
THE UK INSURANCE ACT 2015: A *RESTATEMENT* OF MARINE INSURANCE LAW¹

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I.	Preamble	132
II.	A Tale of Parallel Lives	133
	A. Revolution Through Evolution	135
	B. The New (and improved) Law of Insurance	137
	1. “The Duty Of Fair Presentation” : A Change Of Architecture	137
	2. Test of materiality	138
	3. Remedies for the Breach	139
	4. The New Act Part 3: Warranties	140
	5. The New Act Part 5: Good Faith.	141
	6. The New Act Part 7: General provisions.	143
	7. The New Act: Schedule 1	143
III.	Analysis of The New Law	144
	A. Good Faith.	144
	B. Materiality.	146
	C. Misrepresentations	148
	D. Inducement	149
	E. The New Structure of Fair Presentation.	150

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1. See Insurance Act 2015, c.4 (U.K.) [hereinafter Insurance Act], *available at* http://www.legislation.gov.uk/ukpga/2015/4/pdfs/ukpga_20150004_en.pdf, [<http://perma.cc/N5A2-5V2H>].

F. The Remedies	150
G. The Warranties	151
H. Contracting Out	152
IV. The Effect of Changes on Marine Insurance	153
V. A Comparative View	154
A. A Fresh Convergence	155
B. A Fresh Divergence	156
C. A Possible Solution of the New Divergence	162
VI. Possible Influence of the New Act on American law-Conclusion	163

I. PREAMBLE

The doctrine of *utmost good faith* is a fundamental tenet of the law of marine insurance.

In both Britain and the United States (majority view) the law of marine insurance imposes a duty of “utmost good faith,” or *uberrimae fidei*. This duty sets a high standard: the parties to contracts of marine insurance must not only avoid fraud and misrepresentation, but they are required to disclose voluntarily “every material circumstance.”²

This principle dates back to the seminal 1766 English case *Carter v Boehm*,³ and has gradually been adopted by a majority of the American courts.⁴ However, something unusual happened in February of 2015. On February 6, 2015, the First Circuit decided *Catlin (Syndicate 2003) At Lloyd’s v. San Juan Towing And Marine Services, Inc.*,⁵ making the solemn announcement: “Although this court had not yet held definitively that *uberrimae fidei* is an established rule of maritime law, we do so now, thus

2. Thomas J. Schoenbaum, *The Duty of Utmost Good Faith in Marine Insurance Law: A Comparative Analysis of American and English Law*, 29 J. MAR. L. COM. 1, 1 (1998) [hereinafter Schoenbaum’s Duty of Utmost Good Faith].

3. *Carter v. Boehm*, 3 Burr. 1905 (1766),

4. See *infra* note 16 and accompanying text.

5. See generally *Catlin at Lloyds v. San Juan Towing & Marine Serv. Inc.*, 778 F.3d 69 (1st Cir. 2015).

joining the near-unanimous consensus of our sister circuits.”⁶

Not even a week later, on February 12, 2015, the Queen gave Royal Assent to the Insurance Act 2015, containing the opposite announcement: “Any rule of law permitting a party to a contract of insurance to avoid the contract on the ground that the utmost good faith has not been observed by the other party is *abolished*.”⁷ This contrast may look ironical at first sight, but a close analysis and a view from a proper perspective shows that it is not. This article supplies a history of the making of the Insurance Act, presents a summary and review of the Insurance Act, and examines the many innovations therein contained together with an updated comparative view of the American and British legal systems of marine insurance.

After a wholesome fresh review of the famous opinion of the Fifth Circuit in *Albany Ins. Co. v. Anh Thi Kieu*,⁸ this article suggests that *Anh Thi Kieu* was not, after all, so heretical as other circuits,⁹ but rather a kind of “prophet in homeland” for the many affinities between *Anh Thi Kieu* and the newborn Insurance Act. This article concludes with a review of the possible consequences of the new United Kingdom legislation and of the possible influence on future American case law. The Insurance Act contains, in fact, many other revolutionary provisions, such as on warranties, actions against third parties, variations to insurance contracts, and more.

II. A TALE OF PARALLEL LIVES

From Encyclopedia Britannica:

6. See *id.* at 81 (emphasis added) (citing *N.Y. Marine & Gen. Ins. Co. v. Cont’l Cement Co., LLC*, 761 F.3d 830, 839 (8th Cir. 2014) (recognizing that *uberrimae fidei* is established federal precedent); *AGF Marine Aviation & Transp. v. Cassin*, 544 F.3d 255, 262–63 (3d Cir. 2008) (recognizing that *uberrimae fidei* is established federal precedent); *Certain Underwriters at Lloyd’s, London v. Inlet Fisheries Inc.*, 518 F.3d 645, 650–54 (9th Cir. 2008) (recognizing that *uberrimae fidei* is established federal precedent); *HIH Marine Servs., Inc. v. Fraser*, 211 F.3d 1359, 1362 (11th Cir. 2000) (recognizing that *uberrimae fidei* is established federal precedent); *Puritan Ins. Co. v. Eagle S.S. Co. S.A.*, 779 F.2d 866, 870 (2d Cir. 1985) (recognizing that *uberrimae fidei* is established federal precedent)).

7. Insurance Act, *supra* note 1, at § 14 (1) (emphasis added).

8. See generally *Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882, 889 (5th Cir. 1991) (discussing the *uberrimae fidei* doctrine).

9. See *Catlin*, 778 F.3d at 83 n.13. The *Catlin* court, addresses the view of the Fifth Circuit as follows:

The Fifth Circuit is alone in holding that *uberrimae fidei* is ‘not entrenched federal precedent.’ *Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882, 889 (5th Cir. 1991) This view, however, has been heavily criticized. See, e.g., *Inlet Fisheries Inc.*, 518 F.3d at 652-54 (disparaging the *Anh Thi Kieu* decision as logically flawed and concluding that it ‘does violence’ to established law).

Id.

Parallel Lives, influential collection of biographies of famous Greek and Roman soldiers, legislators, orators, and statesmen written by the Greek writer Plutarch near the end of his life. By comparing a famous Roman with a famous Greek, Plutarch intended to provide model patterns of behavior and to encourage mutual respect between Greeks and Romans.¹⁰

Comparing American and English law of Marine Insurance could be a worthy addition to the Plutarch collection. Plutarch not being around, the task has been done by Professor Schoenbaum with his landmark mini-treatise *Key Divergencies Between English and American Law of Marine Insurance*.¹¹ Chapter Five of the book, dedicated to the “Duty of Utmost Good Faith,” appeared first as an article in the *Journal of Maritime Law and Commerce*.¹² The theme of the book and of the article is that serious divergences have developed between American and English marine insurance law, and that basic reforms are needed in both English and American law.¹³

We will return to these and many other valuable propositions at the conclusion of this work. Here we begin by supplying a background that would help us understand how it could happen that an American Admiralty court decided to embrace the doctrine of *utmost good faith*—of ancient British ancestry, an entrenched rule of Admiralty law, virtually at the same time as the doctrine was being jettisoned in England, its cradle and homeland. The reason is that neither *Catlin* nor the *Insurance Act* were made overnight, but were the product of parallel developments of views over values in the American judiciary and in the English legislation.

In the United States, the courts, struggling to navigate around the unwelcome bounds of *Wilburn Boat*,¹⁴ in quest of the mirage of uniformity of maritime law, ultimately developed a large consensus for treating *utmost good faith* as an entrenched Admiralty rule.¹⁵ In England, *Wilburn Boat* was

10. *Parallel Lives*, ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/676133/Parallel-Lives> (last visited April 25, 2015).

11. See THOMAS J. SCHOENBAUM, *KEY DIVERGENCES BETWEEN ENGLISH AND AMERICAN LAW OF MARINE INSURANCE: A COMPARATIVE STUDY 1* (Cornell Maritime Press, Inc.) (1999).

12. See generally Schoenbaum’s Duty of Utmost Good Faith, *supra* note 2.

13. *Id.* at 1314.

14. *Wilburn Boat Co. v. Fireman’s Fund Ins. Co.*, 348 U.S. 310, 314, 1955 AMC 467, 475–76 (1955); see also Admiralty law may be applied in matters of marine insurance only if an “entrenched [rule] of Admiralty law” can be found, or where the federal court finds it proper or necessary to create a federal Admiralty law. *AGF Marine Aviation & Transp.*, 544 F.3d at 262–63.

15. See, e.g., *N.Y. Marine & Gen. Ins. Co. v. Cont’l Cement Co., LLC.*, 761 F.3d 830, 833 (8th Cir. 2014) (holding that *utmost good faith* is a judicially established federal admiralty rule);

only an exotic name, and the House of Lords, not obsessed with federalism and uniformity, never had to struggle with the statutory rule of *utmost good faith*.¹⁶ Critics, however, were looming in the background for a long time.

A. REVOLUTION THROUGH EVOLUTION

The Joint Report on the Insurance Act 2015, by the British Law Commission and the Scottish Law Commission,¹⁷ supplies a detailed overview of the evolution that led to the Insurance Act 2015. Long before the *Anh Thi Kieu* rebellion in 1991 and the admonitions of professor Schoenbaum in 1998, the English Law Reform Committee issued as early as 1957 a Report recommending reform of Insurance law,¹⁸ followed in 1980 by a report of the Law Commission.¹⁹ This latter, the 1980 Law Com. No. 104, is particularly interesting. In 174 pages, the 1980 Report addresses most of the issues and problems of the insurance industry of the time,

Certain Underwriters at Lloyds, London v. Inlet Fisheries Inc., 518 F.3d 645, 656 (8th Cir. 2008) (declining to follow the approach adopted by only the Fifth Circuit); *Chrisnav Yatching, Ltd. v. Lloyd's Underwriters, et al.*, No. 05-6609, 2006 WL 3461967, 2007 AMC 75 (S.D.N.Y. 2007) (following the precedent set forth by the House of Lords in *HIH Cas. & Gen. Ins. Ltd., et al. v. The Chase Manhattan Bank, et al.*, [2001] EWCA (Civ) 1250, [2001] 2 Lloyd's Rep. 483, 494); Schoenbaum's Duty of Utmost Good Faith, *supra* note 2, at 11. *But see* Albany Ins. Co. v. Anh Thi Kieu, 927 F.2d 882, 891 (5th Cir. 1991). "Based on its lengthy history, we conclude that 'no rule of marine insurance is better established tha[n] the utmost good faith rule.'" *Inlet Fisheries Inc.*, 518 F.3d at 656 (quoting Schoenbaum's Duty of Utmost Good Faith, *supra* note 2).

