REFORMING MARINE AND COMMERCIAL INSURANCE LAW

General Editor
Dr BARIŞ SOYER

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REFORMING MARINE AND COMMERCIAL INSURANCE LAW

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FOREWORD

The contributions which constitute this book emerged from presentations made at a symposium titled "Law Commissions Reform Proposals on Marine and Commercial Insurance", organised under the aegis of the Institute of International Shipping and Trade Law, Swansea University, and held, very appropriately, at the Old Library, Lloyd's Building, on 3 July 2008. The symposium provided a conduit for voicing a response to the profoundly important proposals currently being aired by the Law Commission for England and Wales and the Scottish Law Commission in relation to some of the fundamental legal principles which underpin insurance, namely, in their generality, the doctrine of good faith and the law relating to warranties and insurable interest.

The event attracted substantial interest and the delegates were addressed by eminent speakers representing the Law Commissions, the judiciary, the markets, academia and the two branches of the legal profession. The totality of what was an exhilarating and informative experience has subsequently been transmogrified into this book which I am confident today's policy makers and readers will find well informed, topical, judicious and richly insightful. There is every reason for believing that the contributions, individually and collectively, will make a weighty and material impact on the consultative process currently being undertaken by the Law Commissions.

The event was organised on behalf of the Institute by Dr Barış Soyer, the general editor of this book, who is to be congratulated on his initiative and for convening a very successful symposium.

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PREFACE

The Marine Insurance Act 1906 ("the Act") was the product of Sir Mackenzie Dalzell Chalmers' desire to codify the fundamental principles of marine insurance law, many of which had been originally formulated by Lord Mansfield in the eighteenth century and thereafter developed by successive generations of commercial lawyers. Many would agree with the proposition that the Act was a success in terms of providing the markets and legal profession with an accessible and comprehensive legal framework. It is also commonly acknowledged that the Act is well structured and drafted. These attributes of the Act made it a model for codification particularly in common law jurisdictions—the Act has formed the basis of marine insurance legislation in New Zealand (1908), Australia (1909), Malaysia (1956), India (1963), Hong Kong (1964), Canada (1993) and Singapore (1993)—and it has also been influential in the development of marine insurance law in the United States and Japan.

Naturally certain provisions of any piece of commercial legislation will appear historic and insufficient almost a century after their implementation. This tendency may be explained by changes in market practices, some of which are driven by fluctuations in economic conditions, ever-increasing external influences and changes in judge-made law. For example, the market has long given up on the use of the SG policy, which was one of the pillars on which the Act was built; following forceful criticisms it received in a report published by the United Nations Conference on Trade and Development (UNCTAD) in 1978 (*Marine Insurance—Legal and Documentary Aspects of the Marine Insurance Contract* (UNCTAD Doc. TD/B/C14/ISL127)). Similarly, as a result of evolution of the common law, a wider range of contractual terms are now in use in standard insurance contracts, some of which were not even in existence at the time of the formulation of the Act. Therefore, it is not an exaggeration to suggest that the contemporary insurance practice has left the Act behind in certain respects.

One should also not disregard the fact that fundamental values underpinning the London insurance market have gone through a transition, particularly over the course of the last three decades. Nowadays, most underwriters are more inclined to endorse the letter of law and policy wordings in instances where they would not have done so in the past, mainly as a result of a continuous decline in profit margins. On the other hand, the emergence of alternative insurance markets and increasing competition for market shares give some potential assureds the upper hand when insisting on the use of more

assured-friendly policy terms and to disregard extreme features of the Act. All these developments and changes indicate strongly that the Act no longer strikes a fair balance between contracting parties; and undoubtedly this creates a handicap for the London market in competing with other international insurance markets.

A section of the market and legal profession firmly believes that the problems caused by antiquated principles stipulated in the Act, and the judicial constructions attributed to them, can be addressed simply by making changes in standard terms used in the market. In fact, just such an attempt has been made by the International Hull Clauses 2003, in replacing most insurance warranties with suspensory provisions. Others believe that the harshness of the rules has damaged the international reputation of the London market beyond repair; from this perspective legislative interference is deemed to be absolutely essential in order to send a message to the rest of the world that the London market is determined to operate under new legal rules designed to protect the interests of both contracting parties. The English and Scottish Law Commissions ("the Law Commissions"), which announced a wide-ranging review of insurance law in January 2006, have subscribed to the latter view following the initial scoping exercise. Accordingly, the law reform currently contemplated is extended to cover business insurance as well as consumer insurance.

From June 2006 to March 2007, the Law Commissions published three consultative issues papers. These papers formed the basis of their first Consultation Paper published in July 2007 (Law Commission and Scottish Law Commission, *Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured* (LCCP No. 182; SLCDP No. 134, 2007)) concentrating on reforming pre-contractual information duties, warranties and the legal position of insurance intermediaries. January 2008 witnessed the release of another issues paper on insurable interest. It is expected that another issues paper on post-contractual duties of good faith, fraud and damages for late payment will be released in 2009, and this will be followed by a second Consultation Paper in the same year. Even though at the beginning of the project the Law Commissions were aiming to draft a new code for business insurance, which would apply also to marine, aviation and transport insurance and reinsurance, it is now likely that they will pursue a more modest target of a piecemeal law reform on certain topics that the consultees identified as needing urgent reform.

In the society in which we live today, legal research centres are expected not only to provide academic guidance in law reform debates in areas falling within their remit, but also to offer a public venue where reform proposals can be analysed and debated in depth by interested parties. This was the reason why the Institute of International Shipping and Trade Law (Swansea University) took the decision to organise a one-day symposium at Lloyd's of London on 3 July 2008 to discuss the proposals and current thinking of the of the Law Commissions with regard to the reform of crucial aspects of insurance

law, in particular their potential impact on marine and commercial insurance. Contributing to the ongoing debate on reforming insurance law and providing a channel for the communication of responses to the Law Commissions were the main objectives of the event. The speakers were carefully selected from the judiciary, legal practice, market and academia. Naturally, the debate on areas covered by the first Consultation Paper was more rigorous, as the Law Commissions' proposals on these areas were more concrete at the time of the event. Papers evaluating the reform proposals in these areas form the basis of the book, appearing in seven consecutive chapters (Chapters 2 to 7). However, deliberations were also extended to areas that will form the subject-matter of the second Consultation Paper due in 2009, namely insurable interest and post-contractual duty of good faith. These papers appear as the last two chapters of the book.

The event attracted more than a hundred delegates from various sectors that have an interest in law reform in this area, and it evoked considerable informed discussion. The contributions to this book have been finalised in the months following the event taking into account those discussions. I am hoping that various benefits will emerge as a result of the publication of these papers in book format. First, the book will provide a useful tool for those who are willing to find out more about the legal and practical implications of the reform proposals. Secondly, it is hoped that the in-depth analysis conducted on reform proposals will give a direction to the Law Commissions as to how the proposals can be further improved to make them more acceptable to the market. Finally, it is hoped that the book will provide a useful research tool in the long term for those who have an interest in this area of law, no matter what the outcome of this long reform process turns out to be. Undoubtedly, the book will be of particular interest in some other common law jurisdictions which have been contemplating a law reform of their own over the years.

I would like to express my sincere gratitude to all authors and symposium delegates for their contribution to the final product, which is now presented to readers in the hope that it will play a significant role in the ongoing reform process. I must also thank the director of the Institute of International Shipping and Trade Law, Professor D. Rhidian Thomas, and my other colleagues in the Institute for their ongoing support and encouragement. I am so lucky and honoured to be a part of such an impressive team.

Dr Barış Soyer
September 2008
Swansea, Wales

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