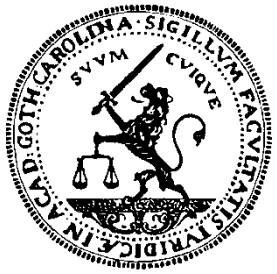

FACULTY OF LAW
Lund University

Erik Ryrberg

A Critical Evaluation of the Duty of Disclosure in Marine Insurance

-A comparative study of English and Nordic law

JURM02 Graduate Thesis

Graduate Thesis, Master of Laws programme
30 higher education credits

Supervisor: Abhinayan Basu Bal

Semester: Fall 2012

Contents

SUMMARY 1

SAMMANFATTNING 2

PREFACE 3

LIST OF ABBREVIATIONS 4

1 INTRODUCTION 5

1.1 Background 5

1.2 Purpose 7

1.3 Delimitation 7

1.4 Method and material 8

1.5 Structure 10

1.6 Definition of terms 10

2 EVOLUTION OF THE LAW OF MARINE INSURANCE IN THE UK AND NORWAY 12

2.1 The Marine Insurance Act of 1906 13

2.1.1 Historical background ***13***

2.1.2 Summary of the MIA, 1906 ***16***

2.1.3 Specific Provisions concerning the Duty of Disclosure ***16***

2.2 The Norwegian Marine Insurance Plan 18

2.2.1 Historical Background ***18***

2.2.2 Summary of the NMIP ***19***

2.2.3 Specific Provisions concerning the Duty of Disclosure ***21***

3 A COMPARATIVE STUDY OF THE DUTY OF DISCLOSURE UNDER UK AND NORDIC MARINE INSURANCE LAW 24

3.1 Carectaristics of an Insurance Contract and the Principle of Equivalence 24

3.2 Scope of the Duty of Disclosure 25

3.2.1 MIA, 1906 ***25***

3.2.1.1 Knowledge 27

3.2.1.2 Materiality 28

3.2.1.2.1 The Objective Test *30*

3.2.1.2.2 The Subjective Test – Inducement *31*

3.2.1.3 Conclusion 32

3.2.1.4 Duration 32
3.2.2 NMIP ***33***
3.2.2.1 Materiality 34
3.2.2.2 Knowledge 35
3.2.2.3 Duration 35
3.3 Non-disclosure **36**
3.4 Misrepresentation **37**
3.5 Innocent Breach **39**
3.6 Exclusions **40**
3.6.1 Exclusions of the MIA, 1906 ***40***
3.6.2 Exclusions of the NMIP ***41***
3.7 Remedies **43**
3.7.1 MIA, 1906 - Avoidance ***43***
3.7.2 NMIP – According to Culpa ***44***
3.8 Changes of the Risk during the contract period **46**
3.8.1 MIA, 1906 - Warranties ***46***
3.8.2 NMIP - Alteration of risk ***47***

4 COMPARATIVE ANALYSIS AND RECENT DEVELOPMENTS49
4.1 Litigation **49**
4.2 Warranties and alteration of risks **52**
4.3 Recent Development **54**
4.4 Law reviews in common law systems **54**
4.4.1 UK ***54***
4.4.2 Australia ***55***
4.4.3 Recent case law ***57***
4.5 The Norwegian system – Nordic integration **58**

5 CONCLUSION **60**

SUPPLEMENT A **68**

SUPPLEMENT B **70**

BIBLIOGRAPHY **73**

TABLE OF CASES **75**

Summary

The duty of disclosure is a system of rules applied during the period up until an insurance policy is concluded. In order to ascertain that the insurer gets all the information he needs to properly evaluate the risk, the prospective assured is under a duty to disclose all material circumstances regarding the risk. This duty has caused a great number of lawsuits in the UK, while there have hardly been any litigation on the matter in the Nordic countries. This thesis will highlight the main differences in the duty of disclosure in marine insurance, between the Nordic and the UK legal systems. As the Norwegian Marine Insurance Plan has transformed into a Nordic Marine Insurance Plan, many of the Marine Insurance Acts in common law countries are going under its first revisions in a hundred years and there will be a discussion on the likely development within the coming few years.

Initially, the thesis will provide an overview of the UK Marine Insurance Act, 1906 and the Nordic Marine Insurance Plan of 2013. The reader will be given a brief summary of the two sets of rules and how they have developed. Following the introductory chapters, there will be a more detailed description of how the duty of disclosure is regulated, and what the main differences are between the UK and the Nordic approach. As will be demonstrated, the UK system is more insurer friendly than its Nordic counterpart. Furthermore, the remedy system under the UK Act is more rigid and may come out harsh on an assured who has failed to fulfil his duties. These, among others, are the differences that will be discussed for the purpose of the comparative analysis. The final part of the thesis will provide some examples of what the UK Law Commission has pointed out as areas in need of modification. Among the conclusions can be mentioned the lack of balance in the Marine Insurance Act, 1906, that are giving the insurers an incentive to claim breach of pre-contractual duties. This might be one of the main reasons to the high number of litigation mentioned above.

Sammanfattning

Upplysningsplikten ålägger den som vill teckna försäkring att förse försäkringsbolaget med relevant information rörande risken. Anledningen till att en sådan skyldighet finns är att den typen av information i många fall finns hos den som vill teckna försäkring. Upplysningsplikten har varit orsaken till en stor mängd domstolsprövningar i Storbritannien medan den i de nordiska länderna knappt har varit uppe till prövning. Syftet med den här uppsatsen är att belysa de viktigaste skillnaderna mellan Storbritanniens och Nordens rättsystem när det gäller upplysningsplikten i marina försäkringsavtal. Medan den Norska Sjöförsäkringsplanen har förvandlats till en Nordisk Sjöförsäkringsplan, genomgår de marina försäkringsavtalslagarna i många common law system sina första revisioner på etthundra år. Den pågående utvecklingen kommer att diskuteras och kommenteras i denna uppsatts.

Inledningsvis kommer den brittiska Marine Insurance Act, 1906 och den Nordiska Sjöförsäkringsplanen av 2013 att beskrivas. En historisk bakgrund följs av en kort översikt över de två regelverken. Därefter kommer en mer ingående beskrivning av hur reglerna kring upplysninsplikten är utformade och de två regelverkens skillnader och likheter kommer att illustreras. Det kommer här bli tydligt att de brittiska reglerna är mer gynsamma för försäkringsbolagen och kan i vissa fall ålägga försäkringstagaren nästan orimliga konsekvenser vid brott mot upplysningsplikten. Detta är några av de skillnaderna som diskuteras i den jämförande analysen.

Avslutningsvis kommer läsaren få en kortare introduktion till de förändringar som den brittiska Law Commission har pekat ut som de viktigaste att genomföra. Bland slutsatserna märks bland annat hur de fördelar som den brittiska lagstiftningen innebär för försäkringsbolagen kan vara en starkt bidragande orsak till den stora mängden domstolsfall som har observerats.

Preface

The idea of this thesis was to write about a piece of law currently under development. As the author has during the time it was written worked for a major insurance company, the duty of disclosure came up as a suitable topic.

First and foremost, I would like to thank my supervisor at the Faculty of Law, Assistant Professor Abhinayan Basu Bal. His guidance, positivity and constant support has been a huge contribution to this thesis. I owe him my full gratitude for taking time and assisting me in my writing.

Other people who have supported me are my girlfriend and the rest of my family, thank you for being there for me!

List of Abbreviations

Cefor	Sjøassurandørernes Centralforening (The Central Union of Marine Underwriters). From 2009 renamed The Nordic Association of Marine Insurers but normally related to as Cefor
CMI	Committe Maritime International
MIA, 1906	The UK Marine Insurance Act, 1906
MIA, 1909	The Australian Marine Insurance Act, 1909
NMIP	Nordic Marine Insurance Plan, 2013
P&I	Protection & Indemnity
UK	United Kingdom of Great Britain and Northern Ireland

1 Introduction

1.1 Background

The parties entering into an insurance contract generally face certain problems that normally are not present during pre-contractual negotiations of ordinary contracts. The relevant information relating to the object of the contract, namely the risk, is primarily in the hands of the assured and the insurer needs this information in order to assess the risk. This information forms the foundation upon which the insurer can decide whether or not to enter into the contract, to what premium and on what conditions. Thus, the assured needs to hand over information regarding the risk to the insurer for the insurer's evaluation. With sufficient information at hand, the insurer may use his professional skills as a risk analyst and present a position on what the terms of the contract should be. When the risk is clarified, the negotiations can begin. The assured's duty to provide the insurer with information about the risk is part of the mutual duty of disclosure. This is the legislative solution to the problem.

In the following section, a particular case will be presented to indicate how the market operates. A shipowner, with a good track record when it comes to damage, approaches an insurer to enter into a Hull and Machinery contract. According to the duty of disclosure, the shipowner is obliged to provide the insurer with material circumstances regarding the risk. However, in practice the insurer will retrieve information about the ship and its management from various sources. In the experience of the author, an insurer will find the vast majority of the material circumstances for evaluating the risk in registers and in the public domain. Classification societies have all the relevant details concerning the ship, its construction and maintenance. The insurer knows exactly what information he needs to evaluate the risk and for several reasons he is eager to retrieve it himself. A ship is a high value asset and the potential loss if the insurer fails to evaluate

the risk correctly is immense. Another reason why he is willing to do the work himself is stiff competition in the insurance market.

According to Marsh Insights: Marine Market Monitor of July 2012[1], there is an overcapacity in the insurance market, which keep the premiums low. According to statistics presented by senior lecturer Cathrine Bjune at the Norwegian Business School in a public seminar on the 8th of March 2012 (BI), hull underwriters, as a community, have not made technical profit on pure hull insurance for over 16 years.[2]

Given these circumstances and that we are dealing with a shipowner with a low damage ratio the following fictional scenario may be considered. When the contract is concluded, the shipowner only communicates the most basic circumstances about the risk, and the underwriter only asks for whatever information he needs to complete the necessary inquiries. The shipowner is in a favourable situation and the insurer sees no point in bothering the shipowner if it is not necessary. During the insurance period, the machinery of the ship suffers a breakdown and the assured approaches the insurer for compensation under the policy. It later turns out that there was a change of flag before the contract was concluded and that the underwriter did not know about this circumstance.

This thesis will examine the duty of disclosure in the UK Marine Insurance Act 1906[3] and the Nordic Marine Insurance Plan 2013[4]. There will be a focus on highlighting the issues brought up by the fictional scenario above. These issues will be answered in a broader sentence through the questions presented in the purpose.

---

[1] Marsh & McLennan is one of the largest insurance brokerage firms. http://uk.marsh.com/Portals/18/Documents/MMM_Issue1_2012.pdf.

[2] http://www.cee.ntu.edu.sg/Events/Documents/Maritime%20Events/8Mar12/Presentation_Cathrine%20Bjune.pdf.

[3] Marine Insurance Act 1906 c. 41 (Regnal. 6_Edw_7). Henceforward referred to as MIA, 1906. See supplement A.

[4] The Nordic Marine Insurance Plan of 2013 – based on the Norwegian Marine Insurance Plan of 1996, Version 2010. Henceforward referred to as NMIP of the PLAN. See supplement B.

1.2 Purpose

The purpose of this thesis is to critically evaluate the duty of disclosure in marine insurance law. The differences and similarities in this aspect between the English MIA, 1906 and the NMIP will for this purpose be examined. Finally, the recent development in this area will be presented and commented.

The questions that this thesis will focus on are

- What is the need and rationale for the duty of disclosure in marine insurance contracts?
- How is the duty of disclosure affected by the knowledge of the insurer?
- What significance does the availability of information in the public domain, or in various registers accessible for the insurer, have for the duty of disclosure?
- What are the possible reasons to why there have been a significantly larger number of lawsuits in England concerning marine insurance law than there has been in Norway?
- How does the warranty system in the MIA, 1906 and the rules of alteration of risk in the NMIP work in conjunction with the duty of disclosure?
- How is the duty of disclosure most likely to develop within the coming few years?

1.3 Delimitation

The main focus for this thesis will be the duty of disclosure. The intention is not to give a complete presentation, but to give the reader an idea of how the duty works in UK and in Nordic law. One of the most significant parts that is left out is the one concerning the brokers and agents. In reality, there will be plenty more parties involved in the insurance policy than the shipowner

and the underwriter. Insurance is often handled by professional brokers who have a certain position in the legislation. E.g. Section 19 MIA, 1906 contain rules about the broker, and the NMIP consequently refers to "the person effecting the insurance" to clarify that this may not be the same as the entity in right of compensation under the policy. There may also be co-insured, whose cover is affected by how the pre-contractual duties are complied with. Matters concerning these parties is not necessary to examine for the purpose of this thesis and their legal status will therefore not be further commented.

The number of English court cases concerning the doctrine of utmost good faith[5] in general and the duty of disclosure in particular is excessive and this part of the MIA, 1906 is thoroughly scrutinised. This thesis will only address the general principles and therefore omit the vast majority of these cases. What circumstances, covered by the duty of disclosure, is actually available for the insurer to retrieve without the participation of the assured? This is something that would have been interesting to investigate further, but falls outside the scope of this thesis.

1.4 Method and material

The approach of the subject will follow a legal dogmatic and comparative method. The applicable law for marine insurance in the UK and in the Nordic market will be described, analysed and compared. The focus will lie on examining how the duty of disclosure is governed in the two systems and how these different approaches are affecting the balance between the parties to a marine insurance policy. The questions mentioned in the purpose of the thesis will be answered by analysing the current state of law and the suggestions for modification that are being discussed by Law Commissions in the UK and in Australia.

