1909, s 36, are for the most part obsolete. The only words defined which are currently used in marine policies are perils of the seas (r 7), pirates (r 8), thieves (r 9), barratry (r 11), ship (r 15), freight (r 16) and goods (r 17). Of these: rr 15-17 are superseded by express wording; r 11 is designed to reflect the common law but does not accurately do so in that the common law recognised an act of the master or crew for the benefit of the assured but nevertheless contrary to instructions;[57] there are doubts as to whether r 9 remains relevant because the term used in modern policies is 'theft' rather than 'thieves', and although the effect of r 9 is to exclude clandestine theft and theft by members of the ship's company it is far from certain that those restrictions are to be implied into the term 'theft'; and the definitions of 'perils of the seas' and 'pirates' in rr 8 and 9 add nothing to the common law. If definitions were thought to be necessary, they could be included in policy wording. ALRC 91 felt that there remained a place for the definitions and that they should be included in revised marine insurance legislation (recommendation 43). The present writer believes this to be unnecessary, but if

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51 *Touche Ross v Baker* [1992] 2 Lloyd's Rep 207.

52 [1993] 2 Lloyd's Rep 582.

53 [2005] Lloyd's Rep IR 174

54 See ALRC 91, see above n 1, which refers to this as the Lloyd's Ship and Goods Policy. The precise meaning of SG and the origin of the wording itself is, however, something of a mystery. See Wright and Fayle, see above n 1, 143.

55 Allsop and Wells, see above n 22, [22]-[24].

56 Although the present author has seen it appended to a policy written in 2004. However, as that policy also had appended to it four other wordings, including a Belgian form dating from 1858, none of which could be read with the other (leaving aside the three different languages used), this should not be regarded as a paradigm.

57 *Earle v Rowcroft* (1806) 8 East 126.

legislation is regarded as desirable then the point could be covered by relevant insertions into ICA 1984, s 11, the definitions section.

As to types of policy, MIA 1909 defines voyage and time policies (s 31), valued and unvalued polices (ss 33 and 34) and floating policies (s 35). The legislation is identical to that in England other than that s 31(2) – repealed in England in 1959 – maintains the prohibition on a time policy for longer than one year but subject to permitting held covered provisions. A perusal of these definitions shows nothing worthy of preservation. The definitions add nothing to the common law or indeed common sense, and the same distinctions between valued and unvalued, and voyage and time policies, are found in non-marine insurance. The definition of floating policy is somewhat outmoded, and deals only with one very specific type of cover, namely, cargo insurance where the carrying vessel has yet to be identified and where, presumptively, all cargo must be declared and in order of despatch to determine when policy limits are exhausted (s 31(3)). In particular there is no longer any need for MIA 1909, s 31(2), and ALRC 91 so decided (recommendation 38). A wide range of declaration policies are now found, both in the marine and non-marine markets, and for all manner of risks ranging from cargo to professional indemnity, and the term 'floating policy' is rarely seen. ALRC 91 recognised this, proposing (recommendation 40) that the section should be amended to include other forms of open and annual policies, and also clarifying an ambiguity in s 31(3) which appears to provide that the obligation for all cargo to be declared is a rule of law rather than one subject to contract (recommendation 41). This all seems to be over-elaborate: there is no need for any sort of default rule when the matter can readily be dealt with by contract.

One brief point on formation should also be referred to here. MIA 1909, s 86 codifies the marine rule that a policy made by an agent without authority may be ratified by the assured even after a loss. The non-marine rule appears to prevent ratification after loss, although there is some uncertainty on that point and it seems likely that the modern approach would favour the marine principle for all policies.[58] If that is indeed the common law rule, then the section has no impact.

MIA 1909, ss 28-36, 92 and the schedule should be repealed. The relevant definitions of marine perils could be added to MIA 1984, s 11. It would be perfectly satisfactory for ICA 1984, s 74 – under which the assured is entitled to receive a copy of policy wording on request – to govern marine policies; arguably, the law should go further and require wording to be provided in all cases no later than fixation, a target towards which the London market is now moving.

VIII INSURABLE INTEREST

It was seen earlier that the insurable interest rules date back to 1745 and to an era where gambling on the safe arrival of vessels constituted a significant amount of the business of the London market. The provisions were re-enacted in MIA 1909, but in a form which sought to codify the numerous insurable interest decisions in the preceding century. MIA 1909, ss 10-12 contain the basic prohibition on insurance without interest and prevent recovery by a person without interest. Insurable interest is defined in narrow terms,[59] and ss 13-20 then give specific illustrations. Bottomry and respondentia proudly feature in s 16. A perusal of the history of insurable interest in the last 50 years shows that the courts have now settled on a generous attitude, refusing to allow what they

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58 *National Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep 582.

59 In *Lucena v Craufurd* (1806) 2 B & PNR 269 Justice Lawrence favoured a test based on moral certainty of profit or loss whereas Lord Eldon referred to legally enforceable rights in property or derived from contract. The latter has prevailed in the legislation.

regard as a technical defence from defeating genuine commercial expectations. It is also the case that insurable interest has been pleaded by insurers as a defence only where something else is really going on.[60] In *Macaura v Northern Insurance*[61] the claimant was denied recovery for the loss of timber which he had insured in his own name but previously sold to a company, although it is unlikely whether the point would have been raised had the fire not followed the policy within a matter of days.[62] In what is now the leading case on insurable interest, *Feasey v Sun Life Assurance of Canada*,[63] the dispute primarily concerned whether retrocessionaires were bound by the unauthorised acceptance of risks by an underwriting agent whose authority had earlier been terminated, and as a fallback defence the retrocessionaires sought to identify a lack of insurable interest possessed by the reinsured P&I Club under arrangements whereby the Club agreed to pay for injuries to the employees of shipowners on a tariff rather than indemnity basis. It is clear from the majority decision in *Feasey* that insurable interest will no longer be allowed to defeat sensible commercial arrangements, and the Court of Appeal indeed approved a series of construction decisions in which insurable interest had been taken to its outer limits by recognising that a sub-contractor engaged to carry out a small amount of work possessed insurable interest in the entire project.

It has become apparent that gambling by insurance is not a serious social problem. Given that, at least in England, there is now freedom to gamble on pretty much anything, ranging from the number of minutes between the fall of Australian test match wickets or the identity of the next Pope, the safe arrival of ships would be unlikely to form any bookmaker's most intense line of business. Further, as the authorities consistently demonstrate, the risk of deliberate destruction by a person not interested in the subject matter is dwarfed by the risk of deliberate destruction by a person who is so interested but has cash-flow problems. ALRC 20 recognised the paucity of policy reasons for demanding insurable interest, and ICA 1984, s 16 took the bold step of abolishing, for non-life policies, the requirement for insurable interest at the date of the inception of the policy.[64] Insurable interest questions are thus to be judged not at the date of inception but at the date of loss, and even here ICA 1984, s 17, modified the previous law by providing that as long as the assured can prove loss he can recover even though he cannot point to any equitable or legal interest in the insured subject matter.

In England there is (probably by accident) no longer a requirement for insurable interest at the inception of a non-life policy, the prohibition on gambling in s 18 of the *Gaming Act 1845* having been repealed by the *Gambling Act 2005*, although the indemnity principle requires proof of loss from the occurrence of an insured peril.[65] However, the 2005 Act does not expressly or impliedly repeal the insurable interest provisions of the MIA 1906,[66] so the insurable interest requirement at both inception and loss remains. The English and Scottish Law Commissions, in an Issues Paper published

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60 An honourable exception is *Newbury International Ltd v Reliance National Insurance Co (UK) Ltd* [1994] 1 Lloyd's Rep 83, which was a pure wager, dressed up as insurance, on the outcome of motor races. It is arguable that this would now be a valid contract in England.

61 [1925] AC 619.

62 The decision itself has been both doubted *Constitution Insurance Co of Canada* v *Kosmopoulos* (1987) 34 DLR (4th) 208; and distinguished *Sharp v Sphere Drake Insurance plc, The Moonacre* [1992] 2 Lloyd's Rep 501.

63 [2003] Lloyd's Rep IR 640.

64 Life assurance was brought into line by the repeal and replacement of ICA 1984, s 18, giving ultimate effect to the minority view in Australian Law Reform Commission, *Insurance Contracts*, Report No 20 (1982).

65 This is narrower than ICA 1984, s 17, as what is required by English law is proof of insurable interest, whereas the Australian legislation dispenses with that concept.

66 The 2005 Act does not extend to activities regulated under the Financial Services and Markets Act 2000, and that includes marine insurance business.

in January 2008, saw no reason to retain the need for insurable interest at inception and felt that any problems could be addressed by requiring the assured to prove loss. It may also be noted that cargo insurers no longer rely upon inception insurable interest, and require only that the assured has an interest at the date of the loss.[67]

So, the question becomes, is there a need for MIA 1909 to retain its insurable interest rules. ALRC 91 was prompted to discuss this question by the decision of the New South Wales Court of Appeal in *New South Wales Leather Co Pty Ltd v Vanguard Insurance Co Ltd*.[68] Here, a cargo of leather was stolen before shipment, so that risk had not passed to the FOB buyer at the time of the loss. That meant that the buyer was precluded from recovery by the insurable interest rules, although the court avoided this obviously unjust result by holding that MIA 1909, s 12(1) – which allows an assured to recover where the subject matter has been insured on a 'lost or not lost' basis and it has been lost prior to the inception of the risk without the assured's knowledge – covered the case. The lost or not lost provision was originally designed to cope with the problem of insurance being taken out on a subject matter outside the jurisdiction and whose safety could not be known, but it is retained by ICC 2009, cl 11.2, so that facts such as those in *Vanguard* do not give rise to a problem as long as the case is followed.[69] Some polices may also specifically cover pre-shipment losses, and ICC 2009, cl 8, has extended cover to losses within the warehouse of origin.

