# MARINE INSURANCE

UBC Law 332

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OUTLINE

## Table of Contents

# 1 Introduction

## *1.1 History*

Origins date back to at least 215 B.C.

First codification was the English Marine Insurance Act of 1906. This is the act upon which all subsequent acts are based, including the Canadian statutes. This was a codification of existing jurisprudence and practice. The English Act was probably received in Canada as Canadian law.

## *1.2 Governing Law/Legislation*

Although the law of insurance is generally thought to come within Provincial jurisdiction under the heading "property and civil rights" in the Constitution Act, marine insurance is now understood to be a matter governed by Canadian Maritime Law (Triglav v Terrasses Jewellers, [1983] SCR 283).

### 1.2.1 Federal Marine Insurance Act

Following the decision in Triglav v Terrasses Jewellers, the Federal Parliament enacted the Federal Marine Insurance Act, S.C. 1993, c.22. This act is modelled on the English Marine Insurance Act of 1906.

### 1.2.2 Provincial Insurance Acts

Prior to the enactment of the Federal Marine Insurance Act many of the provinces had their own acts governing marine insurance. The British Columbia statute is the Insurance (Marine) Act, RSBC 1996 c. 230. These provincial statutes are also modelled on the English Marine Insurance Act of 1906 and are therefore not substantially different from the Federal Act.

The various provinces also have insurance statutes of general application which purport to apply to marine insurance. The B.C. statute is the Insurance Act, RSBC 1996, c.226. Part 2 of this Act contains various provisions of general application. Subject to certain specified exceptions specified in section 3(b), these provisions purport to apply to contracts of marine insurance. The B.C. Insurance Act purports to regulate such things as:

- contents of a policy
- appraisals
- relief against forfeiture
- waiver
- misrepresentation

- payment of premiums
- time for payment of claims
- limitation periods, and
- third party claims against insurers

#### *1.2.2.1 Ordon v Grail*

Although the various provincial acts have not been repealed and remain in force, the decision of the Supreme Court of Canada in Ordon v Grail casts serious doubt on whether they have any application to contracts of marine insurance. There may, however, be an exception for limitation periods. (see s.10 below)

## *1.3 Nature and Scope of Marine Insurance*

The nature and scope of marine insurance is determined by reference to s. 6 of the Marine Insurance Act and by the definitions of "marine adventure" and "maritime perils".

It is a contract of indemnity but the extent of the indemnity is determined by the contract.

It relates to losses incidental to a marine adventure or to the building, repairing or launching of a ship.

A marine adventure is any situation where the insured property is exposed to maritime perils.

Maritime perils are perils consequent on or incidental to navigation.

### 1.3.1 s.6 MIA

6. (1) A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the insured, in the manner and to the extent agreed in the contract, against

(a) losses that are incidental to a marine adventure or an adventure analogous to a marine adventure, including losses arising from a land or air peril incidental to such an adventure if they are provided for in the contract or by usage of the trade; or

(b) losses that are incidental to the building, repair or launch of a ship.

(2) Subject to this Act, any lawful marine adventure may be the subject of a contract.

### 1.3.2 s.2(1) "Marine Adventure"

"marine adventure" means any situation where insurable property is exposed to maritime perils, and includes any situation where

(a) the earning or acquisition of any freight, commission, profit or other pecuniary

benefit, or the security for any advance, loan or disbursement, is endangered by the exposure of insurable property to maritime perils, and

(b) any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property, by reason of maritime perils;

### 1.3.3 s.2(1) "Maritime Perils"

"maritime perils" means the perils consequent on or incidental to navigation, including perils of the seas, fire, war perils, acts of pirates or thieves, captures, seizures, restraints, detainments of princes and peoples, jettisons, barratry and all other perils of a like kind and, in respect of a marine policy, any peril designated by the policy;

# 2 Types of Marine Insurance

## *2.1 Hull and Machinery*

## *2.2 Cargo*

## *2.3 P&I Cover*

## *2.4 Other Third Party Liability Coverage*

Towers Legal Liability

Ship Builders and Repairers Legal Liability

Terminal Operators Legal Liability

Marinas and Dock Owners Legal Liability

## *2.5 Specified Perils v All Risks*

It is important to distinguish between marine policies that are specified perils v all risks.

A specified perils policy is one in which the insurer agrees to indemnify the assured for losses caused by specific perils that are identified in the policy. The Canadian Hulls (Pacific) Clauses are examples of a specified perils policy. A loss must be caused by one of the specified perils in order for it to be covered by the policy. Most hull and machinery policies on commercial vessels are insured on a specified or named perils basis.

An all risks policy, on the other hand, provides much broader coverage. An all risks policy is one in which the insurer agrees to indemnify the assured "against all risks of loss or damage". Things that are not covered by an all risks policy need to be specifically excluded. Most cargo policies and many policies on yachts and pleasure craft are all risks policies.

# 3 Parties

## *3.1 Assured*

The assured, also called the insured, is the person who has taken out the policy and is obliged to pay the premium.

## *3.2 Additional Assureds*

Policies of marine insurance frequently either name additional assureds or contain a clause that extends the insurance to additional assureds by description.

## *3.3 Underwriters*

Underwriters are the entities that agree to indemnify the assured upon the happening of an insured loss. They are also called insurers. Underwriters can be individuals or corporations. Underwriters at Lloyds are represented by various syndicates who negotiate and sign policies on behalf of the "names" they represent.

It is not unusual for a policy of marine insurance to have more than one underwriter. In fact, it is usual for there to be more than one. The policy will name the underwriters and specify the extent of each underwriters interest. The first underwriter named on the policy is the "lead" underwriter. This is the underwriter that will make most decisions that are required to be made in the event of a loss.

### 3.3.1 Underwriting Agents

Underwriting agents are entities that have the authority to enter into or sign insurance policies on behalf of the underwriters. They sign as agent on behalf of the underwriters and, because they are agents only, they are not personally liable to the assured under the insurance contract. An underwriting agent may represent more than one underwriter and may sign on behalf of more than one underwriter.

### 3.3.2 P&I Clubs

P&I Clubs are similar to a mutual insurance company that offers third party liability coverage to shipowners. The members of a P&I Club are shipowners. In a sense, the shipowners are both insurers and assureds. P&I Clubs do not normally issue policies of insurance. Rather, the terms of the coverage they provide are usually set out in the club's Rules.

### 3.3.3 Insurance Companies

The traditional insurance companies also operate in the marine insurance field as underwriters. They may or may not use an underwriting agent.

### *3.4 Brokers*

Brokers play an important role in marine insurance. They are the agents of the assured. The broker will meet with the assured to determine its insurance requirements. The broker will then canvass the market to find underwriters willing to insure the assured and will negotiate terms with those underwriters. The broker may also become involved in the event of a loss by presenting the loss to underwriters and negotiating on behalf of the assured.

# 4 The Marine Insurance Contract

Although the MIA regulates certain aspects of a marine insurance contract it generally preserves freedom of contract. Therefore, the parties are, for the most part, free to determine the nature and extent of their obligations and responsibilities. The terms of the contract are usually contained in the policy of insurance. There may, however, be a slip or cover note which also evidences the terms of the insurance contract.

When reviewing the provisions of the MIA it is extremely important to note that many sections are prefaced with "Unless the policy otherwise provides...". This phrase preserves the parties rights to chose their own contractual terms and it is therefore always important to review the policy terms to see if they differ from the provisions of the MIA.