16. Marine Insurance Act 1906, c. 41, § 17 (UK), *available at* <http://www.legislation.gov.uk/upga/Edw7/6/41/data.pdf> ("Insurance is uberrimae fidei. A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.") [hereinafter MIA 1906]. *See generally* *HIH Cas. & Gen. Ins. Ltd., et al. v. The Chase Manhattan Bank, et al.*, [2003] UKHL 6, [5] (appeal taken from Eng.) (confirming the vitality of the utmost good faith rule); *Pan Atl. Ins. Co. Ltd. & Ors v. Pine Top Ins. Co. Ltd.*, [1994] C.L.C. 868 (H.L.) 899 (appeal taken from Eng.); *Container Transp. Int'l Inc. v. Oceanus Mut. Underwriting Assoc. (Berm.) Ltd.*, [1982] 2 Lloyd's Rep. 178 (Q.B.), *rev'd*, [1984] 1 Lloyd's Rep. 476 (C.A.).

17. THE LAW COMM'N & THE SCOTTISH LAW COMM'N, LAW COM. NO. 353 & SCOT. LAW COM NO. 238, INS. CONTRACT LAW: BUS. DISCLOSURE; WARRANTIES; INSURERS' REMEDIES FOR FRAUDULENT CLAIMS; AND LATE PAYMENT (2014) [hereinafter 2014 REPORT] *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/331737/41872_Cm_8898_Print_Ready.pdf.

18. LAW REFORM COMMITTEE, FIFTH REPORT: CONDITIONS AND EXCEPTIONS IN INSURANCE POLICIES, 1957, Cm. 52, (Eng.). In their Fifth Report, the Law Reform Committee said: "[I]t seems to us to follow from the accepted definition of materiality that a fact may be material to insurers . . . which would not necessarily appear to a proposer for insurance, however honest and careful, to be one which he ought to disclose." *Id.*

19. THE LAW COMMISSION, INSURANCE LAW: NON-DISCLOSURE AND BREACH OF WARRANTY, 1980, Law Com. No. 104 (U.K.), *available at* <http://www.bailii.org/ew/other/EWLC/1980/104.pdf>.

including Marine, Aviation, Transport, Life, Intermediaries and Reinsurance and its findings and recommendations are of amazing actuality today.

Of all its wide contents, the 1980 Report dedicates sixty pages (about 35%) to proposed reform of the law of disclosure, beginning with an analysis of the state of the law on disclosures and concluding:

. . . defects in the present law provide a *formidable case for reform*. However, on consultation it was contended by some representatives of the insurance industry that reform was neither necessary nor desirable. One ground for this contention was the voluntary observance by insurers of the Statements of Insurance Practice.²⁰

The 1980 Report went on to say:

Our conclusion is that the mischiefs which we have noted in the law relating to the duty of disclosure imposed upon applicants for insurance *are not cured by the Statements of Insurance Practice*. Part IV of this report is accordingly devoted to the examination of various ways in which the law of disclosure can be reformed.²¹

The 1980 Report examined, among many others, issues of connection of disclosure with the loss,²² discussed the merits and demerits of the principle of “*proportionality*”²³ and the consequences of breach of the duty of disclosure.²⁴ The 1980 Report also contains similar analysis of the state of the law on *warranties*, with similar critical approach.²⁵ Of particular interest is Part VII, dedicated to the “*basis of contract*” clauses, an issue that will become an important part of the Insurance Act 2015.²⁶

In spite of the finding that there was “*a formidable case for reform*” already in the early eighties, it was not until 2002 that the British Insurance Law Association issued a recommendation to the Law Commissions to

20. See *id.* ¶ 3.23, at 27 (emphasis added). In their Fifth Report the Law Reform Committee said: “[I]t seems to us to follow from the accepted definition of materiality that a fact may be material to insurers . . . which would not necessarily appear to a proposer for insurance, however honest and careful, to be one which he ought to disclose.” *Id.* ¶ 3.18, at 24 (quoting FIFTH REPORT: CONDITIONS AND EXCEPTIONS IN INSURANCE POLICIES *supra* note 18.).

21. *Id.* ¶ 3.30, at 29 (emphasis added).

22. *Id.* ¶¶ 4.89–4.97, at 67–70.

23. *Id.* ¶¶ 4.4–4.17, at 30–35 (emphasis added).

24. *Id.* ¶¶ 4.24–4.27, at 39–41.

25. See generally *id.* ¶¶ 6.1–.23, at 79–90 (emphasis added).

26. *Id.* ¶¶ 7.1–7.11, at 90–94.

study a possible reform of insurance law.²⁷ Both Law Commissions obliged, starting a joint review of insurance contract law in 2006, a project that took almost eight years of consultations with the industry, the market, the legal profession and the judiciary.²⁸

The project addressed a wide spectrum of insurance law including consumer-related issues (out of which, concepts of “proportionality” influenced the non-consumer related rules). A first report²⁹ was released in 2007, followed by a second in 2011³⁰ and by a third in 2012 (CP3).³¹ The final Report of the two Commissions on July 2014³² (hereinafter “Report”) sums up and epitomizes all the developments of the project and is an invaluable source for interpretation and understanding of the Statute.

B. THE NEW (AND IMPROVED) LAW OF INSURANCE.

The new Act is composed of seven Parts and two Schedules. Part 1 supplies the main Definitions; Part 2 deals with the Duty of Fair Presentation; Part 3 with Warranties; Part 4 with Fraudulent Claims; Part 5 with Good Faith and Contracting Out; Part 6 with Amendment of Third Party Rights; Part 7 with General Provisions; Schedule 1 with Remedies and Schedule 2 with Third Party Rights.

1. “The Duty of Fair Presentation”: A Change of Architecture

Part 2 is captioned: “The Duty of Fair Presentation” and consists of seven Sections, from 2 to 8.

27. 2014 REPORT, *supra* note 17, c. 32, at 340–46.

28. THE LAW COMM’N & THE SCOTTISH LAW COMM’N, INSURANCE CONTRACT LAW: A JOINT SCOPING PAPER 3–4 (2005), available at http://lawcommission.justice.gov.uk/docs/ICL_Scoping_Paper.pdf.

29. THE LAW COMM’N & THE SCOTTISH LAW COMM’N, LAW COMM’N NO. 182 & SCOTT. COMM’N NO. 134, INSURANCE CONTRACT LAW: MISREPRESENTATION, NON-DISCLOSURE AND BREACH OF WARRANTY BY THE INSURED (2007), available at <http://www.scotlawcom.gov.uk/files/6412/7892/7069/dp134.pdf>

30. THE LAW COMM’N & THE SCOTTISH LAW COMM’N, LAW COMM’N NO. 201 & SCOTT. COMM’N NO. 152, INSURANCE CONTRACT LAW: POST CONTRACT DUTIES AND OTHER ISSUES (2011), available at <http://www.scotlawcom.gov.uk/files/3113/2429/7329/dp152.pdf>

31. THE LAW COMM’N & THE SCOTTISH LAW COMM’N, LAW COMM’N NO. 204 & SCOTT. COMM’N NO. 155, INSURANCE CONTRACT LAW: THE BUSINESS INSURED’S DUTY OF DISCLOSURE AND THE LAW OF WARRANTIES (2012), available at http://lawcommission.justice.gov.uk/docs/cp204_ICL_business-disclosure.pdf.

32. See generally 2014 REPORT, *supra* note 17.

a. Section 3 – Disclosures and Representations.

Section 3 opens a floodgate to a sea of change introducing the concept of “fair presentation,”³³ a duty that runs through the whole Act under the name of “*the duty of fair presentation*,”³⁴ consisting of disclosures and of representations that conform to certain standards.³⁵ Thus, fair presentation is one, which makes “disclosure of every material circumstance that the insured knows or ought to know,”³⁶ or that gives “the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances.”³⁷ Fair presentation is also one that makes the “disclosure in a manner, which would be reasonably clear and accessible to a prudent insurer.”³⁸

The second attribute of fair presentation is “representation.” Fair presentation obtains if every material representation as to matters of fact is substantially correct and every material representation as to a matter of expectation or belief is made in good faith.³⁹ The insured is not required to make certain disclosures, however, namely the circumstances that diminish the risk, or known to the insurer, or that the insurer ought to know or is presumed to know, or to which the insurer has waived information.⁴⁰

The insurer however may make specific request of enquiry. The insured would then be required to make disclosures also of these circumstances.⁴¹

b. Sections 4 to 6 – Knowledge.

Section 4 addresses the “knowledge of the insured,” consisting in identifying the individuals or managing officers who are responsible for placing the insurance,⁴² and the types of information that those persons or offices are supposed to know.⁴³ Section 5 addresses the “knowledge of the

33. 2015 Insurance Act, *supra* note 1, § 3(1), at 2 (emphasis added). “Before a contract of insurance is entered into, the insured must make to the insurer a fair presentation of the risk.” *Id.*

34. *See id.* § 3(2), at 2.

35. *Id.* § 3(3), at 2.

36. *Id.* § 3(4)(a), at 2.

37. *Id.* § 3(4)(b), at 2.

38. *Id.* § 3(3)(b), at 2.

39. *Id.* § 3(3)(c), at 2.

40. *Id.* § 3(5)(a)–(e), at 2.

41. *See id.* § 3(5), at 2.

42. *Id.* §§ 4(1)–(5), (8), at 2–3.

43. *Id.* § 4(6) (“[A]n insured ought to know what should reasonably have been revealed by a reasonable search of information available to the insured . . .”).

insurer”, and its opening language is interesting: “. . . an insurer knows something only if it is known to one or more of the individuals who participate on behalf of the insurer in the decision *whether to take the risk, and if so, on what terms.*”⁴⁴ Section 6 supplies the notions of the “knowledge” in general. “Knowledge” is not limited to just “actual” knowledge, but extends to matters “which the individual suspected and of which the individual would have had knowledge but for deliberately refraining from confirming them or enquiring about them.”⁴⁵

1. Test of materiality

Section 7 on Materiality is of particular interest. It contains “Supplementary” definitions, one of which is worth pausing to consider, as it deals with the “test of materiality.” While Section 3(3)(c)⁴⁶ provides that the representations that are relevant to a fair presentation are only those that are “material”, Section 7(3) clarifies that “[a] circumstance or representation is material if it would influence the judgement [sic] of a prudent insurer in determining whether to take the risk and, if so, on what terms.”⁴⁷ A useful feature of Section 7 is the list of examples of things that may be material circumstances, like special or unusual facts relating to the risk,⁴⁸ particular concerns that led the insured to seek coverage,⁴⁹ and most interestingly, anything generally understood as worth discovery.⁵⁰

2. Remedies for the Breach

Section 8, which closes Part 2, under the caption “Remedies for Breach,” is perhaps the most important provision of this Part. The Section does not say what the remedies are, it renvoys to the Schedule 1 of the Act.⁵¹ Instead, the Section supplies the definition of what is a “breach” by tying it

44. *Id.* § 5(1), at 3 (emphasis added); see discussion *infra* Part V (discussing the “decisive influence” test).

