interpreting the Rotterdam Rules in the future. The chapter on Exclusions of Liability by Julian Clark and Jeffrey Thompson, as well as a chapter on a related subject by Dr. N.J. Margetson, both provide a clear analysis of the shifting burdens of proof under current law and how these might play out under the new Rules. And the chapter on the Duties of Shippers and Dangerous Cargoes, by Frank Stevens is extremely thorough, with extensive discussion of history, development and meaning of each relevant provision of the Rotterdam Rules. While *The Carriage of Goods by Sea Under the Rotterdam Rules* is not, and is not intended to be, a manual on the Rotterdam Rules, one suspects that it will be consulted frequently in the course of future litigation, to support—or attack—positions taken by litigants.

Nicholas DiMichael*

THE MODERN LAW OF MARINE INSURANCE, VOLUME 3. Edited by D. Rhidian Thomas. London: Informa Law, 2009. Pp. xxxvi/457. GBP 360.00. ISBN 9781843118121.

This is the third volume of a series started in 1996 by its learned editor and contributor, Prof. Rhidian Thomas.[1] The book, like its predecessors, consists of essays on special issues and developments of current interest. It is remarkable that a subject so famously ancient would present so many topics to write about.

An Anglo-American Subject

One might suppose that continual focus on the terms of a particular contract would make marine insurance decisions unattractive as academic subjects, but that has not been so. Sir Michael Mustill (as he then was) once wrote: "It is remarkable that marine insurance has attracted such a wealth of scholars who combined intellectual superiority, breadth of learning and

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[1]When this volume was published, D. Rhidian Thomas was Professor of Maritime Law and Director of the Institute of International Shipping and Trade Law at the School of Law, Swansea University. He is also the author and editor of a number of books on marine insurance.

practical acumen. . . . [N]o other branch of commercial law, and perhaps no legal topic of any kind, has been so richly endowed."[2] And he added that "[t]here is cross-citation of authorities between English, American and Commonwealth authorities to a degree which is rare in other fields." The volume of books and other writings on what would seem to be a pretty narrow patch of law might be explained by many factors. One would be the extent to which radically changing technology and new trading and transactional patterns have met new circumstances in an expanding world trade over the centuries. Another would be the extent to which these developments have led to the continual introduction of new policies and new clauses, which in turn has led to decisions on their meanings (both in isolation and in relation to other policies and clauses).

The writing of jurists and judges on a subject mainly formed by a single regime and defined in the same terms in both lands should be of equal interest in Britain and North America. In words often quoted, Justice Holmes wrote that "[t]here are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business."[3] The commerce has not been one way only. Dr. Wiswall points out much cross-pollination between the foremost admiralty judges on both sides of the ocean, especially Lord Stowell with Justice Story, and Dr. Lushington with Judge Ware.[4] And in recent notable English appeals,[5] in order to decide the meanings of decisions codified in the Marine Insurance Act ("MIA") 1906,[6] the courts have respectfully examined four nineteenth-century U.S. treatises, those of Kent, Duer, Parsons, and Phillips,[7] who in the nature of things had more early English than U.S. decisions to discuss, and have carried their doctrines on as U.S. law.

Multimodal Boundaries

One of the influences for change I have mentioned, an important one, is the wide spread of multimodal transport, joining sea, air, rail, road, or inland

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[2] Sir Michael John Mustill, *Fault and Marine Losses*, 1988 LLOYD'S MAR. & COM. L.Q. 310, 313 nn.8-9.

[3] Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co., 263 U.S. 487, 493, 1924 AMC 107, 109 (1924).

[4] F.L. WISWALL, JR., THE DEVELOPMENT OF ADMIRALTY JURISDICTION AND PRACTICE SINCE 1800: AN ENGLISH STUDY WITH AMERICAN COMPARISONS 31-32 (1970).

[5] Pan Atlantic Ins. Co. v. Pine Top Ins. Co., [1995] 1 A.C. 501, [1994] 2 Lloyd's Rep. 427 (H.L. 1994); Container Transport Int'l Inc. v. Oceanus Mutual Underwriting Ass'n, [1984] 1 Lloyd's Rep. 476 (C.A. 1984).

[6] 6 Edw. 7, ch. 41 (U.K. 1906).

