The Shipping Law Review

Tenth Edition

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PREFACE

The aim of the tenth edition of this book is to provide those involved in handling shipping disputes with an overview of the key issues relevant to multiple jurisdictions. As with previous editions of *The Shipping Law Review*, we begin with cross-jurisdictional chapters looking at the latest developments in important areas for the shipping industry, including international trade sanctions, ocean logistics, offshore, piracy, shipbuilding, ports and terminals, marine insurance, environmental and regulatory issues, decommissioning and ship finance.

We have invited contributions on the law of leading maritime nations, including both major flag states and the countries in which most shipping companies are located. We also include chapters on the law of the major shipbuilding centres and a range of other jurisdictions.

Each of these jurisdictional chapters gives an overview of the procedures for handling shipping disputes, including arbitration, court litigation and any alternative dispute resolution mechanisms. Jurisdiction, enforcement and limitation periods are all covered, as are the key provisions of local law in relation to shipbuilding contracts, contracts of carriage and cargo claims.

In addition, the authors address limitation of liability, including which parties can limit, which claims are subject to limitation and the circumstances in which the limits can be broken. Ship arrest procedure, which ships may be arrested, security and counter-security requirements, and the potential for wrongful arrest claims are also included. The authors review the vessel safety regimes in force in their respective countries, along with port state control and the operation of both registration and classification locally. The applicable environmental legislation in each jurisdiction is explained, as are the local rules in respect of collisions, wreck removal, salvage and recycling. Passenger and seafarer rights are also examined. The authors have then looked ahead and commented on what they believe are likely to be the most important developments in their jurisdiction in the coming year.

The shipping industry continues to be one of the most significant sectors worldwide, with the United Nations Conference on Trade and Development estimating that the operation of merchant ships contributes about US$380 billion in freight rates to the global economy, amounting to about 5 per cent of global trade overall. The significance of maritime logistics in facilitating trade and development has become increasingly apparent in the past year. Heightened and unstable freight rates, port closures, congestion and evolving shipping requirements as a result of covid-19 and the Ukraine conflict have all had far reaching effects beyond the shipping sector itself. As the international shipping industry is responsible for the carriage of over 80 per cent of world trade, with over 50,000 merchant ships trading internationally, the elevated shipping expenses and challenges to global logistics we have experienced this year have exacerbated inflation and supply chain disruptions, adding to the ongoing global crisis and hampering the maritime industry's covid-19 recovery. We have seen global maritime trade, which plunged by approximately 4 per cent in 2020, recover at an estimated rate of 3.2 per cent. In 2021, shipments reached 11 billion tonnes, a value slightly below pre-pandemic levels.

The disruption caused by the pandemic and the war in Ukraine have brought to the fore the importance of the maritime industry and our dependence on ships to transport supplies. The law of shipping remains as interesting as the sector itself, and the contributions to this book continue to reflect that.

We would like to thank all the contributors for their assistance in producing this edition of *The Shipping Law Review*. We hope this volume will continue to provide a useful source of information for those in the industry handling cross-jurisdictional shipping disputes.

Andrew Chamberlain, Holly Colaço and Richard Neylon
HFW
London
May 2023

Chapter 8

MARINE INSURANCE

Jonathan Bruce, Alex Kemp and Jenny Salmon[1]

I INTRODUCTION

Marine insurance was one of the first insurances contemplated by merchants when international trade began. As a hub for international trade across the globe since the 1600s, England has a long and distinguished history as a centre for insurance excellence. During that time, various new classes of insurance have arisen, but marine insurance, from an English law perspective, still maintains its pre-eminence and historical importance in giving us many of the principles that guide insurance law today.