45. See 2015 Insurance Act, *supra* note 1, §6(1), at 4.

46. *Id.* § 3(3)(c), at 2.

47. *Id.* § 7(3), at 4; see also Schoenbaum’s Duty of Utmost Good Faith, *supra* note 2, at 23–24. This definition vindicates what Prof. Schoenbaum called “an important trilogy of nineteenth century cases: *Ionides v. Pender*, *Rivaz v. Gerussi Brothers & Co.*, and *Tate & Sons v. Hyslop*,” which Prof. Schoenbaum submitted were wrongly interpreted by Lord Mustill in *Pan Atlantic Ins. Co. v. Pine Top Ins. Co.* Schoenbaum’s Duty of Utmost Good Faith, *supra* note 2, at 23–24.

48. See Insurance Act, *supra* note 1, § 7(4)(a), at 4.

49. *Id.* § 7(4)(b), at 4.

50. *Id.* § 7(4)(c), at 4.

51. *Id.* § 8(2), at 4.

up with “remedies” with a sort of reverse definition.

Unlike the traditional analytical sequence: what is duty, what is breach, what remedies would follow from a breach, Section 8 introduces the term: “qualifying breach,” which is any “breach for which the insurer has a remedy against the insured.”⁵² Thus, in order to know if a breach is “qualifying,” it is necessary to look through the remedies and see if there is any remedy that may be tied to a breach. In other words, not all breaches under the Act are sanctioned with a remedy.⁵³ Only those for which the Act provides a remedy are qualifying.

This is why the Schedule 1, which follows this article, is the paramount portion of the Act, and that is because Schedule 1, found at the end of the Act, supplies precise conditions for the application of each single remedy. Section 8, however, provides one basic condition for any remedy to apply:

The insurer has a remedy against the insured for a breach of the duty of fair presentation only if the insurer shows that, but for the breach, the insurer —

(a) would not have entered into the contract of insurance at all,
or

(b) would have done so only on different terms.⁵⁴

Section 8 finally wraps up Part 2 with definitions of qualifying breaches that are deliberate or reckless and of qualifying breaches that are neither.⁵⁵ The burden of proof of whether a qualifying breach is deliberate or reckless is on the insurer.⁵⁶

3. The New Act Part 3: Warranties

Part 3 of the Act is composed of only three Sections, but its changes are not less sweeping than those of Section 2. The whole law of Marine Insurance Warranties is entirely changed. Section 10(1) alone is a revolution: “[A]ny rule of law that breach of a warranty (express or implied) in a contract of insurance results in the discharge of the insurer’s liability under the contract is abolished.”

52. *Id.* § 8(3), at 5.

53. *See id.* The Section explicitly states that this provision applies to the whole Act, not just to Part 2. *Id.*

54. *Id.* §§ 8(1)(a)–(b), at 4 (emphasis added).

55. *Id.* §§ 8(4)–(5), at 5.

56. *Id.* § 8(6), at 5.

Under the Act, the insurer is now free of liability under the contract after the moment a warranty has been breached, but remains liable if the loss occurs after the breach has been remedied.⁵⁷ The insurer also remains liable if the warranty ceases to be applicable due to a change of circumstances,⁵⁸ if compliance with the warranty is rendered unlawful by subsequent law,⁵⁹ or when the insurer waives the breach.⁶⁰

In order to be absolutely clear, the Act repeats that the liability of the insurer is not affected for the losses that happen before the breach of warranty or after the breach has been remedied.⁶¹ The remedial action of a breach obtains when “the risk, to which the warranty relates, later becomes essentially the same as that originally contemplated by the parties [or] if the insured ceases to be in breach of the warranty.”⁶² The breach of a warranty is defined at Sect. 10(6), namely: a warranty may require that something has to be done (or not done) by a time ascertainable, or that a condition must be fulfilled, or that something is (or is not to be) the case, and the relevant requirement is not complied with.⁶³

Section 10(7) concerns directly and explicitly Marine Insurance. It modifies Sections 33 and 34 of the Marine Insurance Act 1906 (hereinafter referred to as “MIA 1906”). Specifically, Section 33 of the MIA 1906 is modified by striking out the whole second sentence of Subsection (3), reading: “If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.” Section 33 now survives only on this reading: “A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not.” Section 34 of the MIA 1906 (“when breach of warranty excused”) is also struck out.⁶⁴

Part 3 closes with another innovation. A new set of rules is introduced for a new term: the “*Terms Relevant To The Actual Loss*.” These are terms contained in a contract of insurance—other than those defining the risk as a whole. Compliance with these terms would tend to reduce the risk of: “(a) loss of a particular kind, (b) loss at a particular location, [and] (c) loss at a

57. *Id.* § 10(2), at 5.

58. *Id.* § 10(3)(a), at 5.

59. *Id.* § 10(3)(b) at 5.

60. *Id.* § 10(3)(c), at 5.

61. *Id.* §§ 10(4)(a)–(b), at 5.

62. *Id.* §§ 10(5)(a)–(b), at 5.

63. *Id.* §§ 10(6)(a)–(b), at 5.

64. *See id.* § 10(7)(b), at 6.

particular time.”⁶⁵ In case any of these terms are not complied with and a loss occurs, the insurer may not rely on the breach if the insured can prove that the non-compliance could not have increased the risk of the loss, which actually occurred in the circumstances.⁶⁶ The insured may use these defenses in addition to those provided in the preceding Section 10.⁶⁷

4. The New Act Part 5: Good Faith

Part 5 is captioned “Good Faith and Contracting Out.” It is composed of five sections, of which only one (Sect. 14) is dedicated to “Good Faith,” while the other four are dedicated to restrictions on contracting out terms that would put the insured at a disadvantage. Sect. 14 is without a doubt one of the most striking and noticeable of all the provisions of the New Act. It reads:

(1) Any rule of law permitting a party to a contract of insurance to avoid the contract on the ground that the utmost good faith has not been observed by the other party *is abolished*.⁶⁸

(2) Any rule of law to the effect that a contract of insurance is a contract based on the utmost good faith is modified to the extent required by the provisions of this Act and the Consumer Insurance (Disclosure and Representations) Act 2012.⁶⁹

After establishing this revolutionary new rule, the Section addresses directly and explicitly the Marine Insurance Act—again with a sweeping change:

(a) [I]n section 17 of the Marine Insurance Act 1906 (marine insurance contracts are contracts of the utmost good faith), the words from “and” to the end are omitted, and

(b) [T]he application of that section (as so amended) is subject to the provisions of this Act and the Consumer Insurance (Disclosure and Representations) Act 2012.⁷⁰

This means that Section 17 of the MIA 1906 now reads only: “A contract of marine insurance is a contract based upon the utmost good faith.” Since the New Act has also deleted entirely Sections 18, 19, and 20 of the MIA 1906,⁷¹ this means that the complex architecture established by

65. *See id.* §§ 11(1)(a)–(c), at 6.

66. *See id.* §§ 11(2)–(3), at 6.

67. *See id.* § 11(4), at 6.

68. *See id.* § 14(1), at 7 (emphasis added).

69. *See id.* § 14(2), at 7.

70. *See id.* §§ 14(3)(a)–(b), at 8.

71. *See id.* § 21(2), at 11.

the MIA about “Disclosure and Representations” is totally gone, and what survives is only one short line that reasserts the “utmost good faith” as the foundation of marine insurance.

The rest of Part 5 is worth a short mention. It prohibits insurers from using contractual terms that put the insured at certain disadvantages, and even requires insurers to be proactive in drawing the attention of the insured to disadvantageous terms, before the contract is concluded.⁷² As such, it is outside the scope of this article.

5. The New Act Part 7: General Provisions

Part 7 deals with the scope and application of the Act as subject matter and territory. Relevant to this Article is Section 21 (2) and (3), relating specifically to Marine Insurance. This Section abolishes Sections 18,⁷³ 19,⁷⁴ 20,⁷⁵ and “[a]ny rule of law to the same effect as . . . those provisions” that are abolished.⁷⁶ Part 7 closes with an announcement that the “Act . . . [will] come[] into force at the end of the period of 18 months beginning with the day on which . . . [the Act] is passed[,]” hence on August 12, 2016.⁷⁷

6. The New Act: SCHEDULE 1

Schedule 1 is a structural component of the new architecture, completing and defining the rest of the Act, especially Part 2. It applies to “qualifying breaches of the duty of fair presentation”⁷⁸ and deals specifically with remedies. There are now two basic kinds of breaches: those “deliberate or reckless” and those “neither deliberate nor reckless.”⁷⁹ In the case of the former, the insurer may avoid the contract, refuse all claims, and need *not* return the premium.⁸⁰ In the case of the latter come the most significant changes of the New Act. It would all depend on whether the insurer, not misled by the breach, would have not entered into the contract

72. *See id.* §§ 15–18, at 8–9.

73. *See id.* § 21(2) (abolishing the section dealing with “disclosure by assured”).

74. *See id.* (abolishing the section titled “disclosure by agent effecting insurance”).

75. *See id.* (abolishing the section named “representations pending negotiation of contract”).

76. *See id.* §§ 21(2)–(3), at 11.

77. *Id.* § 23(2), at 12; *see Insurance Act 2015*, PARLIAMENT.UK, <http://services.parliament.uk/bills/2014-15/insurance.html> (last visited May, 4, 2015) (UK). The Royal assent was given on February 12, 2015. *Insurance Act 2015, supra.*

78. *See Insurance Act, supra note 1*, at c. 4, sched. 1, pt.1, § 1, at 13.

79. *See id.* §§ 1–3, at 13.

80. *See id.* § 2, at 13.

on any terms, or whether it would entered into the contract at *different terms*.

“If, in absence of the *qualifying breach*, the insurer would not have entered into the contract on any terms, the insurer may avoid the contract and refuse all claims, but must in that event return the premium.”⁸¹ If instead “the insurer would have entered into the contract, but on different terms,” then the Act provides that “the contract is to be treated *as if it had been entered into on those different terms if the insurer so requires*.”⁸² This provision is further qualified if the different term that the insurer would have accepted was charging a higher premium. In such a case, “the insurer may reduce *proportionately* the amount to be paid on a claim.”⁸³ The following subsection explains how “proportionately” has to work.⁸⁴

It is worth noting that this Section provides for remedies for “*qualifying breaches*.” As seen before, it is the remedy that defines the breach. Breaches that are not *qualifying* are not relevant because a remedy does not sanction them. It is only the remedy that makes the breach *qualifying*, therefore legally relevant.

