

**RECENT DEVELOPMENTS IN MARINE INSURANCE LAW AND
CONSEQUENCES FOR IRAN**

by

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DEDICATION

To all those who try to improve human knowledge and ethics.

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ABSTRACT

The United Kingdom Insurance Act 2015 entered into force on 12 August 2016. It introduced major changes to some provisions of the Marine Insurance Act 1906 which has been the principal model for establishing marine insurance law and practice not only in common law jurisdictions, but also in some civil law countries. The main areas of change are the duty of fair presentation, warranties, insurer's remedies for fraudulent claims and damages for the late payment of claims. This thesis investigates how uniformity in international marine insurance law can be promoted by virtue of the new changes in English law and participation of developing countries. The thesis provides observations on the possible influence of the new Act on Iranian insurance law and practice. This thesis is of potential interest to international organizations and industry associations which advocate for uniformity of marine insurance law and practice, and to Iranian legislators in the future development of national marine insurance legislation.

LIST OF ABBREVIATIONS USED

ABI:	Association of British Insurers
BC:	Before Christ
CIDRA:	Consumer Insurance (Disclosure and Representations) Act 2012
CL:	Clause
CMI:	Comite' Maritime International
DWT:	Deadweight tonnage
GT:	Gross Tonnage
H&M:	Hull and Machinery
IA:	Insurance Act 2015
ICC:	Institute Cargo Clauses
IHC:	International Hull Clauses
IMO:	International Maritime Organization
ILU:	Institute of London Underwriters
IUA:	International Underwriting Association of London
IR:	Iran Islamic Republic (of Iran)
IRISL:	Islamic Republic of Iran Shipping Lines
LMA:	Lloyd's Market Association
MIA:	Marine Insurance Act 1906
NITC:	National Iranian Tanker Company
P&I:	Protection and Indemnity
RDC:	Running Down Clause
SG:	Lloyds Ship and Goods Policy
UK:	United Kingdom
UNCTAD:	United Nations Conference on Trade and Development
UNCITRAL:	United Nations Commission on International Trade Law
USA:	United States of America
USD:	United States Dollar
VLCCs:	Very Large Crude Carriers

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CHAPTER 1:

INTRODUCTION

1.1 Problematique

The United Kingdom Marine Insurance Act, 1906¹ (MIA 1906), an initiative led by Sir Mackenzie Chalmers, codified the notions and principles of marine insurance law dating back to the 18th century, particularly as found in the judgments of Lord Mansfield.² The MIA 1906 was embraced widely and became a model for establishing marine insurance legislation in the Commonwealth, including Australia, Canada, Hong Kong, India, Malaysia, New Zealand and Singapore, and also influenced the laws of other common law jurisdictions such as the USA and Japan.³ The effect was to promote a substantial degree of international uniformity in marine insurance law without employing an international convention. Iran, like some civil law jurisdictions, has also been influenced by MIA 1906. Although Iran has enacted no rules regarding marine insurance, its insurance industry, including insurers and shipping lines, has looked to British law and practice.

It should be noted that MIA 1906 had not received substantial amendments until the beginning of the new century. Now UK insurance law has changed and the marine insurance industry must reconcile with the new Insurance Act, 2015⁴ (IA 2015). As Iran's

¹ *Marine Insurance Act, 1906* (UK), c 41.

² Baris Soyer, "Insurance Act 2015 Coming into Force: Overhauling Commercial Insurance Law in the UK" (2008) 22:4 *Journal of International Maritime Law* 253 at 254.

³ UK, Law Commission & Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment*, Law Com No 353 & Scot Law Com No 238, 2014, at 8, online (pdf):

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/331737/41872_Cm_8898_PrintReady.pdf> [Law Commissions Report].

⁴ *Insurance Act 2015* (UK), c4, s12.

marine insurance practice has followed English practice so far, any evolution in English marine insurance law has potential implications for Iran's legal regime on this subject.

Given the foregoing, a number of important questions arise. First, since uniformity is necessary in maritime law, what might be the impact of the changes in English law on international uniformity in marine insurance? The second question is what is the impact of the new changes occasioned by IA 2015 on countries like Iran which do not have well developed national legal regimes on marine insurance?

There are also subsidiary questions which have played important roles in shaping the thinking in this work. First, given that MIA 1906 was just a national law, why did its influence transcend English marine insurance law to impact other jurisdictions? Second, regarding law reform, are the new changes in MIA 1906 embodied in IA 2015 evolutionary or revolutionary? What is the impact of the changes on the balance between the assureds and insurers' interests, rights and duties? Third, how might the industry, including insurers in the London market and the shipping lines, react to IA 2015 in view of their liberty to opt out of the changes? Will the marine industry opt out in large numbers? With regard to Iran, the pertinent questions addressed in this work are: How has Iranian insurance law and practice been influenced by English insurance law so far, directly and/or indirectly? What are the main legal deficiencies in Iran's regime? Does or should IA 2015 change marine insurance practice and law applicable to Iranian shipping lines?

1.2 Literature Review

Marine insurance is the oldest template of risk coverage whose origins date back to many centuries. However, most of the scholarly literature on marine insurance has been written

after 1906, focusing on the MIA 1906. There is a huge volume of books, articles, and theses on MIA 1906, such as major works by Bennett⁵, Merkin⁶ and Rhidian Thomas⁷. Among a variety of different works, these books provide in-depth cover of the doctrines, principles, rules and practices of the MIA 1906 and helped provide important context for the discussion of UK law and practice in this thesis. Unlike in the case of the MIA 1906, to date, there is relatively little scholarly discussion of the IA 2015. Obviously, it requires some time for the change introduced by this Act, especially with respect to marine insurance, to be appraised by scholars and interpreted by judges and other actors in marine insurance. Early commentators on the subject include Soyer and Clarke.⁸ Of more direct significance for the research on IA 2015 is undeniably the comprehensive joint report of the UK Law Commission and Scottish Law Commission⁹, including their discussion of the process, ideas and challenges behind the bill which became IA 2015.

However, there is no literature directly speaking to uniformity in marine insurance law. Surprisingly, the above-mentioned books on MIA 1906 rarely dealt with the subject of uniformity in marine insurance as an independent topic. Nor is there analysis of the possible influence of IA 2015 on uniformity in the works that have discussed this legislation. The Comité Maritime International (CMI) and United Nations Conference on Trade and Development's (UNCTAD) attempts at creating uniformity in marine insurance failed in the two last decades of the 20th century. In this regard, there is no publication on

⁵ Howard Bennett, *The Law of Marine Insurance*, 2nded (New York: Oxford University Press Inc., 2006).

⁶ Robert Merkin et al, *Marine Insurance Legislation*, 5th ed (New York: Informa Law from Routledge, 2014).

⁷ D Rhidian Thomas, *The Modern Law of Marine Insurance* (New York: Informa Law from Routledge, 2016).

⁸ Baris Soyer, *Supra* note 2; Malcolm Clarke & Baris Soyer, *The Insurance Act 2015: A New Regime for Commercial and Marine Insurance Law* (New York: Informa Law from Routledge, 2016).

⁹ Law Commissions Report, *Supra* note 3.

the reasons behind these unsuccessful endeavors. However, by reviewing the final report of the UNCTAD¹⁰ in 1989, and the reports by Hare¹¹ in the *CMI Yearbook* from 1998 to 2003, this thesis is going to suggest that by relying just on common law countries (like what CMI did) or over stressing the divergence between developing and developed countries (like what UNCTAD did) no realistic results could be obtained and, therefore, there would be no uniformity. Notwithstanding the lack of a specific reliable text on uniformity in marine insurance in view of the new reforms, there is more general maritime law literature on the subject, such as Tetley on uniformity of international private maritime law¹² where he exposes the challenges of uniformity in maritime law. Others include Griggs¹³ on obstacles to uniformity and Jacobsson on the role of treaties in promoting uniformity.¹⁴ By reviewing these general publications, this thesis is going to explain why public international law, namely conventions and treaties, cannot always be relied upon to promote harmonization in an area like marine insurance. Finally, an United Nations Commission on International Trade Law (UNCITRAL) report on international trade law deals, in part, with techniques and suggesting ways to promote harmonization in the commercial field.¹⁵ Though some of these recommendations do not work for marine

¹⁰ *UNCTAD Model Clauses on Marine Hull and Cargo Insurance*, UNCTAD, 1989, TD/B/C.4/ISL/50/Rev.1, online (pdf):

<<http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=340>>

¹¹ John Hare, "Report on the IWG Meeting in London" (2003) *Comite Maritime International Year Book* 573 [Hare, "IWG Meeting 2003"].

¹² William Tetley, "Uniformity of International Private Maritime Law - The Pros, Cons, and Alternatives to International Conventions - How to Adopt an International Convention" (2000) 24 *Tul. Mar L J* 775.

¹³ Patrick J S Griggs, "Obstacles to Uniformity of Maritime Law: The Nicholas J. Healy Lecture" (2003) 34:2 *J Mar L & Com* 191 [Griggs, "Obstacles to Uniformity"].

¹⁴ Mans Jacobsson, "To What Extent Do International Treaties Result in the Uniformity of Maritime Law?" (2016) 22:2 *J Intl Maritime L* 94.

¹⁵ United Nations Commission on International Trade Law, *A Guide to UNCITRAL: Basic Facts about the United Nations Commission on International Trade Law* (Vienna: United Nations, 2013) [A Guide to UNCITRAL].

insurance, this thesis utilizes some of them as the suggestions on how to improve uniformity in marine insurance law.

Iranian shipping lines constantly sign contracts with international insurers which are governed by UK law, based on MIA 1906. Given that there is no authoritative comparison between MIA 1906 and Iranian marine insurance law, in order to evaluate the possible impact of IA 2015, there is a vital need for a comparative study on the United Kingdom marine insurance law, as currently applied and incorporated into Iranian law. In this regard, one could refer to the work of Schoenbaum¹⁶ which shows that even the United States has been influenced by the MIA 1906. Moreover, his comparative approach informed my discussion in Chapter 4 which compares Iranian and British marine insurance laws and practices.

In terms of Iranian sources, one of the few trustworthy works is that of the Honorable Professor of the Civil Law in Iran, the late Naser Katouzian.¹⁷ However, this work has only some basic information on the nature of liability insurance in Iranian law. Consequently, this thesis takes advantage of the combination of Central Insurance of the Islamic Republic of Iran and its subsidiary organizations' statistics¹⁸, communications with two high ranking persons from two Iranian major shipping lines, and the author's personal

¹⁶ Thomas J Schoenbaum, *Key Divergences between English and American Law of Marine Insurance: A Comparative Study*, 1st ed (Maryland: Cornell Maritime Press Inc., 1999).

¹⁷ Amir Nasser Katouzian & Mohsen Izanloo, *Non-contractual Obligations- Civil Liability: Volume 3, Liability Insurance*, 1sted (Tehran: Ganjedanesh, 2008) (Original text is in Farsi, title has been translated to English).

¹⁸ Most importantly: Insurance Research Center

knowledge¹⁹ of the Iran's Civil Code²⁰, Commercial Code²¹, and Maritime Law²² to inform the discussion in Chapter 4 and fill some gaps in Iran's marine insurance legal literature.

1.3 Research Methodology

This is a doctrinal thesis that utilizes a qualitative method to answer its questions. To choose a methodology that is closely related to its field of research, the main concern was with fundamental policy concepts in maritime law and doctrines and principles of marine insurance. These include theory, method and approach, that best illuminate the questions that must be addressed. Although there is textual analysis and comparative dimensions, to facilitate analysis and communication of my thinking and ideas, there is no commitment to any one particular methodology.

Beginning with theoretical perspectives, that is, the underlying presumptions on which this research is based in the context of marine insurance, are concepts of uniformity (key policy principle in maritime law), law reform, law and economics, and law and geopolitics. The demand of these concepts informs what data should be examined and how they should be analyzed. Data collection was done through library research and interviews. These perspectives are explained and discussed on the basis of positivist thinking, as the first two chapters we are going to describe and explain the law as it is. The final chapters make suggestions about what the law ought to be.

¹⁹ The author drew from his Master of Laws studies plus 10 years of experience as a senior legal practitioner, to offer the information in Chapter 4.

²⁰ QANUNE MADANI [CIVIL CODE] Tehran 1307 [1928] (Iran).

²¹ QANUNE TEJARAT [COMMERCIAL CODE] Tehran 1311 [1932] (Iran).

²² Maritime Law of 20 September 1964 (Iran).

A number of approaches have been used to examine the theories. First is the doctrinal approach which has two different functions here. On the one hand, it compares the differences between MIA 1906 and IA 2015. On the other hand, it is applied to investigate relevant Iranian law in order to find concepts to be compared with similar ones in UK insurance law. The comparison of these two different jurisdictions involves doing so through legislations, cases, reports, articles, and legal perspectives. This approach is used specifically in Chapters 2 and 4.

The second approach is interdisciplinary, one that is aimed to overcome limitations imposed by the framework of a single approach. The general belief is that maritime law, and especially marine insurance, is highly connected to economic concepts. The great increase in economic and commercial relations among countries led to the development of transportation services and the industry. Among different methods of transportation, the carriage of the goods by sea is the most popular due to economic efficiency. However, so intolerable are the effects of loss of or damages to goods at sea that no one can imagine maritime carriage without the risk distribution scheme in marine insurance. That is why marine insurance is mandatory in most countries. No one can deny that economic elements played an important role in the recent law reforms in England. In order to continue attracting marine insurance business to the London market, the insurance industry realized that there was a vital need to balance the interests of the parties to the insurance contract. Otherwise, the UK was in danger of losing its reputation as a leader in international maritime services. But, the new changes could affect insurance premiums. From the assureds' point of view, marine insurance provides financial security, seeing that the expenses of running a ship or goods transportation are huge. These factors are important,

especially for the companies of developing countries that have balance of payment problems. In this area, law and economics theories interact, the most well-known of them being ‘rational choice’ theory. However, there is considerable uncertainty in insurance given the nature of risk cover. This prevents a simple resort to cost-benefit analysis, because the costs or benefits of an uncertain action are probabilistic and not definite.²³

The other aspect of an interdisciplinary approach in this thesis combines law and geo-politics. It is important to understand the influence and value of UK legislation in international marine insurance law. That is, to know what happened and when it happened to cause the British legal system to achieve prominence in a wide variety of jurisdictions and why its influence on the content of their legislations is likely to remain over the coming years. Chapter 1 uses the historical approach to review British practice and legislation chronologically. The goal of this geo-political discussion is to explain the hegemony of the United Kingdom in marine insurance.

Finally there is resort to a comparative approach. This is utilized to answer the main question of this research, namely, how the new UK insurance law stands in the light of international practice, and, then, how the new changes will affect Iran. In doing this, first comparison is used to understand and assess marine insurance law in the UK legal system. Second, it is used to identify common themes across the two legal systems, UK and Iran, in order to suggest law reform in Iran and to indicate whether the particular English law changes will be accepted into the Iranian legal system. The comparative approach is the soul of this work. This is more apparent in chapter 2 which compares the old and the new

²³ Richard A Posner, *Economic Analysis of Law* (New York: Aspen Publishers, 2011) at 4-5.

British laws, and in Chapter 4 which examines the possible influence of the new Act on Iranian insurance law and practice.

1.4 Structure

The main objective of the thesis topic, “Recent Developments in Marine Insurance Law and Consequences for Iran” is to pioneer discussion on possible impacts of IA 2015 on the Iranian legal regime. Chapter 1 deals with marine insurance law and practice in the UK before IA 2015. English hegemony in marine insurance is rooted in UK regulations and practice in the 18th and 19th centuries, as codified in MIA 1906 and its subsequent evolution. It answers the question why, although a national legal regime, the UK law has been so important for the international maritime industry. In addition, the chapter discusses how subsequent changes in practice and court decisions led to the call for reform in a law that was the role model around the world in both common law and civil jurisdictions.

Chapter 2 investigates the process which led to the enactment of the IA 2015. It explains the key definitions and the scope of changes made. There are four main areas of change in IA 2015 with respect to the previous marine insurance law, which include: the duty on a business assured to give information to the insurer before taking out insurance (fair presentation); insurance warranties; insurer’s remedies for fraudulent claims; and damages of late payment of claims. The latter was not initially approved by Parliament, but was later enacted within the Enterprise Act 2016²⁴.

Chapter 3 deals with an important paradox in marine insurance: while, marine insurance is inherently international, there is neither an international convention nor a well-

²⁴ *Enterprise Act 2016* (UK), c12.

established global program through which marine insurance perspectives and uniform standards could be pursued. Conversely, uniformity in marine insurance has been derived from an unwritten compromise in a national jurisdiction, namely, the UK law, and in a market for long dominated by London. Perhaps this was the main reason for the failure of international organizations, such as CMI and UNCTAD, in their efforts to provide uniformity in marine insurance. Chapter 3 brings up some positive points and critiques about the role of MIA 1906 in developing uniformity in marine insurance. Subsequently, the potential impact of IA 2015 on international uniformity is discussed, while it is going to examine whether it is possible to find supplementary international methods to improve the uniformity achieved through a national legal regime, that of the UK.

Chapter 4 answers the second major question of the study, namely, the potential impact of the changes in UK maritime law on a country like Iran whose legal system, officially, has little interaction with British insurance law. For this purpose, a brief explanation is offered on Iranian marine insurance by way of primary concepts in Iranian law. The practice of the insurance industry is then examined to find areas of commonalities with the British-led international regime. Finally, suggestions are made on the pros and cons of the UK developments, and the possible reaction of the Iranian legislative authorities, insurers and shipping lines to them.

CHAPTER 2:

THE MARINE INSURANCE INDUSTRY CONTEXT AND THE UK MARINE INSURANCE LAW

Marine insurance is the oldest template of risk coverage. Knowledge of marine insurance's origin and history is necessary to understand its function and essential actors today.¹ The importance of English law changes on the international marine insurance industry, can be traced back to the UK regulations and practice in the 18th and 19th centuries.

2.4 UK Law and Practice Before 1906

2.4.1 Insurance Contract

A marine insurance contract has two parties: the 'insurer' or 'underwriter'²; and the 'insured' or 'assured'. Like any other insurance contract, the marine insurance policy is a contract of indemnity, in which "the amount recoverable is measured by the extent of the insured's pecuniary loss".³ Such a contract is intended to protect the assured against any loss of the movable property and associated interests. That is why the person who has not insurable interest is not entitled to be indemnified since he has not suffered the loss.⁴ Also, marine insurance law prohibits an insurer from paying more than the measure of indemnity to the assured.⁵

¹ Aldo Chircop, William Moreira, Hugh Kindred & Edgar Gold (eds), *Canadian Maritime Law*, 2nded (Toronto: Irwin Law Inc, 2016).

² Individual insurers were called 'underwriters' because they used to write their name and signature below the policies to guarantee their commitment to the voyage.

³ Thomas J Schoenbaum, *Key Divergences between English and American Law of Marine Insurance: A Comparative Study*, 1st ed (Maryland: Cornell Maritime Press Inc., 1999) at 4-5.

⁴ *Ibid* at 4.

⁵ Howard Bennett, *The Law of Marine Insurance*, 2nded (New York: Oxford University Press Inc., 2006) at 15.

The subject of every marine insurance contract is marine adventure and the main concept of the marine adventure is the “risk of maritime perils”.⁶ Marine insurance is intended to cover any loss derived from maritime perils to minimize the consequences of marine transportation accidents.⁷ Maritime perils are accidents or casualties of the marine adventure which are hard to avoid by normal expertise and prudence. Accordingly, by definition they exclude normal and usual actions like waves or wind.⁸ Section 3(2)(c) of the Marine Insurance Act, 1906 (MIA 1906), defines marine perils to include “perils of the sea, fire, war perils, parties, rovers, thieves, captures, seizures, restraints and detainments of princes and people, jettisons, barratry, and any other perils either of the like kind or which may be designated by the policy”.

Like the other contracts, marine insurance policies are subject to the general rules and principles of contract law. In the interpretation of marine insurance policies, as all contracts, the aim is to enforce the intentions of the parties to the contract, although the terms of the policy must be construed according to their “commercial and customary sense and usage”.⁹

2.1.2 Roots

So old is marine insurance in jurisprudence that it can be compared only to general average. During such a long history, marine insurance has been used in different jurisdictions and legal systems. It has been a mix of local laws, common principles and established practices.

⁶ *Ibid* at 23.

⁷ Schoenbaum, *supra* note 3 at 3.

⁸ Chircop et al *supra* note 1 at 410.

⁹ *Ibid* at 433-435.

Early marine insurance was rooted in civil law, before its migration into the common law.¹⁰ The original principles of marine insurance were developed as a part of the merchant law (*lex mercatoria*) in Western Europe and, then, these rules were gradually incorporated into English customary law.¹¹

To find the roots of marine insurance, one should go back in time to when it was in the form of loans initiated by the Phoenicians. The loans were repaid, provided that the vessel or the cargo arrived in complete safety. The ancient concept of general average also influenced the principles of marine insurance. General average is the principle that when there is a loss of a single marine cargo in order to preserve the ship or voyage, the payments for the lost cargo are to be shared among all whose interest was preserved by the loss.¹² However, the formal application of marine insurance, can be traced back to pre-Christian Rome. Roman marine insurance included the concepts of protection against loss, the necessity of insurable interest, accepting the risk by someone who is not the owner of the property, and payment of the premium in return of indemnity.¹³

The template for a modern insurance contract in which the risk related to a ship or cargo transferred from the owner to someone else in return for non-refundable sums of money, first emerged in the thirteenth and fourteenth centuries in northern Italy. This form of insurance then spread first through northern Europe- mainly Bruges, Antwerp and France- and then to England by merchants from the region of Lombardy in the city of

¹⁰ International Working Group on Marine Insurance, “Report to the Plenary Session of the CMI” (2001) *Comite Maritime International Year Book* 203 at 204 [CMI International Working Group, “Plenary Session 2001”].

¹¹ Graydon S Staring & George L Waddell, “Marine Insurance” (1999) 73 *Tul L Rev* 1619 at 1621.

¹² Bennett, *supra* note 5 at 1.

¹³ Chircop et al, *supra* note 1 at 393.

Florence. Similarly, Hanseatic merchants brought this form of marine insurance to England. However, the Lombard and Hanseatic monopoly in insurance in England ended in 15th and 16th centuries respectively, due to their expulsion by the local authorities.¹⁴ In 1576, after Antwerp was sacked by the Spanish, London, as the centre of commerce, became the capital of marine insurance.¹⁵

After the eviction of foreigners, English merchants played a more significant role in marine insurance. Although at first English merchants were not as successful as the Lombards and the Hanseatic League, gradually the English market started to develop.¹⁶

The evidence of the cases came before the English courts in 17th century shows that these courts were ready to enforce marine insurance contracts based on their terms and conditions.¹⁷ Although it has been stated that the common law courts in charge of mercantile issues, were not very experienced in commercial law including marine insurance¹⁸, the fact that principles applied in those courts are so similar to contemporary practice shows that at the beginning of the 17th century marine insurance had been firmly established in England.¹⁹

The 18th century was a real milestone in marine insurance in England, specifically through the court decisions, and mainly because of the work of Lord Mansfield who was the Chief Justice of the King's Bench for 32 years. He tried to promote commercial law by reforming civil procedure, taking advice of special jurors, mainly leading merchants,

¹⁴ *Ibid* at 394.

¹⁵ Bennett, *supra* note 5 at 2.

¹⁶ *Ibid* at 15.

¹⁷ Robert Merkin et al, *Marine Insurance Legislation*, 5th ed (New York: Informa Law from Routledge, 2014) at 1.

¹⁸ Bennett, *supra* note 5 at 17.

¹⁹ Chircop et al, *supra* note 1 at 394.

and taking advantage of legal principles which were accepted by both merchants and lawyers.²⁰

The comprehensive work of Lord Mansfield in marine insurance principles provided the London market with considerable progress. Since the 18th century, London has become the main market of the world's marine insurance,²¹ and consequently, the 19th century movement in codification led to the enactment of the United Kingdom Marine Insurance Act in 1906. It is probably the first comprehensive marine insurance act throughout the world.²²

2.1.3 Marine Insurance Actors (Main Insurers) In United Kingdom

Since the beginning of the London market, there are key actors who have shaped marine insurance market. A large number of 'standard terms and conditions' have been developed and largely spread by these actors, which are similarly understood by owners, underwriters, brokers, judges, and lawyers, not only within the London market but throughout the world. The frequent use of these standard terms and conditions in a wide range of policies provides the marine insurance with a considerable degree of uniformity and therefore certainty.²³

2.1.3.1 *The Institute of London Underwriters*

One of the most important insurers is the Institute of London Underwriters (ILU). A number of companies entered the marine insurance business after the lifting of restrictions on participation of corporate bodies in marine insurance in 1824 and after the American

²⁰ Bennett, *supra* note 5 at 18-19.

²¹ Staring & Waddell, *supra* note 11 at 1621.

²² *Ibid* at 1621-1622.

²³ William Tetley, "Uniformity of International Private Maritime Law - The Pros, Cons, and Alternatives to International Conventions - How to Adopt an International Convention" (2000) 24 Tul. Mar L J 775 at 790.

civil war, which increased the need for insurance. Consequently, on 5 June 1884, ILU was established with the aim of harmonizing corporations in the marine insurance market.²⁴ Since then the ILU has played an essential role in the London market, especially by introducing harmonized terms known as ‘Institute Clauses’. It should be noted that to speak with one voice in the London market, ILU merged with the London International Insurance and Reinsurance Market Association (LIRMA) and the International Underwriting Association of London (IUA) in 1998 was formed.²⁵

2.1.3.2 Lloyd’s

Lloyd’s is the leading marine insurance market and consists of individual and corporate underwriters. Lloyd’s is authorized to conduct business in almost 80 territories and also is permitted to accept risks from over 200 countries, based on national regulations.²⁶

Lloyds started in the 1680s when Edward Lloyd opened Lloyd’s Coffee House, whose customers were mostly from shipping community. Lloyd’s customers used the coffee house to meet, conduct commercial transactions including vessels auction sales, and take out marine insurance. In the following decades, the reputation of the “Lloyd’s Coffee House” spread over London and it became the ‘de facto monopoly’ in marine insurance. However, it was not until 1774 that Lloyd’s transfigured from a coffee house to the

²⁴ Bennett, *supra* note 5 at 10.

²⁵ *Ibid.*

²⁶ Marko Pavliha, “Overview of Marine Insurance Law” (Paper delivered at the IMO International Maritime Law Institute, Malta, 7-10 January 2013), at 3, [unpublished] (online: <<http://www.dpps-mlas.si/wp-content/uploads/2012/12/Overview-of-Marine-Insurance-Law-Prof.-dr.-Marko-Pavliha.doc>>).

organization of underwriters. After that, it took a century for Lloyd's to have the first Act in 1871 and became an organization which had a constitution.²⁷

Lloyd's stood as the centre of the marine insurance market, because of "a combination of chance, corruption, and expediency".²⁸ Undoubtedly, the law helped individual underwriters to have some kind of monopoly in marine insurance by prohibiting the companies, except Royal Exchange and London Assurance, from doing marine insurance business.²⁹ One of the most significant problems of the marine market was that it was scattered. By establishing a coffee house, Lloyd created a centralized maritime hub for "shipping intelligence", which provided shipping information obtained from waterfront, and later on published shipping-oriented newspaper called Lloyd's List. Also, 1730s and 1740s were benchmarks as the market saw a remarkable growth in demand for marine insurance.³⁰

Although, from the 19th century there was strong competition among insurers as a result of the appearance of the new corporate bodies due to the abolition of the Bubble Act in 1824³¹, the insurance market was proved to have enough space for both Lloyd's and companies. So, in spite of ups and downs during the years, Lloyd's remained as the leading market.³²

2.1.3.3 The Mutual Insurance Association (P&I Clubs)

²⁷ Bennett, *supra* note 5 at 3-4.