[5] See section 3.2.1

When examining the applicable law in the UK, case law will always have a prominent role as being the second most important source of law in the common law hierarchy.[6] Since the MIA, 1906 is a codification of case law, the court decisions will be of particular interest while interpreting the Act.[7] Not only will marine insurance cases be used, but also other cases referring to the MIA, 1906. The rationale is that in many aspects the same rules apply to non-marine insurance, as was stated in by Lord Mustill in the House of Lords:

> Although the issues arise under a policy of non-marine insurance it is convenient to state them by reference to the Marine Insurance Act 1906 since it has been accepted in argument, and is indeed laid down in several authorities, that in relevant respects the common law relating to the two types of insurance is the same, and that the Act embodies a partial codification of the common law.[8]

When it comes to the Nordic law, the situation on marine insurance is quite unique. The NMIP is in fact a standard contract, but is characterized as something more resembling a statute than the ordinary standard contract. It has been held that the Plan should be interpreted as if it was statute, which in the Nordic jurisdictions means that the preparatory work would be given a high status. For these reasons, the main source of interpretation of the NMIP will be its extensive commentaries.[9]

Authoritative scholarly will be used to supplement the sources already mentioned. All literature used for this thesis is written by

[6] In England, the hierarchy is as follows beginning with the highest legal status: Enacted legislation, common law (including case law), and authoritative scholarly writing.
[7] Accordning to the principles of *stare decisis*, earlier judgements from any court in the hierarchy is always considered while deciding on a case. Thus, even very old court decisions may still be of great interest and importance to the interpretation if the situation is similar. S.f. Bogdan, M., *Komparativ Rättskunskap*, 2nd ed., Nordstedts Juridik AB, Stockholm, 2003, p. 93.
[8] *Pan Atlantic Insurance Co Ltd* v *Pine Top Insurance Co Ltd*. [1995] 1 AC 501 at 518, *per* Lord Mustill.
[9] The status of the NMIP and its commentaries will be further developed in subchapter 2.2.2.

authors whose expertise on marine law is widely recognized and accepted.

To get an idea of how the duty of disclosure might develop in the future, the most recent reports from the Law Commissions in Australia and the UK will be presented. The Australian perspective is relevant as they, in this field, are one step ahead of their UK counterpart. These reports also serve as a source of the latest developments in the area of marine insurance.

1.5 Structure

The first part of this thesis, chapter 2, will provide an overview of the MIA, 1906 and the NMIP, including an historical background. The specific provisions relating to the duty of disclosure will also be included in this chapter. In chapter 3, these provisions will be further examined, while highlighting the differences and similarities between the two systems. This chapter will explain how the duty of disclosure is constructed, what may constitute a breach and how a breach is sanctioned. Finally in chapter 3, the rules concerning changes of the risk during the contract period will be presented, as they are in some ways part of the duty of disclosure and also delimit the scope of the pre-contractual duties. Chapter 4 contains the comparative analysis and presents the Law Commissions suggestions for the future. Chapter 5 is where the author's conclusions and comments will be given. The thesis will here be summarized and the questions raised in the introduction will be answered.

1.6 Definition of terms

The term "assured" will relate to the party seeking cover for a risk, i.e. the person effecting the insurance, a person entitled to remedy under the

insurance or any agent who acts on behalf of any of the two first mentioned. The MIA, 1906 uses “assured or his agent” and it thus seems appropriate to choose “assured” as a general term. While relating to the “insurer”, the author intends to cover the insurance company or anyone acting on its behalf.

2 Evolution of the law of marine insurance in the UK and Norway

In contrast to many other areas of maritime law, there is no international convention or model law on marine insurance. Attempts have been made by among others the UNCTAD[10] to unify the law, but the differences in the various systems are many. The most recent attempts have been made by the CMI[11] International Working group, which has identified non-disclosure, good faith, alteration of risk and warranties as being the most controversial areas in the attempts for unification of marine insurance law. However, the marine insurance market is global and changes in one set of rules might have an impact on the others as they compete with each other. Thus, the differences in practice are not as vast as can be projected when first contemplating and comparing different rules of marine insurance.

The rules on marine insurance have developed through *lex mercatoria*[12]. Many of the fundamental principles were first defined in England through common law during the 18th century. The law established by the courts was enacted as the MIA, 1906. In Norway, this field of law has seen most of its progress thanks to agreed standard contracts. This was possible as the legislation on marine insurance has been, and still is, dispositive. This has resulted in an extensive set of rules, more resembling legislation with a comprehensive and published commentary to supplement it. In the following chapter, the MIA, 1906 and the NMIP will be individually

[10] The United Nations Conference on Trade and Development.
[11] Comité Maritime International, a non-governmental, non-profit organisation that works for unification of maritime law.
[12] Law merchant, a system of custom and best practice that evolved among merchants. It regulates transactions and the settlement of commercial related disputes. Lex mercatoria was generally recognized by courts along trade routes and has in many parts been incorporated in modern commercial law.

presented and the segments concerning the duty of disclosure will be highlighted.

2.1 The Marine Insurance Act of 1906

2.1.1 Historical background

The Act can be described as a reflection of the customs that have developed over the centuries since marine insurance was first practised in the UK. Most of the common law that creates the foundation of the MIA, 1906 was developed during the 18th century. The principles in the MIA, 1906 are to a large extent based on cases under Lord Mansfield, who was acting as Lord Chief Justice from 1756 - 1788.[13]

Marine insurance was from the beginning, as most matters relating to the trade of goods, a part of the medieval *lex mercatoria*. Disputes were settled in local merchants' tribunals. The proceedings were swift and records from this period are scarce. In the 14th century the Court of Admiralty was established and began to enter the same jurisdiction as the tribunals. However, since few cases reached the Court of Admiralty, this development did not change the situation where little material was saved for forthcoming cases and therefore the progress of the law was slow.[14]

In the 16th century, as international trade became more and more important in England, the government began to take a greater interest in the field of marine insurance and the Privy Council[15] in time established an arbitration court to deal with matters of marine insurance. This specialist court, called the Court of Commissioners, with its expert members and swift trials did for a period attract a substantial part of the lawsuits. The insurers however, being the stronger party, had more to benefit from the fact that the

[13] http://www.westminster-abbey.org/our-history/people/william-murray,-lord-mansfield.
[14] Bennet, H., *The Law of Marine Insurance*, 2nd ed., Oxford University Press Inc., New York, United States, 2006, p. 14f.
[15] Administrative body, committee of advisors to the monarch.

proceedings of formal litigation were more time-consuming and expensive. Thus, they tended to avoid this kind of arbitration in favour of the Admiralty Court.[16]

In 1601, petitions from the assured merchants to the Privy Council led to a new Act[17] whereby the legislator sought to steer litigation back to courts of arbitration. A new Court of Commissioners was created and judicial as well as commercial experts were appointed as Commissioners. Despite attempts to meet the requirements of the commercial community and reforms that sought to give the court extended powers, it did not endure for the long haul.[18]

The case of *Came* v *Moye*[19] among other things stated that judgements passed by the Court of Commissioners did not prevent the parties from bringing the case to a common law court.[20] Thus, litigation in matters of marine insurance was relocated from a court consisting of experts in the relevant fields to the common law courts where knowledge in mercantile law was rare. Under these circumstances the potential development of mercantile law in general and marine insurance law in particular was reduced to a minimum, bare in mind the significance of court rulings in the common law system. The result was a great deal of uncertainty concerning the rules governing insurance contracts and several common law courts that claimed jurisdiction. This negative trend would reach a turning point during the second half of the 18th century.[21]

In 1956, William Murray was appointed Chief Justice of the King's Bench and thus peered as Baron Mansfield. Lord Mansfield would become one of the most important judges in the field of commercial law, particularly marine insurance law. By taking the old law merchant and combining it with

[16] Bennet, H., *supra* note 10 p. 15.
[17] Act concerning Matters of Assurances used among Merchants.
[18] Bennet, H., *supra* note 10 p. 16.
[19] (1658) 2 Sid. 121, 82 E.R. 1290.
[20] Bennet, H., *supra* note 10, p. 16f.
[21] Ibid. p.17f.

established principles of law, he strived to bring certainty and foreseeability into the practice of commercial law. During his time, the faith in the common law courts to handle marine insurance law increased; the absence of petitions to Parliament for new legislation and the few cases of overruling indicated that the market was quite pleased with the development.[22]

The principles developed by the common law courts henceforth ruled in the field of marine insurance law. In the late 19th century, Parliment saw it fit to codify commercial law. The reason was to reduce litigation by clearly stipulating the rules that had been established throughout the centuries. Thus, originating from existing practice and jurisprudence, MIA, 1906 is the product of some 2,000 cases and was drafted by Sir Mackenzie Chalmers. After thorough consideration by a committee, consisting of legislators as well as representatives of shipowners, average adjusters and insurers, the Bill was passed almost twelve years after it was first introduced in the House of Lords in 1894.[23] The MIA, 1906 does not prevent application of the rules of equity[24] or rules of the common law including the law merchant, as long as they are not inconsistent with any express provisions of the Act. This follows from section 91(2) MIA, 1906. Even though the wording of the MIA, 1906 must be considered as the primary source for interpretation of the principles, the Act does not bar the courts from using pre-existing case law whenever needed. As mentioned above, as the Act was drafted it was merely a codification of already established common law.[25]

Subsequently, many other common law countries inspired by the MIA, 1906 created similar legislation[26] and thus it can be described as the mother of all marine statues. The English market dominates the world of marine

[22] Bennet, H., *supra* note 10, p. 18ff.
[23] Bennet, H., *supra* note 10, pp. 20f.
[24] Equity is a set of rules that gives the courts right to by court orders deviate from common law in cases where the strict or technical application of the law would lead to an unfair outcome. Typically, the court will order one of the parties to do something or to refrain from doing something. S.f. Bogdan, M., *supra* note 6, p. 99.
[25] Bennet, H., *supra* note 10, p. 22.
[26] I.e. The Marine Insurance Act, Public Act 1908 No 112 (New Zeeland) and Marine Insurance Act, 1909 (Cth) (Australia).

insurance and consequently English law, implied or expressly, governs much of the world's marine insurance.

2.1.2 Summary of the MIA, 1906

The MIA, 1906 consists of 94 sections and deals with all aspects of insurance law. As described above, the MIA, 1906 is a codification of principles developed in common law mainly during the 18th and the 19th century. Even though intended for marine insurance, it has come to be used for all matters of insurance.

2.1.3 Specific Provisions concerning the Duty of Disclosure

Section 17 MIA, 1906 establishes the concept of utmost good faith for insurance contracts and also states the remedy for failing to comply with this duty, namely avoidance. The duty is imposed on the parties to the contract and it should be made totally clear that this duty is mutual between them. While the case law was ambiguous prior to the codification of marine insurance law in 1906,[27] section 17 MIA, 1906 clarifies that avoidance is optional to the insurer and the contract does not *ipso facto* becomes void when the duty of utmost good faith has been breached.

With the doctrine of good faith being an extensive concept, section 18 MIA, 1906 sets out to specify the assured's part of it as the duty of disclosure. Section 18(1) MIA, 1906 relate to the pre-contractual duties; all material information known or ought to be known by the assured shall be communicated to the insurer before the contract is concluded. Materiality is further explained in section 18(2). The determining factor is: would the information have any influence on a hypothetical prudent insurer when

[27] Bennet, H., *supra* note 10, pp. 104-105.

considering whether to provide cover and if so, at what premium. Section 18(3) MIA, 1906 introduces a number of circumstances that the assured does not have to disclose, unless the insurer explicitly asks to know them. These are circumstances that cannot affect the insurer in any negative way because they reduce the risk. It also includes what is, or should be known to the insurer. Likewise, circumstances that the insurer has dismissed or deemed unnecessary are not considered to be within the scope of the duty of disclosure. The same goes for circumstances that are covered by any warranty and therefore is not something that the insurer needs to worry about for the sake of risk. Section 18 (4) MIA, 1906 states that the question of materiality is in each cases a question of fact. Section 18(5) concerns the concept of "a circumstance" that is mentioned in section 18(1), MIA 1906. Any communication to, or information received by the assured is considered a circumstance. Read in conjunction with section 18(1) MIA, 1906 this also includes what the assured should know in his ordinary course of business.

Section 20 MIA, 1906 contain specific rules concerning the assured's liability for representations made before the contract is concluded. Rules against misrepresentation is part of the doctrine of utmost good faith, as the assured is not only obliged to disclose information, but naturally also responsible to a certain extent for the accuracy of that information. Thus, section 18 and 20 are in many aspects similar to each other. *"Although disclosure and representation are separately dealt with both in the Marine Insurance Act and in this work, there is no hard-and-fast division between them."*[28].

Like section 18(1) MIA, 1906, section 20(1) MIA 1906 stipulate that the provisions in the section only apply to material circumstances. The definition of materiality in section 20(2) MIA 1906 is identical to its equivalent in section 18(2) MIA 1906. Representations are divided into two groups, viz.: those of facts and those of expectations/beliefs.

[28] *Arnould's Law of Marine Insurance and Average*, 17th ed., Sweet & Maxwell, London, 2008, *per* Musthill, M.J., and Gilman, J.C.B., p. 706.

2.2 The Norwegian Marine Insurance Plan

2.2.1 Historical Background

Marine insurance in Norway was first governed by the Maritime Code and from 1930, by the Insurance Contract Act (ICA)[29]. However, with both legislation consisting mostly of non-mandatory rules in relation to marine insurance, standard form contracts has been the main legal source since the first one was drafted in 1871. These standard form contracts referred to as Marine Insurance Plans, have gained a certain position in the hierarchy of rules and legislation and dominates the Nordic marine insurance market.[30]

The ICA §1-3 second paragraph (c) explicitly excludes marine insurance from the mandatory part of the ICA. The perception is that shipowners in general possess a great deal of experience and knowledge when it comes to insurance, thus are not in need of as much protective legislation as the average assured. One reason for this is that a ship is not only a high value asset, but it is also exposed to many perils of different natures, i.e. there are not only many risks to be considered but also the potential loss is immense. Therefore, a shipowner is expected to have an organisation to manage the ship in a professional way, and part of this management should be experienced when it comes to matters of signing insurance policies. Furthermore, shipping is an international industry and the competition is thus global. That means that the competition for marine insurance is also global. As a result the rules must be similar to – or better than the rules in other legal systems in order to be competitive. Too diverse or protective a legislation would probably result in higher premiums and shipowners would look elsewhere for insurance. Perhaps the most obvious reason to exclude marine insurance from the mandatory legislation is that there already was an effective set of rules in place, namely the Norwegian Marine Insurance Plan.

[29] Insurance Contracts Act of 16 June 1989 (no 69).
[30] Falkanger, T., Bull, H. J., and Brautaset, L., *Scandinavian Maritime Law*, 3rd ed., Universitetsforlaget, Oslo, 2011, pp. 516-517.