III. ANALYSIS OF THE NEW LAW

The Insurance Act 2015 changes the substance and the terminology of insurance at large and of marine insurance in particular. Good faith, disclosures, representations, materiality, inducement, warranties, remedies, proportionality, and more, find a totally new treatment in the New Act. The analysis of these changes may be accomplished equally, in any particular order. We will use the following sequence.

A. GOOD FAITH

At first sight, it might seem like “*utmost good faith*” has been

81. *See id.* § 4, at 13.

82. *See id.* § 5, at 13 (emphasis added).

83. *See id.* § 6(1), at 13 (emphasis added).

84. *See id.* § 6(2), at 13 (defining the phrase “reduce proportionately” and providing the mathematical formula for calculation).

“[R]educe proportionately” means that the insurer need pay on the claim only X% of what it would otherwise have been under an obligation to pay under the terms of the contract (or, if applicable, under the different terms provided for by virtue of paragraph 5), where—

Premium actually charged

$X = \frac{\text{Premium actually charged}}{\text{Higher premium}} \times 100$

Higher premium.

Id.

abolished. In fact, it is gone but not forgotten. The New Act deleted almost all the sections of the MIA 1906 dealing with *utmost good faith*, but retained one passage that calls *utmost good faith* by its name. The statutory commandment the New Act has preserved states, “[a] *contract of marine insurance is a contract based upon the utmost good faith . . .*”⁸⁵

What the New Act has adjusted, is the adjective “*utmost*,” which may have been misunderstood. The adjective has never been used to measure the “quantity” of good faith on a scale of intensity of faith, but has been used in support of extreme consequences: no utmost good faith, then complete avoidance of the insurance contract would follow; maximum penalty for maximum breach. It is exactly the harshness of the rule of “all or nothing”, so intended, that caused the major preoccupations of the Law Commissions since the inception of the studies and consultations. Eventually, the Law Commissions recommended that avoidance of the contract be removed as the sole remedy for a breach of utmost good faith and proposed a new system of remedies.⁸⁶

Yet, the Report admits that “[t]he characterization of an insurance contract as a contract of ‘utmost good faith’ *lies at the heart of insurance contract law*”⁸⁷ and in its many consultations addressed the question, whether *utmost good faith* should have been retained as an “interpretative principle” without in itself giving either party a cause of action. The response to the consultation on this issue was a strong support for the proposal: twenty-seven out of thirty-eight respondents (seventy-one percent) supported it, and only three (eight percent) disagreed.⁸⁸ The Faculty of Advocates, responding to consultations, said: “We believe that this concept [of utmost good faith] should continue to inform the approach of the courts in this field. The further advantage to retaining this as an interpretative principle is that resort may continue to be had to the substantial and well developed jurisprudence on the subject.”⁸⁹

In the wake of this consensus, the Law Commissions finally recommended that *utmost good faith* be retained as an interpretative principle, envisaging three roles for the principle: First, the interpretative principle would help in situations where the insured may have disclosed

85. Marine Insurance Act, 1906, c. 41, § 17 (U.K.), available at <http://www.jssusa.com/assets/Uploads/MIA/MIA-1906.pdf>.

86. See 2014 REPORT, *supra* note 17, §§ 30.12–30.21, at 319–20.

87. See *id.* § 30.3, at 317 (emphasis added).

88. See *id.* § 30.8, at 318.

89. *Id.* § 30.22, at 320.

only the bare minimum of information, in the hope that the insurer would fail to make further enquiries;⁹⁰ second, to assure that the policy bears implied contractual terms under the traditional “business efficacy” test;⁹¹ and third, to leave room for judicial flexibility in hard and difficult cases, leaving the courts free to develop the concept of *utmost good faith* to prevent an insurer from denying a claim in a manifestly unfair way.⁹²

In the third consultation (CP3) the Law Commissions sought responses on whether the duty should continue to be called *utmost good faith*, or whether it should simply be called *good faith*. Some responses were for keeping the language in order to distinguish insurance contracts from general commercial contracts, but there was a lack of general consensus for the change. Finding no decisive argument in support of a change, the Commissions decided not to make any recommendation.⁹³ This is why Section 17 of the MIA 1906 remains unchanged in its coat of *utmost good faith*.

B. Materiality

“Fair Presentation” is the benchmark of the new system. It replaces *utmost good faith* as the substance of the duty of the insured before the conclusion of the contract. Like in the old system, the duty of the insured is to make the disclosures and the representations as required by the law.⁹⁴

The Law Commissions took issue on the rules of the existing law (the MIA 1906) regarding the extent of the disclosures required (“every material circumstance”)⁹⁵ and the accompanying remedies (avoidance of all claims as the only remedy).⁹⁶ In making a “case for reform”⁹⁷ the Commissions found that the duty of disclosure was “poorly understood”; “too onerous”; “encourage[d] data dumping . . . of huge volumes of material [of mixed relevance]”; and that the accompanying remedies were “too harsh.”⁹⁸ One more reason for reform was that the existing law was fostering “underwriting at claims stage,” meaning that the insurer could have accepted a poor presentation and then asked questions only once a claim

90. *See id.* § 30.23(1), at 321.

91. *See id.* § 30.23(2), at 321. *See generally* SCHOENBAUM, *supra* note 11, at 87 (explaining the function of *utmost good faith* in terms of “economic efficiency.”).

92. *See* 2014 REPORT, *supra* note 17, § 30.23(3), at 321.

93. *See id.* § 30.25, at 321.

94. *See id.* § 7, at 69.

95. *See id.* §§ 4.14–4.17, at 36.

96. *See id.* § 4.18, at 37.

97. *See id.* §§ 5.1–5.5, at 45.

98. *See id.* §§ 5.6(3), (5), at 46.

arose.⁹⁹ The Commission found this practice, supported by the law as existing, allowing insurers to play a “passive role,” not acceptable.¹⁰⁰

The consultations brought about, of course, contrary arguments. It was argued that reform was unnecessary, as the law was well understood by the sophisticated business parties,¹⁰¹ that the reforms would have caused a “drop in the standards of presentation[s],”¹⁰² and most of all, that reforms would have displaced important judicial precedents of interpretation of the existing law.¹⁰³ The Commissions were not persuaded by these arguments and concluded that reform of the duty of disclosures was needed.¹⁰⁴ However, the Commissions were careful not to make unneeded changes to the existing case law.¹⁰⁵

Particular attention was given to the test of “materiality” announced by the House of Lords in the *Pine Top* case: a material circumstance is one that would influence the judgment of a prudent insurer, that is having an effect on the mind of a prudent insurer in assessing the risk.¹⁰⁶

This predicate is the judicial interpretation of Section 18 (2) of the MIA 1906 that reads: “every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.” This approach is called the “*mere influence*” test, as opposed to the “*decisive influence*” test.¹⁰⁷

The New Act has totally deleted Section 18 (2) of the MIA 1906, but has reproduced the language of materiality almost literally at Section 7 (3): “[a] circumstance or representation is material if it would influence the judgement [sic] of a prudent insurer in determining whether to take the risk and, if so, on what terms.” This does not mean, however, that the test of materiality has remained the same. The New Act makes important changes. First of all, the New Act provides examples of circumstances that would be relevant:

- (a) special or unusual facts relating to the risk,

99. *See id.* §5.6(4), at 46, § 5.36, at 53.

100. *See id.* §§ 5.37–5.40, at 53–54.

101. *See id.* §§ 5.56–5.58, at 57.

102. *See id.* § 5.64, at 58.

103. *See id.* §§ 5.72–5.73, at 60.

104. *See id.* §§ 5.74–5.75, at 60.

105. *See id.* § 6.5, at 63.

106. *See* Pan Atl. Ins. Co. Ltd. & Ors v. Pine Top Ins. Co. Ltd., [1994] C.L.C. 868 (H.L.) 899 (appeal taken from Eng.).

107. *See* 2014 REPORT, *supra* note 17, §§ 4.14–4.16, at 36; *see also* Schoenbaum’s Duty of Utmost Good Faith, *supra* note 2, at 19–20.

(b) any particular concerns which led the insured to seek insurance cover for the risk,

(c) anything which those concerned with the class of insurance and field of activity in question would generally understand as being something that should be dealt with in a fair presentation of risks of the type in question.¹⁰⁸

Also, Section 3 (4) (b) provides that the disclosure required under the duty of fair presentation is one of “sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances.”

The Commissions called the combination of these additions a “key change.”¹⁰⁹ Together, these provisions aim at achieving a more manageable system of disclosures; on one side supplying the insured with guidelines as to the types of information required,¹¹⁰ on the other requiring the insurers not to play a passive role, but an active one, avoiding the practice of “underwriting at claims stage.”¹¹¹ The Commissions recognized that disclosure might often require participation by the insurer, who could and should assist by making further enquiries.¹¹² In other words, the combined effect of Sections 3 and 7 is that even when a material circumstance has not been disclosed, the insured may still have supplied enough “signposts” which would lead a prudent insurer to make further enquiries which, when answered, would reveal material circumstances.¹¹³ In this case, the insured is considered to have complied with the duty of fair representation.

C. MISREPRESENTATIONS

Under the New Act, “representations” are no longer treated separately from “disclosures,” but concur with the latter as component elements of the duty of *fair presentation*. In the MIA 1906 the representations were governed by Section 20, which has been entirely deleted. The test of materiality for misrepresentations is the same as for disclosures and is not

108. See Insurance Act, *supra* note 1, §§ 7(4)(a)–(c), at 4.

109. See 2014 REPORT, *supra* note 1, § 7.34, at 74.

110. See *id.* § 7.29, at 74; Insurance Act, *supra* note 1, § 7(4)(c), at 4. Section 7(4)(c) of the 2015 Insurance Act is particularly suitable for the insurance market, as it points to types of information that are of current understanding in the specific classes of insurance. Insurance Act, *supra* note 1.

111. See 2014 REPORT, *supra* note 17, § 7.38, at 75.

112. See *id.* § 7.39, at 76 (citing to Lord Justice Rix in *WISE Ltd. v. Grupo Nacional Provincial S.A.*, [2004] EWCA (Civ) 962, [64], [2004] 2 All E.R. 613 [64] (Eng.)).