²⁸ Bennett, *supra* note 5 at 9.

²⁹ Merkin et al, *supra* note 17 at 1.

³⁰ Bennett, *supra* note 5 at 9.

³¹ Merkin et al, *supra* note 17 at 1.

³² Bennett, *supra* note 5 at 9.

Protection and Indemnity insurance (P&I) is the mutual insurance based on which individuals “agree to insure each other against marine losses”.³³ This type of insurance originally was started by groups of shipowners to cover liabilities for death or injury resulting from collisions which were not covered by the basic Lloyd’s SG (ship and goods) policy, and also to cover new kinds of liabilities.³⁴

Until the 19th century the third party liability had not caused serious problems in the insurance industry. Not to mention that underwriters who knew the extent of potential risk, were not satisfied to cover such a liability.³⁵ On the other hand, the problems with the activity of Lloyd’s underwriters were as follows. First, the majority of them were settled in London; second, the rate of premiums was high; third, as individual underwriters they could hardly afford the huge losses. Therefore, shipowners decided to form ‘unincorporated associations’ in order to provide mutual hull insurance.³⁶ These developments helped launch the P&I insurance as a new generation of mutual insurance into practice.

At first the cover provided by these mutual clubs was categorized as ‘protecting’. The sinking of the Westenhope vessel and the correspondent case added the function of indemnity to liability for loss and damage to the cargo. As a result protection societies added indemnity clauses to their rules and became protection and indemnity (P&I) clubs.³⁷ In fact, ‘protection’ insurance is related to the liabilities for the ownership of the ship,

³³ See Section 85 of the MIA 1906.

³⁴ Pavliha, *supra* note 26 at 21.

³⁵ Chircop et al, *supra* note 1 at 398.

³⁶ Bennett, *supra* note 5 at 11.

³⁷ Chircop et al, *supra* note 1 at 399-400.

whilst ‘indemnity’ insures liabilities for the operation of a ship.³⁸ Over the years with the growth in statutory and practical liabilities of the shipowners, the coverage provided by the P&I clubs was increased so that today they provided coverage almost for all the risks not covered by the hull insurance coverage.³⁹ Indeed, while the London market mainly offers property insurance and a limited collision liability insurance, other marine insurance liability is covered by P&I clubs.⁴⁰

P&I clubs consist of member shipowners or charterers (everyone who operates ships) who have the role of the insurer and the assured at the same time.⁴¹ The market insurance and mutual insurance mechanisms differ. Market insurance is purchased from a ‘profit-making entity’ and has fixed premiums., Mutual interest associations are non-profit organizations, funded by member contributions, to share the losses and the amount to be paid is defined according to the actual loss.⁴²

There are a number of P&I clubs around the world, most of which are situated in the United Kingdom.⁴³ In order to provide a wider coverage of different kinds of financial risks and also to take advantage of more purchase power to obtain reinsurance for larger claims, the International Group of P&I Clubs was established in 1981 with the so called “pooling agreement”.⁴⁴ The Group consists of 13 of the largest P&I clubs which provide

³⁸ *Ibid* at 415.

³⁹ Schoenbaum, *supra* note 3 at 10.

⁴⁰ Bennett, *supra* note 5 at 11.

⁴¹ Chircop et al, *supra* note 1 at 416.

⁴² Bennett, *supra* note 5 at 12.

⁴³ Schoenbaum, *supra* note 3 at 10.

⁴⁴ Chircop et al, *supra* note 1 at 412.

liability insurance for more than 90 percent of the world's fleet.⁴⁵ The International Group of P&I Clubs has observer status at the International Maritime Organization (IMO).⁴⁶

2.2 Marine Insurance Act, 1906

The purpose of the MIA 1906 was to clarify the legal principles and rules to be applied by the courts, and to enforce order on the ad hoc fact-based decision-making which had become the norm in 19th century marine insurance cases decided by English courts. The codification of marine insurance law coincided with a movement to codify other areas of commercial law.⁴⁷

2.2.1 Introduction of the Act

In fact, insurance contract law in UK is largely derived from principles developed in the 18th and 19th centuries.⁴⁸ However, until the end of the 19th century no serious effort was made to codify the marine insurance comprehensively.⁴⁹ Following the movement of codification in second half of the 19th century, the bill which became the MIA codified the principles and laws from Mackenzie Chalmers' summary of than 2000 cases.⁵⁰ Eventually, after various amendments, the Bill received Royal Assent and became law on December 1906 and then entered into force in January 1907.⁵¹

⁴⁵ See International Group of Protection & Indemnity Clubs, "About the Group" (last visited 20 August 2018), online: International Group of Protection & Indemnity Clubs < <https://www.igpandi.org/about> >

⁴⁶ Chircop et al, *supra* note 1 at 418-420.

⁴⁷ Bennett, *supra* note 5 at 20.

⁴⁸ Baris Soyer, "Insurance Act 2015 Coming into Force: Overhauling Commercial Insurance Law in the UK" (2008) 22:4 Journal of International Maritime Law 253 at 253.

⁴⁹ Chircop et al, *supra* note 1 at 400.

⁵⁰ Bennett, *supra* note 5 at 21.

⁵¹ *Ibid.*

Commonly referred to as the MIA 1906, the Act codified past “decisions and customary practice” by considering notions and principles of marine insurance law, some of which dated back to the 18th century, particularly the judgments of Lord Mansfield.⁵² According to section 91(2) the rules of the common law, including the law merchant and rules of equity, are still applicable in so far as they do not contradict the “express provisions of this Act”.⁵³ Nonetheless, the Act changed some parts of the previous law.

2.2.2 Influence

Before the MIA 1906, marine insurance substantive legislation was confined to only insurable interest. The development of the marine insurance principles was left to the market and courts.⁵⁴ After 1906, the main source of insurance legal principles shifted from case law to statutory law. However, the pre-existing common law was used as the basis for dealing with ambiguity in the statute.⁵⁵

Despite the fact that the MIA 1906 appears to be confined to marine insurance; its rules and principles were incorporated into other areas of English insurance law.⁵⁶ Before and following the MIA 1906, there was no “equivalent non-marine insurance codification”,⁵⁷ with the consequence that many of the principles of the MIA 1906 became part of general insurance law and applicable to other forms of insurance contract, rather than being limited only to marine insurance. After 1906, a lot of non-marine insurance litigation accepted the MIA 1906 principles as the basis of analysis of the relevant law. On

⁵² Soyer, *supra* note 48 at 253.

⁵³ Bennett, *supra* note 5 at 21.

⁵⁴ Merkin et al, *supra* note 17 at 1.

⁵⁵ Bennett, *supra* note 5 at 22.

⁵⁶ Soyer, *supra* note 48 at 253.

⁵⁷ Merkin et al, *supra* note 17 at 1.

the other hand, a large volume of interpretations of the Act came from litigation outside marine insurance.⁵⁸

Over time, the MIA 1906 became a model for the adoption of marine insurance legislation and practice in many countries around the world. Naturally, as the other legal systems tended to follow the central market, the MIA 1906 was became the legislative framework for the rest of the world. Many Commonwealth countries such as Canada, Australia, Hong Kong, Singapore, Malaysia, India and New Zealand largely accepted the MIA 1906 as the basis of their marine insurance legislation. Although, United States is not part of the British Commonwealth, the marine insurance law of the United States, especially before *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*⁵⁹ case in 1955, was greatly dependent on English law.⁶⁰ Even now, although US courts do not treat the MIA 1906 as mandatory, and despite the fact that they believe the maritime center of gravity has probably shifted, American scholars suggest there are still “special reasons for keeping in harmony with the marine insurance laws of England”.⁶¹ In many other countries, the MIA 1906, at least, is regularly referred to by local judiciary or stipulated in marine insurance policies, despite the existence of national marine insurance legislation.⁶² More importantly, the MIA1906 acted as a bridge across the common law and civil law systems since it was

⁵⁸ Bennett, *supra* note 5 at 21.

⁵⁹ Cited in Lord Mustill, “Convergence and Divergence in Marine Insurance Law” (2000) 31 J Mar L & Com 1.

⁶⁰ *Ibid.*

⁶¹ Graydon S Staring, “Book Reviews” (2006) 37 J Mar L & Com 615 at 618.

⁶² UNCTAD Secretariat, *Legal and Documentary Aspects of the Marine Insurance Contract*, UNCTAD, 1982, TD/B/C.4/ISL/27/Rev.1, at 12-13, online (pdf):

<<http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=297>> [UNCTAD, *Marine Insurance Contract*]

partly accepted by some civilian national marine insurance laws, and with the consequence of removing of some previous substantial differences between the two systems.⁶³

2.3 The Marine Insurance Market After 1906

In previous sections we discussed the British marine insurance legal regime. The word 'legal regime' refers not only to the legislative provisions, policy conditions, and judicial decisions, but also to all the procedures that influence the contractual relationships of the parties including market practices. In other words, although marine policies are governed by principles of contract law, their formation and application are also highly dependent on the practice of the market.⁶⁴

Despite the variety of policy forms around the world, the use of English market policies for all types of insurance is so common that these policy forms are regarded as de facto international insurance conditions. In 1982 it was asserted by United Nations Conference on Trade and Development (UNCTAD) that two-thirds of those who sign hull or cargo insurance contracts apply the British conditions solely, or alternatively, or along with local policies. The figure was three quarters for developing countries.⁶⁵ These figures are so considerable, but not surprising. Given the historic influence of the London market, the MIA 1906 became a role model for a wide range of countries as well as the Commonwealth countries;⁶⁶ this is the reason the Act is sometimes referred to as the "mother of all marine statutes".⁶⁷ In return, the widespread acceptance of the Act has

⁶³ CMI International Working Group, "Plenary Session 2001", *supra* note 10 at 206-207.

⁶⁴ UNCTAD, *Marine Insurance Contract*, *supra* note 62 at 29.

⁶⁵ *Ibid* at 11.

⁶⁶ Staring & Waddell, *supra* note 11 at 1621.

⁶⁷ Pavliha, *supra* note 26 at 6.

resulted in a huge amount of the world's marine insurance business carried out in London which perpetuates the use of English law, either expressly or impliedly.⁶⁸ This section is going to explain the British practice in terms of types of insurance and standard clauses. After that the reasons that made law reform unavoidable will be discussed.

2.3.1 Types of Marine Insurance

There are various types of insurance in the marine insurance market. The insurance contract can be categorized from different perspectives. From a shipowner point of view, for instance, there are three different types of insurance: hull and machinery (H&M) insurance for the ship and its equipment, 'loss of hire' coverage in case a casualty has caused the loss of income, and P&I coverage in the case of third-party liability due to ship operation.⁶⁹ On the other hand, originally, the cargo owner's concern is insuring the cargo against loss or damage. But, such a cover may also be extended to general average or salvage that may happen while the goods are transported.⁷⁰

From different viewpoint, similar to charter parties we can classify the marine insurance into 'time' and 'voyage' policies. The former, which usually is applied to cover the ships, insures the subject during a specified time. The latter, which often provides coverage for cargo, covers the risk for a voyage or a number of voyages. Also, P&I cover more frequently is offered on a yearly basis and thus is regarded as a time policy.⁷¹ The

⁶⁸ *Ibid* at 6.

⁶⁹ Chircop et al, *supra* note 1 at 414.

⁷⁰ *Ibid* at 415.

⁷¹ *Ibid* at 437.

most common classification, we can distinguish as three major types of marine insurance policies as follows⁷²:

2.3.1.1 Hull and Machinery Insurance

Normally, the vessel, its machinery, on board⁷³ equipment, certain liabilities with regard to collision, and sometimes general average and salvage charges are included in a basic H&M policy.⁷⁴ In the other word, the subject of hull and machinery insurance is the vessel itself and thus it is taken out by the shipowner. Taking into consideration the wide range of ship types in the modern age, from large tankers to fishing boats, the H&M insurance itself is divided into specialized sub-categories.⁷⁵ It should be noted that H&M insurance is normally issued on a time basis,⁷⁶ and as stated, it usually contains a specific value for the ship.⁷⁷

2.3.1.2 Cargo Insurance

An important part of the global insurance market is devoted to the insurance of cargoes transported by sea. A cargo policy may be procured by the shipper or anyone who has an insurable interest in the shipment of goods, to be indemnified in case of any loss or damage to the cargo following occurrence of the perils specified in the policy.⁷⁸

Generally, cargo is insured under the Institute Cargo Clauses (ICC) with some alteration if needed. However, there is ‘specific policy coverage’ for special commodities

⁷² Schoenbaum, *supra* note 3 at 5.

⁷³ The word ‘on board’ means the object is on the vessel for a long or indefinite time.

⁷⁴ Schoenbaum, *supra* note 3 at 5.

⁷⁵ Chircop et al, *supra* note 1 at 426.

⁷⁶ Schoenbaum, *supra* note 3 at 4.

⁷⁷ *Ibid* at 6.

⁷⁸ *Ibid* at 8.

like oil and other bulk cargoes.⁷⁹ Except for carriage of large bulk goods, usually a cargo vessel contains a wide range of items on board, each of which has its own policy. Also, it is quite likely that the ownership of goods changes during the carriage and thus it would go under the new policy.⁸⁰

2.3.1.3 Protection and Indemnity Insurance

It was mentioned that (P & I) insurance covers third parties or the liabilities not covered by hull insurance. It is usually taken by the shipowner, charterer and so on. In 1836 a court decision ruled that collision was not deemed to be a 'peril of the sea' and, therefore the resulted damage and liability thereof is not covered by the original Lloyd's SG policy.⁸¹ Immediately, Lloyd's underwriters created 'Running Down Clause' (RDC- Collision Liability) to be attached to an original hull policies form to cover three-quarters of the collision liability with respect to the other vessel and its cargo, in return for additional premium.⁸² However, it didn't work well and improper response of the underwriters to third-party liabilities brought the P&I insurance into the practice.⁸³ Beginning with the 20th century, with increasing shipowner statutory and practical liabilities, the corresponding coverage provided by P&I clubs has grown,⁸⁴ so that today they provide coverage for almost all the risks of hull insurance coverage.⁸⁵

⁷⁹ Chircop et al, *supra* note 1 at 431.

⁸⁰ *Ibid.*

⁸¹ Schoenbaum, *supra* note 3 at 10.

⁸² *Ibid* at 10.

⁸³ Chircop et al, *supra* note 1 at 398-9.

⁸⁴ *Ibid* at 415.

⁸⁵ Schoenbaum, *supra* note 16 at 10.

A wide range of other marine insurance types exist in the market. Some are well-established with standard forms, among which are loss of hire, defence cover, and war risk insurance. These other covers are intended to provide for special needs.

2.3.2 The Theme of the Marine Insurance Market

With the emergence of modern marine insurance practices, the crucial importance of uniformity of conditions was recognized, and standardized insurance clauses began to be developed by the marine industry.⁸⁶ These frequently used standard terms and conditions in a wide range of policies provides marine insurance with a considerable degree of uniformity and, therefore, certainty.⁸⁷ In this section the history and variety of these clauses will be reviewed.

For this purpose, one should bear in mind the differences between the ‘London market’ and ‘United Kingdom market’.⁸⁸ London market mainly consists of Lloyd’s syndicates plus those insurance companies that choose to operate on a subscription basis, as it is common in this market. Base on this method, each insurer accepts a percentage of risk along with others, inside or even outside the London market. Outside the London market, the risk often is totally underwritten by one insurer, which may be appealing for some companies. It is noteworthy to mention that normally hull insurance is carried out in the London market, but cargo insurance may be underwritten both in ‘London market’ or ‘United Kingdom market’.⁸⁹

⁸⁶ UNCTAD, *Marine Insurance Contract*, *supra* note 62 at 5-6.

⁸⁷ Tetley, *supra* note 23 at 790.

⁸⁸ Bennett, *supra* note 5 at 29.

⁸⁹ Bennett, *supra* note 5 at 30.

2.3.2.1 Before 1980s

The simple agreement for taking the risk in return for premiums signed in a coffee house later evolved into a standard policy. In 1779, the famous SG marine insurance policies, which included the list of perils and the insurance against them, were officially introduced at Lloyd's. This policy remained standard for both vessel and cargo for more than two hundred years (until the late 20th century) with minor changes.⁹⁰ The Lloyd's SG policy was approved under the second schedule of the MIA 1906, but was not mandatory.⁹¹

After the ILU was established in 1884, it focused on drafting standard terms to fill the gaps on issues which were deemed not to be covered by the SG policy.⁹² Therefore, from the 19th century the ILU started to develop a range of clauses for different types of risk which were attached to the SG policy. Only four years after the ILU's formation, the first collection of 'Institute Clauses' was introduced under the name of '1888 Time Clauses' and were intended to apply on 'year's policies on hulls'. In 1893, separate hull clauses for time and voyage policies were promulgated. Subsequently, the first 'Institute Cargo Clauses' were introduced in 1912.⁹³ Even after merging with the LIRMA in 1998, these clauses continue to be known as 'Institute Clause'.

Policies issued in London market by Lloyd's underwriters and corporates are usually accompanied with Institute Clauses forms. These clauses are regularly modified to meet the different needs of the particular assureds.⁹⁴ The SG and 'Institute Clauses'

⁹⁰ Staring & Waddell, *supra* note 11 at 1621.

⁹¹ Merkin et al, *supra* note 17 at 1.

⁹² *Ibid.*

⁹³ Bennett, *supra* note 5 at 10.

⁹⁴ Merkin et al, *supra* note 17 at 1.

developed on a ‘ad hoc basis’ in response to the constant development of law and practice,. They have always been open to change because of their contractual nature.⁹⁵

2.3.2.2 After 1980s

The 1980s were a milestone period in marine insurance as finally the link between the Institute Clauses and the old SG policy was broken. The SG policy was replaced by the ILU ‘Companies Marine Policy’ and ‘Lloyd’s Marine Policy’ (known as MAR forms) with simplified form of wording for companies and Lloyd’s respectively.⁹⁶

The Lloyd’s SG form, changed for two reasons. The first reason was that the terms and the language of the form seemed too antiquated to be understood and express the intentions of the parties. Secondly and perhaps more importantly, some developing countries announced that the colonial principles and traditions embedded in the London market form, could no longer satisfy their interests. Taking their cue from UNCTAD, developing countries called for a new international regime of marine insurance. In response, the London market replaced the old Lloyd’s SG form with a simpler document which listed the fundamental necessary information.⁹⁷

In 1991, the revised version of the MAR form was published by both the ILU and Lloyd’s. One of the most important features of the revised version was providing exclusive jurisdiction for English courts.⁹⁸ Following the foundation of IUA in 1999, the Institute Mar forms were replaced by the ‘IUA Marine Policy’. The new policy had less substantive

⁹⁵ Bennett, *supra* note 5 at 235-236.

⁹⁶ Merkin et al, *supra* note 17 at 1.

⁹⁷ Chircop et al, *supra* note 1 at 434.

⁹⁸ Bennett, *supra* note 5 at 239-240.

provisions and information. Also, there was no jurisdiction clause in this policy.⁹⁹ After the establishment of the centralized London market policy signing office (known as ‘Ins-sure’) in 2003, the IUA documentation was replaced by Ins-sure ‘Companies Marine Policy’.¹⁰⁰

It should be considered that the above-mentioned policies were intended to be used as a cover sheet for the relevant Institute clauses which cover cargo, hulls and freight. In fact, for complete coverage of a marine adventure, different terms of insurance is needed, that are available under Institute Clauses wording.¹⁰¹

With regard to the cargo, after 1982, new versions of cargo insurance clauses were drafted by the ILU which have been in use since then. These clauses mainly include ICC (A) which cover ‘all risks’ except explicit exclusions, and Clauses B and C which insure only main casualties and are limited to perils that are named, with the same or more exceptions. Apparently, the covered perils listed in clause C are less comprehensive than the perils covered by clause B.¹⁰² In practice, cargo is usually insured under the A clauses. In contrast, B clauses are rarely used. In the absence of any sensible risk other than an accident or similar cases, the C clauses would be sufficient.¹⁰³ The Joint Cargo Committee (made up of the members of the IUA and the Lloyd’s Market Association) which is responsible for reviewing and updating the clauses, introduced the revised version of cargo clauses in 2009.¹⁰⁴

⁹⁹ *Ibid* at 239-240.

¹⁰⁰ *Ibid*.

¹⁰¹ Merkin et al, *supra* note 17 at 1.

¹⁰² Schoenbaum, *supra* note 3 at 8.

¹⁰³ Bennett, *supra* note 5 at 240.

¹⁰⁴ Richards Hogg Lindley, “Institute Cargo Clauses 2009: A Comparison of the 1982 and 2009 Clauses with Additional Commentary” (2009), at 2, online (pdf):

There are also specialized clauses drafted for cargoes with particular risks because of their nature or the way they are transported, including seeds and fats, commodities, oil, coal, rubber, timber, jute, frozen food and frozen meat.¹⁰⁵ Often these kinds of clauses are drafted based on the general cargo clauses with some amendments (to cover perils and exceptions) which have been agreed upon by the relevant industry associations.¹⁰⁶

Traditionally, standard clauses regarding hull insurance are available on a time and voyage basis. However, practically ships are insured under the time policy.¹⁰⁷ The 1983 Institute Time Clauses which were intended to accompany the MAR form was a radical revision of the clauses. In fact, the key features of the SG Policy were combined into the Institute Time Clauses in order to have a unified policy document.¹⁰⁸ The clauses reflected both time and voyage and could be a model for special types of hull insurance with additional or restricted range of perils or exceptions like fishing vessels.¹⁰⁹

The new version of hull clauses for time policies was launched in 1995, contained “express contractual protection against sub-standard maintenance” and some changes in relation to the salvage and general average. However, due to the lack of sufficient consultation with assureds, the new clauses were not welcomed by shipowners. With the

<<https://www.ctplc.com/media/72243/Institute-Cargo-Clauses-2009.pdf>>

¹⁰⁵ Merkin et al, *supra* note 17 at 1.

¹⁰⁶ Bennett, *supra* note 5 at 241.

¹⁰⁷ Merkin et al, *supra* note 17 at 1.

¹⁰⁸ Richards Hogg Lindley, “A Commentary on the International Hull Clauses (01/11/03)” (18 November 2003), at 1, online:

<<https://www.ctplc.com/media/72223/A-Commentary-on-the-International-Hull-Causes.pdf>> [Richards Hogg Lindley, “Hull Clauses 2003”]

¹⁰⁹ Bennett, *supra* note 5 at 241.

excessive capacity in the market and the threat of competitors outside the London market, insurers were not in a position to insist on new clauses.¹¹⁰

The Joint Hull Committee later introduced a more efficient model under the IUA. After holding further consultation and undergoing a complex drafting process the first version of the International Hull Clauses was introduced in 2002 by the Joint Hull Committee. The new set of clauses attracted more shipowner support. , But to ensure that the hull clauses would remain unchanged over the years, the Joint Hull Committee modified the clauses based on the feedback received from the world market and introduced the modified version of International Hull Clauses in 2003.¹¹¹

The 2003 clauses consist of three parts. Part 1, from clause 1 to 33, contains ‘Principal Insuring Conditions’ which are the revised versions of the 1983 clauses. Likewise, the coverage exists against any loss or damage to the ship by a range of named perils, and a considerable number of liabilities which are not included and should be indemnified through P&I clubs. Part 2, including clauses 34 to 44, contains ‘Additional Clauses’ which although mainly reflecting other standard clauses in the market, they did not have counterparts in the 1983 Institute Clauses. Part 3, Clauses 45 to 53, on “Claims Provisions, is completely new.¹¹²

¹¹⁰ *Ibid* at 242.

¹¹¹ Richards Hogg Lindley, “Hull Clauses 2003”, *supra* note 108 at 1.

¹¹² Bennett, *supra* note 5 at 242-3.

Freight insurance includes similar terms as hull insurance on a time or voyage basis.¹¹³ It is usually underwritten through the Time Clauses Freight (1995) or Institute Voyage Clauses Freight (1995) with the cover of the MAR policy form.¹¹⁴

To sum up, we cannot refer to specific clauses as the dominant standard in London market. Apparently, the 1983 and 1995 clauses also continue to be used by parties to the insurance contracts. Accordingly, one could say that all the three forms are relatively common in the market.¹¹⁵ While the International Hull Clauses 2003 were more welcomed by the whole market, the 1995 clauses are still the best option for insurers because they offer better protection against unseaworthiness. With regard to sub-standard shipping, although the 2003 clauses provide more protection in comparison with the 1983 clauses, they are not as strong as the 1995 clauses. However, more experienced assureds may not accept the 1995 clauses. They prefer the 2003 clauses which are more modern and provide ‘widest cover’. With regard to the various Institute Clauses, the Mar policy form would be performed as “a jacket into which details of the risk and terms and conditions may be inserted”.¹¹⁶

2.3.3 Changes After 1906

“Nothing is so continuous as change”.¹¹⁷ Insurance has changed in many ways since 1906. At that time the market was largely based on face-to-face contacts and social bonds, while today it is based on computer systems, sophisticated procedures, and complicated data

¹¹³ Merkin et al, *supra* note 17 at 1.

¹¹⁴ Schoenbaum, *supra* note 3 at 9.

¹¹⁵ Richards Hogg Lindley, “Hull Clauses 2003”, *supra* note 108 at 2.

¹¹⁶ Schoenbaum, *supra* note 3 at 7.

¹¹⁷ Thomas M Remé, “CMI International Working Group on Marine Insurance; Challenges for the Future” (1999) *Comite Maritime International Year Book* 363 at 366.

analysis. Similarly, the types of risks to be insured have widened and there is a need for a huge amount of information to be available to the market participants. Meanwhile, the law failed to keep pace with the modern insurance market and the way people communicate, analyse and conclude deals.¹¹⁸ Not to mention that it didn't reflect the other areas of commercial contract law. Hence, due to the technological advances and changes of underwriting practices, it seemed that some provisions of the MIA 1906 no longer served the needs of the changing insurance practice.¹¹⁹

On the other hand, considering the fact that many of the common law countries, which originally took their law from the UK, started to amend their respective laws in insurance or marine insurance to be more modern and assured-friendly, there was a danger of losing the UK reputation in the international marketplace.¹²⁰ To be more precise, a number of underlying negative aspects with regard to the MIA 1906 appeared with the passage of time. The most unfavorable features can be categorized as below. This chapter is not going to analyze the reasons behind the MIA 1906 problems, but to briefly state the main problems which led to the law reform.

2.3.3.1 Challenges for MIA 1906

For more than one century, marine insurance has been practiced throughout the world under the influence of the UK Act. However, the number of marine insurance cases brought before the courts was relatively rare in comparison with other areas of maritime law like

¹¹⁸ UK, Law Commission & Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment*, Law Com No 353 & Scot Law Com No 238, 2014, at 3, online (pdf):

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/331737/41872_Cm8898_PrintReady.pdf> [Law Commissions Report].

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

carriage of goods.¹²¹ The paucity of marine insurance cases during this period in most jurisdictions may be construed as stability of the marine insurance law,¹²² but it doesn't necessarily mean that the industry had no challenges.