ALRC 91 concluded that there was nothing in the nature of marine policies which demanded different insurable interest rules. Goods may be transported by air, road or ship, and there is no apparent justification for separate treatment. ALRC's primary recommendation (28) was that MIA 1909, ss 10-12 should be assimilated with ICA 1984, ss 16-17 so that a contract of marine insurance would not be void by reason of an absence of insurable interest at the outset and that recovery would be permitted if the assured could show pecuniary or economic loss even though not possessing an insurable interest. That reform would also put paid to MIA 1909, ss 13-20 setting out the specific examples of insurable interest (recommendation 29). ALRC 91 recognised that its proposals might cause some dislocation in the market, and produced two fallback recommendations in the event that full assimilation was not adopted: the *Vanguard* decision should be given statutory force by stipulating that a FOB buyer acquired insurable interest in property on payment rather than on shipment (recommendation 30); and that any lender with a security over marine subject matter should be regarded as having an insurable interest in it (recommendation 31).[70]Other than innate conservatism, there does not seem to be any reason not to go with the primary recommendations.

MIA 1909, ss 10-20 should be repealed.

IX ASSIGNMENT OF POLICIES

Related to insurable interest is assignability. Life policies by their nature are assignable, but non-life policies by their nature are not and the latter position is unaffected by ICA 1984. MIA 1909, s 56, recognising the use of CIF and related sale contracts, provides that a marine policy is assignable at any time, although MIA 1909, s 57 qualifies this by providing that the agreement to assign or the assignment itself must be contemporaneous with the transfer of the subject matter insured. Marine insurance contracts are thus an exception to the prohibition on assignability. The statutory

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67 ICC 2009, cl 11.1.

68 (1991) 25 NSWLR 699 (NSWCA).

69 See Michelle Taylor 'Is the Requirement of an Insurable Interest in the Marine Insurance Act Still Valid?' (2000) 11 *Insurance Law Journal* 147.

70 Doubtless the law anyway.

conditions must, however, be complied with: if the temporal limit is broken, the policy in the seller's hands will lapse on the transfer of the subject matter so that it cannot be revived if there is a later agreement to assign and, under MIA 1909, s 21, transfer of the subject matter does not automatically carry the insurance with it; and, similarly, a premature assignment of the policy means that it has nothing on which to bite so that it will lapse.

ALRC 91 felt that MIA 1909, s 56 should be retained, and indeed extended to marine contracts as well as policies (recommendation 42). As to sections 21 and 57, repeal was recommended by ALRC 91 (recommendations 28 and 29). It would be perfectly possible to repeal MIA 1909, s 56 as well. That would leave the position that there was no statutory provision confirming that marine policies are assignable. However, this is clear as a matter of common law and in any event a clause rendering a marine policy assignable[71] would be perfectly consistent with ICA 1984.

MIA 1906, ss 21, 56 and 57 should be repealed.

X DISCLOSURE AND REPRESENTATIONS

Inevitably attention focuses on the rules relating to non-disclosure and misrepresentation. These have long been regarded as the characterising quality of a contract of insurance, and in England remain the most common form of defence relied upon by underwriters. Often the defence has no connection with the claim, and is a convenient means for the denial of liability in circumstances where underwriters are suspicious of the circumstances of the loss but cannot produce evidence to the standard necessary to establish fraud. Much of ALRC 20 was devoted to utmost good faith, and the reforms – set out in ICA 1984, ss 21 to 33 – have taken time to bed down. The sections are still not fully satisfactory, and have been the subject of recent investigation and proposals for reform, but political events have starved the legislature of time to implement them[72] and the industry is no longer holding its breath. But do the imperfections of the ICA 1984 regime justify the retention of the MIA 1909 regime? When considering that question, two considerations should be borne in mind. The first is that the English courts have, since the implementation of ICA 1984, severely limited the operation of utmost good faith, in particular by insisting that the judgment of the underwriter who wrote the risk must have been decisively influenced by the representation,[73] so that subjective inducement rather than objective materiality has become the most important single consideration. There is also a greater recognition through the waiver principle that the questions actually asked determine what has to be disclosed.[74] The second is that English law, by the *Consumer Insurance (Disclosure and Representations) Act 2011*, has abolished the duty of disclosure and modified remedies for misrepresentation in consumer cases. Business proposals due in 2012 are likely to retain the duty of disclosure but to follow the 2011 measure by modifying remedies. The effect is that fraud permits avoidance, innocence requires payment, and negligence leads

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71 See IHC 2003, cl 23, laying down the conditions for the recognition of any assignment of the hull insurance.

72 The *Insurance Contracts (Amendment) Bill 2010* did not, despite all expectations, progress to law due to the calling of a general election, and it now seems to have been shelved. The Bill would have affected almost exclusively consumer and personal lines cover, and life assurance.

73 *Assicurazioni Generali v Arab Insurance Group* [2003] Lloyd's Rep IR 131, building on the decision of the House of Lords in *Pan Atlantic Insurance Co v Pine Top Insurance Co* [1994] 3 All ER 581. The House of Lords had to explain away the absence of an inducement requirement in the legislation itself by holding that it was so obvious that it was implicit.

74 *Norwich Union v Meisels* [2007] Lloyd's Rep IR 69.

to the insurers being put in the position that would have prevailed had there been no breach of duty (which may mean avoidance, the imposition of terms or proportional payment representing the higher premium that would have been charged). These developments have substantially changed the landscape even since the publication of ALRC 91.

MIA 1909, ss 23-27 in their present form are concerned primarily with the assured's pre-contractual duties. The sections: oblige the assured to disclose material facts; impose a duty on the assured's placing broker to disclose what the broker knows; and require the assured not to make material misrepresentations. ICA 1984, ss 21 to 33 modify all of this in a number of respects. Turning first to disclosure: the duty of disclosure is retained by ICA 1984, s 21 (other than in respect of personal lines insurance[75]), the only changes being that the test is that of the prudent assured rather than the prudent insurer[76] and that a failure to answer a question is not to be treated as a negative answer;[77] insurers must inform a potential assured of the duty to disclose (ICA 1984, s 22); and there is no right to avoid for non-disclosure by a broker of facts known to him but not to the assured. As far as misrepresentation is concerned: ambiguous questions are to be construed as they would be understood by a reasonable assured (ICA 1984, s 23); and a statement is not to be regarded as a misrepresentation if the assured answered to the best of his knowledge and belief or a reasonable assured would not have regarded it as material (MIA 1909, s 26). Finally, as regards remedies: the insurers can avoid in the event of fraud, but in other cases the insurers are entitled to be put into the position that they would have been in but for the breach of duty, and that may involve increased premium, imposition of conditions or avoidance (ICA 1984, s 28); and even in case of fraud the court has the discretion to disregard avoidance where failure to do so would be harsh and unfair (ICA 1984, s 31).

If the likely recommendations of the English and Scottish Law Commissions for business policies are implemented, it will be difficult to slip a cigarette paper into the differences between the reformed system and that in ICA 1984. Both will require disclosure, but based on the prudent assured and requiring proof of actual inducement by the insurers, both allow avoidance for fraud and both give insurers restitutionary remedies for conduct short of fraud. Only two major points remain, and they are related. The first is that non-marine insurers in Australia, unlike their marine counterparts, have no remedy where the broker fails to disclose facts known to him but not to the assured. Such information is almost inevitably market intelligence which is no concern of the assured. The second is that the Australian courts have the discretion to refuse avoidance in fraud cases, although in practice they have done so rarely, and one situation in which the power may be exercised is where the fraud has been that of the broker alone.[78] England is not prepared to take these steps, but there is little to justify that refusal. There can be no objection to the existence of a fallback discretion, even if it is exercised in exceptional cases only, and there is no logic in laying down remedies based on state of mind when the relevant state of mind is not that of the assured but of his broker. The obvious solution is that insurers should have a remedy against the broker in such a case, and MIA 1909, s 25 indeed states that the broker owes a duty to the underwriters to disclose material facts, although all of the authorities on MIA 1909, s 25 proceed on the

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75 ICA 1984, s 21A, which would have been amended by the Insurance Contracts (Amendment) Bill 2010 to make it clear that express questions have to be asked.

76 The Insurance Contracts (Amendment) Bill 2010 would have clarified this concept by tying it to the type of insurance in question.

77 Confirmed by ICA 1909, s 27.

78 *Evans v Sirius Insurance Co Ltd* (1986) 4 ANZ Ins Cas 61-287. Cf *Plasteel Windows Aust Pty Ltd v C E Heath Underwriting Agencies Pty Ltd* (1989) 5 Anz Ins Cas 60-926.

basis that these words mean that the assured must take the consequences of the broker's failure. Right or wrong, the rule is unsupportable.

So, it is suggested that the case is made for unification of the two regimes along the lines in ICA 1984. Perusal of the Australian cases decided under MIA 1909 shows that nothing much would have changed: failure to disclose the restrictions on the master's authority to act,[79] the absence of adequate fire-fighting equipment[80] and inadequate lashings to restrain the movement of helicopters[81] are material on any test; alleged misrepresentation as to the nature of the goods to be carried, negatived by the consideration that full disclosure would have shown that there was nothing of concern involved,[82] would have been the outcome under ICA 1984; inducement is common to both regimes, so that a failure to disclose that bulkheads were not watertight did not provide a defence where disclosure would make no difference.[83]

One other small point is worthy of note here. ICA 1984, s 75, requires an insurer to give reasons for refusal of a risk or cancellation. The purpose of this provision is to counteract the common law rule that previous refusal or cancellation of cover is a material fact which has to be disclosed to later insurers, so that if the assured is armed with a written statement of reasons for the insurers' conduct it will not prejudice later applications. A refusal may, for example, be based on particular circumstances which have ceased to exist (ie, motor cover being refused because of the number of miles driven by the assured in any one year) or upon a particular insurer's rating and risk assessment. Rather curiously, marine insurance has never regarded a previous refusal as a material fact, on the basis that each insurer should make its own decision,[84] and the present author would like to see ICA 1984, s 75 replaced by that principle. ICA 1984, s 75 thus has no relevance to the marine market, and marine insurance could be excluded from it.