113. See *id.* § 7.37, at 75.

worth repeating. The Commissions decided to retain the distinction between “matters of fact” and “matters of expectation or belief,” keeping the “substantially correct” test for the former and the “good faith” test for the latter, clipping the language from the otherwise totally deleted Section 20 of the MIA 1906.¹¹⁴

D. INDUCEMENT

The central theme of the review by the Commissions was the analysis and critique of avoidance as the sole remedy for non-disclosure and misrepresentation, which is treating the contract as if it never existed, with consequent refusal of all claims, even when the insured had neither acted deliberately nor recklessly. From dissatisfaction with this state of things came the elaborate “alternative scheme of more proportionate remedies,” recommended by the Commissions.¹¹⁵ To proceed in this task, the Commissions started from the “inducement test,” as developed by the courts.¹¹⁶

The state of the law as seen by the Commissions was revolving around the seminal case *Pan Atlantic Insurance Co., Ltd v. Pine Top Insurance Co. Ltd*,¹¹⁷ holding that non-disclosures or misrepresentations are “material” if they had an impact on the decision-making process on a prudent underwriter (the so called “mere influence test”).¹¹⁸ For allowing a remedy, however, *Pine Top* went on to require “inducement,” a test directed not to a hypothetical “prudent underwriter,” but to the actual underwriter of the contract in dispute. *Pine Top* left open the question of whether inducement could be presumed or had to be proven—a question that was later resolved by *Assicurazioni Generali SpA v. Arab Insurance Group*, which held that the insurer must prove inducement.¹¹⁹ Since the MIA 1906 was silent about inducement, the Commissions recommended adding it in the Statute,¹²⁰

114. *See id.* §§ 7.52–7.57, at 79–80.

115. *See id.* § 11.1, at 130.

116. *See id.* § 11.2, at 130.

117. *See* *Pan Atlantic Insurance Co. Ltd. v. Pine Top Insurance Co. Ltd.*, [1995] 1 A.C. 501 (H.L.(E.)) 505 (appeal taken from Eng.).

118. *See* 2014 REPORT, *supra* note 17, § 11.6, at 130. *See generally* Schoenbaum’s Duty of Utmost Good Faith, *supra* note 2, at 17–25 (discussing the development of the “mere influential test”).

119. *See* *Assicurazioni Generali SpA v. Arab Insurance Group* [2002] EWCA (Civ) 1642, [62], [2003] 1 W.L.R. 577 (Eng.), available at <http://www.bailii.org/ew/cases/EWCA/Civ/2002/1642.html>; *see also* 2014 REPORT, *supra* note 17, §§ 11.7–11.8, at 131 (defining “inducement test” and noting that, under recent case law, inducement may not be presumed).

120. *See* 2014 REPORT, *supra* note 17, § 11.9, at 131.

which now has it at Section 8.1, as the ultimate test for any remedy.

E. THE NEW STRUCTURE OF FAIR PRESENTATION

The New Act now works this way:

It must be first determined whether there was a “*fair presentation*.”

The fair presentation still works under the “*mere influence test*.”

The *mere influence test*, under the New Act, is tempered with a requirement of active participation of the insurer and can be satisfied by giving sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances.

Determination of a breach under these guidelines is only the first step to remedies.

The insurer has to first prove breach of *fair presentation*.

Once breach of *fair presentation* is proved, the insurer has to give the ultimate proof of inducement, that is:

That the insurer himself (not a hypothetical insurer) would not have entered into the contract all; or

That the insurer would have entered into the contract at different terms.

It is only at this stage that the remedies apply, and because of the attaching of remedies, the breach now achieves the quality and the name of “*qualifying breach*.”

In summary, the insurer must demonstrate materiality and breach, and then satisfy the *inducement* test.¹²¹ Breaches of disclosures and representations that are not material have no consequences by themselves. Materiality alone does not lead to remedies but opens the door to the second step of *inducement*. Only then, the breach becomes *qualified* by the *inducement*, and remedies apply at last.

F. THE REMEDIES

Qualifying Breaches are of two kinds: “deliberate or reckless” and “neither deliberate nor reckless.”¹²² The insurer has the burden of proving

121. 2014 REPORT, *supra* note 17, § 11.59, at 140.

122. *See* Insurance Act, *supra* note 1, sched. 1, pt.1, §§ 2–6, at 13.

both.¹²³ The consequential remedies are more reasonable and articulated than the previous “all or nothing.” “Deliberate and reckless” breaches entitle the insurer to refuse all claims *and* to retain the premium.¹²⁴ The New Act does not distinguish between “non-deliberate/non-reckless” breaches that are “negligent” or “innocent.” Both open the door to *inducement*. The consequent remedies do not depend on the negligence or innocence of the insured, but on what the insurer has been “induced” to do.

The insurer, who would not have entered into the contract *at all* without the breach, may still refuse all claims, but must return the premiums. However, if the insurer would have entered into the contract at different terms, then the insurer may require that the contract be enforced under these different terms.¹²⁵ The Report supplies useful examples of possible “different terms”: the insurer might have contracted some exclusion, or required certain warranties in connection with particular risks, or might have imposed excess limits.¹²⁶ One possible, and quite common situation, is when the insurer, but for the *qualifying breach*, would have entered into the contract, but at a different premium. In that case, the insurer may reduce the claim “proportionally.”¹²⁷ This is an innovation for “non-consumer” contracts.

G. THE WARRANTIES

Part 3 of the New Act, dedicated to “Warranties and Other Terms,” is the one with the greatest changes. The Commissions took issue with the existing law, and building on criticism developed over many years (as noted in previous Consultations), identified four major problems of the existing law: (1) refusal of claims for trivial mistakes with “*no bearing on the risk*”; (2) *remedy* of the breach of warranty *was not allowed*; (3) breach of a warranty would discharge the insurer for *unrelated types of losses*; and (4) the practice of the so-called “*basis of the contract*,” by which obscure terms of the contract would convert a simple statement into a warranty.¹²⁸

The Commission then recommended that the “basis of contract” clauses be abolished, that a breach of warranty may be cured, with the effect of reviving the policy if and when the breach is remedied, and to prohibit

123. See 2014 REPORT, *supra* note 17, §§ 11.47, 11.59, at 138, 140.

124. See Insurance Act, *supra* note 1, sched. 1, pt.1, §§ 2(a)–(b), at 13.

125. See *id.* § 5, at 13.

126. See 2014 REPORT, *supra* note 17, §§ 11.67(1)–(3), at 141.

127. See Insurance Act, *supra* note 1, sched. 1, pt. 2, § 11, at 15.

128. See 2014 REPORT, *supra* note 17, § 12.4(1)–(4), at 153–52.

that terms designed to reduce risks of one type affect risks of a different type.¹²⁹ The insurer's liability is now discharged only for the period between the time the warranty has been breached and the time the breach has been remedied,¹³⁰ and liability remains for losses occurring before the breach of warranty and after the breach is remedied.¹³¹

The New Act goes on to say that any rule that discharges the insurer upon breach of a warranty is abolished.¹³² Notice that, in this same provision, the New Act expressly applies to all warranties, both express and implied. The Report recommended that the extension to implied warranties be applied to marine insurance.¹³³ The New Act, accordingly, does not make the distinction, and the rule applies to all implied warranties in all insurance contracts. It is worthy of notice that the Report also added, at the end of the above recommendation, that these rules would be a "default scheme" in non-consumer insurance, subject to the recommendations on "contracting out."¹³⁴

H. CONTRACTING OUT

Analysis of the New Act concludes with rules against contracting out. The new regime introduced by the Act, however, is not entirely mandatory. On one side, during consultations, many consultees expressed strong support for freedom of contract. On the other, the Commissions were concerned about disparate bargaining powers of small and medium enterprises and their ability to bargain freely.¹³⁵ The Commissions therefore tried to strike a balance between the interests of the insurers and policyholders.¹³⁶ This goal is achieved with the provision of "transparency requirements" in Section 17, which obliges the insurers to take sufficient steps to draw attention to disadvantageous terms, and requiring clarity and unambiguity of those terms.¹³⁷

129. See 2014 REPORT, *supra* note 17, § 12.6, at 154.

130. See Insurance Act, *supra* note 1, § 10(2), at 5.

131. See *id.* §§ 10(4)(a)–(b), at 5.

132. See *id.* § 10(1), at 5.

133. See 2014 REPORT, *supra* note 17, at 192.

134. *Id.*

135. *Id.* §§ 29.18–29.23, at 306–07.

136. See *id.* § 29.17, at 306.

137. See Insurance Act §§ 17(2)–(3), at 8; 2014 REPORT, *supra* note 17, §§ 29.33–29.43, at 309–11.

IV. THE EFFECT OF CHANGES ON MARINE INSURANCE

The Marine Insurance Act 1906 was, until February 2015, the statute originally designed for marine insurance, but from which the rules were taken or borrowed for the law of insurance at large. Case law also overflowed from marine insurance to insurance at large.¹³⁸ The Commissions could not supply a new architecture for the law of all insurance without touching upon the MIA 1906 and the layers of case law developed under it in for more than a century.

Thus the legal consequences of breach of utmost good faith and of warranties could not be changed without a complete overhaul of the same. The doctrines had become so venerable and inveterate that the Commission did not even dare changing the name of *utmost good faith* and felt obliged to repeat that warranties must be “literally complied with.” This was only lip service to the names. In fact, some cardinal provisions of marine insurance were deleted with a stroke of Royal Assent pen. Section 17 of the MIA was mutilated of the second sentence about consequences of breach of utmost good faith and Sections 18, 19 and 20 were totally deleted.

Particularly interesting, however, is the treatment reserved to marine warranties. Section 10.7 of the New Act touches only upon Sections 33 and 34 of the MIA, but the New Act left untouched the rest of the MIA rules on warranties, namely Section 35 on express warranties, 36 on warranty of neutrality, 37 on nationality, 38 on “good safety,” 39 on seaworthiness, 40 on seaworthiness of goods, and 40 on legality. These rules still hold, but there may be speculation on how these rules can be reconciled with the new system. For example, Section 35 of the MIA states that express warranties must be in a form of words from which the intention to warrant is to be inferred. This provision must be reconciled with the prohibition of the

138. See, e.g., *Catlin at Lloyd's v. San Juan Towing & Marine Servs.*, 778 F.3d 69 (1st Cir. 2015); *N.Y. Marine & Gen. Ins. Co. v. Cont'l Cement Co., LLC*, 761 F.3d 830 (8th Cir. 2014); *Great Lakes Reinsurance (UK) PLC, v. Durham Auctions, Inc.*, 585 F.3d 236 (5th Cir. 2009); *AGF Marine Aviation & Transp. v. Richard C. Cassin Cit Group/Sales Fin., Inc.*, 544 F.3d 255 (3d Cir. 2008); *Certain Underwriters at Lloyd's v. Inlet Fisheries Inc.*, 518 F.3d 645 (9th Cir. 2008); *HIH Marine Servs., Inc. v. Fraser*, 211 F.3d 1359 (11th Cir. 2000); *Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882 (5th Cir. 1991); *Windward Traders v. Fred S James & Co. of N.Y.*, 855 F.2d 814 (11th Cir. 1988); *Puritan Ins. Co. v. Eagle S.S. Co. S.A.*, 779 F.2d 866 (2d Cir. 1985); *Steelmet, Inc., v. Caribe Towing Corp.*, 747 F.2d 689 (11th Cir. 1984); *U.S. Fire Ins. Co. v. Cavanaugh*, 732 F.2d 832 (11th Cir. 1984); *Gulfstram Cargo, Ltd., v. Reliance Ins. Co.*, 409 F.2d 974 (5th Cir. 1969); *Fireman's Fund Ins. Co. v. Wilburn Boat Co.*, 300 F.2d 631 (5th Cir. 1962); *Marine Ins. Co. v. Cron*, 2014 WL 4982418 (S.D. Tex. Oct. 6, 2014); *U.S. Fire Ins. v. Liberati*, 1989 A.M.C. 1436 (N.D. Cal. 1989); *Thebes Shipping, Inc., v. Assicurazioni Ausonia Spa*, 599 F. Supp. 405 (S.D.N.Y. 1984).