In contrast, one could argue that the reason of the paucity of cases was that the parties of the marine insurance contracts were not motivated to settle disputes through formal litigation.¹²³ In fact, due to the uncertainty and also the very high cost of international litigation, insurers seldom tend to resort to a legal action. Hence, even most of the doubtful claims are normally compromised.¹²⁴ Consequently as lawsuits between the assured and the insurer are rare, we hardly have reliable experience in relation to the court attitudes toward various cases and therefore it is relatively hard to determine the areas of difficulty within the national legal systems.¹²⁵ However, a number of important decisions regarding marine insurance had to be made to refine the meaning of the MIA 1906's expressions.¹²⁶ This was a sign of antiquity of the Act and in turn, it would lead to more uncertainty.

On the other hand, despite the overall paucity of cases, there were some reports that showed a worrying number of disputes with regard to non-disclosure and breach of warranty. For example, a survey in 2010 announced that 31% of the participants had problems related to non-disclosure, and 5% had experienced the litigation on the issue.¹²⁷

¹²¹ UNCTAD Secretariat, *Marine Cargo Insurance*, UNCTAD, 1975, TD/B/C.3/120, Online (pdf):

<http://unctad.org/en/PublicationsLibrary/tdbc3d120_en.pdf> [UNCTAD, *marine cargo insurance*]

¹²² John Hare, "The CMI Review of Marine Insurance Report to the 38th Conference of the CMI Vancouver, 2004" (2004) *Comite Maritime International Year Book* 248 at 284 [Hare, "Vancouver Conference"].

¹²³ UNCTAD, *Marine Insurance Contract*, *supra* note 62 at 3-4.

¹²⁴ UNCTAD, *marine cargo insurance*, *supra* note 121 at 31.

¹²⁵ UNCTAD, *Marine Insurance Contract*, *supra* note 62 at 3-4.

¹²⁶ Merkin et al, *supra* note 17 at 1.

¹²⁷ Law Commissions Report, *supra* note 118 at 11.

In 2012 and 2013, a series of interviews with UK businesses “with an annual turnover of £50m or more” suggested that insurance claims were not rare, with around 40% of participants having a significant insurance claim. Amazingly, only a quarter of assureds who have been involved in these claims were satisfied with the result. According to the reports, the main four areas of dispute were (in order): policy coverage, quantification of loss, breach of warranty or condition and non-disclosure. The above mentioned items were the principal areas of dispute respectively.¹²⁸

Similarly, we can observe a lot of problems in relation to the insurance policies. Regardless of the fact that some divergence had appeared between Institute clauses and policies that were issued in civil countries, another problem was that standard clauses used to be articulated by insurers without much consultation with policy holders. Hence they were thought to be the dictate of the stronger party rather than a product of the balanced parties’ negotiation.¹²⁹ In this regard, the MIA 1906 did not have any protective regulations or at least transparency requirements to support the assureds.

Above all, it seems that the Act was not consistent with practice, specifically after the important changes in 1983 as mentioned above. The Act had stipulated some presumptions that were constantly put aside by different standard clauses introduced by marine insurance actors.¹³⁰ This is not surprising, as the Act was codified based on the practice of the marine insurance law before 1906 with the small Lloyd’s market.¹³¹ Undoubtedly, it couldn’t have anticipated such a significant change in the maritime

¹²⁸ *Ibid.*

¹²⁹ *Ibid* at 12.

¹³⁰ Merkin et al, *supra* note 17 at 1.

¹³¹ *Ibid.*

industry and therefore in the forms of insurance. The more the practice deviated from the letter of the law, the less parties can rely on such law.

Since 1906, the maritime industry experienced a wide range of technological changes. Ships became larger, the size of crews decreased significantly, ports infrastructure has changed to accommodate containers and increased security demands, the types of cargoes have changed, routes have altered to serve a larger area, navigation and communications equipment has been computerized, all of which are totally different from what existed at the beginning of the century. In addition the containerization of cargo revolutionized international trade and shipping, but, the marine insurance law was unchanged until 2015.¹³²

2.3.3.2 Call for Reform

The evidence shows that at the end of the 20th century the static situation in English marine insurance law was no longer deemed useful or adequate by the insurance industry throughout the world. Accordingly, that initiatives by different authorities started to evaluate national legal regimes. The fact that international marine insurance practice depended so heavily on the UK law, heightened the urgent need to reform some areas of marine insurance law. At the end of the 20th century, the CMI Working Group on marine insurance announced that marine insurance needed greater clarity and reform in the areas of the duty of good faith, the duty of disclosure, alteration of risk, and warranties.¹³³

Perhaps the need for certainty in these areas was the primary motivation that made some

¹³² Mustill, *supra* note 59 at 7.

¹³³ John Hare, "Report of the CMI Standing Committee" (2005-2006) *Comite Maritime International Year Book* 386 at 387-388 [Hare, "Report of the CMI"].

of the followers of UK law, including Australia, Hong Kong, New Zealand, South Africa, and also China and USA, start to evaluate and reform domestic marine insurance laws in the beginning of the 21st century. The main question was whether the MIA 1906 could continue to serve the industry in the new century.¹³⁴

On the other hand, while common law countries were considering the effect of MIA 1906, some civil jurisdictions were actively reforming their legal regimes. Scandinavia introduced a contractual restatement of the marine insurance law based on the Norwegian Plan¹³⁵ and EU was also successful to make some progress in this respect at the end of the 20th century.¹³⁶ Both of these initiatives bolstered claims that the civil legal systems' marine insurance laws met with 21st century demands better than common law systems.¹³⁷

Even within the United Kingdom, the call for reform was not something new. It should be noted that from the middle of the 20th century, several English Law Commission reports suggested that reform was necessary based on, a series of interviews with UK businesses, and reviews of the disputes and litigation.¹³⁸ The need for reform was implicitly acknowledged when, in response to the pressures of some developing countries the London market dropped the SG Policy (which was believed to be against the will of the insureds) and shifted to all risk policies.¹³⁹ The arguments for the reform can be traced back in some

¹³⁴ Hare, "Vancouver Conference", *supra* note 122 at 249.

¹³⁵ This plan adopted in consultation with representatives from industry, trade and academic organizations. This is not legislation as such, but is incorporated into marine insurance contracts by agreement between the parties.

See Norwegian Marine Insurance Plan of 1964, online (pdf): <<http://www.nordicplan.org/Archive/The-Norwegian-Plan-200211/>>

¹³⁶ Hare, "Report of the CMI", *supra* note 133 at 387.

¹³⁷ Hare, "Vancouver Conference", *supra* note 122 at 256.

¹³⁸ Law Commissions Report, *supra* note 118 at 4.

¹³⁹ Staring & Waddell, *supra* note 11 at 1623.

English scholarly writings.¹⁴⁰ The practical problem was that English lawyers were not very motivated to codify their laws because they believed that the codification suppresses “the ability of judges to develop the law”. However it could be argued that sometimes the judge made law is likely to be both uncertain and unpredictable. At least we can refer to Professor Clarke’s quotation from Lord Goff that codification “should only be undertaken where the good it may do is perceived to outweigh the harm it must do”.¹⁴¹ Eventually the Scottish and British Law Commissions determined that the good of codifying outweighed its harm, when they proposed amendments to the MIA 1906 and by laying the groundwork for enacting the Insurance Act 2015.¹⁴²

¹⁴⁰ Staring, *supra* note 61 at 619.

¹⁴¹ Hare, “Vancouver Conference”, *supra* note 122 at 252.

¹⁴² *Insurance Act 2015* (UK), c4, s12.

CHAPTER 3:

THE 2015 INSURANCE ACT VERSUS 1906 MARINE INSURANCE ACT: MAJOR CHANGES AND POTENTIAL IMPACTS

Historical dominance of the London market made the Marine Insurance Act (MIA), 1906 the template for marine insurance legislation and practice throughout the 20th century. However, from the mid-19th century, the 1906 Act was no longer adequate for the marine insurance market demands. Consequently, court decisions relied on business practice and custom, as opposed to the strict wording of the Act. When business practice and custom changed, reform of the statutory definitions and the Act became predictable.

Details of the process which led to the enactment of the Insurance Act (IA) 2015 were contained in the Joint Report on the IA 2015, issued by the English Law Commission and the Scottish Law Commission¹. Long before that, the English Law Reform Committee issued a report² suggesting reform of insurance law in 1957. This report was followed by the report of the English Law Commission in 1980³. The 1980 report discussed issues like the need for connection between disclosure and loss, the principle of proportionality, and

¹ UK, Law Commission & Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment*, Law Com No 353 & Scot Law Com No 238, 2014, at 8, online (pdf):

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/331737/41872_Cm_8898_PrintReady.pdf> [Law Commissions Report].

² UK, Law Reform Committee, *Fifth Report: Conditions and Exceptions in Insurance Policies* (Cmnd 52, 1957) (David Llewelyn Jenkins).

³ UK, Law Commission, *Insurance Law: Non-Disclosure and Breach of Warranty* (Cmnd 8064, 1980) (Justice Kerr) online (pdf):

<<http://www.bailii.org/ew/other/EWLC/1980/104.pdf>>.

the law on warranties, etc.⁴ Also, the 1980 Report warned that many areas of the insurance industry, including marine insurance law were “undoubtedly in need of reform”.⁵

Despite acknowledging that there was ‘a formidable case for reform’, it took more than 20 years to the British Insurance Law Association to recommend to the Commissions to proceed with insurance law reform.⁶ According to the Law Commission and the Scottish Law Commission, the report of the British Insurance Law Association in 2002 was the ‘major factor’ in their decision to come back to the insurance area.⁷ The Commissions started from 2006 and released some reports, followed by the final report on July 2014, containing procedures, views, and developments of the project.⁸ Since there are no comprehensive comments on the IA 2015 to date, the final report is the basis of discussions of this chapter.

The primary project was wide-ranging, encompassing all forms of insurance. Then, the Law Commissions narrowed the scope of the work and preferred to focus on specific subjects. This review proceeded in two stages. The Law Commissions’ first report focused on the consumer’s duty of disclosure. The resulting bill, Consumer Insurance (Disclosure and Representations) Act 2012 (CIDRA)⁹, was passed by Parliament.¹⁰ The second report and draft Bill of the Law Commissions focused on four issues:

- 1) The duty on a business policy holder to give information to the insurer before taking out insurance (referred to as “fair presentation”);

⁴ Attilio M Costabel, “The UK Insurance Act 2015: A Restatement of Marine Insurance Law” (2015) 27 St Thomas L Rev 133 at 138-9.

⁵ Law Commissions Report, *supra* note 1 at 4.

⁶ Costabel, *supra* note 4 at 139.

⁷ Law Commissions Report, *supra* note 1 at 4.

⁸ *Ibid.*

⁹ *Consumer Insurance (Disclosure and Representations) Act 2012* (UK), c.6, [CIDRA].

¹⁰ Law Commissions Report, *supra* note 1 at 1.

- 2) Insurance warranties;
- 3) The insurer's remedies for fraudulent claims; and
- 4) Damages for late payment of claims.¹¹

On 17 July 2014, the UK Government introduced the Insurance Bill in Parliament. It contained the majority of subjects from the Commission draft bill, except two clauses¹² which relate to particular descriptions of loss and late payment.¹³ Eventually, the IA 2015 entered into force on 12 August 2016. It introduced some major changes to the provisions of the MIA 1906. The IA 2015 is not confined to marine insurance contracts but also deals with all business insurance contracts including “professional indemnity policies, contracts of insurance and retrocessions, and even consumer insurance contracts”.¹⁴

The changes introduced by the IA 2015, focus on the substance and terminology of marine insurance. Many concepts like disclosures, representations, good faith, inducement, materiality, warranties, proportionality, and remedies have changed.¹⁵ This Chapter discusses the scope of those changes and definitions in the UK Insurance Act 2015 that have the most potential to affect insurance underwriting around the world. Based on the reports and draft bill produced by the Law Commission and the Scottish Law Commission, the IA 2015 focuses on four issues, which are subsequently discussed, namely fair presentation, warranties, remedies for fraudulent claims, and good faith. Finally, the last part of this Chapter deals with a possibility that may limit the influence of the new changes.

¹¹ *Ibid* at 4.

¹² Clause 11 and 14 of the draft Bill.

¹³ Law Commissions Report, *supra* note 1 at 1.

¹⁴ Baris Soyer, “Insurance Act 2015 Coming into Force: Overhauling Commercial Insurance Law in the UK” (2008) 22:4 *Journal of International Maritime Law* 253 at 253.

¹⁵ Costabel, *supra* note 4 at 147.

3.1 Fair Presentation

3.1.1 Overview

In insurance law, there is a traditional, well-established duty on the policyholder to give information to the insurer before taking out insurance. The duty of disclosure is one of the most important benchmarks of every insurance legal regime as it is the essence of the assured's duty before signing the contract.¹⁶ In fact, this duty derives from the traditional marine insurance obligation to act with the utmost good faith¹⁷. It has been well-rooted since the 18th century when Lord Mansfield stated that “good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact, and from his believing to the contrary”.¹⁸

Imposing the duty of disclosure on the assured seems to be compatible with marine insurance practice, for a number of reasons. First, it is common that at the time of concluding an insurance contract, inspection by the insurer may be impossible as the subject of insurance, the vessel, is on a voyage. Second, it is not feasible to expect the insurer has the ability to assess every kind of data regarding various forms of coverage.¹⁹ Third, there are always a number of facts that are solely available to the assured. There is no doubt that the assured knows more about the way his business runs than the insurer

¹⁶ *Ibid* at 149.

¹⁷ Or *uberrimae fidei*

¹⁸ Aldo Chircop, William Moreira, Hugh Kindred & Edgar Gold (eds), *Canadian Maritime Law*, 2nded (Toronto: Irwin Law Inc., 2016) at 404.

¹⁹ *Ibid.*

does. Thus, disclosing the full information is necessary to enable the market to provide insurance for a wide range of business risks both “efficiently and cost-effectively”.²⁰

The duty of disclosure is also consistent with the concept of economic efficiency by decreasing both parties’ cost. It imposes a duty on the party who has the knowledge of circumstances to disclose such information so that the risk can be assessed more efficiently and cheaply. Consequently, the insurer needs less money for the evaluation procedure and therefore can offer a better rate on premium.²¹ It should be noted that the duty of good faith is a mutual obligation, but, it is often the assured who feels the force of the duty on his shoulder and he is in danger of not being paid if the loss occurred.²²

However, since the MIA 1906 was enacted before the information revolution, it could not anticipate that today data is largely available to various firms, including insurers. Thus, the law was considered difficult to comply with, given harsh consequences it imposes for breaching the duty. So, the desirable solution sought was to more efficiently regulate the relation between the policyholder, who better knows the business he runs, and the insurer who knows the facts relating to assessing the risk.²³ Indeed, while the need for such a duty has remained unchanged, the pre-contractual assured’s duty of utmost good faith in the MIA 1906 was replaced with ‘fair presentation’ in IA 2015.²⁴

3.1.2 MIA 1906

²⁰ Thomas J Schoenbaum, *Key Divergences between English and American Law of Marine Insurance: A Comparative Study*, 1st ed (Maryland: Cornell Maritime Press Inc., 1999) at 85.

²¹ Schoenbaum, *supra* note 20 at 87.

²² *Ibid* at 89.

²³ Law Commissions Report, *supra* note 1 at 27.

²⁴ Soyer, *supra* note 14 at 253.

The MIA 1906, following historical practice, affirmed that it was the duty of the prospective assured to ‘not only avoid fraud and misrepresentation’, but also ‘disclose voluntarily every material circumstances’.²⁵ Sections 18 and 20 of the MIA 1906 dealt with the duty of disclosure. The MIA 1906 required the assured to declare all the material circumstances and avoid making material misrepresentations. Section 18 states that the policyholder must disclose “every material circumstance” that he “knows or ought to know” to the insurer before signing a marine insurance contract. According to MIA 1906, sections 18 and 20, a circumstance is material when it “would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk”.²⁶ Under section 18, it is the assured who should play the active role without being questioned or told what is necessary to disclose. It is likely that an assured places a huge burden on the insurer by disclosing a wide range of information in order to make sure nothing is dropped. It is possible that significant parts of this information will be useless.²⁷

3.1.3 The Idea of Reform

Lots of criticism of the ‘duty of disclosure’ indicated why changing the law in this respect was a must. According to the Law Commissions, the duty was not properly understood and often policyholders had problems complying with it.²⁸ It has been stated that even many of the defenders and opponents of the doctrine failed comprehend that the duty of utmost good faith is a practical duty (not a traditional moral principle) to disclose the knowledge of one

²⁵ Schoenbaum, *supra* note 20 at 85.

²⁶ Soyer, *supra* note 14 at 253.

²⁷ Law Commissions Report, *supra* note 1 at 6.

²⁸ *Ibid* at 46-52.

party of the contract to another.²⁹ Specifically, companies with a high number of employees could not be certain whose knowledge may be relevant and, therefore, they ought to know.

Moreover, the exceptions referred to in section 18 (3) of MIA 1906 were written with such antiquated and arcane language that interpretation of their meaning was difficult. Practically, the passive role of the insurers in this regard could help them to ask questions only after the claim arises and to use that information against the assured. Further, the remedy to failure of the duty of disclosure was too harsh, as the insurer could avoid the contract as if it had never existed, even in cases of minor failures by the assured.³⁰ Given the fact that on many occasions insurers would have signed the same contract (perhaps with higher premiums), even if they had known all the information, avoidance did not seem a fair remedy on such occasions.³¹

It is noteworthy that the courts had already developed the notion of ‘a fair representation of the risk’ during the years, so that in practice, the duty of disclosure was not enforced as toughly as the MIA 1906 indicated. But, apparently, the case law which required the insurer to ask questions when he found the disclosure insufficient, did not comply with the strict wording of Section 18.³²

According to the Law Commissions’ Report, “the great majority of consultees”, including insurers and insurance groups, supported the reform because they wanted more clarity. Even insurers believed that better understanding and compliance with the duty of disclosure would result in greater certainty based on which the “risks are correctly assessed

²⁹ Schoenbaum, *supra* note 20 at 87.

³⁰ Law Commissions Report, *supra* note 1 at 46-52.

³¹ *Ibid* at 29.

³² *Ibid* at 28.

and priced and coverage will be assured”.³³ Similarly, even legal scholars who believe that the doctrine of utmost good faith still had utility in marine insurance, stated that it is in “need of updating and amendments”.³⁴

The call for reform was not unanimous. Some felt since the law was well-established among business parties, the reform would harm the standards of presentation, and undermine the huge volume of judicial precedents. But the reform of the duty of disclosure seemed vital to the Commissions, though they admitted that they should avoid unnecessary changes.³⁵

3.1.4 The New Law

Sections 18 and 20 of the MIA 1906 on non-disclosure and misrepresentation were replaced in the IA 2015 to provide that the assured is required to make “a fair presentation of the risk” to the insurer.³⁶ According to the report of the Commissions, these changes reflected the practice of the case law. In other words, some parts of the duty of fair presentation were already part of the law.³⁷

Contrary to the CIDRA 2012 which eliminates the duty to voluntarily present information to the insurer and only obliges the consumer to answer the insurer’s question, honestly and carefully, under the IA 2015 the duty of fair presentation remains for non-consumer insurance including marine insurance.³⁸ The duty continues to include the necessity to ‘disclose material circumstances’ and not to ‘misrepresent’ them. What

³³ *Ibid* at 31-2.

³⁴ Schoenbaum, *supra* note 20 at 129.

³⁵ Costabel, *supra* note 4 at 149-150.

³⁶ Law Commissions Report, *supra* note 1 at 63.

³⁷ *Ibid*.

³⁸ *Ibid*.

constitutes material circumstances is determined from the perspective of a prudent insurer which is a similar standard to MIA 1906.³⁹ However, in comparison with the MIA 1906, the new Act contains a number of significant changes with regard to the concept of disclosure, knowledge of parties, materiality and remedy.

3.1.4.1 The Concept of Fair Presentation

Section 3(4) of the IA 2015 defines fair presentation as “disclosure of every material circumstance which the assured knows or ought to know” or, in case of failing to do so, “disclosure which gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances”.⁴⁰ Section 4(6) sets out the kind of information that the assured ought to know for this purpose.⁴¹

The Law Commissions distinguished between ‘matters of fact’ with substantially correct test, and ‘matters of expectation or belief’ with good faith test.⁴² Thus, according to section 3(3)(c) of IA 2015, fair presentation requires that every representation in relation to the facts is substantially correct and every representation which relates to a matter of expectation is made in good faith.⁴³ However, Section 3(5) provides that the assured is not under an obligation to make disclosures that decrease the risk, or are known to the insurer, or which is expected that the insurer knows, or to which he has waived information. But if the insurer requests the enquiry, the assured will be obliged to disclose these matters also.⁴⁴

³⁹ *Ibid* at 64.

⁴⁰ Costabel, *supra* note 4 at 140.

⁴¹ Soyer, *supra* note 14 at 253.

⁴² Costabel, *supra* note 4 at 151-2.

⁴³ Soyer, *supra* note 14 at 254.

⁴⁴ Costabel, *supra* note 4 at 140-141.

Under the MIA 1906, the assured could fulfil their duty of disclosure by simply presenting a huge volume of unorganized information without summary or explanations to the insurer. This approach is not a fair presentation of the risk, as it would not be clear and accessible even for a prudent insurer.⁴⁵ To end data dumping and convoluted presentations, according to Section 3(3)(b) of IA, disclosure must be done “in a manner which would be reasonably clear and accessible to a prudent underwriter”. This means that it is against the spirit of the fair presentation of risk if the assured overloads the insurer with unnecessary information, or if he presents data in such an unreasonable complex manner that significant information which is material for risk assessment purposes remain hidden.⁴⁶

3.1.4.2 Knowledge

Section 4 of IA 2015 defines ‘knowledge of the assured’ as limited to the kinds of information actual or deemed known by persons or managers who would conclude a policy.⁴⁷ To see the effect of the changes on companies, it should be noted that one of the most important problems of the MIA 1906 was that under section 18, an assured was obliged to disclose every material circumstances that he knows or ought to know ‘in the ordinary course of business’. There was always a question regarding the organizations whose knowledge was relevant for this section and what investigations should be done before concluding an insurance contract. Since neither the statute nor the case law were helpful in this regard, this was one of the greatest practical challenges and most exhausting tasks for the companies.⁴⁸

⁴⁵ Law Commissions Report, *supra* note 1 at 64.

⁴⁶ Soyer, *supra* note 14 at 254.

⁴⁷ Costabel, *supra* note 4 at 141.

⁴⁸ Law Commissions Report, *supra* note 1 at 64.

For policyholders to better comply with their obligation, there was a need to define what they ‘ought to know’ for fair presentation. Thus, the Law Commissions suggested that an insured company should present what its senior management and those who are engaged in the process of contracting for insurance know, and also what would be clear by a reasonable search among staff or agents.⁴⁹

Section 18(3) of the MIA 1906 included some exceptions for the duty of disclosure. According to section 18(3)(b), the insured is not obliged to disclose circumstances “which are known or presumed to be known to the insurer”. Although these exceptions have been repeated in the section 3(5) of the IA 2015, it is section 5 which deals with the “knowledge of the insurer” to clarify the exceptions.

Similar to the assured, the insurer may be a large organization in which the knowledge of one part may not be available to other parts and especially to the underwriter who wants to make a new contract. The Law Commissions recommended that what an insurer should know is information which is available to the underwriter. Information held in other parts of the organization does not fall within the above exceptions, unless it has already been transferred to the underwriter. Also, if the insurer is a competent one, then it is believed he knows matters which are considered common knowledge and circumstances that insurers of that type are expected to know.⁵⁰

Section 3(5)(b-d) of IA 2015 categorizes the knowledge of the insurer as including what an insurer knows, what he ought to know, and what he is presumed to know. Taking advantage of section 5 of the IA 2015, if something is known to individuals who take part

⁴⁹ *Ibid.*

⁵⁰ *Ibid* at 65.

in underwriting the risk on behalf of the insurer, then it is assumed to be known to the insurer. An insurer ought to know something if it is informed by the insurer's agent or employee and it could have reasonably passed to those who participate in underwriting, or "it is held by the insurer and was readily available to the underwriter".⁵¹ And finally, an "insurer is presumed to know" something on which there is a 'common knowledge', or such an insurer should know it "in the ordinary course of business".⁵² Section 6, clarifying sections 3 to 5, asserts that the knowledge goes further than 'actual' knowledge to "matters which the individual suspected, and of which the individual would have had knowledge but for deliberately refraining from confirming them or enquiring about them".⁵³

3.1.4.3 Materiality

Material circumstances were defined in section 18(2) of the MIA 1906. Accordingly, there was a hypothetical scale based on which the assured had to know what kind of information would affect a prudent insurer's mind.⁵⁴ Similarly, according to section 3(4)(a) of the IA 2015, disclosure must cover all "material circumstances". Section 18 (2) of the MIA 1906 which provided an explanation of materiality, was totally removed by the IA 2015, but the language of materiality has been reproduced in Section 7(3) of the new Act. It declares: "a circumstance or representation is material if it would influence the judgment of a prudent insurer in determining whether to take the risk and, if so, on what terms". To provide a better indicator for assureds, the Commissions extracted a list of material circumstances

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ Costabel, *supra* note 4 at 141.

⁵⁴ Law Commissions Report, *supra* note 1 at 36.

from the case law and, accordingly, section 7(4) lists three instances of material circumstances as follows:

- “(a) special or unusual facts relating to the risk;
- (b) any particular concerns which led the insured to seek insurance cover for the risk;
- (c) anything which those concerned with the class of insurance and field of activity in question would generally understand as being something that should be dealt with in a fair presentation of risks of the type in question.”⁵⁵

According to the Commissions’ opinion, the third one is the most important on which there should be common understanding. To make this structure more clear, insurers, brokers, and assureds are supposed to cooperate to provide a guidance on what should be disclosed.⁵⁶ Under Section 3 (4) (b), wherever a material circumstance is not disclosed, the duty of fair presentation requires the disclosure to be of "sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances".⁵⁷ In short, the old section 18 implied that an insurer can sit and wait for information from the assured. For better disclosure, there is need for cooperation from both sides, the one who knows the facts of a business and the one who knows whether those facts are relevant to the insurance or not. To do so, insurers should assess what they are being told and should ask further questions if needed.⁵⁸

The aim of the Law Commissions was to achieve a better system of disclosures based on which first, the assured is advised which kinds of information are required and, second, the insurer is required to play an active role rather than a passive one which causes

⁵⁵ *Ibid* at 72.

⁵⁶ *Ibid* at 74.

⁵⁷ Costabel, *supra* note 4 at 151.

⁵⁸ Law Commissions Report, *supra* note 1 at 75-78.

“underwriting at claims stage”.⁵⁹ It means that, in comparison to the previous regime, disclosure needs more participation by the insurer, that is, to make more enquiries. Perhaps the Commissions hoped that the combination of Sections 3 and 7 of IA 2015 would guarantee that the insured would supply, at least, enough ‘signposts’ (even if he has not disclosed material circumstance) that a prudent insurer will make further enquiries to reveal material circumstances so that the policyholder will be considered to have conducted the duty of fair presentation.⁶⁰ This is why, Section 7 has introduced this test for materiality.⁶¹

3.1.5 Remedies

According to the MIA 1906, in case of material non-disclosure or misrepresentation, the insurer was entitled to void the contract.⁶² Avoidance as a remedy treats a contract as if it never existed, and thus leads to refusal of all claims, despite the fact that the assured may not have acted recklessly or deliberately. A review of the law of marine insurance was prompted by wide ranging criticism of the use of avoidance as a sole remedy for misrepresentation and non-disclosure. Accordingly, the Commissions pursued more “proportionate remedies”, choosing to protect “inducement test” which was already established by legal decisions.⁶³ Consequently, the remedy for breach of the pre-contractual duty of good faith has been changed under the new law.