## *4.1 Requirements*

### 4.1.1 ss.25-28 MIA

A contract of marine insurance is not admissible in evidence unless it is evidenced by a marine policy. (s.25(1) MIA)

A marine policy need not be executed and issued when the contract is made but may executed and issued afterwards. (s25(2) MIA)

A Marine policy must specify:

- the name of the insured,
- the subject matter insured (see also s.28 MIA),
- the perils insured against,
- the voyage or period covered,
- the sum insured, and
- the name of the insurer. (s.26 MIA)

A marine policy must be signed by the insurer. (s.27 MIA)

## *4.2 Time and Voyage Policies (s. 29 MIA)*

A marine policy may be a voyage or time policy. If it uses the words “at and from” or “from” a particular place to another place it is a voyage policy. If it insures the subject matter for a period of time it is a time policy.

A voyage policy comes to an end at the conclusion of the voyage. A time policy comes to an end upon the expiry of the time specified.

### 4.2.1 Special Rules For Voyage Policies ss.40-46 MIA

For a voyage policy there is an implied term that the marine adventure will commence within a reasonable time and if it is not, the insurer may avoid the contract unless the insurer waived the right to avoid or was aware of the circumstances causing the delay. (s.40 MIA)

A voyage policy will not attach if the ship sails from or to places different from those specified. (s. 41 MIA)

Where after the commencement of the risk the destination of the ship is voluntarily changed the insurer is discharged from all liability for any loss occurring on or after the time the intention to change is manifested, unless the policy provides otherwise. (s.42 MIA)

A deviation without lawful excuse from the agreed course or customary course discharges the insurer from liability for any loss occurring on or after the deviation. Failure to call at the ports of discharge in the order specified or in their geographical order will be a deviation. (s. 43 MIA)

A voyage policy must be carried out with reasonable dispatch and the insurer is discharged from all liability for any loss occurring on or after the time when the delay becomes unreasonable. (s.44 MIA)

Pursuant to s.45 MIA a deviation or delay is justified if it is

(a) authorised by any special term in the marine policy;

(b) caused by circumstances beyond the control of the master and the master's employer;

(c) reasonably necessary in order to comply with an express warranty or an implied warranty;

(d) reasonably necessary for the safety of the ship or subject-matter insured;

(e) for the purpose of saving human life or aiding a ship in distress where human life

may be in danger;

(f) reasonably necessary for the purpose of obtaining medical aid for any person on board the ship; or

(g) caused by the barratrous conduct of the master or crew, if barratry is one of the perils insured against.

Where transhipment at an intermediate port or place is necessitated by a peril insured against the insurer continues to be liable under the voyage policy for a loss occurring on or after the date of transhipment. (s. 46 MIA)

## *4.3 Valued and Unvalued Policies (s.30 MIA)*

A marine policy may be a valued or unvalued policy. If it specifies the agreed value of the subject matter it is a valued policy. If it does not specify the agreed valued but instead provides a limit of the sum insured it is an unvalued policy.

In the event of a total loss under a valued policy, the amount of the indemnity is the agreed value.

In the event of a total loss under an unvalued policy, the amount of the indemnity is calculated pursuant to s. 19 MIA. In the case of a ship, the indemnity is the value of the ship at the time of the commencement of the risk plus the insurance charge. In the case of cargo, the indemnity is the prime cost of the goods, plus the shipping and insurance expenses.

## *4.4 Floating Policies (s.31 MIA)*

A marine policy may be a floating policy. A floating policy is one which leaves the name of the ship or other particulars to be provided at a later time by declaration or endorsement. Floating policies are frequently used by shippers who routinely ship cargo. Floating policies avoid a shipper having to negotiate a new policy for every shipment. Using a floating policy the essential terms of the insurance contract are agreed in advance. Thereafter, all of the shippers goods will be covered by that policy provided the shipper declares the goods as required by the contract. The shipper must declare all of the goods that are covered by the policy and their value. A failure to properly declare will jeopardise the insurance coverage although an omission or error made in good faith may be rectified even after a loss or the arrival of the goods. If a declaration of value is not made until after a loss or arrival of the goods, the indemnity is calculated as though the policy was an unvalued policy.

## *4.5 Construction of the Contract*

The general rules of interpretation of contracts apply to insurance policies.

### 4.5.1 Intention of the Parties

The first rule of interpretation of contracts is that the court will consider the contract as a whole

to search for an interpretation that is consistent with and promotes the intention of the parties to the contract. (Consolidated Bathurst v Mutual Boiler & Machinery, [1980] 1 S.C.R. 888) The application of this general rule is not, however, always straight forward.

### 4.5.2 Narrow Construction of Exceptions

Generally, courts tend to broadly interpret coverage clauses and narrowly interpret exclusions. ( Reid Crowther v Simcoe & Erie General Insurance (1993)13 C.C.L.I. (2d) 16)

### 4.5.3 Contra Proferentem

If there is any ambiguity in the policy, such ambiguity is almost always resolved in favour of an interpretation that benefits the insured. This is an application of the doctrine known as contra proferentem, which means the words of a contract should be interpreted against the interests of the person who drafted it.

A review of the cases interpreting marine insurance policies will uncover many cases where the courts seem to have used the doctrine of contra proferentem as a tool to avoid the plain meaning of the policy and the intention of the parties as disclosed by the words used. Further, such a review might lead one to believe that the doctrine of contra proferentem is the first rule of interpretation of insurance contracts. This is, however, not the case. Consolidated Bathurst makes it very clear that the doctrine of contra proferentem is but one tool to determine the true intent of the parties. The approach set out in Consolidated Bathurst was recently restated by the Supreme Court of Canada in Bristle v Westbury Life Insurance Co., (1992) 13 C.C.L.I. (2d) 1. In that case the Supreme Court noted that where two or more meanings are possible the court should select the meaning that promotes the intent of the parties. Further, the Supreme Court specifically said that courts should avoid an interpretation which will give either a windfall to the insurer or an unanticipated recovery to the insured.

## *4.6 The Premium ss. 47-50 MIA*

### 4.6.1 Amount of Premium s.47 MIA

If the premium is not specified in the policy a reasonable premium is payable.

### 4.6.2 Obligation to Pay ss.48 & 49 MIA

The obligation to pay the premium is the assured's although the broker can also be liable if it effects the policy on behalf of the assured.