“basis of contract” practice that the New Act has banned.

Another foreseeable area of litigation may be how the insurer can discharge its burden of proof of actual inducement. Section 10 (1) of the New Act provides that the new rules on breach of warranties also apply to implied warranties. How will the new rule affect remedial actions in voyage policies and the “blind eye” rule in time policies?

The consequences of the new rules on the law of marine insurance are better seen in a comparative perspective. American law of marine insurance has always been in symbiosis with the English one, mostly concurring but at times dissonant. It would be a misstatement that American law has been subservient to English law of marine insurance. A comparative study, especially following the masterpiece by Professor Schoenbaum, shows that it was a two-way symbiosis, and, as this article will explore in the part that follows, the New Act makes the interface of American and English marine insurance law even closer.

V. A COMPARATIVE VIEW

A meaningful comparative analysis of American and English marine insurance must begin with the works of Professor Schoenbaum, which are specifically dedicated to this task. In his 1998 article, Professor Schoenbaum addressed the issues of *utmost good faith*, finding that the law in England and America had developed independently, although American courts used to cite to English precedents, and while the doctrine remained strong in England, the American courts were finding ways to evade the strictures of *Wilburn Boat*.¹³⁹ The theme was repeated in the book that followed in 1999, addressing not just the issue of *utmost good faith*, but also the whole spectrum of divergences between American and English law of marine insurance.¹⁴⁰ Professor Schoenbaum found “key divergences” especially in the areas of disclosures and representations of inducement and of warranties.¹⁴¹ With the new rules of the Insurance Act 2015, the comparative panorama has changed, revealing that some divergences have disappeared, some have remained but cured in new ways, and only one new divergence has been added.

139. See Schoenbaum’s Duty of Utmost Good Faith, *supra* note 2, at 38.

140. See generally SCHOENBAUM, *supra* note 11.

141. See *id.* at 118–19, 170–71, 175–78.

A. A FRESH CONVERGENCE

The most remarkable divergence noted by Professor Schoenbaum, the one on warranties, has been resolved. Under the New Act, breach of warranty has the same effect as the suspension of coverage under American law. Another interesting convergence is the provision of the New Act that links the operation of warranties to the risks of a particular kind, or location, or time, so that a breach of one of these warranties would have effect only for the type of risk covered by the warranty and would not void coverage of all other covered risks unrelated to the specific warranty that has been breached.¹⁴² The Report explains the reasons at Chapter 18, titled “Detailed Recommendations: Terms Relevant To Particular description Of Loss.” The aim of the new law was to ensure that a breach of a warranty related to one particular type of risk would not cause collapse of coverage of all other covered risks not related to the specific warranty. In other words, the voidance of the whole policy for matters totally unrelated to the breach; exactly what *Wilburn Boat* abhorred.¹⁴³

To the pride of American scholars, the Commissions cited, in support of this recommendation, Article 31, Section 3106 (b) of the New York Insurance Law.¹⁴⁴ It is true that Subsection (c) of that Article states that the whole section does not apply to marine insurance contracts, but, as Professor Schoenbaum pointed out,¹⁴⁵ there are lines of American precedents that have required a link of causation between the breach of warranty and the loss,¹⁴⁶ or between the breach of warranty and the risk.¹⁴⁷ Now there is a convergence of American and English law also on this point.

The “inducement” test was a divergence existing at the time of Professor Schoenbaum’s book, when it was not clear whether actual

142. See Insurance Act, *supra* note 1, §§ 11(1)–(4), at. 6.

143. See 2014 REPORT, *supra* note 17, §§ 18.10–18.24, at 194–96.

144. See *id.* § 18.25, at 196; see also N.Y. INS. LAW § 3106(b) (2015).

A breach of warranty shall not avoid an insurance contract or defeat recovery thereunder unless such breach materially increases the risk of loss, damage or injury within the coverage of the contract. If the insurance contract specified two or more distinct kinds of loss, damage or injury which are within its coverage, a breach of warranty shall not avoid such contract or defeat recovery thereunder with respect to any kind or kinds of loss, damage or injury other than the kind or kinds to which such warranty relates and the risk of which is materially increased by the breach of such warranty.

N.Y. INS. LAW § 3106(b) (emphasis added).

145. See N.Y. INS. LAW § 3106(c); SCHOENBAUM, *supra* note 11, at 155.

146. See *U.S. Fire Ins. Co. v. Cavanaugh*, 732 F.2d 832, 835 (11th Cir. 1984).

147. See *Windward Traders v. Fred S James & Co. of N.Y.*, 855 F.2d 814, 818 (11th Cir. 1988); *U.S. Fire Ins. v. Liberati*, 1989 A.M.C. 1436, 1442 (N.D. Cal. 1989).

inducement could be presumed under English law, while it had to be proven under American law. The *Assicurazioni Generali* case resolved this doubt in 2002,¹⁴⁸ but the New Act made sure that proof of inducement becomes part of the statute. The divergence on the test of materiality remains a “mere influence test” under English law and a “decisive influence test” under American law. However, the decisive influence has become the substance of the inducement itself, in a way swallowed by it. A breach under a “mere influence test” does not produce direct consequences under the New Act, but the remedies depend only on a new and qualified inducement test which looks and sounds like a “decisive influence test.” The New Act has preserved *utmost good faith* only in name, on the belief, shared by Professor Schoenbaum, that the doctrine still has a function of economic efficiency, but has corrected the flaws that strict application of the doctrine had produced. This, however, has created a new divergence that was not there before.

B. A FRESH DIVERGENCE

The new divergence is the obliteration of the substance of the doctrine of *utmost good faith*, which American case law, instead, has been consistently embracing.¹⁴⁹ We are back to the opening lines of this article, namely to the very recent opinion of the United States Court of Appeals for the First Circuit in *Catlin (SYNDICATE 2003) at Lloyd’s v. San Juan Towing and & Marine Services, Inc.*¹⁵⁰ *Catlin* admitted that the issue had been uncertain in the Circuit,¹⁵¹ but decided to join the “nearly unanimous consensus” of the sister Circuits, that had recognized *utmost good faith* as an entrenched rule of Admiralty law, holding that, “[u]nder *uberrimae fidei*, when the marine insured fails to disclose to the marine insurer all circumstances known to it and unknown to the insurer which ‘materially affect the insurer’s risk,’ the insurer may void the marine insurance policy at its option.” The First Circuit found that, in the case under review, there was failure to disclose material circumstances, and held that the insurer was entitled to avoid the policy. Avoidance was the *automatic* consequence of concealment of a material circumstance.

The same result obtained in the cases cited to by *Catlin* for unanimous

148. See *Assicurazioni Generali Spa v. Arab Insurance Group*, [2002] EWCA 1642, [62] (appeal taken from Eng.).

149. See Schoenbaum’s Duty of Utmost Good Faith, *supra* note 2, at 13–14.

150. *Catlin at Lloyd’s v. San Juan Towing & Marine Servs.*, 778 F.3d 69 (1st Cir. 2015).

151. *Id.* at 80–81.

consensus.¹⁵² This result, however, is exactly what the Law Commissions and the New Act wanted to avoid and did avoid statutorily: the sharp remedy of “all or nothing.” On closer look, the cases cited to by *Catlin* embraced the doctrine of *utmost good faith* on the basis of ancient seminal cases from the United Kingdom.

Inlet Fisheries embraced *utmost good faith* on the authority of *McLanahan v. Universal Insurance Co.*, a case from 1828, which in turn followed two *nisi prius* cases before Lord Mansfield,¹⁵³ and took *utmost good faith* for granted on the ground that “[u]berrimae fidei was first recognized in 1766 by Lord Mansfield, and was codified in English law in 1906.”¹⁵⁴ *N.Y. Marine & General Insurance Co.* did the same.¹⁵⁵ *HIH Marine Services v. Fraser* also relied on a more recent precedent of the Eleventh Circuit in *Steelmet v. Caribe Towing Corp.*, which found that *utmost good faith* is “a clear rule of maritime law and is the controlling federal rule even in the face of contrary state authority,” citing to Couch on Insurance and to the last opinion of the Fifth Circuit in the *Wilburn Boat* saga.¹⁵⁶ *Puritan Insurance Co.* also relied on *McLanahan* through *Thebes Shipping, Inc., v. Assicurazioni Ausonia SPA*, which in turn relied on *McLanahan*.¹⁵⁷ *AGF Marine Aviation & Transportation* relied on *Inland Fisheries*, *HIH*, *Steelmet*, and *Puritan*, thus sharing allegiance to inveterate

152. See *Catlin*, 778 F.3d at 80–81 n.13; see also *N.Y. Marine & Gen. Ins. Co. v. Cont’l Cement Co., LLC*, 761 F.3d 830, 839 (8th Cir. 2014) (recognizing that *uberrimae fidei* is “established federal precedent”); *AGF Marine Aviation & Transp. v. Richard C. Cassin Cit Group/Sales Fin., Inc.*, 544 F.3d 255, 263 (3d Cir. 2008) (recognizing that *uberrimae fidei* is “established federal precedent”); *Certain Underwriters at Lloyd’s v. Inlet Fisheries Inc.*, 518 F.3d 645, 650–54 (9th Cir. 2008) (recognizing that *uberrimae fidei* is “established federal precedent”); *HIH Marine Servs., Inc. v. Fraser*, 211 F.3d 1359, 1362 (11th Cir. 2000) (recognizing that *uberrimae fidei* is “established federal precedent”); *Puritan Ins. Co. v. Eagle S.S. Co. S.A.*, 779 F.2d 866, 870 (2d Cir. 1985) (recognizing that *uberrimae fidei* is “established federal precedent”).