Unlike traditional way of MIA 1906 (where one starts from duty to breach and then remedy) Section 8 of IA 2015 on “Remedies for Breach” reserves the process to first

⁵⁹ *Ibid* at 75.

⁶⁰ Costabel, *supra* note 4 at 151

⁶¹ *Ibid* at 141.

⁶² Soyer, *supra* note 14 at 254.

⁶³ Law Commissions Report, *supra* note 1 at 130-131.

introduce the breach. According to this section, a “qualifying breach” is the “breach for which the insurer has a remedy against the insured”. Thus, not all the breaches are tied up with a remedy and, therefore, not all of them are “qualifying” breaches under the new Act. The remedies are set out in Schedule 1 of the Act.⁶⁴

There are two kinds of qualifying breaches: “deliberate or reckless”, and “neither deliberate nor reckless”.⁶⁵ In both cases, the burden of proof is on the insurer. Furthermore, the remedies for both situations are more rational than under the MIA 1906 with the system of ‘all or nothing’.⁶⁶

Accordingly, under the IA 2015, the remedy for breach of the duty of fair representation depends on whether the breach is deliberate or reckless: If the breach is “deliberate or reckless”, then the insurer has the right to avoid the contract and retain the premium which has been paid.⁶⁷ However, on other occasions, the remedy is more proportionate considering what the insurer would have done if the presentation had been fair. First, if he would have accepted the risk but with higher premium, he has the right to reduce the claim payment proportionally.⁶⁸ Second, if he would have considered different terms or warranties, those terms must be considered as if they have been incorporated into the contract.⁶⁹ For example, the Report mentions situations in which the insurer might have considered more exclusions or warranties or limitations with regard to a particular risk.

⁶⁴ Costabel, *supra* note 4 at 142.

⁶⁵ Law Commissions Report, *supra* note 1 at 13.

⁶⁶ Costabel, *supra* note 4 at 154.

⁶⁷ Soyer, *supra* note 14 at 254.

⁶⁸ Law Commissions Report, *supra* note 1 at 64.

⁶⁹ Soyer, *supra* note 14 at 254.

Third, if the insurer would have refused to sign the policy, he may avoid the policy and decline the claims, but should return the premiums.⁷⁰

Again, the burden of proof of a qualifying breach is on the insurer.⁷¹ This is very important, as there is no remedy for breaches that are not qualifying.⁷² It is worth noting that since these remedies have already been publicized through the process of consumer insurance, they were not strange for the insurance industry when the new Act was introduced.⁷³

It seems that the process of getting a remedy has two steps in the IA 2015. The first step (not the only one, as was the case under the previous law) to get a remedy requires the determination of a breach. The insurer must demonstrate both the breach of “the duty of fair presentation” and the materiality of such a breach. The respective test is called the “mere influence test”, which requires the active participation of the insurer. According to the test, “fair presentation” can be satisfied by “giving sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances”. As stated, non-material disclosure and representations will not lead to a remedy at all. Even materiality alone does not result in remedies per se; rather, it opens the door to the next stage.⁷⁴

After the breach of fair presentation has been proved, an “inducement test” is conducted by the insurer at the second stage. According to the Article 13 of the IA 2015,

⁷⁰ Law Commissions Report, *supra* note 1 at 141.

⁷¹ Costabel, *supra* note 4 at 43.

⁷² *Ibid* at 147.

⁷³ Law Commissions Report, *supra* note 1 at 66.

⁷⁴ Costabel, *supra* note 4 at 153.

in case the breach is deliberate and reckless, the insurer can refuse all claims and also retain the premium. Non-deliberate/ non-reckless breaches, though they may be based on “negligence or innocence”, will lead to the inducement test which is based on “what the insurer has been induced to do”.⁷⁵ It should be proved that the insurer himself (an actual test not a hypothetical one like the previous test), would not have signed the contract, or would have concluded the contract with different provisions. Only after this test can a breach be regarded as “qualified” and the insurer could seek the remedies.⁷⁶

In general, it seems that the assured’s new duty to make a fair representation of the risk before contract is more evolutionary rather than revolutionary, as it has fundamental elements of sections 18 and 20 of MIA 1906, and also, it is based on the practice that has been adopted by courts to complete the shortcomings of the previous regime.⁷⁷

3.2 Warranties

Warranty is “a promise made by the policyholder to the insurer.”⁷⁸ According to Section 10(6) of the IA 2015 a warranty may entail that “something is to be done (or not to be done), or a condition is to be fulfilled, or something is (or is not) to be the case”.

The concept of insurance warranty can be traced to case law in the 18th century, specifically to Lord Mansfield’s decisions.⁷⁹ Since then, the idea was that warranties have to be complied with exactly, otherwise, the insurer is discharged from all contractual liabilities from the time that the breach happened and, therefore, he is not obliged to pay

⁷⁵ *Ibid* at 154.

⁷⁶ Costabel, *supra* note 4 at 153.

⁷⁷ Soyer, *supra* note 14 at 254.

⁷⁸ Law Commissions Report, *supra* note 1 at 153.

⁷⁹ Schoenbaum, *supra* note 20 at 131.

the claim even if the breach of a warranty is remedied immediately or before any loss occurred.⁸⁰

Since there are a variety of conditions with different requirements, the area of warranties has been subject to frequent litigation. The key hurdle in a courtroom is to know the real intention of the parties when they agreed upon the contract. It helps to know whether a condition is a true warranty, or suspending warranty or a promissory one or simply a term that limits the risk.⁸¹

3.2.1 Marine Insurance Act 1906

Like many other maritime notions, warranty principles were transferred to the 20th century and were largely codified in the Marine Insurance Act 1906.⁸² Based on section 33 of the MIA 1906, the remedy for breach of a warranty was the automatic discharge of the insurer from liability “from the date of the breach of warranty”, regardless of whether the warranty was material or the breach caused the loss or not. Any excuse, including pleas of good faith, due diligence, and even inevitable accident, was not acceptable.⁸³ More strictly, even remedying the breached warranty before the occurrence of a loss was not beneficial for the assured under the insurance policy.⁸⁴ Accordingly, section 34(2) states that as soon as a warranty is breached, the assured “cannot avail himself of the defence that the breach has been remedied, and the warranty complied with, before loss”.⁸⁵

⁸⁰ Law Commissions Report, *supra* note 1 at 153.

⁸¹ Chircop al, *supra* note 18 at 410.

⁸² Law Commissions Report, *supra* note 1 at 153.

⁸³ Schoenbaum, *supra* note 20 at 131.

⁸⁴ Soyer, *supra* note 14 at 254-5.

⁸⁵ Law Commissions Report, *supra* note 1 at 154.

3.2.2 Basis for Reform

Over the years, warranties as articulated in the MIA 1906 were heavily criticized. First, even an insignificant mistake which was not related to the risk could lead to the refusal of claim. Second, the immediate remedy of the breach was not a defence. Third, breach of a warranty not only led to the insurer being discharged from liability in relation to the violated warranty, but also from all kinds of liability. Fourth, through use of some arcane legal words which were unclear for typical assureds, it was possible that their answers to questions during the negotiations became a warranty on the “basis of the contract” principle.⁸⁶ ⁸⁷ On the other hand, since the courts found the law of warranties relatively harsh, judges rule to moderate it so y that the insurers could not misuse its provisions. However, this trend itself probably introduced a degree of complexity and, therefore, uncertainty into the law.⁸⁸

According to the Report of the Commissions, the proposed change to the law of warranties, specifically sections 33 and 34, was supported by significant portions of those who had been consulted. Both assureds and insurers believed that these provisions damage the reputation of English law and placed English law at a commercial disadvantage in comparison to other jurisdictions.⁸⁹

3.2.3 The Insurance Act 2015

⁸⁶ *Ibid* at 154-6.

⁸⁷ *Ibid* at 154-6.

⁸⁸ *Ibid* at 161.

⁸⁹ See *ibid*.

Part 3 of the IA 2015 on “Warranties and other terms”, with only three sections, is much shorter than Part 2, but not less important in light of the significance of the changes it introduced. In fact, it can be regarded as a revolution in the law of insurance warranties, especially for marine insurance.⁹⁰ Originally, the Commissions identified three major problems in the MIA 1906 with regard to warranties and made respective recommendations:

- 1) The ‘basis of the contract’⁹¹ concept must be abolished;
- 2) Breach of warranty may be remedied; and
- 3) Some terms are designed to reduce a particular kind of loss, or at a specific place or time. The breach of these kinds of warranties shall not affect losses which have occurred as a result of different factors or at a different place or time.⁹²

Consequently, the major changes done, in comparison to the MIA 1906, are explained in the following paragraphs. Section 10(7) of the IA 2015 directly deals with the Marine Insurance Act. According to section 10(7)(a), the second sentence of section 33(3) of the 1906 Act on the automatic discharge of the insurer from the liability is removed. The section now reads as: “A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not”. Also, Section 34 of the previous law on “when breach of warranty excused” has been removed entirely by section 10(7) of the new law.⁹³

3.2.3.1 ‘Basis of The Contract’ Clauses to be of no Effect

⁹⁰ Costabel, *supra* note 4 at 143.

⁹¹ It is a declaration on an insurance proposal form stating that representations made by the assured are true and have the effect of converting into warranties. Thus, if even a minor point turns untrue, the insurer is discharged from the liabilities under the insurer contract.

⁹² Law Commissions Report, *supra* note 1 at 154.

⁹³ Costabel, *supra* note 4 at 144.

One of the longstanding debates in marine insurance law was the validity of the proposal forms containing the “basis of the contract” clause. This clause effectively turned the contents of such a proposal into a warranty. It meant an insurer could easily avoid a claim based on the fact that one of the statements of the proposal form, even a minor one like an address, was inaccurate.⁹⁴ Although “the basis of the contract” clauses had been criticized for more than a century, it remained unchanged over the years, so that even in 2013, the Court of Appeal, applying the MIA 1906, confirmed the validity of such a clause.⁹⁵

The Law Commissions suggested that ‘the basis of the contract’ clauses must be abolished. Instead, every warranty that is important for the insurer should be specifically included in the contract. Also, insurers can resort to the breach of the duty of fair representation in case a material misrepresentation has been made by an assured.⁹⁶ Based on the recommendations of the Commissions, Section 9 of the IA 2015 abolished the ‘basis of contract’ clause.

3.2.3.2 Breaches of Warranty May be Remedied

Abolishing section 33(3) of the MIA 1906, Section 10(7) of the 2015 Act replaces the remedy of automatic discharge with the suspension of liability for breach. According to the sections 33 and 34 of the MIA 1906, breach of a warranty by the assured would result in “automatic discharge of the insurer’s liability from that point”. The Law Commissions suggested that in case of the breach of a warranty, the insurer’s liability should be suspended rather than be discharged. Therefore, based on the IA 2015, the insurer still has

⁹⁴ Law Commissions Report, *supra* note 1 at 10.

⁹⁵ *Ibid.*

⁹⁶ Law Commissions Report, *supra* note 1 at 171.

no liability with regard to losses that occur after a warranty has been breached.⁹⁷ But liability will be restored if the breach is remedied. So, if the breach is corrected before a loss, the insurer is obliged to pay the claim, but if the loss occurs after the breach and before the remedy, the insurer is not liable. This is true where a loss occurred after remedy but it is related to something that happened after breach and before remedy.⁹⁸

For instance, regarding a warranty that prohibits the insured vessel from taking part in a salvage operation, there will be no cover while the vessel breaches the warranty by taking part in the operation. But the cover will be reinstated when the breach is remedied. However, the insurer has no liability in case the loss occurred after the breach was remedied, but as a result of an incident that occurred at the time of breach.⁹⁹ Consequently, according to Section 10(2) of the IA 2015, the insurer is free of liability only “between the time the warranty has been breached and the time the breach has been remedied”.

It should be noted that according to section 10(5) of the IA 2015, the breach of a warranty is considered remedied only when “the risk, to which the warranty relates, later becomes essentially the same as that originally contemplated by the parties” or “if the assured ceases to be in breach of the warranty”. So, it is obvious that the breach of some warranties cannot be remedied and there will be no suspension.¹⁰⁰

Based on Section 10(1) of the IA 2015, the new Act abolishes any rule discharging the insurer due to the breach of a warranty. In this regard there is no difference between express and implied warranties, in all insurance contracts.¹⁰¹ Given that most warranties

⁹⁷ Costabel, *supra* note 4 at 143.

⁹⁸ Law Commissions Report, *supra* note 1 at 171.

⁹⁹ Soyer, *supra* note 14 at 254-5.

¹⁰⁰ *Ibid.*

¹⁰¹ Costabel, *supra* note 4 at 155.

serve the interest of the insurer against alteration of the risk, it seems that the notion of suspension of liability would protect the interest of the assured. In fact, the former concept of automatic discharge has harsh consequences on assureds.¹⁰²

3.2.3.3 Terms Relevant to Particular Losses Affect only That Type of Loss

Although by introducing the concept of suspension of liability, IA 2015 has provided the assured with more protection, still, the assured may be deprived of his cover in the case that there is no link between the breach and the loss.¹⁰³ So, Section 11 of Part 3 has introduced another innovation: the ‘Terms Relevant to the Actual Loss’. There is no limitation for an assured to use this defence as well as those of section 10.

Where a warranty or term in a policy is intended to decrease the risk of a particular type of loss (or at a specific time or place) it seems wise that the breach of such a warranty or term should only affect the insurer’s liability in relation to the losses of the same category, rather than affecting other types of losses as to a different place or time.¹⁰⁴ In this regard, section 11 of the IA 2015 provides that even if a loss occurs while a warranty is not complied with, the policyholder may still be indemnified if he can prove that: first, the breached warranty or term is intended to decrease the risk of a particular loss or time or location; and second, “non-compliance with the term could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred”. So, there is an objective test which is intended to show whether compliance with a specific warranty would have decreased the risk if a particular loss occurred.¹⁰⁵

¹⁰² Soyer, *supra* note 14 at 255.

¹⁰³ *Ibid.*

¹⁰⁴ Law Commissions Report, *supra* note 1 at 172.

¹⁰⁵ Soyer, *supra* note 14 at 255.

The Commissions' Report has provided some examples among which a flood loss cannot lead to the suspension of liability, because of the failure of the assured to install a burglar alarm. Similarly, a loss that occurred during the daytime is not related to the breach of a warranty to employ a night watchman.¹⁰⁶ Also, the Report asserts that this provision applies to “any contract term designed to reduce particular risks”, not just traditional warranties.¹⁰⁷

It should be noted that warranties (or terms) that describe the limits of the cover as a whole are excluded from application of section 11, as they have general limiting effect and they are not connected to a specific risk. For instance, in the case of a warranty that obliges the vessel to be under the supervision of a particular classification society for the time it is under the cover, it is more than obvious that in case of non-compliance with such a warranty all the coverage must be suspended for the duration of the breach.¹⁰⁸ All in all, it is predicted that the provision of section 11 will bring about some uncertainties, as it is not always a simple task to decide whether a compliance with a warranty is related to the occurrence of a loss.¹⁰⁹

3.3 Remedies for Fraudulent Claims

Fraudulent claims are important issues in marine insurance. They impose a lot of expenses on the industry. They affect both insurers who have to invest in new approaches to detect such crimes¹¹⁰ and truthful policyholders who have to pay more premium because of the

¹⁰⁶ Law Commissions Report, *supra* note 1 at 170-1.

¹⁰⁷ *Ibid* at 172.

¹⁰⁸ Soyer, *supra* note 14 at 255.

¹⁰⁹ *Ibid*.

¹¹⁰ According to the Association of British Insurers (ABI) there was 118,500 uncovered fraudulent claims in 2013.

respective losses to insurers. So it is essential for the law to consider clear and deterrent sanctions against fraudulent claims. However, the previous law on fraudulent claims was not clear enough, as there was tension between common law rules on the basis of which the fraudster just forfeits the fraudulent claim, and the MIA which allowed the insurer to avoid the whole contract from the beginning due to the breach of good faith.¹¹¹

3.3.1 Marine Insurance Act 1906

The general law was determinative, in the absence of contractual terms. There are two different situations. First, in relation to the lack of genuine loss, it is obvious that the insurer has no liability to pay the claim. Second, the controversial situation is where an assured “fraudulently exaggerates” the loss in order to receive more money. In such a case, the common law believes that the assured not only should not be paid in relation to the fraudulent element, but also he should be deprived of the whole claim including genuine loss. The “forfeiture rule” was a settled rule which was justifiable according to the Law Commissions, as it would have sent a clear message to fraudulent assureds.¹¹²

Nonetheless, this was not in conformity with section 17 of the MIA 1906. These two contradictory approaches co-existed for more than a century. Based on section 17, in the case of a breach of good faith, the other party can take advantage of the sole remedy of avoidance. It means the parties would return to the pre-contract situation. So the insurer can recover all payments already made to the assured in relation to the correct claims that had been finalized before the fraudulent claim was made. In practice, as it was not in harmony with the values of English law, the courts were reluctant to apply section 17,

¹¹¹ Law Commissions Report, *supra* note 1 at 207.

¹¹² *Ibid* 210-11.

despite its explicitness, to let the insurer return the payments of a genuine claim that was finalized before the fraudulent claim. However, they had to apply a range of complicated reasoning to do that which in turn caused more uncertainty. That is why the Commissions addressed fraudulent claim as one of the highest priorities of reform.¹¹³

3.3.2 The Idea of Reform

The major part of the industry favoured reform to clarify the law and to remove the problems created by Section 17 of the MIA 1906. The proposals of the Commissions on remedies for fraud were welcomed by the majority of consultees. The Lloyd's Market Association (LMA), for example, asserted that: "We support the concept of a clear but fair law on forfeiture as a deterrent to fraud".¹¹⁴ In fact, all sides of the insurance market wanted the civil law to play a more significant role in providing needed certainty by clarifying the contractual relations of the parties to the contract before and after fraud.

3.3.3 Insurance Act 2015

The Law Commissions did not intend to totally restate the law.¹¹⁵ In relation to remedies that exist for the insurer in case a fraudulent claim is made by the assured, both the 1906 and 2015 Acts agree that the insurer is not liable to pay for such a claim and may recover any sums that are paid to the assured based on a fraudulent claim. In this case, the insurer is allowed to assume the contract as having been terminated from the time of the fraudulent act. He can retain all the premiums that were paid by the assured and will not be liable for

¹¹³ *Ibid* at 211.

¹¹⁴ *Ibid* 219.

¹¹⁵ *Ibid* 208.

events occurring after the fraudulent claim. So, the insurer will have liability neither to pay the fraudulent claims nor after the claim.¹¹⁶

Nonetheless, contrary to the former law, section 12 of the IA 2015, states that the assured is still entitled for events that occurred before the fraudulent act. So under this Act, the remedy for a fraudulent claim cannot be extended to avoidance of the whole contract. This is a positive feature that was not clear under the common law. In fact, depriving the assured of all his legitimate claims based on a fraudulent claim occurring at a later stage does not seem logical.¹¹⁷ So we can sum up the new Act's provisions on fraudulent claim as follows:

- (1) Undoubtedly, there should not be any liability for an insurer regarding paying a fraudulent claim. The Law Commissions also suggested that the insurer has the right to recover all the payments which have already been made with regard to such a claim.¹¹⁸
- (2) Once a fraudulent claim has been made, the insurer is entitled to regard the policy as having been terminated. This right is exercisable from the time the fraud is discovered. So the insurer has no liability with regard to any losses after the fraudulent claim. Also, he is not supposed to return premiums which were made before the exercise of the right of termination.¹¹⁹
- (3) Based on the recommendation of the Law Commissions, the insurer's rights against fraudulent claims should not harm previous claims. Thus, section 17 of the MIA 1906 is amended and the remedy of avoidance has been removed.¹²⁰

¹¹⁶ Soyer, *supra* note 14 at 256.

¹¹⁷ *Ibid.*

¹¹⁸ Law Commissions Report, *supra* note 1 at 222.

¹¹⁹ *Ibid* at 222-3.

¹²⁰ *Ibid* at 223.

It should be considered that the Act doesn't define the word 'fraud' or 'fraudulent' and, therefore, resort must be made to established principles of common law for a better understanding.¹²¹

3.4 Good Faith

The doctrine of utmost good faith (*uberrimae fidei*) is one of the most fundamental principles of marine insurance law dating back to the 1766.¹²² According to Section 17 of the MIA 1906, both parties should observe good faith. It states "A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party."

3.4.1 Criticism of a Traditional Concept

Utmost good faith was generally accepted as the fundamental element of insurance contracts, but, section 17 of the MIA was subject to widespread criticism for the fact that its sole remedy was the avoidance of the contract. Although the duty of good faith was a mutual obligation, in practice, it was often the assured who had to endure most of the burden in favour of the insurer.¹²³ Where an insurer has acted in bad faith, apparently, avoidance of the insurance contract is not an appropriate remedy for the assured who is waiting for his claim to be paid. Also, in case the policyholder is one who breached the duty of utmost good faith, avoidance is usually regarded as an improper and harsh remedy.¹²⁴ So, the Law Commissions announced that since they had not considered

¹²¹ Soyer, *supra* note 14 at 256.

¹²² Costabel, *supra* note 4 at 134.

¹²³ Law Commissions Report, *supra* note 1 at 317.

¹²⁴ *Ibid* at 319.

avoidance as a suitable remedy for honest breaches of the duty of fair presentation and not for fraudulent claims, it could not be a good remedy in other circumstances¹²⁵, including good faith as well.

3.4.2 Good Faith in the Insurance Act 2015

3.4.2.1 *Removing Avoidance as the Remedy*

Section 14 of Part 5 which deals with “Good Faith” is one of the most significant provisions of the IA 2015. Section 14(1) states: “[A]ny rule of law permitting a party to a contract of insurance to avoid the contract on the ground that the utmost good faith has not been observed by the other party is abolished”.

On the other hand, according to the Section 14(2) of the IA 2015, “[A]ny rule of law to the effect that a contract of insurance is a contract based on the utmost good faith is modified to the extent required by the provisions of this Act and the Consumer Insurance (Disclosure and Representations) Act 2012”. Also, based on the recommendation of the law Commissions¹²⁶, section 14(3) of the IA 2015 has removed the following part of Section 17 of the MIA 1906: “...and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party”.

Consequently, the duty of good faith remains a general principle of marine insurance without any specific remedy.¹²⁷ Given that Sections 18, 19, and 20 of the MIA 1906 on "Disclosure and Representations" have also been deleted, it seems that the

¹²⁵ *Ibid* at 320.

¹²⁶ See *ibid*.

¹²⁷ *Ibid* at 321.

sophisticated architecture of the previous law has been replaced with the short statement that utmost good faith is the basis of marine insurance.¹²⁸

3.4.2.2 *Good Faith as an Interpretative Principle*

Contrary to general belief, “utmost good faith” has not been abolished. Although most sections of the MIA 1906 on utmost good faith have been removed,¹²⁹ the IA 2015 still asserts that “a contract of marine insurance is a contract based upon the utmost good faith”. It has come from the heart of insurance contract law, the Report said.¹³⁰

Practically, what was adjusted was the adjective utmost which has never been used to measure the extent of faith. In fact, as avoidance of the contract as the maximum penalty is not the sole remedy for bad faith anymore, there is no need to emphasize a word to introduce the maximum breach.¹³¹ However, in the third consultation (called CP3) consultees were asked by the Law Commissions which one better suits the concept, utmost good faith or good faith. There were opposite views and consequently the Commissions could not reach a decisive opinion as to changing the wording.¹³²

At the same time, the strong response to the question of the Law Commissions on whether utmost good faith should remain as an interpretative principle was positive.¹³³ Consequently, the Law Commissions accepted utmost good faith as an interpretive principle with some proposed roles. For example, when the policyholder discloses very

¹²⁸ Costabel, *supra* note 4 at 145.

¹²⁹ *Ibid* at 147.

¹³⁰ Law Commissions Report, *supra* note 1 at 317.

¹³¹ Costabel, *supra* note 4 at 146-7.

¹³² Law Commissions Report, *supra* note 1 at 321.

¹³³ *Ibid* at 318.

little information, hoping the insurer would not conduct more enquiries, he would not behave in good faith, or when an insurer tries to deny a claim on an unfair basis.¹³⁴

The first section illustrated the main areas of the alteration in the IA 2015 in comparison to the MIA 1906. It shows that one of the main targets of the new Act is to create more balance between the interests of policyholders and insurers. However, according to Sections 15 to 18 of the IA 2015, it is possible for the parties to the insurance policies to contract out the provisions of the new Act. So, given the fact that the insurance contracts are normally drafted by the insurers, it is possible that they do not include the new balance. These aspects are addressed in the next section.

3.5 The Possibility of Contracting out

The aim of the reforms was to provide better standards. Despite the aforementioned changes, it should be noted that the IA 2015 sets a default regime, that is, it is possible for parties in non-consumer insurance contracts to contract out of the new law. This means that outside the consumer market, for example in marine insurance contracts, parties can negotiate other arrangements or simply insist that the MIA 1906 should apply to their contracts.¹³⁵

Sections 15 to 18 of IA 2015 are allocated to contracting out and limitations. These limitations aim to prevent the insurer from putting the assured at a disadvantage. To do so, the insurer should seek to draw the assured's attention to detrimental provisions before the policy is signed.¹³⁶ According to the Commissions' forecast, marine insurance is a

¹³⁴ *Ibid* at 320-1.

¹³⁵ Soyer, *supra* note 14 at 253.

¹³⁶ Costabel, *supra* note 4 at 145.

sophisticated market, and it is highly likely that we will see widespread contracting out.¹³⁷ Consequently, unlike consumer insurance which pursues a compulsory regime in which an insurer cannot impose terms which put the consumer in a position worse than what has been stated in the Act, in non-consumer insurance, including marine insurance, parties are free to do that. Nonetheless, the transparency requirements must be regarded as stated in Section 17(2)-(3). Based on section 17, in case the insurer puts the assured in a less advantageous position in comparison to the default regime, he should meet at least two requirements: first, the terms must be clear and without any ambiguity, and second, they must be drawn to the policyholder's attention by the insurer before the conclusion of the contract.¹³⁸ Obviously, the required steps of section 17(2) would be flexibly applied. In other words, efforts to draw the attention of the assured to the respective clauses would be different according to whether the assured runs a small business or represents a large shipping company.¹³⁹

There are no restrictions to the extent to which the IA 2015 may be altered. It is quite possible that parties may make the current regime of fair representation more onerous for the assured, or they may include provisions on how the policyholder should gather data about his company, or may increase the number of those whose information is attributed to the policyholder, or even choose to make any breach of the obligation of fair representation to result in avoidance of the whole contract, rather than observing the proportional remedies regime set out in the IA 2015.¹⁴⁰

¹³⁷ Law Commissions Report, *supra* note 1 at 91.

¹³⁸ *Ibid* at 169.

¹³⁹ *Ibid* at 68.

¹⁴⁰ *Ibid* at 67.