ALRC 91 was prepared to go most of the way. It recommended that: the duty of disclosure should be retained (recommendation 22); a prudent insurer test should replace the prudent assured test (recommendation 22); remedies should be adjusted to match those in ICA 1984 (recommendations 23 and 25); the inducement requirement should be codified; a placing broker should be required to disclose only what a prudent broker would appreciate was material (recommendation 24); and its proposals should be exhaustive of the assured's duty (recommendation 26). One final recommendation (27) was that if a subscription placement is involved, and the leading underwriter has been induced, then all of the following insurers are deemed to have been induced. This is based on a series of first instance English cases to that effect,[85] although there are conflicting authorities and the point has not been finally resolved.[86] Leaving aside the legal status of the principle, the policy behind it is questionable: if an underwriter chooses to rely upon what has been said to the leading underwriter, that should surely not be the fault of the assured.

There is no basis for any distinction. MIA 1909, ss 23-26 should be repealed.

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79 *Re Sunshine Fisheries v Lambert-Bain Pty Ltd and Switzerland General Insurance Company Ltd* [1991] FCA 350.

80 *Benson-Brown v HIH Casualty and General Insurance* [2001] WASC 6.

81 *Helicopter Resources Pty Ltd v Sun Alliance Insurance Ltd* [1991] Supreme Court of Victoria.

82 *Akedian Co Ltd v Royal Insurance Australia Ltd* (1997) 148 ALR 480.

83 *Visscher Enterprises Pty Ltd v Southern Pacific Insurance Co Ltd* [1981] Qd R 561.

84 *Glasgow Assurance Corporation v William Symondson Co* (1911) 16 Com Cas 109.

85 See, eg, *International Management Group v Simmonds* [2004] Lloyd's Rep IR 247.

86 See, eg, *General Accident Fire and Life Assurance Co v Tanter, The Zephyr* [1984] 1 Lloyd's Rep 58.

XI GENERAL GOOD FAITH

MIA 1909, s 23 contemplates that there may be post-contractual duties, and also duties on the insurers, but none of this is spelt out in any detail and MIA 1909, ss 24-26 are confined to the assured's pre-contractual duties. This is unsurprising, because there was no real pre-1906 authority on any of these points. The post-1906 history of the marine insurance legislation is unhelpful. There is now clear authority[87] that: (a) the assured owes post-contractual duties; (b) the insurers owe pre-contractual duties; and (c) the insurers owe post-contractual duties. However: it is unclear what the assured's post-contractual duty entails; although the insurers owe pre-contractual duties, which arguably may extend to disclosing the relevant features of the policy, the only remedy open to the assured is avoidance,[88] which is generally the opposite of what he will require when he discovers – typically after a loss – that he has been sold short on policy coverage; and the most recent cases on the insurers' post-contractual duties of utmost good faith have emphasised the need for a contractual approach (generally in the form of implied terms) so that the assured has a proper remedy in damages for breach if the insurers act from improper motives when considering defences to claims.[89] Insurers may not unreasonably rely upon the assured's breach of utmost good faith, eg, by avoiding based on undisclosed facts which were material at the time of the policy but which have later proved to be unfounded,[90] neither may they act unreasonably in demanding proof of loss.[91]

ICA 1984 has directly adopted the contractual approach which English law has been circling cautiously.[92] ICA 1984, s 13, which is unrestricted by any other law,[93] contains an implied term that each party act with the utmost good faith, and s 14 gives a specific illustration of this by specifying that relying on contract terms in bad faith itself is a breach of the duty of utmost good faith. The matters which have been held to be governed by MIA 1909, ss 13-14, are for the most part post-contractual obligations on insurers, including delay in handling claims, relying unreasonably on the assured's own breach of the duty of utmost good faith and reliance on ambiguous provisions.[94] In fact, a comparison of the English and Australian case law shows that common areas of concern have been addressed under both systems and that in practice there are few cases in which varying outcomes would be reached. There is only one significant difference, in that Australian law recognises that insurers may be liable in damages for late payment of policy moneys[95] whereas English law has rejected that suggestion on the rather curious basis that the sums due under a policy are themselves damages and conceptually it is not possible to award damages for late payment of damages.[96] Indeed, it has been held that such damages are, independently of this notion, not awardable under MIA 1909, because

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87 *Manifest Shipping Co v Uni-Polaris Insurance Co Ltd, The Star Sea* [1995] 1 Lloyd's Rep 651.

88 *La Banque Financiere de la Cite v Westgate Insurance Co* [1990] 2 Lloyd's Rep 377.

89 *Gan Insurance Co v Tai Ping Insurance Co* [2001] Lloyd's Rep IR 667; *Eagle Star v Cresswell* [2004] Lloyd's Rep IR 602.

90 *Drake Insurance Co v Provident Insurance Co* [2004] Lloyd's Rep IR 277.

91 *Napier v UNUM Ltd* [1996] 2 Lloyd's Rep 560

92 The *Insurance Contracts (Amendment) Bill 2010* would, had it passed into law, have allowed administrative enforcement by ASIC.

93 ICA 1984, s 12.

94 Mann, see above n 39, 32-54.

95 *Stuart v Guardian Royal Exchange Assurance of New Zealand Ltd* (No.2) (1998) 5 ANZ Ins Cas 60-884; *Moss v Sun Alliance Australia Ltd* (1990) 55 SASR 145; *Brescia v QBE* [2007] NSWSC 598. It is unclear whether this is the result of ICA 1984, s 13 or a different view of the common law.

96 *Sprung v Royal Insurance (UK) Ltd* [1999] Lloyd's Rep IR 111.

the definition of indemnity in the legislation is exhaustive of the insurers' obligations.[97] The English rule is under pressure, and it is likely that the English and Scottish Law Commissions will shortly recommend its abolition.[98] The replacement of MIA 1909, s 23, with ICA 1984, ss 12 to 14, would codify rather than alter the law. ALRC 91 indeed recommended that ICA 1984, ss 13 and 14 should be extended to marine insurance (recommendation 20) and should go beyond the formation process and run up to the point at which judicial proceedings are commenced[99] (recommendation 21).

XII EXPRESS WARRANTIES

In the non-marine context, warranties are just a bad memory for Australian policyholders, brokers and their lawyers. In England they remain very much in the collective consciousness. Texts have been written on the subject, and it here suffices to outline the statutory provisions and their implications. Warranties have their origins in the days when it was impossible for the assured to know the truth or otherwise of his statements, so he was in effect required to guarantee them. A warranty is a statement by the assured either that a state of affairs exists at the date the statement was made (a present warranty) or a promise that the assured will act or refrain from acting in a given way during the currency of the policy (a future warranty). Both types are referred to as promissory (MIA 1909, s 39(1)). An express warranty must be incorporated into the policy (MIA 1909, s 41(2)). A warranty may be created by any appropriate form of words with or without the use of the word 'warranty' (MIA 1909, s 41(1)), so that a term not described as a warranty but which is fundamental to the risk and whose breach would not be adequately compensated by damages may potentially amount to a warranty.[100] Compliance must be exact (MIA 1909, s 39(3)). Breach of either type of warranty has an automatic terminating effect on the risk under the policy, so that the assured loses the right to recover any loss occurring after the date of the breach[101] and there is accordingly no need for any causal link between breach and loss.[102] An assured may warrant some or all of the answers in the proposal form,[103] and if he does so then any false answer will prevent the risk from attaching even though the statement is not material or did not have an inducing effect upon the insurers. If the warranty is a continuing one, and the assured by act or omission breaks the warranty, then the fact that the breach is subsequently repaired does not have the effect of reinstating the risk as of the date of repair (MIA 1909, s 40(2)) unless the provision can be construed as merely suspending the risk for the

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97 *Ventouris v Mountain, The Italia Express* [1992] 2 Lloyd's Rep 281.

98 See Law Commission (UK), Issues Paper No 7 (July 2010) available at <http://www.justice.gov.uk/lawcommission/insurance-contract-law.htm> at 2nd November 2011.

99 That restriction codifies the decision of the House of Lords in *The Star Sea* [1995] 1 Lloyd's Rep 651.

100 *HIH Casualty & General Insurance Ltd v New Hampshire Insurance Co* [2001] Lloyd's Rep IR 596. A term referred to as a warranty may in the same way be held to be a clause of a less draconian type. See *Yorkshire Insurance Co Ltd v Campbell* [1917] AC 218, in which the Privy Council reversed the finding of the Australian courts that the clause – relating to the pedigree of a horse – was merely a description of the risk. A more recent example of a statement not being classified as a warranty is *Doak v Weekes* (1986) 82 FLR 334 (length of vessel).

101 *Bank of Nova Scotia v Hellenic Mutual War Risks Association, The Good Luck* [1991] 3 All ER 1

102 Heavily criticised by Lord Griffiths in *Forsikrings Vesta v Butcher* [1989] 1 Lloyd's Rep 331.

103 Traditionally by the use of the 'basis of the contract clause', although that particular wording is rarely found in marine insurance.

period of breach.[104] Non-compliance is excused where the warranty ceases to be applicable (MIA 1909, s 40(1)) or where breach has been waived (MIA 1909, s 40(3), although given that the effect of a breach of warranty is automatic termination of the risk, waiver by affirmation is not possible and the right to rely upon the breach can be lost only by estoppel.[105] A sharp reminder of the biting power of marine warranties is provided by *Allison Pty Ltd v Lumley General Insurance Ltd, The Pilbara Pilot*.[106] Here, the policy contained a warranty as to the mooring of the vessel. The impending approach of Tropical Cyclone 'Bobby' led the assured to move the vessel to a potentially safer location, although she was there badly damaged. The insurers asserted that moving the vessel was in breach of warranty, even though the purpose of doing so was to minimise the risk of loss. The Western Australian Supreme Court rejected the insurers' defence on the facts, but the potential strength and unfairness of the warranty argument is obvious. It would be much better to deal with this type of case on a causation basis.[107]

It is of interest to note that the use of warranties in standard London market wordings has steadily decreased. At one time there were warranties as to the number of crew, the safety of the vessel at the outset of the voyage, the time of sailing, the classification and ownership of the vessel, the route, the payment of the premium, the use of convoys and the uses to which the vessel was to be put. Even then, breaches were often to be disregarded under 'held covered' provisions.[108] The draftsmen of the IHC 2003 deliberately refrained from the use of warranties. Classification[109] and navigation[110] provisions are now expressed as suspensory clauses, so that that recovery is denied only where the vessel was unclassed or off route at the time of loss, and premium payment obligations are set out as conditions which cannot be invoked without an extension of time followed by notice.[111] The only warranty left in IHC 2003 is the disbursements warranty,[112] restricting double insurance, but even that cannot be pleaded against a mortgagee unaware of the breach. The word 'warranty' does not appear in ICC 2009.