153. See *McLanahan v. Universal Ins. Co.*, 26 U.S. 170, 189 (1828); SAMUEL MARSHALL, A TREATISE ON THE LAW OF INS.: IN FOUR BOOKS 348–349 (Manning and Loring ed. 1805)(citing to *Fillis v. Bruton* and *Ratcliffe v. Shoolbred*).

154. *Inlet Fisheries*, 518 F.3d at 649.

155. See *N.Y. Marine & Gen. Ins. Co.*, 761 F.3d at 839.

156. See *HIH Marine Servs., Inc.*, 211 F.3d at 1362; *Steelmet, Inc., v. Caribe Towing Corp.*, 747 F.2d 689, 695 (11th Cir. 1984).

Nothing is better established in the law of marine insurance than that “a mistake or commission material to a marine risk, whether it be wilful or accidental, or result from mistake, negligence or voluntary ignorance, avoids the policy, and the same rule obtains, even though the insured did not suppose the fact to be material.”

Steelmet, 747 F.2d at 695 (quoting *Fireman’s Fund Ins. Co. v. Wilburn Boat Co.*, 300 F.2d 631, 646 (5th Cir.) (quoting STEVEN PLITT ET AL., COUCH ON INS. 2568 (3d ed., 2015))).

157. See *Puritan Ins. Co.*, 779 F.2d at 870–71; *Thebes Shipping, Inc., v. Assicurazioni Ausonia Spa*, 599 F. Supp. 405, 426 (S.D.N.Y. 1984) (quoting *McLanahan*, 26 U.S. at 185–86).

English grounds upon which all the other circuits had founded their recognition of *utmost good faith*.

These opinions also share something else in common: a sharp criticism for the *Anh Thi Kieu* decision, which the United States District Court for the Eastern District of Missouri called an “aberration” with the approval of the 8th Circuit.¹⁵⁸ The epithet does not give justice to *Anh Thi Kieu*. The Fifth Circuit may have made a questionable characterization of *Wilburn Boat* and of *Gulfstream Cargo, Ltd. v. Reliance Insurance Co.*,¹⁵⁹ calling their finding of utmost good faith “mere dicta.”¹⁶⁰ However, *Anh Thi Kieu* went on to approve the Supreme Court approach in *Wilburn Boat*, casting a jaundiced eye on the application of a so-called strict breach of warranty rule under general maritime law. The Supreme Court, noted *Anh Thi Kieu*, viewed this maneuver with skepticism.¹⁶¹

Also, another theme runs through the thread of *Anh Thi Kieu*: a finding of use of the doctrine of utmost good faith as unfair overreaching in detriment of a weaker, unsophisticated party. At page 893, Paragraph D, the court shared a comment of the District Court judge, that the boat owner, *Anh Thi Kieu*, has been somewhat taken advantage of and has suffered a great deal as a result of her experience as boat owner of the STACY MARIE . . . The Court feels that under the circumstances and considering the owner, [Ms.] Kieu that they [Albany] were not being exactly fair with her and they were being *super technical*. . . . It is equally possible that the district court’s remarks express frustration with Albany’s “super technical” denial of *Anh Thi Kieu*’s claim.

The same could be said of *Wilburn Boat*, decided over a similar situation of unsophisticated policyholders, with weaker bargaining power and subject to an extremely strict rule that, borrowing language from *Anh Thi Kieu*, could be called “super technical.” *Wilburn Boat* joined *Anh Thi Kieu* as victim of lambasting criticism by courts and scholars. Professor Graydon Staring has even written an obituary of *Wilburn Boat*.¹⁶² However, a more sedate revisiting of these two landmarks of American jurisprudence may be in order after the contemporary developments addressed in this

158. See *N.Y. Marine & Gen. Ins. Co.*, 761 F.3d at 837; see also *Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882 (5th Cir. 1991).

159. *Gulfstream Cargo, Ltd., v. Reliance Ins. Co.*, 409 F.2d 974 (5th Cir. 1969),

160. *Anh Thi Kieu*, 927 F.2d at 889.

161. See *id.*

162. Graydon S. Staring, *Wilburn Boat is a Dead Letter: R.I.P.*, 42 J. MAR. L. & COM. 465 (2011).

article.

Anh Thi Kieu may be misinterpreted to hold that there is no *utmost good faith* in Admiralty law. *Anh Thi Kieu*, however, just held that *utmost good faith* is not “entrenched” in the Fifth Circuit. The following passage in *Anh Thi Kieu* is worthy of notice: “Neither does this Court hold that state insurance law always will supersede the *uberrimae fidei* doctrine. In an appropriate case, it is entirely possible that application of the doctrine would be more appropriate than application of the relevant state insurance regulations.” In fact, later on, the Fifth Circuit did make application of *utmost good faith* in *Great Lakes Reinsurance (UK) PLC v. Durham Auctions, Inc.*,¹⁶³ and in *Marine Insurance Company. v. Cron.*¹⁶⁴

In *Great Lakes* the insurance policy contained a rather ingenious choice of law clause:

It is hereby agreed that any dispute arising hereunder shall be adjudicated according to well established, entrenched principles and precedents of substantive United States Federal Admiralty law and practice but where no such well-established, entrenched precedent exists, this insuring agreement is subject to the substantive laws of the state of New York.¹⁶⁵

The court acknowledged that *utmost good faith* could not be used under the first prong of the clause because not entrenched in the Circuit according to *Anh Thi Kieu*. Since one panel of the court could not overrule another, the court went on to consider whether, under the alternative choice of law, the law of New York would apply.¹⁶⁶

The argument against application of New York law was based on the “reverse” predicate that state law may not govern “if it conflicts with the fundamental purposes of maritime law.” Since *utmost good faith* is not a fundamental purpose of maritime law under *Anh Thi Kieu* (at least in the Fifth Circuit), New York law, by accepting the principle of *utmost good faith* negated in the Circuit, would conflict with the admiralty rule as existing in the Fifth Circuit (i.e., no rule of *utmost good faith*) and should not apply.¹⁶⁷

The *Great Lakes* court rejected this argument. While it is true that

163. *Great Lakes Reinsurance (UK) PLC, v. Durham Auctions, Inc.*, 585 F.3d 236, 244–45 (5th Cir. 2009).

164. *Marine Ins. Co. v. Cron*, 2014 WL 4982418, at *4 (S.D. Tex. Oct. 6, 2014).

165. *Great Lakes*, 585 F.3d at 238–39.

166. *See id.* at 241.

167. *Id.* at 244.

New York law applies *utmost good faith* and under *Anh Thi Kieu* the *utmost good faith* is not entrenched federal precedent, nevertheless *Anh Thi Kieu*:

does not hold that that federal maritime law no longer embraces the *uberrimae fidei* doctrine. To hold that New York law, because it applies *uberrimae fidei*, conflicts with any fundamental purpose of maritime law, would be to unduly extend *Kieu* and to run counter to the great weight of authority which has embraced that doctrine in maritime insurance cases.¹⁶⁸

And recently, in the fall of 2104, the Fifth Circuit reaffirmed this holding in *Cron*, citing directly to *Great Lakes*:

New York's requirement of utmost good faith cannot be contrary to the fundamental principles of general maritime law because maritime law applies the same standard. Although *Kieu* held that *uberrimae fidei* was *not so entrenched* in federal maritime law that it displaces the state law that ordinarily governs marine insurance contracts, *Great Lakes* explained that to hold that New York law, because it applies *uberrimae fidei*, conflicts with any fundamental purpose of maritime law, *would be to unduly extend Kieu and to run counter to the great weight of authority which has embraced that doctrine in maritime insurance cases.*¹⁶⁹

From a combined analysis of *Anh Thi Kieu*, *Great Lakes*, and *Cron*, it appears that *Anh Thi Kieu* did not profess an inimical treatment of *utmost good faith*, but expressed a more contained view that *utmost good faith* was not "so entrenched," at least in the Circuit, as to have the strength of always displacing state law.

Most importantly, *Cron* held that *Anh Thi Kieu* did not mean to say that *utmost good faith* was in conflict with fundamental purposes of Texas insurance law. On the contrary, *Anh Thi Kieu* found "reasonable similarity" between Texas law and an *uberrimae fidei* regime:

Texas law, unlike federal law, imposes an appropriate limitation that relatively minor misstatements which the insured did not intend to make do not afford the insurer an excuse to refuse payment. The fundamental nature of both laws, however, is the same. Texas insurance law shares the concern of federal maritime law that an assured should not profit from her material misrepresentations to the underwriter.¹⁷⁰

The substance, if not the words, of the Fifth Circuit precedents seem to

168. *Id.* (emphasis added) (internal citation omitted); see *Anh Thi Kieu*, 927 F.2d at 890 (5th Cir. 1991).

169. *Cron*, 2014 WL 4982418, at *4 (emphasis added) (quoting *Great Lakes*, 585 F.3d at 244).

170. *Id.* (emphasis added) (citing *Anh Thi Kieu*, 927 F.3d at 887).

accord with the Insurance Act 2015. The inimical view of technicalities and the abhorrence of “all or nothing” remedies with its imbalancing effects, that alienated *Wilburn Boat* and *Anh Thi Kieu*, are all distinctive hallmarks of the Insurance Act 2015.

Even the use of choice of law analysis by *Anh Thi Kieu* may be a symptom of a quest for a more modern and just structure of the relations between insurers and insured. *Anh Thi Kieu* was faced with two competing laws, one of Louisiana and one of Texas. Both laws were good candidates for selection, but the court selected Texas law,¹⁷¹ which was the most protective for the insured and the most exacting for the insurer: it required that misrepresentations could be used as defense only if five elements were pled and proved by the insurer: (1) the making of the representation; (2) the falsity of the representation; (3) *reliance* thereon by the insurer; (4) the intent to deceive on the part of the insured in making same; and (5) the materiality of the representation.

The final decision in *Anh Thi Kieu* was on the intent to deceive, which the court did not find, but the other elements of Texas law are not without significance. The “intent to deceive” coincides with the provision of the New Act that grants the remedy of total avoidance and retention of the premium only in cases of “deliberate or reckless” breach of fair presentation. Reliance of the insurer is, as we have noted above, the ultimate engine of the remedies’ architecture designed by the New Act, which allows remedies only when “inducement” of the actual insurer is proved. So seems to be the “reliance” requirement of the Texas statute. The conclusion is that the “almost unanimous consent” of the circuits is based on ancient rules, completely overhauled by the same creators of those rules, that *Anh Thi Kieu* has not ruled out the use of *utmost good faith* in principle, that the view of *Anh Thi Kieu*, based on Texas law, is closely related to the ultimate views of English law, therefore that *Anh Thi Kieu* and *Wilburn Boat* might deserve a fresh review, and that, after all, *Wilburn Boat* may not be “so” dead, but just rolling in its grave.