Although the beginnings of a marine insurance market in London can be traced back to the late 1600s, it was not until the 1720s that the institution of Lloyd's became a significant influence on the insurance market as we would recognise it today. Synonymous with insurance of all classes, the Lloyd's brand has permeated every corner of the globe. When considering the role that Lloyd's plays in the global marine insurance market, it is important to remember that Lloyd's itself is not a company: it is a market in which members come together as syndicates to insure risk.[2]

Lloyd's can be considered as consisting of two parts: the Market (which, as at 31 December 2020, was home to 50 managing agents and 76 syndicates) and the Corporation of Lloyd's. The Corporation oversees the Market, provides the Market's infrastructure, including services to support its efficient running, and protects and maintains its reputation.[3] The Lloyd's Market effectively provides a place at which underwriters (acting together in syndicates) can sell their insurance products to those wishing to buy them. It is a very dynamic and commercial environment where those looking for insurance are able to talk directly to the decision makers at each syndicate, and negotiate with them as to the terms of cover and the premium that will be paid for the risk in question. Competing quotes and alternative terms can be obtained from competing syndicates by simply crossing the floor and talking to another underwriter.

In November 2018, Lloyd's began a new chapter in its history by opening Lloyd's Insurance Company SA (also known as Lloyd's Europe and Lloyd's Brussels), a Europe-wide operation authorised and regulated by the National Bank of Belgium and regulated by the Financial Services and Markets Authority.[4] This permits it to underwrite non-life European business now that the United Kingdom has left the European Union. Lloyd's Europe is a

1 Jonathan Bruce and Alex Kemp are partners and Jenny Salmon is a senior associate at HFW. The information in this chapter was accurate as at May 2022.
2 www.lloyds.com.
3 https://www.lloyds.com/about-lloyds/what-is-lloyds/lloyds-market (data as at 1 April 2022).
4 https://lloydseurope.com/about/.

subsidiary of Lloyd's of London and has 17 branches in the European Union and one in the United Kingdom. In November 2020, the High Court of England and Wales[5] approved an insurance business transfer scheme, the purpose of which was to avoid disruption of service to policyholders within the European Economic Area (EEA) whose policies were not written by Lloyd's Europe. Pursuant to the scheme, with effect from 30 December 2020, the policies underwritten at Lloyd's between 1993 and 2020 (inclusive) and that have a risk situated or a policyholder resident in the EEA were transferred to Lloyd's Europe. The intention is to allow the transferring policies to be serviced and paid by Lloyd's Europe without the members of the various Lloyd's syndicates breaching any legal or regulatory insurance authorisation requirements in the EEA after the end of the Brexit transition period.

Anyone wanting to place risk at the Lloyd's Market needs to do so via an approved Lloyd's broker. The broker acts as the customer's agent and is the main source for much of the business placed in the Market. The broker has experience in dealing with a multitude of underwriters and can use that experience to place a client's risk with an underwriter best suited to write it, and on the best terms. Brokers are integral to the way in which the Market provides a competitive environment for the placing of risk.

However, the marine insurance market in London does not stop with Lloyd's. There are many corporate underwriters who do not write their risk through the Lloyd's Market. These are stand-alone companies that will write risk either with other companies or in conjunction with Lloyd's syndicates.

Lloyd's syndicates and company insurers can group together to write particular 'lines' on an insurance policy (i.e., a variety of insurers and syndicates can each agree to underwrite a proportion of the risk being insured in return for a proportion of the premium). Those insurers who have subscribed to the policy will then agree between them who will 'lead' the policy in terms of claims management.

Given the extensive history of the English marine insurance market, there are a considerable number of English judicial decisions on matters of marine insurance dating back several hundred years. Although England is still a common law legal system (i.e., the law is applied and developed by the courts via a binding system of precedent), the law of marine insurance was codified in 1906 by the Marine Insurance Act, which for many years was the touchstone not only of marine insurance but of insurance law in general. It has had substantial influence internationally and has been adopted in several Commonwealth Member States. However, the legislative landscape for insurance law in England, Wales and Scotland changed significantly when, following a long period of consultation by the Law Commission and the Scottish Law Commission, the Insurance Act 2015 came into force on 12 August 2016. Because that Act only applies to contracts and contract variations entered into after 12 August 2016, claims arising from policies written before 12 August 2016 are governed by the old law (and these are still going through the courts). However, many of the provisions of the Marine Insurance Act 1906 relating purely to marine insurance were unaffected by the Insurance Act 2015 and remain in force. Furthermore, some policies contract out of all or part of the Insurance Act 2015 or specify that the Marine Insurance Act 1906 is to apply instead. We therefore deal with both regimes in this chapter.