### 4.6.3 Return of Premium ss.82-85 MIA

A premium or part thereof is returnable to the assured where the policy contains a provision requiring the premium to be returned upon the happening of an event and that event happens. (s.83 MIA)

A premium or part thereof is returnable to the assured where there has been a total failure of consideration and there is no fraud or illegality on the part of the assured. (s.84 MIA)

A premium or part thereof is returnable to the assured where the circumstances described in subsections 2 through 11 of s. 85 MIA apply:

> (2) Where a marine policy is void, or is avoided by the insurer as of the commencement of the risk, and there is no fraud or illegality on the part of the insured or the insured's agent, the premium is returnable.
>
> (3) Where the risk is not apportionable and has once attached, subsection (2) does not apply and the premium is not returnable.
>
> (4) Where the subject-matter insured or part of the subject-matter insured has never been exposed to any peril insured against, the premium or a proportionate part of the premium, as the case may be, is returnable.
>
> (5) Where the subject-matter is insured "lost or not lost" and has arrived at its destination safely before the contract is concluded, subsection (4) does not apply and the premium is not returnable unless, at the time the contract is concluded, the insurer knows of the safe arrival.
>
> (6) Where an insured has no insurable interest throughout the period of the risk, the premium is returnable.
>
> (7) Subsection (6) does not apply in respect of a contract by way of gaming or wagering and the premium is not returnable.
>
> (8) Where an insured is over-insured under an unvalued policy, a proportionate part of the premium is returnable.
>
> (9) Where an insured has a defeasible interest in the subject-matter insured that is terminated during the period of the risk, the premium is not returnable.
>
> (10) Subject to subsections (2) to (9), where an insured is over-insured by double insurance, a proportionate part of the premiums is returnable.
>
> (11) Subsection (10) does not apply
>
> > (a) where the double insurance is knowingly effected by the insured, in which case none of the premiums is returnable; and
> >
> > (b) where the policies are effected at different times and either the earlier policy has at any time borne the entire risk or a claim has been paid on the earlier policy in respect of the full sum insured by it, in which case the premium for the earlier policy is not returnable and the premium for the later policy is returnable.

### 4.6.4 If Insurer Fails to Return Premium

It is vitally important that an insurer return the premium when required to do so. This is so because many breaches of the express or implied terms of the policy ( i.e. non-disclosure or misrepresentation) have the effect of giving the insurer the right to elect to void the contract rather than voiding the contract *ab initio*. The return of the premium is evidence that the insurer elects to treat the insurance contract as void. An insurer who fails to return the premium will be held to have waived its right to treat the contract as voided. (Neepawa Yacht v Laurentian Insurance, (1994) D.R.S. 95-04330; Harold A Burner v Sun Insurance, [1952] I.L.R. 1-069)

# 5 Utmost Good Faith, Misrepresentation and Disclosure

## *5.1 Utmost Good Faith s.20 MIA*

> 20. A contract is based on the utmost good faith and, if the utmost good faith is not observed by either party, the contract may be avoided by the other party.

## *5.2 Disclosure s.21 MIA "material circumstances"*

The disclosure requirements are set out in s. 21 MIA as follows:

> 21. (1) Subject to this section, an insured must disclose to the insurer, before the contract is concluded, every material circumstance that is known to the insured.
>
> (2) Subject to this section, an agent who effects insurance for an insured must disclose to the insurer, before the contract is concluded,
>
> (a) every material circumstance that is known to the agent; and
>
> (b) every material circumstance that the insured must disclose, unless the insured learned of it too late to communicate it to the agent.
>
> (3) A circumstance is material if it would influence the judgement of a prudent insurer in fixing the premium or determining whether to take the risk.
>
> (4) Whether any circumstance that is not disclosed is material or not is a question of fact.
>
> (5) In the absence of any inquiry, the following circumstances need not be disclosed:
>
> (a) any circumstance that diminishes the risk;
>
> (b) any circumstance that is known to the insurer;
>
> (c) any circumstance as to which information is waived by the insurer; and
>
> (d) any circumstance the disclosure of which is superfluous by reason of any express warranty or implied warranty.
>
> (6) For the purposes of this section,
>
> (a) an insured is deemed to know every circumstance that, in the ordinary course of business, ought to be known by the insured;

> (b) an agent is deemed to know every circumstance that, in the ordinary course of business, ought to be known by, or to have been communicated to, the agent; and
>
> (c) an insurer is presumed to know circumstances of common notoriety and every circumstance that, in the ordinary course of an insurer's business, ought to be known by an insurer.
>
> (7) If an insured or an agent of an insured fails to make a disclosure as required by this section, the insurer may avoid the contract.
>
> (8) In this section, "circumstance" includes any communication made to, or information received by, the insured.

The following points should be noted:

- The insured is obligated to disclose to the insurer every material circumstance.
- A circumstance or fact is material if it would affect either the premium or the decision to accept the risk.
- The disclosure must be made before the contract is concluded.
- Failure to properly disclose material facts entitles the insurer to avoid the contract. The contract is not automatically terminated, the insurer must elect to avoid it and must return the premium.

## *5.3 Misrepresentation s. 22 MIA*

Misrepresentations by the assured are dealt with in s. 22 MIA as follows:

> 22. (1) Every material representation made by the insured or the insured's agent to the insurer during the negotiations for the contract and before the contract is concluded must be true.
>
> (2) A representation is material if it would influence the judgement of a prudent insurer in fixing the premium or determining whether to take the risk.
>
> (3) Whether any representation is material or not is a question of fact.
>
> (4) A representation may be as to a matter of fact or as to a matter of expectation or belief.
>
> (5) A representation as to a matter of fact is deemed to be true if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer.
>
> (6) A representation as to a matter of expectation or belief is deemed to be true if it is made in good faith.
>
> (7) A representation may be withdrawn or corrected before a contract is concluded.
>
> (8) If any material representation made by the insured or the insured's agent to the insurer during the negotiations for the contract is not true and is not withdrawn or corrected before the contract is concluded, the insurer may avoid the contract.

The following points should be noted:

- The misrepresentation must have been made during the negotiations and must not have been withdrawn or corrected before the contract is concluded.
- A representation is material if it would affect either the premium or the decision to accept the risk.
- Representations are not limited to questions of fact but can also relate to expectations or beliefs although the latter are deemed to be true if made in good faith.
- A material misrepresentation entitles the insurer to avoid the contract. The contract is not automatically terminated, the insurer must elect to avoid it and must return the premium.

### *5.4 Examples of Material Facts*

The following examples of material are taken from Strathy & Moore, Law and Practice of Marine Insurance in Canada, at pp. 56-57:

- whether the ship was missing at the time the risk was placed;
- that the ship had gone into port for repairs at the commencement of the voyage;
- that the ship had gone aground and was leaking;
- the age of the vessel;
- that the vessel was to be towed up and down river;
- that two scows were towed together, rather than singly;
- that the vessel was generally weak and did not have a certificate required under the Canada Shipping Act; and
- the unfavourable claims history of the insured.

## 6 Insurable interest ss.7-19 MIA

The MIA s. 7 requires that the assured have an insurable interest in the subject matter of the marine insurance contract. This requirement is to prevent the contract from being a gaming or wagering contract.

Insurable interest is defined relatively broadly in s. 8 MIA:

> 8. (1) Subject to this Act, a person who has an interest in a marine adventure has an insurable interest.
>
> (2) A person has an interest in a marine adventure if the person has a legal or equitable relation to the adventure, or to any insurable property at risk in the adventure, and may benefit from the safety or due arrival of insurable property, may be prejudiced by its loss, damage or detention or may incur liability in respect of it.

An insurable interest can be defeasible or contingent (s.9) or a partial interest (s.10). The master and crew have an insurable interest for their wages (s.11). A person who advances freight also has an insurable interest (s.12) as does a mortgagee (s.16).

If the assured does not have an insurable interest, the policy is void. (s.18 MIA)

# 7 Perils

As we have seen, s. 26 MIA requires that the policy specify the perils insured against. Further, the definition of maritime perils in s. 2 (1) lists the traditional perils covered by a marine insurance policy. These are the minimum perils one will usually find in a marine insurance policy. Many policies extend coverage to include additional perils. Each policy must be carefully reviewed to determine which perils are covered and which are excluded.

