

DUTY OF DISCLOSURE, DUTY OF GOOD FAITH, ALTERATION OF RISK AND WARRANTIES

AN ANALYSIS OF THE REPLIES TO THE CMI QUESTIONNAIRE

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1. Introduction

The background for this paper is the ongoing work in Comité Maritime International (CMI) concerning the harmonization of marine insurance clauses. By marine insurance is here meant insurance for hull and cargo. CMI has identified 12 issues of marine insurance as a basis for this work towards harmonization. The attempt to harmonize marine insurance includes all the nationalities with membership in CMI. The status of the process as of today is that most (but not all) national CMI offices have answered a questionnaire concerning the 12 issues of marine insurance and the legislative framework. These answers are now being analyzed in order to identify areas creating difficulties in the marine insurance markets around the world and to seek to identify either the solution that is most frequently adopted or to suggest a solution which, on analysis, appears practical and sensible.

As a part of the work towards harmonization, four of the 12 issues will be presented on this conference. The issues are duty of disclosure, duty of good faith, alteration of risk and warranties. The presentation of these issues include both the common law and the civil law perspective. The paper thus include the legislation in UK, USA, Canada, Hong Kong, Australia, New Zealand, South Africa, Norway, Sweden, Denmark, Finland (Scandinavia), Germany, Belgium, The Netherlands, France, Spain, Portugal, Greece, Italy, Croatia, Slovenia, Israel, Venezuela, China, Japan and Indonesia.¹

As mentioned, the synopsis of the issues is based on the material from the different CMI nations. As the extent of the answers to the questionnaires vary substantially, so will the description of the different regulations in this presentation. To the extent that the questionnaires were enclosed with an English translation of the regulation, it has been possible to supplement the questionnaires with the original legal sources. However, as many nations have

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¹ In addition to the CMI questionnaires, the material for this paper was gathered in connection with a marine insurance conference held in Oslo in June 1998. This material was collected with the help of CMI representatives in different civil law countries. I especially wish to express my gratitude to *Avv. Francesco Siccardi, Dr. Tom Remè, Dr. P Sotiropoulos, and Dr. Hermann Lange* for providing me with the necessary documentation and explanations.

not supplied such translation, the only material available for these nations is the answers to the questions. This material is in no way sufficient to answer the more detailed elements of the issues that will be discussed in this paper.

As a starting point, only public legislation and standard marine insurance clauses will be included in the presentation. Also, it may be pointed out that even if the material covers a lot of legal systems, main focus will be given to the UK and US legislation for common law and to the Scandinavian perspective for civil law. There are several reasons for this. One reason is of course that the material from these countries is easily accessible, and that there are no language problems. Some of the other participants in the work have, as mentioned, not included English translations of their legislation and/or standard clauses. This will of course limit the presentation of their insurance systems. Another reason is that the legislation in UK is adopted more or less unaltered in several other common law countries, and that the legislation in UK and US is fairly similar. A discussion of the regulation in UK and US is therefore relevant for most of the common law countries. As for the Scandinavian systems in general and the Norwegian system in particular, a further reason is that both Norway, Sweden and Finland has revised their insurance conditions during the past few years. These conditions are therefore among the more modern in the material.

The three issues will be dealt with under item 3: duty of disclosure, item 4: duty of good faith, item 5: alteration of risk and item 6: warranties and similar clauses. As an introduction, it is necessary to give a survey of the legislation and conditions dealing with marine insurance in the different countries.

2. Overview of the legislation and conditions

2.1. Public legislation

2.1.1. Civil law countries

All the civil law countries seem to have some sort of public legislation concerning insurance contracts, either incorporated in a more general commercial act or as a specific act for insurance contracts. This legislation is, however, either directory for marine insurance in general, or directory as a starting point with a few exceptions.

In **Norway** there is a general Insurance Contracts Act (ICA) dated 16 June 1989. As a starting point this Act is mandatory for all insurance contracts, see Norwegian ICA section 1-3. However, there is an exception from this provision concerning insurance of commercial activity performed by ships that have to be registered according to the Maritime Code of 24 June 1994, or commercial activity dealing with international carriage of goods. Except for national carriage of goods, there is thus complete contractual freedom for marine insurance. However, there is some general contractual legislation concerning illegal and unfair contracts that also a marine insurance contract will have to adhere to. It should also be mentioned that the Norwegian ICA contains only general provisions, and no provisions specially concerning hull or cargo insurance.

Sweden and Denmark have a common general Insurance Contracts Act from around 1930.² The Swedish and Danish ICA contain both provisions that are generally applicable to insurance contracts and provisions that are applicable to marine insurance only. The provisions are directory, unless the Act itself or other legislation imply that the regulation is mandatory, see further below. As provisions may be mandatory even though this is not expressly stated, it is not always clear which provisions are mandatory. The distinction between directory and mandatory provisions may also differ somewhat between the two countries. However, some provisions of special interest for the problems dealt with in this paper are mandatory in both countries. These provisions include duty of disclosure (§ 10 ref. §§ 5, 7, 8 and 9) and increase of risk (§ 50 ref. §§ 45-49). Furthermore, it should be mentioned that Sweden and Denmark similar to Norway have a General Contracts Act with provisions dealing with unfair contracts.

Both the Danish and the Swedish ICA are under revision. The Swedish revision has so far resulted in a draft, which contains no separate provisions that are applicable to marine insurance only. At this moment it is however not possible to say when the new Swedish Insurance Contracts Acts may be adopted.

Finland has got a new Insurance Contracts Act dated 28 June 1994, superseding the old common Nordic Insurance Contract Act which is still in force in Denmark and Sweden. The new Finnish ICA is directory in all aspects for marine insurance connected to commercial activity. The only mandatory requirement in Finland is thus the provision in the general Contracts Act dealing with unfair contracts, already mentioned for Norway, Sweden and Denmark.

In **Germany**, there is a general Insurance Contracts Act (VVG, or *Versicherungsvertragsgesetz*), but this Act does not contain provisions for marine insurance. The only legislation on marine insurance is found in sections 778 - 900 in the German Commercial Code (HGB, or *Handelsgesetzbuch*). This legislation is directory and it is in practice no longer applied. Apparently, there is no English translation of this regulation. This may be explained by the fact that the rules of the Commercial Code in practice have been replaced by Standard Insurance Conditions which were introduced into the German Marine Insurance Market in 1919, see further below under item 2.2.

France has a general Insurance Contracts Act (ICA), Loi no 67-522 du 3 juillet 1967 sur les assurances maritime. The French ICA deals with marine insurance in chapter VII. The provisions apply to both hull and cargo insurance. These rules also apply to the insurance of inland waterways' navigation (hull and cargo). The material does not include a translation of these Acts. The French ICA contains some mandatory rules, but the number of mandatory rules are limited due to the international character of marine insurance. Of interest for this paper is that there are mandatory rules for duty of disclosure, (article L 172-2), and duty of disclosure in case of alteration of the risk, (article L 172-3).

² Danish Insurance Contracts Act dated 15 April 1930 (Danish ICA), Swedish Insurance Contracts Act dated 8 April 1927 (Swedish ICA) (*Försäkringsavtalslagen*; SFS 1927:77). In Sweden, consumer insurance on boats is also regulated by the Consumer Insurance Act (SFS 1980:38).

The **Belgian** Maritime Code (MC) contains under Title VI “Assurances Maritimes”, article 191 to 250 special provisions for marine insurance. The provisions of the MC are complementary to the general Law of Insurance dated 11th June 1874 (1874 Insurance Law), which is still applicable. The MC applies to both hull and cargo. Both the 1874 Insurance Law and the provisions of the MC are directory for marine insurance. Thus, the provisions will only be applied if the parties have not agreed otherwise or if they have omitted to regulate certain points. No English translation is enclosed in the material.

In the **Netherlands** rules on marine insurance are contained in the Code of Commerce (C Com), originating from 1838. The Dutch C Com applies to both hull and cargo insurance. In addition, general Dutch contract law is applied to (marine) insurance. However, the provisions in the Dutch C Com do not play an important role in daily practice. Further it should be noted that The Netherlands are facing new legislation on insurance law. The draft of this new legislation does not contain any specific rules relating to marine insurance. Dutch marine insurance law itself does not contain specific rules with a mandatory character. There are however, some mandatory provisions in the general contract law and the general insurance contract law, which are applied also to marine insurance. The Dutch C Com is translated into English, and part of the translation is enclosed in the material.

In **Greece**, rules on insurance contracts were incorporated in the Commercial Code until 1997. The relevant section in the Commercial Code is today superseded by Law 2496/1997. In addition, the Greek Code of Private Maritime Law of 1958 (CPML) chapter 14 contains provisions for marine insurance. According to CPML section 257, sections 189 to 225 of the Commercial Code also govern marine insurance, unless they are incompatible with the nature of marine insurance and insofar as they are not modified by the special provisions. As mentioned, the Commercial Code has been replaced by the Law 2496/1997. The provisions in the CPML are mostly directory, even if there are some mandatory provisions. The mandatory provisions do however not include the issues in this paper. The provisions in CPML are translated into English, and there is also an English presentation of Law 2496/1997.

Under **Italian** law sections 1882-1932 of the Civil Code (CC) regulate insurance contracts. According to section 1885 these provisions also apply to marine insurance insofar as marine insurance is not governed by the Code of Navigation (C Nav).

This rule must be understood with reference to C Nav art. 1, which outlines the sources of navigation law. The relevant sources are (in decreasing order of rank): the C Nav and the other special rules on navigation, i.e. laws, bylaws and customs related to navigation. In case no special provision related to navigation is applicable, the gap is filled by analogy with other special rules on navigation. If no analogy is possible, finally, the rules of civil law will apply.

Read jointly, Art. 1885 Italian CC and Art. 1 Italian C Nav give the insurance provisions of the CC the status of special rules of maritime law. In practical terms this means that they apply to marine insurance as far as they are not specifically departed from in the C Nav. The Italian C Nav contains a section related to marine insurance (Arts. 514-547), which applies to both cargo and

hull insurance. Both the Italian CC and the C Nav is translated into English.

In principle, the parties in the individual contract may depart from the rules contained in the Italian CC. Nevertheless, art. 1932 lists a set of mandatory rules that may only be departed from in favor of the assured. Of relevance for this paper is art. 1898, defining a duty for the person effecting the insurance to notify the insurer of changes causing the increase of risk. Clauses departing from mandatory rules are replaced with the corresponding provisions in the law. In **Spain** marine insurance is regulated by the Spanish Code of Commerce (C Com) of 1885 (sects. 737 to 805). This code follows the criteria already set out in the "Ordenanzas de Bilbao" of 1737. The Spanish C Com applies to hull, cargo and liability insurance. Provisions for marine insurance are also found in Ley del contrato de seguro of 1980, which is the Spanish Insurance Contract Act (ICA), but this act is not mandatory for large risks (sects. 44.2 and 107.2), including marine and transport exposures. In practice, the Spanish ICA is subsidiary to the Spanish C Com, which has status as special legislation. But as the ICA is not mandatory for large risks, and the C Com as a starting point is not mandatory at all, the parties to the contract are free to depart from the regulation. However, there are some rules that are mandatory, including the concept of indemnity and good faith. The Spanish legislation is not translated into English.

It should also be added that the Spanish ICA is a very consumer protective legislation and therefore departs substantially from the Spanish C Com and the contractual conditions. These differences in the legislation and between legislation and contractual solutions seem to have caused some problems, and the legislation is under revision. A draft for a Marine Insurance Act has been prepared under the auspices of the Spanish Maritime Law Association and has been submitted to the "Comisión de Codificación" (Codified Legislation Committee) for further analysis.

In **Portugal** marine insurance is regulated in the Portuguese commercial code and in some other laws. The regulation applies to both hull and goods. The material contains no information about whether the legislation is mandatory or directory, and no English translation.

Slovenia's national law contains rules on maritime insurance in the Maritime and the Inland Navigation Act, Official Gazette, No. 22-294 (MA) with subsequent modifications. This act applies to both hull and cargo insurance. Some of the rules are mandatory. These include provisions concerning duty of disclosure. The relevant provisions are translated into English.

The provisions of the Maritime Code, 1994 (Part 8, Paragraph 4, Heading: Maritime Insurance Contract) regulate marine insurance in the Republic of **Croatia** (Croatian MC). It has not yet been translated into English. Provisions of the Maritime code on marine insurance include general provisions and special provisions about hull insurance, cargo and liability insurance. The only mandatory provisions refer to the principle of indemnity.

Chinese national rules on marine insurance are contained in the Maritime Code of P.R. China (MC), as the Chapter XII "Contract of Marine Insurance". An English translation exists as reference. The Chapter XII of the Chinese MC

applies both to hull insurance and cargo insurance. (See Art. 218.). None of the rules in this chapter are mandatory.

In **Venezuela** marine insurance is regulated in the Venezuelan Code of Commerce (C Com), which is translated into English. The Code of Commerce applies to both hull and cargo Insurance. Most of its rules are directory and may be substituted by contractual provisions.

Japan has rules for marine insurance in the Japanese Commercial Code (Com C), Book 4, Maritime Commerce, Chapter VI, Insurance, art. 815-841. Also applicable is Book 3, Commercial Acts, Chapter X, Insurance, art. 629-664 containing general provisions for insurance against loss. This legislation applies to both hull and cargo insurance, and is translated into English. The legislation for marine insurance is in principle directory, but with a few exceptions. These are, however, not relevant for the issues discussed in this paper.

In **Indonesia** rules on marine insurance is found in the second Book of the code of Commerce part IX and part X. Also, the Indonesian Shipping Act no 2 of 1992 contain several articles of relevance for marine insurance. The regulation applies to both hull and cargo insurance. It is not clear whether this regulation is mandatory.

2.1.2. *Common law countries*

The statutory basis of **UK** Marine Insurance Law is the Marine Insurance Act of 1906 (UK MIA) which sought to codify the pre-existing common law of marine insurance. In 1901 it was estimated that there were over 2,000 reported cases dealing with issues of marine insurance. This court material and numerous market usages are reflected in the 1906 Act. The Marine Insurance Act of 1906 covers both cargo insurance and hull insurance.

The UK MIA does not contain a specific provision stating whether or not the act is mandatory. To answer this question, it is necessary to consider each clause. Some clauses contain definitions and may thus not be departed from. Others are mandatory by interpretation. However, some of the provisions in the UK MIA only apply “*subject to any express provision in the policy*” or “*Unless the policy otherwise provides*”. If so, the parties are free to depart from them, and frequently do by express contractual terms. The material do not state whether the provisions concerning the issues dealt with in this paper are mandatory or not.

It should be mentioned that whereas UK MIA applies throughout the UK, that is not necessarily true of associated rules of common law.³

The national law of the **United States** does contain some rules on marine insurance. They are contained in court decisions, not an act of the legislature. The effect on the national law on marine insurance is subject to the rules enunciated in the United States Supreme Court’s decision in *Wilburn Boat Co. v. Fireman’s Fund Ins. Co.*, 348 U.S. 310 (1955). This decision implies that

³ Forte (ed.): *Good Faith in Contract and Property* (Oxford 1999), Ch. 5: *Good Faith and Utmost Good Faith: Insurance and Cautionary Obligations in Scots Law*.

issues of marine insurance are governed by the national law of the United States when there is a well-established rule of federal or national admiralty law, or, if not, the court determines that it should fashion a federal or national rule. Otherwise, marine insurance disputes are governed by the insurance law of one of the 50 states.

As a result, to determine the law with respect to any particular issue of marine insurance, it is necessary to answer the following questions: (1) whether there is a well-established federal or national admiralty rule; (2) if not, determine whether there should be a federal or national admiralty rule; (3) if the answer to both (1) and (2) is no, decide which of the 50 states' law applies; and (4) decide what the law of that state is.

As the national law of US is contained in court decisions, the regulation is not obligatory. It should be noted, however, that some of the states have obligatory provisions in their insurance codes, which, in certain circumstances, may apply to policies of marine insurance. Also, it will be seen in the discussions that some of the principles are claimed to be of a mandatory nature even if they are not expressed in a regulation.

Canada is a Federal country with division of powers between the Federal Government in Ottawa and the ten Provincial Governments. Legislatures in seven of Canada's ten Provinces have enacted The Marine Insurance Act of 1906 of the United Kingdom in identical terms. Until fairly recently it was felt that marine insurance could be regulated by both the Federal Government of Canada and by the Provinces. As a result of decisions of The Supreme Court of Canada it is now felt that marine insurance must be regulated by the Federal Government. To accomplish Federal regulation, the Parliament of Canada, in 1993, enacted a new Federal Marine Insurance Act. The new Marine Insurance Act (Ca MIA) was designed to enact the Marine Insurance Act of 1906, but in modern language. The Ca MIA thus contains the regulation on marine insurance in Canada on a federal level. The Federal Marine Insurance Act and The Provincial Marine Insurance Acts apply to both hull and cargo insurance. The rules are directory except for the provisions concerning insurable interest (art. 7.1) and gaming contracts (art. 18).

Because seven Provinces in Canada had enacted the UK MIA, Canadian court decisions follow very closely on those of the UK.

The regulation concerning marine insurance in Australia is contained in Australian Act of Marine Insurance of 1909 (Au MIA). This legislation contains the same provisions as the UK MIA of 1906, without the subsequent minor amendments to the United Kingdom's Act. The first six sections of the Au MIA are additional to those in the United Kingdom's Act, and are concerned with application and interpretation, so that the section numbers in the Australian Act are found by adding 6 to the section numbers in the UK MIA. Although the law was designed to be a code, it does not completely replace the common law in that section 4 provides that the rules of the common law, including the law merchant, apply to contracts of marine insurance "save insofar as they are inconsistent with the express provisions of the Act". This corresponds with sec. 91(2) of the UK MIA. The Au MIA applies to both hull and cargo insurance.

Some of the provisions are mandatory and may not be contracted out of by

the parties to the contract of marine insurance. Of special interest for this paper is that the provisions concerning utmost good faith (sec. 23), duty of disclosure (sec. 24-26) and warranties (sec. 39-47) are mandatory. Thus, even though the legal basis for the Canadian and Australian legislation is the UK MIA, the systems differ concerning which provisions are mandatory.

In **New Zealand**, legislation concerning marine insurance is found in The Marine Insurance Act 1908 (NZ MIA); and the insurance Law Reform Act 1977, which specifically applies to the Marine Insurance Act (section 14), and cannot be contracted out of (section 15). Both acts apply to both hull and cargo insurance. The regulation in NZ MIA is directory except for some provisions. The important mandatory provisions for this paper concern duty of disclosure (sec. 18 and 20) and warranties (sec. 37 - 42).

Hong Kong's legislation concerning marine insurance is contained in the Marine Insurance Ordinance Cap. 329. This applies to both hull and cargo insurance. Some of the provisions are mandatory. Of interest here is that the provisions concerning duty of disclosure (sec. 18 and 20) and warranties (sections 35 and 36) are mandatory.

Israel retains the Ottoman Maritime Trade law 1863. Therefore, almost all marine insurance policies (cargo and hull) contain an express provision providing for English law.

South Africa has no legislation dealing specifically with marine insurance. It has a Short-Term Insurance Act, 1998, which includes "transportation" policies and applies to hull and cargo. The Act is mostly concerned with formalities and contains very little of general principles. It does, however, have provisions relating inter alia to the nature and effect of misrepresentations and warranties. As for questions not regulated in the Act, South Africa marine insurance legislation is founded upon and having as its fall-back system, the Roman-Dutch common law. The Roman-Dutch marine insurance law was in turn based upon the developed European marine insurance law of the time, as crystallised in the Dutch city states of the 17th and 18th centuries. Part of this South African common law however is the importation of later English law, primarily through the direct application of English insurance law from 1879 to 1977. The UK MIA was, however, never of direct application in South Africa. To the extent that the UK MIA was largely a restatement of the law of marine insurance of Europe and England as at the 1870's and 1880's, it is to a very large extent also a restatement of the Roman-Dutch law of marine insurance, with certain notable differences.

2.2. Plans, conventions, agreed conditions and general policy forms

2.2.1. Scandinavia

In **Norway, Sweden and Denmark** the conditions for marine insurance traditionally have been incorporated into an extensive private codification. In Norway and Sweden this codification is published as a Marine Insurance Plan, whereas the Danish regulation is called a Convention.

A common feature of this private legislation is that it aims to regulate all practical questions concerning marine insurance, even those questions which

are also dealt with in the public legislation. The Plans and the Convention are meant to be used instead of the governing Insurance Contracts Act. This means that the private legislation regulates questions where the governing Insurance Contracts Act is not mandatory and thus allows other solutions. It also means that mandatory provisions in the governing ICA are incorporated in the Plan or Convention. This technique does not, however, lift the provisions out of the mandatory regime of the ICA. Even if the Plans and the Convention as such are directory, the parties are obligated to follow the regulation taken from mandatory provisions.

Another characteristic feature is that the Plans/Convention partly contain general provisions for all kinds of marine insurance, partly special provisions for special interests.

Even if the legal framework thus is similar in the three countries, the evolution of the Plans and Convention and the extent of the use of this legislation in today's marine insurance market differ a great deal. I will therefore give a brief overview of the history of this private legislation, and of the insurance conditions used to supplement the Plans and Convention in the market.

In **Norway**, the first Marine Insurance Plan (NP) was introduced in 1876. This Plan was amended in 1894, 1907 and 1930. In 1964, there was a new and extensive amendment, triggered by the ship-owners need for a more extensive cover for error in construction and materials.⁴ The 1964-revision resulted in the cargo clauses being lifted out of the Marine Insurance Plan. A separate Plan for Insurance for the Carriage of Goods was established in 1967.

The 1967 Carriage of Goods Plan was amended in 1995, resulting in the Norwegian Cargo Clauses: Conditions relating to Insurance for the Carriage of Goods of 1995, Cefor Form No. 252 (Norwegian CC). The amendment was mainly a result of the new Insurance Contracts Act in Norway, which is mandatory for insurance concerning national transport of goods, see Norwegian ICA section 1-3 first and second part. Many clauses thus had to be amended to conform to the ICA's requirements. For the most parts these mandatory requirements are also given effect for international carriage of goods, even if the Norwegian ICA is not mandatory for this kind of insurance, see section 1-3 second part letter (e).

The 1964 Marine Insurance Plan was amended in 1996. Similar to the revision of the Cargo Clauses, this amendment was partly caused by changes in the legislative framework. However, the amendment was also triggered by the evolution in the shipping industry and problems in the marine insurance market. The new 1996-Plan contains general provisions, and special conditions for Hull insurance, Hull Interest and Freight Interest insurance, War insurance, Loss of Hire insurance, insurance for Fishing Vessels and small Freighters, insurance for Off Shore Structures, and Builders Risk insurance.

A characteristic feature of the Norwegian Marine Insurance Plan is that it is drafted by a committee consisting of members of all the different groups or organizations effecting marine insurance contracts. Thus, the 1996 Plan has

⁴ See Brækhus and Rein: *Håndbok i Kaskoforsikring*, Oslo 1993, s. 90.

been drafted by a committee with representatives from the Mutual Hull Clubs Committee, the Norwegian Ship owners' Mutual War Risks Insurance Association, The P&I Insurers, The Central Union of Marine Underwriters, the Norwegian Shipowners' Association, the Federation of Norwegian Engineering Industries, Det Norske Veritas, the Fishing Vessel Owners, Sjøtrygdslagene, and the Norwegian Average Adjusters. The Chairman and the Secretary of the Committee were two professors from the Scandinavian Institute of Maritime Law.

Before the introduction of the 1996-Plan the Plan had been supplemented by a set of agreed conditions concerning problems where the provisions in the Plan were outdated or insufficient. The aim of the 1996 Plan is to incorporate such amendments directly into the Plan instead of using separate conditions. To obtain this, the Committee having drafted the Plan has also established a Permanent Revision Committee to make yearly amendments of the Plan to the extent that this is necessary.

An important part of the Norwegian Plan is also the Commentaries to the Plan, written on the basis of the discussions in the Committee drafting the Plan.

In **Denmark** the conditions for marine insurance are incorporated in the Danish Marine Insurance Convention (DC). The first Convention dated 2 April 1850 was amended in 1934. The 1934 Convention is still applied today, and contains general provisions and special conditions for among others Hull, Hull Interest, Builders Risk, Cargo, Freight, Freight Interest and Owners Outfit.

Similar to the Norwegian Plan the Danish Convention was drafted by a Committee consisting of members of the involved organizations, the average adjusters and the University. The organizations represented were Assurandør Societetet, Dansk Skipsrederiforening (Danish Shipowners Union), Foreningen av Danske Sjøassurandører (Danish Union of Marine Underwriters), and Grosserer-Societetets Komité.

To my knowledge there are no efforts being made to amend the Danish Convention.

The Danish Convention is supplemented by rather extensive conditions in the market. A set of conditions for hull insurance is recommended by the Danish Central Union of Marine Underwriters. These conditions concern important general questions and special regulation for Hull, Hull Interest, Freight Interest and Owners Outfit. For cargo insurance the Danish Union of Marine Underwriters has established a set of Limited and Extended Danish Conditions, both dated 1.7.89. These conditions function as a general basis for the insurance conditions used by the individual insurance companies.

The first **Swedish** General Marine Insurance Plan (SP) was introduced in 1891. The 1891-Plan contained the basic conditions applicable to Swedish marine insurance. After being revised in 1896, this Plan remained in force till the end of 1957, i.e. for 61 years. The extensive developments that took place during this relatively long period in the sphere of shipping trade and commerce generally made it desirable to modernize and extend the Plan and its stipulations. A committee consisting of experts on insurance and jurisprudence headed by a master engineer made the revision. A draft of the new Plan was submitted to various parties concerned before the final version was introduced

in the market. The 1957 SP contains general provisions and special conditions for i.a. Hull, Hull Interest, Vessels under Construction, Freight, Freight Interest, Goods and Owners Outfit.

Contrary to the Norwegian Plan, however, the assureds had not been represented in the Committee drafting the Swedish Plan. The conditions of the SP thus are more in favor of the insurers than the Norwegian Plan.⁵ The result is that the Plan's conditions on important parts are replaced by agreed standard hull and cargo conditions.

