The Reform of Insurance Contract law: a Sisyphean task?

The Marine Insurance Act, 1906 is an astonishing piece of Victorian intellectual capital, the overwhelming bulk of the work being undertaken towards the end of Victoria’s reign. It took 12 years to find its way into the statute book, however, and is, in that sense, strictly Edwardian. The Act has arguably made one of the most significant legislative contributions to the prosperity of the City of London (and thus Great Britain itself), just as other types of Victorian capital continue to sustain the British economy, much of London’s railway infrastructure being a prime example.

The Act is built on a compendium of case notes out of which a series of core principles were abstracted, then crafted into the form of a codifying statute. The Act has pride of place among the Victorian legislation designed to bring order to English commercial law, the backbone of international and domestic trade, including the Bills of Exchange Act, 1882 and the Sale of Goods Act, 1893, following the rationalisation of the courts system by the great Judicature Acts commencing in 1873/5, with the fusion of Courts of Common Law and Equity, complemented by the foundation of the Commercial Court in 1895.

The rationalisation of courts and of commercial law is just one example of the Victorians’ irrepressible enthusiasm for rule making which included even sport (sportsmen and traders both require some structure and certainty in their dealings); and, if imitation is the sincerest form of flattery, then it is plain that immediately on its emergence, the Marine Insurance Act was much admired, at least among the Common Law nations although not all of these chose to replicate it. The USA does not have a Marine Insurance Act (though there were proposals a couple of years ago for a Marine Insurance Act in Hawaii), but a parallel if not identical set of principles appear to be applicable in the USA (so far as the writer understands it), albeit with material differences.

The Marine Insurance Act is durable and enduring, remarkably so - it has remained in place, substantially unamended in over 100 years. It is a classic example of accuracy, brevity, clarity with just 94 sections, each beautifully expressed, and has provided the framework, the foundation for the success of London’s hugely successful insurance market over these 100 years, whilst Britain’s role in the maritime world has otherwise undergone enormous change. English marine insurance, in tandem with the English legal system which regulates, applies and enforces it, has survived and prospered whilst much of the edifice on which it was built has been progressively dismembered: ship building, ownership and management have declined dramatically; weeds grow in the shipyards on the Tyne and the Clyde, and Scottish voices have fallen silent in the engine room. There has been a huge migration of ownership and management of vessels east, although not necessarily in all classes of tonnage. We are living in a paradigm shift.

While the Act has remained, frozen in time, the canon of maritime law, some of it intimately linked to insurance, has morphed over the last 100 years almost out of recognition, largely by virtue of a stream of international conventions, devised by CMI and latterly by UNCITRAL, much of it variously imported into English law by enabling legislation. Terms and conditions for the carriage of goods are an obvious example; consider the Hague Rules 1924, Hague Visby Rules 1968 and 1979, Hamburg Rules 1978, even the Rotterdam Rules. Likewise with General Average: the canon of York
Antwerp Rules 1890 - 2004, and their further amendment (given the relative failure of the 2004 rules) on the horizon. The same is true for principles and rules relating to limitation of liability, liability for pollution, liability for passengers, and maritime liens (and the ever upward trajectory of limitation figures and funds).

In the same period English marine insurance has substantially evolved, so far as business insurance is concerned, but purely as a creature of contract with the obligations of assured and underwriters being variously adapted in particular through periodic amendments to London Standard Wordings. But innovation rarely emerges in a vacuum. The fate of the York Antwerp Rules 2004 and likewise the International Hull Clauses of 2003 and looking a little further back the International Time Clauses Hulls of 1995 demonstrate that there cannot be significant policy change in insurance contract law, or the rules inextricably related to it, as a matter of contract or agreement. One simply cannot buck the market.

The 1995 clauses (drafted immediately after a catalogue of losses in the early part of the 1990s) were never widely adopted since they sought to impose rather tougher terms, tipping the balance (if not the scales of justice) in favour of underwriters. They may be widely used today, but they are substantially ‘written down’ towards the terms of the rather more successful 1983 clauses. Equally, the International Hull Clauses 2003, though they may have much in them to be commended and are the product of a scrupulously thorough process of consultation and drafting, have made slow progress towards market acceptance. If parties do not want to enter into tougher bargains, as may be represented by these two sets of clauses, for example, then they simply will not do so. And finally, as to the York Antwerp Rules 2004 (one of the most significant amendments in which is the treatment of salvage in relation to General Average); whilst rules of that character might be more attractive to an underwriting market, the reality is that bills of lading (into which such rules are incorporated) are almost always generated either by owners or operators of vessels. If there is in existence a tough set of terms which is perceived in any way to be of disadvantage to owners and operators, if they have the choice, they will simply stick to that which is tried and tested; that is, an earlier document where the scales are tipped and the interests balanced in a slightly different, slightly more familiar, slightly more acceptable way.