[7] 3 JAMES KENT, COMMENTARIES ON AMERICAN LAW (1828); WILLARD PHILLIPS, A TREATISE ON THE LAW OF INSURANCE (1823); JOHN DUER, THE LAW AND PRACTICE OF MARINE INSURANCE (1845); THEOPHILUS PARSONS, TREATISE ON THE LAW OF MARINE INSURANCE (1868).

water transport with one or more of the others in a single adventure. Thus the Hague, Hague-Visby, Hamburg, or Rotterdam Rules are potentially put in play with the Warsaw Convention and a variety of national rules governing rail, road, and inland water carriage, each with their diverse liability provisions. For full protection, the shipper of cargo may need several types of insurance or reason to believe that one law of carrier liability will cover the whole transport. And if he buys a comprehensive coverage for all modes, the rate will depend in turn on the underwriter's expectation of the certainty of the law. This is the background of *Drawing lines—in the sand?* by Prof. Malcolm A. Clarke.[8] Referring mainly to carriage by sea and European land carriage, he discusses the difficulties of wordings of either exclusivity or deference in the several conventions and laws involved, pointing to the "network" system of the Rotterdam Rules as one potential source of confusion. This leads him to question the supposed line ("in the sand") between marine and non-marine insurance, and he proposes exploration of reasonable expectations as a solution to some issues of coverage. In the United States, a pattern as between sea and rail or road transport, at least, has been decided as maritime by the Supreme Court, holding that the Carmack Amendment did not apply to the cross-country rail trip under a maritime bill of lading with a Himalaya clause extending the ocean carrier's rights to the railroad.[9] Other combinations not dependent on admiralty jurisdiction, or not considered to be primarily for the purpose of sea carriage, impend and Professor Clarke's thoughts may be helpful.

Plumbing the Depths of Indemnity

A marine policy is said to be a contract of indemnity, which means that it holds the assured harmless, as Professor Thomas says in *The concept and measure of indemnity in marine policies*. But holding anyone harmless from casualty is manifestly an ideal and unlikely to be achieved (starting with the impracticality of instant performance). He examines indemnity not as a mere default rule but as a fundamental principle with insurable interest as its corollary and a place in the doctrines of subrogation and contribution. He deals with the measures of partial and total loss, the valued policy, which sidesteps insurable value, and with the limits and consequences of overval-

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[8]Malcolm A. Clarke is Professor of Commercial Contract Law at Cambridge University and author of *The Law of Insurance Contracts* (6th ed. 2009), the leading English treatise on insurance contract law generally. Among other subjects, his books deal with international road carriage in Europe and carriage by road and air.

[9]Kawasaki Kisen Kaisha, Ltd. v. Regal-Beloit Corp., 130 S. Ct. 2433, 2010 AMC 1521 (2010) (rail carriage); *see also* Royal & Sun Alliance Insurance, PLC v. Ocean World Lines, Inc., 612 F.3d 138, 2011 AMC 2784 (2d Cir. 2010) (road carriage).

uation and fraud and other common contract devices that modify indemnity, such as deductibles, franchises, and particular average warranties. In conclusion, he points out some unsatisfactory doctrines in the MIA that parties may do well to modify by contract. It makes explicit a subject we do not often think about and is a good thought piece for prospective assureds in a position to negotiate.

Delayed payment, however practically necessary for a short time, is mentioned above as a failure in the ideal of holding harmless. As we all know, however, payment is sometimes long delayed by unfruitful investigations and unsuccessful defenses, which may not be regarded as practical necessity. An assured's loss by such delay may be very considerable where, say, it prevents his getting a replacement vessel and receiving its income. David Foxton, Q.C.,[10] in *Can a marine insurer be liable for loss consequent on the late payment of indemnity?*, pursues the question in light of a recent ruling by the House of Lords apparently permitting consequential damages rather than merely interest for late payment of money, and phrasing the question as "whether the insurer's obligation to the insured is properly characterized as an obligation to pay a sum of money," a matter of debt, possibly compensated by interest but not consequential damages. This has reference to a view that the policy is an undertaking that the assured shall not suffer loss and is breached on the instant such loss occurs, giving rise to the insurer's liability in damages, as to which, in Lord Brandon's words in an earlier case, "[t]here is no such thing as a cause of action in damages for the late payment of damages." These concepts appear rather slippery as the author pursues them through the thicket of the jurisprudence and he can reach no definite conclusion for the future except that the insurer's immunity from consequential loss is vulnerable to change and "the desired destination and the route there remain elusive."