As the market players had already agreed on a standard contract, there was no need for a new law to replace it.[31]

The Norwegian Marine Insurance Plan dates back to 1871 when it was first drafted. Scandinavia is often claimed to have a strong tradition of striving for consensus and this document can be described as part of that tradition. The NMIP together with its commentaries has from the very beginning been an agreed document, established by representatives for the shipowners and the insurance companies.[32]

Since the very beginning, it has been crucial to have a set of rules that corresponds with and is competitive to the ones found in the international market, a market dominated by English Law. Thus, there are many similarities to be found between the two systems. The Plan has been under consistent review and some major revisions have been made to keep it up-to-date with the needs and demands of the market.

In October 2012 the Nordic Marine Insurance Plan was presented. The introduction of the Nordic Plan does not exactly turn the tables as its rules were already used in the Nordic insurance market through the Norwegian Plan, from which it originates. In the official name, the words "*Based on the Norwegian Marine Insurance Plan of 1996, Version 2010*" is incorporated to clarify that it is basically the same plan with a different name and the only major difference is that it is now explicitly sanctioned by representatives from the other Nordic countries as well. No major changes have been necessary for the purpose of harmonization.

2.2.2 Summary of the NMIP

The NMIP has three features that defines it and sets out its legal status. To begin with, one must be aware that the plan, despite its appearance, is a

[31] Wilhelmsen, T.-L. and Bull, H. J., *Handbook in Hull Insurance*, 1st ed., Gyldendal Norsk Forlag AS, Oslo, 2007 pp. 27-28.
[32] Falkanger, T., Bull, H. J., and Brautaset, L., *supra* note 27, pp. 516-517.

standard form contract. However, the construction is more similar to legislation than an ordinary standard contract and in its former shape, it covered the whole scope of marine insurance.[33]

The NMIP provides complete regulation within its areas of application, which in the latest edition is all shipowners insurances, except from P&I[34] insurance that was excluded in the 1996 version.[35]

Secondly, the NMIP is an agreed document, which means that every group with an interest in the document has through representatives participated upon its construction and revision. With the shipowners, insurers and average adjusters all taking part in the constitution the document becomes balanced and receives widespread acceptance. This committee meets through the Nordic Association of Marine Insurers (Cefor[36]) and is chaired by a representative of The Scandinavian Institute of Maritime Law.[37]
Thirdly, the notes from the discussion form a kind of preparatory work for the NMIP and are published as commentaries. These commentaries are incorporated as a part of the agreed document and reveal the thoughts of the authors. This is expressed in the commentaries to § 1-4, and the commentary continues by claiming that it should be given a high status when interpreting the NMIP. The Norwegian Supreme Court has in the case of NSC *Ocean Blessing*[38] given affirmation to this by declaring that they approve the commentary's definition of its own importance. This was further confirmed by the Supreme Court in the case of NSC Brødrene Prøve[39]. Other court decisions (NA *Stolt Condor*[40] and NSC *Hardhaus*[41])

[33] See subchapter 2.2.1 above.
[34] Protection and Indemnity.
[35] Wilhelmsen, T.-L. and Bull, H. J., *supra* note 28, pp. 28-29.
[36] Sjøassurandørernes Centralforening (The Central Union of Marine Underwriters). From 2009 renamed The Nordic Association of Marine Insurers but normally related to as Cefor. http://www.cefor.no/About-Cefor/History/.
[37] http://www.cefor.no/Documents/Clauses/Nordic%20Plan%202013/2010%20sign%20Nordic%20Plan%20Agreement.pdf; http://www.cefor.no/Clauses/Nordic-Plan-2013/.
[38] ND 1988.216.
[39] ND 1990.194.
[40] ND 1978.139.
[41] ND 1991.204.

have indicated how the wording of the commentary should be weighted. The conclusion of these two cases is that the commentary must be considered as explanations to the rules and only relevant in the parts that actually develop the specific solutions of the Plan. The more general discussions in the commentary must be treated as equal to other doctrine on the area. Conclusively, the commentary has indisputably been established to constitute a part of the NMIP as an agreed document and as such, an important tool for interpreting the NMIP, as long as they concern the specific solutions presented in the Plan.[42]

2.2.3 Specific Provisions concerning the Duty of Disclosure

The rules of the NMIP concerning the duty of disclosure are found in chapter 3 section 1. They are based on the idea that the assured is a professional and thus the responsibilities of this person goes further than in a normal insurance contract.

§ 3-1 imposes on the assured to provide the insurer with all the information needed in order to evaluate the risk before signing the contract. The paragraph also states that the assured must report to the insurer if, after signing the contract, it comes to his knowledge that information is incorrect or incomplete.

§§ 3-2 to 3-4 deals with the remedies when failing to fulfil the duty of disclosure. Unlike the MIA, 1906, the Plan has different remedies depending on the culpability of the breach.

If the breach is fraudulent, the insurer is not bound by the contract in question, according to §3-2 first subparagraph. He is also in his right to

[42] Wilhelmsen, T.-L. and Bull, H. J., *supra* note 28, pp. 29-30.

cancel any other insurance contract he may have with the assured by giving fourteen days' notice. This sanction, which is found in § 3-2 second subparagraph goes beyond the one available under the MIA, 1906 by involving the entire insurance relationship.

If, on the other side the breach is not blameworthy, §3-4 stipulates that the contract will remain in force but the insurer may cancel the insurance by giving fourteen days notice. The assured who makes an innocent mistake will thus not face the risk of losing his insurance cover on the spot, which would be a rather harsh consequence, but is instead given at least fourteen days to sign a new insurance. The insurer on the other hand will have to accept a potentially higher risk than he had intended, but for a maximum of fourteen days. He may also use the right of cancellation as leverage to bring about a re-negotiation of the contract terms with the assured.

Any other failure to fulfil the duty of disclosure will be dealt with under § 3-3. In these cases the consequence of failure will depend on the materiality of the circumstances not disclosed to the insurer, i.e. in which case full disclosure would have influenced the insurer's judgement of the risk and his decisions regarding the contract. If the answer is that he would not have taken on the risk at all, he may cancel the contract. If, however, he would have taken on the risk but on other conditions, the liability is limited to losses that have no connection to the circumstances not disclosed. In other words, the insurer is released from liability for those risks that he was not fully informed about. The same applies to the situation where the assured has come to know that incorrect or incomplete information was given about the risk at the time the contract was formed, but has failed to notify the insurer about this. The insurer may, as in the event of innocent breach, cancel the contract by giving fourteen days notice.

§ 3-6 is a statue of limitation that imposes obligation on the insurer to immediately inform the assured if he discovers a breach of the duty of disclosure and intends to invoke the remedy rules.

Most of the information regarding the ship can be obtained from the classification society and § 3-7 gives the insurer the right to collect these facts from the assured or directly from the classification society. The insurer thus has direct accessibility to basically all he needs to know about the condition of the ship. If the assured do not oblige with this, the insurer will have the right to cancel the insurance by giving fourteen days notice. However, in this case the ship has to be able to reach a safe port before the insurance can cease to be effective.

3 A Comparative study of the Duty of Disclosure under UK and Nordic Marine Insurance Law

3.1 Carectaristics of an Insurance Contract and the Principle of Equivalence

The subject of the insurance contract is risk. The assured seeks to minimize his own financial risk in case of casualty and the insurer takes on the risk for a monetary consideration, the premium. Thus the insurer wishes to know as much as possible about the risk in order to reduce the uncertainty, while the assured wants to get maximum protection at a low premium.

The meaning of the principle of equivalence is that the two parties to a contract should have a reasonable opportunity to retrieve information about the contract interest, which in the insurance contract is the risk, before deciding whether to enter the contract and on what terms. In an insurance contract, the assured will have considerably better access to specifics concerning the risk. The general point of departure is that the assured knows basically everything about the object and the risk proposed for insurance while the insurer has very limited access to such knowledge. The idea is that this imbalance of information must be bridged in order to give both the insurer and the assured a fair chance to base their decisions concerning the contract on sufficient facts.[43]

[43] Bennet, H., *supra* note 10 p. 103.

Apart from being a matter of fairness, the duty of disclosure is a matter of economic efficiency. By obliging the assured to provide the insurer with information, the duty of disclosure gives the insurer a fair chance to assess the risk. This creates conditions where the insurer can match the risk to a proper premium. This should not be considered a disadvantage for the assured, but rather the contrary. If the insurer does not have total insight about the risk, he is inclined to charge a higher premium to compensate for this and to make sure that he does not charge to little in respect to the risk. Another scenario may be that the insurer initiates investigations to clarify all the relevant circumstances. This is normally a more expensive solution than if the assured had just provided the information and higher costs for the insurer will eventually lead to higher premiums. Naturally, each party seeks to get as much benefit out of the contract as possible. Nevertheless, one must also consider that there is a difference between bargaining for a better price, and going so far as to jeopardize the foundations of an efficient contract.

3.2 Scope of the Duty of Disclosure

3.2.1 MIA, 1906

An insurance contract under the MIA, 1906 is characterised as a contract of *uberrimae fidei*, meaning a contract based on the principal of utmost good faith. Lord Mansfield set out this principle in the leading case *Carter v Boehm*[44]

> First. Insurance is a contract upon speculation.
>
> The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only; the under-writer trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risque, as if it did not exist.

[44] (1766) 3 Burr. 1905, 97 E.R. 1162.

> The keeping back such circumstance is a fraud, and therefore the policy is void.[45]

This statement contains all the fundamental parts of the duty of disclosure: The insurer must be able to trust the assured's representation and the assured is required to disclose all relevant circumstances in his knowledge regarding the risk.

A contract of any kind is subject to the principle of good faith, meaning that one must act honestly but is under no obligation to provide the counterpart with information. General contract law has rules against misrepresentation i.e., giving false or misleading information that induces someone into a contract. The remedy for such breach is avoidance.[46]

The principle of utmost good faith is manifested through the duty of disclosure and the duty not to misrepresent. The duty of disclosure is defined in section 18 as a duty for the assured to volunteer all facts that "may affect the judgment of a prudent insurer". Consequently, non-fraudulent misrepresentation is considered a breach of this duty and therefore treated as a breach.

The duty of utmost good faith is not contractual but arises before the contract itself is formed, as was so held in the case of *Banque Keyser Ullman SA* v *Skandia (UK) Insurance Co Ltd*[47] with reference to the earlier case of *Bell* v *Lever Brothers Ltd*.[48]: an obligation cannot be derived from the contract if it exists before the actual formation of the contract.

[45] Ibid.
[46] Bennet, H., *supra* note 10 p. 100.
[47] [1990] 1 QB 665.
[48] [1932] A.C. 161.

3.2.1.1 Knowledge

The starting point for the scope of the duty of disclosure is whether the circumstance is known to the assured. First and foremost it should be clarified that the issue of knowledge in the MIA, 1906 concerns only knowledge about circumstances, not about whether the circumstance is material.[49] The concept of materiality will be discussed below.

Actual knowledge covers not only what the assured subjectively knows, but also circumstances of which the assured would have known, had he not deliberately ignored those circumstances. In section 18 (1) MIA, 1906 it is stated "*the assured is deemed to know every circumstance which in the ordinary course of business, ought to be known by him*", thus stating that the concept of knowledge in the MIA, 1906 is not limited to subjective or actual knowledge. In the case of *London General Insurance Company* v *General Marine Underwriters' Association*[50], the assured had the information in writing in his office (a casualty slip), but had failed to read it. The information was treated as constructive knowledge, about which the assured ought to have known.[51] The assured does not have to initiate examinations to extend his knowledge; the duty of utmost good faith only concerns what the assured knows and not what he could learn.[52] However, if the assured has reason to believe that his knowledge is incomplete or incorrect, he must enquire. This would imply that there is an element of honesty when considering the assured's knowledge.[53] The concept of honesty is difficult to apply to corporations and recent case law suggests that the court should rather consider the knowledge of the company in a more objective manner,[54] i.e. the relevant knowledge remains to be what the assured knows or ought to know.

[49] *London Assurance* v *Mansel* (1879) 11 Ch. D. 363.
[50] [1920] 3 K.B. 23.
[51] Ibid.
[52] *Economides* v *Commercial Union Assurance Co Plc* [1998] Q.B. 587.
[53] *Simner* v *New India Insurance Co Ltd*. [1995] L.R.L.R. 240.
[54] *Genesis Housing Association Ltd* v Liberty Syndicate Management Ltd (for and on behalf of Syndicate 4472 at Lloyd's) [2012] EWHC 3105 (TCC).

When it comes to identification, the knowledge of the persons with decision-making authority is considered to be the knowledge of the company, i.e. the "directing mind and will". This requires naturally that the person's authority concerns the relevant area, and not something that is completely unrelated to the risk. In the case of *Manifest Shipping Co Ltd* v *Uni-Polaris Insurance Co Ltd (The Star Sea)* [55], the court also discusse the concept of "blind eye knowledge", i.e. knowledge that should have been known if the assured had not deliberately shut his eyes to the circumstances. The court held that there must at least be showed that the assured had reason to suspect that there was relevant fact he ought to have known.[56] Agents of the assured are also, as long as they are representing and acting on behalf of the assured, considered as "the assured" in MIA, 1906 section 18.[57]

3.2.1.2 Materiality

Materiality delimits the duty of disclosure and is therefore crucial to understand. Section 18 (1) says that "every material circumstance which is known to the assured" is subject to the duty of disclosure, i.e. if a material circumstance is deemed to be known by the assured, he will be in breach of the duty of disclosure if he fails to disclose it, regardless of the reason for the failure.[58]

The leading case *Carter v Boehm* indicates that the key to determine whether non-disclosure constitutes a breach of the duty of disclosure, is if the actual risk is different from the risk that the insurer based his decisions upon when the contract was concluded.[59] This would imply a materiality test based on a question of increased, or at least different risk.

[55] [2003] 1 A.C. 469.
[56] Ibid.
[57] *Simner* v *New India Insurance Co Ltd*. [1995] L.R.L.R. 240.
[58] *Joel* v *Law Union and Crown Insurance Co* [1908] 2 K.B. 863.
[59] *Carter* v *Boehm* (1766) 3 Burr. 1905, 97 E.R. 1162.