Section 53(1) MIA provides that an insurer is liable for a loss proximately caused by an insured peril even if misconduct or negligence of the crew is also an operative cause.

> **53.** (1) Subject to this Act and unless a marine policy otherwise provides, an insurer is liable only for a loss that is proximately caused by a peril insured against, including a loss that would not have occurred but for the misconduct or negligence of the master or crew.

## *7.1 Insured Perils*

### 7.1.1 Perils of the Sea

Perils of the sea is included in the definition of "maritime perils" and is further defined in s.2(d) of the Schedule to the MIA as meaning "fortuitous accidents or casualties of the seas, but does not include ordinary action of the wind and waves".

It is not necessary that the loss be caused by extraordinary violence of the winds or waves in order for it to be a peril of the sea. It is, however, necessary that there be an accident or casualty that could not have been foreseen as one of the necessary incidents of the adventure. (Wilson Sons & Co. v Xanthos, (1887) 12 App. Cas. 503)

Although foreseeability is a key element of a peril of the sea, foreseeable heavy weather will not always operate to exclude a peril of the sea (as it does with peril of the sea defence in a carriage of goods case). A loss caused by the accidental incursion of sea water into a vessel in foreseeable heavy weather will *prima facie* be a peril of the sea. It is the fortuitous entry of sea

water that is the peril of the sea. (Canada Rice Mills v Union Marine, [1941] A.C. 55)

The leading Canadian cases on what constitutes a peril of the sea are Century Insurance Company of Canada v Case Existological Laboratories Ltd. (The "BAMCELL II"), [1983] 2 S.C.R. 47, and C.C.R. Fishing v British Reserve Insurance Co., [1990] 1 S.C.R. 814. In both cases the insured vessels sinking due to the entry of sea water. In the first case the vessel sank because an employee had negligently left a valve opened. In the second case the vessel sank because a valve was left open and water entered through two corroded screws. In both cases the Supreme Court held that the unintentional entry of sea water into a ship was a peril of the sea. It did not matter that the unintentional entry of sea water was due to negligence or some other cause.

In order for a peril to be "of the sea" it must be something unique to the sea. If it is a peril that could operate on land it is not a peril of the sea. ( Century Insurance Company of Canada v Case Existological Laboratories Ltd. (The "BAMCELL II"), [1983] 2 S.C.R. 47)

### 7.1.2 Fire

Losses caused by fire are generally covered by marine policies. This includes fire losses caused by negligence of the crew (Bush v Royal Exchange (1818) 2 B & Ald. 73) and fire losses caused by arson provided the assured was not privy to the arson (Slattery v Mance, (1962) 1 Q.B. 676).

Damage caused by measures taken to suppress a fire will also be covered, however, if there is damage caused to avoid a fire there will not be coverage. (Watson & Sons v Firemen's Fund, [1922] K.B. 355)

### 7.1.3 Pirates and Thieves

The coverage afforded to losses caused by pirates and thieves must be considered with reference to the definitions set out in the Schedule to the MIA. The term pirates is defined as including "passengers on the insured ship who mutiny and persons who attack the ship from land". The term thieves is defined as not including "persons who commit a clandestine theft or passengers, officers or members of the crew of the insured ship who commit a theft".

### 7.1.4 Captures, Seizures and Restraints

The coverage afforded to losses caused by captures, seizures, restraints of Princes etc. must also be considered with reference to the definitions set out in the Schedule to the MIA. Arrests etc. of kings, princes, and people is defined as including "political or executive acts, but does not include riot or ordinary judicial process".

### 7.1.5 Jettisons

Jettison is the act of throwing goods or equipment overboard to save life or the maritime adventure. It is a general average act and is expressly dealt with in section 65 of the MIA.

### 7.1.6 Barratry

Barratry is defined in the Schedule to the MIA as including "every wrongful act wilfully committed by the master or crew of the insured ship to the prejudice of the owner or charterer of the ship".

## *7.2 Excluded Perils*

Section 53(2) enumerates the perils that are expressly excluded by the MIA.

> (2) Without limiting the generality of subsection (1), an insurer is not liable for any loss attributable to the wilful misconduct of the insured nor, unless the marine policy otherwise provides, for
>
> (*a*) in the case of insurance on a ship or goods, any loss proximately caused by delay, including a delay caused by a peril insured against;
>
> (*b*) ordinary wear and tear, ordinary leakage or breakage or inherent vice or nature of the subject-matter insured;
>
> (*c*) any loss proximately caused by vermin; or
>
> (*d*) any loss or damage to machinery not proximately caused by maritime perils.

It should be noted and remembered that these exclusions only apply "unless the marine policy otherwise provides". Many policies do provide coverage for some or all of these exceptions.

### 7.2.1 Wilful Misconduct

The wilful misconduct exception must be read together with s. 53(1) of the MIA. Pursuant to s. 53(1), if a loss is caused by a covered peril it does not matter if there was also misconduct or negligence. In order for the loss to be excluded the misconduct must be "wilful". Such conduct goes far beyond negligence or even gross negligence. It requires an element of intention. (McCulloch v Murray, [1942] S.C.R. 141)

### 7.2.2 Delay

Losses caused by delay are excluded from coverage even if the delay is caused by a peril that is insured against.

### 7.2.3 Wear and Tear etc.

Losses caused by ordinary wear and tear, ordinary leakage or breakage or inherent vice are not covered. Such losses are not fortuities. They are to be expected in the ordinary course of things and for this reason are not properly the subject of insurance, the purpose of which is to provide protection in the case of fortuities. (Patterson v Harris, (1868) 18 UCCP 305)

### 7.2.4 Vermin

The exclusion of vermin from coverage is primarily only of historical interest. At one time vermin were a major cause of loss and damage. Today, losses caused by vermin are rare.

### 7.2.5 Loss or Damage to Machinery

The exclusion for loss or damage to machinery not otherwise covered by a specified peril should be considered in light of the modern "inchmaree" clauses found in most policies. The "inchmaree" clauses are not standardised but they generally extend coverage to loss or damage caused by "bursting of boilers, breakage of shafts or any latent defect in the machinery or hull" provided "such loss or damage has not resulted from want of due diligence by the Assured, Owners or Managers". The inchmaree clause also extends coverage to loss of or damage caused by negligence of the Masters, Officers, Crew or Pilots but subject to the same proviso that there must not have been a want of due diligence by the Assured etc.

## *7.3 All Risks Policies*

Policies that provide "all risks" coverage must be distinguished from those that provide named perils coverage. "All Risks" policies of insurance provide coverage against all risk of damage or loss but also provide exclusions. The exclusions must be carefully reviewed. To the extent that any loss comes within the exclusions it will not be covered.

Moreover, even if a loss does not come within an exclusion it may still not be covered under an "All Risks" policy. The leading case on the meaning of "all risks" is British and Foreign Marine Insurance Company Limited v Gaunt, [1921] A.C. 41. In this case the House of Lords held that the words "all risks" do not cover all damage however caused and specifically held that the words would not cover damage caused by wear and tear, inevitable deterioration or inherent vice. The court further held that "All Risks" policies cover only damage caused by an accident or due to some fortuitous circumstance or casualty. The various judgements of the law lords are captured by the following quotation from Lord Sumner at p.57:

> "There are, of course, limits to "all risks". They are risks and risks insured against. Accordingly the expression does not cover inherent vice or mere wear and tear or British capture. It covers a risk, not a certainty; it is something, which happens to the subject-matter from without, not the natural behaviour of that subject-matter, being what it is, in the circumstances under which it is carried. Nor is it a loss which the assured brings about by his own act, for then he has not merely exposed the goods to the chance of injury, he has injured them himself."

