

## Book Review – Research Handbook on Marine Insurance Law\*

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Marine insurance has a long history. Prototype forms go back to the ancient civilisations of Babylon and Ancient Greece, and the first academic text on marine insurance was published in 1488 by Pedro de Santarém.<sup>1</sup> By the beginning of the 17th century, the use of marine insurance had become so established that the preamble to the English Policies of Assurance Act 1601 stated that it had been ‘time out of mind a usage’ among English and foreign merchants to procure insurance on ships and goods. Marine insurance legislation led the way with regulating aspects of market practices,<sup>2</sup> and the UK’s Marine Insurance Act 1906 – which itself codified the common law as it stood at the time - has been in force (with relatively few and mostly recent amendments) since 1 January 1907. The often difficult task for judges, practitioners and legal scholars is to position novel issues, new market developments and technical innovations within or outside the continuum of marine insurance law.

The Research Handbook is a snapshot of current marine insurance law issues towards the end of the first quarter of the 21<sup>st</sup> century. The aim of the book is “to present a broad coverage of current marine insurance-related issues”.<sup>3</sup> Amongst the contributing authors are some of the leading academics and practitioners in the field from the UK and abroad, as well as rising stars. Although the chapters have been grouped in loose themes, the contributions are free-standing, each with its own voice and approach to the topics covered, but not building on or cross-referring to each other. Therefore, readers should not expect a systematic and comprehensive textbook but instead look forward to reading an anthology of essays – some are more scholarly and some are more practical - on issues that are not covered in depth in textbooks or cut across textbook silos. Whilst the focus is on UK marine insurance law, the book includes contributions on Japanese, US and German law, as well as references to the EU *acquis communautaire*.

Part I of the Research Handbook considers the concept of marine insurance law and its place within the wider legal system. **Professor Satoshi Nakaide** examines the sources of marine insurance law at the intersection of insurance law and regulation, contract law and commercial law, and explains how the special characteristics of marine insurance and developments in German and English marine insurance law have informed the recent reform

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\* Özlem Gürses (ed), *Research Handbook on Marine Insurance Law* (Edward Elgar, Cheltenham, 2024) xiii and 377pp, ISBN 978 1 80392 667 4. Hardback £200. Also available as e-book.

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<sup>1</sup> Gary Meggitt, ‘Marine insurance fraud and emerging technology’ in Özlem Gürses (ed), *Research Handbook on Marine Insurance Law* (Edward Elgar, Cheltenham, 2024) 275, at 305

<sup>2</sup> In the UK: Marine Insurance Act 1745, Insurance on Ships Act 1785, and Marine Insurance Act 1788. Park (in James Park, *A System of the Law of Marine Insurance* (6th edn, Butterworth 1809) at 346) lists France, Middlebourg (Middelburg), Konyngsburg (Königsberg), Genoa, Rotterdam and Stockholm as having had marine insurance legislation since the end of the 17th century.

<sup>3</sup> Özlem Gürses (ed), *Research Handbook on Marine Insurance Law* (Edward Elgar, Cheltenham, 2024) 1

in Japanese marine insurance law. **Professor Rhidian Thomas** asks in his essay whether ‘Protection and indemnity insurance ... is ...truly insurance?’ and provides a detailed review of the authorities on the definition and characteristics of insurance, together with an analysis of their application to P&I protection. Despite some unusual features of P&I protection (some benefits are discretionary, and pay-to-be-paid clauses), he concludes that ... spoiler alert ... P&I protection is insurance.