Section 18(2) and section 20(2) MIA, 1906 both state "*Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk*." These sections have by referring to a "prudent insurer"[60] declare that it is the general opinion among the insurer community that should be decisive and not the opinion of the specific insurer in question. Thus, materiality is as a starting point an objective concept.[61]

In the case of *Berger & Light Diffusers LTD* v *Pollock*[62], Section 18(2) and 20 (2) MIA, 1906 was interpreted to mean that the insurer had to prove that the information, had it been disclosed, would have led a hypothetical prudent insurer to a different decision on whether or not to accept the risk and on what terms.[63] This proved to be an impractical rule, as it is difficult to determine how the insurer would have acted in hindsight. The yardstick is however not the insurer in question, but a hypothetical prudent insurer. Demanding that the information must be decisive may lead to a situation where focus shifts from objectivity to subjectivity; what information is considered decisive presumably varies more between the members of the insurance community, than what information is considered to affect the risk in general.

The opinion of the courts was changed and a new practice of how to determine what is material information was defined in the case of *Container Transport International Inc* v *Oceanus Mutual Underwriting Association (Bermuda) Ltd.*[64] and further developed in the case of *Pan Atlantic Insurance Ltd* v *Pine Top Insurance Ltd*[65]. In *CTI* v *Oceanus* it was held that if the legislator had wished the rule to be interpreted as was assumed in the

[60] The prudent insurer is thought to represent the insurers as a community. This concept is somewhat unclear, as it is in many cases due to the lack of absolute standards impossible to say how the prudent insurer *would* have acted. S.f. *Container Transport International Inc* v *Oceanus Mutual Underwriting Association (Bermuda) Ltd.* [1982] 2 Lloyd's Rep. 178.
[61] Bennet, H., *supra* note 10 p. 109.
[62] [1973] 2 Lloyd's Rep. 442.
[63] Ibid.
[64] *Container Transport International Inc* v *Oceanus Mutual Underwriting Association (Bermuda) Ltd.* [1982] 2 Lloyd's Rep. 178. Hence forward *CTI* v *Oceanus.*
[65] [1995] 1 AC 501. Hence forward *Pine Atlantic* v *Pine Top*.

Berger & Light Diffusers LTD v *Pollock* case, he would have used different words such as "decisively influence" or "conclusively influence". Hence, the court considered it sufficient for the insurer to prove that the information would have influenced the judgment of a prudent insurer at some level but not necessarily changed his mind about the contract or the premium. Based on these opinions, the court found no reason why the influence would have been decisive for the judgment of the insurer. The opinion thus leaned towards the proper definition of materiality being determined by what a prudent insurer would want to know when assessing the risk, without any prerequisite that the information could lead to a different decision. This was substantiated by section 17 and the doctrine of utmost good faith; all information that might be of interest to the insurer should be disclosed.[66]

The case of *CTI v Oceanus* rejected the decisive test but the scope of the duty of disclosure became too wide; after all, section 18 (2) and 20 (2) refer to circumstances that in some way influences the judgement of a prudent insurer. Some further definition of the scope was thus necessary to establish and in *Pan Atlantic v. Pine Top*, the court brought in the demand for inducement and formulated a test consisting of two cumulative steps, one objective test and one subjective test.[67]

3.2.1.2.1 The Objective Test

To satisfy the objective test, the information must be of the kind that a prudent insurer would need to make pre-contractual judgements of the risk. This part of the test has a wide scope; anything that would influence the judgement is valid to fulfil the criteria. The insurer does not have to prove that it is something that might increase the risk, only that it is something that would have been taken into consideration.

[66] *Container Transport International Inc* v *Oceanus Mutual Underwriting Association (Bermuda) Ltd.* [1982] 2 Lloyd's Rep. 178.
[67] *Pan Atlantic Insurance Ltd* v *Pine Top Insurance Ltd* [1995] 1 AC 501.

3.2.1.2.2 The Subjective Test – Inducement

Even though not explicitly mentioned in the MIA, 1906, the insurer also has to prove that the non-disclosure induced the insurer to enter the contract, i.e. that the insurer's lack of information put the assured in a more favourable position and made the prospect look more appealing to the insurer. The same rule applies to the situation of misrepresentation and it is in the general common law rules of misrepresentation that this subjective test finds its legitimacy.[68] To use common law as a supplement to the MIA, 1906 is sanctioned by section 91(2). The concept of duty of disclosure in the MIA, 1906 is unique to the common law system but since misrepresentation and non-disclosure are considered as similar situations, it seems rational to analogically demand inducement also in the latter situation.

The demand for inducement can also be traced to the very reason for the duty of disclosure, namely to even out the unequal access to crucial information. If the information was of no subjective relevance to the insurer's judgement and therefore would not have influenced him in any way, there is no reason for him to have the choice of avoidance.

In the case of *Edgington* v *Fitzmaurice*[69], the court defined inducing circumstances as something that was part of the information upon which a decision was made, not necessarily decisive but still circumstances that were taken into consideration when forming the decision.[70] The threshold for inducement has since then continued to be a topic for debate. According to the court in the case of *JEB Fasteners Ltd.* v *Marks, Bloom & Co*[71], the insurer must prove that he was substantially encouraged to enter into the contract by the misrepresentation or non-disclosure. If the main motivating factor had nothing to do with the information in question, it could not have induced the insurer to enter into the contract. To fulfil the subjective test it

[68] *Pan Atlantic Insurance Ltd* v *Pine Top Insurance Ltd* [1995] 1 AC 501.
[69] (1885) 29 Ch. D. 459.
[70] Ibid.
[71] [1983] 1 All E.R. 583.

must have had some impact when the insurer formed his decision.[72] In the more recent case *Assucurazioni Generali SpA* v *Arab Insurance Group*[73] the court goes further by stating that the insurer must prove that had it not been for the non-disclosure or misrepresentation, the insurer would not have entered into the contract at the present terms i.e., the lack of full and correct disclosure had an actual influence on the decision.[74]

3.2.1.3 Conclusion

The scope is determined initially by the knowledge of the assured, and further by what is considered material to the prudent insurer. The advantage the insurer is getting from the somewhat low threshold for objective materiality is partially levelled to the benefit of the assured by the requirement of subjective influence. However, since the threshold is quite low, the test of materiality still favours the insurer over the assured.

If the insurer has succeeded in fulfilling the objective test, he might find himself in a favourable position when setting out to prove that the non-disclosure actually encouraged him to enter into the contract. Even though case law has particularly pointed out that the subjective test must be satisfied independently, it cannot be denied that solid evidence in the objective test naturally often shows to be helpful for the subjective test, being more abstract in its character.

3.2.1.4 Duration

The duty of disclosure ceases when the contract is concluded. All the rules concerning the duty of disclosure aims at providing the insurer with sufficient information to valuate the risk. Once the risk is accepted, there is no duty for the assured to keep the insurer informed of any alterations in the risk. The insurer's protection against alterations is through warranties,

[72] Ibid.
[73] [2002] C.L.C. 164.
[74] Ibid.

which will be discussed in section 3.8.1 below. How this relates to the duty of utmost good faith remains unclear.[75]

If, however, the contract is modified or extended, the situation is equal to the conclusion of an entirely new contract. Hence, the duty of disclosure applies as if no earlier contract had existed.[76] In the case of *Commercial Union Assurance Co Ltd* v *Niger Co Ltd*[77], the parties had entered into an indefinite insurance contract that could be cancelled by either of the parties by giving three months notice. The insurer claimed that this meant an on-going duty of disclosure, but this approach was not accepted by the court.[78]

3.2.2 NMIP

In the NMIP, as distinguished from the MIA, 1906, the duty of disclosure does not have a clear legal connection to the duty of good faith, but is regulated as a separate issue and must therefore be treated separately.[79]

NMIP § 3-1 imposes on the assured an active responsibility for providing the insurer with "full and correct disclosure". The questions asked by the insurer are not what defines the scope of the duty of disclosure, as in other cases of more assured-friendly regulation. The crucial question is rather what information the insurer needs in order to make a proper judgment of the risk. This is defined in the Plan as "circumstances that are material to the insurer when deciding whether and on what conditions he is prepared to accept the insurance". The assured's active duty to disclose information is related to his anticipated knowledge in the field and this burden is weighed by the insurers burden of proof when claiming that undisclosed information were material to him.

[75] Bennet, H., *supra* note 10 p. 175.
[76] Bennet, H., *supra* note 10 p. 178.
[77] (1921) 6 Ll. L. Rep. 239.
[78] Ibid.
[79] Wilhelmsen SMI 2001 yearbook p.70.

Under the Plan, as well as under the MIA, 1906, the approach is that the scope does not rely on the assured's actual knowledge. However, under the Plan the subjective knowledge will have impact on the aftermath in case of breach.

3.2.2.1 Materiality

The starting point for determining what circumstances are to be considered material is to determine whether they have been decisive for the particular insurer. The Plan, unlike the MIA, 1906, in § 3-1 refers to these circumstances as "*material to the insurer when deciding whether and on what conditions he is prepared to accept the insurance"*. This means that the circumstances must have been subjectively decisive to the insurer in question. As it is difficult to prove what information is material to the specific insurer in the specific case, he will often turn to more objective evidence. It is easier to show what circumstances are considered material by presenting standard conditions and previous practice. Hence, since the insurer is not limited to his own subjective opinion at the time when the contract was concluded, he may also demonstrate his standpoint by turning to objective evidence to support his claim. The commentary to the plan defines material circumstances as information that an insurer usually can and will demand prior to accepting an insurance risk of the type in question.[80] To sum up this paragraph about materiality: it is quite obvious that it is the objective requirements of the average insurer that in most cases conclusively determines what circumstances should be recognized as material. However, different contracts will mean different needs for information and therefore the Plan must provide the insurer with the possibility to prove what circumstances is material in each specific case.

The insurer's actual requirements define the materiality. The starting point is thus subjectivity but since the burden of proof lies with the insurer he will

[80] Wilhelmsen, T.-L. and Bull, H. J., *supra* note 28, p. 141; NMIP 2013 – Commentary, p. 86, http://www.nordicplan.org/Documents/Nordic%20Plan%202013/NordicPlan2013-Commentary.pdf.

often have to show that his claim is objectively acceptable. Documented and established practice; insurance- and premium conditions are used to show what information the insurer would normally require.

3.2.2.2 Knowledge

§ 3-1 imposes on the assured the duty to make full and correct disclosure during the pre-contractual dialogue. This duty is characterised firstly as active; the assured must independently and on his own initiative present material circumstances to the insurer. Secondly, it is an objective duty as the assured is expected to have, or be able to retrieve, knowledge about all circumstances that might be material to the insurer. Furthermore he should know what information the insurer might need in order to make a correct judgement of the risk, i.e. the duty is not dependant on the insurers participation in specifying or collecting information. The subjective knowledge of the assured is not relevant to the duty of disclosure. As mentioned above, the Plan assumes him to be a professional with substantial knowledge about marine insurance.[81]

3.2.2.3 Duration

§ 3-1 states that the assured is bound by the duty to disclose at the time when the contract is concluded and after that, he must make the insurer aware if it comes to his attention that faults were made when fulfilling the duty. If the circumstances change during the course of the contract, or if it is a matter of entirely new circumstances, then the rules on alteration of risk in chapter 3 section 2 becomes applicable. These rules will be further discussed in subchapter 3.8.2. The NMIP, like the MIA, 1906, considers a renewal of an insurance policy as a new contract, and consequently the duty of disclosure also applies to renewals.[82]

[81] Wilhelmsen, T.-L. and Bull, H. J., *supra* note 28, p. 141.
[82] Ibid. p. 145.

3.3 Non-disclosure

Non-disclosure can essentially be described as the opposite of what has been defined as full disclosure in the previous chapters. Common law has defined some circumstances as material circumstances, but to present all of these would be to go beyond the scope of this thesis. For the purpose of NMIP, the closely related rules of alteration of risk may be consulted, as § 3-8 explicitly identifies some changes that shall be considered as alteration of the risk. These rules will be examined further in subchapter 3.8.2.

One situation in particular will be examined further as an example, and in order to provide the necessary foundation when commenting on the fictional scenario presented in section 1.1. In the given situation there had been a change of flag state. A change of flag is pointed out in § 3-8 as an alteration of risk. The flag state has also been identified as a material circumstance in England in the SPATHARI case or *Demetriades & Company* v *The Northern Insurance Company Limited*[83]. In the SPATHARI case, the assured failed to inform the insurer of the fact that the flag of the ship, during the insurance period, would be changed from British to Greek. The court accepted the insurer's claim that the change of flag resulted in a whole different risk and that this information should have been disclosed.[84] In the case of Sandefjord *Ormlund*[85], the assured had informed the insurer about the change of flag, but had failed to disclose the consequences of the changes. When sailing under a Cyprus flag instead of a Norwegian, the ship only had, in accordance with the rules of Cyprus, one chief officer onboard. The perception of the insurer was that the ship still had two chief officers, as prescribed in Norway. The Norwegian Supreme Court stated that the failure to inform the insurer of the fact that the ship now only had one chief officer onboard constituted a breach of the duty of disclosure.[86]

[83] 1925 S.L.T. 322.
[84] Ibid.
[85] ND 1978.31.
[86] Ibid.

3.4 Misrepresentation

In the NMIP, the provisions concerning the duty of disclosure cover misrepresentation and hence there is no need to address the topic of misrepresentation independently. However, the MIA, 1906 has divided the two duties into two separate sections and they must thus be treated separately. The situation of misrepresentation is very similar to non-disclosure and the two is sometimes hard to distinguish from each other.[87] The duty of disclosure in section 18 concerns an active duty to provide information, while representation in section 20 is about the duty to truthfully answer questions posed by the insurer. As held in the case of *Zurich General Accident & Liability Insurance Co* v *Leven*[88] by Lord President Normand:

> In general, non-disclosure means that you have failed to disclose something which was not the subject of a question but which was known to you and which you ought to have considered for yourself would be material, whereas a representation is something directly said in answer to a specific question, and in the present case there can be no reasonable doubt that, if in answer to the question "Has a person who is going to drive the car been convicted of an offence?" you answer "No," you are making a direct representation that such person has not been convicted.[89]

In order for the insurer to invoke the rules of misrepresentation, the assured must have made a representation. This usually means that information must have passed from the assured to the insurer; misrepresentation may not be claimed if the assured has not communicated about a certain circumstance.[90]

However, there are a few situations that may constitute misrepresentation, even though communication is absent. In all of these situations, the assured is considered to have made a representation even though he has remained silent. These situations are useful when determining where misrepresentation ends and non-disclosure begins.