Therefore, in order for there to be coverage under an "All Risks" policy the loss must have been caused by a fortuity i.e. an accident or casualty. A loss caused by wear and tear, deterioration or inherent vice of the subject matter insured is not covered.

### *7.4 Two or More Concurrent Causes*

In Charterhouse Properties Ltd. v Laurentian Pacific Insurance, (1993) 75 B.C.L.R. (2d) 299, it was held that where damage is caused by two independent concurring causes, one of which is covered by the policy and the other is not expressly excluded, the damage is recoverable. Conversely, if one of the concurring causes is excluded by the terms of the policy the damage is not recoverable.

However, in C.C.R. Fishing Ltd. v Tomenson Inc., (1990) 43 C.C.L.I. 1, the Supreme Court of Canada was called upon to determine whether there was coverage for a sinking which was caused by a combination of factors namely, failure to close a valve and corrosion of cap screws. The Supreme Court ultimately found that both of these causes were insured perils but nevertheless considered whether there would have been coverage if an excluded peril had been a contributing cause. On this issue the Court said:

> "I am of the view that it is wrong to place too much emphasis on the distinction between proximate and remote cause in construing policies such as this...Realistically speaking, it must be recognised that several factors may combine to result in a loss at sea. It is unrealistic to exclude from consideration any one of them, provided it has contributed to the loss. What is essential in order to establish that the loss is "fortuitous" is an accident caused by the intervention of negligence, or adverse or unusual conditions without which the loss would not have occurred. This is the shared idea which underlies the exclusion from coverage of damage due to ordinary wear and tear or inherent vice.... On this reasoning, it does not matter if one of the causes of the loss is ordinary wear and tear or inherent vice, provided that an efficient or effective cause of the loss - one without which the loss would not have occurred - was fortuitous...
>
> It should be sufficient to bring the loss within the risk if it is established that, viewed in the entire context of the case, the loss is shown to be fortuitous in the sense that it would not have occurred save for an unusual event not ordinarily to be expected in the normal course of things."

## 8 Warranties

### *8.1 What is a warranty*

A warranty is defined in s.32 MIA as follows:

> **32.** (1) In this section and sections 33 to 39, "warranty" means a promissory warranty by which the insured
>
> (*a*) undertakes that some particular thing will or will not be done or that some condition will be fulfilled; or
>
> (*b*) affirms or negates the existence of particular facts.
>
> (2) A warranty may be an express warranty or an implied warranty.

## *8.2 Implied Warranties*

There are three warranties implied by the MIA. They are the warranty of legality, neutrality and seaworthiness.

### 8.2.1 Legality s.34 MIA

> **34.** There is an implied warranty in every marine policy that the marine adventure insured is lawful and, in so far as the insured has control, will be carried out in a lawful manner.

The warranty of legality is one which is often expressly included in policies as well as implied. Where there is an express warranty of legality it will have precedence over the implied warranty to the extent the two are inconsistent.

In Harbour Inn Seafoods v Switzerland (1991) 6 ANZ Ins. 61-048, it was held that a breach of the collision regulations was a breach of the implied warranty of legality.

In James Yachts Ltd. v Thames and Mersey Marine Insurance Co. [1976] I.L.R. 1-751, it was held that a breach of Municipal by-laws was a breach of the implied warranty of legality that discharged the insurer from liability.

### 8.2.2 Neutrality s.36 MIA

> **36.** (1) Where in any marine policy insurable property is expressly warranted to be neutral, there is an implied condition in the policy
>
> (*a*) that the property will have a neutral character at the commencement of the risk and that, in so far as the insured has control, that character will be preserved during the risk; and
>
> (*b*) where the property is a ship, that, in so far as the insured has control, the papers necessary to establish the neutrality of the ship will be carried on the ship and will not be falsified or suppressed and no simulated papers will be used.
>
> (2) If any loss occurs through a breach of the implied condition referred to in paragraph (1)(*b*), the insurer may avoid the contract.

### 8.2.3 Seaworthiness ss.37 & 38 MIA

> **37.** (1) There is an implied warranty in every voyage policy that, at the commencement of the voyage, the ship will be seaworthy for the purpose of the particular marine adventure insured.
>
> (2) Where a voyage policy attaches while the ship is in port, there is an implied warranty in the policy that the ship will, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port.
>
> (3) Where a voyage policy relates to a voyage performed in different stages during which the ship requires different or further preparation or equipment, there is an implied warranty in the policy that, at the commencement of each stage, the ship is seaworthy for the purposes of that stage.

> (4)There is no implied warranty in any time policy that the ship will be seaworthy at any stage of the marine adventure, but where, with the privity of the insured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.
>
> (5)A ship is deemed to be seaworthy if it is reasonably fit in all respects to encounter the ordinary perils of the seas of the marine adventure insured.
>
> **38.** (1) There is no implied warranty in any marine policy on insurable property, other than a ship, that the insurable property is seaworthy.
>
> (2) There is an implied warranty in every voyage policy on insurable property, other than a ship, that, at the commencement of the voyage, the ship is seaworthy and reasonably fit to carry the insurable property to the destination contemplated by the policy.

The implied warranty of seaworthiness applies with full effect only to voyage policies. The warranty is that the ship will be seaworthy "at the commencement of the voyage" for the particular adventure insured. A seaworthy ship is one that is "reasonably fit in all respects to encounter the ordinary perils of the adventure insured". In a time policy there is no warranty of seaworthiness but "where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness". Thus, in a voyage policy the insurer needs to prove only one thing; that the ship was unseaworthy at the commencement of the voyage. In a time policy, on the other hand, the insurer needs to prove three things; that the ship was unseaworthy, that the unseaworthiness caused the loss, and that the assured was privy to the unseaworthy state of the ship.

The warranty of seaworthiness relates not only to the hull but also to the machinery and equipment, the crew, and the way in which a ship is loaded (or overloaded). In Laing v Boreal Pacific (2000) 264 N.R. 378, which concerned a time policy, it was held that an overloaded vessel was unseaworthy to the knowledge of the owner and the insurer was entitled to avoid liability.

There is no implied warranty of seaworthiness with respect to property other than a ship, i.e. to cargo but, if the policy is a voyage policy there is an implied warranty that the ship is seaworthy.

## *8.3 Express Warranties*

### 8.3.1 s.33 MIA

> **33.** (1) An express warranty may be in any form of words from which the intention to warrant may be inferred.
>
> (2) An express warranty must be included in, or written on, the marine policy or be contained in a document incorporated by reference into the policy.
>
> (3) An express warranty does not exclude an implied warranty, unless they are inconsistent.