With regard to the warranties, it is true that parties are banned from using the ‘basis of the contract clauses’ to convert a statement into a warranty. But they can agree on specific warranties on the same subject.¹⁴¹ Also, like other areas, parties to a marine insurance policy can change the existing model regarding fraud through contractual terms, provided that the requirements of transparency are complied with.¹⁴²

To sum up, the Law Commissions Report asserted that, with regard to the non-consumer insurance contracts, its recommendations are a default scheme which can be contracted out by the parties.¹⁴³ So, the new regime, based on the new Act, is not completely mandatory. This outcome is the consequent of two concerns: first, freedom of contract, and second, unequal bargaining power of the parties.¹⁴⁴ To create a balance, the transparency requirements in Section 17 were articulated to oblige the insurer to sufficiently draw the assured’s attention to disadvantageous terms.¹⁴⁵

Obviously, by adopting new strategies with regard to fair presentation, warranties, and fraudulent claims, the IA 2015 is intended to affect the methods of underwriting and claim-handling practices, in favour of the assureds. To avoid the impact of the new changes, it is said that the London market wants to conclude insurance contracts under the common law regime of a country that has adopted the MIA 1906 into its legal system, such as Singapore, rather than under English law.¹⁴⁶ Also, it was reported that eight P&I clubs in the UK have already changed their contracts to include a provision for contracting out

¹⁴¹ *Ibid* at 172.

¹⁴² *Ibid* at 223.

¹⁴³ *Ibid* at 192.

¹⁴⁴ *Ibid* at 306-7.

¹⁴⁵ Costabel, *supra* note 4 at 155-156.

¹⁴⁶ Soyer, *supra* note 14 at 256.

the IA 2015.¹⁴⁷ Although, these threats do not seem realistic, they illustrate that the IA 2015 will face many challenges in the UK market as soon as its provisions are subjected to judicial testing.¹⁴⁸ To see the possible influence of the new legal regime, the next chapters will deal with the case of Iran as a developing country, and with regard to the impact of the legal regime on legal uniformity in other countries more generally.

¹⁴⁷ *Ibid* at 253.

¹⁴⁸ *Ibid* at 256.

CHAPTER 4:

**PROMOTING UNIFORMITY IN INTERNATIONAL MARINE
INSURANCE: TECHNIQUES TO FACILITATE DEVELOPING
STATE PARTICIPATION**

According to the current legal regime of maritime zones under the international law of the sea, large portion of the oceans and seas are subject to the jurisdiction of coastal states. Coastal states are entitled (and sometimes obliged to) exercise their sovereignty and jurisdiction through enforcing their laws for a large number of purposes. From the private point of view, the movement of ships through maritime zones of different states with various regulations may raise different issues and affect regular shipping and navigation. Enforcing various national laws may cause undue interference in the navigation of ships and this is likely to disrupt international trade.¹

Consequently, the international character of the shipping industry has necessitated efforts to create as much as possible uniformity in legal aspects of marine transportation at the international level. A number of maritime bodies have been established to promote harmonization of international standards in a variety of maritime areas.² However, in marine insurance there is a different story. While a significant part of modern maritime law has been developed through the initiatives of intergovernmental or non-governmental organizations, in marine insurance there is neither an international convention nor well-

¹ Aldo Chircop, William Moreira, Hugh Kindred & Edgar Gold (eds), *Canadian Maritime Law*, 2nded (Toronto: Irwin Law Inc., 2016) at 7.

² *Ibid.*

established global program through which marine insurance perspectives and uniform standards could be pursued.

Uniformity is feasible when the maritime community, including shipowners, insurers, and cargo owners share a common language. In such a situation, rights and duties would be certain and, therefore, predictable.³ Indeed, marine insurance is an evolving subject connected to modern international shipping and related risks. The more the marine insurance industry grows and trade gets more sophisticated, the more the law needs to ensure that all stakeholders are sufficiently protected.⁴ If convergence of interests is the case, every reform effort should consider the opinions of the role-players in the market_ producers, shippers, carriers and consumers_ who should all be served by the law.⁵ The main goal is to ascertain that no matter where maritime stakeholders trade, they will find that the applicable law is generally similar.

In this chapter the prominent role of the United Kingdom law and practice in developing marine insurance and promoting its uniformity is discussed. The potential impact of the Insurance Act, 2015 (IA 2015) on international uniformity is argued. In the last section, we will explore how we can improve the uniformity achieved through a national legal regime, namely the UK legal system, at the international level by applying international methods.

4.1 The Importance of Uniformity and the Role of UK Legal System

³ Charles S Jr Haight, “Babel Afloat: Some Reflections on Uniformity in Maritime Law” (1997) 28 J Mar L & Com 189 at 190.

⁴ Chircop et al, *supra* note 1 at 457-8.

⁵ John Hare, “The CMI Review of Marine Insurance Report to the 38th Conference of the CMI Vancouver, 2004” (2004) *Comite Maritime International Year Book* 248 at 252 [Hare, “Vancouver Conference”].

4.1.1 The Importance of International Uniformity

Insurance helps businesses to protect themselves against risks that they may encounter but cannot afford to cover. For this reason, insurance is described as “the oil in the wheels of capitalism”.⁶ The development of insurance in London led to wider economic growth in the UK and at the international level.⁷ Lack of uniformity in insurance law makes for unpredictability and uncertainty in commerce. This constrains the confidence of insurers, policyholders, their counsels, and judges in carrying out their functions. Uncertainty induces higher premiums because the risk is not ascertainable. This increases insurance cost, while the insurance value decreases as it is less likely that the assured will recover in the case of damage or loss. Consequently, resort to litigation is more likely to resolve disputes which, in turn, increases costs further. Ultimately, all the added costs of inefficiency are born by consumers who pay for insured vessels, cargoes and workers.⁸ Furthermore, uniformity in any major area of international law results in simplicity, by avoiding or minimizing choice of law difficulties by eliminating the process of determination of the applicable law when a foreign element is involved.⁹

4.1.2 Obstacles to Uniformity

There are obstacles to uniformity in marine insurance law. Most importantly, in the absence of international instruments, there is a range of diverse legal regimes governing the rights and obligations of the parties to the insurance contract. These differences have the potential

⁶ Malcolm Clarke & Baris Soyer, *The Insurance Act 2015: A New Regime for Commercial and Marine Insurance Law* (New York: Informa Law from Routledge, 2016) at 1.

⁷ *Ibid* at 2.

⁸ Michael F Sturley, “Restating the Law of Marine Insurance: A Workable Solution to the Wilburn Boat Problem” (1998) 29 J Mar L & Com 41 at 45.

⁹ William Tetley, “Uniformity of International Private Maritime Law - The Pros, Cons, and Alternatives to International Conventions - How to Adopt an International Convention” (2000) 24 Tul. Mar L J 775 at 797.

to affect international uniformity.¹⁰ Marine insurance has always been a competitive business. That is why different markets have always attracted customers by offering some benefits, including capacity, cost, security conditions, etc. As a result, any effort at harmonization causes fierce competition for adding the rules and conditions of one's own country to the final draft.¹¹ Also, there is no doubt that the systems of marine insurance law differ according to whether they favour the insurer or the assured, or they pay attention to the risk or bearing the risk, and whether they belong to common law systems or in the civil law systems. It is also possible that certain insurance provisions or risk cover in some countries may be contrary to the public or social order of other countries. So variable are the needs for public order in different states that it is very challenging to find an acceptable medium for the majority of states.¹²

4.1.3 The Role of the UK Legal System

It is hard to believe that in the current world, international negotiation does not play an important role in developing an area of law which is inherently international in nature. In the absence of public or private international maritime law, the question is what factor is involved in creating uniform marine insurance law at the international level to simplify and smoothen relations in the marine insurance industry around the world. Contrary to common perception, international conventions are not the only source of uniformity. Rather, there are other tools that may contribute to harmonization of 'international seagoing commerce'

¹⁰ UNCTAD Secretariat, *Legal and Documentary Aspects of the Marine Insurance Contract*, UNCTAD, 1982, TD/B/C.4/ISL/27/Rev.1, at 37, online (pdf): <http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=297> [UNCTAD, *Marine Insurance Contract*].

¹¹ Patrick J S Griggs, "Issues of Marine Insurance" (1998) *Comite Maritime International Year Book* 186 at 187.

¹² Tetley, *supra* note 9 at 801.

throughout the world.¹³ In marine insurance, uniformity has been achieved by virtue of a national statute, namely, the United Kingdom Marine Insurance Act, 1906 (MIA 1906). This statute not only lasted for a long time in its home jurisdiction, but has also inspired other jurisdictions.¹⁴

As discussed in chapter 1, the UK MIA 1906 has been a well-known law for common law practitioners, as well as some civil law jurisdictions which have accepted this law.¹⁵ In addition, it influenced even countries without national marine insurance legislation, like Iran, because it was considered to be a codification of fundamental principles of marine insurance. Thus the UK marine insurance law has played more than a mere domestic role and it could be considered as the *de facto* international legal regime on marine insurance. Indeed, by the time of modern marine insurance emerged in practice, English merchant fleets had already dominated maritime trade routes. London was the centre of commerce and finance and naturally became the international market of marine insurance.¹⁶ Therefore, historically, UK laws, policy conditions, and practices have been very important in the development of marine insurance throughout the world, serving as the basis of every effort to review marine insurance law and the harmonization of contract rules.¹⁷ This was first because of the huge number of international policies which are being written “with English law being the law of choice” and second for the reason that many countries take English law as a model.¹⁸

¹³ *Ibid* at 787.

¹⁴ *Ibid* at 792.

¹⁵ Thomas M Remé, “CMI International Working Group on Marine Insurance; Challenges for the Future” (1999) *Comite Maritime International Year Book* 363 at 366.

¹⁶ UNCTAD, *Marine Insurance Contract*, *supra* note 10 at 5.

¹⁷ *Ibid* at 13-14.

¹⁸ John Hare, “Report on the IWG Meeting in London” (2003) *Comite Maritime International Year Book* 573 at 547 [Hare, “IWG Meeting 2003”].

Today the UK insurance industry is the most important in Europe and the third largest in the world.¹⁹ This business plays an important role in the UK's economic power, with £1.9 trillion in investment equal to 25% of the UK's total net worth in 2015.²⁰ In 2001, for instance, the UK marine insurance business had about 18% of the world's volume of premiums as a whole (hull, cargo, liability other than P&I, and offshore insurance). Japan, with 16% of the worldwide global gross marine premium was the second largest global market. The United States and Germany, with 13% and 9% respectively, were next.²¹ More specifically, in hull insurance which accounts for 26% of the total international marine premiums, the London market led by writing about 20% of the global hull premium. In cargo, however, London with 8.5% of the worldwide premium was fourth after Japan, Germany, and the USA. In relation to offshore insurances, the London market dominated with 56% of the global premiums for this sector, more than twice the USA's share with 26%.²²

With the adoption of the IA 2015, it is essential for those who are active in the marine insurance industry to be familiar with its changes, the reasons behind them, and how they may affect uniformity in marine insurance law and practice. Official materials, including Law Commissions' reports and oral or written materials from the House of Commons on the insurance bill, could be useful in this regard. According to these materials,

¹⁹ Association of British Insurers, "UK Insurance and Long-term Savings Key Facts 2015", 2015 (November 2017), at 1, online (pdf):
<<https://www.abi.org.uk/globalassets/files/publications/public/key-facts/abi-key-facts-2017.pdf>>

²⁰ *Ibid.*

²¹ Astrid Seltmann, "Marine Insurance", in Jozef L Teugels & Bjorn Sundt, ed, *Encyclopedia of Actuarial Science* (John Wiley & sons, Ltd, 2006), at 2, online (pdf):
<<https://onlinelibrary.wiley.com/doi/pdf/10.1002/9780470012505.tam003>>

²² *Ibid.*

the IA 2015 is intended to create a balance between the various interests involved and to be influence the world commercial insurance practice.²³

4.2 Expected Impacts of Changes under UK Insurance Act 2015 on International Uniformity

At first the attempt of the British Law Commission and the Scottish Law Commission was to resolve marine insurance problems without reforming the MIA 1906. Although the attempt failed, the fact that the market itself realized that the previous situation could not continue was a good starting point.²⁴ In the UK it is hoped that the IA 2015, along with the Enterprise Act 2016, will succeed in the marine insurance market. Despite some uncertainties, the reform is considered as a victory after traversing a long path. The hope is that it will ensure that the UK law will maintain its leading position in marine insurance law and practice generally.²⁵ At this time it is very important to explore and assess how the new law can help marine insurance uniformity around the world.

Altogether, the IA 2015 consists of three kinds of provisions. It has retained some of the provisions of the MIA 1906. In addition, some of the principles developed after the enactment of the MIA 1906 are codified under the IA 2015. The new Act also introduces some new concepts to the insurance law environment.²⁶ Until February 2015, the MIA 1906 was a marine-based Act which largely influenced the general law of insurance and case law. Thus, it was an impossible mission to introduce a new scheme for insurance law without manipulating the MIA 1906 and the respective case law based on it for over a

²³ Jiannan Lin, “The Resounding Success of the Insurance Act 2015 with a Slight Blemish” (2017) 5 UK L Student Rev 41.

²⁴ Clarke & Soyer, *supra* note 6 at 4.

²⁵ Lin, *supra* note 23 at 70.

²⁶ Clarke & Soyer, *supra* note 6 at 7-8.

century. So well-rooted were some of the doctrines related to utmost good faith and warranties that the Commissions felt obliged to use the same topics (for example utmost good faith) or comply with the same language (for example warranties). However, the Commissions changed some of the fundamental provisions of marine insurance law, including remedies, which need to be examined in terms of how well they could harmonize with other regulations.²⁷

4.2.1 MIA 1906 Problems in Providing Uniformity

Since 1906, it has been controversial whether the MIA 1906 was the ‘accurate statement of law’ at that time and, if it was, what about subsequent years? On the one hand, having remained unamended for one century was construed as a sign of “the skill of the draftsmen” of the MIA 1906.²⁸ On the other hand, it has been asserted that the MIA 1906 has failed to develop in step with market expansion in terms of types of risk coverage and respective clauses. The former view believes that the MIA 1906 could not be better and, thus, it did not need to be amended. The latter suggests that while the MIA 1906 remained unchanged, the actual law and practice developed without it.²⁹

This chapter does not repeat the pros and cons of the MIA 1906, as this was previously argued. Instead, it discusses the role of the MIA 1906 in facilitating uniformity in marine insurance law in the 21st century and consider whether there is need for a new initiative. This is not to ignore the advantages of the MIA 1906. It is hard to imagine what

²⁷ Attilio M Costabel, “The UK Insurance Act 2015: A Restatement of Marine Insurance Law” (2015) 27 St Thomas L Rev 133 at 156.

²⁸ See *Hua Tyan Development Ltd v Zurich Insurance Co Ltd* [2014] 17 HKCFAR 493 (Hong Kong).

²⁹ D Rhidian Thomas, *The Modern Law of Marine Insurance* (New York: Informa Law from Routledge, 2016) at 1.

would have happened if the MIA 1906 had not been passed. It was quite possible that without a code having clear principles, the UK legal system could not dominate the international market. English courts would have had to apply marine principles by resort to policy terms which might not have been as certain as a statute's provisions.³⁰

Despite its great success and use for a century, the MIA 1906 was subject to a wide range of criticisms from the middle of the 20th century, particularly for being unclear, unfair, and couched in old language.³¹ There is case law after 1906 pointing to the ambiguities and uncertainties of the MIA 1906.³² According to the statistics, to establish a correct legal position in recent years, the courts have had to resort to the pre-1906 practice, as if the MIA 1906 did not exist. In this regard, English courts referred to old cases, not the MIA 1906, to determine concepts like 'perils of the seas', 'the measure of indemnity', and 'the significance of constructive total loss'.³³ On the other hand, it has been claimed that before the 2015 Act, the MIA 1906 served little to marine insurance as many of its parts were abandoned by market practice or other legislative changes.³⁴ Notably, most recent clauses, namely the Institute Cargo Clauses 2009 (ICC 2009) and the International Hull Clauses 2003 (IHC 2009), were far from the principles set out in the Marine Insurance Act 1906.³⁵ Consequently, the English and Scottish Law Commissions and other bodies in other jurisdictions, like the Australian Law Reform Commission, considered the MIA 1906 as old-fashioned. Accordingly, preservation of the Act was not favoured by industry actors, since it did not conform to current market practice. More importantly, considering the

³⁰ *Ibid* at 6.

³¹ Clarke & Soyer, *supra* note 6 at 2.

³² Thomas, *Supra* note 29 at 5.

³³ *Ibid* at 40.

³⁴ *Ibid* at 5.

³⁵ *Ibid* at 4.

defections, the MIA 1906 was unable to serve the market as much as its competitors such as the Norwegian Plan.³⁶ At the time of the enactment of the MIA, there was no attempt to coordinate with or look to other jurisdictions' law and principles.³⁷ Without these outside references, the MIA 1906 could not even take advantage of its counterparts' approaches to adapt itself to the realities of the industry.

An example of the issues with the MIA 1906 is the case of warranties, where the effect of Sections 33 and 34 was that the warranty should be exactly complied with, otherwise the insurer is automatically discharged from liability from the date of breach. There was no need for any connection between the loss and the breach, and it was impossible to remedy a breach. Given the realities of the modern insurance industry, the application of these provisions was widely criticized by academics, law reform bodies, judges and practitioners. Judges tried to remedy the shortcomings by going beyond the narrow interpretations of the above-mentioned sections. Indeed, in some cases, courts decided to adopt suspensory solution, instead of automatic termination, as would later be adopted by the IA 2015. However, the basis of such decisions at that time was not clear and therefore these "cases were incapable of reconciliation".³⁸ In fact, the clear wording of the 1906 Act has been a barrier to accommodating contemporary situations.

4.2.2 IA 2015: A Uniformity Assessment

There are, undoubtedly, a number of positive features with regard to the IA 2015. First, from the theoretical point of view, this is the most comprehensive review of insurance law

³⁶ *Ibid* at 40-41.

³⁷ *Ibid* at 5.

³⁸ Robert Merkin & Özlem Gürses, "The Insurance Act 2015: Rebalancing the Interests of Insurer and Assured" (2015) 78:6 Mod L Rev 1004 at 1018.

since 1906.³⁹ As stated, on one hand, it created some new principles, and, on the other, the Act has clarified some of the doubtful old principles of insurance law. The IA 2015 established a new framework for transmission of information and imposed some restrictions on the wide authority insurers have on warranties. It has also introduced the notion of proportionality into insurance law. The concept of proportionality was not a new concept in some other jurisdictions. But taking into consideration the huge amount of policies written in London between parties with different nationalities, the UK law reforms are more likely to affect other jurisdictions as well.⁴⁰ Second, most of the changes are sensible and consistent with the realities of insurance.⁴¹ Therefore, the insurance industry's desires are more likely to be satisfied with the new reforms.⁴² Third, it seems in every subject, the IA 2015 has tried to level the playing field for the insurer and the assured. It could have gone further but, in comparison with the previous law, the IA 2015 aims to create an equal bargaining power for the assured and therefore to provide more balance between the interests and obligations of both sides of the insurance contract.⁴³ Hence, it has been asserted that the IA 2015 is a more balanced package.⁴⁴

These advancements, nonetheless, do not mean that the IA 2015 will not experience some important challenges. The first one is likely to be a degree of disorder and, thus, uncertainty, during the first stages of its enforcement by the courts and tribunals. There are some concepts like 'assured's reasonable search' and 'risk-defining term' that probably

³⁹ Baris Soyer, "Insurance Act 2015 Coming into Force: Overhauling Commercial Insurance Law in the UK" (2008) 22:4 *Journal of International Maritime Law* 253 at 256.

⁴⁰ Clarke & Soyer, *supra* note 6 at 1.

⁴¹ Soyer, *supra* note 39 at 256.

⁴² Lin, *supra* note 23 at 69.

⁴³ Soyer, *supra* note 39 at 256.

⁴⁴ Merkin & Gürses, *supra* note 38 at 1026.

will cause some difficulty until they find their final position in judicial practice. This is not something that was forgotten in the preliminary procedures of law-making, but the Law Commissions believed that this uncertainty was the price of unavoidable reform. Hence, it seems that some of the provisions of the new Act will require clarification from the English courts as they are applied.⁴⁵ In relation to the duty of fair presentation, for instance, the removal of the sole remedy of avoidance (all or nothing) was a very important step toward reforming the legal system. That significant change, along with the fact that the insurer is supposed to play a more active role in the process of data gathering (by asking questions for instance) may decrease the feeling of unfairness which used to be perceived from the MIA 1906's assured's duty of disclosure. However, in spite of the support by scholars, there is some concern on the scope of 'reasonable research' by which information should be disclosed by the organizations.⁴⁶

Evidently the new regime will cause some disharmony in some areas. In relation to warranties, for example, it is quite probable that there would be a range of litigation on whether a warranty is prescribed for a particular kind of risk at a particular time or place and whether non-compliance with that warranty could have raised the chance of an actual loss.⁴⁷ The way an insurer proves actual inducement, the applicability of rules on implied terms, and remedial actions in voyage policies are among other potential areas of litigation.⁴⁸

Finally, although the new changes are more likely to be in harmony with the industry's desires some doubts still remain, and these are discussed in following sub-

⁴⁵ Soyer, *supra* note 39 at 256.

⁴⁶ Merkin & Gürses, *supra* note 38 at 1015.

⁴⁷ Soyer, *supra* note 39 at 256.

⁴⁸ Costabel, *supra* note 27 at 157.

section. In fact, marine insurance is an evolving area with ongoing changes in practice, attitudes, and economic conditions, while “codification usually aims to state the law as it has been up to the present”.⁴⁹

4.2.3 The Market Response

The IA 2015 is a default regime for business insurance, including marine insurance. There was hope that since it is based on practice and was articulated after lengthy consultation with the market, it is less likely that industry would decide to regularly contract out of it.⁵⁰ The Law Commissions described the new regime as a good balance between the interests of insurers and assureds and discouraged opting out of it. They admitted nevertheless that in sophisticated markets like marine insurance this is highly likely to happen. The main reason is claimed to be the need to be flexible to write a variety of risks, some of which are non-standard and may need special contractual arrangements.⁵¹

So, it would not be unusual for the new Act to be contracted out of in case a risk is very special or complicated. Similarly, the new legal regime may not be appropriate for some reinsurance policies.⁵² However, the reality is that even in non-special cases, many small insurance buyers have little ability or power to negotiate with insurers, if they can

⁴⁹ Lord Mustill, “Convergence and Divergence in Marine Insurance Law” (2000) 31 J Mar L & Com 1 at 11.

⁵⁰ Clarke & Soyer, *supra* note 6 at 9.

⁵¹ UK, Law Commission & Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers’ Remedies for Fraudulent Claims; and Late Payment*, Law Com No 353 & Scot Law Com No 238, 2014, at 307, online (pdf):

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/331737/41872_Cm8898_PrintReady.pdf> [Law Commissions Report].

⁵² Clarke & Soyer, *supra* note 6 at 9.

negotiate at all. It is anticipated that the IA 2015 is likely to be contracted out of in relation to many risks.⁵³

In practice, since the market has not revised its Hull & Machinery (H&M) and Cargo forms completely in accordance with the IA 2015 yet,⁵⁴ the role of the IA 2015 in the future of the market is not very certain. Members of the International Group of P&I Clubs that subject their rules to English law (including the MIA1906) have announced that they will contract out of the IA 2015 at least in some major regards. They asserted that the new Act is not designed for sophisticated markets like mutual protection and indemnity and in which P&I Clubs should consider the interests of both insurers and assureds. Nonetheless, the International Group of P&I Clubs demonstrated that some provisions of the IA 2015 are unavoidable, as they will clarify the uncertainties of the previous law.⁵⁵ Similarly, practical guides produced by Lloyd's Market Association and the International Underwriting Association (IUA) for those involved in insurance business, explain the key changes to insurance law and how the insurers can contract out of the IA 2015.⁵⁶

In relation to the fair presentation of risk, the International Group of Protection and Indemnity (P&I) Clubs asserted that the IA 2015 shares most features of the old duty of disclosure only with more emphasis on the role of the insurer. So they do not consider

⁵³ James Davey, "English Marine Insurance and General Average Law" in Francis D Rose, ed, *International Maritime and Commercial Law Yearbook 2016* (London: Informa Law, 2016) 83 at 85.

⁵⁴ *Ibid.*

⁵⁵ Shipowners Club, Correspondence, "Notice to Members Concerning the International Group's Position on the Insurance Act 2015" (17 November 2015), at 1, online (pdf):

<<https://www.shipownersclub.com/media/2015/11/Notice-to-Members-concerning-the-International-Groups-position-on-the-insurance-act-2015.pdf>>

⁵⁶ See Harry Wright, *The Insurance Act 2015: A Practical Guide to Changes in UK Insurance Law, Prepared for Members of the Lloyd's Market Association and the International Underwriting Association*, 1st ed (London: IUA of London, 2015), online (pdf):

<https://www.iaa.co.uk/IUA_Member/Document_Library/Insurance_Act_2015/IUA_Member/Document_Library/Insurance_Act_2015.aspx?hkey=8c439cce-1b58-4c8d-99f9-6b4f45407290.>

changing the new duty of fair presentation and suggested to clubs to adopt it.⁵⁷ But with regard to remedies, they do not accept the moderate remedies provided by IA 2015. Under the IA 2015, avoidance is not a sole remedy, unless in cases of deliberate or reckless breaches or where the insurer would not have entered the contract if fair presentation had been made. In contrast, the International Group of P&I Clubs declared they intend to preserve avoidance as ‘*ab initio*’ remedy for the pre-contractual duty of fair presentation as it was articulated in MIA 1906.⁵⁸ Practically, it is likely that they want to maintain such a legal right and exercise it arbitrarily.⁵⁹

Similarly, with respect to the breach of warranty and risk management clauses, the International Group of P&I Clubs is not intended to accept the suspensive regime provided in section 10 of the IA 2015. Rather, they prefer to restate the approach of section 33 of the MIA 1906 that contains provisions on automatic discharge of liability in case of breach of a warranty. This “gives Clubs a wider right to reject claims”.⁶⁰ They believe that certain warranties are the essence of the insurance policy, regardless of the type of loss that occurs. Moreover, according to their notice, the new Act’s provisions will bring a degree of uncertainty in relation to warranties and, thus, they prefer to maintain their current practice and to contract out of the new Act’s provisions on warranties.⁶¹ However, as the IA 2015 mandatorily proscribes “any term in an insurance contract by which the assured warrants the truth of all pre-contractual representations”, the Club Rules which state such

⁵⁷ Shipowners Club, *supra* note 55 at 2.

⁵⁸ *Ibid* at 1.

⁵⁹ Davey, *supra* note 53 at 85.

⁶⁰ Shipowners Club, *supra* note 55 at 2.