---

[87] *Pan Atlantic Insurance Ltd* v *Pine Top Insurance Ltd* [1995] 1 AC 501.
[88] 1940 SC 406, 415.
[89] Zurich General Accident & Liability Insurance Co v Leven 1940 SC 406, 415, *per* Lord President Normand.
[90] *HIH Casualty and General Insurance Ltd* v *Chase Manhattan Bank* [2003] UKHL/6.

The first situation is when the insurer is within his right to make assumptions and rely on the assured to make disclosure if these assumptions are in fact wrong. By not correcting the insurer, the assured makes a misrepresentation, as the silence constitutes an implied representation.[91]

The second situation is when the assured makes a correct and true representation, but certain information is left out. In this case, the accurate representation might be given another meaning when a part of the information is missing.[92]

The third situation is implied in section 20(6) MIA, 1906, which states that a representation may be corrected or entirely withdrawn before the contract is concluded. Hence, if the assured remains silent while knowing that a representation that was made truthfully in reality is false, the assured has made a misrepresentation.[93]

Through section 20(3), MIA, 1906 recognises two kinds of representations, namely facts and expectations/beliefs. It important to separate these two, as the assessment of whether there has been a misrepresentation will be different for the two categories. Following section 20 (4), a representation is true if it is substantially correct. This means that the difference between the representation and what is literally true must not be material according to the same principles as in section 18. In the case of *Alexander* v *Campbell*[94], the assured stated that the ship had been remetalled when it actually had gone through a thorough reparation and only parts of the sheathing had been replaced. The representation was considered to be substantially correct.[95] It

[91] *L'Alsacienne Première Société* v *Unistorebrand International Insurance AS* [1995] LRLR 333, 349.
[92] *Perrins* v *The Marine & General Travellers' Insurance Society* (1859) 2 El & El 317,324; *Hamilton & Co* v *Eagle Star & British Dominions Insurance Co Ltd* (1924) 19 L1 L Rep 242, 245-246.
[93] *Traill v. Barring* (1864) 4 De G J & S 318, 326, 329; *St Paul Fire & Marine Insurance Co (UK) Ltd* v *McConnel Dowell Contractors Ltd* [1995] 2 Lloyd's Rep 116.
[94] (1872) 41 L. J. Ch. 478.
[95] Ibid.

should also be noted that there is no reference in the section to the knowledge of the assured. Thus, the assured is strictly liable for representations of fact. The only way to avoid liability if a representation turns out to be incorrect is if the representation may be categorised as an expectation or belief made in good faith. The innocence of the assured is of no relevance if the representation is one of fact.

Section 20 (5) states that an expectation or belief is true if it is made in good faith. This seems reasonable since the assured at the point that he makes the representation cannot know what the true fact is, but he can truthfully represent what he beliefs is the fact, or expects will be the fact. If he makes promissory representation, this may be treated as a warranty, a concept that will be discussed in section 3.8. When determining whether a representation is an expression of a fact or a belief or expectation, the court considers the knowledge of the assured and what possibilities the assured has to control the relevant circumstances. In the leading case of *Bissett* v *Wilkinsson*[96], a representation was made about circumstances that had been evaluated and estimated, but never tested in practice. This representation was considered to be a belief since the representor could not possibly know for sure about theories that had not been put to the test.[97] A representation made concerning an anticipated fact that lies outside the control of the representor, is to be treated as an expression of expectation. This was established in *Bowden* v *Vaughan*[98], where a person with no authority over the ship presented a date for its departure.[99]

3.5 Innocent Breach

As explained above, the MIA 1906 does not make a difference between negligent breach and innocent breach. The NMIP however has a separate paragraph for this situation, with a certain remedy. If the assured is not to be

[96] [1927] AC 177.
[97] Ibid.
[98] (1809) 10 east 415.
[99] Ibid.

blamed for the non-disclosure or misrepresentation, the insurer remains liable. But since the risk is different from the one anticipated at the conclusion of the contract, the insurer may cancel the contract by giving fourteen days' notice. There is a general principle of contract that renders the insurer a right to supplementary consideration in these situations. In the older version of the Plan, this was manifested by giving the insurer right to additional premium. However, this rule has been removed since it was considered superfluous.[100]

A typical situation where innocent breach comes into play is when the assured, after the contract has been concluded, realises that the disclosure was not complete or that a representation was not true. The assured is in such a situation under § 3-1 obliged to notify the insurer about the fault. The insurer may then claim innocent breach of the duty of disclosure according to § 3-4. The consequences for an innocent breach are not unnecessarily harsh for the assured. Nor will the insurer be forced to stand liable for a risk which he did not intended, except for during the notice period of fourteen days. There is no further remedy available in the situation of innocent breach.

3.6 Exclusions

3.6.1 Exclusions of the MIA, 1906

Section 18(3)(b) MIA, 1906 does not exclude information that the insurer with some diligence could have retrieved on his own; the insurer is not even responsible for collecting information from the market or the public domain.[101]

[100] NMIP 2013 – Commentary, supra note 79, p. 90.
[101] Bennet, H., *supra* note 10 p. 137.

Section 18(3)(c) MIA, 1906 concerning waiver, has come to be the most important section for the courts to use when justifying a judgement that does not strike unnecessarily hard upon the assured. While in other cases thought to be an active statement, the judgements concerning the MIA, 1906 shows that courts are leaning towards the exemption of waiver also in cases where the insurer has not explicitly waived the non-disclosed information. The typical situation is when the assured has made what he beliefs to be full disclosure, and a reasonably careful insurer would have made further enquiries but the insurer neglect to do so. The insurer is then considered to have waived information that would have been exposed following a more thorough investigation.[102] A waiver can also be made by asking questions that clearly indicate that the insurer is only interested in limited information. This principle has among others been explained in the case of *Doheny* v *New India Assurance*[103], where L.J. Longmore formulated the test to be applied as follows:

> Whether or not such a waiver is present depends on a true construction of the proposal form, the test being, would a reasonable man reading the proposal form be justified in thinking that the insurer had restricted his right to receive all material information, and consented to the omission of the particular information in issue?[104]

3.6.2 Exclusions of the NMIP

The scope of the duty of disclosure is affected by the insurer's knowledge or presumed knowledge on certain matters. § 3-5 prevents the insurer from claiming non-disclosure when he knew or ought to have known about the circumstance that the assured should have disclosed. It would be in total contrast to the construction of the rules not to take the knowledge of the insurer into the equation, as the very purpose of the rules is to level the inequality of access to information. According to the commentary, phrase in

[102] The Law Commission, *Consultation Paper No 204* and the Scottish Law Commission *Discussion Paper No 155, Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties*, p. 21, http://lawcommission.justice.gov.uk/docs/cp204_ICL_business-disclosure.pdf.
[103] Court of Appeal) [2004] EWCA Civ 1705.
[104] Ibid.

§ 3-5 "ought to have known" includes the situation where the assured has disclosed some information and the insurer whish to know more but neglects to communicate his wish. This sets out the point where the insurer has to take active part in the disclosure and is where the duty of the assured ends. The insurer must naturally speak up if he has been given incomplete information and he is aware of it.[105]

The exclusion in § 3-5 is even applicable in the situation of fraudulent misrepresentation. If the insurer knows that the assured deliberately gives him false information but still takes on the risk, there is no reason to give him the right to cancel the insurance or use it as a leverage to cancel other contracts he might have with the assured.

If a circumstance that might have been material to the insurer at the time the contract was concluded has since then ceased to be material, the insurer may not invoke the §§ 3-3 and 3-4. In this case it is not the lack of inequality of information that is the rationale but the lack of materiality. The duty of disclosure is limited to information that is material to the insurer and the assured does not have to provide the insurer with all the facts about the subject of the insurance. The moment a circumstance ceases to be material, it is excluded from the duty of disclosure. In this situation there is no reason why the insurer should not be able to act if the assured has fraudulently misrepresented the facts. The element of conscious speculation does not exist, as it did in the previous case, and the insurer did not know that he dealt with a dishonest assured when he decided to take on the risk. Therefore the exclusion concerning facts that are no longer material does not apply to fraudulent misrepresentation.[106]

[105] NMIP 2013 – Commentary, supra note 79, pp. 91-92.
[106] Ibid.

3.7 Remedies

As mentioned above, the assured is responsible for the disclosure being completely and truthfully made. There are thus two possible ways in which breach may be committed.

1. Non-disclosure: Failure to disclose a circumstance that is material to the insurer. The circumstance must have been known- or ought to have been known by the assured in the ordinary course of business. Inducement is required.
2. Misrepresentation: The assured has made a false representation of fact or expectation or belief. This false representation must be material to the insurer and he must have been induced by misrepresentation.

3.7.1 MIA, 1906 - Avoidance

The remedy in the MIA, 1906 is absolute, uncompromising and lacks any possibility of adjustment according to the level of culpa. Non-fraudulent misrepresentation is considered a breach of the duty of *uberimae fidei* and is therefore treated as a breach, making the assured strictly responsible to fulfil the duty of disclosure. There is no need to investigate what the assured intentions with the non-disclosure or misrepresentation was in order to invoke the sanctions. The mere fact that the duty of utmost good faith has been broken is enough to give the insurer the right to avoid the contract.[107]

A breach of the duty of utmost good faith does not render the insurer a right to claim damages from the assured. In the case of *Banque Financiere de la Cite SA (formerly Banque Keyser Ullmann SA)* v *Westgate Insurance Co (formerly Hodge General & Mercantile Co Ltd*[108], the court reasoned about this matter as such. The duty of utmost good faith is a non-contractual duty

[107] *Hazel (for Lloyd's Syndicate 260)* v *Whitlam* [2004] EWCA Civ 1600.
[108] [1991] 2 A.C. 249

that arises during the pre-contractual negotiations. As such, the only remedy is avoidance and no damages for breach of contract can be invoked since there was no contract at the time the duty was breached.[109] It has further been claimed that this also has to do with the fact that the doctrine of utmost good faith, even though developed under common law, is equitable in its nature. Bennet, however, is of another opinion. One reason is that for a matter to be tried in equity, it must first be determined whether there actually is a contract, and this is determined in common law. Another reason is that in equity the insurer would have to argue that the contract should be considered void[110], whereas in fact the remedy is to be given the opportunity to avoid the contract, i.e. make it voidable. Even in cases of fraudulent misrepresentation, the courts have remained consistent with the principle that a breach of utmost good faith does not render a contract void, but gives the insurer the choice of avoidance. Thus, the remedy for breach of the duty of utmost good faith in the MIA, 1906 does not arise in common law but in equity.[111]

Normally when a contract is avoided, considerations exchanged between the parties should be returned and full effort should be given in order to place the parties in the position from which they originated. This is called restitution and is mentioned in section 84 MIA, 1906. However, according to section 84(3)(a) MIA, 1906, premiums shall not be returned if the avoidance is based on the assured's fraudulent or dishonest behavior.

3.7.2 NMIP – According to Culpa

Marine insurance offers less protection than general insurance for the assured upon failure to comply with the duty of disclosure. As mentioned above, the assured is expected to be a professional with considerable experience from the insurance market. However, the NMIP offers the

[109] Ibid.
[110] A void contract is a contract that has actually never been valid from the beginning.
[111] Bennet, H., *supra* note 10 p. 106-108.

assured more protection than the MIA, 1906 while linking the sanction to the level of culpa.[112]

In the case of fraudulent representation, the insurer, may according to § 3-2, avoid the contract and any other contract with the assured. The rationale is that the insurer should not be bound by contracts with a person who is acting dishonestly and the materiality of the circumstances in question is therefore of no relevance.[113]

The NMIP takes a pragmatic stand on remedies and the main focus for a negligent breach is to put the insurer in the position he would have been in had full and correct disclosure been made. Various remedies are presented in § 3-3 and the court should apply the one that compensates the insurer for the lack of information. Hence, the insurer must show how he would have reacted to the information, had he received it before the contract was concluded. This is a matter of subjectivity and the insurer may not rely on how other insurers would have reacted, e.g. if the insurer wants to avoid the contract, he must show on a balance of probabilities that he would not have taken on the risk.[114]

The sanctioning system in the NMIP does not provide a wide enough range of solutions to each and every case to put the insurer in the same situation that he would have been in, had full disclosure been made. An example from the commentaries is when the insurer would have incorporated a safety provision in the insurance contract. This is somewhat compensated by the insurer's possibility to cancel the contract by giving fourteen days' notice. The commentary also mentions the fact that there is hardly any case law related to the duty of disclosure thus creating a more differentiated sanctioning system would be unnecessarily complicated.[115]

[112] NMIP 2013 – Commentary, supra note 79, p.89.
[113] NMIP 2013 – Commentary, supra note 79, p. 88.
[114] NMIP 2013 – Commentary, supra note 79, p. 89.
[115] NMIP 2013 – Commentary, supra note 79, p. 90.

One important feature of the sanctioning system is § 3-6 which state that the insurer must notify the assured if the insured discovers that the information given is incomplete, or that a representation is incorrect. Failing to do so without undue delay will render the insurer to lose his right to invoke the breach of the duty of disclosure.

3.8 Changes of the Risk during the contract period

After the contract is signed, the insurer must be able to rely on the risk remaining fundamentally the same during the contract period. To provide a full covering explanation on how changes in the risk are handled under the English and the Nordic system would be to go outside the scope of this thesis. However, since the rules are closely related to the duty of disclosure, a brief presentation will follow.