In addition to the legislative framework, it can still be necessary to consider judicial precedents (known as case law) dating from before 1906 – some case law before this time allows identification of the principles behind the legislation or deals with elements that have

5 *Society of Lloyd's, Re (Part VII of the Financial Services and Markets Act 2000)* [2020] EWHC 3266 (Ch).

not been codified. Since 1906, case law has continued to develop as new issues of interpretation and application of the Marine Insurance Act 1906, more recently the Insurance Act 2015, and other new points of marine insurance law arise, and the highly experienced Commercial Court in London issues judgments on marine insurance disputes and will continue to do so.

The English marine insurance market has also been an international leader in producing standard form terms for the provision of marine insurance. The International Underwriting Association (previously the Institute of London Underwriters) has been instrumental in producing terms and conditions for many types of marine insurance; the most famous of these are the Institute Time Clauses and the Institute Voyage Clauses. The most popular iteration of the Institute Time Clauses is the 1983 revision (they were subsequently revised again in 1995). These Clauses are used around the world in many jurisdictions, regardless of the domicile of the underwriters. Crucially, they are stated to be subject to English law and practice.

One of the most common forms of marine insurance placed in the London market is hull and machinery insurance. The Institute Time Clauses – Hulls 1983 (the 1983 Clauses) adopt a named perils approach that is usual under English law (though we note that Institute Cargo Clauses A (but not B and C) operate an 'all-risks' approach). The perils that are covered by the policy are listed in Clause 6 and are broadly split into two categories: the first allows recovery simply where the loss is caused by one of the specified insured perils, and the second limits recovery where the loss is caused by a specified peril and where the loss or damage has not resulted from want of due diligence by the assured, owners or managers. This latter category of perils is set out in a clause known as the *Inchmaree* Clause and was included in the 1983 Clauses as a result of a judgment in a case of the same name.[6] The *Inchmaree* Clause seeks to widen the cover and includes, for example, the negligence of a ship's master, officers, crew or pilots. The 1983 Clauses then subject the enumerated cover to various exclusions, in Clauses 8, 23, 24, 25 and 26. The 1995 revision to the Institute Time Clauses – Hulls introduced a widening of the *Inchmaree* Clause such that the want of due diligence was extended to cover acts by the 'superintendents or any of their onshore management', as well as the assured, owners or managers.

Cover under the Institute War and Strikes Clause (Hulls-Time) interacts with that under the 1983 Clauses. They widen the enumerated perils at Clause 6 of the 1983 Clauses to include the war perils and amend the exceptions in the 1983 Clauses so that they now exclude the same. This still does not result in an all-risks policy, but one with named perils.

An assured may also wish to take out insurance for other potential losses that it may suffer. For example, the Institute Time Clauses – Hulls, Disbursements and Increased Value 1983 provide cover for an insured party in the event that its hull and machinery insurance does not adequately compensate for the loss of a vessel at market rates in the event of a total loss.

As matters stand, an assured would not usually be indemnified by his or her insurer for any loss of hire or freight that he or she suffers as a result of an insured loss. On large modern vessels, such losses can be extensive, so bespoke loss of hire insurance is often attractive.

Finally, during the Somali piracy epidemic in particular, there was an uptake in kidnap and ransom insurance. These policies pay out the costs of securing a vessel's release from detention by pirates as a priority, and often also facilitate the provision of expert assistance in crisis management and hostage negotiation.

6 *Thames & Mersey Mar Ins Co Ltd v. Hamilton, Fraser & Co (The 'Inchmaree')* (1887) 12 App Cas 484.

II CLAIMS

The first step in obtaining a marine insurance policy is an assured instructing its broker to secure cover for a particular class of risk. It may be that there are several brokers in the chain. A local broker in a jurisdiction where the assured is based may need to refer the work to a London broker for placement at Lloyd's. It should always be noted that the broker is the agent of the assured to whom he or she owes both contractual and fiduciary duties under English law.

