Law Commission
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Reforming Insurance Contract Law
Issues Paper 9
The Requirement for a Formal Marine Policy: Should Section 22 Be Repealed?

October 2010

The Law Commission
and
The Scottish Law Commission

INSURANCE CONTRACT LAW

Issues Paper 9

The Requirement for a Formal Marine Policy: Should Section 22 be Repealed?

THE LAW COMMISSIONS – HOW WE CONSULT

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The Law Commissioners are: The Rt Hon Lord Justice Munby (*Chairman*), Professor Elizabeth Cooke, David Hertzell, Professor David Ormerod and Frances Patterson QC. The Chief Executive is Mark Ormerod CB.

The Scottish Law Commissioners are: The Hon Lord Drummond Young (*Chairman*), Laura J Dunlop QC, Professor George L Gretton, Patrick Layden QC, TD and Professor Hector L MacQueen. The Chief Executive is Malcolm McMillan.

Topic: We examine section 22 of the Marine Insurance Act 1906, which provides that a marine insurance contract must be "embodied in a marine policy". We consider the consequences of this rule and ask whether a "marine policy" may be an electronic document. We tentatively propose that section 22 should be repealed.

Geographical scope: England and Wales, Scotland.

Duration of the consultation: from 29 October 2010 to **17 January 2011**.

How to respond

Please send your responses either –

By email to: commercialandcommon@lawcommission.gsi.gov.uk or

By post to: Christina Sparks, Law Commission, Steel House, 11 Tothill Street, London SW1H 9LJ

Tel: 020 3334 0285 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, where possible, you also send them to us electronically (in any commonly used format).

After the consultation: In the light of the responses, we will work towards a full Consultation Paper, which we hope to publish in 2011.

Freedom of information: We will treat all responses as public documents in accordance with the Freedom of Information Act. We may attribute comments and include a list of all respondents' names in each of our publications. If you wish to submit a confidential response, you should contact us before sending it.

PLEASE NOTE – We will disregard automatic confidentiality statements generated by an IT system.

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THE LAW COMMISSION
THE SCOTTISH LAW COMMISSION

Joint Review of Insurance Contract Law
Issues Paper 9

THE REQUIREMENT FOR A FORMAL MARINE POLICY: SHOULD SECTION 22 BE REPEALED?

CONTENTS

SUMMARY

S.1 By section 22 of the Marine Insurance Act 1906, a contract of marine insurance is inadmissible in evidence unless it is "embodied in a marine policy". This introduces a technicality with potentially drastic consequences for the insured. It provides that where there is no marine policy a person is not allowed to prove the terms of the contract in court, and therefore cannot prove their right to make a claim.

S.2 This appears to have little effect in practice. Insurers will pay claims whether the insured has a written policy document or not. However, there is always the possibility an insurer could invoke section 22. Given that the rationale for section 22 has disappeared, it is hard to defend its continued existence.

S.3 The provision only applies to marine insurance. In other forms of insurance, an insurance contract does not need to be in any particular form.

S.4 This Issues Paper sets out our preliminary thinking. Its purpose is to promote discussion before we formulate our proposals. We seek responses by **17 January 2011**, to the address on page 1 of this paper.

THE ORIGINS OF SECTION 22

S.5 The requirement for a policy originated as a way of preventing tax evasion. In 1795, a stamp duty was imposed on marine insurance. It did not tax the insurance contract as such, but the document, which had to be stamped. To make sure that the parties paid the duty, a succession of statutes declared insurance contracts to be invalid without a formal stamped policy.[1] Section 22 is the successor to these provisions.

S.6 This stamp duty was abolished in 1970.[2] However, section 22 remains.

THE IMPLICATIONS OF SECTION 22

S.7 There are no recent cases in which an insurer has refused to pay a claim because the insured cannot produce a policy. However, if the point were to be taken, the position of the insured is far from clear.

S.8 The cases show that section 22 does not require an insured to possess a policy to bring a claim. He or she simply needs to prove that the policy has been executed.[3] But what if a policy has not been executed? The courts have resisted attempts to circumvent section 22 by arguing that the insurer is in breach of a collateral contract to execute a policy.[4]

1 Stamp Act 1795, s 22; Stamp Act 1891, s 93. See *Warwick v Slade* (1811) 3 Camp 127.

2 Finance Act 1970, Schedule 1(2)(b).

3 *Swan and Cleland's Graving Dock and Slipway Co v Maritime Insurance Co and Croshaw* [1907] 1 KB 116.

4 *Fisher v Liverpool Marine Insurance Co* (1872-73) LR 8 QB 469.

S.9 The Marine Insurance Act 1906 makes a distinction between a "policy" and a "slip" (which is the initial document creating the contract).[5] It allows the court to look at the slip, but only where there is a "duly stamped policy".[6]

S.10 The Act does not define a "policy", though it does require that the policy specifies the name or agent of the insured,[7] and is signed by the insurer.[8] We consider whether nowadays a slip would be enough to fulfil the need for a policy, provided that it meets these requirements. We think it may be sufficient, but the law is far from clear.

S.11 The insurance industry has implemented various initiatives to improve the way contracts are agreed, culminating in two significant developments: the Contract Certainty Code of Practice[9] and the Market Reform Contract. The uncertainty surrounding section 22 has the potential to undermine these initiatives.

MARINE POLICIES AND ELECTRONIC COMMERCE

S.12 We consider whether a policy can be an electronic document. In 2001, the Law Commission said that a policy had to be tangible to satisfy section 22.[10] This is because the 1906 Act gives the broker a lien over the policy, and a lien can only attach to a tangible object.[11]

S.13 We now take the view that this does not necessarily prevent an electronic document from meeting the requirements for a policy. We think a policy may exist, even if it is in a form that the broker cannot take a lien over.

S.14 Another difficult issue is what is meant by the insurer's signature under section 24(1). In 2001 the Law Commission took a broad view. It thought signatures could include digital signatures, scanned manuscript signatures and typed names. Since 2001, several cases have supported the view that typing one's name into a document will suffice, provided the necessary authenticating intention is evinced.[12] However, until a ruling by the higher courts, the issue is not beyond doubt.

THE CASE FOR REFORM

S.15 Section 22 is obsolete. Its original justification has disappeared, and it has the potential to cause problems for insureds and for recent contract certainty initiatives.

5 *Ionides v Pacific Fire & Marine Insurance Co* (1871) LR 6 QB 674.

6 Marine Insurance Act 1906, s 89.

7 Marine Insurance Act 1906, s 23.

8 Marine Insurance Act 1906, s 24(1).

9 "Contract Certainty Code of Practice: Principles and guidance" (June 2007), available at http://www.abi.org.uk/Information/Business/Contract_Certainty.aspx.

10 Law Commission, Electronic Commerce: Formal Requirements in Commercial Transactions (December 2001).

11 *Tappenden v Artus* [1964] 2 QB 185 at p 195.

12 *Mehta v J Pereira* [2006] EWHC 813 (Ch); *Orton v Collins* [2007] EWHC 803 (Ch); *Lindsay v O'Loughnane* [2010] EWHC 529 (QB).

S.16 The paper considers whether marine insurance contracts should meet any formal requirements. Although it is clearly good practice to put all the terms in writing in one place, we think that this should be left to market participants rather than imposed by statute. Statutory formality requirements are blunt instruments, which often lead to inappropriate consequences. For non-marine insurance, the issue is left to normal contract rules, and we think that the same should apply to marine insurance. This would not prevent the parties from issuing formal policies if they wish.

S.17 We tentatively conclude that no statutory formalities should be required and that section 22 should be repealed. We also think that sections 23, 24(1) and 89 should be repealed,[13] alongside the sample policy in the schedule to the Act.

S.18 We think that there is a need to clarify the effect of the brokers' lien in section 53(2). Nowadays, the broker's main security is not a paper policy, but the right to retain proceeds to settle outstanding debts for premiums or fees. We think that this should be recognised in statute. In Part 5 we discuss possible reforms to section 53(2).

S.19 The 1906 Act contains 166 references to a "policy" or "policies". If section 22 were to be repealed, we think that these references would need to be reinterpreted as references to the insurance contract. We welcome consultees' views on whether this would have any undesirable consequences.

S.20 Finally, we consider alternative reforms if consultees wish to retain section 22. We ask if there should be clarification that the document may be in electronic form, and signed with an electronic signature.

QUESTIONS FOR CONSULTATION

S.21 A full list of questions is set out in Part 6 of this Issues Paper.

[13] These provisions are set out in Part 1 of the Issues Paper.

PART 1
INTRODUCTION

1.1 This Issues Paper is part of a joint review of insurance contract law by the Law Commission and Scottish Law Commission. It considers whether there should be legislative reform of section 22 of the Marine Insurance Act 1906. The section provides that a marine insurance contract is inadmissible in evidence unless it is "embodied in a marine policy". The section only applies to marine insurance. Its apparent effect is to make a marine insurance contract unenforceable unless a "policy" is in existence. The definition of a "policy" is unclear, and insureds face potential risks if they have not received the correct documents.

1.2 At the outset of our insurance contract law project in 2006, we suggested that section 22 should be reviewed.[1] Most of those responding agreed with us.[2] At the time, consultees were particularly concerned about whether a policy could be an electronic document.

1.3 This paper raises wider issues. The origins of section 22 can be traced to the introduction of stamp duty in 1795. Parliament raised tax by requiring marine insurance policies to be stamped. As stamp duty on policies was abolished in 1970, the original justification for formal policies no longer exists. We ask whether the rule is now needed at all. Several other provisions of the Marine Insurance Act 1906 are closely linked with section 22, and also impose formality requirements on insurance policies.[3] We ask whether these should also be repealed.

1.4 Our tentative proposals and questions are listed in Part 6. We seek views on these issues by **17 January 2011**, and would be grateful if responses could be sent:

by email to commercialandcommon@lawcommission.gsi.gov.uk;

by post to Christina Sparks, Law Commission, Steel House, 11 Tothill Street, London SW1H 9LJ (tel: 020 3334 0285); or

by fax to 020 3334 0201, marked for the attention of Christina Sparks.

THE STRUCTURE OF THIS PAPER

1.5 This paper is divided into 6 parts. In Part 2 we trace the history of the rule in section 22, from the introduction of stamp duty in 1795 to its eventual abolition in 1970. We explain how a "policy" was originally considered to be different from a "slip", which is the abbreviated form of an insurance contract used in the market. This distinction was retained by the 1906 Act.

[1] Law Commission and Scottish Law Commission, Insurance Contract Law: A Joint Scoping Paper (January 2006), available at http://www.lawcom.gov.uk/docs/ins_scoping.pdf, at para 2.50.

[2] Law Commission and Scottish Law Commission, Insurance Contract Law: Analysis of Responses and Decisions on Scope (August 2006). Out of the 92 consultees responding to the question, 84% agreed that section 22 should be reviewed.

[3] For example, section 24(1) provides that a marine policy "must be signed by or on behalf of the insurer". We also discuss ss 23, 89 and Schedule 1.

1.6 In Part 3 we explore the full implications of section 22. If section 22 is taken at face value, an insured who does not hold a policy may not make a claim, as he or she is unable to prove the existence of an insurance contract. The courts have been prepared to allow a contract to be enforced if a policy exists but the insured does not have physical possession of it. However, the courts have rejected the argument that an insured may have a remedy under a collateral contract, if the policy has not in fact been issued.

1.7 In Part 3 we also discuss what contract documents are needed to constitute a policy. Our tentative conclusion is that any document by which the contract is made, including a slip, is a policy so long as it identifies the insured or their agent and is signed by the insurer. However, the issue is by no means certain. The requirement for a policy under section 22 does not fit well with current industry initiatives to introduce contract certainty, such as the Market Reform Contract.[4]

1.8 In Part 4 we examine whether the requirement for a policy is compatible with electronic commerce. In 2001 the Law Commission considered that a marine policy could not be electronic.[5] We re-examine that conclusion. We now think that a policy can probably be an electronic document, and that a signature could be an electronic signature. However, the issue is not beyond doubt.

1.9 As stamp duty has been abolished, the requirement for a formal marine policy is anachronistic. In Part 5 we consider whether legislation should impose any formality requirements on marine insurance contracts. Our view is that they are no longer needed: instead, the normal contract law rules of contract formation and evidence should apply.

1.10 If the Marine Insurance Act 1906 is to be amended, we tentatively conclude that the opportunity should be taken to repeal section 22, along with sections 22, 23, 24(1), 89 and Schedule 1 of the 1906 Act. At the same time, the effect of the broker's lien under section 53(2) should be clarified. We ask about the implications of abolishing the need for a policy for the 1906 Act more generally. Finally, if section 22 were to be kept, we suggest alternative reforms to ensure the compatibility of the Act with electronic commerce.

1.11 In Part 6 we list our tentative proposals and questions.

RELEVANT STATUTORY PROVISIONS

1.12 The following statutory provisions are relevant for the purposes of this paper. Section 22 of the Marine Insurance Act 1906 provides as follows:

[4] See para 3.60 to 3.63. For examples of Market Reform Contract documentation, see http://www.londonmarketgroup.co.uk/index.php?option=com_content&view=category&id=41&Itemid=144.

[5] Law Commission, Electronic Commerce: Formal Requirements in Commercial Transactions (December 2001), at para 7.10. See also H Beale and L Griffiths, "Electronic commerce: formal requirements in commercial transactions" [2002] *Lloyd's Maritime and Commercial Law Quarterly* 467.

Contract must be embodied in policy

> Subject to the provisions of any statute, a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with this Act. The policy may be executed and issued either at the time when the contract is concluded, or afterwards.

1.13 Section 23 of the 1906 Act provides:

What policy must specify

> A marine policy must specify –
>
> (1) The name of the assured, or of some person who effects the insurance on his behalf.