Part II is concerned with controversial issues arising from the general principles of marine insurance law. **Professor Sir Richard Aikens** re-examines the principle of utmost good faith following the Insurance Act 2015. He considers the nature of the duty of good faith at the formation stage and during the term of the contract as it applies to the insured and the insurer, and to what extent a breach would entitle to enforceable right and remedies. He argues persuasively that ‘good faith’ as a standalone duty has been reduced, but at the same time, without the shackles of the remedy of avoidance, the continuing duty of good faith could make a come-back as an implied term. **Dr Kyriaki Noussia and Yavuz Can Aslan** discuss the English courts’ approach to determining whether and when subrogation rights are available against co-insureds by reference to a detailed analysis of recent case law, the impact of waiver of subrogation clauses and BARECON clauses 12 and 13. **Professor Özlem Gürses’s** contribution, in addition to her editorship of the book, is a chapter on the recoverability of loss by the ship’s mortgagees and the cargo owners under their insurances where the loss is attributable to the wilful misconduct of the shipowner. She points out the tension between protecting insurers from the shipowner’s wilful misconduct and affording an indemnity to innocent insureds. She argues that the courts’ approach which prioritises the interests of the insurer is unjust. The insurance market has responded with a contractual solution – mortgagees interest insurance – which, however, may not be fully effective to provide coverage to mortgagees for losses attributable the shipowner’s wilful misconduct.

Part III deals with coverage issues and losses. **John Dunt** examines whether and under what circumstances marine cargo insurance covers not only physical loss or damage to cargo but extends to financial loss. This question has assumed practical significance in light of increased exposure to storage risk, fraudulent documentation, phantom cargos, and losses caused by payment defaults. On the basis of a detailed analysis of English and US case law on contractual construction, insurable interest and attachment, he concludes that cover for financial loss requires ‘clear words’, and in the absence of specific provisions, all risk marine cargo cover does not extend to financial losses where the cargo never existed. **Professor Peter MacDonald Eggers KC** reviews the law on total loss under marine policies – in his reasoned opinion, a remarkably settled area of law that has not given rise to many litigated issues recently. **Richard Sarll’s** chapter on the treatment of forwarding expenses under the law of general average is fascinating and a useful reminder that marine insurance law and general average are closely linked through s.66 of the Marine Insurance Act 1906. He analyses a series of issues that arise in connection with general average expenses under Rules F and G of the York-Antwerp Rules and queries whether they produce commercial outcomes.

Part IV is a deep-dive into procedural issues that can arise in marine insurance disputes. **Professor Robert Merkin KC** provides a detailed examination of the enforcement of arbitration clauses in P&I Club Rules in the context of claims by third party victims directly against a P&I Club and claims by claimants with sovereign immunity. By reference to recent case law and an extended case study on the 20+ year *Prestige* litigation,<sup>4</sup> he demonstrates clearly that the English courts are taking a creative approach to giving effect to arbitration clauses. Without the constraints of the Brussels Regulation<sup>5</sup> and anticipating the changes to be made by the Arbitration Bill, this is likely to be a dynamic area of law for which Professor Merkin may consider writing a sequel soon (perhaps as an article for the BILA Journal?). **Professor Paul Myburgh** also considers third-party rights of direct action against marine liability insurers. Taking a comparative approach, he examines how those rights have been characterised and defined in scope in the UK, the EU, and under New York law and Japanese law, how governing law and jurisdiction clauses can be leveraged, and how this ultimately impacts on the enforcement of pay-to-be-paid clauses. His evaluation of the different approaches is thought-provoking as he points out bigger picture issues such as access to justice, due compensation for victims, environmental protection and corporate responsibility. **Professor Michael Sturley** adds a US choice-of-law angle by addressing the vertical choice of law between US federal and US state maritime law, and horizontal choice of law among two or more possible US state maritime laws. Arguing that the US Supreme Court decision in *Wilburn Boat Co. v Fireman's Fund Insurance Co*<sup>6</sup> has created uncertainty as to the extent to which state law governs maritime law and its application at horizontal level, he evaluates different solutions ranging from a reconsideration of the issue by the Supreme Court, to creating uniformity via a Restatement of the Law of Marine Insurance, and to making better use of choice-of-law clauses.