It seems abundantly clear that marine insurance is not, and hardly has been, on the path to uniformity. A review of marine insurance within CMI, for example, generated no final product. It is indeed not merely the form of the law (statute) which distinguishes English insurance contract law from that which prevails in other western European, civil law nations (codes). There are obvious substantive differences: for example, the draconian remedy of an instant discharge of underwriters from liability on breach of warranty, even if non-causative, is unknown in the civil law nations (and current indications are that the Joint Commission is unlikely finally to precipitate the death of the non-causative warranty). Further, English law does not recognise adjustable bargains in insurance contract law, whereby the terms and conditions of a contract agreed between assured and insurers should be amended by the Court in certain circumstances; for example where the contract of insurance has been procured by (innocent) non-disclosure. The English remedy remains a hard bright line: either the policy is voidable for material non-disclosure (or misrepresentation) or it is not. The Court cannot retrospectively adjust the original bargain.
There have of course been calls to amend the Act in the past (see for example the Law Commission’s Report of 1980, which came to nought). But are we now finally on the cusp of significant change to the Act, and if so what?

In 2005 the task of reviewing insurance contract law and proposing potential amendment to the Act was allocated to the Joint Commission of the English and the Scottish Law Commissions which set out a joint Scoping Paper in January 2006 and thereafter has issued an enormous volume of materials. Broadly, these can be divided into materials which bear upon pre-contract duties and those which touch upon post-contract duties and other issues. As to the former, there have thus far been three Issues Papers addressing respectively misrepresentation and non-disclosure, warranties, intermediaries and pre-contract information. These papers have been followed by a Consultation Paper issued in July 2007 on misrepresentation, non-disclosure and breach of warranty by the insured. This latter Paper has thus far generated some “solid product” at least in relation to consumer insurance: the Consumer Insurance (Disclosure and Representations) Act 2012 received the Royal Assent on 8 March 2012 and is likely to come into force sometime in early 2013.

But what of business insurance? An Issues Paper on micro businesses was issued in April 2009 with a Consultation Paper on business insurance - pre-contract disclosure, misrepresentation and warranties - following in June 2012.

As to post-contract duties and other matters, there have been a series of Papers addressing insurable interest, one arcane topic (Fires Prevention (Metropolis) Act 1774), damages for late payment (a topic of considerable interest to some), the insured’s post-contract duty of good faith, the broker’s liability for premium, and finally the requirement for a hard copy marine policy (in a world where business is shifting evermore towards electronic products). A resulting Consultation Paper was issued in December 2011 on post-contract duties and these other issues.

It is envisaged that subsequent to this Consultation Paper (and the Consultation Paper in relation to business insurance law: pre-contract disclosure, misrepresentation and warranties) a Final Report will be generated; and then finally a Draft Bill will in due course be laid before Parliament in hopes of attaining the Royal assent at some time thereafter.

This, then, forms something of a back drop against which one might view specific proposed amendments to the reform of insurance contract law when they finally come forward. The Commission has obviously amassed a vast body of work, an invaluable repository of summary of the law and of the views on the many and various interests in the market derived through an exhaustive consultation process. Some might say there has been ‘mission creep’, but the Joint Commissions will, and must persist.

One might touch lightly here on one or two items from the catalogue of amendments that might be made: for example it might be right to curtail the rights of insurers in respect of non-disclosure and misrepresentation in business insurance (and not merely the law that affects consumers); it might be right to finally impale the bète noir of marine insurance, the non-causative breach of warranty; it might be right to afford more extensive rights and remedies for lack of good faith in the presentation of
claims (short of fraud); it might equally be right to create some new statutory right to damages or other compensation payable in addition to policy indemnity (whether there has been a refusal or a delay in paying a valid claim); superficially at least there is an obvious attraction in ending the requirement for the issuance of a hard copy policy and the substitution of a legal right to an electronic document; and why, one might ask, should London brokers continue to be responsible for the payment of premium at a time when funds can be remitted almost instantaneously from abroad at the touch of a key? And why, in the twenty-first century, should English law retain the requirement of an insurable interest to distinguish insurance contract law from gambling? And yet when one looks into the detail, difficulties emerge.

What does seem unlikely is that the whole reform juggernaut will do much to deal with some of the anomalies that can arise from the use of warranties in English insurance contracts. And one might have some sympathy for assureds who continue to regard warranties with some measure of bafflement and annoyance. The remedy for breach of warranty is obviously perceived as harsh (especially if non-causative): the mere use of the term does nothing to provide the parties with any guide to meaning or a guarantee of certainty. The whole Contract Certainty initiative might have promised, as it name would suggest, certainty of content (at least in the sense of gathering together the policy documentation within a few days from placement, so that all the standard forms, clauses, endorsements, etc. are at least stapled together) but that was only ever going to be half of the debate and was never going to achieve certainty of meaning. To take warranties alone, one might chose to describe a particular policy provision as a warranty, but that does not mean that the Courts would necessarily treat that provision as such. Conversely clauses might be drafted which do not include the term ‘warranty’ and the Court would nonetheless hold that such a clause should be a warranty with the consequences that implies.

And so, although in the very concept of ‘contract certainty’ we hear echoes of the positivism of our Victorian forebears who began this whole (now increasingly tortured) process, whatever the legislative outcome, it remains more than likely that the Courts will continue to exercise what is perceived by some to be the utmost ingenuity to ensure that, irrespective of the terms used, the final result of the circumstances of the case should be perceived as broadly “just”. Then, despite the best efforts of the Joint Commission, one must finally wonder what certainty there can be in that.

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