Section 23 formerly required that a marine policy must specify four additional facts, namely the subject-matter insured and the risk insured against;[6] the voyage, or period of time, covered by the insurance;[7] the sum or sums insured;[8] and the name or names of the insurers.[9] These four additional requirements were, however, repealed by the Finance Act 1959.

1.14 Section 24(1) of the 1906 Act provides:

Signature of insurer

> (1) A marine policy must be signed by or on behalf of the insurer, provided that in the case of a corporation the corporate seal may be sufficient, but nothing in this section shall be construed as requiring the subscription of a corporation to be under seal….

1.15 Section 89 of the 1906 Act provides:

Slip as evidence

> Where there is a duly stamped policy, reference may be made, as heretofore, to the slip or covering note, in any legal proceeding.

1.16 Section 90 of the 1906 Act provides:

Interpretation of terms

> In this Act, unless the context or subject-matter otherwise requires … "policy" means a marine policy.

[6] s 23(2).

[7] s 23(3).

[8] s 23(4).

[9] s 23(5).

PART 2
THE ORIGINS OF SECTION 22

THE REQUIREMENT FOR A POLICY

2.1 The historical roots of section 22 can be traced back to section 1 of the Stamp Act 1795, which imposed a special stamp duty regime on all marine insurance policies.[1] The aim of this provision was to raise revenue through a tax on the policy document itself, and it was not a tax on the insurance contract as such.

2.2 The 1795 Act imposed a powerful deterrent to evasion[2] of the stamp duty. Section 11 provided that, unless stamped, the insurance policy was "null and void to all Intents and Purposes whatever". Without a policy, the contract could not be enforced. Section 14 of the 1795 Act provided:

> No insurance made or entered into in Great Britain, in respect whereof any duty is by this Act made payable, nor any contract or agreement for such insurance as aforesaid, shall be pleaded or given in evidence in any court, or admitted in any court, to be good, useful, or available in law or equity, unless the vellum, parchment, or paper on which such insurance shall be engrossed, printed or written, shall be stamped with a lawful stamp.

2.3 Subsequent revenue laws took the same approach, stating that no contract of marine insurance was valid unless expressed in a policy. This requirement was maintained in section 93 of the Stamp Act 1891, which was in force when the Marine Insurance Act 1906 was drafted.

POLICIES AND SLIPS

2.4 The 1795 Act soon caused a practical difficulty. In the Lloyd's market, there is a custom of issuing a "slip" prior to the issue of a formal policy document, if indeed a policy is ever issued. A slip is essentially a memorandum of agreement detailing the main terms of the insurance contract between the insurer and the insured.[3] The slip is usually presented to the insurer by the insured's broker, and a contract of insurance will be concluded when the insurer signs it.

2.5 The existence of the informal "slip" raised two questions: (i) what happened in the absence of a separate policy document; and (ii) what effect did it have once the policy had been issued?

[1] H N Bennett, "The role of the slip in marine insurance law" [1994] *Lloyd's Maritime and Commercial Law Quarterly* 94, at p 95.

[2] Entering into a marine insurance contract without paying stamp duty was a criminal offence. Accordingly, non-compliance with the requirement for a stamp was not simply tax avoidance, it was tax evasion. Section 97 of the Stamp Act 1891 made it an offence both for a person to become an insurer under or to enter into a contract of sea insurance unless it was expressed in a contract of insurance duly stamped. The criminal penalties under the Stamp Act were retained until the passing of the Finance Act 1959.

[3] H N Bennett, "The role of the slip in marine insurance law" [1994] *Lloyd's Maritime and Commercial Law Quarterly* 94, at pp 94 to 95.

2.6 In the context of non-marine insurance, the answer to the first question is clear: a slip, once signed by the insurer, is sufficient to constitute a binding contract of insurance. As Mr Justice Mathew said in *Thompson v Adams*:[4]

> … the [1906 Act] does not apply, and there is no reason why a contract should not be entered into by the slip; and there is every reason, indeed, to suppose that the parties would intend it to be a contract, and upon that point I am against the defendant. I think there was a binding contract to insure, and that the contract contained in the slip is not one from which the underwriter could escape on the ground that it was only optional whether or not he should go on with the contract, and perfect it by a policy of insurance.[5]

2.7 So in *Thompson*, the fact that the slip envisaged the issue of a policy at a later date did not entitle an insurer to argue that it only represented an agreement in honour.

2.8 In the marine context, however, the courts were rigorous in their enforcement of the requirement for a policy. In *Warwick v Slade*,[6] for example, a broker effected a marine policy with an insurer on behalf of its principal. Once the "slip" had been signed, but before the policy had been fully drawn up, the broker paid the premium to the insurer, as it was bound (as a matter of honour) to do. The insured, however, rejected the policy and refused to reimburse the broker for the premium. When the broker sued to recover this sum, the court was forced to dismiss its claim. As Lord Ellenborough explained:

> I cannot take notice of these honorary engagements. Till the stamped policy was signed by the underwriters, no binding contract was entered into, and the authority of the broker might be revoked…. The revenue laws forbid me to look to what is called the slip.[7]

2.9 The case law eventually developed to allow reference to the slip where a policy was in existence. In *Ionides v Pacific Fire & Marine Insurance Co,*[8] Mr Justice Blackburn began by explaining that in the context of marine insurance, the slip was customarily regarded as the final contract between the parties:

> The slip is, in practice, and according to the understanding of those engaged in marine insurance, the complete and final contract between the parties, fixing the terms of the insurance and the premium, and neither party can, without the assent of the other, deviate from the terms thus agreed on without a breach of faith, for which he would suffer severely in his credit and future business.[9]

4 (1889) LR 23 QBD 361.

5 Above, at p 365.

6 (1811) 3 Camp 127.

7 Above, at pp 128 to 129. See also *Roderick v Hovil* (1811) 3 Camp 103.

8 (1871) LR 6 QB 674.

9 Above, at p 684 to 685.

2.10 Having referred to the practical understanding of market participants, the judge went on to describe the legal effect of the slip:

> the slip is clearly a contract for marine insurance, and is equally clearly not a policy.

2.11 This marked a departure from the position in *Warwick v Slade*. While the slip alone was not a policy and therefore did not satisfy the formality requirements of the 1795 Act, it was a contract of insurance. The effect of the decision was therefore to draw a conceptual distinction between the marine insurance contract and the policy.

2.12 The facts of *Ionides* vividly illustrated the practical effect of this distinction. The insurer signed a slip for open cover on hides carried by ships. No policy was ever executed in respect of that single slip. The insured later suggested that it would be more convenient to have two separate policies, and the insurer accordingly signed two new slips. Two policies were subsequently executed in respect of these slips.

2.13 However, a mistake was made in one of the two new slips, which referred to a specific vessel, *The Socrates*. While *The Socrates* was a modern Norwegian vessel, the insured's hides were in fact shipped aboard *The Socrate*, an old French ship. When the hides were lost during the voyage, the insurer denied liability on the ground that the insured had not disclosed a material fact, namely the correct identity of the vessel, before the contract was concluded.

2.14 The case therefore depended on whether the insurance contract was concluded when the original single slip was signed, and thus before any particular vessel had been specified, or when the policy was executed, in which case the mistaken name would have constituted a relevant non-disclosure. Mr Justice Blackburn held that the insurance contract was created by the slip, not the policy, with the result that the insured was entitled to recover for its loss.

> As the slip is… clearly not a policy, it is, by virtue of [the Stamp Act provisions], not valid, that is, not enforceable at law or in equity; but it may be given in evidence whenever it is, though not valid, material; and in the present case it is material. The defendants could not, without a breach of faith, repudiate that engagement and they never proposed to do so. And whilst they adhered to that engagement it was not material to them whether there were or were not facts known to the insured, and not known to them, which might make the vessel a less eligible risk, for they were going to take her whatever she was, at a premium, the amount of which was already finally fixed.[10]

2.15 Mr Justice Blackburn's decision to admit the original slip as evidence of the parties' intentions at the time they entered into the insurance contract was upheld on appeal, where Chief Baron Kelly concluded:

[10] Above, at p 685.

> It is quite enough, therefore, to say that here it was not given in evidence to prove a binding contract between the parties or to contradict or to explain, or in any way affect the construction of the policy in question; but it was given in evidence only to shew what their intention was in preparing the policy. For that purpose I am clearly of opinion that it was admissible in evidence and might be used for that purpose.[11]

2.16 No inroads were made into the basic principle that there must be a policy: the statutory wording was always regarded as being plain. Under the 1891 Act, the Court of Appeal made clear that nothing short of full compliance with the formality requirements would suffice,[12] and this interpretation was also given to similar Commonwealth statutes.[13]

THE 1906 ACT

2.17 In providing that a contract of marine insurance is not admissible in evidence unless "embodied" in a marine policy, section 22 of the Marine Insurance Act 1906 followed much the same approach as the earlier legislation. The 1906 Act also enacted broadly the same formality requirements, including the need to specify five particulars (the insured's name, the subject-matter of the insurance, the risk insured against, the sum insured, and the insurer's name) in section 23.[14] Section 24(1) required that a policy be signed by the insurer.

2.18 The decision in *Ionides* was put into statutory form by section 89, which states (under the heading "slip as evidence"):

> Where there is a duly stamped policy, reference may be made, as heretofore, to the slip or covering note, in any legal proceeding.

2.19 The approach taken in *Ionides* to determining when exactly the insurance contract was concluded was also replicated in section 21 of the 1906 Act:

> A contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not; and for the purpose of showing when the proposal was accepted, reference may be made to the slip or covered note or other customary memorandum of the contract, although it be unstamped.[15]

2.20 While the concepts of a "slip" and a "policy" are acknowledged by the 1906 Act, they are not defined anywhere in such a way as to give any guidance as to how one is to be distinguished from the other.

[11] (1872) LR 7 QB 517 at p 526.

[12] *Home Insurance Co v Smith* [1898] 2 QB 351.

[13] *Nagoremull v Triton Insurance Co* (1924) 41 TLR 168, dealing with section 7 of the Indian Stamp Act 1899.

[14] These particulars were originally specified in sub-sections (1) to (5) of s 23. Sub-sections (2) to (5) were repealed by the Finance Act 1959, so now only s 23(1) (policy must specify insured's name or person effecting the insurance on their behalf) remains in force.

[15] The words in brackets were repealed by the Finance Act 1959.

CHANGES TO THE 1906 ACT

2.21 The stamp duty on marine insurance policies was subsequently altered by the Finance Act 1959, which aligned the tariffs with those on other accident policies,[16] and ultimately abolished by the Finance Act 1970.[17] The requirement for a policy, however, was left intact. As Professor Bennett has observed, this has left a gulf to open up between the letter of the law and commercial practice:

> The market understanding has always been that the underwriter is bound from the moment he initials the slip, even in the absence of a policy. However, the law, driven principally by stamp duty legislation, and commercial practice, adhering obdurately to market tradition, have not always coincided.[18]

2.22 There remains therefore, potentially a risk for an insured who is not in possession of a marine policy.

[16] Finance Act 1959, ss 30 and 37. As noted above, the 1959 Act also removed several of the formalities imposed on marine policies by section 23 of the Marine Insurance Act 1906.

[17] Finance Act 1970, Schedule 1(2)(b).

[18] H N Bennett, "The role of the slip in marine insurance law" [1994] *Lloyd's Maritime and Commercial Law Quarterly* 94, at p 95.

PART 3
THE IMPLICATIONS OF SECTION 22

3.1 As we explained in Part 2, section 22 was intended as a deterrent to stamp duty evasion. Its terms are plain: no insurance contract may be proved in court unless embodied in a marine policy. The 1906 Act retains the distinction between a "slip" and a "policy" as a fundamental conceptual underpinning. Section 89 states that where there is a duly stamped policy, reference may be made to a slip in legal proceedings, implying that without such a policy the court could not look at the slip.

3.2 As drafted, the 1906 Act meant that an insured would need a policy before making a claim against an insurer. Today, it seems unlikely that any reputable insurer would refuse a claim under a legitimate contract because the insured could not produce a policy. However, section 22 continues to exist and raises several complex issues. Below we discuss five questions.

(1) What is the role of the slip?

(2) Can an insurer waive compliance with section 22, or is it a mandatory provision that courts must apply whether it is pleaded or not?

(3) Must an insured physically possess the policy to prove the contract?

(4) Could an insured without a policy bring a claim under a collateral contract?

(5) Does a policy have to contain particular information, or will any document complying with the formality requirements of the 1906 Act amount to a policy, including a slip?

3.3 We then describe recent industry initiatives towards contract certainty which aim to remove the distinction between policies and slips.

THE ROLE OF THE SLIP

3.4 Where both slip and policy exist, there is some confusion over when the slip may be admitted as evidence. We saw this problem arise in the *Ionides* case referred to in Part 2. In *Youell v Bland Welch*,[1] Lord Justice Beldam commented that, although the slip was admissible for some purposes (such as when a claimant seeks rectification of the written policy), it was not admissible as an aid to interpretation of the policy. In a non-binding part of his judgment, he considered the comments of Chief Baron Kelly in *Ionides*,[2] and concluded:

[1] [1992] 2 Lloyd's Rep 127.

[2] Set out above at para 2.15.

> If reinsurers had sought rectification because the policy omitted a term contained in the slip and intended to be incorporated into the subsequent policy, no doubt the Court would have looked at the slip as a document in which the parties had originally recorded their agreement. But that is not the case here and in my judgment the slip was not admissible as an aid to the construction of the reinsurance contract.[3]

3.5 This produced the anomalous situation where a slip may be used as evidence where the court is considering whether to rectify the policy, but may not be used if the court is simply interpreting policy wording. The Court of Appeal subsequently limited this evidential restriction to cases where the policy was intended to supersede the slip. In *HIH Casualty & General Insurance Ltd v New Hampshire Insurance Co,*[4] Lord Justice Rix explained that where the policy was unlikely to have been regarded as the final record of the parties' contract, the wording of the slip was admissible to assist in the construction of the policy. However, "in the absence of a plea of rectification a slip could not be used to alter or contradict the construction of a policy which has superseded a slip".[5]

CAN AN INSURER WAIVE COMPLIANCE WITH SECTION 22?