The Swedish Hull Conditions were first introduced in 1966. They were revised in 1976, in 1987 and again in 1999. The version applied today is the General Swedish Hull Conditions of January 2000 (Swedish HC). Similar to the Norwegian Plan, the Swedish Hull Conditions is an agreed document drafted by the Swedish Club and The Central Union of Marine Underwriters in co-operation with the Swedish Ship-owner Association and a representative from the Average Adjusters. The Swedish HC contain both the special rules relating to the hull coverage, and the more general provisions relating to duty of disclosure, safety regulation, premium etc. The conditions are supplied with published commentaries.

Sweden has also adopted standard conditions for cargo insurance. Today's version is General Conditions for transport of Cargo of April 2000 (Swedish CC). These are, however, not agreed between the interested parties, but established by the Swedish Union of Marine Underwriters without cooperation from the cargo interests.

Contrary to the other Scandinavian countries, **Finland** does not have a Plan or Convention. However, they do have General Hull Conditions for Vessels, which are recommended by the Union of Marine Underwriters and the Shipowners Association. These General Hull Conditions were introduced in 1968, and last amended 1 January 1989, with some later additions. The conditions are similar, but not identical to the 1964 Norwegian Plan. The legislative framework in Finland thus seems close to the framework in Sweden, where the Marine Insurance Plan has limited practical importance, and the main areas of marine insurance is regulated by a set of recommended Hull Conditions.

The Finnish Hull Conditions (HC) are made on the basis of the old 1933 Insurance Contracts Act, and the Finnish HC refers to the 1933 Act. After the introduction of the new 1994 Insurance Contracts Act, a "slip" has been added to the Finnish HC maintaining the 1933 Act as governing law. The slip states that the 1994 Insurance Contract Act is not relevant for the Hull Conditions, and that the 1933 Insurance Contracts Act with additions and amendments, and practices connected to this act, should be the relevant governing law. The same technique to depart from the new ICA as governing law was used in the Norwegian marine insurance market under the 1964 Plan after the introduction of the Norwegian Insurance Contracts Act of 1989. One problem with this technique is how to deal with the mandatory provisions in the 1930 ICA.

⁵ See Brækhus and Rein l.c. s. 14. Hare: Good faith, disclosure, misrepresentation & the omnipotent warranty: A South African perspective, Paper presented at the BMLA/Tulane Conference London May 2000, (Hare) p. 8.

The Finnish Hull Conditions have caused problems in the market, especially due to lack of commentaries. A committee to revise the Hull Conditions was therefore established some years ago. This committee consists of two groups: one group with members mainly from the insurers was established to revise the hull conditions. Another group is established as an executive group for the hull group. This executive group has representatives from all the interested parties (three different ship-owners' associations, and the association of the underwriters) The chairman of both groups is professor Hannu Honka. The aim of the committee is to introduce new hull conditions as an "agreed document". In connection with this amendment, the view has been expressed by Hannu Honka that the 1996 Norwegian Insurance Plan would obviously function as a sort of guide, but that there was a strong feeling for nationally based solutions maintaining certain distinctive features. This indicates that competition aspects shall be emphasized in the new conditions.

The group established to write the new conditions presented a draft to the executive group to be discussed 3 April 2000. As the result of these discussions is still not available and the draft is not published, it is not possible at this time to include the new Finnish conditions in this presentation.

Finland also has General Conditions for Carriage of Goods dated 1993 (CC) and a newer version for Consumers dated 1995. As the Swedish and Danish cargo conditions these are not "agreed" between the interested parties, but constructed by the insurers. Furthermore, the 1993 conditions are not published as a set of standard-conditions to be directly used in the market, but function merely as recommendations for the insurance companies to be incorporated in the individual insurance contracts from each company according to each company's policy. This method seems to be parallel to the method used in the Danish market. The 1993 cargo conditions are under amendment, but the revision is not yet finished.

2.2.2. Separate Standard Conditions developed in other European nations

Germany, UK, the Netherlands, Belgium and France have developed their own standard conditions for hull and/or cargo insurance.

The present legislation of Marine Insurance in **Germany** is the German General Rules of Marine Insurance, also known as the ADS. The ADS was drafted by the German Marine Underwriters on consultation with German Chambers of Commerce and other competent organizations under the leadership of the Hamburg Chamber of Commerce, and was published in 1919. The sections referring to cargo insurance were modernized in 1947. Particular conditions for hull insurance were introduced in 1957.

The 1919 ADS contains both general provisions concerning for instance insurable interest and value, duties of the assured, and premium, and special rules on the insurance of special subject-matters (Hull, Disbursement and Cargo).

The 1919 ADS was altered in 1973, when sections 88-99 of the 1919 ADS concerning cargo insurance were replaced by separate cargo conditions, the so called ADS Cargo of 1973. The result of this amendment was that sections 88-99 in the ADS were abolished. The aim of introducing new cargo clauses was

to incorporate the broker-made clauses that appeared to be of general interest, and to get rid of most of the other broker-made clauses. The cargo clauses were revised in 1984, partly in order to incorporate practical experience from the past ten years, and partly in order to consider the new Institute Cargo clauses in the London market. The last amendment of the ADS cargo clauses started in 1996, resulting in DTV Cargo Insurance Conditions 2000 (DTV Cargo). The objective of this change was to modernize the structure of the conditions, allow a more flexible product design and secure international acceptance of the conditions, as well as to enhance the qualification of marine underwriters and take account of current market requirements. The DTV Cargo Clauses of 2000 provide uniform rules for all modes of cargo, all types of cargo and all trades.

Another major change of the ADS took place in 1978, resulting in the Deutscher Transport-Versicherungs-Verband e. V (DTV) Hull Clauses 1978. These DTV Hull Clauses replaced previous Hull Clauses in the German market, but did not lead to any alteration in the original ADS concerning Hull Insurance. As with the ADS Cargo clauses the aim was to sort out the best broker-made clauses to be incorporated in the conditions.

The 1978 DTV Hull Clauses were further amended in November 1982. Two later amendments have taken place; first in 1984 and then in 1992. The 1992 amendment, however, only concerned a few clauses. Apart from the 1992 amendment, the ADS, ADS Cargo and DTV Hull Clauses are translated into English.

The material contains no information of ongoing amendments or discussions to start amendments of the ADS or the DTV Hull Clauses.

In **UK**, standard form clauses exist for amongst others, hulls policies (time and voyage), freight policies (time and voyage), cargo policies, war and strikes policies (hulls, cargo and freight) and mortgagee's interest policies. At least 120 separate sets of clauses covering particular trades and approved by The Institute of London Underwriters are published by Witherby & Co Ltd each October. The conditions that will be referred to in this paper is the Institute Time Clauses Hulls of 1.11.95 (ITCH) and Institute Cargo Clauses A, B and C of 1.1.82 (ICC).

In **Belgium** the market developed in the early 1980's hull conditions, known as the Corvette Underwriters Conditions (Corvette Conditions). These conditions have later been amended and the latest version is of 1999. The Corvette Conditions are combined with other traditional clauses such as the English Institute Time Clauses Hull and the U.S. Hull Conditions.

Insurance for cargo is mostly effected on the Police d' Assurance Maritime d' Anvers, ler juillet 1859, supplemented by the "Clauses de 1900 (modifiées en 1931)" and the "Clauses conventionnelles", texte de 1931. Although the two mentioned supplementary clauses are optional, they are normally included. The Belgium cargo conditions are called the Antwerp Marine Policy (Antwerp Policy).

Both the Corvette Conditions and the Antwerp Policy are translated into English.

The **Dutch** standard conditions for cargo is The Dutch Bourse Cargo Policy 1991 (Dutch CC). Apparently, there are no standard hull conditions. The Bourse Cargo Policy is translated into English.

The general hull conditions in **France** are the French Marine Hull Insurance Policy for all vessels (French HC). The original policy form was dated 1 December 1983, and was amended 13 December 1984 and 30 January 1992. These conditions were renewed a couple of years ago, and the new policy is adopted from January 1998. The standard conditions for cargo is French Marine Cargo Insurance Policy “all risks” cover and “major events cover”, both Policy Form dated June 30, 1983, as modified February 16, 1990 (French CC). Both the hull and the cargo conditions are translated into English.

2.2.3. European countries combining own standard clauses with foreign clauses

In **Italy** general Forms of Contract for Hull and Cargo Insurance have been in use since the beginning of this century. Until the 1960's the most popular Policy Forms were the Italian Policy of Marine Insurance on Goods, 1933 Ed. for cargo insurance and Insurance Form of the “Società di Assicurazioni già Mutua Marittima Nazionale”, 1942 Ed. for Hull Insurance (Mutuamar 1942), which is translated into English. The hull policy was gradually replaced by the Form of Italian Policy of Marine Insurance for steel hull ships 1972 Ed. The Cargo Policy was substantially amended in 1978. These newer policy forms are not translated into English.

In later years, the Italian marine insurance market has become more dependant on the reinsurance market, and particularly the London market, with the result that the Italian Policy Forms are used in combination with the Institute Time Clauses for Hulls, Freight and Cargo.

The combination of Italian and English conditions was, however, problematic, especially after the English Marine Policy and the ITCH were amended in 1983. One of the aims of this amendment was to include all the insurance conditions in the ITCH instead of operating with a combination of the Marine Policy and ITCH. As the Italian 1972 Hull Policy also contained a comprehensive set of conditions this caused overlapping and conflicts between the Policy and the ITCH. The most important problem was the combination of the “named peril” system in the ITCH and the all risk system in the Italian Conditions. To remedy these problems, a new Policy Form was produced in the Italian market in 1988, named “Marine Hull Insurance Form”, Ed. 1988. This policy is limited to certain general conditions of cover, and does not include risks covered and exclusions. According to this Policy Form, whenever insurance is effected subject to English Policy Conditions, these must be construed and applied according to the practice in the UK.

For cargo insurance, a totally new Policy was introduced in 1983, and was renewed in 1998. The new edition has now been approved by ANIA (the National Association of Insurance Companies). This new Cargo Policy is structured as a General Terms and Conditions plus Additional Clauses cover. The Additional Clauses can be either marine or land transportation insurance and can be based on either all risks or named perils by incorporating Italian risks/exclusion clauses or the ICC A, B or C. There seems to be no translation of these new cargo clauses.

The **Spanish** marine insurance market has adopted standard marine

insurance conditions named “Condiciones Generales del Seguro de Buques”, for hulls, and “Condiciones Generales del Seguro de Mercancías”, for cargo. These standard conditions were prepared between 1927 and 1934, by the Madrid Marine Insurance Committee. The content of the conditions follows closely the Spanish C Com and is influenced by the ILU Hull and Cargo Clauses in use at that time. In later years Spanish companies have felt it necessary to update and change these conditions and some new conditions have been made known by certain companies.

The Spanish General Conditions of 1927 - 1934, are usually accompanied with clauses, endorsements, special conditions and warranties which are attached to the policy to include coverage for specific risks. Examples are American, English or Norwegian clauses for builder’s risk, cargo, hull or oil & gas, or other exposures. All such clauses are fully integrated in the Policy.

The incorporation of foreign clauses to a Spanish marine insurance contract poses serious challenges because the different terms of the contract are based on quite different legal frameworks. It is thus difficult to find a feasible instrument for the construction of the conditions.

2.2.4. Countries with no standard clauses/using only ITCH/ICC or other standard clauses

Portugal, Slovenia, Croatia, Greece, Israel, Venezuela, Australia, Indonesia, South Africa and Hong Kong do not have national standard conditions. A common feature for these countries is a widespread use of the English ITCH and ICC clauses. In **Portugal** there are also individual contracts made by each company. Apparently, the insurance companies have certain General and Special rules, which are contained in the individual Insurance Policy. Also, there are some clauses called “Particulars”, which the parties may agree to include when entering the contract.

Hong Kong also uses other standard conditions, as for instance Norwegian and Japanese.

2.2.5. Japan, China and New Zealand

In **Japan**, standard conditions for hull was established in 1990 (General Clauses of Hull Insurance (Japanese HC). These clauses are widely used. Attached to these clauses will be one out of 6 Special Clauses (Class No. 1 to Class No. 6).

For international transport of cargo there are no standard insurance conditions, and English Clauses (Institute Cargo Clauses) are often used. For national transport of cargo there are, however, standard conditions made in 1989 (General Conditions for Marine Cargo Insurance (Domestic Transportation), or Japanese Cargo Clauses.

China operates with two sets of standard clauses. Hull Insurance Clauses (HC) and Ocean Marine Cargo Clauses (CC). Both conditions are translated into English.

The **New Zealand** marine insurance market does not have standard Policy conditions. However there are some clauses promoted by the New Zealand

Insurance Council which are commonly used by insurance brokers and underwriters. Otherwise, New Zealand underwriters rely on English and German (DTV) standard clauses, and their own policy products. The London Institute of Underwriters' standard clauses are most commonly in use.

2.2.6. US and Canada

There are no standard insurance conditions in use in the US, in the sense that a particular type of risk will always be written pursuant to the same form or set of forms. Many insurance companies, as well as brokerage houses, have developed their own forms. Nonetheless, there exist numerous coverage forms that are the product of research and development of the American Institute of Marine Underwriters (AIMU). Some of these forms, such as the "American Institute Cargo Clauses (April 1, 1966)," have common usage. A selection of the more significant AIMU form clauses are published by Witherby & Co Ltd, together with the English Institute Clauses, ref. above. In this paper, reference is made to American Institute Hull Clauses June 2 1977 (American IHC)

In **Canada**, there are some particular Canadian Clauses including the Great Lakes Hull Clauses and Clauses in use in British Columbia. Apart from that, the marine insurance markets in Canada often use the ITCH and ICC. American Clauses are also widely used.

3. Duty of disclosure

3.1. Introduction

Rules concerning duty of disclosure are found in the Insurance Contract Acts or other contractual legislation, Plans or Conventions of all the different countries in the material. In Sweden and Denmark, the provisions are mandatory in favor of the person effecting the insurance and the assured, ref. above under item 2.1. Similarly, the regulation in France, Slovenia, Australia, New Zealand, Hong Kong and South Africa are mandatory on this point, but the material does not say whether these provisions in general may be departed from in favor of the assured. In UK, the provisions are declaratory except for a fraudulent breach of the duty of good faith and misrepresentation. The position in US is not clear on this point.

The regulation concerning duty of disclosure is closely connected to the provisions concerning duty of good faith, which are discussed under item 4. In the common law countries, the rules concerning duty of disclosure and misrepresentation constitute a part of the broader principle of duty of good faith. In these systems, the rules discussed under this item are therefore a part of the next issue. However, in the civil law countries there is not a similar legal connection between these two issues, and the provisions concerning duty of disclosure is regulated as a separate issue. For the civil law countries it is therefore necessary to treat the provisions concerning duty of disclosure separately. As many of these provisions are similar or fairly similar in the civil law and the common law system, it seems natural to include the regulation of duty of disclosure and misrepresentation in the common law system under item

3. The remaining part of the principle of duty of good faith will be discussed as a separate issue under item 4. This distinction between the two concepts will also shed light over the most important differences between the regulation in the common law and the civil law countries concerning both concepts.

The purpose of the duty of disclosure is to give the insurer the best opportunity to assess the risk he is taking over. The more information the insurer has concerning the risk, the more accurate can his evaluation be. This will in turn make it possible for the insurer to calculate a mathematically correct premium and to draw up an insurance contract accurately fitting the risk. As the person effecting the insurance normally is the person possessing the most information about this risk, it is natural that he should have a duty to pass this information on to the insurer.

From a legal point of view, a principle of disclosure may be explained as a question of fairness; it would not be fair to ask the insurer to evaluate the risk with less information than the information possessed by the person effecting the insurance. This would create a situation of contractual inequality between the parties.⁶ But the principle of disclosure may also be explained from an economic point of view. If the person effecting the insurance were not under a duty to disclose information concerning the risk, he would be likely to keep the information to himself in order to get a lower premium. The insurer would then have to spend time and money to get the same information from other sources. The resources spent for this purpose will of course have to be reimbursed through the premium. Also, if the insurer is uncertain whether he has the full information, he may ask for a higher premium for safety reasons. The duty of disclosure is therefore a tool to obtain a more correct premium, and – contrary to what the assured may believe – this premium may also be lower than if there was no such duty.

The regulation of duty of disclosure seems to have caused few problems in the civil law countries. Typically, they were not amended under the 1996 revision of the Norwegian Plan or under the amendment of the Swedish Hull Conditions, and there are small differences in the Scandinavian systems concerning this issue. This also means that the Scandinavian regulation as a whole conforms to the mandatory requirements of the Swedish and Danish ICA. However, this is an area having caused significant problems in the common law countries. It may therefore be interesting to contemplate methods of regulation that seem to function satisfactorily. Furthermore, it is important to look into the mandatory provisions and the differences between these provisions and the declaratory or contractual regulation to see if the mandatory provisions may cause problems in an attempt towards harmonization.

The discussion is divided into four parts. The first part presents the scope or the extent of the duty of disclosure. The second part concerns the time at which the duty of disclosure applies. The third part discusses the sanctioning system. The fourth and last part contains a summary of the main differences

⁶ Hare: Good faith, disclosure, misrepresentation & the omnipotent warranty: A South African perspective, Paper presented at the BMLA/Tulane Conference, London, May 2000, (Hare) p. 8.

between the mandatory and directory provisions and some reflections connected to the presentation.

3.2. *The scope of the duty of disclosure*

3.2.1. *Overview*

The scope of the duty of disclosure is defined through four main issues: First, there is a need to define the concept of “disclosure” and the relationship between disclosure and misrepresentation. The second issue is what kind of information the duty of disclosure applies to. The third question is whether the insurer will have to outline this information to the person effecting the insurance through questions, or whether the burden to sort out the relevant information rests with the assured. The fourth issue is the relevance of the knowledge of the person effecting the insurance for his duty of disclosure.

3.2.2. *Disclosure and misrepresentation*

Duty of disclosure means a duty to pass on to the insurer information as defined further below under item 3.2.3. This duty may be described as making full and correct or truthful disclosure of the defined circumstances.⁷ Thus, the duty of disclosure is both a duty to pass information to the insurer, and a duty not to misrepresent it. However, some systems have divided these issues in two, with separate provisions for disclosure and misrepresentation.⁸ Even if this is the case, it should however be noted that in practice it is difficult to draw a clear line between the two issues.⁹

As a starting point, this division of the regulation seems to have little consequence for the content of the duty. However, the UK MIA and US common law system operates with a special definition of what constitutes an untrue statement. The provisions in the UK MIA on this point virtually equates truth with materiality in the sense that a statement is not untrue if the correct statement would not be considered material by the insurer.¹⁰ This means that the question of truth will add nothing to the duty, as the question of materiality arises also for the duty to disclose. In US, however, the concept of materiality

⁷ NP § 3-1 first part, Swedish HC § 9 mom. 1, DC § 21, Finnish ICA 1933 § 4, DTV Cargo 4.1, Greek law 2496/1997 § 3, Italian CC art. 1892, French ICA art L172-2, Dutch C Com art. 251, Belgium 1874 Law art. 9, Slovenian MA art. 694 and 695, Chinese MC art. 222, Venezuela C Com. art. 568 no. 1, Japanese Com C art. 644 and apparently, and Croatian MC. The material from Portugal and Spain is not clear about this point.

⁸ UK MIA sec. 20 (1), Ca MIA sec. 22 (1), Hong Kong Ord sec. 20 (1). The Australian answers say nothing about misrepresentation, but as the Au MIA is based on the UK MIA, the same provisions are presumed to apply. South Africa Short Term Insurance Act contains a separate provision concerning misrepresentation in sec. 53. In the civil law systems, ADS 20 has separate regulation of misrepresentation.

⁹ This is illustrated in *Pan Atlantic Insurance Co. Ltd. v. Pine Top Insurance Co. Ltd.*, (1994) 2 Lloyd's Rep. 427.

¹⁰ UK MIA sec. 20 (4), Schoenbaum: *Key divergences between English and American law of marine insurance*, Maryland, 1999 (Schoenbaum), p. 99. On the other hand, Malcolm Clarke argues that this is not correct, as materiality under sec. 20 (4) determines only the difference between (a) truth, and (b) untruth which has consequence in law, i.e. gives grounds for avoidance.

and the concept of truth are two separate concepts. The rule here is that the representation must be substantially true.¹¹

Also, there might be a distinction in the definition of what information the duty of disclosure and the duty not to misrepresent apply to, see below under item 3.2.3.

3.2.3. What information must be disclosed/not misrepresented

As mentioned above, the purpose of the regulation of the duty of disclosure is that the insurer shall obtain sufficient information to make a correct risk assessment. The insurer will need information concerning the risk in order to be able to decide whether to undertake the insurance or not, and to assess the necessary premium and contract conditions. Thus, the starting point for the duty of disclosure is for the insurer to get information that is vital or necessary for this evaluation.

The relevant information may be defined in two steps. The first step is to define the information that shall be disclosed as such. This is part of the question of the content of the duty of disclosure. The second step is to qualify the undisclosed information that may give the insurer a right to invoke sanctions against a failure to give the relevant information. In this paper, the second step is treated as part of the sanctioning system, whereas the first step is discussed here as part of the definition of the scope of the duty. As a starting point it may be a matter of taste whether the definition is connected to the duty or to the sanctions; in both cases it will be a requirement to invoke a sanction. However, the division corresponds to how the regulation normally is built up, and it also illustrates clearly that in principle it is two different conditions.

Some systems do not have a definition of the information as such, but only contain a condition of inducement concerning the sanction. This holds for the Scandinavian common ICA, Belgium, the Netherlands, Italy, France, Slovenia and South Africa concerning misrepresentation.¹²

Other regulations contain a separate definition of what kind of information the duty of disclosure applies to. The content of this definition varies, but the core of the provisions seems to be that the information to be disclosed is "material" for the insurer in deciding whether and on what conditions he is prepared to accept the insurance.¹³ This holds for both civil law and common

¹¹ Schoenbaum p. 99.

¹² Danish, Swedish and Finnish ICA § 4 f, Belgium 1874 Law art. 9, Dutch C Com art. 251, Italian CC art.1892, French ICA art. L 172-2, Slovenian MA art. 694 and 695, South Africa Short Term Insurance Act sec. 53. This condition is discussed further below under item 3.4.

¹³ NP § 3-1 first part, Swedish HC § 9 mom. 1, DC § 21, ADS 19 (1), DTV Cargo 4.1, Greek law 2496/1997 § 3, Chinese MC art. 222, Venezuela C.Com. art. 568 no. 1, Japanese Com C art. 644, UK MIA sec. 18 (2), Au MIA sec. 24 (2), Ca MIA sec. 21 (3), Hong Kong Ord sec. 18 (2), NZ MIA sec. 18 (2). The same definition seems to be applied at national level in the US, based on case law, see M. Lanahan, 26 U.S. (1 Pet.) at 185, 188, 1998 A.M.C. at 2095, 2099; Sun Mutual, 107 U.S. at 509-5 10, 1998 A.M.C. at 1212; Healy, *The Hull Policy: Warranties, Representations, Disclosures and Conditions*, 41 Tul. L. Rev. 245-250 (1967); I A. Parks, *Law and Practice of Marine Insurance and Average*, 219- 220, 222-224 (1987).

law systems. However, the further definition of materiality differs on three accounts. The first difference is between an objective and a subjective approach to the question of materiality. The second difference is whether this approach is measured against the assured or the insurer. The third difference concerns how material the information must be.

As for the approach to materiality, the starting point in the common law countries is an objective approach. Further, this objective approach is normally tested against the insurer. The main question thus is how a prudent underwriter would react if he had the correct information.¹⁴ This is similar to the solution in Germany, Greece, Norway and Spain,¹⁵ and seems also to be the approach in China, Israel and Portugal.¹⁶

An objective approach to materiality measured against the assured is used in South Africa. The main point here seems to be whether a prudent man should understand that the information was material to the insurer.¹⁷ An objective approach to materiality is also common in non-marine insurance in the common law systems.¹⁸

A subjective approach seems to be used in Denmark, Sweden and Croatia.¹⁹ This will correspond to the requirement concerning inducement which are discussed below under item 3.4.

For Venezuela, Japan and South Africa concerning disclosure the interpretation seems more uncertain on this point.

As to the question of how material the information must be, the normal solution is that the information must be decisive for the insurer's assessment of the risk. In UK, however, this part of the question of materiality has been a matter of heavy struggle in the court cases and debate in the literature. The status today is that it is not required that the information is decisive for a prudent insurer when entering the insurance contract on the established terms. It is sufficient that a prudent underwriter would take the information into account when assessing the risk.²⁰ US, on the other hand, use a "decisive influence" test, where the minimum requirement is that the risk must be increased so as to enhance the premium.²¹

¹⁴ Schoenbaum p. 107 f. for UK MIA and US, Griggs: Marine insurance – Is the doctrine of "utmost good faith" out of date? in CMI Yearbook 1994, p. 300.

¹⁵ Reme: Duty of disclosure: Scope of duty and sanctions for breach, in: Reports from Marine Insurance Symposium Oslo, 4.-6. June 1998, MarJus no. 242, p. 98, Spaidiotis: Marine Insurance Law in Greece, year 1998, Issaias Law Office (Marine Insurance Law in Greece), item 17, Commentary NP p. 72. No reference from Spain.

¹⁶ Chinese MC art. 222. Portugal and Israel seem to follow UK on this point.

¹⁷ According to Hare p. 8 f. South Africa traditionally applied the prudent insurer test on this point. However, this solution was rejected in *Mutual & Federal Insurance v Oudtshoorn Municipality* 1985(1) SA 419(SCA), where materiality instead was judged according to a reasonable man or average prudent person, see Hare p. 10. The actions of the assured are thus measured against those of a reasonable person.

¹⁸ See e.g. Australian ICA 1984 sec. 21.

¹⁹ DC § 21, Swedish HC § 9 mom. 1, no reference from Croatia.

²⁰ Schoenbaum p. 107-117, Griggs p. 300-302, Kirby: Marine Insurance – Is the doctrine of "utmost good faith" out of date? In CMI Yearbook 1994, p. 271. However, it should be noted that at the same time, the judges incorporated a decisive inducement test, see below.

²¹ Schoenbaum p. 116. This was the traditional solution in South Africa, but is now rejected, Hare p. 9 f., Hare p. 10-11 also argues that the concept of materiality contains a second part asking whether a prudent person effecting the insurance should have known that the information was material to the insurer.

This is similar to the German cargo clauses,²² and also to the Norwegian interpretation of materiality,²³ and seems to correspond to the approach used in most civil law countries, even if the material is not clear on this point.