⁶¹ *Ibid*.

information to be the ‘the basis of the contract’, must be removed from the Rules of the Group Clubs.⁶²

It should be noted that the ability to contract out of the IA 2015 does not necessarily mean that it could be conducted without any limitation or in an unregulated manner. First, unlike the MIA 1906, there are specific provisions governing the possibility of contracting out which must be followed as specified in sections 15 to 17 of the IA 2015. Most importantly, it is not enough for parties to simply announce that the IA 2015 does not apply. Rather, the alternative obligation or remedy must be clearly expressed and understood by the parties. Second, some of the provisions of the Act like prohibition of ‘basis clause’ are obligatory and cannot be subject to alteration.⁶³

However, if other underwriters decide to do the same as the P&I Clubs, the 2015 Act will work against what the Commissions intended to create in the marine insurance environment, namely balancing the obligations of insurers and assureds. In other words, the Act will raise the assured’s duties without any obligatory provisions which guarantee a decrease in the remedies as to the harshness of a breach.⁶⁴ Furthermore, the extent to which the provisions of IA 2015 will be contracted out is still not clear. This has provided a degree of uncertainty in itself. Although, it depends on a variety of parameters, it has been anticipated that the Act’s regulations will be largely excluded in practice.⁶⁵

4.3 Promoting Uniformity in Marine Insurance Law: Focus on Developing Countries

⁶² *Ibid.*

⁶³ Davey, *supra* note 53 at 85.

⁶⁴ *Ibid.*

⁶⁵ Merkin & Gürses, *supra* note 38 at 1025.

One solution for the aforementioned possible problems of the IA 2015 could be to make a national law more international, hoping it would better serve the international market. Over the years, English law has been relied on to bring about uniformity for marine insurance. It was successful in this, to some extent. However, as shown, not only was the MIA 1906 subject to much criticism in terms of its ability to preserve desirable international uniformity, specifically in the late 20th century and at the beginning of the 21st century, but also, IA 2015 is likely to experience serious challenges in years forward. Uniformity can be achieved neither completely nor in a short time.⁶⁶ But, given the fact that there are some gaps in the current marine insurance regime and considering the economic, commercial and legal aspects of the area, it seems there should be some ways to enhance existing uniformity in years to come. The ways in which this can be done, especially to encourage the participation of developing states in the emerging arrangements is discussed next. It first considers factors of disunity, and process to consider how uniformity could be promoted in the face of these.

4.3.1 What Divides Jurisdictions?

It seems every effort to create uniformity in marine insurance in the 21st century must seriously consider the situation of developing countries. They may not be among the biggest maritime nations, but as assureds, they constitute an important part of the market. As marine insurance is international in nature, constant contacts between assureds and industry in different countries is needed. The increasing complexity of insurance and risks have necessitated such a requirement. Specifically, there is a vital need for more complete

⁶⁶ Tetley, *supra note 9* at 823.

information in transborder operations. From the developing countries' point of view, they still have problems obtaining required information on terms and conditions of the international markets. On the other hand, it is difficult for insurers to obtain satisfactory information on businesses which are located in developing countries.⁶⁷ In this respect, international cooperation can play an important role in improving mutual market information transfer. In that case, parties to the contract, from all over the world, would have common understanding of marine insurance standard clauses.

Some factors have the potential to divide nations in the area of private international law, including marine insurance. One major source of disunity in private international law (marine insurance) is found in different "political and social objectives" of different countries. In many developing countries, raising national revenues or maximizing the rate of employment are much more important than concepts like safety at sea or uniformity in marine insurance.⁶⁸

'Different political systems' can be another cause of disharmony in international private maritime law. Traditionally, socialist countries were more concerned with the issues relating to labour standards at sea, rather than the concerns of shipowners.⁶⁹ Similarly, in marine insurance, developing countries that often are among assureds, pay more attention to the interests of cargo owners and then shipowners, but not insurers.

⁶⁷ UNCTAD secretariat, *Issues of Insurance Regulation and Supervision Relevant for Developing Countries*, 1994, UNCTAD/SDD/INS/6, online (pdf): http://unctad.org/en/PublicationsLibrary/unctadsddins6_en.pdf [UNCTAD secretariat, *Insurance Regulation*].

⁶⁸ Tetley, *supra note 9* at 807.

⁶⁹ *Ibid* at 808.

Differences in national wealth can also cause different standards and, consequently, disunity. Developing countries, understandably, are not very eager to take part in conventions (initiatives) which need technical preparatory works, because they often require much money and complicated compliance standards.⁷⁰

Another factor acts as an obstacle to international uniformity is the fact that states, especially developing countries, do not easily give up their sovereignty in favour of international initiatives in maritime issues. Even today, nationalism can be one of the obstacles to achieving uniformity.⁷¹ The fact that in marine insurance parties should rely on a national legal regime, rather than on an international regime, makes harmonization efforts more complicated.

4.3.2 What Form of Uniformity is Better?

In the majority of international maritime law areas, conventions may be regarded as the final target of those who seek uniformity. The best option would be a universal convention that enjoys the membership of the majority of countries. However, it is not an achievable option in the marine insurance area, at least in the foreseeable future, as there is no such tendency, neither among assureds nor in the market. It is noteworthy that uniformity in marine insurance is highly dependent on the interest of the market, and, therefore, public international law is less likely to offer something desirable.

On the other hand, it does not seem that a convention with a few developing countries, and without the participation of the major markets, could be a good substitution for the current regime, such as the experience with the United Nations Convention on the

⁷⁰ *Ibid.*

⁷¹ *Ibid* 810.

Carriage of Goods by Sea (Hamburg Rules)⁷². Considering the fact that there has already been a kind of international order in marine insurance, in contrast with many other areas of maritime law which are highly dependent on governmental initiatives, this option spoils the current order while it is not capable of creating any reliable alternative. Evidence in areas like carriage of goods and liability show that, sometimes, the result of a new treaty may be less uniformity in the law. From the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Hague Rules)⁷³ to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules),⁷⁴ there is a downward trend in relation to the number of participants in carriage conventions, so that the latter has not come into force yet.⁷⁵ Similarly, in connection with liability, the number of member states which have adopted the related conventions has been so low that the treaty approach to codification carries risks and may not be the ideal model to be encouraged.⁷⁶

Despite the foregoing concerns, there is a higher level of uniformity in marine insurance, in comparison to other fields of maritime law. This is perhaps, due to the importance of uniformity of marine insurance for the world economy and the role of UK

⁷²*United Nations Convention on the Carriage of Goods by Sea*, 31 March 1978, 1695 UNTS 29215 (entered into force 1 November 1992) [Hamburg Rules].

⁷³*International Convention for the Unification of Certain Rules of Law relating to Bills of Lading*, 25 August 1924 (entered into force 2 June 1931) [Hague Rules].

⁷⁴*United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, 11 December 2008, Doc. A/RES/63/122, Not yet in force [Rotterdam Rules].

⁷⁵ International Chamber of Shipping/International Shipping Federation & Comité Maritime International, *Promoting Maritime Treaty Ratification* (London: International Chamber of Shipping/International Shipping Federation, 2013) at 5.

⁷⁶ Patrick J S Griggs, "Obstacles to Uniformity of Maritime Law: The Nicholas J. Healy Lecture" (2003) 34:2 J Mar L & Com 191 at 192 [Griggs, "Obstacles to Uniformity"].

laws and practice since the 18th century and their application throughout the British Empire. In this regard, it seems there is no better choice than maintaining the current order.

However, the current situation is very different from the beginning of the 19th century when the MIA 1906 and a century of practice became a role model throughout the world. Today the range of risks and market behavior cannot be compared to that time. It is essential to improve the current English legal regime by more active participation of international organizations and applying some supplementary techniques to make the current order more uniform.⁷⁷

4.3.3 Techniques to Improve the Current Regime

Taking all the foregoing into consideration, a desirable degree of uniformity is not feasible just by virtue of a national legislative instrument alone. Consequently, if English marine insurance law is expected to continue functioning as a *de facto* international regime, the recent amendments, namely, IA 2015, along with the late payment topic articulated in the Enterprise Act 2016 constitute a promising start. But there is a vital need to resort to supplementary techniques to make the law more globally acceptable and, therefore, to achieve a higher level of uniformity which more efficiently meets the needs and interests of all stakeholders, including states, insurance industry and policyholders. In the following paragraphs, certain methods, including model laws, guidelines, and standard sets of contract rules, will be discussed which have the potential to strengthen the UK legal system to be more flexible about differences in marine insurance contracts and the legal backgrounds in which they operate. In this regard, it has been asserted that as marine

⁷⁷ Tetley, *supra note* 9 at 823.

insurance is international by nature, there is a need for international supervisors who have constant contacts with their counterparts in national legal regimes, particularly with those countries in which it is not easy to obtain reliable information regarding the market.⁷⁸

4.3.3.1 Contractual Techniques

Contractual techniques are usually called by different names such as ‘standard or model clauses’ or ‘standard set of contract rules’. Whatever this method is called, it is intended to help the contract parties to resolve their problems in the process of drafting the contract. Standard clauses can be advantageous for the parties because they specify the issues that should be addressed in such a contract; ensure how the clauses should be stipulated to be valid; and provide common and up-to-date solutions to certain issues.⁷⁹ Thus, a set of rules on certain issues of marine insurance can be a flexible and proper assistance to the current marine insurance legal regime,⁸⁰ with the option of being capable of regular updating to match market demands.⁸¹

It should be considered that to set up standard clauses, not only the content of the provisions is important but also serious consideration should be given to the format which must be both clear and effective at the same time. Furthermore, to save the uniform nature of such a model, it is necessary to maintain some basic provisions unchangable.⁸²

⁷⁸UNCTAD secretariat, *Insurance Regulation*, *supra* note 67 at 32.

⁷⁹ United Nations Commission on International Trade Law, *A Guide to UNCITRAL: Basic Facts about the United Nations Commission on International Trade Law* (Vienna: United Nations, 2013) at 18 [A Guide to UNCITRAL].

⁸⁰ John Hare, “Marine Insurance: The CMI Review Initiative” (2000) *Comite Maritime International Year Book* 325 at 325 [Hare, “CMI Initiative”].

⁸¹ International Working Group on Marine Insurance, “Discussion Paper” (2001) *Comite Maritime International Year Book* 189 at 191.

⁸² UNCTAD, *Marine Insurance Contract*, *supra* note 10 at 41.

In relation to a set of rules which can be operated contractually, Comité Maritime International (CMI) had a very remarkable experience regarding York-Antwerp Rules on general average which is one of the best examples for creating uniformity outside the conventional framework. The fact that the Rules first were adopted in 1980 and have been revised many times since then –last time in 2016- shows the extent to which they have been successful to incorporate into the contracts.⁸³

When the harmonization of marine insurance was on the agenda of the UNCTAD⁸⁴ Working Group, what they called “a set of contractual terms governing the marine insurance policies” was their first option.⁸⁵The initial content of such an international policy was decided to be “Institute Clauses” produced by the Institute of London Underwriters as the base (because of their already widespread use), adjusted to accommodate economic and legal conditions of the other systems as much as possible. Regarding the format, the Norwegian Plan model was welcomed by the UNCTAD Secretariat to have a central core based on which alterations may appear on the contract forms which are issued in various countries⁸⁶. Probably, the model of “British content” and “Norwegian format” could be improved by comparative analysis of other systems.⁸⁷

⁸³ Mans Jacobsson, “To What Extent Do International Treaties Result in the Uniformity of Maritime Law?” (2016) 22:2 J Intl Maritime L 94 at 108.

⁸⁴ The United Nations Conference on Trade and Development (UNCTAD) was established on December 30, 1964, by a UN General Assembly resolution as a permanent organ of the General Assembly, with the purpose of creating sustainable development in the areas of trade, technology, finance, and investment. About maritime field, the main aim of the UNCTAD has been to promote shipping and trade, specifically in developing countries. Also, Marine insurance has been the center of the UNCTAD attention from the very first conference in 1964. See: Chircop et al, *supra* note 1 at 62-63.

⁸⁵ UNCTAD, *Marine Insurance Contract*, *supra* note 10 at 41.

⁸⁶ Contrary to British format in which clauses are attached to the contract.

⁸⁷ UNCTAD, *Marine Insurance Contract*, *supra* note 10 at 42.

Eventually, UNCTAD Model Clauses on Marine Hull and Cargo Insurance was introduced in 1984 through the resolution 60 (XII)⁸⁸ of the Committee on Shipping. The clauses are non-mandatory and are intended to provide guidance on insurance markets - especially those in developing markets- to have their own insurance policies.⁸⁹ In fact, UNCTAD Model Clauses on Marine Hull and Cargo Insurance (1984) were intended to diminish “the monopoly of the London Market and its Institute clauses”.⁹⁰ It was claimed that there was a serious need for creating more harmonization and filling the gaps in areas where there was no legislation.⁹¹ The Model Clauses include provisions on insurable interest, coverage, additional coverage, general exclusions, period of coverage, measure of indemnity, duties of the assured, claims and etc.

However, UNCTAD Model Clauses were not very successful drawing support from the market,⁹² and since they have never been applied in practice, they have been called as a “dead letter”.⁹³ The clauses did not deal with some issues related to domestic law and practice which vary from one country to another. Moreover, UNCTAD acknowledged that some other provisions were required to be added to the clauses to become a “complete policy document”.⁹⁴ It should be noted that in recent years the UNCTAD’s involvement in

⁸⁸ Cited in UNCTAD, *Marine Insurance Contract*, *supra* note 10.

⁸⁹ *Ibid* at 1.

⁹⁰ Marko Pavliha, “Overview of Marine Insurance Law” (Paper delivered at the IMO International Maritime Law Institute, Malta, 7-10 January 2013), at 50, [unpublished] (online: <<http://www.dpps-mlas.si/wp-content/uploads/2012/12/Overview-of-Marine-Insurance-Law-Prof.-dr.-Marko-Pavliha.doc>>).

⁹¹ UNCTAD, *Marine Insurance Contract*, *supra* note 10 at 3.

⁹² *Comite Maritime International Year Book 203* at 205-206 [CMI International Working Group, “Plenary Session 2001”].

⁹³ Pavliha, *supra* note 90 at 20.

⁹⁴ *Ibid* at 1.

matters related to shipping has been reduced⁹⁵ and therefore it hasn't made any other attempt at harmonization of marine insurance since 1984.

4.3.3.2 Model Law

A model law is a legislative text which is often prepared by international institutions and is intended to be legislated as a part of a state's national law. A model law could be a good option when strict uniformity is not the case, as states are free to make alterations to the text to reflect local requirements. This flexibility makes it easier to negotiate a model law and it is likely to achieve more acceptance than many other types of international instruments. Another positive feature of the model law is that it can take advantage of the efforts of those national jurisdictions that previously were engaged in the process of marine insurance legislation, which in turn facilitates harmonization.⁹⁶

Today, with "economic transformation", many developing countries feel more need to enact new laws in relation to marine insurance as one of the important aspects of international commercial law.⁹⁷ Therefore, it is quite possible that a model law be provided by international bodies, based on the UK law and its recent reforms, would be supported by other countries. To achieve desirable harmonization, states must be persuaded to make few changes in a model law when they are incorporating it into a national legal regime. However, diversity in national legal regimes' techniques of legislation, and lack of consensus on how to address certain issues are among possible obstacles to draft a specific uniform text, including a model law on marine insurance.⁹⁸ This may be the reason why

⁹⁵ Chircop et al, *supra* note 1 at 62-63.

⁹⁶ *A Guide to UNCITRAL*, *supra* note 79 at 15-16.

⁹⁷ UNCTAD secretariat, *Insurance Regulation*, *supra* note 67 at 4.

⁹⁸ *A Guide to UNCITRAL*, *supra* note 79 at 15-16.

none of the international organizations has tried to provide a model law in marine insurance so far.

4.3.3.3 *Guidelines and Recommendations*

If it is impossible to provide a complete draft (a single model solution) to be incorporated into national legal regimes, working on a set of guidelines or recommendations for certain issues could be another choice.⁹⁹ Although such a text does not provide a complete model law, it should be more than a simple general statement of objectives which does not effectively help to achieve harmonization.¹⁰⁰ The guidelines can provide the basic ideas for those who want to develop their laws, either for civilian legal systems in a legislative reform, or for judge-made reforms in common law countries. These kinds of guidelines, while they do not prejudice diverging national marine insurance acts, could be useful instruments to help those domestic laws that do not work properly in the international marine insurance market, especially for developing countries.¹⁰¹ Insurance legislation should not be static and should be subject to constant updates based on changing perceptions and economic situations. Thus, in the process of enacting or reviewing national laws, developing countries can take advantage of what already exists in other national jurisdictions, especially the United Kingdom.¹⁰²

It should be noted that according to the UNCTAD report, some of the developing countries already have acceptable insurance legislation or regulations which are consistent with market principles.¹⁰³ However, the fact that these laws have not resulted in more

⁹⁹ *Ibid* at 16.

¹⁰⁰ *Ibid*.

¹⁰¹ Hare, “Vancouver Conference”, *supra* note 5 at 257.

¹⁰² UNCTAD secretariat, *Insurance Regulation*, *supra* note 67 at 4-5.

¹⁰³ *Ibid* at 32.

uniformity shows that there is a need to more efficiently enforce them. Accordingly, international advisory instruments with unambiguous regulatory framework could be helpful for national draftsmen and will lead to more market efficiency and better protection of marine insurance parties. In this regard, international bodies can play important roles by dealing with controversial marine insurance questions through developing soft law.¹⁰⁴

Generally, it seems that ‘guidelines’ are amongst the favorite methods of non-governmental bodies like CMI,¹⁰⁵ as they have adopted these techniques in areas like oil pollution damage and seaway bills.¹⁰⁶ Similarly, In relation to the marine insurance, the main effort of CMI was to provide a set of guidelines which could help national reform initiatives.¹⁰⁷ Along with the national movement in reforming marine insurance legislations, in 1998 CMI found national diversity on some issues of marine insurance and an urgent need for international legal cooperation. Hence, a number of marine insurance problems were suggested for further research and an international working group (consisting of underwriters, academics and practitioners from both common law and civilian legal systems) was set up to proceed the project.¹⁰⁸ They believed a “tangible result” could help countries to re-write their laws of marine insurance.¹⁰⁹ In 1999, four

¹⁰⁴ Jacobsson, *supra* note 83 at 107-108.

¹⁰⁵ Comite Maritime International is a non-profit organization consisting of a large number of national maritime law associations from the shipping world. Since its establishment in 1987 and based on its Constitution, the main object of the Comite Maritime International, as a non-governmental international organization, has been to unify the maritime law by all the appropriate means and activities.

¹⁰⁶ Jacobsson, *supra* note 83 at 107-108.

¹⁰⁷ John Hare, “Report of the CMI Standing Committee” (2005-2006) Comite Maritime International Year Book 386 at 388.

¹⁰⁸ Hare, “CMI Initiative”, *supra* note 80 at 325-326.

¹⁰⁹ CMI International Working Group, “Plenary Session 2001”, *supra* note 92 at 209-210.

items were realized to be the greatest importance: the duty of disclosure; the duty of good faith; alteration of risk; and warranties.¹¹⁰

However, the destination of the work was not much clear at that time (The Singapore Conference in 2001). In their opinion “it was neither necessary nor prudent to determine the precise way in which the exercise would end”.¹¹¹ Accordingly, the report of Dr. John Hare on June 2004 illustrated that there was no unanimity neither about the content nor the result among the CMI Working Group members regarding what they called “CMI Guidelines for the Formulation of Marine Insurance Law”.¹¹² Consequently, CMI, which referred to unsuccessful attempts of UNCTAD as a lesson for the task of its Working Group, similarly failed to take support from the market and unify the law. The unrevealed conclusion of both attempts perhaps was that harmonization was difficult due to the competition on conditions among various legal systems and regimes.¹¹³ In fact, the problem with guidelines could be that they cannot be properly guaranteed. In most of the cases those who are target audience of the guidelines are those who ignore these kinds of recommendations. Though, it seems that they are better than nothing.¹¹⁴

Consequently, taking lessons from above-mentioned efforts of the international organizations, for these supplementary methods to be feasible, a number of requirements should be observed to more efficiently harmonize international marine insurance by the virtue of the UK law and practice. It should be noted that the previous work of UNCTAD and CMI might have some of these requirements, but not all of them.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² Hare, “Vancouver Conference”, *supra* note 5 at 256-260.

¹¹³ Pavliha, *supra* note 90 at 3.

¹¹⁴ Griggs, “Obstacles to Uniformity”, *supra* note 76 at 205.

First, there is a crucial need to broaden acceptance by lawyers, underwriters and the shipping industry.¹¹⁵ No change in marine insurance law could ever be effective without the support of the industry. Thus, it is essential for the supplementary techniques to be consistent with the market practice. To do so, representatives of parties from all geographical regions should gather to work on prospective drafts. Otherwise, the initiative is less likely to be widely used by the industry.

Second, if we want the supplementary techniques to add something to the current regime, they should necessarily take into account the differences and similarities of the common law and civilian legal systems in the contents of substantive law, procedural issues, and draftsmanship.¹¹⁶ In fact they should complement the UK law in a way that a national law inherently is not able to do. In other words, supplementary techniques are required to help English law be enforced throughout the world by considering the local differences and interest. In this regard the interest of less advantageous countries, including developing states, should be on a high priority.

Third, in order to avoid becoming outdated, the prospective supplementary method should be capable of being revised whenever the need arises.¹¹⁷

Fourth, it may not be possible to harmonize all the issues of marine insurance law. Remaining issues ought to be left to courts, and where appropriate, divergence should be

¹¹⁵ Hare, "CMI Initiative", *supra* note 80 at 328.

¹¹⁶ Malcolm Clarke, "An Interim Discussion Paper on Alteration of Risk" (2003) *Comite Maritime International Year Book* 500 at 501.

¹¹⁷ UNCTAD, *Marine Insurance Contract*, *supra* note 10 at 43.

allowed.¹¹⁸ That is to say, there are some areas of difference where uniformity is undesirable or so deep-rooted that uniformity would be unrealistic.¹¹⁹

Finally, the path to uniformity will not be smooth if the task falls entirely on governments' shoulders, as they may act in favour of the political objectives rather than the commercial interest. On the other hand, the danger of losing domestic public interests makes it impossible to leave the task completely on the private sector. Consequently, there is a need for balanced participation of the governments and the private sector.¹²⁰ As a good example, the Government of the United Kingdom, has rarely interfered in the insurance market. The philosophy has been stated that unless there is harm to the public interest, the government is not supposed to restrict business transactions that can prevent the development of the insurance industry, specifically by taking into consideration the international nature of the insurance market.¹²¹

To conclude, it seems that the IA 2015 has produced some benefits for the promotion of intentional uniformity. Most of the changes seem to be consistent with practice and the Act tries to create a balance between the interests of the insurer and the assured. However, insurers in developed countries and assureds in developing countries may still experience some reticence in relying completely on the provisions of the Act. Therefore, there are compelling arguments to take advantage of a range of well-known

¹¹⁸ Hare, "CMI Initiative", *supra* note 80 at 328.

¹¹⁹ Hare, "Vancouver Conference", *supra* note 5 at 250.

¹²⁰ Gordon W Paulsen, "Historical Overview of the Development of Uniformity in International Maritime Law" (1982-1983) 57 Tul L Rev 1065 at 1066.

¹²¹ UNCTAD secretariat, *Insurance Regulation*, *supra* note 67 at 12.

international initiatives to make the new marine insurance regime more broadly desirable, reliable and accepted.

CHAPTER 5:

POSSIBLE INFLUENCE OF THE NEW ENGLISH LAW ON IRANIAN INSURANCE LAW AND PRACTICE

So far, the positive achievements and challenges of the Insurance Act, 2015 (IA 2015), and the prospective influence on uniformity have been discussed. In the years before the enactment of IA 2015, even courts had problems with the limitations imposed by the Marine Insurance Act, 1906 (MIA 1906). From the assured's point of view, the single remedy of contract avoidance seemed to be draconian. The automatic discharge of the insurer's liability due to the breach of a warranty was another harsh remedy. The relevancy of the breach to the loss, how serious the breach was and whether the breach was remedied before the loss were among the factors which were not taken into account.¹

From the developing countries' points of view, when modern marine insurance emerged, standardized clauses were exclusively developed by marine insurers with little systematic consultation with the assureds. Therefore, those clauses naturally met the needs of the national market which had a great number of insurers, namely England.² The important questions now are how the new developments in the UK legal system will affect insurance and reinsurance in developing countries like Iran, and in particular what the key risk areas would be for Iran. The reforms have the potential to improve the unbalanced

¹ Malcolm Clarke & Baris Soyer, *The Insurance Act 2015: A New Regime for Commercial and Marine Insurance Law* (New York: Informa Law from Routledge, 2016) at 107.

² UNCTAD Secretariat, *Legal and Documentary Aspects of the Marine Insurance Contract*, UNCTAD, 1982, TD/B/C.4/ISL/27/Rev.1, at 5-6, online (pdf): <http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=297> [UNCTAD, *Marine Insurance Contract*].

situation between insurers and assureds. The International Institute Clauses are likely to be redrafted in view of the provisions of the new Act. Doing this provides the assured with more negotiation power. Further, the IA 2015 may influence other national jurisdictions, even jurisdictions like Iran that have little interaction with English insurance markets.

To investigate the possible influence of the new changes on Iranian marine insurance, first, this Chapter provides an overview of Iran's marine insurance law, including the general rules governing the contracts. Second, the thesis examines the current practice in the insurance industry. Finally, the thesis argues that taking into consideration the pros and cons of the English developments, as one of the leading markets in the world, what developments are conceivable or even inevitable for Iran.

5.1 Marine Insurance Law in Iran

Iranian maritime legislation, including marine insurance law, has failed to keep pace with the activities of the shipping industry in Iran. Surprisingly, though Iran has a large fleet, it neither enjoys a modern regime of marine insurance law, nor an updated maritime law. In September 1964, the Iranian Maritime Law³ was enacted. In most parts, the law was a translation of the Hague Rules, particularly about commercial shipping and most especially about carriage of goods.⁴ This law has remained unchanged since its adoption and, therefore, there are deep deficiencies in it among which are the rules relating to maritime labour and marine insurance.

³ Maritime Law of 20 September 1964 (Iran).

⁴ Alireza Mohammadzadeh Vadghani, "The Responsibility of the Carrier" (2002) 55 University of Tehran Journal of Law & Political Science 69 at 70.

Despite the clear stipulation of Article 191 of the Maritime Law that the government is obliged to provide and table a bill on marine insurance to parliament, such a draft has never been prepared and, therefore, there is no marine insurance law in Iran. Consequently, Iran's Insurance Law⁵ which was enacted in April 26, 1937, governs all types of insurance, including marine insurance. The law is outdated, being more than 80 years old in addition to not containing any articles or provisions on marine insurance. In fact, of its 36 Articles, not one mentions marine insurance, despite the fact that it is the oldest branch of insurance.

Consequently, unlike the United Kingdom, there is no dedicated marine insurance law in Iran that can be the basis of direct study in this thesis. To understand the exact impact of the new English changes on Iran, the body of Iranian law must be considered as a whole: Insurance Law, the Civil Code⁶, the Commercial Code⁷, general insurance regulations, and common international insurance doctrines. Also, due to the lack of any specific law, Iranian companies' contracts and practices must be regarded in any study of this area. It is only in this way that Iran's current national practice in marine insurance can be compared with the UK marine insurance law and practice.

5.1.1 The Nature of the Insurance Contract in Iran

In Iran, there is no specific definition for marine insurance and therefore one must refer to the general definition of insurance in the Insurance Law. Article 1 of the Insurance Law defines 'insurance' as a contract in which a party undertakes to compensate for loss, or to

⁵ Insurance Law of 26 April 1937 (Iran).

⁶ QANUNE MADANI [CIVIL CODE] Tehran 1307 [1928] (Iran).