3.6 In *Nagoremull v Triton Insurance Co*,[6] the Privy Council were concerned with the effect of section 7 of the Indian Stamp Act 1899, which provided that "no contract for sea insurance shall be valid unless the same is expressed in a sea policy". Giving the judgment of the Privy Council, Lord Sumner said that this provision was not "confined to affording a party a protection of which he may avail himself if he pleases". A court could not, he said, "enforce that as valid that which competent enactments have declared shall not be valid".

3.7 If the courts were to take the same approach to section 22, then an insurer would not be able to waive section 22 simply by omitting to plead it in the event of litigation. Likewise, and perhaps more significantly, an insolvency practitioner may not be able to disregard its strict terms either.

[3] *Youell v Bland Welch & Co Ltd* [1992] 2 Lloyd's Rep 127, at p 141.

[4] [2001] CLC 1480.

[5] Above, at p 1503. See also the widening approach in contract law generally; while it is not permissible to use pre-contractual material as direct evidence as to what the parties meant by their final contractual document, it is permissible to refer to such material as evidence of the surrounding circumstances affecting the parties at the time of entering into their contract: *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 (HL, E & W*); Luminar Lava Ignite Ltd v Mama Group plc* 2010 SLT 147 (First Division, Court of Session).

[6] (1924) 41 TLR 168.

3.8 However, *Nagoremull* was a decision on a different provision that made a contract "invalid", rather than inadmissible in evidence. An English authority suggests that section 22 may not have the same effect. In *Re Home and Colonial Insurance Co*,[7] it was held that a liquidator could incur liability for misfeasance[8] where he paid on a claim on behalf of an insolvent insurer where no policy had been executed. That decision, however, was on the basis of section 93 of the Stamp Act 1891. That provision made a sea insurance contract "invalid" if no policy had been stamped. The judge contrasted that provision against section 22 of the 1906 Act, observing in a non-binding part of his judgment that the effect of the latter was merely to make a contract inadmissible in evidence.[9]

3.9 We think, therefore, that an insurer can waive compliance with section 22. Given the abolition of the stamp duty, there is no warrant for the courts to give "inadmissible in evidence" a strained interpretation that means "invalid". Nevertheless, on its face section 22 is a mandatory provision whose effect cannot be avoided consensually.

DOES AN INSURED NEED TO POSSESS THE POLICY?

3.10 The policy document is of great importance to the insured: without it, the contract of insurance is not admissible in evidence. At one time, this gave considerable potency to the broker's possessory lien in section 53(2) of the 1906 Act. Section 53(2) provides:

> Unless otherwise agreed, the broker has, as against the assured, a lien upon the policy for the amount of the premium and his charges in respect of effecting the policy; and, where he has dealt with the person who employs him as a principal, he has also a lien on the policy in respect of any balance on any insurance account which may be due to him from such person, unless when the debt was incurred he had reason to believe that such person was only an agent.

3.11 Under section 53(2), a broker could retain the policy document until it had been reimbursed for any costs incurred in effecting the insurance. Under section 22, an insured who wanted to claim under the policy would need to obtain the policy document from the broker first. The result was that the broker's lien under section 53(2) was an effective form of security. In *Eide UK Ltd v Lowndes Lambert Group Ltd*, Lord Justice Phillips[10] explained:

[7] [1930] 1 Ch 102.

[8] Under s 215(1) of the Companies (Consolidation) Act 1908.

[9] Above, at p 128. S 212(1)(b) of the Insolvency Act 1986 imposes on a liquidator the same liability to account to a company for misapplication of funds, so the issue of whether a distribution to an insured without a policy remains of practical significance.

[10] Now Lord Phillips of Worth Matravers, President of the UK Supreme Court.

> A possessory lien over the policy plainly has little value if the assured is able to recover directly from the underwriter without production of the policy. Before 1906 I do not believe that this would have been considered possible – hence a number of cases where the assured brought suit in trover against the broker to recover the policy. The position was covered in the Act of 1906 by section 22…. The court would normally be expected to insist upon the production of a policy where a claim was made under it. Quite apart from this it was generally considered that the underwriter could not be required to pay under a policy unless the policy was produced. Thus, in 1906, the possessory lien appeared a highly effective security, for it prevented the assured from recovering under a policy until a lien secured by the policy was discharged.[11]

3.12 The value of this security, however, was significantly undermined by the decision in *Swan and Cleland's Graving Dock and Slipway Co v Maritime Insurance Co and Croshaw*,[12] where the claimants argued that the defendant insurer was liable to pay for a salvage loss. The cost of the salvage itself had already been paid by a third party, and the insurer had subsequently reimbursed the third party for that cost. The claimants (the insured's trustee in bankruptcy together with an assignee of the money payable under the policy) argued that the insurer was still liable under the insurance policy because it should have paid the money to the insured, not the third party.

3.13 The defendant insurer raised several arguments denying that they had any liability to pay the claimants under the policy. One argument was that the claimants were not in possession of the policy, as it had been handed over to the insured's mortgagee. The mortgagee had expressly abandoned any claim to the salvage loss, but the insurer argued that the claimants could not sue unless they themselves could produce the policy.

3.14 In giving judgment for the claimants, Mr Justice Channell seemed surprised that such a "technical" argument had been raised by the defendant insurer, although he noted that the insurer had the third party's interests in mind:

> The first objection taken… on behalf of the insurance company is a technical one. It is of course perfectly justifiable to take such a point, though perhaps if the underwriters were defending on their own account it is not a point which one would expect them to raise. But here they are in fact defending in the interests of other persons whom they have paid and from whom they have received an indemnity for the payment.[13]

3.15 This passage suggests that it was unusual, even in 1906, for insurers to refuse to pay claims on the "technical" ground that the insured could not produce the policy. Mr Justice Channell then considered the substance of the insurer's argument:

[11] [1999] QB 199, at pp 207 to 208.

[12] [1907] 1 KB 116.

[13] Above, at p 122.

> The point is that the plaintiffs are not the holders of the policy of insurance, and that, not having possession of it, they cannot sue upon it. I do not think that that contention is well founded. The policy may be lost, but *the action can be maintained just the same if the plaintiff can prove it*. The production of the policy at the trial, if it is in dispute, is necessary, but it can be produced by subpoenaing the person who has it, and the non-production is merely a ground for suspecting that somebody else has an interest in it. And it would be a complete answer to the underwriters' objection to pay on the ground of non-production that they were not under a liability to anyone else. Here the mortgagee, the person in whose possession the policy is, … makes no claim to the money payable for the salvage loss. Therefore the fact that the policy is in the hands of the mortgagee can afford no answer to the plaintiffs' claim.[14]

3.16 In other words, the claimants were able to succeed in their claim against the insurer despite not being in possession of the policy because there was no doubt that the policy existed, and there was no one other than the claimants to whom the insurer owed a liability to pay the claim.

3.17 In the *Eide* case discussed above, Lord Justice Phillips commented on the effect of the decision in *Swan* on the broker's possessory lien over the policy in section 53(2):

> This decision, coupled with the subsequent abolition of the stamping requirement, has had the effect of reducing the value of the possessory lien on the policy, although production of the policy is sometimes a contractual condition precedent to underwriters' liability.[15]

3.18 The approach adopted in *Swan* assists insureds who are unable to produce the policy itself, but who can prove that the policy exists and, moreover, that the insurer is not liable to anyone else under it. However, the *Swan* decision is limited. It does not help an insured who is unable to prove that the policy exists. More importantly, *Swan* cannot be used where a policy was never executed at all, since it would simply be impossible for the insured to prove that it exists. In this case, section 22 still prevents the insured from proving his contract.

CAN AN INSURED CLAIM UNDER A COLLATERAL CONTRACT?

3.19 Some insureds may have the original slip, but not the executed policy. In other cases, no document may have been produced. Where the insurer has failed to provide the policy, the insured would need to find other ways to circumvent the effects of section 22. One possible argument is that the insurer is liable to the insured under a collateral contract to provide a policy. As the insurer has failed to provide the policy, the insurer should pay damages equivalent to the amount of the claim.

[14] Above, at pp 122 to 123 (emphasis added).

[15] *Eide UK Ltd v Lowndes Lambert Group Ltd* [1999] QB 199.

3.20 Such an argument was advanced in *Fisher v Liverpool Marine Insurance Co*,[16] where the insurer had signed the slip but had not executed a policy before the insured suffered their loss. The claimant insured admitted that the slip could not be used as evidence of the insurance contract, but argued that the slip could be used to prove the existence of a separate, collateral contract to prepare and execute the policy.

3.21 The Queen's Bench Division rejected this argument,[17] and the finding was upheld on appeal to the Exchequer Chamber, where Lord Coleridge[18] explained both the argument and the court's conclusion:

> Although [the slip] is a contract incapable of being enforced in a court of law, I agree that it is a contract binding in honour. The way in which this contract was attempted to be enforced at law was by making what was really one contract into two contracts, by saying that the contract contained in the slip and of which the slip was the evidence was one contract, and that that contract could not be enforced; and that, apart from the contract contained in the slip, there was an obligation on the defendants to prepare a policy and tender it to themselves for execution, and that such obligation arose impliedly from the state of the facts between the plaintiffs and the defendants; that this contract was enforceable, and that the plaintiffs could recover in this action, not the amount which was covered by the slip, but damages for its non-fulfilment…
>
> I agree in opinion with the majority of the Court below, that in the present case there was only one contract. It is argued that there was a subsequent contract between the parties; but I think that the whole transaction must be regarded as a performance or non-performance of the original contract entered into when the slip was initialled… the whole transaction is one, an entire and indivisible contract; and in my opinion, that one entire and indivisible contract cannot be enforced.[19]

[16] (1874) LR 9 QB 418.

[17] *Fisher v Liverpool Marine Insurance Co* (1872-73) LR 8 QB 469. Blackburn J dissented, holding (at p 476 to 477) that the slip could be used as evidence for the purpose of proving a collateral contract.

[18] Chief Justice of the Common Pleas.

[19] *Fisher v Liverpool Marine Insurance Co* (1874) LR 9 QB 418, at pp 424 to 425.

3.22 The collateral contract approach was attempted again in *Genforsikrings Aktieselskabet (Skandinavia Reinsurance Co of Copenhagen) v Da Costa*, where there was actually an oral agreement to issue a stamped policy.[20] The claimant argued that the oral agreement gave rise to a separate contract, for which there was fresh consideration, and that this contract was not for marine insurance. However, as in *Fisher*, the King's Bench Division rejected the claimant's argument. First, the court held that to enforce the alleged collateral contract would be contrary to the provisions of the Stamp Act 1891. Second, it held "that the contract sued upon is itself a contract for sea insurance, and not, as the plaintiffs contended, a new promise upon a good consideration".[21]

3.23 Again, therefore, the claimant had failed to effectively enforce the insurance contract using a collateral contract. It is interesting to note, however, that once again a court criticised the insurer's reliance on the requirement for a policy to be produced. This led Mr Justice Hamilton to refuse the usual order that would require an unsuccessful claimant to pay the defendant's costs:

> With regard to the costs, there is a general view amongst underwriters against the setting up of a stamp objection in insurance cases, and without questioning the wisdom of that which the Legislature has ordained, I think that the Court may properly adopt the same standard as has been adopted in practice by underwriters….
>
> I am not prepared to say that there may not be cases in which non-compliance with the requirements of the Stamp Act may with propriety be relied on by an underwriter as a defence. There may be cases where it may be necessary to do so in order to obtain information which the underwriter is entitled to, or to compel the assured to do that which he is bound to do….
>
> I do not think that [in this case] it was fair to the plaintiffs for the defendant to rely on the Stamp Act, and by so doing he has caused them to incur unnecessary expense. In these circumstances I have come to the conclusion that I ought not to order the plaintiffs to pay the defendant's costs of the action.[22]

3.24 As a result, although the claimant was unable to prove the existence of the policy and so could not recover for its loss, the court was clearly critical of such a defence being taken by the insurer. Even in the face of such criticism, however, the court nonetheless rejected the collateral contract approach.

[20] [1911] 1 KB 137.

[21] Above.

[22] Above, at pp 143 to 144.

3.25 In 1923, the same approach was rejected again, this time in the specific context of section 22. In the Scottish case of *Clyde Marine Insurance Co v Renwick & Co*, an insurer had gone into liquidation having signed several slips, but without having executed policies on them.[23] The question arose whether the insureds could recover using the slips. Lord President Clyde was dismissive of the collateral contract approach, and held that it was incompatible with section 22 and several provisions of the Stamp Act 1891:

> The respondents interested in the first case conceded that their slip does not constitute a marine policy within the meaning of the Marine Insurance Act 1906. While it undoubtedly reflects a concluded verbal contract of marine insurance made between the company as insurers and the broker as representing the assured, it is inadmissible as evidence under section 22 of that Act unless and until embodied in a written marine policy. It necessarily follows from this that the slip cannot be regarded as evidence of a contract to sign and issue such a policy.
>
> Moreover, by section 93(1) of the Stamp Act 1891, contracts for sea insurance – such as that of which the slip is a memorandum – are invalid unless expressed in a policy of sea insurance.[24]

3.26 Despite the above case law, Professor Bennett argues that the abolition of the stamp duty regime has opened the way for the courts nowadays to recognise and accept the collateral contract approach:

> Today, moreover, should the insurer refuse to execute a policy, then, provided the premium has been paid or rendered, the assured may maintain an action for breach of a collateral contract to execute a policy.[25]

3.27 Professor Bennett refers to the decisions in *Fisher* and *Da Costa*, and continues:

> The abolition of stamp duty on marine insurance contracts, however, removes the fiscal barrier to recognition of such an action.[26]

3.28 It is indeed possible that a modern court would accept Professor Bennett's conclusion, and hold that an insurer is liable to pay the insured under a collateral contract, even if the insurance contract cannot itself be proved. It is by no means clear, however, whether this conclusion automatically follows from the abolition of stamp duty. The various decisions which have rejected the collateral contract approach, including those set out above, have rarely been based on the stamp duty regime alone.