C. A POSSIBLE SOLUTION OF THE NEW DIVERGENCE

Now that the law of representations is changed in England, the American precedents on *utmost good faith* are based on grounds that do not exist anymore. The divergence is too sharp to remain. The newly made Insurance Act is not there to be changed. Then what shall we do with the

171. *Anh Thi Kieu*, 927 F.2d 882 at 891.

existing “entrenched” American precedents?

The initial question still remains: is it possible to have a coexistence of *Catlin* and company with the new British law, which is the one that American courts should look at for inspiration, if not guidance? Harmonization of the two seems possible only if all circuits, except the Fifth, reverse themselves, but this is an exercise that seems unrealistic. There might be an alternative solution though. *Catlin*, and all other opinions cited therein, made a “straight” application of *utmost good faith*, that is, granted remedies as *automatic* consequence of the breach, without even mentioning “inducement.” Only *Puritan* used reliance, without much fanfare, as one basis for granting the remedy. Professor Schoenbaum wrote that American courts had always required inducement,¹⁷² but *Catlin* and company were issued after the publication of his works. Except for *Puritan*, none has required inducement, therefore the issue of inducement remains wide open.

What better opportunity to “integrate” the existing case law taking from the freshest evolution of English insurance law? Requiring inducement for the remedies also legitimates a reshaping of remedies under the doctrine of *utmost good faith*, which can even be retained by name (as the New Act did) and used as “interpretative principle.” American courts would not have to embarrass themselves reneging the doctrine; they would just have to take the doctrine to its natural evolution.

VI. POSSIBLE INFLUENCE OF THE NEW ACT ON AMERICAN LAW - CONCLUSION

The above excursus shows that the New Act will surely have influence on the law of marine insurance, both in the United States and at the home of the Act in the United Kingdom. The industry will no doubt make adjustments to daily practice, and choice of law may work in support of such adjustments. In fact, the New Act will come into force on August 12, 2016,¹⁷³ 18 months from the day the Act was passed, thus deliberately giving the industry, the Judiciary, and the legal profession a chance of gradually adjusting to the new reality. While the English players in the industry of marine insurance have received plenty alert from the consultations made by the Law Commissions since 2006, how will American courts, evidently totally unaware of the English “revolution,”

172. See Schoenbaum’s Duty of Utmost Good Faith, *supra* note 2, at 27.

173. See Insurance Act, *supra* note 1.

view the New Act, and will they benefit from its wealth of guidance?

In 1924, upholding an English rule of construction of causation under an insurance policy, Justice Holmes uttered the famous words: “There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business.”¹⁷⁴ Justice Holmes’ exhortation still holds true today, but after almost a century, what would American courts see looking at English law? The answer is that the landscape is in the eyes of the beholder. Federal Admiralty courts want and seek uniformity. Uniformity is a sound principle, but under the rule of *Wilburn Boat*, the uniform rule must be “entrenched.” A rule entrenched is crystallized and cannot be changed. In contrast, the English approach was and is free of constrictions, and the Report of the Law Commissions acknowledged that there is a problem with codification:

Codification has made it difficult for the courts to develop the law to keep pace with commercial changes. Although recent cases have glossed the 1906 Act to accommodate contemporary conditions, the clear words of the 1906 Act continue to exert a strong gravitational pull. The law looks certain on paper, but in practice it is far from it.¹⁷⁵

Codification is a one-way street. Once the law has been codified, there is no practical way of de-codifying it. Any revision to the 1906 Act requires further primary legislation, which is why this report focuses on statutory reform.¹⁷⁶

We do not think that [the author of the 1906 Act, Sir Mackenzie] Chalmers intended his Act to continue in force for more than a hundred years without amendment. He would have assumed that future generations would maintain the law in the same way as they would maintain buildings and infrastructure. We hope that Parliament will be able to carry out this necessary maintenance soon.¹⁷⁷

It did so happen that while American courts adopted inveterate English principles as self-evident uniform rules, English legislators engaged in a fresh labor of self-reassessment and of harmonization of the law with the business world. America and England switched roles: the new World became the Old, and vice a versa. The legal landscape is no longer the venerable one of the old times. A view on English law today encourages

174. *Queen Ins. Co. of America v. Globe & Rutgers Fire Ins. Co.*, 263 U.S. 487, 493 (1924).

175. 2014 REPORT, *supra* note 17, § 1.20, at 8.

176. *Id.* § 1.22, at 8.

177. *Id.* § 1.24, at 8.

courageous changes, not a quest for reassurance by inveterate rules. Uniformity is still a venerable goal of American Admiralty law, but it can be achieved by evolution, not by entrenchment. This is what we see looking at English insurance law today.

A fresh view of the New Act would make sure that inconsistencies like the simultaneous adoption and rejection of *utmost good faith* may not happen again, as the New Act is there for valuable guidance. Having said that, if we compare the *Catlin* decision to abruptly adopt *utmost good faith* with the decades of relentless research and critique by the Law Commissions, one may have the impression that the American world of marine insurance remained static and lethargic. Nothing is further from the truth.

In January 1998, shortly before Professor Schoenbaum's article, Professor Michael Sturley published a comprehensive review of the American law of marine insurance,¹⁷⁸ beginning with the "chaos at the heart of marine insurance law" generated by *Wilburn Boat*.¹⁷⁹ The scope of the article was to collect and analyze the many solutions aired to cure that chaos and to see if there was any possible realistic solution. The first and most obvious solution could have been the overruling of *Wilburn Boat* by the Supreme Court, the maker of the chaos itself.¹⁸⁰ But the Supreme Court had shown a remarkable lack of interest for marine insurance, and given its trend towards widening application of state law (as shown in *Yamaha* and *American Dredging*) the solution appeared unrealistic to Professor Sturley.¹⁸¹ Also, the lower courts "would have to make up for over forty years of inaction and develop the modern rules that are needed today."¹⁸²

A second idea was to let the lower courts distinguish or limit *Wilburn Boat*, endorsing a "maritime but local" approach that seemed supported by *Kossick* and by the separate opinion of Justice Frankfurter in *Wilburn Boat*. This approach, however, cannot work for marine insurance law at large, due to its interstate and international nature.¹⁸³ Professor Sturley then thought about a "*One-Sentence Statute Overruling Wilburn Boat*." This was one solution advanced by the Maritime Law Association of the United States in

178. See Michael F. Sturley, *Restating the Law of Marine Ins.: A Workable Solution to the Wilburn Boat Problem*, 29 J. MAR. L. & COM. 41(1998).

179. See *id.* at 45.

180. *Id.* at 46.

181. *Id.* at 46-47.

182. *Id.* at 47.

183. *Id.* at 48-49.

1991 that found no sponsor in Congress where it was described as “dead in the water.”¹⁸⁴ A more ambitious solution was a proposed statute to be named “United States Marine Insurance Act”. This is a most interesting idea in the context of this article. Professor Sturley reports that the Maritime Law Association of the United States already in 1993 formed an ad hoc Committee to study the MIA 1906 and how the same could be used as a model for a similar legislation in the United States. The Committee worked vigorously at this task, but obvious lack of interest from Congress made this prospect also unlikely.¹⁸⁵

The brilliant idea of Professor Sturley then, was to try working at a Restatement of American law of marine insurance.¹⁸⁶ This solution is indeed the most practical, suitable, and feasible one. The structure itself of the making of a Restatement appears ideal, and Professor Sturley aired it relentlessly at presentations to the ALI, the Association of American Law Schools, and the Maritime Law Association of the United States.¹⁸⁷

Professor Schoenbaum went through a similar review and speculation on propositions for curing the divergences that he found between American and English law of marine insurance. His ideas coincided with those of Professor Sturley, especially the proposition about a new federal law of marine insurance, accompanied by an updating and reforming of the MIA 1906.¹⁸⁸ In the very last footnote of his book, Professor Schoenbaum embraces as a “second solution” the idea of Professor Sturley of a Restatement of the American law of Marine Insurance.¹⁸⁹ While American scholars were preaching relentlessly to deaf ears, the Law Commissions, the British Parliament and Her Majesty obliged.

The intensive works of the Law Commissions on review of insurance law over a long time span¹⁹⁰ mirrors perfectly the procedures for making a

184. *Id.* 50.

185. *See id.* at 50–51.

186. *See id.* at 52–53.

187. *See id.* at 58 n. a1.

188. *See generally* Schoenbaum’s Duty of Utmost Good Faith, *supra* note 2, at 88–89; Michael F. Sturley, *supra* note 178, at 51, 57–58.

189. *See* SCHOENBAUM, *supra* note 11, at 178 n.22.

190. *See How We Work*, LAW COMMISSION, MINISTRY OF JUSTICE, <http://lawcommission.justice.gov.uk/about/how-we-work.htm> (last visited May 12, 2015). The Law Commissions work this way:

[Once a project is decided,] a study of the area of law is undertaken and its defects identified. Other systems of law are examined to see how they deal with similar problem. A consultation paper is issued setting out in detail the existing law and its defects, giving the arguments for and against the possible solutions and inviting comments. The paper is circulated widely to all

Restatement of American law,¹⁹¹ and addresses exactly the same concerns that had preoccupied the American scholars and businesses, who toiled at resolving the same problems at the same time. That the Law Commissions could beat the scholarly American efforts on the finish line matters only in Olympic terms: the important thing is to gain from participation, not to win. From its golden podium, the Insurance Act 2015 (a part of that English law that American courts have consistently liked to watch for guidance) is there for everybody's admiration and celebration as a true Restatement of law, and for encouraging evolution of uniformity of American Admiralty law through unremorseful changes of course by "unanimous American courts."

All courts except, of course, that aberrant Fifth Circuit, a lonesome voice crying in the desert.

interested individuals and organizations, and to the media. [F]eedback [is actively encouraged] from any interested member of the public. . . . [A] report is [then] submitted to the Lord Chancellor and relevant Secretary of State, giving . . . final recommendations and the reasons for . . . them. Where necessary . . . a draft Bill [is included] that would give effect to [the Commission's] recommendations.

Id.

191. Sturley, *supra* note 178, at 52–53. Professor Sturley outlined the many stages for a Restatement: preparation of prospectus, review of it and approval by the 60 members governing body, appointment of a reporter and advisory committee of practitioners, legal scholars, and judges with expertise in the subject, followed by a series of annual cycles, preparation of a preliminary draft, to be distributed to advisory committee and consultative group. *Id.* The reporter then meets with Council for further review, leading to a tentative draft for the vote of full membership of ALI. *Id.* at 53.