When the broker is first approached by the client, he or she will need to consider the precise insurance needs of that client before approaching insurers either in the Lloyd's Market or the companies market to ascertain the price, terms and conditions on which cover can be procured. In weighing up a choice between competing insurers, the broker will consider their claims-handling expertise and who the 'following' subscribers to the policy will be. Once the broker has identified the best compromise between price, terms and expertise of underwriters, he or she will confirm the policy in writing to the assured.

Brokers are crucial cogs in the wheel of a marine insurance policy, both in terms of placing the risk and managing claims. It is likely that a broker will have the closest relationship with the assured and will be the assured's first point of contact should a claim ever arise. He or she will be able to provide immediate advice in the event of a claim, and guide the assured on the best way to present that claim to the insurers. He or she will provide reassurance to insured parties that their claims are being managed correctly and will ensure that underwriters receive all the information they need to pay any claims. This is where the Lloyd's Market comes into its own, and the face-to-face interaction between the decision makers at the insurer and the brokers can be hugely important. This personal interaction is a feature that is unique to the Lloyd's Market.

In the event of a serious marine casualty, the broker's role can become even more important. He or she can provide the assured with assistance in appointing experts, appointing suitable lawyers, and possibly dealing with issues of security for claims that may be brought against the owners. An owner is unlikely to have had a large number of casualties, and therefore the broker's experience can prove very useful.

Problems can arise with issues of coverage, such as when an assured tries to recover certain losses under its policy that are refused by the underwriters on the basis that they are not claims for which they have agreed to indemnify the assured. The broker will work hard to try to avoid these situations ever arising but, unfortunately, they do occasionally happen. If such coverage disputes do arise, the broker has to have in mind his or her role as the agent of the assured and will provide support to the owner in pursuing the insurers for the claim.

III KEY LEGAL PRINCIPLES OF ENGLISH MARINE INSURANCE UNDER THE MARINE INSURANCE ACT 1906

i Duty of utmost good faith

The general principle of the duty of utmost good faith is laid out in Section 17[7] of the Marine Insurance Act 1906, which provides that: 'A contract of marine insurance is a contract based upon utmost good faith and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.' This has the same practical effect as rescinding

7 Now substantially omitted by Sections 14(3)(a) and 23(2) of the Insurance Act 2015.

the contract (i.e., the aggrieved party can nullify the contract so that everything done is liable to be undone, so no losses are paid by the insurer and the premium is returned to the assured). The duty of utmost good faith is reciprocal but is often less relevant to the insurer than the assured, who is much better informed about the subject matter to be insured.

The Marine Insurance Act 1906 placed a positive duty on the assured to disclose material information to the insurer prior to the contract being concluded. This is a reflection of the asymmetry of information between the insurer and the would-be assured; however, under Section 18(3),[8] it is not required to disclose any circumstance:

a that diminishes the risk;

b that is known or presumed to be known to the insurer;[9]

c in which information is waived by the insurer; and

d that it is superfluous to disclose by reason of express or implied warranty.

Section 20 of the Marine Insurance Act 1906 provides that any material representation made by the assured or its agent to the insurer during negotiations for the contract, and before the contract is concluded, must be true. If it is untrue, the insurer may avoid the contract. A representation is material when it would influence the judgement of a prudent insurer in fixing the premium, or determining whether or on what terms it will take the risk.

If an assured or his or her agent makes a statement of fact (or of opinion if it is made by someone with expertise in the matter) and this representation is false and has induced the resulting transaction, then this can result in rescission (the unwinding of the contract), regardless of whether the misrepresentation is fraudulent, or negligent or innocent.

Non-disclosure is essentially a lack of good faith through inaction and applies before the contract comes into effect. Failure to disclose a material circumstance known to the assured allows the insurer to avoid the policy.

ii Warranties

When coupled with the principle of utmost good faith, warranties are onerous obligations on the assured of a marine insurance policy. Section 33 of the Marine Insurance Act 1906 states that a warranty means a promissory warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby the assured affirms or negates the existence of a particular state of facts.

Under Section 34,[10] it is no defence if a breach of warranty is subsequently remedied before the loss in question has occurred.