[23] 1924 SC 113.

[24] Above, at p 123.

[25] H Bennett, *The Law of Marine Insurance* (2nd ed 2006), at para 3.68.

[26] Above.

3.29 For example, Lord Coleridge's opinion in *Fisher* seems to be based upon an ordinary contract law analysis, as he concluded that there was only one contract, not two (as the collateral contract approach would require).[27] As a consequence, if the collateral contract approach was raised before a modern court in order to circumvent section 22, we do not think that the point would necessarily be resolved in the insured's favour. The court may feel bound by the authorities referred to above.

WHAT IS A POLICY?

3.30 Section 90 of the 1906 Act states that a "policy means a marine policy". However, "a marine policy" is not defined by the Act and it is not clear that it is a term of art in the industry. Indeed, documents entitled "slip policies" are in common use, despite the fact that the law distinguishes between slips and policies. The only matter which is certain is that a policy must be a document complying with the formality requirements of the 1906 Act.

3.31 The fact that the statute contemplates there being both a slip and a policy raises the question of whether the signed slip itself constitutes a "marine policy". Does a policy need to be a full record of all the terms of the insurance (which a slip may not be), or merely a written document evidencing the contract which complies with the statutory formality requirements?

3.32 The academic writers are divided on this issue. Professor Bennett supports the latter position:

> It is therefore possible to state that today, for the purposes of marine insurance law, although a policy is required before the contract will be admissible in evidence, a policy is any document which specifies the name of the assured or his agent, is signed by or on behalf of the insurer and designates the subject-matter of the insurance with reasonable certainty.[28]

3.33 Since a signed slip will usually meet all of these requirements, and because the "fiscal impediment" of the old Stamp Acts has now been removed,[29] Professor Bennett concludes:

> A contract of marine insurance is not enforceable unless embodied in a policy, but a slip may contain sufficient information to satisfy the Marine Insurance Act.[30]

3.34 Moreover, *MacGillivray* also seems to provide some support for this view:

[27] *Fisher v Liverpool Marine Insurance Co* (1874) LR 9 QB 418. See para 3.20 above. Similarly, in *Clyde Marine Insurance Co v Renwick & Co* 1924 SC 113, the Stamp Act 1891 appeared to form a secondary argument against the recognition of a collateral contract. See para 3.25 above.

[28] H N Bennett, "The role of the slip in marine insurance law" [1994] *Lloyd's Maritime and Commercial Law Quarterly* 94, at pp 102 to 103. The insurer's signature is required by section 24 of the Marine Insurance Act 1906. The other requirements for a "marine policy" are set out in sections 23 and 26 of the 1906 Act. See para 1.14 to 1.15 above.

[29] Above, at p 103.

[30] Above, at p 118.

> Since the Finance Act 1970 repealed section 30(2) of the Finance Act 1958, it has not been necessary for such a policy to be stamped, and the longstanding question whether a slip issued by Lloyd's underwriters was a policy within the meaning of the Stamp Act is no longer relevant.[31]

3.35 A potential obstacle to any acceptance by the courts that the slip constitutes a policy is the fact that both the 1906 Act[32] and the case law[33] recognise a distinction between slips and policies. Professor Merkin takes the view in *Colinvaux* that:

> A slip is probably not a *policy* of insurance, so that a policy must be issued before any action may be brought by the assured.[34]

3.36 In reaching this conclusion, Professor Merkin refers to the *Ionides* case, which clearly distinguished between a slip and a policy.[35]

Arguments that any written evidence of contract may be a policy

3.37 It is reasonably clear that a slip would have sufficed under the definition of policy under the Stamp Act 1891. Section 91 defined a "policy of insurance" as "every writing whereby a contract of insurance is made, or agreed to be made, or is evidenced".

3.38 The question of whether a slip met this definition was raised in *Home Marine Insurance Co v Smith*.[36] The case concerned a contract for "open cover", where the slip did not specify the particular risks insured. The judge at first instance[37] took the view that it was not a policy under the 1891 Act. In doing so, he framed the issue as being whether slips generally could be stamped and sued on as policies of insurance. Referring to *Ionides* and *Fisher*, he said that those decisions made clear a slip was not a policy.

[31] N Legh-Jones, *MacGillivray on Insurance Law* (11th ed 2008), at para 3-005.

[32] S 89 of the 1906 Act appears to distinguish between "a duly stamped policy" and "the slip or covering note". If a slip and a policy are one and the same, section 89 would become largely redundant. The same may also be said of section 21.

[33] See, for example, *Warwick v Slade* (1811) 3 Camp 127; *Ionides v Pacific Fire & Marine Insurance Co* (1871) LR 6 QB 674; *Fisher v Liverpool Marine Insurance Co* (1874) LR 9 QB 418; *Clyde Marine Insurance Co v Renwick & Co* 1924 SC 113; and *Youell v Bland Welch & Co Ltd* [1992] 2 Lloyd's Rep 127.

[34] R Merkin, *Colinvaux's Law of Insurance* (9th ed 2010), at para 1-33.

[35] *Ionides v Pacific Fire & Marine Insurance Co* (1871) LR 6 QB 674. See paras 2.9 to 2.16 above.

[36] [1898] 2 QB 351.

[37] [1898] 1 QB 829.

3.39 The Court of Appeal upheld the decision, but only on the ground that the particular risk or adventure had not been specified, as was required by section 93(3) of the 1891 Act. Lord Justice Archibald Levin Smith made clear that his decision did not extend to slips generally. He expressly refused to deal with the issue of whether a slip could ever be sued upon.[38] Lord Justice Rigby said that had section 93(3) been complied with, he might have treated it as a policy.[39] *Home Marine Insurance Co v Smith*, therefore, suggests that there is no bar in principle to a slip being a policy under the 1891 Act.

3.40 This decision is significant because "policy" probably bears the same meaning under the 1906 Act as under the 1891 Act.[40] An examination of the statutory background of the 1906 Act reveals that its purpose was simply to clarify the law for merchants by regrouping as much of the law as possible in one place.[41] While section 22 is technically a standalone provision rather than a genuine codification or consolidation of the existing law,[42] a court could probably be persuaded to take the view that the draftsman had the existing provisions in the 1891 Act in mind when drafting the 1906 Act. To borrow the expression used by Mr Justice Maugham in *Re Home and Colonial Insurance Co*,[43] section 22 is effectively a "statutory interpretation"[44] of section 93 of the 1891 Act. It is unlikely the single word policy was intended to bear a special meaning different from that arising under previous statutes.

3.41 We cannot, however, state this conclusion with absolute certainty. A particular difficulty we see with this analysis is the fact that in a related context, the courts have taken the view that a policy must be a complete record of all the terms of the insurance.

[38] [1898] 2 QB 351 at p 356.

[39] Above at p 357.

[40] Albeit the 1891 Act deals with "sea insurance" as opposed to "marine insurance" and the requirement is for a contract "expressed" in rather than "embodied" in the policy. However, in *Re National Benefit Assurance Company* [1928] Ch 74, the court appears to have approached his analysis of the applicability of s 22 of the 1906 Act and s 93 of the 1891 Act on the footing that they were synonymous.

[41] See the speech of the Solicitor General at the second reading of the 1906 Act, *Hansard* (HC), 3 April 1906, vol 155, col 421.

[42] A peculiarity of the 1906 Act is that it did not repeal the relevant sections of the 1891 Act, even though the subject-matter was virtually identical. Instead, ss 91-97 of the 1891 Act remained in force parallel to the 1906 Act until their repeal in 1970. There was no explicit connection between the definition in the 1891 Act and the 1906 Act. The definition in the former is expressly stated to be for the purposes of that Act, and there is no provision applying it by reference to the latter. S 91(1) of the 1906 Act does however provide that nothing in it is to prejudice the operation of 1891 Act.

[43] [1930] 1 Ch 102.

[44] Above, at p 128.

Arguments that a policy must be a complete record of terms

3.42 Unlike the Stamp Act, the 1906 Act deals with the nature of a policy generally, rather than just in relation to stamp duty. For example, the Act codifies the law common law rule governing assignment.[45] By section 50(1) of the 1906 Act, a policy is assignable unless it expressly provides otherwise. Section 50(3) provides for a specific method of assignment, indorsement. This indorsement can be "in blank": once the insurer and the insured have signed their names on the policy, the claims under the policy are assigned to anyone who is the holder.[46] What is unique about this form of assignment is that it is an assignment of the *policy*, not of individual rights of action. Whoever holds the policy can claim under it, even in respect of losses which occur before assignment.[47]

3.43 Under a standard cif contract,[48] a seller must supply to the buyer, along with an invoice and a bill of lading, a marine insurance policy to cover the goods.[49] In that context, the courts have said that such a policy must be a complete record of all the terms of the insurance contract,[50] as it will otherwise not be capable of assignment.[51] A document that does not contain a complete record of the terms is not a "policy" within section 50 of the 1906 Act. This suggests that unless the courts distinguish between the way that word "policy" is used in section 50 and section 22, a policy under section 22 will also have to be a complete record of the contract.

3.44 In *Manbre Saccharine v Corn Products Ltd,*[52] the document in dispute was a letter stating "we hold you harmless in the sum of… in accordance with the terms of the…certificate of insurance", signed by the insurer. Holding that this was not a valid tender, Mr Justice McCardie said:

> There is a wide difference between an actual policy of assurance transferable to the plaintiffs as contemplated by s 50(3) of the Marine Insurance Act, 1906, and such a letter as that of the defendants here.[53]

[45] Or, in Scots law, assignation.

[46] *J Aron & Co v Miall* (1928) 31 Ll L Rep 242 at p 244, col 1.

[47] Above.

[48] A contract for the sale of goods upon "cost, insurance and freight terms". The distinguishing feature of a cif contract is that once he has shipped goods at the port of shipment, the seller discharges his obligations to the buyer by the symbolical delivery of the shipping documents to him, on which the risk shifts to the buyer (see the classic statement of Lord Atkinson in *Johnson v Taylor* [1920] AC 144 at p 156).

[49] *Biddell Brothers v E. Clemens Horst Co* [1911] 1 K. B. 214 at p 221.

[50] *Donald H. Scott v Barclays Bank* [1923] 2 KB 1.

[51] *Manbre Saccharine v Corn Products Ltd* [1919] 1 KB 198.

[52] Above.

[53] Above at p 205.

3.45 Section 50 of the 1906 Act, therefore, contemplates an actual policy with all the terms, rather than some other document. In *Diamond Alkali Export Corp v Bourgeois*,[54] the same judge took the view that this interpretation applied throughout the 1906 Act:

> In my view the Act of 1906 deals with marine policies only. It does not, I think, cover other documents, although they may be said to be the "business equivalent" of policies. I do not think that the Act of 1906 covers the document now before me. In my humble view a document of insurance is not a good tender in England under an ordinary c.i.f. contract unless it be an actual policy and unless it falls within the provisions of the Marine Insurance Act, 1906, as to assignment *and otherwise*.[55]

3.46 Rejecting the argument that a certificate of insurance was a valid tender under a cif contract, the judge then went on to indicate that it might be desirable to amend the 1906 Act to extend the definition of "policy":

> It may well be that this decision is disturbing to business men. It is my duty, however, to state my view of the law without regard to mere questions of convenience. I desire to add four remarks…. *It may well be that legislation is needed to enlarge the operation of* the Bills of Lading Act, 1855, and *the Marine Insurance Act, 1906*.[56]

3.47 Since these cases were decided, most of the formal requirements for a policy set out in section 23 of the 1906 Act have been repealed. Although stamp duty continued until 1970, it was amended by the Finance Act 1959. The 1959 Act also repealed the requirements that a policy must specify the subject matter insured, the length of the contract, the sum insured and the name of the insurer. It would be unusual if a policy no longer had to specify these fundamental matters but yet also had to be a complete record of the terms of the contract. It is true that it has been said that the amendment of one part of a statute cannot alter the meaning of the unaltered words.[57] However, it seems that this may not be the case where the amendment would change a definition in the unaltered words,[58] in our case, the meaning of policy.

[54] [1921] 3 K.B. 443.

[55] Above at p 457.

[56] Above, at p 457 to 458.

[57] *Attorney General v Lamplough* (1878) 3 Ex D 214; *Suffolk County Council v Mason* [1979] AC 705 at p 714.

[58] See the non-binding observations of Lord Neuberger MR in *Boss Holdings Ltd v Grosvenor West End Properties* [2007] 1 WLR 1218 at [23].

3.48 Faced with a straight choice between alternative constructions, a court is unlikely to opt for a construction that would result in the absurdity of a policy having to be a complete record of the contract detailing everything but the subject-matter insured, the period of time covered by the contract, the sum insured and the name of the insurer. This is particularly so given the reluctance with which the courts have enforced the requirement that a policy must be produced (or at least proved to exist) before an insurance contract can be relied upon.[59] A court is therefore unlikely to require a policy to contain a complete record of all the terms of a contract simply because of the early twentieth century authorities on cif policies.

Conclusion: may a slip be a policy?

3.49 The above analysis suggests that it is likely that a slip compliant with all the formality requirements of the 1906 Act would be considered to be a policy for the purposes of section 22. However, we cannot say with confidence that a particular document, including a slip, would be regarded as a policy. This uncertainty is unacceptable, particularly given the drastic consequences for an insured.