### 8.3.2 Express Warranty v Suspensive Conditions

Pursuant to s. 33, an express warranty may be in any form of words from which the intention

to warrant may be inferred. Unfortunately, it has proven difficult for insurers to find the exact words that will lead to the required inference. Words such as "warranted that" have been held to not necessarily delineate a warranty (Century Insurance Company of Canada v Case Existological Laboratories Ltd. (The "BAMCELL II"), [1983] 2 S.C.R. 47) Similarly, the words "warranted free from any claim..." were held not to delineate a warranty in Tulloch v Canada, (1989) 96 N.R. 51. In both of these cases the courts held that it is necessary to distinguish between a true warranty and warranty that merely delimits and is part of the description of the risk. The latter is often referred to as a "suspensive condition". The difference between the two is the consequence that flows from the breach. A breach of a true warranty discharges the insurer from liability from the time of the breach. A breach of a suspensive condition, on the other hand, merely interrupts or suspends the coverage during the currency of the breach.

The words of the policy must therefore be carefully considered to determine whether a particular provision is a true warranty. Where the words used specifically provide that a breach of a particular provision will discharge the insurer from liability from the date of the breach, then the provision will most likely be construed as a true warranty. However, if the consequences of a breach are not described, regard must be had to the nature of the provision and the surrounding circumstances to determine its proper classification.

### 8.3.3 Examples of Express Warranties

The number and type of express warranties are limited only by the imagination and ingenuity of underwriters. Almost anything can be made to be an express warranty provided the proper words are used. Notwithstanding this total freedom to make almost anything a warranty most policies contain relatively few. The more common express warranties are:

- Navigation and trading warranties that limit the geographical areas in which a vessel may operate;
- Laid up and out of commission warranties that require a vessel to be laid up for a defined period or generally;
- Identity of the master warranties that require a named person to command the vessel;
- Towing warranties that prohibit the insured vessel from being towed except where customary or when the vessel is in need of assistance;
- Private pleasure use warranties that prohibit any commercial use of a yacht; and
- Warranties regarding surveys and inspections that require inspections to be conducted or recommendations by surveyors to be complied with.

### 8.3.4 Consequences of Breach

#### *8.3.4.1 s.39 MIA*

> **39.** (1) Subject to this section, a warranty must be exactly complied with, whether or not it is material to the risk.
>
> (2) Subject to any express provision in the marine policy or any waiver by the insurer, where a warranty is not exactly complied with, the breach of the warranty discharges the insurer from liability for any loss occurring on or after the date of the breach, but does not affect any liability incurred by the insurer before that date.
>
> (3) A warranty that the subject-matter insured is "well" or "in good safety" on a particular day is not breached if the subject-matter is safe at any time during that day.
>
> (4) A breach of a warranty is excused if, because of a change of circumstances, the warranty ceases to be applicable to the circumstances contemplated by the contract or if compliance with the warranty is rendered unlawful by any subsequent law.
>
> (5) It is no defence to a breach of a warranty that the breach was remedied and the warranty complied with before any loss was incurred.

It should be noted that a breach of a warranty discharges an insurer from liability from the date of the breach. This is the case even if the breach is remedied before any loss. The insurer is also not required to make an election as with a failure to disclose material facts or a misrepresentation. Moreover, there is no requirement that the warranty be material to the risk.

The consequences of a breach of warranty may only be avoided by an express relieving provision in the policy or by a waiver of the breach by the insurer. A waiver will only be found where the insurer has full knowledge of the breach and demonstrates an intention to treat the contract as continuing. (Daneau v Laurent Gendron Ltee, [1964] Ll. L. R. 220)

# 9 Losses and Measure of Indemnity

## *9.1 Duty of Assured to mitigate s. 80 MIA*

> **80.** It is the duty of an insured and an insured's agent to take such measures as are reasonable for the purpose of averting or diminishing a loss under the marine policy.

## *9.2 Total Loss ss.54-56 MIA*

> **56.** (1) A loss is an actual total loss if the subject-matter insured is destroyed or is so damaged as to cease to be a thing of the kind insured or if the insured is irretrievably deprived of the subject-matter.
>
> (2) Where a ship engaged in a marine adventure is missing and no news of the ship is received within a reasonable period, an actual total loss may be presumed.

### 9.2.1 Measure of Indemnity for Total Loss s.67 MIA

> **67.** Subject to this Act and any express provision in the policy, the measure of indemnity in respect of a total loss of the subject-matter insured is
>
> (*a*) in the case of an unvalued policy, the insurable value of the subject-matter; and
>
> (*b*) in the case of a valued policy, the value of the subject-matter specified by the policy.

## *9.3 Constructive Total Loss s. 57 MIA*

In essence, a constructive total loss occurs when the insured property is still in existence but either cannot be retrieved or the cost of retrieving and/or repairing it will exceed its value. Constructive total loss is defined and dealt with in s. 57 MIA but the parties are free to themselves define those situations that will constitute a constructive total loss under their policy.

> **57.** (1) Unless a marine policy otherwise provides, a loss is a constructive total loss if the subject-matter insured is reasonably abandoned because the actual total loss of the subject-matter appears unavoidable or the preservation of the subject-matter from actual total loss would entail costs exceeding its value when the costs are incurred.
>
> (2) Without limiting the generality of subsection (1), a loss is a constructive total loss if
>
> (*a*) in the case of a ship or goods, the insured is deprived of possession of the ship or goods by reason of a peril insured against and either the insured is unlikely to recover the ship or goods or the cost of recovery would exceed the value of the ship or goods when recovered;
>
> (*b*) in the case of a ship, the ship is so damaged by a peril insured against that the cost of repairing it would exceed the value of the ship when repaired; or
>
> (*c*) in the case of goods, the goods are so damaged that the cost of repairing and forwarding them to their destination would exceed the value of the goods on arrival.
>
> (3) For the purposes of paragraph (2)(*b*), in estimating the cost of repairing a ship, no deduction may be made in respect of general average contributions to the repairs payable by other interested persons, but account is to be taken of the cost of future salvage operations and of any future general average contributions to which the ship would be liable if repaired.

### 9.3.1 Abandonment ss.58-60 MIA

Where there is a constructive total loss the assured may either treat the loss as a partial loss or may treat it as a total loss. If the assured elects to treat it as a total loss, the assured must abandon the property to its insurers by delivering a notice of abandonment. The insurer may either accept the notice of abandonment or reject it. If the insurer accepts the notice it becomes obligated to pay as though there was a total loss and it acquires the interest of the assured in the property.

> **58.** (1) An insured may treat a constructive total loss as a partial loss or may abandon the subject-matter insured to the insurer and treat the constructive total loss as an actual total loss.

(2) Subject to this section and section 59, an insured who elects to abandon the subject-matter insured to the insurer must give a notice of abandonment to the insurer with reasonable diligence after the insured receives reliable information of the loss.

(3) An insured who receives doubtful information of a loss is entitled to a reasonable time to make inquiries before giving a notice of abandonment.

(4) An insured may give a notice of abandonment orally or in writing, or partly orally and partly in writing, and in any terms that indicate the insured's intention to abandon unconditionally the insured interest in the subject-matter to the insurer.

(5) If an insured fails to give a notice of abandonment as required by this section, the constructive total loss may be treated only as a partial loss.

**59.** (1) An insured is not required to give a notice of abandonment to the insurer if

(*a*) the loss is an actual total loss;

(*b*) notice is waived by the insurer; or

(*c*) at the time the insured receives information of the loss, there is no possibility of benefit to the insurer if notice were given to the insurer.

(2) An insurer who has reinsured a risk is not required to give a notice of abandonment to the reinsurer.

