

UTMOST GOOD FAITH IN MARINE INSURANCE: A COMPARATIVE STUDY OF ENGLISH AND CHINESE MARITIME LAW

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1 Introduction

The principle of 'Utmost Good Faith' has always been the crown of the field of Marine Insurance Law, which derived from the case of *Carter v Boehm* (1766).¹ With the codification of the Marine Insurance Act 1906, the principle found expression in ss 17 to 20: s 17 presents the general duty to observe the utmost good faith, with the following sections introducing particular aspects of the doctrine, namely, the duty of the assured (s 18) and the broker (s 19) to disclose material circumstances, and to avoid making misrepresentations (s 20).

However, in English Law there are still some extant divergences with regard to the understanding of utmost good faith in practice, since the test is founded on a hypothetical situation and the scope of s 17 is still uncertain. Furthermore, in Chinese Maritime Law, there is no separate legislation with respect to Maritime Insurance Law, and relevant content is covered as a Chapter of the Maritime Code of the People's Republic of China (PRC) under the heading of 'Contract of Marine Insurance'.² Under this title, there is no specific principal provision which stipulates the doctrine of 'utmost good faith', there is just absurd words with similar meaning.

Therefore, analysis of this doctrine is crucial for the study of Marine Insurance Law in the UK; the comparative study of this principle in insurance law, including some classic cases in both English and Chinese law is valuable for remodelling the marine

¹ (1766) 3 Burr 1905, 1909.

² Articles 216-256, Chapter XII, Maritime Code of the PRC 1992.

insurance regime in China.

2 Specific Aims

The general aim of this project is to facilitate a more comprehensive statement on the duty of 'utmost good faith' in the English maritime law regime. In conjunction with the analysis, a comparison between English and Chinese maritime law in the area of marine insurance will also be constructed, in order to put forward suggestions for amendment of corresponding legislation in Chinese Law. To sum up, this project seeks to add fresh perspectives on the understanding and enforcement of 'utmost good faith' and the status and tendency of the doctrine's legislative intervention, so as to contribute to more effective solutions fitted for specific problems and gaps in practice.

3 Preliminary Studies and Progress Report

Just like the other contract formulas, the conclusion of a marine insurance contract should follow the procedure of 'offer' and 'acceptance'. However, because of the characteristics of the insurance market, the marine insurance contracts have a higher degree of credit, particularly that either party should perform the duty of '*utmost* good faith'.

At common law, only insurance contracts provide a true example of 'utmost good faith'. This is a duty on the person taking up the insurance to disclose to the insurance company all facts of which he is aware which might affect the premium or acceptance of the risk. Failure to do so renders the contract voidable at the option of the insurance company, which means the contract is rescinded. Nevertheless, in the fiduciary situation in equity, this duty is not the nature of contract anymore; it is the relationship of the parties and not the particular contract which gives rise to the need to disclose.³ As stated earlier, ss 17-20 of the Marine Insurance Act 1906 list two leading aspects of

³ Keenan, D., *English Law*, (2004, 14th ed., London, Longman) p.310.

'utmost good faith' – the duty of disclosure, and not to make misrepresentations pending negotiation of contract. Therefore, in the Marine Insurance Act, the narrow sense of 'utmost good faith' mainly covers two definitions: duty of disclosure and representation. But, since the requirements for 'utmost' are so abstract, and the UK is a common law country, the identification and enforcement of the relevant test has been hampered and become much more complicated in practice. Examples are: the standard to measure 'utmost'; when to disclose and make representation; whether the duty is only pre-contractual or continuing; the test for materiality. Most of these issues are based on the premise of hypothetical theory.

Briefly, there are a number of specific issues to be identified with regard to English marine insurance. These issues include breach and duration of duty, materiality and the test, limits on disclosure, misrepresentation, legislative intervention, reform, remedies and legal consequences for breach, especially for the issue about identifying the scope of s 17. At the time he drafted the Act, Lord Mansfield did not mention, or maybe did not notice, the probability of fraud claims advanced by the assured, which results in the divergences about whether the duty of 'utmost good faith' is a continuing one or not. To date, the argument has concentrated on whether the fraud claim is covered by the 'utmost good faith' doctrine or not. After the review of a group of classic cases, there is a suggestion that the judgment tends to discourage the exaggerated extension of s 17, and prefers to catalogue the fraudulent claim under the heading of 'fraud' at common law.

With regard to China, the situation is not good; either the legislation or the enforcement is poor and lacks regulation. Chinese Insurance Law adopts similar words to s 17, listing the legal effects of the breach of this obligation. There are specific articles under the Maritime Code of the PRC on this topic as well. Unfortunately, in China, there is still no principal provision dealing with 'utmost good faith' in the marine insurance contract until now. The insured's disclosure duty was firstly identified by the Regulations of the

PRC on Contracts of Property Insurance 1983⁴ (repealed) which stipulated that the insured should observe the disclosure duty if the insurer made enquiry. When it comes to article 222 of the Maritime Code of the PRC, the disclosure duty is extended to the scope at common law – indefinite disclosure. In fact, besides the lack of ‘utmost good faith’ requirement in the Maritime Code, the Maritime Code adopts the term ‘inform’⁵ instead of ‘disclosure’ under the Marine Insurance Act 1906. Whether this is purposely or just a translation problem needs further verification as well. However, for the time being, there are some distinctions on the content of provisions.