3.50 Furthermore, in 2007, the insurance industry adopted a Code of Practice, known as "Contract Certainty". In the light of this initiative, it is all the more important for market participants to be certain that their bargains are legally binding. A gulf would open up between market practice and the law if section 22 were to require a more exhaustive record of the contract than that which is habitually used.

CONTRACT CERTAINTY CODE OF PRACTICE

3.51 In December 2004, the Financial Services Authority ("FSA") challenged the UK insurance industry to end the widespread "deal now, detail later" culture. As a result, the industry took steps to improve the way contracts are agreed, so that insureds have greater certainty over what they have bought and insurers have greater certainty over the risks taken. The project ultimately resulted in a "Contract Certainty Code of Practice", which was agreed between many of the leading insurance associations[60] and published in June 2007.[61]

3.52 The Code of Practice applies to general insurance contracts either entered into by an FSA-regulated insurer, or arranged through an FSA-regulated intermediary.[62] The definition of "Contract Certainty" is set out at the start of the Code of Practice:

[59] As evidenced by the refusal to award costs in *Da Costa*, cited at para. 3.23 above.

[60] The participating organisations were: the Association of British Insurers ("ABI"); the British Insurance Brokers' Association ("BIBA"); the Institute of Insurance Brokers ("IIB"); the International Underwriting Association ("IUA"); Lloyd's of London; the Lloyd's Market Association ("LMA"); and the London Market Insurance Brokers' Committee ("LMBC". This organisation became the London and International Insurance Brokers' Association ("LIIBA") in December 2008).

[61] "Contract Certainty Code of Practice: Principles and guidance" (June 2007), available at http://www.abi.org.uk/Information/Business/Contract_Certainty.aspx . The guidance applies to general insurance. The following "pure protection" classes are specifically excluded: Private Medical Insurance, Term Assurance, Critical Illness and Income Protection. The guidance applies equally to reinsurance.

[62] Above, at p 1.

> Contract Certainty is achieved by the complete and final agreement of all terms between the insured and insurer by the time that they enter into the contract, with contract documentation thereafter.[63]

3.53 The significance of the Code of Practice for this paper is that it imposes specific requirements on insurers regarding the creation and the content of contractual documents. Principle A of the Code states:

> The insurer and broker (where applicable) must ensure that all terms are clear and unambiguous by the time the offer is made to enter into the contract or the offer is accepted. All terms must be clearly expressed, including any conditions or subjectivities.[64]

3.54 The explanation accompanying Principle A notes that:

> The proposed contract is the document which contains the offer and can take many forms. Individual market protocols define these. Examples include… slips or other placing documents….
>
> All terms should either be expressed in full or unambiguously identified….
>
> The contract should clearly identify all parties to the contract.[65]

3.55 Principle B adds the further requirement that "contract documentation must be provided to the insured promptly". The explanation and guidance for this Principle includes the following:

> Contract Documentation contains all the agreed terms of the contract between the insured and the insurer and details of the insurers' participations. The insurer must provide contract documentation to the insured (or their agent). Contract documentation must be sent to the insured promptly….
>
> The following are examples of insurer authorised contract documentation:

[63] Above.

[64] Above.

[65] Above, at p 2.

- Insurance Policy; …

- A copy of the complete slip.[66]

3.56 One consequence of these principles is that an insurer is required to write down all the terms of the insurance contract and provide a copy to the insured promptly. The most likely way in which this will be achieved in practice is for the slip to contain all the contract terms when it is signed by the insurer, and for a complete copy of the slip to be forwarded to the insured as soon as possible. Although this does not ensure that a policy will be executed (at least, not in the traditional sense of what is meant by a "policy"), it does mean that slips will usually contain most, if not all, of the requirements that a document must satisfy before it can constitute a "marine policy" within section 22.[67]

3.57 This conclusion is reinforced by the "sample checklist content" set out in Appendix 2. This checklist is included with the Code of Practice and is intended to assist insurers by providing one means by which conformity with Principle A may be assessed. The sample questions include:

> Are all parties to the contract clearly identified?
>
> Is the period of cover clearly expressed?
>
> Are the sums insured and/or limits clearly expressed?
>
> Is the premium or rate (together with any relevant deductions) clearly expressed?
>
> Are any payment terms clearly expressed?[68]

3.58 Assuming that the slip contained answers to these questions, most of the formal requirements of a policy would be met, including the name of the insured (required by section 23(1)). However, there is at least one requirement of a "marine policy" that the Contract Certainty Code of Practice does not address, as it says nothing about whether the contract document must be "signed by or on behalf of the insurer". Section 24(1) of the 1906 Act makes it clear that a document must be signed by the insurer before it can constitute a "marine policy" that would be admissible to prove an insurance contract. We discuss the requirement of a signature in Part 4, below.

3.59 The significance of the Contract Certainty Code of Practice is that, if complied with, a completed slip will contain a detailed set of contract terms. This would surely strengthen any argument that the insured might make under the third approach above, namely that the slip can itself constitute a "marine policy" under section 22 now that the stamping requirement has been removed. This, however, seems to be all that the Code of Practice can add to an insured's attempt to circumvent the provision, as the Code does not require an insurer to execute a "policy" in the traditional sense.

[66] Above, at p 3.

[67] See paras 1.13 to 1.16 above.

[68] "Contract Certainty Code of Practice: Principles and guidance" (June 2007), at p 9.

THE MARKET REFORM CONTRACT

3.60 The London Insurance Market has been the subject of a Market Reform Programme, which consists of a number of projects sponsored by the London Market Group.[69] In 2004, the Group developed the London Market Principles Slip to ensure a common format to the way business was introduced to the market. This was followed by the Market Reform Slip in 2006.

3.61 In 2007 the Market Reform Contract ("MRC") replaced (and, significantly, renamed) the previous standard "Market Reform Slip". [70] The MRC is essentially a standard form contract for insurers and brokers to use, and which was designed to comply with the Contract Certainty Code of Practice. It was jointly developed by the London Market Association, the International Underwriting Association and the London Market Brokers Committee (the latter's role has been taken over by the London & International Insurance Brokers Association), under the auspices of the London Market Group.

3.62 For the purposes of this paper, the significance of the MRC is twofold. First, as the MRC is the London Market standard, most marine insurance contracts are likely to contain all of the terms required for a "marine policy" under the Marine Insurance Act 1906 because the MRC will require them to be included. As with contracts complying with the Contract Certainty Code of Practice, an MRC will satisfy the formality requirements of the 1906 Act and may itself constitute a "marine policy".[71]

3.63 Second, it reinforces the argument that what used to be called the slip is nowadays treated by the insurance market as the main contractual document. Both the Contract Certainty Code of Practice and the development of the MRC suggest that the industry wishes to move away from the distinction between "slips" and "policies" and focus instead on a single complete version of the insurance contract.

[69] This is a market-wide body made up of the chief executives of market participants, chief executives of trade associations and representatives of Lloyds, previously known as the Market Reform Group.

[70] For more information about the MRC, see the London Market Group's website at http://www.londonmarketgroup.co.uk/index.php?option=com_content&view=category&id=41&Itemid=144. The MRC (Open Market) became the London Market standard on 1st November 2007 and should be used for the following: All firm quote and firm order open market insurance and reinsurance business placed by London Market Brokers; marine open cargo covers and declarations attaching thereto; declarations or off-slips attaching to line-slips, where the use of MRC (Line-Slip) declarations is not appropriate; and applicable declarations off limited binding authority agreements, where the coverholder, broker and insurers agree that it is appropriate.

[71] Contracts that fall within the "Market Reform Exempt-Client Requirement" category (where the client has expressed a preference to use a London placing document in a different format) do not need to conform with the MRC guidelines. However, the MRC guidelines state that the placing document must still comply fully with the Contract Certainty Code of Practice.

CONCLUSION

3.64 We are not aware of any recent case in which the parties have raised arguments on the basis of section 22. It does not appear to be causing problems in practice. However, it is an anomalous and archaic provision which, when applied to modern practice, has the potential to introduce uncertainty and complexity into the law.

3.65 Section 22 is out-of-step with the contemporary market place. We have seen that moves are afoot to use a single document as a record of a marine insurance contract. Section 22 creates uncertainty as to the legal status of these documents. It also requires the insured to produce some sort of document signed by the insurer. None of the arguments we have outlined would help those who attempt to rely on purely oral contracts.

3.66 In a climate where there is a desire to reduce the burden of law and regulation on business, it is difficult to justify retaining section 22 in its current form. In Part 5 we discuss possible reforms.

PART 4
MARINE POLICIES AND ELECTRONIC COMMERCE

4.1 In our 2006 Joint Scoping Paper, the main problem we identified with section 22 was that its requirement for an insurance contract to be embodied in a marine policy "appears to envisage a formal written record of the contract".[1] We noted that, in the Law Commission's Advice on Electronic Commerce published in 2001, it was concluded that a "marine policy" under section 22 could not be an electronic document.[2] This led the British Insurance Law Association to suggest that section 22 should be amended to deal explicitly with electronic trading.[3] Similar issues may also arise with regard to the requirement for the insurer's signature in section 24(1). We now consider each of these sections in turn.

SECTION 24(1): THE INSURER'S SIGNATURE AND ELECTRONIC COMMERCE

4.2 We start by looking at section 24(1) and its requirement that a "marine policy must be signed by or on behalf of the insurer", since we believe this provision is compatible with modern electronic commerce.

4.3 The 2001 Advice on Electronic Commerce expressly considered whether an electronic signature could fulfil statutory signature requirements, including the one set out in section 24(1):

[1] Law Commission and Scottish Law Commission, Insurance Contract Law: A Joint Scoping Paper (January 2006), available at http://www.lawcom.gov.uk/docs/ins_scoping.pdf at para 2.54.

[2] Law Commission, Electronic Commerce: Formal Requirements in Commercial Transactions (December 2001), at para 7.10. While the Scottish Law Commission is in favour of e-enablement generally, the Commission has not yet reached a concluded view on these issues; although the subject was touched upon in Part 34 of the Report on Land Registration, 2010 (Scot Law Com No 222).

[3] British Insurance Law Association, Insurance Contract Law Reform: Recommendations to the Law Commission (September 2002), at para 29.5.

> The common law takes a pragmatic approach as to what will satisfy a signature requirement. For example, provided that the "signatory" intends to authenticate the document, it need not be the "signatory" who actually signs. A number of cases have approved forms of signature by stamping, by printing, by typewriting and in other forms not applied in any "personalised" way…. The common characteristic of the cases is that the courts looked to whether the method of signature used fulfilled the function of a signature (namely, demonstrating an authenticating intention), rather than whether the form of signature used was one which was commonly recognised.[4]

4.4 Section 7 of the Electronic Communications Act 2000 states that electronic signatures are admissible in evidence, if they are "incorporated into or otherwise logically associated" with any electronic communication or data, for the purpose of "establishing the authenticity" or integrity of the communication or data. The Law Commission commented that this was merely an evidential provision which did not determine whether an electronic signature satisfied any given statutory requirement.

4.5 The Law Commission recommended that, because signatures affect many areas of personal and commercial life, the courts should apply an objective test when determining whether a signature requirement is met. This test was to consist of asking whether the conduct of the "signatory" would indicate an authenticating intention to a reasonable person. It was thought that such an approach would be "consistent with the authorities, flexible and would, over time, produce the greatest certainty".[5]

4.6 The paper then discussed four particular methods of electronic signature, all of which could possibly be used by an insurer to "sign" an insurance contract. The conclusion was that:

> Digital signatures, scanned manuscript signatures, typing one's name (or initials) and clicking on a website button are, in our view, all methods of signature which are generally capable of satisfying a statutory signature requirement. We say that on the basis that it is function, rather than form, which is determinative of the validity of a signature. These methods are all capable of satisfying the principal function: namely, demonstrating an authenticating intention.[6]

4.7 It was noted, however, that this was a difficult area and that consensus would be difficult to achieve:

[4] Law Commission, Electronic Commerce: Formal Requirements in Commercial Transactions (December 2001), at paras 3.25 to 3.26. (referred to below as Electronic Commerce: 2001 Advice). We cited the cases of *Re Whitley Partners Limited* (1886) LR 36 ChD 337; *Halley v O'Brien* [1920] 1 IR 330; *Ex parte Dryden* (1893) 14 NSWR 77; *Goodman v J Eban LD* [1954] 1 QB 550; *British Estate Investment Society Ltd v Jackson (HM Inspector of Taxes)* [1956] TR 397; *Brydges (Town Clerk of Cheltenham) v Dix* (1891) 7 TLR 215; and *Newborne v Sensolid (Great Britain) LD* [1954] 1 QB 45.

[5] Electronic Commerce: 2001 Advice, at para 3.29.

[6] Electronic Commerce: 2001 Advice, at para 3.39.

> We are aware that our views in relation to electronic signatures are not universally accepted; others believe that a signature requires there to be a physical memorial. Again, we acknowledge the difficulties which the lack of consensus on this issue presents when considering reform of the statute book.[7]

4.8 As a result of the above it was concluded that the signature requirement in section 24 of the Marine Insurance Act 1906 was not an impediment to the use of an electronic document.[8]

4.9 Recent English authority is consistent with the view taken in 2001. In *Mehta v J Pereira*,[9] His Honour Judge Pelling QC stated that a typed name in an email could be a signature for the purposes of section 4 of the Statute of Frauds 1677, specifically endorsing the Law Commission's 2001 Advice. *Lindsay v O'Loughnane*[10] decided that a fraudulent misrepresentation was "signed" within the meaning of section 6 of the Statute of Frauds Amendment Act 1828 if it was marked "Regards…" followed by the name of the sender. Similarly, in *Orton v Collins*,[11] the insertion of a firm of solicitors' name at the end of an email accepting a Part 36 offer was held to be a "signature" complying with the relevant Practice Direction. We think the same reasoning would apply to digital signatures and scanned manuscript signatures.[12]

4.10 However, there is still a need for caution. The first point to make is that, as a Court of Appeal judge observed in *Firstpost Homes v Johnson*,[13] the meaning of signature depends on the underlying philosophy of the provision in question. Strictly speaking, there is not a common law concept of a signature. It is not absolutely certain the same approach will be taken under the 1906 Act as under other provisions.