One of the most important reforms introduced by ICA 1984 was to negative the effect of warranties. ICA 1984, s 24 disposes of present warranties by the simple device of treating every statement as a representation rather than as a warranty,[113] so that breach does not have any automatic effect but rather attracts the ordinary rules which govern misrepresentation as set out in ICA 1984, ss 23 and 28 and discussed above. As regards future warranties, the position is regulated by the oft-litigated provisions of ICA 1984, s 54. Again, only a brief summary is needed here. The section applies where the assured is in breach of an obligation imposed upon him under the policy. Under ICA 1984, s 54(1), if the clause is not one whose breach is not capable of causing or contributing to loss (eg, a notification clause), then the insurers cannot refuse to pay the claim but the amount may be reduced by the extent to which the insurers have been prejudiced. Most warranties are unlikely to fall into this category, because a warranty in its origins and

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104 As in *Provincial Insurance v Morgan* [1933] AC 240.

105 *HIH Casualty v AXA Corporate Solutions* [2003] Lloyd's Rep IR 1.

106 [2006] WASC 104.

107 See Kate Lewins, 'Breach of Warranty in Marine Insurance: Allison Pty Ltd t/as Pilbara Marine Port Services v Lumley General Insurance Ltd [2006] ('Pilbara Pilot')'(2006) 20 *Australian & New Zealand Maritime Law Journal* 54.

108 *Australia and New Zealand Banking Group Ltd v Compagnie d'Assurances* [1996] Vic Rep 40: breach of warranty of trading limits protected by held covered clause even though notice not given to insurers.

109 IHC 2003, Cll 13-14.

110 IHC 2003, Cll 10-11 and 32-33.

111 IHC 2003, Cl 35.

112 IHC 2003, Cl 24.

113 An idea adopted in the *English Consumer Insurance (Disclosure and Representations) Act 2011*.

nature is likely to affect the risk. However, some warranties may be caught by ICA 1984, s 54(1), eg, where the assured is required to warrant all of his pre-contractual statements only some of which relate to the risk. A specific example is (where it is still used) the premium warranty, under which late payment of instalment terminates the risk automatically but does not discharge the assured from his obligation to pay the missing instalment and also any future instalments.[114] Most warranties are capable of affecting the risk, and if there is breach the insurers are entitled to refuse to pay the claim (ICA 1984, s 54(2)), but this is subject to four qualifications: the insurers must pay the claim if the assured proves that no part of the loss was caused by the breach of warranty (ICA 1984, s 54(3)); if the assured proves that some part of the loss was not caused by the breach, the insurers must pay that part (ICA 1984, s 54(4)); steps taken to preserve life or property are to be disregarded (ICA 1984, s 54(5)(a));[115] and an act which could not have been reasonably avoided is to be disregarded (ICA 1984, s 54(5)(b)). There is no need here to go into the complex case law on these provisions, much of which relates to claims made under professional indemnity policies which have no part to play in marine insurance,[116] because the section works tolerably clearly in the context of warranties. The most serious criticisms of warranties disappear: there is no automatic termination; there has to be a causal link between the breach and the loss; and immaterial statements cannot be converted into actionable misrepresentations.

It is obvious from the above account that warranties are gradually falling into disuse, although some old wordings still retain them and warranty cases do surface from time to time.[117] The most recent English cases have recognised the draconian nature of warranties and have attempted to construe them as narrowly as the language will bear.[118] Given the judicial and academic consensus that warranties are unjustifiable, and given the market's own increasing reluctance to rely upon technical breaches, is there any longer a need to preserve express warranties in marine policies? It its boldest move, ALRC 91 thought not, but it deferred to a great deal of evidence expressing the need for caution and chose not to apply the ICA 1984, s 54 model. Instead it adopted a compromise regime which rejected the proportionality approach set out in the terrestrial legislation. Under ALRC 91, warranties were to disappear and to be replaced (if required by the insurers) by express contract terms under which insurers would be relieved from liability in the event of a breach which was the proximate cause of the loss even if there are other proximate causes (recommendations 7-9). A breach which was remedied before any loss would cease to be of significance. In the absence of any such express term, insurers would be entitled only to damages on breach. The burden of proving breach would rest on the insurers, although the burden of showing that the breach was not the proximate cause of the loss would be borne by the assured (recommendation 19).

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114 *Chapman & Co Ltd v Kadirga Denizcilik ve Ticaret AS* [1998] Lloyd's Rep IR 377.

115 A provision which would almost certainly have led to a decision in favour of the assured in *The Pilbara Pilot*, discussed above.

116 The detailed analysis of these cases in ALRC 91, see above n 1, [9.81]-[9.102] is an excellent dissection and reconciliation, but of no real relevance to the issued addressed by the Report.

117 Most recently, *Pt Buana Samudra Pratama v Marine Mutual Insurance Association (NZ) Ltd* [2011] EWHC 2413 (Comm).

118 *Pratt v Aigaion Insurance* [2009] Lloyd's Rep IR 149 (crewing warranty applicable only where vessel preparing for or actually sailing). Cf *Switzerland Insurance Australia Limited v Mowie Fisheries Pty Ltd* [1997] FCA 231 (a warranty that vessel would remain in survey was not broken simply because the assured was in breach of a condition attached to the survey certificate). Cf *Argo Systems FZE v Liberty Insurance (Pty)* [2011] EWHC 301 (Comm): warranty against hold harmless clause in favour of third party applicable even to a standard market term.

The differences between the ALRC 91 recommendations and ICA 1984, s 54 are too subtle for the present writer's grasp. Perhaps the main point is that if any part of the loss is proximately caused by the assured's breach of an express term, ALRC 91 would remove all recovery whereas ICA 1984, s 54 would involve apportionment. The former proposal does not have the benefit of overriding merit, because by definition it operates in a disproportionate fashion. If that is the only obstacle to the adoption of ICA 1984, s 54 in the marine context, then it really is far from persuasive.

MIA 1909, ss 39-41 should be repealed and ICA 1984, s 54 should govern express warranties.

XIII IMPLIED WARRANTIES

There are no implied non-marine warranties. By contrast, MIA 1909 devotes no less than six sections to implied warranties. Closer perusal of those sections shows that they are for the most part negative, in that there are no implied warranties of: neutrality (MIA 1909, s 42(1)) other than a long-obsolete warranty as to carrying papers of neutrality where there is an express neutrality warranty (MIA 1909, s 42(2)); nationality (MIA 1909, s 43); good safety, unless (as no longer occurs) there is an express warranty (MIA 1909, s 44); or cargo-worthiness (MIA 1909, s 46). These sections can be ditched without ado, as suggested by ALRC 91 (recommendation 17). The only substantive warranties that remain are seaworthiness (MIA 1909, ss 45 and 46(2)) and legality (MIA 1909, s 47).

The most important implied warranty is that of vessel seaworthiness.[119] The law here draws a distinction between voyage policies and time policies. In the case of a voyage policy, under MIA 1909, s 45(1)-(4) there is a red-blooded warranty which requires the vessel to be seaworthy at the outset of every stage of the voyage,[120] failing which the risk terminates automatically. Accordingly, if there is a subsequent loss, at a time when the warranty was not being complied with, the insurers cannot be liable. Further, in a voyage policy on cargo, there is an implied warranty that the vessel is reasonably fit to carry the cargo (s 46(2)). By contrast, under a time policy, MIA 1909, s 45(5) states that seaworthiness provides a defence only if, with the privity (knowledge) of the assured the vessel was sent to sea in an unseaworthy state and the loss is attributable to the unseaworthiness to which the assured was privy. ALRC 91 proposed the abolition of the implied voyage policy seaworthiness warranties and replacing them with express terms, if required (recommendation 10). The express term would provide a defence only where the assured knew or ought to have known of the relevant circumstances that they rendered the vessel unseaworthy and failed to take such remedial steps as were reasonably available to him (recommendation 11). As a lesser alternative, MIA 1909, s 46(2) should be repealed[121] and the implied warranty of seaworthiness in both time and voyage policies should follow the time model in MIA 1909, s 45(5). These proposals are welcome but they do not show any convincing reason why ICA 1954, s 54 should not govern the position. As far as voyage policies are concerned, the warranty of seaworthiness would be swept away by ICA 1984, s 54, and replaced with a causation test under s 54(3) whereby insurers would have a proportionate defence to the extent that the unseaworthiness contributed to the loss. As far as time policies are concerned,

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[119] There is no warranty of cargo-worthiness: MIA 1909, s 46.

[120] *Garnat Trading & Shipping (Singapore) Pty Ltd v Baominh Insurance Corporation* [2011] EWCA Civ 773 confirms that whether or not there are separate stages is a matter not of contract but of fact.

[121] The warranty is in effect disapplied by ICC 2009, cl 5 unless the assured is aware at the time of loading that the vessel is unseaworthy.