⁷ QANUNE TEJARAT [COMMERCIAL CODE] Tehran 1311 [1932] (Iran).

pay the damages incurred by other party, or to pay specified amount of money, in case of an incident, in return for receiving insurance premiums.

Generally, marine insurance is based on an insurance contract. Therefore, it should be correspondent with the general contract law and regulations stipulated in the Iranian Civil Code and the Commercial Code. However, marine insurance is different from the contracts stipulated in the Civil Code in terms of a number of features, including the effect of the contract, parties' obligations and the remedies for breach.

Contracts in Iran are divided into two main categories: First, 'nominate' or 'specific' contracts and, second, 'innominate' or 'unnamed' or 'unlisted' contracts. For the former, there is a statutory description of its conditions in the Civil Code. Every nominate contract is a special contract used with the same understanding of terms, the nature and circumstances of the transaction, and the reciprocal rights and obligations of the parties. In contrast, an innominate contract is one to which no legal designation is attached and, thus, there are no standardized legal conditions in the Civil Code and jurisprudence for it.

In Iran, the insurance contract follows a pattern that is different from the logic of nominate contracts. According to the general rules of contracts, namely Article 216 of the Civil Code, it is essential for a transaction to have certain, clear, and straightforward considerations. In contrast, one of the insurance contract's considerations, namely, the terms reflecting the obligations of the insurer as one of the parties is not certain. It is not clear how, how much, and when the insurer may compensate the damages of the assured. Rarely is there such a structure in other contracts in Iranian law.

In spite of the above-mentioned difference, and despite the fact that insurance is not a nominate contract according to the Civil Code, nobody doubts that it is a legal contract for the following reasons. First, it is placed under the definition of Article 183 of the Civil Code which states: “a contract is made when one or more persons make a mutual agreement with another one or more persons, on a certain thing, and that agreement is accepted by the latter person” [author’s translation]. Second, it is not necessary for every contract to be specified as a legal contract in the Civil Code. Although marine insurance is neither stated in the Insurance Law nor in the Civil Code, it is permitted by virtue of the principle ‘freedom of contracts’ articulated in Article 10 of the Civil Code. Third, the fact that there is an Insurance Law in Iran, Article 1 of which defines the insurance contract, shows that Iranian law and jurisprudence have accepted the insurance contract (including marine insurance) and its differences from general commercial contracts, due to the economic necessity of the insurance.

Insurance is also known as an unconscionable or adhesion⁸ contract. It is believed that an insurance contract is usually drafted by one of the contract parties and the other party can do little to negotiate on terms and conditions.

According to Iranian legal principles, all contracts are presumed to be binding unless there is evidence to the contrary. As there is no exception in relation to insurance in the Civil Code or Commercial Code, according to the *pacta sunt servanda* principle [the presumption of irrevocability of contracts], insurance is an irrevocable contract [or a binding contract]. In other words, unlike revocable contracts, parties to an insurance

⁸ contracts of adhesion (or standard form contracts; or take-it-or-leave-it contracts) are contracts between two parties, where the terms and conditions of the contract are set by one of the parties, and the other party has little or no ability to negotiate more favorable terms and is thus placed in a "take it or leave it" position.

contract cannot revoke it unless there is mutual consent or by the decision of a court. Moreover, like other jurisdictions, it is generally accepted in Iran that insurance is highly dependent on the constancy of the obligations between parties.

Finally, it should be mentioned that according to Article 2(9) of the Commercial Code, marine insurance is a commercial activity. Therefore, commercial provisions may apply to the marine insurance contract, if needed. Unlike consumer insurance, marine insurance should be under the supervision of the Commercial Code, as it is usually used by merchants.

5.1.2 General Principles of Insurance in Iran

5.1.2.1 Good Faith

It is believed that good faith is an implied term of every contract. In comparison to most other contracts, good faith plays a major role in insurance law because of its nature. Unlike English law in which good faith generates a wide range of rules and discussions in regard to insurance law, under Iran's Civil Code good faith does not affect the validity and the effects of contracts, including marine insurance. In insurance law, good faith is the obligation of both parties to the insurance contract. But similar to MIA 1906, the greater emphasis of Iranian Insurance Law is on the obligations of the assured.

5.1.2.2 The Principle of Indemnity

Similar to British law, there is a principle of indemnity in the Iran legal system. Accordingly, the aim of insurance is to provide the assured with indemnity, but not as a source of income for him. It is not accepted that the economic situation of the assured will be better after a marine incident than it was before it, due to insurance indemnity.

Otherwise, it would be something like a wagering or gambling contract which is null and void under Islamic jurisprudence. Thus, Article 19 of the Insurance Law states that the insurer is obliged to pay the difference between the price of goods before and after the incident. According to Article 22 of the Insurance Law, to perform this obligation, the price of goods at the destination is the basis of payment.

5.1.2.3 Subrogation Principle

The subrogation principle says that once the insurer pays to the assured, he is entitled to be the deputy of the assured with a right to succeed to any interest he has, and can claim against a tortfeasor on behalf of the assured. This reflects Article 30 of the Insurance Law which states that the insurer, after accepting or paying damages, is the subrogee of the assured against individuals responsible for an incident or damage.

5.1.2.4 Privity of Contract

Articles 10 and 219 of the Civil Code emphasize the ‘privity of contract’ (*res inter alios acta alteri nocere non debet*) principle. According to Article 10, private contracts shall be binding on those who have signed them. Similarly, Article 219 states that contracts made according to law are binding on the parties or their substitutes. However, rarely has this principle remained totally intact in most jurisdictions. Similar to the English and French legal systems, in Iran there are some exceptions to privity of contracts, specifically in articles 196 and 231 of the Civil Code, both of which have accepted the validity of obligation in favour of a third party. An obligation in favour of the third party has also been accepted in Articles 768 and 769, where the Civil Code deals with the contract of settlement. Indeed, there is no reason for this rule to be confined to the settlement contract.

Beyond the forgoing, Article 6 of the Insurance Law has also accepted the obligation in favour of the third party in an insurance contract. Consequently, an obligation in favour of a third party in an insurance contract is permitted under Iranian law as an exception to the principle of privity of contract.

5.1.2.5 Insurable Interest

Some Iranian scholars have argued that nobody wants to insure property that is of no benefit to him, because insurance entails some obligations and expenses for the assured, like premiums.⁹ However, insurable interest is one of the important principles of insurance. In fact, Article 4 of the Insurance Law provides that the assured should have an interest in the existence of the property.

5.1.3 The Subject and Obligations of the Insurance Parties

5.1.3.1 The Subject of Insurance

Article 4 of the Insurance Law states that the subject of insurance can be property, including objects or visible property, benefits, financial rights, or any legal rights. So close are liability insurance and insurance of property (including cargo insurance) that Iranian legal literature discusses both under the title of damage insurance. The most important similarity of liability insurance and insurance of properties is that both resound in indemnity reparation. Both are aimed at compensating any damage or loss incurred by the assured, and none of them is allowed to provide profit for the assured.¹⁰

⁹ See Mohammad Houshangi, *Carriage of Goods Insurance*, 1sted (Tehran, Iranian Insurance Joint-Stock Company, 1990).

¹⁰ Katouzian & Izanloo, *supra* note 17 at 20-1.

The main difference between these two insurances in Iran's legal regime is that property insurance deals with the positive features of the assured's asset, like the right of ownership or mortgage, while liability insurance insures the negative aspects of the asset, like debt.¹¹ Furthermore, unlike the insurance of properties in which the amount of compensation is definite or certain, in liability insurance the amount of liability is not clear in advance. This is why Article 10 of the Insurance Law on deficiency of insurance, Article 7 on excessive insurance and Article 9 on double insurance have no place in liability insurance.¹² In case the subject of the insurance is goods, according to the Article 22(1) of the Insurance Law the assessment of the damage in transportation insurance is based on the price of the property at the destination.

5.1.3.2 Obligation of the Parties

Iranian law recognizes four different persons connected with the insurance contract: the insurer, an individual who undertakes to pay damages in return for receiving premiums; the policyholder, a person who concludes an insurance contract with the insurer and undertakes the payment of premiums; the assured, if the policyholder insures the tortious liability of another person, then the policyholder is a person other than the assured; and the injured party, as defined in liability insurance.¹³

The main obligation of the insurer is to compensate for any loss or pay the damage incurred by the assured. These are the 'requirements of the substance of insurance contract' in Iran.¹⁴ In law, unlike tortious liability, the obligation of the insurer is derived from the

¹¹ *Ibid* at 21.

¹² *Ibid* at 22.

¹³ *Ibid* at 6-7.

¹⁴ *Ibid* at 55.

contract; thus, the insurer has no other basis of liability to pay the damages or compensate for losses other than the contract.¹⁵ Probably, the main duty of the assured is to pay the premiums. Article 33 of the Insurance Law emphasizes the payment of premiums, but there is no specific guarantee for this obligation to be fulfilled. This matter is dealt with under Articles 237 and 239 of the Civil Code on breach of the duty. We discuss this in the following paragraphs.

In addition to the main obligations of the assured under the insurance contract, including the duty of disclosure (Articles 12 and 13 of the Insurance Law), informing the insurer about the an increased risk (Article 16 of the Insurance Law), and taking necessary actions to avoid incidents (Article 15 of the Insurance Law), there are two important specific conditions in Iranian liability policies. First, the assured is prohibited from liability acknowledgement. This is to prevent collusion with the injured party against the insurer. Nonetheless, it is controversial whether such a condition is contrary to public order or not.¹⁶ Second, the assured is prevented from settling any agreement with the injured party without the insurer's consent.¹⁷ In this regard, Article 30 of the Insurance Law states that the insurer, after accepting or paying indemnity, is the subrogee [deputy] of the assured against individuals who are responsible for the incident that caused damage or loss. Therefore, if the assured acts in a way considered to be contrary to this right, his responsibility to the insurer will be engaged.

5.1.4 Similarities and Differences between Iran and UK Marine Insurance Law

¹⁵ *Ibid* at 2.

¹⁶ *Ibid* at 99-103.

¹⁷ *Ibid* at 105.

5.1.4.1 The Duty of Disclosure

Insurance is a contract based on risk and its distribution, in which the insurer relies heavily on the presentation of risk by the assured in order to determine the premiums and insurance warranties. As stated in Chapter 2, the duty of disclosure is one of the most important benchmarks of every insurance regime, because it is the essence of the assured's duty before signing the contract. Then again, in marine insurance the concept of material disclosure is tightly connected with the concept of good faith. In Iran's Insurance Law, similar to the MIA 1906, the assured has the duty to give information to the insurer before signing the insurance contract.¹⁸

Articles 12 and 13 of the Iran Insurance Law are on the duty of disclosure. There are two kinds of breaches: deliberate and non-deliberate. It should be noted that unlike UK law, recklessness is not a criterion for the breach in the Iran Law. Based on Article 12, in case of deliberate breach of the duty of disclosure, including misrepresentation or avoiding the disclosure of material circumstances, the contract would become null and void, even if the breach has not affected the incident. Apparently, unlike UK Law, it is not the insurer who has the right to avoid the contract. Rather, the contract would become automatically null and void. The nullity of an insurance policy as a remedy treats a contract as if it has never existed. Where the breach is deliberate, then the insurer has the right to retain the premium which has been paid and demand the premiums that have not been paid yet.

According to Article 13, if the breach is not deliberate, then the contract would not automatically be null and void. Rather, the insurer can accept the risk but with a higher

¹⁸ Article 12 of the Iranian Insurance Law.

premium, provided that the assured accepts to pay the higher premium, or cancel the contract. In this case, the insurer should return the premiums he received after the date the contract was cancelled.

It seems that the duty of disclosure in Iran's Insurance Law suffers from the same problems as the MIA 1906. Since there is no trace of established practice and judicial precedent, it is highly likely that the duty is not properly understood in the Iranian insurance market. Moreover, it is obvious from the wording of the Law that it does not consider the fact that the assured may be a company (or a legal person). The unanswered question is whose knowledge in the company can be the basis of fulfilling the duty of disclosure. However, it seems that the remedy under the Iranian law is less harsh in comparison to the MIA 1906. In fact, Iran's Insurance Law, at least, in case of non-deliberate breach of duty of disclosure, has accepted the concept of proportionate remedies and, therefore, it is closer to the ideas of the UK Law Commissions in their recommendations for the IA 2015.

5.1.4.2 *Warranties or Conditions*

Due to its character, the marine insurance contract should have some specific features, like the necessity of insurable interest and the possibility of risk, as already discussed. In other areas, marine insurance is to be the subject of general conditions of validity of contracts as stipulated in Article 190 and other articles of the Civil Code.¹⁹ According to Article 190, the validity of a contract requires four essential conditions to be present: first, the intention and mutual consent of both parties to the contract; second, the competence of both parties;

¹⁹ Katouzian & Izanloo, *supra* note 10 at 30.

third, a definite subject-matter for the contract; and fourth, the lawfulness of the cause of the transaction.

In relation to warranties, which are called ‘conditions’ in Iranian law, there is no specific guarantee in Insurance Law for breach of obligation by the parties to the insurance contract. Thus, no choice remains but to refer to Articles 234 and 239 of the Civil Code on breach of the duty. Article 234 states that conditions are of three different kinds. First, qualitative conditions or conditions regarding qualification, which refer to the quantity or quality of the object. Second, collateral events [corollary condition] which refer to the occurrence or happening of some extraneous events. Third, performance conditions which relate to the performance or non-performance of an act by one of the two parties or by a third party.

If there is an unfulfilled condition, the party who stands to benefit by it has the right to cancel the contract by virtue of Article 235 of the Civil Code. According to Article 237, if the condition, made as part of the contract, involves the performance or non-performance of an act, a person who is in charge to carry out such an act must do so; in the event of his failure to do so, the other party can ask the judge for the execution of the condition. However, if it is not possible to force the performance of an act by the person who must perform it and if the act is of such a kind that no one else can perform it, then according to Article 239 of the Civil code, the other party may cancel the contract.

5.1.4.3 Fraudulent Claims

The concept of fraudulent claims, as stated in MIA 1906 and in IA 2015, does not exist in Iranian Insurance Law. Article 11 of the Insurance Law deals with inaccurate assessment:

in case the assured or his legal representative overpriced the property by fraudulent intent, the insurance contract is null and void, and the insurer has the right to retain the premium which was paid. According to Article 34 of the Insurance Law, where an insurance contract contains a number of subjects, fraud in one subject affects the other subjects, and the whole contract would be null and void.

5.1.4.4 Late Payment

It is generally accepted that the insurer needs a reasonable period of time to examine the claim. This depends on the type and complexity of the insurance and claims thereof. However, there should be a remedial mechanism where an insurer unreasonably refuses to pay sums due within a reasonable time.

MIA 1906 was silent with regard to the insurer's refusals to effect indemnity or regarding unreasonable delay to pay a claim.²⁰ Thus, the assured was not entitled to any kind of remedy for any loss incurred as a result of the insurer's failure to pay the claim. This seemed unfair, uncommercial and against the "ordinary principles which apply to damages for breach of contract in general contract law".²¹ Calling the previous law "anomalous and out of step with general contractual principles", the Law Commissions recommended a provision on the basis of which the insurer shall pay the claim within a

²⁰ UK, Law Commission & Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment*, Law Com No 353 & Scot Law Com No 238, 2014, at 252, online (pdf):

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/331737/41872_Cm8898_PrintReady.pdf> [Law Commissions Report].

²¹ *Ibid.*

reasonable period of time, so that the breach of this implied term will result in a remedy, including damages.²²

According to the Commissions, more than 80 percent of those who responded to the respective inquiries stated that insurers are supposed to pay sums due within a reasonable period of time, and there should be liability for a breach.²³ Even among insurers, a vast majority of respondents said that insurers should be obliged to a contractual obligation in this regard. The Association of British Insurers (ABI), for instance, declared: “[T]he ABI accepts that there is a need for reform in this area ... If the insurer has declined a valid claim and has acted unreasonably, we accept that the law should be brought into line with general commercial contractual principles.”²⁴

However, there were some arguments that awarding anything more than the interest to a policyholder who has suffered from late payment would result in extra expenses to an insurer and, therefore, an increase in premiums. According to the International Underwriting Association (IUA) “allowing recourse to unlimited damages would potentially open up the claims process to increased litigation on bad faith grounds, which would be difficult to police and would inevitably drive up legal costs and the costs of insurance.”²⁵

In spite of removing the provisions concerning the issue of late payment from the 2015 draft Bill for being too controversial at that time, later on, the IA 2015 was supplemented by the Enterprise Act 2016 on the issue of compensation for late payment of

²² *Ibid* at 276.

²³ *Ibid* at 251.

²⁴ *Ibid*.

²⁵ *Ibid* at 265-6.

claims. This remedy is now available under Part 5 of the Enterprise Act 2016, according to which there is an implied term in every insurance policy that the insurer must pay any sums due within a reasonable period of time. The goal was to support small and medium businesses which are vulnerable to late payment. Therefore, a policyholder who suffers from any loss due to the breach of this implied term would be entitled to damages. Admittedly, there should be causation between the insurer's breach of the implied term and the loss that the assured suffered from.²⁶

As a key factor, a 'reasonable period of time' depends on the circumstances of each case. However, since uncertainty in this regard may make the stakeholders hesitant, there is need for some guidance. A reasonable period of time definitely means the time to examine and assess a particular claim. The Law Commissions also recommended that factors like the type of insurance, the size and complexity of the claim, compliance with any relevant statutory or regulatory rules or guidance, and factors outside the insurer's control should be taken into account in defining the reasonable period of time to pay to a policyholder.²⁷ So, the insurers are not liable for the delays driven from factual disputes or the act of policyholder itself which are not under the control of the insurer.²⁸

Unlike the previous position in UK law, the issue of late payment was well anticipated in Iranian law. According to Article 1 of the Insurance Law, in Iran the insurer is obliged to compensate for any loss or damages incurred by the assured with respect to perils covered by the policy. Based on Article 19 of the Insurance Law, this obligation

²⁶ *Ibid* at 256.

²⁷ *Ibid* at 276.

²⁸ *Ibid*.

should be performed immediately after the incident; otherwise the assured can ask a court to force the insurer to perform his obligations according to the provisions of the Civil Code.

In relation to late payment by the insurer, there is no other provision in the Insurance Law. According to general principles, late payment damages start from the date of the definitive judgment, not from the date of the incident. In other words, specifically in liability insurance, the insurer has to pay late payment damages from the date of a definitive judgment issued against the assured, up to the date of enforcement of the judgment, without any need for a further claim. This is deduced from Article 522 of the Civil Procedure Code.²⁹

5.1.4.5 Contracting Out

There is no concept of ‘contracting out’ in Iranian law, including in marine insurance law. However, there is a general classification of statutory provisions in imperative or mandatory laws and expository or declaratory laws. A number of commercial provisions belong to the second category. Consequently, due to the principle of ‘freedom of contract’ derived from Article 10 of the Civil Code, it is possible for parties to the insurance contract to limit or increase the obligations (liability) of the insurer, for instance.

To sum up, in terms of the concepts of proportionality, late payment and warranty, Iran’s laws seem more consistent with IA 2015 than MIA 1906. However, since there is no well-established marine insurance law in Iran, a discussion of the subject would not be complete without consideration of the actual structure and practice of marine insurance of this country in order to explore the possible influence of the new UK law on Iran.

²⁹ AINE DADRASI MADANI [CIVIL PROCEDURE CODE] Tehran 1379 [2000] (Iran).

5.2 Structure and Practice of Marine Insurance in Iran

Maritime transportation plays an important role in Iran. More than 90% of Iran's foreign trade is carried by sea.³⁰ After reviewing related Iranian laws and regulations, to better evaluate Iran's marine insurance regime, this section investigates the insurance industry in Iran. First, it looks at the most important Iranian fleets, mostly concerned with the transportation of hydrocarbons, bulk and other cargoes, and which are the major marine insurance actors as potential assureds in Iran and in the international insurance markets.

5.2.1 Iran Shipping Lines

The capacity of Iran's shipping lines is about 3,000,000 GT.³¹ The National Iranian Tanker Company (NITC) and the Islamic Republic of Iran Shipping Lines (IRISL) are the most important Iranian shipping lines. The NITC was founded in 1955 and since then has developed into one of the largest tanker fleets in the world. It includes a capacity of about 14 million tons deadweight of very large crude carriers (VLCCs). NITC has more than 3,700 seafarers and about 1,000 shore-based personnel who together ensure that the fleet meets the highest standards, both those of the International Maritime Organization (IMO) and Oil Companies International Marine Forum (OCIMF).³²

The Islamic Republic of Iran Shipping Lines (IRISL), with more than 50 years of experience in marine transportation, owns a wide diversity of modern vessels in different categories and tonnages. IRISL is able to ship different types of cargo, including break

³⁰ Mohammadzadeh Vadghani, *supra* note 4 at 70.

³¹ Personal communication from Seyed Alaeddin Sadat Rasool (29 July 2018) (Seyed Alaeddin Sadat Rasool is the General Manager of the Legal Department of Islamic Republic of Iran Shipping Lines).

³² Personal communication from Captain Shahram Farahbod (27 July 2018) (Captain Shahram Farahbod is the commercial director of the National Iranian Tanker Company).

bulks, containers, oil products, petrochemicals, heavy lifts and project cargoes to/from major ports of the world. Currently, IRISL Group operates 142 vessels with 4.5 million DWT carrying capacity. IRISL is the 17th containership operator ranked by Clarkson research and the largest in the Middle East.³³

5.2.2 Insurance Market in Iran

From the social perspective, the notion of indemnification dates back to the Achaemenid Empire founded 550 years BC.³⁴ Nonetheless, the background of modern Iranian insurance dates back to just a hundred years ago when two foreign companies registered insurance branches in Iran at the beginning of the 20th century. Article 8 of the Law on Registration of Companies³⁵ enacted on 24 November 1931, was the first legislation that referred to insurance. According to this article, Iranian or foreign insurance companies had to follow the regulations of the Ministry of Justice.³⁶ There has been significant developments in the insurance industry since then.

According to one study, the fluctuations of insurance, including marine insurance, have affected Iran's economic growth and development.³⁷ With specific reference to insurance, It should be noted that Article 31 of the Act on Establishment of Central Insurance of IR Iran & Insurance Operation,³⁸ which was enacted on 20 June 1971, requires that insurance in Iran must be conducted by public joint-stock companies which

³³ Personal communication from Seyed Alaeddin Sadat Rasool, *supra* note 31.

³⁴ Center for Cultural and Encyclopedia Development, *Insurance Encyclopedia* (Tehran: Insurance Research Center, 2014) at 516.

³⁵ Law of 24 May 1931 (Registration of Companies) (Iran).

³⁶ Center for Cultural and Encyclopedia Development, *supra* note 34 at 388.

³⁷ Hamidreza Izadi & Maryam Izadi, "Investigating the Relationship between Marine Insurance (Vessel and Transportation) and Economic Growth in Iran Using Self-Evaluation Model" (2012) 27:3 *Insurance Research Journal* 1 at 23.

³⁸ Act of 24 May 1971 (Establishment of Central Insurance of IR Iran and Insurance Operation) (Iran).

have been registered according to the regulations under this law and the Commercial Code. Thus, it seems that, unlike in England, individuals in Iran are not allowed to be the insurers. This is similar to Canada where only companies can act as insurers, although Canadian insurance regulators allow insurance by Lloyd's of London, which is organized as insurance syndicates comprised of individuals and insurance companies.³⁹

According to the Insurance Research Center, decisive factors in determining insurance premiums in Iran are close to those of countries like Australia, China, India, Japan, Maldives, Singapore, Switzerland, United Kingdom, and the United States.⁴⁰ The reason might be that Iranian insurers, as actors on global maritime trade, follow international coverage and conditions, namely those of the Institute of London Underwriters (ILU).

It is generally accepted that insurance is a regulated industry. One reason governments regulate insurance is because of solvency concerns. Insurance companies receive their revenues before they pay their costs. Governments are concerned that insurance companies might use too much of the monies collected as premiums from their assureds to pay very high dividends to shareholders and then not have enough free funds to be able to pay the claims in full. Hence, for solvency considerations, specific regulations are necessary to require insurance companies to maintain a certain amount of money or equivalent reserves to compensate claims if needed.⁴¹ In Iran, the main function of insurance regulation falls on the Central Insurance of IR Iran (Central Insurance). Central

³⁹ Aldo Chircop, William Moreira, Hugh Kindred & Edgar Gold (eds), *Canadian Maritime Law*, 2nded (Toronto: Irwin Law Inc., 2016) at 434.

⁴⁰ Property and Liability Insurance Research Group, *Study on Advisory Proposal Forms on Freight Insurance* (Tehran: Insurance Research Center, 2015) at 1.

⁴¹ Richard A Posner, *Economic Analysis of Law* (New York: Aspen Publishers, 2011) at 137-8.

Insurance leads the Iran insurance market by adopting regulations and directing insurance companies.⁴² The High Insurance Council is one of the subsidiaries of the Central Insurance with the duty to issue related regulations to be followed by insurance companies.⁴³

According to statistics of the Central Insurance in 2016, total premiums in Iran's insurance market rose by 1.4%, reaching 8.9 billion dollars. In this respect Iran ranked 42nd in the world, and the fifth in the Middle East in 2106. With these figures, Iran shared 0.19% of the total world market, and 13% of the Middle East market.⁴⁴ In 2016, 52,294,532 policies were issued in Iran, and 35,291,815 loss payments were made.⁴⁵

5.2.3 Marine Insurance

It has been asserted that around 12% of the total expenses of a shipping line is spent on marine insurance.⁴⁶ The figure for IRISL is about 7,000,000 USD per year.⁴⁷ However, the contribution of marine insurance to the total insurance market is relatively low.⁴⁸ Statistics from the Central Insurance are presented in two main categories: life insurance and other insurances. Although there is no specific title for marine insurance,⁴⁹ it is definitely placed in the second category. Similarly to global insurance cover, in Iran marine insurance is

⁴² Center for Cultural and Encyclopedia Development, *supra* note 34 at 389.

⁴³ *Ibid* at 400-1.

⁴⁴ Office of Planning and Development & Bureau of Statistical Analysis, *Statistical Yearbook of 1395 Insurance Industry* (Tehran: Central Insurance of IR Iran, 2016) at 53-5.

⁴⁵ *Ibid* at 77-8.

⁴⁶ Reza Razavi sayyad & Marzieh Shahrezayi, *A look at the latest changes in the maritime insurance industry* (Tehran: Islamic Republic of Iran Shipping Lines IRISL, 2014) at 3.

⁴⁷ Personal communication from Seyed Alaeddin Sadat Rasool, *supra* note 31.

⁴⁸ Center for Cultural and Encyclopedia Development, *supra* note 34 at 287.

⁴⁹ Office of Planning and Development & Bureau of Statistical Analysis, *supra* note 44 at 74.

usually divided into three categories: hull and machinery (vessel) insurance; cargo (transportation) insurance; and maritime liability.⁵⁰

Originally in Iran, the phrase ‘maritime transportation insurance’ referred to cargo insurance.⁵¹ Transportation insurance is one of the most profitable covers for insurers in Iran. However, the problem is that the rate of transportation insurance premiums is still higher than the world average rate. Central Insurance has tried to lower this rate by granting some subsidies to the industry to be more compatible with the international market.⁵² In this regard, Regulation No. 81 of the Iranian High Insurance Council on determining the premiums of the various types of insurance policies and Regulation No.8 of the Iranian High Insurance Council on insurance tariffs, are the bases of insurance contracts and rates.⁵³ Moreover, cargo insurance in Iran is done on the basis of coverage and conditions provided by the ILU Cargo Clauses, namely clauses A, B and C.⁵⁴ Consequently, one could say that the source of insurance contracts signed in Iran is the Cargo Clauses, as well as the Iranian High Insurance Council’s regulations.