7 Electronic Commerce: 2001 Advice , para 3.40.

8 Electronic Commerce: 2001 Advice, para 7.5.

9 [2006] EWHC 813 (Ch).

10 [2010] EWHC 529 (QB).

11 [2007] EWHC 803 (Ch).

12 This leaves open the issue of whether clicking a website button would constitute a signature. However the issue is not relevant to the present discussion. It is highly unlikely that an insurer would attempt to sign a policy in this way.

13 [1995] 4 All ER 355.

4.11 The second point to make is that the judge in *Mehta* was not referred to the decision of the Court of Appeal in *Goodman v J Eban Ltd*,[14] which summarises the authorities on physical signatures. *Goodman* suggests that there needs to be an "affixing" or "impression" of a signature on a document in order for there to be a signature.[15] This connotes some sort of physical impression involving an instrument directly under the control of the signatory. It was on that basis alone that a faxed signature was held to be a signature in *Re a Debtor (No. 2021 of 1995)*.[16] It is therefore possible that the higher courts may take the view that a signature has to be physical.

4.12 In Scotland, there tends to be a more conservative approach to the manner in which statutory requirements of writing are interpreted. For example, the Requirements of Writing (Scotland) Act 1995 provides that certain juridical acts must be in writing and be signed. As this was interpreted as a requirement for a "wet" (pen-and-ink) signature, to facilitate the introduction of a limited form of electronic conveyancing in Scotland, an order under section 8 of the Electronic Communications Act 2000 was regarded as being necessary.[17]

4.13 In Part 5 we discuss whether the requirement for a signature in section 24(1) should be retained at all. We tentatively conclude that the section should be repealed, so as to remove any need for a signature, whether in traditional or digital form. However, if section 24(1) is to be retained, we think that the issue of whether an electronic signature is sufficient should be clarified.

SECTION 22: MARINE POLICIES AND ELECTRONIC COMMERCE

4.14 Even if the signature requirement in section 24(1) is compatible with electronic commerce, it does not necessarily follow that an electronic document can constitute a "marine policy" within section 22. As we discuss in Part 3, an insured may need a "marine policy" in order to prove the existence of their marine insurance contract in court. If the insured has only an electronic version of the policy, the question arises whether that electronic document can constitute a "marine policy" under section 22.

[14] [1954] 2 WLR 581.

[15] Above at p 586. In *Goodman*, a rubber stamp was deemed to be a "signature" for the purposes of s 65 of the Solicitors Act 1932.

[16] [1996] 2 All ER 345.

[17] S 8 of the Electronic Communications Act 2000 contains a power to amend primary legislation for the purpose of facilitating electronic communications where a signature is required. Automated Registration of Title to Land (Electronic Communications) (Scotland) Order 2006, SSI 2006/491; see also Opinion by Professors Stewart Brymer, George Gretton, Roddy Paisley and Robert Rennie commissioned by the Keeper of the Registers of Scotland and published at 2005 JR 201.

4.15 As we saw above, in the Law Commission's 2001 Advice on Electronic Commerce, it was concluded that an electronic signature could satisfy the requirements of section 24(1) of the Act.[18] However, it was suggested that the position regarding section 22 was different and that "a marine policy could not be an electronic document".[19]

4.16 The 2001 Advice noted that "there is a clear demand for the increased use of electronic communications in the insurance market", as a result of which the following options for reform were recommended:

> We believe that reform of the [Marine Insurance Act 1906] should dispense with the rule that the contract for marine insurance is only enforceable once it is embodied in a (paper) marine policy. Reform must however enable the marine insurance contract to continue to fulfil its essential role in international trade.
>
> We have identified two options for reform, both of which would be capable of achieving these objectives. Because the (paper) marine policy is no longer required for the collection of stamp duty, the first option is to dispense with the marine policy as a legal document under the [Marine Insurance Act 1906]. The second option is to retain the marine policy as a legal document under the [Marine Insurance Act 1906], defining it to include an electronic equivalent.[20]

4.17 The conclusion that a "marine policy" could not be an electronic document was reached on the basis of sections 50(3) and 53(2) of the 1906 Act, which deal with assignment (or in Scots law, assignation) of the policy by indorsement and with the broker's lien over the policy respectively. It was thought that the broker's lien was incompatible with electronic policies and that it was unclear whether an electronic policy could be assigned by indorsement. As a result, it was concluded that:

> This prevents a marine insurance transaction from being entirely electronic.[21]

4.18 The Law Commission and Scottish Law Commission now take a different view. For the reasons we explore below, we do not think that either of these two sections of the 1906 Act necessarily prevents a "marine policy" from being an electronic document.

[18] Electronic Commerce: 2001 Advice, para 7.5.

[19] Electronic Commerce: 2001 Advice, para 7.10.

[20] Electronic Commerce: 2001 Advice, paras 7.14 to 7.15.

[21] Electronic Commerce: 2001 Advice, para 7.10.

Section 50(3) and the assignment of a policy by indorsement

4.19 The Law Commission's 2001 conclusion that a "marine policy" could not be an electronic document was based partly on section 50(3) of the 1906 Act, which provides that a marine insurance policy may be assigned by indorsement on the policy, or in another customary manner. On the ground that an indorsement usually refers to something which is written or printed on the reverse of a document, it was concluded that:

> The ability to assign in section 50 depends upon "indorsement" of the marine policy. It is unclear whether this precludes the use of an electronic document.[22]

4.20 The two Law Commissions, however, are now of the opinion that the uncertainties regarding section 50(3) do not provide a sufficient basis for concluding that a marine policy cannot be electronic. Leaving aside the issue whether "electronic indorsement" might be possible,[23] we think that there is one main objection to the 2001 approach to indorsement.

4.21 Even if a valid assignment of the policy by indorsement requires, for the purposes of section 50(3), a paper policy, it does not follow that the policy must always be in paper form. At most, it would suggest that an electronic policy cannot be assigned by indorsement, since that might require writing on the back of a paper policy. There may, however, be other ways in which a policy may be assigned apart from indorsement, and an electronic policy may be susceptible to such alternative forms of assignment. This conclusion is supported by section 50(3) itself, which explicitly provides that a policy may be assigned by indorsement "or in other customary manner". As such, even if it is impossible to write on the "back" of an electronic policy, it may be assigned in some other way.

4.22 The consequence of this observation is that we do not think that section 50(3) presents any real obstacle to a "marine policy" being in electronic form. In 2007, Lloyd's Legal Department obtained advice from Robin Knowles QC on this issue. As the advice said of section 50(3):

> This provision does not amount to a requirement that a marine policy must be on paper. It may contemplate that there will be a paper policy, but that is not the same thing as providing that there is no marine policy if it is not on paper. The section simply describes how assignment may be effected.[24]

[22] Electronic Commerce: 2001 Advice, para 7.8.

[23] We do not think that it should necessarily be impossible to have an electronic indorsement. Although, as was said in the 2001 Advice (at para 7.8, n 10), "an indorsement usually refers to something which is written or printed on the back of a document", we see no reason why it should not be possible to have some form of electronic stamp or writing that would perform a similar function. It may be possible for the electronic document to include an interactive text box that could be edited after the conclusion of the contract in order to assign the contract to another party.

[24] At para 11.

Section 53(2) and the broker's lien over the policy

Introduction

4.23 As we discussed in Part 3, under section 53(2) of the Marine Insurance Act the broker has a lien over the policy "for the amount of the premium and his charges in respect of effecting the policy". When an insured could not make a claim without producing the policy, the lien gave brokers a useful means of ensuring that insureds paid their debts.

4.24 It might be thought that as the practical significance of policies reduced, so did the importance of the lien. However, the lien has been given a new lease of life by the decision in *Eide UK Ltd v Lowndes Lambert Group Ltd*.[25] Here the Court of Appeal confirmed that the broker's lien extends to claim proceeds paid to the broker. Lord Justice Phillips described the right to retain proceeds as a "commensurate right". He noted some uncertainty over the basis of the right, but suggested that it was based on mercantile usage.

> The precise basis of [the broker's right to the proceeds] does not appear clearly from the authorities, but one can well understand that it should have become established as a matter of mercantile usage, for it is a natural adjunct of the lien on the policy. It was a normal part of the duty of the broker who remained in possession of the policy to collect the insurance proceeds and that duty would have been anomalous indeed if the act of collecting under the insurance policy had destroyed the security afforded by the lien.[26]

4.25 This decision was followed in *Heath Lambert Ltd v Sociedad de Corretaje de Seguros, Banesco Seguros CA*.[27]

4.26 In Issues Paper 8, on brokers' liability for premiums, we considered the case law on section 53(2) and asked whether the law on brokers' liens operated satisfactorily. One uncertainty which has arisen is whether the right to retain proceeds is dependent on the broker having a lien over the policy. It is not at all clear from the authorities whether a broker who does not possess a policy but who has been paid the claim proceeds has a right to retain those proceeds in settlement of the debt. We return to this issue in Part 5.

The Law Commission's 2001 view: the policy must be tangible

4.27 In reaching the 2001 conclusion that a "marine policy" could not be an electronic document, the Law Commission relied mainly on the existence and operation of the broker's lien in section 53(2). The Advice stated:

[25] [1999] QB 199.

[26] Above, at p 211.

[27] [2006] EWHC 1345 (QB).

> The general concept of a lien is not clearly defined as liens arise in specific situations. Where liens are found, whether as a creature of common law or statute, they are exercised over something tangible. The fact that section 53(2) provides that a marine policy is capable of being subject to a lien suggests, in our view, that a tangible object is required and that an electronic document will not therefore suffice.[28]

4.28 The fact that a tangible object was required for the broker's lien to operate led to the conclusion that a "marine policy" must be a tangible object, and that, as a result, it could not be an electronic document.

4.29 The Commissions no longer subscribe to this view. As we explore below, it is uncertain whether a lien may operate in respect of an electronic document. However, even if the lien in section 53(2) can only be exercised in respect of a tangible "marine policy", that is not the same as requiring that the "marine policy" must *always* be a tangible object.

Can the broker's lien apply to an electronic document?

4.30 In the 2001 Advice, it was said that:

> Some form of electronic functional equivalent of a lien may be devised and sanctioned by law in the future. However we believe that the fact that no such equivalent currently exists implies that a marine policy must be a tangible (paper) object.[29]

4.31 Although we do not think that section 53(2) implies that a marine policy must be a tangible object, it remains correct that the English courts have never recognised a lien over an electronic document. It is also unlikely that the Scottish courts would recognise such a lien over a non-tangible document.[30]

4.32 It is possible that in the future, as electronic commerce continues to flourish, the courts will start to recognise liens over electronic documents. Clearly, where multiple copies of the document exist, the security has less practical value, but it would be wrong to think that a lien over an electronic document could never have any practical value. One party may possess a particular electronic document while the other does not.

4.33 That said, the recognition of a security over electronic documents would be a significant legal change. It raises difficult issues, outside the scope of the current paper.

[28] Electronic Commerce: 2001 Advice, para 7.9.

[29] Electronic Commerce: 2001 Advice, para 7.9, n 12.

[30] A J M Steven, *Pledge and Lien* (2008) paras 9.12 and 17.81.

Does every "marine policy" have to be subject to the broker's lien?

4.34 Although the observation that "a tangible object is required" for the broker's lien to operate probably remains correct, we are not convinced that this necessarily leads to the conclusion that a marine policy can never be an electronic document. The policy may be valid, even if the lien is not valid. Although the broker may not have a lien on the policy unless it is in tangible (paper) form, it does not follow that a marine policy must always be in paper form.

4.35 The opinion obtained from leading Counsel by Lloyd's Legal Department in 2007 makes this point clearly:

> Section 53(2) does not amount to a requirement that a marine policy must be on paper. Again the section may contemplate that there will be a paper policy, but that is not the same thing as providing that there is no marine policy if it is not on paper. In the event that in order for there to be a lien there must be "something tangible" then it would follow that there would be no lien unless the policy was on paper, but not that there would be no policy unless it was on paper.[31]

4.36 The opinion also points out that the express wording of section 53(2) envisages situations in which there may not be a lien over the policy, as it only applies "unless otherwise agreed". If the parties may agree to dispense with the broker's lien completely, there seems to be no reason why the marine policy should always have to be in a form that would be susceptible to the lien.

4.37 This line of thinking has led us to the view that section 53(2) does not prevent a marine policy from being an electronic document.

Conclusion

4.38 We no longer believe that either section 50(3) or section 53(2) constitutes an obstacle to a "marine policy" being an electronic document. Under section 50(3), assignment of a policy by indorsement may require the "marine policy" to be a tangible object, but that does not mean that every "marine policy" must be a tangible document. Similarly, it may be true that, to be subject to the broker's lien in section 53(2), the policy must be in tangible form. However, it does not follow that a "marine policy" must always be subject to the lien and that it must therefore *always* be in tangible form.

4.39 We therefore see no reason why a "marine policy" within section 22 may not nowadays be an electronic document. However, the issue is not entirely beyond doubt. It may be that confusion over the meaning of section 22 has inhibited reliance on purely electronic documents. In Part 5 we ask consultees for their views on the practical effect of removing the requirement for a marine policy.

[31] Advice to Lloyds Legal Department from Robin Knowles QC, at para 17.