English law has now moved ahead of ICA 1984, s 54(3): the Supreme Court has ruled in *Global Process Systems Inc v Berhad, The Cendor Mopu*[122] that if there has been a peril of the seas affecting an unseaworthy vessel then the assured is entitled to recover. The previous status of unseaworthiness as an uninsured peril, which would be given priority if it was the dominant cause,[123] has been reduced to an exception to perils of the seas where it is the sole cause. Scrapping the strict warranty for voyage policies would reduce rights of insurers, but justifiably so. MIA 1909, s 45(5) has been rendered a dead letter anyway.

The second relevant warranty is that of legality (MIA 1909, s 47). This is in two parts: the assured warrants from the outset that the voyage is a lawful one; and he further warrants that, as far as he can control the matter, the voyage will be carried out in a lawful manner. As ALRC 91 pointed out, the warranty can be broken by relatively trivial infringements of any of the plethora of statutory provisions which now regulate the shipping industry.[124] ALRC 91 proposed that the implied warranty should be repealed and replaced with an express term if required (recommendation 13), and that either any breach of an express term should discharge the insurers from liability (recommendation 14) or that any breach of an express term should discharge the insurers from liability insofar as loss was attributable[125] to the breach. The present author strongly disagrees with this approach. The common law contains perfectly respectable (although, at the margins, difficult to apply) rules which govern the right of a lawbreaker to enforce, or recover an indemnity under, a contract. In essence, if the contract itself contemplates an illegal venture, it will be void on public policy grounds. Alternatively, if there is no illegality in formation but only in performance, the guilty party cannot recover if, to do so, he must pray in aid his own illegality.[126] That means that incidental illegality which has no relevance to the claim does not give a defence. A case has to be made for allowing the parties to agree that additional rights are to be conferred upon insurers for lesser breaches. One such justification may be found in the need to enforce ship safety rules, smuggling and trade laws, employment codes and rules on pollution and the carriage of hazardous equipment. However, these are surely matters for criminal or administrative enforcement, not the civil law. In short, there does not seem to be any justification to allow insurers to rely upon even express terms relating to illegality unless they satisfy the ordinary ICA 1984, s 54 test or there are public policy reasons to deny indemnity.

MIA 1909, ss 43-47 should be repealed and ICA 1984, s 54, should govern any express provision made by the parties.

XIV VARIATION OF RISK

The common law is sympathetic to an assured who, by reason of events occurring during the currency of the policy, imposes a greater risk upon the insurers than was contemplated at the outset. It is only where the assured completely alters the nature of the underlying risk, eg, by converting a building site into a storage facility,[127] that insurers are discharged automatically from any further liability. By contrast, where the risk of loss

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[122] [2011] UKSC 5, in part anticipated by *Skandia Insurance Co Ltd v Skoljarev* (1979) 142 CLR 375.

[123] *JJ Lloyd Instruments v Northern Star Insurance Co, The Miss Jay Jay* [1987] 1 Lloyd's Rep 32; *Skandia Insurance Co Ltd v Skoljarev* (1979) 142 CLR 375.

[124] *Doak v Weekes* (1986) 82 FLR 334;*Switzerland Insurance Australia Ltd v Mowie Fisheries Pty Ltd* (1997) 74 FCR 205; *Solway v Lumley General Insurance Ltd* [2003] QCA 136.

[125] Which ALRC 91, see above n 1, took as being equivalent to 'caused by'.

[126] See generally, *Tinsley v Milligan* [1994] 3 All ER 65.

[127] *Swiss Reinsurance Co v United India Insurance Co Ltd* [2005] Lloyd's Rep IR 341.

is merely increased rather than changed, insurers are not discharged from liability[128] and an express term which prohibits or requires approval for such change is to be construed as merely reflecting the common law so that it has no effect unless there is an actual change in risk.[129] Under ICA 1984, s 60, an insurer may reserve the right to cancel on change or increase of risk, and if a loss occurs before there has been cancellation then liability or otherwise is determined by the rules in ICA 1984, s 54. The point is that there is no concept of automatic termination.

By contrast there are rules in MIA 1909, ss 48-55, which provide for the automatic termination of a marine risk where there is some form of alteration of risk. First, where the subject matter is insured 'at and from' a place, the voyage must be commenced within a reasonable time (MIA 1909, s 48). Secondly, where the place of departure is specified by the policy, and the ship sails from some other place, the risk does not attach (MIA 1909, s 49). Thirdly, where the destination is specified in the policy and the ship sails for some other destination, the risk does not attach (MIA 1909, s 50). Fourthly, where, after the commencement of the risk, there is a change of destination, the risk is automatically discharged from the date on which the intention to change is manifested even though it has not actually happened (MIA 1909, s 51). Fifthly, where a ship deviates from the voyage contemplated by the policy, the insurers are discharged from the date of deviation (MIA 1909, s 52), which includes adhering to the order designated by the policy (MIA 1909, s 53). Sixthly, if the assured fails to prosecute the voyage with reasonable despatch, the insurers are automatically discharged at the point at which the delay becomes unreasonable (MIA 1909, s 54). Both delay and deviation, although not change of voyage, are subject to a series of exceptions based on necessity or matters beyond the control of the assured (MIA 1909, s 55).

In practice most of these provisions have become obsolete. They have long been excluded or modified by held covered clauses extending cover for any period of breach, or by conferring upon the assured 'liberty to touch and stay' at other ports. Modern policies are no longer written on an 'at and from' basis, and navigation limits which subsume the rules on place of departure, change of voyage and deviation are subsumed by them. Delay is expressly excluded from freight and cargo policies, so that delay does not automatically terminate the risk but rather operates as a limit on recovery. The principle that the insurers are discharged if the vessel sets sail for an unauthorised destination is inconsistent with the traditional cargo warehouse to warehouse clause under which cover commences at the warehouse of origin, and the Court of Appeal ruled in *Nima SARL v Deves Insurance Co plc*[130] that the cargo remains covered during transit to the vessel but coverage is automatically lost where the vessel sets sail for its unauthorised destination. Many cases of this type involve 'phantom vessels', where cargo arrives for loading and then disappears. The transit clause in ICC 2009, cl 8, extends cover by specifying that the risk attaches inside the warehouse and not outside it, so that moving and loading risks are within the policy, and cl 10.2 addresses the conflict raised by phantom vessels by disapplying MIA 1909, s 50 where the vessel has sailed for a different destination without the knowledge of the assured or his employees.

So, all of the matters dealt with by MIA 1909, ss 48 to 55 are governed these days by express provisions which do not resort to automatic termination. Attachment of the risk, presently falling within MIA 1909, ss 49 and 50, is a matter of contract, and there is nothing in ICA 1984 which interferes with it. Subsequent failure to adhere to navigation limits is equally a matter of contract, and a policy which provides for suspension of the risk while the vessel is in breach of those limits. There is authority that ICA 1984, s 54,

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[128] *Scottish Coal Co v Royal and Sun Alliance plc* [2008] Lloyd's Rep IR 718.
[129] *Kausar v Eagle Star Insurance Co Ltd* [2000] Lloyd's Rep IR 154.
[130] [2002] Lloyd's Rep IR 752.

has no application to risk definition provisions,[131] so navigation limits would not be affected if they were brought within the non-marine regime. It may be noted that ALRC 91 felt that the attachment of risk provisions should be preserved but that the automatic termination rules relating to change of voyage, deviation and delay should be repealed and the matter should instead be governed by contract (recommendation 16).

MIA 1909, ss 48-55 should be repealed and ICA 1984, s 54 should apply to any express provision made by the parties.

XV PREMIUM

MIA 1909 says little of value about premiums: s 37 requires a reasonable premium to be paid in the absence of agreement, although there is a good chance that if there is no agreement on premium the court will find that there is no contract unless there is some objective mechanism for its determination; MIA 1909, s 58, laying down a presumption that payment of the premium and the commencement of the risk are concurrent conditions is ousted in practice; and MIA 1909, s 59 and 60, which require the broker to pay the premium, have already been repealed in Australia so as to bring the law of marine and non-marine brokers into line. The other provisions relating to premiums, those on return of premium in ss 88-90, codify the principles which apply also to non-marine insurance. Sections 88 and 89 lay down the obvious propositions that if a part of the premium is returnable it is to be returned, and if the contract provides for return of some or all of the premium on the happening of an event, the premium must be returned if that event occurs. Section 90 sets out the basic rule that once the risk has attached no part of the premium is returnable and if the risk has not attached then the premium is returnable. There is one minor difference between marine and non-marine insurance, in that under s 90(3)(e) an assured who has over-insured under an unvalued policy is entitled to a return of the relevant proportion of his premium. There is no reported instance of an assured seeking a return of premium under this provision, and it is almost certainly obsolete.

The rules relating to premiums are disapplied by MIA 1909, s 85 in the case of mutual insurance. P&I Clubs work on the basis not of one-off premiums but rather of initial payments supplemented by calls if additional funding is required to meet losses. This section becomes redundant if the others are repealed, and it is in any event erroneous in its description of mutual insurance as the situation 'where two or more persons mutually agree to insure each other'. That description was accurate up until 1856, at which date P&I Clubs took advantage of the newly-conferred benefit of corporate form.

MIA 1909, ss 37, 58, 80-82 and 91 should be repealed.

XVI CAUSATION

Causation, other than in the context of the causal link between loss and the assured's breach of a policy term,[132] is not a matter addressed by ICA 1984, as it is essentially a question of fact in every case whether a loss has been proximately caused by an insured peril. Further, it is a matter of contract whether a loss is or is not insured, and coverage is – subject to one exception discussed below – not regulated by ICA 1984. The most important maritime risk is 'perils of the seas', a phrase recently reconsidered by the

[131] *Stapleton v ATI Ltd* [2002] QDC 204 (restriction on area in which motor vehicle could be used).

[132] ICA 1984, s 54.

Supreme Court in *Global Process Systems Inc v Berhad, The Cendor Mopu*.[133] The Supreme Court, reviewing some 250 years of authority, concluded that a peril of the seas is simply a fortuitous event giving rise to loss, even one that was foreseeable and indeed very likely, and that the concluding words of the definition – 'excluding the ordinary action of the wind and the waves' – meant no more than that there had to be some form of occurrence which gave rise to loss. The word 'ordinary' refers to 'action' and not to 'the wind and the waves', so that even if a vessel went down in perfectly normal sea conditions there could be a peril of the seas if the loss was caused by an unexpected event. This decision, which is not dependent upon MIA 1909, is of great significance for causation, as will be seen shortly.

