

BILA ANNUAL CONFERENCE : 28 SEPTEMBER 2001

Questionnaire For Delegates Concerning Possible Insurance Contract Law Reform

1	Are you in favour of the principle of "Utmost Good Faith" applying to the whole period of the insurance contract?	Yes/No
2	Is it necessary that the principle of UGF should continue to apply to all insurance contracts?	Yes/No
3	Should different considerations apply to non-disclosure that is innocent or negligent as compared with deliberate or fraudulent non-disclosure?	Yes/No
4	On the basis that an insured may not know what is material to insurers, should the test be what an insured would reasonably be expected to disclose after taking into account the knowledge of the insured regarding such matters?	Yes/No
5	Should the Courts recognise that in the placing of a risk, the underwriter has a duty to ask relevant questions?	Yes/No
6	If an insurer has failed to ask a question upon a proposal form about a particular fact or circumstance, should it be deemed to have waived enquiry and be denied exercising any remedy based upon it having been material?	Yes/No
7	Should the duty of disclosure be different in reinsurance contracts?	Yes/No
8	Should any breach of UGF owed by an insurer make it subject to a claim for general damages?	Yes/No
9	Should an insurer be subject to a timetable with regard to admitting liability and settling a claim, subject to there being no delay caused by the insured in the insurer's investigation of the loss and assessment of the quantum?	Yes/No
10	Should a breach of warranty entitling an insurer to repudiate the contract, be restricted to a breach causing the loss?	Yes/No

If you believe another question is a central one to the present discussion or you have another comment or contribution of any kind, please advise the editor.

Possible Reforms to Insurance Contract Law :

(1) Summary of Provisional Findings of BILA Sub-Group on Marine Insurance

- **History of Reform**
 - UNCTAD 1968/1978
 - Law Commission 1980
 - Canada Federal Marine Insurance Act 1997.
- **Current/Recent Projects**
 - Australian Law Reform Commission report May 2001;
 - Comite Maritime International (CMI);
 - Oslo;
 - Toledo;
 - International Working Group:
 - Questionnaire;
 - Analysis of 26 jurisdictions;
 - Singapore 2001;
 - US MLA
- **British Maritime Law Association- Marine Insurance Sub-Committee**
 - Comprises solicitors, barristers, insurers (fixed premium and mutual) judges, brokers, academics, adjusters and shipowners' representatives;
 - Reviews in 1992 and 2000;
 - Different pet hates;
 - Lack of consensus;
 - Recognition of a major difference between commercial and "consumer" marine risks;
 - Lack of evidence of major injustice in commercial marine world.

- **Features of Marine Insurance Market**

- International nature;
- UK MIA significant in many other jurisdictions;
- Economically dominated by UK and USA;
- Highly competitive;
- Proposal forms are rare in the commercial marine market - it is often difficult to accurately assess risk because of geographical and timing considerations. Warranties and full disclosure can therefore be particularly important;
- Market is not able to dictate harsh terms- e.g. failure of (tougher) 1995 Institute Hull Clauses;
- A specialist marine broker places virtually all business. Special broker clauses are common;
- Norwegian Plan - no defence for non-causative breach of warranty but tougher on unseaworthiness. Other options are the German ADS Conditions or the French markets. There is genuine choice.

- **Commercial Response**

- Marine Insurance Act 1906, despite its limitations, is very flexible
- Market can and does respond to changing needs:-
 - First Institute Clauses issued in 1888;
 - Revised numerous times since then. More revisions are in contemplation;
 - SG Policy Form scheduled to the 1906 MIA was scrapped in 1983 post the UNCTAD report;
 - Developed wordings to deal with all sorts of risks never contemplated by MIA 1906:
 - Containerisation of cargo;

- Exploration for oil offshore-hybrid risks, marine, non-marine and aviation;
 - Other market wording such as CODEX have no warranties at all.
- **Personal View**
 - In the difficult areas of warranties and good faith, the courts have shown no inclination to extend principles for good reason. The courts recognise the draconian nature of the remedy for breach.
 - The marine insurance cases that have been decided in recent times have mostly been very **fact** specific. It is hard to find a reported case in modern times where the result could objectively be regarded as harsh.
 - The courts will award indemnity costs and enhanced interest following Part 36 offers.
 - Major statutory reform in non-consumer fields not justified. Problem areas not easily susceptible to contractual variations have or will be addressed e.g.
 - Contracts (Rights of Third Parties) Act 1999
 - Third Parties (Rights Against Insurers) Act
 - Electronic Trading
 - Unfair Terms in Consumer Contracts Regulations
 - If there is a genuine belief that the commercial marine insurer has the better of the bargain, the wordings can be amended to meet the different conditions. Statutory modification is a sledgehammer to crack a nut.
 - Arguable that there should also be changes to benefit insurers e.g.
 - Adjustment of premium where there is material change of risk during currency of policy
 - Tougher sanctions for non-payment of premium
 - Explicit sanctions for misconduct in the claims process

- All can be dealt with by wording modification if the market will stand it

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