Normally, the requirement of materiality is common for disclosure and misrepresentation. There are however, two exceptions from this. As already mentioned, the South African regulation of misrepresentation have departed from the objective materiality approach and instead operates with a requirement of materiality or inducement for the actual insurer. This seems to imply that South Africa in reality follows the UK MIA solution where objective materiality is added to subjective inducement, but where the objective material information does not need to be decisive for the prudent insurer.²⁴ The other exception is ADS 20 stating that a circumstances are deemed to be material especially if they were misrepresented by the assured, and he had declared his statement to be correct.

In addition to the general requirement of materiality, some systems highlight the concept of materiality in more detail. One method here is to emphasize that circumstances inquired into are material.²⁵ Another method is to emphasize certain issues to be specially dealt with by the person effecting the insurance. The French Hull Conditions 8.1 emphasize that the duty of disclosure also applies to the flag, the classification society and the class of the vessel. Similarly, the most recent Italian Forms (the 1983 and 1988 Policy) list a number of circumstances which the insurer considers material, such as whether the subject matter insured is represented by dangerous goods, or the goods have been transshipped or have to be transshipped. Italian Hull Conditions also contain a "classification clause" providing for a duty of the person effecting the insurance to declare if the vessel is classed and what classification the vessel has been assigned.

Some systems also define matters that need not be disclosed.²⁶ A main point for both the common law systems and the civil law systems here is that information already known to the insurer need not be disclosed.²⁷ Further, in the common law systems, it is not necessary to disclose a fact contrary to a warranty.²⁸ The reason is that the warranty rule makes it unnecessary to apply the disclosure rule, and is simpler to apply since the warranty either establish materiality or makes it irrelevant, see further below under item 6.

²² DTV Cargo 4.1.

²³ Commentary NP p. 72, Brækhus/Rein p. 119 f.

²⁴ Hare p. 13-15, Staring/Waddell: *Marine Insurance*, in *Tulane Law Review* volume 73, p. 1655-1656.

²⁵ DTV Cargo 4.1, Court of Cassation, 4 April 1991, n. 3501 concerning Italian CC art. 1892, ADS 21, Schoenbaum p. 116 concerning US.

²⁶ UK MIA sec. 18 (3), Au MIA sec. 24 (3), Ca MIA sec. 21 (5), Hong Kong Ord sec. 18 (3), NZ MIA sec. 18 (3). The same solution seems to be used in US, see Parks: *Law and Practice of Marine Insurance and Average*, p. 224-230 (1987), and South Africa, see Hare p. 13.

²⁷ UK MIA sec. 18 (3), Au MIA sec. 24 (3), Ca MIA sec. 21 (5) (b) Hong Kong Ord sec. 18 (3) (b), NP § 3-5, SP § 15, DC § 27, ADS 20 (2), DTV Cargo 4.3, Slovenian MA art. 694 third part.

²⁸ UK MIA sec. 18 (3) (d). The position in US is the same, see Cattell p. 22.

3.2.4. *Active and passive duty of disclosure*

The question here is what method is used to acquire the material information. Two different approaches are used in this respect. The first approach may be called an “active” duty of disclosure, whereas the second approach is characterized as a “passive” duty of disclosure. With an active duty of disclosure the duty to assess what information is material for the insurer rests with the person effecting the insurance. On the other hand, a passive duty of disclosure implies that the insurer will have to define what information is material through a questionnaire. This is a different approach from the one described above under item 3.2.2, where information specially asked for are deemed to be material. A passive duty of disclosure implies that information not asked for is not material.

Both approaches are used in the civil law marine insurance systems, but an active duty of disclosure is the main solution. The common law systems seem mainly to apply an active duty of disclosure, but elements of a passive duty of disclosure is found in the US, see below.

An active duty of disclosure, viz. the person effecting the insurance has a duty to disclose all (material) facts to the insurer, is the main solution in all the countries.²⁹ However, this starting point may be modified either in parts of the legislation or in certain conditions. The Dutch solution is to modify the duty of disclosure if the insurer is using a form of proposal. This method is also common in non-marine insurance. If so, it is sufficient for the assured to answer the questions asked correctly. This method makes the question of materiality less important, as the insurer may not claim that information not asked for nevertheless was material. In US, there seem to be a similar regulation: when the insurer makes an inquiry information not asked for will not have to be provided.³⁰ A more general modification is established in the Spanish ICA and Greek legislation, stating that the assured shall only answer the questions asked by the insurer.³¹ To what extent the Spanish provision supersedes the starting point of active duty of disclosure is not explained in the material.

The Spanish and Greek solution is similar to the method used in the Norwegian Cargo Clauses § 12, where the starting point is that the insurer will have to ask for the information he needs to insure the risk. The duty of disclosure

²⁹ UK MIA sec. 18 (1), Au MIA sec. 24 (1), Ca MIA sec. 21 (1), Hong Kong Ord. sec. 18 (1), NZ MIA sec 18 (1), NP § 3-1 first part, Swedish HC § 9 mom. 1, DC § 21, Finnish ICA 1933 § 4 f, ADS 19 (1), DTV Cargo Conditions 4.1, Dutch C Com art. 251, Slovenian MA art. 694 and 695, Croatian MC, Belgian Law 1874 art. 9, Greek law 2496/1997 § 3, Italian CC1892, Chinese MC art. 222, Venezuela C.Com. art 568 no. 1, Japanese Com C art. 644, French ICA art. L 172-2. The material from Portugal and Spain include no references on this point. This also seems to be the solution in US and South Africa, see further for US *M Lanahan v. the Universal Ins. Co.*, 26 U. S. (1 Pet.) 170, 183, 1998 A.M.C. 285, 294 (1828); *Sun Mutual Ins. Co. v. Ocean Ins. Co.*, 107 U.S. 485, 1998 AM.C. 1191, 1213 (1883); Healy, *The Hull Policy: Warranties, Representations, Disclosures and Conditions*, 41 Tul. L. Rev. 245 (1967); I A. Parks, *Law and Practice of Marine Insurance and Average*, 216-222 (1987, and for South Africa Hare p. 8.

³⁰ Schoenbaum p. 116-117.

³¹ Spanish ICA art. 10, Marine Insurance Law in Greece item 17.1, where it is stated that it was not the intention of the legislator to release the assured from disclosing material facts that were not put forward in the questions.

of the person effecting the insurance is thus limited to answering the insurer's questions. Only if the person effecting the insurance has knowledge of special circumstances that he realizes are material for the insurer, is he under a duty to disclose these circumstances. This provision is taken from the Norwegian ICA § 4-1, which is mandatory for national carriage of goods, but is given a general application in the Cargo Clauses, including international transport.

3.2.5. *The relevance of the knowledge of the person who effects the insurance*

The relevance of the knowledge of the person who effects the insurance rises two questions. The first question concerns the relevance of knowledge of the factual information: Does the duty of disclosure apply to all material information, or only to material information that the person effecting the insurance possesses or ought to possess. If there is a requirement of knowledge, the second question is whether the person effecting the insurance also must realize that the information is material to the insurer. This means that there are four alternatives concerning knowledge: 1) The duty of disclosure is objective regardless of knowledge. 2) The duty only applies to factual knowledge concerning the information. 3) The duty applies to knowledge the assured has or ought to have. 4) The duty is connected to knowledge both of the information and of the materiality.

The strictest definition of the scope of the duty of disclosure is to apply the duty to all material information regardless of whether the person effecting the insurance possesses the information. If so, neither the knowledge of the information nor the understanding that this information is material for the insurer is relevant. This starting point is used in the Norway, in the German Cargo Clauses, where the person effecting the insurance is to give full and correct disclosure of all circumstances which are material to the insurer.³² The same approach is used in the common law systems for misrepresentation.³³

A more normal starting point is to apply the duty of disclosure to circumstances the assured knows or ought to know about. In Slovenia, Spain, China, and the systems built on MIA US and South Africa, the duty of disclosure applies to every material fact known to the assured, or which he ought to have known.³⁴ According to the UK MIA provision "ought to have known" shall be judged in an objective way as what the insured ought to know in the ordinary course of business,³⁵ whereas the Chinese solution is a

³² NP § 3-1 first part, DTV Cargo 4.1.

³³ UK MIA sec. 20 (1), Ca MIA sec. 22 (1), Hong Kong Ord sec. 20 (1). The Australian answers say nothing about misrepresentation, but as they use the MIA, the same provisions are presumed to apply. US seems to follow UK on this point, see Cattell et al.: *Marine Insurance Survey: A Comparison of the United States Law to the Marine Insurance Act of 1906*, 20 Tul.Mar.L.J. 1 (1995), (Cattell) p. 23-24.

³⁴ Slovenian MA art. 694, Chinese MC art. 222, UK MIA sec. 18 (1), Au MIA sec. 24 (1), Ca MIA sec. 21 (1) ref. (6), Hong Kong Ord sec. 18 (1), national US law according to case law, see Cattell p. 21-22, Hare p. 8. Israel claims to follow UK law. The Spanish material includes no references on this point. Japanese Com C art. 644 and Italian CC art. 1893 say nothing about knowledge, but connect the reaction to bad faith or gross negligence, which may lead to the same result.

³⁵ UK MIA sec. 18 (1), Clarke: *Law of Insurance Contracts* (1994) Ch. 23-8C. Contrary, see Arnold's *Law of Marine Insurance and Average*, 1981, no. 640, who seems to follow the Chinese solution, see below.

subjective approach asking for what the assured ought to have known in his actual business practice.³⁶

The third alternative, actual knowledge concerning the information, is a condition in Denmark, Germany (ADS), France, the Netherlands, Belgium, Greece, and also it seems, Venezuela.³⁷

The fourth and most favorable starting point is applied in Sweden, where the contracting party must disclose all circumstances that might influence the insurers in assessing the risk, as far as he is aware of this possible influence.³⁸ This seems to imply that the duty of disclosure presumes knowledge on the part of the person effecting the insurance; if he does not possess knowledge of the factual information he cannot know that this information is material for the insurer. A similar provision seems to be used in the French hull and cargo conditions.³⁹

The last method may be compared to the solution in South Africa for disclosure, but here the approach to the knowledge of materiality is objective, and not subjective. This implies that the duty of disclosure applies to information the assured knows or ought to know about, and which a prudent man would have realized was decisive for the insurer.⁴⁰

The significance of the difference in approach depends on the sanctioning system. It matters less that the duty of disclosure is objective if the insurer in the case of good faith is only allowed a limited reaction. On the other hand, some of the provisions requiring knowledge give the insurer the right to cancel the contract even if the person effecting the insurance gives wrong or incomplete information in good faith. In these instances, the difference in approach does not seem to lead to any difference in practical result, see further below under item 3.4.

3.3. The time at which the duty of disclosure is in effect

The purpose here is to discuss at what period of time the duty of disclosure applies. One may here distinguish between two separate questions. One question is when the factual circumstances that shall be disclosed must be evident. The other question is at what point in time the person effecting the insurance must be without knowledge of the information or the materiality to be able to claim that he has not breached his duty of disclosure or at least that the breach was done in good faith. If there is no breach of the duty, the starting point will be that the insurer may not invoke a sanction. Also, a breach of the

³⁶ Chinese MC art. 222.

³⁷ DC § 21, ADS 19 (1), French ICA art. L 172-19-3 ref. art. 172-2, Dutch C Com art. 251, Belgium Law 1874 art. 9 (according to Rohart p. 310-311 ref. p. 309-310, and von Ziegler: The "utmost good faith" in Marine Insurance Law on the Continent, in: Huybrechts (Ed), Marine Insurance at the turn of the Millennium, volume 2 p. 28), Greek law 2496/1997 § 3, Venezuela C Com art. 568 no. 1.

³⁸ Swedish HC § 9 mom (1).

³⁹ The wording in French HC art. 8 (1) and French CC art. 14-1 is "all circumstances of which he is aware that would influence the insurers", and departs somewhat from the wording of the French ICA, where only knowledge of the information is required according to the text. The conditions may therefore be interpreted similar to the ICA.

⁴⁰ Hare p. 8-10.

duty of disclosure in good faith generally activates a less serious sanction from the insurer than if the person effecting the insurance is acting negligently or deliberately.

As for the first question, the main solution in the material is that the factual events that the person effecting the insurance has a duty to disclose are circumstances existing at the time the contract is entered into. This solution is used in Norway, Sweden, Denmark, Finland, Germany, the Netherlands, UK, Israel, Canada, Australia, Hong Kong, China, Japan, Slovenia, Portugal, Spain, France, South Africa and China.⁴¹ In Sweden, however, this main rule is supplemented with a special duty of disclosure during the insurance period concerning defined issues, i.e. change of management.⁴²

On the other hand, not all countries seem to distinguish between the duty of disclosure and a duty to notify the alteration of risk. In Venezuela, the duty of disclosure is not limited, and thus seems to apply both before and during the currency of cover.⁴³

It should also be noted that many of these countries have special rules for duty of notifying the insurer about alterations of the risk after the contract has been effected. As alteration of risk is a separate concept with separate regulation in most of the countries, this duty of notification will be dealt with under item 5 concerning alteration of risk.

The German solution concerning open cover for cargo insurance seems to be a border case between the duty of disclosure and the alteration of risk. In Germany, rules for open cover in cargo insurance provide that the assured has a duty to declare all risks coming under the open cover. If he fails to do so, or he makes an incorrect declaration, the insurer will not be liable. New cargo may be seen as an alteration of the risk under the original contract, or as extending the contract to include more insured goods. The first view will lead to an alteration of risk perspective, whereas the second solution will mean that the duty of disclosure is postponed until the time when the cargo is included in the cover.

If the duty of disclosure applies to the whole insurance period, the question of knowledge and good faith will of course also be relevant for the whole period. In systems where the duty of disclosure only applies to circumstances existing at the time the contract is entered into, the question of knowledge and good faith must as a starting point be connected to the same period in time. The Norwegian, Swedish and Finnish systems, however, have a special rule concerning duty to correct wrong information.⁴⁴ This duty applies if the person effecting the

⁴¹ NP § 3-1 first part, SP § 12, Swedish HC § 9 mom. 1, DC § 21, Finnish ICA 1933 §§ 4 and 5, ADS 19 (1), Dutch C Com § 251, French ICA art. L 172-19.3, UK MIA sec. 18 (1), Au MIA sec. 24 (1), Ca MIA sec. 21 (1), Hong Kong Ord sec. 18 (1), Chinese CM art. 222, Japanese Com C art. 644, Slovenian MA art. 694 and 695. No references from Portugal, Spain and Israel. The solution seems to be applied in the US based on case law. Staring/Waddell, Parks, *Law and Practice of Marine Insurance and Average*, 230-231 (1987). The same solution seems to be presumed by Hare p. 13 for South Africa.

⁴² Swedish HC § 10, ref. further below under item 8.

⁴³ Venezuelan C Com art. 568.

⁴⁴ NP § 3-1 second part, Swedish HC § 10 mom. 1, Finnish HC § 35 no. 2. The DC contains no similar provision, and it may be argued that the Swedish solution is contrary to the mandatory regulation in the Swedish ICA § 4 f.

insurance, after the contract is effected, becomes aware of having given wrong information concerning facts existing at the time the contract was entered into. It is important to emphasize that this is not a duty of disclosure of facts happening during the insurance period, but limited to a duty to correct a misunderstanding of the factual circumstances existing at the time the contract is effected.

3.4. *The sanctioning system*

3.4.1. *Overview*

The sanctioning system raises four main issues. The first question is what sanctions the insurer may invoke. One may here distinguish between a right to cancel the contract, a right to claim additional premium, a right to claim freedom of liability for an incurred casualty, a right to partial reduction in the liability, and avoidance of the contract. The second question concerns the relevance of knowledge and the degree of fault on the part of the person effecting the insurance. The main solution is that the sanctions will vary depending on the assured's knowledge and the degree of fault. However, the combinations between the sanctions and the knowledge and degree of fault, and also the number of different solutions, vary. It should also be remembered that the scope of the duty of disclosure influences the question of fault. If the scope of the duty of disclosure is defined without any reference to the knowledge of the person effecting the insurance, incomplete or wrong information because of lack of knowledge will constitute a breach of the duty. On the other hand, if the duty of disclosure only applies to factual circumstances known by the contracting person, or even is conditioned on knowledge of the information being material, lack of knowledge will imply that there is no breach. However, the discussion will illustrate that this difference in approach not always corresponds to a similar difference in result.

The third question is the relevance of causation between the undisclosed or misrepresented circumstance and the casualty. The main solution is that such causation is not required, but there are some exceptions to this rule. A fourth question is whether there is a condition that the undisclosed or misrepresented information has in any way influenced the insurer's acceptance or assessment of the risk. This condition is closely connected to the requirement that the duty of disclosure only applies to information that is material to the insurer. For systems using a subjective materiality concept, the question of inducement and materiality will be identical. With an objective approach to materiality, the requirements will be different. The question of materiality concerns normally whether the information was relevant for an imaginary reasonable or prudent underwriter. The question of influence concerns the actual insurer and is an inquiry into reliance and the causal connection between the misrepresentation or omission and the effecting of the insurance.⁴⁵

In the following, the starting point for the discussion is the different degrees of fault. To illustrate the connection between the description of the duty

⁴⁵ Schoenbaum p. 117.

and the sanctions, it is natural to start with the relevance of knowledge under item 3.4.2, continue with breach of the duty of disclosure in good faith under 3.4.3, and thereafter discuss negligence in 3.4.4 and fraud and breach of honesty and good faith under 3.4.⁴⁶

3.4.2. *Knowledge as condition for breach*

In systems where the duty of disclosure is defined as a duty to disclose information that the assured possesses knowledge about, no knowledge will as a starting point imply that there is no breach, and that the insurer may not invoke any sanctions. This is the case in Denmark, Germany (ADS), France, the Netherlands, Belgium, Greece, China, and also it seems, Venezuela, see above under item 3.2.5. Similarly, in systems requiring knowledge both of the circumstances and of their influence on the insurer, no such knowledge will as a starting point render the insurer fully liable. Such provisions are found in Sweden and apparently the French hull and cargo conditions, see above under item 3.2.5. And in systems where the duty to disclose applies to circumstances the assured knows or ought to know about, the assured will be fully covered if he neither knew nor ought to know these circumstances. This will then be the general starting point in Slovenia and Spain, and for duty of disclosure in the systems built on UK MIA, US and South Africa, see above under item 3.2.5.⁴⁷

However, the Swedish and Danish solution is that even if there is no defined duty to disclose unknown information, the insurer may cancel the insurance if he has got wrong or insufficient information, and the assured did not know and cannot be blamed for not knowing that the information was not correct.⁴⁸

3.4.3. *Breach in good faith*

3.4.3.1. *The concept of good faith*

The concept of breach of the duty of disclosure in good faith is closely connected to the question of knowledge as a condition for breach. If no knowledge implies that there is no breach, the concept of breach in good faith will relate to lack of understanding of the significance of the information. On the other hand: If the duty of disclosure is defined as an objective duty regardless of knowledge (knew or ought to know), the concept of breach in good faith will relate to both knowledge concerning the factual circumstances, knowledge concerning the materiality, and any excuses the assured may have. It is therefore necessary to distinguish between these two situations.

⁴⁶ It should be noted that the definitions of fraud, bad faith, negligence and good faith may vary in the different systems. It is, however, outside the scope of this report to analyze these concepts in further detail. The discussion is therefore based on the terms used in the material without a more detailed interpretation.

⁴⁷ The result will here depend on how strict "ought to be known" by the assured is interpreted. According to Schoenbaum p. 104 "knowledge is required but a person is deemed to know every fact which in the course of his business ought to be known to him".

⁴⁸ Swedish HC § 9 mom. 4, DC § 23.

3.4.3.2. *The sanctions*

The strictest sanctions against wrong or incomplete information in good faith is that the contract is null and void, or that it may be avoided by the insurer. Avoidance is used in UK, Hong Kong, Canada and South Africa for misrepresentation.⁴⁹ Good faith will here also include the situation where the assured did not possess the correct information. Avoidance may also be claimed in France,⁵⁰ whereas the Belgian and Dutch expression, and apparently also the Spanish solution, is that the contract is “null and void”.⁵¹ However, in these provisions, good faith relate to the assured’s understanding of the significance of the information as all the mentioned systems protects an assured without knowledge, see above under 3.4.2. A general condition to invoke such sanction is that the insurer proves that he would not have concluded the contract or concluded it on other conditions if he had been duly informed.⁵² Also, the premium may be returned.⁵³

The normal solutions in this instance, are however, less strict against the person effecting the insurance. In Norway, Sweden, Denmark, Germany, Japan and apparently Croatia, the insurer will be fully liable for incurred casualties if there is a breach of the duty of disclosure in good faith. In Norway, Denmark and Japan good faith relates to knowledge both of the information and the significance of it.⁵⁴ In Sweden and Germany on the other hand, good faith relates to knowledge of the information.⁵⁵ This solution thus corresponds to the situation where the duty of disclosure is conditioned on the assured’s knowledge, see above under item 6.4.2. Such liability will, however, often be combined with a right to cancel the contract,⁵⁶ or a right to call in additional premium.⁵⁷

An alternative solution is that the insurer is entitled to reduce the

⁴⁹ UK MIA sec. 20 (1), Ca MIA sec. 22 (8), Hong Kong Ord sec. 20 (1). The same solution will be found in Au MIA, but there is no reference in the material. US seems to follow the UK solution as a main rule on federal level, see Healy, *The Hull Policy: Warranties, Representations, Disclosures and Conditions*, 41 Tul. L. Rev. 245, 251 (1967), Cattell p. 24, Staring: *Marine insurance – Is the “duty of good faith” out of date?* In CMI Yearbook 1994, p. 293-294. However, some courts have departed from this, stating that negligence and good faith will not be sufficient for the insurer to claim avoidance, see Schoenbaum p. 100 and Staring p. 293. In South Africa, innocent misrepresentation will give the insurer a right to avoidance if the misrepresentation is not fundamental, see Hare p. 16.

⁵⁰ French ICA 172-2.

⁵¹ Belgian Law 1874 art. 9, Dutch C Com art. 251 and apparently the Spanish C Com art. 381, see Von Ziegler p. 23-24 and p. 27-28 and Rohart p. 310-313. A similar solution is used in South Africa if innocent misrepresentation is fundamental, see Hare p. 16.

⁵² Belgium Law 1874 art. 9 and 10, Dutch C Com art. 251, French ICA 172-2 (decisive for concluding the contract), Spanish C Com art. 381, South African Short Term Insurance Act sec. 53, (misrepresentation). UK MIA sec. 20 are as mentioned interpreted to contain such a condition, see Batz: *Utmost good faith in marine insurance contracts*, in: *Marine Insurance at the turn of the millennium*, volume 1, 1999 (Batz1999) p. 17, Schoenbaum p. 117 f. US admiralty rule is the same, see Schoenbaum p. 118.

⁵³ Belgian Law 1874 art. 9 and 10, French ICA 172-2, UK MIA sec. 84 and South Africa, see Hare p. 16.

⁵⁴ NP § 3-4, DC § 23, Japanese Com C art. 644.

⁵⁵ Swedish HC § 9 mom. 4, ADS 20 (2), DTC Cargo 4.2 and 4.3.

⁵⁶ NP § 3-4, DC § 23, Swedish HC § 9 mom. 4.

⁵⁷ ADS 20 (3), DTV Cargo 4.4.

indemnity proportionally to the premium paid. This solution is used in France for good faith concerning the significance of the information if the insurer would have accepted the insurance, but on other conditions had he known about the undisclosed fact.⁵⁸ The similar Italian provision is connected to good faith concerning both the information and the materiality, and combined with a right to cancel the contract.⁵⁹

3.4.4. *Negligence*

3.4.4.1. *The concept of negligence*

Some systems operate with the concepts of good and bad faith, and include no special regulation for negligence. This is the case in France, Belgium, and the Netherlands, where the solutions described above for good faith will be applied also against the negligent assured with knowledge of the undisclosed information. Apparently, lack of knowledge will in these systems result in no breach even if the assured can be blamed for this lack of knowledge. This means that negligence in these systems will follow the regulation for no knowledge (negligence concerning lack of knowledge) or breach in good faith (negligence concerning materiality).

In the other systems, negligence is either given a separate regulation, or will follow the solution for intent⁶⁰ or fraud/bad faith,⁶¹ or gross negligence is treated similarly as fraud (or bad faith).⁶² In systems where negligence is expressly regulated, three different approaches are used. One approach is to connect negligence to lack of disclosure in general, which seems to imply that negligence is evaluated against both knowledge and materiality.⁶³ The other approach is to connect negligence to the question of lack of knowledge only.⁶⁴ The third approach is a combination of the two, mentioning both negligence concerning disclosure and negligence concerning lack of knowledge.⁶⁵

3.4.4.2. *The sanctions*

As with a breach in good faith, a negligent breach of the duty of disclosure may render the contract null and void,⁶⁶ it may be avoidable at the option of the

⁵⁸ French ICA art. L 172-2. The same solution is used in Spanish ICA see Rohart p. 317-318.

⁵⁹ Italian CC art. 1893.

⁶⁰ NP § 3-3.

⁶¹ ADS 20 (1), Spanish ICA sec. 10.3, UK MIA sec. 18 (1) (disclosure) and sec. 20 (1) (misrepresentation), Ca MIA sec. 21 (7) (non disclosure) and 22 (8) (misrepresentation), AU MIA sec. 24 (1) (disclosure), Hong Kong Ord sec. 18 (1) (non disclosure) and sec. 20 (1) (misrepresentation).

⁶² Italian CC art. 1892, Japanese Com C art. 644, Slovenian MA art. 695, ADS 20 (1) (gross negligence concerning lack of knowledge leading to failure of disclosure) .

⁶³ Italian CC art. 1892, Japanese Com C art. 644, NP § 3-4, DC § 23.

⁶⁴ UK MIA sec. 18 (1) (non disclosure), Ca MIA sec. 21 (7) (non disclosure) , AU MIA sec. 24 (1) (disclosure), Hong Kong Ord sec. 18 (1) (non disclosure), Swedish HC 9 mom. 4, ADS 20 (1).

⁶⁵ Slovenian MA art. 695, DTV Cargo 4.2-2 and 4.3-2.