The principle in MIA 1909, s 61(1), that the insurer is liable for any loss proximately caused by an insured peril but not otherwise, adds nothing to the common law. Equally, the exclusion for wilful misconduct, as opposed to negligence,[134] in MIA 1909, s 61(2)(a) is a common law principle, and the rule that delay is not an insured peril (s 61(2)(b)) is in practice ousted for cargo claims where the delay is beyond the control of the assured.[135] That leaves the exclusions in s 61(2)(c), namely, 'ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject matter insured, or ... rats or vermin … or for any injury to machinery …' How would repeal of s 61(2)(c) affect this list?

There is no objection to a terrestrial policy excluding ordinary wear and tear, and it has been held in Victoria that this phrase extends only to loss which is inevitable from the use of the subject matter and does not extend to loss attributable to external factors.[136] Vermin infestation can be insured or excluded by contract, and in practice it falls within all risks cargo cover. The injury to machinery exclusion reflects *The Inchmaree*, which held that damage caused by mechanical breakdown is not a peril of the seas. But the Inchmaree Clause,[137] which has been standard in hull policies since the case was decided, permits the assured to recover for damage caused by bursting of boilers, later extended to breakage of shafts, and IHC 2003 extended cover not just to such damage but also to the costs common to repairing the boiler or shaft and other damage[138] and, for additional premium, damage suffered by the boiler or shaft independently of other damage.[139] As far as 'inherent vice' is concerned, *The Cendor Mopu* effectively held that this is not an exclusion at all but rather is a description of the limitations of perils of the seas, so that if the subject matter is damaged by a peril of the seas then by definition there cannot be inherent vice. By contrast, if there is no external event which has given rise to loss, and the subject matter simply deteriorates by reason of its internal nature, then there is no peril of the seas because the loss can be attributable only to inherent vice, and there is no cover. In short, the Supreme Court has deleted these words from the legislation. Although there is no decided case on the point, the view at the Bar is that *The Cendor*

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133 [2011] UKSC 5, in part anticipated by *Skandia Insurance Co Ltd v Skoljarev* (1979) 142 CLR 375. See also *Ocean Harvester Holdings Pty Ltd v MMI General Insurance Ltd* [2004] QCA 41, where the cover was for accidents rather than perils of the seas.

134 In *HIH Casualty and General Insurance Ltd v Waterwell Shipping Inc* [1998] NSWSC 436 crew negligence – in the form of allowing water to enter the vessel by failing to close valves – was elevated to an insured peril. It is not clear that this is right as a matter of law, as the provision is negative and merely states that negligence is not a bar to recover if the insured peril is occasioned through negligence, although it is plainly the case under IHC 2003, cl 2.2, which treats crew negligence as an insured peril in its own right.

135 ICC 2009, cl 8.3.

136 *JSM Management Pty Ltd v QBE Insurance (Australia) Ltd* [2011] VSC 339.

137 IHC 2003, cl 2.2.

138 IHC 2003, cl 2.3, 2.4.

139 IHC 2003, cl 41.

Mopu has dealt the same fate to the so-called exclusion for 'ordinary leakage and breakage'.

ICA 1984, s 46, which has no parallel anywhere in English law, lays down the principle that an insurer may not rely upon an exclusion for loss caused by a hidden defect which existed before the policy was entered into and of which the assured was not, and a reasonable person in his position would not have been, aware. Secondary legislation has restricted this provision to consumer policies.[140] Interestingly, this provision is echoed by the Inchmaree Clause, which provides cover for 'latent defects', a term which has been construed widely,[141] and ICA 1984, s 46 can in principle happily apply to marine policies.[142]

MIA 1909, s 61, should be repealed. As ICA 1909, s 46 has no application to commercial policies, there is no need to make an exception for marine policies, and the matter can be left to the parties.

XVII FRAUDULENT CLAIMS

One of the most contentious areas of insurance law is fraudulent claims. The common law has adopted an increasingly harsh attitude. In a series of decisions in the last decade, it has been established that where a claim is fraudulent, the entirety of it will be lost. This will occur if the claim falls into any of the following categories:[143] it relates to a loss that either has not occurred or which was deliberately brought about by the assured; the sum claimed is greater than the loss suffered; the assured has deliberately suppressed a known defence; and the assured has used fraudulent means or devices in the presentation of his claim. The last in particular has proved to be problematic, in that an assured who has suffered a perfectly genuine loss but who embellishes the circumstances in which it occurred will lose the entirety of his claim[144] even though his statements have no obvious bearing on the loss or fraud was resorted to because of constant wrongful refusals of the insurers to pay an established claim.[145] In a recent marine example, *Pt Buana Samudra Pratama v Marine Mutual Insurance Association (NZ) Ltd*,[146] insurers were held to have an arguable case for a fraudulent claim even though the false statements were made after the insurers had, by virtue of a 'follow the leader' clause, become bound to pay following settlement by the leading underwriter. The cases do not go as far as recognising a duty of disclosure in the context of claims,[147] but IHC 2003, cl 45 appears to do just that and has thereby caused a good deal of discontent in the broking community.[148] ICA 1984, s 56 reflects the common law rule that the entire claim is defeated, but goes on to give the court a discretion to allow the valid part of a claim if

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140 Insurance Contracts Regulations, SR 1985 No 162.

141 See *Prudent Tankers SA v Dominion Insurance Co Ltd, The Caribbean Sea* [1980] 1 Lloyd's Rep 338.

142 *Nelson v Hollard Insurance Co* [2010] NSWSC 199 indicates that s 46 is actually narrower in scope than the Inchmaree Clause.

143 *Agapitos v Agnew* [2002] Lloyd's Rep IR 573; *Axa Insurance Co v Gottlieb* [2005] Lloyd's Rep IR 369.

144 See, eg, *Sharon's Bakers (Europe) Ltd v AXA Insurance UK plc* [2011] EWHC 210 (Comm)

145 *Aviva Insurance Ltd v Brown* [2011] EWHC 362 (QB).

146 [2011] EWHC 2413 (Comm).

147 *Interpart Commerciao e Gestao SA v Lexington Insurance Co* [2004] Lloyd's Rep IR 690; *Marc Rich Agriculture Trading SA v Fortis Corporate Insurance NV* [2005] Lloyd's Rep IR 396.

148 The fear is that an assured who obtains quotes for repairs is under a duty to disclose the lowest quotes that have been rejected even though there may be good objective reasons for such rejection.

only a 'minimal or insignificant' part of it is fraudulent and rejection of the entire claim would be 'harsh and unfair', although the court is to have regard to the need to deter fraud. The principle of judicial discretion has been firmly rejected by the English and Scottish Law Commissions.[149]

Once again, appearances are deceptive, and it may be that there is little difference between marine and non-marine law here. The cases on ICA 1984, s 56 relate to claims which have been exaggerated in a minor way only. The discretion has been exercised in favour of assureds in only one case, and that related to a minor exaggeration of the amount of loss.[150] However, that result would probably also have been reached by an English court, as it is recognised that trivial exaggeration does not constitute fraud in the first place.[151]

XVIII LOSSES

Undoubtedly the most often-cited difference between marine and non-marine insurance is the recognition by the former of constructive total loss. A non-marine assured whose property is affected by an insured peril has suffered either a total loss (destruction) or a partial loss (damage), and if his property is taken by a third party he has suffered either a total loss (no prospect of recovery) or no loss at all (prospect of recovery). Marine insurance similarly recognises total and partial losses (MIA 1909, ss 62, 63 and 64), although there is an intermediate possibility of constructive total loss where the damage is repairable or recoverable but at a cost which exceeds the repaired or recovered value: in these cases the assured can elect to treat the CTL as an ATL (MIA 1909, ss 66 and 67). However, these distinctions are not adhered to in practice. If property is damaged beyond economic repair – and the obvious example is a motor vehicle, although the principle applies to any chattel[152] – the practice is to write it off and treat it as totally lost: that is CTL by any other name. Again, if property is stolen, the practice of insurers is to treat it as lost and to pay accordingly. These considerations led Rix LJ in *Masefield v Amlin*[153] to suggest that the concept of ATL is narrower in marine than in non-marine insurance, although the practical effect of this comment is that the non-marine ATL is more or less the same as the marine ATL and CTL combined. But even if some differences remain, it is the practice of the market to define CTL in terms different to those found in the MIA 1909: the IHC, cl 21, provides – for the benefit of the assured – that there is a CTL when the cost of repairs or recovery exceeds 80% of the insured value of the vessel rather than the full repaired value; and the ICC, cl 13, limits CTL to cases where the cargo is reasonably abandoned on account of apparent unavoidable ATL or its repair or recovery costs would exceed its arrived value. The statutory definitions are thus redundant.

The significance of CTL in marine insurance is that the assured is entitled to give a notice of abandonment to the insurers: if it is accepted, the assured is entitled to recover on the basis of ATL; if it is rejected, but the assured can later prove that there was a CTL at the date of rejection, he is again entitled to recover on the basis of ATL (MIA 1909, s 68). This has to be done as soon as practicable, and so that there is a potential conflict with ICA 1984, s 54, which would look for prejudice. Historically, the purpose of this rule was to allow the assured the ability to relinquish the insured subject matter to the

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149 Law Commission, see above n 98.

150 *Entwells Pty Ltd v National and General Insurance Co Ltd* (1991) 6 ANZ Ins Cas 61-059.