PART 5
PROPOSALS FOR REFORM

THE CASE FOR REFORM

5.1 Now that the insurance stamp duty regime has been abolished, the original rationale for section 22 no longer exists. However, the section remains as a potentially troublesome part of modern insurance law.

5.2 The section states that an insured may not prove an insurance contract unless it is "embodied in a marine policy". On its face, section 22 represents a difficulty for every insured who has not received a policy but who needs to prove that they are insured under a marine insurance contract in order to make a claim under it. This introduces unnecessary uncertainty into the law.

5.3 Section 22 is also out-of-line with current market practice. The trend in the insurance industry is to move away from the old distinction between "slips" and "policies". Instead, the focus is on the underlying insurance contract itself. Thus the Contract Certainty Code of Practice aims to ensure that all policy terms are completely and finally agreed before the inception of the insurance contract.[1] Similarly, the Market Reform Contract initiative resulted in the standard form insurance placing document being known, in the London Market at least, as the "Market Reform Contract" to emphasise that the insurance contract is actually concluded when the insurer signs the document, rather than when the policy is later executed.[2]

5.4 As we argue below, we think it is damaging to have law which is widely ignored and clearly divorced from market practice. It undermines the esteem in which the law is held, and gives rise to potential uncertainties. We think that if there is to be legislation to reform some aspects of the Marine Insurance Act 1906, the opportunity should be taken to bring this aspect of the law into line with the contemporary market.

5.5 Below we start by looking at the main policy issue: should there be any statutory requirements for marine insurance contracts to meet certain formalities? We tentatively conclude there should not be any formality requirements.

5.6 We then look in more detail at the effect this would have on the Marine Insurance Act 1906, tentatively proposing repeals of sections 22, 23, 24(1), 89 and Schedule 1. We think there is still a need to preserve the broker's lien in section 53(2), but we conclude that this section should be updated. We then consider the effect of removing the need for a policy on the other provisions of the 1906 Act.

5.7 Finally, we briefly discuss an alternative option, which is to keep section 22, but to amend it to allow for documents to be in electronic form.

[1] See "Contract Certainty Code of Practice: Principles and guidance" (June 2007), available at http://www.abi.org.uk/Information/Business/Contract_Certainty.aspx.

[2] See "Market Reform Contract v 1.3" (August 2008), available at http://www.londonmarketgroup.co.uk/index.php?option=com_content&view=category&id=41&Itemid=144. The MRC replaced the earlier "Market Reform Slip".

IS THERE A NEED FOR FORMALITY?

Should legislation set out any formality requirements for marine insurance?

5.8 The first question is whether legislation should require the parties to a marine insurance contract to use any particular formalities in the way they do business. In particular, should insurance contracts always be set out or evidenced in writing? Should they be signed by the insurer, and should they specify the name of the insured?

5.9 It is clearly good practice for insurers and insureds to put a complete set of contract terms in writing. This is an essential part of the drive towards contract certainty, reducing the possibilities for misunderstandings, disputes and fraud. Furthermore, one would normally expect the written document to specify the parties to the contract, and include some indication that the parties or their agents had read the terms and intended to be bound by them.

5.10 The question is not whether written contracts are desirable, but whether they should be required.[3] If a formality is required, it is almost inevitable that someone, somewhere will fail to comply with it. The issue is what consequences should flow from this failure. Such consequences may be inappropriate and harsh. Section 22 is particularly inappropriate: if taken literally, the section means that if an insurer has failed to issue a policy, the insured is unable to prove the contract, and therefore unable to make any claims under it.

5.11 We do not think that it is right to deprive an insured of the right to claim because the insurer failed to comply with the required formalities. We have considered whether it may be possible to impose some other sanction, such as a criminal penalty or civil sanction on the insurer. However, this has the potential to add a burden on business, and we do not think it appropriate in primary legislation. We think that the issue of contract certainty is best left to the market, backed where necessary by market regulation by the FSA or its successor.

5.12 We have also considered whether it should be possible to have an enforceable oral contract for marine insurance. Under the Marine Insurance Act 1906, as it stands at present, oral contracts are unenforceable. We cannot think of any way in which an insured under an oral contract can circumvent the effects of section 22. Yet it might be useful for the parties to agree cover over the phone to take effect immediately, and to send the paperwork at a later date. We think that if it is clear from the normal common law rules on contract formation and evidence that such a contract was made, the lack of writing should not prevent the insured from making a claim.

[3] For a discussion of the benefits and detriments of requirements for writing in land law, see P Critchley, "Taking Formalities Seriously", in (eds) S Bright and J Dewar, Land Law: Themes and Perspectives (1998). Critchley lists many potential benefits: to the parties (who may for example be warned about the effects of their actions, and educated about the consequences); to the courts (who are provided with suitable evidence); and to the state (who may, for example, tax the formal document). However, she warns that when used inappropriately, they may appear as "damaging and ineffectual" blunt instruments, giving rise to added costs and to injustice.

5.13 Our tentative view, therefore, is that legislation should not impose any formal requirements on marine insurance contracts. Instead, the normal contract rules of contract formation and evidence should apply. The current requirements for a signed policy should be repealed. We would welcome views on this issue.

5.14 **Do consultees agree that there should be no statutory requirements that marine insurance contracts should be in writing or signed**?

5.15 **If consultees think there should be statutory requirements for formality, what requirements should there be? What consequences should follow if the formal requirements are not me**t?

The practical effect

5.16 We would be interested in receiving evidence on the practical effects of removing the requirement for a marine policy. We suspect that the practical effect would be negligible, given that section 22 is widely ignored. However, it may be that some insurers feel that it constrains their business practices, and would view removing the requirement for a marine policy as a helpful deregulatory measure, removing a potential burden on business.[4] We would also be interested to hear whether there may be any undesirable consequences from removing the requirement.

5.17 Even if, as we suspect, section 22 is rarely encountered in practice, we think that there is nonetheless a good case for repealing the provision. Obsolete statutory provisions can cause problems for businesses, particularly businesses which are new to the market, since they need to know what the law is and how to comply with it in the simplest, most cost-effective way. Obsolete provisions such as section 22 may present a misleading picture of what is required from an insurer.

5.18 Furthermore, obsolete law which is divorced from market practice may have a corrosive effect on the respect shown to the law. English law is widely used for insurance contracts throughout the world, and the standing of English insurance law is not enhanced by the continued existence of provisions which make little sense in a contemporary market.

5.19 **We welcome consultees' views on the practical effects of removing the requirement for a formal marine policy.**

THE PROPOSED REPEALS

5.20 Below we consider the effects of removing the formality requirements for marine insurance in more detail, considering each in turn.

[4] It is possible that some firms are concerned about the use of electronic documents. However, industry practice has been to adopt electronic documents as the norm. Thus in January 2010 the London Market Group Chairman wrote to participants to say that the 2009 milestones had been reached, including full adoption of electronic policies. It was reported that paper is now only used where there is a territorial or jurisdictional reason, or client request, so to do. For more information, see http://www.marketreform.co.uk/index.php?option=com_content&view=article&id=380&Itemid=171&2ced3df0a1c08ee30f41a6e26bbeabd2=e3ef9d9c79323b77ce6826e7e9d6ff9d.

Repealing section 22 and the need for a "marine policy"

5.21 Now that a paper policy is no longer required for the collection of stamp duty, we tentatively propose that section 22 should be repealed. The insured would not then need a "marine policy" (as currently understood) in order to prove an insurance contract in court. Other documentation, such as a signed copy of the slip, and possibly even oral evidence, would then become admissible in evidence for the purposes of proving the existence of an insurance contract.

5.22 We think that any burden on business imposed by section 22, whether in terms of cost to insurers or by creating misleading perceptions of what modern insurance law requires, can no longer be justified. There is currently a conspicuous political and legislative trend towards removing excessive regulatory burdens on business,[5] and we think that section 22 is one such burden that can simply be eliminated.

5.23 **We ask consultees whether section 22 should be repealed so that a "marine policy" is no longer required for a contract of marine insurance to be proved in court**.

Section 23 and what a "marine policy" must specify

5.24 Section 23 formerly set out five requirements that a "marine policy" must specify. Four of these were repealed by the Finance Act 1959, so that only one now remains.[6] Under section 23(1), a marine policy must specify the name of the insured or the name of the person who effects the insurance on their behalf. Since this provision specifically deals with what a "marine policy" must include, we tentatively propose that it should be repealed along with section 22.

5.25 By repealing section 23, we would not wish to suggest that an insurance contract, as distinct from a "marine policy" under section 22, would no longer have to include the insured's name. We think that an insurance contract must always have an identifiable insured, even if they are not always referred to in writing.[7] However, we see no reason to impose formal statutory requirements to that effect.

5.26 **If consultees agree that section 22 should be repealed, we ask whether section 23 should be repealed at the same time**.

[5] See, for example, the "Programme for Government: Business", published by the Department for Business, Innovation and Skills on 30 July 2010 (available at http://www.bis.gov.uk/news/topstories/2010/Jul/pfg-business): "The Government firmly believes that British businesses need to be free to grow, and not dealing with burdensome tick-box regulation and form filling. This is why the Government is committed to stopping the endless flow of regulation that can act as a barrier to growth, and instead only plans to regulate as a last resort."

[6] See para 2.21 above.

[7] Despite this, we take the view that it would remain good practice for insurers to write down all such details relating to their insurance policies. This would include naming the insured. The importance of such a written record is supported by the Contract Certainty Code of Practice, which provides (at p 2) that the "contract should clearly identify all parties to the contract". See para 3.56 above.

Section 24(1) and the requirement for the insurer's signature

5.27 We also tentatively propose that section 24(1) should be repealed along with section 22. The requirement in section 24(1) that a policy must be signed on or behalf of the insurer would lose most of its practical effect if insurance contracts could be electronic, or even oral. We think that the signature requirement imposes an unnecessary regulatory burden on insurers, and think that it should therefore be removed.[8]

5.28 Section 24(2) provides that where two or more insurers subscribe to the same policy, each subscription constitutes a distinct contract with the insured. While we do not propose to change the underlying principle that each insurer has a distinct contract with the insured, it may well be necessary to amend it to take account of the removal of the requirement for a policy.

5.29 **If consultees agree that section 22 should be repealed, we ask whether section 24(1) should be repealed at the same time so that a "marine policy", or even a contract of marine insurance, does not have to be signed by, or on behalf of, the insurer**.

Section 89 and the slip as evidence

5.30 Section 89 of the 1906 Act provides that the "slip" may be referred to in legal proceedings "where there is a duly stamped policy". This provision essentially confirmed and codified the old *Ionides* decision, where Mr Justice Blackburn (and, on appeal, the Court of Exchequer Chamber) held that the slip was admissible for the purpose of showing what the parties intended at the time they entered into the contract even though it could not be used to prove the existence of the insurance contract itself.[9]

5.31 If section 22 were to be repealed, section 89 would become irrelevant, since the slip (or indeed any relevant document) would be admissible in legal proceedings whether or not there was a "duly stamped policy". As such, we think that section 89 could simply be repealed.

5.32 **If consultees agree that section 22 should be repealed, we ask whether section 89 should be repealed at the same time**.

Schedule 1 and the sample form of the policy

5.33 The Marine Insurance Act 1906 included, in Schedule 1, a sample marine policy, which insurers could use in order to ensure that their policies conformed to the Act's various requirements. We do not know how regularly, if at all, this sample policy is used in the modern insurance market. We doubt whether it is used very much, and ask whether, if section 22 were to be repealed, Schedule 1 should also be deleted from the 1906 Act in order to prevent any confusion regarding policy requirements. Of course, repeal of this Schedule would not prevent the parties from using the same type of form if they so wished.

[8] We do, however, think that it is perfectly possible to have an electronic signature. This would allow an electronic document to be "signed" by the insurer.

[9] *Ionides v Pacific Fire & Marine Insurance Co* (1871) LR 6 QB 674. See paras 2.9 to 2.16 above.

5.34 **We ask whether consultees agree that Schedule 1 is no longer relevant and should therefore be repealed along with section 22**.

CLARIFYING SECTION 53(2) AND THE BROKER'S LIEN

5.35 We discuss below the fact that if section 22 were to be repealed, several other provisions of the 1906 Act would need to be amended accordingly.[10] However, we think that section 53(2) deserves particular attention. The link between the concept of a "marine policy" in section 22 and the broker's lien over such a policy in section 53(2) means that the two provisions must be considered together, so that any reform of the former does not adversely affect the operation of the latter.

5.36 We considered the broker's lien in section 53(2) in Issues Paper 8. We said that the lien "gives the broker a lien over both the policy and any policy monies it receives from the insurer". Now that we have examined the concept of a marine policy in more detail, we think that this may have been an oversimplification. First, it is not entirely accurate to describe a broker's right to retain proceeds as a "lien". As we discuss in Part 4, until now the courts have limited a "lien" to tangible goods, rather than to money. The right over proceeds is best thought of as a form of set-off or compensation.[11]

5.37 Furthermore, it is not clear from the *Eide* case whether the lien under section 53(2) requires the broker to possess a "marine policy", as defined by section 22, before it can have any "commensurate right to retain claims proceeds collected under the policy".[12] We would not want any repeal of section 22 to have the effect of removing the broker's rights over the policy proceeds.

5.38 We do not intend to overstate our concern regarding the broker's lien under section 53(2), because marine insurance brokers have long been held to have a general lien on the goods and chattels of their principals in respect of all claims they have against them. This general lien would extend to any claims proceeds that the broker holds for the insured, regardless of how section 53(2) is interpreted.

[10] See paras 5.47 to 5.56 below.