**60.** (1) If an insured gives a notice of abandonment as required by section 58, the rights of the insured are not prejudiced by a refusal of the insurer to accept the abandonment.

(2) An acceptance of an abandonment may be either express or implied from the conduct of the insurer, but the mere silence of an insurer after a notice of abandonment is given does not constitute an acceptance.

(3) On acceptance of an abandonment, the abandonment is irrevocable.

(4) On acceptance of an abandonment, the insurer

(*a*) conclusively admits liability for the loss and the sufficiency of the notice of abandonment; and

(*b*) is entitled to acquire the interest of the insured in whatever remains of the subject-matter insured, including all proprietary rights incidental thereto.

(5) On acceptance of the abandonment of a ship, the insurer is entitled to

(*a*) any freight being earned at the time of, or earned subsequent to, the casualty causing the loss, less the costs incurred in earning it after the casualty; and

(*b*) if the ship is carrying the shipowner's goods, reasonable remuneration for the carriage of the goods subsequent to the casualty.

## *9.4 Partial Losses*

**61.** (1) A partial loss is any loss that is not a total loss.

(2) Where insured goods reach their destination in specie but cannot be identified by reason of obliteration of marks or otherwise, the loss, if any, is a partial loss.

(3) Unless a marine policy otherwise provides, an insured who brings an action for a total loss but establishes only a partial loss may recover for a partial loss.

## 9.4.1 Measure of Indemnity for Partial Loss

### *9.4.1.1 Of Ship*

**68.** Subject to any express provision in the marine policy, the measure of indemnity in respect of a partial loss of a ship is

(*a*) where the ship is repaired, the reasonable cost of the repairs less the customary deductions, but not exceeding the sum insured in respect of any one casualty;

(*b*) where the ship is partially repaired, the aggregate of the reasonable cost of the repairs, as determined under paragraph (*a*), and the reasonable depreciation, if any, arising from the unrepaired damage, the aggregate not exceeding the cost, as determined under paragraph (*a*), of repairing the whole damage; and

(*c*) where the ship is not repaired and is not sold in a damaged state during the risk, the reasonable depreciation arising from the unrepaired damage, but not exceeding the cost, as determined under paragraph (*a*), of repairing the damage.

### *9.4.1.2 Of Goods*

**70.** (1) Subject to any express provision in the policy, the measure of indemnity in respect of a partial loss of goods or movables is

(*a*) where part of the goods or movables insured by an unvalued policy is totally lost, the insurable value of the part lost, ascertained as in the case of a total loss;

(*b*) where part of the goods or movables insured by a valued policy is totally lost, that proportion of the value of the goods or movables specified by the policy that the insurable value of the part lost bears to the insurable value of all the goods or movables, ascertained as in the case of an unvalued policy; and

(*c*) where the whole or any part of the goods or movables is delivered damaged at its destination, that proportion of the insurable value of all the goods or movables, in the case of an unvalued policy, or the value of all the goods or movables specified by the policy, in the case of a valued policy, that the difference between the gross value of all the goods or movables in a sound condition at that destination and their gross value in their damaged condition at that destination bears to the gross value of all the goods or movables in a sound condition at that destination.

## *9.5 Sue and Labour Expenses s.79 MIA*

**79.** (1) Where a marine policy contains a sue and labour clause, the engagement thereby entered into is supplementary to the contract and the insured may recover from the insurer any expenses properly incurred under the clause, even if the insurer has paid for a total loss of the subject-matter insured or the subject-matter insured is warranted free from particular average, either wholly or under a specified percentage.

(2) General average losses, general average contributions, salvage charges, and expenses incurred for the purpose of averting or diminishing a loss by a peril not insured against are not recoverable under a sue and labour clause.

### *9.6 Third Party Liability s.73 MIA*

> **73.** Subject to any express provision in the policy, the measure of indemnity in respect of any liability to a third party that is expressly insured against by a marine policy is the amount paid or payable by the insured to the third party in respect of the liability.

### *9.7 Proportional Liability s. 75 MIA*

> **75.** Where a loss is recoverable under a marine policy, the insurer, or each insurer if there is more than one, is liable for that proportion of the measure of indemnity in respect of the loss that the amount subscribed by the insurer is of
>
> (*a*) in the case of an unvalued policy, the insurable value of the subject-matter; and
>
> (*b*) in the case of a valued policy, the value of the subject-matter specified by the policy.

### *9.8 Successive Losses s.78 MIA*

> **78.** (1) Subject to this Act and unless the marine policy otherwise provides, an insurer is liable for successive losses, even if the total amount of the losses exceeds the sum insured.
>
> (2) Where, under a marine policy, a partial loss that has not been repaired or otherwise made good is followed by a total loss, the insurer is liable only for the total loss.
>
> (3) Nothing in subsections (1) and (2) shall be construed as affecting the liability of an insurer under a sue and labour clause.

## 10 Prescription Periods and Notice Requirements

### *10.1 Prescription by Statute*

The MIA does not prescribe a limitation period for a claim under a marine insurance policy. This omission has resulted in a great deal of uncertainty as to whether there is a statutory limitation period applicable to such claims. This uncertainty arises because of the decision of the Supreme Court of Canada in *Ordon v Grail*, [1998] 3 S.C.R. 437. Until the decision in *Ordon v Grail* it was thought that the limitation periods prescribed by provincial statutes would apply to marine insurance claims. Within British Columbia, section 24 of the *Insurance Act* provides for a one year limitation period from the time of the furnishing of a proof of loss. However, with the decision of the Supreme Court of Canada in *Ordon v Grail*, [1998] 3 S.C.R. 437, it is now very doubtful whether provincial limitation periods are constitutionally applicable to matters otherwise governed by Canadian maritime law, including marine insurance.

The question of the applicable limitation period is further complicated by section 39 of the *Federal Court Act*. Section 39(1) provides that the laws relating to limitation "in force in any province between subject and subject" apply to proceedings in the Federal Court "in respect of any cause of action arising in that province". Section 39(2) provides that a cause of action arising

otherwise than within a province is subject to a six year limitation period.

At first reading section 39 of the *Federal Court Act* would seem to incorporate by reference the applicable provincial limitation period. It may, in fact, do so but only in respect of actions commenced in the Federal Court. It does not apply to actions commenced in any other court.

The application of provincial limitation periods to maritime matters was recently considered by the Federal Court in the case of *Geist et.al v Vancouver Marina et al.* (June 21, 2000) Registry No. T-1411-97). In this case Prothonotary Hargrave of the Federal Court held, on the basis of the *Ordon v Grail*, that the British Columbia *Limitation Act* was constitutionally inapplicable to a claim in contract and tort against a marina for damage to a vessel. Similar reasoning would likely apply in respect of a claim under a marine insurance policy. However, the Prothonotary also held that because of s. 39 (1) of the *Federal Court Act* the British Columbia Limitation Act was incorporated as federal law and therefore did apply to the action commenced in the Federal Court.