⁶⁶ Belgian Law 1874 art. 9, Dutch C Com art. 251 and apparently the Spanish C Com art. 381, see Von Ziegler p. 23-24 and p. 27-28 and Rohart p. 310-311 and p. 313, and South African law when there is a fundamental mistake, see Hare p. 16.

insurer,⁶⁷ or he may claim that the contract is not binding.⁶⁸ An alternative sanction is freedom of liability for incurred casualties.⁶⁹ If this is combined with cancellation of the contract, see below, the solution is very similar to avoidance. Also, this remedy may be combined with a refund of premiums paid.⁷⁰

A more favorable solution is reduction in indemnity. Two alternative methods for reduction is used: Reduction in proportion to the ratio of the premium paid to the premium that would have been calculated if the breach had not taken place,⁷¹ or reduction according to an evaluation based on the influence of the undisclosed information on the insurance contract and the casualty, the degree of fault or other circumstances.⁷² The last solution is to call for additional premium. This solution is conditioned on the undisclosed circumstances being decisive for the evaluation of the risk, and entitles the insurer to require the difference between the premium paid and premium that would have been quoted on the basis of full information.⁷³

In situations where the contract is binding in spite of the breach of disclosure, the insurer may also have a right to terminate the contract.⁷⁴ A combination of claiming freedom for liability for casualties incurred and termination will mean that the insurer will not have any liability under the contract. If cancellation is combined with a right to call in additional premium, the insurer will on the other hand be liable for casualties having occurred before the cancellation.⁷⁵

In addition to a combination of termination for future coverage and other sanctions, there may be a combination of sanctions connected to variations in the degree of fault, or the influence of the undisclosed circumstance on either the coverage or the casualty. One solution is to limit the sanction to gross

⁶⁷ Spanish ICA sec. 10.3, Italian CC art. 1892, French ICA art. L 172-2, French CC art. 14-1 and 18, French HC art. 8-1 and 14, Slovenian MA art. 695, UK MIA sec. 18 (1) (disclosure) and sec. 20 (1) (misrepresentation), Ca MIA sec. 21 (7) (non disclosure) and 22 (8) misrepresentation, AU MIA sec. 24 (1) (disclosure). Avoidance is also claimed to be the solution in Croatia, but here there are no references in the material. US seem to follow the UK solution as a main rule on federal level, see Healy, *The Hull Policy: Warranties, Representations, Disclosures and Conditions*, 41 Tul. L. Rev. 245, 251 (1967), *Staring: Marine insurance – Is the “duty of good faith” out of date?* In CMI Yearbook 1994, p. 293-294. However, as mentioned above, some courts have departed from this, stating that negligence and good faith will not be sufficient to render the contract void. This holds for both misrepresentation and disclosure, see Schoenbaum p. 100 and 101. According to Hare p. 16, avoidance is used when there is not a “fundamental” mistake.

⁶⁸ NP § 3-3 first part, DC § 24.1 and § 25, SHC § 9 mom. 5 ref. SP § 13.

⁶⁹ NP § 3-3 second part, DC § 24.2 and § 25, SHC § 9 mom. 5 ref. SP § 13, ADS 20 (1), DTV Cargo 4.2.

⁷⁰ UK MIA sec. 84, South Africa, see Hare p. 16.

⁷¹ French ICA art. L 172-2 (negligence concerning materiality, right information would have lead to other conditions), Greek Law 2496/1997 § 3, Italian CC 1893 (ordinary negligence concerning knowledge and materiality).

⁷² Norwegian ICA § 4-2, which is applied for the Norwegian CC.

⁷³ Slovenian MA art. 694, Croatia MC (no reference), Chinese MC art. 223.

⁷⁴ Italian CC art. 1893, Greek Law 2496/1997 § 3, Chinese MC art. 223, NP § 3-3 third part, Swedish HC § 9 mom. 4 and § 22 no. 2 (a), Japanese Com C art. 644, Japanese HC art. 17, Japanese CC art. 11.

⁷⁵ Chinese MC art. 223.

negligence,⁷⁶ or to the contracting person being more than a little to blame.⁷⁷ If so, ordinary negligence renders the insurer liable. In some systems the sanctions are different for gross negligence and ordinary negligence. This is the case in Italy and Slovenia, where avoidance is used for gross negligence and reduction in liability or additional premium for ordinary negligence.⁷⁸ Further, the reaction may depend on the undisclosed or misrepresented circumstances having caused the insurer to withhold his consent to the contract or entered it on different terms.⁷⁹ Also, this distinction may lead to different reactions. If knowledge of the circumstances would have led the insurer to refuse the contract, this will result in a stricter reaction (avoidance⁸⁰ or the contract not being binding⁸¹), whereas if the circumstances only had effected the conditions of the contract, a less strict sanction will apply (calling in additional premium,⁸² pro rata reduction of liability,⁸³ or freedom of liability for losses caused by the undisclosed risk⁸⁴).

On the other hand, a general feature of the sanctioning system in case of negligence is that causation between the circumstances not disclosed and the casualty is no issue. An exception from this is the Scandinavian solution in case the insurer would have effected the insurance, but on different terms had he known of the undisclosed or misrepresented circumstances. In this case the insurer will be responsible for casualties that are not caused by the undisclosed circumstance. The person effecting the insurance has the burden of proving no causation.⁸⁵

3.4.5. *Fraud and bad faith*

3.4.5.1. *The concepts*

By “fraud” is here meant that the person effecting the insurance intentionally gives wrong or incomplete information in order to get an insurance contract he would otherwise not be able to get, or to get the contract on better condition. This implies that the person effecting the insurance must have knowledge about the factual circumstances and also about the significance of these circumstances for the insurer. Also he must act in order to obtain a gain.

⁷⁶ Japanese Com C art. 644, Japanese HC art. 17, Japanese CC art. 11.

⁷⁷ Norwegian ICA § 4-2, which is applied for the Norwegian CC.

⁷⁸ Italian CC art. 1892 and 1893, Slovenian MA art. 694 and 695.

⁷⁹ Italian CC art. 1892 and 1893, Belgian law 1874 art. 9, Dutch C Com art. 251, Dutch Cargo Policy art. 19, Slovenian MA art. 694 and 695 and Croatian MC. UK MIA sec. 18 and 20 are as mentioned interpreted to contain such condition, see Batz 1999 p. 17, Schoenbaum p. 117 f. US admiralty rule is the same, see Schoenbaum p. 118.

⁸⁰ French ICA art. L 172-2, Croatian MC.

⁸¹ NP § 3-3 first part, DC § 24.1 and § 25, SHC § 9 mom. 5 ref. SP § 13.

⁸² Croatian MC.

⁸³ French ICA art. L 172-2.

⁸⁴ NP § 3-3 second part, DC § 24.2 and § 25, SHC § 9 mom. 5 ref. SP § 13.

⁸⁵ NP § 3-3 second part, DC § 24.2 and § 25 (not cargo-insurance), SHC § 9 mom. 5 ref. SP § 13. A similar provision is stated in DTV Cargo 4.2-2 if the assured can prove that the undisclosed information did not influence the premium. It may also be mentioned that some American cases have rejected the rule of utmost good faith as federal US law and instead applied state law, and thereby included a condition of causation, see Schoenbaum p. 101.

The concept of “bad faith” is less clear, but seems normally to be equalized to intent. This implies that the person effecting the insurance possesses knowledge about the information, and may be also that he understands the significance of this for the insurer.

3.4.5.2. *The sanctions*

Fraud and bad faith activate the strictest sanctions. However, also fraudulent behaviour or bad faith on the part of the person effecting the insurance may activate very different sanctions. If the person effecting the insurance fraudulently or in bad faith has breached his duty of disclosure, the contract may be void,⁸⁶ it may be voidable at the option of the insurer,⁸⁷ he may claim that the contract is not binding,⁸⁸ or he may be free of liability for an incurred casualty.⁸⁹ The sanction may be conditioned on the information being decisive for the insurer in deciding whether to accept the risk or on which conditions the insurance should be effected.⁹⁰ Further, it may be stated that there is no return of premium.⁹¹ The insurer may also be given the option to claim additional premium.⁹²

Normally, the sanction against fraud will be applied regardless of whether there is causation between the undisclosed or misrepresented circumstance and the subsequent casualty. An exception here is the Japanese solution, where lack of causation will lead to liability for the insurer for casualties having occurred before the contract is cancelled.⁹³ The same holds for the German cargo clauses

⁸⁶ Belgian Law 1874 art. 9, Dutch C Com art. 251, Spanish C Com art. 381, see Von Ziegler p. 23-24 and p. 27-28. The same holds for South Africa if there is a “fundamental” mistake, see Hare p. 16.

⁸⁷ Spanish ICA sec. 10.3, Italian CC art. 1892, French ICA art. L 172-2, French CC art. 14-1 and 18, French HC art. 8-1 and 14, DTV Cargo 4.5, Slovenian MA art. 695, UK MIA sec. 18 (1) (disclosure) and sec. 20 (1) (misrepresentation), Ca MIA sec. 21 (7) (disclosure) and 22 (8) (misrepresentation), AU MIA sec. 24 (1) (disclosure). This is also claimed to be the solution in and Croatia, but here there are no references in the material. The same seems to be the solution in US, see Healy, *The Hull Policy: Warranties, Representations, Disclosures and Conditions*, 41 Tul. L. Rev. 245, 251 (1967), Staring 1994, p. 293-294. According to Hare p. 16, this is also the solution in South Africa if there is not a “fundamental” mistake.

⁸⁸ NP § 3-2, DC § 22, SP § 11 ref SHC § 9 mom. 3.

⁸⁹ ADS 20 (1), DTV Cargo 4.2-1, Greek Law 2496/1997 § 3, Chinese MC art. 223, Japanese Com C art. 645.

⁹⁰ Italian CC 1892, Belgian law 1874 art. 9 and 10, Dutch C Com art. 251, Dutch Cargo Policy art 19, French ICA art. 172.19.3, Slovenian MA art. 695. This is also claimed to be the solution in Croatian MC. UK MIA contains no such condition, but inducement is in UK interpreted to follow from the requirement of materiality, see Batz p. 17, Kirby p. 271-273, Griggs p. 301-302, Schoenbaum p. 117 f. US admiralty rule of utmost good faith follows the UK solution on this point, but the distinction between materiality and inducement is not always made clearly in the cases, see Schoenbaum p. 118. The question seems to be undetermined in Australia, see Kirby p. 273-275.

⁹¹ French ICA, art. 172-2, French CC art. 14-1 and 18, French HC art. 8-1 and 14, UK MIA sec. 84 (1). This seems to be the solution in South Africa as well, see Hare p. 16.

⁹² Slovenian MA art. 695 and Croatia (no reference).

⁹³ Japanese Com C art. 645. It may also be mentioned that some American cases have rejected the rule of utmost good faith as federal US law and instead applied state law, and thereby included a condition of causation, see Schoenbaum p. 101.

in case of disclosure if the policy holder can prove that the undisclosed information did not influence the premium.⁹⁴

In some countries the sanction against fraud is also applied when the person effecting the insurance is guilty of intent, or of having breached honesty and good faith. This seems similar to the concept of “bad faith”. Thus, the Greek and Chinese reaction freedom of liability is used for both fraud and intent.⁹⁵ In Denmark, Sweden and Finland the reaction that the contract is not binding also applies if the person effecting the insurance has acted against honesty and good faith.⁹⁶

If the reaction is freedom of liability instead of avoidance or the contract not being binding for the insurer, there is also a question of termination. In Greece, China and Japan the insurer is thus given a right to terminate the contract when the person effecting the insurance is guilty of fraud or intent.⁹⁷

3.5. *Some conclusions*

According to the discussion in item 3, some main issues may be identified for the purpose of harmonization. As a starting point, one will have to look into the relationship between disclosure and misrepresentation, and the need for separate regulation. A second main issue is what kind of information the regulation shall apply to (the questions concerning materiality and inducement, and the difference between active and passive duty of disclosure). A third issue is the relevant point of time. The fourth issue is the very important question of the relevance of the assured’s knowledge or degree of fault. The fifth issue is the question of causation and the sixth issue the sanctions to be applied.

However, it also follows from the above that the duty of disclosure is regulated by a variety of approaches and material solutions. The total picture is thus very confusing, and it is difficult to point out main solutions, even if the main issues may be identified. Also, the differences in approach and material solutions may be of various degree of importance. Some differences seem to be more a matter of terms or construction than of difference in material solutions.

The differences in approach to the scope of the duty of disclosure between a duty to disclose all (material) facts and a duty to disclose (material) facts that is known may have limited practical importance. A duty to disclose all (material) facts is of limited consequence if the sanctioning system is limited to a negligent breach, or no knowledge/good faith activates a very limited sanction, i.e. a right to cancel the contract. On the other hand, to connect the duty of disclosure to knowledge both of the circumstances and the significance for the insurer give little meaning if the insurer may sanction against the assured who ought to have possessed the relevant knowledge. However, as the relationship between the description of the duty and the sanctioning system is

⁹⁴ DTV Cargo 4.3. In case of fraudulent misrepresentation the contract is avoidable, see 4.5.

⁹⁵ Greek Law 2496/1997 § 3, Chinese MC art. 223.

⁹⁶ Swedish HC § 9 mom. 3, DC § 22, Finnish ICA 1933 § 4.

⁹⁷ Greek Law 2496/1997 § 3, Chinese MC art. 223, Japanese Com C art. 644, Japanese HC art. 17, Japanese CC art. 11.

not always clear, some efforts should be made to clarify the connection between different levels of knowledge and different sanctions.

Another difference that may be of less importance concerns the conditions of materiality as a part of the definition of the information that is to be disclosed and the condition of inducement as part of the sanctioning system. If the concept of materiality is subjective, it will be equivalent to the condition of inducement. In this instance, it will not matter whether the condition is part of the definition of the information to be disclosed or part of the sanctioning system. On the other hand, if the definition of materiality is objective (i.e. MIA-based systems, US, Germany, Norway) there is a distinction between the two issues. As a condition of inducement seems to be a general requirement, the main question will be whether one also is in need of a condition of materiality.

The discussion also shows that the mandatory requirements in the Danish, Swedish French and Slovenian legislation in general and the Norwegian ICA for national cargo insurance give the person effecting the insurance more protection if he passes wrong or insufficient information over to the insurer than the mandatory and directory legislation in some of the other countries. As a starting point, both the mandatory and the declaratory systems are based on an active duty of disclosure. The only exception here is the passive duty of disclosure for carriage of cargo within Norway. However, national carriage of goods should not pose a serious problem in an international attempt of harmonization.

There also seems to be a rather homogenous approach to the time the duty of disclosure applies, where the main solution is that both the factual circumstances and the knowledge or good faith of the contracting party shall be evaluated at the time the contract is entered into. However, the provision in Norway, Sweden and Finland concerning the duty to correct information later seems to be contrary to mandatory regulation in Denmark, France and Slovenia, and probably also the Swedish ICA. The common law systems also depart from this provision, but the principle of good faith may open the door for this solution, see below under item 4.

As for the sanctioning system, the difference between avoidance and the contract not being binding when the contracting party has acted fraudulently seems to be a matter of term more than a difference in result. The mandatory provisions in Denmark and Sweden stating that the contract is not binding upon the insurer⁹⁸ should not be problematic as the insurer is allowed to provide for a less strict solution. These systems may therefore adopt a less strict sanction if that should be preferred. However, a more lenient sanction may be stopped by the French mandatory legislation, providing for (optional) avoidance of the contract in case of bad faith. Apparently, the insurer is not free to deviate from this rule in favor of the assured. The same seems to be the situation with some MIA-based systems (in UK only for fraud), South Africa and US, where the insurer's right to avoid the contract is the only remedy.

More serious problems concern the sanctioning system for negligence and good faith. According to UK MIA based legislation the insurer may avoid the

⁹⁸ DC § 22, SP § 11.

contract if the assured knew or ought to know that the information he passes on to the insurer is either insufficient or wrong, if the information concerns circumstances that would have influenced the insurer's risk assessment. This holds also if the assured does not realize the significance of the information. These provisions are as mentioned above under 3.1. mandatory for some common law countries (but not in UK except for fraud). According to Danish and Swedish legislation a similar sanction is conditioned on the insurer having refused the insurance if he had known about the undisclosed circumstance. If he had entered the contract, but on other conditions, the insurer will only be free of liability for casualties caused by the undisclosed circumstance.⁹⁹ Slovenia's legislation is even more protective, as avoidance is limited to gross negligence on the part of the person effecting the insurance. For ordinary negligence, including the situation where the assured ought to have known about the undisclosed information, the insurer may only call for additional premium.¹⁰⁰ The French ICA art. L 172-2 seems to be even more favorable with protection for the assured who does not know, but should have known, about the information. Also, if the assured knew about the information, but thought it was insignificant (good faith), he will get pro rata indemnification if the information only was decisive for the insurance conditions, and not for the contract.

A more limited mandatory regulation is found in the Norwegian ICA § 4-2 for national trade, providing for a broad evaluation of reduction in liability if the contracting person is more than a little to blame.

The mandatory systems thus operate with different levels of protection for negligence. If all the mandatory solutions are respected in favor of the assured, but one may choose more favorable provisions, ordinary negligence may only lead to additional premium. On the other hand, if more favorable solutions for the assured are not allowed, it is not possible to find solutions that combine the mandatory restrictions in the mentioned regulations.

There are also differences in the systems when the person effecting the insurance does not possess knowledge about the information or the significance of the information for the insurer. Again, the French ICA art. L 172-2 seems to be most favorable, with full protection for the assured who has no knowledge about the information even if he ought to have known. This is contrary to all the other mandatory systems, where the insurer may sanction against an insurer who ought to have possessed the knowledge. On the other hand, Sweden, Denmark and Slovenia protect the assured if he cannot be blamed for not having the relevant knowledge. The same holds for the Norwegian legislation for cargo insurance.¹⁰¹ This is contrary to systems where the insurer may avoid the contract also if the assured did not possess the information, viz. UK MIA based legislation (not mandatory in UK on this point), US and South Africa in case of misrepresentation. This conflict between the mandatory systems may be a substantial problem for harmonization. Also, many of the directory provisions

⁹⁹ SP § 13, DC §§ 24 and 25.

¹⁰⁰ Slovenian MA sec. 694 and 695.

¹⁰¹ DC § 23, Swedish HC § 9 mom 4, Norwegian ICA § 4-2, Slovenian MA sec. 694.

follow the strict solution where the contract is null and void or the insurer may avoid the contract even if the assured has acted in good faith concerning the significance of the information (Belgium, Netherlands and Spain). An agreement for this issue may therefore prove difficult.

Even if there may be agreement as to what is the purpose of the regulation of duty of disclosure, it is obvious that this purpose does not lead to a common solution. Some of the solutions may however be explained by the reasoning behind the regulation. As the purpose of the regulation is to give the insurer sufficient information to assess the risk, information not needed for this purpose should not invoke any reaction. This may therefore explain a condition of inducement or a condition of subjective materiality, which exists in most of the systems.

A flexible sanctioning system dependent on the degree of fault of the part of the assured may be explained in terms of economic efficiency and legal fairness. If fraudulent behaviour were to be accepted, the insurer would be forced to take measures as a defense against being deceived. As a matter of social efficiency such costs are wasted, and should be avoided.¹⁰² The risk for fraud should therefore clearly rest with the assured. The same may be said for behaviour against honesty and good faith. However, as this concept is difficult to define, it may be wise to avoid using it.

With lesser degree of fault on the part of the assured, the reasoning becomes more uncertain. From an economic point of view it may be argued that the risk for lack of information should rest with the person who had the easiest access to the information in question.¹⁰³ As for specific information concerning the risk, this will normally be the assured, being the owner of or at least having some sort of interest in the risk. On the other hand, the insurer is the professional risk carrier. This implies that he will have better access to more general information, and also that he will know what information to look for. Efficiency arguments thus favor that the assured carries the risk for information concerning the particular risk he wants to insure, whereas the insurer carries the risk for more general information. Also, the latter part of this reasoning may explain a requirement of objective materiality, lifting the risk for a more uncommon risk assessment back to the insurer. If the insurer wants particular information, he also has the opportunity to make inquiries. If the risk for more special information rests with the assured, this may induce him not only to give the insurer a lot of unnecessary information, but also to do a lot of unnecessary research to gain information in order not to breach his duty.

As a starting point, efficiency arguments concerning the risk for lack of information holds whether the party with easiest access to information is negligent or in good faith.¹⁰⁴ Legally, however, there are arguments in favor of treating an assured in good faith better than an assured acting negligently.

¹⁰² Cooter and Ulen: *Law and Economics*, 1988, p. 259-260.

¹⁰³ Posner: *Economic Analysis of Law*. 4 ed. (1992) p. 95 and 102, Kronman: *Contract Law and Distributive Justice*, in: *Yale L.J.* Vol. 89 (1979/80), p. 4, Trebilcock: *The Limits of Freedom of Contract*, 1993, p. 105-106.

¹⁰⁴ Trebilcock p. 105-106, Kronman p. 4.

Loosing coverage for losses having occurred when the lack of information is discovered is a sanction that may amount to a substantial sum of money, and may thus be difficult to handle for the assured. It seems to be a very harsh punishment against an assured having acted in good faith. The insurer, on the other hand, has been paid to carry the risk, and even if his risk assessment was wrong, he has the possibility to finance his loss over future premiums. He may even be able to calculate future premiums on the bases that there will always be a risk of some information deficiency. It may therefore be argued that the insurer will have a sufficient remedy if he has a right to cancel the contract and/or call for additional premium. This is a solution followed in most of the civil law countries.

A more substantial sanction is called for when there is a negligent breach of the duty of disclosure. If the insurer would not have accepted the risk if he had known about the unknown circumstances, it seems logical that the contract should not be binding or that the insurer may claim avoidance. This seems to correspond with the main stream of solutions in both common law and civil law, even if some systems have a more favorable solution.

On the other hand, if the insurer would have accepted the risk, but on other conditions, it is difficult to see why he should be able to claim such a harsh sanction. Logically, there is therefore a good reason to follow the distinction between these two situations that are applied in many of the civil law countries. However, it is difficult to point out a logically "correct" reaction in the latter situation. Economically it may seem correct to operate with a pro rata liability, or to call for additional premium. An example of pro rata liability is found in the French ICA art. L 172-2 if an assured with knowledge of the information but in good faith concerning the significance of it fails to disclose circumstances that was significant for the insurer's risk assessment. The solution is criticized in the French market for creating practical problems as there are no official rating scheme in the marine insurance market. The French Marine Underwriters therefore tried to escape it by stating in the hull and cargo conditions that any non-disclosure (of facts known by the assured) shall render the contract null and void.¹⁰⁵ The proportionality principle has also been heavily criticized in the common law countries. The UK Law Commission advised against a principle of premium adjustment because the assessment of the additional premium would be too difficult, and this view seems to be accepted also in Australia and US. It has also been argued that this solution would encourage non-disclosure and misrepresentation because the assured would know that in the event of a claim, the worst that would happen will be that he is required to pay the premium he would have paid if the risk had been properly presented in the first case.¹⁰⁶

An alternative solution is to let the insurer be liable for the claim if there is no causation. This solution is may be less logical than proportionality from an economic point of view, but it corresponds to other clauses used to limit the insurer's liability. A requirement of causation also has an equitable ring to it. It

¹⁰⁵ Rohart p. 319, with reference to the 1983 French HC and CC.

¹⁰⁶ Griggs 1994 p. 307, Kirby 1994 p. 276-277, Staring 1994 p 295-296.

should also be mentioned that this has been the solution in the Nordic countries throughout this century without having seemed to cause problems, and these provisions were kept unaltered under the Norwegian 1996 amendment of the Plan and the 2000 amendment of the Swedish conditions. There is therefore no factual evidence to suggest that this solution will cause problems for the insurers, even if one may claim that no liability regardless of causation gives a sharper encouragement for full disclosure.

If this reasoning is compared to the mandatory systems, five main obstacles occur. One main problem will be the common law solution for misrepresentation in good faith (no knowledge of the correct information). The second obstacle is the common law solution for negligent breach of the duty of disclosure/truthful representation when the insurer would have accepted the risk on other terms had he known about the undisclosed circumstances. A third problem is that the French legislation fully protects an assured who did not know, but should have known the information. The fourth obstacle is that the French and Slovenian systems use a proportionality principle instead of a causation principle. And the fifth obstacle is that an objective materiality requirement may meet some problems, both compared to UK case law concerning the materiality requirement, and compared to mandatory provisions in the civil law systems which only require subjective inducement. The material is however not totally clear on this point.

4. *Duty of good faith*

4.1. *Common law countries*

4.1.1. *Introduction*

In the common law countries the duty of disclosure is a part of the broader concept of duty of good faith. The purpose here is to discuss the remaining part of this principle. Although there are minor variations in the way the principle of good faith is practiced in the different common law countries, the basic features of the concept seems to be the same. In marine insurance systems based on the UK MIA, the general doctrine of utmost good faith is enunciated in Section 17 of the UK MIA:¹⁰⁷

“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 either party”

New Zealand, South Africa¹⁰⁸ and US¹⁰⁹ use the same concept based on

¹⁰⁷ See also Au MIA sec. 23, Hong Kong Ord sec. 17, Ca MIA sec. 20.

¹⁰⁸ *Videtsky v Liberty Life Insurance Association of Africa Ltd* 1990 (1) SA 386 (W), *Mutual & Federal Insurance v Oudtshoorn Municipality* 1985(1) SA 419(SCA), *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (SCA).

¹⁰⁹ In US the view of the majority of courts is that the United States national law considers policies of marine insurance to be contracts of utmost good faith. See Healy, *The Hull Policy: Warranties, Representations, Disclosures and Conditions*, 41 Tul. L. Rev. 245-246 (1967); Goldstein, Joel K., *The Life and Times of Wilburn Boat M Critical Guide (Part 11)*, 28 J. Mar. L. & Com., 555, 576-577 (1997). A significant exception is *Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 822, 1991 A.M.C. 2511 (5th Cir.

common law and equity. It is not clear to what extent the principle is mandatory.¹¹⁰

The principle of good faith applies to all policies whatever the risk or the subject-matter insured. In order to illustrate the relationship between the duty of good faith and the duty of disclosure, the discussion here is divided between pre contractual obligations, obligations while the contract is running and the consequences of breach.

4.1.2. *Pre-contractual obligations*

As mentioned, the duty of utmost good faith embraces the duties connected to disclosure and misrepresentation as these are spelled out in UK MIA sec. 18-21. These obligations apply prior to the initial formation of the contract and at renewal, and are discussed in more detail above under item 3. However, the pre contractual obligations inherent in the duty of good faith are wider than these two provisions in the Act.