In the event of non-compliance with a warranty, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred before that date.[11] The effect of Section 33(3) is strict and applies irrespective of whether the breach of the warranty in question was the cause of the loss being claimed.[12]

8 id.

9 The insurer is presumed to know matters of common notoriety and knowledge, and matters that an insurer in the ordinary course of its business, as such, ought to know.

10 Now omitted by Sections 10(7)(b) and 23(2) of the Insurance Act 2015.

11 See Section 33(3) of the Marine Insurance Act 1906.

12 *De Hahn v. Hartley* (1786) 1 Term Rep 343 99 ER 1130; the Insurance Conduct of Business rules provide special exceptions for consumer insurance. Now omitted by virtue of Sections 10(7)(a) and 23(2) of the Insurance Act 2015, although the remaining provisions of Section 33 are still in force.

Although the parties are free to narrow the scope and application of warranties by amending the wording in the policy, in the absence of such steps, the insurer is entitled to construe warranties strictly. If the insurer wishes to allege breach of a warranty, the burden is on the insurer to demonstrate that the warranty has in fact been breached.[13]

The Marine Insurance Act 1906 implies certain warranties into policies. The most important of these are to be found in Section 39 (which remains in force), which states that in a voyage policy there is an implied warranty that at the commencement of the voyage, the ship should be seaworthy for the purpose of the particular adventure. This can be contrasted with the position under a time policy (which the majority of modern insurance policies are), which is outlined in Section 39(5). In a time policy, there is no implied warranty that the ship should be seaworthy at any stage; however, if, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness. It should be noted that Section 39(5) is not a warranty but acts as a defence for the insurer if it can be proven. As such, if the proximate cause of the loss is found to be any of the specified perils in the policy, it is arguable that the Section 39(5) defence cannot arise.[14]

On first review, Section 39(5) seems to be a very useful term for insurers to rely on. The difficulty from an insurer's point of view, however, is demonstrating that the assured did in fact have knowledge of the vessel's lack of seaworthiness and then proving that the loss in question was attributable to that deficiency. To the best of our knowledge, there have been no cases in which the defence has been successfully invoked in the past 100 years.

iii Constructive total loss and notice of abandonment

Section 56 of the Marine Insurance Act 1906 states that a loss may be either partial or total: a total loss may be either actual or constructive. The Act defines both types of total loss:

> *Section 57 Actual total loss*
> *(1) Where the subject-matter is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss.*
>
> *Section 60 Constructive total loss defined*
> *(1) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.*

These provisions remain in force and are unaffected by the Insurance Act 2015.

In essence, if the subject matter insured is no longer available to the assured, there is an actual total loss, whereas if this is not the case, but avoidance of total loss appears impossible or is only achievable by expense exceeding the subject's value, then there is a constructive total loss.[15]

In the event that the assured wishes to claim for a constructive total loss (but not an actual total loss), it must give notice of abandonment to its insurer whereby it abandons all

13 *Bond Air Services v. Hill* [1955] 2 QB 417.

14 *Versloot Dredging v. HDI-Gerling (The 'DC Merwestone')* [2013] 2 Lloyd's 131.

15 Rose, *Marine Insurance Law and Practice* (Second Edition, 2012, Informa, London), p. 447.

interest in whatever is left of the insured vessel subject to payment for a constructive total loss. If the assured does not wish to abandon its interest in the insured vessel, its claim may be treated as a partial loss rather than a total loss.[16]

There is no particular form of words that must be used for a notice of abandonment, although standard practice has arisen via brokers. Section 62(2) of the Marine Insurance Act 1906 simply states that:

> *Notice of abandonment may be given in writing, or by word of mouth, or partly in writing and partly by word of mouth, and may be given in any terms which indicate the intention of the assured to abandon his insured interest in the subject-matter insured unconditionally to the insurer.*

It is standard practice for insurers to reject notices of abandonment as they tend to have little interest in owning, running and managing ships. Instead, the insurer will agree with the assured to treat them as though they had issued proceedings in the applicable jurisdiction as at the date of the notice of abandonment.[17] This agreement is necessary because, according to English law, the notice of abandonment must be justified on the facts not only at the time the notice of abandonment is given, but also at the time proceedings are commenced.