The article pertains to policies governed by English law and the issue is of only academic interest in the United States. Canadian maritime law recognizes a right to punitive damages springing from breach of utmost good faith, evidently without frequent awards.[11] In the United States, numerous state laws, but not all, allow damages for delayed payment, without apparent theoretical strain, and no general conclusion is possible in the confusion resulting from resort to state law under the noxious doctrine of the *Wilburn Boat* case,[12] the mention of which signals that we have now plumbed the Depth.

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[10]David Foxton, Q.C., specializes in commercial law and is a Special Professor at the University of Nottingham, lecturing on insurance law issues.

[11]GEORGE R. STRATHY & GEORGE C. MOORE, THE LAW AND PRACTICE OF MARINE INSURANCE IN CANADA 372-73 (2003).

[12]Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 1955 AMC 467 (1955).

Anonymous Assureds

Rather obviously, an underwriter agreeing to insure an undisclosed principal must have confidence in the agent's not having withheld critical information about the character of the principal. That does not commonly appear as an issue in marine insurance reports. The insurance of an undisclosed principal is much more likely to be an issue when a disclosed principal obtains coverage for additional assureds disclosed only by class descriptions of their relations with itself, in terms such as "associated," "interrelated," "operating with or for," and the like. This is a common situation and a glance through the topic in the AMC Digest reveals a remarkable incidence of claims as unnamed assureds in that situation. Prof. Howard Bennett,[13] in *The doctrine of the undisclosed principal and contracts of insurance,* discusses undisclosed principals to insurance contracts in respect of their express or implied exclusion, validity of their contracts, and determination of their coverage by a valid contract. The question of validity arises in regard to disclosure in placing, when the non-disclosure is obvious, and indeed necessary in the issuance of an open policy to a broker "for account of whom it may concern," but unacceptable when the principal's identity should be recognized to raise concern on the part of the underwriter. The more frequent issue of coverage arises from the insurer's later objection that the claimed assured is not a member of a class of designated additional assureds, either for the purpose of its claiming indemnity or being protected from subrogation by the insurer. The author discusses the interpretation and construction of the descriptions of assureds in light of the choice of words and also the significance of circumstances as indicative of intent.

When the Principal "Knows" What the Agent Knows

In *Fraud and insurance agents: The law after* Moore Stephens, Prof. Robert Merkin[14] considers his subject starting from the doctrine framed by two non-insurance fraud cases involving imputation of knowledge. The first, *Moore Stephens*,[15] is a recent case in the House of Lords and the other is an 1896 Chancery decision, *Re Hampshire Land Co.*[16] He says:

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[13]Howard Bennett is Hind Professor of Commercial Law at the University of Nottingham and the author of *The Law of Marine Insurance* (2d ed. 2006), a major comprehensive text, and other works in commercial law.

[14]Robert Merkin is Professor of Commercial Law in the University of Southampton, author of many books on insurance and reinsurance, and co-editor of *Lloyd's Reports: Insurance & Reinsurance*.

[15]Moore Stephens v. Stone & Rolls Ltd, [2009] UKHL 39 (HL).

[16]Re Hampshire Land Co., [1896] 2 Ch 743.

> At the heart of the *Moore Stephens* case was the question of attribution of conduct and imputation of knowledge, and in particular the scope of the exception to imputation of knowledge set out in *Re Hampshire Land Co.* Put briefly, *Re Hampshire Land Co* is regarded as having decided that if an agent has committed an act of fraud upon his principal, any knowledge of that fraud is not to be imputed to the principal.

In *Moore Stephens*, the principal was a corporation whose controlling employee defrauded banks with false documents in the principal's name. The banks then sued the corporation. The judgments in the case and others relevant provide Prof. Merkin with much to think about in relation to attribution of conduct and imputation of knowledge, which he carefully distinguishes from each other and finds confused in the courts. There is much to be learned here, or at least reminded of, about primary and vicarious liability and the elements of imputation in non-disclosures and subsequent conduct.

Institute Cargo Clauses 2009

The inclusion of these new policy terms in this book on law prompts me to repeat that marine insurance is *A Unique Conflation of Contract and "Law,"* as I once subtitled an explanation of it.[17] More briefly here, the "law" has been distilled from contract usages and stands mainly today as a body of default provisions effective when the parties do not agree otherwise, as they may do in these clauses. John Dunt and William Melbourne,[18] two men especially well qualified by their work on the clauses, provide a thorough, well-documented study of them in *Insuring cargoes in the new millennium: The Institute Cargo Clauses 2009.*

The 2009 Clauses are not an original work but a revision of the 1982 Clauses, which have done good service but needed refurbishment without changing the structure and without changing the intention very much, mainly in adjustments in favor of assureds, including redefinition of the coverage period. Nevertheless the number of changes is considerable. The authors explain why each was made and the questions, rulings, and criticisms that prompted it. They add an appendix showing clause-by-clause the changes made from the 1982 version. This chapter should be a valuable reference for

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[17]Graydon S. Staring, *The CMI Looks at Marine Insurance Law: A Unique Conflation of Contract and "Law,"* 2 BENEDICT'S MAR. BULL. 223 (2004).