One extension is that sec. 17 contrary to the provisions concerning disclosure and misrepresentation contains no requirement that the information should be material. The duty of utmost good faith embraces not only circumstances material to the subject matter insured (the physical hazard), but also any other circumstance material in any way to the risk presented to the insurer (the moral hazard), such as the assured's claims record. However, it is not clear exactly how far these obligations reach. In *Banque Keyser Ullmann v. Skandia*¹¹¹ at p. 93 it was held that the duty is

"... not only to abstain from bad faith but to observe in a positive sense the utmost good faith".

The more detailed content of the principle of "utmost good faith" is however difficult to grasp.

As mentioned above under item 3.2. UK case law has interpreted materiality in a very limited fashion, stating that it is not necessary that the undisclosed matter was decisive for a prudent insurer. On the other hand, a condition of inducement is read into sec. 18 and sec. 20, even if this is not an express condition. How far art. 17 may deviate from materiality and inducement concerning disclosure and misrepresentation before the contract is entered into seems uncertain. On the other hand it is argued that this is not a problem because the only sanction for breach of the duty of good faith expressed in sec. 17 is avoidance under sec. 18 and sec. 20, and for avoidance under these provisions there must be both materiality and inducement.¹¹²

Another extension of the principle compared to the duty of disclosure is

1991), in which the United States Fifth Circuit Court of Appeals distinguished statements from earlier cases as dicta, and held that utmost good faith would not apply in all cases. Accordingly, the application of good faith will vary depending on the court of appeals district in which the case arises.

¹¹⁰ The only answer stating this expressly is Australia concerning Au MIA sec. 23. However, the same seems to hold for US, see Schoenbaum p. 97, even if *King v. Allstate Insurance Co* comes to another result.

¹¹¹ [1987] 1 Lloyd's Rep 69.

¹¹² Clarke with reference to the Pan Atlantic case cited above.

that it is mutual and thus also applies to the insurer.¹¹³ In Hong Kong, however, the common law has established that an insurer is under a pre-contractual duty of disclosure to his insured only in respect of matters which are material to the risk or to the recoverability of a claim.¹¹⁴ Also, both in UK and US the duty is normally claimed against the assured.¹¹⁵

4.1.3. *Obligations while the contract is running*

The duties of disclosure and to make correct representation are obligations prior to the initial formation of the contract and at renewal. The duty of good faith is, on the other hand, not confined to those obligations and may to some extent continue after the contract has been concluded. The starting point is that this holds both for the assured and the insurer. However the position in US seems to be that the duty of good faith after the contract is entered into is only relevant for the insurer, and is not invoked against the assured.¹¹⁶

In UK three issues seem to be included in the duty of good faith after the contract is effected. The first issue is that the duty of good faith attaches to the giving notice under held covered clauses, ref. The *Litsion Pride* case.¹¹⁷ The insurance policy in this case contained a held covered clause which expressly stated that the assured would be held covered for the voyage in question even without prior advice to the insurer. However, the court held that if the assured wished to obtain the benefit of a held covered clause, he must give the information required by the contract in good faith.¹¹⁸ A held covered clause is a legal tool to reinstate coverage for a risk which would otherwise be excluded through an express or implied warranty, see further below under item 6. A notification requirement concerning coverage under a held covered clause thus seems to have parallels to the notification requirements that in the civil law countries are inherent in the provisions concerning alteration of risk, see below under item 5. Whether this solution is adopted in the other countries with legislation based on MIA or common law is not addressed in the material.

The second issue is that the assured, if he wishes to vary the terms of the cover, must disclose all circumstances relevant to the variation at the time the variation takes place.¹¹⁹ Again, the situation in the other MIA based countries is unclear.

The last issue is that the doctrine of good faith is used to deal with fraudulent claims.¹²⁰ This solution is also followed in New Zealand. This

¹¹³ In US the duty imposed by the national law applies to both the insured and the insurer, (See, Staring, *Marine Insurance - Is the Doctrine of Utmost Good Faith "Out of Date?"* - 2 CMI Yearbook 1994, 288). However, there is a trend toward applying state law of bad faith and punitive damages against insurers of marine policies. Clann, Brown, and Sydow, *Judicial Interpretation of Insurance Contracts in Maritime Law: the Duty of Good Faith in Handling Claims*, 66 Tul. L. Rev. 479 (1991).

¹¹⁴ The House of Lords approved the Court of Appeal's decision in *Banque Financiere De La Cite S.A v Westgate Insurance Co. Ltd.* (1991) 2 A. C. 2049.

¹¹⁵ Schoenbaum p. 103.

¹¹⁶ Schoenbaum p. 122, Staring/Waddell p. 1659 and p. 1665-1670.

¹¹⁷ *Black King Shipping Corporation v. Massie (The Litsion Pride)*, (1985) 1 Lloyd's Rep 437.

¹¹⁸ Batz 1999 p. 19-20.

¹¹⁹ *Fraser Shipping Ltd. v. Colton (The Shakir III)* (1997) 1 Lloyd's Rep. 586, Batz 1999 p. 19.

¹²⁰ *The Star Sea* (1997), 1 Lloyd's Rep. 360. The same solution seems to be accepted in South Africa, see the Videtsky case.

implies that the presentation of claims must be made in good faith. On the other hand, innocent non-disclosure in the claims context is not a breach of the duty of good faith.¹²¹ The same holds for a negligent statement in a claim.¹²²

In South Africa, the assured's duty to avert or minimize a loss is also claimed to be part of the duty of good faith.¹²³

The US solution is as mentioned somewhat different from the other common law countries as focus is here directed towards the insurer. Apparently, both state law and federal law impose a rather strict duty of good faith on insurer's handling of claims.¹²⁴

It follows from this that the precise scope of the post-formation doctrine of good faith, its remedial structure and its relation to Section 17, are still not clear. A pending appeal to the House of Lords may provide some answers.¹²⁵

4.1.4. *Consequences of breach*

The remedy according to UK MIA when there is a breach of the duty of good faith is that the contract may be avoided. Avoidance is not triggered automatically, but happens after the insurer so elects.¹²⁶ The same solution is followed in US.¹²⁷

Contrary to the provisions for duty of disclosure or misrepresentation there is as already mentioned no condition in sec. 17 that the breach concerns a fact that was material and would have induced the insurer not to accept the insurance or to accept it on other conditions. Neither is there any condition that the assured in a case of non-disclosure knew about the undisclosed fact or ought to have known about it. The right to avoid the contract according to sec. 17 does not in any way depend on fault of the party in breach of the duty. Thus, even if the insured is wholly innocent in failing to disclose a fact prior to the conclusion of the contract, the insurer will have no liability whatsoever, as he may avoid the contract.¹²⁸ This means that fraudulent behaviour is treated the same way as negligence and good faith.

It should be noted that there is no remedy in damages for breach.¹²⁹ The only remedy is for the party prejudiced to avoid the contract.

If the breach is connected to the formation of the contract, the result is that

¹²¹ Batz 1999 p. 21.

¹²² Alfred McAlpine v. BAI (2000) Lloyd's Rep. IR 352.

¹²³ Hare p. 17-18. To what extent South Africa will follow the UK notion of good faith concerning held covered clauses, variation of cover and claims, is not clear, see Hare p. 2 f, particularly p. 5. There are no reported cases in Australia

¹²⁴ See further Staring/Waddell p. 1659 and p. 1665-1670.

¹²⁵ The Star Sea mentioned above.

¹²⁶ Batz 1999 p. 24.

¹²⁷ Schoenbaum p. 125.

¹²⁸ Batz: Duty of disclosure: Scope of duty and sanctions for breach, in: Reports from Marine Insurance Symposium, Oslo, 4-6 June 1998 (Batz 1998), p. 87. Clarke: The Law of Insurance Contracts (2000), Ch. 27-2B4, disagrees, claiming that conditions of inducement and materiality follow from the underlying common law.

¹²⁹ Schoenbaum p. 127-128 regarding negligence. The question of damages for deceit is more uncertain, see ALRC p. 123-124, London Assurance v Clare (1937) 57 Ll.L.Rep. 254, 270.

the whole contract may be avoided. The contract will then be treated as if it never existed. The extent of the sanction is less clear when the breach is made while the contract is running. If the breach is connected to a held covered clause it is uncertain whether the insurer may avoid merely the cover for the additional premium area, or the whole contract. Similarly, if there is a breach of the duty to notify a variation in the cover, it is not certain whether the insurer may avoid only the variation or the whole policy. If there is a fraudulent claim the question is whether the whole policy may be avoided, or just the part of the policy the claim concerns. This issue is particularly relevant if the policy is a fleet policy for many ships and the claim is for one of them.¹³⁰

4.2. Civil law countries

Whereas all the civil law countries in the material operate with a duty of disclosure, a duty of good faith as an additional concept is not generally inherent in the marine insurance system in these countries. The Scandinavian insurance legislation does not include a regulation of this concept except for what already follows from the regulation of duty of disclosure. The same holds for the Netherlands, Slovenia, Japan and apparently for Portugal.

However, some systems also include the concept of duty of good faith. The duty may be defined explicitly in the insurance legislation or the contract clauses, it may be included in general contract legislation, or it may be inherent in the system without any special provision. Also, more specific clauses may be seen as an example of the more general principle of good faith.

Direct regulation of a duty of good faith **both in the insurance legislation and in general contract legislation** is used in Germany and France. In Germany, the principle is stated in both the ADS clauses and in the Civil Code, stating that “All parties concerned shall act in the utmost good faith”.¹³¹ However, this rule does not provide for a sanction in case the duty of utmost good faith is not complied with. German courts have thus not come to a uniform interpretation of this rule. Similarly, the French provision is placed in both the general legislation and in the insurance legislation.¹³²

In Italy, Spain and Argentina, the principle is **established in general contract legislation**.¹³³ Belgium, China and Venezuela, on the other hand, state that good faith is a **general requirement for all contracts**, but not defined through an explicit provision in the law

Similar to the common law version of the principle, the general good faith principle in civil law seems to be applied both to the time when the contract is entered into and when the insurance period is running. The concept of duty of

¹³⁰ Batz 1998, p. 89, Batz 1999 p. 25-30. The effect of the policy of a fraudulent claim is debated in UK, see Clarke: Law of Insurance Contracts (2000) Ch. 27-2C and ALRC p. 124-125.

¹³¹ ADS 13, ref. also § 242 BGB.

¹³² French Code Civil art. 1134, French ICA art. L 172-19.

¹³³ Italian CC art. 1366 and 1375, and Spanish Civil Code art. 1258 and 1288, the Spanish C Com art. 57 and the Argentinian Civil Code art. 1198, see Rohart: The doctrine of utmost good faith in the marine insurance law of some civil law countries, CMI Yearbook 1994, p. 308.

good faith thus seems to overlap both the regulations concerning duty of disclosure and the regulation concerning alteration of risk. Another similarity seems to be that it applies both to the insurer and to the assured. As a starting point, the provisions for duty of disclosure and alteration of risk do not prescribe any duties for the insurer. But as mentioned above under item 3.2.3 the insurer may normally not claim a breach of duty of disclosure concerning facts that he knew or should have known when the contract was concluded.¹³⁴ This may be seen as an element of good faith for the insurer.

Also, some countries refer to **special provisions in the insurance contract as an example of the principle of good faith**. An example is that Italy claims that the duty of the assured to do everything in his power to avert or minimize the loss is a part of this principle.¹³⁵ This is parallel to the South African attitude, see above under item 4.1.3. Similarly does Croatia state that the duty to document a loss must be seen as part of a principle of good faith. This corresponds to the practice in UK.

4.3. *Some conclusions*

The principle of good faith seems partly to embrace the rules concerning duty of disclosure, partly to have a wider applicability.

The connection between the principle of good faith and the duty of disclosure is strongest in common law. Compared to the regulation concerning disclosure and misrepresentation, the regulation concerning duty of good faith creates two main problems. One problem is the question of how far the duty of disclosure may be extended as far as conditions for materiality and inducement are concerned. These conditions are a main part of most of the other systems on this point, and it is difficult to see how the civil law systems can manage without these elements in the regulation. It is also difficult to see a reason for extending the duty of disclosure like this. Another problem concerns the inflexibility concerning the sanction compared to the degree of fault. This problem arises also concerning UK MIA sec. 18 and 20, see above under item 3.5, but is even more prevalent here.

The rest of the principle also contains some problems. One problem is that the principle of good faith is a very indistinct concept. This holds whether the principle is expressly provided for in the marine insurance legislation (MIA-based legislation, France, Germany), in general contract law, or in common law and equity. The wording good faith or utmost good faith does not say what the good faith should be referred to. The principle may therefore be used to impose duties upon the parties to the contract in any area where there is a lack of more express regulation. Interestingly enough, this feature of the concept has been criticized by common law judges.¹³⁶

However, the vague meaning of the concept has also been defended as a

¹³⁴ See i.a. NP § 3-5, SP § 15, DC § 27, ADS 20 (2).

¹³⁵ Italian CC art. 1914.

¹³⁶ See *Mutual & Federal Insurance v Oudtshoorn Municipality* 1985(1) SA 419(SCA) for South Africa.

necessary part of the common law system to obtain fairness.¹³⁷

It should be noted that most of the defined areas in the common law countries where the principle of good faith are applied (held covered clauses, claims for losses and sue and labor), are under specific regulation in most civil law systems. The problems concerning this part of the duty of good faith is thus not the need for regulation, but the legal device of using a common and very open standard to deal with all of them. Even if some of the civil law countries with such provisions see these provisions as an example of the duty of good faith, it is, however, difficult to see that anything is gained by defining such rules as part of a general principle of good faith.

On the other hand, it may be argued that the duty of good faith is a flexible tool because of this broadness, and therefore may fill in gaps in need of regulation. But the price of such flexibility is a total lack of predictability for the parties to the contract, especially for the assured. Instead of a clearly defined duty to notify the insurer in certain circumstances, or to use sufficient care when making a claim for a loss, he has to deal with a very indistinct standard of behaviour that may come as a total surprise for him. With the value of the ship at stake, it seems fair that his duties toward the insurer should be outlined in a more precise manner. The fact that many civil law systems manage without this principle also clearly illustrates that it is fully possible to regulate the mentioned areas more precisely in the contract conditions.

Another problem is that the principle as applied in common law seems unfair. Instead of creating equality between contracting parties, which is a goal for the rules concerning duty of disclosure, the duty of good faith seems to tip the balance back in favor of the insurer. Why should he be able to avoid a contract because of circumstances that was not material for his acceptance of the risk? This seems to create an undeserved gain for the insurer on account of the assured. Another point is that the provision in its traditional version does not divide between fraud, negligence, accidents or good faith. Even in the core areas of the principle concerning duty of disclosure it may be debated whether it is wise to treat such different behaviour the same way. When the principle is used in other areas, the logic behind this attitude is even harder to understand.

It follows from this that the problems the principle of good faith will cause in a development towards harmonization will vary depending on what part of the principle is discussed. The problems concerning duty of disclosure is already mentioned above under item 3.5, and concerns mainly the inflexibility of the reaction compared to the degree of fault by the party effecting the insurance. A further part of the principle seems to correspond to the regulation concerning notification of alteration of risk, which is discussed in more detail below under item 5. Held covered clauses and loss statements, on the other hand, are not part of this report, and will thus not cause problems for this process.

5. *Alteration of risk*

5.1. *Introduction*

When entering into an insurance contract the insurer will normally base his calculation of the premium and the policy conditions on certain

¹³⁷ Kirby p. 285-287.

presumptions concerning the risk. When these presumptions are altered, he may therefore either want to terminate the coverage or to change his insurance conditions. One tool to obtain this change is provisions concerning alteration of risk, providing for what changes the assured may make on his own, and in what circumstances he will need to communicate with the insurer and if necessary, alter his insurance conditions.

This kind of regulation is found in most of the civil law countries in the material, which are further described below under item 5.2. The legislative situation in the common law countries is different, and discussed below under item 5.3.

5.2. The civil law countries

5.2.1. Introduction

Similar to the duty of disclosure, rules concerning alteration of or increase in risk are traditionally an inherent part of a marine insurance policy in the civil law countries. Most of the systems in the material include provisions concerning this problem. The regulation in some countries is very similar to the regulation of duty of disclosure. In Denmark, Sweden, France and Italy, it is a mandatory part of the public legislation.¹³⁸ This must of course be taken into consideration in a process of harmonization. The provisions do not seem to have caused specific problems but they are important as a background for the discussion concerning warranties and more specific clauses concerning classification, seaworthiness, management issues and similar topics.

The Dutch and Chinese legislation do not seem to use the concept of alteration of risk, but do contain certain similar provisions for specific problems, see below under item 6. The Spanish system seems as a main rule to follow the English clauses, which are dealt with under item 6, but also include some material concerning alteration of risk.

The discussion will start with the concept of alteration of risk under item 5.2.2, move on to the duty to notify under item 5.2.3, whereas the sanctioning system will be dealt with under item 5.2.4.

5.2.2. The concept of alteration of risk

The definitions of what constitutes an alteration or increase of the risk vary, but the definitions seem to be based on four different approaches. The first approach is that the risk must be increased compared to the written or implied conditions of the insurance contract.¹³⁹ The second approach is that the risk must be altered or increased in such a way that the insurer would not have accepted the insurance at all,¹⁴⁰ or would not have accepted the insurance on the

¹³⁸ See Danish ICA 1930 and Swedish ICA 1927 §§ 45 f, Italian CC 1932 ref. 1898 and French ICA art. L 172-3.

¹³⁹ NP § 3-8.1, Swedish HC § 18.1 ref. SP § 41, Finnish HC § 35 (1) with reference to Finnish ICA 1933, see § 45.1, DC § 42. The same approach seems to be used in Venezuelan C Com art. 559, using the term "essential circumstances" that were "taken into consideration in estimating the risk".

¹⁴⁰ Belgian Law 1874 art. 31.

same conditions if he had known about the increase.¹⁴¹ A third method is to say that the risk is “substantially” altered.¹⁴² The last approach is to connect the sanction to circumstances affecting or altering the risk after the contract is concluded without any further definition.¹⁴³

In addition to these approaches, some systems define certain risks to represent an increase of risk.¹⁴⁴

The main content of this seems to be that the concept of alteration of risk only includes circumstances that were in some way relevant for the insurer when the contract was entered into. Contrary to the provisions concerning duty of disclosure the relevance criteria, however, seems to be connected to the actual insurance contract, and not to an objective materiality concept. There is no indication in the material that alteration of risk is built on a prudent insurer test. Rather, alteration of risk seems to be based solely on a subjective approach to materiality.

It also follows from the presentation above that one way to define the relevance of the alteration of risk is to connect the concept of alteration to the insurer’s hypothetical attitude to the changes if he had known about them at the time the contract was entered into. In other systems, the question of the insurer’s attitude is an issue in the sanctioning system, ref. below under item 5.2.4. The practical result of both solutions will be that the insurer may not react against an alteration of risk that would not have had any influence on the contract if he had known about it at the time the contract was effected.

The Portuguese system has provisions concerning alteration of risk, but the material contains no definition of the concept.

5.2.3. *Duty to notify the insurer*

An increase of risk as defined under item 5.2 will normally activate a duty to notify the insurer. Three different situations may activate the duty of notification. One solution is that the duty will be activated by the assured’s knowledge of the increase, regardless of whether he is responsible for the increase himself.¹⁴⁵ In these regulations, the duty to notify the insurer also applies to the situation where the risk is increased due to circumstances outside the control of the assured. A second alternative is that a duty to notify only applies if the assured is responsible for the increase.¹⁴⁶ The third solution is that the duty to notify only applies if the alteration is not caused by the insured.¹⁴⁷

¹⁴¹ Italian C Nav section 522 ref. CC art. 1898, Greek Law 2496/1997 § 4.

¹⁴² Japanese Com C art. 656, Slovenian MA art. 710, Croatian MC (no reference).

¹⁴³ French HC art. 8(2) ref. French ICA art. L 172-3. ADS 23 seems to use the same approach, but further defines some circumstances that constitute an alteration of risk. See also DTV Hull 11 and Cargo 5.

¹⁴⁴ NP § 3-8.2, DTV Hull 11.5 and Cargo 5.3. These provisions will be dealt with insofar as they are relevant for the issues discussed in this paper.

¹⁴⁵ NP § 3-11, French ICA art. L 172-3, French HC art. 8 (2), Greek Law 2496/1997 § 4, Japanese CC art. 8, Italian CC art. 1898, and apparently Portuguese legislation (no reference).

¹⁴⁶ Belgium Law 1874 art. 9, Venezuelan C Com art. 559.

¹⁴⁷ DC § 43, Swedish HC § 19 ref. SP § 42, Finnish ICA § 46, Japanese Com C art. 657.2, Japanese HC art. 14-3.

The implication of this solution seems to be that the assured will not have to notify the insurer of alterations caused by the assured himself. However, in order to keep his coverage, he will have to notify, because otherwise the insurer may be free of liability for subsequent casualties.¹⁴⁸

If the insurer accepts the alteration of risk, whether made by the assured or a third party, the increase will cause no problems for the coverage of future claims, but the insurer may be entitled to additional premium.¹⁴⁹ On the other hand, the insurer may as a main rule also have the option to terminate or cancel the contract when he is notified.¹⁵⁰ This is, however, not always the case.¹⁵¹ The right to cancel may also depend on the alteration being due to the assured,¹⁵² or limited to the situation where the alteration is due to a third party.¹⁵³

5.2.4. *The sanctioning system*

5.2.4.1. *Overview*

If there is a duty of notification, a breach of this duty may activate a sanction from the insurer. The same holds if there is no duty to notify the insurer, but the assured is responsible for the alteration of the risk. The sanctioning system raises two main questions. The first question is what sanction the insurer may apply. Four methods are used in this situation: the insurer may avoid the contract or the contract loses its effect, the insurer may be free from liability for an incurred casualty, and he may have the right to a pro rata reduction of the liability. Some systems are using only one solution, others are using a combination.

The second question is what conditions must be fulfilled for the insurer to be able to invoke the sanctions mentioned. These conditions seem to be connected to three different issues. The first issue is the question of fault of the part of the assured. The second issue is the question of how the insurer would have reacted had he known about the alteration of risk when the contract was entered into. The third issue is how the alteration of risk has influenced the casualty or the extent of the loss. The systems vary however as to whether all the issues are relevant, and how the issues will influence the insurer's liability.

In the following, the starting point for the discussion is the degree of fault on the part of the assured. Contrary to the discussion concerning duty of

¹⁴⁸ DC § 42, Swedish HC § 18, Japanese Com C art. 656, Japanese HC art. 14-1-(8), ref below under item 5.4.

¹⁴⁹ DTV Hull 11.4, DTV Cargo 5.5, French ICA art L 172-3, Greek Law 2496/1997 § 4, Japanese HC art. 14-3 and CC art. 8, and apparently Spanish ICA art. 12. This seems to be the solution in Portugal as well, but no reference is given.

¹⁵⁰ Italian CC art. 1898.2, Greek Law 2496/1997 § 4, French ICA art. L 172-3, NP § 3-10, DC § 44, SP § 43, Swedish HC § 22 no. 1 (f) and no. 2 (b), Finnish HC § 35 no. 1 ref 1933 ICA § 47, Japanese Com C art. 657.1, HC 14-2-(2), Spanish ICA art. 12, Portuguese regulation (no reference).

¹⁵¹ The starting point in DTV Hull 11 and DTV Cargo 5 is that the assured is entitled to alter the risk.

¹⁵² French ICA art. L 172-3, Japanese HC 14-2-(2).

¹⁵³ Japanese Com C art. 657.1. However, the reaction against alteration of risk due to the assured is that the contract loses its effect, which seems to imply that the contract is not binding, and cancellation thus not needed, see art. 656. Swedish HC § 22 no. 2 (b) is also conditioned on the alteration being due to the assured or accepted by him.

disclosure, the degree of fault will here be related to two different questions, namely whether the assured is responsible for the alteration of risk, and whether he has notified the insurer about the alteration when he became aware of it. It is therefore necessary to distinguish between three different situations. The first situation is where the alteration is due to the assured, and he has not notified it in the prescribed way. The second situation is that the assured fails to notify an alteration not due to him, but that he knows about. The last situation is when the alteration is not due to the assured, and he has no knowledge about it.

5.2.4.2. *No notification of alteration due to the assured*

If the assured is responsible for the alteration, and has not notified the insurer, he will either have breached a duty not to alter the risk, or breached the duty to notify. None of the systems operating with a concept of alteration of risk allow the assured to act like this without some kind of sanction, but the extent of the sanctions and the conditions to invoke it vary.

The strictest sanction when the alteration is due to the assured is that the insurer may **avoid** the contract. This sanction is only used in Belgium. The condition for this sanction is that the insurer would not have accepted the insurance if he had known about the increase.¹⁵⁴ However, a very similar sanction seems to be that the contract loses its effect, which is applied in general Japanese insurance legislation.¹⁵⁵

The most common sanction where the assured is responsible for the alteration without notifying it seems to be **total freedom of liability** for an incurred casualty, which is used in Japan, Spain, Croatia, Slovenia, Venezuela, Germany, Italy, and the Scandinavian systems. However, the conditions to apply this sanction vary. The simplest regulation is prescribed in Japan, Spain and Croatia where the insurer is free of any liability if the assured alters the risk without the insurer's consent.¹⁵⁶ The same may apply if the risk is increased with the assured's consent.¹⁵⁷ This solution does not distinguish whether the increase would result in the insurer's refusal to accept the cover, or would have led him to alter the insurance conditions. Nor is there any requirement concerning causation between the alteration of risk and the casualty.

The starting point in Venezuela is similar: the insurer is discharged from liability under the contract if the assured alters the risk without the insurer's consent. However, an additional condition here is that the insurer would not have accepted the insurance or accepted it on different conditions had he known about the increase when the contract was entered into.¹⁵⁸ Causation between the alteration of risk and the casualty is not an issue here.

¹⁵⁴ Belgium Law 1874 art. 31.

¹⁵⁵ Japanese Com C art. 656. However, the regulation for marine insurance is more favorable, see below.

¹⁵⁶ Japanese HC art. 14-1-(8), Spanish ICA art. 12, Croatian and Slovenian legislation (no reference). According to the Japanese Com C art. 825 this will not apply if the increase has in no way influenced the casualty.

¹⁵⁷ Croatian legislation (no reference).

¹⁵⁸ Venezuelan C Com art. 559.