3.8.1 MIA, 1906 - Warranties

A warranty is in a technical sense a certain term of the insurance contract and must be incorporated directly or by reference into the contract to be valid. This is normally achieved by presenting it in writing in the policy, oral warranties are valid but unusual.[116]

A warranty means that the assured promises to perform certain obligations during a pre-defined period of time. Should the assured fail to comply with the mentioned warranties, the risk initially intended to be covered by the insurer is altered, and the insurer is hence relieved from the liability undertaken in the insurance contract. Thus, the insurer may set out some prerequisites before taking on a risk and then use these warranties as a shield if the conditions are not fulfilled.[117] Breach of warranty automatically terminates the contract of insurance, unless the insurer invokes a waiver of

[116] Soyer, B., *Warranties in Marine Insurance*, 2nd ed., Cavendish, London, 2006 pp. 2-3.
[117] Ibid.

termination, by which the insurer declares that he wants the contract to continue despite the breach.[118]

3.8.2 NMIP - Alteration of risk

For the purpose of comparison, the rules on alteration of the risk in NMIP Chapter 3 Section 2 and the rules on safety regulations in section 3 may be considered to be the warranty rules of the Plan. The rationale for the rules is to act as a guarantee for the insurer, that the risk will remain fundamentally the same during the contract period. The Plan has chosen to focus on alteration of the risk rather than escalation of the risk. The reason is that it may be impossible to appreciate how the changes will affect the risk at the times that they are incurred.[119] Thus, it seems fair to impose an obligation on the assured to notify the insurer about the changes so that he may take the necessary precautions.

As mentioned in section 3.3, there are a few situations that are pre-defined as alterations of risk in § 3-8. These are changes of: State of registration, manager of the ship, classification society and the company responsible for technical/maritime operation of the ship. Section 2 also point out other circumstances, changes of which will raise a duty for the assured to take action, but these will not be dealt with in this thesis. Other changes must be of such significance that the explicit or implied foundations of the contract are changed.[120] Furthermore, § 3-12 states that the altered circumstance must have remained material to the insurer if he is to invoke any of the remedy rules of § 3-9 (wilfully conducted alterations of the assured will modify the liability of the insurer) or § 3-10 (the insurers right to cancel the insurance). However, the materiality is of no significance when it comes to

[118] Clarke, M. A., *The Law of Insurance Contracts*, 2nd ed., LLP, London, 1994 p. 489.
[119] NMIP 2013 – Commentary, supra note 79, p. 95.
[120] NMIP 2013 – Commentary, supra note 79, p. 95.

§ 3-11 and the assured's duty to notify the insurer as soon as it comes to his knowledge that an alteration of the risk will, or has already occurred.[121]

[121] NMIP 2013 – Commentary, supra note 79, pp. 97-98.

4 Comparative analysis and recent developments

This chapter will be divided into two sections. The first one will constitute a comparative analysis between the two systems. The main focus will be answering some of the questions raised in the purpose of the thesis. Many of the differences between the MIA, 1906 and the NMIP have already been highlighted in chapter 3. The other section will present a brief summary of the recent developments in the UK, Australia and in the Nordic region. The idea is to provide the reader with a glimpse of some of the changes that may be implemented in the future.[122]

4.1 Litigation

Inquiries have shown that the business consider MIA, 1906 section 18 as a source of disputes. A member survey conducted by the risk management association AIRMIC's report from 2010 suggests that up to one out of three in the market have had disputes over section 18 during the last five years.[123] Over the last ten years, there have been 41 judgments on section 18.[124] To give an idea of what the costs are for that number disputes, the Law Commission has estimated that the insurers and assured together spend some 46,4 £M per year in England and Wales on disputes concerning section 18 MIA, 1906.[125]

[122] For further reading on the UK revision is recommended the reports published by the Law Commission on http://lawcommission.justice.gov.uk/.
[123] AIRMIC Non-disclosure of material information – Member Survey (2010). The fully 1100 individual members of AIRMIC handle risk management and represent 450 companies, http://s.zoomerang.com/sr.aspx?sm=jdoGDp73OqGdQGj9o4oJBR%2b6npsbLnrcYz7Oby4WNRI%3d.
[124] The Law Commission, *supra* note 101, p. 8.
[125] Ibid. p. 202.

In Norway however court cases on the duty of disclosure and misrepresentation is scarce. There have historically been very few cases and none since the introduction of the 1996 Plan, upon which the NMIP of 2013 is based.[126]

There may be many explanations as to why the duty of disclosure has caused so much litigation in England and almost none in Norway. One theory presented by Wilhelmsen and Bull is that the insurer can find most of the material information without the participation of the assured.[127] This could perhaps explain why there has been so few lawsuits in Norway, but it does not help when justifying the large amount of lawsuits in England; quite the contrary. The explanation would imply that the Norwegian insurance companies are better at collecting information than their English counterparts. Another possible scenario is that they are playing a more active part in the disclosure of material circumstances. The Law Commission of England has while evaluating the MIA, 1906 stated that section 18 perhaps does not put enough pressure on the insurer to take an active role in this aspect of the pre-contractual process.[128] This has partially to do with the remedy of avoidance, which will be discussed further down in this section. One important rule to support the explanation provided by Wilhelmsen and Bull is NMIP § 3-7, which gives the insurer access to information about the ship held by the ship's classification society.

Another explanation might be the differences in the test of materiality. The MIA, 1906 has a test based on the prudent insurer, complemented with an inducement test that does not require the circumstance to be decisive. The NMIP, on the other hand, demands the circumstance to be decisive for the insurer in question. The insured may rely on objective evidence to support his claim of materiality, but the threshold nevertheless seems to be higher compared to the MIA, 1906. A consequence of a higher threshold when

[126] Wilhelmsen, T.-L. and Bull, H. J., *supra* note 28, p. 142.
[127] Ibid. p.139-140.
[128] The Law Commission, *supra* note 101, p. 35.

proving materiality is that the outcome of the hearing becomes more uncertain, which in turn deters the insurer from turning to litigation.

The harsh consequences of avoidance in the MIA, 1906 for breach of the duty of utmost good faith are also something that may induce the insurer to file a lawsuit. This absolute and uncompromising remedy may have been a main reason for the detailed scrutiny of all aspects of the doctrine of utmost good faith. Under the NMIP, the insurer must show how he would have acted, had he been given the information. This prerequisite lays further burden on the insurer while claiming breach of the duty of disclosure. Not only does the insurer have to show that the circumstance was a decisive one for it to qualify as material; he then also has to show in what way it was decisive. This procedure, combined with the variation of available remedies makes it far less attractive for the insurer to take the case up to court.

One main conclusion to be drawn is that the MIA, 1906 clearly is a more insurer friendly act and that this imbalance must have contributed to the high number of lawsuits.

One fundamentally different reason could be variations in the market. One might assume that, since Norway is a considerably smaller country, the explanation is simply that there are fewer players in the Norwegian market than in the UK market. However, the Nordic market is the second largest global market for hull insurance with 11,1% of the global premium. The UK markets has a total share of 18,3%.[129] That means that despite the fact that more insurance policies are written in the UK, the UK market being larger than the Norwegian market cannot explain the difference in number of lawsuits. The Norwegian market is by far the most significant one within the Nordic market.

[129] http://www.iumi.com/images/stories/IUMI/Pictures/Conferences/SanDiego2012/Monday/05_ff_globalreport_seltmann.pdf.

4.2 Warranties and alteration of risks

By incorporating warranties, the scope of the insurance cover is set out and as mentioned above, the scope of the duty of disclosure is also affected by the warranties. If a certain circumstance is covered by a warranty, the insurer does not have to worry about it since he will not be liable if the warranty is breached. Also, the assured may leave this part out of his disclosure, as it will not be part of the risk evaluation. An example of this is when a warranty is set out to the effect that the insured vessel will not navigate in e.g. areas where it can expect to encounter ice. The insurer then does not have to evaluate the risk of navigating the vessel in such condition and the assured does not have to disclose detailed information on how well equipped the ship is for navigating in icy waters.[130]

Warranties could appear to be very similar to representations, but breach of a warranty must be distinguished from misrepresentation. The most prominent features of a warranty is that it is a promise to fulfil a certain obligation and that promise is incorporated in the contract; the representation has neither of these features. A representation is as explained in subchapter 3.4 a presentation of a fact or a belief or an expectation; the assured answers a question regarding a certain circumstance. With a warranty on the other hand, the assured undertake an obligation and must comply with the performance of this obligation. In the case of *Pawson* v *Watson*[131], Lord Mansfield emphasised that a representation is not part of the contract but of the pre-contractual duty of utmost good faith, while the warranty is actually part of the contract.[132] The case of *De Hahn* v *Hartley*[133] further explains the differences by maintaining, "There is a material distinction between a warranty and a representation. A

[130] Soyer, B., *Supra* note 114, pp. 2-3.
[131] (1778) 98 E.R. 1361.
[132] Ibid.
[133] (1786) 99 E.R. 1130.

representation may be equitable or substantially answered; but a warranty must be strictly complied with."[134]

The case of *Newcastle Fire Insurance Co* v. *Macmorran & Co*[135] identifies another difference between a warranty and a representation, namely that materiality has no relevance to the warranty. "It is a first principle of the law of insurance, on all occasions, that where a representation is material it must be complied with – immaterial, that immateriality may be inquired into and shown; but that if there is a warranty it is part of the contract that the matter is such as it is represented to be. Therefore, the materiality or immateriality signifies nothing."[136]

The main purpose of warranties is to define and preserve the risk. Alteration of risk has a clear purpose to protect the insurer from any changes to the risk. Both warranty and alteration of risk is there because the insurer must be able to rely on that the circumstances regarding the risk that was disclosed at the time the contract was signed remains the same throughout the insurance period. Thus, the alteration of risk rules is the relevant counterpart in the NMIP for a comparative analysis with warranty. It should however be noted that the concepts of warranties is something that does not exist in Nordic law. Thus, what combines warranties and alteration of risk is that both systems protect the insurer from an alteration of the risk.

The main difference is that only changes in material circumstances will constitute an alteration of the risk, while a breach of a warranty will render the contract voidable, regardless of materiality.

The rules on alteration of risk stipulate communication between the assured and the insurer. Furthermore, it presents solutions on how to keep the policy from being cancelled and is generally a rather pragmatic set of rules. The warranty system on the other hand seems to be out of date, as it strictly

[134] Ibid.
[135] (1815) 3 E.R. 1057.
[136] Ibid.

provides that the insurer complies with the prerequisites. If the assured fails, the contract becomes voidable. The insurer has to present a waiver for the policy to remain in force. This must be considered a highly impractical way to delimit the duty of disclosure.

4.3 Recent Development

4.4 Law reviews in common law systems

4.4.1 UK

The MIA, 1906 is currently under review and the idea is to draft a bill with suggested amendments by the end of 2013. The Law Commission has especially pointed out the duty of disclosure as an area that needs revision.[137] Three aims have been set out by the Commission namely:

1) To clarify how the duty of disclosure should be fulfilled.
2) To encourage the insurers to take a more active part in assisting the assureds in the process of disclosure.
3) To provide fair remedies.

Besides being somewhat unclear, the MIA, 1906 has also been said to be insurer friendly, and thus lack balance between the interests of the parties to an insurance contract. The remedy system has also been pointed out by the law commission as a reason as to why so many disputes end up in litigation. As mentioned above, the remedy system under the MIA, 1906 provides only one solution namely avoidance, and there is no possibilities for the courts to adjust the remedy to a perhaps more suitable solution in the specific case. The commission therefore suggest a more flexible model, more similar to other legal systems e.g. the NMIP. The modifications recommended includes remedies adapted to the culpa of the assured and according to how the insurer would have acted, had full disclosure been made, e.g. it is

[137] The Law Commission, *supra* note 101, p. 8.

proposed that the remedy in the case of non-fraudulent breach, should act as to prevent the insurer from ending up in a less favourable situation. Hence, avoidance as a remedy should only be used in those cases where the insurer would not have accepted the insurance. If, on the other hand, the insurer would have insisted on different terms, the contract should be treated as if those terms were included. If the insurer would have accepted but charged a higher premium then the claim should be reduced in proportion to the higher premium.[138]

This proposed set of rules have obvious similarities with NMIP § 3-3 and may thus be considered as a step towards a more assured friendly legislation in more harmony with many of the civil law legislations.

4.4.2 Australia

The governing law in Australia is the Marine Insurance Act, 1909[139], which is based on the MIA, 1906. Australian insurance law has historically followed in the footsteps of the English insurance law, but this changed in 1984. The Australian Insurance Contract Act, 1984[140] excluded marine insurance, but brought major changes into general insurance law.[141] Some of the changes may now be implemented also into marine insurance, as the Australian Law Reform Commission is drafting a new Marine Insurance Act. A bill has been presented with several proposed reforms relevant for this thesis.

Among the key recommendations published on 7 May 2001, last modified on 3 August 2012 are three reforms of particular interest. The first two concern the abolishment of the concept of warranties. A diversion of remedies for breach of any express term of the contract would replace express warranties. Furthermore, the Act would permit express terms

[138] The Law Commission, *supra* note 101, p. 13-14.
[139] Marine Insurance Act, 1909 (Cth). Henceforward MIA, 1909.
[140] Insurance Contract Act, 1984 (Cth).
[141] The Law Commission, *supra* note 101, p. 27.

regarding seaworthiness and legality and those terms would replace the implied warranties that are now used to protect the insurer for such risks. [142]

Another radical change would be the modification of the duty of disclosure. Instead of using the prudent insurer when determining materiality and what circumstances that needs to be disclosed, the proposal is to consider what the assured knows to be material, or what a reasonable person in the assureds position would know to be relevant to the insurer; a prudent assured test.[143] The main motivation for making this change is that it would, according to the Australian Law Reform Commission, solve two problematic issues of the existing Act. The first one is that the duty as presently formulated is considered to be far too extensive. To make full disclosure, the assured need to know what circumstances is considered material to a prudent insurer and not only the decisive circumstances, but also anything that would influence the insurer while evaluating the risk and forming his decision. Hence, the assured must have a great knowledge when it comes to matters of insurance, and this cannot be expected from all shipowners. The second problem has been addressed in the case of *Pan Atlantic* v *Pine Top* and concerns the subjective part of the test of materiality. Section 24(2) MIA, 1909 is factually identical to section 18(2) MIA, 1906, as both only relate to the prudent insurer and do not explicitly require inducement of the actual insurer. This implies that before *Pan Atlantic* v *Pine Top*, it was not clear whether the actual insurer would have to be influenced in order to claim materiality and invoke breach of the duty of disclosure.[144] The principle about inducement set out in *Pan Atlantic* v *Pine Top* has been implemented in Australian law by the case of *Akedian Co Ltd* v *Royal Insurance Australia Ltd and Sun Alliance Australia. Ltd*[145].