[18]Messrs. Dunt and Melbourne are Consultants at Clyde & Co LLP and members of the Cargo Clauses Working Party of the Joint Cargo Committee, London. Mr. Dunt is Senior Research Fellow at the Institute of Maritime Law, University of Southampton.

shippers, lawyers, and others involved in frequent cargo carriage under these clauses or those of 1982.

Indefinable Piracy and Other Crimes

As everyone knows, piracy and related crimes have become daily occurrences, painful to their immediate victims and very costly to owners and insurers. The high costs, of course, have generated a lively interest in questions of coverage, if any, and where coverage might be found as between hull, war, and strikes. In these questions, characterization as piracy, theft, warlike hostilities, terrorism, or seizure (which are usually covered somewhere) or a malicious act (which is usually excluded) is critical. But discrimination does not stop at that level of taxonomy. In *Coverage against unlawful acts in contemporary marine policies*, Prof. Baris Soyer[19] explains the patterns of coverage for these acts and their distinctions from common speech and criminal law generally (e.g., theft is violent, not furtive) and the qualifications of motive, as financial, personal, political, or malicious, involved in classifying these crimes for coverage; some rather nice distinctions are made. In addition to the topics of piracy and theft, he explores barratry and the murky topic of coverage for ransom payments, the source of income to Somali pirates.

In *Challenges in modern marine insurance of shipowners' interests: piracy and terrorism*, Prof. Trina-Lise Wilhelmsen,[20] with characteristic thoroughness, discusses the Norwegian Conditions.[21] She emphasizes piracy, terrorism, and blocking and trapping, with plenty of related background in the Conditions, such as coverage of consequential damages from losses and delays, and interpretative authorities and canons. She compares particular Conditions with their English counterparts, notes disparities in the assignment of risks to marine or war (e.g, piracy to marine in Norway and now war in England) and points out where also gaps or overlaps may occur when an owner insures marine risks in one market and war risks in the other. It appears, regrettably, that as in England and the United States, the definitions of pirate and piracy in Norway are far from clear relationally, motivational-

[19]Baris Soyer is Professor of Commercial and Maritime Law and Director of Taught Master Programmes at the School of Law, Swansea University, and author of *Warranties in Marine Insurance* (Cavendish 2001), now in its second edition (Routledge 2006).

[20]Trina-Lise Wilhelmsen is a Professor and Director of the Scandinavian Institute of Maritime Law and author of several books and other writings on marine insurance and other commercial law subjects.

[21]These refer here to the Insurance Contract Act 1989/69, which is mandatory, and the Norwegian Marine Insurance Plan 1996, Version 2007, industry "standards."

ly, or even geographically (e.g., does "at sea" mean open sea, outside territorial waters, or high seas, a term not itself clearly defined?).

From the texts, as from the news reports, one is struck by the modern vagueness of piracy and precious nicety with which it is approached in the courts; we used to "know it when [we saw] it." When rather than the pirates our patience is tried, we may long for the clarity of the past, when one catching them in operation was expected to dispatch them summarily. Unfortunately, the modern Somali pirates are shrewd business men who may be the first to take security in the form of hostages aboard or ashore as a business plan, with the important feature that when any are ransomed others remain.[22]

Conflict of Laws—A Cruise on Waters of Discord

Professor Martin Davies[23] is the author of *Warranties and utmost good faith in US marine insurance contracts.* These two topics are the most discordant in U.S. marine insurance law. Teaching at Tulane in New Orleans, Prof. Davies is at the heart of a large maritime commerce and seat of the Fifth Circuit Court of Appeals. That busy maritime court is the most conspicuous creator of discord in both topics, as the author of an implausible implied warranty of seaworthiness in time hull policies, which it miscalls the American rule,[24] and the sole major court to deny that the doctrine of utmost good faith is established in maritime law.[25] Prof. Davies writes here, however, not as a reformer but as a guide through the thicket of applying these doctrines and the larger field of inconsistencies in the lower courts of the whole country in their choices of maritime or state law for these issues.