Part V connects marine insurance to the international trade of goods. **Professor Margarida Lima Rego's** chapter sets into context the insurance requirements around the transportation of goods (i.e. the risk transfer from seller to buyer which may not coincide with the transfer of ownership) and then proceeds to compare the Incoterms® 2020 Rules insurance requirements under CIF (costs, insurance and freight; named port of destination) to CIP (carriage and insurance paid; named place of destination. For both CIF and CIP, the seller must obtain insurance cover against the buyer's risk: for CIF insurance cover as provided by Clauses (C) of the Institute Cargo Clauses (named perils cover), and for CIP insurance cover as provided by Clauses (A) of the Institute Cargo Clauses (all risks cover). **Professor Miriam Goldby's** contribution is an excellent example of the challenges of accommodating new technologies in the operation of the existing (marine insurance) law: could digitalised cargo insurance certificates be validly assigned under s.50 of the Marine Insurance Act 1906? In the UK, this question has now been addressed by the Electronic Trade Documents Act 2023 (to the creation of which Professor Goldby contributed) which enables electronic trade documents that meet certain criteria to have the same legal recognition and functionality as their paper equivalents.

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<sup>4</sup> The loss event took place in 2002. The dispute has been subject to several rounds of proceedings in the English courts and the Spanish courts, and was subject to a reference to the ECJ. The latest reported decision is *London Steam-Ship Owners' Mutual Insurance Association Ltd v Spain* [2023] EWHC 2473 (Comm).

<sup>5</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)

<sup>6</sup> 348 U.S. 310 (1955)

Part VI considers new technologies and emerging risks and how the marine insurance industry can tackle them. **Gary Meggitt** provides an overview of the emerging technologies used in the insurance sector and how they can be harnessed to prevent and detect insurance fraud. He puts forward a convincing case for technology to operate alongside courts, regulators and policy-makers to curtail fraud, and hints at an Insurtech revolution. **Feng Wang** strikes a cautious note reminding us that new technologies also introduce risks, most notably cyber risk. He evaluates the governance role of cyber risk insurance in the shipping industry and concludes that the lack of consensus, transparency, and comprehensive cover does not yet make cyber insurance an effective risk governance tool. However, he suggests various steps – including better risk assessment based on more reliable data, risk prevention measures and raising cyber awareness – to make cyber risk insurance a more effective and appealing proposition. **Dr Livashnee Naidoo** also considers the governance role of insurance but in the context of the Poseidon Principles for Marine Insurance which is a sector-specific initiative to assess and account for emissions within their hull and machinery portfolios. Having examined the contractual architecture and the regulatory dimension of the Poseidon Principles, she concludes that they are a collaborative tool of governance for meeting industry decarbonisation goals. **Professor Dieter Schwampe** analyses the (Covid) pandemic exclusion clause for transport insurance that the Gesamtverband der Versicherer (German Association of Insurers) published in 2021. The clause excludes liability for loss caused by dangerous infectious diseases and loss caused by precautionary measures taken by public authorities in connection with such diseases and operates irrespective of other contributing causes. The clause comes with various ‘write-back’ options that reintroduce cover for specific aspects and, in relation to hull insurance, allow for the reinstatement of the proximate cause doctrine. Let us hope that this exclusion clause never comes into play.

This brief review cannot do justice to the breadth and depth of the Research Handbook. It feels churlish to point out gaps when the book does not claim to cover current marine insurance-related issues comprehensively but, given geopolitical and legal developments over the last few years, the readership may have welcomed chapters on marine war risks, the marine insurance implications of sanctions regimes and dark fleets, insuring autonomous or remote controlled ships, and a general round up on (marine) insurance case law in which the provisions of the Insurance Act 2015 have been tested. On the other hand, these additions may have rendered the book too long and too heavy: as it is, it is a perfect rucksack or handbag size and thus perfect portable reading material. I would recommend it to anyone who practises, teaches or researches in marine insurance law because it provides insights and analysis not covered at the same level of detail in standard textbooks. The editor and the contributing authors deserve congratulations on this splendid book.