The German ADS Clauses operate with a different combination of requirements. The starting point is that the insurer is free from liability if the assured causes an alteration of risk and deliberately (hull and cargo) or by gross negligence (cargo) breaches the duty to notify the insurer. However, the insurer may not react if the increase in risk had no effect on the occurrence of the casualty or the extent of it.¹⁵⁹ A similar solution is found in Slovenia, stating that the insurer is free from liability from loss caused by an alteration of risk attributable to the insured.¹⁶⁰ Here there is a combination of fault and influence of the alteration of risk on the casualty, but no requirement connected to the insurer's attitude towards the alteration of the risk.

A combination of all three issues is found in the Scandinavian system. The regulation is here very similar to the duty of disclosure. A common condition for freedom of liability is that the assured has increased the risk by intent or agreed to such increase. If this condition is fulfilled, two alternative provisions apply. The first provision regulates the situation that the insurer would not have effected the insurance if he had known about the increase. In this instance, he will be free from liability irrespective of any causation between the increase of risk and the casualty. The second provision regulates the situation when the insurer would have accepted the insurance if he had known about the increase, but on other conditions. In this situation, he is only liable to the extent that the loss is not caused by the increase of the risk.¹⁶¹

In Greece, Italy and France there is a **combination of freedom of liability and proportionate reduction of the indemnity**. However, the conditions activating the different solutions vary. The starting point in Greece and Italy is that alteration of risk is defined as a change that would have caused the insurer not to have accepted the insurance at all or on the same conditions had he known about the alteration. In Italy, the sanctioning system is connected to this difference. The insurer will be free of liability in the first case. In the latter case he may reduce the liability in the same proportion as the proportion of the premium paid and the premium that should have been paid had the alteration of risk been taken into consideration when the contract was entered into.¹⁶² The Greek sanctioning system is dependent on how much the assured is to blame for not having notified about the alteration, and follows the regulation of duty of disclosure. Negligent non-disclosure leads to a reduction of indemnity, whereas intentional non-disclosure leads to freedom of liability.¹⁶³

In the French system, alteration of risk is on the other hand not connected to the insurer's attitude. However, similar to the Greek system, the sanction will depend on how much the assured is to blame. If the assured can prove his good faith, which seems to imply that he cannot be blamed for not having notified the

¹⁵⁹ DTV Hull Clauses 11.3 and DTV Cargo 5.4.

¹⁶⁰ Slovenian MA art. 710 second part.

¹⁶¹ NP § 3-9, DC § 42, Swedish HC § 18 ref. SP §§ 41. See also Finnish HC § 35 (1), which is based on the similar regulation in the Finnish ICA 1933. The Danish regulation has a separate provision for insurance for cargo, stating a pro rata reduction in the liability when the insurance would have been accepted on other conditions.

¹⁶² Italian CC 1898.

¹⁶³ Greek Law 2496/1997 § 4.

insurer, the insurer is entitled to reduce the indemnity proportionally to the premium paid. In a situation where good faith cannot be proved, the starting point in the legislation is that non-disclosure of an alteration made by the assured will result in termination of the insurance three days after the assured got aware of the alteration.¹⁶⁴ This seems to imply that the insurance will automatically terminate at this point in time, and that the insurer will be free of liability. However, the French Hull Conditions seem to be more favorable, stating that a breach of the duty of disclosure of an alteration of risk will result in proportionate reduction of indemnity.¹⁶⁵ Causation between the alteration of risk and the casualty is not an issue in either regulation.

If the insurer can claim that the contract is void (Belgium), loses its effect (Japanese general insurance regulation) or terminates (French ICA), there is no need to cancel the contract. On the other hand, a right to freedom of liability or reduction in the claim will normally be combined with a right for the insurer to cancel the contract.¹⁶⁶ The right to cancel may therefore both be a defense measure against alteration of risk that is notified by the assured, ref. above under item 5.2.3, and a sanction against alteration without notification. An exception from this is found in the German conditions, where the starting point is a right for the assured to alter the risk, and cancellation of the contract is not an option for the insurer.¹⁶⁷

5.2.4.3. Failure to notify an alteration due to a third party, but which the assured is aware of

Alteration of risk that is not due to the assured will normally in itself not activate a sanction from the insured. However, this situation may activate a duty to notify the insurer, ref. above under item 5.2.3. A breach of this duty may have similar results as if the alteration was due to the assured.

In some systems the insurer's sanction is connected to the breach of the duty to notify an alteration of the risk, and not to the alteration itself. This is the case in Germany, France, Italy and Greece.¹⁶⁸ This implies that it does not have any bearing on the sanctioning system whether the alteration of the risk are caused by the assured or a third party. The sanctioning system under this item is thus the same as described under item 5.2.4.2.

In other systems a breach of a duty to notify about an alteration not caused by the assured activates the same sanctions as if the assured was responsible for the alteration. This is the case in Japan¹⁶⁹ and Scandinavia.¹⁷⁰ However, an

¹⁶⁴ French ICA art. L 172-3.

¹⁶⁵ French HC art. 8 (2) ref. art. 14.2.

¹⁶⁶ Italian CC 1898.2, French HC art. 14.2, Greek Law 2496/1997 § 4, NP § 3-10, DC § 44, Swedish HC § 22 no. 1 (f) and no. 2 (b), Finnish HC § 35 no. 1 ref. 1933 ICA § 47, Japanese HC 14-2-(2), Portuguese regulation (no reference).

¹⁶⁷ DTV Hull 11 and DTV Cargo 5.

¹⁶⁸ DTV Hull 11.3 and DTV Cargo 5.4, French ICA art. L 172-3 and French HC art. 8 (2) ref. art. 14.2, Italian CC art. 1898, Greek Law 2496/1997 § 4.

¹⁶⁹ Japanese Com C art. 657.2, HC 14-3.

¹⁷⁰ NP § 3-11, DC § 43, Swedish HC § 19 ref. SP § 42. See also Finnish HC § 35 (1), which is based on the similar regulation in the Finnish ICA 1933.

additional condition may be connected to the breach of the duty to notify. The Scandinavian regulation on this point is conditioned on the assured having breached the duty to notify about an increase without justifiable reason.

In Belgium, Slovenia, Croatia and Venezuela, there seem to be no sanctions against alteration of risk not due to the assured.¹⁷¹ However, in Venezuela, the duty of disclosure in C Com art. 568 will also be applied during the insurance period, and it is stated in the material that the assured must inform the insurer about an increase in the risk.

5.2.4.4. The assured is not aware of the alteration

If the assured is not aware of the alteration of risk, he cannot notify the insurer about it. In this instance the assured has not breached a duty not to alter the risk, and there is no duty for the assured to notify the insurer. This implies that the insurer is fully liable for an incurred casualty, and that the insurer does not have a right to cancel the contract. However, according to the Scandinavian regulations, the insurer may in this instance cancel the contract.¹⁷²

5.3. The situation in the common law countries

Contrary to the civil law countries, the common law countries do not seem to share a general concept of alteration of risk. There is no general regulation in UK MIA on this problem, and the concept is not contained in the US or South African case law. However, elements that are covered under the concept of alteration of risk in the civil law countries are found in other provisions in the MIA. Three such provisions may here be pointed out. One is that some of the risks that might otherwise be defined as an alteration of risk are provided for under the concept of warranties, see below under item 6. Two is that the duty of good faith as applied to notification under held covered clauses may be compared to the notification requirements for alteration of risk, ref. above under item 4. A third set of provisions that might otherwise be dealt with under the concept of alteration of risk is UK MIA sec. 42-49 concerning "The Voyage". As deviation and similar issues is not part of this paper, provisions concerning the voyage will not be discussed in further detail.

The total result of these provisions in MIA seems to be that most of the material risks under a marine insurance policy are dealt with, and thus preventing the assured from alteration of a material risk without the insurers knowledge, unless otherwise is stated in the policy. On the other hand, there are no general rules preventing the assured from increasing risks not particularly dealt with in MIA or the policy. Neither is there any general common law duty to notify the insurer concerning an alteration of risk. This seems to hold for UK, Canada, Australia, and New Zealand.

A similar starting point seems to follow from US case law. The courts have stated that alterations of the risk which would result in a loss of coverage should

¹⁷¹ Belgium Law 1874 art. 31, Slovenian MA art. 710 first part, Venezuelan C Com art. 559. No reference from Croatia.

¹⁷² NP § 3-11, DC § 44, SP § 43, Finnish ICA 1933 § 47.

be treated in the terms of the policy, its conditions and warranties. Accordingly, it is doubtful whether, under the national law, an increase in the risk which is not specifically proscribed by the policy would result in a loss in coverage.¹⁷³

In South Africa, however, the starting point is the opposite: the assured may not increase the risk without notifying the insurer, who may then decide whether he want to continue the contract at the same terms. No legal sources are identified as a reason for this.

On the other hand, alteration of risk might be dealt with in the policy. Such clauses may take different forms. In Hong Kong it is not uncommon to add clauses concerning notification and liability for “increase of risks”. However, these clauses only operate when the increase is permanent and habitual.¹⁷⁴

Another type of clauses is used in Canada and US and provides for automatic coverage, subject to notification to the insurer and/or additional premium for deviation, change of voyage or delay.¹⁷⁵

5.4. *Some conclusions*

As the concept of alteration of risk seems to be a civil law concept, and the problems concerning alteration of risk in the common law countries are dealt with mainly as warranties, this item will mainly concentrate on the civil law regulation. Problems concerning warranties as compared with mandatory provisions concerning alteration of risk will be discussed below under item 6.

The main impressions from this discussion are that most of the civil law countries operate with a concept of alteration of risk, and that there are some main common features in this regulation. One main feature concerns the concept, which seems to presume that the risk is changed in a way that is material to the insurer’s acceptance of the contract or its conditions. Another main feature is that an alteration of risk activates a duty to notify the insurer, and gives the insurer a right to cancel the contract or call for additional premium. A third main feature is that if the assured is responsible for the alteration, he will lose his cover or get a reduction in the indemnification. A fourth characteristic issue is that the same applies if the assured is not responsible for the alteration, but fails to notify the insurer about it.

However, even if there are some common features the details of the regulation varies considerably. This is in especially true for the combinations of different sanctions and different conditions to invoke them. This variation may imply that it is difficult to define the logic behind the regulation. On the other hand, it is difficult to see the need for such variation.

The variation in itself may cause difficulties in a process of harmonization. However, the main obstacle against harmonization is of course the mandatory regulations in Sweden, Denmark, France and Italy, which contain several

¹⁷³ *Navegacion Goya, S.A. v. Mutual Boiler & Machinery Insurance Co.*, 411 F.Supp. 929 (S.D. N.Y. 1975).

¹⁷⁴ *Shaw v Robberds* (1837) 6 A. and E. 75

¹⁷⁵ *Windward Traders v Fred S. James & Co. of N E*, 855 F. 2d 814, 817 (11 th Cir. 1988); *New York Mar. & Gen. Ins. Co. v. Gu-CMarine Towing, Inc.*, 1994 A.M.C. 976 (E.D. La. 1993).

different provisions. One aspect concerns the concept of alteration of risk, where three different approaches are in operation. Sweden and Denmark compare the alteration of the risk to the risk defined or implied in the contract, the Italian concept is connected to the insurer's attitude to the alteration if he had known about it, whereas France has no specific definition. Whether this difference in approach results in a difference in practice is however difficult to say without knowledge of how the French provision is interpreted.

Another difference concerns the sanctioning system. The French sanctioning system for alteration of risk is not quite clear, but it seems to open for automatic termination three days after the risk is altered if the assured does not notify the insurer. An alternative solution is reduction in liability. In Italy, the solution seems to be that the insurer will be free of liability if he would not have accepted the insurance had he known about the alteration of the risk. Acceptance on other conditions leads to proportionate reduction.

The Swedish and Danish legislation is somewhat different. If the insurer would not have accepted the insurance, the solution is freedom of liability, viz. the same as in Italy, but somewhat more strict than in France. Would the insurance have been accepted on other conditions, the insurer will be fully liable for losses not caused by the alteration of risk. In case of causation, this is stricter than the Italian solution, resulting in a proportionate reduction. If there is not causation, on the other hand, the Sweden and Danish solution is more favorable.

The Swedish, Danish and the Italian mandatory requirements may be departed from in favor of the assured. It is not clear if the same is the case for France. But if so, it should be possible to select the most favorable solution. However, even this approach may meet some difficulties because of the differences in the details in the regulation and the fact that it is not always possible to say what solution is most favorable.

Also, the mandatory provisions are more favorable for the assured than provisions resulting in avoidance and total freedom of liability in situations where the alteration of risk might have led the insurer to accept the insurance on other conditions. To obtain harmonization these countries must therefore be willing to follow the less strict regime of the mandatory regulation. The same holds for common law countries solving the requirement of notification under a hold covered clause through the principle of good faith. Breach of this principle gives the insurer a right to void the contract whether the increase was material or not.

On the other hand, Germany has a more lenient approach, which seems to be better for the insured than any other system.

As a starting point for an attempt towards harmonization, it may be wise to compare the reasoning behind the duty of disclosure with the provisions for alteration of the risk. The duty of disclosure gives the insurer a tool for maximum information when the contract is entered into; the duty not to alter the risk or to notify such notification gives him a tool to keep the presumptions for cover unaltered. As with duty of disclosure, this reasoning imply that to sanction against alteration of risk, it should be a condition that the alteration would have induced the insurer not to have accepted the contract or accepted in on other terms had he known about the alteration. Also similar to disclosure, the right to

total freedom of liability should only be an option for the insurer in the first case. If the insurer would have accepted the insurance on other conditions, the most logical solution is reduction of liability or to call in more premium. However, liability in case there is no connection between the risk increase corresponds more closely to alternative methods to limit the insurer's liability. Whatever solution is chosen, it may, however, be argued that the close similarity between the reasoning behind the regulation for duty of disclosure and the regulation for alteration of risk calls for similarity also in the methods chosen.

6. *Warranties and similar conditions. General presentation*

6.1. *Overview*

Similar to alteration of risk, warranties may be seen as a tool for the insurer to regulate what kind of presumptions or conditions the cover is based on, and what kind of alterations the insured may make without losing his cover. However, even if the aim is the same, there are substantial differences between these two tools.

The concept of warranties is first and foremost a common law concept, but some civil law countries have adapted the principle as well. This concept will be discussed below under item 6.2.

Most of the civil law countries in Europe do not have a concept of warranties in their insurance legislation. This is the situation in the Scandinavian countries, Germany, Belgium, the Netherlands, France, Italy and Croatia. Among the non-European countries Japan has the same general attitude.

On the other hand, except for what may follow from the mandatory provisions concerning alteration of risk in Sweden, Denmark, France and Italy, the legislation in these countries does not forbid the use of warranties. However, it should be noted that the legislators in the preparatory documents for the Norwegian ICA pointed out that they were very sceptical to the use of warranties. They further pointed out that such clauses according to the individual circumstances might be set aside by the court according to the Scandinavian Contract Act section 36.¹⁷⁶ This warning has, of course, influenced the attitude of the market towards such clauses, ref. below.

Even if the concept of warranties is not used, the contractual freedom on this point has resulted in the use of conditions that may be compared to the common law concept of warranties. However, the problems that are dealt with in these clauses are different in the different systems, and also it seems that the clauses are characterized differently. Two main areas that may be regulated by clauses similar to warranties in the civil law countries are classification, seaworthiness and safety regulation, and change of flag, ownership and management. These two issues are however treated as separate issues under the CMI project, and thus dealt with under item 7 and 8. As these issues also may be dealt with under the common law system, it is natural to include the relevant part of the warranty regulation here.

¹⁷⁶ Ot prp nr 49 (1988-89) Om lov om forsikringsavtaler s. 32.

In addition to the problems discussed under 7 and 8, some countries are using a more general approach similar to warranties called “specially stipulated conditions”. Also, some countries in the material are characterizing certain other clauses as “warranties”. These two problems are discussed under item 6.3.

6.2. *Warranties*

6.2.1. *Introduction*

The concept of warranties is first and foremost a common law concept based on UK MIA and case law, and is applied to systems having adapted UK MIA as part of their marine insurance legislation. Furthermore, it is inherited as part of the South African common law. The concept seems also to be applied in Portugal, Spain, Slovenia, Venezuela and China.

The starting point for the use of warranties is UK MIA sec. 33, which reads:¹⁷⁷

“(1) A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say, a 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 he affirms or negatives the existence of a particular state of facts.

(2) A warranty may be express or implied.

(3) A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date the breach of warranty, but without prejudice to liability incurred by him before that date.”

The concept of warranties itself raises three main issues. The first is what constitute a “warranty” as provided for in UK MIA sec. 33 (1) and (2), see below under item 6.2.2. The second question is the meaning of the term “exactly complied with” in sec. 33 (3), see below under item 6.2.3. The third issue is the sanction, ref. item 6.2.4. As the regulation is considered very harsh, there are certain legislative efforts in the common law systems to soften the regulation. This calls for a fourth issue (6.2.5) concerning developments away from the traditional warranty principle. Also, policy conditions may give the assured a better cover through a so-called held covered clause, see below under item 6.2.6. A last issue concerns the insurer’s waiver of breach of a warranty, item 6.2.7.

6.2.2. *What constitutes a warranty*

According to UK MIA sec 33 (1) a warranty is a condition whereby “the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the

¹⁷⁷ See also Hong Kong Ord sec. 33, Ca MIA sec 39, Au MIA sec. 39, NZ MIA sec. 34. Warranties are also defined in the Spanish C Com sects. 755.5 and 7, 756, 760, 764 and 781. 7. A translation of these provisions is however not included in the material.

existence of a particular state of facts".¹⁷⁸ A similar definition is used in US,¹⁷⁹ and apparently also in South Africa.¹⁸⁰

According to this definition, there are two different kinds of warranties. The first kind is an affirmative, factual warranty that is a stipulation that certain facts exist. An example is a statement that a vessel is classified with a particular Classification society at the time the proposal for insurance was submitted. The second is a promissory or continuing warranty that is a true promise that pertains to the future as well as the present. A promissory warranty binds its maker to a promise to do or refrain from doing something during the currency of the policy, or that a certain state of affairs shall exist during the currency.¹⁸¹ An example here will be that the vessel's class shall be maintained throughout the insurance period. The first kind of warranty thus seems to be closely connected to representation, which also may be described as a stipulation of a certain fact. The second kind of warranty seems similar to alteration of risk, but instead of connecting the assured's duty to an alteration of the risk, the assured's duty is expressed as an undertaking or a guarantee which is not necessarily connected to the risk.

In addition to the distinction between affirmative factual (representation) warranty and a promissory warranty, UK MIA sec 33 (2) makes a distinction between express and implied warranties.¹⁸² Express warranties are those written in the policy. Several kinds of express warranties typically are found in standard clauses, such as the Institute clauses. Some common express warranties are 1) warranties establishing geographical trade limits, 2) warranties as to date of sailing, 3) warranties as to number of crew, 4) warranties against towage, 5) warranties as to additional insurance and 6) warranties as to acting with reasonable dispatch in all circumstances under the assured's control. As none of these provisions are issues included in this paper, they will not be dealt with in further detail.

Three types of implied warranties are recognized in marine insurance; 1) The warranty of seaworthiness of the vessel, MIA sec. 39, 2) the legality of the marine adventure and, MIA sec. 41, and 3) warranty against deviation during the voyage, MIA sec. 46. The question of seaworthiness is discussed separately below under item 7.3. The warranty of legality is treated as part of the question of safety regulations in item 7.4. The question of deviation is not a separate issue, and will not be dealt with in detail.

MIA sec. 37 further excludes an implied warranty of nationality of the ship or that nationality will not be changed during the currency of the policy. Some of the Institute clauses however, contain an express warranty of nationality, see further below under item 8.

As the implied warranties are defined in MIA itself, there is no question of form concerning these warranties. Express warranties are further regulated

¹⁷⁸ See also Hong Kong Ord sec. 33 (1), Ca MIA sec 39 (1), Au MIA sec. 39 (1), NZ MIA sec. 34 (1).

¹⁷⁹ Schoenbaum p. 140.

¹⁸⁰ Hare p. 19.

¹⁸¹ Schoenbaum p. 140, Hare p. 19.

¹⁸² See further Schoenbaum p. 131-132.

in UK MIA sec. 35. This provision does not require any particular form or use of words to express a warranty, but merely states that an express warranty “may be in any form of words from which the intention to warrant must be inferred”. Also, and express warranty must be included in or written upon the policy or referred to in the policy.

6.2.3. *The compliance requirement*¹⁸³

According to UK MIA sec. 33(3) “a warranty must be exactly complied with”. This implies that warranties in marine insurance contracts must be strictly performed. There is no question of fault on the part of the assured. The cause of the breach of a warranty does not matter. Neither is the question of materiality an issue. A warranty must be strictly performed whether the actual condition is material to the insurer or not.

In UK this strict compliance rule have been practiced for more than two hundred years. It also seems to be adapted in countries using the MIA and in South Africa.¹⁸⁴

The same solution was traditionally applied in US as federal law. However, the Supreme Court in *Wilburn Boat Co. v. Fireman’s Fund Insurance Co.* ruled that state law should apply to warranties under marine insurance. This resulted in three different approaches to the rule in lower US courts. One approach is to apply state law to warranties in marine insurance contracts, and to hold that the strict compliance rule is applicable as state law. A second approach is to apply the strict compliance rule as federal law, ignoring the ruling of the Supreme Court. A third approach is to apply the strict compliance rule as both federal and state law. As a result, the strict compliance rule survived the *Wilburn Boat* decision.

The strict compliance rule implies that an affirmative warranty that certain facts exist stated in the policy or referred to in the policy is treated differently than misrepresentation at the time the contract is entered into. According to UK MIA sec. 20 (1) the insurer may only react if the misrepresentation is “material”. If the misrepresentation is expressed as an affirmative warranty, there is no requirement of materiality or inducement. It is difficult to see the reason behind this difference in the regulation. This solution is also heavily criticized in common law.¹⁸⁵

In South Africa this result has lead to a provision in the Short Term Insurance Act sec. 53 concerning misrepresentation, which includes affirmatory warranties, and which contains a condition of materiality.¹⁸⁶ The materiality concept in this section is a subjective requirement of inducement, similar to the interpretation of UK MIA sec. 20 (1).

¹⁸³ This item is based on Schoenbaum p.130-131 and p. 142-145 for US and UK.

¹⁸⁴ Hare p. 19-20 for South Africa.

¹⁸⁵ See Hasson (1971) 34 MLR 29 and Birds: Modern Insurance Law (1977) p. 140 for UK, Schoenbaum p. 140-141 and 145 for UK and US, and Hare p. 20 for South Africa, who points out that the Roman-Dutch law would have required that the warranty was an essential term.

6.2.4. *The sanction*

UK MIA sec. 33(3) further provides that in the event of breach, “the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date”.¹⁸⁷

If a promissory warranty is not complied with, the insurer is discharged from liability as from the date of the breach of warranty, for the reason that fulfillment of the warranty is a condition precedent to the liability or further liability of the insurer. As mentioned above there is no requirement of fault on the part of the insured. Neither does it matter whether the breach of the warranty is the cause of the loss.

However, the insurer is liable for casualties having incurred prior to the breach. Also, the insurer is entitled to retain premium up to that date. On this point, the regulation differs from the regulation concerning misrepresentation, where the premium will be returned unless the misrepresentation is fraudulent, see above under item 3.4.

Discharge of the insurer from liability is automatic and is not dependent upon any decision by the insurer to treat the contract or the insurance at an end. In countries based on MIA the provision is treated literally. As this differs from the sanction concerning misrepresentation, where the contract may be avoided by the insurer, breach of an affirmative factual warranty in the policy will render a different sanction than misrepresentation.

Slovenia and Venezuela seem to follow the approach in UK MIA concerning the sanction, stating that the breach of a warranty leads to termination of cover regardless of causation between the breach and the subsequent casualty. The same holds for South Africa.¹⁸⁸

The US solution concerning the sanction is somewhat different.¹⁸⁹ Breach has two different consequences. The majority view holds that breach merely suspends coverage, which can be reinstated, if the assured corrects the breach. Under this view, the policy remains in effect and the insurer does not even have an option to terminate the policy. The assured gets a chance to reinstate the policy unilaterally by curing the breach.

A second line of American cases declares that the insurer is “discharged” or the policy is “void” without going into detail on what this means. However, presumably what is meant is that the insurer has the right to choose to be discharged from liability. This seems to correspond to Spanish legislation, where the insurer when there is a breach of warranty has a right to choose between termination of the policy and waiver of the breach with or without the payment of any additional premium.¹⁹⁰ The parties may however agree otherwise. A

¹⁸⁶ See Hare p. 14 and 19-20.

¹⁸⁷ See also Hong Kong Ord sec. 33 (3), Ca MIA sec 39 (2), Au MIA sec. 39 (3), NZ MIA sec. 34.

¹⁸⁸ Hare p. 18 use the term “cancellation”, but apparently this means automatic termination, see p. 20.

¹⁸⁹ See further Schoenbaum p. 148-149. Some cases do however apparently follow the solution in MIA on this point, see *Drake Fishing v. Clarendon Am. Ins. Co.*, 136 F.3d 851 (1st Cir. 1998); *Lexington Ins. Co. v. Cooke’s Seafood*, 835 F.2d 1364, 1366 (11th Cir. 1988); *Graham v. Milky Way Barge*, 824 F.2d 376, 383 (5th Cir. 1987).

¹⁹⁰ Spanish ICA art. 12. These are the same rules that are applied to alteration of risk after having

similar regulation is found in China, but here the insurer's options are connected to a notice from the assured about the breach of a warranty.¹⁹¹

6.2.5. *Legislation to soften the strict concept of warranties*

Even if several countries have adapted the UK MIA concept of warranties, there is also a movement in the legislation away from this strict concept. This is partly achieved by regulation (New Zealand and South Africa), partly by court decisions (US and Canada). Three different methods are used to soften the principle. One technique is to include a condition of causation for the insurer to be able to avoid liability.¹⁹² Another method is to let the insurer react only if the provision materially affects the risk.¹⁹³ A third method is the one already mentioned above, to suspend coverage instead of avoiding the contract.¹⁹⁴

6.2.6. *Held Covered clauses*¹⁹⁵

In order to protect the assured from the harsh consequences of a breach of warranty, marine policies in many of the countries using this concept contain so-called "held covered" clauses which allow the policy to continue even after a breach of a warranty. This is expressed to be the situation in UK, US,¹⁹⁶ Canada, Spain and China. On the other hand, such clauses are not common in Australia.¹⁹⁷

An example of a held covered clause is ITCH Hulls 1995 form 3 stating that given "any breach of warranty as to cargo, trade, locality, towage, salvage services, or date of sailing", the assured shall be held covered "provided notice be given to the Underwriters immediately after receipt of advices and any amended terms of cover and any additional premium required by them be agreed". A similar clause is found in the Spanish Policy and in the Chinese Hull and Cargo Clauses.¹⁹⁸

To take advantage of these clauses, the assured must fulfill two requirements. First, adequate notice must be given to the insurer. Failure to give notice will terminate the extension of cover. Second, the assured must pay an additional premium to retain the cover.

notified the insurer. Alteration of risk without the knowledge of the insurer results in no liability for a subsequent casualty. Portugal merely states that the policy is void.