151 See *Galloway v Guardian Royal Exchange (UK) Ltd* [1999] Lloyd's Rep IR 209.

152 Plainly not to policies on buildings, as the value of the land is often greater than that of the building.

153 [2011] Lloyd's Rep IR 338.

insurers at the outset, so that alternative arrangements could be made immediately to minimise freight and other losses. However, that has not proved to be the practice, at least with hull claims. There is a widespread, albeit yet untested, view in the market that if an underwriter accepts a notice of abandonment, the effect of so doing is, under MIA 1909, s 69, to create a binding arrangement under which equitable title to the subject matter vests in the underwriter immediately and legal title to the subject matter is transferred to the underwriter automatically on payment of the loss. The underwriter may not wish to bear the burden of the ownership of a wreck, and so the current practice is for the notice of abandonment to be refused as a matter of course and for a decision to be taken as to whether or not to assume legal ownership when the loss is paid. If the underwriter chooses not to assert ownership, the outcome is a legal conundrum as to who actually owns the wreck, given that the assured has abandoned it and the insurers have refused it.[154] The difference between marine and non-marine law is that a non-marine assured cannot tender a notice of abandonment which, if accepted, binds the insurers to pay for an ATL and to take the subject matter; instead he may be required by the insurers, if they so choose, to hand over to the insurers, on payment for an ATL, what remains of the damaged subject matter. In practical terms the outcome is the same: nothing is resolved until actual payment, at which point the insurers can make a decision as to whether they do or do not want to assert ownership. So the entire notice of abandonment procedure, at least for hulls, has outlived its usefulness. Its main function in practice is to fix the date on which the assessment of the existence or otherwise of a constructive total loss occurs as being the date on which the notice is rejected, but even that is a rule of practice and not a rule of law.[155] Abolishing the notice of abandonment would, it might be argued, give rise to a 'wait and see' scenario, whereby the parties would have to see, based on later events, whether there was or was not a loss. However, that is the law if anything other than a vessel or marine cargo is seized – as in the case of aircraft[156] or jewellery[157] – and it would now also seem to be the law also in marine cases following *Masefield v Amlin* in which the Court of Appeal was unable to say that the taking of a vessel and its cargo by pirates amounted to a loss of the cargo and instead that all depended upon the outcome of negotiations.

A further complication created by the concept of constructive total loss arises from the problem of successive losses, addressed by MIA 1909, s 83. The section is unexceptional insofar as it provides that the insurers are liable for successive partial repaired[158] losses even though they exceed the sum insured,[159] and also that an unrepaired partial loss merges into a total loss, as those are also non-marine rules. However, the section stops short at the situation in which an insured constructive total loss is followed rapidly by an unrelated uninsured actual total loss. In *The Kastor Too*[160] the Court of Appeal held that the constructive total loss constituted a loss in its own right and that the assured was entitled to recover for it. It is almost certain that the position would be the same in non-marine insurance. Imagine a car damaged beyond economic repair in a road accident which is then, while awaiting removal for scrap, torched by rioters: insurers would, it is suggested, find it difficult to persuade a court that the loss is by the uninsured peril of riot. So the repeal of MIA 1909, s 83, would not cause any problem.

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[154] All of these issues were discussed, without resolution, in *Dornoch Ltd v Westminster International BV (No 2)* [2009] EWHC 889 (Admlty).

[155] The law points to the date of the issue of the proceedings.

[156] *Scott v Copenhagen Re* [2003] Lloyd's Rep IR 696.

[157] *Moore v Evans* [1918] AC 185.

[158] *Kusel v Atkins, The Catariba* [1997] 2 Lloyd's Rep 749.

[159] Although many policies contract out of the rule by fixing a maximum insured sum for any one event and in the aggregate.

[160] *Kastor Navigation Co Ltd v AGF, MAT* [2004] Lloyd's Rep IR 481.

This may need some further thought, but there seems no obvious reason for a modern day distinction between different classes of property which have been damaged or seized. MIA 1909, ss 62-69 and 83 should be repealed.

XIX MEASURE OF INDEMNITY

Under an unvalued non-marine policy, the amount recoverable by the assured is the difference between the value of the subject matter immediately before and immediately after the occurrence of the insured peril. The marine rule, in MIA 1909, s 22, takes as the reference point the value at the date of the policy.[161] To modern eyes this is a curious rule, in that it undermines the indemnity principle by conferring a windfall to one or other side depending upon market movements between policy and loss. The English courts have taken the view that the s 22 principle is one that is readily ousted by express wording, and that standard London market wordings do just that.[162] The section is thus redundant and its repeal would not cause any difficulties.

The amount recoverable under a marine policy is subject to a series of complex rules in MIA 1909, ss 74 to 82. These distinguish the various forms of insured subject matter (ships, goods, freight and liability) and specify how the amount of recovery is to be calculated. Much of what is laid down is ousted by agreement, eg, the 'customary deduction' of one-third for a partial loss of a ship in MIA 1909, s 75 is no longer applied and instead the assured is entitled to recover on a 'new for old' basis under IHC 2003, cl 12, and other modifications are made by cll 13-15. The amount recoverable is a matter of contract, and in practice the sections are subject to contractual variations. Further, the sections do not provide a complete code.[163] Given the exclusion of MIA 1909, s 22, it is fair to say that none of the sections is applied in full in practice and that matters are regulated by contract, just as is the case in non-marine insurance.

One specific feature of marine insurance is the principle in MIA 1909, s 87, that policies are subject to average. This has an impact where the assured is underinsured and has suffered a partial loss: average requires the amount of the assured's recovery to be reduced proportionately to the degree of underinsurance. Average has no impact where there is a total loss, as the assured is entitled to recover the full sum insured. In practice average is not always applied, and policies may pay on a new for old basis. ICA 1984, s 44, treats average as a trap for the unwary policyholder, as many people would not appreciate that a reference to 'average' means that underinsurance can reduce cover for partial loss. Accordingly, the *1984 Act* states that an average clause can be relied upon only if its meaning is made clear at the outset. This protection is unnecessary in the marine market and it could be disapplied without harm.

MIA 1909, ss 70-72 and 79 set out, in a particularly cumbersome fashion, the principles governing the recovery of salvage charges and general average losses from underwriters. The sections have long been superseded by the York-Antwerp Rules, revised most recently in 2004, and market wordings have been modified to reflect the Rules. Particular average warranties, excluding partial losses, and as defined in MIA 1909, s 82, have long since disappeared and have been replaced by 'total loss only' policies. ALRC 91 saw no particular need to repeal any of these provisions. Equally, there is no particular need to keep them.

It was noted above that damages for late payment are not awardable under English law, whereas such damages appear to be awardable under the general utmost good faith

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[161] *Franke v CIC Generale Insurance Ltd, The Coral* (1994) 33 NSWLR 373.

[162] *The Captain Panagos DP* [1985] 1 Lloyd's Rep 625; *Thor Navigation Inc v Ingosstrakh Insurance* [2005] Lloyd's Rep IR 490.

[163] See, eg, s 75, which omits the possibility that a vessel has been sold in an unrepaired state.

principle in ICA 1984, s 13, if not at common law as it is construed in Australia. It was there suggested that there is no basis for distinguishing marine and non-marine insurance in this regard. Further, there is no reason why the rule in ICA 1984, s 57, that interest is payable from the period during which indemnity has been unreasonably withheld, should not extend to marine insurance. The present law allows the award of interest on a marine payment only where the assured has litigated or arbitrated and secured judgment for the sum due.

MIA 1909, ss 22, 70-72, 74-79 and 82 should be repealed.

XX SUING AND LABOURING

Another of the key differences between marine and non-marine insurance is suing and labouring. The duty of the assured to take reasonable steps to prevent or mitigate a loss is set out in MIA 1909, s 84(4), and the assured's right to recover the costs of so doing in addition to the sums due under the policy is set out in MIA 1909, s 84(1). The latter provision is curious, because it is prefaced by the words 'Where the policy contains a suing and labouring clause', thereby suggesting that the assured has a duty at law to prevent or mitigate loss but that he is only entitled to recover his expenditure if the policy so provides. It is clear, however, that in those rare cases where there is no suing and labouring clause the assured is nevertheless entitled to recover his reasonable expenditure.[164] The duty has been whittled away to almost nothing. The cases upon which s 78(1) were based all turned on causation questions, and the courts have now confirmed that the provision merely lays down a causation principle to the effect that the assured cannot recover to the extent that his own act or failure to act is the proximate cause of the loss.[165] As pointed out by Rix LJ in *Masefield v Amlin*, insurers have not successfully relied upon a failure to sue and labour as a defence to a claim since the legislation was passed,[166] and it is strongly arguable that there is no pre-1906 case to that effect either. So in practice MIA 1909, s 84 merely says that if the policy so provides, an assured who incurs expenditure to prevent or mitigate a loss is entitled to indemnity for sums reasonably incurred. Virtually all marine policies say that, and some non-marine policies do as well. In fact this is an area of law in need of general reform, because as things stand an assured who does take steps to prevent or mitigate a loss without the support of a suing and labouring clause acts as a volunteer and has no entitlement to reimbursement,[167] and it cannot be right that there is no incentive for an assured who wishes to do so to take reasonable steps for the benefit of both himself and his insurers.

XXI SUBROGATION AND CONTRIBUTION

The common law rules on subrogation are codified in MIA 1909, s 85. Those rules were modified by ICA 1984, ss 65-67, adopting the recommendations of ALRC 20. The only significant difference between the two regimes is that under ICA 1984, s 67(2), reversing the common law and marine rule, the insurers may retain any sum recovered from the third party which exceeds the assured's loss: the windfall, which will typically

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164 *Emperor Goldmining Co v Switzerland General Insurance Co* [1964] 1 Lloyd's Rep 348.

165 *State of Netherlands v Youell* [1998] 1 Lloyd's Rep 236.

166 The Court appears to have overlooked *Linelevel Ltd v Powszechny, The Nore Challenger* [2005] 2 Lloyd's Rep 534, where the assured lost a small part of his claim on the ground that he had caused additional loss by failing to effect repairs in a timely fashion. But this is surely a conclusion that would have been reached in the non-marine context.