For instance, compared with the Marine Insurance Act 1906, the ‘inform’ duty in the Chinese maritime code covers the duty of disclosure and not to make misrepresentations in English maritime insurance. With respect to the breach of duty, the legal consequences are different. In China, the infringement of duty is divided into two categories: intentional and non-intentional act, which leads to two different legal consequences of duty breach.⁶ In contrast, in the Marine Insurance Act 1906, if the assured fails to perform the duty, no matter whether utmost good faith, or the duty of disclosure and not make misrepresentation under this heading, the contract may be avoided, without any premise. But sometimes, as there is no other remedy, avoidance of the contract is the only remedy available to the assured,⁷ since the courts have held that damages cannot be awarded for such a breach.⁸

There are still some other differences which should be identified: after a survey, there are several issues worth detailed discussion:

- 1) the definitions of good faith, utmost good faith, disclosure, representation and

⁴ State Council, Regulations of the PRC on Contracts of Property Insurance 1 September 1983.

⁵ Article 222, Maritime Code of the PRC 1992.

⁶ Article 223, Maritime Code of the PRC 1992.

⁷ Hodges, Susan, *Law of Marine Insurance*, (1996, London, Cavendish Publishing Limited), p.85.

⁸ *Manifest Shipping & Co Ltd v Uni-Polaris Insurance Do Ltd & La R Reunion Europeene* [1995] 1 Lloyd’s Rep 651, QBD.

- other related definitions in two systems;
- 2) the time for disclose and representation;
 - 3) the test for material facts;
 - 4) the avoidance of contract;
 - 5) the legal consequences of duty breach; and
 - 6) the post-contractual duty.

The next step is to study the history and current circumstances (legislation and case survey) of the duty of 'utmost good faith' in English and Chinese maritime law in depth, so as to find some feasible solutions.

4 Research Design

Thus far, I have gone through more than ten books, including the *Origins of the Early English Maritime and Commercial Law*,⁹ *Law of Marine Insurance*,¹⁰ *The Law of Marine Insurance*,¹¹ *海上保险合同法详论 (Law of Marine Insurance Contract)*,¹² *English Law*,¹³ *Marine Insurance Legislation*,¹⁴ *Arnould's Law of Marine Insurance and Average*,¹⁵ *Cases and Materials on Marine Insurance Law*,¹⁶ and a couple of classic law reports and journal articles. Although the project is concentrated on the doctrine of 'utmost good faith', various legal disciplines should be used to provide a picture of the optimal ways in which to remedy it. So, this term, I plan to widen the range of books to cover the scope of common law and English law, contract law, general marine insurance law, and law of evidence as well.

⁹ Sanborn, Frederic Rockwell, *Origins of the Early English Maritime and Commercial Law*, (1930).

¹⁰ Hodges, Susan, *Law of Marine Insurance*, (1996, London,, Cavendish Publishing Limited).

¹¹ Bennett, Howard, *The Law of Marine Insurance*, (2006, 2nd ed., London, Oxford University Press).

¹² Wang, Pengnan, *Law of Marine Insurance Act*, (2003, 2nd ed., Dalian, Dalian Maritime University Press).

¹³ Keenan, Denis, *Smith & Keenan's English Law*, (2004, 14th ed., London, Longman).

¹⁴ Merkin, Robert M., *Marine Insurance Legislation*, (2005, 3rd ed., London, LLP).

¹⁵ Arnould, Joseph, *Arnould's Law of Marine Insurance and Average*, (1981), vols. 1, 2, 3.

¹⁶ Hodges, Suan, *Cases and Materials on Marine Insurance Law*, (1999, London, Cavendish).

Additionally, I have already surveyed more than eight websites. Several of these sites have a large number of links to other sites with information about the principle of 'utmost good faith', so I plan to look at many of these other sites. The majority of the sites that I evaluated had the text of complete articles, law reports and precedents about marine insurance, including materials from the Australian Law Reform Commission, British Insurance Law Association, British Maritime Law Association, Comite Maritime International, Law Commission, which help me to pay close attention to English prospects of change, and updated information about law reform in common law countries, and I will read these articles in detail. Obviously, since the comparison between English and Chinese marine insurance regimes is a part of the research project, the survey of complete articles, law reports and textbooks in both Chinese and English is necessary as well.

Thus, this term, I plan to complete the literature review process as soon as possible, widening the research scope to related topics. Additionally, I plan to decide the outline draft for the final thesis, and try to figure out a clear and logical picture step by step.

5 Methodology

1) *Legal Multidisciplinary*

Firstly, a legal multidisciplinary approach is used, since it is believed that the duty of utmost good faith in marine insurance law is so important that various legal disciplines should be used to provide a full picture of the optimal ways in which to remedy it, including Contract Law, Maritime Law, Marine Insurance Act, Law of Evidence, Common Law and English law.

2) *Comparative Approach*

This project does not only engage in a legal multidisciplinary approach, but will also rely upon a comparative research approach. Thus, the relevant regulations and codes will be examined, as well as their implementation in UK and China.

3) Case Studies

Within the set-up of the research project from which this research will result, it is also considered important to provide good case studies of typical marine insurance cases. In addition, a clear look at various case studies can provide important indications of the instruments used in the performance of utmost good faith in practice, in both English and Chinese markets.

6 Conclusion

The question of utmost good faith is always an intriguing one; it promotes uncertainty and leaves too much discretion to the court. To date, research in the doctrine of 'utmost good faith' has focused on two sets of concerns: tests for materiality and issues pertaining to legal effects of breach of duty (especially for misrepresentation and fraudulent claims). Under the heading of this project, research that integrates such areas of relevance to the English Law, Contract Law, law of evidence, maritime law and marine insurance law in China is planned for the future. The project commenced in April 2008, and will be completed within around three years with a final report to the School of Law and Social Science.