¹⁹¹ Chinese MC art. 235.

¹⁹² New Zealand Insurance Law Reform Act of 1977 sec. 11. This provision is not mandatory in marine insurance, and marine insurance policies may therefore follow the MIA concept. The same solution is followed by some US courts, stated to be state law or even federal US law, see Schoenbaum p. 155.

¹⁹³ South African Short Term Insurance Act sec. 53 concerning affirmative warranties, and US court cases, see Schoenbaum p. 155-156.

¹⁹⁴ Schoenbaum p. 154.

¹⁹⁵ See Schoenbaum p. 157-158.

¹⁹⁶ *Hilton Oil Transp. v. Jonas*, 75 F.3d 627, 620 (11th Cir. 1996); *Kalmbach v. Insurance Co. of Pa.*, 529 F.2d at 555 (9th Cir. 1976); S.B. Long, "Held Covered" Clauses in Marine Insurance Policies, *Ins. Counsel J.* 401 (1957).

¹⁹⁷ The Australian Law Reform Commission Discussion Paper 63, *Review of the Marine Insurance Act 1909*, July 2000. (ALRC) p. 65.

¹⁹⁸ Chinese HC VI no. 3 and CC IV no. 3.

6.2.7. *Waiver*

According to UK MIA sec. 34 (3), a breach of a warranty may be waived by the insurer. A waiver is a voluntary and express decision to forego a contract right. The same solution is applied in US.

The concept of waiver has been subject to legal controversy. One difficulty is that, as the remedy of avoidance of the contract is automatic, there would appear to be nothing for the insurer to waive.¹⁹⁹ However, in the Good Luck case it was held that the effect of a waiver was simply that to the extent of the waiver, the insurer cannot rely upon the breach as having discharged him from liability.²⁰⁰

6.3. *Similar provisions*

Some systems operate with a concept called “specially stipulated conditions” which are claimed to be similar to the warranty concept, see below under 6.3.1. Also, some of the civil law countries in the material characterize certain clauses as “warranties”, see 6.3.2. Some clauses that are often expressed as warranties in the civil countries will be discussed under items 7 and 8.

6.3.1. *“Specially stipulated conditions”*

The Croatian and Slovenian marine insurance regulation include a system that they compare to the warranty concept and call “specially stipulated conditions”. The consequences of breaching these conditions will depend on whether the condition was important for the insurer’s acceptance of the risk, or only for the evaluation of the risk. If the condition was decisive for the acceptance of the insurance, a breach of the condition will give the insurer a right to avoid the contract. A breach of a condition that influenced the evaluation of the risk, will, on the other hand lead to a proportionate deduction of the indemnity.²⁰¹

As a concept, these specially stipulated conditions seem to be similar to the concept of alteration of risk, where Croatia and Slovenia do not link the question of alteration of risk to the influence on the insurance contract, but rather to whether the risk increase was substantial or not.

6.3.2. *Other clauses claimed to have a similarity to warranties*

In Germany, ADS section 42 providing for a time limit to notify the insurer about a loss is compared to a warranty. The time limit is as a main rule 15 months from the termination of the insurance, and the assured will lose his claim if this condition is not complied with. Negligence on the part of the assured is no condition. Apparently, this is the only condition in the German

¹⁹⁹ ALRC p. 64, with further reference in note 13.

²⁰⁰ Bank of Nova Scotia v. Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck), 1992 I AC 233, 263. For a further discussion on how to reconcile the reasoning in this case and the doctrine of waiver, see Clarke: Law of Insurance Contracts (2000) Ch. 20-7A.

²⁰¹ Slovenian MA art. 722. No reference from Croatia.

system that will result in no liability for the insurer regardless of whether the assured is to blame.

Similar time limit clauses are found in the other civil law systems. In my opinion, it is more relevant to evaluate these clauses as part of the question of time barring or limitation than to compare them to the concept of warranty.

France and Sweden compare the obligation of disclosure to the concept of warranties. Systematically, however, these conditions are normally treated as special concepts. Sweden also mentions the similarity to the regulation of alteration of risk. It follows from the discussion above that the concepts of alteration of risk and of warranties are indeed closely related. However, as a general rule, it may be said that the concept of warranties is a stricter approach to make exceptions from the cover than alteration of risk.

6.4. Some conclusions

To the extent that the concept of warranties is used, there seems to be a fairly common approach. The concept is based on the provisions in UK MIA sec. 33, and thereby followed by countries with legislation based on MIA. It is also adopted by South Africa, thus overriding Roman-Dutch law, and by some civil law countries making use of English insurance conditions. US seem to follow the same principles, except for some minor differences concerning the sanction. Also, US State law is not necessarily as harsh as federal law. It should be noted that one of the differences concerns the sanction, where there seems to be a division between automatic discharge according to MIA, whereas the US solution is either suspension or that the insurer may avoid liability.

The concept of warranties seems to raise problems at three different levels. One is that the provisions themselves are very confusing, and that it is difficult to grasp what is the true nature of the regulation. As Shoenbaum remarks at page 151, the provision tangles together four different concepts: warranty, promise, condition and representation. The part of the concept overlapping the regulation concerning misrepresentation is very confusing, and it is not easy to define which misrepresentations are regulated under MIA sec. 20, which are provided for under sec. 17 concerning good faith, and when sec. 33 concerning warranties should be applied to misrepresentations. It is also difficult to see why promise and condition are used together in the same provision, as these two concepts normally have different functions and a breach will result in different sanctions.

The second problem is that the regulation seems to be unfairly harsh. It gives the insurer a tool to avoid liability even if the warranty was not material to the insurers decision to accept the risk, without any requirement of causation, and without regard to any kind of fault on the part of the assured. The best illustration of the harshness of the regulation are the attempts within the common law legislation to soften the regulation, and the use of held covered clauses. In spite of this, however, the principle is kept as a starting point, giving the insurer a tool to avoid liability, and to keep the premium, even if the warranty was immaterial and there was no causation. It is difficult to see any logical reason for this result, even if it may be explained by analyzes of the concept of conditions in ordinary contract law.

Particularly for affirmative warranties it is beyond reason why the insurer needs the protection in UK MIA sec. 33 concerning these warranties when he already has UK MIA sec. 20 and 17. As mentioned above, the relationship between these provisions seems unnecessary confusing.

A third problem is the use of warranties compared to mandatory regulation in civil law countries. The mandatory provisions in Danish and Swedish ICA concerning alteration of risk do not seem to permit the far more harsh regulation of warranties. Also, the French and Italian legislations are more favorable towards the assured than the common law principle of warranties. In an attempt towards harmonization, this implies either that the common law systems are willing to soften their regulation, or that a double set of clauses are suggested. It does not seem realistic that the legislators in the four mentioned civil law countries will open the door for the stricter principle of warranties, ref. the Norwegian political attitude on this point. Also, it would seem to be to go backwards into the future to adopt legal principles from 1906 instead of the principles of the far more modern insurance legislation in the civil law countries.

It should, however, be noted that some problems that under the UK system are dealt with as warranties in other systems are given a very similar regulation, even if the concept of warranties are not expressly used, see further under items 7 and 8. Even if the principle of warranties is abolished, this will therefore not mean that the material solution inherent in the principle will not be kept for certain issues.

7. Warranties continued; loss of class, seaworthiness and safety regulation

7.1. Introduction

The regulation dealt with under this item is different from the regulation described under items 3-6 in two aspects. Firstly, the duty of disclosure, duty of good faith, alteration of risk and warranties are general concepts that may be used to map out the risk before the insurance commences and to keep the risk under control during the insurance period. The regulations for loss of class, seaworthiness and safety regulation, on the other hand concern special problems of great importance when the insurance is effected and while the insurance is running. In some systems the general provisions concerning alteration of risk and warranties deal with these problems, but in other systems they are provided for in separate provisions. This chapter may therefore be seen as an extension of the chapters concerning duty of disclosure, alteration of risk and warranties, but may on the other hand also be seen as an individual chapter dealing with special problems.

A second difference between this chapter and the more general provisions dealt with earlier concerns the type of insurance that is the focus of the discussion. Whereas the general provisions are common for hull and cargo insurance, the questions discussed here are mostly important for hull insurance. However, some cargo clauses contain regulation concerning one or more of the issues discussed under this item.

A main feature for classification, seaworthiness and safety regulation is

that these concepts all have to do with the safety of the ship and cargo and the efforts to avoid damage or loss covered by insurance. As such, this regulation is an important part of the insurer's ability to ensure that the ship is in all respects in an acceptable condition to meet the perils insured against, and that the necessary precautions have been taken to keep the ship in this condition. As a starting point, these safety aspects may as mentioned be dealt with through the general policy provisions. However, in some systems special provisions, underlining that the general rules are not considered to be sufficient to deal with the safety problems, emphasize the focus on safety.

This aspect of classification requirements, seaworthiness and safety regulation touches upon a question of the systematic approach to this regulation. Exclusions for loss of class, unseaworthiness and breach of safety provisions may be seen as excluded perils as compared to objective limitations of liability as for instance exclusions for war risk, nuclear risks, wear and tear etc. However, a characteristic feature of the safety provisions is that the assured can avoid the risk materializing by acting in a prudent manner. It is therefore an element of the assured's acts or omissions in these provisions that is not inherent in the exclusions mentioned. This distinction may be emphasized by the structure of the regulation,²⁰² but this is not necessarily so.

To the extent that the regulation for loss of class, seaworthiness and safety regulation touches upon mandatory provisions, the distinction between the subjective and objective approach to these provisions becomes more important. In Sweden and Denmark, the ICA contains mandatory provisions for safety regulation which limit the insurer's right to be free of liability. Furthermore, the mandatory provisions for increase of risk in the same countries and in France and Italy may be seen as a barrier to rules concerning unseaworthiness and loss of class. In this perspective, mandatory provisions may restrict the insurer's approach to these problems.

7.2. Loss of class and change of classification society

MIA contains no implied warranty concerning loss of class or change of classification society. However, this question is regulated in Institute Time Clauses Hulls 4 and 5. According to 4.1 and 4.2 in this clause

"4.1. It is the duty of the Assured, Owners and Managers at the inception of and throughout the period to ensure that the vessel is classed with a Classification Society agreed by the underwriters and that her class within that society is maintained, any recommendations requirements or restrictions imposed by the Vessel's Classification Society which relate to the Vessel's seaworthiness or to her maintenance in a seaworthy condition are complied with by the dates required by that society.

4.2. In the event of any breach of the duties set out in Clause 4.1 above, unless the Underwriters agree to the contrary in writing, they will be discharged from liability under this insurance as from the date of the breach provided that if the Vessel is at sea at such date the Underwriter's discharge from liability is deferred until arrival at her next port."

²⁰² See NP chapter 2 as compared to chapter 3.

Further, it is stated in clause 5 of the ITCH that the insurance will automatically terminate at the time there is a change of the vessel's classification society, or change or cancellation of the class.

This clause is not characterized as a warranty, but it is expressed in a form similar to warranties, with a combination of an affirmative warranty connected to the inception of the insurance and a promissory warranty connected to the insurance period. The duty is further divided into two: the assured has a duty to keep the vessel classed as agreed with the insurer, and to fulfill recommendations, requirements, or restrictions imposed by the Classification society.

The reaction is also similar to a warranty: Discharge from liability as from the day of the breach. Fault on the part of the assured is no issue, and there is no requirement of causation between the breach and the casualty. Neither is there any requirement that the loss of or change of Classification society or the fulfillment of recommendations are material for the insurer. Even if the assured can prove that the insurer would have accepted a new Classification society if he had been asked, the insurer will be discharged from liability. The result is also the same if the recommendations that are not fulfilled are of minor importance.

Contrary to several other express warranties, there is no "held covered clause" for the Classification Clause. It is thus a stricter approach than the similar approach connected to other problems.

The solution in ITCH is adopted directly in countries using the ITCH clauses as standard clauses because they do not have their own clauses, viz. Portugal, Slovenia, Croatia, Greece, Israel, Venezuela, Australia, Indonesia, South Africa and Hong Kong. Spain and Italy, who combine the ITCH with their own standard clauses seem to follow the ITCH warranty approach on this point. Also Canada and New Zealand have a widespread use of the ITCH clauses. A similar solution is also found in the American Institute Hull Clauses, which contain a Change of Ownership Clause corresponding to clause 5 in ITCH, and results in automatic termination of the insurance where there is a change in the Classification society or loss of class.

An identical or similar regulation is used in the hull clauses in Norway, Sweden, Finland, Denmark, Belgium and China. The starting point is that the ship is to be classified in a classification society approved by the insurer.²⁰³ If the ship loses its class or changes Classification society without the approval of the insurer, the insurance will automatically terminate.²⁰⁴

The approach to establish this condition, however, differs. In China, the provision is placed under the heading "Termination", which also includes breach of a warranty. The Belgian clause is placed under "Underwriters warranties". A somewhat similar approach is used in Sweden and Denmark, where the provision is seen as a rule to shorten the insurance period through

²⁰³ NP § 3-14 first part, Swedish HC § 11 mom. 1, Finnish HC § 14 (2), Belgian Corvette Policy 4.1.1. The same provision is presumed in Danish HC 2.3 (1) and apparently in Chinese HC VI no. 2.

²⁰⁴ NP article 3-14 second part, Danish HC article 2.3 (1), Finnish HC § 14 (2), Swedish HC § 4 second part, Belgian Corvette Policy 4.1.3 and 4.2.1, Chinese HC VI no. 2.

automatic termination.²⁰⁵ This, of course, emphasizes the parallel between the provisions concerning class and the warranties.

In Norway, the classification provision is part of the regulation of alteration of the risk in chapter 3 concerning duties of the assured. However, it is clear that the regulation is far stricter than the general rules for alteration of risk. The clause caused a lot of discussion during the revision, and some members of the Plan Committee were of the opinion that the regulation was unnecessary harsh. It also follows from the Commentary to the Plan that the Plan Committee was aware that the provision could be misused. This would be the result if the assured changed Classification society without notifying the insurer, but it was clear that the insurer would have accepted the new Classification society had he been asked. It is thus stated in the Commentaries that in this situation the court might put the provision aside according to the Scandinavian Contract Act section 36.²⁰⁶ This conforms to the attitude of the legislators when constructing the Norwegian ICA of 1989, and illustrates the point made above under item 6.1.

In Finland, the classification requirement is a part of the regulation of safety measures, but with a stricter sanction than the ordinary rules on this point.

In the Finnish and Belgian conditions, non-compliance with periodic surveys is treated as loss of class.²⁰⁷ This solution is similar to the regulation in the Norwegian market before the revision of the Plan. However, in the new Plan, periodic surveys are treated as a safety measure.²⁰⁸ The reason for this is partly that it was difficult to define what was included in the concept of “periodic surveys”, partly that the reaction with automatic termination was considered too harsh.²⁰⁹

The German approach is to treat the classification requirement as a part of the regulation of seaworthiness. This implies a less strict regulation than the special classification requirements mentioned above. The underwriters are not liable for loss or damage resulting from the vessel having put to sea in a state of unseaworthiness, especially without the highest class of a recognized classification society (and some other circumstances, see further below). Contrary to the warranty approach described above, the provision is not applied if the breach of the classification requirement, and thus the unseaworthiness, is due to reasons beyond the control of the assured. Also contrary to the stricter regulation, there is a condition of causation for the insurer to react.²¹⁰

Under the German system change of classification society and breach of class recommendations will have to be dealt with as an ordinary alteration of the risk, see above under item 5.

²⁰⁵ It may be argued that this kind of provision is contrary to the mandatory regulation in the Swedish and Danish ICA. A detailed discussion of this problem falls, however, outside the scope of this paper.

²⁰⁶ Commentary to Norwegian Marine Insurance Plan 1996. Version 1999 p. 87.

²⁰⁷ Finnish HC § 14 (3) third part, Belgian Corvette Policy 4.1.2 and 4.1.3.

²⁰⁸ NP § 3-24.

²⁰⁹ Commentary to NP p. 86 and p. 107-108.

²¹⁰ DTV Hull Clauses 23.1 and 23.2.

The French regulation is again different, connected to a combination of duty of disclosure and alteration of risk. Under the duty of disclosure the duty to disclose the classification society and the class of the vessel is specially mentioned.²¹¹ A breach of this duty may lead to the policy being void.²¹² Further, the assured is under a duty to disclose any change in the vessel's classification society, and any alteration, cancellation or withdrawal of her class, and is also under a duty to comply with recommendations, requirements and restrictions imposed by the class.²¹³ The penalty for breaching these duties is cancellation of the insurance with a three days notice, or proportionate reduction in the indemnity.²¹⁴ The French policy conditions on this point thus conform to the mandatory regulation in French ICA as described above under item 3 and 5, and illustrate that mandatory provisions restrict the warranty approach.

In cargo insurance, there is normally no classification requirement. However, the French and German Cargo conditions contain clauses stating that insurance cover will only apply to transport on ships fulfilling certain classification requirements.²¹⁵

7.3. *Seaworthiness*

7.3.1. *Introduction*

The regulation of seaworthiness is less common than the classification requirement. In systems operating with separate provisions for seaworthiness, two different approaches are used. One approach is the warranty approach, where there is an expressed or implied warranty of seaworthiness (item 7.3.3). The other approach is to have a special exclusion for losses caused by unseaworthiness that may be attributed to the assured (item 7.3.4). Contrary to the general warranty regulation, however, the common law countries in this instance use both approaches, depending on the kind of policy.

A common question for these two approaches is the concept of seaworthiness, which will be discussed in item 7.3.2.

On the other hand, some systems do not have separate provisions concerning this question. In these systems the problem will have to be dealt with through other more general provisions, see below under item 7.3.5.

7.3.2. *The concept of seaworthiness*

The concept of seaworthiness is normally not defined in detail in the provisions concerning this question. Some systems use the word "unseaworthiness" without any qualification at all.²¹⁶ If so, the exclusion from liability is connected to the ship being in an unseaworthy condition without

²¹¹ French HC art. 8.1.

²¹² French HC art. 14 first part. According to French ICA, which is mandatory on this point, such reaction is conditioned on the assured being in bad faith.

²¹³ French HC art. 8.3 and 9.1.

²¹⁴ French HC art. 14 second part.

²¹⁵ French CC art. 2 and DTV Cargo 7.1 second part.

²¹⁶ NP § 3-22, Swedish HC § 12, Danish HC 4.4, Finnish HC § 5.

trying to define the express meaning of this. It seems, however, to be a general agreement that seaworthiness is not an absolute standard, but a relative term that must be evaluated according to the ship in question, the trading area, time of the year, cargo shipped etc.. The requirement is less demanding of a vessel while in port than when putting to sea. So, too, it varies with the particular perils of a voyage, such as its length, the cargo to be carried, the seas to be navigated and ports of call and the season. Also, it seems to be a general approach that seaworthiness as a term extends not only to the physical condition of the vessel, but also to other aspects of the ship such as adequacy of fuel, sufficiency of the crew and even stability.²¹⁷

The German, Slovenian and Chinese provisions on the other hand give more detailed guidelines as to what constitute unseaworthiness by adding a list of weaknesses to the general description, so that the listed defects will imply that the ship is unseaworthy. All these provisions include that the ship is not properly equipped, manned, or loaded.²¹⁸ The German provision also includes that the ship is without the documents necessary for the vessel, the crew, or her cargo, or without the highest class of a recognized classification society and without the sailing permission certificate of the competent authority.²¹⁹ The Slovenian legislation adds technical defects and more passengers than permitted.²²⁰

7.3.3. *The warranty approach*

A warranty approach to the question of seaworthiness is applied in the MIA based regulation concerning voyage policies.²²¹ This warranty states that the ship at the commencement of the voyage shall be seaworthy for the purpose of the particular adventure insured. As voyage policies are not much used except when a ship is on a voyage to a scrap yard, this provision is not very practical. For time policies, neither the UK MIA nor the ITCH contains a warranty of seaworthiness.

The same warranty is also applied for the ship under a voyage policy for goods.²²² However, the implied warranty of seaworthiness for a policy for goods is waived in the Cargo Clauses.²²³

On this point, the US solution departs from the solution in UK. In US, there may be an express warranty in the policy concerning seaworthiness.²²⁴ In

²¹⁷ For US and UK see C Staring: A warranty of seaworthiness in Time Hull Policies, p. 3, with references, Schoenbaum p. 160-161. For NP see Comments to the NP p. 99-101. For Italy see Court of Cassation, 2 March 1973, No. 572 confirming Tribunale of Genoa, 31 December 1968. For Australia, see The Australian Law Reform Commission Discussion Paper 63, Review of the Marine Insurance Act 1909, July 2000, p. 82.

²¹⁸ DTV Hull Clauses 23, Slovenian MA art. 733, Chinese HC II, 1.

²¹⁹ DTV Hull Clauses 23.

²²⁰ Slovenian MA art. 733.

²²¹ UK MIA sec. 39 (1), Au MIA sec. 45 (1), NZ MIA sec. 40, Ca MIA sec. 37 (1), Hong Kong Ordinance sec. 39 (1). Spain seems to follow the UK MIA on this point.

²²² UK MIA sec. 40, NZ MIA sec. 41.

²²³ ICC A B and C Clauses 5.2.

²²⁴ Schoenbaum p. 160.

addition, there is a special “American Rule”, which some courts have applied, while other courts and commentators have criticized. The “American Rule” is stated to consist of two different warranties, but according to the systematic approach in this paper, it consists of one warranty and one condition which is similar to an ordinary limitation of liability and the civil law approach to this problem.

The first part of the “American Rule” is a warranty of seaworthiness upon attachment of coverage.²²⁵ It is generally agreed that the warranty arises only if the vessel is in port at the time the insurance attaches; however, the law is unclear in this respect. Also, it is discussed whether such a warranty exists at all. Staring Craydon concludes concerning this issue that:

“It is a fair conclusion that there is no American Rule at all and what has passed for one consists of two rules, one of which is not a warranty but a simple condition corresponding to the Marine Insurance Act and generally observed in the United States, and the other (a warranty still ill-defined) is little more than a Fifth Circuit rule effective in its own important region, without commercial foundation.”

7.3.4. *Exceptions for losses caused by unseaworthiness*

The MIA based warranty for seaworthiness is as mentioned limited to voyage-policies. A time policy, which is the most common form, contains no implied warranty of seaworthiness. On the other hand, a time policy is subject to a special provision that if the ship, with the privity of the assured, is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.²²⁶ The same solution is applied in the Institute Cargo Clauses.²²⁷ The main difference from the warranty approach is that the insurer will only be free from liability if 1) the loss is caused by the unseaworthiness, and 2) the assured is in bad faith concerning the unseaworthiness.

This solution seems to be similar to the second part of the “American Rule”. This rule implies that once the initial warranty is satisfied, an additional condition which has been described as a “sort of negative modified warranty ... that the Owner, from bad faith or neglect, will not knowingly permit the vessel to break ground in an unseaworthy condition.” Unlike the first implied warranty, however, the consequence of a violation of this negative burden is “merely a denial of liability for loss or damage caused proximately by such unseaworthiness.”²²⁸

Also, this common law regulation corresponds to the civil law approach to the question of seaworthiness. The normal solution is that the exclusion for unseaworthiness only applies for losses caused by the unseaworthiness, and that

²²⁵ *Saskatchewan Government Ins. Office v. Spot Pack, Inc.*, 242 F.2d 1422 (51hCir. 1992), cert. denied, 510 U. S. 813 (1993).

²²⁶ UK MIA sec. 39 (5), Au MIA sec 45 (5), Ca MIA sec 37 (4), Hong Kong Ordinance sec. 39 (5), NZ MIA.

²²⁷ ICC A, B and C Clauses 5.1.

²²⁸ *The Spot Pack*, 242 F.2d at 388, Staring op. cit. p. 5.

there is a condition of fault on the part of the assured.²²⁹ However, there are some differences concerning at which point in time the ship must be in a seaworthy condition and the assured must be in good faith. The Danish, German, Japanese and Chinese exceptions are connected to the ship's departure from the last harbor.²³⁰ The solution in Norway, Sweden, Finland and Slovenia is to connect the question of seaworthiness to the point in time where the assured was in a position to intervene.²³¹ This will be similar to the departure from harbor approach if it is not possible for the assured to intervene at any later time. However, with the modern techniques of communication the situation may well be that intervention can be made also when the ship is at sea.

Portugal states that there is an exclusion for unseaworthiness, but gives no further details about the regulation. In the Netherlands and Venezuela, the question is solved in the policies, but no further details are given.

Apart from the Institute Cargo Clauses and the Danish Cargo Clauses, the question of seaworthiness is not expressly regulated in the cargo conditions. However, these conditions often exclude damage caused by unfitness of means of transport that may include the situation where the ship is unseaworthy.²³² The condition to invoke this clause is either that the assured became aware of the unfitness at a time it would have been possible for him to intervene,²³³ or that the assured exercised due diligence in choosing the carrier.²³⁴

7.3.5. No special regulation

Belgium, France, Italy, Croatia and Indonesia refer to no special exclusions for unseaworthiness. This means that the problem must be solved through more general rules concerning alteration of risk or misconduct by the insured. The Italian material implies that the provisions concerning exclusions for gross negligence²³⁵ are interpreted in a way that makes an act or omission of the assured leading to unseaworthiness grossly negligent in itself, and loss caused by unseaworthiness is thus excluded through these provisions.²³⁶ In practice this ruling is presumed to lead to the same result as UK MIA sec. 39(5) for time policies.