The modification of the duty of disclosure would further mean that the remedy for fraudulent non-disclosure or misrepresentation remains the

[142] http://www.alrc.gov.au/inquiries/marine-insurance-act-1909.
[143] http://www.alrc.gov.au/inquiries/marine-insurance-act-1909.
[144] See discussion above in subchapter 3.2.1.2.
[145] (1997) 148 ALR 480.

same, namely, that the insurer may avoid the contract and keep whatever premium that he has received. If, however, the non-disclosure or misrepresentation is not fraudulent, the insurer must show how the lack of full and correct disclosure and representation has affected his mind while forming his decision on whether to take on the risk, and at what terms, and for what premium. If the insurer would have accepted the risk on other terms, he will remain liable under the insurance contract, except for losses that are attributable to the non-disclosure or misrepresentation. Premiums, deductibles or excess can be adjusted and taken into consideration correspondingly when defining the scope of liability for the insurer.[146]

The changes proposed by the Australian law commission defiantly make the Act more like the NMIP, especially with respect to the remedy system. The "reasonable assured test" enacted in The Australian Insurance Contract Act, 1984,[147] are now being examined for the purpose of reform of the MIA, 1906. The result of introducing the "reasonable assured test" has been satisfactory. However, critics claim that it is uncertain and that clarifications should be amended to the Act. This reveals the importance of not only suggesting reforms focusing on bringing equality into UK marine insurance law, but certainty and precision must also be addressed.

4.4.3 Recent case law

Recent case law has not brought any notable changes into the area of the duty of disclosure. Nevertheless, one case, *WISE (Underwriting Agency Ltd* v *Grupo Nacional Provincial SA*[148], will be highlighted as it deals with the concept of a reasonable careful insurer. If the assured presents a risk fairly, the insurer must show due diligence and make appropriate enquires if necessary. Otherwise the court may consider his negligence as a waiver according to MIA, 1906 Section 18(3)(c). The reasonable careful insurer is,

[146] http://www.austlii.edu.au/au/other/alrc/publications/reports/91/app4.html.
[147] NB! The principle is not yet applicable to marine insurance in Australia.
[148] [2004] EWCA Civ 962 at [46].

according to L.J. Rix "neither a detective on one hand nor lacking in common sense on the other.[149] This indicated that the courts are shifting towards a more practical view when it comes to the insurer. This resembles the provision in NMIP § 3-6, concerning the insurer's duty to give notice to the assured if he discovers that he has been given incomplete or inaccurate information. Attempts to move the focus away from strict and rigid interpretations of rules, and give more attention to how business is reasonably conducted are also made in general contract law. The starting point was the case of *Investors Compensation Scheme Ltd.* v *West Bromwich Buildning Society*[150].

4.5 The Norwegian system – Nordic integration

As mentioned above, there are only a few cases under the NMIP concerning the duty of disclosure and misrepresentation. The insurance market seems to be satisfied with the construction of the Plan, though the author cannot know about everything that stirs under the surface. Hence, no major reforms have been made to the construction of the NMIP since the latest major review in 1996. The principal development is the introduction of the Nordic Marine Insurance Plan, which came into force on the 1st of January 2013. The Nordic Plan is for all relevant purposes identical to the Norwegian Marine Insurance Plan of 1996, version 2010. The important difference is that all the Nordic shipowners' associations are now signatory parties to the Plan.

As mentioned in chapter 2.2.2 above, the NMIP is drafted by The Nordic Association of Marine Insurers (Cefor). Within this organisation there is a Standing Revision Committee that is continuously looking at improvements of the Plan and new versions are published every few years. Insurers may

[149] Ibid.
[150] [1998] 1 WLR 896.

propose amendments trough Cefor and shipowners trough their national shipowners' associations. No major changes are planned as of the publishing date of this thesis.[151]

[151] http://www.cefor.no/Clauses/Nordic-Plan-2013/.

5 Conclusion

In the common law system, the duty to disclose is part of the more general duty to exercise utmost good faith. In Nordic legislation however, duty of disclosure is dealt with as a separate issue. While the MIA, 1906 has developed in the courts during the centuries; the NMIP is the result of a close cooperation between shipowners and insurance companies dating back to 1871. The difference in the way these two set of rules has developed is good to have in mind when comparing the MIA, 1906 and the NMIP. It should also be remembered that at the time the NMIP was drafted, the principles of the duty of disclosure had been set out in England, and the first authors of the NMIP were inspired by common law.

During the 20th century, the principles of common law was enacted in the UK as the MIA, 1906 was passed. The Act inspired other common law countries to draft bills similar to the MIA, 1906. Since then, there has not been much modification made in the field of marine insurance law. There are many conflicts in the UK concerning the duty of disclosure and hence much litigation. The rules are considered to be insurer friendly, as they do not encourage the insurer to take active part in the disclosure of circumstances material to the risk and the remedy for breach is avoidance. The problems often occur when peril has struck and the assured claims compensation under the insurance. The only remedy available is avoidance and the sanctioning system does not take culpa into account. Thus, the consequence for a fraudulent assured who has misrepresented a mayor circumstance, is the same as for a innocent assured who by mistake failed to mention a circumstance he did not realize was material. The situation gives the insurer incentive to scrutinize the possibilities to limit their liability or avoid the contract in whole. As a result of this imbalance between the parties to an insurance contract, and since there are often high value assets at stake, the insurer has much to gain on refusing a claim with reference to a breach of the duty of disclosure.

The NMIP is much more balanced, especially when it comes to the available remedies. Initially, the remedy is decided according to the culpa of the assured. If the breach is negligent, the insurer must show how he was affected by the breach and the remedy is set correspondingly. The test of materiality may be somewhat clearer in the NMIP, but it should be remembered that these rules has not really been set to test in a court of law.

Another possible explanation to why the number of lawsuits is so much higher in UK compared to Norway might be related to the markets. Can the answer lie in the fact that the Norwegian market is a smaller one with only a few players who are to a large extent familiar to one another? According to the author, this cannot be an accurate explanation. The integrated Nordic marine hull insurance market is the second largest in the world and Nordic insurance companies provides insurance to shipowners globally.

The answer must rather be that the NMIP are, as a result of the cooperation between the insurers and the assured, much more balanced than the MIA, 1906. Furthermore, the participation makes the parties more aware of the meaning of the rules. This knowledge is accessible to anyone through the commentaries to the plan. Despite from being balanced, the Plan is hence also quite easy to interpret. It should also be noted that a standing committee is continuously working to improve the Plan and keep it up-to-date.

How the MIA, 1906 and the NMIP is dealing with alterations of the risk during the contract period may also have some effect on the duty of disclosure. The MIA, 1906 uses warranties to guarantee that the risk remains fundamentally the same. If the assured fails to comply, the contract of insurance is terminated. The NMIP on the other hand has chosen a different approach. When the contract is concluded, the duty of disclosure transfers into a duty to notify the insurer of any alteration of the risk. By defining what may constitute an alteration of the risk, the NMIP clarifies the duty of disclosure. The consequences if the risk is altered depends on whether the assured in any way participated in the change, and how material

the change is to the insurer. The system is thus a rather flexible one that strives to keep the policy active if possible. The differences in this aspect between the MIA, 1906 and the NMIP is an example of how the NMIP presents solutions that attempts to avoid any situations where the parties may end up in a conflict due to uncertainty or imbalance.

The extent to which the assured is liable for providing the insurer with the proper information generally depends on the experience and knowledge the assured can be expected to possess. While beginning the negotiations prior to a marine insurance contract, the insurer and the assured will start off in two different corners. The insurer is naturally the expert on insurance but does not initially know much about the risk of the particular insurance object, namely the ship. The assured on the other hand is assumed to know basically everything that can be known about the ship. The assured certainly is no expert on insurance, even though expected to have greater experience on insurance than the typical assured. However, when it comes to marine insurance, both the MIA, 1906 and the NMIP assumes that both parties are professionals with a high level of understanding on how the insurance market works and what is expected of them. In many cases this will be the truth, since a broker often will be involved. Hence, it is reasonable to expect that the assured in marine insurance have more experience than the average entity searching cover for a risk. It should however be remembered that what knowledge and experience a shipowner has of providing an insurer with full and correct disclosure may differ, but the insurer remains an expert on evaluating risk.

The idea of the duty of disclosure is that the insurer and assured shall meet and produce a good insurance contract from which they both get a benefit. The assured explains what risk and the circumstances concerning this risk that he wants transferred to the insurer, and the insurer will then use his knowledge about risk and insurance to propose a reasonable policy. The rules shall therefore create an environment where the assureds' total knowledge about the risk can be stripped down to the relevant parts, by

using the insurer's knowledge about what information is relevant to assess the risk. The ideal would be that the insurer gets just the right information, and thereby being able to provide the assured with an insurance contract that covers exactly the right risks, to a matching premium. This would be the most efficient way to do business.

The responsibility of making full and correct disclosure lies with the assured. The insurer may to a large extent remain inactive and wait for information to fall in his lap. The problem with this wide duty is that the assured, even though assumed to possess extensive experience from the insurance business, is not a professional insurer, and cannot be expected to know everything about the insurance business, nor can he read the mind of the insurer. One way of solving this is to use questionnaires. This would however perhaps make the process to stiff and by posing the question "is there anything else that the insurer should know about?" the scope of the necessary disclosure would remain unclear. Conclusively it may be hard for the insurer to know what circumstances is material and the sanctions for a breach is quite harsh, at least under the MIA, 1906. This may result in an "all or nothing disclosure", which is not an ideal situation for either of the parties.

The knowledge of the insurer is significant when analysing the duty of disclosure. Most of the information that the insurer needs in order to assess the risk is available in various ship registers and public databases, the insurer might not have to get any information at all directly from the assured. With modern technology, more and more information regarding ships is getting digitalized and thus getting more accessible to the insurer. However, despite all the modern time databases and ship registrars, the assured is still considered to have a closer connection to the object insured and accordingly the need for the duty of disclosure remains. There is significant rationale for keeping a quite strict legislation. Insurance as a way for a business to minimize the risk and transfer it to an insurer is a cornerstone in modern economy. A business with the proper insurance cover

will not have to go bankrupt when peril strikes; this is crucial for a stable economy and labour market, i.e. it is absolutely necessary to safeguard a well functioning insurance market where the insurance companies may properly calculate the risk. Also poorly run companies seek to obtain insurance and the law must be prepared for all eventualities and impose a just and fair share of liability on each of the parties. Even though there is no need for strict legislation when business relations are good, the legislator cannot assume that this will always be the situation. An Act should provide certainty and consistency into the market, and protect the parties from unreasonable consequences for their actions.

In the experience of the author, since the insurance business is exposed to stiff competition, and assured are viewed as customers and not advisories, the insurer will assist the assured in the process of diligence. How the disclosure works in real life will of course depend on the relationship between the insurer and the assured, the experience of the assured, and whether a broker on behalf of the assured is involved or not. The insurer will often take on a greater responsibility than he is legally obliged to. This perception has received some support in the statistics presented by the Law Commission in 2012. The figures shows that the when dealing with small businesses, the insurer is more active and asks more questions, thereby assisting the assured with the disclosure, than when dealing with larger businesses.[152]

To sum up the part concerning the knowledge of the parties, liability mainly lies with the assured. Neither the MIA, 1906 nor the NMIP imposes on the insurer to take an active part in retrieving the material circumstances regarding the risk. Even though both set of rules exclude actual and constructive knowledge of the insurer, the insurer is not obliged to use his sources of information to expand his knowledge. The NMIP however does state in the commentaries that the insurer must show due diligence with respect to the information given, meaning that he must notify the insurer if

[152] The Law Commission, *supra* note 101, p. 8.

he knows that the information is incorrect or incomplete. The availability of information though not having any extensive legal significance, it may still be important in practice. On a tough market, the insurers are fighting to sign policies with the shipowners in their respective target group. It should always be remembered that since the insurance policy is a commercial contract and the assured is actually a client of the insurer, it is in the insurer's interest to treat the assured accordingly. There is thus no practical reason to why the insurer should remain inactive during the pre-contractual negotiations just because the assured has an active duty of disclosure. Most of the information is available to the insurer on the public domain or in various registers. In the experience of the author, insurers therefore do not bother the assured to provide them with information they can retrieve themselves just as easily. Furthermore, as the Plan entitles the insurer to obtain information directly from the ship's classification society, the duty of disclosure in some situations becomes obsolete. Finally, even though the assured is a professional with more knowledge about insurance than the typical client, it still is the insurer who has most knowledge on this field and in many cases he is expected to lead the assured through the process of concluding an insurance policy.

As indicated in chapter 4, the marine insurance law is currently being revived in the UK and in Australia. The duty of disclosure has been identified as one of the areas in most need of modification due to the high numbers of litigation. Effective disclosure supports a competitive and efficient insurance market capable of providing cover for a huge variety of risks. Change in law should lower the transaction costs, as it would bring certainty into the system. However, the insurance market is generally not very open to changes. This can partially be explained by the very essence of the market being created to oppose risk. Changes means uncertainty and uncertainty means risk and risk costs money. The English insurance law has developed during a very long period of time and this gives a perception of certainty, despite the high number of lawsuits. When new concepts are brought in, it normally takes long time for the market to accept it, one

example being the reluctance to use the latest version of the institute clauses[153]. Another reason is that the imbalance and uncertainty serves the purposes of two groups, namely insurance companies and lawyers. There are accordingly more things to consider when discussing changes in the field of marine insurance law, e.g. relating to politics and what influence these two groups has in society.

Considering the ever-ongoing globalization and shifts of economic power centers, the UK insurance market must make sure it does not fall behind. As a shipowner seeking cover for a risk, the NMIP would defiantly seem more attractive than the MIA, 1906. The applicable law is however only one of many things taken into consideration when signing a policy of marine insurance. Nevertheless, the most reasonable for the insurance market as a whole would be to change the rules according to the suggestions laid forward by the Law Commission. The current MIA, 1906 was drafted to serve a market that was quite different from the present one and acting in a completely different environment.

If the development in the UK may be major amendments, the trend in the Nordic market is harmonization and small adjustments. The latest version was the first on to which shipowners from all Nordic countries were signatory parties. The Plan itself did not see any noteworthy changes and no major revisions are expected in the foreseeable future.