What is important from the insured owner's perspective is that once the notice of abandonment has been issued, and regardless of whether it has been rejected, the assured must not do anything that is inconsistent with the intention to continually and unconditionally abandon the insured property to the insurers. Therefore, for example, it is arguable that continuing to crew, manage, commercially operate a vessel or, indeed, sell a vessel[18] could be taken as contrary to the intention to abandon, and thus relegate the assured to claiming for a partial loss rather than a constructive total loss. One way around this may be for the insurer and assured to enter into a temporary agreement with each other, whereby the assured continues to operate the vessel to the benefit and order of the insurers and without prejudice to its right to claim for a constructive total loss.

IV THE INSURANCE ACT 2015

In January 2006, the Law Commission and the Scottish Law Commission conducted a joint review of insurance contract law. They issued a scoping paper inviting views on which areas of insurance contract law were in need of reform. As a result of the consultations, the Consumer Insurance (Disclosure and Representations) Bill was introduced into the House of Lords under the Special Bills procedure in May 2011. The Bill received Royal Assent on 8 March 2012 and came into force on 6 April 2013. At that time, the intention of the Law Commission was to draft a second Bill to cover disclosure and misrepresentation in non-consumer insurance contracts, the law of warranties, damages for late payment of claims and insurers' remedies in the event of fraud. This subsequent Bill received Royal Assent on 12 February 2015 as the Insurance Act 2015 and came into force on 12 August 2016.

16 Marine Insurance Act 1906, Section 62.
17 There have been recent variations to this wording used by certain underwriters that may or may not have the same effect.
18 *Dornoch Ltd v. Westminster International BV* [2009] EWHC 889.

The provisions of the Insurance Act 2015 reflect the feeling that the law of marine insurance did not always mesh with the practice in other classes of business, and that modernisation of the laws would bring UK practice into line with other jurisdictions. Significant changes have been made in the areas of disclosure, misrepresentation and warranties.

i The duty of fair presentation

Section 3(1) of the Insurance Act 2015 provides that an assured needs only to volunteer a 'fair presentation of the risk' before the contract is entered into. This presentation needs to be in a manner that would be 'reasonably clear and accessible to a prudent insurer'.[19] This has replaced the duties regarding disclosure and representations that are contained in Sections 18, 19 and 20 of the Marine Insurance Act 1906. The assured must disclose 'every material circumstance which the insured knows or ought to know' or must provide sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing material circumstances. Section 7(3) of the Insurance Act 2015 provides that a circumstance is material if it would influence the judgement of a prudent insurer in determining whether to take the risk and, if so, on what terms. In practice, this will mean that the obligation will be on the insurer to ask any further questions to which it wishes to have answers before accepting the risk. Sections 4 to 6 deal with knowledge and introduce new legal and factual tests for determining the attribution of knowledge for the purposes of the duty of fair presentation. This is a complex issue under the Act and is likely to require clarification by the courts in due course. Agents of the assured (most notably brokers) no longer have a separate duty of disclosure.

The first case to consider the duty of fair presentation,[20] *Young v. RSA*,[21] was heard in Scotland in the Outer House of the Court of Session in 2019 and, on appeal, by the Inner House of the Court of Session in 2020. The Court was asked to consider whether the insurer had waived the non-disclosure of the insured and it confirmed that the Insurance Act 2015 does not alter the law on waiver.

ii Remedies for breach of the duty of fair presentation

In circumstances where the duty of fair presentation has been breached, under Section 8(1) the insurer must show that it would have acted differently had it received a fair presentation. There is a range of remedies available,[22] depending on the nature of the breach and how the insurer would have acted in its absence. If the breach was deliberate or reckless, the insurer can avoid the policy and keep the premium. If the breach was neither deliberate nor reckless, the remedy depends on what the insurer would have done had it received a fair presentation; if the insurer would have entered into the contract but on different terms, it can elect to treat the contract as having been entered into on those terms, and if it would have charged a higher premium, it will be permitted to reduce claims proportionately.