7.4. Safety regulation

7.4.1. Introduction

By safety regulation is here meant a regulation concerning measures for the prevention of loss. Special provisions for breach of safety regulation seems to be a Nordic invention, not much used in the other civil law countries. The Danish and Swedish ICA contain mandatory provisions concerning safety provisions, but as mentioned in chapter 2.1 these acts are under amendment.

²²⁹ NP § 3-22, Danish HC 4.5, Danish CC 4.8, Swedish HC § 12, Finnish HC § 5, DTV Hull Clauses 23.1 and 23.2, Slovenian MA art. 733 first part, Chinese HC II,1, Japanese CC art. 829.2.

²³⁰ Danish HC 4.5, Danish CC 4.8, DTV Hull Clauses 23.1, Japanese CC art. 829.2, Chinese HC II, 1.

²³¹ NP § 3-22, Swedish HC § 12, Finnish HC § 5.2, Slovenian MA 733.

²³² Norwegian CC § 18, Swedish CC 2.4, DTV Cargo 7

²³³ Norwegian CC § 18, Swedish CC 2.4.

²³⁴ DTV Cargo 7.

²³⁵ Italian C Nav section 524 ref. CC section 1900.

²³⁶ See Tribunale Genoa, 31 December 1968, Court of Cassation, 2 March 1973.

The Nordic approach to this problem is to exclude losses caused by breach of safety regulations, see item 7.4.2.

In the common law countries a comparable result is provided for in the implied warranty of legality, see item 7.4.3. The connection between breach of safety regulation and other provisions in the policy is discussed under item 7.4.4. Also, some conditions contain special regulation concerning international safety conventions, see item 7.4.5.

7.4.2. Exclusions for loss caused by breach of safety regulations

A safety regulation may be issued by public authority, by the ship's classification society, or by the insurer. The widest concept of safety regulation is found in the Norwegian hull and cargo conditions, NP § 3-24, defining a safety regulation as any rule concerning measures for the prevention of loss issued by public authorities, prescribed by the insurer pursuant to the insurance contract, or issued by the classification society.²³⁷ In the Danish conditions only regulation issued by public authorities has got the status of a safety regulation according to the contract.²³⁸ According to the Swedish hull clauses, regulation issued by the classification society or the supervising authorities is given status as safety regulation, whereas in the cargo clauses the insurer shall issue the safety regulation.²³⁹ The Finnish conditions contain only special safety provisions, resulting in no general inclusion of public or other regulation as a relevant safety regulation in the contract.²⁴⁰

In order for the insurer to be free from liability concerning breach of a safety provision two conditions must be fulfilled: Firstly, the assured must be responsible for the breach, and secondly, the loss must be caused by the breach.²⁴¹

7.4.3. Safety regulation as a warranty

In MIA based systems, there is an implied warranty that the adventure is lawful, and that, so far as the insured can control the matter, the adventure shall be carried out in a lawful manner. This warranty probably encompasses breach of safety regulations issued by public authorities.²⁴² Recommendations etc.

²³⁷ NP § 3-24, Norwegian CC § 20.

²³⁸ Danish HC 4.7 ref. DC § 49, stating that a safety regulation must be expressly stated in the insurance contract.

²³⁹ Swedish HC § 11 mom 1, Swedish CC 13. In addition, the SHC § 11 mom 2 onwards defines some specified safety provisions. The Danish and Swedish regulation is supposed to conform with the mandatory provision in the Nordic 1930 ICA § 51 that a safety regulation must be expressly stated in the contract.

²⁴⁰ Finnish HC § 12. Strictly speaking, this is the correct approach according to the ICA 1930 § 51, which still is mandatory for Denmark and Sweden.

²⁴¹ NP § 3-25, Danish HC 4.7 ref. DC § 49, Swedish HC § 11 mom 6 ref. SP § 52. This regulation corresponds to the 1930 ICA § 51.

²⁴² UK MIA sec. 41, Au MIA sec. 47 and *Mowie Fisheries v Switzerland Insurance* (1997) 144 ALR 234, NZ MIA sec. 42 and *Harbour Inn Seafoods v Switzerland General Insurance*, Australian Law Reform Commission DP 63 p. 127.

issued by the Classification society are as mentioned above under item 7.2 included in the Classification requirements in ITCH 4.1.

To the extent the warranty of legality includes breach of public safety regulations, the insurer will be discharged from liability from the date of the breach of such regulation regardless of the assured's knowledge of the breach and regardless of causation between the breach and the loss.

In Australia, it is also assumed that the warranty concerning seaworthiness probably encompasses breach of safety regulations.²⁴³ The condition here must, however, be that the breach of the regulation results in the ship being unseaworthy, see further below under item 7.4.4.

7.4.4. Breach of safety regulation included in other regulation

There is a close connection between breach of safety regulations and the question of seaworthiness in that a breach of a safety regulation may lead to the ship not being seaworthy. In systems operating with both kinds of regulations, the result will therefore be that the insurer may invoke both provisions.

In systems that contain no specific provision for breach of a safety regulation, a breach of such regulation will not in itself invoke a sanction from the insurer. If however, there is an exclusion for unseaworthiness, this exclusion may be invoked if a breach of a public safety regulation (national or international) leads to the ship not being in a seaworthy condition. This is expressly stated in the German hull conditions, see above under item 7.3, and also follows from the Australian material, above item 7.4.4. On the other hand, if a breach of a safety regulation does not have this result, it must be dealt with by other provisions, i.e. alteration of risk or misconduct.

Belgium, France, Italy, Croatia and Indonesia seem to have no regulation for either seaworthiness or safety regulation. The only way to handle a breach of public safety regulation will then be through the general provisions.

Another general approach to solve this problem is through exclusions for lack of maintenance if that is the result of a breach of a safety regulation. This problem will not be discussed further here.

7.4.5. Requirements connected to the ISM Code and the SOLAS Convention

The ISM Code and the SOLAS Convention are two international safety regulations of particular interest and importance for marine insurance. Provisions concerning breach of safety regulations will include breach of these provisions to the extent that the concept includes international safety regulations. This is the case in Norway, Denmark and presumably in Sweden, but not in Finland.

A breach of the ISM Code, however, leads to special problems in this context. During the amendment of the Norwegian Plan it was discussed to what extent non-compliance with the ISM Code would discharge the insurer from liability. The Committee concluded that this rarely would be the case due to the

²⁴³ Mowie Fisheries v Switzerland Insurance (1997) 144 ALR 234.

causation requirement in the penalty system. The ISM Code provides a more general internal control arrangement and quality assurance system for ship owners, under which breach of the formal requirements for creation and maintenance of the system will less frequently be the cause of the casualty in question. Thus, a breach of the ISM Code must normally lead to some kind of defect that may be the direct cause of a casualty for the insurer to be able to invoke a breach of safety regulations against the assured. In such a case, the defect will often also result in the ship not being seaworthy.

In some cases, the other systems contain special regulation concerning these conventions even if they do not include the concept of safety regulations in their conditions. In Italy, sometimes the “classification clause” in the ITCH is extended to encompass the adoption of safety certificates. In that case the rules for warranties apply. The Japanese material states that non-compliance with the ISM code is normally provided for in the hull policy, but does not describe the method.

The ITCH on the other hand, contains as far as I can see no regulation concerning the ISM Code or the SOLAS Convention. However, as the ISM Code has been made mandatory by the SOLAS Convention, the UK MIA standard of seaworthiness with which the vessel must comply is now to be tested against the requirements of the Code. Thus, there is a strong possibility that a failure to comply with the requirements of the ISM Code will be evidence of unseaworthiness with potential consequences under Section 39 of the UK MIA. This connection between a breach of the ISM Code and the question of seaworthiness will probably be the same for all MIA based legislation.

In addition, this question is regulated in some of the cargo clauses. According to the new German Cargo Clauses, there is a requirement that the means of international transport shall be certified according to the ISM Code or as required by the SOLAS Convention. The condition to invoke breach of this requirement is that the assured has not acted as “prudent businessman in choosing the carrier or forwarding agent”.²⁴⁴ A similar solution is described for the French Cargo Clauses, stating that loading on a non ISM compliant vessel renders the policy not applicable. Nevertheless, the innocent holder of the policy remains covered.²⁴⁵ The last reported example is a Cargo ISM Endorsement developed by the London market which places the onus on the cargo owner to ensure the cargo is carried with a vessel that is ISM certified or whose owners or operators hold an ISM Code Document of Compliance.²⁴⁶

If there is no safety regulation, warranty or condition concerning the ISM code or the SOLAS Convention, a breach of these rules will have to be dealt with by general provisions in the contract. The most practical approach seems to be to use the exclusions for gross negligence.

²⁴⁴ DTV Cargo Conditions 7.1 and 7.2.

²⁴⁵ Reference to art. 3-2 of the French CC which states that the insurance does not apply to the consequences of trade barriers or hindrance to the commercial transactions of the assured. Art 3-3 excluding the illegal trading of cargo seems better.

²⁴⁶ Cargo ISM Endorsement (JC 98/019, 1 May 1998), described in Australian Law Reform Commission DP 63 p. 82.

7.5. *Summary*

The main impression from this discussion is that the insurer looks upon safety at sea as a very important issue. Also, there is a common approach to two main questions, namely certain classification issues and the question of seaworthiness. One disorder concerning these two issues is that the classification requirements in some systems include not only the class of the vessel, but also certain obligations given by the Classification society. Another item where there is a distinction in approach is the US implied warranty of seaworthiness at the inception of a time policy. As this is discussed and also criticized in the US market, it may not pose a serious problem for harmonization. Apart from that, the question of seaworthiness seems to follow the same pattern for all the systems. For safety regulation, on the other hand, the regulation is much less common.

A main provision in the material is a very absolute and strict exclusion for change of classification society and loss of class. Here the warranty approach is used both in the common law and the civil law countries, and there seems to be no example of held covered clauses. Only France and Germany depart from this. For France, the mandatory provisions concerning alteration of risk, which incidentally Denmark and Sweden ignore in their provisions, may explain this more protective approach. In Germany, the reason may be that hull insurance is of less importance in the German market.

The fact that so many countries have the same approach to the classification requirements implies that it will be difficult to get acceptance for a more lenient solution. On the other hand, the arguments against the general warranty approach may be applied similarly against this regulation. If it can be proven that the insurer would have accepted the change of classification society if he had been asked, it seems very unreasonable that such a change should result in termination of the policy. It may therefore be argued that at least a materiality condition should be included for this issue. For loss of class it is easier to defend the strict solution as one may presume that loss of class will normally be material for the insurer.

As for compliance with recommendations, requirements or restrictions from the Classification society, the warranty approach seems even more unreasonable. It may here be referred to the discussion in the Norwegian market, where compliance with periodic surveys was lifted from the Classification Clause to the Safety Regulation Clause, and where safety regulation issued by the classification society traditionally has been defined as a safety regulation according to this clause. This solution will include conditions of fault and causation for the insurer to be able to sanction against breach of the Class requirements, which seems to be a more fair approach. The Norwegian solution also implies that the stricter approach is not necessary to deal with this problem successfully.

It may also be pointed out that the regulation in ITCH 4.1 seems to overlap the UK MIA regulation of seaworthiness on this point, as only recommendations, requirements or restrictions which relate to the Vessel's seaworthiness or to her maintenance in a seaworthy condition are included in the provision. The main

focus of the regulation thus seems to be to secure the seaworthiness of the ship, and not the recommendations as such. The result of the combined regulation is that if the ship is unseaworthy for other reasons than non-compliance with the recommendations etc. from the classification society the insurer will only be able to react if this is due to the assured and the loss is caused by the unseaworthiness. If on the other hand the assured is guilty of non-compliance with these recommendations etc. and there is thus a risk for the ship being unseaworthy, the insurance will be terminated automatically. It is difficult to see why a mere risk for unseaworthiness should be treated much harsher than unseaworthiness itself.

In principle, this argument may also be used against the regulation for change of classification society and loss of class, as the main problem seems to be the risk for less strict classification control and reduced quality of the safety of the ship following the change. An exclusion for loss caused by unseaworthiness should therefore be sufficient to deal with these problems. Since the market has decided that this is not so, the reason may be that the concept of unseaworthiness is difficult to define and also that it may be difficult for the insurer to prove that the ship in fact was unseaworthy and that this defect caused the loss. An automatic termination approach obviously provides the insurer with a more efficient tool to control the risk for unseaworthiness. Whether this risk is so great as to justify the crude approach may be debated.

The concept of safety regulation is of less common usage. As a concept, this is mainly a Nordic approach. The equivalent solution in the common law systems is found in the implied warranty of legality. However, this will be limited to public regulation, and may also be criticized for the same weaknesses as the general warranty approach. The advantage of the safety regulation approach is that it gives a consistent tool to deal with all safety regulation, including the international conventions and the recommendations from the classification societies. Compared to the warranty approach for these recommendations the safety regulation will therefore give both a more systematic and a more reasonable regulation. Compared to the regulation of seaworthiness, the advantage of safety regulations is that it is much easier to document a breach of a safety regulation than to prove that the ship was unseaworthy. Safety regulations therefore encompass some of the advantages of the warranty approach without including the harshness of the sanction.

It may therefore be argued that the combination of exclusions for unseaworthiness as defined in all systems except the US and a concept of safety regulation will render the warranty approach for the classification issues unnecessary, at least as far as recommendations and periodic surveys are concerned. This solution will probably also be more acceptable in the French legislation, where the mandatory provisions for alteration of risk seem to be an obstacle for the warranty approach.

8. Warranties continued - change of flag, owner, management etc.

8.1. The problem

The last decades have experienced an increasing internationalization of the shipping industry, and also of marine insurance. This has resulted in ship owners

choosing to sail under a foreign flag and to use crew from other nations where wages are lower than in their own country. Also, there has been a trend towards internationalization of ship management, and a diversification of management functions. Among the problems in the marine insurance market following this evolution is the relationship between the insurer and the ship owner, and the risk concerning unknown and maybe foreign owners, less strict flag state requirements and less qualified crew and management. These problems are dealt with in provisions concerning change of flag, ownership, management etc..

The problems dealt with under this item can be compared to the problems dealt with under item 7 in that a main concern is the quality of the ship and the standard of maintenance procedures and procedures to secure the safety of the ship. However, rules concerning change of flag, owner and management are less direct tools to obtain this goal as they concern the legal framework for and organization of the management of the ship. This may explain the fact that questions concerning flag, ownership and management of the ship are not regulated in the cargo clauses, but are solely a hull problem.

A characteristic feature for the issues of change of flag, ownership and management is also that these problems are normally not dealt with by the legislation. The questions will therefore normally have to be solved in the policy. As a lot of countries are following the ITCH, the solution in these clauses will be dominant in the material.

8.2. *The regulation*

For **change of flag**, the strictest solution, which is automatic termination of the policy, will be found in ITCH, American HC and in the Danish HC.²⁴⁷ This solution is thus also adopted in systems using the ITCH as standard clauses, viz. Portugal, Slovenia, Croatia, Greece, Israel, Venezuela, Australia, Indonesia, South Africa and Hong Kong. Spain, which combines the ITCH with its own standard-clauses, and Canada, seem to follow the ITCH warranty approach on this point.

However, Italy seems to depart from the ITCH solution concerning this issue, and argues that change of flag may be considered an alteration of risk, despite the fact that they use the ITCH as standard conditions combined with their own clauses. Also New Zealand follows another solution, with no exclusion for change of flag.

Under the French system the assured has a duty to disclose the flag when the contract is entered into, and to disclose any change of the flag during the insurance period. If the latter duty is not complied with, the reaction is similar to the reaction for alteration or loss of class; viz. cancellation of the policy with three days notice or proportionate reduction of indemnity.²⁴⁸

²⁴⁷ ITCH 5.2, American Institute HC 1977, Change of ownership Clause, Danish HC 2.3 no 2. The regulation in Danish HC is similar to the class requirement, ref. above under 7.2. It may be argued that this regulation is contrary to the mandatory provisions in the Danish ICA, but the clauses may be defended if they are defined as a relevant increase of risk.

²⁴⁸ French HC art. 8.1 and 8.3 and art. 14.

The conditions in Norway, Sweden, Finland, Slovenia, New Zealand and Japan contain no regulation for change of flag. However, in Japan, change of flag will always result in change of ownership, and therefore be provided for under this regulation, see below. Similar provisions may be found in other countries, but these are not discussed in the material.

Change of ownership will in Denmark, Germany, Norway, Sweden, Finland, Italy, France and Japan, and according to ITCH and American HC lead to automatic termination of the insurance.²⁴⁹ In ITCH, the American, Danish, French and Japanese Clauses the same rule is applied to bare-boat charter.²⁵⁰ As mentioned above, this regulation will also apply to systems using the ITCH as standard conditions. On the other hand, The New Zealand conditions contain no similar regulation, but assignment of the policy is regulated in the law.²⁵¹ Slovenia reports that they do not operate with exclusions for change of ownership.

In UK and US based systems, and also according to the Danish conditions, the regulation applied to change of ownership normally is also applied to **change of management**.²⁵² Again, Italy seems to depart from the ITCH solution on this point, and argues that changes in management may be considered an alteration of risk. This corresponds to the normal civil law approach to this question. The German and Swedish system here is that transfer of management of the ship shall be disclosed to the insurer. The German solution is that the assured has a duty to notify the insurer if “the manning, fitting-out and inspection of the vessel is transferred to new management”. Underwriters will in this situation have a right to cancel the insurance with a 14 days notice. In the case of non-disclosure, the insurer is discharged from liability unless the non-disclosure was not intentional.²⁵³ The Swedish conditions follow the ordinary duty of disclosure, with a diversified reaction according to the degree of fault on the part of the assured, and also a right to terminate the contract.²⁵⁴

According to the Norwegian Plan change of the manager of the ship or the company which is responsible for the technical/maritime operation of the ship is deemed to be an alteration of the risk as defined in the Plan.²⁵⁵ The penalty system here is as described above under item 5.2.4.

The other systems contain no specific regulation concerning these issues, and must therefore fall back to the general provisions.

²⁴⁹ Danish HC 2.3 no 4, DTV Hull Clauses 13, NP 3-21, Swedish HC § 4, Finnish HC § 38, Italian HC art. 12, French HC art. 17 eighth and ninth paragraph, Japanese HC art. 14-1-6, American Institute HC Change of Ownership Clause, and ITCH 5.2. It may be argued that the Danish regulation is contrary to the mandatory provisions in the Danish ICA, but the clauses may be defended if they are defined as a relevant increase of risk.

²⁵⁰ ITCH 5.2, American Institute HC Change of Ownership Clause, Danish HC 2.3 no 3, French HC art. 17 eighth and ninth paragraph, Japanese HC art. 14-1-6.

²⁵¹ NZ MIA sec. 51 and 52.

²⁵² ITCH 5.2, American Institute HC, Change of Ownership Clause, Danish HC 2.3 no 3.

²⁵³ DTV Hull Clauses 12.1, 12.2 and 12.5.

²⁵⁴ Swedish HC § 10 second part.

²⁵⁵ NP § 3-8 second part.

8.3. *Summary*

The insurer's attitude towards change of flag, ownership and management is less homogenous than the attitude towards the safety issues discussed above under item 7.

The most common attitude on these issues seems to be automatic termination when there is a change of ownership. On this issue, the civil law regulation follows the warranty principle in the common law approach, and there is no example of more flexible exclusions. As it will often be difficult to show that change of ownership is the cause of the loss, it may be necessary to operate with absolute exclusions on this point. Also, it may be argued that change of ownership is of such a great importance both for the contractual relationship between the insured and the assured and for the management of the ship that termination is a necessary approach to protect the insurer from having to deal with owners where they have had no prior contact.

On the other hand, not all countries are applying the same harsh regulation for charter on bare-boat basis. The attitude in the Norwegian market when the Plan was amended was that the main issue to be regulated was the ownership, and that bare-boat charter should only invoke a sanction if the conditions to apply alteration of risk was satisfied. A main point here is that the insurer may not react against such change unless the change was material for the insurer.

Change of flag leads to automatic termination in systems using the ITCH or American HC, but many civil law systems lack any kind of exclusion for this change. This may imply that automatic termination is too harsh for change of flag. The question to be discussed here is whether the main question is who owns the ship, and that the regulation of change of flag is unnecessary.

The last issue was transfer to new management. Again you have the same distinction between the common law approach of automatic termination and the civil law approach of alteration of risk or similar solutions. Reference may therefore be made to earlier comparisons of the two approaches.

9. *Summary and main conclusions*

The main impressions from the discussions in this paper are as follows:

The most common concept in this paper is duty of disclosure, which is applied in both common law and civil law systems. In addition, the common law system and some civil law systems operate with a concept of good faith, but this is a generally more accepted concept in the common law countries. Even so, conceptually, it may be stated that there is a fairly common approach in the civil law and the common law countries with regard to circumstances concerning the evaluation of the risk before the contract is entered into. The differences on this point thus concern the material solutions more than the conceptual approach.

However, when it comes to circumstances happening when the insurance is running, the common law and the civil law systems have chosen different starting points. The civil law countries as a main rule apply the concept of alteration of risk, corresponding closely to the regulation concerning duty of disclosure. On the other hand, the common law systems and some systems having adopted the English insurance conditions apply the concept of

warranties. The systems meet, however, in special regulation in the civil law systems concerning certain issues (seaworthiness, classification issues, and change of flag, nationality and management).

Also, the main issues in the different regulations seem to be fairly common. The main issues concerning the duty of disclosure are the scope of the duty, the time the duty is applied, the relevance of the knowledge of the person effecting the insurance, and a sanctioning system varied according to the degree of fault of the person effecting the insurance. There is however, less variation in the sanctioning system in the common law systems than in the civil law systems. Also, the detailed regulation of these issues varies a great deal, and the total picture of the regulation is fairly complicated.

The main issue concerning the principle of good faith is that it embraces the duty of disclosure, but reaches further both concerning the scope of the duty of disclosure and concerning the time. The extensions of the scope concern the question of materiality and the knowledge of the assured. The extension of the time aspect concerns the fact that duty of good faith in UK (but not in US) is also applied against the assured while the insurance is running. However, it seems also to be a common feature with the principle that there is a great uncertainty as to how far it reaches. Thus, contrary to the regulation concerning duty of disclosure, the complication is not to get an overall view of the regulation, but to grasp the real content of the provisions.

The main issues concerning alteration of risk are the concept of the alteration of risk, the duty to notify the insurer and a sanctioning system connected to a combination of breach of a duty not to alter the risk and a duty to notify about such alteration of risk. However, as with duty of disclosure, the detailed regulation of these issues varies a great deal, and the total picture of the regulation is fairly complicated.

As for warranties, the main issues are the concept of warranties, the condition of absolute compliance, and the sanction of no liability/voidability regardless of materiality, fault and causation. Also, a common feature here is legislation trying to soften the principle, and held covered clauses to protect the assured. Another common feature is the difficulty to grasp the real nature of the principle. Thus, even if the provision is fairly simple in its wording, and only one regulation is applied contrary to the masses of regulations concerning alteration of risk, the principle is not an easy one to understand.

The total impression thus is that the civil law regulations create a very confusing picture, but that the regulation in most systems can be explained by legal fairness and economic efficiency. The common law systems are on the other hand deceptively simple in its common regulation, but hard to understand and even harder to explain.

As already stated above, the civil law systems also illustrate that the market may function without the principles of good faith and warranties. As a starting point it is difficult to see that the insurer needs any further protection than that which follows from the duty of disclosure. The principle of good faith may create a safety net for the insurer, but at the same time introduces a great deal of uncertainty for the assured. This seems contrary to what insurance is all about, namely to acquire certainty and to do away with risk.

Much of the same may be said about the concept of warranties, which compared to alteration of risk seems unnecessary harsh. However, even if a system does not use the concept of warranties, many conditions contain provisions that are very similar to warranties. The fact that these provisions regulate different problems may however indicate that few problems are of such a character that there is total agreement of the necessity of the warranty approach.

As for the question of harmonization, the main obstacles will be the mandatory regulations. One main obstacle is that the legislation in Denmark, Sweden, Slovenia, France, Italy, Australia, South Africa and may be also UK and US contain mandatory provisions for some or all of the issues discussed in this paper. As the Swedish and Danish ICA are under amendment, the mandatory provisions in these countries may disappear. The mandatory provisions in France, Italy, Slovenia and the common law countries will on the other hand prevail. The Italian mandatory regulation, however, concerns only alteration of risk, and may be departed from in favor of the assured. Only stricter solutions concerning alteration of risk will thus cause a problem under this legislation. The French mandatory provisions include also duty of disclosure, and the Slovenian legislation concerns only duty of disclosure. It is not clear to what extent more favorable solutions for the person effecting the insurance or the assured may be accepted in these systems. Neither is it clear to what extent the mandatory common law rules or principles may be departed from in favor of the assured. As the common law regulations of good faith and warranties are much stricter than the mandatory regulation in any civil law system, this seems to be the most problematic regulation to be dealt with in an attempt of harmonization.

Harmonization will thus require either that stricter systems accept that the milder solutions in France and Italy will define the limit for how strict these provisions may be, or that this legislation is made directory for marine insurance. The fact that the French and Italian markets seem to function under the prevailing mandatory regulation implies that stricter rules are not necessary to protect the interests of the insurers and the community of persons effecting insurance.

The discussion further shows that even if the civil law share the same main concepts and a main attitude concerning which problems should be given special regulation in a marine insurance contract, the details of the regulation are very different. Also, there are as mentioned some basic differences between the civil law countries and the common law countries. Harmonization will thus require that the different markets are willing to give away national and maybe traditional solutions and adapt a broader, more systematic and international attitude to the different questions. This holds both for the selection of the main concepts and for the more detailed regulation. Inherent in this is a shift in the perspective that in marine insurance the conditions themselves are the commodity and thus a factor of competition.

On the other hand, within the civil law systems the differences seem to apply more to the detailed elements of the regulation than to the main principles and reasoning. If there is agreement about main principles and the aim of the

regulation, agreement of the details should not be an impossible task. It is more uncertain whether it is possible to unite the basic differences between the civil law systems and the common law system in one set of clauses.

Also, even if there are some principles that may be agreed upon, the underlying concepts may well vary in the different countries. Concepts like fraud, intent, negligence and good faith may have a common core, but the borderline between the concepts may be defined differently. Another common concept that seems to vary is the concept of material information used in the regulation of duty of disclosure and duty of good faith. One point to be made here is that international harmonization cannot solve national discussion of the content of such concepts. Pointing out main international solutions based on the same starting point will thus not solve the court case battles in UK on the definition of materiality.