The important consequence of *Geist et.al v Vancouver Marina et al.* is that the limitation period applicable to a marine insurance claim may depend on the court in which the action is commenced and where the cause of action arose. If the action is commenced in the Federal Court and the cause of action arose solely within one province, the applicable limitation period could be that prescribed by the province in which the cause of action arose. If the action is commenced in the Federal Court and the cause of action arose otherwise than within a single province, the applicable limitation period could be the six years prescribed by section 39(2) of the *Federal Court Act*. If the action is commenced in a court other than the Federal Court section 39 has no application and the provincial limitation period is constitutionally inapplicable. In such a case there is either no prescribed limitation period or the matter is governed by common law equitable considerations of undue delay and prejudice rather than definite time limits. (*Roscoe's Admiralty Practice*, (5th ed.) at p.102; *The Kong Magnus,* [1891] P. 223)

## *10.2 Contractual Limitation and Notice Periods*

Some policies of marine insurance expressly provide for actions against insurers to be commenced within a set period of time (contractual limitation periods) or for notice of claims or possible claims to be given within a set period of time (contractual notice periods). Such contractual terms have been upheld and enforced by the courts. (See for example Robertson v Pugh (1888) 15 S.C.R. 706)

The validity of contractual limitation periods depends, in part, on the legislation that governs the particular insurance contract. As we have seen, the legislation governing the insurance contract may depend on the court in which the action is commenced as well as the place where the cause of action arose. Insofar as a matter might be governed by the Insurance Act of British Columbia, any contractual term limiting the time for bringing an action would be null and void to the extent that it is contrary to the one year period prescribed by section 24. This follows from section 4 of the Act which provides that the statutory limitation period applies "notwithstanding any law or contract to the contrary".

### *10.3 Relief Against Forfeiture*

Pursuant to the common law and law of equity as well as various statutes of general application, the Courts have a power and discretion to relieve against forfeiture. There have been many cases in which this discretion has been exercised to prevent an insurer from avoiding an insurance policy for breach of a condition, including a condition relating to notice. The predominant factor leading the Courts to exercise this discretion is lack of prejudice. The insurer cannot simply rely on the failure to give notice or the passage of time. Rather, the insurer must show that it has, in fact, been prejudiced in some material way, such as by a judgement having been rendered against the assured or by a disappearance of material witnesses or evidence. It is only when the insurer can show actual prejudice that the Courts will not exercise the discretion in favour of the assured and relieve against the forfeiture of the insurance policy.

## 11 Subrogation s.81 MIA

**81.** (1) On payment by an insurer for a total loss of the whole of the subject-matter insured or, if the subject-matter insured is goods, for any apportionable part of the subject-matter insured, the insurer becomes entitled to assume the interest of the insured in the whole or part of the subject-matter and is subrogated to all the rights and remedies of the insured in respect of that whole or part from the time of the casualty causing the loss.

(2) On payment by an insurer for a partial loss of the subject-matter insured, the insurer acquires no title to the subject-matter but is subrogated to all the rights and remedies of the insured in respect of the subject-matter from the time of the casualty causing the loss to the extent that the insured is indemnified, in accordance with this Act, by the payment for the loss.

## 12 Underinsurance, Overinsurance and Double Insurance

### *12.1 Underinsurance s.88 MIA*

**88.** Where an insured is insured for a sum that is less than the insurable value of the subject-matter insured, in the case of an unvalued policy, or less than the value of the subject-matter insured specified by the policy, in the case of a valued policy, the insured is deemed to be self-insured in respect of the uninsured difference.

### *12.2 Overinsurance s.85(8) MIA*

85(8) Where an insured is over-insured under an unvalued policy, a proportionate part of the premium is returnable.

### *12.3 Double Insurance s.86 MIA*

**86.** (1) An insured is over-insured by double insurance if two or more marine policies are effected by or on behalf of the insured on the same marine adventure and interest or part thereof and the sums insured exceed the indemnity allowed by

this Act.

### 12.3.1 Rights of Insured s. 86(2) MIA

86(2) An insured who is over-insured by double insurance

(*a*) may claim payment from the insurers in any order, unless the marine policy under which the claim is made provides otherwise, but may not receive more than the indemnity allowed by this Act;

(*b*) if claiming under a valued policy, shall give credit, as against the value specified in the policy, for any sum received by the insured under any other policy without regard to the actual value of the subject-matter insured;

(*c*) if claiming under an unvalued policy, shall give credit, as against the full insurable value, for any sum received by the insured under any other policy; and

(*d*) is deemed to hold any sum received in excess of the indemnity allowed by this Act in trust for the insurers, according to their right of contribution among themselves.

### 12.3.2 Rights of Insurers s.87 MIA

**87.** (1) Where an insured is over-insured by double insurance, each insurer is liable, as between the insurer and the other insurers, to contribute rateably to the payment of a loss in proportion to the amount for which the insurer is liable under the insurer's contract.

(2) An insurer who contributes more to the payment of a loss than required by subsection (1) is entitled to bring an action against the other insurers for contribution and to such other remedies as a surety is entitled to for paying more than the surety's proportion of a debt.

# 13 Miscellaneous Issues

## *13.1 Relief Against Forfeiture*

Most provinces have a statutory provision giving the courts the power to relieve against penalties and forfeiture. Section 24 of the Law and Equity Act of B.C. is typical:

> 24 The court may relieve against all penalties and forfeitures, and in granting the relief may impose any terms as to costs, expenses, damages, compensations and all other matters that the court thinks fit.

Additionally, s. 10 of the Insurance Act of B.C. contains a relief against forfeiture provision.

> 10 If there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss, and a consequent forfeiture or avoidance of the insurance in whole or in part, or if there has been a termination of the policy by a notice that was not received by the insured owing to the insured's

> absence from the address to which the notice was addressed, and the court deems it inequitable that the insurance should be forfeited or avoided on that ground or terminated, the court may, on terms it deems just, relieve against the forfeiture or avoidance or, if the application for relief is made within 90 days of the date of the mailing of the notice of termination, against the termination.

The validity and applicability of these provisions must be considered in light of the decision of the Supreme Court of Canada in Ordon v Grail. However, if such provisions are found to not be constitutionally applicable, the Ordon v Grail analysis might well lead a court to amend Canadian maritime law to incorporate the principles contained in these provisions. In either event, the court will look at the entire circumstances when considering whether to grant relief against forfeiture. An extremely important consideration is whether the insurer has been prejudiced by the failure to give notice.

## *13.2 Third Party Rights Against Insurers*

Many provincial statutes contain a provision giving injured persons a right of direct action against the insurer of the defendant. Section 24 of the B.C. Insurance Act is typical:

> 24 (1) If a judgement has been granted against a person in respect of a liability against which the person is insured and the judgment has not been satisfied, the judgment creditor may recover by action against the insurer the lesser of
>
> (a) the unpaid amount of the judgment, and
>
> (b) the amount that the insurer would have been liable under the policy to pay to the insured had the insured satisfied the judgment.
>
> (2) The claim of a judgment creditor against an insurer under subsection (1) is subject to the same equities as would apply in favour of the insurer had the judgment been satisfied by the insured.
>
> (3) This section does not apply in the case of a contract of automobile insurance.

Because of the constitutional issues regarding the applicability of provincial statutes to matters governed by Canadian maritime law there is an issue as to whether these statutes can apply to marine insurance.

Many marine insurance contracts contain a provision that makes the obligation to indemnify the assured conditional on the assured having paid the claim against it. This is done using words such as "shall become liable to pay and shall have paid...". These clauses are called “pay to be paid”. The effect of such clauses is that if the assured has not actually paid the injured party, because of bankruptcy or some other reason, the insurer is under no obligation to indemnify and the injured party cannot recover direct against the insurer. (Conohan v Cooperators 2002 FCA 60)