He starts with the notorious *Wilburn Boat* case and its vague ruling that enforcement of warranties (and other features?) as to which there is no "judicially established admiralty rule" is to be left to state laws. Recognizing *Wilburn Boat* as the font of all the confusion, he shows with examples that

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[22]While pirates held young Julius C.,
He promised them, when he was free,
He'd crucify the lot
(Which they took for jovial tommyrot);
And freed with ransom duly paid,
He duly kept the promise made.

[23]Martin Davies is Admiralty Law Institute Professor of Maritime Law at Tulane University Law School, Director of the Tulane Maritime Law Center, and author of books on admiralty and shipping law and other commercial subjects.

[24]Saskatchewan Gov't Ins. Office v. Spot Pack, Inc., 242 F.2d 385, 388, 1957 AMC 655, 661 (1957).

[25]Albany Insurance Co. v. Anh Thi Kieu, 927 F.2d 882, 1991 AMC 2211 (5th Cir. 1991). Because the Fifth Circuit holds that the doctrine is no longer entrenched in maritime law, it refers instead to state law on the obligation of disclosure.

many federal courts differ in their choices of law because of their understandings of *Wilburn Boat* and the availability of apparent grounds of exception. What might well be emphasized more as an element in the confusion is the unawareness of courts, and presumably counsel, of the historic intimate relationship of the two topics, in which a fact subject to a warranty is not required by utmost good faith to be disclosed, since it is consistently recognized that the warranty is the parties' explicit agreement on the point.[26] The unwary court, although bound to utmost good faith in a disclosure issue, may nevertheless emasculate the warranty, upsetting the balance struck by the parties.[27] The author points out the further complexity (and occasional futility) of the double choice involved in choosing state law; after the "vertical" choice between admiralty and state comes the choice of which state, which sometimes turns out to be a state like California or New York that follows the maritime rule.

This essay may help a U.S. lawyer see what rule she will face, and will in any case be a good thinking piece for those facing the issues treated.

Conflict of Laws—Pax Romana

In civil and commercial matters, conflicts of governing law within most of the EC, and to some extent affecting parties outside it, are governed at start by Regulations, Rome I (contractual), Rome II (non-contractual), and conflicts of jurisdiction and enforcement are governed by the EC Jurisdiction Regulation and the Lugano Convention. These are meant to clarify matters and no doubt do so to an extent, but appear to leave abundant issues for choice, dispute, and academic discussion, as conflicts systems generally do. As usual in other regimes, insurance sometimes receives discrete treatment, for such reasons as locale of the subject matter or the special interest of the regulatory state. Professor Yvonne Baatz,[28] who has written in the previous volume on the conventions then in force, writes here of *Recent developments in party choice of the applicable law and jurisdiction in marine insurance and reinsurance contracts*. Under governing law, she deals with party choice and third-party issues that arise with assignment, subrogation, and direct actions against insurers. The larger portion of her

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[26] *See* 3 JAMES KENT, *supra* note 7, at 233; 2 JOHN DUER, *supra* note 7, at 572; 1 WILLARD PHILLIPS, *supra* note 7, at 320-21; Cal. Ins. Code § 332 (1935) ("facts . . . as to which he makes no warranty").

[27] *See, e.g.*, U.S. Fire Insurance Co. v. Liberati, 1989 AMC 14 36 (C.D. Cal. 1989) (applying state rule of materiality to warranty in circuit and state committed to utmost good faith).

[28] Yvonne Baatz is a Professor of Law in the School of Law at the University of Southampton. Before joining its faculty she was a practicing solicitor in London specializing in shipping litigation. She has written or co-written a number of books and articles on marine insurance and shipping law.

chapter deals with the permutations of jurisdiction when the parties have chosen a court either within or without the EC and either some or none of the parties are domiciled in the EC, with sub-topics of third-party practice and anti-suit injunctions. The interest of EC members is obvious; the volume of trade by others across the EC boundaries should make their interest also clear.

Et alia

The book is well divided into sub-captioned chapters and admirably provided with the appropriate tables and good indices. All chapters follow the excellent practice of numbering paragraphs with chapter number first and using these numbers in the index of cases, which is a convenience in pinpoint citations and in looking for the author's comment on a particular case. As usual in marine insurance books from Informa, appendices provide the texts of the MIA 1906 and collections of clauses referred to, including the Norwegian Marine Insurance Plan of 1996, Version 2007.

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