19 Insurance Act 2015, Section 3(3)(b).

20 Although we note that the courts have been willing to consider the concept of a 'fair presentation of risk' enshrined in the Insurance Act 2015 when ruling on disputes involving allegations of material non-disclosure arising out of policies written before 12 August 2016. See *Axa Verischerung AG v. Arab Insurance Group* [2017] EWCA Civ 96.

21 [2019] CSOH 32 and [2020] CSIH 25.

22 Set out in Part 1 of Schedule 1 to the Act.

iii Warranties

The Insurance Act 2015 lessens the harsh effect of warranties. It repeals the second sentence of Section 33(3) and all of Section 34 of the Marine Insurance Act 1906, which had conclusively discharged an insurer's liability following a breach of warranty. Instead, a breach of a warranty will suspend an insurer's liability from the time of the breach until the breach is remedied. Again, it was felt that allowing the insurer to be discharged from liability as from the date of the breach is a disproportionately harsh remedy in circumstances where, for example, the warranty was being complied with at the time of the loss in question.

Section 11, headed 'Terms is not relevant to the actual loss', applies to any contractual term (including warranties, but excluding any term that defines the risk as a whole) if compliance with that term would tend to reduce the risk of loss of a particular kind, or at a particular location or at a particular time. Subject to Section 10, insurers can still rely on breach of such a term unless the assured can show that its non-compliance with the term could not have increased the risk of the loss that actually occurred in the circumstances in which it occurred.

The Insurance Act 2015 also introduces a prohibition on 'basis of contract clauses', at Section 9.

iv Fraudulent claims

The Insurance Act 2015 changes the law regarding fraudulent claims by removing avoidance as a remedy. Section 12 states that if a fraudulent claim is made, the insurer is not liable for it, and can terminate the contract and refuse liability for any subsequent claim, but it will not affect any previous claims, regardless of whether they have been paid. However, it deliberately does not deal with the definition of a fraudulent claim, nor refer at all to fraudulent devices, as the Law Commissions considered that this should be determined by the courts.

Fraudulent devices, used in connection with presentation of an insurance claim, were considered by the courts in *Versloot Dredging BV v. HDI Gerling Industrie Versicherung*.[23] In this case, the insurers argued for a fraudulent device defence, in that a crew member had deliberately or recklessly given a false account of the casualty in a letter to the insurers' solicitors. The account was to the effect that the crew had not investigated the bilge alarm that had sounded shortly after the ingress of water because the vessel was rolling in heavy weather at the time. It later emerged that the bilge alarm had not sounded, and therefore the explanation as to why the alarm had not been investigated was false. The High Court of England and Wales found that this evidence was false and misleading and that the crew member in question had no reason to believe it was true, and that he was reckless in his actions. The Court also found that the false account was intended to promote the claim.

Accordingly, the judges at first instance and in the Court of Appeal[24] rejected the owners' claim. An important reason for both decisions was the public policy justification of dissuading fraud by assureds. The judge at first instance had expressed regret at having to do so since he considered that the owners' fraudulent conduct was only mildly culpable. It was a reckless untruth told on one occasion only and abandoned well before the case went to trial. The judge in this case considered that the forfeiture of the claim was disproportionately harsh in the circumstances, and expressed the view that a more flexible test of materiality should be

23 *Versloot Dredging BV v. HDI Gerling Industrie Versicherung AG and others* [2013] EWHC 1666 (Comm).

24 *Versloot Dredging BV v. HDI Gerling Industrie Versicherung AG and others* [2014] EWCA Civ 1349.

adopted, which would permit the courts to consider whether it was just and proportionate to deprive an assured of its substantive rights in light of all the circumstances of the case. In a decision that was of significant interest to all participants in the insurance market, the UK Supreme Court[25] found in favour of the owners, ruling that when an assured tells a 'collateral lie' in the presentation of an otherwise sound claim, the lie does not taint the claim and the insurer is not entitled to repudiate the claim and avoid the policy. Although the lie itself is dishonest, because it is otherwise immaterial to the validity of the claim, in telling it the assured has not made a recovery to which it would not otherwise have been entitled.

