Book Review

Baris SOYER, Richard AIKENS et al.

Reforming Marine and Commercial Insurance Law

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The Marine insurance Act 1906 (the Act) is influential. The Act became 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 was the codification of the fundamental principles of marine insurance law. Certain provisions of the Act appear that they cannot catch up with the progress of the community after their initial implementation more than a century ago. This tendency may be explained by changes in market practices, some of which are driven by fluctuations in economic conditions, external influences and changes in judge-made law. This book includes the presentations made at a symposium 'Law Commissions Reform Proposals on Marine and Commercial Insurance'.

The first Consultation Paper (CP1) of the Law Commissions was published in 2007 after the publication of Scoping and Issue Papers. In the event 105 responses to CP1 were received and there are different views among consultees on many of the proposals in CP1. The Law Commissions are concerned to ensure that the changes they are proposing do not have unintended negative consequences for the insurance industry in the UK, of which reinsurance is one of the UK's biggest exports. One important message from most of the authors of the book is that the reform or changes of the legislation of marine and commercial insurance should maintain certainty which can be followed by the markets.

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Two regimes i.e. mandatory regime and default regime are in discussion in the reform. The proposal for a default regime in insurance in the business context created difficulty to the Law Commissions. The first competing factor is that of freedom of contract which is a strong element in contracts between parties in business. The second one is the possibility of abuse of such freedom by one of the parties. One of the principal arguments advanced in favour of a mandatory regime is that freedom of contract might, in practice, lead to no change at all as insurers might, in practice, insist on a different contractual regime. The argument in favour of a default regime instead of a mandatory one is that irrespective of whether individual businesses are any more sophisticated than consumers, they ought to take the trouble to become more sophisticated because their insurance contracts form an important part of their business.

The Law Commissions have proposed that in place of the prudent insurer test for determining whether a fact is material, an author suggested that there should be a reasonable insured test, along the lines previously proposed by the Law Commissions in 1980. The present approach of the Law Commissions is to have one set of legal rules which will apply to all types of businesses and to all types of policies even though some businesses and some parts of the market have features which might require special legal treatment. It is questionable whether the Law Commissions have been bold enough when tackling the question of whether the duty of disclosure should be retained. An author thought that insureds will continue to bear a heavy onus in the area of disclosure.

The heated discussion on the ‘decisive influence’ option and the choice of ‘wish to know’ on the issues of materiality and non-disclosure is interesting and goes on. It is not clear the subjective or objective limb of the test might offer an answer. The subjective limb is a fact that the proposer actually knew was one the insurer would want to know about. The objective limb is a fact which a reasonable insured in the circumstances would have appreciated would be one that the insurer would want to know about. An author commented that a proposed model of reform which is untested and unserviceable may push business departing to

jurisdictions where certainty can still be found.

Warranties in marine insurance law may be divided into promissory or delimiting warranty before or after a contract of marine insurance is concluded. Failure to comply exactly with the warranty will discharge the insurer from liability as from the date of the breach of the warranty unless there is an express provision in the contract that changes the position. The Consultation Paper found that the law on warranties is out of line with reasonable expectations and concluded that the present law on warranties is unjust and the Law Commissions is to remedy the defects by moving insurance contract law into line with general contract law. An author commented that reformers should think carefully before adopting proposals that might upset the basic principle of contracts of insurance. Various reform options for the issue of warranty are discussed e.g. adopting the doctrine of 'alteration of risk', equating warranties with other risk definition clauses, converting warranties into suspensory provisions and making alterations in the current warranty regime in line with general contract law. The vulnerability of small-sized businesses is the main reason why the Law Commissions are proposing statutory controls to limit the use of warranties and similar provisions. Serious doubt was raised by an author to the effectiveness and appropriateness of the statutory controls in connection to warranties.

Insurable interest is one of the important factors in the principle of marine insurance. The Act declared null and void any insurance made on "policy proof of interest" terms, or by way of gaming or wagering, or without the benefit of salvage to insurers. Gambling of the Gambling Act 2005 and Marine Insurance (Gambling Policies) Act 1909 was raised and it seems that section 4 of the Act has been unaffected. Meaning of insurable interest in indemnity insurance and contingency insurance were discussed. One author commented that in indemnity insurance the major issue arising from the requirement of insurable interest is lack of clarity in the law. The remaining problems identified by the Law Commissions are more questionable. Suggestions are made in response to the proposals of the Law Commissions in connection to the issue of insurable interest.

The existence of a post-contractual duty of utmost good faith has been well established. It will be a breach of duty if the assured presents a fraudulent claim and the insurer will be entitled to a remedy for such breach. The areas which are uncertain are discussed. Another issue which is raised is the legal position relating to the late payment of claims by insurers. An author commented that the injustice associated with the above issues lies with inadequate armoury of remedies available to each of the parties. The inadequacies can be overcome by granting the court discretion to meet the justice of the case by an appropriate remedy.

An author commented that on the whole the proposed reforms appear to have greater fairness between assureds and insurers although there are points of detail which require more careful thought. The reforms which are proposed by the Law Commissions would raise more wide-ranging issues than are raised under the present law. It is clear that several authors call for certainty on any reform proposed by the Law Commissions. Further topics may be written on the papers of the Law Commissions such as should micro-business be treated like consumers for the purposes of pre-contractual information and unfair terms, damages for late payment and the insurer's duty of good faith.