167 *Yorkshire Water Services v Sun Alliance* [1997] 2 Lloyd's Rep 21.

be the result of currency movements, goes to the insurers rather than to the assured where they have funded the subrogation action. ALRC 91 (recommendation 32) adopted the principles set out in ICA 1984, although wished to see the provision expanded to cover the situation in which the action was funded by the assured.[168] No justification was seen for drawing any distinction between marine and non-marine subrogation. Further, ALRC 91 (recommendation 33) proposed the adoption of the principles in ICA 1984, s 68(2) that the content of a contract under which the assured's rights against a third party are reduced or excluded should not be a material fact,[169] and in ICA 1984, s 68(1) that a policy term which precludes the assured from entering into a contract under which the liability of the third party is reduced or excluded[170] is binding only if the assured was clearly informed of it in writing.[171] The best approach would be to amend ICA 1984 by adding the provisions of MIA 1909, s 85 and revising ICA 1984, s 67 to implement the recommendations of ALRC 91.

Contribution runs parallel to subrogation. A policyholder is free at common law to insure the same risk as many times as he wishes. The rule dates back to the pre-1909 period when there was no control over the solvency of non-life insurers, and these days double insurance tends to occur by accident, eg, where two policies are on different subject matter but incidentally overlap in particular respects, or where a second policy is taken out in the mistaken belief that there is no other valid insurance in place.[172] The right of the assured to take out two or more policies, and the right of the assured to claim from the insurers in such order as he thinks fit, is set out in MIA 1909, s 38 and there are parallel provisions in ICA 1984, s 76. Again this represents both the marine and non-marine positions. In practice its terms are rarely applicable, because policies contain a battery of express terms which regulate double insurance rules. Insurers may, for example: restrict cover from attaching where there is other insurance in existence; cancel cover if a later policy providing the same cover is taken out; postpone coverage by rendering the policy an excess layer policy where there is other insurance; and restrict recovery to a rateable proportion. The courts have frequently been faced with the task of reconciling competing exclusion, postponement or proportionality clauses in the two policies, and the outcome is potentially somewhat arbitrary.[173] ICA 1984, s 45 takes the simple step of outlawing 'other insurance' provisions which operate to restrict the assured's right of recovery in the event that two or more policies cover the same loss. This is a simple rule and is in practice replicated by express policy terms. It could readily be extended to marine insurance. The section does not apply to non-overlapping insurances, and therefore has no impact on the disbursements warranty in IHC 2003, cl 24 which regulates the other insurances that may be obtained by the assured. MIA 1909, s 86 recognises the equitable principle of contribution between paying insurers, as does ICA 1984, s 76 although it does not identify how contribution is to be calculated. There is some dispute as to whether contribution is to be determined by reference to maximum liability,[174] independent liability[175] or common liability.[176] The last measure cannot be

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168 The *Insurance Contracts Amendment Bill 2010*, had it passed into law, would have implemented the proposals of ALRC 91 for the amendment of ICA 1984.

169 Reversing *Tate v Hyslop* (1884-5) LR 15 QB 368.

170 If there is no such term, the insurers have no recourse against the assured at common law, as he has merely increased the risk: *SGIC v Brisbane Stevedoring* (1969) 123 CLR 228.

171 There is no such obligation as the law stands: *Argo Systems FZE v Liberty Insurance (Pty)* [2011] EWHC 301 (Comm).

172 The situation in *O'Kane v Jones, The Martin P* [2005] Lloyd's Rep IR 174.

173 See *National Farmers Union Mutual Insurance Society Ltd v HSBC Insurance (UK) Ltd* [2010] EWHC 773 (Comm).

174 Where the ratios are based on the insurers' respective maximum liabilities under the policy.

175 Where the actual liability of each insurer for the loss is ascertained, and apportionment is based on those figures.

applied in marine law, because MIA 1909, s 86 demands contribution based on apportionment.[177] However, this is unlikely to be of any consequence, because modern practice in both marine and non marine insurance is to apply either maximum or independent liability, depending upon the nature of the policy.

MIA 1909, ss 36 and and 86 should be repealed, and the rules on double insurance and contribution should be those in ICA 1984.

XXII IS ICA 1984 COMPATIBLE WITH MARINE INSURANCE?

Thus far the author has tried to demonstrate that there is very little in the MIA 1909 which is worthy of preservation. However, it remains to determine whether there are any features of ICA 1984 other than those already discussed and those which are confined to life or are specific to other forms of insurance, which render it inappropriate to marine law. A number of sections fall to be considered.

First, where but for express provision the law applicable to the contract would be the law of an Australian state or territory, ICA 1984, s 8(2), strikes down the choice of law clause. The Australian High Court ruled, by a majority, in *Akai Pty Ltd v People's Insurance Co Ltd*[178] that a contract expressly governed by English law and subject to English exclusive jurisdiction was, as a matter of Australian law, neither of those things. The choice of law clause disappeared under ICA 1984, s 8(2), and the exclusive jurisdiction clause was void under ICA 1984, s 52, as an attempt to contract out of the legislation because the English court, if seised of the case, would apply English law in accordance with the agreement of the parties.[179] If marine risks were brought within ICA 1984, that would mean that the insurers of Australian marine risks would have to reconcile themselves to the application of ICA 1984. ALRC 91 discussed applicable law and jurisdiction at length, and ultimately concluded that it would not be appropriate to restrict party autonomy even where the contract was between Australian parties, as that would reduce competitiveness in the market (recommendation 35).[180] Given the widespread use of English law clauses and the Norwegian Plan, it would seem sensible to disapply MIA 1909, s 8. In the same way, the prohibition on pre-dispute arbitration clauses is incompatible with the marine market and ICA 1984, s 43 should be disapplied.

Secondly, Division V of ICA 1984, which imposes material control over the terms of insurance policies, is for the most part inappropriate to the marine market. Sections 34-37, regulating the use of standard terms and notification of unusual terms, do not in any event extend to most commercial contracts and equally have no place in the marine context. Section 38 on cover notes does extend to commercial policies but has no relevance to marine insurance. More contentious is s 42, which permits the assured to recover the maximum amount that his premium would have bought from that insurer. This provision does not appear to have been litigated or to have given rise to much difficulty, but once again it does not seem particularly relevant to the marine market where premiums are carefully calculated based upon the risk run. The final group of contractual provisions, ss 48 and 49: (a) allow a third party identified in the policy by name or otherwise as a beneficiary to recover as if he was a party, subject to any defences otherwise available to the insurers; and (b) allow a third party who is not identified in a

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176 Where the actual liability of each insurer is ascertained. If the loss exceeds the liability of insurer A but not insurer B, then the insurers contribute equally up to the limit of insurer A's liability and insurer B takes the balance.

177 *O'Kane v Jones, The Martin P* [2005] Lloyd's Rep IR 174.

178 (1996) 188 CLR 418.

179 As indeed it did: see *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90.

180 Recommendation 36 proposed extending the jurisdiction of the Federal Court to marine insurance disputes.

property policy but who has an interest in the subject matter to recover where the assured has a policy covering his own interest but that interest is less than the sum insured. The former provision can readily be extended to marine policies, the hull and cargo policies both recognise third party rights and in England the *Contracts (Rights of Third Parties) Act 1999* confers a general exception to privity along much the same lines. The latter provision, which is capable of being excluded by contract, again creates no problem for marine insurers, as the law has developed the doctrine of pervasive insurable interest whereby an assured with a limited interest is likely to have a pervasive insurable interest which allows him to recover the entire sum insured under the policy on the basis that he accounts for the proceeds in excess of his own interest to the other interested parties.[181] The outcome is much the same.

Thirdly, ICA 1984, ss 59-63 permit insurers to cancel the policy on notice where the assured is in breach of any statutory or contractual duty towards the insurers. ALRC 91 proposed that this be extended to marine policies (recommendation 18) with the difference that a contractual provision permitting cancellation for any or no reason – prohibited under ICA 1984, s 63 – should be valid in a marine policy. Cancellation clauses were at one time common but they do not appear in the most recent London market wordings, and they have little to recommend them in that they are capable of being exercised in circumstances where future losses otherwise covered by the policy look likely. It is suggested that ALRC 91 was too cautious in its approach and that assimilation is the correct response. There is no obvious basis for exclusion of marine insurance here.

XXIII CONCLUSION

The author draws two conclusions from the above analysis. The first is that the repeal of the *Marine Insurance Act 1909* would have almost no consequences. The vast bulk of it is inconsistent with modern practice, obsolete or unnecessary. Cases decided since 1909 have increasingly – and maybe in some circumstances unwittingly – led to harmony between the marine and non-marine principles. The second is that bringing marine insurance within the *Insurance Contracts Act 1984* would be relatively straightforward. Very few sections would require modification or exclusion.

Justice Allsop[182] has noted that the proper approach to reform of marine insurance is international rather than domestic, given the predominance of the London Market and London Wordings. However, he has also commented that:

> Whilst the Act has served the commercial community for a century, one wonders whether the marine insurance markets would not be better served by a more up to date and comprehensively adopted contemporary model.

This reason for inaction is turning into a reason for action, given that English law is on the verge of transformation and that the clauses used in the London Market have for many years – in some instances dating back to pre-1906 – undermined much of that part of MIA 1909 which is not obsolete. Justice Allsop also comments that:

> Whilst there no doubt can be a powerful case for some degree of reform and international coherence, I challenge the modern drafter to be as economical and enduringly precise as Mackenzie Chalmers.

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[181] The principle developed in cargo claims, and has been extended to other matters, in particular construction works. It was given the blessing of the majority of the Court of Appeal in *Feasey v Sun Life Assurance Corporation of Canada* [2003] Lloyd's Rep IR 640.

[182] Allsop and Wells, see above n 22, [86]-[89].

The present author would question whether enduring precision is a feature of the present legislation, but wholly agrees with the sentiment that this is an important objective. Nevertheless, the *Insurance Contracts Act 1984* – leaving aside the 'claims made' liability cover question and one or two other issues – seems to the present author to have satisfied that very test.