Hull and machinery insurance has sometimes been considered to be the same as marine insurance in Iran’s legal literature. In recent years, some Iranian insurance companies tried to provide coverage for Iranian ships and their equipment in order to compensate for the lack of international coverage by international insurance companies. The activities of these companies are monitored by the Central Insurance and Iran Chamber

⁵⁰ Center for Cultural and Encyclopedia Development, *supra* note 34 at 287.

⁵¹ See *ibid* at 170.

⁵² H Izadi & M Izadi, *supra* note 37 at 9.

⁵³ Property and Liability Insurance Research Group, *Business Insurance Advisory Rates (2014): Property and Liability Insurance* (Tehran: Insurance Research Center, 2014) at 77.

⁵⁴ *Ibid* at 10.

of Commerce.⁵⁵ Like other insurance companies around the world, Iranian companies have tried to take advantage of the Institute Clauses prepared by the ILU and in this regard, Time Clauses 280, 284, 289, and 346 are among the most popular clauses.⁵⁶

Recently, due to economic sanctions, a few P & I clubs were established in Iran, but their success or failure is not clear yet. According to Article 1(7) of Regulations on the Establishment and Activities of Insurance Institutes in Free Trade-Industrial Zones,⁵⁷ mutual insurance clubs are the institutes that offer their service in the form of mutual insurance and only to their members. In addition to Iranian law and regulations, P & I insurance in Iran is subject to Clause 344⁵⁸ which is standard throughout the world. It has been stated that presenting this cover in some ports is obligatory for voyage permission.

When the contract of insurance is between two Iranian parties, Iranian law and jurisdiction governs the contract. The applicable law is the Insurance Law, the Act on Establishment of Central Insurance of IR Iran and Insurance Operation, and the general regulation of contracts stipulated in the Civil and Commercial Codes. There are also rules set by the High Council of Insurance that are binding on insurance contracts in Iran.

In Iran, marine insurance is a commercial rather than a civil activity. In other words, the application for marine insurance by the assured and the issuing of policy by the insurer are regarded as commercial activities and thus come under the commercial court's

⁵⁵ Reza Razavi sayyad & Marzieh Shahrezayi, *supra* note 46 at 29.

⁵⁶ *Ibid.*

⁵⁷ Regulations of 29 August 2000 (Establishment & Activities of Insurance Institutes in Free Trade-Industrial Zones) (Iran).

⁵⁸ Based on which the Underwriter agree to indemnify the assured for any sum or sums paid by the assured to any other persons by reason of the assured becoming legally liable, as owner of the vessel, for any claims, demand, damages or expanses during the period of the insurance, where such liability is in consequence of certain matters specified.

jurisdiction. In contrast, in other types of insurance, it is presumed that the assured is engaging in a civil activity.⁵⁹

In examining the statistics of the Central Insurance, it is not clear what percentage of transportation insurance and liability insurance is allocated to maritime transportation and liability of maritime carriers. There are official maritime statistics only for vessel insurance which include hull & machinery and Protection & Indemnity. As many as 5,283 policies concerning vessels were issued in 2016 and among these 338 cases resulted in compensation claims.⁶⁰

In comparison to other branches of insurance, it has been asserted that marine insurance has performed well in compensating claims and, consequently, potential Iranian assureds are not reluctant to buy policies in domestic markets.⁶¹ However, Iranian marine insurers encounter a number of serious problems in international markets. First, the insurance market is not as competitive as it should be, since the private sector is not sufficiently involved in this industry. In most developed countries, no company owns more than 25 percent of the insurance market. But in Iran, more than 50 percent of the insurance market is in the underwritten by the Iranian Insurance Company.⁶² All the shares of the Iran Insurance Company, which was founded in 1935, belong to the government.⁶³ It has been observed that the private sector has been more active in Iran's insurance industry in recent years,⁶⁴ but it is a long way from reaching international standards. Further, there are

⁵⁹ Center for Cultural and Encyclopedia Development, *supra* note 34 at 171.

⁶⁰ Office of Planning and Development & Bureau of Statistical Analysis, *Supra* note 44 at 120.

⁶¹ H Izadi & M Izadi, *supra* note 37 at 23.

⁶² Electronic Research Group, *Estimation of Optimal Number of Insurance Companies in Iran's Insurance Industry* (Tehran: Insurance Research Center, 2017) at 40.

⁶³ Center for Cultural and Encyclopedia Development, *supra* note 34 at 784.

⁶⁴ H Izadi & M Izadi, *supra* note 37 at 5.

still many sectors and investments that should be covered by marine insurance. The cycle of insurance and reinsurance is not efficient yet.⁶⁵ Therefore, not only are Iranian insurers' shares very low in the international market, they also do not play important roles in overseas insurance contracts signed by Iranian shipping lines.

5.2.4 Iranian Assureds in the International Insurance Market

As Iranian insurers are not very active in international markets, the effect of the new changes in UK law may just affect the major Iranian assureds, namely Iranian shipping lines. When the contract of insurance is between Iranian fleets and foreign insurers, English law is normally used as the convenient governing law in respective policies. Also, like many other parts of the industry around the world, English practice is of high importance.⁶⁶

For an overview of the practice, one must first observe the kinds of insurance coverage which are usually purchased by Iranian shipping lines. For the IRISL, the range of coverage includes hull & machinery insurance, protection & indemnity insurance, cargo insurance, and shipowners' Liability (SOL) Insurance⁶⁷ cover.⁶⁸ In a communication from NITC, the Commercial Director answered:

Our ships are normally covered for H&M, P&I and FD&D⁶⁹. We also provide the ships with cover for breach of warranties or additional war risk while passing the high risk areas as defined by joint war committee of London plus K&R (Kidnap

⁶⁵ Ibid at 24.

⁶⁶ Personal communication from Seyed Alaeddin Sadat Rasool, *supra* note 31; Personal communication from Captain Shahram Farahbod, *supra* note 32.

⁶⁷ If a vessel has to drydock with cargo on board, the Bill of Lading may be frustrated and the shipowner will lose P&I cover. SOL insurance covers this additional exposure. This exposure also applies if a cargo has to be transhipped, stored, or lightered. In these cases, the defence under the bill of lading is frustrated and P&I cover is lost. The potential liability is the value of the cargo declared.

⁶⁸ Personal communication from Seyed Alaeddin Sadat Rasool, *supra* note 31.

⁶⁹ This insurance, often referred to as "FD&D" or simply "Defense," provides members with cover for claims handling assistance and for legal costs in relation to a wide range of disputes. Such disputes are outside the scope of P&I or H&M insurance and arise from the building, buying, selling, owning or operation of an entered vessel.

and Ransom)... In general to decide on the type and scope of the insurance cover required for any fleet one should make a full Risk Assessment to identify the risks exposed to and then manage the risk by transferring those that could not be absorbed to the insurance market.⁷⁰

As stated in Chapter 1, the ILU which later became the IUA is one of the most important actors in marine insurance and that has always been active in developing marine insurance clauses. Its 1983 Clauses are the basis of the majority of marine insurance policies for Iranian shipping lines.

It seems that hull and machinery insurance cover of the Iranian shipping line is mainly based on the Institute Time Clauses - Hull 280, which is the most commonly used model clause by ship owners. Clauses - Hull 280 is a well-known clause for major Iranian assureds because it bears the least ambiguity in wording.⁷¹ Other clauses, such as the institute additional perils clause (CL294), institute time clauses - hulls, disbursement and increased value (CL 294), institute war and strikes clauses hull (CL 281) and many other clauses are also incorporated into the policy to ensure the integrity and full coverage of the insurance against all probable risks the ship is exposed to.⁷²

However, it should be noted that the above-mentioned clauses are just basic formats that can be tailored to suit the specific needs of the owners.⁷³ Consequently, they are usually changed to meet the Iran's shipping lines' needs more efficiently. According to the NITC Commercial Director:

As it is the case for any other type of contracts, the interested parties, i.e., the assured and the insurer may agree to amend or add articles within each clause which would obviously be of effect on the level of premium, e.g., the RDC (Running Down Clause) has been excluded from our H&M cover and has been added to our P&I cover. This is due to the fact that first of all, in case any security

⁷⁰ Personal communication from Captain Shahram Farahbod, *supra* note 32.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid.*

is demanded by the colliding vessel's interest, it can be more easily provided by the P&I rather than hull underwriter and besides the level of deductibles of P&I are usually less than that of the hull. Another example is a General Average Absorption Clause which is also incorporated in our policy. Such Clauses play a vital part in reducing the number of small, uneconomic collections from cargo interests by allowing the Assured to recover General Average in full under the Hull Policy, up to a specified limit.⁷⁴

In addition, in international trade there is also another source of law for Iranian shipping lines:

...the reference is made to various conventions Iran has accepted and entered in. No need to mention that these conventions affect and are related to insurance coverage we may obtain from P&I clubs. The example of these conventions are 'Convention on Limitation of Liability for Maritime Claims'⁷⁵, 'International Convention on Civil Liability for Oil Pollution Damage'⁷⁶, 'International Convention on Civil Liability for Bunker Oil Pollution Damage'⁷⁷, etc.⁷⁸

Finally, it should be mentioned that Iran's shipping lines prefer London Arbitration in case legal disputes arising out of the contracts.⁷⁹ They believe the arbitration process is faster and easier. More importantly, they have achieved better results via arbitration in comparison to the courts.⁸⁰ Obviously, as there is no specific legal text on marine insurance in Iran, Iranian judicial precedent is not the case.

It is difficult to predict the potential effects of the IA 2015 new changes on the Institute Clauses and it is even more difficult to evaluate the influence of that Act on Iran's shipping lines. According to the NITC Commercial Director:

As you know, English law operates completely different compared to our legal system. To explain, their system of common law grants a considerable amount of

⁷⁴ *Ibid.*

⁷⁵ *Convention on limitation of liability for maritime claims*, 19 November 1976, 1456 UNTS 24635 (entered into force 1 December 1986).

⁷⁶ *International Convention on Civil Liability for Oil Pollution Damage*, 29 November 1969, 973 UNTS 14097 (entered into force 19 June 1975).

⁷⁷ *International Convention on Civil Liability for Bunker Oil Pollution Damage*, 23 March 2001, UKTS 47 (entered into force 21 November 2008) [BUNKER].

⁷⁸ Personal communication from Captain Shahram Farahbod, *supra* note 32.

⁷⁹ Personal communication from Seyed Alaeddin Sadat Rasool, *supra* note 31; Personal communication from Captain Shahram Farahbod, *supra* note 32.

⁸⁰ *Ibid.*

power and authority to the courts whose decisions are considered as precedent to be followed by other courts till the next prominent award by another court. Considering this procedure, there are limited areas in the English legal system which, apart from courts' awards, have specific law and regulations for and insurance is one of these areas. Insurance law has been unchanged for about 100 years till the year 2015 when the Insurance Act 2015 amended some aspects of the Marine Insurance Act 1906. These aspects are nothing but the issues that arose during this one century, and which the courts found necessary to change. Concerning the general attitude of the insurance industry, which is for the benefit of the Insured, no doubt, the said amendments have considered and tried to improve the issues found to have been unfavorable to the Insured during the years.

In respect of the potential effect of the changes to Insurance Law, I believe, the ITC clauses [Institute Time Clauses] shall not be affected by these amendments other than the interpretation of these clauses, for instance, in respect of the effect of the breach of warranties to the insured.⁸¹

It has been stated that the London insurance market has provided some new clauses with regard to the IA 2015. The Lloyd's Market Association (LMA) published 18 clauses, five of which were on ways of contracting out of the IA 2015 provisions. It seems that these clauses will be popular among marine insurers.⁸² However, the point is that due to the changes in UK law, shipping lines have to cope with the more updated clauses. To do so, Iran's shipping lines may encounter more problems since, as stated above, they did not absorb the updated clauses, like the 1995 or 2003 versions, before the law reforms, and they still feel more comfortable with the 1983 Clauses.

5.3 Next Steps

The Insurance Act 2015 has introduced a number of changes in the way insurance contracts are bought and sold, and the way disputes are settled. It is a new scheme for commercial insurance. The assured is more likely to benefit from the new regime, since the insurer's

⁸¹ Personal communication from Captain Shahram Farahbod, *supra* note 32.

⁸² Clarke & Soyer, *supra* note 1 at 95.

ability to refuse the claim is limited, a proportional remedy is introduced, and the harsh impact of some of the warranties is balanced.

The MIA 1906 was in favour of the insurer. At that time, the idea was that the assured had considerable knowledge about his business and, therefore, the law should protect the insurer against loss. Therefore, in the situation where the assured had breached an obligation, the insurer had a wide range of opportunities, including avoiding the contract, refusing all the claims, and being discharged from liability, most of which might not correspond with the assured's wrongdoing.⁸³ Such a view may, possibly, have come from the doctrine of 'deviation' in the early stages of the insurance industry. According to this doctrine, if the assured does something that raises the risk of the insurer, the insurer can be exempted from his duties under the contract. This used to be mainly justified by 'moral hazard', that is, lack of a significant incentive to guard against risk where one is protected from its consequences by insurance. By expanding the insurance market the risk pool was large enough that there was no need to impose the risk of a change on the assured. Indeed, insurers were able to compensate for an increase in one policy's risk by decreasing another risk at the same time. Thus, the doctrine of deviations gradually faded due to the change in the economics of the insurance market.⁸⁴ However, the tendency to support the insurer affected the MIA 1906.

It seems the primary goal of the IA 2015 is to create a balance between the interests of assureds and insurers. Thus, unlike previous attempts to reform the law, the last work of the Law Commissions was to address the problems encountered by assureds. According to

⁸³ Law Commissions Report, *supra* note 20 at 3.

⁸⁴ Posner, *supra* note 41 at 135-6.

the Law Commissions, there was evidence from UK businesses that the previous law had increased insurance disputes.⁸⁵ Consequently, reforms were designed to provide a regime that meets the basic needs of both parties to the contract.⁸⁶

Outside the consumer market, however, parties may still be able to negotiate for less advantageous terms if they wish.⁸⁷ Although, such terms should be brought to the buyer's attention, it has been argued that contracting out of the provisions of IA 2015 has the potential to erode the positive features of the reform. In fact, the Law Commissions included 'contracting out provisions' to persuade the insurance industry not to abandon the draft bill as the most comprehensive reform since 1906.⁸⁸ In other words, the Law Commissions had to adopt a pragmatic approach. They wanted a uniform application of IA 2015 to ensure its enactment. It was a political compromise to curtail opposition against the reform in the market. The Law Commissions had to consider the concerns of powerful insurers who had the power to prevent IA 2015 from being enacted or implemented. In that case, no assured would benefit from the reform.⁸⁹

The Law Commissions recommended that courts make a distinction between small enterprises which buy insurance online or through non-specialist brokers, and large sophisticated companies that have the ability to negotiate the wording of the policies.⁹⁰ The former are much like consumers with very limited ability to negotiate in order to obtain better terms. So, they should be given support "to make an informed decision (with or

⁸⁵ Law Commissions Report, *supra* note 20 at 4.

⁸⁶ *Ibid.*

⁸⁷ *Ibid* at 13.

⁸⁸ Clarke & Soyer, *supra* note 1 at 94-95.

⁸⁹ *Ibid* at 96.

⁹⁰ *Ibid* at 94-95.

without the aid of a broker) about whether to agree to the alternative position, to negotiate for the default position or to seek an alternative insurance provider”.⁹¹ Therefore, the typical clauses which enable the routine contracting out of the Act are against the will of the Law Commissions. With regard to the sophisticated insurance market, however, the Law Commissions accepted that freedom of contract is one of the inevitable parts of the UK insurance market.⁹²

In the process of Parliamentary debates, the British Government predicted that there would be no “pent-up demand for wide-spread contracting out”.⁹³ It will take time to verify this. But the argument against sections 16 and 17 on contracting out of the provisions of IA 2015 is that the wide liberty derived from these sections threatens one of the main goals of enacting IA 2015, namely a better balance of interests between policyholders and insurers. In fact, contracting out of the provisions is likely to work against the reform, as it allows the insurer to retain the former law.⁹⁴

Facing such a problem, some major assureds, like Iranian shipping lines, may wish to opt for choosing their own national law as governing law. It should be noted that since the second half of the 20th century, some developing countries that had found the existing legal regime economically disadvantageous to them as assureds, started to develop local marine insurance regimes and policies.⁹⁵ However, due to the complicated nature of marine insurance, domestic laws in most of these countries could not find their places in international transactions. In Iran, as stated, despite the imposition of Article 191 of its

⁹¹ Law Commissions Report, *supra* note 20 at 307-308.

⁹² *Ibid* at 307-8.

⁹³ Clarke & Soyer, *supra* note 1 at 95.

⁹⁴ *Ibid* at 96.

⁹⁵ UNCTAD, *Marine Insurance Contract*, *supra* note 2 at 41.

Maritime Law requiring that a marine insurance act should be enacted and enforced, this did not occur and no legislation with the subject of marine insurance has passed through Parliament. Consequently, the Iran Insurance Law, Commercial Code and Civil Code govern all types of insurance, including marine insurance. These laws have no specific provision for marine insurance, but contain only general insurance rules. Facing such a situation, policies which are underwritten under the governance of Iranian law should contain a variety of contractual terms and conditions based on international marine insurance customs to fill the legal gaps. In contrast, the UK MIA 1906 was codified out of two centuries of practice and, therefore, policies underwritten under it do not have to repeat common marine insurance provisions.

Even if it is unlikely that many international insurers would accept the prospective Iranian marine insurance law as a convenient law, the existence of an efficient national law will provide the Iranian shipping lines with more options for their different activities. In addition, such a law could be a good model for Iranian insurers who wish to find a place in the international market in the years to come.

Furthermore, in the common law, marine insurance, like the other areas of commercial law, has always been based on contractual principles which are regularly refined by the courts. The role of legislation in the common law is includes consolidation of principles underlying regulatory structures, frequently in favour of consumers.⁹⁶ Unlike

⁹⁶ D Rhidian Thomas, *The Modern Law of Marine Insurance* (New York: Informa Law from Routledge, 2016) at 1.

the common law, civil law judges rely on existing codes containing general rules and principles which are obligatory, provide guidance in their interpretation.⁹⁷

Moreover, it is admitted that the IA 2105 will affect methods of underwriting and claim-handling practices. As stated in Chapters 2 and 3, some parts of the international market may evade the impact of the new changes. Although it is highly unlikely that the international market would put aside UK law entirely, the IA 2015 will probably face some challenges during its implementation and enforcement. In this regard, Iranian shipping lines or insurers may find some parts of the new changes undesirable. Having a reliable national marine insurance law can provide them with more options in the international market. It should be noted that unless the Iranian government enacts a modern Marine Insurance Act, neither foreign insurers nor Iranian shipping lines would resort to a jurisdiction which has no specific provisions regarding marine insurance.

Therefore, to have more effective participation in international trade, Iran should enact a Marine Insurance Act. Such a law should take advantage of the experience of other jurisdictions in its own codification of this area. In this way, a hundred-year English experience, from the beginning of the 20th century provides an excellent example for Iranian legislators to learn from and to utilize in crafting an effective legislation to enhance both efficiency and equity for parties to the marine insurance contract.

On the other hand, although some modern issues, like information technology, have been introduced to the statutory area by the Law Commissions, so high is the pace of change in this field that it is likely that the related concepts and their respective expressions

⁹⁷ *Ibid.*

would become old-fashioned much sooner than what occurred to the MIA 1906. This probability can be said to be a common problem for all codifications.⁹⁸ Therefore, being a part of international initiatives regarding supplementary methods (discussed in Chapter 3) could be a prudent decision to monitor the domestic laws, including IA 2015 and a prospective Iranian marine insurance law to ensure they are constantly up to date.

It is noteworthy that in the process of British marine insurance reform, the influence of other jurisdictions could be observed, including that of Europe, Australia, and New Zealand, on some new ideas, like proportionate remedies contained in the first Schedule of IA 2015.⁹⁹ It shows that nowadays, no domestic legislation, however well-established, could entirely depend on local practice for its efficiency. This is another reason for the idea that, not only is there an urgent need to enact a functional law, but also that such a law should be in constant interaction with other jurisdictions and the international market. Supplementary methods, as explained in Chapter 3, provide national jurisdictions with this great opportunity.

In the end, it could be said that every attempt at harmonization of marine insurance law, which includes identification of the areas of difference among various countries, is worthy whether a measure of legislative harmonization would be feasible or not. This is because, at least, such a study could help to enhance knowledge and to understand differences in marine insurance regulation and development.¹⁰⁰

⁹⁸ Clarke & Soyer, *supra* note 1 at 114.

⁹⁹ *Ibid* at 107.

¹⁰⁰ Malcolm Clarke, “An Interim Discussion Paper on Alteration of Risk” (2003) *Comite Maritime International Year Book* 500 at 501.

CHAPTER 6:

CONCLUSION

The Insurance Act, 2015 (IA 2105) amended the Marine Insurance Act, 1906 (MIA 1906) and made significant changes to United Kingdom marine insurance law as it had been interpreted and practiced for more than a century. This thesis examined the potential effects of this change in UK marine insurance law and practice first on international uniformity in marine insurance and second, on countries like Iran, which do not have a well-developed home-grown marine insurance law and practice, and which have been relying upon the practices articulated in MIA 1906.

Generally, any change in UK marine insurance law and practice is very important for other jurisdictions. The historical evolution of maritime law and practice in England introduced London as the leading marine insurance market throughout the 18th and 19th centuries. Naturally, as other legal systems tended to follow the central market, the MIA) 1906 became the legislative model for marine insurance practice in the rest of the world. However, toward the end of the 20th century, MIA 1906 was no longer adequate for the more complicated demands of the market which were so different from those of 1906. Putting aside the traditional Lloyd's SG clauses after nearly 200 years, and with the start of domestic law reforms in countries that used to follow English law, and given the efforts of international organizations to create universal marine insurance programs, it became clear that the MIA 1906 could no longer serve the industry in the new century.

The reforms created by IA 2015 include: the duty on a business policyholder to give information to the insurer before taking out insurance (fair presentation); the concept

of good faith; insurance warranties; the insurer's remedies for fraudulent claims; and damages for the late payment of claims. The late payment issues were enacted within the Enterprise Act, 2016. Apparently, by adopting new strategies for fair presentation, warranties, fraudulent claims, and late payment, the new law is intended to affect methods of underwriting and claim-handling practices. Many concepts, like the way of disclosure, good faith, inducement, materiality, the effect of warranties, proportionality, and remedies, have changed in favour of the assureds. However, in comparison with Consumer Insurance (Disclosure and Representations) Act 2012 (CIDRA) which is a revolution in consumer insurance, the IA 2015 is an incremental or evolutionary reform legislation. Regarding the duty of fair presentation, much of MIA 1906 has remained unchanged, including the test of fairness and materiality which are still objective and the inducement of the insurer which is still subjective. Also, the IA 2015 cannot be considered revolutionary as it allows widespread contracting out. However, in relation to the remedies, the IA 2015 is an important progress as the new remedies are more flexible and reasonable.¹ Meanwhile, the Law Commissions did not include litigation-sensitive concepts, such as fairness and reasonableness. Doing so would have caused long litigation, and would have given insurers great opportunity to judicially redraft the respective parts of the law.² Nonetheless, potentially, in a short period of time, some of the new concepts of the IA 2015 will be subject to litigation to make them clearer. But in the long run, the new language of the Act, specifically the provisions on remedies, will find its place.³

¹ Malcolm Clarke & Baris Soyer, *The Insurance Act 2015: A New Regime for Commercial and Marine Insurance Law* (New York: Informa Law from Routledge, 2016) at 122.

² *Ibid* at 96.

³ *Ibid* at 122.

The role of insurance in other businesses shows that uniformity is a must in marine insurance law. Uniformity is achieved where the whole industry, including insurers and assureds, have a common language for marine insurance contracts and, therefore, rights and duties would be clear, certain and predictable. Lack of uniformity causes insurers, assureds, and judges to not carry out their functions efficiently and confidently. Uncertainty induces higher premiums and, thus, increased insurance costs, while insurance quality decreases as it is less likely that the assured will recover in the case of damage or loss. Consequently, litigation is more likely to be resorted to resolve disputes which, in turn, entail further costs. That is why the impact of the new changes on marine insurance uniformity must continue to be monitored and studied.

In the absence of a public international law solution, such as a convention or treaty, uniformity in marine insurance has been achieved by virtue of a national legal system. The English regime has acted as the *de facto* international regime because of the following reasons. First, a huge number of international policies are being written, having the English law as the applicable law for the contract and the convenient law of dispute resolution. Second, many countries have adopted English law as a legislative model and transplant. However, similar to the MIA 1906 which was subject to a lot of criticism in terms of its ability to create the desirable international uniformity, IA 2015 is also likely to experience serious challenges in the coming years. As it has been proven that marine insurance is not an area for a public international law program, this thesis suggests making the IA 2015 more international by virtue of supplementary internationally accepted initiatives. The hope is that these would serve the international market more efficiently. In other words, there is a vital need to resort to supplementary techniques like model laws, guidelines, and

a standard set of contract rules to make the English law more desirable, reliable, and flexible. Only in this way could a higher level of uniformity be achieved with the active participation of developing states which had no important part in the emergence of modern marine insurance law and practice.

The impact of the law reforms in the UK on Iran contended with the fact that there is no formal marine insurance law in Iran, nor any legislation on the subject of marine insurance. Resort was, therefore, to the old Iran Insurance Law and the general rules of contract law articulated under the Civil Code and the Commercial Code. The comparative assessment disclosed, however, that Iran's body of law in this area is more in harmony with the IA 2015 in terms of the concepts of proportionality and warranties, than with the MIA 1906. In practice, in Iran, the effect of UK law will be felt by Iranian shipping lines which are in constant commercial relations with the international insurance market. In policies signed between Iranian fleets and foreign insurers, it is English law that is normally used as the convenient law. Also, like many other parts of the industry around the world, English practice is of high importance. The IA 2015 is aimed at creating more balance between the interests of assureds and insurers by introducing the notion of proportionality in remedies, limitation of the insurer's power in refusing claims, and balancing the impact of warranty breaches. Consequently, the assureds, including Iranian shipping lines, are more likely to benefit from the new regime. However, there is always the possibility that less advantageous terms may be imposed by insurers by virtue of the possibility of contracting out of IA 2015. This has the potential to ignore the positive features of the reform encoded in the Act.

From the viewpoint of Iranian legislation, it is essential for Iran to enact a special law on marine insurance. First, as a civil law country, there is a vital need for a special legislation on whose general rules and principles courts can rely, at least in relation to domestic transactions. Second, the existence of an efficient national law will provide shipping lines with more options in their different activities, despite the fact that probably, many international insurers prefer UK law and practice.

In the end, for a more effective participation in international trade, Iran should enact a marine insurance law. Such a legislation should take advantage of the codification experiences of other jurisdictions. In this way, England's hundred-year experience from 1906-2015 could serve as the template for Iranian legislators to draw and build upon. Overall, as discussed in Chapter 3, the universal initiatives could assist developing countries like Iran to constantly update their marine insurance legislations to be both efficient and equal for the parties to marine insurance contract.

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