[11] In Scots law, it would appear that when sums under the policy are paid out to the broker by the underwriter, the lien held by the broker is transferred into a right of retention in respect of the sums paid (see AJM Steven, *Pledge and Lien* (2008) para 17-45). There is also, however, doubt as to whether money as such can be the subject of a right in security under Scots law. (See *The Laws of Scotland: Stair Memorial Encyclopaedia, Reissue 2*, "*Banking, Money and Commercial Paper*" (2000) para 145).

[12] *Eide UK Ltd v Lowndes Lambert Group Ltd* [1999] QB 199, at pp 206 to 207. See paras 3.11 to 3.17 above.

5.39 Despite this, we think that section 53(2) should nonetheless be amended or replaced, so as to clarify the law in this area. We think that we should clarify that a broker has an express general lien over any property of the insured, that has lawfully come into the broker's possession in its capacity as broker.[13] The statute should also clarify that brokers have a right to retain any funds held on behalf of the insured to settle the insured's debt to the broker in respect of any outstanding premium or charges. This right should apply to all funds held by the broker in its capacity as broker, irrespective of whether the broker has a lien over the policy.

5.40 **We ask whether consultees agree that the extent of the broker's lien should be clarified by statute.**

5.41 **Should the broker's lien extend to any property of the insured that has lawfully come into the broker's possession in its capacity as broker**?

5.42 **Should the broker have a right to retain funds held on behalf of the insured to settle the insured's outstanding debt in respect of premiums or charges**?

5.43 In Issues Paper 8, we said that it was unclear whether, in English law, the type of general lien available to a broker in marine insurance was also available with regard to non-marine insurance.[14] This is because English law distinguishes between general liens and particular liens.[15] While a general lien may be exercised in respect of the general balance of the insured's account (so the broker may exercise its lien over the claims proceeds of policy A in respect of the insured's debt under policy B),[16] a particular lien may only be exercised in respect of individual transactions (so, assuming the insured had paid everything due to the broker in connection with policy A, the broker would not be entitled to retain the claims proceeds of policy A even if there are outstanding debts under policy B).

5.44 Particular liens are more common and tend to arise in most agency relationships, whereas general liens arise only in specific cases:

[13] In English and Scots law, an agent's lien only permits retention of the debtor's property which has come into an agent's possession as a result of the agent's duties. For example, in *M'Call & Co v James Black & Co* (1824) 2 Sh App 188 it was held that an agent acting as both a broker and a factor could not exercise its factor's lien over property coming into its lawful possession as a broker. Similarly, in *Houghton v Matthews* (1803) 3 B & P 485, a factor's lien arising out of a debt in respect of goods which he had sold as factor to the plaintiff did not extend to goods which the plaintiff had employed him to sell.

[14] We noted that in Scots law, however, brokers are recognised as being among the limited categories of persons endowed with a general lien. See Law Commission and Scottish Law Commission, Issues Paper 8: The Broker's Liability for Premiums – Should Section 53 be Reformed? (July 2010), at para 4.6, n 10.

[15] In Scots law, particular liens are known as special liens.

[16] Section 53(2) is itself a good example of such a general lien, as it applies "in respect of any balance on any insurance account which may be due to [the broker] from [the policyholder]".

> The lien of an agent is, as a rule, a particular lien, confined to such claims as arise in connection with the goods and chattels in respect of which the right is claimed. He may, however, be given a general lien, extending to all claims arising out of the agency, either by express contract or by usage.[17]

5.45 This is why we think there may be a distinction between the types of liens available in marine and non-marine insurance. Although several commentators include "insurance brokers" among the categories of persons who are endowed with general liens,[18] the various authorities cited in support of this claim are marine insurance cases.[19] In our view, therefore, it remains unclear, at least in English law, whether a non-marine insurance broker has a general or a particular lien. We think that, if section 53(2) is amended as we suggest above, the scope of the section could also be clarified so that it is clear whether the same rules on the broker's lien apply to non-marine insurance.

5.46 **Do consultees agree that there should be statutory clarification that the broker's general lien applies to both marine and non-marine insurance**?

IMPLICATIONS FOR OTHER PROVISIONS IN 1906 ACT

5.47 Although the distinction between an insurance contract and an insurance policy no longer has any practical implications for insurance practice, it is an important concept underpinning to the Marine Insurance Act 1906. The Act refers both to "the contract" and to "the policy", and it makes the distinction with care. Thus the earlier sections of the Act mostly talk about the contract. For example, in section 17, "a contract of marine insurance is a contract based on utmost good faith". Similarly, under sections 18 to 20, the assured has obligations to the insurer "before the contract is concluded".

5.48 By contrast, the provisions which follow section 22 largely refer to policies. Section 90 states that "unless the context or subject-matter otherwise requires … 'policy' means a marine policy". This directly links every mention of the word "policy" throughout the 1906 Act with the concept of a "marine policy" in section 22.

[17] *Halsbury's Laws of England, Volume 1: Agency* (5th ed 2008), at para 114. In Scots law, the case law suggests that the factor's (commercial agent's) general lien may be exercised by all agents of a general nature who make advances or undertake liabilities on behalf of their principals: *Glendinning v Hope & Co* 1911 SC (HL) 73 at 78 (Lord Kinnear). See also *The Laws of Scotland (Stair Memorial Encyclopaedia)* Volume 20, para 87. In fact, as brokers are merely agents, it has been suggested the broker's general lien is derived from the factor's general lien: see AJM Steven, *Pledge and Lien* (2008), para 17-42

[18] See, for example, *Halsbury's Laws of England, Volume 1: Agency* (5th ed 2008), at para 114, n 5; *Halsbury's Laws of England, Volume 68: Lien* (5th ed 2008), at para 828. By contrast, see *Bowstead and Reynolds on Agency* (18th ed 2006), at para 7-081, where the list of those who have been held to have a general lien refers specifically to "marine insurance brokers". We think this cautious specificity is justified. For Scots law, see above.

[19] For example, *Mann v Forrester* (1814) 4 Camp 60 and *Hewison v Guthrie* (1836) 2 Bing NC 755.

5.49 In total, the Act makes 166 references to “policy” or “policies”. If we were to abolish the distinction between a policy and a contract currently set out in section 22, we think that the references to policy in the Act would need to be reinterpreted as references to the insurance contract. To illustrate this point we give three examples, though there are many more. We then ask if this would have any unintended consequences.

5.50 The first example would be the rules governing double insurance, set out in section 32. This section is said to apply “where two or more policies are effected by or on behalf of the insured”. When the Act was drafted, insureds could only be doubly insured if they possessed at least two insurance policies against the same event. This is because an insured who had entered into an insurance contract but who did not possess a policy was not able to prove the contract and therefore could not claim. Without at least two policies, the insured did not have two enforceable contracts.

5.51 However, if we were to repeal section 22, an insured could have an enforceable insurance contract without a policy. It would be necessary to reinterpret section 32 to apply whenever the insured had two or more enforceable insurance contracts, whether or not formal policies were ever issued on either contract.

5.52 A second example would be section 39 which states that “in a voyage policy” there is an implied warranty of seaworthiness. Again, it would be odd if the implied warranty only applied where a specific policy was issued. If the implied warranty is to stay, we think it should apply to all enforceable marine insurance contracts, whether or not a specific policy was issued.

5.53 A third example is section 26(1), which states that the subject-matter of the insurance policy must be designated with reasonable certainty. Section 26(1) must be considered alongside section 26(3), which sets out the consequences of not defining the subject-matter with reasonable certainty:

> Where the policy designates the subject-matter insured in general terms, it shall be construed to apply to the interest intended by the assured to be covered.

5.54 Section 26(1) is more than just a formality: it is an integral part of the way in which the insurance contract will be interpreted. For this reason, we think that the provision should be interpreted to mean that the insurance contract would have to designate the subject-matter being insured with reasonable certainty, but this would not have to be set out in a formal policy as such.

5.55 **If the references to “marine policies” within the Marine Insurance Act 1906 were to be interpreted as references to marine insurance contracts, would this have any unintended consequences?**

ALTERNATIVE OPTION FOR REFORM: AMENDING SECTIONS 22 AND 24(1)

5.56 Although our preferred option for reform of section 22 is to repeal the provision, we considered whether the provision should instead be amended so that a "marine policy" could definitely be an electronic document. This was one of the two options for reform proposed in the 2001 Advice on electronic commerce.[20] It was also the approach urged by the Sub-Committee of the British Insurance Law Association ("BILA") in its 2002 Recommendations to the Law Commission:

> Section 22 of the [Marine Insurance Act] 1906 needs amendment to include a reference to electronic trading. This could be achieved either by a specific amendment of the section, and/or by delegated powers to the appropriate Minister, to up-date the methods of making a marine insurance policy in accordance with modern techniques.[21]

5.57 It would of course be possible to amend section 22 so that a "marine policy" is retained as a legal document under the Marine Insurance Act 1906 but with an expanded definition that includes an electronic equivalent.[22] This approach could retain all of the current minimal content requirements for a "marine policy", such as the requirement that the insured's name be specified (section 23(1)), but would also allow such policies to be electronic documents.

5.58 We also think that it may be possible to amend section 22 in this way using the delegated powers approach. Section 8 of the Electronic Communications Act 2000 gives to "the appropriate Minister" a power to modify (by statutory instrument) the provisions of "any enactment… in such manner as he may think fit for the purpose of authorising or facilitating the use of electronic communications or electronic storage" using a statutory instrument.[23] In particular, this power may be used to allow "the doing of anything which… is required to be or may be done or evidenced in writing or otherwise using a document, notice or instrument".[24] As such, the appropriate Minister for the Marine Insurance Act 1906 could use this power to amend section 22 so that a "marine policy" could be in electronic form.

[20] Electronic Commerce: 2001 Advice, at para 7.19.

[21] British Insurance Law Association, Insurance Contract Law Reform: Recommendations to the Law Commission (September 2002), at para 29.5.

[22] A similar approach was recently adopted in relation to certificates of motor insurance. The Motor Vehicles (Electronic Communication of Certificates of Insurance) Order 2010, which came into force on 30 April 2010, amended the Road Traffic Act 1988 so that motor insurance certificates can now be issued in electronic form (for example, as an email attachment or accessed via a website). See also the section 8 order made in 2006 to introduce a limited form of electronic conveyancing in Scotland, namely the Automated Registration of Title to Land (Electronic Communications) (Scotland) Order 2006, SSI 2006/491.

[23] Electronic Communications Act 2000, s 8(1).

[24] Above, s 8(2).

5.59 Although amendment of section 22 by either primary or delegated legislation would make the concept of a "marine policy" compatible with electronic commerce, we do not think that such an amendment would solve all of the problems we have identified with section 22. Most obviously, the requirement for an insurance contract to be "embodied in a marine policy" before it can be proved in court would remain, and would continue to present a potential obstacle to an insured where no policy (whether in tangible paper form or in electronic form) was ever executed. For this reason, we favour outright repeal of section 22 to either type of amendment set out above.

5.60 **If consultees do not agree that section 22 should be repealed, we ask whether section 22 should be amended so that a marine policy may be an electronic document**.

5.61 In paragraph 5.27 above, we tentatively proposed to repeal the requirement in section 24(1) that a policy must be signed by or on behalf of the insurer. However, if consultees considered that the section should be retained, we think it may be helpful to specify what would constitute an insurer's signature, in both paper and electronic documents. Again, provision for electronic signatures could be introduced under section 8 of the Electronic Communications Act 2000.

5.62 **If consultees do not agree that section 24(1) should be repealed, should the section be amended to clarify the ways in which an insurer may sign both paper and electronic policies? We ask for views on what constitutes a signature for these purposes.**

PART 6
LIST OF CONSULTATION QUESTIONS

We ask for comments on and responses to the following questions:

IS THERE A NEED FOR FORMALITY?

6.1 Do consultees agree that there should be no statutory requirements that marine insurance contracts should be in writing or signed? (Para 5.14)

6.2 If consultees think there should be statutory requirements for formality, what requirements should there be? What consequences should follow if the formal requirements are not met? (Para 5.15)

6.3 We welcome consultee's views on the practical effects of removing the requirement for a formal marine policy? (Para 5.19)

THE PROPOSED REPEALS

6.4 Should section 22 be repealed so that a "marine policy" is no longer required for a contract of marine insurance to be proved in court? (Para 5.23)

6.5 If so, should Parliament also repeal:

(1) Section 23, so that there would be no statutory requirement for a marine insurance contract or policy to contain the insured's name? (Paragraph 5.26)

(2) Section 24(1), so that there would be no need for a marine insurance contract or policy to be signed by or on behalf of the insurer? (Paragraph 5.29)

(3) Section 89, which would be redundant? (Paragraph 5.32)

(4) Schedule 1? (Paragraph 5.34)

CLARIFYING SECTION 53(2) AND THE BROKER'S LIEN

6.6 Do consultees agree that the extent of the broker's lien should be clarified by statute? (Paragraph 5.40)

6.7 Should the broker's lien extend to any property of the insured that has lawfully come into the broker's possession in his capacity as broker? (Paragraph 5.41)

6.8 Should the broker have a right to retain funds held on behalf of the insured to settle the insured's outstanding debt in respect of premiums or charges? (Paragraph 5.42)

6.9 Should there be statutory clarification that the broker's general lien applies to both marine and non-marine insurance? (Paragraph 5.46)

IMPLICATIONS FOR OTHER PROVISIONS IN THE 1906 ACT

6.10 If the references to “marine policies” within the Marine Insurance Act 1906 were to be interpreted as references to marine insurance contracts, would this have any unintended consequences? (Paragraph 5.55)

ALTERNATIVE OPTION FOR REFORM

6.11 If consultees do not agree that section 22 should be repealed, should it be amended to clarify that a marine insurance policy may be an electronic document? (Para 5.60)

6.12 If consultees do not agree that section 24(1) should be repealed, should the section be amended to clarify the ways in which an insurer may sign both paper and electronic policies? We ask for views on what constitutes a signature for these purposes. (Para 5.62)