Circulated in more than 100 States to personalities in the legal and maritime professions

The IMO International Maritime Law Institute Official Electronic Newsletter (Vol. 4, Issue No. 33) 5 February 2007

AUSTRALIAN PROFESSOR LECTURES ON CARGO INSURANCE

University of Macau Associate Professor of Law, Professor Ping-fat Sze was recently at IMLI and lectured on Cargo Insurance. Professor Sze is an eminent authority on marine insurance and has had several publications in the area of insurance and the carriage of goods. He is also a Visiting Fellow at Clare Hall, Cambridge.

Professor Ping-fat Sze lecturing on Cargo Insurance to IMLI Class 2006-2007

His lectures covered principles on insurance including the policy of insurance, risks covered, exclusions to the policy of insurance, duration of insurance, duty of utmost good faith, and the provisions contained in the Institute Cargo Clauses.

In an interview conducted, Professor Sze expressed his views on the following:

What are the basic differences between the principles of insurance followed in the continental system and those followed in the common law system?

This is a very complicated and difficult question because differences exist not only between the common law and the continental system but also among jurisdictions within the same legal family. For example, the duty of utmost good faith (so entrenched in English insurance law) has been construed and applied with marked divergences (over the time and scope of application, *inter alia*) in the United States (see eg Schoenbaum "The Duty of Utmost Good Faith in Marine Insurance: A Comparative Analysis of American and English Law" (1998) 29 JMLC 1) whereas Member-States of the EU have yet to agree on a common code on the substantive law of general insurance notwithstanding the three generations of insurance directives (see eg Basedow "The Case for a European Insurance Contract Code" (2001) JBL 569; Ruhl "Common Law, Civil Law and the Single European Market for Insurances" (2006) 55 ICLQ 879). The detailed provisions over such issues as the alteration of risk, notice requirement and sanction also vary from one jurisdiction to another (see eg Wilhelmsen "Duty of Disclosure, Duty of Good Faith, Alteration of Risk and Warranties" CMI Yearbook 2000 332).

In the field of marine insurance, a number of differences are noteworthy. As a matter of common law, the rules governing the duty of disclosure (and, for that matter, misrepresentation) form part and parcel of the broader and higher duty of utmost good faith. Continental lawyers may also find the "materiality" and "knowledge" tests (as applied in the common law) puzzling.

"Warranties" remain a distinguishing feature of the common law system although the idea of warranties has been questioned in some common law jurisdictions such as Australia (see Australian Law Reform Commission Report 2001).

Have the differences helped or hindered the unification of international maritime law in the area of marine insurance?

It is again difficult to tell. There are both historical and practical explanations for the current state of development. Nevertheless, assuming that there is a genuine and justified need for the unification of marine insurance law, it may be tentatively suggested that those differences have both helped and hindered the application of a "uniform" law. Businessmen and lawyers are, by their very nature, risk-averse and, with the benefit of such a rich collection of precedents over the Marine Insurance Act 1906, have more probably than not chosen English law and practice as the applicable law for their insurance cover, insofar as such free choice of law has not been forbidden by their national law. The problem over the want of unification is thus by-passed (if not resolved) as a matter of practical legitimacy.

On another note, changes (if any) in the current situation depend very much on the will of the market-players and their respective governments. As Professor Wilhelmsen aptly said, harmonization (and for the present purposes, unification) of the laws "will thus require that the different markets are willing to give away national and maybe traditional solutions and adopt a broader, more systematic and international attitude to the different questions … both for the selection of the main concepts and for the more detailed regulations [necessitating] a shift in the perspective that in marine insurance the conditions themselves are the commodities and thus a factor of competition" (ibid p 410). A common core for underlying concepts (such as fraud, intent, negligence and good faith) has to be worked out (ibid p 411).

Even though there is an international convention created for marine insurance, it remains a moot point as to whether (and if so, how far) it helps achieve the objective of uniformity if the convention also provides for modification or "contract-out" (cf the Vienna Convention on the International Sale of Goods 1980). The fact that we have had three conventions on cargo liability alone (with yet another convention forthcoming under the aegis of the CMI and UNCITRAL) serves only to highlight the special (if not also inherent) features and conditions of the shipping world (cf air/land transport).

As a first-time visiting professor to IMLI, what are your impressions of the Institute and the students?

IMLI is a world-renowned institution for advanced research in international maritime law and practice. Apart from an impressive Faculty (both resident and visiting), the Institute houses a very resourceful library. To my mind, no energetic and enthusiastic researcher would be disappointed by the facilities available at the Institute.

During my sojourn at IMLI, I conducted six lectures for the LL.M. class. I have been deeply impressed by the dedication and intellectual abilities of my students, all of whom have already obtained strong academic and professional credentials from their own countries. They actively participated in class discussion and other academic exercises. It is my well-considered opinion that their hard work over the year in Malta will be duly rewarded and, from the perspective of IMLI, has also helped promote the rule of international maritime law in the 21st century.

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