Section 16 permits the parties to a non-consumer policy to contract out of all the material provisions of the Insurance Act 2015 (save for Section 9) if sufficient steps have been taken by the insurer to draw the disadvantageous term to the attention of the assured before the contract is entered into or the variation agreed and the relevant terms are clear and unambiguous. It was anticipated by the Law Commissions at the consultation stage that certain sophisticated markets would choose not to apply some of the changes made by the Act. Among others, the members of the International Group of P&I Clubs have opted to contract out of some of the provisions, on the basis that they are generally happy with their well-established practices.

v Amendment to the Third Parties (Rights Against Insurers) Act 2010

Section 20 of the Insurance Act 2015 amends the Third Parties (Rights Against Insurers) Act 2010; the latter came into force on 1 August 2016, replacing the Third Parties (Rights Against Insurers) Act 1930. Similar to its predecessor, the purpose of the 2010 Act is to protect a third party to whom an assured had incurred an insured liability in circumstances where the assured becomes insolvent. It provides that the insurance money can be paid to the third party rather than becoming an asset in the insolvency, and transfers to the third party some of the insolvent assured's rights under the insurance policy, allowing the third party to bring proceedings directly against the insurer. The key change in the 2010 Act is that a third party can now bring proceedings directly against the insurer or seek information about the insurance position at an early stage, without first establishing the liability of the assured.

V INTRODUCTION OF THE RIGHT TO DAMAGES FOR LATE PAYMENT

Part 5 of the Enterprise Act 2016 inserts a new Section 13A into the Insurance Act 2015, which provides that it will be an implied term in all insurance contracts entered into after 4 May 2017 that any claim will be paid within a reasonable time. This issue had been considered by the Law Commissions in their consultation but not originally included in the Insurance Act 2015.

The introduction of the right to damages for late payment caused a considerable amount of comment in the market; however, the extent to which assureds will be able to recover damages remains to be seen. 'A reasonable time' includes time to investigate and assess the claim, taking into account the type of insurance, the size and complexity of the claim, compliance with any relevant statutory or regulatory rules or guidance and any factors outside the insurer's control. Breach of the implied term will provide the assured with a claim for damages for uninsured losses flowing from the breach. Section 13A has recently

25 *Versloot Dredging BV v. HDI Gerling Industrie Versicherung AG and others* [2016] UKSC 45.

been considered by the Commercial Court, which held that as the claim in question had not been paid within a year from the Notice of Loss on 14 February 2019, the insurers were in breach of s13A(1). However, Section 13A(4) gives insurers a defence to any such breach if they can show that there were 'reasonable grounds for disputing the claim'. The judge in that case noted that while the insurers had disputed the claim for reasons that ended up being wrong, and thus pursued unnecessary investigations, this was not, alone, enough to render the grounds for disputing the claim unreasonable. Therefore, no damages were awarded in that case.[26] It is clear that the analysis in each case will be highly fact sensitive.

VI CONCLUSION

The English marine insurance market has been at the heart of international insurance since its inception several hundred years ago. It has been central in developing an extensive canon of case law and has led the way in developing a statutory code for insurance. Even today, it is leading the way in refining and updating the law in terms of business insurance. The introduction of the Insurance Act 2015 is bringing some significant changes to marine policies, part of the effect of which will be to make English-law policies more attractive and competitive in the international market.

It is as yet too soon to provide concrete comment on the effect of the Insurance Act 2015 on English marine insurance law. However, it is perhaps worth noting that the Act came into force at a time when conditions in the insurance market generally were fairly soft, and brokers and assureds were in a relatively strong negotiating position in relation to policy terms, which may lead to enhanced protection for assureds in relation to the areas of the Act that are less clear (what exactly constitutes a fair presentation, for example).

The London courts have unparalleled expertise not only in matters of marine insurance but also in wider shipping, trade and commodities disputes, giving them a depth of knowledge unmatched in other jurisdictions.

26 *Quadra Commodities SA v. XL Insurance Company SE & Ors* [2022] EWHC 431 (Comm) (4 March 2022).