Finally, the fictional scenario presented in the first chapter will be commented. The insurer had in this case acted as expected when dealing with a seemingly good client. This is a typical example of when the duty of disclosure seems to be superfluous. However, the scenario shows that the duty of disclosure remain to be a fundamental guarantee as it protects the insurer from liability if any unexpected circumstance is exposed after the contract is concluded. The insurer shall not be punished for going beyond his legal obligations while assisting the assured on fulfilling the duty of

[153] Standard contracts used in the London insurance market.

disclosure. Had the change of flag occurred during the contract period, he would have been protected by the rules of warranty/alteration of risk.

Supplement A

Relevant Sections of the MIA, 1906

Section 17 Insurance is uberrimæ fidei.
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 the other party.

Section 18 Disclosure by assured.

(1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.

(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) In the absence of inquiry the following circumstances need not be disclosed, namely:

  (a) Any circumstance which diminishes the risk

  (b) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know;

  (c) Any circumstance as to which information is waived by the insurer;

  (d) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty.

(4) Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact.

(5) The term "circumstance" includes any communication made to, or information received by, the assured.

Section 20 Representations pending negotiation of contract

(1) Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract.

(2) A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) A representation may be either of a representation of as to a matter of fact, or as to a matter of expectation or belief.

(4) A representation as to a matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer.
(5) A representation as to a matter of expectation or belief is true if it be made in good faith.
(6) A representation may be withdrawn or corrected before the contract is concluded.
(7) Whether a particular representation be material or not is, in each case, a question of fact.

Section 84 Return for failure of consideration.

(1) Where the consideration for the payment of the premium totally fails, and there has been no fraud or illegality on the part of the assured or his agents, the premium is thereupon returnable to the assured.
(2) Where the consideration for the payment of the premium is apportionable and there is a total failure of any apportionable part of the consideration, a proportionate part of the premium is, under the like conditions, thereupon returnable to the assured.
(3) In particular -
    (a) Where the policy is void, or is avoided by the insurer as from the commencement of the risk, the premium is returnable, provided that there has been no fraud or illegality on the part of the assured; but if the risk is not apportionable, and has once attached, the premium is not returnable:

Supplement B

Relevant Sections of the NMIP, 2013

Chapter 3 - Duties of the Person Effecting the Insurance and of the Assured

Section 1. Duty of Disclosure of the Person Effecting the Insurance

§ 3-1. Scope of the duty of disclosure
The person effecting the insurance shall, at the time the contract is concluded, make full and correct disclosure of all circumstances that are material to the insurer when deciding whether and on what conditions he is prepared to accept the insurance.

If the person effecting the insurance subsequently becomes aware that he has given incorrect or incomplete information regarding the risk, he shall without undue delay notify the insurer.

§ 3-2. Fraudulent misrepresentation
If the person effecting the insurance has fraudulently failed to fulfil his duty of disclosure, the contract is not binding on the insurer.

The insurer may also cancel other contracts he has with the person effecting the insurance by giving fourteen days' notice.

§ 3-3. Other failure to fulfil the duty of disclosure
If the person effecting the insurance has, at the time the contract is concluded, in any other way failed to fulfil his duty of disclosure, and it must be assumed that the insurer would not have accepted the insurance if the person effecting the insurance had made such disclosure as it was his duty to make, the contract is not binding on the insurer.

If it must be assumed that the insurer would have accepted the insurance, but on other conditions, he shall only be liable to the extent that it is proved that the loss is not attributable to such circumstances as the person effecting the insurance should have disclosed. Liability is limited in the same manner if the person effecting the insurance has been in breach of the duty of disclosure after the contract was concluded, unless it is proved that the loss occurred before the person effecting the insurance was able to correct the information supplied by him.

In the cases referred to in paragraph 2, the insurer may cancel the insurance by giving fourteen days' notice.

§ 3-4. Innocent breach of the duty of disclosure

If the person effecting the insurance has given incorrect or incomplete information without any blame attaching to him, the insurer is liable as if correct information had been given, but he may cancel the insurance by giving fourteen days' notice.

§ 3-5. Cases where the insurer may not invoke breach of the duty of disclosure

The insurer may not plead that incorrect or incomplete information has been given if, at the time when the information should have been given, he knew or ought to have known of the matter. Nor may he invoke § 3-3 and § 3-4 if the circumstances about which incorrect or incomplete information was given have ceased to be material to him.

§ 3-6. Duty of the insurer to give notice

If the insurer becomes aware of the fact that incorrect or incomplete information has been given, he shall, without undue delay and in writing, notify the person effecting the insurance of the extent to which he intends to invoke § 3-2, § 3-3 and § 3-4. If he fails to do so, he forfeits his right to invoke those provisions.

§ 3-7. Right of the insurer to obtain particulars from the ship's classification society, etc.

The person effecting the insurance shall, at the insurer's request, provide him with all available particulars from the classification society concerning the condition of the ship before and during the insurance period.

If the person effecting the insurance fails to fulfil his duty under paragraph 1, the insurer may cancel the insurance by giving fourteen days' notice, but with effect no earlier than on arrival of the ship at the nearest safe port, in accordance with the insurer's instructions.

The insurer is authorised to obtain information referred to in paragraph a directly from the classification society and from the relevant authorities in the country where the ship is registered or has been trough port-State control. The person effecting the insurance shall be notified no later than the time when the insurer seeks to obtain such information.

Section 2. Alteration of the risk

§ 3-8 Aleration of the risk

An alteration of the risk occurs when there is a change in the circumstances which, according to the contract, are to form the basis of the insurance, and the risk is thereby altered contrary to the implied conditions of the contract.

A change of the State of registration, of the manager of the ship or of the company which is responsible for the technical/maritime operation of the ship shall be deemed to be an alteration of the risk as defined by paragraph 1. The same applies to a change of classification society.

§ 3-9. Alteration of the risk caused or agreed to by the assured
If, after conclusion of the contract, the assured has intentionally caused or agreed to an alteration of the risk, the insurer is free from liability, provided that it may be assumed that he would not have accepted the insurance if, at the time the contract was concluded, he had known the alteration would take place.

If it may be assumed that the insurer would have accepted the insurance, but on other conditions, he is only liable to the extent that the loss is proved not to be attributable to the alteration of the risk.

§ 3-10. Right of the insurer to cancel the insurance
If an alteration of the risk occurs, the insurer may cancel the insurance by giving fourteen days' notice.

§ 3-11. Duty of the assured to give notice
If the assured becomes aware that an alteration of the risk will take place or has taken place, he shall without undue delay, notify the insurer. If the assured, without justifiable reason, fails to do so, the rule in § 3-9 shall apply, even if the alteration was not caused by him or took place without his consent, and the insurer may cancel the insurance by giving fourteen days' notice.

§ 3-12. Cases where the insurer may not invoke alteration of the risk
The insurer may not invoke § 3-9 and § 3-10 after the alteration of the risk has ceased to be material to him.

The same applies if the risk is altered by measures taken for the purpose of saving human life, or by the insured ship salvaging or attempting to salvage ship or goods during the voyage.

Bibliography

Legislation

Insurance Contracts Act of 16 June 1989 (no 69).

Marine Insurance Act 1906 c. 41 (Regnal. 6_Edw_7).

The Nordic Marine Insurance Plan of 2013 – based on the Norwegian Marine Insurance Plan of 1996, Version 2010.

Doctrine

Arnould's Law of Marine Insurance and Average, 17th ed., Sweet & Maxwell, London, 2008.

Bennet, H., *The Law of Marine Insurance*, 2nd ed., Oxford University Press Inc., New York, United States, 2006.

Bogdan, M., *Komparativ Rättskunskap*, 2nd ed., Nordstedts Juridik AB, Stockholm, 2003.

Clarke, M. A., *The Law of Insurance Contracts*, 2nd ed., LLP, London, 1994.

Falkanger, T., Bull, H. J., and Brautaset, L., *Scandinavian Maritime Law*, 3rd ed., Universitetsforlaget, Oslo, 2011.

Soyer, B., *Warranties in Marine Insurance*, 2nd ed., Cavendish, London 2006.

Wilhelmsen, T.-L. and Bull, H. J., *Handbook in Hull Insurance*, 1st ed., Gyldendal Norsk Forlag AS, Oslo, 2007.

Internet sources

Marsh Insights: Marine Market Monitor, July 2012, http://uk.marsh.com/Portals/18/Documents/MMM_Issue1_2012.pdf (accessed: 2013-01-02).

NMIP 2013 – Commentary, http://www.nordicplan.org/Documents/Nordic%20Plan%202013/NordicPlan2013-Commentary.pdf, (accessed : 2013-01-03).

Nordic Plan Agreement between the Nordic Shipowners' Associations and Cefor, http://www.cefor.no/Documents/Clauses/Nordic%20Plan%202013/2010%20sign%20Nordic%20Plan%20Agreement.pdf (accessed: 2012-10-19).

Power Point slides from a public seminar "The Marine Insurance markets – an overview and update" held at the Norwegian Business School by Associate Proffessor and Lawyer Cathrine Bjune at 8th of Mars 2012, http://www.cee.ntu.edu.sg/Events/Documents/Maritime%20Events/8Mar12/Presentation_Cathrine%20Bjune.pdf. (accessed: 2013-01-02).

Presentation of the signatory parties to the NMIP and presentation of the Plan's Standing Revision Committee, http://www.cefor.no/Clauses/Nordic-Plan-2013/ (accessed: 2012-11-19).

Presentation of William Murray, Lord Mansfield, http://www.westminster-abbey.org/our-history/people/william-murray,-lord-mansfield (accessed: 2013-01-02).

Review of Marine Insurance Act 1909, http://www.alrc.gov.au/inquiries/marine-insurance-act-1909 (accessed: 2013-12-15).

The Australian Law Reform Commission - Appendix D Draft Explanatory Memorandum, http://www.austlii.edu.au/au/other/alrc/publications/reports/91/app4.html (accessed: 2013-12-15).

The History of Cefor, http://www.cefor.no/About-Cefor/History/ (accessed 2012-10-16).

The Law Commission, *Consultation Paper No 204* and the Scottish Law Commission *Discussion Paper No 155, Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties,* p. 21, http://lawcommission.justice.gov.uk/docs/cp204_ICL_business-disclosure.pdf (accessed: 2012-11-20).

Table of Cases

Australian Cases

Akedian Co Ltd v *Royal Insurance Australia Ltd and Sun Alliance Australia. Ltd* (1997) 148 ALR 480.

English Cases

Alexander v *Campbell (1872)* 41 L. J. Ch. 478

Assicurazioni Generali SpA v *Arab Insurance Group (BSC)* [2002] C.L.C. 164.

Banque Financiere de la Cite SA (formerly Banque Keyser Ullmann SA) v *Westgate Insurance Co (formerly Hodge General & Mercantile Co Ltd)* [1991] 2 A.C. 249

Banque Keyser Ullman SA v *Skandia (UK) Insurance Co Ltd* [1990] 1 QB 665.

Bell v. *Lever Brothers Ltd*. [1932] A.C. 161.

Berger & Light Diffusers Pty Ltd. v *Pollock* [1973] 2 Lloyd's Rep. 442.

Bissett v *Wilkinsson* [1927] AC 177.

Bowden v *Vaughan* (1809) 10 east 415

Carter v *Boehm* (1766) 3 Burr. 1905, 97 E.R. 1162.

Commercial Union Assurance Co Ltd v *Niger Co Ltd* (1921) 6 Ll. L. Rep. 239.

Container Transport International Inc v *Oceanus Mutual Underwriting*

Association (Bermuda) Ltd. [1982] 2 Lloyd's Rep. 178

De Hahn v. *Hartley* (1786) 99 E.R. 1130.

Demetriades & Company v *The Northern Insurance Company Limited* 1925 S.L.T. 322

Doheny v *New India Assurance Ltd* (Court of Appeal) [2004] EWCA Civ 1705

Economides v *Commercial Union Assurance Co Plc* [1998] Q.B. 587.

Edgington v *Fitzmaurice* (1885) 29 Ch. D. 459.

Genesis Housing Association Ltd v Liberty Syndicate Management Ltd (for and on behalf of Syndicate 4472 at Lloyd's) [2012] EWHC 3105 (TCC).

Hamilton & Co v *Eagle Star & British Dominions Insurance Co Ltd* (1924) 19 L1 L Rep 242, 245-246.

Hazel (for Lloyd's Syndicate 260) v *Whitlam* [2004] EWCA Civ 1600.

HIH Casualty and General Insurance Ltd v *Chase Manhattan Bank* [2003] UKHL/6.

JEB Fasteners Ltd. v *Marks Bloom & Co* [1983] 1 All E.R. 583.

Joel v *Law Union and Crown Insurance Co* [1908] 2 K.B. 863.

L'Alsacienne Première Société v *Unistorebrand International Insurance AS* [1995] LRLR 333, 349.

London Assurance v *Mansel* (1879) 11 Ch. D. 363.

London General Insurance Company v *General Marine Underwriters' Association* [1920] 3 K.B. 23.

Manifest Shipping Co Ltd v *Uni-Polaris Insurance Co Ltd (The Star Sea)* [2003] 1 A.C. 469.

Newcastle Fire Insurance Co v *Macmorran & Co* (1815) 3 E.R. 1057.

Pan Atlantic Insurance Co Ltd v *Pine Top Insurance Co Ltd.* [1995] 1 AC 501.

Pawson v *Watson* (1778) 98 E.R. 1361.

Perrins v *The Marine & General Travellers' Insurance Society* (1859) 2 El & El 317,324

Simner v *New India Insurance Co Ltd*. [1995] L.R.L.R. 240.

St Paul Fire & Marine Insurance Co (UK) Ltd v *McConnel Dowell Contractors Ltd* [1995] 2 Lloyd's Rep 116.

Traill v. Barring (1864) 4 De G J & S 318, 326, 329

WISE (Underwriting Agency Ltd v *Grupo Nacional Provincial SA* [2004] EWCA Civ 962 at [46].

Zurich General Accident & Liability Insurance Co v *Leven* 1940 SC 406, 415.

Norwegian cases

ND 1978.139.

ND 1978.31 Sandefjord

ND 1988.216.

ND 1990.194.

ND 1991.204.